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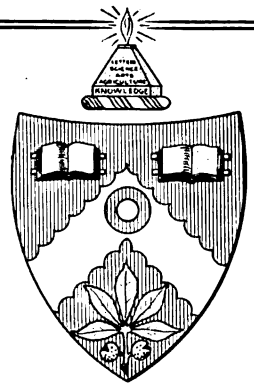

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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

NORMAN L. FREEMAN,

REPORTER.

VOLUME 144.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN OCTOBER AND NOVEMBER, 1891, OCTOBER AND NOVEMBER, 1892, AND JANUARY AND MARCH, 1893.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

BENJAMIN D. MAGRUDER, CHIEF JUSTICE.
JOSEPH M. BAILEY, CHIEF JUSTICE.*

JOHN SCHOLFIELD,
JOSEPH M. BAILEY,
DAVID J. BAKER,
JACOB W. WILKIN,
ALFRED M. CRAIG,
SIMEON P. SHOPE,
BENJAMIN D. MAGRUDER,
} JUSTICES.

ATTORNEY-GENERAL,
GEORGE HUNT.

REPORTER,
NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,
FRANK W. HAVILL, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,
ETHAN A. SNIVELY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,
ALFRED H. TAYLOR, Ottawa.

---

*Mr. JUSTICE BAILEY became Chief Justice at the June Term, 1892.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

THE CHICAGO AND GREAT WESTERN RAILROAD COMPANY

v.

CARL WEDEL.

Filed at Ottawa, November 23, 1892.

1. RAILROAD — *in a public street — whether a damage to abutting property.* If the construction and operation of a railroad and side track along a public street in front of a house and lot will not have the effect to decrease the market value of the property, but the same will sell for more money in the open market than if the tracks of the railroad had not been constructed and operated, there will be no damages and no cause of action.

2. EVIDENCE — *fixing the value of a house and lot — comparing with actual sales.* In arriving at the value of a house and lot in a city at a particular time, what similar property in the neighborhood sold for in the market about the same date, is competent evidence. Therefore, it is competent to show by a witness fixing a valuation, that his estimate is based upon what he had been paying for similar property in the neighborhood

3. SAME — *expert testimony* In an action by the owner of a house and lot to recover damages caused to his property by the construction and operation of a railway in a street just in front of the house, a witness was called by the plaintiff, who had seen the premises and location of the railroad, but who was not present when any trains had passed, and was asked this question: "From the proximity of the railroad

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track, can you tell whether the smoke and cinders and gases from passing locomotives would enter these premises — enter the house?" and he answered, "Yes, sir, very likely." *Held*, that if the witness had at any time seen trains pass the premises, it would have been proper for him to state any facts which had come to his knowledge, but that he could not assume the position of an expert and give his opinion to the jury as evidence.

4. PRACTICE — *time to object — incompetent evidence — objection too late on appeal.* If the averments in a declaration in an action by a lot owner against a railway company to recover damages, caused by the construction and operation of railroad tracks in the street fronting the lot, are insufficient to admit proof of a permanent injury, and a recovery for a depreciation of the market value of the property, the introduction of such proof should be objected to when offered on the trial. The objection comes too late when made for the first time on appeal or error.

5. ERROR WILL NOT ALWAYS REVERSE — *admission of improper evidence.* When a particular fact is so well shown by the evidence as that the improper admission of other evidence will not add any weight to the proof of that fact, such admission will afford no ground for a reversal.

6. SAME — *error waived.* If it is error for the court to deny defendant's motion, made at the close of the plaintiff's evidence in chief, to dismiss for want of evidence sufficient to authorize a recovery, it will be waived by the defendant's introducing evidence and asking instructions on the merits.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

Mr. H. S. BOUTELL and Mr. K. K. KNAPP, for the appellant:

There are two kinds of action that may be brought against a railroad company for damages to real estate: (1) The action for consequential damages based upon the provision of our present Constitution for damaging property for the public use. *C. & E. Q. R. R. Co.* v. *Loeb*, 118 Ill. 203. (2) An action for damages caused by the illegal or negligent construction or operation of a road. In the first the plaintiff recovers for the entire damages, past, present and future, and a recovery is a bar to a second action, while the latter action may be brought as often as the illegal or negligent act occurs.

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As to the evidence of the value of the property, see *I. & W. R. R. Co.* v. *Van Horn*, 18 Ill. 257; *L. B. & M. R. R. Co.* v. *Winslow*, 66 id. 221; *P. & P. U. Ry. Co.* v. *P. & F. Ry. Co.*, 105 id. 121; *White* v. *Hermann*, 51 id. 243; *Johnson* v. *F. & M. R. R. Co.*, 111 id. 418; *C. & N. W. Ry. Co.* v. *C. & E. R. R. Co.*, 112 id. 607; *Cemetery Assoc.* v. *R. R. Co.*, 121 id. 212.

Messrs. PARTRIDGE & PARTRIDGE, for the appellee, discussed the facts and evidence at some length.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of trespass on the case, brought by Carl Wedel against the Chicago and Great Western Railroad Company to recover damages caused to the plaintiff's property by the construction and operation of defendant's railroad in Rebecca street, in Chicago, in front of the plaintiff's premises. The plaintiff owned a lot, upon which he resided, twenty-four feet wide, fronting on Rebecca street. The street runs east and west, and the house is on the north side of the street, fronting south. In the construction of the road the defendant threw up an embankment crossing Rebecca street diagonally from the south-east to the north-west in front of plaintiff's premises. The embankment was shown to be about four feet higher than the natural surface of the ground, and the most of the street in front of the premises was occupied by the road-bed and tracks of the defendant's road. It is claimed in the argument that, under the declaration in this case, no recovery can be had for a depreciation in the market value of the plaintiff's property caused by a legitimate construction and operation of the road, as no general damages or general depreciation of the market value of the property was alleged. Whether the declaration was technically sufficient to allow proof of a permanent injury to the premises and a recovery for a depreciation of the market value of the property, we shall not stop to consider. If the averments of the declaration were

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insufficient in this regard, objection should have been made to the introduction of the evidence on the trial, when the difficulty could have been avoided by an amendment to the declaration. But no objection was interposed; on the other hand, the case was tried by both parties on the theory that, if plaintiff was entitled to recover at all, he was entitled to a recovery for the general depreciation of the market value of the property, caused by the legitimate construction and operation of the road. Under such circumstances, the objection now interposed comes too late. After the plaintiff had closed his evidence, the defendant entered a motion to dismiss on the ground that the evidence introduced was insufficient to authorize a recovery. This motion was overruled, and the defendant then introduced evidence on the merits and, at his request, the jury was instructed as to the law involved in considering the case on its merits. If the court erred in overruling the defendant's motion to dismiss, the error was waived by introducing evidence on the merits and the instructions to the jury, as held in *Joliet, etc., Ry. Co.* v. *Velie*, 140 Ill. 59.

It is next claimed that improper evidence was admitted on behalf of the plaintiff. A witness for the plaintiff, who had seen the premises and the location of the railroad in front of the premises, and who had not been present when any trains had passed, was asked the following question: "From the proximity of the premises to the railroad track, can you tell whether the smoke and cinders and gases from passing locomotives would enter these premises — enter the house? (Objected to; objection overruled; exception by counsel for the defendant.) A. Yes, sir, very likely." If the witness had at any time seen trains pass the premises, it would have been proper for him to state any facts which had come to his knowledge. But we do not think he could assume the position of an expert and give his opinion to the jury as evidence. But, while it may be conceded that the court erred in allowing the witness to give his opinion, the error was one which could do

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no harm. The tracks of the railroad were located only a few feet from the plaintiff's house, and it is so apparent that the running of trains would throw smoke and gases in and on the premises, that the opinion of the witness would add no weight to a fact so self-evident.

It is also claimed that the court erred in refusing to allow the witness Hawley to testify in behalf of defendant, that the valuation he placed on the premises was based upon what he had been paying for similar property in the neighborhood. What similar property in the neighborhood sold for in the market was competent evidence in arriving at the value of plaintiff's property, and while the court sustained an objection to one question asked the witness Hawley, which might seem to indicate that an improper rule was laid down, yet, upon examination of the entire evidence of the witness, it will be found that no substantial error was committed. The witness stated that the value of the house and lot in November, 1885, was about $1800. Then the following occurred: "Q. Was that about the price you were paying for lots in that neighborhood? A. Yes, sir. Q. That is, improved in substantially the way this was? A. Yes, sir; I don't know how; I put a valuation on the property of about $1800; that is what I — Q. Of the house and lot? A. Of the house and lot; yes, sir. Q. Was that valuation based upon what you had been paying for similar property in the neighborhood? (Objected to; objection sustained; exception by counsel for defendant.)" The next question following the one objected to was as follows: "Q. What did you pay for lots similarly situated in that neighborhood? A. With improvements? Q. With improvements? A. Well, I paid from $1600 a house — well, I didn't pay over $2000 for any property in that vicinity that was worth any less than Mr. Wedel's property."

The court refused the following instruction asked by the defendant: "The jury are instructed that, if they find from the evidence that the construction and operation of the tracks

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of the defendant has caused a change in the best use to which the premises could be applied, and that the property is now worth more in the open market for the new use than it was before the construction of the road, then they should find for the defendant."

If the value of the property was increased in the market by the construction and operation of the road, then the plaintiff had sustained no damage and ought not to recover, and this, as we understand the instruction, is the principle intended to be given to the jury. But, upon looking into the record, it will be found that the court gave to the jury an instruction in behalf of the defendant which, in substance, announced the same principle. It was as follows: "The jury are instructed that, if they find from the evidence that the premises of the plaintiff will sell for more in the open market than it would if the tracks of the defendant had not been constructed and operated in the manner shown by the evidence, and that this result was caused by the construction and operation of the tracks of the defendant, then they should find for the defendant."

As the court had given this instruction, no necessity existed for giving the other one, and no error was committed in its refusal.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HERMAN H. KOHLSAAT

v.

JOHN E. CRATE.

Filed at Ottawa, November 23, 1892.

1. INJUNCTIONS — *dissolution — amount of damages.* Section 12 of chapter 69, relating to injunctions, does not, either expressly or by implication, limit the amount of damages to be assessed against the com-

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plainant on the dissolution of an injunction, to the penalty of the bond given. On the contrary, it implies the assessment of such damages as will compensate the injured party for such losses as are directly occasioned to him, and such expenditures as are necessarily occasioned, by the wrongful suing out of the injunction, whether any bond is given or not.

2. The office of an injunction bond is not to create or measure the liability of the complainant for damages, but to secure the payment of such damages up to the amount of the penalty of the bond.

3. SAME — *of the bond.* The statute (sec. 9, chap. 69) authorizes the granting of an injunction without bond in cases for good cause shown, when the judge or master is of the opinion that the injunction ought to be granted without any bond. The statute fixes the amount of the bond only in cases where the collection of judgments is sought to be enjoined. In all other cases the penalty of the bond is discretionary with the judge or master awarding the writ.

4. CHANCERY — *recitals in a decree — how far conclusive.* One of the usual modes of preserving the evidence of a fact in a chancery suit, is by the finding of such fact in the decree. In such case, the evidence must be preserved in the record by a certificate, if its sufficiency to establish the fact is questioned. When the evidence is not preserved by certificate, the findings of fact in the decree will be conclusive on this court.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Mr. GEORGE W. STANFORD, for the appellant:

Attorney's fees will not be allowed for defending the suit; only fees paid or incurred in procuring a dissolution of the injunction will be allowed. *Moriarty* v. *Galt*, 125 Ill. 417.

The evidence must be preserved. *Howard* v. *Austin*, 12 Bradw. 645; *Diggers* v. *Bell*, 8 id. 254.

Defendant below could not lay the foundation for large damages by employing an unnecessary number of counsel. *Collins* v. *Sinclair*, 51 Ill. 328; *Elder* v. *Sabin*, 66 id. 126; *Blair* v. *Reading*, 99 id. 600; High on Injunctions, secs. 1686, 1688; *Hotchkiss* v. *Platt*, 8 Hun, 46.

The party must preserve the evidence. *Albright* v. *Smith*, 68 Ill. 181. The statement that the court heard evidence is

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not sufficient. *Steele* v. *Boone*, 75 Ill. 457; *Palmer* v. *Gardiner*, 77 id. 143; *Spring* v. *Coll. etc.*, 78 id. 101; High on Injunctions, sec. 1661.

It is to be noted that the court had no power independent of the statute to award damages in this case. *Phelps* v. *Foster*, 18 Ill. 309.

An assessment of damages is only allowed as an incident to, or the result of, the giving of a bond to secure such damages. High on Injunctions, sec. 1657.

Where the practice prevails of decreeing damages upon the dissolution of an injunction, it is held the court can not go beyond the bond and award greater damages than the penalty therein fixed. High on Injunctions, sec. 1669; *Sturgess* v. *Knapp*, 33 Vt. 486; *Lawton* v. *Green*, 64 N. Y. 326.

The granting of the injunction in this case was a judicial determination of two questions then before the court. First, shall an injunction issue at all; second, what shall be the estimate of or limit of damages recoverable if the injunction shall be dissolved. The act of the court requiring a bond in penalty of $500 was an act fixing the limit of damages, was a judicial act. Such is the view taken and sustained by elaborate reasoning in *Sturgess* v. *Knapp*, 33 Vt. see pages 524, 525; also *Russell* v. *Farley*, 105 U. S. 433, 439–443.

Messrs. HYNES & DUNNE, and Messrs. DUNCAN & GILBERT, for the appellee:

The statute, if it means what it says, requires the court to award the party aggrieved such damages as the nature of the case may require and to equity appertain, and does not limit the amount to the penalty of the injunction bond. R. S., 1874, chap. 69, sec. 12.

Evidence in a chancery case may be preserved by recitals in the decree. Either party, if dissatisfied with the recitals, may cause the evidence to be preserved in a certificate. *White* v. *Morrison*, 11 Ill. 361; *Moore* v. *School Trustees*, 19 id. 83;

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McIntosh v. *Saunders*, 68 id. 128; *Cooley* v. *Scarlett*, 38 id. 316; *Walker* v. *Carey*, 53 id. 470.

CHIEF JUSTICE BAILEY delivered the opinion of the Court:

On the 20th day of September, 1890, Herman H. Kohlsaat, the appellant, filed his bill in chancery in the Circuit Court of Cook county, against John E. Crate, the appellee, praying, among other things, for an injunction restraining the appellee from subletting, for the purposes of a saloon or dram-shop, a certain portion of a building which had theretofore been leased and demised by the appellant to the appellee. An injunction *pendente lite* was allowed by the court upon the appellant's filing an injunction bond in the penal sum of $500, with surety to be approved by the court, conditioned for the payment to the appellee of all damages that might be awarded him in case the injunction should be dissolved. The bond required was filed and approved, and the injunction became operative September 23, 1890.

The appellee having entered his motion to dissolve the injunction, the cause was referred to the master to take evidence, and the motion afterward coming on for hearing, was granted, and an order was entered May 14, 1891, dissolving the injunction, and giving the appellee leave to file his suggestions of damages. The appellee thereupon filed such suggestions, claiming damages in the sum of $796 for fees and charges of solicitors and counsel for services rendered by them in and about procuring a dissolution of the injunction, $100 for stenographer's fees, $100 for the expenses of procuring the attendance of witnesses, and $1,600 on account of rents of the premises which he would have received and of which he was deprived by the injunction, making $2,596 in all.

The cause coming on to be heard on the appellee's suggestion of damages, the court found that, by reason of the wrongful suing out of the injunction, the appellee was compelled to and did pay the sum of $771 for fees and charges of his solic-

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itors and counsel for services necessarily rendered by them in and about procuring a dissolution of the injunction and that he was compelled to and did lose rents of the demised premises to the amount of $1,446, by reason of the wrongful suing out of the injunction, amounting in all to the sum of $2,227. But the court held that, as the injunction bond which the appellant was required to file was only in the penal sum of $500, and as that was the only bond filed by him in the case, the liability of the appellant to the appellee on account of damages sustained by reason of wrongfully suing out the injunction was limited to $500. A decree was thereupon entered requiring the appellant to pay the appellee, within ten days of the entry of the decree, the sum of $500 for his damages, and also dismissing the bill at the appellant's costs for want of equity.

On appeal by the present appellee to the Appellate Court, the decree for damages was reversed, and the cause was remanded to the Circuit Court with directions to enter a decree awarding the appellee his damages in the sum of $2,227, which that court had found he had suffered by reason of wrongfully suing out the injunction. The case now comes to this court by appeal from the judgment of the Appellate Court.

We are of the opinion that the judgment of the Appellate Court is right and should be affirmed. Section 12, chapter 69, of the Revised Statutes is as follows: "In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction, suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require, and to equity appertain, to the party damnified by such injunction, and may award execution to collect the same: Provided, a failure so to assess damages shall not operate as a bar to an action upon the injunction bond."

It seems clear that the intention of the statute is to give to the party who is damnified by the wrongful suing out of an

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injunction, the right to have his damages assessed, and to a decree awarding the same to him, wholly irrespective of whether an injunction bond has been given or not, or of the amount of the penalty of the bond if one has been given. There is nothing in the language of the section above quoted which would seem, either expressly or by implication, to limit the amount of damages to be assessed, to the penalty of the bond, the only limitation being, that the damages assessed shall be such as the nature of the case may require and to equity appertain. This clearly implies the assessment of such damages as will compensate the injured party for such losses as are directly occasioned to him, and such expenditures as are necessarily occasioned, by the wrongful suing out of the injunction.

The statute does not provide that injunction bonds shall be required in all cases, as section 9 authorizes the judge or master granting an injunction, to order its issue without bond, in cases when, for good cause shown, he is of opinion that the injunction ought to be granted without bond. In only one class of cases, viz., where an injunction issues to enjoin a judgment, is the amount of the penalty of the injunction bond fixed by the statute. In all other cases, if a bond is required the amount of the penalty is discretionary with the judge or master awarding the injunction. The absence of a bond would certainly be no obstacle to the assessment of damages under the provisions of section 12, nor are we able to see how a bond with an inadequate penalty can constitute such obstacle. The liability of the party wrongfully suing out the injunction to compensate the other party for the damages thereby occasioned is not created by nor is it dependent upon the bond which may be given. His liability grows out of his wrongful act in suing out the writ, and the injurious consequences which thereby result to the opposite party. The office of the bond is not to create or measure the liability of the complainant for damages, but to secure the payment of such damages, up to the amount of the penalty of the bond. The decisions of the courts of other

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States to which we are referred seem to have been based upon rules of law essentially different from those prescribed by our statute, and therefore can not control here.

The point is made that the finding of the Circuit Court as to the amount of solicitors' and counsel fees paid by the appellee, and now directed to be awarded to him as a part of his damages is not warranted by the facts appearing in the record. The evidence upon which the assessment of damages was made is not in the record, but the fact found by the court, viz., that, by reason of the wrongful suing out of the injunction, the appellee was compelled to and did pay out the sum of $771 for the fees and charges of his solicitors and counsel for services necessarily rendered by them in and about procuring a dissolution of the injunction is recited in the decree. The fact thus found by the court and upon which the assessment of damages is based, is preserved in the record in one of the modes usual in chancery proceedings, viz., by the recitals of the decree, and the fact thus appearing is sufficient to sustain the decree which, by the remanding order of the Appellate Court, the Circuit Court is directed to enter. Nor is there anything in the record upon which the contention can be based that the employment of two firms of solicitors and counsel was unnecessary, or that the fees paid to them were exorbitant. The fact, as found by the court, is the other way, and that fact properly appearing in the record, is conclusive, at least, in the absence of the evidence upon which the finding of the court was based.

We find no error in the record, and the judgment of the Appellate Court will accordingly be affirmed.

Judgment affirmed.

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HATTIE JACKSON, Impleaded, etc.

v.

HENRY L. GLOS.

Filed at Ottawa, November 23, 1892.

1. CHANCERY — *bill making deceased persons parties — how taken advantage of.* If a bill for the confirmation of title under the Burnt Records Act shows on its face that two persons made defendants were dead before the bill was filed, the irregularity should be taken advantage of by demurrer, so as to afford the complainant an opportunity to dismiss as to such persons. If so taken, the court will be called upon to rule in respect of the costs occasioned by making deceased persons parties.

2. SAME — *preserving evidence — after demurrer to bill is overruled.* When the defendant, under the Burnt Records Act, demurs to the bill and abides the same when overruled, he can not afterward object that no evidence was given in support of the allegations of such petition. In such a case the statute does not require the evidence heard to be set forth and preserved.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. TEWKESBURY & CULVER, for the plaintiff in error.

Mr. H. S. MECARTNEY, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a bill, under the Burnt Records Act, by the defendant in error, against the plaintiff in error, and others.

A demurrer was interposed to the bill, which the court overruled, and this ruling, among others, is assigned for error.

The ground of demurrer alleged was a want of equity. It is insisted by counsel for plaintiff in error that the demurrer should have been sustained, because persons having no interest in the litigation were made parties defendant, and that two persons, Thomas A. Jackson and Mary L. Jackson, whom the

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bill shows to have been dead before it was filed, were made defendants. Counsel should have alleged this as ground of demurrer; it certainly does not affect the equity of the bill as between plaintiff in error and defendant in error. Had it been alleged as a ground of demurrer, it would have been competent for the court to have permitted the defendant in error to have dismissed as to them: R. S., chap. 22, sec. 37. It is not contended that the making of these persons defendants affected injuriously the rights of plaintiff in error otherwise than in the matter of costs, which, it is contended, were increased thereby.

It is enough to say, in answer to this, that plaintiff in error should have raised that specific question by her demurrer, and the court could then have decreed in respect of such costs.

The only other error assigned that we feel called upon to notice is, that the findings of the court below are unsupported by the evidence.

The amended record filed in the case by our leave shows, that the cause coming on to be heard on the demurrer of plaintiff in error, to the bill of defendant in error, the demurrer was overruled, and the plaintiff in error was ruled to answer within ten days, and the record shows that she did not make such answer, and so she is to be considered as abiding by her demurrer. And it was ruled by a majority of this court in *Heacock* v. *Hosmer*, 109 Ill. 245, that, when a party admits the truth of a petition under the Burnt Records Act, by demurring to the same, and abides by his demurrer when overruled, he can not afterward object that no evidence is given in support of the allegations of such petition; and that, in such case, the statute does not require the evidence to be set forth.

The other objections urged are all obviated by the amended record.

The decree is affirmed.

Decree affirmed.

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ANTHONY KOZEL

v.

GEORGE DEARLOVE *et al.*

Filed at Ottawa, November 23, 1892.

1. STATUTE OF FRAUDS— *authority of agent to sell land —varying its terms.* If an agent, having written authority to sell lands of his principal, sells the same at a less price, or on different terms than he is authorized, he must have a new and further authority, which must also be in writing under the Statute of Frauds. A verbal consent of the principal for him to sell on other terms is invalid under the statute.

2. The owner of lots, in writing, authorized his agent to sell the same at certain prices and upon certain terms. The agent made a sale at a less price and on more favorable terms, and communicated that fact to the principal, who assented to the sale and verbally directed the agent to execute the contract, which he did. *Held*, that as the agent's authority to make such a contract was not in writing, the same was void and not enforcible.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Messrs. GOLDZIER & RODGERS, for the appellant.

CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was a proceeding, by petition, under the provisions of chapter 29 of the Revised Statutes, entitled "Contracts," to compel George Manlove and Edwin D. Messinger, the executors of the last will and testament of Richard Manlove, deceased, to execute and deliver to the petitioner a deed conveying to him certain real estate, in performance of a contract for such conveyance entered into by Richard Manlove, in his lifetime. The contract thus sought to be enforced purports to have been executed by Asa W. Clark as agent for Richard Dearlove to Anthony Kozel, and appears to have been assigned, prior to the filing of the original petition, by Kozel to Frank C. Layer. The petition was accordingly filed by Layer, but the contract having

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been subsequently reassigned by him to Kozel, the latter intervened and, by leave of the court, filed his supplemental petition, and the proceeding was thereafter prosecuted in his name.

It appears that on the 1st day of October, 1889, Richard Dearlove executed an instrument in writing, in which he placed certain prices on each of forty lots in Dearborn's addition, etc., in Cook county, and authorized Asa W. Clark to sell said lots at an advance of not less than sixteen per cent upon the prices thus fixed, one-third of the purchase money to be paid in cash, and the residue on or before the expiration of three years, with six per cent annual interest, "unless a less amount in cash or more favorable terms be agreed to by said Dearlove." On the 19th day of June, 1890, Clark executed a memorandum of the contract in question, by which he agreed to sell and convey to Kozel a portion of the lots at prices and upon terms which are conceded to have been more favorable to the purchaser than those fixed by the written authority given to Clark by Dearlove. The evidence tends to show that, before the memorandum of the contract was signed, Clark communicated the proposed terms to Dearlove, who was then sick, and that Dearlove assented to them, and orally instructed Clark to close the transaction on those terms.

The petition alleges the performance by the petitioner of the contract on his part, that is to say, by the payment of the cash required to be paid at the execution of the contract, and by being willing and ready to pay to the executors the installment payable by the terms of the contract upon the execution of the conveyance, and to secure the deferred payments in the manner in the contract provided, and by having tendered such performance to the executors. It is also alleged that Dearlove, by his will, devised the lots covered by the contract to George M. Dearlove, who was also one of his heirs at law. The petition made the executors, the devisee and the heirs of Dearlove parties defendant, and prayed for a decree compelling the executors to execute to the petitioner a good and sufficient war-

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ranty deed conveying said lots to the petitioner, upon payment by him of the amount required by the contract to be paid upon the execution of the conveyance, and upon execution by him of the notes and mortgage for the deferred payments provided for by the contract.

The executors answered admitting the allegations of the petition, and alleging that the interests of the estate of the testator demand that the purchase of the premises in question should be completed at the earliest practicable date, and they therefore ask that the prayer of the petition be granted.

The devisee and certain of the heirs of Dearlove answered, denying that the petitioner has any interest, either legal or equitable, in the premises in the petition described, or that Dearlove, ever, by his agent duly authorized in writing, entered into a written contract for the conveyance of said premises to the petitioner upon the terms in the petition set forth. They also denied performance by the petitioner of the terms of the alleged contract as alleged in the petition.

The cause being heard on pleadings and proofs, a decree was entered finding that the petitioner was not entitled to the relief prayed for by the petition, and dismissing the petition, at the petitioner's costs, for want of equity. To reverse this decree, the petitioner now brings the record to this court by writ of error.

The only question presented by the record which we need consider is, whether Clark was authorized to sign the contract sought to be enforced, or a note or memorandum thereof, by any written instrument signed by Dearlove, as required by the second section of the Statute of Frauds. That he had competent written authority to sell the lots in question at certain specified prices and upon certain prescribed terms is not disputed. But the written instrument gave him no authority to sell at lower prices or upon different terms. No one, we presume, would claim that, if he had undertaken to do so without consulting his principal, his act would have had any legal

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validity, or have been enforcible against the principal. The agent was just as powerless to make such sale as he would have been if no written authority had existed. To sell upon different terms required a new and further authority, and such new authority, to be valid under the Statute of Frauds, must itself have been in writing and signed by the principal.

It is of no avail to show that the modified terms were communicated to Dearlove and were assented to by him, and that he directed the execution of the contract on those terms. The authority thus given to the agent was not in writing, and so was not a compliance with the requirements of the statute. We think the petition was properly dismissed, and the decree will therefore be affirmed.

Decree affirmed.

MARTIN SCHULTZ

v.

HENRY MEISELBAR.

Filed at Ottawa, November 23, 1892.

1. SETTING ASIDE DEFAULT — *sufficiency of affidavit — negligence of attorney.* An affidavit filed on a motion to set aside a judgment by default, although it may show a meritorious defense, is insufficient, if it fails to show any other reason why plea was not filed in time, than that the defendant's attorney failed to do so "through press of business and inadvertence." The negligence of the attorney in failing to file a plea, is the negligence of the client.

2. SAME — *for censurable act of plaintiff — not prejudicial to defendant.* Two or three weeks before judgment by default, the attorney of the defendant withdrew the declaration and papers in the case, giving his receipt to the clerk of the court therefor. While the papers were still out of the clerk's office the plaintiff improperly obtained possession of such receipt and took judgment by default. *Held*, that while the abstraction of the receipt was highly censurable, it afforded no ground for setting aside the judgment by default, such act not interfering prejudicially to the defendant.

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3. JUDGMENT BY DEFAULT — *papers in possession of defendant's attorney.* It is not error to take judgment by default for want of a plea, where the defendant's attorney had withdrawn the declaration and papers from the files two or three weeks before, and still had them at his office. A party can take no advantage by reason of his own improper act.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. GEO. R. DRIGGS, Judge, presiding.

Mr. A. S. CRONK, for the appellant.

Mr. E. J. WALSH, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellee brought assumpsit against appellant to the November term, 1891, of the Cook Circuit Court. Summons was thereupon duly issued in the cause and served upon the appellant on the 16th day of October, 1891. Appellee's declaration consisted of the common counts, and it was filed in due time for the term to which the summons was returnable. Accompanying the declaration was a copy of the account for the recovery of which the suit was brought, and also the affidavit of appellee, showing the nature of his demand, and that the amount due from appellant, after allowing to appellant all his just credits, deductions and set-offs, was $1000. On the 18th of November, 1891, being the third day of that term of court, appellant not having filed any plea to the declaration of appellee, judgment was rendered in favor of appellee against appellant by default, and appellee's damages were thereupon assessed at $1000, for which, and for costs, judgment was rendered. Three days after judgment was thus rendered, appellant, by his attorney, moved to set it aside and filed affidavits in support of the motion. The court overruled the motion, and this ruling presents the only question for our consideration upon this record.

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The affidavits may be conceded to disclose a meritorious defense, but they show no reason why plea was not filed within the proper time, other than that the attorney employed by appellant to defend him in that case, and who represents appellant in this appeal, failed to do so "through press of business and inadvertence." If this attorney was unable to attend to the case through press of business, it was plainly the duty of appellant to employ another attorney who could attend to it; and the negligence of the attorney in failing to file plea is the negligence of his client. *Mendell* v. *Kimball*, 85 Ill. 582; *Walsh* v. *Walsh*, 114 id. 656.

But counsel further insists that the judgment by default was erroneously entered, because he himself had taken the declaration, account and affidavit from the files some two or three weeks before the judgment was rendered, and then had them in his actual possession in his law office.

To allow counsel to thus continue causes and prevent the obtaining of judgments, would be to offer a premium for improperly withdrawing or improperly withholding records from the files where they belong. Appellant cannot be heard to say there was no record in the case simply because his counsel had improperly withheld these papers from the files. When filed, they became, in legal contemplation, permanent records of the court, and although, in fact, subsequently withdrawn from the files, for all legal purposes they are to be regarded as always remaining on file. And if lost or destroyed, they could be restored by filing proved copies. *Daniel* v. *First National Bank*, 65 Ill. 409; *Meyer* v. *First National Bank*, id. 411.

Complaint is made that appellee improperly abstracted the receipt of appellant's attorney for these papers from the files. It may be conceded that appellee should have been punished by the court for that act. It was certainly highly censurable, but it is impossible to see how appellant was prejudiced by it.

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It could by no possibility have had any tendency to hinder him in pleading at the proper time.

We can not say that the ruling of the court below in refusing to set aside the judgment was unjust and oppressive, and its judgment must therefore be affirmed. *Union Hide and Leather Co.* v. *Woodley*, 75 Ill. 436; *Hitchcock* v. *Herzer*, 90 id. 543.

Judgment affirmed.

ANDREW C. WILSON

v.

TRUSTEES OF SCHOOLS.

Filed at Springfield, January 18, 1893.

1. SCIRE FACIAS — *to revive a judgment — writ stands as a declaration.* On *scire facias* to revive a judgment, the writ stands in the place of a declaration and must aver every material fact necessary to entitle the plaintiff to the judgment of revival asked for.

2. SAME — *to revive judgment in ejectment — of its allegations.* Where the allegations of a *scire facias* to revive a judgment in ejectment affirmatively show that the judgment sought to be revived, not only adjudged the plaintiff to be entitled to the possession of the premises, but also to be the owner thereof in fee simple; that the recovery was not for a term of years, but for the entire estate; that such judgment remained unexecuted, and that execution therein remained to be made to the plaintiff, the same will be sufficient to entitle the plaintiff to judgment of revival. The plaintiff need not allege that he has not parted with his title by conveyance.

3. A *scire facias* to revive a judgment in ejectment need not aver in terms that the title of the plaintiff has not expired, where the judgment recites that the recovery was for the fee simple title, and not for a term of years.

APPEAL from the Circuit Court of Calhoun county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. WITHERS & RAINEY, for the appellant.

Mr. E. A. PINERO and Mr. T. J. SELBY, for the appellees.

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Opinion of the Court.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

To the October term of the Circuit Court of Calhoun county appellees sued out a writ of *scire facias* to revive a judgment in ejectment previously rendered in said court in their favor against appellant. On the return of the writ, appellant entered his motion to quash it, because it failed to aver that the title to the premises therein described "had not expired prior to the issuing of the writ." This motion was overruled and the defendant duly excepted, and elected to abide by his motion. The court thereupon heard the evidence offered by the plaintiffs and gave judgment in their favor, reviving the judgment as asked, and awarding them a writ of possession for the premises therein described. From that judgment this appeal is prosecuted.

The only question presented for our decision is, was the writ of *scire facias*, upon which said judgment was rendered, sufficient upon its face to entitle plaintiffs below to recover? Appellant's point is, as stated in his motion, that the writ is fatally defective, because it does not "aver and set forth that the title to the premises therein described, established by the plaintiffs at the trial of said ejectment suit, had not expired prior to the commencement of this proceeding."

It is well settled that a writ like this stands in the place of a declaration, and must aver every material fact necessary to entitle the plaintiff to the judgment of revival asked for.

Appellant insists that, under this rule, the writ in question is bad, for the reason above stated, and his counsel rely upon the case of *Smith* v. *Stevens*, 133 Ill. 192, to support this contention.

The writ in this case is materially different from the one held to be defective in that. There the recital was simply "of a judgment for one messuage, piece or parcel of land with no averment whatever as to the nature or extent of the estate established" by the judgment sought to be revived, and we held that, inasmuch as the recovery in ejectment is only for

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the possession, the recital in that writ would apply as well to a recovery where the estate established was only for a term of years, as where it was for the fee. We expressly said, after quoting the averment to the effect that no execution upon said judgment had been made: "This by no means excluded the possibility that the recovery may have been only for a term of years, and that no portion of such term is yet to come." It also appears from the form of a writ to revive a judgment in ejectment there quoted from (Id.), that it is applicable only where the recovery is for a term of years, and not where the fee is found to be in the plaintiff. The writ in this case avers that, "at the October term of said court, 1879, the plaintiffs recovered a judgment against the defendant in an action of ejectment for the following piece or parcel of land (describing it), which said court found that said Andrew C. Wilson was guilty of unlawfully withholding; and the said court further found the fee simple title to said premises in the said plaintiffs. And said court further ordered that plaintiffs have a writ of possession for said premises. * * * And whereas said judgment remains in full force and effect, unreversed and unsatisfied, and no writ of possession has ever issued in conformity to the said order of court therein, and although said judgment was given as aforesaid, yet no execution upon said judgment hath ever been made, and that execution of said judgment still remains to be made to the plaintiffs." These allegations affirmatively show that the judgment sought to be revived, not only adjudged the plaintiffs to be entitled to the possession of certain premises, but also adjudged them to be the owners thereof in fee simple; that the recovery was not for a term of years, but for the entire estate; that such judgment remained unexecuted, and that execution thereof remained to be made to the plaintiffs. There was, therefore, no term recovered by them which could expire. True the plaintiffs might have conveyed the premises between the time of obtaining the judgment and suing out this writ, but we apprehend it will not be seriously

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contended that they were required to negative such conveyance in order to entitle them to the relief asked. The facts averred in this writ clearly entitled the plaintiffs to the judgment of revival, in the absence of any showing to the contrary by the defendant, and the Circuit Court very properly overruled the motion to quash the writ.

Its judgment will be affirmed.

Judgment affirmed.

JOSEPH GUERTIN

v.

JOSEPH MOMBLEAU.

Filed at Ottawa, January 19, 1893.

1. CONVEYANCES — *idem sonans — identity of person.* Where land is conveyed to Mitchell Allen, and a deed is given by Mitchell *Allain*, the latter will pass the title that was in Mitchell Allen. The names 'Allen" and "Allain," being *idem sonans*, it will be presumed that they are the names of the same person.

2. SAME — *acknowledgment before a notary — out of his county.* A notary public is authorized by the statute (sec. 9, chap. 99), to take the acknowledgment of a deed in a different county from that in which he resides.

3. SAME — *of after-acquired title — married woman.* In 1872, and before the Act of 1874, enlarging the powers of married women, a husband and wife made a deed purporting to convey the title to certain lots which the wife claimed, but as to part of which she had no title; it was held that an after-acquired title of the wife passed to the grantee of her and her husband.

4. LIMITATIONS — *color of title — after-acquired title.* Where a person not having the title to land, or the whole of the title, conveys the same by a deed, which purports to convey the title, a subsequent deed to such person, by one having title, will inure to the benefit of the holder under the first deed, and can not be relied on as color of title under the limitation law by the grantor in such subsequent deed.

5. SAME — *Act of* 1839 — *facts essential to constitute a bar.* To constitute a bar under the Limitation Act of 1839, three things must concur; — color of title acquired in good faith, and possession and payment

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of taxes for seven successive years. The absence of either requisite is fatal to the defense.

6. APPEALS AND WRITS OF ERROR — *amending bill of exceptions — in matter of form.* An amendment of a bill of exceptions filed at a succeeding term, in a matter of form, when it appears in the record that there is enough to amend by, will not be stricken from the files in this court.

APPEAL from the Circuit Court of Kankakee county; the Hon. N. J. PILLSBURY, Judge, presiding.

This was ejectment in the Circuit Court of Kankakee county, by Joseph Mombleau against Joseph Guertin, to recover certain lots in Achille Chiniqui's addition to the village of St. Anne, in said county. The case was tried by the court without a jury. The plaintiff offered in evidence:

1st. Patent from United States to George W. Cassady for S. E. fr. qr., Sec. 4, T. 29 N. R. 12 W.

2nd. Deed from said Cassady to Mitchell Allen for same tract.

3rd. Deed from Mitchell Allain to Ambrose Allain, conveying N. half of the S. E. qr. of Sec. 4, and the N. half S. half, S. E. Sec. 4.

4th. Judgment in favor of John N. Lowe vs. Ambrose Allen entered January 23, 1858, and an execution, with levy and sale endorsed thereon, of the N. half S. E. qr. of Sec. 4.

5th. A deed from the sheriff of Kankakee county under said sale to Achille Chiniqui; dated and recorded August 7, 1860.

6th. Town plat by Achille Chiniqui, recorded August 30, 1871, blocks one (1) and two (2), of which lie entirely in the N. half, S. half of S. E. qr. of Sec. 4, and blocks 3, 4, 5 and 6, except 39 ft. off the north side of the same are also in the N. half of the south half of the S. E. of said quarter, while the north 39 ft. of said last-named blocks, and all other lots and blocks in the addition, are in the N. half of said S. E. qr. of said section.

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7th. Deed from Achille Chiniqui to Charles A. Chiniqui, purporting to convey lots 1 and 2 in block 2, and blocks 3, 4, 5, 6, 7, 8, 9 and 10, in said addition, recorded June 10, 1871.

8th. A warranty deed from Charles A. Chiniqui and wife to Lucy Chiniqui, wife of Achille Chiniqui, conveying the same lots and blocks, dated June 16, 1871.

9th. Warranty deed from Achille Chiniqui and Lucy Chiniqui to W. D. Judson, Amos Tenney, Joseph E. Young, dated August 16, 1872, recorded August 20, 1872, conveying lots in controversy and others.

10th. Various other deeds conveying whatever title Judson, Tenney and Young acquired to the plaintiff.

11th. Quitclaim deed from Mitchell Allain to Alphonso Bondreau, purporting to convey N. half S. E. qr. Sec. 4, etc., May 14, 1872. Recorded May 17, 1872.

12th. A deed from Ambrose Allain and wife to Alphonso Bondreau, purporting to convey said N. half S. one-half S. E. qr. said Sec. 4. Date, June 25, 1875. Recorded same day.

13th. Deed from Alphonso Bondreau and wife to Charles A. Chiniqui, purporting to convey N. half S. half S. E. qr. said Sec. 4. October 11, 1877.

14th. Deed from Charles A. Chiniqui to Lucy Chiniqui, purporting to convey N. half S. half S. E. qr. said Sec. 4, June 17, 1880. Recorded December 21, 1881.

The defendant introduced in evidence:

1st. A quitclaim deed from Charles A. Chiniqui to Lucy Chiniqui, dated December 17, 1881. Recorded December 21, 1881.

2nd. Quitclaim deed from Lucy Chiniqui to Joseph Guertin, defendant, April 20, 1882, and recorded same day, and each deed describing the property mentioned in the declaration. Trial resulted in judgment for plaintiff and the defendant appeals.

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Mr. DANIEL H. PADDOCK and Mr. WILLIAM PORTER, for the appellant.

Mr. T. P. BONFIELD and Mr. C. R. STARR, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was ejectment to recover certain lots in Achille Chiniqui's addition to the village of St. Anne, in Kankakee county. The evidence preserved in the record shows a patent from the United States to George W. Cassady, and a deed from him to Mitchell Allen. The next deed in the chain of title is from Mitchell *Allain* to Ambrose Allain. This deed was objected to, as not conveying the title vested by the conveyance from Cassady, in Mitchell Allen. It was held in the case of *Chiniqui* v. *Catholic Bishop*, 41 Ill. 153, that these names were *idem sonans*. That they are similar in sound when pronounced in ordinary conversation seems clear, and we have no disposition to review the grounds of that holding.

The record showed the title of Ambrose Allain, under said conveyances, to the N. half of the S. E. qr. of Sec. 4, was sold at sheriff's sale under a judgment in favor of Lowe, and against said Ambrose Allen, and a deed was made by the sheriff thereunder to Achille Chiniqui for the same. Achille Chiniqui laid out an addition to the village of St. Anne, which embraced land on the said N. $\frac{1}{2}$ of said S. E. $\frac{1}{4}$ of said Sec. 4, and also on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of said quarter section. That is, blocks 1 and 2, and all of blocks 3, 4, 5 and 6, except 39 feet off the north end of the north tier of lots, are upon the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of said south-east quarter, while the 39 feet excepted and other blocks are upon the N. $\frac{1}{2}$ of said S. E. qr. Under this state of facts, the deed from Achille Chiniqui to Charles A. Chiniqui, and the deed of the latter to Lucy Chiniqui, conveyed no title to any part of the lots or blocks situated on the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of said south-east one-fourth, but was good as to the lots and blocks on the N. $\frac{1}{2}$ of said quarter.

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It is clear that Achille Chiniqui, by virtue of the sheriff's deed before mentioned, acquired title only to the 80 acres, more or less, described as the N. ½ of the S. E. ¼, etc., while the title to the 40 acres, more or less, being the N. ½ of the S. ½ of said quarter, remained in Ambrose Allain.

While the title thus stood, the N. ½ of said S. E. ¼ in Lucy Chiniqui, she, joined by her husband, Achille Chiniqui, executed, acknowledged and delivered their warranty deed for the lots in controversy to Judson, Tenney and Young.

By *mesne* conveyances, whatever right Judson, Tenney and Young acquired became vested in the plaintiff.

Objection is made to the deed of Lucy Chiniqui and her husband to Judson, Tenney and Young, on the ground that the acknowledgment appears to have been taken in Cook county by a notary public of Du Page county. This was, we think, authorized by the ninth section of the Notaries Public Act, in force July 1, 1872.

The principal contention, however, is, in respect of whether the title subsequently acquired by Charles A. Chiniqui inured to Lucy Chiniqui, his grantee, and those succeeding to her right. She acquired no title by the conveyance from Charles A. Chiniqui to herself, to the N. ½ of the S. ½ of said S. E. ¼ Sec. 4, the title remaining in Ambrose Allain. In 1875, after her conveyance to Judson, Tenney and Young, said Ambrose Allain conveyed N. ½ of the S. ½ of the S. E. ¼ of said section 4 to Bondreau, who, in 1877, conveyed the same to Charles A. Chiniqui. The latter having, by his warranty deed of June 16, 1871, covenanted to warrant the title to the lots situated upon said tract, to said Lucy Chiniqui, the title or interest acquired by said Charles A. therein would have inured to her, if she had not made her warranty deed to Judson, Tenney and Young. It is insisted that such after-acquired title would not inure to the benefit of her grantees. It is said that the warranty deed of Lucy Chiniqui and her husband was void, so far as it attempted to convey lots to which she had no title, and

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being void as a conveyance she was not estopped by the covenants in her deed from holding the after-acquired title to her own use. That is to say, that the title acquired by Charles A. Chiniqui would inure under his deed to her, but would not inure to Judson, Tenney and Young and their grantees, under her deed to them. This contention seems to be based upon the theory that the estoppel arises solely from contract, and as a married woman was not clothed with full power of contracting generally, before the act of 1874, the covenants of warranty in her deed are not binding on her. Mr. Tiedeman, in his work on Real Property, sections 7–23, says: "In relation to the title of the land, an estoppel by deed arises when there is in the deed an express or implied representation that the grantor, at the time of his conveyance, was possessed of the title which his deed purports to convey. If there is such a representation, and it is false, whether he is committing fraud, or is acting under an honest belief, he is estopped from denying that he has title; he could not, by setting it up, defeat his own grant." See 3 Wash. Real Prop. 94. It is unimportant for us to notice the difference of opinion in the books, as to whether the covenants operate to convey or transfer the after-acquired title, or whether the title remains in the grantor by estopping him from asserting title contrary to his deed. Nor is it important whether section 7 of chapter 30, Revised Statutes, is declaratory of the common law, or changes the same in any respect. That section of the statute reads as follows: "If any person shall sell and convey to another by deed, or conveyance, purporting to convey an estate in fee simple absolute, in any tract of land or real estate, and not then being possessed of the legal estate, or interest therein, at the time of the sale and conveyance, but after such sale and conveyance the vendor shall become possessed of and confirmed in the legal estate of the land, or real estate so sold and conveyed, it shall be taken and held to be in trust, and for the use of the grantee or vendee; and the conveyance aforesaid shall be held and

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taken, and shall be as valid as if the grantor had the legal title or interest at the time of such sale and conveyance." This statute applies only to deeds and conveyances which purport to convey an estate in fee. *Halbroo* v. *Debo*, 99 Ill. 372. In *Hill et al.* v. *Blackwelder*, 113 Ill. 295, we said, that by this provision of the statute "A conveyance of land by one not having title is made as valid to pass an after-acquired title as if the grantor had the legal title at the time of conveyance." It is conceded, practically, that since the Married Woman's Act of 1874, the provision quoted would apply to deeds of married women, as it would to the deeds of males or *femmes sole*. The power to convey land is a power to contract in relation to it. Section 18 of the Conveyance Act, in force July 1, 1872, and in force when Mrs. Lucy Chiniqui's deed was made, provides that: "Any married woman being above the age of eighteen years, joining with her husband in the execution of any deed * * * or other writing for or relating to the sale, conveyance or disposition of her lands or real estate, or any interest therein, shall be bound and concluded by the same in respect to her right, title, claim or interest in such real estate as if she were sole." It may well be that prior to the Act of 1874 she would not be liable to an action on the covenants in her deed to Judson, Tenney and Young, but it by no means follows, under the section last quoted, that the title subsequently acquired would not inure to her grantees. If the effect of her deed purporting to convey title in fee is to bind and conclude her in respect to her right, title, claim or interest in the real estate, as if she was sole, it seems clear that the same effect should be given to her deed as if it was the deed of a *femme sole*, in which case it unquestionably would have the effect of passing subsequently acquired title. We are unable to perceive, upon principle, where a married woman is claiming land, and joins with her husband in the execution of a deed, conveying the same, and the title would inure to her grantee if

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she were sole, why it would not inure under a conveyance made by her in pursuance of this statute.

The effect is simply to give a deed, otherwise void as a conveyance, because the grantor has no title, the validity which makes it operative when the grantor subsequently acquires title. The statute declares that the effect of such a deed shall be to pass any after-acquired title by the grantor, the same as if he was seized of it when the deed was made. We are of opinion that the after-acquired title by Charles A. Chiniqui, by means of the conveyance from Bondreau, inured to the grantees of Lucy Chiniqui. Her title having by operation of her deed under the statute passed to her grantees, she had no title to convey, and her deed, dated April 20, 1882, to the defendant constituted no defense to the action.

The defendant also relies upon the sixth section of the Limitation Act as to some of the lots in controversy. Appellant did not acquire color of title until April 20, 1882, less than seven years before the bringing of this suit. He can not rely upon the deeds to Charles A. or Lucy Chiniqui, as color of title, for the reason that whatever interest they acquired by or under said deeds, *eo instanti* inured to the benefit of their grantees, who took the same as if named in such deed as grantees. They at no time acquired claim and color of title in good faith, as against their prior grantees.

The three requisites of color of title acquired in good faith, possession and payment of taxes for seven successive years not concurring, the bar of the statute was not complete. *Stearns* v. *Gittings*, 23 Ill. 388; *Morrison et al.* v. *Norman et al.*, 47 id. 477.

After the appeal in this case was perfected, appellee obtained leave of the Circuit Court to amend the bill of exceptions, and the same was amended accordingly, and on *certiorari* was sent up duly certified. Appellant perfected a separate appeal from the order allowing the amendment, which is docketed as No. 2 of the term, and moved in this court to strike

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such amended record from the files. This will not be done. It is evident that the deed from Ambrose Allain to Alphonso Bondreau, before mentioned, was before the court and considered. The original bill of exceptions shows that No. 24 of an abstract of title, marked in pencil on margin "IX," being deed from Ambrose Allain to Alphonso Bondreau, conveying the disputed lands by quitclaim, was offered and admitted in evidence. This is the deed set out in the amended bill of exceptions, and shows the land conveyed. There was, we think, sufficient in the original bill of exceptions to authorize the amendment.

Finding no error in the record, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

CHARLES WUNDERLE *et al.*

v.

CATHARINE WUNDERLE.

Filed at Springfield, January 18, 1893.

1. LAW OF DESCENTS — *who may inherit — non-resident aliens — sec.* 1, *chap.* 39, *R. S.* If a citizen of the United States dies intestate seized of land in this State, leaving no issue, but leaving a widow, who is a resident citizen, and a brother and sister, who are non-resident aliens and incapable of taking by inheritance, and no other kindred capable of taking are shown, the widow, under clause 6 of section 1 of chapter 39 of the Revised Statutes, will take the whole of the land as the sole heir. The kindred referred to in such statute refers to such kindred as are capable of inheriting.

2. SAME — *subject to legislative control.* Citizens of the United States are not deprived of the right to transmit their lands by devise or descent merely because certain of their kindred, who are non-resident aliens, are declared to be incapable of inheriting real estate. The law-making power can direct who shall be regarded as heirs, and where land shall go in default of heirs. When a subject or citizen dies intestate, the presumption of law is that he has heirs capable of inheriting.

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Syllabus.

3. SAME — *legislative power — law at the time of descent cast — vested rights.* Rules of inheritance are the creatures of municipal or civil law, and except as to rights already vested, may be changed and modified at pleasure. The legislature has power to change the course of descent, and such change will operate instantly upon all estates which may subsequently descend. The law existing at the time of descent cast governs the right to inherit. A mere expectation of property in the future is not considered a vested right.

4. Neither citizens nor aliens have vested rights in the estates of their living kindred. But aliens who had acquired lands in this State before the act of 1887 went into effect, had vested property rights which could not be confiscated or taken from them.

5. SAME — *common law — aliens incapable of taking by inheritance.* The right of inheritance is an incident of allegiance or citizenship, and an alien can not take lands by descent nor transmit them to others as his heirs, by the common law. By that law aliens had no inheritable blood and were incapable of taking by inheritance.

6. ALIENS — *taking lands by act of parties — title at common law.* At common law, though aliens could not take by operation of law, they could take by the act of the parties. Not taking by descent, they could take by grant or devise until "office found;" that is to say, an alien could hold lands conveyed or devised to him until it was ascertained by inquiry or inquest of office whether or not such lands belonged to the sovereign by reason of the alienage of the holder.

7. Hence it is generally held that in the absence of express statutory provisions to the contrary, an alien's title to land purchased by him or devised to him, is valid against everybody but the State, and can be divested only by "office found" or by some other act or proceeding taken by the State for the purpose of acquiring possession.

8. ESCHEATS — *at common law — and under Alien act of* 1887. The act of 1887 in enacting that "a non-resident alien * * * shall not be capable of acquiring title to, or taking or holding any lands or real estate by descent," is merely declaratory of the common law. By that law, if a man leaves no other relatives but aliens, his lands will escheat to the sovereign without office found. In such case a proceeding in the nature of office found is not necessary to vest in the sovereignty the title to land escheated for want of heirs. But a proceeding may be required, not to give title, but for information of title already passed.

9. Such a proceeding is the Illinois statute in regard to escheats, the first section of which declares, among other things, that the estates of persons dying seized of real estate without any devisees or heirs capable of inheriting the same, shall escheat. Titles by escheat must be established in accordance with the provisions of this statute.

10. As under the act of 1887, the lands of a deceased intestate in this State can not descend to his non-resident alien kindred, they will escheat to the State or county, if he leaves no resident kindred capable of inheriting.

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11. If a citizen of this State dies intestate leaving lands in the State, and his next heirs are aliens who can not take, the inheritance will descend to the next of kin who is competent to take, in like manner as if no such aliens had ever existed, and the lands will not escheat.

12. COMMON LAW — *how far in force in this State.* The common law of England, so far as applicable and of a general nature, and also all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law prior to the fourth year of James the First, are in force in this State, except so far as they are changed by legislative authority.

13. REAL ESTATE — *title passes according to the lex rei sitæ.* It is a general rule of the common law that the title to real property must be acquired and passed according to the *lex rei sitæ.* This rule not only applies to alienations and acquisitions made by the act of the parties, but also to estates and rights acquired by operation of law. And the descent and heirship of real estate are governed by the law of the country where it is located.

14. This principle, originally applicable between countries entirely foreign to each other, prevails as among the States of the American Union, and from it results the doctrine that the title of aliens to land within the limits of the several States is a matter of State regulation.

15. TREATY — *effect on conflicting statutory provisions.* While it is true that the right of foreigners to acquire and hold title to real estate is entirely dependent on the laws of the State in which the land is situate, it is also true that the State law must give way, if it conflicts with any existing treaty between the government of the United States and the government of the country of which such foreigner is a subject or citizen.

16. SAME — *removing statutory disqualification to hold real estate.* But the treaty which will suspend or override the statute of a State, must be a treaty between the United States and the government of the particular country of which the alien, claiming to be relieved of the disability imposed by the State law, is a citizen or subject. A treaty with some other country of which such alien is not a citizen or subject can not have the effect of removing such disability.

17. Under article 6 of the Federal constitution, provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and such a treaty will control or suspend the statutes of the States whenever it differs from them. Hence, if the citizen or subject of a foreign country is disqualified under the laws of a State from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property.

18. The disability imposed upon non-resident aliens by the first section of the act of 1887 is not removed by any existing treaty between

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the United States and the Grand Duchy of Baden, or between the United States and the German Empire.

19. STATUTES CONSTRUED — *act of* 1887 — *non-resident aliens holding real estate.* By the act of 1887, relating to aliens, the non-resident alien is not merely forbidden to "acquire or own, hold or possess," but it is expressly declared that he "shall not be capable of acquiring title to or holding" real estate. *Held*, that this language could not be construed as permitting the non-resident alien to hold a defeasible title, subject to be divested only by forfeiture in favor of the State.

20. The act specifies what aliens may hold defeasible titles, such as the heirs of aliens who had theretofore acquired lands, and resident aliens declaring their intentions to become citizens, and creditor aliens seeking to enforce liens on judgments. From this it must be presumed that the legislature intended to withhold such right from the aliens not embraced in those classes, and who are declared to be incapable of taking or holding.

21. SAME — *act of* 1887 — *alien heirs of citizens — exception in section* 1. The act of 1887, relating to aliens, can not be so construed as to extend the exception in section 1 to the alien heirs of citizens, as well as the heirs of aliens, and thereby give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale or acquire an actual residence in the State.

22. The exception in section 1 of the act of 1887, relating to non-resident aliens, should not be so construed as to embrace others than the class of persons therein specifically designated.

23. The words "heirs or aliens who *may* acquire lands," etc., in section 1 of the act of 1887, relating to aliens, refer to the case specified in section 8 of the act, where a non-resident alien owning lands in this State at the time the act took effect, disposes of the same during his lifetime, and takes security for the purchase money, and afterward he "or his non-resident heirs" again obtain the title on sale made under a judgment or decree rendered in order to enforce the payment of any part of such purchase money. These words of exception do not apply to heirs of a citizen and resident of the United States.

24. SAME — *a statute will be construed as passed by the legislature.* It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. A construction will not be adopted which will make the legislature say what it has not said. A construction of a statute, variant from the strict and literal meaning, is only justified upon the ground that it effectuates the intention of the legislature manifestly disclosed by a consideration of the whole context.

25. CONSTITUTIONAL LAW — *whether special legislation. The Alien act* of 1887 is not a special law within the meaning of the State constitution. It is sufficiently general in its terms to embrace all non-resident

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aliens, except those included in the exception specified in section 1 thereof. A limitation of its general application arising from the exercise of the treaty-making power by the general government does not make it special within the meaning of the State constitution.

26. If that act had, in express terms, excepted from its operation those citizens or subjects of foreign countries, to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still be a general law as to a large number of non-resident aliens not embraced within the class so excepted.

27. The law of 1887, relating to non-resident aliens, does not contravene the constitutional prohibition of special legislation changing the law of descents.

28. The object of the exception in section 1 of the act of 1887 was to save the rights of those aliens who had already acquired lands in this State, subject to the laws thereof; that is to say, subject to the provisions of the act of 1851, and the embodiment of such reasonable exception in the act of 1887 did not make that act a special law within the meaning of the State constitution.

29. SAME — *general and uniform laws.* Laws are general and uniform when alike in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation.

30. It is not clear that the constitutional prohibition against special legislation was intended to refer to the operation of State laws upon different classes of foreigners, but only to their operation upon different classes among the citizens of the State; and, more especially, is it not clear that discrimination among different classes of non-resident aliens was intended to be forbidden by the prohibition of special legislation changing the law of descent.

31. SAME — *statute upheld unless clearly unconstitutional.* A statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution.

APPEAL from the Circuit Court of Jersey county: the Hon. GEORGE W. HERDMAN, Judge, presiding.

This is a bill filed on June 22, 1891, in the Circuit Court of Jersey county, by Charles Wunderle and Veronica Schaeffer, the appellants herein, against Catharine Wunderle, the appellee, asking for a partition of 116 acres of land in said county, subject to the widow's dower and homestead. The bill alleges that Alexander Wunderle, the brother of the appellants, the complainants below, was, in his lifetime and at the time of

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his death, the owner seized in fee of said land, and, being so seized, died intestate on January 2, 1891, leaving appellee, the defendant below, his widow, and the complainants, his brother and sister, as his only heirs at law; that by said death the defendant and the complainants became seized in fee as tenants in common of said land by descent from said Alexander Wunderle; that the defendant, as widow of the deceased, became seized in fee of one undivided half of the premises, and entitled to dower in the other half; that the complainants are entitled each to one undivided one-fourth of the land, subject to the dower and homestead rights of the widow; that said dower and homestead have never been set off; that no other persons than said complainants and defendant have any interest in or title to said premises or any part thereof.

The defendant filed her plea to the bill, alleging that at the time of his purchase of said land, and prior and subsequently thereto, and at the time of his death, the said Alexander Wunderle was a citizen and a resident of the United States; that the complainants were at the time of his death and have ever been and are now, as to the United States, non-resident aliens; that neither of the complainants is now, or ever was a resident or citizen of the United States, but that both of them were born, have ever resided and still continue to reside in the Grand Duchy of Baden, and were at the time of the death of Alexander Wunderle and are now subjects of the German Empire; that by an act of the legislature of Illinois, approved June 16, 1887, in force July 6, 1887, and at the time of said death, it was provided among other things that non-resident aliens should not be capable of acquiring title to, or holding, any lands, or real estate, in this State by descent, etc., except, etc., reference being made to said act, etc., and the defendant pleading the same to said bill, etc.

The cause was heard by the Circuit Court upon the bill and plea, and that court found that the plea was sufficient in law to bar the right of the complainants to the relief prayed for,

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and dismissed the bill with costs, etc. From the decree so entered by the Circuit Court the present appeal is prosecuted.

Mr. J. G. KOESTER, Mr. WILLIAM VOCKE and Mr. JULIAN W. MACK, for the appellants:

The statute of 1887 relating to aliens is void because it is in conflict with various treaties made by the government of the United States, which are by the constitution declared to be a part of the supreme law of the land. Const. of the U. S., Art. VI; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions Atty.-Gen., p. 417; *Chirac* v. *Chirac*, 2 Wheat. 259; *Ware* v. *Hylton*, 3 Dall. 199; *People* v. *Gerke*, 5 Cal. 381.

It is in conflict with a treaty made with the German Empire, and violates the principles of international comity. Treaty between the U. S. and German Empire, proclaimed December 11, 1871, Art. 10, last paragraph; Wheaton's Intern. Law, par. II, chap. II, sec. 4; Field's Intern. Code, chap. 26, secs. 334–336.

Being void as to citizens of those countries with which the United States has entered into treaties, but affecting citizens of other countries with whom no treaty relations exist, it operates as a special law changing the statute of descent as against the latter.

Affirming the decree of the court below would require a construction of the statute unjustly discriminating between the heirs of alien land owners and the alien heirs of such as are citizens, in this, that it would extend a qualified right of inheritance to the former class, while disqualifying the latter. See Const. of Ill., Art. IV, sec. 22; *People* v. *Millett*, 117 Ill. 294.

In that view the law would take away vested rights and impair the obligation of contracts in violation of the organic law of the Nation as well as of the State of Illinois.

The construction of the statute should be a liberal one so far as it affects private rights.

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Though apparently the right of inheritance by aliens is limited to property of alien ancestors, yet the statute should be construed so as to extend the benefit of alienation likewise to the alien heirs of our citizens. This construction is demanded, in view of the construction heretofore given to the alien and other laws in this State.

As to the common law of England relating to aliens, see Blackst. Com., B. I, p. 371, and B. II, pp. 249–251, Cooley's Ed.

As to the common law of Virginia and Illinois, see 1 Minor's Inst. 144; 1 Tucker's Com. on Blackst. 65 *et seq.; Hubbard* v. *Goodwin*, 3 Leigh, 508.

Statutes of Illinois: Territorial Act of Sept. 17, 1807; Illinois Session Laws, 1819, Feb. 6, p. 6; Illinois Session Laws, 1827, Feb. 7, p. 49; Illinois Session Laws, 1829, Jan. 23, p. 207; Revised Statutes, 1845, chap. 4; Illinois Session Laws, 1851, Feb. 7, p. 149; Illinois Session Laws, 1887, June 16, p. 5; Illinois Session Laws, 1891, p. 3.

In order to arrive at the proper interpretation of a statute the courts will, in doubtful cases, strain the meaning of words, transpose or interpose words, change their ordinary meaning or insert modifying clauses. See *Kilgour* v. *Gockley*, 83 Ill. 109; *County of Perry* v. *Jefferson*, 94 id. 214; *People* v. *Hoffman*, 97 id. 234.

Forfeitures are never enforced by the courts, unless the legislature has a plain constitutional right to enact them, and, exercising this right, has enacted them in plain and unequivocal language.

The statute is loosely drawn, and taking away private rights should be most carefully considered.

The plea offers no defense to the bill, because appellants have, at least, a defeasible title. *Carlow* v. *Aultman Co.*, 28 Neb. 672; *Bone* v. *Canal Co.*, 5 Atl. Rep. 751; *Hickory Farm Oil Co.* v. *Railroad*, 32 Fed. Rep. 22.

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Mr. D. D. GOODALL, for the appellee:

While the territory now comprising the State of Illinois belonged to Virginia, the common law prevailed. Under that law an alien could acquire land by purchase or devise and hold it until office found.

But in no case could an alien take real estate by descent. He had no inheritable blood. The title could not pass to or vest in him even for an instant, and if a citizen or subject died leaving no relations other than aliens, his estate escheated to and vested in the State without office found. Blackstone's Com., title Escheat, 6; *Crane* v. *Reeder*, 21 Mich. 24; 4 Am. Rep. 430.

In section 1 of the statute of 1887 the enacting part declares that a non-resident alien, etc., shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise. This is not simply a provision that a non-resident alien "shall not acquire title," as appellants would have it, but an enactment that he shall not be capable of acquiring title, etc., thus clearly and explicitly making non-resident alienage an impediment and a bar to the acquisition of title in the cases designated.

Under this provision no title to lands or real estate whatever can pass to, vest in, or be taken by a non-resident alien for a single instant. Nor can he have or take, as appellants contend, a defeasible or any estate therein.

This will further appear from a consideration of chapter 49, R. S., title Escheat, which provides: "That if any person shall die seized of any real or personal estate without any devise, and leaving no heirs or representatives capable of inheriting the same, or the devisees be incapable of holding the same, and in all cases where there is no owner of real estate capable of holding the same, such estate shall escheat to and vest in the county in which it, or the greater portion thereof, is situated."

Thus the statute of escheat vests the title of real estate where there is no one capable of inheriting or holding the same in the county where it is located; and the enacting clause of the

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law of 1887 declares that a non-resident alien shall not be capable of acquiring title to or taking or holding any lands or real estate, etc., showing, we think, conclusively that, by reason of his incapacity, no title or estate, not even a defeasible one, can, under these provisions, ever vest in or be acquired, taken or held by a non-resident alien.

Without discussing the proposition of whether or not the general government has the power under our constitution to control by treaty the law of inheritance in a State, we will say that this law does not conflict with any provision of any treaty under which appellants can claim.

They are residents and subjects of the Grand Duchy of Baden, which is now a part of the German Empire, and there is no provision in any treaty between the United States and Baden by which subjects or citizens of the one party are permitted to inherit, take or hold lands or real estate in the country of the other. Both the treaty of 1857 and that promulgated in 1870 are wholly silent upon that subject. Nor does article 10 or any other article or provision of the treaty of 1871 with the German Empire confer this right.

Baden, with the other duchies, kingdoms, principalities and free cities now comprising the German Empire, were formerly independent and sovereign. Each made its own laws and negotiated its own treaties.

As to the contention that the act is void because it affects subjects of those countries where such treaty rights exist differently from those where they do not, and thus operates as a special law changing the statute of descent and taking away vested rights, etc., we will only say that neither citizens nor aliens have vested rights in the estates of their living kindred. The maxim is well known — "*Nemo est hæres viventis.*" The power of the legislature to change the law of descent has been often exercised and never questioned, and the law existing at the time of descent cast governs the right to inherit. *Pila* v. *German, etc., Association*, 23 Fed. Rep. 700.

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It is true our constitution prohibits the passage of a special law changing the law of descent, but this act is in no sense a special law. It affects all the inhabitants of the State in precisely the same manner. Nor does it become special for the reason that some foreign powers have, by treaty with our general government, secured for their subjects partial immunity from its effects. The law will stand unimpaired, though these treaty rights and privileges be respected and accorded, and "it is the duty of the court to uphold the statute where the conflict between it and the constitution is not clear." *Newland* v. *Marsh*, 19 Ill. 385; *Johnson* v. *R. R. Co.*, 23 id. 207.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

Alexander Wunderle, the owner of the land in controversy, died intestate and without issue, and left him surviving a widow, who is the appellee herein, and one brother and one sister, who are the appellants herein. His death took place in January, 1891, while the Act of 1887 hereinafter mentioned was in force. Have appellants become the owners of one undivided half of the land, subject to the widow's dower and homestead rights therein, under the laws of this State in regard to the descent of property? The decision of this question depends upon the decision of the further question, whether the fact, that the appellants were non-resident aliens at the time of the intestate's decease, rendered them incapable of taking real estate in Illinois by inheritance.

By chapter 4 of the Revised Statutes of 1845, it was provided, that "all aliens, *residing in this State*, may take by deed, will or otherwise, lands and tenements, and any interest therein, and alienate, sell, assign, and transmit the same to their heirs, or any other persons, whether such heirs or other persons be citizens of the United States or not, in the same manner as natural-born citizens of the United States or of this State might do; and, upon the decease of any alien having title, or interest in, any lands or tenements, such lands and

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tenements shall pass and descend in the same manner as if such alien were a citizen of the United States, and it shall be no objection to any persons having an interest in such estate that they are not citizens of the United States; but all such persons shall have the same rights and remedies, and in all things be placed on the same footing as natural-born citizens and actual residents of the United States." It will be noticed that the Act of 1845 conferred the right to take lands by deed, will, or otherwise, and to alienate, sell, assign and transmit the same, upon "*all aliens residing in this State.*"

By an Act, approved February 17, 1851, the foregoing provision of said chapter 4 of the Revised Laws was amended by leaving out the words, "residing in this State," after the words, "all aliens," so as to confer the right to take lands by deed, will or otherwise, and to alienate, sell, assign and transmit the same, upon all aliens whether residing in Illinois or not. (1 Starr & Cur. Ann. Stat. chap. 6, page 264). The Act of 1851 remained in force until 1887. On June 16, 1887, the legislature passed an act, which went into force on July 1, 1887, entitled "An Act in regard to aliens, and to restrict their right to acquire and hold real and personal estate, and to provide for the disposition of the lands now owned by non-resident aliens." (Laws of Ill. of 1887, page 5; 3 Starr & Cur. Ann. Stat. chap. 6, page 60).

By the tenth section of the Act of 1887, the Act of 1851, "and all other acts and parts of acts in conflict with" the Act of 1887, are repealed. The first section of the Act of 1887, with the exception of the proviso at the end thereof in reference to "minor aliens actually residing in the United States," is as follows: "Be it enacted, * * * That a non-resident alien, firm of aliens, or corporation incorporated under the laws of any foreign country, shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent, devise, purchase or otherwise, except that the heirs of aliens who have heretofore acquired lands in this State

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under the laws thereof, and the heirs of aliens who may acquire lands under the provisions of this Act, may take such lands by devise or descent and hold the same for the space of three years and no longer, if such alien at the time of so acquiring such lands is of the age of twenty-one years, and if not twenty-one years of age, then for the term of five years from the time of so acquiring such lands, and if, at the end of the time herein limited, such lands so acquired by such alien heirs have not been sold to *bonâ fide* purchasers for value, or such alien heirs have not become actual residents of this State, the same shall revert and escheat to the State of Illinois the same as the lands of other aliens under the provisions of this Act." By the use of the words, "heirs of aliens who *may acquire* lands under the provisions of this Act," reference is evidently made to the case specified in section 8 of the Act, where a non-resident alien, owning lands in this State at the time the Act took effect, disposes of the same during his lifetime, and takes security for the purchase money, and afterwards he, "or his non-resident heirs," again obtain the title on sale made under a judgment or decree, rendered in order to enforce the payment of any part of such purchase money.

The appellants do not come within the terms of the exception mentioned in section 1, because they are not the heirs of an alien, but, on the contrary, the deceased intestate, whose heirs they claim to be, was a citizen and resident of the United States at the time of his death. They do, however, come directly within the terms of the principal or enacting clause of section 1. As it is conceded, that they are and always have been residents of the Grand Duchy of Baden and subjects of the German Empire, each of them is a non-resident alien; and the enacting clause of section 1 expressly and explicitly declares, that "a non-resident alien * * * shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent." Manifestly, therefore, the appellants are not entitled to take any portion of the lands

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in controversy by inheritance from their deceased brother, if the Act of 1887, as applied to the facts of this case, is a valid law. The subject presented by the record, is the validity of the Act of 1887.

First, it is said, that the Act conflicts with various treaties made by the government of the United States, and particularly with a treaty made in 1871 with the German Empire.

It is a general rule of the common law, that the title to real property must be acquired and passed according to the *lex rei sitæ*. This rule not only applies to alienations and acquisitions made by the acts of the parties, but also to estates and rights acquired by operation of law. The descent and heirship of real estate are governed by the law of the country where it is located. (Story on Confl. of Laws, secs. 424, 448, 483, 509; *Stoltz* v. *Doering*, 112 Ill. 234). This principle, originally applicable as between countries entirely foreign to each other, also prevails as among the States of the American Union. From it results the doctrine, that the title of aliens to land within the limits of the several States is matter of State regulation. (Williams on Real Property — 4th ed. — page 64, note 1; Lawrence's Wheaton on International Law, page 168 n.; Story on Confl. of Laws, sec. 430; Wheaton's Int. Law (Boyd) — 3d ed. — page 132; 2 Wharton's Inter. Law Dig., bottom pages 490 and 497; Field's Inter. Code — 2d ed. — page 176). But while it is true that "the right of foreigners to hold title to real estate is entirely dependent on the laws of the State in which the land is situate," (2 Wharton's Int. Law Dig. sec. 201, page 490) it is also true, that the State law must give way if it conflicts with any existing treaty between the Government of the United States and the government of the country of which such foreigner is a subject or citizen.

Article 6 of the Federal Constitution provides, that "all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the

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constitution or laws of any State to the contrary notwithstanding." In construing this article it has been held, that provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and that a treaty will control or suspend the statutes of the individual States whenever it differs from them. Hence, if the citizen or subject of a foreign government is disqualified under the laws of a State from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property. (*Hauenstein* v. *Lynham*, 100 U. S. 483; *Geofroy* v. *Riggs*, 133 U. S. 258; *Ware* v. *Hylton*, 3 Dall. 199; *Chirac* v. *Chirac*, 2 Wheat. 259; *Orr* v. *Hodgson*, 4 Wheat. 453; *Fairfax* v. *Hunter*, 7 Cranch, 603; *The People* v. *Gerke*, 5 Cal. 381). But the treaty, which will suspend or override the statute of a State, must be a treaty between the United States and the government of the particular country, of which the alien, claiming to be relieved of the disability imposed by the State law, is a citizen or subject. A treaty with some other country, of which such alien is not a citizen or subject, cannot have the effect of removing the disability complained of.

The objection made to the Act of 1887 is, that it does not allow non-resident aliens, who would be the heirs of citizens under the Illinois statute of descents but for their alienage, to hold real estate, which they might otherwise inherit as heirs, for such a reasonable length of time as would enable them to sell the same, and remove the proceeds of sale. In support of this objection counsel refer us to several treaties containing such provisions as the following: "Where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time

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to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of *detraction* on the part of the governments of the respective States." (Lawrence's Wheaton on Int. Law, page 167; Wheaton's Int. Law, 3d Eng. ed. by Boyd, pages 131–132). But the appellants are subjects of the Grand Duchy of Baden; and counsel have referred us to no treaty with Baden, nor have we been able to find any, which contains such a provision as that last above quoted. The treaties between the United States and Baden, made in 1857 and in 1868, had reference to the extradition of criminals and to naturalization, but they contained no stipulations as to the acquisition, or transfer, or transmission of property. (Treaties and Conventions, U. S. 1776–1887, pages 41–46). On the contrary, we find it stated in one of the works on International Law, that, at a time when certain treaties were made with some of the German States by a representative of the United States, "Baden declined making any." (Lawrence's Wheat. on Int. Law, page 168, note).

It is claimed, however, that the treaty concluded on December 11, 1871, between the German Empire, of which Baden now forms a part, and the United States, contains a stipulation which should be so construed as to remove the disability imposed upon the appellants by the Act of 1887. That stipulation is embodied in Article 10 of the treaty and is as follows: "In all successions to inheritances, citizens of each of the contracting parties shall pay in the country of the other such duties only as they would be liable to pay, if they were citizens of the country in which the property is situated, or the judicial administration of the same may be exercised." (Treaties and Conventions — U. S. 1776–1887 — page 366.) This article in a treaty, made by the German Empire soon after its formation, conferred no new rights so far as the power to take, hold, or dispose of land was concerned. It merely recognized existing treaties theretofore made between the United States and certain of the German States, which became parts of the Empire

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when it was formed. It did nothing more than stipulate in regard to the payment of duties in cases where treaties already in existence contained provisions upon the subject of successions to inheritances. Article 10 permitted such stipulations as had been made in the treaties of the separate States to continue in force under the treaty of the Empire, but neither that article, nor any other article of the treaty of 1871, provided that the subjects of the Empire should be permitted to take or hold real estate in the United States, except so far as the right to do so was guaranteed by existing treaties.

In *In re Thomas*, 12 Blatch. 370, in an opinion delivered by Mr. Justice BLATCHFORD, it was held that the convention, concluded between Bavaria and the United States on September 12, 1853, for the extradition of criminals, was not abrogated by the absorption of Bavaria into the German Empire; and the learned Justice there says: "An examination of the provisions of the constitution of the German Empire does not disclose anything, which indicates that then existing treaties between the several States composing the Confederation called the German Empire and foreign countries were annulled, or to be considered as abrogated."

Our conclusion upon this branch of the case is that the disability imposed upon non-resident aliens by the first section of the Act of 1887 is not removed, so far as the appellants are concerned, by any existing treaty between the United States and the Grand Duchy of Baden, or between the United States and the German Empire; nor is the disqualification of the appellants, as declared by said Act, affected in any way by provisions in treaties between the United States and other governments than those of Baden and the German Empire.

Second, it is said, that the Act of 1887 is a special law, and, as such, violates section 22 of Article 4 of the constitution of Illinois, which provides, among other things, that "the General Assembly shall not pass local or special laws * * * for * * * changing the law of descent."

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The Act is charged with being special in its character by reason of its alleged conflict with some of the treaties made by the United States with foreign governments. The contentions of counsel upon this point are: that there are treaties in force, which confer upon the subjects or citizens of certain foreign countries the right to take and hold lands in this country by descent and otherwise; that, inasmuch as the Act is overruled by these treaties as to the non-resident aliens so protected by them, its effect is to deprive the non-resident aliens not protected by the treaties of the right so to take and hold lands in the State, and to leave those who are protected by the treaties in full enjoyment of said right; that there is in this way a discrimination between the two classes of aliens; that the Act is thus special, in that it classifies aliens into those who can take by inheritance and those who cannot take by inheritance. If the law can be regarded as special, because it does not apply to aliens protected by treaties, its special character in this particular is produced by the treaties, and not by its own provisions. The Act is sufficiently general in its terms to embrace all non-resident aliens, except those included in the exception specified in section 1 as above quoted. A limitation of its general application, arising from the exercise of the treaty-making power by the Federal government, does not make it special within the meaning of the State constitution. It is general as applied to all non-resident aliens not protected by treaties. If it had, in express terms, excepted from its operation those citizens or subjects of foreign countries, to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still have been a general law as to the large number of non-resident aliens not embraced within the class so excepted. Laws "are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation." (*The People* v. *Wright*, 70 Ill. 388).

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Moreover, a statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution. It is not clear, that the constitutional prohibition against special legislation was intended to refer to the operation of State laws upon different classes of foreigners, but only to their operation upon different classes among the citizens of the State. (*The People* v. *Wright*, *supra*; *Millett* v. *The People*, 117 Ill. 294; *The People* v. *Cooper*, 83 Ill. 585). More especially is it not clear, that discrimination among different classes of non-resident aliens was intended to be forbidden by the prohibition of special legislation changing the law of descent. The right of inheritance is an incident of allegiance or citizenship. "An alien cannot take lands by descent, nor transmit them to others as his heirs, by the common law." (1 Wash. on Real Prop.— 5th ed.— marg. page 49, top page 79; 2 Kent's Com., pages 53–54; *Hauenstein* v. *Lynham*, *supra*; 2 Black. Com. 249; 1 Am. & Eng. Encl. Law, pages 458 to 462 and notes). At common law aliens had no inheritable blood, and were incapable of taking by inheritance. (*Heeney* v. *Trustees, etc.*, 33 Barb. 360; *Ettenheimer* v. *Heffernan*, 66 Barb. 374.) In *Dawson's Lessee* v. *Godfrey*, 4 Cranch, 321, the Supreme Court of the United States, speaking through Mr. Justice JOHNSON, said: "As the common law, which is the law of Maryland on this subject, deprives an alien generally of the right of inheriting, it is incumbent upon the plaintiff to establish some exception in favor of his case. But I know of no exception at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law." The Supreme Court of Michigan, in an opinion delivered by Mr. Chief Justice CAMPBELL, has said: "The laws of Congress manifest a disposition to open the door as wide as possible to induce aliens to become citizens. But they show as plain an intent not to give any special privileges to aliens who do not comply with the statutes. * * * The disability of alienage had never any dependence on feudal tenures," (in this country),

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"but always rested on the broader principle that States are organized for the benefit of their own people, and that those, who are not within the allegiance, can have no claim beyond what the law sees fit to give them." (*Crane* v. *Reeder*, 21 Mich. 24).

The Act is also charged with being special in its character by reason of the exception contained in that portion of section 1, which is above quoted. As the exception permits the heirs of aliens, who had acquired lands in the State before the passage of the Act, and the heirs of aliens who might acquire lands under the provisions of the Act in the manner above stated, to take such lands by devise or descent and hold them for certain periods, subject to their escheat to the State in case they should not be sold at the end of such periods, or in case such alien heirs should not become actual residents of the State at the end of such periods, it is said that a special privilege is granted to the non-resident heirs of aliens which is denied to those who would be the non-resident heirs of citizens but for the disability imposed by the Act; that, where a citizen of this country, whether such by birth or naturalization, dies owning lands in this State, and leaving kindred in a foreign country who are non resident aliens, such kindred, though coming within the degrees of relationship authorized to inherit under the statute of descents, cannot take such lands by devise or descent under the Act, but that, where a non-resident alien owning lands before the passage of the Act, dies still owning them and leaving kindred who are non-resident aliens, such kindred, if coming within the degrees of relationship authorized to inherit under the statute, may take such lands by devise or descent and hold them for a number of years with the right to sell them. In view of this feature of the Act, counsel for appellant say: "The legislature is forbidden by the constitution from declaring that certain individuals may inherit from one part of the people, viz.: deceased aliens, and may not inherit from another part, viz.: deceased citizens." We do not regard the objection thus made to the Act as tenable.

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The object of the exception now under consideration was to save the rights of those aliens, who had already "acquired lands in this State subject to the laws thereof," that is to say, subject to the provisions of the Act of 1851 as above quoted. Rules of inheritance are the creatures of the municipal or civil law, and, except as to rights already vested, may be changed and modified at pleasure. "*Nemo est hæres viventis*" is a well-known legal maxim. The legislature has power to change the course of descent, and such change will operate instantly upon all estates which may subsequently descend. The law existing at the time of descent cast governs the right to inherit. A mere expectation of property in the future is not considered a vested right, and hence "the rules of descent are held subject to change in their application to all estates not already passed to the heir by the death of the owner." (Cooley on Cons. Lim.—6th ed.—page 439; *Sturgis* v. *Ewing*, 18 Ill. 176; *Crane* v. *Reeder*, 21 Mich. 24; *Pilla* v. *German School Ass'n*, 23 Fed. Rep. 700.) It follows, that neither citizens nor aliens have vested rights in the estates of their living kindred. But aliens, who had acquired lands in Illinois before the Act of 1887 went into force, had vested property rights, which could not be confiscated, or taken away from them; and, while it is true that they acquired such lands subject to the right of the legislature to change the law of descent, yet the Act of 1851 had not only specifically authorized them "to transmit the same to their heirs," but had provided that upon their decease their lands "should pass and *descend* in the same manner as if" they were citizens of the United States; and, by the terms of the law, it could not be urged as an objection to them, that they were not citizens of the United States, but they were thereby placed upon "the same footing as natural-born citizens." Accordingly, when the legislature in 1887 repealed the Act of 1851, it evidently thought it best to so far continue the privileges of that Act to aliens who had acquired lands in Illinois under it and because of it, as to confer upon

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their heirs the right to take by devise or descent a defeasible estate in such lands. We do not think that the embodiment of such a just and reasonable exception in the Act of 1887 made it a special law within the meaning of the State constitution. The observations, already made as to the exception of aliens protected by treaties from the operation of the Act, apply to the exception in favor of the heirs of aliens who had acquired lands before the passage of the Act. As to the large class of aliens not embraced in the latter exception, the law is general in its application. Its general character is also seen in the fact that it has reference to future, as distinguished from past, acquisitions of real estate. It was not necessary that citizens should be made capable of inheriting in express terms. Citizens are not deprived of the right to transmit their lands by devise or descent, merely because certain of their kindred, who are non-resident aliens, are declared to be incapable of inheriting real estate. The law-making power can direct who shall be regarded as heirs, and where lands shall go in default of heirs. (*Crane* v. *Reeder*, *supra*.) Where a subject or citizen dies intestate the presumption of law is that he has heirs capable of inheriting. (*Wilbur* v. *Tobey*, 16 Pick. 177.)

Our conclusion is that the Act of 1887 does not contravene the constitutional prohibition of special legislation changing the law of descent.

Third, it is urged that the Act of 1887 should be liberally construed, and that such liberal construction would have the effect of extending the exception named in section 1 to the alien heirs of citizens, as well as to the heirs of aliens. In other words, we are asked to so construe the exception as to give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale, or acquire an actual residence in the State. This would involve the insertion of the words "and the alien heirs of citizens" after the words "except that the

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heirs of aliens." By such a construction we would make the legislature say what it has not said. It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. Counsel cite, as authority for their contention upon this point, the following cases: *Kilgour* v. *Gockley*, 83 Ill. 109; *County of Perry* v. *Jefferson County*, 94 Ill. 214; *Walker* v. *Springfield*, 94 Ill. 364, and *The People* v. *Hoffman*, 97 Ill. 234.

A careful examination of all these cases will show that, where the construction given to the words of a statute is variant from their strict and literal meaning, such construction is only justified upon the ground that it effectuates the intention of the legislature, as manifestly disclosed by a consideration of the whole context. In the *Gockley* case, an act of the legislature relieved persons under 21 years of age from the bar of a statute of limitations, provided they should bring an action within three years after the disability should cease; and it was held that females, whose minority is at an end under our laws at 18 years of age, could bring their actions within three years after reaching the latter age, because it was the manifest intention of the legislature that the action could be brought within three years after the disability of minority should cease, whether it ceased at the age of 21 years, or at the age of 18 years. In the *Jefferson County* case a mistake was made in a certain location named in the body of an act to change the county line between two counties; and the court resorted to the title of the act as avowing its object and showing the intention of the legislature. In the *Springfield* case, the word "said" was rejected and the word "the" substituted therefor in a section of a statute, because a consideration of the whole section showed that the real intention of the legislature was expressed by such substitution. In the *Hoffman* case, it was held, that the expression "*capias ad satisfaciendum*" was used by mistake in a statute for the expression "*capias ad respondendum*," because the context clearly showed

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that the legislature intended to designate the latter and not the former writ.

But, here, the legislature has expressly declared that the heirs of certain aliens shall take and hold lands for limited periods subject to the privilege of avoiding their escheat to the State by a sale of them, or by acquiring an actual residence in the State, within said periods. But the Act of 1887 nowhere declares, nor is there anything on its face to indicate that the legislature intended thereby to declare, that the non-resident alien kindred of citizens should so take and hold lands for certain periods. The evident design of the legislature was to prevent the accumulation of landed estates in the hands of non-resident aliens. The latter are permitted to acquire and hold personal property in the same manner and to the same extent as natural-born citizens. The Act holds out inducements to resident aliens to become citizens by granting them the privilege of acquiring lands and retaining them for certain periods after declaring their intentions to become citizens, and by providing for escheats to the State in case of failure to sell, or to acquire citizenship within such periods. We cannot say, that the failure to provide for the non-resident alien kindred of citizens may not have been in pursuance of the general design to encourage the naturalization of resident aliens and to discourage the ownership of land by non-resident aliens. *Non constat* that it was not the intention of the legislature to induce citizens to devise their lands to their resident kindred, or, in case of intestacy, to transmit them to heirs living in this country.

We are of the opinion that the exception in section 1 should not be so construed as to embrace others than the class of persons therein specifically designated. (*Luhrs* v. *Eimer*, 80 N. Y. 171).

Fourth, it is claimed that the appellants in this case took such an interest in the lands in controversy as they can hold until the State interferes with them; and that the interest so

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taken by them must be regarded as valid, until it is assailed in a direct proceeding instituted by the State. We are unable to yield our assent to this proposition.

At common law, though aliens could not take by operation of law, they could take by the acts of parties. Not taking by descent, they yet could take by grant or devise until "office found;" that is to say, an alien could hold lands conveyed or devised to him, until it was ascertained by inquiry, or inquest of office, whether or not such lands belonged to the sovereign by reason of the alienage of the holder. (*Hauenstein* v. *Lynham, supra; Cross* v. *De Valle*, 1 Wallace, 13; 3 Black. Com. 258; 1 Wash. on Real Prop.,—5th ed.,— page 79; 1 Am. & Eng. En. Law, 458–460). Hence it has come to be generally held, that, in the absence of express statutory provisions to the contrary, an alien's title to land purchased by him, or devised to him, is valid against everybody but the State, and can be divested only by "office found," or by some other act, or proceeding taken by the State for the purpose of acquiring possession. (1 Devlin on Deeds, sec. 127; *Jackson* v. *Adams*, 7 Wend. 368; *Goodrich* v. *Russell*, 42 N. Y. 177; *Heeney* v. *Trustees, etc., supra; Ettenheimer* v. *Heffernan, supra; Airhart* v. *Massieu*, 98 U. S. 491). So, it has been decided that, where lands are conveyed to a corporation forbidden by its charter to hold real estate, the title of the corporation cannot be collaterally attacked, but can only be questioned in a direct proceeding by the State. In many of the cases, however, where it has been thus decided, it appears that the corporation was permitted to hold land to a certain extent, or for certain purposes, as for instance for the purposes of its business, or that it was forbidden to "*purchase and hold*," and not forbidden to either *purchase or hold*. (*Barnes* v. *Suddard*, 117 Ill. 237; *Hamsher* v. *Hamsher*, 132 Ill. 273; *Leazure* v. *Hillegas*, 7 Serg. & Rawle, 313; *Runyan* v. *Coster*, 14 Pet. 122; *Hickory Farm Oil Co.* v. *Buffalo, N. Y. & P. R. R. Co.*, 32 Fed. Rep. 22). In *Bone* v. *President, etc.*, 5 Atl. Rep. 751, the

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opinion fails to state the facts of the case, but it would appear from the syllabus and notes, that the corporation was entitled to hold land to a certain extent. In *Carlow* v. *Aultman*, 28 Neb. 672, where a non-resident corporation had bought property at a judicial sale in order to protect its lien under a judgment in its favor, it is not stated what the provisions of the corporate charter were; but the language of the Nebraska Statute there quoted is different from the language of the Act of 1887 now under consideration.

Here, the non-resident alien is not merely forbidden to "acquire or own, hold or possess," but it is expressly declared that he "*shall not be capable* of acquiring title to or taking or holding," etc. This language cannot be construed as permitting the non-resident alien to hold a defeasible title subject to be divested only by forfeiture in favor of the State. The Act specifies what aliens may hold defeasible titles, such as the heirs of aliens who had theretofore acquired lands, and resident aliens declaring their intentions to become citizens, and creditor aliens seeking to enforce liens or judgments. The legislature having thus conferred the right to take and hold a defeasible title upon certain specified classes of aliens, must be presumed to have intended to withhold such right from the aliens, who are not embraced in those classes and who are declared to be incapable of taking or holding.

Whether or not the Act of the legislature, approved June 19, 1891, in force July 1, 1891, amending section 3 of the Act of 1887 by adding a second proviso thereto, had the effect of so changing section 1 of the Act of 1887 as to confer upon non-resident aliens the right to take a defeasible title in lands conveyed to them by deed, is a question which we are not called upon to decide in this case, as the appellants here claim to take by descent, and not by deed.

As, under the Act of 1887, the lands of a deceased intestate in this State cannot descend to his non-resident alien kindred, they will escheat to the State or county if he leaves no resident

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kindred capable of inheriting. The common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, are in force in this State, except so far as they are changed or repealed by legislative authority. (Rev. Stat., chap. 28, sec. 1). If, therefore, the Act of 1887 had done nothing more than simply repeal the Act of 1851, the common law, which forbids an alien to take or hold real estate by descent, would have been in force in this State. It follows, that the Act of 1887, in enacting that "a non-resident alien * * * shall not be capable of acquiring title to or taking or holding any lands or real estate in this State by descent," is merely declaratory of the common law. By that law, "if a man leaves no other relations but aliens, his land shall escheat to the lord." (2 Blackstone 249). In such case, the land escheats to the State without office found; (*Crane* v. *Reeder*, *supra*), that is to say, a proceeding in the nature of office found is not necessary to vest in the sovereignty the title to lands escheating for want of heirs. But a proceeding may be required, not to give title, but "for information of title already passed." (Idem). Such a proceeding is the Illinois statute in regard to escheats, the first section of which declares, among other things, that the estates of persons dying seized of real estate without any devise, or heirs capable of inheriting the same, shall escheat. (Rev. Stat., chap. 49, sec. 1). We have held that titles by escheat must be established in accordance with the provisions of this statute. (*Wallahan* v. *Ingersoll*, 117 Ill. 123).

Accordingly, if Alexander Wunderle had died leaving no other kindred than non-resident aliens, or, in other words, leaving no heirs capable of inheriting, a proceeding under the escheat law might be necessary to establish the right of the State or county to take possession of the property in question. But it was also a principle of the common law, that, where

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there was a failure of inheritable blood by reason of alienage, the lands did not escheat, but went to the next heir, or the next of kin capable of inheriting. (*Jackson* v. *Green*, 7 Wend. 335; *Orr* v. *Hodgson*, 4 Wheat. 453; *Jackson* v. *Jackson*, 7 Johns. 214; *Luhrs* v. *Eimer*, 80 N. Y. 171; *Crane* v. *Reeder*, *supra*). The rule is thus stated by Chancellor Kent: "If a citizen dies, and his next heir be an alien who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed." (2 Kent's Com. 56).

Inasmuch, therefore, as the appellants cannot inherit from their deceased brother by reason of their alienage, the interest in the land, which would otherwise have gone to them, descends to the next of kin, competent to take under the statutes of Illinois. We are of the opinion that, under the facts of this case as presented by the record, the appellee must be regarded as such next of kin. Our statute of descents provides, that "if any intestate leaves a widow or surviving husband and no kindred, his or her estate shall descend to such widow or surviving husband." (Rev. Stat., chap. 39, sec. 1, clause 6). The kindred here referred to are evidently such kindred as are capable of inheriting. It not appearing that the deceased had any other kindred than his non-resident alien brother and sister, his widow is entitled to take the whole of the land in controversy.

Our conclusion, upon the whole case, is that the Act of 1887 is a valid law in the respects herein indicated, except as to those aliens, who are relieved from the effect of its operation by existing treaties between the United States and the countries of which such aliens are citizens or subjects.

The decree of the Circuit Court is accordingly affirmed.

Decree affirmed.

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Syllabus.

MARTHA E. PLUMMER *et al.*

v.

OSCAR YOST *et al.*

Filed at Mt. Vernon, January 19, 1893.

1. ELECTION OF SCHOOL OFFICERS — *right of women to vote.* Since the passage of the act of June 19, 1891, entitled "An act to entitle women to vote at any election held for the purpose of choosing any officer under the general or special school laws of this State," women above the age of twenty-one and having the qualifications required in that act, are entitled to vote at any election of school officers, except that of superintendent of public instruction and county superintendents of schools.

2. At the election of the State and county superintendent of schools, the qualifications of the voters must be those prescribed in sec. 1 of art. 7 of the constitution, but the constitution contains no direction as to what other school officers shall be created, or as to the mode in which the incumbents of those offices shall be designated and chosen.

3. SCHOOL LAW — *power of legislature to determine the qualification of voters.* The General Assembly, having complete control of the subject, has the power to provide for the designation of all school officers, except the two named in the constitution, by appointment or by popular vote, but such election is not necessarily a proceeding identical with the elections provided for by the constitution, nor is it necessary that the qualifications of those voting for school officers shall be the same as those of electors as defined by the constitution.

4. SAME — *discretion of legislature.* Section 1 of article 8 of the constitution requiring the General Assembly to provide for a system of free schools, leaves to the legislature the discretion as to the mode in which the system shall be organized, and the officers by whom it shall be controlled and directed, and its affairs administered. The only school officers expressly provided for by the constitution are a county superintendent and a State superintendent of public instruction.

APPEAL from the County Court of Jefferson county; the Hon. JOHN C. EDWARDS, Judge, presiding.

Mr. N. H. Moss and Mr. C. H. PATTON, for the appellants.

Mr. GEORGE B. LEONARD, for the appellees.

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Mr. CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was a proceeding, instituted by Oscar Yost and Otto W. Wallace, in the County Court of Jefferson county, to contest the election of Martha E. Plummer and Mary M. Moss, to the offices of members of the board of education of school district number one, in Mt. Vernon township, Jefferson county. The contestants filed their statements under oath, which was answered by the defendants, and the cause was heard upon the following agreed statement as to the facts:

"That an election was held in said school district, according to law, on the 16th day of April, 1892, for the election of two members of the board of education in and for said district, and that at said election there were four candidates for said offices, to-wit, the contestants and the defendants; that the contestants are males and the defendants are females, and that at said election there were 883 ballots cast; that 293 of said ballots were cast by women, and the residue, 590, were cast by male voters; that all of said candidates and all of said voters were at the time of said election, possessed of the necessary age, citizenship, and residence in said State, county and school district, to make them legal voters, and eligible as candidates for said offices, unless the fact of the sex of the defendants, and of said 293 female voters, and the further fact that they, nor either of them were registered, rendered them ineligible as candidates and illegal voters; that at said election said Otto W. Wallace received 299 of said male votes, and Oscar Yost received 358 of said male votes, and the residue of said 883 votes were cast for the defendants, and being 517 votes for the defendant Martha E. Plummer, and 516 votes for the defendant Mary M. Moss; that all of said female voters voted for and their ballots were cast and counted for the defendants, and by which means their said majority was produced, and that they received certificates of their election, and afterwards, in due time, took

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their oaths of office, and are now in the exercise of the duties thereof.

"It is also stipulated, that when each of said female votes were presented, they were challenged by the contestants, and that they then procured, made and executed affidavits of their right to vote at said election, in the usual form required by male voters whose right to vote is challenged, and who are not registered, and again presented their ballots to the judges of said election together with said affidavits, which were and each of them were again challenged by the contestants, and by one of the judges of said election, but said ballots and affidavits were and each of them were then and there received and entered on the poll lists of said election and counted as aforesaid. It is further stipulated, that none of said voters or candidates at said election were registered for said election previous thereto."

Upon the foregoing facts the court held, that at said election, there were only 590 legal votes cast; that contestant Otto W. Wallace received 299, and contestant Oscar Yost received 358 of said legal votes, and that defendant Martha E. Plummer received only 224, and defendant Mary M. Moss only 225 of said legal votes; that contestants Oscar Yost and Otto W. Wallace each received a majority of all the legal votes cast at said election, and were duly elected to said offices. Exceptions to the finding and judgment of the court were duly preserved, and the defendants bring the record to this court by appeal.

The question presented for our decision is, whether the court below decided correctly in holding that the 293 women who voted at the election sought to be contested, were not entitled to vote or have their ballots counted at such election. The first section of the "Act to entitle women to vote at any election held for the purpose of choosing any officer under the general or special school laws of this State," approved June 19, 1891, provides as follows:

"Any woman of the age of twenty-one years and upwards, belonging to either of the classes mentioned in article 7 of the

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Constitution of the State of Illinois, who shall have resided in this State one year, in the county ninety days, and in the election district thirty days preceding any election held for the purpose of choosing any officer of schools under the general or special school laws of this State, shall be entitled to vote at such election in the school district of which she shall at the time have been for thirty days a resident: Provided, any woman so desirous of voting at any such election shall have been registered in the same manner as is provided for the registration of male voters."

The facts appearing by the stipulation show that the women who voted at the election in question possessed the qualifications required by the statute to entitle them to vote at elections of school officers. The admission that all those who voted at the election possessed the necessary age, citizenship and residence in the State, county and school district, to make them legal voters, must of course be understood as an admission that the women who voted were twenty-one years of age or upwards; that they were either native born or naturalized citizens of the United States, and that they had resided in the State one year, in the county ninety days and in the school district thirty days preceding the election. The only ground upon which their right to vote is questioned is, that they are not "male citizens of the United States," according to the literal import of the language used in article 7 of the Constitution, referred to in the statute above quoted.

Although the statute refers to article 7 of the Constitution in such terms as to adopt the qualifications of voters prescribed in that article, yet, as we held in *People* v. *English*, 139 Ill. 632, the true construction to be placed upon the statute is, that the qualifications prescribed in article 7 are adopted, save only the one relating to sex. To hold that that qualification also was intended to be adopted would make the statute meaningless and absurd. In the case referred to we said:

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"If the language of the act and the words of the Constitution thus incorporated therein are construed literally, they would seem to indicate that it was the legislative intention to confer upon women the right to vote at any election held for the purpose of choosing any officer of schools under the general or special school laws of the State, provided such women were males. A construction that would lead to such an absurdity is wholly inadmissible. A statute is to be interpreted according to its true intent and purpose, and its strict letter must be made to yield to the obvious intent. Words which are meaningless or inconsistent with the intention otherwise plainly expressed in the act may be rejected as redundant or surplusage. Here the word male read into the statute from the constitutional provision referred to therein is repugnant to the language of the statute, both preceding and following the part where such reference is made, and is wholly inconsistent with the entire scope and the manifest intent of the act. The evident intention of the legislators was, to give women the right to vote at the election of public school officers, provided they were twenty-one years of age, are citizens of the United States and have resided in the State, county and election district the respective lengths of time required, and have been registered, where the registration of voters is provided for."

In the case above cited the question was whether the statute under consideration was valid, so as to confer upon women the right to vote for a county superintendent of schools. That officer being one expressly provided for by the Constitution, and required to be chosen by election, the manner of his election to be prescribed by law, we held that, so far as such election was concerned, the Legislature had no power to dispense with any of the qualifications on the part of the electors prescribed by article 7 of the Constitution. But we said: "It may be that it is competent for the Legislature to provide that women who are citizens of the United States and over twenty-one years of age, may vote at elections held for school directors

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and other school officers who are not mentioned in the Constitution; but that question is not before us for decision, and we therefore express no opinion in regard to it." It will thus be seen that the question presented by the record now under consideration is essentially an open one, or, at least, that it is in no way concluded by our decision in *People* v. *English*, *supra*.

Section 1, of article 8, of the Constitution, makes it the duty of the General Assembly to "provide for a thorough and efficient system of free schools, where all the children of this State may receive a good common school education." The mode in which the required "system of free schools" should be organized, and the officers by whom it should be controlled and directed and its affairs administered, is left to the legislative discretion of the General Assembly. The only school officers expressly provided for by the Constitution are, a county superintendent of schools in each county, and a State superintendent of public instruction. As to the former officer, section 5, of article 8, provides as follows: "There may be a county superintendent of schools in each county, whose qualifications, powers, duties, compensation, and the time and manner of election, and term of office, shall be prescribed by law." Section 1, of article 5, provides that the executive department of the State Government shall consist, among other officers, of a superintendent of public instruction, and section 3, of the same article, provides for an election of that officer quadrennially, "at such places and in such manner as may be prescribed by law." At the election of these two officers, as we held in the case above cited, the qualifications of the electors must be those prescribed in section 1, of article 7, of the Constitution. But the Constitution contains no direction as to what other school offices shall be created, or as to the mode in which the incumbents of those offices shall be designated and chosen. Those matters are left wholly to the discretion of the General Assembly.

It can not be doubted that, in providing for a system of free schools, a form of organization essentially different from the

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present one might have been adopted. Entirely different officers might have been provided for, and provision might have been made for the designation of those officers by appointment rather than by election. Accordingly, it is provided by section 17, of article 6, of the General School Law, that in cities having a population exceeding 100,000 the members of the board of education shall be appointed by the mayor, by and with the advice and consent of the common council; and, unquestionably, a similar mode of appointment of all school officers, other than the two above mentioned, might have been constitutionally adopted. The General Assembly having complete control of the subject, had, of course, the power to provide for the choice of these officers by popular vote, but such an election is not necessarily a proceeding identical with the elections provided for by the Constitution, nor is it necessary that the qualifications of those voting for school officers should be the same as those of electors, as defined by the Constitution.

A principle analogous to the one under consideration was involved in our decision in *People* v. *Nelson*, 133 Ill. 565. That case presented, among other things, the question of the constitutionality of that provision of the act for the creation of sanitary districts which permitted cumulative voting in the election of the trustees of such districts, and we held that, since there was no restriction upon the General Assembly in regard to the mode of election of such trustees, it was discretionary with it to provide for their election by cumulative votes. In considering the question, we said: "The point is made that the effect of the sections of the Constitution providing for cumulative voting in the election of representatives, and in the election of directors of private corporations, is to deny to the General Assembly power to authorize cumulative voting for any other purposes, upon the principle that the expression of one thing is the exclusion of another. This could be true only in the event that some provision of the Constitution required elections,

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generally, to be by a majority of the persons voting, but can not be true where all the elective officers are named, and it is specifically provided how they shall be elected. In such case, the direction that each officer shall be elected in a prescribed way, negatives that he shall be elected in any other way, but the negation can go no further, because the election to each office can be governed only by the restrictions applicable to that office. There is no provision in the Constitution requiring elections, generally, to be by a majority of the persons voting, but in each article of the Constitution certain officers are named, and as to those there are required to be elections, but as to other officers not named, there is no requirement or restriction in this respect."

The case of *Belles* v. *Burr*, 76 Mich. 1, involved substantially the same question now before us, and is therefore quite in point. The Constitution of Michigan provided that, in all elections, every male citizen, etc., should be an elector and entitled to vote. It also required the Legislature to provide for and establish a system of primary schools. The school law of Michigan, passed in pursuance of this constitutional requirement, gave every person of the age of twenty-one years, and possessed of certain other qualifications — that of being a male not being one of them — the right to vote at school district elections. The plaintiff, a woman over twenty-one years of age, and possessing the other statutory qualifications, offered to vote at an election of school trustee, but her vote having been rejected by the inspectors, she brought suit against them for damages and recovered a verdict. On appeal from the judgment rendered on such verdict, the Supreme Court held that the plaintiff was entitled to vote at that election, notwithstanding the qualifications for electors prescribed by the Constitution, and the judgment was accordingly affirmed. In its opinion, the court, after remarking that no officer of the school district was mentioned in or recognized by the Constitution, said: "While it must be conceded that no person can vote for the election of any officer

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mentioned in the Constitution unless he possesses the qualifications of an elector prescribed by that instrument, it does not follow that none but such electors can vote for officers which the Legislature has the right to provide for to carry out the educational purpose declared in that instrument."

The case of *Wheeler* v. *Brady*, 15 Kansas, 26, was *quo warranto* to try the title of a school district trustee to his office, the majority which he received at the school election being made up wholly of the votes of certain females who were permitted to vote. The Constitution of that State conferred the right to vote at elections upon white male citizens of the age of twenty-one years and upwards, and possessing certain other prescribed qualifications. Provision was made by that instrument for the election of various officers, but no mention was made of school district elections or of the election of school district officers. By the school law, two classes of persons were permitted to vote at school elections, viz., 1. those possessing the constitutional requirements, and 2. females possessing the same qualifications excepting that of sex. It was held that the females who voted for the defendant in that case were qualified to vote at that election, and that the defendant was therefore duly elected. In reaching that conclusion, the court said: "There is no school district election or meeting provided for in the Constitution; there is no provision as to how school district officers shall be elected, appointed or chosen; and we suppose that no one will claim that they are, by the terms of the Constitution, to be elected at either of the elections provided for in the Constitution; hence it would seem that the Legislature would have complete power over the matter; that the Legislature might provide for the election or appointment of school district officers as it should choose, when it should choose, in the manner it should choose, and by whom it should choose."

State v. *Cones*, 15 Neb. 444, presented a state of facts very similar to those appearing in the case last cited, and was

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decided in the same way, and upon the same principles. See also Opinions of Judges, 115 Mass. 602.

We are of the opinion that the women who voted at the election in question in the present case were entitled to vote at that election, and that their ballots were properly counted in favor of the defendants. It follows that the defendants were legally elected to the offices of members of the board of education of school district number 1, in Mt. Vernon township, and that the judgment of the County Court deciding the contest in favor of the contestants is erroneous. The judgment will be reversed, and the cause will be remanded to the County Court, with directions to enter judgment in favor of the defendants.

Judgment reversed.

WISCONSIN GRANITE COMPANY

v.

MICHAEL P. GERRITY *et al.*

Filed at Ottawa, January 19, 1893.

1. CREDITOR'S BILL — *essential allegations and proof.* In a creditor's bill for the purpose of reaching equitable assets of the defendants, and to subject them to the complainant's judgment, it is necessary to allege and prove that the complainant's remedy at law has been exhausted before the filing of the bill.

2. But when the real scope and effect of the bill is simply to set aside and remove out of the way of the complainant's execution upon his judgment at law, certain conveyances executed by the judgment debtor after he became debtor to the complainant, without any valuable consideration and purely voluntary, it is not necessary to allege and prove the exhausting of his legal remedy, but the creditor may file his bill as soon as he recovers his judgment.

3. FRAUDULENT CONVEYANCE — *a gift from a husband to his wife.* In this case a wife saved out of money given her by her husband for family expenses, $1,000, which she deposited in bank in her own name. Afterward, the husband needed the money to pay for property which he was purchasing, and she gave it to him, and still afterward, feeling

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that his life was uncertain, he made two deeds to her of certain real estate, so that in the event of his death, the property should belong to her and their children. *Held*, that the transaction was totally wanting in the indispensable elements of a bargain and sale of the property, and was purely a gift to the wife by the husband, which, though good as between them, was fraudulent as to the existing creditors of the husband.

4. In such case, the fact that the husband retains other property, but which is not of sufficient value over and above the incumbrances thereon to satisfy the creditor's judgment, will not prevent the setting aside of the deeds to the wife as in fraud of the judgment creditor.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. H. M. SHEPARD, Judge, presiding.

Messrs. TATHAM & WEBSTER, for the appellant.

Mr. C. M. HARDY, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

We are of the opinion that the courts below misconceived the scope and effect of the present bill. They assumed that it was a creditor's bill for the purpose of reaching equitable assets of the defendant and subjecting them to the payment of complainant's judgment, to sustain which it was necessary to allege and prove that complainant's remedy at law was exhausted before the filing of the bill. *Durand* v. *Gray, Kingman & Collins*, 129 Ill. 9, and cases therein cited. But its real scope and effect is simply to set aside and remove out of the way of complainant's execution upon its judgment at law, certain conveyances executed by the defendant after he became debtor to the complainant, without any valuable consideration and purely voluntary, and therefore fraudulent in law as against the rights of the complainant, to sustain which it was unnecessary to allege and prove the exhausting of its legal remedy before the filing of its bill, but it was authorized to file its bill as soon as it had recovered its judgment. *Miller* v. *Davidson*, 3 Gilm. 518; *Newman* v. *Willetts*, 52 Ill. 98;

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Weightman v. *Hatch*, 17 id. 281; *Getzler* v. *Saroni*, 18 id. 511; *Beebe* v. *Saulter*, 87 id. 518.

The evidence is quite clear that Mrs. Gerrity had no separate estate out of which she could have paid for the property conveyed to her by her husband, the defendant in the execution. Her testimony is only that she had got money from her husband for household expenses, from time to time, and that she saved, out of those amounts, $1000, which she had deposited in bank to her credit, and that afterward she gave her husband her bank-book, and he drew out the $1000, and that that was in payment for the property conveyed to her. No specific contract is described as having been made between them, nor does she pretend to know whether the property was of equal or greater or less value than $1000. Her questions and answers proceed thus: Q. The conveyance made in May, 1889, the conveyance of a large portion of the property mentioned and described in this bill, do you remember anything about that conveyance? A. No, I do not; I remembered it at the time, I suppose, and have forgotten it probably. Q. When did you first learn that it had been conveyed to you? A. Which do you mean, this property? Q. This property, yes; I do not refer now to the homestead; the rest of the property. A. Yes; well, I really do not know just when; of course Mr. Gerrity notified me at the time, and I could not specify any date though. Q. You don't know whether it was in May, 1889, or whether it was in 1890? A. No, sir; I do not. Q. Or whether it was a year before that? A. I do not. Q. Did you ever see the deed for the property, conveying it to you? A. That I could not say, either. Q. Do you know how it came to be conveyed to you? A. Yes, sir. Q. Well, how? A. Well, Mr. Gerrity hadn't been feeling very well, and I think that he wanted to feel sure that if anything happened, that both my little ones and I would be seen and cared for, and I think that was the motive — and I know in fact that actuated him to do so. Q. Did he state to you that was his motive? A. He may not

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have done so in so many words, but I know the man was very sick. Q. Never mind what you know. What did he state to you? A. No; he did not. Q. Did he say anything to you at the time this conveyance was made? A. He may have; and still I may have forgotten it. Q. You do not remember, distinctly, of any conversation in regard to it? A. I do not remember, distinctly, what was said. Q. Do you know how much the property was actually worth at the time it was conveyed to you? A. No, sir; I do not. Q. Do you have any idea? A. I have none. Q. Anything said to you by Mr. Gerrity at the time about how much it was worth? A. No, sir. Q. You have no idea? You didn't ask any questions, did you? A. I asked no questions, for I had implicit confidence and took everything just as it was. Q. You did not consider that you were purchasing that property for a valuable consideration? A. I did not think anything about that. Q. After the property was conveyed to you did you have anything to do with regard to the management of it? A. No, sir; I authorized my husband to do so. Q. Did you do anything more with regard to the management of it than you did before it was conveyed to you? A. Nothing. Q. Did you ever receive any rents for this property after it was conveyed to you? A. Not only secondary. I authorized Mr. Gerrity to attend to these lots directly. Q. Did you ever sign any leases or do anything with reference to the management of the property? A. Not to my knowledge.

The defendant's version of the transaction is thus given in his examination as a witness:

"The amount of the consideration for the conveyance to Mrs. Gerrity of the various pieces of property, except that one conveyed on her wedding day, was about a thousand dollars, somewhere in the immediate vicinity of a thousand dollars. She gave me the bank-book with the orders to go down to Mr. Christoph's bank and get the money. At the time that I purchased this piece of ground that lay next to her house, I was

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doing business in the bank myself at the time, and with her endorsement was all I required to get the money, and I did get it out of the bank. That is the consideration, that money that I owed her, that I considered it in this deed. She gave me that money to buy this property, in other words, in the neighborhood of a thousand dollars — that was the amount. Now, why I made this conveyance, that of course, I will go into if you want it. Q. What was the condition of your health at that time, Mr. Gerrity? A. I was recommended to join an insurance society here, a benevolent insurance society, and the doctor rejected me for heart disease — that is the Royal Arcanum, and the day after I got notice of being rejected, I made this deed to her with that consideration, if anything should occur she had the property, what might be in it, for her and for our children, and that is the only consideration." And on re-cross-examination he said: "The principal reason why I conveyed the property to my wife was because I was feeling unwell at that time, and I wished to make provision for my wife and family if there was anything in it. About a thousand dollars she had given me formerly. The chief consideration, after giving back the money she had given me, was in case anything happened to me, my wife and family might be cared for. I have paid off some of the incumbrances. Most of them still remain. I told parties they could sell this property once since I conveyed it to my wife."

The substance of the entire testimony on this question amounts to no more than this: Mrs. Gerrity saved out of money given her by her husband for family expenses $1000, which she deposited in bank in her name. Afterward her husband needed the money to pay for property which he was purchasing, and she gave it to him. And still, after that, feeling that his life was uncertain, he made two deeds to her of property in controversy, so that, in the event of his death, the property should belong to her and their children. That this is totally wanting in indispensable elements of a bargain and sale is too

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plain for argument. It was a gift, pure and simple, from Gerrity to his wife, and nothing else.

As between the parties, the conveyances are undoubtedly good, but as to these existing creditors it is different. If the effect of the conveyances was to hinder and delay them in the collection of their debts, then, as to such creditors, the conveyances are fraudulent and of no effect. It is true that it is shown that Gerrity had property, known as the "Grand Crossing Property," of considerable value, which was not included in these deeds, but that property was subject to an incumbrance placed upon it by Gerrity, in the shape of a mortgage for $555, upon which $50 of interest is due, and it is also incumbered by the lien of a judgment against Gerrity in the Criminal Court of Cook county for $2000, which incumbrances, under any view of the evidence as to the value of the property, do not leave an amount in value that can be realized from this property sufficient to pay complainant's judgment.

Necessarily, therefore, the effect of these conveyances was to hinder the complainant in the collection of its debt. The Appellate Court, therefore, erred in affirming the decree of the Superior Court dismissing complainant's bill.

The judgment of the Appellate Court is reversed, and the decree of the Superior Court is also reversed, and the cause is remanded to the Superior Court for further proceedings consistent with this opinion, in which each party shall be allowed to introduce additional evidence, if it shall be so desired.

Judgment reversed and cause remanded.

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Syllabus.

NATHAN NEUFELD

v.

AUGUST RODEMINSKI.

Filed at Ottawa, January 19, 1893.

1. MALICIOUS PROSECUTION — *advice of counsel as a defense.* The law upholds and favors prosecutions under the public laws of the land, and shields and protects parties instituting them in good faith and from proper motives. So, when a party consults with counsel of good standing, and lays before him fully the facts within the party's knowledge, and then acts in good faith and in the honest belief that the party charged is probably guilty of the criminal offense, he will not be held responsible, if it shall turn out that the party is not guilty.

2. SAME — *advice of counsel as a shield — not acted on in good faith.* But this rule supposes always that the party seeking counsel does so in good faith, and also that he has made to his counsel a full and honest statement of the facts. If counsel is sought simply for protection against indulging his malice, or to enable him to use the criminal laws for unjust and oppressive uses for his private gain and advantage, it will afford no defense to the party causing the arrest, but will be rather an element of increased damages.

3. If a criminal prosecution is instituted by a party maliciously, and not in good faith upon the advice of legal counsel that a crime has been committed, he will be liable for a malicious prosecution, and the advice of counsel will not avail as a defense.

4. So, if, notwithstanding the advice of counsel, a criminal prosecution is instituted for the purpose of forcing the collection of a debt, without probable cause that a crime has been committed, the party so prosecuting can not shield himself behind the advice of counsel.

5. If a criminal prosecution is instituted against one for the mere purpose of coercing him into the payment of a debt, or the surrender of some right claimed, and not in the interest of public justice, or to vindicate the law and punish crime, and the charge is falsely made, the fact that the prosecutor procured the advice of counsel will not shield him from an action for malicious prosecution.

6. There must be both malice and want of probable cause, and the advice of counsel sought and acted upon in good faith will constitute a defense to an action for malicious prosecution. Such advice, acted upon in good faith, constitutes probable cause; but if, without acting upon such advice, the party prosecutes for the mere purpose of collecting his debt, or to harass or annoy the person charged, it can not be said

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that the advice of counsel created probable cause in the mind of the prosecutor.

7. MALICE — *what constitutes.* The evil quality of the heart which prompts a man to make a false charge against another for the purpose of private gain or advantage, is legal malice.

8. PRACTICE IN THE SUPREME COURT — *error will not always reverse.* A judgment will not be reversed for a faulty instruction when, taking it in connection with the series given, there is no prejudicial error.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. GEORGE DRIGGS, Judge, presiding.

Mr. EDGAR C. BLUM, for the appellant:

If appellant acted upon an honest belief of appellee's guilt, based on reasonable grounds, he can not be held liable. The gist of the action is that the prosecutor acted maliciously and without probable cause. *Barrett* v. *Spaids*, 70 Ill. 408; *Leidig* v. *Rawson*, 1 Scam. 272; *Wheeler* v. *Nesbitt*, 24 How. 544.

In a suit for malicious prosecution, it must appear not only that there was a want of probable cause, but that the prosecutor was actuated by malice in causing the arrest. Both must concur. *Bishop* v. *Bell*, 2 Brad. 55; *Comisky* v. *Green*, 7 id. 369; *Hirsch* v. *Mettelman*, id. 112; *Russell* v. *Deer*, id. 181; *Harpham* v. *Whitney*, 77 Ill. 32.

To sustain the averment of malice, the charge must be shown to have been willfully false. *Harpham* v. *Whitney*, *supra*; 2 Greenleaf on Ev. 453; 1 Hilliard on Torts, 514.

"The term malice in this form of action is not to be considered in the sense of spite or hatred against an individual, but of *malus animus*, and as denoting that the party is actuated by improper and indirect motives." *Harpham* v. *Whitney*, *supra*.

Has appellee established in this case that appellant, in causing his arrest, acted without probable cause?

Probable cause for instituting a criminal prosecution is a reasonable ground of suspicion, supported by circumstances

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sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged. *Ames* v. *Snider*, 69 Ill. 376; *Barrett* v. *Spaids*, 70 id. 409.

Probable cause is not a question of actual guilt, but of honest and reasonable belief of the prosecutor. *Gardiner* v. *Mays*, 24 App. 286.

The charge must be shown to have been willfully false. 2 Greenleaf on Ev. sec. 453, and authorities cited.

As to the legal advice of counsel constituting a defense, see *Ames* v. *Snider*, 69 Ill. 381; *Barrett* v. *Spaids*, 70 id. 413; *Anderson* v. *Friend*, 71 id. 475; 85 id. 135; *Lowenthal* v. *Streng*, 90 id. 74; *Stuart* v. *Sonneborn*, 98 U. S. 187.

It is well settled in this State and, we think, all others, that the advice of counsel, obtained in good faith, constitutes sufficient probable cause. *Davie* v. *Wisher*, 72 Ill. 264; *Ash* v. *Marlow*, 20 Ohio, 119; *Hill* v. *Palmer*, 38 Mo. 13; *Eastman* v. *Hansom*, 44 N. H. 519; *Walter* v. *Sample*, 25 Pa. St. 275.

Mr. JOHN MCGAFFEY and Mr. THEODORE G. CASE, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This was an action for malicious prosecution brought by appellee against appellant in the Circuit Court of Cook county, which resulted in a judgment of $3000, which is stated by appellant's counsel to have been reduced to $1000 in the Appellate Court, where the case was heard on appeal and the judgment for the latter sum, as it would seem, affirmed.

The questions of fact pressed upon our attention have been settled adversely to the contention of appellant by the judgments of the Appellate and Circuit Courts. It is also insisted that the court erred in giving the following instruction:

"If the jury believe from the evidence that the defendant maliciously, or for the mere purpose of forcing the collection

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of an ordinary debt, and without probable cause, instituted the prosecution complained of in the declaration, or that said criminal prosecution was instituted from a fixed determination on the part of the defendant to harass and oppress the plaintiff, rather than from the opinion of legal counsel to the effect that plaintiff was probably guilty of the crime charged against him; or if the jury believe from the evidence that a full, fair and true statement of all the facts known to the defendant was not submitted to counsel, then, and in either case, the opinion given by the counsel is no defense in this action, provided the jury further believe from the evidence that the criminal charge was false, malicious and without probable cause."

The Appellate Court, as it is claimed, refused to pass upon the errors assigned, questioning the correctness of the instructions, for the reason that it did not appear from the record at whose instance they were given.

Waiving this objection and treating them all as given for the plaintiff, we incline to the opinion that no prejudicial error has intervened.

The jury were fully instructed that the burden was upon the plaintiff, to show by evidence that the defendant in causing the arrest of the plaintiff, complained of, acted maliciously and without probable cause to believe that the plaintiff was guilty of the crime with which he was charged; and that the jury must believe from a preponderance of the evidence before they could find for the plaintiff that the defendant so acted maliciously and without probable cause. That, although they believed from the evidence that the defendant was actuated by malice, in causing said arrest of the plaintiff, yet no right of recovery existed unless the plaintiff had proved, by a preponderance of the evidence, that the defendant acted without probable cause.

Correct definitions of malice were given and the jury were told, "that by probable cause is meant, reasonable ground of suspicion supported by facts or circumstances sufficiently strong

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in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." *Ames* v. *Snyder*, 69 Ill. 376; *Barrett* v. *Spaids*, 70 id. 409.

The jury were then told, that where a party consults with competent legal counsel in good faith, to ascertain what course to pursue in reference to acts done by another, and the counsel, after proper deliberation and examination of the case, advises an arrest for a criminal offense, and the party acts thereon, he will not be held to respond in damages for his action, notwithstanding it may appear that the party accused was not guilty of the supposed crime, provided it appears from the evidence that such advice was sought in good faith, and that a fair, full and true statemen of all the fact was submitted to the counsel, and that the party instituting the criminal prosecution was induced to act, and acted on such advice in good faith. *Ross* v. *Innis*, 35 Ill. 487; *Davie* v. *Wisher*, 72 id. 262; *Anderson* v. *Friend*, 71 id. 475; *Skidmore* v. *Bricker*, 77 id. 164; *Murphy* v. *Larson*, id. 172. And the jury were again told, that although the plaintiff was not guilty of the offense for which the defendant caused his arrest, yet the plaintiff could not recover unless he established by the evidence that the defendant had no probable cause to believe him guilty. Then follows in the series the instruction quoted. It is objected first, that by the instruction under consideration, the jury were told that if they believed that the defendant maliciously, or for the mere purpose of forcing the collection of an ordinary debt, and without probable cause, instituted the criminal prosecution complained of, then the opinion given by counsel is no defense to the action, provided they further believed "from the evidence that the criminal charge was false, malicious and without probable cause."

It is manifest that if the jury believed, as stated in the last clause of the instruction just quoted, that the criminal charge made by the defendant, was "false, malicious and without probable cause," that the defendant was without legal defense

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to the action. But in any event, if the prosecution was instituted maliciously by the defendant, and not in good faith upon the advice of counsel that a crime had been committed, the advice of counsel could not avail.

So, if, notwithstanding the advice of counsel, the prosecution was instituted for the mere purpose of forcing the collection of an ordinary debt, without a probable cause to believe that the crime had been committed, the defendant could not shield himself behind the advice of counsel.

It is said: "That evil quality of the heart which prompts a man to make a false charge against another for the purpose of private gain or advantage, is legal malice." *Kimball* v. *Bates*, 50 Me. 308. See *Brooks* v. *Warwick*, 2 Starkie, 393; *Ross* v. *Langworthy*, 13 Neb. 492.

If the criminal prosecution against appellee was instituted for the mere purpose of coercing him into payment of a debt, or the surrender of some right claimed, and not in the interest of public justice, or to vindicate the law and punish crime, and was falsely made, the fact that he procured the advice of counsel will not shield him from the consequences of his wrongful act, done, not in good faith upon such advice, but with the sinister motive of personal gain. The law upholds and favors prosecutions under the public laws of the land, and shields and protects parties instituting them in good faith and from proper motives. So where a party consults with counsel of good standing, and lays before him fully the facts within the party's knowledge, and then acts in good faith, and in the honest belief that the party charged is probably guilty of the criminal offense, he will not be held responsible if it shall turn out that the party is not guilty. But as said in *Adams* v. *Snyder*, *supra*, this rule supposes always that the party seeking counsel does so in good faith, and also that he has made to his counsel a full and honest statement of the facts. If counsel is sought simply for protection against indulging his malice, or to enable him to use the criminal laws for unjust and

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oppressive uses for his private gain and advantage, it will afford no defense to the party causing the arrest, "but will be rather an element of increased damages." *Ross* v. *Innis*, 26 Ill. 259.

There must be both malice and want of probable cause, and the advice of counsel, sought and acted upon in good faith, will unquestionably constitute a defense in an action for malicious prosecution. But the party must have acted in good faith upon the advice, for the reason that it is assumed that the advice of counsel creates that probable cause, without which to institute a criminal prosecution against another can not be tolerated. So, if, without acting upon the advice, the party, for the mere purpose of collecting his debt, or to harass or annoy the person charged, instituted the criminal prosecution, it can not be said that the advice of counsel created probable cause in the mind of the prosecutor or caused him to believe the accused guilty.

While the instruction is not to be commended in the manner drawn, we are of opinion, when taken in connection with the series given, there was no prejudicial error. Objection is also made to the refusal of certain instructions containing the statutory provision in respect of embezzlement by bailees, warehousemen and others. They were properly refused.

In no possible way that we can see would they tend to illustrate or shed light upon the questions at issue.

Finding no prejudicial error, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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Syllabus.

HELEN J. WATERMAN *et al.*

v.

PHILANDER M. ALDEN *et al.*

Filed at Ottawa, January 19, 1893.

1. TRUSTS AND TRUSTEES — *degree of skill required of trustees.* Trustees must discharge the duties of their trust to the best of their skill and ability, with such care and diligence as men fit to be entrusted with such matters may fairly be expected to put forth in their own business of equal importance.

2. SAME — *equity jurisdiction — to remove trustees or compel them to act.* Courts of equity have a very broad jurisdiction over trust estates and trustees, and will remove the latter for a failure through neglect, or from willfulness, to perform their duties, or will compel them to carry out the trust which they have been appointed to and have accepted, as shall appear, under all the circumstances of a given case, for the best interest of the estate and all the parties interested in the same.

3. It is not every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce a court of equity to remove them; but the act or omission must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity.

4. Courts of chancery have jurisdiction generally on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their negligence or mismanagement, and the fact that trustees are also executors of a will of the testator who created the trust, will not deprive a court of equity of its jurisdiction, when the bill does not seek to remove any part of the administration of the estate from the County Court.

5. SAME — *liability of trustees — for neglect to collect notes.* When trustees, to whom a testator devised his property in trust, consisting of notes, among other things neglect to take proper steps to collect or secure the same, which might have been collected or secured by proper care and diligence, whereby the debt secured thereby is lost, they will be chargeable with the amount of the loss from their neglect of duty.

6. The fact that the relations existing between the testator or payee of the notes and their makers may have been such that the former would, if living, rather lose the debt than press its collection, will furnish no excuse for the trustees to neglect or fail to use all reasonable diligence in the matter. Their duties are fixed by the law, and a violation of them renders them personally liable.

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7. In such a case it does not follow, because the trustees were guilty of negligence in not collecting the notes as executors, that they are not also guilty of neglect of duty in that regard as trustees. The executors and trustees being the same persons, it is impossible that there should be an act of fraud or breach of duty by the executors which is not consented to and acquiesced in by them as trustees.

8. SAME — *failure of trustees to collect notes — defense therefor.* Trustees of a fund, who are also the executors of an estate, will not be held personally liable for a failure to collect a note constituting part of the estate and trust property, where it does not appear that they could have secured or collected it, however prompt and diligent they might have been, and defense to the note is shown.

9. SAME — *right of trustees to legal counsel — attorney's fees chargeable to estate.* Where an estate is devised to executors in trust for the benefit of certain beneficiaries, and it becomes a matter of difficulty to determine what property belongs to the principal and what to income, the trustees will be entitled to the advice of legal counsel, and, if necessary, the aid of a court of equity, to properly settle that question, and to charge the estate with reasonable attorney's fees.

10. SAME — *liability of trustees for costs.* Where trustees of an estate are responsible for the most expensive part of the litigation on bill by the beneficiaries to remove them and to charge them for losses resulting from their neglect of duty, and it appears that they failed to keep proper accounts of their trusteeship, there will be no error in charging them with the principal part of the costs and expenses of such litigation.

11. COSTS — *in chancery — discretion of the chancellor.* The taxing of costs in a chancery proceeding is always within the sound legal discretion of the chancellor, and his decree in that regard will only be reversed when it is shown that such discretion has been abused.

12. WITNESSES — *bill charging trustees with neglect to collect notes — competency of makers of the notes.* On bill by the beneficiaries of a trust fund against trustees holding the trust property to charge them with notes which were not collected, the makers of such notes are competent witnesses to show that they had a valid defense against their collection.

APPEAL from the Appellate Court for the Second District;— heard in that court on appeal from the Circuit Court of Lee county; the Hon. JOHN D. CRABTREE, Judge, presiding.

Mr. WILLIAM R. PLUM, for the appellants:

The trustees are liable for the breach of duty as executors. *Rowan* v. *Kirkpatrick*, 14 Ill. 1; *Whitney* v. *Peddicord*, 63

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id. 249; *McCreedy* v. *Mier*, 64 id. 495; Perry on Trusts, sec. 876; Story's Eq. Plead. 213.

On the question of the dual capacity of the appellees, see *Johnson* v. *Johnson*, 2 Hill (S. C.), 215; *State* v. *Hearst*, 12 Mo. 365; *Watkins* v. *State*, 2 Gill & J. 220; *Karr* v. *Karr*, 6 Dana, 3.

It is a breach of trust not to furnish accurate information of the estate; trustees must keep clear and distinct accounts, and be ready to render them whenever called for, or pay costs. Willis on Ests. of Trustees, L. L. No. 10, 177–81.

It is a paramount duty to have them ready and open for inspection. Courts will not tolerate an omission. Urlin on Trusts, 277.

Trustees are bound to keep clear and distinct accounts of the property in their management. *Freeman* v. *Fairlie*, 3 Mer. 43.

All presumptions are against trustees failing to keep accounts. Perry on Trusts, sec. 821.

Payments to attorneys and others for work on accounts which the trustees themselves may do, will not be allowed. *Hurlbut et al., Exrs.*, v. *Hutton*, 13 Cent. Rep. 378 (N. J.); *Fowler* v. *Lockwood*, 3 Redf. R. 466.

Executors must promptly collect, especially when the debt is on personal liability only, though the debtor is reputed wealthy; solicitation without suit insufficient. *Lawson* v. *Copeland*, 2 B. C. C. 156; *Cary* v. *Bond*, 2 Beav. 486; *Bailey* v. *Gould*, 4 Y. & C. 221; *Atty.-Genl.* v. *Highman*, 2 Y. & C. C. 634; *Powell* v. *Evans*, 5 Ves. 839; *Buttoch* v. *Wheatley*, 1 Call. 130; Lewin on Trusts, 290; Schouler on Executors, 267; *Johnson's Estate*, 9 Watts & S. 107; *Byrne* v. *Norcott*, 13 Beav. 336; *Whitney* v. *Peddicord*, 63 Ill. 250.

They should not have employed the bank's attorney. *Waring* v. *Waring*, 3 Ired. Ch. 331.

Alden had no right to secure his own debt at the expense of the estate. *Long's Estate*, 6 Watts, 49.

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Trustees are held to the same diligence they should exercise as to their own affairs. Lewin on Trusts, 294–307; Perry on Trusts, 266.

Alden and Robinson are liable in chancery for a *devastavit*. *Rowan* v. *Kirkpatrick*, 14 Ill. 1; *James* v. *Frearson*, 1 Y. & C. C. C. 370; *Taylor* v. *Millington*, 4 Jur. (N. S.) 204.

They can not plead the dual capacity dodge in these courts of conscience and common sense. *Johnson* v. *Johnson*, 2 Hill (S. C.), 215; *State* v. *Hearst*, 12 Mo. 365; *Watkins* v. *State*, 2 Gill & J. 220; *Karr* v. *Karr*, 6 Dana, 3; Williams on Executors, 1658, 6th Eng. ed.

When and for what cause equity will remove a trustee. *Clemens* v. *Caldwell*, 7 B. Mon. 161; *Atty. Genl.* v. *Garrison*, 101 Mass. 223; *Farmers' Loan and Trust Co.* v. *Hughes*, 11 Hun, 130; *Lill* v. *Neafie*, 31 Ill. 101; Story's Eq. Jur. secs. 1287, 1289; *Andrews* v. *Tucker*, 7 Pick. 250; *Johnson's Appeal*, 9 Pa. St. 416; Perry on Trusts, 818; *Richards* v. *Barrett*, 5 Bradw. 510.

Trustees must be constantly ready with their accounts and not mix them with others. If suit is necessary they will be mulct in costs. Urlin on Trusts, 277; Fletcher on Estates of Trustees, L. L. No. 10,177; Godefroi on Trusts and Trustees, 227–8; Tiffany & Bullard on Trusts and Trustees, 704–5–6; Perry on Trusts, 911.

Chargeable if credits omitted in accounts. *Chamberlain* v. *Estey*, 55 Vt. 378.

If he denies assets contrary to the facts, suppresses evidence, puts plaintiffs to unnecessary proofs, sets up unfounded or inequitable defenses he must pay the costs. Perry on Trusts, 900; *Cook* v. *Lowry*, 95 N. Y. 103.

Chargeable if only inconvenience results from misconduct, not willful. Perry on Trusts, 901, 903.

So if guilty of breach of trust in general. Tiffany & Bullard, 703; *Moore* v. *Zabriskie*, 3 C. E. Greene, 51.

Or loan money in a manner unauthorized. Id. 704.

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If suit concerns separate funds they bear their share. Perry on Trusts, 903 A.

If trustee fails in his resistance to claims he is liable for costs. *Beverly* v. *Brooke*, 4 Gratt. 187; *Jenkins* v. *Eldredge*, 3 Story, 325.

Solicitors' fees. If a trustee is deprived of his costs for misconduct he can not have solicitors' fees. Perry on Trusts, 910.

He has no claim for reimbursement, if proceedings were occasioned by his negligence. Lewin on Trusts, 636–7.

Messrs. CARNES & DUNTON, for the appellees:

As to when is to begin the computation of the net income and profits, see *Sitwell* v. *Barnard*, 6 Ves. 520; 3 Pomeroy's Eq. 136; Perry on Trusts, sec. 550; Lewin on Trusts, 5th ed., 247–249.

It frequently becomes material to ascertain the precise time when the possession in the character of executor or administrator ceases and that of trustee commences. In the former case he is answerable to the probate courts, in the latter to courts of chancery only. Homer's Probate Law, sec. 114, citing Hill on Trustees, 237; *In re Estate Whitman*, 22 Ill. 518. See also *Hall* v. *Irwin*, 2 Gilm. 181; *Nicoll* v. *Scott*, 99 Ill. 530.

If the trust is given to one named and the same person is afterward appointed executor, the trust is not annexed to the office of executor. 1 Perry on Trusts, sec. 262; *James' Appeal*, 3 Grant, 169.

When executor is discharged and he becomes liable as trustee. 1 Perry on Trusts, sec. 4631; citing *Hall* v. *Cushing*, 9 Pick. 395; *Newcomb* v. *Williams*, 9 Met. 534; *Conkey* v. *Dickinson*, 13 id. 53; *Hubbard* v. *Loyd*, 6 Cush. 522; *De-Peyster* v. *Clendenning*, 8 Paige, 310; *Miller* v. *Congdon*, 14 Gray, 114.

When trustees personally liable for a loss and of the care required of them. Story's Eq. Jur. secs. 1268, 1271, 1272; *Whitney* v. *Peddicord*, 63 Ill. 249; *Rowan* v. *Kirkpatrick*,

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14 id. 1; *McElheney* v. *Musick*, 63 id. 330; *Shields* v. *Shields*, 6 Barb. 56.

A case can not be found taxing trustees with costs, unless found guilty of *mala fides* or criminal negligence. Lewin on Trusts, 634.

In suits between trustees and *cestui que trust* when there is a fund under the control of the court, it is a general rule that the trustees shall have their costs, as matter of course, out of that fund, unless they have forfeited that right by misconduct. *Atty. Genl.* v. *City of London*, 1 Ves. Jr. 246; *Taylor* v. *Glanville*, 3 Med. 176; *Curtiss* v. *Chandler*, 6 id. 123; *Ceventry* v. *Ceventry*, 1 Kern. 758.

"The mere fact that an executor has neglected to render an account when requested will not, of itself, make him liable for costs." Tiffany & Bullard on Trusts and Trustees, 704; *White* v. *Jackson*, 15 Beav. 191; *Robertson* v. *Wendell*, 6 Paige, 322; *Minuse* v. *Cox*, 5 Johns. Ch. 451; *Dunscomb* v. *Dunscomb*, 1 id. 507; *Smith* v. *Smith*, 4 id. 445.

"In these cases the court will exercise a sound discretion, and if it appear that the *cestui que trust* demanded more than he was entitled to receive, and the executor submitted to the discretion of the court, he will be entitled to his costs. Tiffany & B. 704; *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 507. * * * Trustees should not in general be charged personally with costs." T. & B. 706; *Moses* v. *Murgatroyd*, 1 Johns. Ch. 473. * * *

"Suits against trustees are frequently rendered necessary by circumstances, independent of and wholly unconnected with any breach of trust, and in such cases the court will meet the justice of the case by apportioning the costs of suit, and will, in general, give the trustees all the costs not actually occasioned by their breach of trust." T. & B. 708; Hill on Trustees, 564; *Frozier* v. *Andrews*, 2 Jones & Lat. 199; *Sterritt's Appeal*, 2 Pa. 419.

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"Where there was a suit to charge the trustees with the consequence of a particular breach of trust, and also to obtain the direction of the court as to the general administration of the trust, the trustee was allowed the general costs of suit, but charged with so much as had been caused by his breach of trust." T. & B. 709; *Pride* v. *Fooks*, 2 Beav. 430; *Hewitt* v. *Foster*, 8 Jur. 759.

"Courts are not eager to punish trustees by depriving them of their costs, and where there are mitigating circumstances, they have been allowed their costs of suit in which the decree was against them for a breach of trust; as where there had been a misapplication of only a small part of the fund, and the suit had been instituted for other purposes, and there was no imputation against the trustees." T. & B. 712; *Fitzgerald* v. *Pringle*, 2 Moll. 534; *Semmes* v. *Rickermann*, 2 Ves. Jr. 36; *Bennett* v. *Going*, 1 Moll. 529; *Taylor* v. *Tabrum*, 6 Sim. 281.

"In suits between trustees and *cestui que trusts*, where there is a fund under the control of the court, trustees, as a general rule, are entitled to their costs out of the fund, to be taxed as between solicitor and client, and not like ordinary cases as between party and party." T. & B. 713; *Amand* v. *Bradbourn*, 2 Chan. Cas. 138; *Mohun* v. *Mohun*, 1 Sw. 201; *Pride* v. *Fooks*, 2 Beav. 473; *Hosack* v. *Rogers*, 9 Paige, 463; *Irving* v. *DeKay*, id. 533; *Minuse* v. *Cox*, 5 Johns. Ch. 451.

"But costs between solicitor and client will not include every charge which a party's own solicitor would be entitled to make against him in his bill, or any charges or expenses which are not, strictly speaking, costs; therefore to include all, the decree should go on to allow the trustee his charges and expenses or for just allowances." T. & B. 713; Hill on Trustees, 565; *Fearns* v. *Young*, 10 Ves. 184; Hill on Trustees, 556.

"He, the executor, may be allowed his costs where there has been a breach of the trust." *Norris' Appeal*, 71 Pa. St. 115-126.

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Mr. JUSTICE WILKIN delivered the opinion of the Court:

On the 28th day of November, 1870, James S. Waterman executed his last will and testament, by which he gave his wife one-third of all his estate, and a specific legacy of $5000, in trust for the use of one Nellie Farnhdon. The rest of his estate was disposed of by the following residuary clause: "I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to the said Philander M. Alden and George S. Robinson, * * * the executors of this my last will and testament, hereinafter nominated and appointed, in trust for the use and benefit of my brothers and sisters, to-wit (naming them): to have and hold, manage, and control the same for such purpose, for and during the term of twenty-one years, from and after the date of my decease and during the continuance of said trust estate as aforesaid, to receive, collect and pay over to my said brothers and sisters above named, the net income and profits thereof, in equal portions to each, annually, the child or children of a deceased brother or sister to take the same portion the father or mother would have taken if living. And at the expiration of said twenty-one years after my decease, I give, devise and bequeath to my said brothers and sisters, their heirs and assigns forever, the said rest, residue and remainder of my estate, both real and personal, to be equally divided between them, share and share alike, the child or children of any deceased brother or sister to take the same share the father or mother would have taken if living, and in case of the death of any of my said brothers or sisters, leaving no issue, the share such brother or sister would have taken, if living, to be equally divided among my surviving brothers and sisters."

The testator died July 19, 1883, and on the 24th of the same month, said will was duly admitted to probate, in the County Court of DeKalb county, whereupon said Alden and Robinson were qualified, and took upon themselves the duties

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of executors and trustees as in and by the will provided. The estate was very large, being inventoried at about $531,000, consisting of farm lands and other real estate to the value of $127,512.70, and the balance in cash, notes and accounts, stocks, etc. The widow declined to take under the will, and her husband having left no child, or children, or descendants of such, one-half of the entire estate, real and personal, was partitioned and set off to her, as provided by the statute in such case. The administration was still pending and undetermined in said County Court at the filing of this bill. Said Alden and Robinson had reduced a part of the trust property to possession and made a partial distribution of the proceeds thereof to the beneficiaries, when, on the 9th of June, 1887, Robert W. and Charles Waterman, surviving brothers of the testator, and certain children of deceased brothers and sisters, claiming under said residuary clause, begun this action in the Circuit Court of said DeKalb county, against Alden and Robinson, to compel them to render an account of their trusteeship, to charge them with certain losses to the trust estate by reason of their negligent and wrongful conduct in and about the management of the same, and to have them removed as such trustees, and others appointed in their stead.

After protracted litigation, a final decree was rendered in the cause by the Circuit Court of Lee county, to which it had been removed. The complainants carried the record to the Appellate Court for the Second District by appeal. There both parties assigned errors, and an extended statement of the case, with a very carefully prepared opinion by CARTWRIGHT, J., was filed, affirming the decree of the Circuit Court in all respects. This appeal is from that judgment of affirmance.

The record is unusually voluminous, and the argument of counsel on behalf of appellants has taken an almost unlimited range. It would be impossible to even casually notice all the points made, without extending this opinion to an unreasonable length. For a full statement of the facts of the case we

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refer to the opinion of the Appellate Court. We also concur in the conclusions reached by that court, as set forth in said opinion, except as hereinafter indicated.

The points more particularly pressed upon our attention are,

First. The Circuit Court erred in refusing to remove appellees as trustees.

Second. The Circuit Court erred in refusing to hold said trustees personally liable for the loss of the "Marsh indebtedness."

Third. The Circuit Court erred in its division of the costs and expenses of the litigation. The parts of the final decree relating to these assignments of error are as follows: "It is further ordered, adjudged and decreed that the motion of complainants, filed herein on the 17th of July, 1890, for the removal of Alden and Robinson, as trustees, be overruled."

"And it is further ordered, adjudged and decreed that this court has no jurisdiction to investigate the charge against said Alden and Robinson, or either, on account of any alleged loss, growing out of the failure of the Sycamore Marsh Harvester Man'fg Co., the Marsh Binder Man'fg Co., C. W. Marsh and W. W. Marsh, or either, or two or more of them, or the alleged neglect of the said Alden and Robinson to collect or secure the payment of obligations owing by them, or some of them, to the estate of James S. Waterman, deceased."

"It is further ordered, adjudged and decreed that the expenses of this litigation paid up to October 15, 1889, as found by said master's report, to-wit: $3,869.71, and the attorney's fees and attorney's expenses in this cause paid or incurred since October 15, 1889, as enumerated and shown by the testimony of D. J. Carnes and William Lathrop, heard in open court, up to July 19, 1890, to-wit: $1,348.27, be allowed said trustees in their accounts, when they shall have actually paid the same, and shall be charged to the principal fund, less one-fourth part of the gross attorney's fees therein included, which one-fourth part is found by the court to be $988.62, and which one-fourth

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part said trustees are ordered to bear personally, leaving $4,229.36 to be charged to the principal fund. This decree shall not be construed as allowing or disallowing any other expense of this litigation paid or incurred by said trustees since October 15, 1889. And it is further ordered and decreed that the costs of this proceeding be taxed as follows: That is to say, that two-thirds thereof be paid by the trustees, as such, out of the principal fund in their hands, and one-third of said costs out of the distributable income going to the complainants, and that in taxing the costs the clerk allow $500, paid by stipulation on file herein to Mason B. Loomis, and $360, paid by said trustees to Sherwood Dixon, as special masters. Also payment by them of $15.40 for witness fees, and $312.80 for depositions, which sums so far as paid by them, except that paid Master Dixon, are shown by his report to have been paid and are embraced in the items of $3,869.71, costs of this litigation. The clerk will also tax as part of the complainant's costs herein the sum of $392.86, paid by complainant for taking depositions. Also $47.40 for certified copies of record, $2.50 for service of subpœnas, $8 witness fees paid by complainant's solicitor. The clerk will also tax the usual taxable costs incurred by either party."

We will consider the foregoing questions in the order named, referring to the facts appearing in the record especially applicable thereto.

There is no difficulty in finding the legal measure of care and diligence required at the hands of trustees in the management of a trust estate. Cases may be found holding that inasmuch as no compensation can be allowed them, when not expressly provided for, they can only be held liable for losses which result from their gross negligence or willful misconduct, but the rule undoubtedly is, that they must discharge the duties of their trust to the best of their skill and ability, "with such care and diligence as men fit to be entrusted with such matters may fairly be expected to put forth in their own busi-

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ness of equal importance." Story's Eq. Jur., vol. 2, sec. 1268b; Pomeroy's Eq. Jur., vol. 2, sec. 1070.

The evidence in this case clearly shows, and in fact it is admitted, that appellees were, prior to the filing of this bill, guilty of some negligence, in and about the management of the trust property. First, they wholly failed to keep proper accounts of the trust funds and of their dealings with the same, as will more fully appear hereafter. In the second place, Robinson gave little or no attention to the business, being much of the time absent from the State. It will not do to say, as is attempted, that his personal attention was not necessary to the proper management of the business, in view of the fact that numerous letters were written him by Alden, complaining of his continued absence and demanding his presence and attention to the estate. Finally, general negligence was shown in failing to promptly collect or secure claims due the estate, especially those owing by the "Marsh Manufacturing Companies."

It does not follow necessarily that, because of these acts of negligence, a court of chancery should remove them. Courts of equity have a very broad jurisdiction over trust estates and trustees, and will remove the latter for a failure through neglect, or from willfulness, to perform their duties, or will compel them to carry out the trust which they have been appointed to, and have accepted, as shall appear under all the circumstances, of a given case, for the best interest of the estate, and all parties interested in the same. In Story on Equity Jurisprudence, vol. 2, sec. 1289, it is said: "It is not, indeed, every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce courts of equity to adopt such a course (remove the trustees). But the act or omission must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity."

The dereliction of duty on the part of these trustees seems to have resulted from mere negligence rather than willfulness,

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and we are of the opinion that the chancellor was justified on the whole record in refusing to remove them.

Whether or not the trustees should be held personally liable for losses sustained by the complainants on the "Marsh indebtedness" is attended with much more difficulty. It is alleged in the bill that among the assets which came into their hands were three judgment notes, payable to said James W. Waterman, one for $5000, dated April 27, 1883, due in ninety days, signed by the Sycamore Marsh Harvester Co., and C. W. and W. W. Marsh. One for the sum of $3000, dated June 13, 1883, due in ninety days, by the same parties, and one for $5350.40, dated January 1, 1878, by C. W. and W. W. Marsh alone. It is then alleged that after said notes came into their hands and were due and payable to them, they knew the makers were embarrassed financially and likely to fail, but took no steps to collect or secure the same until June 30, 1884. That said Alden being cashier, one of the directors, and a large stockholder in the Sycamore National Bank, on October, 1883, the said Alden knowing the financial embarrassment of the said makers of said notes, said bank loaned them about $25,000; that thereafter said Alden pressed said parties for security for said bank indebtedness, which was given, but that he made no effort whatever to obtain security for said indebtedness due the estate, although security therefor could have been obtained; that on said June 30, 1884, Alden caused the notes due the estate to be put in judgments in the Circuit Court of Lee county, although the Circuit Court of De Kalb county was at the time in session, the makers of said notes having property in the last-named county subject to lien, and levy, of judgments on said notes; that he employed the same attorney who represented said bank, and he at the same time took judgment in its favor for said $25,000 indebtedness; that through the wrongful and negligent conduct of said trustees, said property in DeKalb county was allowed to be levied upon and taken on executions in favor of said bank, and others, to the exclusion of those in favor of

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the estate; that, through the negligence of the trustees, property attempted to be levied upon in said county on executions in favor of the estate, was wrongly described and thereby priority of lien in favor of said estate lost; that by reason of such neglect and mismanagement on the part of appellees, the greater part of the said indebtedness was wholly lost to said estate.

The first special master to whom the case was referred found against the complainants on these allegations, as to negligence and omissions of duty on the part of the trustees, and reported that they should not be held liable for the loss. But the chancellor, before whom the cause was then pending, took a different view of the evidence, and, on exceptions to the master's report, found "that said trustees, Alden and Robinson, should have known that said Marsh Harvester Manufacturing Company and Marsh's were insolvent and in failing condition from the time of the death of the said James S. Waterman until their actual failure about July, 1884, and that said trustees did not exercise due and proper diligence to collect, or have secured said undisputed indebtedness to said estate; and it appearing, had said trustees diligently pressed said undisputed indebtedness to said estate for payment or security, that security might have been obtained therefor; so it is ordered that trustees Alden and Robinson be charged with the payment of said undisputed indebtedness to said estate."

This order only includes the two notes signed by the manufacturing companies and the Marsh's, the other note being disputed, as hereafter shown. On a re-reference of the case, the master was directed to report the amount of loss on said two notes which he did, finding the amount of loss to the trust estate to be $4328.78, but the Circuit Court of Lee county, as appears from the foregoing extract from its decree, refused to allow the claim for want of jurisdiction.

That a loss to the complainants has been sustained by reason of the failure of appellees to collect the whole amount of those notes is not denied. That they might have been collected by

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the use of ordinary business management, and diligence, or secured, is clearly established by the evidence. We think it is equally clear that the trustees knew that said parties were heavily indebted, and liable to fail long before any effort was made by them to secure, or collect said indebtedness. The only finding of the court below on the facts is to that effect. While Special Master Loomis, by his report, excuses the conduct of the trustees, he does not do so on the ground that they were not negligent, but rather upon the theory, that, from the relations existing between the testator and the Marsh's, it is fair to presume that he, if living, would have used no more care and diligence in enforcing those claims than did appellees. It need scarcely be suggested that no such test can properly be applied to the conduct of trustees. There may be abundant reason for believing that Mr. Waterman, though a careful business man, would much rather have lost the indebtedness than to have pressed the collection of it, but that furnishes no excuse for these trustees to neglect or fail to use all reasonable diligence in the matter. Mr. Waterman might do with his own as he pleased, but the duties of these appellees are fixed by the law, and if they have violated those duties they are personally liable.

The question, then, as to whether or not the Circuit Court erred in refusing to hold appellees liable to make good said loss, must be decided upon the admission that upon the facts proved and found by that court, in a proper tribunal, they can be so held, the only question now being, did said court properly hold that it had no jurisdiction to adjudicate upon the matter? That courts of chancery have jurisdiction generally, on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their negligence or mismanagement, is too clear to call for the citation of authorities. The decree of the Circuit Court seems to have proceeded upon the theory that inasmuch as the trustees were also executors of the will of James S. Waterman, a court of chancery could not

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compel them to make good the loss sustained by complainants, without interfering with the jurisdiction of the County Court before which the administration of the estate was pending. This we think is a misapprehension. The negligence in failing to secure or collect these claims, it is said, was the negligence of the executors, over whom in the administration of the estate, the County Court has exclusive jurisdiction. The relief sought by this bill is against the *trustees* and not the executors, and if the relief prayed can not be granted by a court of chancery, it must be because complainants have failed to prove such dereliction of duty on the part of appellees in their capacity as trustees as should make them liable, and not because their bill seeks to remove any part of the administration of the estate from the County Court. It does not follow because Alden and Robinson were guilty of negligence in not collecting said indebtedness as executors, they are not also guilty of neglect of duty in that regard as trustees. Suppose other persons had been executors, and they had been guilty of the conduct charged in this bill, causing the loss here complained of, and these trustees, with full knowledge of that misconduct, had not only consented, but themselves contributed thereto, would there have been any doubt as to the power of a court of chancery to charge the trustees, regardless of the liability of the executors, in their settlement of the estate in the County Court? The executors and trustees being the same persons, it is impossible that there should be an act of fraud, or breach of duty by the executors, which is not consented to and acquiesced in by the trustees.

The question is not, in which capacity appellees are liable, and hence cases cited by counsel on either side, discussing the question as to whether funds were held, in one capacity or another, have no application. On the allegations of the bill, and the finding of facts by the Circuit Court, the debts in question have been absolutely lost to the estate, and to that extent the complainants have been injured, and the only question which can now or hereafter arise between these parties is, have

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these trustees, by their negligent conduct, become liable for that loss? Nothing which may be hereafter done in the settlement of the estate in the County Court can affect this question, and we are unable to see why these complainants should be sent to that court for the settlement of their rights. We are, therefore, of the opinion that the Circuit Court erred in refusing to take jurisdiction of the question of the liability of appellees for said loss, and that it should have decreed that they make good the same to the trust fund in their hands.

As to the note signed by the Marsh's alone, the first master reported that the makers claimed to have a defense against it, and when the case was again referred, the master was directed to ascertain whether or not a valid defense did exist to said note, and report the same. He reported that a defense was insisted upon, and that, on the testimony of said C. W. and W. W. Marsh, it was established, the only question being as to the competency of those parties as witnesses, to prove the defense, and on that question he found in their favor. We think his conclusion as to their competency was correct. Moreover it does not appear that appellees could have secured or collected that note, however prompt and diligent they might have been. The Marsh's denied that they owed it, and do not say they would have paid or secured it if applied to for that purpose; whereas they admit that the other two notes were undisputed, and could have been secured, if security had been asked for. Appellees should not, therefore, be held liable on said personal note. Both parties object to the apportionment of the costs and expenses of the suit, made by the Circuit Court. We think the order in that regard is quite as favorable to appellees as the facts of the case would justify. They are responsible for the most expensive portion of this litigation, in failing to keep proper accounts of their trusteeship. In the first special master's report is the significant finding that they "made out and exhibited an entirely new book of accounts as executors, also one as trustees, since the filing of the

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bill," and that fact, the master well says, "amounts to an admission that prior books are not what they ought to be." There is no claim on their part that they attempted to keep accurate separate accounts of the trust estate. The only apology for failing to do so is that they did not know how to classify the two kinds of property. But they were entitled to counsel, at the expense of the trust estate, to assist them, and if necessary, to the directions of a court of equity in that regard. They certainly had no right to omit a plain, legal duty because they may have been in doubt as to how it should be performed. On that theory they might have neglected that duty during the entire period of their trusteeship. At all events, on the report of the first master, the court found it necessary to again refer the case to a master to make a complete statement of the account, and this, of necessity, greatly increased the costs and expenses of the suit. Appellees can not, therefore, justly complain that they were required to pay a considerable part of the whole expense.

On the other hand, owing to the large amount and variety of assets belonging to the estate, it was a matter of some difficulty at least, as the result of this litigation shows, to determine just what property belonged to principal, and what to income. As before said, appellees were entitled to the advice of counsel, and, if necessary, the aid of the court to properly settle that question. The statement of the account, approved by the court below, is, therefore, for the benefit of all parties interested in the trust estate, those who take the income and those who shall finally take the principal, and it can not be said that either should be entirely exempt from liability for costs and expenses in making it. It is conceded that taxing costs in a chancery proceeding is always within the sound, legal discretion of the chancellor, and that his decree in that regard will only be reviewed where it is shown that there has been an abuse of that discretion. We see no reason for interfering in the present case on that ground.

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It is insisted with great earnestness that the account stated by the last special master, and approved by the court, is erroneous in that it fails to charge the trustees with interest on the small amounts which had been charged wrongfully by Alden for railroad fare and commissions on insurance. It is perhaps true that the account is inaccurate in that respect, but the matter is of so little importance that no court ought to entertain the objection as reversible error. We have examined the account, and compared it with the proofs in the case, and are satisfied that it is substantially correct and does justice between the parties, except in the matter of the Marsh indebtedness, as above stated. For that error the decree of the Circuit Court will be reversed, and the cause will be remanded to the Circuit Court, with directions to enter a decree in conformity with the views herein expressed.

Reversed and remanded.

CHARLES O. VOSE

v.

WILLIAM A. STRONG *et al.*

Filed at Ottawa, January 19, 1893.

1. STATUTE OF FRAUDS — *contract for a share in the increase in the value of lands.* A claim of an agent that he was to have a certain percentage in the increase in value of the lands of his principal for his looking after the same and collecting the rents, etc., being in the nature of a lien upon or interest in such lands, is within the Statute of Frauds.

2. SAME — *performance of oral contract — taking the case out of the statute — proof required.* Even where there is performance of an oral contract sufficient to take the case out of the statute, a court of equity will not enforce such contract, unless the proof of its terms is clear and satisfactory.

3. WITNESS — *competency in his own behalf — contract between witness and testator.* The complainant in a bill against the executors of the will of a deceased person for an accounting of the sum due him

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from the testator at the time of his death is, under section 2, chapter 52, of the statute, incompetent to testify in his own behalf as to the contract between himself and the testator.

4. APPEALS AND WRITS OF ERROR — *failure to assign cross-errors — questions not considered.* Where the appellee fails to assign for cross-error the finding of a special contract against him, and that there is a variance between the complainant's allegations in his bill and the proofs, those questions will not be before this court for consideration.

APPEAL from the Appellate Court for the Second District; — heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

Mr. GEO. S. HOUSE, for the appellant.

Mr. C. W. BROWN, for the appellees.

CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by Charles O. Vose against William A. Strong, Robert Meers and Asa F. Mather, executors of the last will and testament of Martin C. Bissell, deceased, and trustees thereunder, for an accounting, and to establish a claim against the estate of the testator, upon an express contract alleged to have been entered into by the complainant and the testator, in the lifetime of the latter. It appears that in the year 1881, Bissell, who resided at Joliet, was a man of considerable means, and was and for many years had been engaged quite extensively in the business of loaning money, buying and discounting notes and other paper, and in miscellaneous trading, and was also the owner of considerable amount of real estate. At that time this business was, and for some years had been, under the management of William Grinton, subject to Bissell's general supervision, Grinton being in Bissell's service under a written agreement by which his duties were defined and his compensation fixed. About March 1, 1881, the complainant entered the service of Bissell in the management of his business, and the principal controversy in the case relates to the terms of the contract under which he was

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employed, and under which he subsequently rendered services to Bissell.

The bill alleges, in substance, that Bissell represented to the complainant that he was quite feeble in health and was then becoming too old to give the necessary personal attention to his business, and therefore desired to make some arrangement with the complainant to take the management of the business, in connection with Grinton; that on the 1st of March, 1881, the complainant, with the understanding held out by Bissell that he should have an interest of some character in the business, commenced work in the management of Bissell's affairs, without any definite arrangement as to compensation, or as to what interest in the business he should finally have; that he continued this service, both for the purpose of learning the business, and also with a view of allowing Bissell an opportunity of determining whether the services would be satisfactory to him, for about one year; that Bissell then expressed himself as entirely satisfied with the complainant, and stated that he was desirous of retaining the complainant's services permanently, under some fair arrangement; that after some negotiations, Bissell proposed to the complainant the following terms:

That they, Bissell and the complainant, should become interested in business together as *quasi* co-partners, upon the following basis: That Bissell should put into the business and under the control, charge and management of the complainant, subject to Bissell's supervision, all his property, both real and personal, (except his dwelling-house property where he then resided), together with all property, both real and personal, that he might thereafter acquire, the complainant to take the necessary and proper care of the same, doing all that he should be required to do by Bissell, or that should be required to be done in the interest of good business management; that this arrangement should continue during the lifetime of Bissell; that the value of the real estate then on hand and placed within

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the control and management of the complainant should be that fixed by Bissell in his inventory book for the year 1881, after acquired real estate to be valued at its actual cost; that complainant should bear and pay one-eighth of all the losses sustained, and one-eighth of all taxes, insurance and repairs, and receive one-eighth of the income of the property, real and personal, then on hand and thereafter to be acquired; that, in addition he should receive one-eighth of the increase of real estate then on hand over and above the value as shown by the inventory, and one-eighth of the increase of all real estate thereafter acquired over its actual cost price during the continuance of the agreement, which was to be and continue during the lifetime of Bissell; that the real estate then held, or thereafter to be acquired, should be inventoried and re-valued by agreement of the parties yearly, and the increase in the value thereof thus determined.

The bill further alleges that the complainant accepted the foregoing proposition, and so advised Bissell; that the contract thus consummated was not reduced to writing and signed by the parties thereto, but rested and still rests in parol; that by the agreement of the parties, the contract was to relate back to March 1, 1881, the day the complainant entered Bissell's service; that the complainant continued the performance of the contract from the time it was made, and in all respects kept and performed it on his part, until it was terminated by the death of Bissell, which occurred May 12, 1888, and that it is now completely executed on the complainant's part; that Bissell, at the date of the contract, was the owner of divers pieces of real estate, and had since acquired the title to divers other pieces, which had become greatly enhanced in value; that the title to this real estate stood in the name of Bissell at the time of his death, and was now held by the defendants in trust, but subject to the lien, charge and claim of the complainant for one-eighth of such enhanced value; that although it was agreed between the complainant and Bissell that the

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real estate should be inventoried and valued yearly, and the increase in its value thus fixed, no such adjustment or settlement was in fact made, and the matter was allowed to drift along without action in that respect; that the complainant's share in the earnings of the business arising from loaning money, discounting of paper, rents of real estate, etc., were credited to him on Bissell's books, the balance of credits in complainant's favor at the date of Bissell's death being $1,932.39, but that upon an accounting there would still be due him, principally from his share of the enhanced value of the real estate, upwards of $15,000.

The defendants answered, denying that the complainant had any contract with Bissell in respect to his services, but admitting that Bissell intended to pay him a reasonable compensation for what he did. The answer traverses the material allegations of the bill, and insists that upon a just accounting, the complainant would not be entitled to anything more than he had already been credited with. It also sets up and pleads the Statute of Frauds.

The cause being heard on pleadings and proofs, a decree was rendered finding that the complainant entered Bissell's service on or about March 1, 1881, under an agreement, in and by which the complainant agreed to look carefully after all Bissell's interests; keep his property in repair; make such changes in repairing, buying and selling as Bissell should direct; rent his property to the best advantage; do any office work which might be obtained to do, and transact any business which Bissell might direct, the complainant to pay one-third of the office rent and expenses, and one-eighth of the taxes, insurance and repairs upon the property, and to have and receive, in full payment for his services, one-eighth of the income, settlements to be made annually; that under that agreement and none other the complainant remained in Bissell,s employment and rendered services, up to May 12, 1888, the date of Bissell's death; that under the agreement, the complainant was and is

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entitled to have one-eighth of Bissell's gross income during the period of such service, less one eighth of the taxes, insurance and repairs and one-third of the office rent and expenses, but that he was not entitled to have or receive one-eighth or any part or portion of the rise in value or increase of the real estate of Bissell, whether such real estate remained unsold at Bissell's death or had been previously sold. It was thereupon ordered that the cause be referred to the master to state the account between the complainant and the estate of Bissell upon the foregoing basis. On appeal by the complainant to the Appellate Court, this decree was affirmed, and he now brings the record to this court by a further appeal.

The complainant assigns for error the finding of the trial court that the contract between him and Bissell did not provide that he should receive as a part of his compensation for his services, a share of the enhanced value of Bissell's real estate, and that under the contract, he was not entitled to receive one-eighth or any other part of such enhanced value. As the contract was not reduced to writing, its terms must be ascertained from the evidence, and whether the complainant's version of it or the one established by the decree is the true one is purely a question of fact, and it is the only material question presented by this appeal.

It is true the defendants, both by their answer and at the hearing, contested the question whether there was any express contract between the complainant and Bissell, their contention being that the contract was only an implied one, and that the complainant was entitled to recover compensation for his services only upon a *quantum meruit*, but the court having found otherwise, and the defendants having, by failing to assign cross-errors, acquiesced in that finding, there is no longer any controversy in that respect. It is also true that the contract which the court finds is the one established by the evidence, varies in many of its essential provisions from the one alleged by the complainant in his bill, and it may be that the defend-

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ants, if they had seen fit to invoke and insist upon the rule that the complainant's *allegata* and *probata* must agree, and that if he recovers at all, it must be upon the case made by his bill, they would have been entitled to defeat a recovery on account of the want of agreement between the bill and the evidence. But that is an objection to the decree which the defendants alone are entitled to make, and as they are not complaining of the decree, that question is not before us for consideration.

The record contains no direct evidence of the terms of the contract. So far as appears, no third person was present at the time it was made. Bissell is dead, and as the defendants are defending as the executors and trustees of a deceased person, the complainant, who is both a party to and directly interested in the event of the suit, is, under the provisions of section 2, of chapter 51, of the Revised Statutes, incompetent as a witness. The evidence, which is necessarily all indirect and circumstantial, is very voluminous, and consists mainly of admissions, either direct or implied, claimed to have been made by Bissell in his lifetime. Any attempt on our part to analyze the evidence thus presented, in such way as to show what seems to us to be its fair probative force, would involve an expenditure of more time than we have at command, and would after all serve no useful purpose. We have been favored by counsel with able and very elaborate briefs and arguments, which we have carefully and fully considered, and the conclusion to which we have arrived is, that the present contention by the complainant, that he was to receive one-eighth of the increased value of Bissell's real estate as a part of the compensation for his services, is not sustained by the evidence.

Our conclusion is to some extent influenced by the consideration that the claim which the complainant is now seeking to enforce is in the nature of a lien upon or interest in the lands owned by Bissell in his lifetime, the right or interest thus sought to be enforced being one which is clearly within the

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Statute of Frauds. Even where there is performance or part performance of an oral contract sufficient to take the case out of the statute, a court of chancery will not enforce such oral contract unless the proof of its terms is clear and satisfactory. While there is some evidence tending to sustain the complainant's version of the contract, yet, when all the evidence is taken together, and is considered in the light of the conduct of the parties during the entire period of the complainant's service, and of their dealings with each other, it results, as we think, in no clear and satisfactory conclusion that the complainant was to receive a share of the enhanced value of Bissell's real estate, but rather the reverse.

We are of the opinion that the decree is sustained by the evidence, and the judgment of the Appellate Court affirming it will be affirmed.

Judgment affirmed.

HANNAH B. HERBERT

v.

JAMES HERBERT.

Filed at Ottawa, January 19, 1893.

1. RESULTING TRUST — *purchasing land with money belonging to another.* If a man purchases and pays for land with money belonging to a woman living with him as his wife, and without her sanction or consent has the land conveyed to himself, a court of equity will compel him to convey it to her. But the evidence must fairly establish that the woman furnished the money that paid for the property.

2. SAME. Where a man, through a series of years, placed all his earnings in the hands of a woman, living with him as his wife, for safe keeping, except enough to defray his personal expenses, and out of part of such money which she turned over to him, he bought property for their home, and took a deed in his own name with her knowledge of that fact, it was *held* that there was no resulting trust created in favor of the woman, and that a bill by her to compel him to convey to her was properly dismissed.

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3. MASTER'S REPORT — *overruling exceptions to immaterial items.* There is no error in overruling an exception to a master's report for a failure to find that money loaned belonged to the complainant, where the title to the note taken on such loan, or the money it represents, is not involved in the suit.

APPEAL from the Circuit Court of Peoria county; the Hon. THOMAS M. SHAW, Judge, presiding.

This was a bill brought by Hannah B. Herbert in the Circuit Court of Peoria county against James Herbert to compel the conveyance of certain real estate in Peoria, described in the bill, which was purchased in 1886, and the title taken in the name of the defendant, and for a decree confirming the title in the complainant. The grounds of recovery as alleged in the bill, briefly stated, are, that the property was purchased with her money; that the defendant, by deception, secured the possession of that money and with it bought the property, agreeing to take the title in her name, but without her knowledge or consent, procured the title to be made to himself; and afterward when complainant discovered that fact and remonstrated with him, defendant promised to convey to her the title, but kept putting her off with one pretext or another, etc. The defendant put in an answer to the bill in which he denies that complainant's money paid for the real estate, but avers that he purchased and paid for same with his own money. He also denies that he agreed to put title in complainant's name, and avers that same is defendant's clear of every claim and demand of complainant, legal or equitable. Avers that he left complainant in possession of a large amount of personal property of the value of $1000, and notes secured by real estate mortgage of the value of $5000, all property of defendant, and complainant has converted the same, and had sole use of said real estate and said assets. A replication to the answer having been filed, the cause was referred to the master in chancery to take testimony and report the same to the court with his conclusions of law and fact. The master in chancery, after

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taking the evidence, reported the same to the court as schedules A, B and C. He also submitted his findings as follows: That the complainant and defendant on or about the 15th of September, 1854, at Gloucester, Wales, took each other for husband and wife by mutual agreement, no authorized marriage ceremony being performed, and for twenty-four years thereafter lived together as husband and wife, and were so known and publicly received wherever said parties resided. That at said date both parties were poor, the complainant being engaged as a housekeeper, and defendant as railroad fireman, at about $5 per week, in which occupation he continued until coming to America. That in the spring of 1864 defendant came alone to America, leaving complainant at home from want of means, and she afterward came in the fall of same year, on transportation furnished her by defendant. Parties resided a short time in Pennsylvania, coming thence to Peoria in 1870, from there moving to East St. Louis the same year, where they lived until 1878 or 1879, when they moved to Vincennes, Ind., where they continued to reside until sometime in 1885. That at East St. Louis and Vincennes defendant was employed as railroad engineer, earning from $125 to $200 per month, and defendant monthly turned over or gave to complainant a large portion of his wages, out of which she was to pay their living and necessary household expenses, and was to take care of and save what she could for future use, and to provide against future want in case of sickness, misfortune or old age. That both parties were industrious, frugal and economical, and in 1885, when they came to Peoria, complainant had in her possession, in money and securities, the sum of $12,000. That of this, defendant loaned one Heye Dieken, October 1, 1885, $5000, on note payable to James Herbert and Hannah Herbert, or either of them.

That the remainder of said securities, amounting to the sum of $7000, was by complainant, on April 30, 1886, turned over to defendant to be cashed, they having decided to purchase

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the premises described in complainant's bill, and on said date defendant bought the same, the money being paid and deed made the following day, May 1, 1886, and title taken in name of defendant. Possession was on said day taken and said parties continued to live and cohabit on said premises as husband and wife as a homestead until May, 1888, when defendant, becoming infatuated with one Julia Bazzard, whom he married in March, 1889, abandoned complainant and their said home and property and refused longer to live with her. Complainant continues to occupy said premises as her homestead, and to receive, use and enjoy the rents and income thereof, and she also received the interest and principal of said Heye Dieken loan when same came due. Said master finds that the relation of husband and wife existed between said parties. The said $12,000, so in possession of complainant, was the savings of complainant from the earnings of defendant, turned over to her by defendant to keep and save, not as her sole and individual property, but for their joint use and benefit, and for the survivor in the case of the death of either. And that said money was the money of defendant.

That the premises in controversy were purchased with a portion of said funds for a homestead, and were used and occupied as such until May, 1888, when defendant abandoned same and property and complainant, and said homestead is still the homestead of complainant.

The complainant filed the following exceptions to the master's report:

Exceptions to master's report: *First.* Because master erred in finding defendant's earnings ranged from $125 to $200 per month, instead of $65 to $75 per month for the first few years at East St. Louis.

Second. Because said master has not found that defendant only gave complainant about half his earnings, instead of a large portion thereof.

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Third. Because said master has not found that defendant gave what he gave complainant absolutely as her own, after paying rent and household expenses, as a separate provision for her.

Fourth. Because said master has found defendant was frugal and determined to save, and has not found that he was in the habit of spending money freely, and for licentious and extravagant purposes.

Fifth. Because said master has not found the $5000 loaned Heye Dieken was complainant's.

Sixth. Because said master has not found said premises were purchased with complainant's money, in whole or in part, and not with defendant's.

Seventh. Because said master has not found that $1500 of said money was derived from complainant's mother by her, and other money from other sources than her husband.

Exceptions 8 to 12, inclusive, are embraced in the foregoing, and it will not be necessary to set them out. On the hearing the exceptions were all overruled, and a decree was rendered dismissing the bill without prejudice to any claim of complainant to dower and homestead in the premises.

Mr. JUDSON STARR, for the appellant.

Mr. ARTHUR KEITHLEY, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The questions presented by this record are in the main questions of fact, and while we have given the evidence a careful consideration for the purpose of a proper determination of the exceptions to the master's report, we do not regard it necessary in this opinion to enter upon an extended review of the evidence taken by the master and incorporated in the record. As to the amount of the defendant's earnings per month during the first few years he was at East St. Louis, it may be that the master in chancery found the amount larger than it should have

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been, as claimed by the fourth exception, but we do not regard that finding of sufficient importance to call for any special notice. Whether the defendant at that time received $65 or $125 per month could not have any special bearing on the ultimate decision of the case, as will appear hereafter. The second exception is not well taken. Upon examination of the evidence it will be found that the decided weight of the evidence is that the defendant handed over to the complainant his entire earnings from month to month, except small sums used for personal expenses. The third exception is predicated on the theory that the money which the defendant gave to the complainant was given her absolutely as a separate provision. We do not think the evidence sustains the position. The defendant's time was almost constantly occupied in the discharge of his duties on the railroad, first as fireman and later as engineer. He did not seem to have time to devote to other matters. It was therefore his habit, as fast as he drew his pay, to pass it over to complainant, and she took charge of the money, paying the family expenses and retaining the balance in her hands for safe-keeping, but we find no reliable evidence in the record that the money thus turned over was intended as a settlement on the complainant. The money was passed to her to hold and use for the benefit of both parties, as their necessities might require. The fourth exception calls in question that part of the master's report which finds the defendant frugal and economical. It is said defendant was in the habit of spending money freely, etc. We do not think the evidence sustains this position. The evidence tends to show that the defendant was industrious, and if he was in the habit of spending money in a reckless or extravagant manner, the fact is not established by the evidence. Indeed, the fact that the defendant accumulated, from his own labor as fireman and engineer, $12,000, from 1870 to 1885, in addition to supporting himself and complainant, would seem to indicate that he did not indulge in extravagant habits of any character.

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The fifth exception finds fault with the master's report because the master failed to find that the $5000 loaned Heye Dieken belonged to the complainant. The note given for this loan was payable to complainant and defendant, or either of them. The complainant obtained possession of the note and collected the amount due thereon, both principal and interest. We do not understand that the title to this note or the money it represented is involved in this litigation, and for this reason, if for no other, it was not necessary for the master to make a finding as to the ownership of this money. The sixth exception to the master's report is as follows: "Because said master has not found said premises were purchased with complainant's money, in whole or in part, and not with defendant's." This exception and exception seven, which raises the question in regard to $1500 invested in the property, which it is claimed complainant brought with her from England, may be considered together. If the property in controversy was purchased and paid for with money belonging to complainant, and the defendant, without the sanction or consent of complainant, had the land conveyed to himself, we think it clear that a court of equity should compel the defendant to convey to the complainant. But before a decree could be rendered in favor of the complainant, the evidence should fairly establish the fact that the complainant furnished the money which paid for the property. The complainant says that in the fall of 1864, when she came to this country, she brought over with her $1500, one thousand of which her mother gave her and five hundred she had earned. The defendant testified that complainant had no money whatever when she came over, and we are inclined to think on this point he is corroborated by the other evidence. In the spring of 1864 the defendant came to this country alone, leaving complainant in the old country for the want of means to pay her passage. During that season he earned money in this country, and in the fall of that year sent transportation and she came over. If she had $1500, as she now

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claims, is it reasonable to believe she would have remained in the old country waiting for transportation until the defendant could earn the money here and send it to her? Moreover, when the parties came to Peoria in 1870 Bennet testifies that they told him they had no money, and this finds corroboration in the fact that when the parties came to Peoria they stopped for a short time at the house of a Mr. Davis, until defendant could find work, where they incurred a bill of $65 for board. In the meantime defendant went to East St. Louis, found work and sent for his wife, but Davis would not permit complainant to remove her beds and other things until the bill was paid. The result was the goods were left with Davis until money was earned by the defendant at East St. Louis, and then complainant returned and paid the bill and reclaimed her goods. If the complainant then had money, as she now claims, it is strange that she would leave her goods in the hands of another party as security for a board bill until such time as her husband could earn the money and discharge the bill. It may be that complainant brought over with her money and kept it secreted so that no person knew the fact, but we do not think the evidence when all considered sustains that theory. On the other hand, we think it plain from the evidence that complainant brought no money with her, and she received none afterward except £5 from her mother's estate. When the parties returned to Peoria in 1885 the complainant had in her possession, in money and securities, $12,000. In October of that year they loaned $5000 of the amount to one Dieken. In the spring of 1886 the remaining $7000 was turned over to the defendant, the bonds were cashed and the property in question purchased for $7000, and paid for by the defendant from the proceeds of the money and bonds complainant turned over to him. There is no controversy over the fact that the entire $12,000 was in the possession and control of the complainant when they came to Peoria, but whether the money was her own separate property is the question in dispute, she claiming that it was,

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while on the other hand the defendant claims that the money was the accumulation of his earnings from year to year from 1870 to 1885.

The theory of the complainant is the wages of the defendant were divided each month, one-half turned over to her as her separate property, and the other half retained by the defendant. The defendant, however, testifies that his earnings from month to month were turned over to the complainant, nothing being retained by him except a very small amount for personal expenses when he was on the road; that the money was to be used in payment of the current family expenses so far as required, the balance to be retained by her for the future use and benefit of both parties; that no part of the earnings were set off to her as her sole and separate estate, but was the money of defendant. This is the view adopted by the master in chancery, and under all the evidence we are inclined to think it is the correct one. The record contains no reliable evidence that the defendant retained from month to month one-half of his earnings, but on the other hand the evidence fully tends to show that the earnings were all, or nearly so, turned over to complainant from month to month, at times exceeding in amount $200. It is unreasonable to suppose that the defendant would place all of his earnings in the hands of complainant as her absolute property and thus be deprived of all benefit therefrom in the future, regardless of what his necessaries might be. On the other hand he knew that the complainant was economical and saving, and the money would not be squandered if turned over to her, and hence he was willing to make her the custodian of his earnings, with the understanding that she should hold the same for the benefit of both parties, and not as her separate property. It has been suggested that under the arrangement when the property was purchased it was agreed and understood that the title should be taken in the name of complainant, and that the defendant disregarding this understanding and without the knowledge of complainant had the

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deed made to himself. This position is not supported by the evidence. James Bennet who assisted in making the purchase of the property, and a witness for complainant, testified: "In talking about the purchase Mrs. Herbert said she wanted title put in her name. I don't know why she said it. I said, 'any man is a * * fool that would put everything in his wife's name,' in presence of Mrs. Herbert, and that one-half would be hers anyway if it was in his name. Q. 84. Was it then and there agreed that the title should be in Mr. Herbert's name? A. Well, that is the way it was done anyhow. I supposed that was the understanding and it was so put."

On cross-examination he testified: "Mrs. Herbert knew after the place was bought, on the morning of the same day deal was finished, in whose name place was bought. I never heard her make objection after the conversation where I gave my opinion. That was the only time. I knew of course in whose name place was being deeded — that it was in James Herbert's — that was the understanding of course."

Moreover, after the deed was made it was immediately placed upon record, and the parties went into the possession of the property and no fault was found with the manner in which the property was deeded until the parties separated two years afterward. If the property was deeded to the defendant contrary to the understanding and agreement of the parties, it is unreasonable to believe that complainant would have remained silent for two long years, and made no effort to protect her rights until the defendant had deserted her and married another woman. The decree of the Circuit Court will be affirmed.

Decree affirmed.

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Syllabus. Statement of the Case.

FRANK STODALKA *et al.*

v.

JOSEF NOVOTNY.

Filed at Ottawa, January 19, 1893.

1. HOMESTEAD — *how conveyed.* All deeds or other instruments for the alienation of the homestead of a party, whatever may be their language, are invalid as affecting the homestead, unless it shall be released or waived in the manner prescribed by the statute.

2. SAME — *contract for the sale of a homestead — its essentials.* A contract for the sale or conveyance of land which is a homestead, must not only contain a special release of the homestead right, but it must also be in writing and subscribed by the person in whose favor the homestead exists, with his or her wife or husband, if he or she has one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged.

3 SAME — *imperfect contract of sale — reforming and enforcing specific performance.* Where the written contract of a husband and wife for the conveyance of their homestead contains no release of the right of homestead, and is not acknowledged as required by law, a court of equity can not specifically enforce the same by reforming the same in accordance with the verbal contract, although the omission of such release and acknowledgment may be the result of mistake or ignorance of the officer drafting the same.

4. A court of equity has no power to reform a contract for the sale of a homestead by the insertion therein of a release of that right and an acknowledgment, and then to enforce specific performance. Such court can not give life to an instrument which has no vitality in itself.

APPEAL from the Circuit Court of Cook county; the Hon. EDWARD P. VAIL, Judge, presiding.

This was a bill for reformation of a contract in writing, entered into November 24, 1889, between the parties, by which, in consideration of the agreement of Novotny to pay Stodalka and wife $3475, in the manner following: $100 earnest money in hand, and the balance on the 1st day of June, 1890, etc., Frank Stodalka and Josefina Stodalka "covenanted and agreed to convey and assure to said party of the second part" (Novotny) "in fee simple, clear of all incumbrances whatever,

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by a good and sufficient deed, the lot, piece or parcel of ground," etc., describing it, with the buildings and improvements thereon. It was further agreed that on the failure of Novotny to make the payments, or any of them, as stipulated, the contract, at the option of the first party, should be forfeited and determined, and all previous payments retained as liquidated damages. Time is made the essence of the contract, etc. The bill as originally filed averred the readiness and willingness of Novotny to perform; the payment of the $100 at the execution of the contract; that he demanded abstracts as provided for in said agreement, but defendants refused to deliver the same; that on the 31st of May and again on the 2d of June, 1890, he tendered the sum of $3375, being the balance of the purchase-price agreed upon, and requested the said Frank and Josefina Stodalka to deliver to him a sufficient warranty deed conveying the land free of all liens and incumbrances, including the release of dower and homestead; that they absolutely refused to accept said money and execute said deed, and notified him that they would not then, or at any other time, carry out said contract, etc. The prayer was that they be required to convey by warranty deed, free from all liens, including homestead and dower, etc. The bill was afterward amended so as to allege that prior to the time of reducing the contract to writing, the parties had agreed that Novotny should purchase the premises in said contract mentioned, for the price therein set forth, and that the defendants should execute to him a warranty deed, containing, in addition to the covenants of warranty, the release of the dower right of said Josefina Stodalka, and the homestead right of each of said defendants in said premises, and that they would deliver up to Novotny, on the 1st day of June, 1890, upon payment of the sum of $3375, possession and control of said premises. It is then alleged that complainant is a Bohemian, unacquainted with the English language, and with ways and methods of buying and selling real estate, and that the parties went together to the

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house of one John Dvorak, a notary public, stated to him said agreement, and requested him to reduce the same to writing; that said notary, through ignorance, etc., neglected in said contract to make provision for the release of the dower right of the defendant Josefina, or of the homestead rights of the defendants in said premises, "and neglected, through ignorance as aforesaid, to acknowledge" the said contract. It is then alleged, that although the contract, through the ignorance and mistake of said notary, failed to provide for the release of the homestead and dower rights before mentioned, that the true and real intention of the parties to said contract was, that the same should be released and waived in accordance with the statute, etc. The prayer was also amended, "that said contract may be corrected and rectified so as to show the true intent and meaning of the parties."

Answer was filed admitting the ownership of the property in fee, and the entry into the contract set forth in the original bill, but denying that complainant had been willing or offered to perform the same; charges that he refused to do so; denies that they notified complainant that they would not accept the purchase-money, and deliver a warranty deed in accordance with the contract; avers that on the contrary they offered to carry out said agreement and deliver a warranty deed in accordance therewith, and that he refused to accept it, and traversing the remaining allegations of the bill, etc. Upon hearing, the court found that the parties entered into the written contract mentioned, and that through mistake and ignorance of the notary public in drafting the contract, he failed to insert that said premises were to be conveyed by said defendant, with full release of dower and homestead rights of said defendants, and also neglected to insert, through ignorance as aforesaid, that said defendants were to give up and deliver possession of said premises to complainant June 1, 1890, and although said contract was in fact acknowledged by said defendants, said notary public neglected to affix to the same a

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certificate of acknowledgment. It is then ordered, adjudged and decreed that this contract be reformed and rectified so as to read, "that the said party of the first part hereby covenants and agrees to convey and assure to the said party of the second part in fee simple, clear of all incumbrances whatever, by a good and sufficient warranty deed, *including the release and waiver of all rights of dower and homestead*," and by adding a certificate of acknowledgment in due form, including the release and waiver of the right of homestead and dower, by said John J. Dvorak, notary public, tested with his seal at Chicago November 27, 1889. The court then finds that contract was made as reformed, and decrees that within three (3) days from the date of depositing the amount found due with the clerk, said defendants execute a warranty deed conveying said premises, with waiver of all right by virtue of the Homestead Law, and properly acknowledged, likewise waiving said right, and that in default one of the masters of said court execute said conveyance; and that, upon execution and delivery of said deed, either by defendants or the master, the defendants deliver complete possession of said premises to said complainant, and that in default thereof, writ issue, etc.

Mr. THEO. H. SCHINTZ, for the appellants:

In order that a deed shall pass the homestead right of the grantor it must contain a special release of that right. When the homestead is not specifically named as conveyed, no general language in the deed, though it comprehend every claim, interest and estate of whatever description at law or in equity, in express terms, will pass the right or estop the householder from asserting it as against any one claiming under the deed. *Redfern* v. *Redfern*, 38 Ill. 509; *Boyd* v. *Cudderback*, 31 id. 113; *Vanzant* v. *Vanzant*, 23 id. 536; *Black* v. *Lusk*, 69 id. 70; *Best* v. *Gholson*, 89 id. 465.

The requirements of the statute as to the mode of releasing the homestead are matters of substance and not merely of

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form, and where the provisions of the statute have not been complied with, the courts can not supply the omission. *Lindley* v. *Smith*, 58 Ill. 250.

A court of chancery will correct a mistake in a conveyance, but will not, under the pretext of correcting a mistake, make that a conveyance which is not in itself a conveyance. *Lindley* v. *Smith*, *supra*. See also *Murphy* v. *Williamson*, 85 Ill. 149; *Russell* v. *Rumsey*, 35 id. 362.

Messrs. CROSS & JINDRICH and Mr. ALEXANDER COLLINS, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

Section 1 of chapter 52 of the Revised Statutes provides that the homestead and all right and title therein shall be exempt from the laws of conveyance, descent and devise, except as thereinafter provided. Section 4 of the act provides that no release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance, etc.

It would seem clear, if it was a case of first impression, that a verbal contract not in writing, agreeing to convey the homestead, was, under this statute, without validity; and if it be true, as alleged in the bill and shown at the hearing, that it was verbally agreed between complainant and the defendants that the homestead should be waived and released, that such agreement could not be specifically enforced, irrespective of whether part of the consideration had been paid or not. But we have been called upon frequently to construe this and similar provisions, and held that in all cases, whatever may be the language of the deed or instrument in writing, that it was invalid as affecting the homestead, unless there had been a

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release and waiver of the homestead in the manner prescribed by the statute. *Vanzant* v. *Vanzant*, 23 Ill. 540; *Miller* v. *Myrtle*, 27 id. 405; *Patterson* v. *Kreig*, 29 id. 518; *Pondee* v. *Lindley*, 31 id. 187; *Redfern* v. *Redfern*, 38 id. 509; *Black et al.* v. *Lush*, 69 id. 70; *Best* v. *Gohlson*, 89 id. 466.

Not only must the contract contain a special release of the right of homestead, but it must also be in writing, and subscribed by the person in whose favor the exemption exists, with his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged. It is conceded that the contract in writing, executed by the defendants, contained no release or waiver of the homestead; but it is insisted, first, that the agreement was to convey in fee simple clear of all incumbrances whatever, and, therefore, it is said, necessarily included the release of the homestead estate. This position is met fully in the case of *Redfern* v. *Redfern*, *supra*. Upon the like insistence in respect of the deed there under consideration, it was said: "But we are bound, in all such cases, whatever may be the general language of the deed, whenever the claim of the homestead is set up, to examine and see if that right has been released or waived in the mode prescribed in the statute." We need not pursue this branch of the discussion farther.

And, second, it is insisted that the verbal agreement between the parties was for the conveyance and release of the homestead estate, and that, by mistake of the scrivener, it was omitted from the written contract, and the acknowledgment likewise omitted. And the general doctrine, that courts of equity will correct and reform instruments in writing to accord with the facts, is invoked. This doctrine is well understood and often applied, but courts of chancery will not, under the pretext of correcting a mistake, "make that a conveyance which is not in itself a conveyance." Thus it was said in *Lindley* v. *Smith*,

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58 Ill. 250, in speaking of conveyances by married women, under the statute then in force: "A court of chancery cannot give life to an instrument which has no vitality in itself. A married woman can convey her land only in the manner prescribed by the statute in existence at the time she makes the deed; to make the deed effectual, all the forms and solemnities required by the statute should be observed." So, here, the written instrument was without validity in respect of the estate of homestead of defendants in this property, and the court was without power to vitalize it. As such estate can only be released in writing, subscribed and acknowledged as prescribed by the statute, the attempt of the court to reform the contract in writing, upon proof of the verbal agreement, was in effect to make a new and independent contract affecting a release and waiver of the estate. This can not be done.

Moreover, the court decreed that the notary public who drew the written contract, be required to append his acknowledgment to the instrument as reformed, waiving the homestead in due form of law. This was unauthorized either by the allegations in the bill or proofs. The bill alleges, as amended, that the notary public, through ignorance, neglected to acknowledge the instrument, and the proof shows that there was in fact no acknowledgment. It clearly appears that no one thought it necessary that an acknowledgment should be taken or made, nor was it spoken of or considered in any manner at the time of the execution of the instrument, or thereafter.

We are of opinion that the court erred in reforming the contract and decreeing its specific performance as reformed. It appears affirmatively, that the defendants have always been ready and willing, and offered to convey according to the terms of the written agreement, and that the complainant declined and refused to accept a conveyance without a waiver and release of the homestead estate therein. The estate of homestead is a freehold, and was clearly involved in this liti-

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gation. The motion to dismiss the appeal entered in this court will, therefore, be overruled. The decree of the Circuit Court will be reversed and the cause remanded with instructions to dismiss the bill.

Reversed and remanded.

GEORGE A. ARNOLD *et al.*

v.

AUGUSTUS BOURNIQUE.

Filed at Ottawa, January 19, 1893.

1. BUILDING CONTRACT — *to pay on architects' certificate — its conclusiveness.* Where a building contract provides that the contract price, etc., agreed to be paid for the erection of a building, shall be paid by the owner to the contractors "upon the presentation of certificates signed by" the architects therein named, who are to settle all disputes and adjust the accounts, a recovery may be had upon the execution of the architects' certificates of the sum due, without first presenting the same to the owner of the building. In such case the presentation of the certificate is not one of the substantial requirements of the contract, but the decision in writing by the architect of the sum due is the substantial part thereof.

2. In such case, when the architect has adjusted the accounts, determined the amount due from the owner to the contractor, and has delivered to the latter a final certificate of such sum so found due and owing, the rights of the parties will thereby become fixed, and the fact that the contractor does not keep such certificate, or hands it back to the architect, will not change the relations or rights of the parties, nor will such act affect the validity of the certificate, but its validity will remain the same after it is returned as before.

3. Where a building contract provides that in case of a disagreement relating to the extra work or work to be deducted, or in regard to the performance of any covenant, the decision of an architect in respect thereto shall be final, the execution and delivery of a certificate by him of the value of the extra work and work deducted, and of the sum due the contractor, will be conclusive on both parties to the contract, unless fraud or mistake is shown.

4. SAME — *architect's certificate — condition precedent.* Where, by the terms of a contract under which materials are furnished and labor

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is performed in the erection of a building, it is provided that payment shall only be made upon the certificate of an architect, the law is well settled that the obtaining of such certificate is a condition precedent to the payment of the money, and an action can not, as a general rule, be maintained to recover the money until the certificate has been obtained from the architect.

5. SAME — *certificate fraudulently withheld.* If, however, the materials have been furnished and the work completed according to the contract, and a certificate has been demanded from the architect and fraudulently withheld by him, the contractor will be relieved from the necessity of procuring the architect's certificate.

6. PRACTICE — *directing what the verdict shall be.* Although the plaintiff's evidence may wholly fail to establish a cause of action under one count of his declaration, yet if it is sufficient to make a *prima facie* case under another count, it will be error to instruct the jury to find for the defendant.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. ALBION CATE, for the appellants:

Plaintiffs should have been allowed to introduce evidence of the value of the labor and materials furnished. *Davidson* v. *Proost*, 35 Ill. App. 129; *Bentley* v. *Davidson*, 74 Wis. 420; *Fowler* v. *Deakman*, 84 Ill. 130.

When it is provided in the contract that the decision of an architect shall be final on all questions of difference arising under the contract, his decision that the work is completed in conformity with its terms is conclusive, unless impeached for fraud. *Downey* v. *O'Donnell*, 86 Ill. 49.

It matters not whether the contention be that the architect did issue a final certificate, and that certificate exists in contemplation of law, although lost and out of the power of plaintiffs to produce, or whether the contention be that the architect arbitrarily and captiously refused to issue the certificate; in either case the plaintiffs, on a showing that they had completed the contract, would be entitled to recover.

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In *Badger* v. *Kerber*, 61 Ill. 328, the rule is laid down that when the superintendent selected by the parties capriciously or fraudulently refuses to give the contractor a certificate of completion, the latter is not thereby debarred from recovery after performance.

Mr. GEORGE W. BRANDT, for the appellee:

If an action could not be maintained on the express contract between the parties, no action at all could be. Chitty on Contracts, 23; *Walker* v. *Brown*, 28 Ill. 378; *Ford* v. *Mc Vay*, 55 id. 122; *Compton* v. *Payne*, 69 id. 354; *Kellogg* v. *Turpie*, 93 id. 267; *Chicago* v. *Sexton*, 115 id. 242.

The obtaining by appellees from the architect of a certificate for the payment of money and the presentation thereof, were conditions precedent to any right of action by appellants. *Packard* v. *Van Schoick*, 58 Ill. 82; *Coey* v. *Lehman*, 79 id. 176; *Barney* v. *Giles*, 120 id. 154.

There is no count in the declaration on which appellants could recover, except the first, and as there is no evidence tending to prove that, appellants could not recover. *Elder* v. *Hood*, 38 Ill. 536; 1 Chitty on Pleading, 140; Chitty on Contracts, 173; *Cutter* v. *Powell*, 6 T. R. 320.

Appellants having elected to declare the conduct of Burnham & Root in November, 1883, when they offered the paper to them, fraudulent and void, are forever thereafter estopped to allege that such conduct was valid and binding. Bigelow on Estoppel, 642; *Kellogg* v. *Turpie*, 93 Ill. 265; *Morris* v. *Rexford*, 18 N. Y. 552; *Redmond* v. *Clark*, 46 id. 354; *Field* v. *Bland*, 81 id. 239; *Sloan* v. *Holcomb*, 29 Mich. 153; *Thompson* v. *Howard*, 31 id. 308; *Brown* v. *Pitney*, 39 Ill. 468; *Glover* v. *Benjamin*, 73 id. 42; *Bradley* v. *Coolbaugh*, 91 id. 148.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit brought by Arnold & Taggart, appellants, against Augustus E. Bournique to recover

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a balance claimed to be due on a building contract, executed by the parties on the 1st day of March, 1883. On the trial in the Circuit Court, after the plaintiffs had closed their testimony, on motion of the defendant, the court instructed the jury to find for the defendant. Under the instruction a verdict was returned for defendant, upon which the court entered a judgment which, on appeal, was affirmed in the Appellate Court. In order to determine whether the court erred in the instruction to the jury, it will be necessary to refer briefly to the testimony introduced by the plaintiff. Under the contract executed by the parties, and read in evidence, plaintiffs' carpenters agreed to do all the carpenter work and furnish the material therefor for defendant's dancing academy and dwelling-house on Twenty-third street, Chicago, in consideration of which defendant agreed to pay plaintiffs, "upon the presentation of certificates signed by the said Burnham & Root (who were the architects named in contract), the sum of $11,254.30 * * * ; damages for delay, as mentioned in the specifications, shall be deducted from the contract price as liquidated; and, furthermore, fifteen per centum of the value of all work done and materials furnished shall be held back until this contract is declared by said Burnham & Root completed; or, if the contract is completed at specified time or times, said fifteen per cent kept back shall then be paid forty days after the work of this contract is declared by architects finished, provided said work and materials are free and discharged from all claims, liens and charges." The contract also contained the following clause: "And in case the parties shall fail to agree as to the time, value of extra or deducted work, or the amount of extra time, the decision of the architects shall be final and binding; the same in case of any disagreement between the parties relating to the performance of any covenant or agreement herein contained."

The plaintiffs, after reading the contract in evidence, introduced evidence tending to prove that, after the contract was

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executed, the plaintiffs proceeded with the work under the contract, and fully completed their contract, as they claimed, about the last day of October, 1883. As the work progressed, the defendant paid, on certificates issued by the architects, $8800. In November, 1883, plaintiffs called on Burnham & Root for a final certificate of the balance due under the contract, claiming also for extras. On the 22d day of November, Burnham & Root adjusted the accounts of the plaintiffs, allowing a certain amount for extras, and deducting certain amounts for work left off, and as showing the conclusion reached on the amount for extra work claimed, and as respects the deductions they gave plaintiffs two papers as follows:

"Deduction for work left off and defective workmanship done by Taggart & Arnold, % A. E. Bournique:

Total..... $238 91

Also, extras."

"CHICAGO, *November* 22, 1883.

Items allowed Taggart & Arnold on Bournique:

Total..... $281 75."

These two papers were delivered as the final decision of the architects on the two questions embraced therein. A few days after the above papers were delivered, the architects, Burnham & Root, made out and delivered plaintiffs or one of them a final certificate for $1747, the balance due from the defendant to plaintiffs under the contract, and for extras, after allowing for deductions in favor of defendant. This final certificate was executed by the architects and delivered to one of the plaintiffs, who, being dissatisfied with the amount, handed it back to Burnham & Root. Some time after the certificate was handed back, plaintiffs called on Burnham for the certificate, but they failed to get it, Burnham informing them that he had made out one certificate and would not make another.

The theory upon which the Circuit Court instructed the jury to find for the defendant, as we understand from the

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record, was that the plaintiff could not recover unless he had first obtained a certificate from the architects of the balance due, and presented that certificate to the defendant; that the presentation of a certificate under the contract was a condition precedent to a recovery.

Where, by the terms of a contract under which materials are furnished and labor is performed in the erection of a building, it is provided that payment shall only be made upon the certificate of an architect, the law is well settled that the obtaining of such certificate is a condition precedent to the payment of the money, and an action can not, as a general rule, be maintained to recover the money until the certificate has been obtained from the architect. *Packard* v. *Schoick*, 68 Ill. 80; *Cory* v. *Lehman*, 79 id. 176; *Barney* v. *Giles*, 120 id. 154.

If, however, the materials have been furnished and the work completed according to the contract, and a certificate has been demanded from the architect and fraudulently withheld by him, the contractor will be relieved from the necessity of procuring the architect's certificate. *Michaelis* v. *Wolf*, 136 Ill. 68.

In the first count of the declaration it was averred that the defendant had fraudulently prevented the architects from issuing a certificate, and that they, the architects, had wrongfully and fraudulently neglected and refused to issue a certificate; and on the first trial of the cause the plaintiffs undertook to establish the averments of the declaration. In this, however, they did not succeed. Subsequently, and on October 27, 1888, an additional count to the declaration was filed, in which the plaintiffs, after setting out the building contract, averred that as to deductions and extras Burnham & Root were to decide, and their decision was to be final, as well as to all payments to plaintiffs and all other matters growing out of and pertaining to the performance of all of said work and promises, and that defendant promised to pay plaintiffs such sums as Burnham & Root should adjudge due them.

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That after the completion of said work on, to-wit: November 1, 1883, said architects made a full and final adjudication in writing, which they signed, of the final amount and balance due plaintiffs for said work and material, and passed upon all deductions and extras, in which writing they found that there was due from defendant to plaintiffs a balance of $1747. That by means of the premises defendant became indebted to pay plaintiffs the said sum of $1747 when requested, yet, although often requested, hath hitherto refused.

The evidence of the plaintiff in regard to the adjustment of the accounts of the parties by the architects, and the execution and delivery of a final certificate showing the balance due the plaintiffs, was introduced for the purpose of sustaining the averments of the additional count of the declaration, and we are inclined to the opinion that the court erred in taking the case from the jury by the instruction.

By the terms of the contract itself the parties had agreed that in case of disagreement relating to extra work, or work to be deducted, or in regard to the performance of any covenant of the contract, the decision of the architects should be final. Under this provision of the contract, after the labor and materials had been furnished and the job completed, the plaintiffs had the right to prove that their accounts for labor and material had been adjusted by the architects, and that the amount due had been determined, and a final certificate made and delivered to them, showing the amount then due. The execution and delivery of the certificate by the architects was final and conclusive upon both the plaintiffs and the defendant, unless fraud or mistake was shown, which is not pretended on either side. *McAuley* v. *Carter*, 22 Ill. 53; *Korf* v. *Lull*, 70 id. 420; *Same* v. *Same*, 84 id. 225. When the architects had adjusted the accounts, determined the amount due, and executed and delivered to plaintiffs a final certificate, the rights of the parties became fixed. The fact that the plaintiffs did not keep the final certificate, but handed it back to the architects, did

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not change the relation or rights of the parties, nor did such act affect the validity of the certificate; its validity remained the same after it was returned as it was when in plaintiffs' hands.

It is, however, claimed that the defendant could only be made liable to pay upon the presentation of the certificate to him by the plaintiffs, and as the plaintiffs failed to present the certificate, they could not recover. We do not concur in this view. A recovery may be had on a promissory note payable on demand, although no demand has been made. So also an action may be maintained on a certificate of deposit which provides that it is payable on return of the certificate properly indorsed, although no return of the certificate has been made. *Hunt* v. *Divine*, 37 Ill. 137. We perceive no reason why a different rule should be applied to a certificate of this character. Suppose plaintiffs had lost their final certificate after it was issued, and it had been destroyed so that it never could be presented to defendant, would they be precluded of a recovery? A rule of that character would be unjust, and might in many cases result injuriously to parties. The presentation of the certificate was not one of the substantial requirements of the contract. As has been substantially said before, the decision of the architects, reduced to writing and signed by them, was the substantial act which determined the right of plaintiffs to the money, and determined the obligation of the defendant to pay. From what has been said it follows that the instruction of the court was erroneous. The judgment of Appellate and Circuit Courts will be reversed and the cause remanded to the Circuit Court.

Reversed and Remanded.

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Syllabus.

DANIEL COUGHLIN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa, January 19, 1893.

1. IMPARTIAL JURY — *what constitutes.* It was a cardinal rule of common law that the jurors, to be impartial, should stand indifferent between the parties. A juror was required to have such freedom of mind that he should stand indifferent. He should be wholly free, even from the suspicion of bias.

2. SAME — *constitutional guaranty.* The constitution must be construed as guaranteeing to every defendant accused of crime a trial by an "impartial jury," as that term was understood at common law.

3. SAME — *constitutionality of sec.* 14, *chap.* 78, *R. S.* The proviso to section 14 of chapter 78 of the Revised Statutes, declaring that a juror shall not be disqualified from acting as such in a criminal case, from the fact that he has formed an opinion or impression, based upon rumor or upon newspaper statements, about the truth of which he has formed no opinion, "if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and *the court shall be satisfied* of the truth of such statement," is not in violation of the constitutional rights of one tried on a charge of crime.

4. SAME — *sec.* 14, *chap.* 78, *R. S., construed.* Under that statute, as framed, the competency of a juror remains as it was before, a judicial question, to be determined by the court from the evidence, and the court must be satisfied now, the same as before the statute was passed, of the impartiality of the juror before deciding to overrule the defendant's challenge.

5. The constitutional guarantee of the right to a trial by an impartial jury has the same force since that statute as before, and hence the statute can be construed and enforced only in subordination to that provision of the constitution. The statute can not in any degree change the essential qualifications, which jurors must possess, but it merely furnishes a new test by which those qualifications are to be determined.

6. That statute makes the statement of the juror that he can render a fair and impartial verdict according to the law and the evidence, competent, as bearing upon the question of his impartiality, and requires the court to hear and consider such statement, if the juror sees fit to make it. The result is to make the competency of the juror as affected by his opinions based upon rumor or newspaper statements a question of fact. But the statute does not attempt to determine in the least what

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shall be the probative force of the statement of the juror when made, or how far it shall have the effect of relieving him of the disqualification arising from his opinion.

7. SAME—*test of impartiality.* When the opinion of the juror is only slight or transient, or is hypothetical, considerable reliance is placed upon his statement under oath that his opinion is not of such character as will interfere with his action as a juror, and such statement is one of the most satisfactory tests of his impartiality.

8. SAME — *opinions which disqualify.* But when it is once clearly shown that the juror has a fixed and positive opinion as to the merits of the case, or as to the guilt or innocence of the defendant, his statement that, notwithstanding such opinion, he can render a fair and impartial verdict according to the law and the evidence, has little, if any, tendency to establish his impartiality. His statement that he can render a fair and impartial verdict does not tend to show that he is not partial, as it does not tend to show the non-existence of the fixed and decided opinion to which he has already confessed.

9. Where the examination of a juror showed clearly that he had fixed and settled opinions as to the guilt or innocence of a party on trial for murder, and as to most of the facts and circumstances relied on by the prosecution to show defendant's guilt, and disclosed a prejudice against the defendant and the members of a society to which he belonged, it was held that the juror was incompetent, notwithstanding his statement, drawn out by cross-examination, that he thought he could render a fair and impartial verdict, according to the law and the evidence.

10. If a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties or either of them, or from rumor, and that opinion is positive and not hypothetical, and such as will probably prevent him from giving an impartial verdict, a challenge to him should be allowed. But if the opinion be merely of a light and transient character, such as is usually formed by persons of every community upon hearing a floating report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind and a fixed conclusion thereon, or if it is hypothetical, the challenge ought not to be allowed.

11. If the judgment of the juror is convinced, if his belief is established from facts, of the truth of which he has no reasonable doubt, of the guilt or innocence of the accused, or that one party or the other should recover, or the existence of certain facts has been so established in his mind as to produce conviction, he is incompetent. Neither party should be put to the necessity of producing proof to remove a preconceived opinion.

12. No case in this State can be found where the juror, after admitting the existence in his mind of a positive opinion upon the merits,

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has been permitted to establish his own competency by testifying that, notwithstanding his opinion, he can or will render a fair and impartial verdict. But such opinion has uniformly been held to be a disqualification *per se*, and is incapable of being removed by the testimony of the juror, or other evidence tending to show that it will not affect his verdict.

13. A decided and positive opinion as to the merits of the case raises such manifest presumption of partiality as at common law would constitute a principal cause of challenge. The incompetency of the juror follows as a necessary legal consequence which is incapable of being rebutted.

14. CHALLENGING JURORS—*at common law.* Challenges to jurors, based upon an allegation of bias, favor or partiality, were, at the common law, divided into two classes, viz., principal challenges and challenges to the favor. A principal challenge was grounded on such manifest presumptions of partiality that if the fact alleged was proved to be true, the disqualification of the juror followed as a legal conclusion, incapable of being rebutted. On challenge to the favor, the disqualification arose as a question of fact to be determined by the triers, the evidence adduced in support of the challenge leading to no presumption not subject to rebuttal by other evidence.

15 SAME—*grounds of challenge—at common law.* Among the principal causes of challenge were consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was godfather to the child of either party, or *e converso;* that the juror was of the same society or corporation with either party, or had an action implying malice depending between him and the other party; or was tenant or within the distress of either party; or was master, servant, counselor, steward or attorney of either party; or after he was returned he ate and drank at the expense of either party, or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal challenge that the juror had formed and declared his opinion touching the matter in controversy.

16. SAME—*grounds of principal challenge—right to controvert.* When the matter alleged was ground for principal challenge, all the challenging party was required to do was to prove the existence of the ground, and that, on being shown, rendered the juror incompetent, and no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a free and impartial verdict.

17 SAME—*grounds of principal challenge—absolute disqualification under our law.* Most of the objections to jurors which at common law were held to be ground of principal challenge, are held with us to be absolute disqualifications; that is, upon mere proof of the fact alleged, the disqualification follows as a legal conclusion, and evidence is not admitted to show that, notwithstanding the fact proved, the juror is really impartial.

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18. SAME — *burden of proof.* The party interposing a challenge to a juror has the burden of sustaining it by proof.

19. APPEALS AND WRITS OF ERROR — *overruling challenge of jurors — subject to review.* The rule of the common law making the decision of the triers of jurors challenged to the favor final, and not subject to review on error, has not obtained in this State, and the action of the trial court in overruling a challenge to a juror for partiality is subject to review by this court. It is the duty of this court to review the action of the trial court in all cases as to the competency of jurors.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. S. P. MCCONNELL, Judge, presiding.

Mr. WILLIAM S. FORREST, Mr. RUSSELL, Mr. WING and Mr. DANIEL DONAHUE, for the plaintiff in error.

Mr. GEORGE HUNT, Attorney General, for the People.

Mr. CHIEF JUSTICE BAILEY delivered the opinion of the Court:

On the 29th day of June, 1889, an indictment was presented in the Criminal Court of Cook county by the grand jury, against Daniel Coughlin, Martin Burke, John F. Beggs, Patrick O'Sullivan, Frank J. Woodruff, Patrick Cooney and John Kunze, charging them, and divers other persons to the grand jury unknown, with having conspired to kill and murder Patrick Henry Cronin, and that, in pursuance of such conspiracy, they did kill and murder said Cronin. At the August term, 1889, of said court, Coughlin, Burke, O'Sullivan, Beggs and Kunze were tried on the indictment, and at such trial Beggs was acquitted, Kunze was found guilty of manslaughter and his punishment was fixed at imprisonment in the penitentiary for the term of three years, and Coughlin, Burke and O'Sullivan were each found guilty of murder, and their punishment was fixed at imprisonment in the penitentiary for the terms of their natural lives. The verdict, as to Kunze, was set aside by the court and a new trial was awarded, and Coughlin, Burke and O'Sullivan were each sentenced to imprisonment for life, in accordance with the verdict.

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To obtain a reversal of the sentence as to himself, O'Sullivan sued out a writ of error from this court returnable to the October term, 1890, and the cause thus brought here for review was submitted to this court on the printed arguments of counsel at the March term, 1891. Afterwards, and before the announcement of our decision, O'Sullivan died, and thereby, as we held in denying a motion by his administrator to enter judgment *nunc pro tunc* as of a date prior to his death, his writ of error was abated. *O'Sullivan* v. *The People*, *post*, p. 604.

Coughlin has now sued out a writ of error returnable to the October term, 1892, of this court, and has assigned numerous errors, and the cause thus presented having been submitted on the briefs and arguments of counsel, is now before us for decision.

A brief statement of the facts surrounding the homicide, and of the circumstances under which it is supposed to have been committed, so far as they were disclosed at the trial, will be necessary to a proper understanding of the questions raised by the assignments of error. On and prior to May 4, 1889, Patrick Henry Cronin was a physician and surgeon, and was residing and having his principal office at No. 486, North Clark street, Chicago, and was engaged in the practice of medicine and surgery. He also had a down-town office in the Chicago Opera House Building, on the corner of Clark and Washington streets, that being about one and one-half miles south of his residence. At about 7.30 o'clock, P. M. of May 4, 1889, a stranger, driving a horse and buggy, called at 486, North Clark street, for Dr. Cronin, and presented a business card of Patrick O'Sullivan, who was an ice dealer, and said that one of O'Sullivan's men had been seriously injured, and asked Dr. Cronin to go at once to render him professional assistance. The man who thus called seemed to be in haste, and Dr. Cronin thereupon hurriedly collected his utensils, bandages, cotton, and such other materials as he supposed might be needed, and got into the buggy with the stranger and was by him driven away rapidly in a northerly

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direction, towards the ice-house and residence of O'Sullivan. That was the last time Dr. Cronin was seen alive by any of his friends so far as is known. His body was found in a high state of decomposition on the 22d day of May, 1889, in the catch-basin of a sewer, in the north part of the city, several miles north of O'Sullivan's residence.

The evidence tending to connect Coughlin and his co-defendants with the homicide is purely circumstantial. The theory of the prosecution is, that Dr. Cronin was put to death in pursuance of a conspiracy to take his life, entered into by the defendants and other parties who are unknown; that to accomplish the objects of such conspiracy, he was induced, in the manner already indicated, to go to a house near O'Sullivan's residence, known as the Carlson cottage, on pretense that the person who had been injured and who needed his professional services was there; that he was there met by all or a portion of the conspirators and murdered, and that his body was thereupon taken by those who had put him to death and deposited in the catch-basin where it was afterwards discovered.

It appears that Dr. Cronin and all the defendants who were tried, except Kunze, were natives of Ireland or of Irish descent, and were members of an organization composed exclusively of persons of Irish nativity or descent, known as the "United Brotherhood," and commonly called the "Clan-na-Gael." According to the theory upon which the defendants were tried, as such theory was outlined by the state's attorney in his opening statement to the jury, the "United Brotherhood" was a secret, oath-bound organization, having a membership and subordinate bodies in all parts of the country; that the objects for which it was formed and kept in existence were, to assist, by force of arms or otherwise, in freeing Ireland from its dependence upon the government of Great Britain and in securing its national independence; that for the purpose of concealing its real purposes from the public, its subordinate bodies or "Camps" were called and generally

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known as literary societies; that the affairs of the organization were directed by an executive committee, that committee being originally composed of members from each district, but that at a meeting of the organization held in Chicago in 1881, the executive committee was reduced to five members; that this executive board had the power to command, and that no member had a right to disobey, and that whatever it commanded the members were required to do; that the members were required by their oaths and by the laws of the organization to obey the executive committee, even in defiance of the government or any other authority; that three certain members of the executive committee, who constituted the majority, assumed control of the organization; that from year to year, large sums of money were raised to be used for the purpose of securing the independence of Ireland which came into their hands; that these three men, after assuming supreme control of the organization, adopted and put in force a line of policy which was disapproved by a considerable portion of the membership, and that dissatisfaction arose in relation to the accounts given by them of the society funds, and that thereupon a serious division arose in the organization, Dr. Cronin being one of the leaders of the opposition; that in consequence of his opposition to the three men in control of the organization and popularly known as the "Triangle," and of his efforts to subject them to discipline, a bitter feeling was created between him and them, which extended to the membership of the organization, and among others, to Camp 20, of which Coughlin, Burke and O'Sullivan were members; that Dr. Cronin was denounced as a traitor and a British spy, and that at a meeting of Camp 20, a committee, of which defendant Coughlin was a member, was appointed to try him, and that such committee afterwards tried him and ordered that he be put to death, and that his death followed in execution of that order.

We have deemed it necessary, in view of questions which will be hereafter discussed, to state thus far the theory of the

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prosecution in relation to the complicity of the "United Brotherhood" and especially of the members of Camp 20 in the alleged conspiracy to take the life of Dr. Cronin, as detailed by the state's attorney in his opening statement to the jury, although very little if any evidence was given at the trial to support it. There seems to have been an entire failure to prove that any committee was appointed by Camp 20 to try Dr. Cronin, or that defendant Coughlin was a member of a committee appointed for that purpose, or that Dr. Cronin was ever tried or condemned by such committee, or that any such proceedings as those alleged were had in Camp 20 looking to his accusation, trial or condemnation. There is evidence tending to show that, at a meeting of Camp 20 held February 8, 1889, Coughlin made a motion for the appointment by the senior guardian of a committee of three, but it does not appear that such committee was appointed for the trial of Dr. Cronin, but the evidence seems to indicate that it was appointed for an entirely different purpose.

The principal facts, in addition to those above stated, which the evidence tends to show, and which are relied upon to establish the defendants' guilt, are these: On the 20th day of February, 1889, one J. B. Symonds rented rooms at 117, South Clark street, directly across the street from Dr. Cronin's downtown office, and on the following day purchased furniture, a carpet, a valise, a trunk and a trunk strap, which were delivered to him at the rooms which he had rented. On the 20th day of March, 1889, defendant Burke, under the name of Frank Williams, rented a cottage situated in the immediate vicinity of O'Sullivan's residence owned by Jonas Carlson, and spoken of by the witnesses as the Carlson cottage. Burke, immediately after leasing the cottage, went to O'Sullivan's house and had a conversation with him, in which he was overheard by Carlson to say: "The cottage is rented." A day or two afterwards, Burke and an unknown man removed the furniture, carpet, trunk, etc., from the rooms at 117, South

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Clark street, and placed them in the Carlson cottage. On one or more occasions thereafter and prior to May 4th the trunk was seen by a witness in the cottage. Shortly prior to April 20th a conversation took place between Carlson and O'Sullivan in which Carlson asked: "Do you know my tenants?" to which O'Sullivan replied: "I know one of them, is the rent due?" Carlson answered: "Not until the 20th;" and O'Sullivan then remarked: "He will pay you then." Burke was absent from the cottage from the time he rented it until April 20th, when he reappeared and paid the rent for the second month, but the cottage was not occupied by him prior to May 4th, the day of Dr. Cronin's disappearance.

On or about March 30th, O'Sullivan called on Dr. Cronin at his down-town office and entered into a contract with him by which he employed the Doctor to render all necessary professional assistance to his, O'Sullivan's, employes who might be injured in his service, and to others who might be injured by them, at a fixed sum, viz., $6 or $8 per month, and it was arranged that as O'Sullivan might be out of town or sick, the messenger calling for the Doctor should identify himself by delivering to the Doctor one of O'Sullivan's business cards, and O'Sullivan, at the time of making the contract, handed to Dr. Cronin some of his cards.

On the 4th day of May, 1889, Coughlin called at the livery stable of Patrick Dinan, at No. 260, North Clark street, and engaged a horse and buggy for a friend of his, saying that his friend would call for it at about seven o'clock in the evening. At about the hour indicated, a stranger to Dinan called and inquired if Coughlin had ordered a horse and buggy for him, and being answered in the affirmative, he claimed to be the party for whom Coughlin had ordered it, and a horse and buggy being delivered to him, he got in and drove away in the direction of Dr. Cronin's residence. The evidence tends to identify the horse thus obtained from Dinan with the one in the possession of the messenger who called for Dr. Cronin at

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about 7.30 the same evening and with which the Doctor was a few minutes later driven away in the direction of the Carlson cottage. At about 9.30 the same evening the horse and buggy were returned to the livery stable, the horse being bespattered with mud, and coming, as the evidence tends to show, from the north.

The evidence tends to show the presence of Coughlin and another man, not identified, walking along the sidewalk in the vicinity of the Carlson cottage at about four o'clock in the afternoon of May 4th, and at about five o'clock the same afternoon, defendant Burke was met by Carlson coming out of the cottage, Burke saying to Carlson that he had got to fix the cottage up. At about seven o'clock the same evening, the voices of two men conversing in the cottage were overheard by Carlson.

Paulina Hoertel, one of the witnesses for the prosecution, testifies that at about eight o'clock the same evening she was passing the Carlson cottage, and that as she was passing, two men drove up to the cottage in a buggy, one of whom got out and went into the cottage while the other drove away; that immediately after the man entered the cottage, she heard a sound as of blows, and the exclamation, "Oh, God, Jesus!" Another witness testifies that about half past eight, he saw two men, whom he claims to identify as Coughlin and Kunze, drive up to the cottage, and that the one whom he identifies as Coughlin went into the cottage, apparently opening the front door with a key, and that the other man soon afterward drove away.

There is evidence tending to show that at about ten o'clock of the same evening O'Sullivan, Coughlin and Kunze were together in a saloon in the vicinity of the Carlson cottage. Also that late in the night of May 4th, sounds were heard in the cottage as of nails being driven into a box. At about 11.30 the same night, three unknown men were seen travelling east on Fullerton avenue near Cooper street in a wagon drawn by a horse described as dark grey or bay, the wagon containing a trunk or box. About midnight three unknown men were seen proceed-

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ing north on Clark street near Frederick street, with a wagon containing a box and drawn by a horse described as bay or black. At about one o'clock three unknown men were seen in Edgewater in a wagon containing a box, and drawn by a horse described as bay. At about two o'clock the same parties were seen again without a box going south on Clark street near its intersection with Diversey street. The next morning a trunk broken open and blood-stained and containing some cotton-batting was found near Evanston avenue. Stains were also found on the steps of the Carlson cottage and the sidewalk in front of it, and also the tracks of men on the side of the street nearest the cottage. Afterward, the floor of the cottage was painted by some one unknown, and later one or more blood-stains were found on one of the walls of the cottage.

The foregoing, though not intended as a complete resume of the evidence introduced by the prosecution, is a sufficient statement, for the purposes of this opinion of the leading circumstances which the evidence tends to establish and upon which the prosecution relied for a conviction of the defendants.

Counsel for the plaintiff in error have assigned upon the record no less than forty-six errors, and in support of their assignments of errors, have filed exceedingly, and, as we think, needlessly voluminous arguments, containing matter sufficient to fill about one and one-fourth volumes of the size of the Illinois Reports, and in which they have discussed, with great amplitude, a large variety of propositions upon which they ask a reversal of the judgment against their client. This mode of argument has of itself presented a serious obstacle in the way of an early decision of the case. Fortunately, however, as we view the record, we shall not be required to consider or discuss the great mass of the propositions advanced, but shall base our decision upon only one portion of the numerous errors assigned.

In impaneling the jury, the court overruled a challenge for cause interposed by Coughlin and certain of his co-defendants, among other jurors, to Elijah J. Bontecou and Benjamin F.

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Clark, and they were each sworn as jurors, and were members of the jury which tried the case. At the time these jurors were called, the regular panel had been exhausted, and they were jurors summoned on a special venire, by a special bailiff appointed by the court for that purpose. At the time they were called and examined as jurors, Coughlin had exhausted his peremptory challenges allowed him by law, and the same seems to have been true of his co-defendants who joined in his challenge for cause.

Elijah J. Bontecou, being examined by counsel for the defendants, testified as follows: I have read the newspaper accounts of the commission of the crime for which these men are on trial. Have seen in these accounts the names of the defendants. Have read such accounts daily since March 4th. Think I read the testimony at the inquest, but am not sure. I have sometimes talked about the guilt or innocence of these men. Can hardly say that I have discussed the question fully. I have discussed the evidence with reference to them pro and con. I have now an opinion whether Burke, O'Sullivan and Coughlin are guilty. Have no decided opinion as to the guilt or innocence of Kunze. Having heard but one side of the case, as to Burke, O'Sullivan and Coughlin, I should say that I had formed an opinion. That opinion is rather firmly held. I should say that it amounts to a conviction. I sometimes have a doubt as to its correctness. My doubt as to its correctness is only as we doubt newspaper reports, that is all. I supposed the articles to be true.

I have an opinion as to whether Dr. Cronin was killed at the Carlson cottage. I have no opinion as to whether Burke was the tenant of that cottage. I have an opinion as to whether O'Sullivan made a contract with Dr. Cronin for his professional services, and as to whether he made that contract for the purpose of using it as a scheme to entice the Doctor away to be murdered. Also as to whether the Doctor was taken from his home by the horse and buggy engaged at Di-

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nan's livery stable by Coughlin, and as to whether Coughlin knew, when he hired the rig at that stable, that it was to be used to take the Doctor away to be murdered. Also as to whether the Doctor was killed in pursuance of a conspiracy, and whether Coughlin, O'Sullivan and Burke were members of that conspiracy. Am not so sure that Kunze was a member of the conspiracy; I do not feel the same way about him. I have not felt sure that the Doctor was tried by a committee of Camp 20. I have sometimes thought there was no real trial but only an apparent one. I have an opinion that there was a sort of a trial there. I have an opinion that the Doctor was put to death in pursuance of the finding at such trial. I presume I have expressed these various opinions, and that my friends and acquaintances generally know what they are.

As it is now, I have a prejudice against the members of Camp 20. I would not refuse to believe members of Camp 20 under oath as witnesses merely because they were members of it. I have a prejudice against them only from what I have read.

In reply to questions put to him by the state's attorney, he said: I understand that there is a legal presumption that every defendant placed on trial is innocent until his guilt is proved in court, and that he can be convicted only, if at all, upon evidence adduced in court in his presence and in the hearing of the jury; that nothing else must weigh in the juror's mind except the evidence heard in court and the law, and I suppose that to hang a man on anything else would be equivalent to lynch law. I think, with my own knowledge of my own mental and moral make-up, that, if sworn as a juror, I could render a fair and impartial verdict in this case based exclusively upon the law and the evidence.

The court thereupon examined the juror as follows:

Q. Are you conscious at this time of any inclination to find this verdict one way or the other?

A. I have an inclination to find it of course from what I read; I am prejudiced against them.

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Q. That is what I mean; I mean to say, sitting here as a juryman, would you have an inclination to find this verdict otherwise than according to the evidence?

A. Why, I think that I could decide according to the evidence. I feel in this way about it, not having heard anything except the newspaper evidence, I have a prejudice as it is. If there was evidence introduced to show that these parties were innocent, I think that I could give them the benefit of the doubt in that case and decide according to the evidence. There is that prejudice, a sort of feeling I can not explain, that I have.

Q. Perhaps I could state it in this way to find out your attitude in this matter: These men, according to the law, are presumed to be innocent for the reason that they have had no trial; there has been no sworn evidence against them; they have never seen the witnesses against them. The witnesses, when they were testifying, if they have ever testified anywhere, have never been cross-examined. It has been an *ex parte* examination before the grand jury and it resulted in an accusation, nothing but an accusation, not estimated in the law beyond that, except as a mere charge, a formal pleading. This is the first time these men have ever been brought to trial, and they are to be tried now upon the evidence of sworn witnesses brought here to confront them. We want to try the case also before twelve fair men, men who are willing to act upon that presumption of innocence, that is to say, will consider them innocent all through this case until there is evidence enough to convict them; who will listen to the State's evidence and listen to the defendants' evidence fairly and impartially, and bring in a verdict warranted only by the evidence and based solely upon the evidence. Could you sit here as one of the twelve men and do that kind of thing?

A. I think I could.

Q. Would you have an inclination to do otherwise than bring in a verdict according to the evidence?

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A. Well, I have the inclination, I might change my inclination.

Q. If you have an inclination at this moment to bring in a verdict on anything but the evidence you are not a fair juror — if you have an inclination that you are disposed to find a verdict otherwise than warranted by the evidence?

A. No, I am not disposed to do that. I would found it wholly upon the evidence.

Q. You mean by that word inclination, that you have from your newspaper reading of course some impression which may be unfavorable?

A. Yes, sir, that has expressed it.

Q. Would those opinions or impressions in any manner influence you here now, when you are sworn here to the solemn duty to try this case on the evidence?

A. No, sir.

Q. Are you certain of that?

A. Positive of that.

Q. No matter what you have read; no matter what impression you have entertained; no matter what prejudice you have imbibed, these men, like all your fellow citizens who are accused of crime, are entitled to a trial before twelve men who will give them a fair trial. You realize that?

A. Yes, sir.

Q. They are entitled to that presumption of innocence, which of course practically amounts to this, that they are innocent until evidence is brought into this court to convict them, of a proper character. Would your opinion strengthen the evidence of the State, any opinion which you entertain, or would you simply found your opinion, which should be your verdict, upon the evidence which you hear in court, treating what you have read as useless for this trial?

A. Well, sir, I hardly know how to answer that. I can not help feeling that, as Mr. Moore has said here the same way, that it would require evidence to change my opinion as it is

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now, but if there were testimony introduced to convince me that the men were innocent of this thing, I would certainly acquit them in spite of the prejudice.

Q. Suppose the State introduced no evidence regarding the horse and buggy, that they introduced no evidence that is very good concerning this contract, and half a dozen other of these instances concerning which you have probably read, and the defendants introduced credible evidence, are you going to act —

A. No, sir, on the testimony they might give.

Q. Suppose they did not introduce any testimony and the State did not make much of a case?

A. Then I should have to acquit the men.

Q. You are all the time saying it would require some evidence to remove your opinion. If they introduced evidence to show their innocence, then of course you would act upon that. Do you appreciate the attitude you would be in, sworn as a juror, that these men would not be obliged to say anything at all, unless the State made out a case — they would not be called upon to introduce any evidence until the State had made a pretty strong case against them. If their counsel deemed their case was not very strong, they need not say anything, they could rely on your fairness and my fairness not to convict them on a weak case — not to require them to show their innocence. They could trust to the magnanimity of the law which considers them innocent until they are proved guilty?

A. Your honor, it does not seem possible for anybody to go with the jury without having this feeling I have, and it don't seem to me that, because a person is sworn, that they can banish all this prejudice they have and immediately say they have no opinion and believe the men innocent.

Q. If you said you believed them innocent to-day, I would have to let you go on the challenge of the State. The whole question here is, whether or not you are capable of that degree of fairness, of that judicial consideration of that matter, that you can sit here and say: "This is a trial of my fellow citizens,

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brought here upon an accusation of the State. I do not know whether they are guilty or not. I shall only find them guilty when there is evidence of sufficient credible character to convince my mind in an unprejudiced condition, beyond all reasonable doubt, of their guilt"?

A. I believe I can feel that way.

The juror was then examined by counsel for the People as follows:

Q. Does this statement of yours, that you have an opinion that it would take evidence to remove, mean anything more than, that you can not perform a miracle and change your mind without something to do it?

A. That is it.

Q. Notwithstanding that opinion in your mind, you believe you could render a fair and impartial verdict based exclusively upon the law?

A. I believe I could.

Benjamin F. Clark, being examined as to his competency as a juror by counsel for the People, testified: I have an opinion as to the guilt or innocence of these defendants, based upon what I have read, and nothing else. I read the papers very attentively, read very thoroughly evenings. I understand that the law presumes a defendant placed on trial to be innocent until his guilt is established beyond a reasonable doubt. I presume I approve of that principle of law, and if taken as a juror, notwithstanding any opinion derived from my newspaper reading I would render a fair and impartial verdict, based upon the law and the evidence.

In answer to questions put to him by counsel for the defendants, he testified: I have read the Chicago newspaper accounts of the commission of the crime for which these men are on trial, the murder of Dr. Cronin. I have seen in those accounts the names of defendants Burke, O'Sullivan, Coughlin and Kunze. I have read the newspapers continuously, daily I should say. I take the Tribune regularly, and the Tribune, Times, Inter-Ocean

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and Herald Sundays. These are the papers I read, and the News occasionally. I have read the articles about this case very carefully, and studied them very closely. I have given considerable thought to the subject. I have read the testimony that was given at the coroner's inquest; also the testimony that was heard at Winnipeg; and what purported to be the testimony given before the grand jury. I have frequently discussed the questions of the guilt or innocence of the defendants with my acquaintances. I have analyzed and compared what was said in the public newspapers to be the evidence in the case. I presume I have commented on the evidence in talking with friends. In those discussions I have heard opinions in relation to the guilt or innocence of these men on trial expressed. I think I have expressed such opinions.

I have now an opinion as to whether Burke, O'Sullivan and Coughlin are guilty or innocent. I haven't given so much thought as to whether Kunze was guilty or innocent as I have to the others. My opinions respecting the guilt or innocence of Burke, Coughlin and O'Sullivan are pretty firmly held. I have no reasonable doubt of their correctness. I think I have expressed those opinions. I think some of my friends and acquaintances know what my opinions are on that subject. It would require evidence to remove those opinions.

I have an opinion that Dr. Cronin was killed in pursuance of a conspiracy. I have an opinion that Burke, O'Sullivan and Coughlin, each and all, were members of that conspiracy. That opinion is pretty firmly held like the others. I have an opinion as to whether Dr. Cronin was killed at the Carlson cottage; and as to whether Martin Burke was a tenant of that cottage; and as to whether O'Sullivan made a contract with Dr. Cronin last spring for his professional services; and as to whether he made that contract for the purpose of using it as a scheme to entice the Doctor away to be murdered; and as to whether the Doctor was taken away from his house on May 4th by a horse and buggy hired at Dinan's livery stable by Coughlin;

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and as to whether Coughlin knew, when he hired the horse and buggy, that it was to be used for the purpose of taking the Doctor away to be murdered. I have an opinion as to whether the Doctor was tried by a committee of Camp 20 last spring; and as to whether he was put to death in pursuance of the finding of that committee.

I have a prejudice against the Clan-na-Gael society, only as it has been brought to my mind in reading this evidence. I never heard of this society before the 1st of May last. I have a prejudice against the members of Camp 20 of that society. I think that prejudice would lead me to refuse to believe under oath members of Camp 20 testifying in behalf of these defendants to facts which, if true, would show their innocence, these defendants also being members of that Camp. I hardly think I could begin this trial by presuming these men to be innocent.

On further examination by counsel for the People, he said: I have stated that, if taken as a juror in this case, I could render a fair and impartial verdict based exclusively on the law and the evidence, notwithstanding my opinion. I have no doubt about that.

Q. Would you treat the testimony of members of Camp 20 of the Clan-na-Gael the same as you would any other witnesses, up to the time it appeared that the Clan-na-Gael or that Camp had anything to do with this matter?

A. I may have an opinion prejudiced against them, against their views.

Q. Would you allow that to affect your criticism in scrutinizing and weighing the evidence?

A. Well, I do not know that I could help its prejudicing me somewhat.

Q. I want to know whether you treat their testimony any different from the way you would treat anybody's testimony of equal character and equal intelligence and equal relationship to the defendants on trial — equal association with the defendants on trial, unless it appeared from the evidence here, that

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Camp 20 had something to do with this crime, or was in itself an unlawful combination; would you treat them any differently from the manner in which you would treat any other witness, unless those facts appeared?

A. I am afraid I would have to; I am prejudiced against that combination.

This is upon the understanding that it is an unlawful or criminal combination. Unless that appeared in the evidence, I think I would be able to cast that aside and give my verdict according to the law and the evidence in the case.

The court thereupon examined the juror as follows:

Q. Mr. Clark, all witnesses, when they come to the witness stand and are sworn, their credibility is in the hands of the jury, that is to say, the jury have a right to determine whether they are to be believed, from their association, their interests, their surroundings and manner of testifying — all those things which in ordinary life, go to make up the question of a man's honesty or dishonesty, his credibility or discredibility. You have the right, of course, as to every witness, when he comes to the stand, to discredit him, if you believe, upon his interest, if he seems to have any, or upon his lack of truthfulness, if he seems to lack that quality, and in every respect take into consideration everything that surrounds him; but you have no right, of course, to disregard a man simply because he belongs to some particular society or some particular race or some particular nationality, or anything of that kind, prior to the time that some evidence was introduced to show that he belonged to a criminal combination, or prior to the time that some evidence was introduced to show that the man was a man whose veracity was not ordinarily credited by the people, or some other thing of that kind, which would give you a right to take his testimony with allowance, or perhaps under the circumstances, the question which is put to you about this testimony is a narrow one; you must answer it as narrowly as it is put to you: Whether or not you would refuse to believe members of

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Camp 20, testifying in behalf of these men, simply because they are members of Camp 20. That is the question. Would you do so, or would you treat their testimony, in view of the other remark of the court, in the light of their entire surroundings?

A. Well, that might be a prejudice, it would be hard work for me to get over that prejudice, Judge.

Q. Your prejudice against the organization itself?

A. Yes, sir, as an organization.

Q. I can not say, of course, that is for you to determine entirely. I can not determine that; I do not know anything about it. I only know this, that if taken as a juryman, you ought not to act upon any prejudice or upon any opinion. I am certain about that, and I want to be very certain that you would not, before I would be willing to let you qualify as a juryman. The question is, whether or not you would discredit, I mean, refuse to believe these men, simply because they have joined this organization, and belong to that Camp?

A. I think I should throw my prejudices aside and decide upon the law and the evidence as it was given, so far as I was able to. I am strongly prejudiced now.

Q. Strongly prejudiced against that organization, that is true. It is like a great many other prejudices; it may be invented; I don't know anything about that. I wont know until you get through with this case. Certainly you ought not to act upon anything except what you hear in this case?

A. I should certainly try to give my decision in accordance with that.

Q. You would not do that, as I understand you to say, you would not do that. Do you believe then — I take it, you believe, from what you said in your last answer, that you would, if taken as a juryman, be able to render a fair and impartial verdict on the law and the evidence?

A. I should endeavor to do so, certainly.

Q. Do you believe you could?

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A. I do not know, Judge, whether I would want to say that I could or not.

Question by counsel for the People: Are you in any different state of mind, Mr. Clark, now, from the state of mind you were in when you told me you had no doubt of your ability — that you could do it?

A. Well, the question has been put in a little different shape, has it not?

By the court: In what respect is it different?

A. I want to convey this idea, that I am strongly prejudiced. I would get away from my prejudices if I could. If I was serving on this jury, I certainly shall try to throw aside prejudice and give my decision on the law and the evidence as presented to me.

Q. You of course have reflected somewhat on the principles which govern the administration of criminal law, probably you have?

A. Somewhat, yes, sir.

Q. That is, that these men are presumed to be innocent, as you would be, as I would be, as anybody else would be, were they brought into court to be tried on an accusation of crime, after an indictment found by the grand jury, because prior to that time, there has been nothing but an *ex parte* hearing, and a very hurried one sometimes, before the grand jury, and it has resulted in an accusation. For the first time now, these particular men here are brought into court to be tried upon that indictment. They are entitled to be tried upon the legal presumption of innocence. The practical effect of that presumption is, that the State carries the burden of proof, and must introduce evidence here sufficient to prove their guilt, and that must remain even after the defendants introduced their evidence, there must be a balance so strong in favor of their guilt, as to leave no reasonable doubt in the minds of the jury, after it is all in, that they are guilty, before any action can be taken. So the legal principles are, that the presump-

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tion of innocence which prevails practically for the purpose of making the State bring in evidence against them and carry the burden all through, that is, the State must carry the burden, and the men are entitled to acquittal, if the State can not make that sort of a case against them. Don't you believe that, sitting here as a juryman, feeling the full responsibility of your position as a juror trying your fellow citizens for a grave matter, where their lives and liberty are in jeopardy, that you would act according to these legal principles, and render a fair and impartial verdict, based alone upon the evidence and the law?

A. I think I could; yes, sir, I should try to.

Q. When you were interrogated by Mr. Forrest, you replied to him that you had no reasonable doubt about the correctness of the opinion which you had formed. The court wants to know if you mean by that, that you have no reasonable doubt regarding that, providing the facts stated in the papers were true; if it were a hypothetical opinion you mean, that is an opinion based upon the possibility or probability even of the facts as stated in the paper.

A. The statement in the paper is all I have to found an opinion upon.

Q. When you say you have no reasonable doubt, did you mean that if the statements were true, then you had no reasonable doubt? Is that what you meant?

A. Certainly.

Q. And nothing else?

A. Yes, sir.

Upon the foregoing examination of these jurors the court held that the competency of each was established, and overruled the challenge for cause interposed to each by Coughlin and certain of his co-defendants, and the jurors were sworn and formed a part of the jury before which the trial was had. Exceptions to these rulings were duly preserved, and Coughlin now assigns them for error. The propriety of these

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rulings constitutes the only question we feel called upon to consider.

The original Constitution of this State adopted at the time the State was admitted into the Union, provided that, in all prosecutions by indictment or information, the accused should have a right to "a speedy public trial by an impartial jury," and in both the subsequent revisions of the Constitution, viz., that of 1848, and that of 1870, the one now in force, the same provision has been retained, and it is now, as it has been ever since the State has had an existence, a part of our fundamental law. The same provision is found in the Constitution of the United States, and, as we may presume, in those of most if not all the States of the Union. With us, it is found in what is known as the Bill of Rights, in which this and many other of the provisions declaratory of the fundamental principles of human rights, and of free and just government, which have come down to us from the great charter of English liberty, are gathered up and made a part of our constitutional law.

In the legal and constitutional history of England the term "impartial jury" has received a fixed and definite meaning, and the term having been borrowed from the common law as it had existed there for ages, it must be deemed to have been adopted in view of the recognized and well understood meaning which had thus been fixed upon it. *Eason* v. *The State*, 6 Baxter, 466. The Constitution must be construed as guaranteeing to every defendant in a criminal prosecution a trial by an "impartial jury," as that term was understood at common law.

It was a cardinal rule of the common law that juries, to be impartial, should stand indifferent between the parties. The rule is laid down by Lord Coke, that he that is of the jury must be *liber homo*, that is, not only a freeman and not bound, but also one that hath such freedom of mind that "he stands indifferent as he stands unsworn." Coke Litt., 155a, note d. "It is essential that every juryman should be wholly free,

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even from the suspicion of bias, and be *omni exceptione majores.*" *Dauncey* v. *Berkeley*, cited in 3 Chit. Gen. Prac., 795. As said in *Hesketh* v. *Braddock*, 3 Burr. 1847: "The law has so watchful an eye to the pure and unbiased administration of justice, that it will never trust to the passions of mankind in the decision of any matter of right."

Challenges to jurors, based upon an allegation of bias, favor or partiality, were, at the common law, divided into two classes, viz., principal challenges and challenges to the favor. A principal challenge was grounded on such manifest presumption of partiality, that if the fact alleged was proved to be true, the disqualification of the juror followed as a legal conclusion, incapable of being rebutted. In case of a challenge to the favor, on the other hand, the disqualification arose as a conclusion of fact to be determined by the triers, the evidence adduced in support of the challenge leading to no presumption which might not be overcome by other evidence.

Among the various matters which, at common law, were held to be principal cause of challenge, that is, cause from which bias or partiality would be inferred as a legal conclusion, were these: consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was god-father to the child of either party, or *e converso;* that the juror was of the same society or corporation with either party; or was tenant or "within the distress" of either party; or had an action implying malice depending between him and either party; or was master, servant, counsellor, steward or attorney for either party; or after he was returned, he ate and drank at the expense of either party; or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal challenge, that the juror had formed and declared his opinion touching the matter in controversy. 5 Bac. Abridg., 353; 3 Black. Com., 363; 2 Tidd's Prac., 853; Coke-Litt., 155; 3 Burns' Justice of the Peace (28th Ed.), 519; 21 Viner's Abridg., 252; 1 Chit. Crim. Law,

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541; 3 Chit. Gen. Prac., 794; *Pringle* v. *Hulse*, 1 Cow., 436, note 1; *People* v. *Bodine*, 1 Denio, 304. According to these authorities and others like them, where the matter alleged was held to be ground for principal challenge, all the challenging party was called upon to do was, to prove the existence of the fact alleged by him as a ground of challenge, and that being shown, the incompetency of the juror followed as a necessary legal consequence, and in such case, no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a fair and impartial verdict. The law, from the fact proved, conclusively presumed bias, and permitted no further inquiry.

In this State, triers are not appointed, according to the mode of procedure at common law, all challenges, by our practice, being determined by the court. Nor has the common law distinction between principal challenges and challenges to the favor been kept up in this State, still many of the principles growing out of that distinction have been habitually recognized and enforced. Indeed, most of the objections to jurors which at common law were held to be ground of principal challenge, are held with us to be absolute disqualifications, that is, upon mere proof of the fact alleged, the disqualification follows as a legal conclusion, and evidence is not admitted to show that, notwithstanding the fact proved, the juror is really impartial.

In view of the principles discussed thus far, two inquiries legitimately arise in the present case, 1, whether the facts proved in relation to the jurors challenged constituted disqualifications *per se*, and 2, if they must be held to be such as raise only a *prima facie* presumption of bias or partiality, whether, in view of all the evidence adduced upon the hearing of the challenges for cause, the court was justified in deciding that the jurors were competent.

In 5 Bacon's Abridgment, 353, it is laid down as a principal cause of challenge that a juror "has delivered his opinion

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touching the matter." So, in *Blake* v. *Millspaugh*, 1 John., 316, it was held that a juror who had previously given an opinion on the very question in controversy was incompetent. "If one has expressed an opinion upon the prisoner's guilt, it is good ground of challenge for principal cause." *Greenfield* v. *The People*, 74 N. Y., 277. The cases in this country are numerous where the formation and expression of an opinion as to the merits of the controversy is held to be a disqualification *per se*. There are also many cases where the mere formation of such opinion, though not expressed especially if it appears that evidence will be required to remove it, is held to be such disqualification. Among the numerous decisions of this character in the other States, the following may be cited: *Palmer* v. *The State*, 42 Ohio St., 596; *Polk* v. *The State*, 45 Ark., 165; *Stephens* v. *The People*, 38 Mich., 739; *Brown* v. *The State*, 57 Mis., 424, and numerous cases there cited; *Brown* v. *The State*, 70 Ind., 576; *Dugle* v. *The State*, 100 ib., 259; *Goodwin* v. *Blachley*, 4 ib., 438; *Stare* v. *Rocks*, 22 La. An., 1038; *Miller* v. *The State*, 29 Neb., 437; *Owens* v. *The State*, 32 ib., 167; *Myers* v. *Commonwealth*, 79 Penn. St., 308; *State* v. *Coella*, 2 Wash. St., 99; *State* v. *Culler*, 82 Mo., 623; *Vance* v. *The State*, 19 South Western Rep., 1066.

But in view of the importance of the questions before us, and of the desirability of arriving at a perfectly correct understanding of the rule on this subject as it has been administered in this State, it may not be amiss to attempt a somewhat comprehensive review of the decisions to be found in our own reports, having any material bearing on the subject. It will be found, we think, that at an early period of our judicial history, a wise and conservative rule was announced, sufficiently definite to insure to the accused a trial by an impartial jury, yet sufficiently flexible to meet the ever varying conditions which may arise in the administration of justice; and that the rule thus formulated has been consistently and firmly applied and adhered to ever since, and is now, except perhaps so far as it

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has been modified by our recent statute, the law by which we are governed to-day.

The first case in which the competency of a juror who had formed an opinion was considered was *Noble* v. *The People*, Breese, 54. The report of that case shows merely that the juror had formed an opinion, but had not expressed it, and the court, in holding him not disqualified, said: "The law and Constitution provide that all men shall be tried by an impartial jury; but, as the mind of man is organized, it is almost impossible for a jury to be perfectly impartial. Slight impressions will appear on the mind of any person who will at all think of any subject. This is unavoidable. These impressions will go on step by step on the mind, until they are confirmed into complete opinions. Yet the law can not draw any distinctions between the most hasty impressions and a confirmed opinion; therefore all these grades of opinion must be treated alike, and ought not to disqualify the person from acting on the jury. It is quite a different thing when these opinions are expressed. Every person wishes to appear to the world consistent; therefore there is a strong partiality for those opinions when expressed, so much so, that it disqualifies a person so situated from acting on a jury."

The value as an authority of the remarks here quoted is very much impaired by the meagerness of the report of the facts upon which they are based. Nothing is stated tending to show the strength of the juror's opinion, or as to whether it was fixed and settled or otherwise. Nor does it appear whether the opinion was as to the guilt or innocence of the accused, or as to some collateral fact. Bearing in mind the rule that the party, interposing the challenge has the burden of sustaining it by proof, it is clear that, if the report states all the facts shown by the evidence, the decision holding that the impartiality of the juror had not been successfully impeached was clearly correct, wholly regardless of whether a fixed and settled opinion as to the guilt or innocence of the accused would have

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been a disqualification or not. The juror's opinion, so far as appears, may have been but slight, or only hypothetical, and so not amounting to a disqualification under any rule applicable to the subject, and a decision of the question as to what might have been the result, if the juror's opinion had been so far fixed and settled as to be likely to influence his action as a member of the panel, so far as we can gather from the report, was not called for.

The question next arose in *Smith* v. *Eames*, 3 Scam., 76, where it received a full and careful consideration, and the decision there rendered has been the leading authority on the subject from that time to the present. In that case, a juror, being examined on his *voir dire* by the defendant's counsel, testified that he had both formed and expressed an opinion in relation to the right of the plaintiff to recover. On examination by the plaintiff's counsel, he testified that he had formed his opinion from rumor; that he did not know who the witnesses were; that he still entertained his opinion if what he had heard was true, but he was not asked whether he believed the rumors to which he referred. The trial court held him to be competent, and this court affirmed that decision. In the opinion, which was delivered by Mr. Justice BREESE, it was said:

"A juror is disqualified if he has expressed a decided opinion upon the merits of the case. If, without any qualification whatever, a juror says that the defendant is guilty, or the like, or that the plaintiff ought to recover in the action, or that the verdict ought to be against the plaintiff, he would be disqualified, as not standing impartial between the parties. If, on the contrary, a juror says that he has no prejudice or bias of any kind for or against either party; that he has heard rumors in relation to the case, but has no personal knowledge of the facts; and, from the rumors, he has formed and expressed an opinion in a particular way, if they were true, without expressing any belief in their truth, we should think he would not be disqualified. By hearing reports of a case, not from the witnesses, nor

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from the parties, but from common fame, and making up an opinion upon them, the juror has not prejudged the case, unless the case should turn out to be precisely as the rumors were, a thing very improbable; but he has adjudged only the rumors, varying in their hue and color as they circulate through the country. The human mind is so constituted that it is almost impossible, on hearing a report freely circulated in a county or neighborhood, to prevent it from coming to some conclusion on the subject; and this will always be the case while the mind continues to be susceptible to impressions. If such impressions become fixed, and ripen into decided opinions, they will influence the man's conduct, and will create necessarily, a prejudice for or against the party towards whom they are directed, and should disqualify him as a juror."

Again: "If a person, without any knowledge of the facts, upon the faith of mere rumor alone, forms a decided opinion, and is convinced, without any evidence, he is not fit to judge his fellows. But if, in obedience to the laws of his organization, his mind receives impressions from the reports he hears, which have not become opinions fixed and decided, though they may seem to be at first, he would not be disqualified."

Then, after reviewing various authorities, the opinion proceeds: "We lay down this rule, that if the juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or either of them, or from rumor, and that opinion is positive, and not hypothetical, and such as will probably prevent him from giving an impartial verdict, the challenge should be allowed. If the opinion be merely of a light and transient character, such as is usually formed by persons in every community, upon hearing a current report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind, and a fixed conclusion thereon, or if it is hypothetical, the challenge ought not to be allowed."

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Since the decision in *Smith* v. *Eames* was announced, the rule stated in the paragraph last quoted has been referred to and followed and has been accepted as the settled law, and it must be now so regarded, except so far as it has been modified by the fourteenth section of the act of 1874 in relation to Jurors. The first case in which it was cited and applied was *Gardner* v. *The People*, 3 Scam., 83. There several jurors, to whom a challenge for cause was interposed, testified on their *voir dire* that they had formed and expressed opinions as to the guilt or innocence of the prisoners from reports; that they had heard none of the witnesses nor any person who professed to know the facts detail them; that they had no reason to believe or disbelieve the reports more than any other reports that float through the neighborhood, and that the opinions they had expressed were, that if the reports were true, their opinions were as they stated. On applying the foregoing rule, these jurors were held to be competent.

In *Sellers* v. *The People*, 3 Scam., 412, a juror, a short time prior to the trial and on different occasions said, that he believed the prisoner "would be hung; that he ought to be hung; that nothing could save him; that salt could not save him, and that there was no law to clear him;" and subsequently went to the jail and told the prisoner that he ought not to be hung, and if he were on the jury he would not be hung. The court, quoting what was said in *Smith* v. *Eames*, viz., that "if without any qualification whatever, a juror says that the defendant is guilty," or the like, he is disqualified, held the juror incompetent.

In *Vennum* v. *Harwood*, 1 Gilm., 659, the jurors, in answer to questions put to them by counsel for the defendant, severally declared that they had neither formed nor expressed an opinion relative to the rights of the parties or merits of the case. They were all accepted and sworn without challenge, and a verdict being rendered in favor of the plaintiff, the defendant, on motion for a new trial, proved by the affidavits of

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witnesses, that one of the jurors, before the trial, had declared, among other things, that the plaintiff ought and would recover heavy damages against the defendant. The motion for a new trial having been denied, this court, on appeal, held that, under the rule laid down in *Smith* v. *Eames*, the juror was incompetent, and for that reason the judgment was reversed and a new trial awarded.

In *Baxter* v. *The People*, 3 Gilm., 368, a juror, when first examined, stated that he had formed and expressed an opinion from reports, a part of which he believed. When further examined, he stated that the opinion he had formed was on the hypothesis that the rumors were true, only a part of which he believed; in fact, he had no opinion whether the rumors which he had heard were true or false, and that the opinion he had formed was not of a fixed and definite character. This court, in holding the juror competent, remarked that the objection was not as strong as that appearing in *Smith* v. *Eames*, and in further elucidation of the rule in such cases, it was said: "It seems sufficient if the judgment of the juror is convinced; if his belief is established from facts, of the truth of which he has no reasonable doubt, of the guilt or innocence of the accused, or that one party or the other should recover. Has the existence of certain facts been so established in his mind as to produce conviction. If so, he is incompetent, for neither party should be put to the necessity of producing proof to remove a preconceived opinion. If the juror is ready to respond to the question, 'Is the prisoner guilty, or is he innocent?' then he is incompetent. But if from not being convinced of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent."

In *Neely* v. *The People*, 13 Ill., 685, one juror testified that he had heard statements which he then believed and still believed to be true, and from those statements had formed an opinion; that if the evidence should turn out as he had heard, he had an opinion, but if the evidence should be different, he

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would be governed by the evidence in finding a verdict. A second juror testified that he had formed an opinion from statements he had heard, and that those statements came from such a source that he believed them to be true. A third juror testified that he had formed an opinion from statements he had heard; that he believed the statements he had heard to be true, but did not know whether he heard them from witnesses or not; that he should believe them until disproved, but that if the contrary was proved, he did not know that the opinion formed would influence him. A fourth juror testified that he had frequently heard the case spoken of; that he was at the town where the examination before the justice of the peace was had shortly after the examination; that he had been told by one person present what the evidence in the case was; that he had heard statements in regard to the case from one of the counsel in it; that he had formed an opinion from the statements he had heard, and he believed them to be true; that if the evidence should turn out as he had been told, he had an opinion, but if not, then he had no opinion; that he had not formed such an opinion as would prevent him, after hearing the evidence in the case, from rendering a fair and impartial verdict. Each of these jurors testified that the opinion he had formed was as to the guilt or innocence of the defendant. This court, under the rule announced in *Smith* v. *Eames*, held all these jurors incompetent, saying: "Each of the jurors had formed a definite opinion as to the guilt or innocence of the prisoner, based upon information as to the facts of the case which he believed to be true. His opinion was of a positive and not of a hypothetical character. He would have entered the jury-box with a fixed opinion as to the question to be determined, that would have controlled his action as a juror, unless the testimony disclosed a state of facts materially different from what he had already believed to be true."

In *Thomson* v. *The People*, 24 Ill., 60, a juror testified that he had conversed with a witness in the case, and had

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formed an opinion as far as he had heard, but had not formed an opinion as to the guilt or innocence of the prisoner. It was not shown as to what the opinion of the juror related, or whether it involved in the least the merits of the controversy. The juror was held to be competent.

In *Gray et al.* v. *The People*, 26 Ill., 344, a juror stated that he had read about the case in the newspapers; that he did not know the defendants; that he believed the reports that there was a house-breaking; that if the defendants were the persons named in the papers, he had an opinion as to their guilt or innocence; that one of the persons named in the newspapers might have been Gray, and if it should turn out that that person was one of the defendants, he should have an opinion as to their guilt or innocence. He further stated that he had not formed and expressed an opinion as to the guilt or innocence of the defendants; that he had in his mind no bias or prejudice, and could give the defendants a fair trial according to the evidence. The juror was held disqualified, under the rule laid down in *Smith* v. *Eames*.

In *Collins et al.* v. *The People*, 48 Ill., 145, five jurors who were accepted by the court and who formed a part of the panel which tried the case, stated on their *voir dire*, that they had heard the circumstances of the difficulty; that they believed the statements, and upon such statements had fixed opinions as to the merits of the case, such as would require evidence to remove or change, but that those opinions could be changed by sufficient evidence; that they had no prejudice against the accused, and they believed they could render a fair and impartial verdict according to the evidence. In the decision of this court holding these jurors incompetent, it was said: "It has been repeatedly held by this court, that if a juror has a decided opinion respecting the merits of the controversy, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties, or from rumor, he is disqualified from trying the case, if challenged for cause.

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(Citing *Smith* v. *Eames*, *supra*, and the other cases following the rule there laid down). These cases must govern this case. A prisoner should never be required to encounter a pre-existing opinion deliberately formed, which the juror believes to be true, and which the prisoner would be obliged to overcome. When tried by such jurors, he can not be said to have had a fair trial, unless he choose to permit them to act in the case. He has a right to be tried by men who are wholly impartial, without prepossession or prejudice against him or his case. Tested by these rules, these jurors were incompetent, when objected to by the accused, and the court below erred in not allowing the challenges to these jurors."

In *Leach* v. *The People*, 53 Ill., 311, two jurors were challenged by the defendant, who stated that they had partially formed opinions from what they had heard and read, but it clearly appeared that those opinions were not fixed, and were merely hypothetical, and wholly dependent upon whether what they had heard was true. This court, in the opinion, cited the rule as laid down in *Smith* v. *Eames*, and held that the challenges were properly overruled.

Davis v. *Walker*, 60 Ill., 452, was a suit brought to recover damages under the act of 1867 forbidding the introduction of Texas or Cherokee cattle into the State. A juror, on his examination, testified that, in his opinion, Texas cattle would communicate disease to native cattle, whether diseased themselves or not. A challenge to the juror was overruled, and this court, in holding that decision to be erroneous, said: "The juror entered the box with an opinion already formed upon one of the main issues involved in this controversy. That the plaintiff's cattle died not long after a herd of Texas cattle passed along the road to defendant's farm was not denied. The question to be determined was whether the disease which killed them was derived from the Texas cattle or produced by some other cause. If a juror had already a fixed opinion that a deadly malady walked in the footsteps of Texas cattle, though

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free from disease themselves, it is clear he would most unavoidably attribute the death of the plaintiff's cattle to that cause which he was already satisfied would produce the result, no other cause being positively shown."

In *Lycoming Fire Ins. Co.* v. *Ward*, 90 Ill., 545, a juror had heard a part of the evidence in a suit by the same plaintiff against another insurance company, which had just been tried, and in which the questions involved were similar to those at issue in the case which the juror was called to try. It did not appear that he had formed any fixed or decided opinion, and this court, citing and applying the rule laid down in *Smith* v. *Eames* held that he was competent.

In *Gradle* v. *Hoffman*, 105 Ill., 147, the juror challenged, stated on his *voir dire* that he had read an account of the case in the newspapers, but remembered no part of what he had read; that the account made no impression on his mind; that he had then no impression and that no evidence would be required to remove one. He further said that if the evidence was equally balanced, it would be difficult to decide. This juror was held to be impartial and qualified, this court remarking that "such a juror would no doubt regard an instruction of the court as to his duty in case the evidence was evenly balanced."

In *C., B. & Q. R. R. Co.* v. *Perkins*, 125 Ill., 127, which was a suit brought to recover damages for the death of th plaintiff's intestate, one juror had heard of the accident at th time the deceased was killed and had heard people talk abo the matter, but stated that he had no opinion in the case fr what he had read or otherwise. This juror was held to be c petent. Another said that he had an opinion in regard to wh of the parties ought to succeed in the case, and to him a c lenge for cause was sustained. This court held that he was n impartial juror, and that the challenge was properly susta

Plummer v. *The People*, 74 Ill., 361, was the first decided by this court in which reference is made to our p

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statute in relation to Jurors. In that case one juror had heard rumors and formed an unfavorable opinion against the defendant, but did not think it would prevent his rendering a fair and impartial verdict. The opinion quotes the statute, and holds that under its provisions this juror was competent. Another juror was asked the question: "You think that you have heard reports which you believe to be true, in respect to the defendant, which would have a tendency, in some degree, to bias your mind in this respect?" To which he answered: "It may have." This juror was held to be incompetent, the court remarking: "Where a juror has been exposed to influences, the probable effect of which is to create a prejudice in his mind against the defendant, which would require evidence to overcome, to render him competent it should clearly appear that he can, when in the jury box, entirely disregard those influences, and try the case without, in any degree, being affected by them."

The foregoing are all the decisions in this State prior to the passage of our present statute, to which our attention has been called, and several of those of later date, bearing upon the question now under consideration. Taking them all together, it is plain that the rule in this State, except so far as it is modified by the statute, is perfectly well settled, that if a juror has made up a decided opinion upon the merits of the case, either from personal knowledge of the facts, or from the statements of witnesses, or from the relations of the parties, or from either of them, or from rumor, and that opinion is positive and not hypothetical, and is such as will probably prevent him from giving an impartial verdict, he is disqualified. No case can be found where a juror, after admitting the existence in his mind of an opinion of that character, has been permitted to establish his own competency by testifying that, notwithstanding his opinion, he can or will render a fair and impartial verdict. Such opinion has uniformly been held to be a disqualification *per se*, and is incapable of being removed by

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the testimony of the juror or other evidence tending to show that it will not affect his verdict. A decided and positive opinion as to the merits of the case, raises such manifest presumption of partiality as at common law would constitute a principal cause of challenge. The incompetency of the juror follows as a necessary legal consequence, which is incapable of being rebutted. And so, in all the cases above referred to, where such fixed and positive opinion is shown, and the juror testified that, he could nevertheless render a fair and impartial verdict, such testimony of the juror has been wholly disregarded, and he has been held to be incompetent, in spite of his own assertion of his impartiality. Such was the case in *Neely* v. *The People*, 13 Ill., 685; *Gray et al.* v. *The People*, 26 ib., 344, and *Collins et al.* v. *The People*, 48 ib., 145.

In *Winnesheik Ins. Co.* v. *Schueller*, 60 Ill., 465, which was a suit against an insurance company upon one of its policies for a loss by fire, a juror challenged stated that he had some prejudice against insurance companies generally; that his prejudice was founded on the fact that he could not comprehend their proceedings, but he testified that his prejudice would not affect his verdict. He was held to be incompetent, and his assertion that his prejudice would not affect his action as a juror seems to have been regarded as wholly unimportant, as it was not commented upon. But in the opinion it was said: "A juror should stand indifferent between the parties. No bias should influence his judgment and swerve him from strict impartiality. It would have required as much evidence to remove his unfounded prejudice as to convince him of the justice of the defense. The juror said that he had no more prejudice against this than any other company, but that he had a prejudice against all insurance companies. How is it possible that his mind would not be biased, and his determination, to some extent, influenced? It is not necessary that his unfavorable impressions should be so strong that they could not be shaken by evidence. It is sufficient if proof be necessary to restore his impartiality.

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A party should never be compelled to produce proof to change a preconceived opinion or prejudice which may control the action of the juror."

The worthlessness of the testimony of a juror as to his own fairness, after having disclosed a fixed and decided opinion as to the merits of the controversy, or a strong inclination or bias against or in favor of one of the parties, is well stated in *C. & A. R. R. Co.* v. *Adler*, 56 Ill., 344. There several jurors who tried the case were asked which way they would be inclined to find, if the evidence were evenly balanced, and each answered that in such case he would lean against the defendant, one of them stating that he would do so because the railroad company was able to stand it, and because he thought a private individual should have a little the advantage. These jurors were held to be disqualified, and in the opinion it was said: "Nor does the fact that jurors, who avow, under oath, that they would incline to favor a recovery by the plaintiff on evidence evenly balanced, declare that they are impartial, in the slightest degree tend to prove their impartiality. Their statement only tends to prove that they are so far lost to a sense of justice, that they regard what all right-thinking men know to be wrong, as just and impartial. To try a cause by such a jury, is to authorize men who state that they will lean in their finding against one of the parties, unjustly to determine the rights of others, and it would be no difficult task to predict, even before the evidence was heard, the verdict that would be rendered. Nor can it be said that instructions from the court would correct the bias of jurors who swear that they incline in favor of one of the litigants."

The same view was taken by the Supreme Court of Michigan in *Stephens* v. *The People*, 38 Mich., 739. There six of the jurors stated that they had formed an opinion, from what they had heard and from reputation, that the defendant was guilty as charged in the indictment. On being asked whether their opinions were of a positive character that it would be im-

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possible for them to hear the testimony and decide impartially, they answered that they thought not. It was held that they were incompetent, and that it was useless to ask them whether they could render a just and impartial verdict. On this latter question the court said: "Under such circumstances, it is idle to inquire of the jurors whether they can return just and impartial verdicts. The more clear and positive were their impressions of guilt, the more certain they may be that they can act impartially in condemning the guilty party. They go into the box in a state of mind that is well calculated to give a color of guilt to all the evidence; and if the accused escapes conviction, it will not be because the evidence has not established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so." To similar effect, see, *Owens* v. *The State*, 32 Neb., 167; *Miller* v. *The State*, 29 ib., 437; *Curry* v. *The State*, 4 ib., 548; *Cowan* v. *The State*, 22 ib., 519; *Olive* v. *The State*, 11 ib., 1; *Greenfield* v. *The People*, 74 N. Y., 277; *Dugle* v. *The State*, 100 Ind., 259; *Polk* v. *The State*, 45 Ark., 165; *Wright* v. *Commonwealth*, 32 Grat., 941; *Jackson* v. *Commonwealth*, 23 ib., 919; *Eason* v. *The State*, 6 Baxter, 466; *Goodwin* v. *Bacheley*, 4 Ind., 438; *Vance* v. *The State*, 19 S. W. R., 1066.

We have now reached the point where we may properly consider the question as to how far these well established rules have been modified by section 14, of chapter 78, of the Revised Statutes. That section declares that certain enumerated objections to petit jurors, not material here, shall be sufficient cause of challenge, and concludes with the following provisos:

"*Provided, further*, that it shall not be a cause of challenge that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state, on oath, that he believes he can render an impartial verdict, according to the law and the evidence:

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And, provided, further, that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

The constitutionality of this statute was directly called in question in *Spies et al.* v. *The People*, 122 Ill., 1, and we there held it to be constitutional, and we are still disposed to adhere to the conclusion announced in that case. See also *Spies* v. *Illinois*, 123 U. S., 131. Similar statutes exist in several of the other States, and their validity seems to be generally conceded.

The only exception to this to which our attention has been called is the statute of Tennesee, which was held in *Eason* v. *The State*, 6 Baxter, 466, to be unconstitutional. By that statute, however, an opinion formed or expressed, touching the guilt or innocence of the accused, upon information derived exclusively from a published account of the facts of the offense charged, should not render the juror incompetent, unless the writer of the statement professed to have been a witness of the occurrence, provided, the juror would state that he believed he could give the accused a fair and impartial trial upon the law and the evidence. But in that statute there was no provision, as there is in ours, that to render the juror competent, the court must be satisfied of the truth of his statement, that, notwithstanding his opinion, he can give the accused a fair and impartial trial. If our statute had been so framed as to make the competency of the juror depend solely upon whether he could state that he could render a fair and impartial verdict, thus, in effect, making the juror the sole judge of his own competency, a very different constitutional question would

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arise from the one now presented. As our statute is framed, the competency of the juror remains, as it was before, a judicial question, to be determined by the court from the evidence, and the court must be satisfied now, the same as before the statute was passed, of the impartiality of the juror, before deciding to overrule the defendant's challenge.

The validity of our statute then being assumed, we have only to determine its force and effect, as applied to the case before us. It must be conceded that the constitutional provision guaranteeing to every person accused of crime, the right to a trial by an impartial jury, has the same force since the statute as before. The statute therefore can be construed and enforced only in subordination to that provision. It can not be regarded as changing in any degree the essential qualifications which jurors must possess, but merely as furnishing a new test by which those qualifications are to be determined. It must, as a necessary consequence, be construed, not as derogating from, but so as to effectuate the constitutional requirement, viz., an impartial jury.

It makes the statement of the juror that he can render a fair and impartial verdict, according to the law and the evidence, competent, as bearing upon the question of his impartiality, and requires the court to hear and consider such statement, if the juror sees fit to make it, and the result therefore would seem to be, that the question of the competency of a juror, as affected by his opinions based upon rumor or newspaper statements must in all cases be treated as a question of fact. But the statute does not attempt to determine in the least what shall be the probative force of the statement of the juror when made, or how far it shall have the effect of relieving him of the disqualification arising from the existence in his mind of such opinion. The juror's statement becomes evidence, to be received and given such weight as, under all the circumstances appearing, it is fairly and justly entitled to. Before it can operate to remove the disqualification, the court must be satis-

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fied of its truth, and that question is left to be determined all the facts and circumstances appearing in evidence, i the guidance of those rules of evidence which exist inde ently of the statute.

In the review of the authorities we have already ma has sufficiently appeared that, where the opinion of the is only slight or transient, or is hypothetical, very conside reliance is placed upon his statement under oath, tha opinion is not of such character as will interfere with his a as a juror. Indeed, where the opinion is shown to be of character, such statement is usually one of the most sat tory tests of the juror's impartiality. But the holding o and other courts is substantially uniform, that where it is clearly shown that there exists in the mind of the jur the time he is called to the jury box, a fixed and po opinion as to the merits of the case, or as to the guilt or cence of the defendant he is called to try, his statement notwithstanding such opinion, he can render a fair and i tial verdict, according to the law and the evidence, has lit any tendency to establish his impartiality. This is so be a juror who is shown to have in his mind a fixed and po opinion as to the guilt or innocence of the accused, i impartial, as a matter of fact, to say nothing of those conclusions which formerly prevailed, and which would prevail, if the statute were not in existence. His state that he can render a fair and impartial verdict does not te show that he is not partial, since it does not tend to the non-existence of the fixed and decided opinion to v he has already confessed. It merely tends to show tha juror, while admitting that he has prejudged the pris case, believes in his ability to act as though he had not so, or that, while admitting his actual partiality, he belie his ability to act as though he were impartial. It being stantly kept in mind, that the fact to be proved by the j answer is, that he is impartial, in the constitutional sense

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word, it is difficult to see how, after a juror has avowed a fixed and settled opinion as to the prisoner's guilt, a court can be legally satisfied of the truth of his answer that he can render a fair and impartial verdict, or find therefrom that he has the qualification of impartiality, as required by the Constitution.

In applying the foregoing principles to the facts before us, it is scarcely necessary to observe that, if the trial court was in error in overruling the defendant's challenge to any one of the jurors objected to, the judgment must be reversed. The defendants had a constitutional right to a trial by twelve impartial jurors, and so, if any one of the twelve was lacking in the requirement of impartiality, the defendants have not been tried by an impartial jury. We have therefore confined our attention to the objections raised to jurors Bontecou and Clark, although exceptions were taken to the decision of the court overruling the defendants' challenges to three other jurors.

As seems to us to be abundantly manifest from the examination of these two jurors given above at length, they both had in their minds fixed and settled opinions as to the guilt or innocence of the defendants, and among them, of Coughlin, the plaintiff in error. They also avowed fixed and settled opinions specifically in relation to the truth of most of the facts and circumstances alleged by the prosecution, and relied upon as tending to establish the guilt of the defendants. These facts as to which these jurors entertained fixed and settled opinions were not only material, but went to the very foundation of the case made by the prosecution, so that without proof of them, a conviction of the defendants would have been impossible, and the truth of all or nearly all of them was sharply contested at the trial, the evidence in relation thereto being in many respects conflicting, and calling for the exercise of the most impartial and unbiased judgment on the part of the jury. They also disclosed a prejudice against the defendants themselves, and against the members of a society to which they

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belonged, a prejudice which they admit would have a ten
to affect their action as jurors.

Bontecou, it is true, was brought to make answer th
could render a fair and impartial verdict, in accordance
the law and the evidence, but that result was reached
after a singularly argumentative and persuasive cross-e
nation by the court, in which the right of every person ac
of crime to an impartial trial, and to the presumption of
cence until proved guilty beyond a reasonable doubt, an
duty of every citizen, when summoned as a juror, to lay
all opinions and prejudices and accord the accused such
were set forth and descanted upon at length, and in whic
intimation was very clearly made that a juror who coul
do this was recreant to his duty as a man and a citizen.
der pressure of this sort of cross-examination, Bontecou
to have been finally brought to make answer in such w
to profess an ability to sit as an impartial juror, and on
answering he was pronounced competent, and the challen
to him was overruled. Whatever may be the weight
narily due to statements of this character by jurors, their
as evidence is in no small degree impaired in this case b
mode in which they were, in a certain sense, forced fro
mouth of the juror. The theory seemed to be, that if a
could in any way be brought to answer that he could sit
impartial juror, that declaration of itself rendered him co
tent. Such a view, if it was entertained, was a total mi
ception of the law.

Juror Clark, however, when asked by the court wheth
taken as a juror, he would be able to render an impartia
dict, answered: "I should endeavor to do so certainly," b
the question: "Do you think you could?" he said: '
not know, Judge, whether I would want to say that I cou
not." On being further questioned, he explained: "I
to convey this idea; that I am strongly prejudiced. I w
get away from my prejudice if I could. If I was servi

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this jury I certainly should try to throw aside prejudice and give my decision on the law and the evidence as presented to me." In another place, in answer to a question as to whether he could treat the testimony of members of Camp 20 according to the principles explained to him by the court, he said: "Well, that might be a prejudice; it would be hard work for me to get over that prejudice, Judge." Then, after further and fuller explanation by the court as to the rights of the accused to a fair trial, and as to the duties and responsibilities of citizens called upon to serve as jurors, the question was again put to him whether, upon the principles thus laid down, he could render a fair and impartial verdict, based alone upon the evidence and the law, he answered with apparent reluctance: "I think I could; yes, sir, I should try to." On this answer he was held to be competent. But his answers, when all are taken together, come far short of evidencing a belief, even in the juror's mind, that he would be able to give the defendants a fair and impartial trial, upon the law and the evidence.

The court, in his cross-examination of the jurors, appealed to their sense of duty to be impartial, and to their power to put aside their opinions and prejudices by force of will, and apparently convinced Bontecou of his ability to do so, and he was brought to answer accordingly. But even he, when his entire examination is considered, seems to have been doubtful of his ability to lay aside his opinions and prejudices and act impartially. In answer to questions similar to those, put to juror Clark, he said: "Your Honor, it does not seem possible for anybody to go with the jury without having this feeling I have; and it don't seem to me that, because a person is sworn, that he can banish all this prejudice he has, and immediately say he has no opinion, and believe them innocent." In this he gave utterance to what the ordinary experience of men teaches. It requires no very profound knowledge of human nature to know, that with ordinary men, opinions and prejudices are not amenable to the power of the will, however honest the intention

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of the party may be to put them aside. They are likely to remain in the mind of the juror, in spite of all his efforts to get rid of them, warping and giving direction to his judgment, coloring the facts as they are developed by the evidence, and exerting an influence, more or less potent, though it may be unconsciously to the juror himself, on the final result of his deliberations. To compel a person accused of a crime to be tried by a juror who has prejudged his case, is not to give him a fair trial.

Nor should a defendant be compelled to rely, as his security for the impartiality of the jurors by whom he is to be tried, upon the restraining and controlling influence upon the juror's mind of his oath to render a true verdict according to the law and the evidence. His impartiality should appear before he is permitted to take the oath. If he is not impartial then, his oath can not be relied upon to make him so. In the terse and expressive language of Lord Coke already quoted, the juror should "stand indifferent as he stands unsworn."

The suggestion is made that, so far as the case is controlled by the statute, the power to determine the competency of the jurors is committed to the trial court and that the determination of the question by that court is final, and not subject to review on writ of error. In this view we are unable to concur. At common law the decision of challenges to the favor was committed to triers, and it was held that their decision was final, and not subject to review on error. But that rule has never obtained in this State, as was expressly held in *Winnesheik Ins. Co.* v. *Schueller*, 60 Ill., 465. It was there insisted that a particular challenge was in the nature of a challenge to the favor, and that the court, acting as trier, having decided that the juror was competent, his decision, upon common-law principles, was final. But this court said: "Such has never been the practice in this State, and we think it is the better rule, and that it is our duty, to review the action of the court below in all cases, as to the competency of jurors." It should

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be observed moreover that this court has repeatedly reviewed the decisions of the trial courts as to the competency of jurors, in cases arising under the statute, and its authority so to do has not been questioned. *Plummer* v. *The People*, 74 Ill., 361; *Wilson* v. *The People*, 94 ib., 299; *Spies et al.* v. *The People*, 122 ib., 1.

The conclusions to which we have arrived in relation to the competency of the jurors in this case are not, in our opinion, in conflict with the decisions in *Wilson* v. *The People*, and *Spies et al.* v. *The People*, just cited. In the *Wilson* case, the juror testified that he had read the newspaper accounts of the crime, and had conversed with several persons while in attendance upon court in relation to it; that he had formed an opinion in the case, and would still have an opinion if the facts should turn out as he had heard them; that it would take some evidence to remove his opinion, but that he would be governed by the evidence, and could give the defendant a fair and impartial trial, according to the law and the evidence. We held the juror competent because his opinion seemed not to have been decided, but one of a light and transient character, which, even before the statute, would not have disqualified him, the case being one which would properly fall within the second branch of the rule laid down in *Smith* v. *Eames*.

The opinion of the juror challenged in the *Spies* case did not appear to be fixed or positive. He answered that, from all he had read and heard, he had an opinion as to the guilt or innocence of some of the defendants; that his opinion was made up from random conversations, and from newspaper reading, but from nothing reliable, or that he regarded as in the nature of sworn testimony; that he had never talked with the witnesses, or with any one having knowledge of the facts; and that he could listen to the evidence fairly and impartially and render a fair, impartial, unprejudiced and unbiased verdict. He never expressed his opinion, nor did it appear that evidence would be required to remove it. His answers as to his

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ability to render a fair and impartial verdict were given readily and with apparent frankness, and there was nothing tending to impeach the finding of the trial judge that his answers in that behalf were true. The case therefore was one properly governed by the statute, or even under the rule existing prior to the statute, he might properly have been held to be competent. It was upon the ground that his opinions appeared to be merely light and transient that the ruling of the trial court denying the challenge was sustained.

His answer that he was prejudiced against anarchists was held not to disqualify him, as that appeared, from the facts disclosed at the trial, to be a prejudice against an unlawful and criminal organization, whose theories, if carried into effect, would involve the destruction of all law and government. This was held to be no disqualification, upon the principle that a man may have a prejudice against crime and still be a competent juror. In the present case, the evidence failed to show that the Clan-na-Gael society was an unlawful or criminal organization, or that, as an organization, it had anything to do with the alleged homicide. The prejudices of the jurors, therefore, against that organization, and against the defendants as members of it, had no such basis or justification as had the prejudice of the juror challenged in the *Spies* case.

We are of the opinion that jurors Bontecou and Clark, were disqualified, and that the decision of the court overruling the challenges to these jurors was erroneous. This error necessarily works a reversal of the judgment, as to the defendant in error, and disposes of the case before us. We therefore forbear an expression of any opinion as to the various other questions raised by counsel, but for the error above indicated, the judgment as to defendant Coughlin will be reversed, and the cause, as to him, will be remanded to the Criminal Court of Cook county for a new trial.

Judgment reversed.

SCHOLFIELD, J.: I dissent both from the reasoning and conclusion in the foregoing opinion.

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Mr. JUSTICE MAGRUDER, dissenting:

I am unable to concur in the reversal of the judgment in this case. The judgment is reversed upon the alleged ground that Bontecou and Clark were not impartial jurors. In the abstract of the record prepared and presented to the Court by counsel for plaintiff in error, I find in the examination of Bontecou the following: "Do you believe, with your own knowledge of your own mental and moral make-up, that, if sworn as a juror in this solemn duty, you could render a fair and impartial verdict in this case, based exclusively upon the law and the evidence? A. I think I could. * * * Sitting here as a juryman would you have inclination to find this verdict otherwise than according to the evidence? A. Why, I think that I could decide according to the evidence, I feel in this way about it: not having heard anything except the newspaper evidence I have a prejudice as it is. If there was evidence introduced to show that these parties were innocent, I think that I could give them the benefit of the doubt in this case and decide according to the evidence. * * * You mean by that word, inclination, that you have from your newspaper reading, of course, acquired some impression which may be unfavorable? A. Yes, sir, that has expressed it. Would those opinions or impressions in any manner influence you here now, when you are sworn here to the solemn duty to try this case on the evidence? A. No, sir. You are certain of that? A. Positive of that."

In the same abstract there appears, in the examination of the juror Clark, the following: "I have an opinion as to the guilt or innocence of the defendants. It is based upon what I have read in the newspapers. * * * If taken as a juror, notwithstanding my opinion derived from newspaper reading, I should render a fair and impartial verdict in this case based upon the law and the evidence. * * * I have read the testimony that was given at the coroner's inquest, the testimony heard at Winnipeg, what purported to be the testimony given

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before the grand jury in this city in June and July. * * * I think I have expressed opinions as to the guilt or innocence of the men on trial. * * * I have an opinion as to whether the doctor was tried by Camp 20 last spring; also an opinion whether he was put to death in pursuance of the finding of that committee. I have a prejudice against the Clan-na-Gael society only as it has been brought to my mind in reading this evidence. * * * You have stated, that, if taken as a juror in this case, you could render a fair and impartial verdict based exclusively on the law and the evidence notwithstanding your opinion? Ans. Yes, sir; I have no doubt about that. Would you treat the testimony of members of Camp 20 of the Clan-na-Gael the same as you would any other witnesses up to the time that it appeared that the Clan-na-Gael or that camp had anything to do with this matter? Ans. I may have an opinion, prejudice against them, against their views. * * * Is it upon the understanding that it is an unlawful or criminal combination? Ans. Yes, sir. Unless that appeared in the evidence, would you allow it to influence your consideration of the evidence here as a juror, or your verdict as a juror? Ans. I think I would be able to cast that aside and give my verdict according to the evidence, the law and the evidence in the case. * * * I shall certainly try to throw aside prejudice and give my decision on the law and the evidence as presented to me. * * * Don't you believe that sitting here as a juryman, feeling the full responsibility as a juror, trying your fellow-citizens for a grave matter, where their lives and liberty are in jeopardy, that you would act according to these legal principles, and render a fair and impartial verdict, based alone upon the evidence and the law. What do you say to that? Ans. I think I could. Yes, sir, I should try to."

The majority opinion shows that other answers than those above quoted were made by the jurors Clark and Bontecou, but those here set forth are sufficient to establish their competency to sit as jurors. When plied with questions they did

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not deny that they had received impressions and formed opinions as to the guilt or innocence of the accused. Their frankness in revealing their thoughts and feelings in regard to the issues involved, instead of disclaiming all bias of any kind, bespeaks their conscientiousness and honesty of purpose. Whenever the questions addressed to them brought their attention back to the foundations of their impressions and opinions and to the effect thereof upon their mental conditions, two facts were most clearly disclosed: first, that the impressions received or opinions formed by them were such only as were based upon newspaper statements; second, that they believed in their own ability to fairly and impartially render a verdict in the case in accordance with the law and the evidence.

At the present day and in this country there is a general diffusion of intelligence among the people. Nearly everybody, who knows how to read, reads the newspapers. When a great crime is committed which excites public interest, there is scarcely a man in the community where it occurs, who does not know of it, and read about it, and form some sort of an opinion in regard to it. If men, who read, and are affected by, newspaper accounts of the commission of crime, are excluded from the jury box, then trial by jury might as well be abolished. In recognition of the difficulty of obtaining jurymen in criminal cases who do not read newspapers, and do not receive impressions from what they read, the legislatures of many of the States have passed laws upon this subject.

The statute of Illinois provides as follows:

"Provided further, That it shall not be a cause of challenge, that a juror has read in the newspapers an account of the commission of the crime with which the prisoner is charged, if such juror shall state, on oath, that he believes he can render an impartial verdict, according to the law and the evidence.

"And provided further, That in the trial of any criminal cause, the fact that any person called as juror has formed an

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opinion or impression, based upon rumor or newspaper statements (about the truth of which he has expressed no opinion) shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

It was held by the Supreme Court of the United States in *Spies* v. *Illinois*, 123 U. S. 131, that this statute was not repugnant to the constitution of the United States, nor to the constitution of Illinois, which guarantees to the accused party in every criminal prosecution "a speedy trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Bontecou and Clark do not state, that they ever expressed any opinion as to the truth of the newspaper statements from which they derived their impressions. This being so, and inasmuch as the only impressions or opinions formed by them were based upon newspaper statements, and inasmuch as they both stated upon oath that they believed they could fairly and impartially render a verdict in accordance with the law and the evidence, and inasmuch as the trial judge showed his satisfaction with the truth of their statements in this regard by permitting them to act as jurors in the case, why were they not qualified to take their seats in the jury box? Ought it to be decided, that they were disqualified when they held no other opinions than those, which, by the express terms of the law, are declared to be insufficient to disqualify them?

The mere fact, that a juror has expressed an opinion as to the guilt or innocence of the accused, when such opinion is based only on rumor or newspaper statements, does not necessarily disqualify him. (*Smith* v. *Eames*, 3 Scam. 76; *Gardner* v. *The People*, 3 Scam. 83; *Baxter* v. *The People*, 3 Gilm. 376; *Thomas* v. *The People*, 67 N. Y. 220; *Reynolds* v. *The United States*, 98 U. S. 145, 156; *Spies* v. *Illinois*, 123 U.

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S. 131; *People* v. *McGonegal*, 136 N. Y. 62). The test question as to the fairness and impartiality of the juror is, whether his verdict will be based only upon the account which may be given at the trial by witnesses under oath. (*Spies* v. *Illinois*, *supra*.) It sufficiently appears in this case from the examination of the above named jurors, that they would base their verdict only upon the account which should be given by the witnesses under oath at the trial.

The fact, that one of the jurors read in a newspaper what purported to be testimony taken at a coroner's inquest or before a grand jury, did not disqualify him. Such publications of what purports to be evidence come under the designation of "newspaper statements" as those words are used in the statute. It was so expressly decided in *Hopt* v. *Utah*, 120 U. S. 430, where the Court say: "We think that evidence, or what purports to be evidence, printed in a newspaper, is a "statement in a public journal" within the meaning of the statute; and that the judgment of the court upon the competency of the juror in such cases is conclusive."

It does not seem to me, that there was any such prejudice on the part of the juror Clark against the Clan-na-Gael Society as amounted to a disqualification. He expressly states, that his prejudice against that organization was based solely upon the supposition, that a committee of one of its branches known as Camp 20 had assumed to try Dr. Cronin, and that he was put to death in pursuance of the finding of that committee. If the Clan-na-Gael Society was a murderous organization, sentencing men to death who had incurred its anger and executing such unlawful sentences in secret, then a prejudice against it was nothing more than a prejudice against murder. Prejudice against crime does not disqualify a juror. (*Spies* v. *The People*, 122 Ill. 1, and cases cited). Clark said upon his examination, that, unless the Clan-na-Gael Society should appear from the evidence to be an unlawful or criminal

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society, he would be able to cast aside his prejudice against it and give his verdict according to the law and the evidence.

I can see nothing objectionable in the examination of the jurors by the trial Court. The law requires that Court to be satisfied of the truth of the statement made by the juror, that he believes he can fairly and impartially render a verdict in accordance with the law and the evidence. Here, the questions addressed by the trial judge to the jurors show, that he was making a conscientious effort to satisfy himself of what the statute made it his duty to be satisfied. Challenge for favor is based upon the bias or prejudice of the juror, and was originally ascertained by triers from whose decision there was no appeal. In this State challenges for favor are submitted to and passed upon by the trial judge. Though some of the answers of a juror taken separately may perhaps establish a disqualification, yet if the effect of all that he says is to show that he is a proper juror, he ought not to be excluded. (*Phelps* v. *The People*, 72 N. Y. 363). Under the statute above quoted, the trial court is clothed with the power of deciding judicially, from all the answers of the juror in connection with his statement of his belief in his own ability to render a verdict in accordance with the law and the evidence, whether or not such juror is really capable of fairly and impartially trying the case notwithstanding the opinions which he entertains. The determination of the trial Court in this matter ought not to be disturbed except for manifest error. Nothing less than a finding contrary to the weight of the evidence, amounting to a palpable abuse of judicial discretion by the trial judge, should authorize a reversal. It does not appear here, that the statements of the jurors, which the court below found to be true, were, as matter of fact, untrue. (*The State* v. *Cunningham*, 100 Mo. 382).

These views are but a repetition of those expressed in reference to the statute now under consideration by the Supreme Court of the United States in *Spies* v. *Illinois*, *supra*, where Mr. Chief Justice WAITE used the following language: "In

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Reynolds v. *The United States*, 98 U. S. 145–156, we said 'that upon the trial of the issue of fact raised by a challenge to a juror, in a criminal case, on the ground that he had formed and expressed an opinion on the issues to be tried, the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily to raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the conscience or discretion of the court.' If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another, in the same general jurisdiction, it certainly ought not to be relaxed in a case where, as in this case, the ground relied on for the reversal by this court of the judgment of the highest court of the State, is that the error complained of is so gross as to amount in law to a denial by the State of a trial by an impartial jury to one who is accused of crime. We are unhesitatingly of opinion that no such case is disclosed by this record." In determining the competency of a juror under the circumstances here detailed, the trial judge has a right to take into consideration not only the statements made by the juror but also his appearance and bearing while subject to examination. Of course the reviewing court can know nothing about the appearance or bearing of the juror. (*Thomas* v. *People*, *supra*).

It will not do to say, that the fairness and impartiality of the juror are to be determined solely by such answers as he makes to the questions addressed to him in relation to his impressions or opinions without reference to his own estimate of the effect

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of those impressions or opinions upon his capacity to decide fairly and impartially. The statute expressly empowers him to state under oath his belief as to his ability to fairly and impartially render a verdict in accordance with the law and the evidence. A conscientious juror could not state, that he had the belief referred to in the statute, if his existing opinions had conclusively biased his mind against the accused. A belief is a condition of mind; and a statement of belief is necessarily a statement of the effect, which certain facts or opinions have had in producing that condition of mind. (*Lycoming Fire Ins. Co.* v. *Ward*, 90 Ill. 545; *Stokes* v. *The People*, 53 N. Y. 171; *Balbo* v. *The People*, 80 N.Y. 484; *Cox* v. *The People*, 80 N. Y. 512; *Abbott* v. *The People*, 86 N. Y. 460; *Corneth* v. *The People*, 92 N. Y. 85; *People, ex rel. Oyer & Term.*, 83 N. Y. 436; *People* v. *Otto*, 101 N. Y. 690; *People* v. *Mahoney*, 18 Cal. 183; *Leach* v. *People*, 53 Ill. 311; *Albrecht* v. *Walker*, 73 Ill. 69; *Thomson* v. *People*, 24 Ill. 60; *Collins* v. *People*, 48 Ill. 145; *Wilson* v. *People*, 94 Ill. 299; *Kroer* v. *People*, 78 Ill. 294; *Curley* v. *Com*, 84 Pa. St. 151). If a juror's statement as to his own mental condition when he expresses his belief in his ability to decide the case according to the law and the evidence cannot be accepted as showing his fairness and impartiality, then his statement as to his mental condition when he says that he has a prejudice against the prisoner ought not to be accepted as showing his unfairness and partiality.

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Syllabus. Brief for the Appellants.

PENNSYLVANIA COMPANY

v.

CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY.

Filed at Ottawa, January 19, 1893.

1. LIMITATIONS — *action against carrier — for neglect in transporting goods.* An action against a common carrier for an alleged neglect of duty to properly bill, direct and transport goods delivered to the carrier, is barred in five years from the date of the alleged tort or breach of duty, and not from the time when the damages actually ensue. This is when the action is not brought upon any written contract.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. S. P. MCCONNELL, Judge, presiding.

Mr. GEO. WILLARD and Mr. E. O. BROWN, for the appellant:

The gist and cause of the present action is to recover as in case of a breach of duty on the part of the defendants to indemnify the plaintiff for the money which it was compelled to pay by process of law. Such actions are recognized as means of enforcing payment of money as an indemnity. *Allen* v. *Breusing*, 32 Ill. 505; *Drennan* v. *Bunn*, 124 id. 175.

In such cases the statute of limitations does not begin to run until the time of payment. *Schillo* v. *McEwen*, 90 Ill. 77; *Walker* v. *Goodrich*, 16 id. 341; *Thompson* v. *Reed*, 48 id. 118; *Roberts* v. *Reed*, 16 East, 215; *Crosby* v. *Wyatt*, 23 Me. 156; *Brodman* v. *Page*, 11 N. H. 431; *Hall* v. *Thayer*, 12 Metc. 130; *Davies* v. *Humphreys*, 6 M. & W. 153; *Colvin* v. *Buckle*, 8 M. & W. (Exch.) 680; *Holmes* v. *Williamson*, 6 M. & Sel. 158; *Burnell* v. *Minot*, 4 Moore, 340; Angell on Limitations, sec. 128; Parsons on Contracts (5th ed.), 34–36.

But even if the declaration be construed to be an action based solely on a breach of the duty arising from the evidence of appellee's written acknowledgments of the receipt of the oil

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in question, as shown on pages 12 and 13 abstract, the statute of five years would not apply to bar the action. The written receipts referred to constitute contracts in writing, and, therefore, do not outlaw before the lapse of ten years after the action accrued. *Railroad Co.* v. *Johnson*, 34 Ill. 389; *Railroad* v. *Jaggerman*, 115 id. 407.

Actions on the case and in assumpsit are concurrent remedies where there is an express or implied contract, as in this case. And a declaration framed in assumpsit will support case, and so a declaration framed in case will support assumpsit. *Carter* v. *White*, 32 Ill. 509; *Nevin* v. *Pullman P. Car Co.*, 106 id. 222; *Willenborg* v. *Railroad Co.*, 11 Bradw. 298; *Sherburne* v. *T. F. Co.*, 19 id. 615.

Mr. E. WALKER, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action on the case brought by the Pennsylvania Company against the Chicago, Milwaukee and St. Paul Railway Company and the Canadian Pacific Railway Company to recover damages for the failure of the defendants to transport and deliver certain oils from Chicago to Brandon, in the Province of Manitoba and Dominion of Canada. The second amended declaration contained two counts; in the first count it is averred that on, to-wit: the 1st day of May, 1886, the plaintiff was a common carrier of oils, goods, wares and merchandise, from Cleveland, Ohio, to the city of Chicago. That the defendants, at and during the same time, were carriers of oils, goods, wares and merchandise, from Chicago to Brandon, in the Province of Manitoba and Dominion of Canada. It is then averred that on, to-wit: the 5th day of May, A. D. 1886, at, to-wit: Cleveland aforesaid, to-wit: at the county of Cook aforesaid, it, the said plaintiff, received of the Forest City Oil Company a large quantity, to-wit: fifty-two barrels of carbon, to-wit: carbon oil of great value, to-wit: of the value of $1000,

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consigned to G. G. Fortier, at Brandon, Manitoba, to-wit: Brandon, in the Province of Manitoba, in the Dominion of Canada, in care of a certain railroad, to-wit: The Canadian Pacific railroad, to be taken reasonable care of and properly directed, billed and transported within a reasonable time from Cleveland aforesaid to Brandon aforesaid, and there, at Brandon aforesaid, to be delivered within such reasonable time to the said consignee or other proper person.

It is then averred that the plaintiff transported the oil from Cleveland to Chicago, and on, to-wit: the 17th day of May, A. D. 1886, the said oil, in good order and properly billed and directed, was delivered by the said plaintiff to the said defendants, to be by them taken reasonable care of and by them properly directed, billed and transported within a reasonable time to a certain other place, to-wit: Brandon aforesaid, for hire and reward. And said plaintiff avers that said defendants then and there, to-wit: on the day last aforesaid, at, to-wit: Chicago aforesaid, received and accepted the said oil for transportation and delivery as aforesaid, for hire and reward. And plaintiff avers that it thereupon became and was the duty of said defendants to take reasonable care of said goods, and properly bill and direct the same, and transport the same to Brandon aforesaid within a reasonable time, and there, to-wit: at Brandon aforesaid, to safely deliver to the consignee. The declaration contains a second count, which in form is substantially like the first, except it is averred that it received sixty-four barrels of oil at Cleveland on July 31, 1886, consigned to Fortier & Burke, at Brandon, Canada, which it is averred, as in the other count, defendants received at Chicago, to be properly directed, billed, transported and delivered at Brandon aforesaid. It is then averred that it became and was the duty of said defendants to take reasonable care of said goods, to-wit: said lot of fifty-two barrels of oil, and said lot of sixty-four barrels of oil, and properly bill and direct the same and transport the same to, to-wit: Brandon afore-

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said, within a reasonable time, and there, to-wit: at Brandon aforesaid, within such reasonable time to safely deliver the said oil to the said consignees or other proper persons, and to repay all sums of money which the plaintiff by due process of law might or should be compelled to pay to the owners of said oil on account of any wrongful or negligent failure on the part of said defendants so to do. Yet the said defendants did not nor would perform their said duty, but, on the contrary, thereof so wrongfully and negligently conducted themselves in the premises that thereby and by reason thereof the said oil, to-wit: the lot of fifty-two barrels and the lot of sixty-four barrels became and were injured and damaged and wholly lost to the owners thereof, and the owners thereof thereby became and were entitled to damages against this plaintiff on account thereof, to the full value of said goods, and the plaintiff avers that it became the duty of the said defendants to repay and reimburse to the said plaintiff any sum or sums which the said plaintiff was by said negligence of the defendants compelled to pay, and did pay the said owners of said goods, and the plaintiff avers that by reason of such negligence of said defendants, and by such loss it was compelled by due process of law, to-wit: by the judgment of the Superior Court of said Cook county, Illinois, to pay damages and costs amounting to a large sum of money, to-wit: $2500, which plaintiff avers is the value of the goods. Yet defendant has not repaid to plaintiff to plaintiff's damage, etc. The defendants pleaded the general issue and the statute of limitations of five years, upon which pleas plaintiff took issue. After the evidence was concluded, the court instructed the jury to find for the defendant.

Upon looking into the record it appears that the plaintiff, a common carrier, undertook to carry two consignments of oil from Cleveland, Ohio, to Brandon, Canada. The oil was transported over the plaintiff's line of road from Cleveland to Chicago, where it was delivered to the Chicago, Milwaukee and St.

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Paul Railway Company, the defendant herein, consigned to Brandon, Canada. The defendant company carried the oil to Minneapolis, where it was delivered to the St. Paul, Minneapolis and Manitoba Railroad Company. This company carried the goods to the next connecting line, and that line carried the goods to Winnipeg, where the goods seem to have been lost, and never reached the consignees. The consignees, never having received the oils, sued appellant and recovered the value of the property. After paying the judgment this action was instituted against appellee and the Canadian Pacific Railroad Company. The declaration is somewhat peculiar, but it is apparent from the averments that the action is one predicated on the theory that defendants were common carriers for hire from Chicago to Brandon. That plaintiff, having delivered defendants at Chicago a quantity of oil to be transported to Brandon, it became, and was the duty of defendants, to take reasonable care of the property, and properly bill, direct and transport the same to Brandon and there deliver the goods to the consignee. That defendants did not perform the duty of common carrier imposed by law, but on the other hand, through their negligent conduct in directing and transporting the goods the property was lost, and hence their liability. The instruction to the jury to find for the defendants was predicated on the ground that the action was barred by the statute of limitations, and whether the action is barred by the five years statute of limitations is the principal, and indeed the only question of any importance presented by the record. Section 15 of the statute of limitations provides "actions on unwritten contracts, express or implied * * * and all civil actions not otherwise provided for shall be commenced within five years next after the cause of action accrued." As this is an action on the case to recover for an alleged neglect of duty, and as an action of that character falls within the terms of the section of the statute *supra*, it follows, unless the action

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was brought within five years next after the cause of action accrued, the statute was a bar to the action.

Upon looking into the evidence it will be found that the first consignment of oil was delivered to appellee at Chicago on the 17th day of May, 1882, and the second on August 5, and that the appellee delivered the first lot to the St. Paul, Minneapolis and Manitoba railroad, at the terminus of appellee's line, about the 24th day of May, 1882, and the second about the 8th day of August, of the same year. It also appears that the negligence relied on to maintain a recovery against appellee was the act of changing the names of the consignees when it delivered the goods to the connecting carrier. These acts of negligence occurred, if at all, in May and August, 1882. This action was not, however, brought until the 3d day of September, 1887, more than five years after the negligent acts relied upon. If, therefore, the statute commenced to run when the breach of duty or tort occurred, it is plain that the statute was a bar to the action. In vol. 13, American and English Encyclopædia of Law, the rule on this subject is stated as follows: "In the case of torts arising *quasi e contractu*, and in actions for breach of contract, the statute generally begins to run at the date of the tort or breach, and not when damages ensue." See, also, 2 Greenl. Ev. 433; Angell on Limitations, sec. 136, where the same rule is laid down. Here we think it is clear that the action accrued against appellee at the time the goods were delivered to the next connecting line misdirected.

It is, however, claimed that the action is one to recover as in case of a breach of duty on the part of the defendants to indemnify the plaintiff for money it was compelled to pay by process of law, and the statute of limitations did not begin to run until the plaintiff paid the judgment recovered against it for the loss of the goods.

We do not concur in this view. The action, as is apparent from the declaration and the evidence introduced to support it, is based solely on a breach of duty imposed upon the defendants

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when they, as common carriers, received the goods and undertook to ship and deliver the same. It is also said the receipts for the goods constitute a contract in writing, and an action thereon would not be barred until the expiration of ten years. A sufficient answer to this position is that the action is not based on the receipts, nor were they relied upon as the contract between the parties by which the rights of the respective parties should be governed or controlled.

We perceive no error in the judgment of the Appellate Court, and it will be affirmed.

Judgment affirmed.

A. E. STAFFORD

v.

NEALY C. WOODS.

Filed at Ottawa, January 19, 1898.

1. HOMESTEAD — *limited to the life of the estate to which it is incident.* The estate of homestead can in no case be more extensive than the interest to which it attaches and of which it forms a part. If the householder has an estate in fee, the estate of homestead may likewise be a fee, but if he has only an estate for life or for years, the estate of homestead will expire at his death or at the expiration of the term for years.

2. So, where the householder has merely an equitable interest under a contract of purchase which is liable to be terminated by his non-performance of the contract, anything having the legal effect of terminating the right of possession under the contract, will at the same time and for a like reason terminate the estate of homestead.

3. SAME — *estate, how transferred — assignment of contract.* The holder of an estate of homestead in land held by him under a contract of purchase, can not transfer the same by his assignment of the contract in which his wife does not join. By such an assignment the assignee will acquire no right of possession which can prevail against the homestead estate, which he can assert against either the assignee or his widow after his death, she still continuing to occupy the premises.

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Brief for the Plaintiff in Error.

4. SAME — *how defeated — vendor's lien.* Where the vendor of land, by the terms of the contract of sale, has the option, in case of non-payment of the purchase money as therein provided, to declare the contract forfeited and determined, and to re-enter and take possession of the premises sold, such forfeiture and re-entry will defeat the estate of homestead of the purchaser, and the vendor may maintain ejectment against the widow of such purchaser upon failure to make payments of the purchase money. And the grantee of such vendor will have the same right to re-enter or maintain ejectment.

5. By section 3 of the Homestead act of 1872 no homestead can exist against a claim for the purchase money of the land to which it is attached. Whether, then, the vendor of premises sold on credit, or his grantee, be regarded as the owner of the fee subject to a contract of sale which he has the right to rescind, or, as a mortgagee in possession, he may recover possession by action of ejectment as against the widow of the purchaser.

6. EJECTMENT — *involves only legal rights.* In the action of ejectment the courts can deal only with the legal title, and have no power to investigate or adjust partnership accounts, or protect mere equitable rights.

WRIT OF ERROR to the Circuit Court of Knox county; — the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. WILLIAMS, LAWRENCE & WILLIAMS, for the plaintiff in error:

Ejectment lies only where lands have been unlawfully entered or are unlawfully withheld. *Stow* v. *Russell*, 36 Ill. 18, 36; *St. L., A. & T. H. R. R. Co.* v. *Karnes*, 101 id. 402, 408.

The homestead could only be released by an instrument in writing, subscribed by the householder and his wife, and acknowledged, as required by the act. Under this statute, our court holds the estate of homestead remains to a tenant during the continuance of his lease. *Watson* v. *Saxer*, 102 Ill. 585, 591.

In which case this court say: "Under this statute, a tenant holding a leasehold interest in premises may claim the benefit of the statute as well as the owner in fee. Indeed the holder of any possessory interest in lands without regard to the extent of his title, may invoke the aid of the statute." Id. 591.

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The act of 1873 created an estate of homestead, which was then unknown to the law; this new estate is limited only as to its value, being $1000, and not by any specific degree of interest or title to property to which it attaches. A formal conveyance of the premises, constituting the homestead without formal release of the homestead, in no manner interferes with the homestead rights, but is consistent therewith and subservient thereto. *Eldridge* v. *Pierce*, 90 Ill. 474.

Such being the Homestead act, and Stafford and his wife being in possession of these premises under this contract of purchase, he (Stafford) could not alienate his interest in the land under the contract, without joining his wife with him. *McKee* v. *Wilcox*, 11 Mich. 358.

Woods is in the position simply of one who, having purchased the premises subject to a mortgage, is in duty bound to pay the mortgage, and can properly acquire the unincumbered title only through payment and discharge of the incumbrance. In such case, having paid the purchase money, he could not set it up against the wife's claim of dower or homestead. *Selb* v. *Montague*, 102 Ill. 446; *McCabe* v. *Swap*, 14 Allen, 188.

Mr. J. A. McKENZIE, for the defendant in error:

There is no homestead right as against purchase money of the premises.

The express words of the statute are sufficiently plain upon this proposition. Statutes, 1873, sec. 3.

This statute is precisely the same as the law of 1851. *Shear* v. *Reynolds*, 90 Ill. 238.

The statute is plain that no homestead right can exist as against claim for purchase money of the land to which it is attached. *Bush* v. *Scott*, 76 Ill. 524.

We make no pretense that this section applies where a pre-existing debt for purchase money is liquidated by money borrowed for that purpose by vendee. *Austin* v. *Underwood*, 37 Ill. 438.

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But it is purchase money, if advanced at time of purchase for that purpose. *Austin* v. *Underwood*, 37 Ill. 438.

Money paid at request of purchaser to complete purchase of homestead is deemed purchase money. *Magee* v. *Magee*, 51 Ill. 500; see, also, *Williams* v. *Jones*, 100 id. 362; *Allen* v. *Hawley*, 66 id. 164; *Selb* v. *Montague*, 102 id. 446.

Mr. CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was an action of ejectment, brought by Nealy C. Woods against Mrs. E. A. Stafford, the widow of Thomas D. Stafford, deceased, to recover possession of a part of lots 15 and 16, in a certain subdivision in the city of Galesburg, the plaintiff claiming title in fee. Both parties claim under Robert Chappell as their common source of title.

On the 20th day of September, 1872, Thomas D. Stafford entered into a contract for the purchase of said premises of Robert Chappell for $2,000, of which $300 was paid at the date of the contract, the residue to be paid in certain installments thereafter. The contract, at the time it was made, was evidenced by a receipt given by Chappell for the cash payment, the receipt also describing the land and expressing the terms of the sale. At that date Chappell had not acquired title to the premises, but a few days later, having obtained title, he put Stafford into possession under the contract. Stafford was then the head of a family residing with the same, and on taking possession of the lots purchased, he moved on to them with his family and established his homestead thereon.

On the 7th day of November, 1872, formal articles of agreement were executed by Chappell, of the first part, and Stafford, of the second part, whereby Chappell on his part, covenanted and agreed that, if Stafford should first make the payments and perform the covenants thereinafter contained, he would convey and assure to Stafford said lots in fee, clear

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of all incumbrances, by a good and sufficient warranty deed, reciting, as a part of the description of the lots, that they were the same upon which Stafford then resided. Stafford, on his part, covenanted and agreed to pay Chappell $2,000 as follows: $300 cash in hand, the receipt whereof was acknowledged, and the residue in four installments, viz., $200 January 1, 1873, $500 January 1, 1874, $500 January 1, 1875, and $500 January 1, 1876, with ten per cent annual interest, and to pay all taxes, assessments or impositions that might be legally levied or imposed upon the premises subsequent to the year 1871. The instrument also provided as follows:

"And in case of the failure of the said party of the second part to make either of the payments or perform any of the covenants on his part, hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and said Chappell shall have the right to re-enter and take possession of the premises aforesaid, and thereupon resell the same, giving ninety days' notice of time and place of sale by publication in newspaper in city of Galesburg, for cash, applying the proceeds in satisfaction of all payments, if sufficient, and any surplus above principal, interest and expenses returned to Stafford, who shall likewise make up any deficiency, if any. It is mutually agreed that all the covenants and agreements herein contained, shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties."

Shortly after the articles of agreement were executed, Stafford's wife died, and in August, 1873, he married the defendant. After their marriage, Stafford and the defendant, his wife, continued to occupy the premises in question as their homestead until Stafford's death, which took place in 1890. Since that time the defendant, his widow, has continued to occupy the premises as her homestead.

Woods, the plaintiff, was a son-in-law of Stafford, and at the date of the purchase of the premises in question, Stafford and

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Woods were partners in the business of manufacturing and selling brick in the city of Galesburg, and so continued until Stafford's death. At the date of the purchase Stafford's eyesight was failing, and he soon afterward became blind, and thereafter Woods had principal charge of the business of the firm.

The payments on the contract were not made promptly on time, but from time to time Chappell had use for brick, which were delivered to him by the firm, and credited on the contract. In this way payments were made so that the amount remaining due and unpaid November 4, 1878, was $848.05. On that day Stafford endorsed on the contract an assignment, by which, for value received, he assigned all his interest therein to Woods, and delivered the contract so endorsed to Woods. In this assignment the defendant did not join.

Woods, after the assignment, presented the contract to Chappell and obtained from him a warranty deed of the premises to himself, and gave back a mortgage to secure the residue of the purchase money remaining due. This mortgage seems to have been paid several years before Stafford's death, and there is evidence tending to show that it was paid by the delivery by Woods to Chappell of a quantity of brick, but whether the brick thus delivered belonged to the firm or to Woods individually does not clearly appear.

At the trial, which was had before the court, a jury being waived, Mrs. Stafford set up as her defense, that she had an estate of homestead in the premises in question which had not been extinguished, and which entitled her to the possession thereof. This defense was disallowed by the court, and the defendant was found guilty of wrongfully withholding the premises from the plaintiff, and judgment was thereupon rendered that the plaintiff recover possession of said premises of the defendant, and establishing the plaintiff's title thereto in fee. To reverse this judgment the defendant now brings the record to this court by writ of error.

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The only question for us to consider is, whether at the commencement of the suit, Mrs. Stafford had an unextinguished estate of homestead, entitling her to retain possession of the premises sought to be recovered as against the defendant. There can be no doubt, we think, that the defendant's husband, prior to the assignment by him of his contract of purchase, had an estate of homestead which he would have been able to assert, at least as against creditors. The statute in force at that time limited the estate to the value of $1,000, but not in respect to any specific degree of interest or character of title in the property to which it attached. *Eldridge* v. *Pierce*, 90 Ill., 474. It provided: "That every householder having a family shall be entitled to an estate of homestead, to the extent in value of $1,000, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy on execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided."

Stafford, prior to the assignment of his contract of purchase to Woods, was in the rightful possession of the premises under the contract, and was occupying the premises as his residence. He therefore, by the express terms of the statute, had an estate of homestead which attached to and was co-extensive with the right and title which he had in the premises by virtue of the contract. In *Watson* v. *Saxer*, 102 Ill., 585, we held that, under the present statute, the holder of any possessory interest in lands, without respect to the extent of the title, may invoke the aid of the statute, and therefore, that a party in possession of premises under a contract of purchase, and occupying the same as a residence with his family, is entitled to a homestead right therein, to the value of $1,000, as against all creditors, except his vendor for unpaid purchase money.

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But it seems too plain for argument that the estate of homestead can in no case be more extensive than the interest to which it attaches and of which it forms a part. If the householder has an estate in fee, the estate of homestead may likewise be a fee, but if the householder has only an estate for life or for years, the estate of homestead will expire at his death, or at the expiration of the term for years. In this case the interest held by Stafford at the time he assigned his contract was not the fee, but merely an equitable interest which was liable to be terminated and defeated by his non-performance of the contract of purchase, and it is manifest that anything which would have the legal effect of terminating the right of possession under the contract, would at the same time and for a like reason, terminate the estate of homestead.

It must be admitted that as Mrs. Stafford did not join in the assignment of the contract, the homestead estate remained unaffected by the assignment. That estate must accordingly be held to stand in the same situation as though the contract of purchase had remained in Stafford's hands down to the time of his death. Woods acquired by the assignment no right of possession which could prevail as against the homestead estate. But he subsequently obtained a conveyance of the fee from Chappell, and was thereby placed in Chappell's shoes, and the question is whether, as the owner of the fee, he has the right, as against the homestead estate, to recover possession. The legal title which Chappell might have asserted, and the rights which the ownership of that title gave, are now vested in Woods, his grantee. On the other hand, as Mrs. Stafford did not join in the assignment of the contract of purchase, her homestead right was not waived or released, and is capable of assertion by her precisely as it might have been by Stafford if he were still living and still holding the contract. The rights of the present parties then may be determined upon the basis of those which would have remained in Chappell and Stafford, if there had been no conveyance and no assignment of the contract.

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We think it is clear that, if they had been the parties litigant under the conditions here supposed, Chappell could have successfully prosecuted his action of ejectment for the recovery of the possession of the premises in controversy from Stafford, notwithstanding the estate of homestead which the latter had acquired. This follows, in the first place, from the terms of the contract under which the homestead estate was acquired and is now sought to be asserted. The last installment of the purchase money became due January 1, 1876, yet, on the 4th day of November, 1878, the date of the assignment of the contract to Woods, $848.05 of the purchase money remained due and unpaid, and no portion of that sum, so far as the evidence shows, has since been paid by Stafford, in his lifetime, or by his widow since his death. By the terms of the contract, the vendor had the option, in case of non-payment of the purchase money as therein provided, to declare the contract forfeited and determined, and to re-enter and take possession of the premises sold. The estate of homestead, which was derived solely from the contract of purchase, was necessarily subject to the terms and provisions of that contract, and anything which put an end to the right of possession acquired under the contract, for the same reason put an end to the estate of homestead. That estate could have no independent existence superior to the interest in the premises out of which it was carved, but necessarily terminated with that interest. The purchaser's default in the payment of the purchase money gave the vendor the right, by electing to avoid the contract, to re-enter and take possession. Upon his making such election, the purchaser's right of possession terminated, and the estate of homestead necessarily fell with it.

In the second place, by the third section of the act in relation to exemptions, it is provided that no property shall, by virtue of that act, be exempt from sale for a debt or liability incurred for the purchase thereof. As was said in *Bush* v. *Scott*, 76 Ill., 524: "The statute is plain to the point that no

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homestead right can exist as against a claim for the purchase money of the land to which it is attached." If then we regard Chappell, or Woods, his grantee, not as the owner of the fee, subject to a sale which he had a right to declare void, but merely as a mortgagee after condition broken, which is the light most favorable to Mrs. Stafford in which he can be viewed, he has the right to avail himself of any remedy to which he is entitled as mortgagee, and among them, that of bringing ejectment to recover possession of the mortgaged premises, and his debt being for the purchase money, no homestead right on the part of the mortgagor can be successfully interposed as an impediment to his so doing. We are of the opinion that in either of the views above suggested, the finding and judgment of the Circuit Court must be sustained.

It is claimed that there is evidence having some tendency to show, that Woods, after obtaining a conveyance of the premises in question from Chappell, paid off the unpaid purchase money by delivering to Chappell a quantity of brick belonging to the firm of which Stafford was a member, and that at least to the extent of Stafford's interest in the brick so delivered, the payment should be deemed to have been made in his interest, and that it should therefore enure to the benefit of Mrs. Stafford's homestead estate. Whatever equitable rights may have grown out of such diversion of partnership assets, if any were diverted, it is sufficient to say that in this suit we can deal only with the legal title, and have no power to investigate or adjust partnership accounts or protect mere equitable rights. That can be done only in another proceeding and in another forum.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

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Syllabus.

RHODE A. LANCASTER *et al.*

v.

GEORGE W. ROBERTS *et al.*

Filed at Ottawa, January 19, 1893.

1. CONTRACT OF SALE — *failure of vendor to comply — option of vendee.* A contract for the sale of land provided that the purchaser should be furnished with a complete abstract of the title, and that in case the title should be found to be materially defective within ten days thereafter, then unless such defects should be cured within sixty days after written notice thereof, the earnest money should be refunded, and the contract become void. *Held*, that on the failure of the vendor to obviate the defects in the title within sixty days after notice, the purchaser had the right to treat the contract as inoperative and demand the return of the cash payment, or to tender the balance of the purchase money and demand a deed of the premises, in the exercise of his legal option to take the defective title.

2. SAME — *promises by vendor to cure defective title — waiver as to time.* — If the vendor, from time to time, after the lapse of the sixty days, promises to cure the defects in the title, which promises are accepted, this will amount to an arrangement between the parties for an extension of the time fixed by the contract for the curing of the defective title, and such arrangement will involve a waiver on the part of the vendor of the requirement that the purchaser should either take back the earnest money or pay the balance of the purchase money at the expiration of the sixty days. Time, though the essence of a contract, may be waived.

3. SAME — *signing by a third person not named therein.* Where a third person merely annexes his name to a contract, which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature can only be regarded as an expression of his assent to the act of the parties making the contract, and may perhaps operate as an estoppel against his assertion of title.

4. So, when a written contract recited that A agreed to sell, and B agreed to purchase, a lot at a price named, and contained a covenant to convey by a good and sufficient warranty deed on payment, and the contract was signed by A, C and D as well as by B, it was held that C and D could not be held bound by the covenant or be treated as signing as joint vendors of A any more than that they signed as joint purchasers.

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Syllabus.

5. SAME — *mutuality of contract.* In such a case there is a want of mutuality in the contract as between B, the purchaser on the one side, and C and D on the other, as the latter could not enforce the contract as to B.

6. Where a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other.

7. SAME — *failure of vendor's title — his power to rescind.* Where the vendor of land is in no position to compel a specific performance of the contract by the vendee by reason of the failure of the vendor to remove incumbrances from the title, and his inability to make a good title, he can not rescind the contract.

8. SAME — *laches of purchaser — caused by acts of vendor.* The vendor of land can not take advantage of the purchaser's neglect to promptly rescind the contract, or take steps to enforce specific performance, when such delay is caused by the vendor's repeated promises to cure the defects in the title to the property, and thereby retain the earnest money.

9. Where the purchaser of land is induced to delay filing his bill for specific performance, by the promises of the vendor to cure the defects in the title, such promises will excuse a delay of about two years in filing the bill.

10. SAME — *conditions as to title — construed most strongly against vendor — option of purchaser.* A condition in a contract for the sale of land, by which the sale is to become void in case the vendor can not deduce a good title, is to be taken most strongly against him, because he alone is able to judge of the necessity of making the condition before he offers the property for sale. Such a condition gives an option, not to the vendor, but to the purchaser, to avoid the contract for failure to deduce a good title.

11. It is a familiar rule that the vendor of land can not force the purchaser to pay his money and receive a defective title, but the purchaser may elect to take a title which is defective.

12. SPECIFIC PERFORMANCE — *right of purchaser to waive failure of vendor—and to abatement out of purchase money.* In suits by the purchaser for a specific performance where the vendor is unable to make a complete title, it is a general rule that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description or other matter touching the estate.

13. DOWER — *deed sufficient to release.* Where a deed of a husband is signed and acknowledged by his wife without mention of her name in the same, her signature will operate as a relinquishment of her dower, although the deed does not mention her as a grantor, or her dower in any way whatever. This depends upon the provisions of our statutes

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which are construed as giving to the signature or acknowledgment of the wife or husband such effect.

14. PRACTICE — *demurrer by several defendants to a bill — good as to some and bad as to others.* Where there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good and be allowed as to one of the defendants, and be bad and disallowed as to the other defendants, as the defense may be good as to one person and be wholly inapplicable to another.

APPEAL from the Superior Court of Cook county; the Hon. H. M. SHEPARD, Judge, presiding.

The original bill in this case was filed in the Superior Court of Cook County on November 21, 1889, by Resin Lancaster against the appellees for the specific performance of the following contract: "This memorandum witnesseth, that George W. Roberts * * * hereby agrees to sell, and Resin Lancaster * * * hereby agrees to purchase at the price of $15,500.00 * * * Lot * * 2, etc * * * known as No. 1230 Wabash Avenue, Chicago, etc. * * * subject to (1) existing leases expiring, the purchaser to be entitled to the rents, if any, from the time of delivery of deed. (2) All taxes and assessments levied after the year 1886. (3) Any unpaid special taxes or assessments levied for improvements not yet made, subject to present lease.

Said purchaser has paid $500.00 as earnest money to be applied on said purchase when consummated, and agrees to pay within five days after the title has been examined and found good, the further sum of $15,000.00, * * * provided a good and sufficient Warranty Deed conveying to said purchaser a good title to said premises (subject as aforesaid), shall then be ready for delivery.

A complete abstract of title, or merchantable copy * * * to be furnished within a reasonable time, with a continuation thereof brought down to this date. In case the title upon examination is found materially defective within ten days after said abstract is furnished, then, unless the material defects be

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cured within sixty days after written notice thereof, the said earnest money shall be refunded and this contract is to become inoperative.

Should said purchaser fail to perform this contract promptly on his part at the time and in the manner herein specified, the earnest money paid as above, shall at the option of the vendor, be forfeited as liquidated damages, including commissions payable by vendor, and this contract shall become null and void. Time is of the essence of this contract, and of all the conditions thereof.

In Testimony whereof, said parties hereto set their hands, this Twentieth day of July, A. D. 1887.

Interlined before signing.

GEORGE W. ROBERTS, [SEAL.]
NELLIE F. P. JONES, [SEAL.]
ANN AUGUSTE ROBERTS, [SEAL.]
RESIN LANCASTER, [SEAL.]"

On December 20, 1889, the defendants filed a demurrer to the bill, which was argued and sustained on August 6, 1890, and leave was then given the complainant to amend his bill. The case stood thus until November 9, 1891, when the complainant filed an amended bill, several solicitors in the meantime appearing for the defendants, and again withdrawing their appearance. The amended bill was demurred to by the three defendants, George W. Roberts, Nellie F. P. Jones, and Ann Auguste Roberts, and, the demurrer having been sustained, the complainant elected to stand by his bill, which was dismissed at his costs for want of equity. Subsequently his death was suggested, and his executors, the present appellants, were substituted as complainants.

The amended bill alleges, that on said July 20, 1887, said three defendants "being or pretending to be seized and possessed in fee simple" of said premises entered into said written agreement with the complainant for the sale of the

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same; that said agreement was signed by each and all of said defendants and by complainant, and recorded on August 2, 1887, in the recorder's office of Cook County; that said defendants therein and thereby "jointly and severally covenanted and agreed for themselves, their heirs, executors and administrators, for and in consideration of the sum of $15,500, to be paid as hereinafter mentioned, well and truly to convey by a good and sufficient warranty deed in fee simple to your orator, his heirs or assigns, the tract or parcel of land above described; and in consideration whereof your orator covenanted and agreed to pay to said defendants, their heirs, executors or administrators the said sum of $15,500," in the manner stated in said agreement, which is attached as an exhibit to the bill and made a part thereof; that on or about August 2, 1887, said defendants submitted to the complainant an abstract of title to said premises, which, upon examination, was found to be materially defective: there being still outstanding and unreleased, three incumbrances executed by said George W. Roberts, one upon said premises for $1900, dated April 19, 1883, payable in three years; one upon said premises and other property for $23,000, dated May 26, 1886, payable in five years; one upon the undivided one-half of said premises and other property for $10,000, payable on demand; and there also being a judgment for $11,163, rendered May 27, 1887, against said George W. Roberts; that complainant was ignorant of said liens when the agreement was made; that knowledge of said defects was given by complainant to said defendants in writing within ten days after said abstract was delivered to complainant, and they were requested to cure the same, but said defendants and each of them wholly neglected to cure the same or any of them, although the defendant George W. Roberts from time to time from said last mentioned date until the date of the filing of the bill herein promised to cure such defects, and solely by reason of said promises and with the hope from day to day that the same would be cured, the

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complainant delayed the filing of the bill in this cause until the 21st day of November, 1889; that orator has always been willing, able and ready to comply with the terms of said agreement on his part; that on the 2d day of August, 1887, and at divers times thereafter, he applied to said defendants and offered to pay them $15,000, on their delivering to your orator a sufficient warranty deed for the said premises according to said agreement; yet the said defendants refused and ever since have and still refuse to comply with said agreement on their part, and to convey said premises to complainant by a good and sufficient warranty deed conveying a good title subject as above set forth, although your orator is and always has been ready, willing and able to pay the said sum of $15,000, and fully perform his part of said agreement whenever they, the said defendants, will make and deliver to him a good and sufficient deed, subject as aforesaid, for the premises aforesaid, and to take such title as the defendants actually had, upon compensation being allowed to him for the difference in value of the title thus actually conveyed, and of the title agreed to be conveyed.

The prayer of the bill, after waiving the answer under oath, is that the said defendants may be decreed specifically to perform the said agreement, and to make a good and sufficient deed of conveyance to orator, he being ready, able and willing, and offering specifically to perform the agreement on his part, and upon the defendants making out a good and sufficient title to the said premises and executing a proper conveyance thereof to orator pursuant to the terms of said agreement, to pay to the defendants the residue of the said purchase money; and that in case it shall appear that the title of said George W. Roberts in and to said premises is impaired in value by reason of the existence of and lien of said incumbrances and judgment, or any or either of them, said defendants be ordered and decreed to convey to the complainant such estate and title in and to said premises as they are by this court found to have

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therein, and that the complainant be decreed to have compensation for the difference in value of the title thus actually conveyed, and of the title agreed to be conveyed; and that orator may have such other and further relief as equity may require.

Messrs. BALL, WOOD & OAKLEY, for the appellants:

Courts of equity have long since overruled the doctrine that a bond for the payment of money conditioned to be void on the conveyance of land, is to be considered a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out. The agreement between the parties in this case is clearly no alternative agreement. *Dooley* v. *Watson*, 1 Gray, 414.

A bond with a penalty to convey land will be specifically enforced against the obligor. He can not elect to pay the penalty, and it is immaterial that the purchaser is not formally bound, or has not performed, if he has offered to perform. *Gillis* v. *Hall*, 7 Phila. 422; *Fisher* v. *Shaw*, 42 Mo. 32; *Daily* v. *Litchfield*, 10 Mich. 29; *Horken* v. *Pynchon*, 8 Gray, 550.

It is the law that one who signs an instrument is presumed to know its contents, and this presumption is so strong as to be binding upon one who can not write. *Doran* v. *Mullen*, 78 Ill. 346.

Nor can one who has signed a deed or will, invalidate the same by his parol declarations. *Dickie* v. *Carter*, 42 Ill. 376, cited with approval, and followed in *Massie* v. *Huntington*, 118 Ill. 88.

Where the name of a party appears in the body of an instrument, but he did not sign the same, he is not bound. The signature to the contract is the essential thing. *Thomas* v. *Caldwell*, 50 Ill. 140; *Mears* v. *Morrison*, Breese, 223.

The name of the party to be bound may appear anywhere in the instrument. "When the name is signed at the end,

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the intention is obvious and clear that the party did so as an assent to the contract." But if the signature be found in the instrument, it is still a question of intention to be determined by an inspection of the paper. Bingham on Sale of Real Property, 428.

Even the setting down of initials may be a sufficient signature. Sugd. Vend. 116.

Under the provisions of section 1 of the act of 1869, it is clear that a married woman by joining in a deed or other writing of or relating to the sale, etc., of any lands with her husband, is concluded, as to any interest she might have in the land conveyed, including that of dower, as if she were sole.

From that time her contract in writing made jointly with her husband, for the disposition of her lands, became binding upon her, and she may be compelled to specifically perform the same. *Hogan* v. *Hogan*, 89 Ill. 430; *Edwards* v. *Schoeneman*, 104 id. 278; *Bute* v. *Kneale*, 109 id. 652; *Bradshaw* v. *Atkins*, 110 id. 323.

A glance at the authorities in our State will show that we are not to be barred by any lapse of time under the circumstances of this case. See *Hamilton* v. *Lubukee*, 51 Ill. 415; *Jackson* v. *Spink*, 59 id. 404; *Munn* v. *Burges*, 70 id. 604; *Farrar* v. *Payne*, 73 id. 82; *Rush* v. *Sherman*, 80 id. 160; *Cushman* v. *Walrod*, 83 id. 171; *Gibbons* v. *Hoag*, 95 id. 45; *Beach* v. *Dyer*, 93 id. 295; Wood on Liens, 117; *Carter* v. *Tice*, 120 Ill. 287.

Messrs. OLIVER & SHOWALTER, for the appellees:

Engagements as to title are never implied as against the vendor of land. Every such guaranty must be expressly contracted for, otherwise the purchaser takes his chance as to defects in the title. *Botsford* v. *Wilson*, 75 Ill. 136.

The contract fixes the consequences to the parties of a failure or refusal by the vendor to cure a defect of title, namely, that

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"the said earnest money shall be refunded and this contract is to become inoperative." This stipulation is for the benefit of the vendor.

The case of a person not a party to a contract subscribing his name to the same, is so far exceptional, that the only instances readily found in the books are those where married women have written their names to deeds or contracts made by their husbands. In Illinois effect is given by statute to the mere formality of subscribing and acknowledging by a wife, even in a case where the deed, on its face, would not show her to be a party to the contract. The question here is, what legal significance is imported by the fact that a person subscribes his name to a writing, when the contract expressed in said writing appears to be between other persons? That Mrs. Roberts or Mrs. Jones may or may not be married women is immaterial. They did not become parties to the contract by writing their names to the paper set forth in this amended bill, as is shown by the following citations: *Powell* v. *M. & B. M. Co.*, 3 Mason, 349; *Fowler* v. *Shearer*, 7 Mass. 14; *Lithgow* v. *Kavanagh*, 9 id. 161; *Catlin* v. *Ware*, id. 218; *Lufkin* v. *Curtis*, 13 id. 223; *Bruce* v. *Wood*, 1 Metc. 543; *Leavitt* v. *Lamphrey*, 13 Pick. 382; *Cox* v. *Wells*, 7 Blackf. 410; *Davis* v. *Bartholomew*, 3 Ind. 485; *McFarland* v. *Febiger*, 7 Ohio, 194; *Lothrop* v. *Foster*, 51 Me. 367; *Hatcher* v. *Andrews*, 5 Bush, 46–61; *Bank* v. *Rice et al.*, 4 How. 225.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

First, it is claimed on the part of the appellees, that the demurrer to the bill was properly sustained, upon the alleged ground, that the provisions of the contract described in it are not binding upon all the parties against whom it is sought to specifically enforce it. This contention is based upon the fact, that the contract does not mention or in any way refer to Nellie F. P. Jones and Ann Auguste Roberts, although it is

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signed by them. As they are not referred to in the body of the agreement, it is said that their signatures thereto are mere surplusage.

The courts have passed upon a number of cases, where the deed or contract of a husband has been signed by his wife without mention of her name in the instrument itself. It has been held in this State, that, where the wife of a grantor in a deed signs the deed with him, her dower is thereby relinquished, although the body of the deed does not describe her as a grantor, or name her or her dower in any mode whatever. (*Johnson* v. *Montgomery*, 51 Ill. 185; *Miller* v. *Shaw*, 103 Ill. 277; *Yocum* v. *Lovell*, 111 Ill. 212; *Schley* v. *Pullman Palace Car Co.*, 25 Fed. Rep. 890; *Bute* v. *Kneale*, 109 Ill. 652). The same is true of the estate of homestead as well as of the estate of dower, and of deeds where the wife is grantor and the husband signs with her without being named in the deed. (Idem.) The Illinois cases, however, depend upon particular statutory provisions, which are construed as giving to the signature or acknowledgment of the wife or husband the effect above stated. In other States it has been held, that a deed which is merely signed by a wife, but does not contain apt words of grant on her part, does not pass her dower. (*Bruce* v. *Wood*, 1 Met. 542; *Leavitt* v. *Lamprey*, 13 Pick. 382; *Lothrop* v. *Foster*, 51 Me. 367; *Cox* v. *Wells*, 7 Blackf. 410; *Davis* v. *Bartholomew*, 3 Ind. 485; *McFarland* v. *Febiger*, 7 Ohio, 337). These cases, decided in other States, were shown in *Johnson* v. *Montgomery*, *supra*, to be inapplicable under the statutes of Illinois.

But we have been referred to no authority, which discusses the effect of merely signing a deed or contract where the relation of husband and wife does not exist between the grantor or party named in the instrument, and the party signing the same but not named therein. It would seem, however, upon reason and principle, that, where a third person merely annexes his name to a contract which in the body of it does not mention

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him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature in such case can only be regarded as an expression of his assent to the act of the parties in making the contract, and may perhaps operate as an estoppel against his assertion in the future of an adverse interest in the subject-matter of the agreement. We, therefore, think that the bill misstates the effect of the signatures of Nellie F. P. Jones and Ann Auguste Roberts to the contract in alleging that they thereby agreed to sell the lot and covenanted to convey it by a good and sufficient warranty deed. The assumption, that they signed the contract as joint vendors with George W. Roberts, is no more justified by anything which appears upon the face of the instrument, than the assumption that they signed their names as joint purchasers with Lancaster.

There is a want of mutuality in the contract as between Lancaster on the one side and said Nellie and Ann on the other. The latter could not enforce the contract against the former. "Whenever * * * the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, though its execution in the latter way might in itself be free from the difficulty attending its execution in the former." (Fry on Spec. Perf.—3 ed.—sec. 440)

But, while the demurrer was properly sustained as to said Nellie and Ann, it need not necessarily have been sustained as to George W. Roberts. "Where there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good and be allowed as to one of the defendants, and be bad and disallowed as to the other defendants; for the defence may be good as to one person, and be wholly inapplicable to another." (Story's Eq. Plead., sec. 445). If, therefore, the bill is such, that the complainant was entitled to have an answer to it from George W. Roberts, it was error to sustain the demurrer as to him.

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Second, it is claimed on behalf of the appellees that the demurrer to the bill was properly sustained upon the alleged ground that the only remedy, which the purchaser named in the contract can resort to, is a suit at law for the amount of the cash deposit made at the time of the execution of the agreement. This contention is based upon that clause in the contract which provides, that "in case the title upon examination is found materially defective within ten days after said abstract is furnished, then unless the material defects be cured within sixty days after written notice thereof, the said earnest money shall be refunded and the contract is to become inoperative."

A condition in a contract of sale, by which the contract is to be void in case the vendor cannot deduce a good title, is to be taken most strongly against the vendor, because he alone is able to judge of the necessity or propriety of making the condition before he offers the property for sale. (*Greaves* v. *Wilson*, 25 Beav. 290; *Page* v. *Adams*, 4 Beav. 269). Such a condition gives an option, not to the vendor, but to the purchaser, to avoid the contract for failure to deduce a good title. (*Roberts* v. *Wyatt*, 2 Taunt. 268). In the recent case of *Hale* v. *Cravener*, 128 Ill. 408, the contract contained the following provision: "In case the abstract of title to be furnished as aforesaid does not show a good title, as herein stated, then the $500.00 this date paid thereon shall be returned to said first party, and this contract determined;" and we there held, that said provision was designed for the benefit of the purchaser and could not be taken advantage of by the vendor, because the latter was presumed to know the title, while the former did not know it. If it were otherwise, a vendor might purposely neglect to furnish a good title, and then rely upon his own default, in order to accomplish a rescission of the contract by merely returning the earnest money.

It is a familiar rule, that the vendor cannot force the purchaser to pay his money and receive a defective title. (*Wallace* v. *McLaughlin*, 57 Ill. 53; *King* v. *Knapp*, 59 N. Y.

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462; *Hepburn* v. *Auld*, 5 Cranch, 262). But the purchaser may elect to take a title which is defective. (*Harding* v. *Parshall*, 56 Ill. 219; *Hoyt* v. *Tuxbury*, 70 Ill. 331; *Hale* v. *Cravener*, *supra;* 3 Pom. Eq. Jur., sec. 1405, and cases referred to in notes).

In the case at bar, the title was found to be defective within ten days after the abstract was furnished, and notice of such defects was given to the vendor, who was allowed by the contract sixty days after such notice for the purpose of curing the defects. At the end of the sixty days the vendor, Roberts, had not cleared the title by removing the incumbrances and cancelling the judgment. Therefore, the purchaser, Lancaster, had the right at that time either to treat the contract as inoperative and demand the return of his cash payment, or to tender the balance of the purchase money and demand a deed of the premises in the exercise of his legal option to take the defective title disclosed by the abstract. There are no allegations in the bill, that he did either, but the bill alleges that Roberts promised from time to time after the lapse of the sixty days to cure the defects in the title, and that Lancaster was always ready and willing to perform his part of the contract. The bill being demurred to, these allegations must be assumed to be true. If Roberts thus promised to cure the defects and Lancaster accepted his promise to do so, there was substantially an arrangement between the parties for an extension of the time fixed by the contract for the curing of the defective title. This arrangement involved a waiver on the part of Roberts of the requirement that Lancaster should either take back the earnest money, or receive the defective title, at the expiration of the sixty days. Although time be made of the essence of the contract, yet the condition may be waived. (1 Sugden on Vendors—Perkins' 8th Am. ed.—page 417; *Dennis* v. *McCagg*, 32 Ill. 429).

The vendor here has not been in a position to compel a specific performance by the vendee. The latter could not be compelled to pay for a title clouded by encumbrances. Unless the

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vendor can sustain a bill for specific performance, he cannot rescind the contract. (*Wallace* v. *McLaughlin*, *supra*). Even if Roberts had the right to tender a deed and offer to return the earnest money, he did not do so. His failure to make such tender and offer is implied from the continued promises to cure the defects in the title, as such promises are alleged in the bill. It would be inequitable to allow the vendor to retain the earnest money, if the purchaser was ready and willing to perform and was prevented from taking steps to enforce performance against the vendor by the latter's promises to cure the defects in the title. (*Snyder* v. *Spaulding*, 57 Ill. 480).

We do not think, that the bill is demurrable because it asks for compensation or for an abatement of the amount of the encumbrances out of the purchase-money. When the answer and the testimony are before the court, it may not be possible or advisable to grant such compensation, but equity has the power to allow it. In suits by the purchaser for a specific performance where the vendor is unable to make complete title, "the general rule (for it is not universal), in all such cases is, that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate." (2 Story's Eq. Jur.—13th ed.—sec. 779; *Woodbury* v. *Luddy*, 14 Allen, 1; *Gerome* v. *Scudder*, 2 Rob. (N. Y.) 169; *Wallace* v. *McLaughlin*, *supra*; *Snyder* v. *Spaulding*, *supra*; *Lombard* v. *Chicago Sinai Congregation*, 64 Ill. 485). We are of the opinion that Lancaster was entitled to file the bill, and cannot be limited to an action at law for the earnest money.

Third, it is said that the demurrer to the bill was properly sustained upon the alleged ground that it shows *laches* upon the part of the purchaser. If it should turn out to be true when the facts are developed, that the purchaser was induced to postpone action under the contract by promises to cure the

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title made by the vendor from time to time during the period between notice of the defects and the filing of the original bill, then the purchaser was excusable for not sooner filing his bill for specific performance. While the allegations are not as full and definite as they should have been both in regard to the causes of the delay in beginning the suit and in regard to the other matters herein considered, yet we think that the bill shows sufficient ground for relief to have justified the court in overruling the demurrer as to George W. Roberts and requiring him to answer.

We cannot see that the delay in the progress of the suit after the demurrer to the original bill was overruled and leave was given to amend it, was due any more to the fault of the complainant than to the fault of the defendants. There is no specific relief asked for in the amended bill, which could not have been granted under the general prayer for relief in the original bill. The original bill, as well as the amended bill, was for the specific performance of the contract. The amended bill was in no sense a new suit, and the delay in filing it cannot be charged as *laches* under the circumstances of this case.

The decree of the Superior Court in sustaining the demurrer and dismissing the bill is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

THE PEORIA, DECATUR AND EVANSVILLE RAILWAY COMPANY

v.

W. S. RICE.

Filed at Springfield, January 18, 1893.

1. NEGLIGENCE — *degree of care required of person injured.* Where a plaintiff, through no fault of his, is suddenly placed in a position of great danger of losing his life, and exercises such care for his safety as

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ordinary care and prudence may require of one in his situation, his right of action, otherwise good, will not be defeated by the fact that it might have been possible for him to have escaped by a different course, in safety.

2. Where a plaintiff jumped from a hand-car on a bridge to the ground to avoid being run over by a train, an instruction that does not hold him to the exercise of reasonable care in selecting his means of escape, but is calculated to lead the jury to believe that the court intended to limit their inquiry to the care exercised by him in making the jump from the hand-car, would be clearly erroneous.

3. Same — *instructions construed.* An instruction in such a case, telling the jury they must believe from the evidence that the plaintiff, "while in the exercise of due care, caution and prudence, * * * was forced to jump from a hand-car," can not be held to mean less than that the plaintiff was required to show that he was exercising due care in being on the car at the time and place he was forced to jump. Its reasonable interpretation is not merely that plaintiff must have made the jump with due care, but that he was exercising due care when forced to jump.

4. An instruction that if the jury believe from the evidence that the plaintiff, while in the employ of the defendant as section foreman, and while in the performance of his duty in helping to repair a bridge, and while in the exercise of due care, etc., was forced to jump from a hand-car on such bridge to the ground to save his life, "through the neglect and wrongful acts proven of the servants of the defendant in wrongfully running a freight train," etc., is not open to the objection that it assumes the defendant was guilty. The instruction would have been better if the word "proven" had been omitted.

5. An instruction told the jury that the negligence the evidence must show in order to sustain a recovery is, "in wrongfully running a freight train upon said bridge," which is the negligence charged in the declaration. The negligence of the defendant's employés mentioned in the subsequent part of this, and the other instructions given for the plaintiff, refer to the running of the freight train. *Held*, that the instructions were not obnoxious to the charge of directing the jury that they might find the defendant liable for acts of negligence different from those alleged in the declaration, especially when an instruction for the defendant puts the burden upon the plaintiff to prove his case, as charged in the declaration.

6. Same — *relation of fellow-servants — whether it is established.* In an action by a section foreman of a railroad company for a personal injury caused by the negligence of its servants in running a freight train upon a bridge being repaired, the court instructed the jury for the plaintiff that, if, at the time of the injury, the plaintiff and the men in charge of the freight train were employed in different departments and

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were not associated with each other in the performance of their duties, but were wholly separated and disconnected from each other in the performance of their duties, they were not fellow-servants. *Held*, that the instruction was proper.

7. The fact that a section foreman engaged in the repair of a railway bridge has the right to flag a freight train approaching such bridge, and it is the duty of the engineer to obey the signal, in no way tends to establish the relation of fellow-servant between them.

8. PRACTICE — *personal injury case — ordering plaintiff to submit to a physical examination.* There is no error in refusing to order the plaintiff, in an action for a personal injury, to submit to a physical examination by the defendant's physician to ascertain the extent of the injury. The court has no power to require the injured party to submit to a personal examination against his will.

APPEAL from the Appellate Court for the Third District; — heard in that court on appeal from the Circuit Court of Logan county; the Hon. LYMAN LACEY, Judge, presiding.

Messrs. STEVENS & HORTON, and Messrs. BLINN & HOBLET, for the appellant:

If the plaintiff's negligence contributes materially to the injury, he can not recover, and it is immaterial whether or not it applies to the force causing the injury. *G. & C. R. R. Co.* v. *Fay*, 16 Ill. 558; *I. C. R. R. Co.* v. *Buckner*, 28 id. 299; *C. & A. R. R. Co.* v. *Becker*, 76 id. 25; *Abend* v. *T. H. & I. R. R. Co.*, 111 id. 202; *C. & A. R. R. Co.* v. *Jacobs*, 63 id. 180; *T. W. & W. R. R. Co.* v. *Jones*, 76 id. 317.

As to the power and duty of the court to order the plaintiff to submit to a personal examination by medical experts. *Parker* v. *Enslow*, 102 Ill. 272; *C. & E. I. R. R. Co.* v. *Holland*, 18 Bradw. 418; *Freeport* v. *Isbell*, 93 Ill. 386; *White* v. *Milwaukee City Ry. Co.*, 61 Wis. 536; *A., T. & S. F. R. R. Co.* v. *Thul*, 29 Kan. 466; *R. & D. Railroad* v. *Childress* (Ga.), 41 A. & E. 216; *Schroeder* v. *C., R. I. & P.*, 47 Iowa, 375; *Hatfield* v. *St. P. & D. R. R.*, 33 Minn. 130; *A. G. S. R. R. Co.* v. *Hill* (Ala.), 44 A. & E. 441.

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Brief for the Appellee. Opinion of the Court.

Mr. A. G. Jones and Messrs. Beach & Hodnett, for the appellee:

Whether the plaintiff and those in charge of the train were fellow-servants is a question of fact, settled conclusively by the affirmance. *I. & St. L. R. R. Co.* v. *Morgenstern*, 106 Ill. 216; *C. & N. W. Ry.* v. *Moranda*, 108 id. 576.

As to the power and duty of the court to require a party to submit to an examination of his person. *White* v. *R. R. Co.*, 61 Wis. 536; *Ry. Co.* v. *Thul*, 29 Kan. 466; *Schroeder* v. *Ry. Co.*, 47 Iowa, 375.

That no such power exists independent of statute: *Stuart* v. *Havens*, 17 Neb. 211; *R. R. Co.* v. *Finlayson*, 16 id. 578; *Parker* v. *Enslow*, 102 Ill. 273; *Neuman* v. *R. R. Co.*, 50 N. Y. Superior, 412; *Roberts* v. *R. R. Co.*, 29 Hun, 154; *Hess* v. *Lowrey*, 122 Ind. 225.

Appellee and the servants of appellant engaged in running the freight train were not fellow-servants. *C. & A. R. R. Co.* v. *Kelly*, 127 Ill. 637; *C. & N. W. Ry.* v. *Moranda*, 93 id. 302; *C. & A. R. R. Co.* v. *Shannon*, 43 id. 338; *C. & N. W. Ry.* v. *Swett*, 45 id. 194; *C. & N. W. Ry. Co.* v. *Jackson*, 55 id. 492; *Ryan* v. *C. & N. W. Ry.*, 60 id. 171; *C. & N. W. Ry.* v. *Taylor*, 69 id. 461; *I. C. R. R. Co.* v. *Patterson*, 69 id. 650; *T. W. & W. Ry Co.* v. *Fredericks*, 71 id. 294; *P., Ft. W. & Ch. Ry. Co.* v. *Powers*, 74 id. 34; *Rolling Mill Co.* v. *Johnson*, 114 id. 57.

Imprudent conduct for sudden fright is chargeable to the wrong doer. *Collins* v. *Davidson*, 19 Fed. Rep. 83; *Stokes* v. *Staltonstall*, 13 Pet. 189; *C., R. I. & P. Ry. Co.* v. *Dignan*, 56 Ill. 487; *Galena & C. U. R. R. Co.* v. *Yarwood*, 17 id. 509.

Mr. Justice Wilkin delivered the opinion of the Court:

This was an action on the case, by appellee against appellant, for a personal injury alleged to have been received through the negligence of its employés. The case was tried in the

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Circuit Court of Logan county, and a verdict returned for the plaintiff for $8000. On a motion for a new trial by the defendant, the court required the plaintiff to enter a remittitur for $3000, and upon his doing so, overruled the motion and entered judgment on the verdict for $5000 and costs of suit. To this ruling the defendant excepted and appealed to the Appellate Court of the Third District. That court having affirmed the judgment of the Circuit Court, this appeal is prosecuted.

The substantial questions raised on the record, open to re-examination in this court (being questions of law only), are: Did the trial court err in refusing to order the plaintiff to submit to a physical examination by medical experts, as to the nature and extent of his alleged injuries? Was the jury erroneously instructed as to the law of the case, on behalf of the plaintiff? And, did the trial court err in refusing instructions asked on behalf of the defendant?

The record shows that at the close of the plaintiff's evidence in chief, counsel for the defendant requested the court to order the plaintiff to submit to an examination, by four physicians named, "for the purpose of ascertaining whether he is now in the condition to which he testified, that is, permanently ruptured upon both sides."

This motion was overruled and the defendant excepted. The motion was not even supported by the statement of counsel, much less an affidavit or other proof that such an examination was necessary to a full and fair trial of the case.

The extent to which courts have gone, sustaining the power to compel such examinations is, that such orders may be made, in the sound legal discretion of the trial court, when it appears that such an examination is reasonably necessary to the attainment of justice. This motion might, therefore, have been very properly overruled upon the authorities cited by appellant, upon the ground that no occasion for the examination was shown. Especially so since the plaintiff had previously undergone an

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examination by the defendant's principal surgeon at Evansville, at defendant's request, and also submitted to an examination by two physicians of its selection, under an order of court made at a former term. It certainly will not be contended that a plaintiff may be compelled to submit his person to an examination by physicians as often as his case may be called for trial, without any showing whatever as to the necessity therefor.

But the ruling in this case was placed upon the broad ground that the court had no power to grant the motion, and this court is committed to that doctrine. We do not think injustice is likely to result to a defendant by a refusal to make such an order, especially when given the full benefit of the fact that the plaintiff has refused to submit voluntarily thereto, as was done in this case, both by evidence and instructions to the jury. The contrary rule would often operate harshly upon the plaintiff, result in embarrassment to the court in trying cases, and be very liable to abuse. Rules of practice must be laid down, not with reference to a single case, but to be applied generally, and we entertain no doubt that our conclusion heretofore announced on this subject is the better and safer practice. The motion was properly overruled. *Parker* v. *Enslow*, 102 Ill. 273; *Joliet St. Ry. Co.* v. *Call*, 143 id. 177. See *Roberts* v. *R. R. Co.*, 29 Hun, 154; *Penn. Co.* v. *Newmyer*, 129 N. Y. 50; *McQueyan* v. *Delaware, L. & W. R. Co.*, 129 Ind. 401; *Ry. Co.* v. *Botsford*, 11 U. S. 1000; *R. R. Co.* v. *Finlayson*, 16 Neb. 578; *Stuart* v. *Havens*, 17 id. 211.

Four instructions were given at the request of the plaintiff. The first, second, and third of these are condemned by counsel for appellant, as being erroneous, and calculated to mislead the jury to the prejudice of the defendant below. The first is in the following language:

1. "The court instructs the jury that if they believe from the evidence that the plaintiff while in the employ of the defendant as section foreman on the 29th day of April, 1890,

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while in the performance of his duty in helping to repair a bridge over Salt Creek on the line of defendant's road, and while in the exercise of due care, caution and prudence, if it has been proven that he was exercising due care, caution and prudence was forced to jump from a hand-car on said bridge to the ground below to save his life or prevent great bodily injury, through the negligent and wrongful acts proven, of servants of the defendant, in wrongfully running a freight train of the defendant down to and upon said bridge, if the evidence shows that they did so wrongfully run the said train; and if the jury further believe from the evidence that in making such jump the plaintiff was in the exercise of reasonable care, caution and prudence for his own safety, under all the circumstances shown by the evidence and that plaintiff was thereby injured, and if you further believe from the evidence, that such injury was caused by the negligent and wrongful acts of the employés of defendant in charge of said freight train, then the jury should find the issues for the plaintiff and assess his damages at such sum as the jury may believe from the evidence he sustained, provided the jury further believe from the evidence that the employés of the defendant, in charge of and operating said freight train at the time of such injury, and the plaintiff were not fellow-servants of the defendant engaged in the same grade or line of employment, as explained in these instructions."

As to the circumstances under which the alleged injury occurred, there was no substantial conflict at the trial. Plaintiff was one of the section foremen on defendant's road. His section included "Salt Creek" bridge. Two men worked under him on the section. On the day of the accident, he and his men and two bridge carpenters were engaged in repairing said bridge. One of the section men was sent by plaintiff to flag a freight train, which was liable to pass before the work could be completed. The engineer failed to observe the flag, and was approaching the bridge at a considerable rate of speed

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with his train, while plaintiff and the other three men were still at work. Plaintiff, and two of those men got on a hand-car, on which they had taken out material, and tools, and attempted to run it to the end of the bridge ahead of the approaching train, but before they reached it, the plaintiff jumped from the hand-car to the ground several feet below, and as he claims received the injuries for which he sues. The other two men left the hand-car from the opposite side, and were not injured. The fourth man remained at the place where the work was being done, and climbed down the side of the bridge without injury. The theory of the plaintiff is that he was in the exercise of ordinary care in attempting to get out of the way of the train upon the hand-car, and was compelled to jump in order to escape being run over. Appellant on the other hand insisted that he was himself negligent, in not leaving the bridge immediately upon discovering the approaching train, without attempting to remove the hand-car — in not getting upon the cap of the bridge until the train passed, or climbing to the ground as did the fourth man.

One of the objections urged to the foregoing instruction is that it does not hold the plaintiff to the exercise of reasonable care in selecting his means of escape, but was calculated to lead the jury to believe that the court intended to limit their inquiry to the care exercised by him in making the *jump* from the hand-car. The instruction so understood would unquestionably be erroneous, but we do not think it is fairly susceptible of that construction. The jury are told that they must believe from the evidence that the plaintiff "*while in the exercise of due care, caution and prudence* * * * * was forced to jump from a hand-car," etc. We can not think a jury would, under the evidence in this record, understand that language to mean less than that plaintiff was required to show, that he was exercising due care in being on the car at the time and place he was forced to jump. The reasonable interpretation of the language is not, merely, that plaintiff must have made

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the leap with due care, but that he was exercising that degree of care when "forced to jump." But even if it could be fairly said that the jury might, in the absence of instructions to the contrary, have given it the construction contended for by counsel for the appellant, still by two of those given at the instance of the defendant, they were told that if, by the exercise of reasonable care, plaintiff could have left the bridge in safety, without going on the hand-car, it was his duty to do so, and he could not recover.

It is again insisted that, by the language "through the negligent and wrongful acts proved of servants of the defendant, in wrongfully running a freight train," etc., the instruction assumes that the defendant was guilty of negligence. The instruction would have been complete, and in better language, if the word proven had been omitted, but in view of that which follows, the jury could not have understood that word to mean that the plaintiff was relieved of the burden of proving the negligence of the defendant. But it is further urged that this and each of the other instructions given on behalf of the plaintiff, allowed him to recover, if he was injured through the negligence of the employés of the defendant, whether such negligence was charged in the declaration or not. The negligence which the jury is told by this instruction the evidence must show is, "in wrongfully running a freight train of the defendant down to and upon said bridge," and that is the negligence charged in the declaration. The negligence of the employés of the defendant, mentioned in the subsequent part of this instruction, and in the others given on behalf of the plaintiff, refer to the running of said freight train. Certainly it can not be seriously contended that these instructions directed the jury that they might find the defendant liable for acts of negligence different from those alleged in the declaration, as was the case in *W., St. L. & P. Ry. Co.* v. *Coble*, 113 Ill. 115, nor that they call the attention of the jury to acts of care required by the law, of employés of the defendant in the run-

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ning of said freight train, which were not mentioned in the declaration, as in *C. & A. R. R. Co.* v. *Bragonier*, 119 Ill. 51. We are at a loss to see how a jury could, under either of these instructions, feel authorized to return a verdict against the defendant, on account of negligence not in issue in the case. Moreover the first instruction given on behalf of the defendant put the burden upon the plaintiff to prove his case as charged in the declaration.

The second and third of plaintiff's instructions purport to inform the jury what facts are necessary, under the law of this State, to render employés of a common master fellow-servants. The second is conceded to be in conformity with the decision of this court in the *Moranda* case, 93 Ill. 302, but it is insisted that it is inapplicable to this case. This contention seems to be based upon the assumption that the fact that plaintiff was seeking to control the trainmen through a flagman, and that the negligence complained of is the failure to observe the signals, tended to show that plaintiff and those in charge of the train were, at the time, co-operating with each other and, therefore, fellow-servants, within the rule that exempts the common master. If that position could be maintained, all employés of one employer would be fellow servants within that rule, whenever it could be shown that, one was at the time of an injury, attempting to prevent another from committing it. The fact that plaintiff had a right to flag the freight train, and that it was the duty of the engineer to obey the signal, in no way tended to establish the relation of fellow-servants between them.

The third instruction given on behalf of plaintiff, in effect, told the jury that if, at the time of the alleged injury, plaintiff and the men in charge of the freight train were employed in different departments, and were not associated with each other, in the performance of their duties, but were wholly separated and disconnected from each other in the performance of their duties, they were not fellow-servants. It is said: "The

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jury would naturally infer from the instruction that, an employé in the track department could not be a fellow-servant with one in the operating department, for the simple reason that they belonged to, or worked in, different departments." We do not so understand the instruction. By its express language, it was not enough that the parties named worked in different departments of labor, but they must also have been so employed, as not to be associated with each other in the performance of their duties, but "*wholly separated and disconnected*" in the performance thereof.

We find no substantial error in the instructions given on behalf of the plaintiff.

Thirteen instructions were asked by the defendant, nine of which were given, the last being only as to the form of the verdict, in case the finding was for the defendant. Three of those which were refused, counsel for appellant insist should have been given. They each attempt to lay down the law as to the diligence plaintiff was required to exercise in order to entitle him to recover.

That ground was fairly covered by those given. But these were properly refused because they did not correctly state the law applicable to the case. The first two (numbered 10 and 11) make the plaintiff's right of recovery depend, not upon the exercise of due care on his part in selecting a means of escape, but upon the infallibility of his judgment in making that selection.

The fact that it was possible for plaintiff to escape from the bridge in safety would not defeat his right of recovery if he made a good case in other respects. His failure to exercise reasonable care and prudence in doing so would. The jury was instructed as favorably to defendant on this branch of the case as it had a right to ask, or the law would justify.

The third refused instruction (numbered 13) was also properly refused upon the ground that it had no proper application to the case. There is nothing in the record tending to show

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that plaintiff adopted the means of escape pursued by him in preference to others, because of an "advantage supposed to be offered thereby" to himself.

Other grounds of reversal urged by counsel are in our opinion untenable.

We have carefully considered the errors assigned upon this record so far as they are cognizable in this court, and are of the opinion that the judgment of the Appellate Court should be affirmed.

Judgment affirmed.

MALCOM McNEIL *et al.*

v.

THE SHOBER AND CARQUEVILLE LITHOGRAPHING COMPANY.

Filed at Ottawa, January 19, 1893.

1. PROMISSORY NOTE — *signed by president and treasurer of a corporation.* A promissory note signed "Malcom McNeil, President World's Pastime Exposition Company, Albert F. Dexter, Treasurer," is *prima facie* the note of McNeil and Dexter.

2. ERROR WILL NOT ALWAYS REVERSE — *error committed at the instance of the party complaining.* This court will not determine the admissibility of evidence introduced on the trial or the correctness of the rulings in the submission of the case, when the holding is as favorable to the party complaining as he asked, or could ask under the most liberal of the adjudged cases, and which, if error, was made at his instance.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. S. P. McCONNELL, Judge, presiding.

Messrs. BALL, WOOD & OAKLEY, for the appellants:

The defendants are not liable for this debt, and parol evidence is admissible to show whose note it was that was sued on. *La Salle Nat. Bank* v. *Tolu*, 14 App. 141; *Mechanics'*

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Bank v. *Bank of Columbia*, 5 Wheat. 326; *Baldwin* v. *Bank of Newberry*, 1 Wall. 234; *Broadway* v. *Allen*, 17 Wend. 40; *King* v. *Davis*, 21 N. J. L. 683; *Hale* v. *Pierce*, 32 Md. 327; *Richmond* v. *Snead*, 19 Gratt. 354; *Lazarus* v. *Shearer*, 2 Ala. (N. S.) 718; *Owings* v. *Grubbs*, 6 J. J. Marsh. 31; *McClellan* v. *Reynold*, 19 Mo. 312; *Hardy* v. *Pilcher*, 57 Miss. 17; *Hogan* v. *Rice*, 4 Col. 90; *Hoveny* v. *Mayill*, 6 Conn. 680; *Mason* v. *Chandler*, 9 Mass. 337; *Neill* v. *Spencer*, 5 App. 473; *Western Union* v. *Smith*, 75 Ill. 496; *Bowles* v. *Lambert*, 54 id. 237; *Stookey* v. *Hughes*, 18 id. 55; *Scanlan* v. *Keith*, 102 id. 634.

Mr. Israel Cowen, for the appellee:

That such a note is the personal note of the signers, see *Sturdivant* v. *Hill*, 59 Me. 172; *Tucker Manuf. Co.* v. *Fairbanks*, 98 Mass. 101; *Savage* v. *Rix*, 9 N. H. 263; *Bank* v. *Hooper*, 6 Gray, 567; *Trustees, etc.* v. *Rautenberg*, 88 Ill. 219; *Powers* v. *Briggs*, 78 id. 493; *Stobie* v. *Dills*, 62 id. 433; Story on Bills, sec. 76; Daniels on Neg. Instr. secs. 301 and 305; *Fiske* v. *Eldridge*, 12 Gray, 474; *Seaver* v. *Coburn*, 10 Cush. 324.

The court should bear in mind that there are numerous authorities to the effect that the question is not as to what parties intended to do by their act of signing, but what they actually did, and that extrinsic evidence is not permissible to change the effect of their acts, as witness the following authorities: *Stackpole* v. *Arnold*, 11 Mass. 27; *Stobie* v. *Dills*, 62 Ill. 433; Daniels on Neg. Instr. sec. 305.

Mr. Justice Shope delivered the opinion of the Court:

The World's Pastime Exposition Company, an Illinois corporation, of which appellants were respectively president and treasurer, became indebted to appellee, and in settlement of the account, which was receipted, the following note was executed and delivered:

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"Chicago, *July* 6, 1886.

"$1546.35. On August 1st, without grace, after date we promise to pay to the order of Shober & Carqueville Lithographing Company, one thousand five hundred forty-six and thirty-five one-hundredths dollars, at our office 307 Opera House Bl'k.

"Malcom McNeil, *President World's Pastime Exposition Company.*

"Albert F. Dexter, *Treas.*"

Suit was brought against McNeil and Dexter, upon said note, resulting in verdict and judgment against them personally. On appeal, the Appellate Court affirmed the judgment, and the defendants below prosecute this further appeal. The issue in the trial court was, whether McNeil and Dexter were individually liable, or whether the promissory note was in fact the note of the corporation, the Pastime Company. No question of law is presented for our determination. The trial court, following *Scanlan* v. *Keith*, 102 Ill. 634, and *Lasalle Nat. Bank* v. *Tolu*, 14 Ill. App. 141, and cases holding the same doctrine, permitted appellants to show that the note was given for a debt of the corporation, and to give in evidence all of the attending facts and circumstances having any tendency to establish that it was the intention of the parties, and of the makers of the note, that it should be the note of the corporation, and that it was not intended to create personal liability. And the court, while holding correctly that, *prima facie*, it was the note of McNeil and Dexter, submitted the question of fact to the jury, whether they intended to give their individual note, or to execute a note for and on behalf of the corporation only. It is wholly unnecessary to determine the admissibility of this evidence, or the correctness of the rulings in the submission of the case, for the reason that the holding was as favorable to appellants as they asked, or could ask under the most liberal of the adjudged cases, and if error was committed

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it was at their instance, and in their favor. Counsel do not question the correctness of any ruling of the trial court, other than that of overruling the motion for new trial. It is insisted that, upon the facts shown, that motion should have been sustained. This presents a question of fact, properly presentable to the Appellate Court, but which we, by the statute, are prohibited from determining.

We find no error of law in this record, and the judgment of Appellate Court will be affirmed.

Judgment affirmed.

JOHN EVANS CORNELL

v.

GEORGE NEWKIRK *et al.*

Filed at Ottawa, January 19, 1893.

1. MORTGAGE WITH POWER OF SALE — *publication of notice — statutory requirements.* The statute (R. S., chap. 95, sec. 14) requiring notice of sale under a power in mortgages and deeds of trust, to be published once in each week for four successive weeks, controls the mortgagee in giving notice, although the mortgagor may have provided for a different notice by the terms of the mortgage.

2. A mortgage, to secure a debt, provided for a sale in default of payment, after the publication of thirty days' notice thereof in a newspaper, etc. The statute in force at the time of the sale required the notice should be given by publication once in each week for four successive weeks. The notice of the sale was published thirty days before the sale, but only once. *Held*, that while the provision of the statute was not complied with, the failure to comply with the statute did not render the sale void, but only voidable.

3. SAME — *legislative power to require notice.* In the absence of any statute on the subject, the mortgagee could only be required to give such notice of a sale, on default of payment, as may be prescribed by the terms of the mortgage. But the legislature has the right to determine by statute that mortgaged lands shall not be sold by a mortgagee or trustee in any case, unless a decree of sale shall be entered in some competent court, and having such power it may authorize a sale without a decree,

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upon such terms and conditions and upon such notice as it may deem best. And such statutory regulation of sales and powers will control the stipulations of the parties.

4. SAME — *irregularity of sale thereunder — right of mortgagor to affirm or avoid sale.* Where an irregularity occurs in the sale of mortgaged premises under a power in a mortgage or deed of trust, which does not render the proceeding void, but only voidable, the mortgagor will have the right to affirm the sale or set it aside by instituting proceedings for that purpose in apt time.

5. SAME — *defective notice of sale thereunder — laches of mortgagor.* Where land was sold by a trustee under a power of sale upon a defective notice, and the mortgagor abandoned all claim to the premises for over four years and paid no taxes, and finally made a deed without consideration, and the purchaser had made valuable improvements on the property before any bill was filed to set aside the sale, it was held that the *laches* of the mortgagor and his grantee were such as to bar the equitable relief sought.

6. EVIDENCE — *declarations of mortgagor — showing acquiescence in sale under a mortgage.* In such case the declarations of the mortgagor before he made a conveyance of the property, that he claimed no title, and the fact that he executed his deed without consideration, were held proper evidence to be considered in determining the question whether he had acquiesced in the sale.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Mr. F. B. DYCHE, for the appellant:

A sale under a power in a mortgage is void when the notice required by the law is not given. Jones on Mortgages, sec. 1927; *Lawrence* v. *Farmers' Loan and Trust Co.*, 13 N. Y. 200; *Shillaber* v. *Robinson*, 97 U. S. 68; *Bilger* v. *Walker*, 14 Wall. 302; *Thompson* v. *Coms.*, 79 N. Y. 45; *Webb* v. *Hoeffer*, 53 Md. 187; *Denning* v. *Smith*, 3 Johns. Ch. 343; *Lee* v. *Mason*, 10 Mich. 403; *Van Slyke* v. *Sheldon*, 9 Barb. 278; *Sherwood* v. *Reade*, 7 Hill, 431; *Doyle* v. *Howard*, 16 Mich. 261; *Williamson* v. *Doe*, 7 Blackf. 12.

The sale in the attempted foreclosure being void, the mortgagee and his assigns had twenty years in which to redeem.

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Jones on Mortgages, secs. 1144, 1145; *Locke* v. *Caldwell*, 91 Ill. 417; *Hallesy* v. *Jackson*, 66 id. 139; *Morgan* v. *Morgan*, 10 Ga. 300; *Moore* v. *Cable*, 1 Johns. Ch. 386; *Slicer* v. *Bank, etc.*, 16 How. 571; *Howland* v. *Shurtleff*, 2 Met. 26; *Robinson* v. *Fife*, 3 Ohio St. 551; *Ayres* v. *White*, 10 Cush. 72.

Mr. JEREMIAH LEAMING, for the appellees:

The sale was not void, but if it was, appellant is barred from redemption by the statute of limitations of ten years. Starr & Curtis' Statutes, chap. 83, secs. 10 and 11.

If the sale and conveyance of July 8, 1886, be voidable on the ground of irregularity, the appellant has been guilty of *laches*, in his application to redeem. He has not been prompt, eager and diligent, but has awaited the changes in the market before taking action. The property has greatly enhanced in value. *Hamilton* v. *Lubukee et al.*, 51 Ill. 415; *Munn* v. *Burges et al.*, 70 id. 604; *Bush* v. *Sherman*, 80 id. 160; *McHany* v. *Schenck*, 88 id. 357; *Jenkins, assignee*, v. *Pierce*, 98 id. 646; *Hoyt* v. *Pawtucket Institution*, 110 id. 390; *Irish* v. *Antioch College*, 126 id. 481.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill brought by John Evans Cornell against George Newkirk and others, to set aside a mortgage sale of certain lots in Cornell, Cook county, described in the bill, and to redeem the premises from a mortgage. The defendants answered the bill, and replications having been filed to the answers, the cause proceeded to a hearing on the pleadings and evidence, and the court entered a decree dismissing the bill, which, on appeal, was affirmed in the Appellate Court. As to the main facts in the case there is no substantial dispute between the parties. The facts, or those deemed material to a proper understanding of the case, may be briefly stated as follows:

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On February 11, 1876, Paul Cornell, being the owner, conveyed by warranty deed, to Edward F. Adams, lots 37 to 39, inclusive, in block 70, lots 18, 19 and 27 to 36, inclusive, in block 71, Cornell, in sections 26 and 35 T. 38 N., R. 14, E. 3d P. M. Adams, to secure the purchase money, at the same time gave back to Cornell a mortgage with power of sale of same date, securing his two notes for $1300 each, with eight per cent annual interest, payable annually, notes payable in one and two years respectively from date, to the order of Cornell. Cornell, by deed of assignment on February 26, 1876, assigned said mortgage and indorsed said notes, and delivered said notes and mortgage to Amos M. Moore. Moore held the notes and mortgage as collateral security for a debt due from Cornell to George Newkirk. Adams paid nothing on the notes, neither interest or principal, nor did he pay any taxes after the execution of the mortgage. On account of Adams' default of payment, on the 4th day of June, 1886, under a power of sale contained in the mortgage, Moore published a notice in the Chicago Daily Evening Journal, a newspaper published in Chicago, that under and by virtue of the power contained in the mortgage, he would, at a place therein specified, on the 8th day of July, 1886, sell the premises at public vendue, for the purpose of paying the mortgage indebtedness. At the time and place stated in the notice, the trustee Moore sold the premises to George Newkirk, for the sum of $4720, the amount due on the notes and mortgage, and upon making the sale, the trustee cancelled the notes and mortgage, and executed and delivered to the purchaser a deed of the premises, which was placed on record July 15, same month sale was made. In 1875, all of the property had been sold for taxes and purchased by Briggs, who obtained a tax deed in 1878. In November, 1878, Briggs conveyed to South Park commissioners, and August 4, 1880, the commissioners conveyed to Newkirk. It also appears that in 1878 Newkirk paid all taxes on the property, including forfeitures from 1873, and since his pur-

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chase under the mortgage he has made lasting and valuable improvements.

In 1878 Adams left this State and became a resident of San Francisco, Cal., and, so far as appears, abandoned all claim to the property. On the 23d day of September, 1890, John Evans Cornell obtained a quitclaim deed from Adams which Adams testified was executed without consideration, but the complainant testified that he left one dollar as a consideration with the agent of Adams, to be forwarded to him. After obtaining the deed and on the 23d day of October, 1890, this bill was filed.

It is first insisted by the appellant that the sale under the mortgage was void, on account of the insufficiency of the notice. The clause in the mortgage providing for notice of sale is as follows: "After publishing a notice in a newspaper printed in the city of Chicago, Illinois, thirty days before the day of sale, may sell, etc." The deed executed by the mortgagee contained a recital of the notice conceded to be correct, as follows: "In pursuance of said power of sale, in said mortgage contained and above recited, and of the statute in such case made and provided, I, the undersigned, Amos M. Moore, party of the first part, on the 4th day of June, A. D. 1886, caused due notice to be published in the Chicago Evening Journal, a newspaper published in said city of Chicago, that said premises hereinafter described would, on the 8th day of July, A. D. 1886, at the hour of one o'clock in the afternoon of said day, be sold," etc.

It thus appears that the notice given by the mortgagee complied fully with the requirement contained in the mortgage, but reliance is placed in section 14, chapter 95, of our statute to establish the insufficiency of the notice. The first clause of this section requires at least thirty days' previous notice of such intended sale shall be given whether so specified in the power of sale or not. The second sentence states what shall be sufficient for such notice to contain, and prohibits a sale except in the county in which the premises are situated. The next sentence

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is as follows: "The notice shall be given by publication once in each week for four successive weeks, in some newspaper or other paper authorized by law to publish legal notices published in the county or counties where the premises are situated; * * * but in no case shall a notice be given for a shorter time than is required by the mortgage or deed of trust."

We are inclined to the opinion that the statute requiring the notice to be published once in each week, for four successive weeks, should control the mortgagee in giving notice, although the mortgagor had provided for a different notice by the terms of the mortgage. Had there been no statute on the subject the mortgagee could only be required to give such notice of the sale as was prescribed by the terms of the mortgage, but the legislature had the right to determine by statute that mortgaged lands should not be sold by a mortgagee or trustee in any case, unless a decree of sale had been entered in a court of competent jurisdiction, and having this power, the legislature might authorize a sale without a decree upon such terms and conditions and upon such notice being given as in its wisdom it might think for the best interest of all parties concerned. But while the mortgagee was required by the statute to publish a notice of sale for four successive weeks, and while this provision of the statute was not complied with, the failure to give such notice did not render the sale void but only voidable. The main object of a notice was to apprise the public that the property would be sold at a given time and place, so that it might bring a fair price. Here more than thirty days' notice was given and the property was not sacrificed but sold for its full value. All the notice was given that the mortgagor required by his contract should be given. So far as appears he was in no manner injured by the failure of the mortgagee to give the notice required by statute. After the property was sold, the mortgagor had the right to affirm the sale or set it aside by instituting proceedings for that purpose in apt time. Where irregularities in a sale have occurred the

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mortgagor, as all the authorities agree, must proceed in apt time; if he is guilty of *laches*, his *laches* will be a bar to relief.

In *Bush* v. *Sherman*, 80 Ill. 160, in discussing this subject the court said: "The principle that lies at the foundation of all the cases in this court upon this subject is, the party who challenges a sale on account of irregularities that may have intervened, must be diligent in discovering that which he alleges will avoid the sale, and diligent in his application for relief."

The principle announced in the *Bush* case has been recognized and approved in many other cases in this court. *Hoyt* v. *Pawtucket Ins. Co.*, 110 Ill. 399; *Speck* v. *Pullman Co.*, 121 id. 60; *McHany* v. *Schenk*, 88 id. 365; *Fitch* v. *Willard*, 73 id. 107; *Estes* v. *Furlong*, 59 id. 302; *Hamilton* v. *Lubukee*, 51 id. 420; *Sloan* v. *Graham*, 85 id. 30; *Williams* v. *Rhodes*, 81 id. 571; *Breit* v. *Yeaton*, 101 id. 242; *Munn* v. *Burges*, 70 id. 64; *Dempster* v. *West*, 69 id. 613; *Maher* v. *Farwell*, 97 id. 56; *McDonald* v. *Stow*, 109 id. 40; *Nichols* v. *Otto*, 132 id. 91.

It will be remembered that the sale in question took place on July 8, 1886, and, so far as appears, the mortgagor Adams never interposed any objection whatever to the sale, he paid no taxes and set up no claim to the property, but the purchaser advanced quite a large sum of money to clear the property of taxes, and made improvements, and made sales of a portion of the lots, relying on the title obtained at the mortgage sale. From July, 1886, to October, 1890, a period of four years and three months, the sale was allowed to stand without objection from any quarter. Not a single word of objection was heard until the property began to increase in value, then the complainant, on September 23, 1890, procured a quitclaim deed from Adams without consideration, and in the month of October following, filed his bill to vacate the sale. These facts, in our opinion, establish such inexcusable *laches* of the mortgagor and his grantee as will preclude a recovery. It may be true that the purchaser under the mortgage sale has no right to inquire

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whether the complainant paid an adequate consideration for his deed obtained of Adams. But the declarations of Adams before he executed the deed, that he claimed no title, and the fact that he executed a deed without consideration, are facts proper to be considered in the determination of the question whether he had acquiesced in the sale. We think the judgment of the Appellate Court correct and it will be affirmed.

Judgment affirmed.

MADS C. MONSON *et al.*

v.

ANTON KILL.

Filed at Ottawa, January 19, 1893.

1. AGENT'S AUTHORITY — *must be strictly pursued.* The owner of land gave a real estate broker written authority to sell the same within six months for $12,000, one-half to paid be in cash, and the balance in one, two and three years with six per cent interest, payable annually, secured by notes and mortgage on the property. The agent made a contract of sale which recited that the purchaser had paid $500 purchase money to be applied on the purchase when consummated, and had agreed to pay within ninety days after the title had been examined and found good, the further sum of $5500, and to pay the balance in three equal installments of $2000, due separately on or before one, two and three years after the date of the contract, and stipulating that the notes should provide that payments might be made on or before the time named in the notes, with six per cent interest, etc. *Held*, that the authority to sell for one-half cash in hand was in no sense complied with by a sale on ninety days' time, and that the authority to sell and make the balance over and above the cash payment payable in one, two and three years, did not authorize the making of a contract that such payments might be made on or before such times, at the option of the purchaser.

2. A written authority to an agent to sell land of his principal within six months for a fixed net price, one-half to be paid in cash and the balance in one, two and three years, with six per cent interest, payable annually, secured by notes and mortgage on the property, is not complied with by a sale on ninety days' time. In such case the authority to

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sell is special and limited, and the purchaser will be required to know that the authority must be strictly pursued.

3. CLOUD ON TITLE — *contract for sale of land — by an agent — in excess of his authority.* The record of a contract for the sale of land made by an agent not in pursuance of his authority, or in excess thereof, being such as to interfere with the sale by the principal, will be treated in equity as a cloud upon the title of the latter and set aside.

4. SAME — *bill to remove — must allege possession or that the land is unoccupied.* A bill seeking to remove a cloud upon the title to land is defective if it fails to allege that the complainant is in the possession of the land, or that he claims to be the owner thereof, and that it is unimproved and unoccupied, and is subject to a special demurrer.

5. SAME — *waiver of defects in bill to remove.* If the complainant in a bill to remove a cloud on title is in the possession of the land at the time of filing the bill, that fact should be alleged. But if the defendant fails to demur specially for that cause, and answers and proceeds to hearing without objection, he will waive the defect in the bill.

6. CHANCERY — *decree nunc pro tunc.* There is no error in entering a decree *nunc pro tunc*, thereby restricting the time in which to perfect an appeal, when the party is not thereby prevented from perfecting his appeal.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. H. M. SHEPARD, Judge, presiding.

Appellee being the owner of the lot of land described, executed the following instrument:

"SOUTH EVANSTON, Cook Co., Ill., 18 Aug., 1890.

Mr. M. C. MONSON.

DEAR SIR: I hereby agree, authorize and give you the exclusive right to sell my acre lot N. W. Cor. of Asbury and Kirk Aves, in E. ½, Sec. 25, 41, 13 W., 3 P. M., in South Evanston, Cook Co., Ills., with buildings and improvements thereon for $12,000, net. Whatever you get over and above this amount is your commission. Terms $6,000 cash, balance in one, two and three years, with 6% int. p. a., secured by notes and mortgage on said property. Complete abstract, furnished substantially as above, 6 months time, S. ½, N. ½, N. E. ¼ of N. E. ¼.

ANTON KILL."

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On the 6th day of November, 1890, Monson, in the name of appellee, by himself as agent, entered into a contract with appellant Beveridge, by which Beveridge agreed to purchase for the sum of $12,000. The contract recited that the purchaser had paid $500 purchase money, "to be applied on said purchase when consummated," and agreed to pay, within ninety days, "after the title had been examined and found good, the further sum of $5500," at the office of Monson, provided a good and sufficient warranty deed with waiver of homestead, etc., with all right of dower, etc., should then be ready for delivery. And to pay the balance in three equal installments of $2000, due separately on or before, one, two and three years, after the date of this contract; and stipulating that the notes shall provide that payments may be made on or before the times named in the several notes, with interest at six per cent, and be secured by mortgage or trust deed on the property. A complete abstract to be furnished within a reasonable time and brought down to date. Ten days is then provided in which the purchaser may examine abstract, and if title was found to be defective, materially, unless material defects were cured within sixty days after written notice, the earnest money was to be refunded and the contract inoperative.

This bill was filed by appellee June 9, 1891, to cancel said contract of sale, and, the same having been placed on record, to remove it as a cloud upon appellee's title. A decree was rendered in accordance with the prayer of the bill; that decree was affirmed in the Appellate Court, from which the defendants below prosecute this further appeal.

Mr. CONSIDER H. WILLETT, for the appellants:

The Superior Court had no jurisdiction because the bill failed to allege that the property was vacant or that the complainant was in possession. R. S., chap. 22, sec. 50; *Gage* v. *Abbott*, 99 Ill. 366; *Hardin* v. *Jones*, 86 id. 313; *Smith* v. *McConnell*,

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17 id. 135; *Oakley* v. *Hurlbut*, 100 id. 204; *Washburn* v. *Burnham*, 63 N. Y. 132.

The written authority of the owner to the broker to sell the land gave him power to execute a contract of sale to the purchaser. *Peabody* v. *Hoard*, 46 Ill. 242; *Watson* v. *Sherman*, 84 id. 264; *Cossitt* v. *Hobbs*, 56 id. 233; Mechem on Agency, sec. 321; *Johnson* v. *Dodge*, 17 Ill. 433; *Matherson* v. *Davis*, 42 Tenn. (2 Cold.) 443; *Pringle* v. *Spaulding*, 53 Barb. 21; *Haydock* v. *Stow*, 40 N. Y. (Hand) 363; *Smith* v. *Allen*, 86 Mo. 178; *Vanada* v. *Hopkins*, 1 J. J. Marshall (Ky.), 285.

It was necessary for such authority to be in writing, because the statute so commands it. R. S., chap. 59, sec. 1.

The real estate broker being clothed with written authority to make a contract of sale for the owner with the purchaser, also had the power to execute a contract of sale adopted by the Chicago Real Estate Board, which required the owner to give a warranty deed. Mechem on Agency, sec. 322; *Hemstreet* v. *Burdick*, 90 Ill. 444; *Minor* v. *Willoughby*, 3 Minn. 225; *People* v. *Boring*, 8 Cal. 406; *Valentine* v. *Piper*, 22 Pick. 85; *Vanada* v. *Hopkins*, 1 J. J. Marshall, 285; *Shreve* v. *Hankinson*, 34 N. J. Eq. 413, 415; *Marr* v. *Given*, 23 Me. 55; *Alemany* v. *Daly*, 36 Cal. 90.

The broker had the right to contract for the delivery of a warranty deed prior to the payment of the entire purchase price.

If any details of the written contract given to the purchaser exceeded the authority of the real estate broker, such contract was void only as to such provisions of the contract as exceeded such authority, and the rest of the contract was valid. *Mc Vey* v. *McQuality*, 97 Ill. 93; *Ferris* v. *Martin*, 10 Humph. (Tenn.) 495; *Lyon* v. *Pollock*, 99 U. S. 668; *Vanada* v. *Hopkins*, 1 J. J. Marshall, 285; *Minor* v. *Willoughby*, 3 Minn. 225, 234.

The contract was not void because it gave the purchaser ninety days after the examination of title in which to make

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balance of first payment, and did not extend the time of making the cash payment beyond the limited six months in which the broker had authority to sell. The contract was made November 6, 1890, and ninety days would be February 6, 1891, while the six months did not expire until February 18, 1891.

Messrs. RUBENS & MOTT, for the appellee:

It is urged that the court had no jurisdiction because the bill did not allege either that appellee had possession, or that the premises were vacant.

The bill would have been obnoxious to a special demurrer, but none having been interposed, and the objection not being urged by way of plea, nor in the answer, it is now too late. *Gage* v. *Schmidt*, 104 Ill. 106.

Moreover, the proof shows that appellee was in possession. This was sufficient.

The contract was a cloud upon the title, because the record of it constitutes constructive notice in this State, no matter what the law may be in New York.

Any instrument or deed which might interfere with the sale of the land is a cloud against which equity will grant relief. *Larmon* v. *Jordan*, 56 Ill. 204; *Sea* v. *Morehouse*, 79 id. 216.

The business of a real estate broker is to negotiate sales of real estate and to bring seller and purchaser together. The authorities distinguish an authority to sell given to a broker from a similar authority given to one not a broker. In the former case such authority is construed to authorize the broker to find a purchaser merely, and not to execute a contract. *Duffy* v. *Hobson*, 40 Cal. 240; *Coleman* v. *Garrigues*, 18 Barb. 60; *Morris* v. *Ruddy*, 20 N. J. Eq. 236; *Roach* v. *Coe*, 1 E. D. Smith, 175; *Vanhorne* v. *Frick*, 6 S. & R. 90; *Ryan* v. *McGee*, 2 Mackey (D. C.), 17.

The requirement that one-half cash should be paid was not complied with by executing and delivering a contract, upon the payment in escrow of only $500. *Bosseau* v. *O'Brien*, 4 Biss.

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395, 401; *Coleman* v. *Garrigues*, 18 Barb. 60; *Roach* v. *Coe*, 1 E. D. Smith, 188.

"The exercise of the option given, too, did not consist in merely signifying within the sixty days, a willingness to take the lands, but there must have been, within that time, the payment of $1000 cash in hand." *Sea* v. *Morehouse*, 79 Ill. 216.

Authority to sell did not authorize a contract to convey by warranty deed. *Yazel* v. *Palmer*, 88 Ill. 597; *Coleman* v. *Garrigues*, *supra*.

The condition that the balance was to be paid in one, two and three years, was not fulfilled by permitting such payments "on or before" the time specified. *Jackson* v. *Badger*, 35 Minn. 52; *Siebold* v. *Davis*, 67 Iowa, 560.

The authority to sell is silent as to the possession of the property. Even if it were sufficient to permit Monson to execute a contract, such contract could not vary from the terms of the authority. If a contract had been made in strict accordance with the power conferred, the purchaser would not be entitled to demand a deed until the entire purchase money had been paid. Until the purchaser could demand a deed, he would have no right to the possession. *Chappell* v. *McKnight*, 108 Ill. 570.

But the contract, as executed, provides for a deed upon the payment of one-half cash, and, therefore, entitles the purchaser to possession at that time.

The terms of an express contract can not be enlarged by custom. *Deshler* v. *Beers*, 32 Ill. 368; *Dixon* v. *Dunham*, 14 id. 324.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The first point made is, that the bill is defective in not alleging that the complainant was in possession of the land; or that he claimed to be the owner and the land was unimproved and unoccupied. Sec. 50, chap. 22, R. S.; *Gage* v. *Abbott*, 99 Ill. 366; *Oakley* v. *Hurlbut*, 100 id. 204.

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The testimony shows that the complainant was in possession of the land at the time of filing the bill, and that fact should have been alleged. But the defendant having failed to demur specially for that cause, and having answered and proceeded to hearing without objection, waived it. *Gage* v. *Schmidt*, 104 Ill. 106.

2. The recorded contract would interfere with the sale of the land by appellee, and should be treated in equity as a cloud upon his title. *Larmon* v. *Jordan*, 56 Ill. 204; *Sea* v. *Morehouse*, 79 id. 216. By reference to the contract given to Monson, by appellee, it will be seen that Monson was given authority to sell within six months, for a fixed net price, one-half to be paid in cash and the "balance in one, two and three years," with six per cent interest payable annually, secured by notes and mortgage on the property. If it be conceded, which it is unnecessary to determine, that Monson had authority to execute the contract with Beveridge, and to extend the time ten (10) days for the examination of the abstract by the purchaser, there was still a clear departure from the power and authority given. The authority to sell for one-half ($\frac{1}{2}$) cash in hand, is in no sense complied with by a sale on ninety days' time. The authority here was special and limited, and the purchaser was required to know that the authority must be strictly pursued. *Jackson* v. *Badger*, *supra;* Mechem on Agency, secs. 285, 325 and cases cited.

Beveridge took from Monson a contract in writing and, in the absence of proof to the contrary, will be presumed to have known of Monson's authority to sell. There is nothing in the case tending to show that Beveridge was led to deal with Monson as a general agent.

It is clear that appellee was not bound to take $6000, at three months' time, instead of cash in hand. As said by the Appellate Court, in effect the sale was for a less price than authorized, by reason of the loss of the use of the money for that period. *Holbrook* v. *McCarthy*, 61 Cal. 216; *Bust* v.

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Cole, 28 N. Y. 261; *Sea* v. *Morehouse*, 79 Ill. 216; *Coleman* v. *Garrigues*, 18 Barb. 60.

Again the authority to sell the land and to make the balance, over and above the cash payment, payable in one, two and three years, did not authorize the making of a contract, that such payments might be made *on or before* said times, at the option of the purchaser. This precise question arose in *Siebold* v. *Davis et al.*, 67 Iowa, 560. The court say in respect of it: "In this regard the contract of sale exceeded the limits of the plaintiff's authority, and is, therefore, not binding upon the principal." So in *Jackson* v. *Badger*, 35 Minn. 52, where the same question is presented, the court say, "making the three thousand dollars payable on or before three years" was not in accordance with the prescribed condition that it should be payable "in three years."

Appellee had the right to prescribe the terms upon which his land should be sold, and having done so, in express terms, the stipulation must be substantially followed.

Other objections are insisted upon, but we do not deem it necessary to discuss them. It is, however, insisted that a custom prevails among real estate brokers in Chicago that would authorize the making of this contract. It is unnecessary to determine whether a usage or custom, extending the time of payment of a cash sale ninety days, and authorizing payments to be made where land is sold upon credit, *on or before* the time stipulated, could be upheld as reasonable or not, for the reason that the testimony offered upon that subject wholly fails to establish any such general usage or custom.

It is also objected that the court erred in entering its decree *nunc pro tunc*, thereby restricting the time in which to perfect an appeal. We are unable to see that there was error in so entering the decree, but if there was, appellants have not been prejudiced thereby.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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EDWARD DAY *et al.*

v.

MARY WALLACE.

Filed at Springfield, January 18, 1893.

1. WILLS — *construed — devising the same land to different persons.* Where a testator in the several parts of his will devises the same land to different persons in fee, and there is nothing in the will to show that he intends the last named devisee to take to the exclusion of the first, the two devisees will take the land concurrently as tenants in common. In such case there is not such a clear and irreconcilable repugnancy between the two devises as to make the later one abrogate the prior one.

APPEAL from the Circuit Court of Sangamon county; the Hon. JACOB FOUKE, Judge, presiding.

Messrs. PATTON & HAMILTON, for the appellants:

When a testator gives the same tract of land, first to A and then to B, without any word of exclusion, they will each take an undivided moiety thereof as tenants in common. 2 Jarman on Wills, 476; 1 Redfield on Wills (4th ed.), 449.

The Supreme Court of this State, in *Rountree* v. *Talbot et al.*, 89 Ill. 246, says:

"If two parts of a will are totally irreconcilable, the subsequent part is to be taken as evidence of a subsequent intention. But this rule is only adopted from necessity, to prevent the avoiding of both provisions for uncertainty. It is only applied in those cases where the intention of the testator can not be discovered, and where the two provisions are so totally inconsistent that it is impossible for them to coincide with each other or with the general intention of the testator."

In *Brownfield* v. *Wilson et al.*, 78 Ill. 467, it is said that a later clause of a will is to be considered when repugnant to a former provision, as intending to modify or abrogate the former; but that all of its parts should be considered together, and, if

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possible, every clause and provision should be given effect. *Hamlin* v. *U. S. Ex. Co.*, 107 Ill. 443.

In *Siddons* v. *Cockrell et al.*, 131 Ill. 653, it is held that such a construction shall be given as shall give force and effect to every word and clause, and if a prior and a subsequent clause are repugnant, the prior clause shall be restrained or modified by the subsequent clause.

Applying this principle to this will, both clauses can stand. In other words, the eighth is restrained or modified by the ninth clause, so that Mrs. Wallace takes a share of the land, concurrently with the Day heirs.

Messrs. RICKS & CREIGHTON, and Messrs. DRENNAN & HOGAN, for the appellee:

The intention of the testator must control, if not in contravention of law. In construction the whole will must be looked to to ascertain the intention. *Hamlin* v. *United States Express Co.*, 107 Ill. 443.

Testing the will by this rule the conclusion is irresistible that each of the clauses is a conveyance in fee of the land in question and the other lands described therein.

It is equally clear that the intention of the testator to thus give the entire fee to a single tract of land to two distinct devisees can not in law be carried out and give the effect to the clauses of the will their language, according to its usual meaning and interpretation, imports. We maintain that the two clauses are repugnant and inconsistent and can not stand together.

The court below adopted the view that the rule of construction declared by the Supreme Court of this State is that, in such cases, the later or ninth clause should be deemed the last expression of the testator, and control. *Brownfield* v. *Wilson et al.*, 78 Ill. 467; *Rountree* v. *Talbot et al.*, 89 id. 246; *Murfit* v. *Jessop*, 94 id. 158; *Hamlin* v. *United States Express Co.*, 107 id. 443; *Brownfield* v. *Wilson*, 78 id. 470.

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If two parts of a will are totally irreconcilable, the subsequent one is to be taken as a subsequent intention. *Rountree* v. *Talbot*, 89 Ill. 249; 2 Jarman on Wills, secs. 44, 472; 2 Blackst. Com., sec. 381; 1 Redfield on Wills, secs. 455, 451; *Hollens* v. *Coonan*, 9 Gill, 62; *Pratt* v. *Rice*, 7 Cush. 209.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

By the eighth clause of the last will of George Gregory, deceased, he devised to appellants two tracts of land, one of twenty acres, and the other of eighty acres. By the ninth clause of the same will, he devised to appellee two tracts also; one of twenty acres, and the other of eighty acres. The eighty-acre tract in both clauses is the same. By her certain cross-bill in the court below, appellee alleged that the two clauses, in so far as they attempt to devise the same land, are irreconcilably repugnant to each other, and, therefore, the last must prevail, and she asked the court to decree her the said eighty-acre tract to the exclusion of appellants, and the prayer of her bill was granted. From that decree this appeal is prosecuted.

Appellants do not deny that said eighty-acre tract was devised twice, in the manner alleged in the bill, but they deny that the two clauses of said will are thereby rendered wholly and irreconcilably repugnant, within the meaning of the rule which gives effect to the later clause to the exclusion of the former, and insist that the rule of construction in such case is to give the land to the devisees in both clauses concurrently as tenants in common.

The authorities are not uniform on the subject, but the later and more generally approved rule seems to be as contended by appellants. In Jarman on Wills, vol. 2, p. 44, it is said:

"Sometimes it happens that the testator has, in several parts of his will, given the same lands to different persons in fee. At first sight this seems to be a case of incurable repugnancy, and, as such, calling for the application of the rule, which sacrifices the prior of two irreconcilable clauses, as the only

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mode of escaping from the conclusion that both are void. Even here, however, a reconciling construction has been devised; the rule being in such cases, according to the better opinion, that the devisees take concurrently. The contrary, indeed, is laid down by Lord COKE, and other early writers, who say that the last devise shall take effect; and a similar opinion seems to have been entertained by Lord HARDWICKE, though he admitted that, latterly, a different construction had prevailed. The point underwent much discussion in *Sherrat* v. *Bentley*, already stated; and Lord BROUGHAM, after reviewing the authorities and fully recognizing the general doctrine, which upholds the latter part of a will by the sacrifice of the former, to which it was repugnant, considered that, consistently with this rule, it might be held, that, where there are two devises in fee of the same property, the devisees take concurrently. 'If, in one part of a will,' he said, 'an estate is given to A, and afterward the same testator gives the same estate to B, adding words of exclusion, as 'not to A,' the repugnance would be complete, and the rule would apply. But if the same thing be given first to A, and then to B, unless it be some indivisible chattel, as in the case which Lord HARDWICKE puts in *Ulrich* v. *Litchfield*, the two legatees may take together without any violence to the construction.' It seems, therefore, by no means inconsistent with the rule, as laid down by Lord COKE and recognized by the authorities, that a subsequent gift, entirely and irreconcilably repugnant to a former gift of the same thing, shall abrogate and revoke it, if it be also held that where the same thing is given to two different persons in different parts of the same instrument, each may take a moiety; though, had the second gift been in a subsequent will, it would, I apprehend, work a revocation."

Redfield, speaking on the same subject, says: "The more rational, and perhaps the general, opinion at the present day is that, where the same thing is given in the same will to two different persons, they shall take jointly, either as joint tenants

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or tenants in common, according to the terms of the devise or bequest." After referring to what was said by Lord BROUGHMAN in *Sherrat* v. *Bentley*, quoted by Jarman as above, he adds: "We fully concur in his lordship's suggestions here, as every one must, we think, in regard to the reasonableness of the latter rule of construction, when it can be applied, as in the case of the devise of the same estate to different devisees, and we have no doubt it will generally be recognized as the true rule, and the one established by the authorities for the government of cases of this character. But, as well observed by the learned chancellor, in an after portion of his opinion, that is not a case of clear and irreconcilable repugnancy. But the testator having given the same estate to two persons, in different portions of his will, it is the same as if all the names had been united in one gift of the same estate." 1 Redfield on Wills, p. 443. The case of *McGuire* v. *Evans*, 5 Ired. Eq. 269, goes to the full extent of holding this doctrine, even as applied to a double bequest of indivisible property.

On the contrary, as said by Jarman, *supra*, authorities are not wanting holding the contrary construction. *Hollens* v. *Coonan*, 9 Gill, 62; *Covert* v. *Sebern et al.*, 35 N. W. Rep. 636 (Iowa).

The case is one of first impression in this State, and in the conflict of authority on this subject we are left free to adopt that rule which to us seems most reasonable and best calculated to effectuate the intention of the testator. Taking into consideration all the facts of this case proper to be considered, it is manifest that whatever presumption might otherwise arise in favor of the latter clause expressing that intention, rather than the former, is rebutted. In the first place it is clear from the two clauses that he intended to give appellants one hundred acres of land, and a like quantity to appellee. He owned at the time of making his will, and when he died, some two hundred and forty acres of land not disposed of by the will. Eighty acres of this undisposed of land was in the same section

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as the eighty in question. It is, therefore, clear that, instead of changing his mind after making the first devise of the eighty-acre tract described in the will, either he or the person who wrote his will made a mistake in the description in one of the clauses. It is impossible to tell in which clause that mistake occurred. We know of no rule by which we are allowed to say it was made in the first, rather than in the last. We can conceive of no good reason why the consequences of such a mistake should be wholly visited upon appellants.

While it is true that an application of the rule laid down by the above named authors will not fully carry out the intention of the testator, it will come nearer accomplishing that purpose than the one insisted upon by appellee, and adopted by the court below. Certainly it does justice between the parties. Appellants and appellee should take said real estate as tenants in common, appellants taking one undivided half thereof and appellee the other.

We are of the opinion that the decree below is erroneous, and should be reversed, and the judgment of this court will be entered accordingly, and the cause will be remanded to the Circuit Court with directions to enter another decree conforming to the views herein expressed.

Reversed and remanded.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

JULIA F. ARNOL.

Filed at Springfield, January 18, 1898.

1. RAILROAD COMPANY — *duty to stop its trains for passengers to alight.* It is the duty of a railway company carrying passengers on a freight train, in reaching the station of the passenger's destination, to bring the train to a full stop, with due and proper care and caution with

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reference to the personal safety of the passengers; and, thereupon, not to start or move forward such train in an improper and dangerous manner at a time when such passengers may rightfully, in the exercise of due care, arise from their seats and prepare to leave the train at such station.

2. The implied contract of a railway carrier of passengers to carry them safely to their destination, includes the duty of furnishing a reasonable opportunity to alight from the train in safety at the end of the journey.

3. SAME — *conduct of its servants — ordinary care of passenger.* If the conduct of those operating a freight train, to which was attached a caboose, and their management of the train, amounted to an invitation for passengers to alight at a station for the discharge of passengers, and would be so understood and acted upon by reasonable and prudent persons, and a passenger acting in good faith upon such invitation, arises, upon the train coming to a standstill, for that purpose and is injured by a sudden start of the train, the jury will be justified in finding that he was in the exercise of ordinary care for his safety at the time of the injury.

4. If, by reason of such apparent invitation, the passenger was placed in peril from the further movement of the train, the duty of the railway company will at once arise to stop its train a sufficient length of time to permit him to leave it in safety, or to warn him of the danger in time to avert injury. In such case it will not be material whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinarily and unnecessarily violent.

5. SAME — *measure of duty of carrier.* The duty of the carrier is to be measured by the peril to the passenger whom it has accepted and undertaken to safely carry, and who has been induced by the conduct of its servants to assume a position of danger. Such duty relates to the place where the passenger has been induced by the conduct of its servants and the stopping of the train to believe he was to alight, and not to the final stopping of the train after the injury, a few feet further on at the same platform.

6. SAME — *due care of passenger — a question of fact.* Whether a passenger on a freight train was justified in assuming that it was the intention of those in charge of the train to discharge passengers at the first stop of the train at the station of his destination, and in attempting to get off, is a question of fact for the jury, in a suit by the passenger to recover for a personal injury caused by starting the train with a sudden jerk without warning.

7. SAME — *carrying passengers on freight trains — rights and hazards of the passenger.* A passenger taking passage upon a freight train or in a caboose or car attached to such a train, can not expect or require the

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conveniences, or all the safeguards against danger that he may demand upon trains devoted to passenger service. He will be held to have accepted the accommodations provided by the company, subject to all the ordinary inconveniences, delays and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains and managed with proper care and skill.

8. The passenger has the right to presume that the train is thus made up and equipped, and that the cars, machinery and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such a train.

9. If a railway company consents to carry passengers for hire, by freight trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. It is only the hazards incident to such trains which the passenger assumes in taking a freight train, and not hazards or peril arising from the negligence or want of proper care of those in charge of it.

10. In the operation of freight trains, the primary object is the carriage of freight, and the appliances used are, and are known by passengers to be, adapted to that business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation, that would destroy the use of the train for its primary purpose. But the law requires that the highest degree of care be exercised that is practicable and consistent with the efficient use of the means and appliances adopted; and the carrier is held to the same strict accountability for negligence of its servants, injuriously affecting the passengers, as it would be if the transportation had been by a train devoted to passenger service exclusively.

11. CARRIERS OF PASSENGERS — *degree of care required.* Ordinarily carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted. This rule applies in the absence of a valid contract limiting the liability of the carrier whenever the relation of passenger and carrier is established.

12. While it is said that the utmost care and the highest degree of diligence is to be exercised, it is to be understood that the care and diligence exacted is not such as will exclude all possible peril, or required to be of that degree that will render the use of the instrumentalities of transportation known to be employed, impracticable; but it always has relation to the mode of conveyance accepted, and the conditions and circumstances necessarily attendant.

APPEAL from the Appellate Court for the Third District; — heard in that court on appeal from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

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Statement of the Case.

This was an action by appellee to recover for personal injury alleged to have been occasioned by the negligence of the servants of the appellant company. A trial resulted in a verdict for plaintiff of $2500, upon which judgment was rendered, and which was, on appeal, affirmed in the Appellate Court. By its fourteenth instruction, appellant asked that the jury be instructed to return a verdict for defendant, which was refused. This ruling is, among other things, assigned for error, and will necessitate an examination of the record to see whether there was evidence tending to sustain plaintiff's right of recovery.

Appellant at the time of the alleged injury, and for some months, at least, prior thereto, had run on its road daily, from Bloomington south, what was called "an accommodation train," consisting of a "caboose" attached to its regular freight train, which left Bloomington between 5 and 6 o'clock, P. M. The record shows this train accommodated very considerable local travel, and on the evening in question the caboose was well filled. The train consisted of twenty-six freight cars and the caboose, and the train crew, of an engineer, fireman, conductor and two brakemen.

Appellee took the train at Bloomington for Shirley, which was reached before nightfall. In approaching Shirley, from the north, there is a gradual ascent until about the south end of the station platform, and then a descent somewhat more rapid, for a considerable distance.

Upon approaching Shirley, a north-bound freight train was found standing upon the main track, and the south-bound train, on which appellee was a passenger, was required to take the siding. Upon nearing the switch, the engineer ceased working steam and slowed up, to permit the brakeman on the forward end of the train to run ahead and open the switch, which was done, and the train passed through upon the siding at a rate of speed, as the engineer testifies, not faster than a man could walk. The rear brakeman stepped from the caboose,

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where he seems to have been stationed, closed the switch after the train, and regained the caboose.

The evidence tends to show the caboose stopped twice, the first time at the north end of the platform or still farther north, and then was jerked forward and came to the final stop at the south end of the platform. Just where it stopped the first time, or how far the caboose ran, between that stop and the final one, is in controversy. Appellee and other witnesses place the first stop at the north end of the platform, and the distance run between the stops about thirty feet. Other witnesses place it much farther north, and the distance run much greater, some placing it as far as two hundred and fifty feet. The first stop is variously described, as momentary; for an instant; and as continuing for ten or fifteen seconds, and it is clear that no opportunity was then given for passengers to leave the train.

Appellee testifies, that upon the approach of the train to the station, the brakeman called out, "Shirley," "Shirley," in the usual manner of announcing the approach to the station. If the evidence of appellee and some other of the witnesses was credited, the jury were justified in finding that the caboose stopped at the north end of the station platform, after the usual station signal and call had been given by the brakeman.

Appellee testifies, in effect, that having heard the station announced in the usual manner, and observing the slowing up of the train and its coming to a standstill at the station platform, she arose from her seat with the intention of leaving the train, when instantly, and without warning, the caboose was jerked so violently forward that she was thrown down to the floor of the car and seriously injured. Her head was thrown toward the rear of the caboose, and the passengers who went immediately to her assistance were thrown into confusion by the jar when the train came to the final stop. She was found to be insensible, and in that condition taken from the car. The engineer, thinking the siding south of the station too short to ac-

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commodate his train, and let the caboose up to the platform, applied the air brakes with which the first seven cars of the train were equipped, thereby permitting the forward brakeman to run ahead of the engine and open the south switch, to let the engine out on the main track. The switch being open, the engine pulled out on the main track, and again came to a full stop. The nineteen freight cars, back of the seven equipped with the air brakes, were permitted to run free, no brake having been applied to any of them.

Messrs. WILLIAMS & CAPEN, and Mr. WILLIAM BROWN, for the appellant:

An omission of a duty amounts in law to an act of negligence. Shearman & Redfield on Neg. (3d ed.) sec. 280.

There must be evidence upon which reasonable men could reasonably and properly find the fact of negligence. Id. sec. 11.

The burden of proof is on the party affirming negligence. Id. secs. 12 and 280.

If the evidence would justify an inference consistent with the absence of negligence on the part of defendant, just as well as it would an inference of negligence, the plaintiff can not recover. *Smith* v. *First Nat. Bank*, 99 Mass. 605; *Cotton* v. *Wood*, 8 C. B. (N. S.) 568; *Toomey* v. *Brighton R. R.*, id. 146; Shearman & Redfield on Neg. note 2, sec. 12.

"It is not enough for one to prove that he has suffered loss by some event which happened on defendant's premises or even by the act or omission of the defendant. He must prove that the defendant in such act or omission violated a duty resting upon him." *Curran* v. *Warren Chemical Works*, 36 N. Y. 153; *Welfare* v. *Brighton, etc., R. R.*, L. R., 4 Q. B. Cases, 693; *Terre Haute* v. *Augustus R. R., etc.*, 21 Ill. 186; *Tourtelotte* v. *Rosebrooke*, 11 Met. 460.

"The presumption is that the defendant has complied with all the obligations which rest equally upon every man, and if he has not, the plaintiff must prove it. He must for this pur-

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pose prove facts from which it can be ascertained with reasonable certainty what particular precaution the defendant ought to have taken but did not take." *Daniel* v. *Metropolitan R. R.*, L. R., 3 C. P. 216, 491.

In all actions for negligence the burden is upon the plaintiff to allege and prove such negligent acts for the defendant as will entitle the plaintiff to recover. *C., B. & Q. R. R. Co.* v. *Harwood*, 90 Ill. 425; *C., B. & Q. R. R. Co.* v. *Gregory*, 58 id. 272; *Blanchard* v. *L. S. & M. S. R. R. Co.*, 126 id. 416; Patterson's Railway Law, sec. 373, and cases cited in note.

The injury to appellee resulted from one of the perils necessarily incident to travel on a freight train. *Frink* v. *Potter*, 17 Ill. 406.

The court erred in giving appellee's instructions, Nos. 2 and 3, and in refusing to give appellant's instructions, Nos. 6 to 14, inclusive. *C., B. & Q. R. R. Co.* v. *Hazzard*, 26 Ill. 373; *I. C. R. R. Co.* v. *Nelson*, 59 id. 110.

Messrs. BENJAMIN & MORRISSEY, and Mr. W. B. CARLOCK, for the appellee:

It is the duty of railroad companies engaged in the transportation of passengers, whether by freight or passenger trains, to do all that human care, vigilance and foresight can, under the circumstances, and in view of the mode of conveyance adopted, reasonably to guard against and prevent accidents and consequent injury to passengers. They are held to strict care and vigilance in operating their respective modes of conveyances, and are liable for the consequences of slight neglect or want of care. Life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car. *Frink et al.* v. *Potter*, 17 Ill. 406, 410; *O. & M. R. R. Co.* v. *Muhling*, 30 id. 92; *R. R. Co.* v. *Horst*, 93 U. S. 291, 296; *R. R. Co.* v. *Doane*, 115 Ind. 435; *Dunn* v. *Grand Trunk Ry.*, 58 Me. 196.

Where it is shown that a caboose or car for passengers was under the exclusive control of the carrier or its servants, and

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that an accident to a passenger was such as, under the ordinary course of things, would not have occurred had those who had the management of the car used proper care, it affords reasonable evidence that the accident arose from want of care. *Edgerton* v. *R. R. Co.*, 39 N. Y. 227; *Stokes* v. *Saltonstall*, 13 Peters, 181; *R. R. Co.* v. *Pollard*, 22 Wall. 341; *Dougherty* v. *Co.*, 81 Mo. 325; *R. R. Co.* v. *Reynolds*, 88 Ill. 418.

The verdict is sustained by the law and the evidence. *Nance* v. *R. R. Co.*, 94 N. C. 619; *McNulta* v. *Ensch*, 31 Ill. App. 100; *S. C.*, 134 Ill. 46.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

In this country it is the almost universal practice to announce the station which the train is approaching before it is reached, and while the train is still in motion. And it is universally understood that such announcement is intended as notice to passengers, without warning to the contrary, that the next stop of the train will be at the station announced. The purpose is understood to be, to enable the passengers intending to alight at that station, to be ready to leave the cars promptly, without undue haste or inconvenience to themselves or unnecessary delay of the train. It is not to be expected that there will be the same particularity in drawing up to a station by a freight train, as by a train devoted to passenger service. The great length and weight of such trains and the appliances necessary in their operation render them less easy of control. And so the public, presumably, understand, and conduct themselves accordingly. In this connection, the errors assigned to the ruling of the court in refusing the tenth, eleventh, twelfth and thirteenth instructions asked by appellant may be considered.

These instructions severally told the jury that no recovery could be had under the first, second, third and fourth counts of the declaration.

The first, second and third counts allege that it was the duty of the defendant to safely carry plaintiff from Bloomington to

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Shirley, and there slacken the speed of its train with due care, and stop the same a reasonable time to enable plaintiff to alight, etc., and that the defendant did not use care and diligence in slackening the speed of its train, or stop its train at Shirley, etc., while the plaintiff was alighting therefrom, with due care, etc., caused the same to be suddenly and violently started forward, etc., whereby she was thrown down, etc., and injured.

The fourth count varies the same charge, and alleges, that: "While the plaintiff with the consent and permission of defendants, with due care, etc., was arising from her seat to alight," etc., the defendant caused the train to be suddenly started, etc., whereby, etc.

The implied contract to carry safely necessarily includes the furnishing of reasonable opportunity to alight from the train safely at the end of the journey. *R. R. Co.* v. *Aspell*, 23 Pa. St. 147; *Imhoff* v. *Chicago, etc., R. R. Co.*, 20 Wis. 36; *Jeffersonville R. R. Co.* v. *Hendricks' Admrs.*, 26 Ind. 228; *Burrows* v. *Erie Ry Co.*, 63 N. Y. 556; *Dougherty* v. *Chicago, etc., Ry. Co.*, 86 Ill. 467; *W., St. L. & P. Ry. Co.* v. *Rector*, 104 id. 296.

Whether appellee was, under the circumstances shown, justified in assuming that it was the intention of those in charge of the train to discharge passengers for Shirley, at the time and place of the first stop of the caboose in which she was riding, was a question of fact for the jury. If the conduct of appellant's servants and their management of the train amounted to an invitation to then alight, and would be so understood and acted upon by reasonable and prudent persons, and appellee, acting in good faith upon such invitation, arose, upon the train coming to a standstill, for that purpose, the jury would be justified in finding that she was in the exercise of ordinary care for her own safety. If she, by reason of such apparent invitation, was placed in peril from the farther movement of the train, the duty at once arose, on the part of appellant, to stop its train a sufficient length of time to permit her

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to leave it in safety, or to warn her of the danger in time to avert injury. And it could not, in such case, be material, whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinary and unnecessarily violent. The duty of the carrier was to be measured by the peril to the passenger whom it had accepted and undertaken to safely carry, and who had been induced by the conduct of its servants to assume a position of danger. In *McNulta, Receiver, etc.*, v. *Ensch*, 134 Ill. 46, speaking of the duty of the receiver, who was operating the railroad, we said: "Having, by the acts and conduct of his servants, justified the plaintiff in attempting to get off the train, the duty of defendant attached to stop his train at the station a sufficient length of time to enable the plaintiff to reach the platform in safety," and *held*, that the duty related to the place where the plaintiff had been induced, by the conduct of the servants and the stopping of the train, to believe he was to alight, and not to the final stopping of the train after the injury, a few feet further on, at the same platform. See, also, *Tabor* v. *Del., etc., R. R. Co.*, 71 N. Y. 489; *Cent. Ry. Co.* v. *Van Horn*, 38 N. J. L. 133; *Columbus, etc., Ry. Co.* v. *Farrell*, 31 Ind. 408; *Bridges* v. *North London Ry. Co.*, L. R., 7 H. L. 213; *Nance* v. *R. R. Co.*, 94 N. C. 619; *Praeger* v. *Bristol, etc., Ry. Co.*, 24 L. T. (N. S.) 105.

But it is insisted that the rule announced in these cases has no application here, for the reason that appellee, having voluntarily taken passage upon a freight train, assumed all risk incident to the operation of such train, in the usual and ordinary manner in which such trains are managed and operated. Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, can not expect or require the conveniences or all of the safeguards against danger that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all of the ordinary inconveniences,

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delays and hazards incident to such trains, when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. The passenger has a right to presume that the train is thus made up and equipped, and that the cars, machinery and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such trains. He may take the train or not, at his option, and if he voluntarily selects such a train he should be and is held to have accepted it in discharge of the liability of the carrier to provide a safer and better mode of conveyance, and to have assumed the risk and inconvenience incident to its proper management and operation.

But if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train and the appliances necessarily used in its efficient operation, there can not, in the nature of things, be the same immunity from peril in traveling by freight train, as there is by passenger trains, but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different, because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard the passenger assumes in taking a freight train, and not hazard or peril arising from the negligence or want of proper care of those in charge of it. Ordinarily, carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence, practically consistent with the efficient use and operation of the mode of transportation adopted. *Tuller et al.* v. *Talbott*, 23 Ill. 357; *C., B. & Q. R. R. Co.* v. *Hazzard*, 26 id. 373; *C. & A. R. R. Co.* v. *Pillsbury*, 123 id. 9, and case cited. And this rule applies, in the absence of a valid contract limiting the liability of the carrier, whenever the relation of passenger and

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carrier is established. While it is said that the "utmost care" and the "highest degree of diligence" is to be exercised, it is to be understood that the care and diligence exacted is not such as will exclude all possible peril, or required to be of that degree that will render the use of the instrumentalities of transportation, known to be employed, impracticable; but it always has relation to the mode of conveyance accepted and used, and the conditions and circumstances necessarily attendant. In the operation of freight trains, the primary object is the carriage of freight, and the appliances used are, and are known by the passengers to be, adapted to that business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation that would destroy the use of the train for its primary purpose. But the law does require that the highest degree of care be exercised that is practicable and consistent with the efficient use of the means and appliances adopted. And the carrier must accordingly be held to the same strict accountability for negligence of its servants injuriously affecting the passengers, as it would be, if the transportation had been by a train devoted to passenger service exclusively.

We need not extend this opinion by further discussion of the reasons for the rule; it is based upon a wise public policy, as well as upon the plainest principles of reason and justice and is sustained by authority. *R. R. Co.* v. *Muhling*, 30 Ill. 9; *C., B. & Q. R. R. Co.* v. *Hazzard*, 26 id. 381; *S. C.*, 1 Biss. 513; *I. & St. L. R. R. Co.* v. *Horst*, 93 U. S. 291; *Ohio, etc., Ry. Co.* v. *Dickerson*, 39 Ind. 317; *R. R. Co.* v. *Doane*, 115 id. 435; *P. & C. Ry. Co.* v. *Thompson*, 56 Ill. 138; *Edgerton* v. *N. Y. & H. R. R. Co.*, 35 Barb. 389; *S. C.*, 39 N. Y. 227; *DeLaye* v. *N. Y. Cent. Ry. Co.*, 56 Barb. 227; *Dunn* v. *G. T. Ry. Co.*, 58 Me. 187.

If, therefore, appellee was, in consequence of conduct of appellant's servants and their management of the train, placed in danger of injury from its farther movement, and the train was jerked forward without notice or warning of the danger, and

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she was thereby injured, appellant would be liable. It is no answer to say that the train was operated in the ordinary and usual manner of running and operating freight trains. The duty of the carrier was to be measured by the peril of the passenger, whom it had accepted and undertaken to safely carry, and who had been needlessly put in danger by the acts of its servants, and its responsibility by the consequences that might result to her, from a failure to observe that duty. There being evidence tending to establish a neglect of the duty charged in the first, second, third and fourth counts of the declaration, the tenth, eleventh, twelfth, thirteenth and fourteenth instructions asked by appellant were properly refused.

It is objected that the court erred in giving appellee's second and third instructions. These instructions were based upon the theory that it was the duty of appellant to stop its train long enough at the first stop, shown by the evidence, to permit the plaintiff to alight in safety, and while, perhaps, not strictly accurate, they each state the law as applicable to the fact shown, with substantial correctness.

It was undoubtedly the duty of the railway company to bring its train to a full stop, "with due and proper care and caution, with reference to the personal safety of the passengers, and, thereupon, not to start or move forward such train in an improper and dangerous manner at a time when such passengers might rightfully, in the exercise of due care and caution, arise from their seats and prepare to leave the train at such station." In our view the proposition quoted contains a substantially accurate proposition of law, and no further discussion will be necessary.

Nor will it be necessary to discuss or determine whether there is evidence to sustain the allegations of negligence charged in other counts of the declaration, or whether permitting the nineteen freight cars to run free upon the down grade, without any attempt to control them, thereby communicating an

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accelerated jerking motion to the caboose, was negligence in the operation of the train.

We find no error in this record for which the judgment of the Appellate Court should be reversed, and it is accordingly affirmed.

Judgment affirmed.

WILLIAM A. JACKSON *et al.*

v.

JOHN JACKSON *et al.*

Filed at Ottawa, January 19, 1898.

1. CURTESY — *estate by the curtesy — at common law.* At common law where a man marries a woman seized, at any time during coverture, of an estate of inheritance, and has issue by her born alive, which might by possibility inherit the same estate as heir to the wife, and she dies in the lifetime of the husband, he will hold the land during his life by the curtesy.

2. HUSBAND AND WIFE — *interest of husband in the lands of his wife — at common law.* Under the common law there were two interests which, under the marriage relation, a husband might acquire in the lands of the wife: *first*, by virtue of the marriage alone the husband had the right to occupy the lands of which the wife was seized and to receive the rents and profits during coverture; *second*, upon the birth of a child capable of inheriting, the husband became invested with an estate in the lands, which, during the life of the wife, was denominated initiate, and upon her death became consummate.

3. A woman married in 1858 acquired title to eighty acres of land and had issue born capable of inheriting in 1859, and also in 1860. *Held*, that her husband took a vested estate in the land as a tenant by the curtesy initiate, which he might have conveyed, and one which might have been sold on execution against him, and that it was not within the power of the legislature to deprive him of such vested estate by any subsequent act.

4. SAME — *Married Woman's act of* 1861 *and* 1874 — *abolishing estate by curtesy.* Where a married woman in 1873 acquired title to a forty-acre tract, it was held that her husband was, by the Married Woman's act of 1861, precluded from acquiring any estate in such land during the coverture, and the wife not dying until after the act of 1874

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took effect, he took only dower in such land. During his wife's life the husband had no vested estate in his wife's land, acquired since the act of 1861, and the legislature had the right to abolish the estate by curtesy.

5. BILL OF REVIEW — *when it lies.* If there has been an erroneous application of the facts found by a decree, a court of equity may revise or reverse the decree by bill of review.

6. SAME — *must be brought within five years.* A decree in a suit for partition which finds the several interests of the parties, and appoints commissioners to make partition, is a final decree, though no partition is ever made, which may be reviewed by writ of error or bill of review in five years after the rendition of the same. The fact that the case remains on the docket several years after the entry of the decree, can not affect the rule requiring a bill of review to be filed within that time.

7. SAME — *minority of party excluded from the five years limitation.* A bill of review, for error apparent on a decree or the record, must be brought within the time allowed for suing out writs of error, which is five years. In such case the minority of the party filing the bill will be excluded from the five years the same as on a writ of error.

WRIT OF ERROR to the Circuit Court of Stark county; the Hon. N. E. WORTHINGTON, Judge, presiding.

Mr. MILES A. FULLER and Mr. V. G. FULLER, for the plaintiffs in error:

This is a bill of review brought by complainants to revise a decree of partition entered in the same court, for error in law, apparent upon the face of the decree, and may be brought as matter of right and leave of court not necessary. *Getzler* v. *Saroni*, 18 Ill. 511–517; Puterbaugh's Chancery Pleading (1st ed.), 256.

Bills of review may be brought for errors of law appearing on the face of the decree. Story's Eq. Pl., sec. 405.

The rule has now become well settled that the court will, upon such a bill, reverse or revise its own decree for an erroneous application of the law to the facts found, whenever a Court of Appeals would do so for the same cause. *Evans* v. *Clement*, 14 Ill. 209; *Moore* v. *Bracken*, 27 id. 23; *Griggs* v. *Gear*, 3 Gil. 2.

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The statute has not prescribed the time within which a bill of review may be filed, but this court, in analogy to writs of error, has fixed the time at five years (*Lyons* v. *Robbins*, 46 Ill. 278), excluding from said five years the time of the disability of infancy, duress, etc. Rev. Stat., chap. 118, sec. 85.

Since the act of 1861 the husband had no present interest in his wife's lands and his right to curtesy was contingent, and did not vest until the death of the wife. *Beach* v. *Miller*, 51 Ill. 209; *Lucas* v. *Lucas*, 103 id. 125; *Bozarth* v. *Largent*, 128 id. 105.

At common law, and by the laws of this State, until the passage of the Married Woman's act of 1861, by marriage, the husband acquired an estate, during coverture, in the lands of the wife, held by her, in her right, but subject to his absolute control; he was entitled to the rents and profits, and it could be sold for his debts. It was as absolutely his own while the marriage relation existed as if the title itself was vested in him. 2 Bacon's Abr., 15; 1 Washburn on Real Property, 276; *Bozarth* v. *Largent*, 128 Ill. 95.

It was liable to be seized and sold on execution for his debts, and the wife was powerless to prevent it. Freeman on Judgments, 186.

It was a freehold estate, vested in possession of the husband, continuing during the existence of the marriage relation, complete in itself, and to which nothing is wanting during the term, and he may sell it without her consent. 1 Washburn on Real Property, 276.

The estate was acquired by the marriage and had no connection with or relation to the estate of curtesy, and could not exist with it, because this estate continued during the marriage relation, and curtesy vested only on the death of the wife, when this estate by the coverture terminated.

That an estate by the curtesy initiate is a legal vested estate, liable to be conveyed or sold on execution: See *Bozarth* v. *Largent*, 128 Ill. 102; *Mettler* v. *Miller*, 129 id. 640; *Brud-*

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ing v. *Davis*, 77 W. Va. 639; *Henderson* v. *Oldham*, 5 Dana, 254; Washburn's Real Estate, 140; *Wheeler* v. *Hotchkiss*, 10 Conn. 225; *Starr* v. *Pease*, 8 id. 541; *Townsend* v. *Griffin*, 4 Harr. 440.

Mr. M. SHALLENBERGER and Mr. ALLEN P. MILLER, for the defendants in error:

Complainants' solicitors assert that they can review the former proceedings in this case "for error in law, apparent on the face of the decree, and may be brought as matter of right, and leave of court not necessary." And as no other reason is, or can be given than "error of law apparent on the face of the decree," for the filing of said bill of review, it may be well to inquire whether there is such error, if any, in said decree, as to warrant this proceeding. "Errors of law, against which relief can be had by bill of review, must be such as arise rather from obvious mistake or inadvertence, appearing on the face of the decree, or at least of record, than from alleged error in the deliberate judgment of the chancellor, on a debatable question of law or equitable right." Puterbaugh's Chancery Pleading (1st ed.), 251; *Caller* v. *Shields*, 2 Stew. & Port. 417; *Young* v. *Forgey*, 4 Heyw. 189.

It is a general rule that a bill of review will not be entertained unless brought within the time allowed by statute for the suing out of a writ of error. *Sloan* v. *Sloan*, 102 Ill. 581; Story's Equity Pl. (7th ed.) sec. 410; *Lyon* v. *Robbins*, 46 Ill. 278.

"Adult defendant can not take advantage of non-age of co-defendant to bring writ of error, or join with minor in bringing it, after the lapse of five years." *Moore et al.* v. *Capps*, 4 Gil. 315.

There are four things necessary to constitute the tenancy by the curtesy: marriage, seizin of the wife, issue, and death of the wife. It was initiate on issue had, and consummate on the death of the wife. The initiate estate was a vested interest;

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could be sold on execution against the husband or conveyed by him. 4 Kent's Com. 27, 28; *Shortall* v. *Hinckley*, 31 Ill. 219; *Mettler* v *Miller*, 129 id. 640.

The interest of the husband as a tenant by the curtesy initiate was a legal estate, and was both salable and assignable. 4 Am. & Eng. Enc. of Law, 962, and authorities cited in note 1; *Lang* v. *Hitchcock*, 99 Ill. 550, and cases there cited; *Gay* v. *Gay*, 123 id. 225.

In this case there can be no question but that all four requisites have occurred, and that John Jackson is tenant by the curtesy in these lands unless the subsequent legislation of 1861 and 1874 has so changed the law that the estate by the curtesy has been swept away from him. The law of 1861 did not abolish the tenancy by the curtesy, but did modify it. The Supreme Court, in the case of *Armstrong* v. *Wilson*, 60 Ill. 227, expressly decided that the law of 1861 did not abolish the tenancy by the curtesy, and referred to a number of former decisions of the court affirming and recognizing that estate after the passage of the law of 1861.

The law of 1861 did modify the tenancy by the curtesy so far as any lands were concerned which the wife acquired after the passage of that act. As the object of that law was to give the wife the control of her separate real estate independent of her husband, it necessarily operated to suspend or hold in abeyance the husband's rights to the rents and profits during the lifetime of the wife. This doctrine is clearly laid down by this court in *Cole* v. *Van Riper*, 44 Ill. 58.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill of review brought by Wm. A. and John M. Jackson against John Jackson and others on the 20th day of August, 1890, in which the complainants sought to review and vacate a decree in a partition proceeding rendered on the 6th day of April, 1883, in the Circuit Court of Stark county.

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Opinion of the Court.

The facts out of which the litigation arose may be briefly stated.

John Jackson and Paulina A. Jackson were married on the 14th day of October, 1858, and the following named children were born to them:

Lydia E. Jackson, born June 15, 1859.

Laura B. Jackson, born October 24, 1860.

William A. Jackson, born October 23, 1862.

Ursula A. Jackson, born October 7, 1864.

John M. Jackson, born August 25, 1866.

On the 13th day of March, 1860, Paulina A. Jackson became seized in fee of the west half of the N. E. ¼ of Sec. 2, 12 N., 5 E., in Stark county, and on the 4th day of January, 1873, she became seized of forty acres, part of the N. W. ¼ of Sec. 2, in the same township, more particularly described in the petition for partition.

On the 29th day of November, 1875, Mrs. Jackson died, leaving her husband, John Jackson, and her four children surviving her. On the 31st of August, 1882, the two daughters, Laura B. and Lydia, together with their husbands and William A. Jackson, who was then a minor, filed a petition for partition of the premises involved against John Jackson and the other two heirs. John Jackson answered the bill claiming an estate of tenancy by the curtesy in the premises.

On the hearing at the March term, 1883, of the court, the court found:

That John Jackson had an estate in curtesy in all of said premises, and was in possession thereof. That the foregoing named children of Paulina A. Jackson are "the owners in common of said premises, subject to life estate by the curtesy of John Jackson."

A decree was rendered, ordering partition of the premises subject to the life estate, and Samuel M. Adams, Benjamin R. Brown and Charles Potter were appointed to make such parti-

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tion, and if not subject to division, to appraise and report the same.

The case was continued from term to term without further action until the March term, 1888, when said commissioners reported:

That they had examined the premises and find that they are not susceptible of division without prejudice to parties, and appraise the W. ½ N. E. 2, at $60 per acre, and the forty-acre tract at $55, both, however, subject to the life estate of John Jackson.

At the March term, 1889, the cause was dismissed.

It is first contended by appellee that there is no such error appearing on the face of the decree as will authorize a court of equity to interfere by bill of review. If there has been an erroneous application of the facts found by the decree a court of equity may revise or reverse the decree by bill of review. *Evans* v. *Clement*, 14 Ill. 208. The facts upon which the court found that John Jackson was entitled to hold the premises as tenant by curtesy, all appear on the face of the decree.

The date of the purchase of the lands by Paulina A. Jackson, with their description, date of her marriage, date of the birth of her children, and date of her death, all appear on the face of the decree. If, therefore, the decree under the facts as found, was erroneous, it could be corrected. The next question presented is, whether the complainants or either of them have lost their right to bring this bill, by lapse of time. As has been seen, the decree was rendered on the 6th day of April, 1883, and this bill was brought on the 20th day of August, 1890. No time has been prescribed by statute within which a bill of review must be brought, but writs of error are required to be sued out within five years from the time a judgment or decree has been rendered; and in analogy to the time prescribed for prosecuting writs of error, it has been held that a bill of this character should be brought within the time allowed for suing out a writ of error. *Lyon* v. *Robbins*, 46 Ill. 278. In

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case of writ of error, sec. 86, chap. 110, of our Practice act, prescribes, that a writ of error shall not be brought after the expiration of five years from the rendition of the decree or judgment, but if the party entitled to the writ was an infant when the judgment was entered, the time of minority shall be excluded from the five years. Applying this rule to the present case, which we think should be done, John M. Jackson, one of the compainants, as found by the court in its decree, was born August 25, 1866, he would not, therefore, be of age until August 25, 1887, and, excluding his minority, he would have until August 25, 1892, to bring his bill, and the bill was filed two years before the time expired. So far, therefore, as John M. Jackson is concerned, his bill was brought in apt time. As respects the other complainant, he occupies a different position; he, as appears, became of age in October, 1883, and hence would be barred in October, 1888. It is, however, said that the time did not begin to run until the suit was finally disposed of in March, 1889. We do not concur in that view. The rights of all the parties as to their title and interest in the premises were fully and definitely determined and settled by the decree of April 6, 1883. That was a final decree and as to all persons who were parties to the proceeding, and under no disability, the decree could not be reviewed by writ of error or bill of review after five years, and the fact that the cause remained on the docket until 1889, and was then stricken from the docket, does not materially affect the question. The decree of April 6, 1883, was the only one ever entered in the case and there was nothing to prevent a writ of error from being prosecuted to review the decree at any time after it was rendered, for the period of five years.

We now come to a consideration of what may be regarded the merits of the case. That is, whether John Jackson was entitled to an estate of tenant by the curtesy in the premises. At common law, "When a man marries a woman seized at any

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time during coverture of an estate of inheritance, * * * and hath issue by her, born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England." 4 Kent, page 27; *Shortall* v. *Hinckley*, 31 Ill. 219. There are four things necessary to constitute the tenancy by the curtesy: marriage, seizin of the wife, issue, and death of the wife. Here all of these facts existed, and it is plain at common law John Jackson would have an estate by the curtesy in the lands. It may also be remarked in this connection that, under the common law, there were two interests which, under the marriage relation, a husband might acquire in the lands of the wife. First, by virtue of the marriage alone the husband possessed the right to occupy the lands of which the wife was seized and receive the rents and profits during coverture. Second, upon the birth of a child capable of inheriting, the husband became invested with an estate in the lands which, during the life of the wife, was denominated initiate and upon her death it became consummate. There is, however, but little or no dispute between counsel in regard to the rules of the common law on the subject, but the question in dispute is how far and to what extent the common law has been changed and modified by our statute. In 1861 the legislature passed an act known as the Married Woman's act, which provides, "That all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman during coverture acquires in good faith from any person, other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain during coverture her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried."

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In 1874 the legislature passed an act to revise the law in relation to dower, the first section of which provides as follows: "That the estate of curtesy is hereby abolished, and the surviving husband or wife shall be endowed of the third part of all the lands whereof the deceased husband, or wife, was seized," etc. Under the act of 1861, and the Dower act of 1874, it is claimed that Jackson was only entitled to dower in the lands. It will be observed that Paulina A. Jackson acquired the eighty-acre tract of land in 1860, before the act of 1861 was passed; that she was married in 1858, issue born capable of inheriting in 1859, and also in 1860. As to this tract of land Jackson had an estate as tenant by the curtesy initiate before the act of 1861 was passed. This was a vested estate, one which Jackson, had he desired, might have conveyed, and one, too, which might have been sold on execution against him. *Shortall* v. *Hinckley, supra; Mettler* v. *Miller*, 129 Ill. 640. As the estate of Jackson was a vested estate before the act of 1861 was passed, it was not within the power of the legislature to destroy it or deprive him of it by any act that might be passed for that purpose. *Rose* v. *Sanderson*, 38 Ill. 247. As to the eighty-acre tract of land, we think the decision of the court was correct.

The forty-acre tract stands upon a different footing. That tract was acquired by Mrs. Jackson in 1873, when the act of 1861 was in full force. Under that act Jackson was precluded from acquiring any estate whatever in the land during coverture. It was, during coverture, the sole and separate property of the wife, and she alone was entitled to the rents, issues and profits thereof. *Cole* v. *Van Riper*, 44 Ill. 64. As Jackson, therefore, in 1874, his wife being still alive had no vested estate in the land, the legislature had the undoubted right to abolish the estate of curtesy, as to him and all others who were alike situated, and provide, as it did, that a surviving husband or wife shall only be entitled to dower. This view is fully sustained by the late case of *McNeer* v. *McNeer et al.*, 142 Ill.

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Syllabus.

388. There is nothing in *Cole* v. *Van Riper*, *supra*, holding that the husband has any vested estate in the lands of the wife acquired after the passage of the act of 1861, before the death of the wife. Before the death of the wife he has no estate by curtesy, either initiate or consummate. The fact that the husband might, after the death of the wife, become vested with an estate as tenant by the curtesy, did not stand in the way of the legislature abolishing that estate at any time before the estate became vested. As to the eighty-acre tract the decree of the Circuit Court will be affirmed, but as to the forty-acre tract the decree will be reversed and the cause remanded.

Appellants will recover costs.

Reversed and remanded.

VICTOR BARDONSKI

v.

JOHN BARDONSKI *et al.*

Filed at Ottawa, January 19, 1898.

1. CHANCERY — *relief against judgment at law.* It is well settled that a court of equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his part.

2. Where a party, when sued at law with another, relies solely on the promise of his co-defendant to take care of his interest and make a defense for both, and pays no retainer fee to his co-defendant, who is also an attorney at law, and nearly two years thereafter the suit is dismissed as to the co-defendant, and judgment entered by default against the other, who employs no one and takes no steps to present his legal defense, his negligence will be such as to preclude him from enjoining the collection of such judgment.

3. ATTORNEY'S NEGLIGENCE — *is negligence of the client.* The negligence of an attorney at law in failing to avail of a legal defense to an action at law, is the negligence of the client, and will preclude relief in equity, although the attorney may be insolvent.

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Statement of the Case. Briefs of Counsel.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

This was a bill by appellant to enjoin appellees from levying an execution issued on a judgment in the Circuit Court of Cook county in favor of John Bardonski, and against appellant, and assigned to appellee Goin, rendered February 23, 1888, on default. It appears that suit upon the same claim had been brought against appellant and one Frederick C. Dannecker in 1885, which, upon plea being filed, was dismissed, and the present suit brought in June, 1886, against appellant, and said Dannecker. Summons was served on Dannecker June 10, and upon appellant June 11, 1886. Dannecker filed a plea. On the 23d of February, 1888, the suit was dismissed as to Dannecker and default taken against appellant. This bill was filed March 24, 1888. On the hearing the preliminary injunction was dissolved and the bill dismissed. On appeal to the Appellate Court the decree was affirmed and appellant prosecutes this further appeal.

Messrs. FELSENTHAL, D'ANCONA and RINGER, for the appellant:

A default for not pleading will be opened when it is suffered by the neglect of the attorney and he is insolvent. *Meacham* v. *Dudley*, 6 Wend. 514; *Campbell* v. *Bristol*, 19 id. 102; *People* v. *Mayor*, 11 Abb. Pr. 66; *Allen* v. *Stone*, 10 Barb. 547; *Graybrook* v. *McCrudie*, 9 Wend. 438; *Elston* v. *Schilling*, 7 Roberts, 74; *Sharpe* v. *Mayer*, 19 How. Pr. 193; *S. C.*, 31 Barb. —; *Waring* v. *McKinley*, 62 id. 612; *Huebschmann* v. *Baker*, 7 Wis. 542; *Stowell* v. *Eldred*, 26 id. 504; *Holdon* v. *Meadows*, 31 id. 284.

Mr. FRANK H. GOIN for the appellees:

The negligence, ignorance or misapprehension of an attorney employed by a party to the action, or his mistakes as to the

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law is not ground for equitable relief. *Winchester* v. *Grosvenor*, 48 Ill. 517. The negligence of an attorney is the negligence of the party himself. *Kern* v. *Strausberger*, 71 Ill. 413; *Burton* v. *Wiley*, 26 Vt. 430; *Farmers' Loan Co.* v. *Walworth Co. Bank*, 23 Wis. 249; *Broda* v. *Greenwald*, 66 Ala. 538; *Sharp* v. *Moffitt*, 94 Ind. 240; *Quinn* v. *Wetherbee*, 41 Cal. 247; *Shricker* v. *Field*, 9 Iowa, 366; *Kreite* v. *Kreite*, 93 Ind. 583; *Yates* v. *Monroe et al.*, 13 Ill. 219; *Smith et al.* v. *Powell*, 50 id. 21; *Albro* v. *Dayton*, 28 id. 325; *Spaulding* v. *Thompson*, 12 Ind. 477; *Dibbe* v. *Trulock*, 12 Fla. 185; *White* v. *U. S. Bank*, 6 Ohio, 529; *Chester* v. *Apperson*, 4 Heisk. (Tenn.) 639; Freeman on Judgments (3d ed.), secs. 500–508; *Clark* v. *Ewing*, 93 Ill. 572.

Neither will relief be granted on the ground that an attorney, through design or ignorance, mismanaged the defense. Freeman on Judgments, sec. 508.

Equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense in the former action, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake, unmixed with fault or negligence on his own part or of those representing him. Freeman on Judgments (3d ed.), sec. 485, and cases cited; *Jevne et al.* v. *Osgood*, 57 Ill. 340; *Lavender* v. *Boaz*, 17 App. (Ill.) 421; *Pettis* v. *Bank*, 17 Vt. 435; *Clark* v. *Ewing*, 93 Ill. 574; 12 American and English Encyclopædia of Law, 145–147, and cases cited; *Buntain* v. *Blackburn*, 27 Ill. 406; *Sanger et al.* v. *Fincher, Adm'x, etc.*, 27 id. 346; *Allen* v. *Smith et al.*, 72 id. 331; *Walker* v. *Shreve et al.*, 87 id. 474; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332; 2 Story's Equity Jurisprudence, sec. 887; *Lucas* v. *Spencer*, 27 Ill. 17; *Ballance* v. *Loomis*, 22 id. 84; *Mellendy* v. *Austin*, 69 id. 15; *Yates* v. *Monroe et al.*, 13 id. 219; *Smith et al.* v. *Powell*, 50 id. 21; *Winchester* v. *Grosvenor*, 48 id. 517.

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The above doctrine is true, even though the judgment is "manifestly wrong" or unjust. Freeman on Judgments (3d ed.), sec. 485, and cases cited; *Walker* v. *Shreve et al.*, 87 Ill. 474.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

It is unnecessary to enter upon a discussion of the merits of the claim upon which the judgment was founded. It is alleged in the bill, and the proof tends to sustain the allegation, that appellant did not in fact owe the same, and in the absence of countervailing testimony, appellant must have succeeded in the common law action had he interposed his defense. The bill seeks to avoid the consequences of appellant's negligence in not interposing his defense on the facts; that his co-defendant, Dannecker, was a lawyer, and had received the money as a fee, in the prosecution of a claim in favor of one Theodosia Bardonski against the Chicago and North Western Ry. Co.; and that no part of it ever came to the hands of appellant; that upon the institution of the first suit, Dannecker agreed with appellant to look after it, file plea for him, and notify him of the time of the hearing, which he did; that upon the dismissal of the first suit, when they were again sued, Dannecker told him to pay no attention to it, that he would make the proper defense for both of them. The bill alleges that appellant "wholly relying and confiding in said Dannecker to make a proper defense, he" (complainant) "did nothing further in the premises, took no further steps in said suit," and he testifies: "I paid no attention to the suit until I was informed that there was judgment rendered." "I paid Dannecker no retainer."

It is insisted, first, that from the fact that although the declaration was filed in August, 1886, the judgment was not taken until February 23, 1888; that Runyan filed a plea for Dannecker in said cause, and that the files were so kept in said court that a plea might have been abstracted, the presumption must obtain that a plea was filed for appellant by Dannecker,

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or by some one by him employed. No plea was found on file. Runyan and Harris, who had appeared in the case, both testified, and there is no pretense that any plea was filed by them for appellant, although one was filed for Dannecker by Runyan. Dannecker resided in Louisville, Ky., at the time the judgment was rendered and the hearing therein had, and it is to be presumed that had he filed such plea for appellant, or employed or authorized another attorney to do so, it would have been shown. In the absence of this proof, which was within the power of the appellant to make, if true, it must be presumed that the record and files show the true condition of the case.

It is said, however, that the negligence, if any is attributable, was the negligence of Dannecker, and it being alleged and shown that he was and is insolvent, a court of equity will interfere to prevent the wrong to appellant resulting from such negligence.

We are referred to some cases decided by the Supreme Court of New York, which sustain that contention, but we are committed to the contrary doctrine. *Winchester* v. *Grosvenor*, 48 Ill. 517; *Kern* v. *Strausberger*, 71 id. 413; *Clark* v. *Ewing*, 93 id. 572.

In *Kern* v. *Strausberger* we said: "It is apprehended it can make no difference in principle whether the attorney is solvent or insolvent. The cases are decided on the theory that the party is himself guilty of *laches* in relying on the diligence of his attorney, and that he is not excusable for failing to make his defense at law simply because he employed counsel to do it for him. Indeed, the combined diligence of *both* is required, otherwise the party has not availed himself of all the means the law has placed in his hands to enable him to make his defense. This he must do before he can invoke the aid of a court of chancery." It here appears, that from the 11th of June, 1886, until after February 23, 1888, appellant paid no attention whatever to the cause, although duly served upon the former

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day with summons. During that time he neither saw nor consulted with said Dannecker, or any other attorney; did not know where Dannecker's office was, or that he had in fact employed anybody to attend to said suit. If he did not know, the slightest diligence would have apprised him that Dannecker, during all that time, resided out of the State. And it must be said that his own negligence produced the result of which he complains. The law gave him his day in court, with the privilege of making his defense, and he can not invoke the aid of a court of equity to relieve him from its consequences.

It is well settled that equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his own part. See 12 Am. & Eng. Enc. of L., 145, cases cited in note 5.

The rule in this State being, as said in *Kern* v. *Strausberger*, *supra*, "that the negligence of an attorney is the negligence of the party himself," appellant would also be responsible for the conduct of Dannecker as his attorney, unless special circumstances are shown in the conduct of the attorney which would amount to a fraud upon the client, and the judgment was the result of such fraud. *Clark* v. *Ewing*, *supra*. Here, although unlawful confederation and collusion are alleged between the attorney and appellees, the record is barren of any evidence tending to sustain it, and there is no circumstance shown other than that Dannecker agreed to interpose the defense for appellant and failed to do so.

Moreover it does not appear that appellant *relied* upon Dannecker as his attorney. He paid him nothing, and it was evidently understood that he was not to pay Dannecker for his services. The latter having received the money sued for and claiming it, regarded the suit as his own, and proposed to attend to it himself without trouble or expense to appellant.

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And it would seem that appellant relied upon his co-defendant, as such, rather than as his lawyer, to employ attorneys and interpose the defense. If this view be correct, it relieves the case of the grounds so strenuously urged for reversal, that the judgment was the result of the negligence of appellant's attorney.

In any view of the case to be taken, a court of equity can afford no relief.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

ALBERT SCHULTZE

v.

LOUISA H. A. SCHULTZE *et al.*

Filed at Springfield, January 18, 1898.

1. UNITED STATES TREATY — *liberally construed.* Where a treaty of the United States with a foreign nation admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred, following the case of *Hauenstein* v. *Lynham*, 100 U. S. 483.

2. ALIEN LAND LAWS — U. S. TREATY WITH BREMEN — *rights of alien heirs thereunder — treaty construed.* By section 7 of the treaty of the United States with the Hanseatic Republic of Bremen, concluded on December 20, 1827, where a citizen of the United States dies intestate, owning land and leaving non-resident alien kindred, residing in and citizens of Bremen, who would be his heirs but for their alienage, there is granted to such kindred the term of three years within which they may dispose of such lands and remove the proceeds.

3. The word "representatives" in the second clause of section 7 of such treaty refers to all who take by will or descent, including devisees and heirs as well as executors and administrators; otherwise there is no antecedent to which the word "said" before the word "heirs" in the third clause can refer. The second clause may be construed to mean that the representatives or heirs of American citizens, being citizens of

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Syllabus.

Bremen. shall succeed to personal goods. It follows that by the terms of the third clause the heirs of American citizens who are citizens of Bremen have the prescribed term of three years to dispose of real estate, which they would have inherited but for their alienage.

4. SAME — *title of non-resident alien heirs to lands inherited — partition.* Where non-resident alien heirs of an American citizen are granted, by treaty of the United States, three years within which to sell lands they would have inherited but for their alienage, and to remove the proceeds, they will take a fee in such land determinable by the non-exercise of the power of sale within three years. They will have such an interest in the land as will entitle them to maintain a proceeding for partition.

5. In such a case the fee vests in the non-resident alien heirs, and they will have the rights of ownership in the property and all the advantages of its use and possession for the purpose of making sale of the same. By such a treaty the alien heir is clothed for the period granted, for the purpose of making sale, with the same rights that he would enjoy if he was a resident heir, being subject simply to the obligation to sell and convey the fee to some other party capable of holding. The right to sell and dispose of land at pleasure and dispose of the proceeds can not be exercised unless the donee is vested with title or the complete ownership.

6. SAME — *treaty suspends the statute.* The effect of the treaty of the United States with Bremen is to suspend, during the period of three years, the operation of the alien law of this State, which makes non-resident aliens incapable of taking lands by descent; and the right of the resident heir or of the heirs capable of taking under the State law, and the right of the State or county to take the land by escheat in default of heirs capable of holding the same, are also suspended during the term of three years named in the treaty.

7. STATUTES CONSTRUED — *sec.* 1, *chap.* 39, *R. S.— heirship of surviving husband or widow.* The statute (chap. 39, sec. 1) which makes the surviving husband or widow of a decedent an heir when there is no descendant left, applies to cases where the surviving widow or husband is capable of taking, and not to cases where there is incapacity by reason of alienage.

8. PARTIES — *bill for partition — estate will not escheat where any heir is capable of taking.* In the absence of any treaty of the United States with a foreign country providing otherwise, the interest that a non-resident alien heir of a citizen of this State would take but for his alienage, will not escheat to the State or the county, if there is a resident heir capable of taking by descent, as such heir will take the entire estate of such decedent, and hence the State or county is not a necessary party to a bill for partition.

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Statement of the Case.

APPEAL from the Circuit Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

This is a bill, filed on December 11, 1891, in the Circuit Court of Cook county by Louisa H. A. Schultze, the complainant below, who is one of the appellees here, against Albert Schultze, one of the defendants below and the appellant here, and Anna Schomberg, one of the defendants below and one of the appellees here, for the partition of certain land in that county. The bill alleges, that George Ludwig Schultze died intestate and without issue on July 5, 1891, owning the premises in controversy, and leaving him surviving the complainant, his widow, and Albert Schultze, his brother, and Anna Schomberg, his sister, as his only heirs at law; that the deceased intestate was a citizen of the United States; that the defendant, Albert Schultze, is also a citizen of the United States residing in Illinois; that the complainant is a resident of the Hanseatic Republic of Bremen in the Empire of Germany; that the defendant, Anna Schomberg, resides in Bremen, Germany; that no other persons except the complainant and the defendants have any interest in said premises; that by the death of said George they became seized in fee as tenants in common by descent in the proportions provided by law (the widow of one-half and dower in the other half, and the brother and sister of one-half subject to the widow's dower); that the dower has not been admeasured, etc.

The defendant, Schomberg, filed an answer, substantially admitting the allegations of the bill. The defendant, Albert Schultze, filed a plea, setting up that the deceased was a citizen of the United States at the time of his purchase of the land and up to his death; that the complainant is, as to the United States, a non-resident alien, and before filing her bill resided, and still resides, in the Hanseatic Republic of Bremen in the German Empire, and was, at the time of said death, and still is, a citizen of said republic; that, by an act of the legislature

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of Illinois, in force in July, 1887, and at the time of said death, it was provided that non-resident aliens, etc., shall not be capable of acquiring title to or taking or holding any lands in this State either by descent, devise, purchase or otherwise, except, etc., reference being made to said act for its provisions; that the defendant pleads said act and prays judgment, etc.

The cause was heard upon the bill and answer of Anna Schomberg and the replication thereto, and upon said plea. The court held that the plea was not sufficient in law to bar complainant's right to the relief prayed, and overruled the same, the defendant Albert Schultze excepting to said ruling and praying an appeal. After hearing testimony, the court found the allegations of the bill to be true; that partition should be made and dower assigned; that commissioners be appointed, etc. The case is brought by appeal to this court, and by consent to the Central Grand Division.

Mr. ARTHUR SCHROEDER, for the appellant:

Sec. 1, chap. 6, relating to inheritance by aliens, by plain language prohibits non-resident aliens from acquiring and holding title to real estate in this State by descent, devise, purchase or otherwise. Such Alien act is not local or a special law, but is general in its nature and scope.

As bearing on the construction and validity of the Alien act in force in this State, reference is made to *Mick* v. *Mick*, 10 Wend. 379; *Kennedy* v. *Wood*, 20 Wend. 230; *Connolly* v. *Smith*, 21 Wend. 59; *People* v. *Coughlin*, 2 Hill, 67; *Moore* v. *White*, 6 Johns. Ch. 360; *Gansevert* v. *Lunn*, 3 Johns. Cas. 109.

Mr. WILLIAM VOCKE and Mr. JULIAN W. MACK, for the appellees:

The statute of this State relating to aliens is void because it is in conflict with various treaties made by the government of the United States, which are by the constitution declared to be

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a part of the supreme law of the land. Const. of U. S., art. VI; *Hauenstein* v. *Lynham*, 100 U. S. 483; 8 Opinions of Att'y General, 417; *Chirac* v. *Chirac*, 2 Wheat. 259; *Ware* v. *Hylton*, 3 Dall. 199; *People* v. *Gerke*, 5 Cal. 381.

It is in conflict with a treaty made with the German Empire, and violates the principles of international comity; Treaty between the U. S. and German Empire, proclaimed December 11, 1871, art. 10, last paragraph; Wheaton's International Law, par. 2, chap. 11, sec. 4; Field's International Code, chap. 26, secs. 334–336.

Being void as to citizens of those countries with which the United States has entered into treaties, but affecting citizens of other countries with whom no treaty relations exist, it operates as a special law changing the statute of descent as against the latter.

The construction of the statute should be a liberal one so far as it affects private rights.

As to the common law of England, relating to aliens, see Blackst. Com., B. I, p. 371, and B. II, p. 249–251, Cooley's ed.

As to the common law of Virginia and Illinois, see 1 Minor's Inst., 144; 1 Tucker's Com. on Blackst., 65 *et seq.*; *Hubbard* v. *Goodwin*, 3 Leigh, 508.

Statutes of Illinois: Territorial Act of Sept. 17, 1807; Illinois Session Laws, 1819, Feb. 6, p. 6; Id. 1827, Feb. 7, p. 49; Id. 1829, Jan. 23, p. 207; Revised Statutes, 1845, chap. 4; Ill. Session Laws, 1851, Feb. 7, p. 149; Id. 1887, June 16, p. 5; Id. 1891, p. 3.

In order to arrive at the proper interpretation of a statute, the courts will, in doubtful cases, strain the meaning of words, transpose or interpose words, change their ordinary meaning or insert modifying clauses. See *Kilgour* v. *Gockley*, 83 Ill. 109; *County of Perry* v. *Jefferson*, 94 id. 214; *People* v. *Hoffman*, 97 id. 234.

Forfeitures are never enforced by the courts, unless the legislature has a plain constitutional right to enact them, and

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exercising this right, has enacted them in plain and unequivocal language.

The statute is loosely drawn, and taking away private rights should be most carefully considered.

The plea offers no defense to the bill, because appellants have at least a defeasible title. *Carlow* v. *Aultman Co.*, 28 Neb. 672; *Bone* v. *Canal Co.*, 5 Atl. Rep. 751; *Hickory Farm Oil Co.* v. *Railroad*, 32 Fed. Rep. 22.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The main questions involved in this case are settled by the opinion filed at this term in the case of *Wunderle* v. *Wunderle*, *ante*, page 40. In that case, the non-resident aliens claiming to take lands by descent in Illinois were held to be incapable of inheriting under the act of 1887, there being no treaty, permitting them to acquire or hold lands in this country, between the Grand Duchy of Baden of which they were subjects, and the United States of America. Here, however, the appellees, who are non-resident aliens, are citizens of the Hanseatic Republic of Bremen, between which Republic and the United States a convention or treaty was concluded on December 20, 1827, and afterwards ratified and proclaimed. Article 7 of said treaty is as follows: "The citizens of each of the contracting parties shall have power to dispose of their personal goods, within the jurisdiction of the other, by sale, donation, testament, or otherwise; and their representatives, being citizens of the other party, shall succeed to their said personal goods, whether by testament or *ab intestato*, and they may take possession thereof, either by themselves or others acting for them, and dispose of the same at their will, paying such duties only as the inhabitants of the country, wherein said goods are, shall be subject to pay in like cases; and if, in the case of real estate, the said heirs would be prevented from entering into the possession of the inheritance on account of their character of aliens, there shall be granted to them the term of three years to dis-

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pose of the same, as they may think proper, and to withdraw the proceeds without molestation and exempt from all duties of detraction on the part of the Governments of the respective States."

The language of this article is not as clear in its meaning as the provision quoted in *Wunderle* v. *Wunderle*, *supra*, which allows a reasonable time to sell and remove the proceeds "where on the death of *any person* holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other were he not disqualified by alienage, etc." But the rule laid down by the Supreme Court of the United States is that, "where a treaty admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred." (*Hauenstein* v. *Lynham*, 100 U. S. 483). If the language of article 7 be given a liberal construction, it may be held to mean, that, where a citizen of the United States dies intestate owning land and leaving non-resident alien kindred, residing in and citizens of Bremen, who would be his heirs but for their alienage, there will be granted to such kindred the term of three years within which they may dispose of such lands and remove the proceeds. The word, "representatives" in the second clause of the article must refer to all who take by will or descent, including devisees and heirs, as well as executors and administrators; otherwise, there would be no antecedent, to which the word "said" before the word "heirs" in the third clause could be made to refer. The second clause can be construed to mean, that the representatives or heirs of American citizens being citizens of Bremen shall succeed to personal goods. It follows that, by the terms of the third clause, the heirs of American citizens who are citizens of Bremen shall have the prescribed term of three years to dispose of real estate, etc.

The appellees are, therefore, entitled, under said article 7 of the treaty, to the privilege of selling the interests in the land

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in controversy, which they would have inherited from the deceased George Ludwig Schultze under the laws of Illinois but for their alienage, and of removing such proceeds of sale, provided they do so within three years. The question then arises: what interest in the land is vested in non-resident aliens by the grant to them of a term of three years within which they can sell such land and remove the proceeds?

It would seem, that, in such case, the alien heirs take a fee determinable by the non-exercise of the power of sale within three years. (*Kull* v. *Kull*, 37 Hun, 476). By the terms of the treaty the power to dispose of the land and appropriate its proceeds is granted in positive terms. Such a power to sell cannot be exercised unless the donee is vested with the fee, or, in other words, the complete ownership. It has been said that, "it is an affront to common sense to say that a man has no property in that which he may sell when he chooses, and dispose of the proceeds at his pleasure." (*Kull* v. *Kull*, *supra*). In the case of *Kull* v. *Kull*, *supra*, where the proceeding, like the present one, was for partition, the precise question now under consideration was involved, and it was there held, that the fee vested in the non-resident alien; that the treaty intended to confer upon him the rights of ownership in the property and the advantages of its use and possession for the purpose of making the sale; that, under the provisions of the treaty, the alien heir was clothed, for the period granted for the purpose of making the sale, with the same rights he would enjoy if he were a resident heir, being subject simply to the obligation to sell and convey the fee to some other party capable of holding.

It follows, that the non-resident aliens, thus vested with the power of sale under the treaty, can bring a partition suit for the purpose of having their interests set apart in severalty. The right to bring such a suit is involved in the ownership of the determinable fee; and the partition of the property will make it easier to dispose of it in accordance with the permis-

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sion granted by the treaty. An undivided interest in land is always less salable than a definite portion thereof as fixed by a division.

The effect of the treaty is to suspend, during the period of three years, the operation of the alien law of this State, which makes the non-resident aliens incapable of taking land by descent. The rights of the resident heirs, or the heirs capable of taking under the State law, and the right of the State or county to take the land by escheat in default of heirs capable of holding the same, are also suspended during the term of three years named in the treaty. (*Kull* v. *Kull*, *supra*). If, at the end of the three years, no sale is made by the non-resident aliens, the State law again comes into force and directs the disposition of the property. (Laws of 1887, page 5).

In the case at bar, upon the showing made by the present record, the land could not escheat to the State or the county, because appellant, the brother of the deceased, is a citizen of the United States and a resident of Illinois, and, therefore, capable of inheriting according to the views expressed in *Wunderle* v. *Wunderle*. By clause second of section 1 of the Statute of Descents in this State, it is provided, that estates shall descend, "when there is no child of the intestate, nor descendant of such child, and no widow or surviving husband, then to the parents, *brothers* and sisters of the deceased," etc. (Rev. Stat. chap. 39, sec. 1). It being alleged in the bill and also in the plea that the widow, Louisa H. A. Schultze, one of the appellees herein, is a citizen of Bremen, no question as to the effect of the citizenship of her deceased husband upon her alleged alienage is presented in this case. The statute evidently refers to cases where the surviving widow or husband is capable of taking, and not to cases where there is incapacity by reason of alienage. Hence, it is manifest that appellant would take the whole of the land under the State law if the treaty were not in the way. As the appellant is a party to the partition proceeding, he will be bound by it. As it is not

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shown that the land will escheat for failure of heirs capable of inheriting, it cannot be said that the State or county is a necessary party.

For the reasons here stated, we think that the plea of the appellant was not sufficient to bar the right to the relief prayed for in the bill.

Accordingly, the decree of the Circuit Court is affirmed.

Decree affirmed.

FREDERICK G. SMITH

v.

WILLIAM H. SMITH *et al.*

Filed at Ottawa, January 19, 1893.

1. ADVANCEMENT — *when presumed — how the presumption may be rebutted.* Where one purchases land with his own money and the legal title is taken in the name of his wife or child, the law will presume that it was intended as an advancement. This presumption may be rebutted or supported by evidence of antecedent or contemporaneous acts, facts or circumstances connected with the purchase, or so soon thereafter as to be fairly considered a part of the transaction itself.

2. SAME — *presumption rebutted — resulting trust.* Where a husband buys land with his own means, if his wife, by fraud or wrongful act against his intention, obtains a conveyance to be made in her name, the presumption of an advancement will be rebutted, and the presumption that she holds in trust will arise.

3. SAME — *and herein of the burden of proof.* The presumption of fact, when a deed is made to the purchaser's wife, that it was intended as a gift or advancement, must prevail until overcome, or rebutted by proof of such facts and circumstances as will satisfy the conscience of the chancellor that the conveyance was, in fact, taken to the wife for the benefit of the husband. The burden of proof is on the party claiming a resultant trust to show that an advancement was not intended.

APPEAL from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

This was a bill filed by appellant in the Circuit Court of Cook county against Walter H., F. Clarence, Jessie O. and

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H. Irene Smith, to have a resulting trust declared and enforced in his behalf in certain property in the city of Chicago. After issues joined, the cause was referred by the court to a master in chancery to take the evidence and report the same to the court, together with his conclusions.

Upon the incoming of the report, the master having found in favor of the complainant, exceptions were filed to the report by defendants Walter H. and Jessie O. Smith, which exceptions were sustained by the court, and said complainant's bill dismissed. From this ruling of the court this appeal is prosecuted.

The facts in this case are substantially as follows: In 1883 the property in question belonged to the Travelers' Insurance Company and had for sometime been occupied by appellant with his family. Appellant desiring to purchase the property for a home, through a Mr. Calhoun, opened negotiations with Mr. White, the agent of the company. The result was that a price and terms of sale were agreed upon, and appellant took an abstract of title to his attorney and procured his opinion thereon. Shortly afterward, it is shown, appellant brought a mortgage (of the premises) to secure $800, part of the purchase price, to the same attorney for examination and said: "Here is the mortgage White has made out. I will come over here some noon hour with my wife; we can acknowledge it, then I wish you would attend to the winding up of it." Subsequently appellant and wife called at the attorney's office. The mortgage and notes were produced, and, by direction of the attorney, Mrs. Smith signed the same *first* and appellant's signature followed hers, that being the order of the names in the body of the instrument. The four (4) principal notes of $200 each, and twenty (20) interest coupons were all signed the same way. The attorney indorsed on the back of the mortgage, "Adelaide Smith and Frederick J. Smith." "Travelers' Insurance Company." Appellant then said that he was very busy, and handing the mortgage to the attorney with a check for $675, being the cash payment, requested him to go down with Mrs. Smith

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to White's office and close up the purchase. The attorney and Mrs. Smith went to White's office, delivered the mortgage, notes and check and received in return a warranty deed from the Travelers' Insurance Company conveying the property to Mrs. Adelaide Smith. Nothing had been said up to that time by appellant to the attorney in reference to whom the deed was to be made, nor is any explanation given of why Mrs. Smith was made principal in the mortgage, and why she signed the notes and coupons. The mortgage was by "Mrs. Adelaide Smith and her husband, Frederick J. Smith," and acknowledged accordingly.

It does not appear that the attorney had been consulted in respect of how the title was to be taken, and when the deed was received he directed the attention of Mrs. Smith to the fact that it was to her, but does not remember what she said. The deed was placed on record by the attorney. The evidence shows subsequently, how long after the recording of the deed does not appear, the attorney called appellant's attention to the matter, who replied: "Well, for the present, we will let the thing rest; my wife will make a deed to me, fix it all right." The proof shows that appellant paid the entire purchase price, taxes and repairs out of his own money. Mrs. Smith had no means. From the time of the purchase the property was occupied as a homestead by appellant and Mrs. Smith until Mrs. Smith's death in March, 1886, and by appellant since. Appellant remarried in April, 1887. It appears that in the conversations between appellant and the attorney, before referred to, appellant said that he was buying the property, and said nothing about buying it for his wife. There is testimony of declarations by appellant tending to show that he understood the property to be his wife's. Thus, on a visit of himself and wife to the house of witness Reed, the wife of witness remarked that the title to *their* new house was in her name; appellant replied that is just what he did — had it put in his wife's name. At another time he said that he wanted to purchase a lot to

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live on, for the reason that the property in controversy belonged "to the children," etc.

Mr. THOMAS TAYLOR, JR., for the appellant:

The doctrine of resulting trusts arises by analogy, from the theory of the common law that a feoffment without consideration results to the feoffer. *Grey* v. *Grey*, 2 Swanst. 598; Dyer, 146; 2 Roll. Abr., 781; Coke Litt., 271, 23.

Resulting trusts are established, though in apparent derogation of the statute of frauds, that justice may be done. *Peer* v. *Peer*, 11 N. J. Eq. 432.

If A buy real property with his own money, and the legal title be taken in the name of B, a stranger, the latter becomes a trustee thereof for A.

Such is the old and well established law in nearly all the English speaking countries, and its discussion to-day is a matter of supererogation. *Anonymous*, 2 Vent. 361; 10 Bac. Abr. 1, 9, 200, title "Trusts;" Story's Eq. Jur. sec. 1201.

If A buy real estate with his own money, and the legal title be taken in the name of B, who is the wife of or child of A, then the law says *prima facie*, there is no trust, but a settlement, provision or advancement. *Persons* v. *Persons*, 25 N. J. Eq. 250; *Wallace* v. *Bowers*, 28 Vt. 639.

"Whether a purchase in the name of a wife or child is an advancement or not, is a question of pure intention." *Maxwell* v. *Maxwell*, 109 Ill. 591; *Persons* v. *Persons*, *supra*.

If a husband buy real property intending it for himself, and by mistake, or ignorance, or fraud, or without his assent or without his knowledge, which is the case at bar, the legal title be taken in the name of his wife, there is a resulting trust in his favor. *Peer* v. *Peer*, 11 N. J. Eq. 432; *Wallace* v. *Bowers*, 28 Vt. 639; *Maxwell* v. *Maxwell*, 109 Ill. 591; Perry on Trusts, secs. 144, 147.

The presumption of a provision for the wife may be rebutted by parol testimony. *Persons* v. *Persons*, *supra*; *Maxwell* v. *Maxwell*, *supra*.

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Any antecedent acts or facts may be received, either to rebut or support the presumption, and any acts or facts so immediately after the purchase as to be fairly considered a part of the transaction, may be received for the same purpose. *Maxwell* v. *Maxwell*, *supra*; *Peer* v. *Peer*, *supra*; *Shepherd* v. *White*, 10 Tex. 72; *Wallace* v. *Bowers*, 28 Vt. 639; *Persons* v. *Persons*, *supra*.

The presumption of a provision, where the husband buys real property and the conveyance is taken in the name of the wife, being based upon a supposed duty or moral obligation, is necessarily weak, as it is well known that in many jurisdictions a moral obligation is not a sufficient consideration for a contract and only results in a *nudum pactum*. *Dyer* v. *Dyer*, 2 Cox, 94, per Chief Baron EYRE.

The presumption is so weak that it merely acts as a "circumstance of evidence." *Dyer* v. *Dyer*, 2 Cox, 94.

"Thus, if there is any circumstance accompanying the purchase, which explains why it was taken in the wife's or a child's name, and shows that it was not intended to be an advancement, but was intended to be a trust for the husband or father, the presumption of an advancement will be rebutted and the inference of a trust will be established." 1 Perry on Trusts (4th ed.), sec. 146; *Cook* v. *Rosemond*, 27 Tex. 457; *Sunderland* v. *Sunderland*, 19 Iowa, 325.

Messrs. MONK & ELLIOTT, for the appellees:

The fact that a husband or a father paid the consideration money for an estate conveyed to a wife or child, will not establish a resulting trust in his favor. It will be taken as an advancement. *Maxwell* v. *Maxwell*, 109 Ill. 588; *Johnston* v. *Johnston*, 138 id. 385.

The presumption of an advancement can be overcome only by evidence that is clear, explicit and unequivocal, and such as will satisfy the conscience of the chancellor.

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It seems, at one time, to have been considered that the presumption of an advancement was a slight one and easily overcome, but this notion never had a firm foothold, and has long since been exploded, and it is now settled that the proof to rebut the presumption of an advancement must be as clear, satisfactory and explicit as that required to establish a resulting trust. *Reed* v. *Huff*, 40 N. J. Eq. 229; *Shay* v. *Pittes*, 35 Ill. 360; *Reed* v. *Reed*, 135 id. 482; *Bogy* v. *Roberts*, 48 Ark. 17; *Sutherland* v. *Sutherland*, 69 Ill. 481; *Mahoney* v. *Mahoney*, 65 id. 406.

When land is purchased by a husband, who takes the title in the name of the wife, the presumption is strong, if not conclusive as between them, that it is intended as an advancement for the wife, and not as a trust in favor of the husband. *Sunderland* v. *Sunderland*, 19 Iowa, 325.

If the title is taken in the name of the wife with the husband's consent, the presumption that it is intended as an advancement is, in the absence of a written declaration, conclusive. Any arrangement or understanding that the wife will convey to the husband will create only an express trust, and must be in writing. *Johnston* v. *Johnston*, 138 Ill. 385.

Declarations of the husband subsequent to the conveyance can not be admitted to overcome the presumption of an advancement.

To render competent the declarations of complainant, it must appear that they were made before or contemporaneously with the purchase, or so immediately thereafter as to be fairly considered a part of the transaction. *Maxwell* v. *Maxwell*, 109 Ill. 588; Perry on Trusts, sec. 147; *Robinson* v. *Robinson*, 45 Ark. 481; *Harness* v. *Harness*, 49 Ind. 385.

Declarations made by the husband after the purchase, though incompetent to control the effect of the deed, may be used against him by the wife in support of the legal title. Perry on Trusts, sec. 147.

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Mr. JUSTICE SHOPE delivered the opinion of the Court:

It is a familiar and well established rule, that where one purchases land with his own money, and the legal title is taken in the name of his wife or child, the law raises a presumption that it was intended as an advancement. *Finch* v. *Finch*, 15 Ves. 50; *Read* v. *Huff*, 40 N. J. Eq. 234, and cases cited; *Maxwell* v. *Maxwell*, 109 Ill. 588; Perry on Trusts, sec. 146.

The presumption thus arising may be rebutted or supported by evidence of antecedent or contemporaneous acts, facts or circumstances, connected with the purchase, or so immediately thereafter as to be fairly considered a part of the transaction itself. Cases, *supra*; *Robinson* v. *Robinson*, 45 Ark. 484; Perry on Trusts, sec. 147.

Are the facts presented by the record in this case sufficient to overcome the presumption, attaching to the conveyance in question, that the same was intended by appellant as an advancement to his wife?

The complainant's bill alleges that at the time of the purchase of said real estate, he was closely engaged in business, and, not having time to attend to the details thereof, entrusted the same to his wife, Adelaide Smith; that it was the intention to have the title to said real estate taken in complainant's name, but he discovered afterward that it had been taken in the name of his wife; that his wife knew all the time that the same belonged to and should have been taken in the first instance in the name of complainant. These allegations are evidently intended to impute fraud and artifice, upon the part of appellant's wife, in taking the deed to the property, and indirectly and inferentially charge that she being entrusted "to attend to the details of said purchase," surreptitiously procured said deed to be made to herself as grantee, instead of to her husband, the appellant. Admitting that these allegations amount to a substantial charge of fraud, or to any other statement of fact, sufficient, if sustained by the evidence, to over-

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throw the presumption attaching to the conveyance, the bill is not borne out and supported by the evidence in the case.

It is clear to our minds, from the evidence in the record, that from the time Mr. Calhoun's connection with the negotiations ceased, no one had anything to do with the purchase, other than appellant himself, until the day the transaction was closed. Mr. Calhoun, in his testimony, leaves the appellant to go ahead, and carry on the negotiations for the purchase already inaugurated by his apparently disinterested instrumentality. The appellant procured the abstract of title, which it is reasonable to presume he obtained from or through Mr. White, agent of the grantor, the insurance company, and took the same to his attorney for examination. Afterward the appellant took a mortgage, made out by Mr. White to secure $800 of the purchase price, to said attorney to examine. Appellant and his wife subsequently called at the attorney's office and signed the mortgage and acknowledged it before him, Mrs. Smith signing the mortgage, four principal notes and twenty interest coupons first, and appellant signing after her, under the direction of appellant's attorney. Appellant then handed a check of $675 to said attorney, and directed his wife and said attorney to go to White's office and close the transaction.

Appellant, instead of trusting the details of the purchase to his wife, performed every act, ordinarily incident to the purchase of real property, and his wife does not appear in the transaction in any essential particular, if at all, until the day the purchase is closed. All the connection then shown consisted in her executing the notes and mortgage and going with the attorney to turn over the same and the check to Mr. White, and obtaining the deed which was executed ready for delivery.

The deed and its acknowledgment in Hartford, Conn., the mortgage, notes and interest coupons all bore date October 1; the transaction was closed December 1, prior to which latter date there is not a scintilla of evidence showing or tending to show that appellant's wife had any connection, directly or

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indirectly, with the purchase of the property. Undoubtedly, if the wife, by fraud or wrongful act against the intention of the husband, had obtained the conveyance to be made in her name, the presumption of an advancement would be rebutted, and the presumption that she held in trust arise. Perry on Trusts, sec. 148, and cases cited. But there is absolutely no evidence tending to sustain the allegations of the bill in that regard. It may be that the death of White and of Mrs. Smith, and the consequent disqualification of appellant, renders it impossible to show the true state of the case.

The burden being upon appellant, he must establish the necessary facts, either by direct proof of a contrary intention, or of facts and circumstances which will overcome and rebut the presumption. The presumption of fact, where the deed is made to the wife, that it was intended as a gift or advancement, must prevail until overcome or rebutted by proof of such facts and circumstances as will satisfy the conscience of the chancellor that the conveyance was in fact taken to the wife for the benefit of the husband. In this case, independently of the proof that the consideration was paid by the husband, there is evidence of no fact or circumstance, as we read the record, inconsistent with the presumption. Indeed, the only competent evidence in the record tends to show that the husband had the deed made to the wife, and that he recognized the title to be in the children of the wife after her death intestate. It is unnecessary, therefore, in this case to consider the many authorities cited where an attempt has been made to lay down a rule as to the measure and *quantum* of evidence necessary to overcome the presumption of a gift or advancement. The burden is, at least, on the party holding the affirmative, to make out his case and show that an advancement was not intended. Perry on Trusts, secs. 145–152, and cases *supra*.

The decree dismissing the bill was properly entered and must be affirmed.

Decree affirmed.

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THE PEOPLE OF THE STATE OF ILLINOIS

v.

JAMES MINER *et al.*

Filed at Ottawa, January 19, 1893.

1. CRIMINAL LAW — *appeal by the people.* A defendant having been arrested for a criminal offense, tried before a competent court and acquitted, can not, on the application or appeal of the people, be tried a second time. This applies as well to misdemeanors as to felonies.

2. FISH LAW — *provision for appeal, unconstitutional.* Section 14 of the fish law of 1885 and 1887, which provides for an appeal from a judgment, acquitting one charged with a breach of that law, and for his trial on appeal, is in violation of section 10, article 2 of the constitution, which provides that no person shall twice be put in jeopardy for the same offense.

3. APPEALS AND WRITS OF ERROR — *record treated as an answer to a writ of error.* Where the trial court refuses to grant an appeal from its judgment, to the plaintiff, who causes to be filed in this court a transcript of the record upon which errors are assigned, if the other party appears and files briefs, the record may be treated as filed in answer to a writ of error, and there being no appeal, a motion to dismiss the appeal can not be allowed.

4. SAME — *validity of a statute.* Where the only question presented by the record is the constitutionality of a statute, an appeal lies directly from the trial court to this court.

WRIT OF ERROR to the Circuit Court of Mercer county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. JAMES M. BROCK, for the plaintiff in error.

Messrs. PEPPER & SCOTT, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a prosecution instituted before a justice of the peace of Mercer county against James Miner and Fred Sillick for a violation of the fish law, by illegally catching and killing fish with a seine, contrary to the statute of the State. The prosecution was commenced by filing a sworn complaint before the

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justice, upon which a warrant was issued in the name of the people for the arrest of the defendants named in the complaint. The defendants were arrested and brought before the justice, where a trial was had before a jury, resulting in a verdict of not guilty, and the defendants were discharged. Walter D. Dodson, who made the complaint, took an appeal to the Circuit Court where, on motion of the defendants, the appeal was dismissed. For the purpose of reversing the judgment of the Circuit Court the People have brought the record to this court.

The defendants entered a motion to dismiss the appeal. This motion will have to be overruled. In the first place no appeal was allowed nor has an appeal been taken. There is, therefore, no appeal to be dismissed. An appeal was prayed in the Circuit Court and denied. The people then filed in this court a transcript of the record properly certified, upon which errors have been assigned, and as the defendants have appeared and filed briefs, the record may be treated as filed in answer to a writ of error.

It is also insisted that this court cannot entertain jurisdiction of this case on appeal from or error to the Circuit Court; that the case should have gone to the Appellate Court. There is but one question presented by the record and that is, the constitutionality of a statute; and under the ruling in *People* v. *Blue Mountain Joe*, 129 Ill. 370, the case was properly brought directly to this court.

The Circuit Court, as we understand the record, dismissed the appeal on the ground that the proceeding was a criminal prosecution, and as there had been one trial before the justice of the peace and a jury, the defendants could not be tried a second time for the same offense on appeal or otherwise. Section 10, article 2 of our constitution provides: "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Section 14 of the fish law of 1885 and 1887 provides: "That any defendant who may be convicted, or in case of acquittal the

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party making the complaint, or any person who will give the necessary bond, shall have the right of appeal on the same terms as in civil cases before justices." As the statute is sufficiently comprehensive to allow an appeal in a case of this character, on behalf of the people, the only question to be determined is, whether the statute is in conflict with the constitution. On the 31st of May, 1887, the legislature passed an act to encourage the propagation and cultivation and secure the protection of fishes in all the waters of this State. This act contained sixteen sections and provided that all acts in conflict with the act should be repealed. On the 3d day of June, 1889, another act was passed amending the act of 1887 by substituting sections 1 to 6 and section 15, for sections 1 to 6 and section 15 in the other act. The act was again amended in 1891, but as this prosecution was commenced in November, 1890, it must be controlled by the acts of 1887 and 1889, and such portions of the act of 1885 as were not repealed by the act of 1887. Section 8 of the act of 1887 requires all suits brought to enforce the provisions of the act to be brought before a justice of the peace, in the name of the people, on the complaint of any person showing by affidavit that some section of the act had been violated. Section 10 provides that if the justice before whom the complaint is made shall be satisfied that there is reasonable cause, he shall issue his warrant directed to the sheriff or constable of the county, commanding him forthwith to arrest and bring before him the person alleged to be guilty. Section 11 provides for a trial before the justice and a jury, if one should be demanded, and judgment shall be for conviction or acquittal. Section 12 authorizes an execution to issue upon a judgment of conviction immediately, and section 13 provides if the execution is returned no property found, the justice shall issue his warrant to the sheriff or constable, commanding him to take and deliver the defendant to the jailer of the county, who shall commit the defendant not less than ten nor more than sixty days, as the justice shall direct in his warrant. Sec-

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tion 5 of the act of 1889 makes it the duty of all sheriffs and constables and fish commissioners to cause any person violating the act to be promptly prosecuted, and the fish commissioners shall have power to arrest without warrant any violator of the act, except as to sections 2 and 3. Section 15 provides that a person violating any of the provisions of the act shall be guilty of a misdemeanor, and upon a conviction shall be fined not less than ten nor more than two hundred dollars. Under these provisions of the statute the defendants were arrested under a warrant, charged with the violation of a public law, a conviction under which is declared to be a misdemeanor. In view of the language of the statute and the manner in which the defendants were arrested, tried and acquitted, the conclusion is irresistible that the defendants were tried for a criminal offense. Indeed, the fact that defendants were on trial for a criminal offense might be placed on section 8, Division 2, of the Criminal Code. That section declares a criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence. The defendants having been arrested for a criminal offense, tried before a court of competent jurisdiction, can they, on the application of the people, be tried a second time? This is forbidden both by the common law and our constitution and cannot be done. In Wharton's American Criminal Law, vol. 1, sec. 573, after referring to the provision in the Federal constitution, to the effect that no person shall be subject for the same offense to be twice put in jeopardy, the author says: "Whether this amounts to anything more than the common law doctrine involved in the plea of *autrefois acquit* has been much doubted. What that doctrine is has been already stated. It is founded, to adopt the summary of Chitty, upon the principle that no man shall be placed in peril of legal penalties more than once upon the same accusation. It has, therefore, been generally agreed that where a man has once been pronounced not guilty on a valid indictment or appeal he can not

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afterward be indicted again upon a charge of having committed the same supposed offense. At common law, as has been seen, it means nothing more than that where there has been a final verdict either of acquittal or conviction on an adequate indictment the defendant can not a second time be placed in jeopardy." The question in a somewhat different form was before this court at an early day in *The People* v. *Dill*, 1 Scam. 257, where the defendant had been indicted for selling liquor without a license. A trial was had and defendant acquitted. The State's Attorney, in behalf of the people, excepted and sued out a writ of error. The defendant appeared and moved to dismiss the writ of error for the want of jurisdiction, and the motion was sustained and the writ of error dismissed. The same question arose in *The People* v. *Royal*, 1 Scam. 557. There the defendant had been tried and convicted for an assault and battery before a justice of the peace. On appeal by the defendant to the Circuit Court the judgment of the justice was reversed and the defendant discharged. The people sued out a writ of error and the court dismissed it on its own motion, and in deciding the case said: "The constitution of this State * * * has declared that no person shall for the same offense be twice put in jeopardy, * * * or, in other words, that he shall be again tried for the same offense after an acquittal. * * * It is manifest that in such a case this court has no jurisdiction over the cause, and that even a reversal of the judgment of the Circuit Court could not be of practical utility." It will be observed that both of the cases cited, like the one here involved, were misdemeanors. The doctrine is, therefore, applicable to misdemeanors as well as felonies. The language of our constitution on this point is plain: "No person shall be twice put in jeopardy for the same offense." Where there has been a trial and conviction or acquittal for a criminal offense, regardless of the magnitude of the crime, the constitution applies. We have been, however, referred to *The People* v. *Bridges*, 142 Ill. 30, as an authority sustaining the position of

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appellant. In that case the question was neither raised, considered nor decided, and hence it can have no bearing here. We have also been referred to *Jones* v. *State*, 15 Ark. and *Taylor* v. *State*, 36 id. as authorities sustaining the position of appellant. In those cases it was held, as we understand them, that where a defendant is indicted for a misdemeanor, punishable by fine only, and is acquitted, and the people sue out a writ of error and reverse the judgment, there may be a second trial. But the decision is based on the peculiar phraseology of the constitution of that State which provides that a person "shall not be twice put in jeopardy of life or limb." This differs so much from the language of our constitution that the decisions of the Supreme Court of Arkansas, although rendered by an able bench, can not be regarded as authority to control cases arising under our constitution. The case of *The People* v. *Blue Mountain Joe*, 129 Ill. 370, was an ordinary action of debt and can have no bearing here. In conclusion, we are of the opinion that the section of the statute which authorized the people to take an appeal was unconstitutional, and the Circuit Court did right in dismissing the appeal. The judgment will be affirmed.

Judgment affirmed.

MENZO LAMBERT *et al.*

v.

JOHN ALCORN.

Filed at Ottawa, January 19, 1893.

1. DRAINAGE — *into any natural water-course.* Under section 4 of the act of 1885, relating to drainage, the land owner may drain his land in the course of natural drainage and discharge the water into any natural water-course, or into any natural depression, whereby the water will be carried into some natural water-course.

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Syllabus.

2. SAME — *rights of owner of dominant heritage.* The owner of a higher tract of land has the right to have the surface water falling or naturally coming on his premises by rains or melting snows pass off through the natural drains, upon or over the lower or servient lands next adjoining; and the owner of the dominant heritage has the right by ditches and drains to drain his own land into the channel provided by nature, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased.

3. WATER-COURSE — *defined.* If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water-course within the meaning of the rule applicable to that subject.

4. But such water-course can exist only where there is a ravine, swale or depression of greater or less depth, and extending from one tract to the other, and so situated as to gather the surface water falling upon the dominant tract, and to conduct it along a defined course to a definite point of discharge upon the servient tract.

5. It is not important that the force of the water flowing from one tract to the other has not been sufficient to wear out a channel or canal having definite and well marked sides or banks. That depends upon the nature of the soil and the force and rapidity of the flow of the water. If the surface water, in fact, uniformly and habitually flows off over a given course, having reasonable limits as to width, the line of its flow is, within the meaning of the drainage law, a water-course.

6. SAME — *right to improve.* A natural water-course is not required to be used only in its natural state, but may be improved, either by being deepened or widened by artificial means, or by the construction along its course of a channel or drain beneath its surface for the purpose of more effectually carrying off the surface water from the land. The construction of such improvement does not create a substantively new water-course nor amount to an abandonment of the natural water-course.

7. PONDS — *their outlet.* Where ponds, situate on uplands, are surrounded with what may be called a rim with a slight depression at some point over which the water escapes when their basins are full, such point will constitute their outlet.

8. INJUNCTIONS — *partial dissolution — damages.* Damages may properly be assessed and awarded to the defendant on a partial dissolution of an injunction, and such assessments have been sustained by this court.

9. SAME — *dissolution — solicitor's fees as damages.* A defendant may recover, as damages on dissolution of an injunction, the solicitor's fees which he has paid, or become obligated to pay, for services ren-

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dered in obtaining a dissolution of the injunction, but not for those rendered in the general defense of the suit. When the evidence fails to discriminate between services rendered in the case generally and those strictly necessary to procure a dissolution of the injunction, the allowance of the fees of counsel can not be sustained.

10. SAME — *pendente lite.* Where a bill seeks for a perpetual injunction against the laying of a tile drain, an injunction *pendente lite* is a mere ancillary writ which may be applied for or not, its only office being to preserve the matters in their original condition until a final hearing.

11. When such a bill is prosecuted without a preliminary injunction, the defendant may proceed without being liable for contempt, but in that case he acts at the risk of having his acts *pendente lite* declared illegal, and of being compelled to restore everything to its original condition.

12. SAME — *granted on matters not litigated — dismissed without prejudice.* To a bill to enjoin a defendant from draining *all* his land across the complainants' land, the defendant answered denying any purpose or present intention of draining a fifty-acre tract of his over the complainants' premises, and claiming the right to drain his other land over the same. On the hearing the court dissolved the injunction as to all the land except the fifty acres, and as to that made the injunction perpetual: *Held*, that in the absence of proof showing, at least, a *prima facie* case as to the fifty acres, the complainant was not entitled to the relief sought, and that as the right to extend the drain over the fifty-acre tract was not litigated, the bill should be dismissed without prejudice.

APPEAL from the Appellate Court for the Second District;— heard in that court on appeal from the Circuit Court of La Salle county; the Hon. DORRANCE DIBELL, Judge, presiding.

Messrs. BROWN & AYERS and Mr. J. B. RICE, for the appellants:

There must have existed on both the lands of the parties a connected water-course by which the proposed drainage was to be effected. *Peck* v. *Herrington*, 109 Ill. 611; *Miller* v. *Laubach*, 47 Pa. St. 154; *Butler* v. *Peck*, 16 Ohio St. 334; Washburn on Easements, 353, 354; *Commissioners of Highways of Pre-emption* v. *Whitsitt*, 15 Ill. App. 318; *Wagner* v. *Chaney*, 19 id. 546; *Hicks* v. *Silliman*, 93 Ill. 255; *Dickinson* v. *City of Worcester*, 7 Allen (Mass.), 19; *Livingston* v. *McDonald*, 21 Iowa, 160; Washburn on Easements, 224, sec.

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16; *Martin* v. *Riddle*, 26 Pa. St. 415; *Kaufmann* v. *G mer*, id. 407.

Increase of the burden on lower heritage, by enlargeme the open ditch across appellee's land from time to time du past twenty years, must of necessity prevent any prescri right of flow over land of appellants from being acq by appellee. Tiedeman on Real Property, 605; Woo Nuisances, 457, sec. 415; Washburn on Easements, sec. 48.

Has not gained any prescriptive right to such flow by twenty years' enjoyment. *Rawstrom* v. *Taylor*, 11 Exch. Wood on Nuisances, 415, 416.

Appellee does not propose to use even this artificial cha but will construct an entirely new and independent arti channel to convey the waters from his lands.

Owner of the higher lands has no right to open or re natural barriers and let on to lower lands water which w not otherwise naturally flow in that direction. *Anders Henderson*, 124 Ill. 164; *Dayton* v. *Drainage Com.*, 12 271; *Kaufmann* v. *Griesmer*, 26 Pa. St. 407.

Must drain into a natural water-course or channel on d nant heritage. *Peck* v. *Herrington*, 109 Ill. 611; *Wagn Chaney*, 19 Ill. App. 546; *Commissioners of Highway Pre-emption* v. *Whitsitt*, 15 id. 318.

Can not collect water from the dominant heritage by dit and other artificial means, and without discharging them a natural water-course on dominant heritage, but instead int artificial channel, discharge them through the same upon l lands. *Wagner* v. *Chaney*, 19 Ill. App. 546; *Hicks* v. *man*, 93 Ill. 255; *Miller* v. *Laubach*, 47 Pa. St. 154.

There did not exist across either the lands of appell those of the appellants, or of all collectively, a natural w course at time of commencement of this suit, or prior the

Definition of water-course. Angell on Water-Courses, *Earle* v. *De Harte*, 1 Beasley Ch. (N. J.) 283–284.

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Brief for the Appellee.

Record shows that proposed drainage will result in absolute destruction of complainants' lands for farm or agricultural purposes.

Upper proprietor can not conduct surface water from his land by new channels in unusual quantities on to particular parts of land below him to injury of lower proprietor. Washburn on Easements, 353; *Peck* v. *Herrington*, 109 Ill. 620; *Hicks* v. *Silliman*, 93 id. 255; *Herrington* v. *Peck*, 11 Bradw. 62; *Livingston* v. *McDonald*, 21 Iowa, 160; *Martin* v. *Riddle*, 26 Pa. St. 416; *Waffles* v. *Railroad Co.*, 58 Barb. 413; *Miller* v. *Laubach*, 47 Pa. St. 154; *Butler* v. *Peck*, 16 Ohio St. 416; *Templeton* v. *Vasloe*, 72 Ind. 134; *Dickinson* v. *City of Worcester*, 7 Allen, 19; *Kaufmann* v. *Griesmer*, 26 Pa. St. 407; Cooley on Torts, 577; Washburn on Easements, sec. 209; Wood on Nuisances, 404: Angell on Water-Courses, sec. 108.

Messrs. FOWLER BROS., for the appellee:

As to the right of an owner of the dominant heritage to drain his land by ditches into the natural channel or water-course, and what is a water-course, see *Peck* v. *Herrington*, 109 Ill. 620; *Kankakee Drainage District* v. *Lake Fork Special Drainage District*, 130 id. 265; *Coms. of Highways* v. *Whitsitt*, 15 Ill. App. 323; *Anderson* v. *Henderson*, 124 Ill. 170; *Graham* v. *Keene*, 34 Ill. App. 90.

The same rule in this State applies to surface water as to running streams. *Graham* v. *Keene*, *supra*; *Peck* v. *Herrington*, 109 Ill. 611; *Gilham* v. *Madison Ry.*, 49 id. 84; *Gormley* v. *Sanford*, 52 id. 158; *Wagner* v. *Chaney*, 19 Ill. App. 546; *Totel* v. *Benefoy*, 123 Ill. 653; *Anderson* v. *Henderson*, 124 id. 164; *Drainage District* v. *Same* 130 id. 264; *Young* v. *Coms. of Highways*, 134 id. 569.

Damages may be assessed on partial dissolution of an injunction under the statute. R. S., chap. 69, sec. 12; 2 High on Injunctions, sec. 1649; *Darst* v. *Gale*, 83 Ill. 136.

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Mr. CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought by Menzo Lambert and Hannibal Hill against Joseph Alcorn, to restrain the defendant from putting in a system of tile drains on his own land, and extending the same across certain adjoining land belonging to Mary Wilson, whereby the surface water on the defendant's land would be discharged into a ditch in a public highway, whence it would flow on to and across the lands of the complainants towards a stream known as Indian Creek. The defendant is the owner of a tract of land of somewhat irregular shape, containing about 160 acres, the north line of the tract being the line running east and west through the centres of sections 8, 9 and 10, of a certain township in La Salle county. Adjoining the defendant's land on the west is a tract about 40 rods in width belonging to Mary Wilson. Lambert, one of the complainants, owns a tract of land 80 rods in width east and west, lying immediately west and north of and cornering upon the land of Mary Wilson. Immediately west of Lambert's land is another tract 80 rods in width, also belonging to Mary Wilson, and adjoining that land on the west is the land of complainant Hill. Indian Creek runs some distance to the west of Hill's land. The defendant's land, and the first mentioned tract belonging to Mary Wilson, are bounded on the north by a highway, which runs from a point a considerable distance east of those tracts to a point a few rods west of the south-east corner of Lambert's land, where it terminates in another highway running from the north-east to the south-west, and cutting across Lambert's land near its corner.

The bill alleges that the defendant's land is very wet, and at certain seasons of the year filled with sloughs and ponds; that such sloughs and ponds are the natural receptacles for the most of the surface water falling on the defendant's land; that if left to its natural course, very little, if any, of the surface water would flow to and upon the lands of the complainants;

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that their lands are good farm lands and under good cultivation and very valuable; that the defendant is preparing, by means of a tile drain, to drain all of his land upon the lands of the complainants, to their irreparable injury; that the natural course of the water is not to and upon the lands of the complainants, and that it could never reach or damage their lands save by artificial means.

The defendant, by his answer, admits, that some portions of his land are low and wet, but not boggy or swampy; that there are upon portions of his land low basins or natural depressions that, during wet seasons of the year, fill up with water, forming small ponds; that above a certain point or level, such ponds will overflow and pass off from the defendant's land in a westerly or north-westerly course, down through a natural depression in the surface of the land, into Indian Creek; that all the water accumulating on the defendant's land, (except in a designated part of the south-west portion thereof), and except as retained in the natural depressions in the surface of the soil, has so passed off along such draw or natural depression in the surface ever since the original settlement of the country, and before any of the lands were fenced or any ditches or drains were cut through them; that this natural depression in the surface is and for all time has been a natural water-course for the water accumulating on the defendant's land to pass off into Indian Creek; that the water accumulating in some of the ponds on the defendant's land naturally passes off of itself; that in others, the water having no means of escape except by evaporation, percolates through the adjoining land, rendering much of it wet and unfit for cultivation, and rendering the land unhealthy for the defendant and his family; that if the water should be drained off, as it easily can be, the land would become healthy, rich and productive.

The answer further alleges that, in the year 1890, he decided to drain certain portions of his land, and for that purpose, he purchased large quantities of drain tile, and employed com-

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petent and skillful persons to lay out drains across that portion of his land along the above natural depression in the surface, west into a similar drain laid along the same natural depression across the land of Mrs. Wilson; that he had cut a ditch and laid a tile drain from the west line of his land easterly some 50 or 60 rods, when the injunction in this suit was served; that he intended to extend his tile drain to the east line of his land, and to lay lateral drains south from the main drain on so much of his land as would naturally discharge its waters in that direction, although he had not yet attempted to determine how far the waters would naturally flow in that direction. The answer denies that his proposed drains would work permanent or irreparable injury to the complainants, and denies that he proposed or had attempted to drain the water accumulating on the south-easterly part of his land, above mentioned, into the draw or natural depression running towards the west, and discharging water on to or through the complainants' lands, but, on the contrary, disclaims any intention of ever doing so.

The cause being heard on pleadings and proofs, the court found that the defendant's land is flat and wet, and that there are several ponds thereon formed by natural depressions in the surface; that in times of heavy rains and melting snows, these ponds fill with water; that there is a natural depression, slough, swale or draw extending across the defendant's land, except the south-east part thereof, and extending westerly across the lands of both the complainants, and emptying into Indian Creek, wherein surface water from rains and melted snows have always, in a state of nature, passed from the defendant's land, except as above mentioned, across the lands of the complainants to the creek, and when in times of high water these ponds have overflowed, the natural course of the water has been through the same natural draw or water-course to the creek; that about 50 acres in the south-east part of the defendant's land do not naturally discharge their surface water westerly through this draw or water-course.

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The court further found that the material allegations of the bill were not sustained by the proofs, except as to the 50 acres above mentioned, and that the material allegations of the defendant's answer were sustained by the proofs, except as to the 50 acres; that as to the 50 acres, the equities were with the complainants, and they were entitled to have the injunction made perpetual, but that as to all the other lands of the defendant, the equities were with the defendant, and he was entitled to have the injunction dissolved. A decree was accordingly entered making the injunction perpetual as to the 50 acres, and dissolving it as to the residue of the land, and the defendant was adjudged to pay one-tenth of the witness fees and of the fees of the sheriff for serving subpœnas, and the complainants were adjudged to pay the residue of the costs.

By leave of the court, the defendant filed his suggestions of damages on dissolution of the injunction, and upon the hearing of his suggestions, the court assessed his damages at $338.55, and a decree was thereupon rendered in his favor and against the complainants for that sum.

From the foregoing decree the complainants appealed to the Appellate Court and assigned various errors. The defendant also assigned as a cross-error that portion of the decree making the injunction perpetual as to 50 acres of his land. The Appellate Court overruled the errors assigned by both parties, and affirmed the decree in all respects. The complainants, by a further appeal have now brought the record to this court, and substantially the same errors and cross-errors are assigned here as in the Appellate Court.

The evidence adduced at the hearing is quite voluminous, and relates mainly to the topography of the lands of the complainants and defendant, and of the other lands in that vicinity. Without pausing to state any portion of the evidence in detail, it will suffice for us to say, that we have given it careful consideration, and find that it clearly establishes the following facts: The lands owned by the parties to this suit form a part

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of a body or tract of land containing three or four thousand acres or more, lying south and east of Indian Creek, and being almost wholly low, flat and nearly level, and interspersed with small depressions which, in wet weather, are filled with water and become small ponds. The general slope of this land is towards the creek, and there is, and was when the land was in its natural state, a slight depression or swale, running across the northerly side of the defendant's land, and thence across the land owned by Mrs. Wilson to the highway running along the northern boundary of her land and that of the defendant, and thence, in a general direction a little north of west, across the lands of the complainants and other intervening tracts, to the creek. The descent along this swale or depression towards the creek is slight, the elevation of its bed, as shown by measurements in evidence, at the easterly line of the defendant's land being a little less than 30 feet, and at the westerly line a little over 27 feet above the level of the creek. But, as we understand the evidence it is shown with sufficient clearness, that in times of high water, the drainage from all the defendant's land, except about 50 acres in the south-east portion of it, is, and always has been through this depression or swale, over the lands of the complainants and other intervening tracts, into the creek. It does not appear that the current along this depression has ever been sufficiently strong to wash out or form a distinct channel, but the depression is well marked, and sufficient to determine the direction and course of the flow of surface water from the defendant's land.

Some years ago an open ditch was dug on the defendant's land along the course of this depression, for the purpose of carrying off the water from his land more rapidly, and the main tile drain which he was having laid at the time the injunction was served, commenced at the point where the swale or depression in question enters the highway, and run thence, along the line of the open ditch, across the corner of Mrs. Wilson's land, and thence easterly on the defendant's land. The

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defendant's scheme of drainage involves the extension of this main drain to the easterly line of his land, and the connection with it of lateral tile drains from the south sufficient to drain his entire land, except the 50 acres above mentioned.

The complainants' contention is, first, that but a small portion of the defendant's land naturally drained towards the west along the depression in question, and that before the construction of artificial ditches, a large portion of the land covered by his proposed system of tile drains found an outlet for its surface waters in other directions. Upon this question the evidence is somewhat conflicting, but after the most mature consideration we have been able to give to it, we are of the opinion that it sustains the finding of the Circuit Court, and shows that all the defendant's land which he is now seeking to drain, when in a state of nature, discharged its surface water through the swale or depression in question into Indian Creek.

But the next, and, as it seems, the principal contention of the complainants is, that to sustain the decree of the Circuit Court, there must have existed on the lands of both the complainants and the defendant, at the time of the commencement of the suit, a connected natural water-course, that is, a well defined channel or canal, having its bed and sides or banks, through which the proposed drainage from the defendant's land on to the lands of the complainants was to be effected; and it is insisted that there was in fact no channel or water-course of that character on the lands of either the complainants or defendant; and if there was, the proposed system of drainage wholly ignores its existence, so far at least as the defendant's land is concerned, the plan being to discharge the surface water from the defendant's land through an entirely new and artificial channel, viz., a tile drain laid several feet beneath the surface of the ground.

One radical fallacy in this contention grows out of the restricted definition sought to be placed by the complainants upon the term "water-course," as applied to the drainage of surface

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water from one tract of land on to another. If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow, is a water-course, within the meaning of the rule applicable to that subject. Doubtless such water-course can exist only where there is a ravine, swale or depression of greater or less depth, and extending from one tract on to the other, and so situated as to gather up the surface water falling upon the dominant tract and to conduct it along a defined course to a definite point of discharge upon the servient tract. But it does not seem to be important that the force of the water flowing from one tract to the other has not been sufficient to wear out a channel or canal having definite and well marked sides or banks. That depends upon the nature of the soil and the force and rapidity of the flow. If the surface water in fact uniformly or habitually flows off over a given course, having reasonable limits as to width, the line of its flow is, within the meaning of the law applicable to the discharge of surface water, a water-course.

This definition, though not in accordance with the decisions of the courts of some of the other States, is, as we think, borne out by the decision of this court in *Peck* v. *Herrington*, 109 Ill., 611. That was a suit brought by Herrington to restrain Peck and another from draining certain sloughs or small ponds into what was claimed to be a natural water-course or channel on their lands, and extending across the land of Herrington to a stream of water. This water-course consisted, as it seems, of a swale or depression in the land, extending from the vicinity of the sloughs or ponds to be drained to a stream nearly two miles away, and was the channel through which, in its natural state, the surface water was discharged from the lands bordering upon it into the stream. The point was made that such channel was not a water-course within the accepted legal definition. On that point we said:

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"It is not denied, as we understand the argument, that the owner of a dominant heritage may, by ditches and drains, drain his own land into the natural and usual channel or water-course, even if the quantity of water thrown upon the servient heritage is increased. But it is said there is no natural water-course here into which the ponds could be drained, and in support of this position we have been referred to *Hoyt* v. *City of Hudson*, 27 Wis., 653, and other like cases in that State, where it is held that a water-course or natural channel is a stream usually flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water, and the term does not include surface water conveyed from a higher to a lower level, for limited periods. It is a sufficient answer to the position taken that the rule established in Wisconsin has never been adopted in this State, but, on the other hand, the same rule has been applied to surface water flowing in a regular channel, as is applied to a water-course."

The facts in the *Herrington* case are, in all their material features, so precisely analogous to those presented by the record now before us, that it is impossible to distinguish between them, and the rule in relation to channels through which surface water only is accustomed to flow laid down in that case, is equally applicable here.

The point that the proposed system of drainage is in fact an abandonment of the natural water-course, if one ever existed, is scarcely worthy of serious consideration. It assumes that a natural water-course, if used at all, must be used in its natural state, and is therefore incapable of improvement, either by being deepened or widened by artificial means, or by the construction along its course of a channel or drain beneath the surface, for the purpose of more effectually carrying off the surface water from the land. Or the assumption seems to be, that the construction of such improvements creates a substantively new water-course, in no way dependent upon the one provided by nature, and carrying with it none of the rights

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arising from the existence of the former. It is sufficient to say, that both common sense and the uniform decisions of this court are the other way. In the *Herrington* case, it appeared in proof that an artificial ditch had been dug along the bed of the natural water-course, deepening and straightening it and removing intervening obstructions out of the way, and it was not supposed that the original channel and all rights appertaining to it were thereby abandoned. It remained and was treated as constituting the same water-course it was before, and the defendant was held entitled to drain the surface water from his land into it in its improved condition.

The right of the owner of the dominant estate to drain his land, although the amount of water cast upon the servient land be increased, was stated in *Dayton* v. *Drainage Commissioners*, 128 Ill., 271, as follows: "The rule undoubtedly is, that the owner of a higher tract of land has the right to have the surface water falling or naturally coming upon his premises by rains or melting snow pass off through the natural drains upon or over the lower or servient lands next adjoining, and the owner of the dominant heritage has the right, by ditches and drains, to drain his own land into the channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased. But the owner has no right to open or remove natural barriers and let on to such lower lands water which would not otherwise naturally flow in that direction. That would subject the servient heritage to an unreasonable burden which the law will not permit, and against which the owner ought reasonably to have protection." The rule of law thus stated is perfectly well settled, as also appears from the following decisions: *Anderson* v. *Henderson*, 124 Ill., 164; *Young* v. *Commissioners of Highways*, 134 id., 569; *Drainage District* v. *Drainage District*, 130 id., 261; *Hicks* v. *Silliman*, 93 id., 255; *Peck* v. *Herrington*, *supra*.

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We are of the opinion that this rule has been properly applied in the present case. The fair result from all the evidence is, that the defendant's land as to which the injunction is dissolved, is all within the territory, the natural drainage of which is in the direction of the water-course running westerly to Indian Creek. It is true there may be slight elevations in the surface of the earth, preventing the outflow of the surface water and keeping it back in the form of sloughs or ponds, but the evidence is clear that when those ponds are so filled with water as to overflow, the course of the overflow is towards and along the water-course in question. As was said in *Anderson* v. *Henderson*, *supra*, "It is a matter of common observation, that needs no proof to establish the fact, that ponds situated on uplands, as they are frequently discovered to exist, are surrounded by what may properly be called a rim, with a slight depression at some point, over which the water escapes when more flows in from the higher lands than the basin will naturally contain. That is its natural outlet." And as the evidence shows that when the ponds in question are so full as to run over, the surplus water runs off through the water-course leading to Indian Creek, it is clear that the drainage from these ponds is in that direction.

Since the decision by this court of the case of *Peck* v. *Herrington*, the Legislature has enacted a law, embodying substantially, in statutory form, the rule established in that case. Section 4, of the "Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," in force July 1, 1885, is as follows:

"Owners of land may drain the same in the general course of natural drainage, by constructing open or covered drains, discharging the same into any natural water-course, or into any natural depression, whereby the water will be carried into some natural water-course, or into some drain on a public highway with the consent of the commissioners thereto; and when such drainage is wholly upon the owner's land, he shall not be liable in damages therefor to any person or persons or corporation."

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Under this statute, the land-owner draining his own land, may drain it "in the general course of natural drainage," and discharge the water "into any natural water-course," or "into any natural depression whereby the water will be carried into some natural water-course." The system of drainage contemplated by the defendant, and which the bill was brought to restrain, comes clearly within the provisions of this statute, as well as within the rules established by the decisions of this court.

Complaint is made of the assessment of damages in favor of the defendant on dissolution of the injunction. It is not contended that damages may not properly be awarded a defendant on a partial dissolution of an injunction, this court having expressly sustained assessments of that character. *Walker* v. *Pritchard*, 135 Ill., 103; *Brackbush* v. *Dorsett*, 138 id., 167.

The objection to the assessment of damages is, that it is not supported by the evidence. The amount of the damages awarded is $338.55. The evidence shows, and the decree finds, that the defendant had become bound to pay, as his reasonable solicitors' fees in and about the defense of the suit, and in obtaining a dissolution of the injunction, the sum of $300, and had paid and become bound to pay for the necessary fees and charges of a civil engineer to make a survey and determine the elevation and levels of the land in controversy, and in making necessary plats to be introduced in evidence on the trial of this suit, the further sum of $76.16. The decree found that these fees and expenses were reasonable and necessary, and that the defendant ought to recover of the complainants nine-tenths thereof, making the sum of $338.55 above mentioned.

We find no basis in the evidence for an apportionment of these fees and expenses in the manner indicated, unless it be that upon which the taxed costs of the suit were apportioned between the parties in the same ratio, and that seems to have been because the final decree was in part only in favor of the

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defendant, the injunction being made perpetual as to 50 acres of his land. If this be true, the manifest intention of the court was to assess as damages the entire cost of defending the suit, to the extent to which the defense was successful. The solicitors' fees shown by the evidence are the total fees of the defendant's solicitors for their entire services in defending the suit. There is evidence that a motion for a dissolution of the injunction was made, though, on account of the illness of the Judge, it seems to have been but partially heard and never decided. The record before us affords abundant evidence that the principal part of the services rendered by the defendant's solicitors were in the general defense of the suit and particularly upon the final hearing. This is shown by the great volume of testimony adduced and the great number of witnesses produced and examined at the hearing. But the evidence wholly fails to distinguish between the services rendered in relation to the motion to dissolve, and those rendered in the general defense of the suit, and there is nothing, so far as we are able to see, from which the value of the services directed solely to the object of obtaining a dissolution of the preliminary injunction can be determined.

The rule is, that a defendant may recover, as damages on dissolution of an injunction, the solicitor's fees which he has paid or become obligated to pay, for services rendered in obtaining a dissolution of the injunction, but not those rendered in the general defense of the suit. *Jevne* v. *Osgood*, 57 Ill., 340; *Alexander* v. *Colcord*, 85 id., 323; *Field* v. *Mendenwald*, 26 Ill. App., 642; *Gerard* v. *Gateau*, 15 id., 520. In *Alexander* v. *Colcord*, *supra*, it was held to be serious objection to the evidence in support of a suggestion of damages of this character, that it made no discrimination between services rendered in the case generally, and services which were strictly necessary to procure a dissolution of the injunction. That discrimination not being made in this case, there is no evidence upon which the assessment of damages can be based.

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It follows that the portion of the decree relating to damages can not be sustained.

Perhaps the view was entertained by court and counsel at the time of the assessment of damages, that as the only relief sought by the bill was an injunction, the entire defense was virtually directed to the sole object of procuring a dissolution of the injunction, and therefore that all the services rendered in the case must be deemed to have been rendered for that purpose. The relief sought by the bill was a *perpetual* injunction restraining the defendant from laying his proposed tile drain, and an injunction *pendente lite* was a mere ancillary writ which the complainant was at liberty to apply for or not as he saw fit. Its only office was to preserve the *statu quo* until a final hearing could be had. The complainants might have prosecuted their suit without asking for a preliminary injunction, and if the defendant had proceeded to construct his drains during the pendency of the suit, he would not have been in contempt for disobedience to a writ it is true, but he would have acted at the risk of having his acts *pendente lite* declared illegal, and of being compelled to restore everything to the condition in which it was at the commencement of the suit. In a litigation of this character, the services rendered in the general defense of the suit are as clearly distinguishable from those rendered for the mere purpose of getting rid of an injunction *pendente lite*, in case one has been issued, as they are in cases where relief of a different character is sought.

We are of the opinion that the cross-error assigned by the defendant should be sustained. The bill charges that the defendant intended and was about to drain all his land across the complainants' property by means of his proposed system of tile drains. The defendant, by his answer, denies and expressly disclaims any intention to drain the 50 acres as to which the injunction was made perpetual, in that manner. As to the issue thus formed, the burden of proof was clearly with the complainants, and in the absence of proof sufficient to show,

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at least *prima facie*, that the allegations of their bill were true as to that land, they were entitled to no decree. The only witness by which they sought to make that proof was the defendant himself, and while his answers are not in all respects clear and satisfactory, they certainly fail to establish affirmatively the allegations of the bill as to the 50 acres. He denies that he has determined or intends to drain that portion of his land, but leaves the impression that that is true for the reason that he has not yet considered that subject. If the burden was on him to prove the truth of his answer, perhaps a different result might be drawn from his testimony. But as the burden is on the complainants, we are satisfied that the defendant's testimony does not furnish the affirmative proof required to entitle them to a decree. As neither party, however, has litigated the defendant's right to extend his tile drains on to or over the 50 acres on its merits, the bill, as to that portion of the defendant's land should be dismissed without prejudice. The complainants should also be required to pay all the costs in the Circuit Court.

The decree dissolving the injunction and dismissing the bill as to all the defendant's land except the 50 acres will be affirmed. That portion of the decree awarding the complainants a perpetual injunction as to the 50 acres will be reversed, with directions to the Circuit Court to dissolve the injunction and dismiss the bill as to that portion of the defendant's land, without prejudice. That portion of the decree awarding the defendant damages upon dissolution of the injunction will be reversed, and the cause will be remanded to the Circuit Court, for such further proceedings as to justice and equity may appertain, not inconsistent with this opinion. The decree as to costs will be so modified as to require the complainants to pay all the costs in the Circuit Court. The defendant will be required to pay one-fourth and the complainants three-fourths of the costs in this court and also in the Appellate Court.

Judgment affirmed in part and in part reversed.

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Syllabus. Statement of the Case.

THOMAS RAYFIELD *et al.*

v.

THE PEOPLE *ex rel.* James N. McElvain.

Filed at Springfield, January 18, 1893.

1. SCHOOLS — *forming new districts — territory in different townships.* Under section 51 of article 3 of the revised School law of 1889 the several boards of trustees of different townships, in forming a new district by detaching territory from two or more districts in different townships, must act in conformity with that section. The different boards must act concurrently upon the petition and not jointly.

2. SAME — *trustees of schools — joint meetings.* There is no authority of law given to call or organize joint meetings of the trustees of schools of several townships, or for the transaction of business by such a body.

3. QUO WARRANTO — *against acting school directors — sufficiency of plea.* A plea to an information in the nature of *quo warranto* against persons assuming to act as school directors of an alleged school district in two or more townships, that at the regular meeting in April, 1890, of each of the boards of trustees of each of said townships, a petition for the formation of the new district was presented to said respective boards, and that they, upon due consideration, granted the prayer of the petition, is not sufficient. It is but a statement of a conclusion, and sets forth no facts from which it can be seen what was done by the several boards.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. GEORGE W. HERDMAN Judge, presiding.

This was a proceeding in the court below, by information in the nature of *quo warranto*, to oust plaintiffs in error from the office of school directors of district No. 9, etc. The charge in the information is that said district was never legally organized, setting up certain alleged irregularities in the proceeding under which the attempted organization was made. Respondents filed a plea to the information, in which they attempted to set up the legal formation of said district, and their subsequent election as directors thereof. A demurrer to the plea was sustained by the Circuit Court, and respondents failing to make further

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answer to the information, judgment of ouster, and a nominal fine, with costs of the proceeding, were entered against them. To that judgment they excepted and sued out this writ of error.

The further facts necessary to the decision of the case will be stated in the opinion.

Mr. J. S. CARR, for the plaintiffs in error.

Mr. THOMAS F. FERNS and Messrs. HAMILTON & LEACH, for the defendants in error.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

The only controverted question in this case is, does the plea of respondents, on its face, show that said district was legally formed? Its averments as to that fact are, that "on the 13th of March, 1890, respondents, with others, caused a petition to be filed with the clerk and treasurer of" townships eight and nine, in range twelve, and township nine, in range thirteen, as follows:

"To the Trustees of township No. eight, range No. twelve, 9–12 and 9–13: We the undersigned being two-thirds of the legal voters in the territory herein described, petition the Trustees of Schools of township eight, range twelve, nine — twelve and nine — thirteen, west of the third principal meridian, in the State of Illinois, to make a new school district of the following territory, viz.: The west one-half of section No. five and all of section No. six, in township No. eight, north of range No. twelve, west of the third principal meridian, and all of sections thirty, thirty-one and thirty-two, except the northeast quarter of the northeast quarter of section No. thirty-two, lying south and east of Macoupin creek, in township No. nine, range twelve, and all that portion of sections twenty-five and thirty-six in township No. nine north, range No. thirteen, west of the third principal meridian, lying east of the Macoupin creek; and we declare that said proposed district, will not contain less than

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ten families residing in the same, and that no district from which territory will be taken, will be left with less than ten families residing therein.

Dated at Kane, Illinois, this tenth day of March, 1890."

Signed by seventeen petitioners.

It is then averred that a copy of said petition, with a notice, etc., was delivered to the clerks of the boards of directors, of the several districts in said townships, more than ten days before the regular meeting of the several boards of trustees of said townships in the month of April, 1890, the boundaries of which would be changed by the prayer of the petition if granted, to-wit: (naming the districts), notifying said boards of directors that the petition would be filed. Then follows the averment:

"And these defendants aver that at the regular meeting in April, 1890, of each of said boards of trustees of each of said townships, said petition was presented to said respective boards, and that upon consideration by said boards of trustees the prayer of said petition was granted. And the defendants aver that said several boards of trustees for the purpose of jointly considering said petition, agreed that there should be a joint meeting of all of said trustees, at a point within the territory of said township, to-wit: At George Willer's lime kiln, on Wednesday the 30th day of April, 1890."

It is then averred that there was a joint meeting of the boards of said trustees of said several townships, at said lime kiln, which, from time to time, adjourned to meet again, and finally an adjournment to meet at the Douglas school-house, and after an adjourned meeting there, on the 6th day of June, 1890, said several boards of trustees "met in joint or concurrent session to consider and take action upon said petition, etc." It then sets out the action of said joint meeting, granting said petition and forming said district.

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It will thus be seen that the attempt to organize said district No. 9 was under the provisions of section 51 of the revised School law of 1889. S. & C., vol. 3, p. 1160, par. 80.

Assuming that the plea shows a compliance with all the preliminary requirements of the statute to authorize the making of the order creating the new district, it is fatally defective, in that it not only fails to show that said several boards of township trustees acted in conformity with the power conferred upon them by said section 51, but shows affirmatively that they did not so act.

According to the allegations of the plea, by the manner in which they proceeded the said trustees construed the language of section 51, "by the concurrent action of the several boards of trustees," to mean by the joint action of said boards. Clearly that is not the meaning of the words in their common acceptation, and the provisions of that and the following sections show it was not so intended by the legislature. This can be made no clearer than by reading the statute itself. Besides this, there is no authority given to call or organize a joint meeting of trustees of several townships, or for the transaction of business by such a body. It is, we think, too clear for argument, that all the plea says was done at the joint meeting of said several boards on the 6th of June was void and of no more effect than if it had never occurred.

But counsel for plaintiff in error contends that the plea shows a concurrent action by said boards.

This contention is based upon the allegation "that at the regular meeting in April, 1890, of each of said boards of trustees of each of said townships, said petition was presented to said respective boards, and that upon consideration by said boards of trustees the prayer of said petition was granted."

A moment's reflection will show that the position is untenable. That allegation in the plea is mere inducement to that which follows it. It is but a statement of a conclusion, and sets forth no facts from which it can be seen what was done by the

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several boards. No one will seriously contend that the plea would have been good, as showing the legal organization of the district, if it had ended with the foregoing averment.

As before said, we think the plea shows affirmatively that the district of which plaintiffs in error claim to be directors was not legally formed, and, therefore, there could be no such office as school directors of said district.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

EDWARD A. STEVENS *et al.*

v.

ST. MARY'S TRAINING SCHOOL *et al.*

Filed at Ottawa, January 19, 1893.

1. COUNTIES — *their powers.* A county has power to make and do all acts in relation to its property and concerns necessary to the exercise of its corporate powers; and each county board has power to manage the county funds and the county business, and to examine and settle all accounts against the county.

2. SAME — *judicial control.* Counties are public corporations created for the purpose of convenient local government, and possess only such powers as are conferred upon them by law. Their powers are more limited than those of incorporated cities and villages. But in the exercise of such discretionary or legislative powers as are conferred on them by law, they are as much beyond judicial control as other municipal corporations.

3. MUNICIPAL CORPORATIONS — *power of courts of equity to restrain them.* Tax payers and property holders may resort to equity to restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from misapplying the moneys of the corporation and from making payment of illegal claims. But, as a general rule, the restrictions upon the right of a court of equity to interfere with the action of municipal bodies extend to cases where these bodies are exceeding their lawful powers.

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Syllabus.

4. The weight of authority and the tendency of the more recent decisions are in favor of the position that the restraining power of the courts should be directed against the enforcement, rather than the passage of unauthorized orders and resolutions or ordinances by municipal corporations.

5. There are instances when this restriction upon the power of the courts will sometimes be disregarded, as when the corporate body is exercising mere business or ministerial, rather than legislative, powers, or is wrongfully disposing of property held by it as trustee for the public, or is attempting to act upon matters not, by its charter or by the law, subject to its jurisdiction.

6. It is well settled that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations.

7. SAME — *whether estopped to aver their own incapacity.* A municipal corporation which has entered into a void contract will not be estopped from taking advantage of its own incapacity when suit is brought upon such contract, or other efforts are made to secure its execution.

8. COUNTY BOARDS — *exercise of legislative powers — interference of courts of equity.* Where county boards are acting within the boundaries of their legislative powers, the courts will not only refrain from interfering with the passage of resolutions or orders by them, but will also refuse to enjoin the enforcement of such resolutions and orders, except in certain cases where they are unreasonable.

9. A court of equity has not the power to enjoin a county board from passing a resolution that an illegal contract be made by the county, and from making an order that an illegal claim be allowed against the county, where no irreparable injury is likely to ensue therefrom, but it may enjoin the execution of such contracts when made and the payment of such claims after their allowance.

10. SAME — *appropriating funds in aid of sectarian schools.* The county boards in this State have no power to appropriate county funds in aid or support of sectarian schools, or of any school controlled by a church or religious denomination, as that is prohibited in express terms by section 3 of article 8 of the constitution.

11. The direction in the constitution that no county shall appropriate or pay any of the public funds to a school controlled by a church, involves the ascertainment of a fact. It must be ascertained by the county board whether the school applying for the appropriation or payment is or is not controlled by a church. The court can not assume in advance that the county board will ignore the real facts and violate the fundamental law by making illegal contracts or payments. It is time enough for a court of equity to interfere when the attempt is made to enforce the unconstitutional act.

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. WRIT OF ERROR to the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

This is a bill filed on January 12, 1889, in the Circuit Court of Cook county by Edward A. Stevens and John M. Stiles of the city of Chicago in said county in behalf of themselves as citizens and tax payers, and on behalf of all other citizens and tax payers who may choose to be made parties, against St. Mary's Training School, a corporation organized under the laws of Illinois, and its officers, the board of commissioners of Cook county and its members, and George R. Davis, the treasurer of Cook county, for the purpose of enjoining said school and its officers from setting up or prosecuting against said county any claim for aid or compensation for the subsistence, shelter, clothing, care or instruction of its wards or inmates, and from making any contract with said county with reference to such aid or compensation, and for the purpose of enjoining said board and its members and agents from approving or ordering paid any such claim and from making any such contract, and from doing anything to promote or abet the payment of any such aid or compensation or the making of any such contract, and for the purpose of enjoining said county treasurer from paying out of any public funds in his custody any sum of money whatever on any claim of said school, or for its aid, or for compensation to it for such subsistence, shelter, clothing, care or instruction. A preliminary injunction was granted in accordance with the prayer of the bill. A demurrer was filed to the bill by the training school and its officers, which was ordered to stand as the demurrer of all the defendants. The cause was heard upon said demurrer as the demurrer of all the defendants, and, upon such hearing, the Circuit Court dismissed the bill for want of equity. The present appeal is prosecuted from such decree of dismissal.

The bill alleges that said school, or corporation, and its officers propose and intend to procure out of the public funds of

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the county money to aid it, and for its use and benefit; that said corporation is a school and institution under church control within the meaning of section 3 of article 8 of the constitution of this State; that said board and its members propose and intend to aid and abet the said intent of such church school by contracting to pay said moneys, and by approving quarterly its claims and ordering the same paid; that said treasurer intends to pay said approved claims; that said proposals and intentions involve violations of the public trusts reposed in said board and in said treasurer, in that the same are contrary to the form and effect of said constitutional provision; that said corporation was instituted and has been and is maintained as an instrumentality of the Roman Catholic Church; that one of its main purposes is to effectuate the religious objects of said church; that said church is provided with a most efficient organization and is able to sway its members in all matters involving their religion; that it deems itself specially and exclusively commissioned to teach religious truth; that it has an elaborate scheme of religious doctrines, whose acceptance its priests and adherents strive earnestly to promote; that its policy is to control the education of the young and to surround them with its influence; that said training school is governed and controlled, in accordance with said policy, by priests and laymen devoted to said church, zealous to promote its designs and obeying its wishes without dissent; that the consequence of sending a minor child to said school is to put him in training to become a Roman Catholic churchman; that the governing purpose to be effected by said school is to mould the inmates thereof as much as possible into Roman Catholic church, members; that no other teaching except that of said church is tolerated at said school, and all of the teachers are members and most of them ecclesiastics of that church; that for a number of years said board have contracted with said school for the reception into it of boys, sent there as provided by the "Act to provide for and to aid training schools for boys," approved

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June 18, 1883, for their subsistence, clothing, shelter, instruction and training during their residence there, and for the payment to said school out of the public funds in the custody of the county treasurer various graded sums per month for each of said boys so sent; that by means thereof large sums of money have been misappropriated unwarrantably and in contempt of said constitutional provisions; that the most recent of said contracts expired by its terms on December 31, 1888; that, by a decision of the Supreme Court of Illinois, the members of said board and the officers of said school were well advised of the illegality of such misappropriation of the public funds and of such contracts in relation thereto, yet, in despite thereof, the said school, its officers and management, have presented for allowance to said board a claim in aid of said school pursuant to said contract, expiring December 31, 1888, and for the quarter at that date terminating, amounting to the sum of $2313, and have applied to said board to renew their contract on the old terms for another year; that complainants have been informed and believe that said board, unless enjoined therefrom, will affirm and order paid said claim of $2313, and renew said contract; that, from inquiry made and information acquired, complainants aver that members of said board in number sufficient to approve said claim and said contract, and to order the same paid and executed, "are already pledged in secret to the promoters of said claim and contract;" that said school refrains as much as possible from permitting its constitution, rules, by-laws and operation to be known, and secrecy governs the conduct of those interested in its management; that this reticence is observed for the reason that the real rules by which said school is administered could not be definitely expressed without manifesting the fact that said school has the character of a purely Roman Catholic institution; that, in the hope that said school may appear in the eyes of non-catholics as a non-sectarian institution, and for the purpose of obtaining in its aid payments out of the public funds the promoters of

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said school pretend and claim that it has not a church or sectarian character, and that there is nothing in its charter that stamps it as such; that the control of said institution has been from the first and is intended to be in the care of those who have special favor for the Roman Catholic Church and its religious interests and will allow its wishes to govern their conduct in reference to said school; the bill prays, that all contracts of said school with reference to the payment to it out of any of the public funds of said county of any claim for aid or compensation for the subsistence, shelter, clothing, care or instruction of any of its wards or inmates, and especially the contract mentioned as expiring December 31, 1888, may be decreed and adjudged wholly void and of no binding effect, and that an injunction may issue against said school and its officers, said Board and its members, and said County Treasurer, enjoining them in manner and form as above stated.

Mr. FRANCIS C. RUSSELL, for the plaintiffs in error:

Municipal corporations are trustees in respect to the functions which they exercise. High on Injunctions (2d ed.), secs. 1236–1238; *Schumm* v. *Seymour*, 9 C. E. Greene, 343; *Sherlock* v. *Village of Winnetka*, 59 Ill. 398; Spence's Eq. Jur. 32–35.

Municipal corporations may be enjoined whenever it becomes necessary to prevent them from betraying the public trusts confided to them to the injury of private individuals. High on Injunctions (2d ed.), sec. 1236 *et seq.* and cases cited; Dillon on Mun. Corp. (2d ed.), secs. 727, 734–736; *Perry* v. *Kinnear*, 42 Ill. 160; *Beauchamp* v. *Kankakee Co.*, 45 id. 276; *Sherlock* v. *Village of Winnetka*, 59 id. 398; *Chestnutwood* v. *Hood*, 68 id. 132; *Springfield* v. *Edwards*, 84 id. 626; *Wright* v. *Bishop*, 88 id. 302; *Fitzgerald* v. *Harms*, 92 id. 372; *Board of Education of Galesburg* v. *Arnold*, 112 id. 11; *Browne* v. *Concord*, 56 N. H. 375; *English* v. *Smock*, 34 Ind. 115; *Smith* v. *Appleton*, 19 Wis. 468.

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The illegal appropriation of public funds as well as the incurring of an illegal debt or liability by a municipal corporation may be enjoined at the instance of every tax payer. High on Injunctions, sec. 1236 *et seq.* and cases cited; *Perry* v. *Kinnear*, 42 Ill. 160; *Beauchamp* v. *Kankakee Co.*, 45 id. 274; *Chestnutwood* v. *Hood*, 68 id. 132; *Springfield* v. *Edwards*, 84 id. 626; *Wright* v. *Bishop*, 88 id. 302; *Board of Education of Galesburg* v. *Arnold*, 112 id. 11.

Mr. GEORGE W. SMITH, for defendants in error:

The bill is in every respect premature. When the county board shall have audited and allowed the claim, and when a warrant shall have been ordered to be drawn, it will be time enough to complain.

A court of equity will not interfere with the action of the county board, but may enjoin the performance of its contract if invalid. See *Chestnutwood* v. *Hood*, 68 Ill. 132; *Springfield* v. *Edwards*, 84 id. 626; *Wright* v. *Bishop*, 88 id. 302; *Fitzgerald* v. *Harms*, 92 id. 372; *Board of Education* v. *Galesburg*, 112 id. 11; *Brown* v. *Concord*, 56 N. H. 375; *Smith* v. *City of Appleton*, 19 Wis. 468; *Chicago* v. *Evans*, 24 Ill. 53; *Linden* v. *Case*, 46 Cal. 171; *Des Moines Gas Co.* v. *City of Des Moines*, 44 Iowa, 505.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The bill in this case was demurred to, and, therefore, its statements must be assumed to be true. It alleges, that the defendant in error, the Saint Mary's Training School, is a corporation which is controlled by the Roman Catholic Church; and that the Board of Commissioners of Cook County has made contracts with said corporation for the payment to it out of the funds of the county of certain monies for the instruction and training of boys committed to its care. That such contracts are void and such payments illegal is settled by the decision of this Court in *County of Cook* v. *Industrial School for Girls*,

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125 Ill. 540. It was there held, that county boards in this State have no power to appropriate county funds in aid or support of sectarian schools, or of any school controlled by a church. The constitution of Illinois is very emphatic upon this subject, and the language, in which its meaning is expressed, is too plain to be misunderstood. Section 3 of Article 8 of that instrument is as follows: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State, or any such public corporation, to any church or for any sectarian purpose."

But the question presented by the record is, whether a court of chancery has power to enjoin a board of county commissioners from passing a resolution that an illegal contract be made by the county, and from making an order that an illegal claim be allowed against the county. The bill prays, that the county board may be enjoined from making contracts with the Training School in the future, and also from ordering the payment to said School of a balance due for the quarter ending December 31st, 1888, upon a contract already existing between the Board and the School. Has equity the power to enjoin the passage of ordinances, by-laws, resolutions and orders by municipal corporations, or is its power confined to the issuance of injunctions against the enforcement and execution of such ordinances, by-laws, resolutions and orders after the same have been passed?

It is well settled, that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations. (2 Dill. on Mun. Corp. — 4th ed. — secs. 94, 475, 908; 2 High on Inj.— 3d ed.— secs. 1240, 1246).

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Counties are corporations created for the purpose of convenient local government and possess only such powers as are conferred upon them by law. (*Harney* v. *The I. C. & D. R. R. Co.*, 22 Ind. 244). They have been called *quasi*-municipal corporations; and their corporate powers are more limited than those of incorporated cities and towns. (1 Dill. on Mun. Corp. — 4th ed. — sec. 25; *Symonds* v. *Clay County*, 71 Ill. 355). In the exercise of such discretionary or legislative powers as are conferred upon them by law, counties are as much beyond judicial control as other municipal corporations. (*Fitzgerald* v. *Harms*, 92 Ill. 372).

The Board of Commissioners of Cook County can exercise the same powers as boards of supervisors in other counties. (*McCord* v. *Pike*, 121 Ill. 288). Each county has power to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers; and each county board has power to manage the county funds and county business, and to examine and settle all accounts against the county. (*Fitzgerald* v. *Harms*, *supra*). Where county boards are acting within the boundaries of their discretionary or legislative powers, the courts will not only refrain from interfering with the passage of resolutions and orders by them, but will also refuse to enjoin the enforcement of such resolutions and orders, except in certain cases where they are unreasonable. In *Fitzgerald* v. *Harms*, *supra*, where we refused to sustain an injunction against the county clerk from issuing an order upon the county treasurer for the amount of a claim previously allowed by the county board and against the county treasurer from paying the same, we placed such refusal solely upon the ground that the board was acting within the bounds of the powers conferred upon it by law, and said: "a court of equity cannot interfere with the deliberations or the action of the board of commissioners over a matter which the law has entrusted to them, unless fraud be shown, or they have undertaken to allow a claim which was not of a character

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to be paid by the county." Literally interpreted the language here used might be construed to mean, that a court of equity could interfere with the deliberations of the board, if its members were undertaking to allow a claim which was not of a character to be paid by the county. But the case cannot be regarded as so deciding, because the question of the power of a court of equity to enjoin the board from making an order by a vote of its members for the payment of a claim, as distinguished from its power to enjoin the clerk or auditor from drawing a warrant and the treasurer from paying the amount of the claim after the order of allowance had been made, was not involved nor in any way suggested.

It is correctly announced by the text writers in general terms, that tax-payers and property holders may resort to equity to restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from misapplying the monies of the corporation, and from making payment of illegal claims. (2 Dill. on Mun. Corp.— 4 ed. — secs. 914, 919; Cooley on Taxation — 2 ed. — p. 764; 2 High on Inj. — 3 ed. — secs. 1237, 1238, 1239; 1 Pom. Eq. Jur. sec. 260; 10 Am. & Eng. En. of Law, p. 959). It is also correctly laid down as a general proposition, that the restrictions upon the right of a court of equity to interfere with the action of municipal bodies do not extend to cases where those bodies are exceeding their lawful powers. (2 High on Inj. — 3 ed. — sec. 1241).

But some of the adjudged cases, which are referred to as sustaining these general doctrines, are not in harmony with each other, and others of them are not definite and decided in their conclusions, upon the question whether equity will confine its restraining power to the instrumentalities which undertake to carry out and execute the unauthorized resolutions and ordinances of municipal corporations, or whether it will enjoin such corporations, acting in their corporate capacity, from adopting resolutions and ordinances which are in excess of their

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legal or constitutional authority. There are cases, which hold, or seem to hold, that, where a municipal corporation is about to pass a resolution or ordinance which is void as being *ultra vires*, a court of chancery will enjoin it from so doing. Among such cases may be mentioned the following: *Davis* v. *The Mayor, &c., of N. Y.*, 1 Duer, 451; *The People* v. *Sturtevant*, 9 N. Y. 263; *Davis* v. *The Mayor*, 14 N. Y. 506; *Spring Valley Water-Works* v. *Bartlett*, 16 Fed. Rep. 615; *Town of Jacksonport* v. *Watson*, 33 Ark. 704; *The State* v. *Commissioners*, 39 Ohio St. 58; *Page* v. *Allen*, 58 Pa. St. 338; *Follmer* v. *Nuckolls County*, 6 Neb. 204; *Peter* v. *Prettyman*, 62 Md. 566; *Patton* v. *Stephens*, 14 Bush (Ky.), 324; *Board of Education* v. *Arnold*, 112 Ill. 11; *Spillman* v. *Parkersburg*, 35 W. Va. 605; *The City of Valparaiso* v. *Gardner*, 97 Ind. 1; *City of Springfield* v. *Edwards*, 84 Ill. 626; *Howell* v. *City of Peoria*, 90 Ill. 104.

In none of the cases last above cited, except the first four, was the question now under consideration expressly passed upon, but the facts stated in the opinions seem to warrant the conclusion, that injunctions were sustained against the corporate action of the municipalities, as distinguished from the action of agents or officers proceeding under their orders.

In the New York cases it was held, that a court of chancery could enjoin the board of aldermen of a city from passing an ordinance to construct a railway in one of the streets; that municipal corporations are creatures of limited powers in the appropriation of the funds of the people; that, when they attempt to appropriate such funds to purposes not authorized by their charters or by positive law, whether it be done by resolution, ordinance or under the form of legislation, their acts are void, and that, while courts will not attempt to control their discretion, yet, if, under pretense of exercising such discretion, they threaten, or are about to do, what amounts to a gross abuse of power to the injury and in fraud of the rights of individuals and the public, the courts will interfere to pre-

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vent the threatened injury. But later decisions in New York, some of which are referred to hereafter, have taken a different view, refusing to follow the earlier cases above mentioned as going too far in the direction of subjecting the legislative and political powers of municipal bodies to the control of the courts. (*Alpers* v. *City and Co. of S. F.*, 12 Sawyer's Rep. 631). In *Spring Valley Water- Works* v. *Bartlett, supra*, an injunction against the Mayor and Supervisors of San Francisco, restraining them from passing an ordinance to fix the price of water furnished to the city, was sustained over the objection, that the defendants were a "legislative body endowed with legislative powers, to be exercised with absolute discretion;" and it was held, that the board of supervisors of a municipal corporation will be enjoined from passing an ordinance which is not within the scope of their powers, where its passage will work an irreparable injury. The *Bartlett* case, however, seems to have been overruled by the later case of *Alpers* v. *City and Co. of S. F., supra.*

The last four cases above cited, to-wit: *Spillman* v. *Parkersburg*, *The City of Valparaiso* v. *Gardner*, *City of Springfield* v. *Edwards* and *Howell* v. *City of Peoria*, are cases where cities were enjoined from incurring indebtedness in excess of the constitutional limit, or from entering into contracts that would involve such excess of indebtedness. But in these cases the point to which attention was more especially directed, was the meaning of the word "indebtedness," and what constituted a "debt" within the meaning of the constitution; and it is not altogether clear, that "incurring indebtedness" does not refer as well to the enforcement as to the passage of corporate resolutions.

A large number of the decisions, which uphold the right of equity to interfere with the action of municipal corporations where such action is in excess of their legal powers, will be found, on examination, to be based upon facts which show, that the injunctions were issued against the officers or agents

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attempting to execute or enforce corporate resolutions, ordinances, by-laws or orders, as will be seen by reference to the following cases: *New London* v. *Brainard*, 22 Conn. 553; *Webster* v. *Town of Harwinton*, 32 Conn. 131; *Bayle* v. *New Orleans*, 23 Fed. Rep. 843; *Harney* v. *The I. C. & D. R. R. Co.*, *supra*; *Davenport* v. *Kleinschmidt*, 6 Mont. 502; *Willard* v. *Comstock*, 58 Wis. 565; *Lynch* v. *E. L. & M. Ry. Co.*, 57 Wis. 430; *Place* v. *City of Providence*, 12 R. I. 1; *Austin* v. *Coggeshall*, 12 R. I. 329; *Sherman* v. *Carr*, 8 R. I. 431; *Newmeyer* v. *Mo. & Miss. R. R. Co.*, 52 Mo. 81; *Osterhout* v. *Hyland*, 27 Hun, 167; *Mayor, etc., of Baltimore* v. *Gill*, 31 Md. 375; *Merrill* v. *Plainfield*, 45 N. H. 126; *Hospers* v. *Wyatt*, 63 Iowa, 264; *Roberts* v. *Mayor, etc., of N. Y.*, 5 Abb. Pr. Rep. 41; *Schumm* v. *Seymour*, 9 C. E. Greene (N. J.), 143; *List* v. *Wheeling*, 7 W. Va. 501; *Rutz* v. *Calhoun*, 100 Iowa, 392; *McCord* v. *Pike*, 121 Ill. 288; *English* v. *Smock*, 34 Ind. 115; *The City of Madison* v. *Smith*, 83 Ind. 502; *Sackett* v. *The City of New Albany*, 88 Ind. 473; *Wright* v. *Bishop*, 88 Ill. 302; *Sherlock* v. *Village of Winnetka*, 59 Ill. 389; *Crampton* v. *Zabriskie*, 101 U. S. 601.

In the case of *Crampton* v. *Zabriskie*, *supra*, which may be regarded as a leading case upon this general subject, Mr. Justice FIELD uses the following language: "Of the right of resident tax-payers to invoke the interposition of a court of equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, which they in common with other property holders of the county may otherwise be compelled to pay, there is at this day no serious question. * * * From the nature of the powers exercised by municipal corporations, the great danger of their abuse, and the necessity of prompt action to prevent immediate injuries, it would seem eminently proper for courts of equity to interfere upon the application of the tax-payers of a county to prevent the consummation of a wrong, when the officers of those corporations assume, in excess of their powers, to create burdens upon property holders;"

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but the facts of the case, in the decision of which this language was used, show that the legislative action of the county board had already been put forth in all essential respects before the injunction was asked for; there, the board of Chosen Freeholders of a county in New Jersey had purchased certain lands without legal authority to do so, and had issued bonds in payment for the same; and the object of the injunction, as is stated in the opinion of the court, was "to enjoin the prosecution of the action to enforce their payment" by the holder of the bonds.

In *Colton* v. *Hanchett*, 13 Ill. 615, it was held that the board of supervisors of a county had no authority to appropriate the county funds to aid a private individual in the construction of a toll-bridge, and that an injunction would issue at the suit of a tax-payer to restrain the board from granting a sum of money to a private individual for such purpose; but it appears from the statement of the facts in the case, that the board had previously passed a resolution directing, that an order should be drawn upon the county treasurer for the money, to-wit: $1000.00, in favor of such individual, upon his completion of the bridge, and upon his conveying to the county a right of way over the bridge for certain of its officers.

In *Perry Co.* v. *Kinnear*, 42 Ill. 160, the county board made an appropriation to pay to a judge of the Circuit Court money in addition to the salary allowed him by law; and it was held that such appropriation of the money of the citizens was illegal and would be enjoined by a court of equity at the suit of tax-payers; but, before the injunction was applied for, the board had passed a resolution ordering the county clerk to issue an order on the treasurer in favor of the judge, and the injunction was against the county clerk from issuing the order and the county treasurer from paying it. In *Beauchamp* v. *Kankakee Co.*, 45 Ill. 274, the facts were similar to those in the *Perry Co.* case, and the ruling was the same.

In *Carter* v. *City of Chicago*, 57 Ill. 283, where the question was whether a city could be enjoined from so constructing a

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roadway as to include in it the portion of land set apart in the plat for sidewalks on either side of the roadway, it was held that the city held the fee of the streets in trust for the public, and would be enjoined from a violation of such trust by such an abuse of its powers as to injure the property of individuals; but the injunction there issued was against the enforcement of an ordinance which had already been passed.

In *Sherlock* v. *Village of Winnetka*, *supra*, where it was held that, although a municipal corporation was vested with the largest discretion in the exercise of its public and political powers, yet it must be regarded as the depositary of a trust in reference to the corporate property, and, if guilty of a breach of such trust, would not be exempt from judicial interference merely because the forms of legislation were used; it appears that the injunction was mainly directed against the collection of a tax, the levy of which had been ordered in an ordinance theretofore passed by the village council. (*Milhau* v. *Sharp*, 15 Barb. 193).

But we are not limited, in the investigation of this subject, to an examination of the facts of the cases, which, while sustaining the general power of equity to restrain the action of municipal bodies, do not make any special reference to the mode of exercising such power. There are many decisions which hold, in express and definite terms, that "the courts will not enjoin the passage of unauthorized ordinances, and will ordinarily act only when steps are taken to make them available." (1 Dill. on Mun. Corp. — 4 ed. — sec. 308, note on page 387). There may be instances where this restriction upon the power of the courts will sometimes be disregarded, as where municipal corporations are exercising mere business or ministerial, rather than legislative, powers, (*The City of Valparaiso* v. *Gardner*, *supra*; 1 Dill. on Mun. Corp.— 4 ed.— secs. 473, 474, 927, 1048); or are wrongfully disposing of property held by them as trustees for the public, (*Milhau* v *Sharp*, *supra*; *Sherlock* v. *Village of Winnetka*, *supra*); or

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are attempting to act upon matters not by their charters or by the law subject to their jurisdiction, (*Alpers* v. *City and Co. of S. F.*, *supra*); or where it appears that the mere voting on and formal passage of a resolution or ordinance will instantly, without any action or attempt to enforce any right or privilege under it, effect an irremediable private injury. (*Whitney* v. *The Mayor, &c., of N. Y.*, 28 Barb. 233).

The weight of authority and the tendency of the more recent decisions are in favor of the position, that the restraining power of the courts should be directed against the enforcement, rather than the passage, of unauthorized orders and resolutions, or ordinances, by municipal corporations. To this effect are the following authorities: *The Des Moines Gas Co.* v. *The City of Des Moines*, 44 Iowa, 505; *Linden* v. *Case*, 46 Cal. 171; *Merriam* v. *Board of Supervisors*, 72 Cal. 517; *City of Chicago* v. *Evans*, 24 Ill. 52; *Whitney* v. *Mayor*, 28 Barb. 233; *People* v. *Mayor*, 32 Barb. 35; *People* v. *Mayor*, 9 Abb. Pr. Rep. 253; *Cin. Street R. R. Co.* v. *Smith*, 29 Ohio St. 291; *Harrison* v. *City of New Orleans*, 33 La. Ann. 222; *Alpers* v. *San Francisco*, 12 Sawy. 631; 2 High on Inj. sec. 1243 — 3d ed.

In *Alpers* v. *San Francisco*, *supra*, Mr. Justice FIELD, who wrote the opinion in *Crampton* v. *Zabriskie*, *supra*, says: "If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts, while the legislative body of the State, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative action threatened may be in disregard of constitutional restraints and impair the obligation of a contract, * * does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised is not subject to interference by the judiciary. * * * The principle, that the exercise of legislative

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power by a municipal body is beyond judicial control is important in our institutions to be weakened by occasio decisions in disregard of it."

In *The Des Moines Gas Co.* v. *The City of Des Moines*, *pra*, where the city of Des Moines had chartered a gas compa with certain exclusive privileges and attempted by a subsequ ordinance to repeal said charter and grant the same privile to another company, it was sought to enjoin the passage of repealing ordinance, on the ground that it would be a violat of the contract created by the charter, and therefore uncon tutional; but it was held that the court had no power to is the injunction under the circumstances, and it is there sa "The General Assembly is a co-ordinate branch of the St government, and so is the law-making power of public mu cipal corporations within the prescribed limits. It is no m competent for the judiciary to interfere with the legislat acts of the one than the other. But the unconstitutional a of either may be annulled. Certainly the passage of an unc stitutional law by the General Assembly could not be enjoin If so, under the pretense that any proposed law was of t character, the judiciary could arrest the wheels of legislati * * * After its passage the judiciary may declare the l unconstitutional. *Piqua Bank* v. *Knoop*, 16 How. 3(*Dodge* v. *Woolsey*, 18 How. 331, but previous to that ti judicial powers cannot be invoked. * * * A void lav no law, and this without doubt is true as to an ordinar * * * While it is not the province of the judiciary interfere and arrest the passage of the ordinance, yet the do are open for the purpose of testing its legality."

In *Linden* v. *Case*, *supra*, it was held, that an injunct will not be granted to restrain a Board of Supervisors fr contracting a liability, which is not a legal charge against county, or "from allowing any accounts against the cou thereon", the Supreme Court of California saying: " order made by a Board of Supervisors is valid or bind

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unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liabilities. * * * If illegal claims are allowed by the Board against the County, it will be the duty of the auditor to refuse to draw warrants therefor; and, if warrants are drawn, it will be the duty of the Treasurer to refuse to pay them. The presumption is that these officers will faithfully discharge their duty in the premises."

In the more recent case of *Merriam* v. *Board of Supervisors*, *supra*, decided in 1887, it was held that an injunction would not lie at the instance of a tax-payer to restrain the Board of Supervisors of a county from ordering certain claims to be paid on the ground that they were not proper or valid demands against the county, and it was there said: "The members of the Board would themselves be individually responsible for moneys willfully paid out without authority of law. They are trustees of the funds for certain specified purposes, and cannot, except by violating their oaths, allow them to be applied to other purposes. They act judicially, it is true, and will not be held accountable for mere errors, but they will not be excused on the ground that they have acted honestly merely because they do not steal the funds. If they willfully appropriate moneys for a purpose not authorized by positive law, they are liable civilly and criminally."

In *City of Chicago* v. *Evans*, *supra*, a bill was filed to enjoin the common council of Chicago from passing an ordinance, granting to the North Chicago City Railway Company the right to construct a railway across the Clark street bridge &c., and we said in that case: "The procuring the adoption of this ordinance is not such an illegal and unwarranted act as can produce injury, and until they act under it as their only warrant, no reason is perceived why they should be stayed in their action. The passage of ordinances which confer no

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rights or authority, are harmless until steps are taken to make them available."

Our survey of the authorities leads us to the conclusion that, in the case at bar, the application for an injunction was premature. If the Board of Commissioners had passed a resolution to make a new contract with the appellee, or had made an order directing the payment of the balance due on the old contract, and the appellants had filed a bill to prevent the mandates of the board from being carried into effect by enjoining the clerk or auditor of the board from drawing a warrant on the county treasurer and by enjoining the county treasurer from paying such warrant, or by enjoining such other steps as might be taken to enforce the action of the board, then a very different case would have been presented for our consideration.

The direction, that no county shall appropriate or pay any of the public funds to a school controlled by a church, involves the ascertainment of a fact. It must be ascertained by the county board, whether the school applying for the appropriation or payment is or is not controlled by a church. A court of chancery cannot assume in advance, that the board of county commissioners will ignore the real facts, and violate the fundamental law of the State by making illegal contracts, or illegal appropriations. It is time enough for equity to stretch forth its preventive arm, when some attempt is made to enforce the unconstitutional act. A municipal corporation, which has entered into a void contract, cannot be estopped from taking advantage of its own incapacity when suit is brought upon such contract, or other efforts are made to secure its execution. (*Austin* v. *Coggeshall*, *supra*; *Schumm* v. *Seymour*, *supra*).

There is nothing in the bill to show, that there would have been any haste in drawing a warrant upon the county treasurer, or in obtaining payment from him, if the order allowing appellee's claim had been made by the Board. It does not appear, that the remedy of appellants would not have been as effective

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against the instrumentalities attempting to carry out the mandate of the Board as against the corporate body itself. While the legislative power, which has been delegated to municipal corporations, is of a limited and subordinate character, it yet remains true, that judicial interference with it is fraught with serious consequences, and cannot be too carefully avoided.

The decree of the Circuit Court is affirmed.

Decree affirmed.

SUSAN T. ALEXANDER *et al.*

v

LAURA A. PARKER.

Filed at Springfield, January 18, 1893.

1. BENEFIT SOCIETIES — *who may be beneficiaries.* A statute for the formation of associations for charitable or benevolent purposes, provided that a corporation organized thereunder may, "for the purpose of assisting the widows, orphans, *or other persons dependent upon deceased members,*" provide in its by-laws for the payment by each member of a fixed sum, to be held by the corporation until the death of a member occurs, and then to be forthwith paid to the person entitled thereto, etc. A by-law of such a society required that each applicant for membership should enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he might desire his benefit paid, and provided that a benefit might be made payable to a member's wife, children, etc.; and lastly to any other person dependent upon him: *Held*, that the statute and by-laws contemplated that the fund might be paid to a person dependent upon a member, even though such person was not in any way related to him. The dependency required in such case is not necessarily a legal dependency.

2. SAME — "*dependent*" *defined.* A dependent, as the term is used in reference to these benefit societies, is one who is sustained by another. The maintenance of dependents is such support as consists in the furnishing of "food, clothing, lodging or education." Maintenance in the matter of clothing does not refer to occasional gifts of clothing, but to such a regular supply of clothing as may be reasonably necessary to make the body comfortable.

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Syllabus.

3. A lady in March, 1883, became engaged to be married to a member of a benefit society, she being about forty years of age, and receiving at that time a salary of about $500 per year as clerk or bookkeeper in the office of the collector of internal revenue. She was engaged in that office from 1878 to June 30, 1887, and her salary up to July 1, 1882, was $400 per year. From that time up to July 1, 1884, it was $500 per year, and from the latter date to June 30, 1887, was $600 per year. She had no children and lived with her mother and sister. After the last date she worked for a time in a bank at a salary of one dollar a day, awhile for a safe and lock company for three dollars a week, and awhile in a store for twenty dollars a month, receiving during this time assistance and support from her mother and sister. The member to whom she was engaged failed in business in 1885, from which time he was poor and earned but little, and during the last three years of his life he never saw his affianced wife more than twice. He paid nothing toward her board, and gave her only a few presents, but paid seventy-five dollars a year in assessment on his certificate of membership: *Held*, that the affianced was not a dependent upon the member.

4. The fact that a woman is the affianced wife of a deceased member of a benefit society does not, as a matter of law, make her dependent upon him for support, etc., within the meaning of the statute relating to such a corporation, which authorizes the payment of a sum of money to any one dependent upon him. The mere engagement to marry a woman imposes no obligation on the promisor except to carry out his contract.

5. The fact that the person named in the certificate of membership may receive occasional gifts of clothing, jewelry, money, etc., does not make such person dependent upon the member making such presents. But the dependent person need not be wholly dependent on a member, but may be dependent in part only. Trivial or casual or perhaps wholly charitable assistance will not create a relation of dependency within the meaning of the statute or by-laws.

6. Where the statute and the charter of a benefit association provide for the payment of benefit funds to persons dependent upon the members, the word "dependent" means some person or persons dependent for support in some way upon the deceased. Dependence for favor, or for affection, or for companionship, or as servants or retainers, is excluded.

7. SAME — *dependence is a question of fact — "affianced wife."* The designation of the person named in the certificate of membership as the "affianced wife" for the beneficiary, is not sufficient to preclude an examination of the evidence for the purpose of determining whether, as matter of fact, the person so named was really dependent upon the deceased member or not. Whether a person is included among the dependents of a member of a benefit society is a question of fact, and each case must be decided on its own merits.

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Statement of the Case.

8. SAME — *"affianced wife" — not a "widow" or "relative," within the statute.* Under a statute authorizing the accumulation of a mortuary fund for the benefit of widows or relatives of deceased members, an affianced wife can not be made a beneficiary. She being bound to the deceased by no other tie than that of an engagement of marriage, is not a relative within the meaning of such a statute.

9. SAME — *authority to pay benefits to persons not within the classes designated by law.* Where the statute under which a benevolent corporation is organized, and its charter adopted in pursuance of such statute, designate certain classes of persons as those for whom a benefit fund is to be accumulated, a person not belonging to either or any of such classes is not entitled to take the fund. The corporation will have no authority to create a fund for other persons than the classes specified in the law, nor can a member direct the fund to be paid to a person outside of such classes.

10. SAME — *rights of beneficiaries designated by law — against others designated by the member or society.* Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law of their right to or interest in the fund. The designation of any one not within such class as the beneficiary is void.

11. SAME — *contract with members — how evidenced.* The contract between a benefit society and its members is contained in the certificate, if one be issued, taken in connection with the constitution and by-laws of the organization and the statutes of the State under which it is formed.

APPEAL from the Appellate Court for the Third District; — heard in that court on appeal from the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

This is a bill of interpleader, filed on April 8, 1889, in the Circuit Court of Adams county, by the Supreme Council of the Royal Arcanum, a corporation organized under the laws of Massachusetts, against the appellee and the appellants. It appears from the allegations of the bill and from the undisputed evidence, that Edwin H. Turner, then of the city of Quincy, in said county, became a member of Quincy Council, No. 195, Royal Arcanum, in June, 1883; that said Supreme Council issued to him, as such member, a benefit certificate for $3000, dated June 15, 1883, designating, as the beneficiary

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therein, the appellee, Laura A. Parker, describing her as "Mrs. Laura M. Parker (affianced wife)"; that said Turner died on October 2, 1888, at Larned, in the State of Kansas, being then a widower, and leaving six children, who are the appellants herein, and that, at the time of his death, he was in good standing in said order. The bill states, that the fund of $3000 is claimed on the one hand by appellee, as the beneficiary named in the certificate, and, on the other hand, by the appellants, as children and heirs of the deceased, and offers to bring the fund into court, and prays that defendants may be required to interplead and settle their claims, etc. After answers and replications filed, a decree was entered in accordance with the prayer of the bill of interpleader, and directing that the money be paid into court, and that the complainant be discharged. Thereupon, the appellee filed her bill in said cause, setting up the payment of the fund into court, and averring that, at the time of the issuing of said certificate, and at the time of said Turner's death, "she was dependent upon him for her support within the true intent and meaning of the constitution and laws of the * * * Supreme Council of the Royal Arcanum," and praying that the money be paid to her. The appellants answered the bill, denying its allegations, and claiming that the fund belongs to them as the children and next of kin of the deceased. The statutes of Massachussets under which said corporation was organized, the certificate of incorporation, and the constitution and laws of the Royal Arcanum, were made exhibits to the pleadings, and introduced in evidence. After the introduction of testimony and the hearing of the cause, the Circuit Court entered a decree, finding that the complainant, Laura A. Parker, "was dependent upon the insured * * * in some degree, and to a certain extent, for her maintenance within the true intent and meaning of the statutes, constitution and laws" aforesaid, from June 15, 1883, up to and subsequent to said Turner's death, and ordering that the money be paid to her. This decree has been affirmed by

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the Appellate Court; and from the judgment of the latter court the present appeal is prosecuted.

The certificate issued to Edwin H. Turner on June 15, 1883, recites that it is so issued upon condition that he complies "with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern said council and fund." The certificate also recites, that the Supreme Council of the Royal Arcanum "binds itself to pay out of its widows and orphans' benefit fund to Mrs. Laura M. Parker — (affianced wife) — three thousand dollars in accordance with and under the provisions of the laws governing said fund," etc.

Section 2 of chapter 115 of the General Statutes of Massachusetts, in regard to associations for charitable and other purposes, provides that "such association may be formed for any * * * charitable or benevolent purpose," etc.; section 5 provides that "the corporation may prescribe by its by-laws the manner in which * * * the purposes of its incorporation may be carried out;" section 8 provides that "a corporation organized for any purpose mentioned in section 2 may, for the purpose of assisting the widows, orphans, *or other persons dependent upon deceased members*, provide in its by-laws for the payment by each member of a fixed sum, to be held by said association until the death of a member occurs, and then to be forthwith paid to the person or persons entitled thereto," etc. In May, 1882, the legislature of Massachusetts passed another law, by section 1 of which the corporation is authorized to "make to any member thereof who is disabled by accident or sickness, or to the wife, children or other relatives of, or any person dependent upon such member, weekly or other payments as may be provided by its by-laws," etc.; and by section 2 of which section 8, as above quoted, is amended so as to read: "A corporation organized, etc., * * * may, for the purpose of assisting the widows, orphans, *or other*

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relatives of deceased members, or any persons dependent upon deceased members, provide," etc.

The certificate of incorporation of the Supreme Council of the Royal Arcanum declares that the incorporators have associated themselves with the intention of forming a corporation, etc., "for the purpose of * * * aid to its members and their dependents, * * * assisting the widows and orphans of deceased members, establishing a fund for the relief of sick and distressed members, and one for a widows and orphans' benefit fund," etc. Article 2 of the constitution of said Supreme Council states the object of the order to be: * * * "2d. To give all moral and material aid in its power to its members and those dependent upon them; 3d. * * * to assist the widows and orphans of deceased members; 4th. to establish a fund for the relief of sick and distressed members; 5th. to establish a widows and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the order, who has complied with all its lawful requirements, a sum not exceeding $3000 shall be paid to his family, or those dependent on him, as he may direct."

Among the provisions of section 2 of law 3 of the order are the following:

"Sec. 2. (1) Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said direction.

(2) A benefit may be made payable to the following classes of persons:

Class first. To a member's wife, children, grandchildren, father, mother, grandparents, brother or sister, nieces and nephews, cousin in the first degree, aunt, uncle, next of kin who would be distributees of the personal estate of such member, upon his death, intestate; in either of which cases no

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proof of dependency shall be required before the issuing of the benefit certificate.

Class second. To any other person who is dependent upon the member for maintenance (food, clothing, lodging or education); in which case written evidence of the dependency, within the requirements of the laws of this order, must be furnished to the satisfaction of the supreme secretary before the benefit certificate can be issued. * * *

(6) No benefit shall be payable to a person or persons of the second class mentioned in paragraph 2 of this section, unless the dependency therein required to be shown exists at the time of the member's death; in which case proof of such dependency at the member's death shall be furnished, in writing, to the satisfaction of the supreme regent, before payment of the benefit shall be made. If, at the time of the death of such member, the dependency herein required shall have ceased, or shall be found not to have existed, or if the designation shall fail for illegality or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, paragraph 2 of this section, if living, in the order of precedence as therein enumerated. If no one of said class shall be living at the death of the member the benefit shall revert to the widows and orphans' benefit fund."

Messrs. CARTER, GOVERT & PAPE, for the appellants:

A corporation, which is created under a general law, derives its powers from the same, and they can not be extended beyond such as are specified in the statute. *Cork* v. *Stock, etc.*, sec. 3, and cases cited in note; *People* v. *Chicago Gas Trust Co.*, 130 Ill. 268.

This principle applies to mutual benevolent societies, and consequently they can not provide a contract that a mortuary benefit fund may be made payable to any class of persons other than such as are enumerated in the statute under which they have been organized. *Palmer* v. *Welch*, 132 Ill. 141; *American Legion of*

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Honor v. *Perry*, 140 Mass. 580; *American Legion of Honor* v. *Smith*, 45 N. J. Eq. 466; *Lyon* v. *Rolfe*, 76 Mich. 146; *Nat. Mut. Aid Ass'n* v. *Gouser*, 43 Ohio St. 1; *Skillings* v. *Mass. Benev. Assoc.*, 146 Mass. 217; *Daniels* v. *Pratt*, 143 id. 216; *Elsey* v. *Odd Fellows Mut. Relief Assoc.*, 142 id. 224; *Britton* v. *Supreme Council of the Royal Arcanum*, 46 N. J. Eq. 102.

Consequently, if a member of such an association designates as his beneficiary a person who does not belong to any of the classes mentioned in the statute, and if the association issues a benefit certificate to such person, the designation is nevertheless invalid and the effect is the same as if no beneficiary had been named. The benefit fund in such cases is payable to the persons to whom it would have gone if no attempt had been made to designate a beneficiary. *Palmer* v. *Welch*, 132 Ill. 141.

The statute of Massachusetts under which the Supreme Council of the Royal Arcanum was organized, provided that the mortuary benefit might be made payable to "widows, orphans or other relatives of deceased members, or persons dependent upon deceased members." Appellee in this case does not come within any of these classes. An affianced wife of a member is not as such a dependent upon him. And appellee was not otherwise dependent on the member Turner. *Palmer* v. *Welch*, 132 Ill. 141; *Parke* v. *Welch*, 32 Ill. App. 188; *American Legion of Honor* v. *Perry*, 140 Mass. 580.

The Supreme Council of the Royal Arcanum, in its articles of association, did not create the mortuary fund for the benefit of all the classes mentioned in the statute, but only for the benefit of "widows and orphans." It can not, therefore, be paid to any one but widows and orphans of members. *Lyon* v. *Rolfe*, 76 Mich. 146; *Britton* v. *Supreme Council of the Royal Arcanum*, 46 N. J. Eq. 102.

Mr. GEORGE W. FOGG, for the appellee:

The same rules of construction should be applied to dispositions of property created by mutual benefit societies as are

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applied to bequests by wills. *Minon Mutual Benefit Assn.* v. *Montgomery*, 70 Mich. 587; 14 Am. State Rep. 519, *et notis.*

The constitutions, charters and by-laws of a benevolent association are agreements, whatever be the name they bear, and as such are binding on members and associations alike, if they contravene neither law nor public policy. *Brown* v. *Starkel*, 12 Law Rep. Ass. 430; *U. M. Ac. Assn.* v. *Miller*, 26 Ill. App. 308; Bacon on B. S., secs. 37, 170, 177, 178, 179; *Tyrrell* v. *Washburne*, 6 Allen, 466, and *Hyde* v. *Woods*, 94 U. S. 523.

In determining the powers of associations, their charters and laws are to be construed like other instruments. The object being to discover the intention of the parties; and to this end, and to carry out the purposes and objects of the organization, a liberal policy has generally obtained. Bacon on B. S., secs. 348, 91, 62, 69, 74, 78, and cases there cited; Morawetz on Corp., secs. 316 and 338, inclusive; *Folmer's Appeal*, 87 Pa. St. 133.

A policy of insurance should be liberally construed in favor of the beneficiaries named by the insured. *Stone's Admr.* v. *U. S. Cos. Co.*, 34 N. J. 375; May on Ins., sec. 175; *U. M. Ac. Assn.* v. *Frohard*, 33 App. 178; *Folmer's Appeal, supra.*

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The question to be determined is, whether the fund in the registry of the Circuit Court belongs to appellee, as the beneficiary named in the benefit certificate issued to Edwin H. Turner by the Supreme Council of the Royal Arcanum, or to appellants, as the children of said Edwin H. Turner, now deceased. Where the statute, under which a benevolent corporation is organized, and its charter adopted in pursuance of such statute, designate certain classes of persons as those for whom a benefit fund is to be accumulated, a person not belonging to either or any of such classes is not entitled to take the fund. The corporation has no authority to create a fund for

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other persons than the classes specified in the law, nor can a member direct the fund to be paid to a person outside of such classes. Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law of their right to, or interest in, the fund. (*Palmer* v. *Welch*, 132 Ill. 141; *American Legion of Honor* v. *Perry*, 140 Mass. 580; *Britton* v. *Royal Arcanum*, 46 N. J. Eq. Rep. 102; Bacon's Ben. Soc. and Life Ins. secs. 245 and 252). Bacon, in his work on Benefit Societies and Life Insurance, at section 245, states the general rule to be, that "if, by statute or charter, the beneficiaries of members are confined to certain classes, the designation of any one not of such class is void." The contract between a benefit society and its members is contained in the certificate, if one be issued, taken in connection with the constitution and by-laws of the organization and the statute of the State, under which it is formed. (Idem sec. 236).

If appellee belongs to either of the classes of persons named in the statute and constitution and by-laws of the association, she can only belong to the class designated as "persons dependent upon deceased members." Being only an "affianced wife," or, in other words, being bound to the deceased by no other tie than that of an engagement of marriage, she was not a relative within the meaning of the statute; she does not belong to class first described in the second paragraph of section 2 of Law 3.

Nor can it be said, that appellee was legally dependent upon Turner, the deceased member to whom the certificate was issued. The fact that a woman is the affianced wife of a deceased member of a benefit society does not, as matter of law, make her dependent upon him. (*Palmer* v. *Welch*, *supra*; *McCarthy* v. *New Eng. Order of Protection*, 153 Mass. 314). In *American Legion of Honor* v. *Perry*, *supra*, the Supreme Court of Massachusetts says upon this subject: "At the time

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of the decease of said Perry, a valid engagement of marriage subsisted between him and the defendant Augusta, and, by reason of this, she claims to be dependent upon him. Until they became man and wife by marriage, there was no obligation upon the said Samuel to support or provide for her. She does not come within the class of persons whom, if able, he was bound by law to support. The mere engagement to marry imposed no obligation upon him, except to carry out his contract with her. Their mutual promise to marry did not in any sense, by itself, make her dependent upon him."

Counsel for appellants contend, that the words, "affianced wife," were intended to indicate the relationship between the beneficiary and the deceased member, and that, inasmuch as, under paragraphs 1 and 6 of section 2 of Law 3, appellee's name and supposed relationship were entered in the certificate and the designation of such relationship has failed for illegality, the benefit thereby became payable to the appellants as children of the deceased. This contention would have much force, if the designation of appellee as an affianced wife should be construed to be exclusively a designation of relationship, and nothing more. But paragraph 1 of section 2 provides for the entry, upon the application and in the certificate, of the name and *dependence*, as well as the name and *relationship*, of the person to whom the applicant may desire his benefit to be paid. The statute and laws evidently contemplate, that the fund may be paid to a person who is dependent upon a member, even though such person may not be in any way related to him. The dependency required is not necessarily a legal dependency. (*McCarthy* v. *New Eng. Order of Protection*, *supra*). While it is not altogether clear how and to what extent the character of the dependency is required by the by-law to be entered in the certificate, yet, at the same time, it is possible that the use of the expression, "affianced wife," may have been intended to designate the nature of the beneficiary's dependence upon the member applying for the certificate. We are not inclined

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to hold, that the designation of the person named in the tificate as an "affianced wife" is sufficient to preclude an ex ination into the evidence, for the purpose of determir whether, as matter of fact, the person so named was re dependent upon the deceased member or not. It has b said "that whether or not a person is included among dependents of a member of a benefit society is a questior fact, and that each case must be decided upon its own meri (Bacon's Ben. Soc. and Life Ins. sec. 261).

The requirements in section 2 of Law 3, that written dence of the dependency must be furnished before the cer cate is issued, that the dependency must exist at the tim the member's death, and that, if, at the time of his death, dependency shall have ceased, or shall be found not to h existed, the benefit shall be payable to the persons name said "class first"—all indicate that proof as to the depende may be sought outside of the terms of the certificate it In *McCarthy* v. *New Eng. Order of Protection*, *supra*, certificate, issued to one McCarthy, was payable to "Sara Judge, fiancée;" and the evidence was examined for the pose of determining the fact of said Sarah's dependence u McCarthy in his lifetime.

The question then arises, whether the appellee was eve fact dependent upon Edwin H. Turner, deceased, and, if whether such dependence had ceased at the time of his de Where the statute and charter of an association provide for payment of benefit funds to persons dependent upon the m bers, the word, "dependent," means "some person or per dependent for support in some way upon the deceas (*Ballou* v. *Gile*, 50 Wis. 614; Bac. on Ben. Soc. and Life sec. 261). Dependence for favor, or for affection, or for c panionship, or as servants, or retainers, is excluded. A dep ent, as the term is used in reference to these benevo associations, is one who is sustained by another, or relies support upon the aid of another. In the present case,

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dependent is defined in class second of paragraph 2 of section 2 of Law 3 to be a person, "who is dependent upon the member for maintenance (food, clothing, lodging or education)." To "maintain," according to Webster, is "to bear the expense of; to support; to keep up; to supply with what is needed." He defines maintenance to be, "means of sustenance; supply of necessaries and conveniences." The maintenance, specified in said "class second," is such support as shall consist in the furnishing of "food, clothing, lodging or education." (Schouler on Husband and Wife, sec. 66). The legislative purpose in passing the statutes, under which the present association was organized, "was to provide a way by which men of small means might combine together to accumulate a fund for the benefit of those who should, as each dropped out by death, be dependent on him for food, raiment and shelter." (*Britton* v. *Royal Arcanum*, 46 N. J. Eq. 102). Maintenance in the matter of clothing does not refer to occasional gifts of clothing, but to such a regular supply of clothing as may be reasonably necessary to make the body comfortable. The fact, that the person named in the certificate may receive "occasional presents of clothing, jewelry, money, etc.," does not make such person dependent upon the member making such presents. (*Palmer* v. *Welch*, *supra*).

It was decided in *McCarthy* v. *New Eng. Order of Protection*, *supra*, that the dependent person need not be wholly dependent on a member, but may be dependent in part only. In that case it was held, that a woman engaged to be married, who, at her intended husband's request, leaves an employment which affords her a comfortable support for one in which her earnings are insufficient for that purpose, and receives from him a sum each week to make up the difference, is a person dependent upon him within the meaning of the statute. The *McCarthy* case goes as far in the direction of a liberal interpretation of the statute as correct rules of construction will warrant; but even in that case there was a regular contri-

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bution of a definite amount at fixed periods for the support of the beneficiary, the court saying: "Trivial or casual, or perhaps wholly charitable assistance, would not create a relation of dependency within the meaning of the statute or by-laws."

Section 1 of the Act of 1882 provides that, where a member is disabled by accident or sickness, the association may make "to the wife, children or other relatives of, or any person dependent upon such member, *weekly*, or other payments as may be provided by its by-laws." It is fairly inferable from this language, that the legislature of Massachusetts intended the support of dependent persons to be made up of regular and continuous contributions, and not to consist of spasmodic liberality or charity.

Applying the definitions and principles here announced to the facts of the present case, we can reach no other conclusion than that the appellee was not dependent upon the deceased for such maintenance, as is contemplated by the statute and laws of the Supreme Council of the Royal Arcanum. This appears from the testimony of the appellee herself.

She became engaged to be married to the deceased in March, 1883, being then a widow of about 40 years of age, and receiving at that time a salary of $500 per year as a clerk or book-keeper in the office of the collector of internal revenue at Quincy. She received a commercial education, and worked in said office as a clerk from 1878 to June 30, 1887. Her salary up to July 1, 1882, was $400 per year, from that date to July 1, 1884, was $500 per year, and from the latter date to June 30, 1887, was $600 per year. She had no children, and lived with her mother and married sisters at their home in Quincy. After leaving the revenue office in 1887, she worked awhile in a bank on a salary of $1 per day, awhile for a safe and lock company for $3 a week, and awhile in a store for $20 per month, receiving during this time assistance and support from her mother and sisters and brothers-in-law.

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The deceased, Edwin H. Turner, failed in business in Quincy in 1885, and in that year left Quincy and went to Kansas City, and from there to Larned in the State of Kansas, where he lived until his death on October 2, 1888. From 1885 to his death he seems to have been poor, working in a store owned by some of his children at Larned, Kansas. During the last three years of his life he never saw appellee more than twice, once on a visit to Quincy, and once in St. Louis, where she went from Quincy to meet him and spent several days with him. From the time of his failure in 1885 up to June 30, 1887, he was not earning as much as appellee.

Upon her direct examination appellee swore, that "the annual amount of clothing and money and other valuables contributed from the time of her engagement in March, 1883, up to the time of Turner's death was about $150 annually." This statement was not sustained by the facts developed upon the cross-examination. She there admitted that one-half of said amount — $75 per year — consisted of dues and assessments paid upon said benefit certificate. These dues and assessments cannot be regarded as contributions to her support as a dependent person. She does not show, that the deceased ever paid one cent towards her board or lodging. The only contributions made by him in her behalf before he left Quincy in 1885, which she is able to remember, are the following: "a dress-cloak for nice or elegant wear" presented to her in October, 1883, near her birthday; a dress, costing $35, in the spring of 1884; subsequently a winter dress, and at one time a bonnet; occasionally some perfume and car-tickets. The only money, which he is proven to have sent to her after he left Quincy in 1885, was the sum of $5, remitted to her in a letter written on December 21, 1886, for the purchase of a Christmas present. She did not see the deceased for two years before his death, and she is unable to specifically mention any other remittance than the one named, nor does the correspondence show any.

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Manifestly, the appellee was not dependent upon the deceased when the certificate was issued in June, 1883, nor at the time of his death in October, 1888; nor can his contributions to her between those dates be regarded otherwise than as "occasional presents."

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the Circuit Court with directions to enter a decree directing the fund to be paid to the appellants.

Judgment reversed.

STOCK QUOTATION TELEGRAPH COMPANY

v.

BOARD OF TRADE OF CITY OF CHICAGO.

Filed at Ottawa, January 19, 1893.

1. PRACTICE — *exceptions — when taken.* A plaintiff can not avail of an error in giving an instruction to the jury to find for the defendant, unless he has excepted to the instruction in the trial court. An objection to an instruction made for the first time in this court comes too late.

2. SAME — *directing what the verdict shall be.* If the plaintiff fail to introduce in evidence the contract upon which the suit is brought, he can not recover, and there will be no error to instruct the jury to find for the defendant.

3. SAME — *stipulation as to evidence — bill of exceptions.* Parties have the right to stipulate, before the bill of exceptions is signed, what evidence was introduced before the jury, and the evidence so agreed upon may be incorporated into the bill of exceptions, and all evidence thus incorporated in the bill, when signed by the judge, will become a part of the record.

4. BILL OF EXCEPTIONS — *right of parties to change.* Any matter embodied in the bill of exceptions under the seal of the court is a part of the record, and the parties have no right to change or add to the record of the court by stipulation, and if they do, such matters can not be regarded by this court.

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Opinion of the Court.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. GEORGE DRIGGS, Judge, presiding.

Messrs. GOGGIN & WINSLOW, for the appellant.

Mr. A. W. GREEN, for the appellee.

Per CURIAM: This was an action brought by the Stock Quotation Telegraph Co. against the Board of Trade of the City of Chicago to recover damages for the breach of an alleged contract, whereby the defendant agreed to furnish the plaintiff market quotations for transmission to certain correspondents. It was alleged in the declaration that the defendant did wrongfully and injuriously cause and procure the disconnection of the telegraph wire running from defendant's place of business in Chicago to plaintiff's office in Chicago, which said wire was used by defendant to transmit and send to plaintiff said market reports, whereby the plaintiff was unable to get the market quotations, by reason whereof the plaintiff was grievously and seriously injured to its damage, etc.

To the declaration the defendant pleaded not guilty, and on a trial before a jury the court instructed the jury to find for the defendant, which was done, and the court rendered judgment on the verdict, which judgment was affirmed in the Appellate Court. It is insisted that the court erred in instructing the jury to find for the defendant. Upon looking into the record it will be found that no exception was taken to the giving of the instruction by the plaintiff. If the plaintiff thought the instruction was erroneous, and desired to question its correctness on appeal, it could only do so by excepting to the instruction in the Circuit Court. The rule is well established that an objection to an instruction made for the first time in this court comes too late and will not be considered. *Harbaugh* v. *City of Monmouth*, 74 Ill. 367.

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But waiving the fact that no exception was made to the instruction in the Circuit Court, as the appellant's case is presented by this record, we perceive no ground upon which the judgment can be reversed. The plaintiff's action is predicated upon a written contract, which purports to have been executed by and between the plaintiff and defendant September 1, 1886. As that contract was the foundation of the action, unless it was read in evidence at the trial, and unless that fact appears from the record, the plaintiff could not recover and the court very properly instructed the jury to find for the defendant. Upon looking into the record, it appears from the bill of exceptions that the plaintiff offered and read in evidence a contract between the parties dated September 1, 1886, and as stated in the bill of exceptions the same was marked as plaintiff's exhibit "A," but on making up the bill of exceptions exhibit "A" was not incorporated in it, but it was attached to the original bill and marked exhibit "A," and upon the back of the bill of exceptions will be found a stipulation as follows: "It is hereby stipulated that the foregoing bill of exceptions and the exhibit 'A' hereunto attached be included and made a part of the record in said cause and may be filed in the Appellate Court" (signed by the attorney for the defendant). The parties had the right to stipulate before the bill of exceptions was made up and signed, what evidence was introduced before the jury, and the evidence agreed upon could be incorporated into the bill of exceptions, and all evidence thus incorporated in the bill of exceptions, when signed by the judge, would become a part of the record. But we do not understand that the contract can be made a part of the record by stipulation of the parties as is attempted to be done here. Any matter embodied in the bill of exceptions under the seal of the court becomes a part of the record, but the parties have no right to change and add to the record of the court by stipulation.

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If we are correct in this, the exhibit "A" was no part of the record, and the record failing to show that the contract relied upon was in evidence, there was no evidence before the jury upon which the plaintiff could recover.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

PRENTICE D. CHENEY

v.

JAMES W. PATTON *et al.*

Filed at Springfield, January 19, 1893.

1. FORMER ADJUDICATION — *decree conclusive on parties in interest and those under them, as to all matters involved.* Where a bill in chancery is prosecuted in the name of one, at the instance or for the benefit of another, the adjudication or decree entered therein will be conclusive as to the latter, not only as to what was determined in such suit, but also as to all other matters involved which might have been raised and determined in it. The decree will equally bind one acquiring title, after such suit, in the subject-matter of the suit.

2. The real party in interest to an action or bill in chancery, whether brought in his name or in the name of another for his use and benefit, with his knowledge and consent, will be bound by the judgment or decree rendered in the case.

3. SAME — *plea, held good.* To a bill to foreclose a second mortgage one of the defendants pleaded a former decree dismissing a bill to foreclose the same mortgage filed by another person, and alleged that, before the filing of the first bill, the complainant in the last bill assigned and transferred the notes and mortgage to the complainant in the first bill; that the latter had notice of the filing of the prior bill and of the pendency of that suit; that the prior suit was prosecuted with the knowledge and consent of the latter and in his interest and for his benefit; and that after the commencement of such prior suit the complainant in the last bill acquired from the complainant in the first bill, and was reinvested with the legal title to, said notes and mortgage and was in privity with him: *Held*, that the plea was a bar to the second suit.

4. The question in every such case must be, was the party sought to be concluded the real party in the action pleaded in bar, and if he was, whether the action was openly so conducted, or his connection therewith concealed, is immaterial.

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APPEAL from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. PALMER & SHUTT and Messrs. RINAKER & RINAKER, for the appellant.

Mr. JAMES W. PATTON, for the appellees.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

This case is before us a second time. On the former hearing it was remanded with directions to the Circuit Court to allow the parties to amend their pleadings if they so desired. See 134 Ill. 422.

After the case was redocketed in the Circuit Court, complainant amended his bill, and to so much thereof as sought relief against the lands claimed by the defendants, James W. and Francine E. Patton, they filed an amended plea. To this plea a replication was filed by the complainant, and the cause went to a second hearing, as to these parties, on the issues thus formed. The Circuit Court again dismissed the bill as to said defendants, and the said land claimed by them, and the complainant appeals. In the opinion, reported in 134 Ill., at page 437, we said: "If, as a matter of fact, the *Smith* suit was prosecuted at the instance of plaintiff in error, and for his benefit, then the adjudication in that case is binding and conclusive upon him. (*Cole* v. *Favorite*, 69 Ill. 457; *Bennitt* v. *Wilmington Star Mining Co.*, 119 id. 9.) So, also, if Smith, at the time of his suit, was the owner of the notes and mortgages, and plaintiff in error has since been reinvested with the title, then he must necessarily have derived such title through Smith and be in privity with Smith's title and be bound by the final decree in the *Smith* case. In either of the events above supposed the conclusiveness of the adjudication in the *Smith* case will include, not only what was determined in that suit, but also all other matters properly involved and which might

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have been raised and determined in it." See *Bennitt* v. *Wilmington Star Mining Co.*, *supra*, and authorities there cited.

The plea upon which this hearing was had in the Circuit Court is the same as the one before us when the above decision was made, with the additional averment: "That before Smith filed his bill in the Macoupin Circuit Court, Cheney assigned and transferred said notes and mortgages, by indorsing his name thereon and delivering the same, with said mortgages, to the said Henry J. Smith; that the legal title to said notes and mortgages was in said Henry J. Smith at the time of the filing of his said bill; that the complainant herein had notice of the pendency of said suit of Henry J. Smith, and the same was prosecuted with the knowledge and consent of the plaintiff, and in his interest and for his benefit; that, after the commencement of the same, the complainant herein acquired from said Henry J. Smith and was reinvested with the legal title to said notes and mortgages and was in privity with the title of said Henry J. Smith."

It will be seen that this amendment, by its allegations, makes the decree in the *Smith* case effectual as a bar to this action, within the language of the foregoing decision, on both of the grounds therein indicated, viz.: The legal title to said notes and mortgages was transferred to and held by Smith when that bill was filed, and afterwards complainant became reinvested with said title through Smith and in privity with his title; also, that the *Smith* suit was prosecuted with the knowledge and consent, and in the interest and for the benefit of complainant. The only question, therefore, upon this branch of the case is, was one or both of these allegations of the plea supported by the evidence? If they were, then, unless what was said in the former decision of the case is wrong, appellees' defense, under the plea of *res adjudicata*, was complete, and all other questions raised on the record become unimportant.

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Counsel for appellant dispose of the question of proof on the first branch of the plea, without reference to the evidence, upon the ground that this court decided in *Patton* v. *Smith*, 113 Ill. 499, that Smith never had the title to said notes, and mortgages, and therefore they say, he could confer no title upon complainant, and there could be no privity of title between them. It will, however, be seen by reference to that case, that whether the legal title to the notes and mortgages, as between Cheney and Smith, was ever in the latter, was neither before the court nor decided. It is there expressly said: "The notes purport to be assigned on the 23d day of May, 1877, by Cheney to Smith, and both of these parties testify that the notes were sold, and assigned on that date." The controversy on this branch of the case then was, whether Smith was a *bona fide* owner, and therefore not concluded by the Heaton decree, as it was then conceded Cheney was.

Patton did not then claim that there was no assignment of the notes in *fact*, but he insisted, as he does now, that the assignment was a mere shift on the part of Cheney, aided by Smith, to escape the Heaton decree of foreclosure, to which he, Cheney, must have then thought he was a party. As before said, the decision was not, that as between Cheney and Smith, Smith did not hold the legal title, but on the contrary, the fact of an assignment is there conceded, by which the legal title did pass. Nor do we understand it to be denied now, that appellant did make such an assignment. But whether that fact is denied, or not, the proof establishes it beyond all question, and the testimony which proves that fact, is also a part of the evidence which conclusively proves that the "Smith suit" was only so in name, and was in fact the suit of Cheney. No good purpose would be served by a review of that testimony. No one can read it, without being forced to the conclusion, from the filing of the bill to the final disposition of the case of *Smith* v. *Patton*, Smith was the merest fig-

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ure-head, used by Cheney, for the purpose of trying to avoid the Heaton foreclosure.

No stronger case could be presented for the application of the just rule, that the real party in interest to an action, whether so by name or not, is bound by the judgment. Freeman on Judgments (2d ed.), secs. 174 and 175; *Cheney* v. *Patton et al.*, *supra*, and cases there cited.

An attempt is made to limit this rule to cases in which "an open, actual and acknowledged participation in the management, conduct and control of a suit, with all the actual rights of a party," is shown, but we do not think any such qualification can be sustained, either upon principle or authority. The question in every such case must be, was the party sought to be concluded, the real party in the action pleaded in bar, and if he was, whether the action was openly so conducted, or his connection therewith concealed is immaterial. Otherwise, he who uses the name of another, in which to prosecute a suit, for the purpose of gaining some advantage over his adversary, would be given an advantage over one, who, though not a party to a suit in name, is the party in interest openly, and for an honest purpose.

Again it is insisted that at most the action set up in the plea is no bar to the complainant's right to recover upon this bill, because the only fact there decided was, that Smith did not own the notes and mortgages at that time. As already shown, that is not the real scope of that decision, but if it was, the position here contended for would be untenable. Complainant in this bill being the real party in the one filed in the name of Smith, is concluded not merely by that which was actually decided there, but also by every other matter which might properly have been submitted for decision on that bill, and which the plea here shows, was all the matters at issue between the parties in the present action. *Cheney* v. *Patton*, *supra*, and the authorities cited.

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Cases cited by counsel for appellant as holding the contra are not in point.

We are very strongly of the opinion that, upon the who record, appellant is shown to have been a party to the Heat foreclosure, and concluded by that decree, but we have n deemed it necessary to place the affirmance of the decree belo upon that ground.

If, as is earnestly insisted by counsel for appellant, the decr of the Circuit Court works a grievous hardship upon him, l alone is responsible for that result. Even if he were not, pla and well-established rules of law can not be disregarded, order to relieve him from that hardship. Under the law ar the evidence, the decree below is right, and it will be affirme

Decree affirmed.

JOHN K. THOMPSON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa, January 19, 1893.

1. PRACTICE — *absence of judge from the bench, during argume* Under the law a person on trial for a serious crime, which may depri him of his liberty, has the right to the presence of the presiding jud during the argument of the case to the jury, and his absence during t closing remarks of the State's Attorney, so as not to be able to pass up objections to statements made by him, is an error of such magnitude to call for a reversal of a judgment of conviction.

2. SAME — *argument of counsel — part of the trial — rights of d fendant.* On the trial of a criminal case before a jury the defenda has the right to be heard before the jury in person or by counsel, as may elect. This is a right guaranteed by law. Indeed, the argume before the jury is a part of the trial of the cause, as well as the introdu tion of evidence to prove the guilt or innocence of the defendant, or a other fact at issue on the trial.

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WRIT OF ERROR to the Criminal Court of Cook county; the Hon. FRANCIS ADAMS, Judge, presiding.

Mr. C. W. DWIGHT, for the plaintiff in error:

It was error for the judge to leave the court room, abandon the trial and leave the defendant to the tender mercies of an unscrupulous, vindictive State's Attorney. *Meredeth* v. *People*, 84 Ill. 479; *Hoagland* v. *Creed*, 81 id. 506; *Bishop* v. *Nelson*, 83 id. 495; *Cobb* v. *People*, 84 id. 511.

It was error for the State's Attorney to take advantage of the absence of the judge, to abuse the defendant in the presence of the jury.

It was error for the State's Attorney to make statements to the jury about the ordinances of the village, while he had the ordinances in his pocket, and refused to put them in evidence. *Raggio* v. *The People*, 135 Ill. 533; *Yoe* v. *The People*, 49 id. 410; *Fox* v. *The People*, 95 id. 71.

Mr. GEORGE HUNT, Attorney General, for the People:

I can not undertake a justification of the remarks made by the attorney who prosecuted the suit on trial below. It is only in aggravated cases, however, where the statute has been violated, or where the court can reasonably presume that a verdict may have been affected by extravagant language, that this court will reverse a case on account of improper remarks of counsel.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment against John K. Thompson for an assault with an intent to commit murder with a revolver, etc., upon one Aaron Minnick, in Cook county. To the indictment the defendant pleaded not guilty, and on a trial the jury found the defendant guilty as charged in the indictment, and fixed his punishment at imprisonment in the penitentiary for the term of four years. The difficulty which resulted in the defendant's

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indictment occurred at the village of DesPlaines, in Cook county, and as to the principal facts there is no substantial dispute. It appears from the record that on the afternoon of the assault the defendant, Thompson, who was somewhat in liquor, was at the railroad bridge crossing the DesPlaines river, and while there, standing on the bridge, he, in company with witness Wicke, shot at some leaves upon the water with his revolver. Robert Cain, a night policeman at DesPlaines, had his attention called to Thompson, by one of the trustees of the village, who said that Mr. Thompson was shooting in the corporation, which was against the village ordinances; when Thompson started for home from where he was shooting he was accosted by Cain and a village trustee, Aaron Minnick, and Cain said to Thompson, you know it is against the village ordinances to be shooting in the corporation, and you know it is against the law to be carrying concealed weapons. He said he did not know it was against the village ordinances to shoot in the corporation.

Cain then requested Thompson to give up his revolver, which Thompson refused to do. Then Cain and Minnick approached Thompson and undertook to take the revolver from him by force, and in the melee Thompson fired four shots, two of which took effect, one on Cain, the other on Minnick; neither, however, proved to be dangerous. No warrant had been issued for Thompson's arrest, nor was any effort made to arrest him before the assault, for the violation of any ordinance or law. This is apparent from the evidence of both prosecuting witnesses, Cain and Minnick, who testify that they did not go to Thompson for the purpose of arresting him, nor attempting to arrest him, but merely to take his revolver from him.

Several errors are relied upon by counsel for the plaintiff in error to reverse the judgment, but we will only consider one of them, as that is conclusive of the case. It appears from the bill of exceptions contained in the record that during the argument of the case before the jury, the presiding judge left the

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court-room and entered his private room and remained out of the court-room during the entire closing argument of the State's Attorney. It is true the judge was in a private room adjoining the court-room, preparing instructions to be given to the jury, but he could not, and as appears from the record, did not hear the argument to the jury, and during the closing argument repeated objections were interposed to remarks of the State's Attorney, but as the judge holding the court was absent from the court-room and there was no presiding judge present to pass upon the questions raised or attempted to be raised, they were never decided. On the trial of a criminal case before a jury the defendant has a right to be heard before the jury in person or by counsel as he may elect, and the people have a right to be heard through the State's Attorney or such other person as may be selected for that purpose. This is a right guaranteed by law. Indeed, the argument before the jury is a part of the trial of a cause, as well as the introduction of evidence to prove the innocence or guilt of a defendant or any other fact at issue on the trial. If the presiding judge may leave the court-room and engage in other business during the argument before the jury, he may upon the same ground leave while the evidence is being introduced during the progress of the trial at any other stage of the proceeding. Under our system of practice in the Circuit Court, during the progress of any judicial proceeding, the law requires a presiding judge to sit during each and every stage of such proceeding, whether it be a jury trial or some other proceeding in court, and the presence of the judge can not be dispensed with. The rule here announced is fully sustained by *Meredeth* v. *The People*, 84 Ill. 479, where it was held that the presence of the judge during the argument of a criminal case could not even be dispensed with by consent of the parties. In this case, however, there was no consent. Had the judge stepped out of the court-room into his private room for a short time, where he could still hear the argument and where he would have been

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in a position to pass upon any question which might properly arise in the argument, we are not prepared to say that an error would have occurred. But such was not the case here, no part of the closing argument for the State was heard, and although several objections were made to different portions of the argument, they were not, on account of the absence of the judge from the court-room, passed upon or decided. Under the law the defendant, who was on trial for a serious crime, one which deprived him of his liberty, had the right to the presence of the presiding judge during the argument of the case before the jury, and the absence of the judge was, in our opinion, an error of sufficient magnitude to reverse the judgment.

The judgment will be reversed and the cause remanded.

Judgment reversed.

LEWIS L. SHARPE

v.

W. J. MORGAN & COMPANY.

Filed at Ottawa, January 19, 1893.

1. ATTACHMENT — *recognizance by defendant — its purpose and effect.* The purpose and effect of giving a recognizance by the defendant in attachment, as provided in section 15 of the Attachment act, is to enable the defendant to obtain control of the property attached or in the hands of garnishees, upon giving security for the payment of the judgment to be recovered in the attachment suit. Upon giving the bond or recognizance, the case proceeds *in personam* and the judgment entered is a personal judgment, the recognizance standing as security for its payment.

2. SAME — *liability of surety therein — judgment against administrator.* The surety in a recognizance given to release the property attached, or to release the garnishee from liability, becomes liable to pay the judgment that may be recovered against the administrator of the defendant in the action on final trial thereof. In such case the judgment against the personal representative of the sole defendant in the

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same proceeding is a judgment against such defendant within the meaning of the statute.

8. SAME — *not abated by death of defendant.* By section 11 of the Abatement act the death of the sole defendant does not abate the action in cases where the cause of action survives, but, upon suggestion of the death, summons may issue against his administrator and the cause will then proceed as if the same had been originally commenced against him.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action of assumpsit by W. J. Morgan & Company against James Allison, and by an attachment, which was served upon garnishees. The defendant, with Lewis L. Sharpe, entered into recognizance in open court conditioned that the defendant would pay to the plaintiff whatever judgment might be rendered against the defendant upon final trial with costs, etc., within ninety days after judgment.

Before trial and judgment the defendant Allison died, and Henry A. Foster, his administrator, was made defendant, and on the final trial the plaintiff recovered judgment against the administrator for $797.60 and for costs, which, not being paid within ninety days, the plaintiff sued out a writ of *scire facias* upon the recognizance against Sharpe, the surety, who pleaded *nul tiel record* as to the recognizance. To this plea the plaintiff replied "that there is such record of the said recognizance remaining in the said Superior Court of Cook county, in the words and figures following," setting out the record of the recognizance in full. The defendant demurred to this replication, assigning the following special causes:

"*First.* The recognizance set out in the said replication is an entirely other and different recognizance than that described in the *scire facias* heretofore filed herein.

"*Second.* That said replication contains new matter and concludes to the court.

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"*Third.* That said replication contains an entirely other and different ground of action from that stated in the *scire facias* heretofore filed herein."

The demurrer was overruled, and the defendant standing by his demurrer, the cause was tried upon the issues by the court without a jury, and the court found the issues for the plaintiff. The defendant then filed a motion for a new trial, assigning causes as follows:

"*First.* The court admitted on the trial on the *scire facias* improper evidence on the part of the plaintiff, that is to say, the court admitted in evidence on the trial on said *scire facias* a recognizance other and different from that described in said *scire facias.*

"*Second.* The court admitted in evidence on the trial on said *scire facias* the record of a judgment other and different from that required by the condition in the said recognizance so offered in evidence.

"*Third.* There is no evidence in this case of the forfeiture of the recognizance before the issuing of the *scire facias* thereon.

"*Fourth.* There is no evidence in this case tending to show the death of James Allison, or the substitution of an administrator as a party defendant in the original suit in which said *scire facias* issued.

"*Fifth.* There is no evidence in this case tending to show that the judgment alleged in the said *scire facias* was recovered in the case in which the said recognizance was entered into.

"*Sixth.* The recognizance offered in evidence in this case is conditioned to pay whatever judgment might be rendered against James Allison only, while the judgment alleged in the *scire facias* is against Henry A. Foster, his administrator.

"*Seventh.* The finding of the court on the said trial on the said *scire facias* is contrary to the law and the evidence."

Which was overruled by the court.

The defendant also filed a motion in arrest of judgment, which was also overruled.

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Brief for the Appellant.

Messrs. CONDEE & ROSE, for the appellant:

The liability of a surety can not be extended by implication beyond the terms of his contract; to the extent, in the manner, and under the circumstances pointed out in his obligation he is bound, and no further. Brandt on Suretyship and Guaranty, 134; Baylies on Sureties, 144; *Miller* v. *Stewart*, 9 Wheat. 703; *State* v. *Medary*, 17 Ohio, 565; *Myers* v. *Parker*, 6 Ohio St. 501; *Phillips* v. *Wells*, 2 Sneed, 153; *Field et al.* v. *Rawlings*, 1 Gilm. 582; *State* v. *Tompkins*, 74 Ill. 482; *Cooper* v. *People*, 85 id. 417; *Mix* v. *Singleton*, 86 id. 194; *Phillips* v. *The Singer Mfg. Co.*, 88 id. 305; *Dodgson* v. *Henderson*, 113 id. 360; *Trustees of Schools* v. *Sheik et al.*, 119 id. 579; *The Burlington Ins. Co.* v. *Johnson*, 120 id. 622; *Vinyard* v. *Barnes*, 124 id. 346.

The law is the same whether the bond be statutory or otherwise. Drake on Attachment, sec. 325; *Andrew* v. *Fitzhugh*, 17 Mich. 93; *Quillen* v. *Arnold*, 12 Nev. 234; *Richards* v. *Stover*, 114 Mass. 101; *Tucker* v. *White*, 5 Allen, 322; *Simson* v. *Cransen*, 121 Mass. 492; *Sharp* v. *Bedell*, 5 Gilm. 88; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Young* v. *Mason*, 3 Gilm. 55; *Nofsinger* v. *Hartnett*, 84 Mo. 549; *Wood* v. *Fisk*, 63 N. Y. 245; *Davis* v. *Van Buren*, 72 id. 587; *Reynolds* v. *Hall*, 1 Scam. 35; *Governor* v. *Thomas*, 43 Ill. 134.

When there is a condition precedent, there can be no liability until such condition is fulfilled. Bishop on Contracts, sec. 586; *Oakly* v. *Morton*, 1 Kern. 25; *Bruce* v. *Snow*, 20 N. H. 484.

The doctrine of condition precedent applied to statutory attachment bonds. *Payne et al.* v. *Able*, 6 Bush, 344; *Odell* v. *Wootten*, 38 Ga. 223; *Martin* v. *Kilbourn*, 68 Tenn. 331; *Carpenter* v. *Turrell*, 100 Mass. 450; *Hamilton* v. *Bryant*, 114 id. 543.

The fact that a descriptive word or phrase is added to a party's name in a judgment does not prevent the judgment

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from being a personal one; the addition is merely surplusage. Black on Judgments, sec. 24; *John Doe, ex dem., etc.*, v. *Richard Roe, casual ejector, etc.*, 51 Ga. 482; *Hall et al.* v. *Craige*, 68 N. C. 305; *Dougherty* v. *McManus*, 36 Iowa, 657; *Powers* v. *Briggs*, 79 Ill. 493; *Trustees, etc.*, v. *Rautenberg*, 88 id. 219.

Departure in a replication is bad on demurrer. Gould's Pleadings, p. 422.

Mr. JAMES FANNING LATHAM, for the appellee:

Upon giving the recognizance, the proceedings ceased to be one *in rem* and became one *in personam*, the recognizance standing as a security for any personal judgment that might be obtained. *Hill* v. *Harding*, 93 Ill. 77.

This action did not abate on the death of Allison, but on the suggestion of his death, summons being issued against his administrator, proceeded against such administrator "as if it had been originally commenced against him." Section 11, chapter 1 of "Revised Statutes."

The undertaking of the appellant was statutory; the recognizance was made in view of these statutes, and in legal contemplation they entered into and formed a part of it. *Love* v. *Fairfield*, 5 Gilm. 303; *Churchill* v. *Abraham*, 22 Ill. 455; *Hibbard* v. *McKindley*, 28 id. 240–255.

There is a distinction between a common law bond and one prescribed by statute; as to the first, the liability of the obligors is limited by the language of the condition; as to the second, the condition will be construed so as to have the effect intended by the statute, because the statute enters into and is part of the instrument. *Hibbard* v. *McKindley*, *supra*.

We have examined the cases cited by appellant, in which, because of a change in the proceedings, the sureties upon statutory bonds were held to have been released. In each of them the change of parties was brought about by the procurement of the plaintiff. The obligation of the obligors upon a stat-

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utory recognizance is well stated in *Bean* v. *Parker*, 17 Mass. 602, quoted in *Quillon* v. *Arnold*, 12 Nev. 234–245, cited by appellant.

When he enters into his contract he pledges himself, on certain contingencies, to pay whatever may be recovered in the usual course of law in the action to which his bond refers. *Leonard* v. *Spiedel*, 104 Mass. 556; *Sanderson* v. *Stevens*, 116 id. 133; *Campbell* v. *Brown*, 121 id. 516; *Dalton* v. *Barnard*, 150 id. 473.

Sureties are not discharged by an amendment of the summons so as to reach a third defendant. *Christal* v. *Kelley*, 88 N. Y. 285.

Nor by an amendment of pleading not affecting their obligation. *U. S.* v. *Moseley*, 7 Saw. C. C. 265.

Nor by an amendment of one count of a declaration if the attachment holds good on another. *Warren* v. *Lord*, 131 Mass. 560.

The bond would not be affected by the dismissal of one of the defendants to the suit. *Poole* v. *Dyer*, 123 Mass. 363.

It has been held that a mistake in the bond, by which the writ was described as having been issued from the Circuit Court instead of the District Court, can not avail the surety so as to release him from his obligation. *Ripley* v. *Gear*, 58 Iowa, 460.

Allison, the original defendant in the attachment proceedings, dies before judgment. The cause does not abate thereby, but under our statute proceeds against the decedent's administrator, "as if it had been originally commenced against him." R. S., sec. 11, chap. 1.

This section of the Abatement act applies especially to attachment proceedings. *Davis* v. *Shapleigh*, 19 Ill. 386.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

Appellee brought an action of assumpsit against James Allison and sued out an attachment in aid, which was served on

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one Sternheim, as garnishee, who had property of Allison in his possession. Allison appeared in open court and entered into a recognizance, as provided in section 15 of the Attachment act, with appellant as surety. The attachment was thereupon dissolved, and the proceeding against the garnishee set aside. Before judgment, Allison died; suggestion of his death having been made, his administrator was made party defendant and the case proceeded to judgment. That judgment not having been paid within ninety (90) days after its entry, as conditioned in the recognizance, the present writ of *scire facias* was sued out against the surety. The question presented by the record is, whether the failure to pay the judgment against the personal representative of Allison was a breach of the condition of the recognizance.

The recognizance in this case was in substantial compliance with the statute, the purpose of which is to enable the defendant to obtain control of the property attached, or in the hands of garnishees, upon giving security for the payment of the judgment to be rendered in the cause in which the recognizance is given. Upon giving the bond or recognizance the case proceeds *in personam;* the judgment entered is a personal judgment, the recognizance standing as security for its payment. *Hill* v. *Harding*, 93 Ill. 77. The language of the statute is, that the recognizance shall be "conditioned that the defendant will pay the plaintiff the amount of the judgment and costs, which may be rendered against him in that suit on a final trial, within ninety days after such judgment shall be rendered." And the recognizance here was conditioned for the payment "of whatever judgment may be entered herein against said defendant upon a final trial hereof," etc. At the time of entering into this recognizance, section 11, chapter 1 of the Revised Statutes provided, that upon the death of a sole defendant the action should not on that account abate, in cases where the cause of action would survive, etc.; but upon suggestion of the death upon the record, summons might issue

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against his administrator and the cause "proceed as if it had been originally commenced against him."

The giving of the recognizance is a right accorded by law to the defendant, which the plaintiff must accept, if the right is properly exercised. Its effect is to release the property attached, and to discharge the garnishee from liability for property of the attachment debtor in his hands. To effect this purpose appellant voluntarily joined with the attachment debtor, and took upon himself the obligation prescribed by the statute, to pay whatever judgment might be rendered in that action. He was bound to know, that upon the death of Allison, the suit would not abate, but might proceed to final judgment against his personal representative. The statute provides that the defendant may enter into a recognizance to secure the judgment that may be rendered "against him" in that suit. The law being that, upon the death of Allison, the suit might proceed against the administrator, it must be held that the undertaking of appellant was made in contemplation thereof, and was to stand as security for the judgment rendered against the defendant "in that suit, on final trial." Any other construction of the statute would not only be inconsistent with the language employed, but would lead to the most absurd and unjust results. In contemplation of law, the judgment against his personal representative in the same proceeding is a judgment "*against him*" within the meaning of the language employed. If this be not so, the legislature must have intended to deprive the plaintiff of the security afforded by the service of his attachment, in all cases where the defendant dies before the entry of final judgment. Such a construction is not consistent with the language employed, or the spirit and purpose of the act. *Churchill* v. *Abraham*, 22 Ill. 455; *Brown* v. *Gorton*, 31 id. 416.

It may be conceded, without at all affecting the question here involved, that a surety may stand upon the very terms of his contract, and if he does not assent to its variation, and a

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change is made affecting his liability, he can not be bound thereby. This case is clearly distinguishable from those where a common law or voluntary bond is executed; and from those also, where there has been some change in the liability of the surety by the act of the parties seeking to enforce it, as in *Tucker* v. *White*, 5 Allen, 322; *Richard* v. *Stover*, 114 Mass. 101; and other similar cases cited by counsel for appellant. The liability of appellant, as surety, was in no wise increased or changed, because by operation of law the action survived against the personal representative. And we hold that the effect of appellant's undertaking was to pay the judgment recovered "in that suit" in the usual course of law. *Bean* v. *Parker*, 17 Mass. 602; *Quillion* v. *Arnold*, 12 Nev. 234; *Poole* v. *Dyer*, 123 Mass. 363.

In the latter case the goods of Ellen and John Dyer had been attached at the suit of Poole. A bond was given to pay the judgment "in such action" and the attachment dissolved. The plaintiff discontinued as to Ellen Dyer and took judgment against John Dyer only. It was held that the non-payment of this judgment was a breach of the condition of the bond. There, although the parties to the action were changed by the voluntary action of the plaintiff, the court said: "The result, so far as the surety is concerned, is the same, whether the plaintiff discontinues against one defendant, or fails to recover against him upon the trial. No change is made in the nature of the claim which is the subject of the suit, and no greater and different liability is cast upon the surety by the discontinuance." We need not pursue the discussion farther. The obligation being statutory, must be construed so as to give effect to the purpose and intent of the statute.

Other errors are assigned which we have carefully examined, and find either that they do not arise upon the record in this court, or are not of sufficient merit to warrant discussion.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY *et al.*

v.

CITY OF CHICAGO.

Filed at Ottawa, January 19, 1893.

1. SPECIAL ASSESSMENT — *ordinance therefor — void for uncertainty.* An ordinance for making a system of sewers, etc., under which a special assessment was made, among other things, provided that, "for all rock excavations, in addition to his price per foot of sewer, the contractor is to receive a compensation of —— dollars per cubic yard," which blank was nowhere filled, and also that "the commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that the said commissioner may deem desirable or necessary, and the contractor shall furnish any additional materials, or do any additional work required by such changes at the rate said department shall determine to be just." *Held*, that the ordinance was invalid.

2. LOCAL IMPROVEMENT — *ordinance authorizing commissioner to reject any and all bids, invalid.* An ordinance for the construction of a local public improvement, which provides that the commissioner of public works reserves the right to reject any proposal, etc., of bidders for a contract to do the work, etc., at his discretion, is in conflict with section 50 of chapter 24 of the Revised Statutes, which requires all contracts for making any public improvement, when the expense thereof shall exceed $500, shall be let to the lowest responsible bidder.

APPEAL from the County Court of Cook county; the Hon. G. W. BROWN, Judge, presiding.

Mr. ALBERT H. MEADS, Mr. PLINY B. SMITH and Messrs. GARDNER & MCFADON, for the appellants.

Mr. JOHN S. MILLER and Mr. GEORGE A. DUPUY, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is from a judgment of the County Court of Cook county confirming an assessment for a system of sewers in Sixty-seventh street, Madison avenue and Seventieth street, in the city of Chicago, and for a pumping station in connection

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with said system of sewers and for an outlet from said pumping station into Lake Michigan.

It is, among other things, provided in the ordinances under and by virtue of which this assessment is made, that "for all rock excavation, in addition to his price per foot of sewer, the contractor is to receive a compensation of —— dollars per cubic yard," and this blank is nowhere else filled. And again: "The commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that the said commissioner may deem desirable or necessary, and the contractor shall furnish any additional materials or do any additional work required by such changes at the rate said department shall determine to be just."

It is enough to say these provisions are condemned in *Foss* v. *City of Chicago*, 56 Ill. 354; *Wright* v. *City of Chicago*, 60 id. 312; *U. B. Ass'n* v. *Chicago*, 61 id. 439; *Walker* v. *Chicago*, 62 id. 286; *Village of Hyde Park* v. *Carton*, 132 id. 100. And it is unnecessary to repeat their reasoning.

In another ordinance "the commissioner reserves the right to reject any proposals at his discretion," which seems to be directly in the teeth of section 50, chapter 24, Revised Statutes, 1874.

The judgment is reversed and the cause is remanded with directions to the court below to enter judgment refusing to confirm the assessment.

Judgment reversed.

ILLINOIS CENTRAL RAILROAD COMPANY

v.

THE CITY OF CHICAGO.

PER CURIAM: The questions here are precisely the same that arise in the foregoing case of *L. S. & M. S. Ry. Co.* v. *Chicago*, and for the reasons there given, the judgment is reversed and the cause is remanded.

Judgment reversed.

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Syllabus.

JOHN F. HEUER

v.

NORTH WESTERN NATIONAL INSURANCE COMPANY OF MILWAUKEE.

Filed at Ottawa, January 19, 1893.

1. INSURANCE — *against loss by fire — exemption from liability for loss by explosion.* A clause in a policy of insurance against loss by fire, that the company shall not be liable for any loss caused by explosion of any kind, unless fire ensues, contemplates the existence of more than one kind of explosion, and is broad enough to include an explosion produced by the ignition and combustion of the agent of explosion as well as an explosion without combustion.

2. So where an explosion was produced by the lighting of a match in the basement of a building which was filled with illuminating gas, causing the falling of the floor of the store above where the insured had his goods, and there was no damage to the goods by the actual burning or scorching of them, but they were injured by the falling of the floor, it was *held*, that the insurance company was not liable under a policy containing such an exemption clause for the damage to the goods so resulting.

3. SAME — *determining whether a loss is caused by fire or explosion within the meaning of the policy.* It is a well-settled principle in the law of insurance, that the proximate and not the remote cause of the loss must be regarded in order to ascertain whether the loss is covered by the policy or not. If a lighted match is applied to a keg of powder or to illuminating gas confined in a room, and an explosion thereby occurs which causes damage, but is not followed by combustion, the explosion will be the proximate cause of the injury, and the lighted match only the remote cause. In such case the lighted match is not a fire in the meaning of a policy of insurance against loss by fire.

4. The determination of the question whether a loss is attributable to fire or to explosion will sometimes depend upon the further question, whether the fire is an incident to the explosion, or whether the explosion is an incident to the fire. The effects of explosion will be included in the loss occasioned by a precedent fire producing the explosion, if the fire is the direct and efficient cause of the loss and the explosion is but the incident.

5. A loss other than by combustion, resulting from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only. In

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the application of this principle, it makes no difference whether the fire operating as the principal cause of the loss, and to which an explosion occurring during its progress is a mere incident, originates in the building where the insured property is located or out of it.

6. If a policy merely insures property against loss by fire generally, without making any exception of a loss by explosion, the flame of a lighted match or burning gas jet may be such a fire as is embraced within the terms of the policy, and the loss resulting from an explosion caused by the contact of the lighted match or burning gas jet with gunpowder or illuminating gas or other explosive substance, may be covered by the policy.

7. When there is no exception of a loss by explosion, the fire producing the explosion is a cause of the loss, so as to come within the meaning of the policy.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. GEORGE H. KETTELLE, Judge, presiding.

Messrs. RUBENS & MOTT, for the appellant:

The language of the policy is to be construed most strongly against the company. 1 Wood on Fire Ins., sec. 60; *Ins. Co.* v. *Scammon*, 100 Ill. 649.

As to clause of exemption of liability for loss caused by explosion, see *Washburn* v. *Ins. Co.*, 2 Flip. 664; 1 Wood on Fire Ins., sec. 104; *Ins. Co.* v. *Boom*, 95 U. S. 130; Phillips on Ins., secs. 1037, 1132; *Brady* v. *Ins. Co.*, 11 Mich. 425; *Butler* v. *Wildman*, 3 B. & Ald. 398; *Lung* v. *Tingsboros*, 11 Cush. 563; *Ins. Co.* v. *Tweed*, 7 Wall. 44.

We refer now to cases in which there was no provision exempting loss or damage by explosion, to-wit: *Scripture* v. *Lowell, etc., Ins. Co.*, 10 Cush. 356; *Hobbs* v. *Ins. Co.*, 12 Can. Supr. Ct. 631; *Renshaw* v. *Ins. Co.*, 33 Mo. App. 394; *Waters* v. *Ins. Co.*, 11 Pet. 213; *Insurance Co.* v. *Corlies*, 21 Wend. 367.

No case has been found where the company escaped liability from a loss caused by the ignition of an explosive substance, producing an explosion, if no exemption clause was contained in the policy; but where explosions have occurred through

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the expansion of steam, etc., not involving an accidental ignition of an explosive substance, the companies have been held exempt, on the ground that the peril insured against is fire and not explosion, although the policies were silent as to explosions. *Millandon* v. *Ins. Co.*, 4 La. Ann. 15; *Babcock* v. *Ins. Co.*, 6 Barb. 637; *Scripture* v. *Ins. Co.*, *supra*.

The exemption does not apply in case a wrongful fire precedes the explosion. *Ins. Co.* v. *Dorsey*, 56 Md. 70; *Ins. Co.* v. *Foote*, 22 Ohio St. 340.

Messrs. TATHAM & WEBSTER, for the appellee:

Under the exemption clause of the policy there was no liability for a loss by an explosion not the result of a fire and not followed by a fire. *Miller* v. *Ins. Co.*, 41 Ill. App. 395; Wood on Fire Ins., sec. 104; *Caballero* v. *Herm Ins. Co.*, 15 La. Ann. 217; *Briggs* v. *N. A. Ins. Co.*, 43 N. Y. 446; *U. S. Ins. Co.* v. *Foote*, 22 Ohio St. 340; *Ins. Co.* v. *Tweed*, 7 Wall. 44; *Roe* v. *Columbus Ins. Co.*, 17 Mo. 301; *Montgomery* v. *Fireman's Ins. Co.*, 16 B. Mon. 427; *Stanley* v. *Western Ins. Co.*, L. R. 34–71; *St. John* v. *Am. Ins. Co.*, 11 N. Y. 516.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action of assumpsit, begun on March 5, 1890, in the Superior Court of Cook county, by the appellant against the appellee company upon an insurance policy, issued by said company on July 8, 1889, insuring a stock of jewelry and fixtures belonging to the plaintiff and contained in the three-story brick building known as No. 426 Milwaukee avenue in Chicago. The plea was non-assumpsit. By agreement a jury was waived, and the cause was submitted to the court for trial without a jury upon an agreed state of facts. The court refused to hold as law applicable to the case four propositions submitted by the plaintiff. The finding and judgment were in favor of the defendant, and the judgment of the trial court

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has been affirmed by the Appellate Court, whence the case is brought here by appeal.

The policy is for insurance against loss or damage by fire and contains the following provision:

"This company shall not be liable by virtue of this policy * * * for any loss or damage by fire caused by means of an earthquake; nor of an invasion, insurrection, riot, civil commotion, or military or usurped power; * * * nor for any loss caused by the explosion of gunpowder nor any explosive substance, nor by lightning or explosion of any kind, unless fire ensues, and then for the loss or damage by fire only."

By the agreed statement of facts, it is stipulated that, on September 13, 1889, at 7 o'clock in the morning, an explosion took place in the basement of said building by which the damage to the insured property occurred; that the explosion was produced by the lighting of a match in the basement which was then filled with illuminating gas; "that the damage was a damage by the explosion produced in this manner, but was not a damage produced by the burning of the property insured;" that the illuminating gas was accidentally ignited by the flame from said lighted match, and burned, and instantaneously produced this explosion; that the ignition of the match and gas in the basement was immediately followed by a loud report and explosion; that the explosion, so caused, caused the falling of the floor of the store and the damage to the goods; that there was no damage to the goods by the actual burning of them.

The question presented by the refusal of plaintiff's propositions is, whether the loss sustained, under the circumstances thus detailed, was a loss by fire within the meaning of the policy. It is conceded, that no fire ensued from the explosion, and that the goods were not burned by fire, but were damaged by the falling of the floor, which was produced by the explosion. If, therefore, the loss was in any sense the result of fire, such

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fire could only have been the flame of the match, which came in contact with the illuminating gas. Is the loss to be attributed to the explosion, or to the lighting of the match, which preceded the explosion? If it is attributable to the explosion, the loss is not covered by the policy, and the company cannot be held liable.

The exemption clause provides that "this company shall not be liable * * * for any loss caused by * * * explosion of any kind unless fire ensues." The use of the expression, "explosion of any kind," contemplates the existence of more than one kind of explosion. Without undertaking to make an accurate classification, we deem it sufficient to say, that one kind of explosion is that which is produced by the "ignition and combustion of the agent of explosion," as where a lighted match is applied to a keg of gun-powder, and another kind of explosion is that which does not involve "ignition and combustion of the agent of explosion," as where steam, or any other substance, acts by expansion without combustion. (*Scripture* v. *Lowell Mut. Fire Ins. Co.*, 10 Cush. 356). The exemption clause is broad enough to embrace both kinds of explosion. As the present case, where it appears that a lighted match was applied to the illuminating gas confined in the basement of a building, furnishes an instance of the first kind of explosion above specified, it manifestly comes within the terms of the exemption.

It is a well settled principle in the law of insurance, that the proximate and not the remote cause of the loss must be regarded in order to ascertain whether the loss is covered by the policy or not. *In jure non remota causa sed proxima spectatur.* Lord BACON says: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." (*Everett* v. *The London Assurance*, 19 C. B. [N. S.] 126). Where a lighted match is applied to a keg of gun pow-

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der, or to illuminating gas confined in a room, and an explosion thereby occurs which causes damage, but is not followed by combustion, the explosion is the proximate cause of the injury, and the lighted match is only the remote cause. In such case, fire does not reach the property injured, but the concussion resulting from the explosion damages it. Here, the goods insured were not brought in contact with the fire produced by the lighting of the match, but with the explosive power of a fireless concussion, which caused the floor of the store, in which they were situated, to fall, and thereby occasioned the injury.

In *Everett* v. *The London Assurance*, 19 Com. Bench (N. S.) 126, a powder magazine, more than half a mile distant from the house insured, ignited and exploded, shattering the windows and window frames and damaging the structure generally by the atmospheric concussion caused by the explosion, but not burning, heating or scorching any part of the premises; and it was there held, that "it would be going into the causes of causes to say that this was an injury caused by fire to the property insured;" that the expression "loss or damage occasioned by fire" was to be construed as ordinary people would construe it, and that those words "mean loss or damage either by ignition of the article consumed, or by ignition of part of the premises where the article is."

In *Caballero* v. *Home Mut. Ins. Co.*, 15 La. Ann. 217, where a fire broke out in a building about 200 feet distant causing the explosion of gun-powder, which, by the concussion of the air, injured the building insured against fire, it was held, that such a loss could not have been within the reasonable intendment of the parties and was not covered by the policy.

In *Briggs* v. *N. A. and M. Ins. Co.*, 53 N. Y. 446, where the policy insured certain machinery in a mill against loss by fire and contained a provision, like the one in the case at bar, exempting the company from liability "for loss caused by * * * explosions of any kind, unless fire ensues, and then for the loss or damage by fire only," vapors from the works in

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the mill, where the business of rectifying spirits was carried on, came in contact with a burning lamp in the mill, left there by persons repairing the machinery, causing an instantaneous explosion, which blew off the roof of the building and blew down the greater part of the walls and injured the machinery, and also resulting in a fire which occasioned some damage, though slight compared with that caused by the explosion; and it was there held that the company was liable for the damages caused by the fire which followed the explosion, but not for those caused by the explosion itself, the court saying, among other things: "The exception, too, is general, including explosions by fire as well as others. There seems no reason for excluding an explosion like this from the exception. There was no fire prior to this explosion. The burning lamp was not a fire within the policy. The machinery was not on fire, as such term is ordinarily used, until after the explosion." So, it may be said, in reference to the case at bar, that there was no fire prior to the explosion, and that the lighted match was not a fire within the policy.

In *United Life, Fire and Marine Ins. Co.* v. *Foote*, 22 Ohio St. 340, the policy insured a stock of merchandise against fire, and provided that the company should not be liable for "any loss or damage occasioned by or resulting from any explosion whatever," and it appeared, that a mixture of whisky vapor and atmosphere, coming in contact with the flame of a gas-jet in the still-room, ignited from it and immediately exploded, setting a fire in motion which destroyed the insured property; it was held, that the loss was from the fire occasioned by the explosion, and that the company was not liable for it under the broad language of the exemption clause, but it was at the same time held, that the burning gas-jet "was not such fire as was contemplated by the parties as the peril insured against. The gas-jet though burning, was not a destructive force against the immediate effects of which the policy was intended as a protection; although it was a possible means of putting such

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destructive force in motion, it was no more the peril insured against than a friction match in the pocket of an incendiary." (See also *Roe* v. *Columbus Ins. Co.*, 17 Mo. 301; *Montgomery* v. *Firemen's Ins. Co.*, 16 B. Mon. 427; *St. John* v. *The American Mut. Fire and Mar. Ins. Co.*, 11 N. Y. 516; *Ins. Co.* v. *Tweed*, 7 Wall. 44; 1 Wood on Ins. sec. 104; *Commercial Ins. Co.* v. *Robinson*, 64 Ill. 265; *Transatlantic Fire Ins. Co.* v. *Dorsey*, 56 Md. 70).

The determination of the question whether the loss is attributable to fire or to explosion will sometimes depend upon the further question, whether the fire is an incident to the explosion, or whether the explosion is an incident to the fire. The effects of explosion will be included in the loss occasioned by a precedent fire producing the explosion, if the fire is the direct and efficient cause of the loss and the explosion but the incident. A loss, other than by combustion, resulting from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only. It is not apprehended, that it makes any difference in the application of this principle, whether the fire operating as the principal cause of the loss, and to which an explosion occurring during its progress is a mere incident, originates in the building where the insured property is located, or out of it. (*Transatlantic Fire Ins. Co.* v. *Dorsey*, *supra*; *United Life, Fire and Mar. Ins. Co.* v. *Foote*, *supra*; *Briggs* v. *N. A. and M. Ins. Co.*, *supra*). In *Briggs* v. *N. A. and M. Ins. Co.*, *supra*, it was said by the N. Y. Court of Appeals: "The explosion here was the principal and the fire the incident. In such a case there can be no doubt that the defendant is not liable for the damage caused by the explosion. Where, however, the explosion is the incident and the fire the principal, a different question would be presented. Had the building been on fire, and, in the course of the general conflagration, there had been an explosion of a boiler, which injured some machinery that the fire was rapidly consuming, different views and considera-

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tions might well obtain." In the case at bar, however, it cannot be said that the explosion causing the damage was an incident to a precedent fire, as the fire, which preceded the explosion, was nothing more than the flame of a lighted match.

There are some cases, which appear to hold an opposite view upon this subject from the view here expressed. But those cases will be found upon examination to grow out of losses under policies, which contain no clause exempting the companies from liability for loss by explosion. If the policy merely insures the property against fire generally, without making any exception of a loss by explosion, the flame of the lighted match or burning gas-jet may be such a fire as is embraced within the terms of the policy; and the loss resulting from an explosion caused by the contact of the lighted match or burning gas-jet with gun-powder or illuminating gas, or other explosive substance, may be covered by the policy. "The plaintiffs * * * insist that an explosion caused by fire is a fire, and therefore the defendant is liable for the explosion as for a fire. But that reasoning gives no force to the exception. * * * It may be conceded, that, in the absence of this exception, a recovery could have been had for the whole damage, as for a loss by fire. The authorities referred to by plaintiff's counsel tend to that result. * * * An explosion, without this exception, if it come under the general head of fire, might have afforded ground for recovery, but the defendant guarded against that result by this express stipulation." (*Briggs* v. *N. A. and M. Ins. Co.*, *supra.*)

In *Scripture* v. *Lowell Mut. Fire Ins. Co.*, 10 Cushing, 356, a burning match was applied to a cask of gun-powder in the attic of plaintiff's house, the gun-powder took fire, exploded and blew off the roof of the house, and set fire to a bed and clothing and charred and stained some of the woodwork; there, the damage consisted in part of combustion and in part of explosion, and it was held that the whole damage was covered by a policy "against loss or damage by fire," but there was no

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exemption in the policy there sued upon from loss by explosion. Nor was there any such exemption in the policies sued upon in the following cases referred to by counsel for appellant: *Hobbs* v. *Guardian*, 12 Can. Sup. Ct. 631; *Renshaw* v. *Missouri State Mut. Fire and Mar. Ins. Co.*, 103 Mo. 595; *Waters* v. *M. L. Ins. Co.*, 11 Pet. 213; *Renshaw* v. *Fireman's Ins. Co.*, 33 Mo. App. 394; *City Fire Ins. Co.* v. *Corlies*, 21 Wend. 367. While these cases hold that an explosion caused by the application of fire to an explosive substance comes within the terms of a policy which insures against fire, they do not hold that the loss thereby occasioned is a loss by fire only, and not a loss by explosion as well. As the policies there considered did not except losses by explosion, the question whether such losses resulted from fire or from explosion, or whether the one or the other was the proximate or remote cause of damage, did not arise and was not discussed. Where there is no exception of a loss by explosion, the fire producing the explosion is a cause of the loss so as to come within the meaning of the policy.

We think, that the loss in this case resulted from the explosion, and not from any fire which preceded or followed the explosion, and that it comes within the terms of the exemption clause above quoted. We are, therefore, of the opinion that the lower courts decided correctly in holding that the company was not liable.

The judgments of the Superior Court of Cook county and of the Appellate Court are accordingly affirmed.

Judgment affirmed.

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Syllabus.

THE CITY OF JOLIET

v.

MARY A. SHUFELDT.

Filed at Ottawa, January 19, 1893.

1. NEGLIGENCE — *defective street — efficient cause.* Where a horse, while being driven along a street, in consequence of the opening of the bits in its mouth, runs away, without fault on the part of the driver or the plaintiff, whereby the plaintiff is thrown from the vehicle at a place where the street was left in an unsafe condition and injured, neither the running away of the horse nor the defect in the street being alone sufficient to produce the injury, but it is produced by the combination of both, and they become, therefore, in combination, the efficient and proximate cause, in such case the causal relation is direct between the defective street, occasioned by the negligence or omission of duty by the city, and the injury to the plaintiff, and without any intervening efficient cause.

2. If the accident of a team running away, without fault or negligence, would not have caused the injury to the plaintiff, but for a defect in the street, and such defect is the result of carelessness or negligence on the part of the city, it will be liable for the injury.

3. SAME — *injury by the combined result of accident and negligence.* If a party, while observing due care for his personal safety, is injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen and provided against by the city.

4. The general doctrine is that it is no defense, in an action for injuries, resulting from negligence, that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred.

5. SAME — *instruction assuming ordinary accident.* In an action against a city for an injury caused by a wall at a street crossing not being of sufficient height to prevent a person being tipped over the same by a horse running away, from a defect in the bits of the bridle so as to be beyond the control of the driver, it is not prejudicial error for an instruction to assume that the accident by which the horse became uncontrollable was an ordinary accident likely to occur, as the breaking of bridles and harness and of vehicles is of constant occurrence, and is a matter within common knowledge and experience, and needs no proof.

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Statement of the Case.

APPEAL from the Appellate Court for the Second District; — heard in that court on appeal from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

The facts are substantially as follows:

"Exchange street in the city of Joliet runs west from Bluff street, which extends north and south along the base of a bluff or hill. Exchange street was laid out sixty-six feet wide, and originally extended up the hill on quite a steep grade to an intersection with Broadway, at the top of a hill at about two hundred and forty-eight feet west of Bluff street. Broadway runs north and south, and extends from its intersection with Exchange in a course up a hill to Oneida street. About the year 1886 the city of Joliet cut down about two-thirds of Exchange street, for the purpose of making a more level and convenient route from Bluff street west to regions lying west of Broadway, and thereby entirely severed the former connection of most of Exchange street with Broadway, and carried Broadway over the part so cut down by means of a viaduct. About one-third of Exchange street was left substantially at the original grade, connecting Broadway with Bluff street, as before. The roadways were of stone and were separated by a stone wall. There was a sidewalk on the north side of the upper roadway and a carriage-way next south with a cobble-stone gutter next the stone wall. The carriage-way declined toward the wall, the decline from the middle being about six inches in ten feet. The stone wall was made with benches or rises going up the hill and finished with coping stones laid level. The wall was about four feet higher than the carriage-way proper and from four to something over five feet higher than the gutter.

A carriage could be driven in the gutter and close to the wall. On the evening of June 2, 1889, at about ten o'clock, Mary A. Shufeldt was riding in a top buggy, with the top partly down, drawn by a horse procured at a livery stable by a

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young man who was driving and managing the horse, down the hill on Broadway from Oneida street toward the viaduct and the upper roadway on Exchange street. The horse started into a trot and when the driver pulled the lines to check him, it was found that the bit had parted at the connection of the mouth-piece with one ring, and the bridle was pulled back off from the horse's head upon his neck and he was freed from any kind of restraint. The horse ran down Broadway and turned into the upper roadway on Exchange street toward the barn where he was kept. In making the turn the buggy struck the stone wall at a point where it was a little over five feet higher than the gutter and between sixteen and seventeen feet higher than the lower roadway. The driver, who was nearer the wall, was thrown over it into the lower roadway, and Miss Shufeldt was thrown upon the wall and then fell from the wall into the lower roadway. The seat arm to which she was clinging was broken and her hand lacerated and she sustained injuries from which she was paralyzed and became utterly helpless, with no prospect of recovery. The horse continued down the hill with the buggy until it struck a telegraph pole where the buggy was left with the right fore wheel dished and the thills and cross-bar broken. Suit was instituted and there was a verdict and judgment for $5000. It should be added that in the direction in which appellee was going on Broadway, there was a sharp descent to Exchange street and continuing into Exchange street. The grade is sharp at this point, being about nine feet in every one hundred feet. The roadway around the curve, from Broadway into Exchange street, declines both ways, toward the wall and south, that is, the outside of the curve made, declines both ways. By reason of the sidewalk, on the north side of Exchange street, said street is reduced to about twelve feet in width. Before the accident the horse was kind and gentle, the harness practically new, and it does not appear, nor is it claimed, that

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appellee or the driver was guilty of any negligence or want of proper care.

The charges of negligence laid in the declaration involve the construction of the street and wall, that the road was of insufficient width, that it was out of repair and in bad and unsafe condition, and that the stone wall dividing the upper and lower roadways was insufficient in height, etc.

On appeal to the Appellate Court the judgment was affirmed and the city appeals.

Mr. J. W. DOWNEY, City Attorney, and Mr. J. L. O'DONNELL, for the appellant:

It is the duty of the city to keep its streets in a reasonably safe condition so as not to produce damage to a traveler even in cases of ordinary accidents likely to occur. *Joliet* v. *Verley*, 35 Ill. 58.

But before a recovery can be had in any case it must be pleaded and proven that the negligence complained of was the proximate cause of the injury. *Fent* v. *T. P. & W. Ry. Co.*, 59 Ill. 349; *T., W. & W. Ry. Co.* v. *Muthersbaugh*, 71 id. 572; *Phillips* v. *Dickerson*, 85 id. 11; *Schmidt* v. *Mitchell*, 84 id. 195; *Shugart* v. *Egan*, 83 id. 56; *Marble* v. *Worcester*, 4 Gray, 395; *Rockford* v. *Tripp*, 83 Ill. 247; *Joliet* v. *Seward*, 86 id. 402; *Joliet* v. *Seward*, 99 id. 267.

Whether or not the street in question was in a reasonably safe condition to provide against ordinary accidents likely to occur, was a question of fact, and whether or not the running away of the horse, as shown by the evidence, was an ordinary accident likely to occur, was a question of fact and for the jury. *The Penn. Co.* v. *Frana*, 112 Ill. 398; *Myers, Admr.*, v. *I. & St. L. R. R. Co.*, 113 id. 386; *Copner* v. *Penn. Co.*, 12 Bradw. 600; *C. & W. W. Ry. Co.* v. *Moranda*, 108 Ill. 587; *C. & A. R. R. Co.* v. *Kelly*, 127 id. 637; *I. & St. L. R. R. Co.* v. *Morgenstern*, 106 id. 216.

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Mr. GEO. S. HOUSE and Messrs. SHUMAN & DEFREES, for the appellee:

The running away of horses attached to vehicles is so clearly a common and ordinary accident, as to be expected or anticipated. Such an accident is an ordinary one to be guarded against. *City of Lacon* v. *Page*, 48 Ill. 499; *Joliet* v. *Verley*, 35 id. 58.

If a person, while observing due care for his personal safety, be injured by the combined result of an accident and the negligence of a city or village, and the injury would not have been sustained but for such negligence, yet although the accident be the primary cause of the injury, if it was one which common prudence and sagacity could have foreseen and provided against, the negligent city or village will be liable for the injury. *Village of Carterville* v. *Cook*, 129 Ill. 152; *Joliet* v. *Verley*, *supra*; *King* v. *Cohoes*, 77 N. Y. 83; *Bloomington* v. *Bay*, 42 Ill. 503.

When the injury is the combined result of an accident and of a defect in a street, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if there be no fault or negligence of the plaintiff, if the accident be one which common prudence could not have foreseen and guarded against, the city is liable. *Palmer* v. *Andover*, 2 Cush. 600; *Kelsey* v. *Geloor*, 15 Vt. 708; Angell on Highways, 275.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The principal point urged for reversal arises upon the second instruction given on behalf of plaintiff; whereby the jury were in effect told, that if the plaintiff with a companion who was driving, was riding in a buggy drawn by a horse along and upon one of the public streets of the city, and that without the fault of the plaintiff, or her companion, they being in the exercise of ordinary care and prudence, the bit of the bridle, on the horse, became loosened so that control of the horse was lost,

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and thereby the horse became and was unmanageable and ran away, without negligence on the part of plaintiff or said driver, and turned from said street into another public street of said city; and the loosening of the bit, and loss of control of the horse was a pure accident, which common prudence and sagacity could not have foreseen and provided against, and that said street into which the horse turned was so out of repair, or defective, that the same was not reasonably safe or secure to guard against ordinary accidents likely to occur thereon, to persons using the same without fault, and in the exercise of ordinary care and prudence, and that by reason of the unsafe and defective condition and repair of said street, the said buggy was thrown against a wall there existing, with such force as to throw the plaintiff out of the buggy, and cause the injury complained of, and the city had actual notice of such defects in the street, etc. the city would be liable for the injuries thus sustained.

It is insisted with great force that conceding the negligence of the defendant, such negligence was not the proximate cause of the injury; and that in any event the running away of the horse concurring in producing the injury, the defendant is, therefore, not liable. We are referred to a number of Massachusetts cases, and some others may be found, which sustain the views of counsel. In this State, however, those cases have not been followed. In *Joliet* v. *Verley*, 35 Ill. 58, we held that if a plaintiff, while observing due care for his personal safety, was injured by the combined result of an accident, and the negligence of a city, or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could with common prudence and sagacity have been foreseen and provided against. This doctrine has received express approval in many subsequent cases, among which may be mentioned, *Bloomington* v. *Bay*, 42 Ill. 503; *City of Lacon* v. *Page*, 48 id. 499; *Village of*

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Carterville v. *Cook*, 129 id. 152. In *City of Lacon* v. *Page*, *supra*, the doctrine was applied to a case like the present, where the accident concurring with negligence of the city in producing the injury, was the running away of the plaintiff's horses, without fault on his part. There the city having constructed a drain under one of its streets, allowed it to so get out of repair, that a hole a foot wide, two feet long and eight inches deep had been made in the street. The plaintiff was driving his horses to a lumber wagon, when they ran away, one wheel of the wagon going into this hole; in the rebound plaintiff was violently thrown to the ground and injured. We there said, after approving the rule in the *Verley* case, *supra*, and holding it applicable: "One great reason for requiring a corporation to keep its streets in repair is to reduce, as far as possible, the injuries that may result from the accidents so liable to occur in crowded thoroughfares. If the accident would not have caused the injury but for the defect in the street, and that defect is the result of carelessness on the part of the city, and the plaintiff has used ordinary care, the city must be held liable."

The same doctrine has been announced in many decided cases elsewhere. See *King* v. *City of Cohoes*, 77 N. Y. 83; *Baldwin* v. *Turnpike Co.*, 40 Conn. 238; *Hull* v. *Kansas City*, 54 Mo. 601; *Hunt* v. *Town of Pownal*, 9 Vt. 411; *Winship* v. *Enfield*, 42 N. H. 197; *Hey* v. *Philadelphia*, 81 Pa. St. 44; *Sherwood* v. *City of Hamilton*, 37 U. C. (Q. B.) 410; *Palmer* v. *Andover*, 2 Cush. 600; *Kelsey* v. *Glover*, 15 Vt. 708.

In *Baldwin* v. *Turnpike Co.*, *supra*, it is said: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants combined with some accidental cause to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of the plaintiff was uncontrollable for some distance before the injury occurred in any way affect

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the liability of the defendants." And the court held the loss should be charged upon the party guilty of the first and only negligence. In *King* v. *City of Cohoes*, *supra*, after reviewing the authorities upon this subject, it is said: "When, without any fault of the driver, a horse becomes uncontrollable, or runs away, it is regarded as an incidental occurrence, for which the driver is not responsible; and the rule, as laid down in the cases cited, may be formulated thus: When two causes combine to produce an injury upon a traveler upon a highway, both of which are in their nature proximate — the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible — the municipality is liable, provided the injury would not have been sustained but for such defect. This appears to us to be the reasonable rule." And after noting the care and diligence required of municipalities, the court adds: "They are not bound to furnish roads upon which it will be safe for horses to run away, but they are bound to furnish reasonably safe roads; and if they do not, and a traveler is injured by culpable defects in the roads, it is no defense that his horse was at the time running away, or was beyond his control."

We are aware that the courts of Massachusetts, Maine, Wisconsin, and perhaps others, have adopted the contrary rule, but we regard the doctrine to which this court is committed, as the better and more reasonable one, and must decline to depart from it. No additional duty or obligation is imposed thereby, upon the municipality. It is only required to use reasonable diligence and care, in making its streets safe for the public use, in view of those accidents, which may, in the exercise of common prudence, be anticipated and guarded against. The general doctrine is, that it is no defense, in actions for injuries resulting from negligence, that the negligence of third persons, or an inevitable accident, or that an inanimate thing contributed to cause the injury to the plaintiff, if the negligence of the defendant was an effi-

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cient cause, without which the injury would not have occurred. *W. St. L. P. Ry. Co.* v. *Shacklet, Admx.*, 105 Ill. 364; *Transit Company* v. *Shacklet*, 119 id. 232; *Consolidated Ice Mach. Co.* v. *Keifer*, 134 id. 481; *Pullman Palace Car Co* v. *Laack*, 143 id. 242; *Peoria* v. *Simpson*, 110 id. 301; see 16 Am. & Eng. Enc. of L. 440–3 and notes; 2 Thomp. Neg. 1085. This being the general rule, we are unable to perceive in what way the intervention of the mere brute force or will of the horse, at liberty without fault or negligence of the plaintiff, and for which neither party is responsible, can be different in its effects or consequences from the intervention of the act of a third person, or of an accident having a like effect, provided the injury would not have occurred but for the negligence of the defendant. In such case neither the running away of the horse, nor the defects in the street are alone sufficient to produce the injury, but it is produced by the combination of both, and they become, therefore, in combination, the efficient and proximate cause. The causal relation is direct between the defective street, occasioned by the negligence, or omission of duty, by the defendant, and the injury to the plaintiff, and without any intervening efficient cause.

The verdict of the jury in this case was general and might have been predicated on either of the charges contained in the declaration. They may have found that the negligence consisted in not raising the wall a sufficient height to prevent the plaintiff from being precipitated seventeen feet upon the stones at the bottom of the cut, or that the road was left too narrow, or because of its sloping toward the wall. The horse had already run down the declivity upon Broadway, and upon reaching the intersection with Exchange street, made the turn into this narrow twelve-foot street with a descent of about nine feet in one hundred to the east, or lengthwise of the street, and descending also to the south, or toward the wall separating this roadway from the other cut by the city, and the natural result, the road, as stated by counsel for appellant, being smooth,

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would be to give the buggy a violent lateral motion in the direction of the wall, which would be accelerated by the declivity of the road, and which might have been avoided had the road been level, or the outer edge of the segment of the circle described by the horse in turning, been higher than the inner, or had the road sloped from, instead of to, the wall. The evidence shows that the horse did not come in contact with the wall, and the jury would be justified in finding that if the street had been of reasonable width, or had been so constructed that the buggy would not have been thrown against the wall, the injury would not have occurred. If they found that the injury resulted from either of said causes, and that the city was negligent therein, they would also be justified in finding that such negligence was the proximate cause of the injury. It is, however, urged that the court in this instruction assumed that the accident by which the horse became uncontrollable was an ordinary accident, likely to occur, and that being a question of fact, proper to be passed upon by the jury, it was error. Without pausing to discuss or determine whether the instruction is susceptible of that interpretation, if the point be conceded, it is not prejudicial error. The requirement of the instruction, before the jury could find the defendant guilty, was, that they should believe, from the evidence, "that said Exchange street was so out of repair or defective, that the same was not reasonably safe or secure to guard against ordinary accidents, likely to occur thereon to persons using the same," in the exercise of ordinary care and prudence. By another instruction given by the court, at its own instance, the jury were told that the defendant was not liable for the injury, if they believed, from the evidence, that the wall in question was of sufficient height to be safe for persons who, exercising reasonable care, etc., and sufficiently high to prevent horses, carriages and persons from tipping or falling over the same "in case of accidents, *ordinarily likely to occur*, while so driving on said street at that point, and that the street at said point was other-

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wise, as to its condition of repair, in a reasonably safe condition for persons driving thereon," etc. Taking these instructions together it seems impossible that the jury could have understood the court as assuming the fact stated. But if this was otherwise it would form no just ground for reversal. The breaking of bridles and harness, and of vehicles, are of constant occurrence. That horses, although otherwise tractable and gentle, are liable to, and do, run away when thus freed from restraint, is a common and ordinary experience against which every reasonable and prudent man takes precaution. There was nothing extraordinary in this horse running away, and it might reasonably have been anticipated. No one would think it necessary to prove that it was an accident likely to occur; it is a matter of common knowledge and experience. And if the case were sent back for another trial, and the question submitted as one of fact, the finding could by no possibility be different, as to the accident being one ordinarily likely to occur. Other objections were interposed which we have carefully examined, but deem without merit. Finding no prejudicial error the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WILLIAM H. HOLDEN

v.

LOUISA DUNN *et al.*

Filed at Ottawa, January 19, 1893.

1. DOWER — *in surplus of proceeds of mortgaged premises after payment of mortgage under foreclosure sale.* Where a person purchases land subject to a mortgage, which he assumes to pay and discharge, and dies after decree that the property be sold under a power of sale if the sum found to be due is not paid within the time fixed therein, but before any sale is made, the mortgaged premises will descend to his

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Statement of the Case.

heirs, subject to the encumbrance of the decree, and his widow will be entitled to dower in any surplus of the sale money after satisfying the decree as against judgment creditors of her husband.

2. If, on a sale of land under a decree of foreclosure, the mortgaged premises sell for a greater sum than is necessary to satisfy the mortgage debt, the excess will represent and take the place of so much property as it is for. In such case the money in excess of the mortgage debt is the representative of the land, and will pass to the widow and children of the owner of the equity of redemption, if the sale is not made before his death, and not to the administrator.

3. The interest of a mortgagee is merely the right to subject the mortgaged premises to the payment of his debt, and before entry for condition broken, or purchase under sale pursuant to decree, it is not such an interest in land as may be sold on execution or mortgaged, but the mortgagor's title is such an interest, and, being such, it is subject to dower under our statute.

4. SAME — *decree of foreclosure — intervening petition of widow for dower in surplus.* Where a decree was entered against a husband and wife for the foreclosure of a mortgage, which was a prior lien, and against which the wife had no right of dower, and the decree directed the payment of the proceeds in satisfaction of the mortgage and the surplus money to other creditors of the husband, as to whom there was no release of dower, and he died before any sale, whereby the widow was entitled to dower against such other creditors, it was held no error, on her intervening petition, to so modify the original decree as to give her dower in any surplus of the proceeds of the sale, after payment of the mortgage debt.

5. MORTGAGE SALE — *under conditional decree — surplus distributed as realty.* A conditional decree authorizing the sale of land under a power, in the event that the amount found to be due on a mortgage is not paid, will not operate as an equitable conversion of the mortgaged premises into personalty.

6. CONVEYANCE — *subject to a mortgage — rights of grantee.* When a person takes a sale or conveyance of land subject to a mortgage of the vendor, which he assumes to pay, he will be placed in the shoes of his vendor, and his title will be good as to everybody but the mortgagees.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. KIRK HAWES, Judge, presiding.

After the intermarriage of John W. and Louisa Dunn, he purchased of George W. Cass, for a consideration of $15,775, ten acres of land in the south-west part of the city of Chicago, known as block 14 of Steel's subdivision of the south-east

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quarter, and the east half of the south-west quarter of section 26, township 39, north range 13, east of the third principal meridian, subject to a trust deed to Frank M. Elliott, dated October 5, 1888, to secure $7500, which encumbrance Dunn assumed and agreed to pay as part consideration of the conveyance from Cass to him.

This trust deed, given by Cass to Elliott, and which was assumed by Dunn, was given to secure the payment by Cass to Isabella Steel, Charles S. Steel and Mary F. Steel, of his three promissory notes, dated October 5, 1888, for the principal sum of $2500 each, payable on or before one, two and three years after date, with interest at the rate of six per cent per annum.

After Dunn's purchase from Cass he paid to the Steels the first of the notes due in October, 1889, and also paid the semi-annual interest due in April, 1890, on the remainder of the notes. Dunn having failed in business, default was made in the payment of the second of the notes, which fell due October 5, 1890, and about the same time numerous judgments were entered against him. The Steels, and Elliott, as trustee, on the 17th day of October, 1890, filed their bill in the Superior Court of Cook county for a foreclosure of the trust deed. They made defendants to this foreclosure proceeding, Cass, John W. Dunn, Louisa Dunn, this defendant in error, and other persons in possession, and who had acquired liens on the premises subject to the trust deed.

In that suit such proceedings were had that a decree was entered on the 30th day of March, 1891, finding that there was due to the complainants on account of their notes and trust deed, the sum of $5295.64, which should be first paid out of the sale of the premises, and that there were due to certain other defendants from the said John W. Dunn certain amounts on account of claims for mechanics' liens on the premises for buildings erected by him, and certain amounts on account of certain judgment liens on judgments obtained

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against Dunn; and it was ordered, adjudged and decreed, that unless Cass or Dunn, or some of the other defendants, should within five days pay the sum of $5295.64, with interest thereon at six per cent, due the complainants, the Steels, and should also pay the complainants their solicitors' fees and costs, that the premises, or so much thereof as might be necessary, should be sold by the master in chancery, and that out of the proceeds the master should make distribution and payment in the following order:

1st. Master's fees on the sale, costs and solicitors' fees.

2d. Mary E. Cork, mechanic's lien, $589.62.

3d. William Kerr, mechanic's lien, $358.51.

4th. Complainant's trust deed debt, $5295.64.

5th. The Chicago National Bank, judgment lien, $7411.56.

6th. First National Bank, judgment lien, $4656.18.

7th. Union Trust Company, judgment lien, $7291.31.

8th. William H. Holden, judgment lien, $7804.08.

The surplus to be paid subject to the further order of the court.

After that decree of sale was entered, and before any sale made pursuant to that decree, John W. Dunn, the husband of Louisa Dunn, and the owner in fee, died intestate leaving Louisa Dunn, his widow, and Eva Dunn, Belle Dunn and John W. Dunn, Jr., his children and only heirs at law.

No proceedings were taken in the matter until an order was entered in the cause at the instance of the complainants and Stephen W. Rawson, whereby the rights of the complainants were assigned to Rawson, and notices of the decree were, pursuant to the statute, served upon the heirs of John W. Dunn, and upon the administratrix of his estate. Thereupon Louisa Dunn, by leave of court, filed her petition in the cause, setting up the facts as above stated, and alleging that John W. Dunn, being seized in fee of the premises, by virtue of her marriage and upon the death of John W. Dunn, she became and was entitled to a vested dower in the lands above described as

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against all persons except the holder or holders of the note or notes secured by the trust deed above described and that such dower had not been assigned to her or set off, and that she had not received any compensation therefor.

She also alleged that the value of the premises was $30,000, and that there ought to be a surplus on a sale of the premises, over and above the amounts due on said notes, and she prayed that her rights as to any surplus over and above the trust deed and solicitors' fees, costs and mechanics' liens should be protected and set aside and invested, and that she might have and recover her dower in the premises, and for other relief.

Demurrers were filed to the petition by all of the defendants thereto, and on the hearing of the same in the Superior Court the demurrers were overruled; and the defendants, electing to stand by the demurrers, a decree was entered, taking the petition as confessed, and decreeing that the original decree should be enforced and carried into effect, and that the premises should be sold forthwith by the master under and by virtue of the decree, and that out of the proceeds he should first pay the amounts due on account of the notes, costs, attorneys' fees and mechanics' liens, and out of the remainder he should divide and set apart one-third thereof and report the same for the further order and direction of the said Superior Court, the same to be invested under the direction of the court, and the interest and income thereof to be paid to Louisa Dunn for her life as dower in the premises, and out of the remainder he should pay the sundry claims and demands in the order set out in the original decree of sale, and that upon the death of Louisa Dunn the one-third of said remainder of said proceeds, set apart for her use, decreed to be divided and set off and invested under the direction of said court, should be paid to the defendants in the same shares and proportions that the same would have been paid in the original decree had not the same been divided, set off and invested as aforesaid.

This writ of error is sued out to reverse that decree.

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Messrs. HOLDEN & BUZZELL, for the plaintiff in error:

When complainants sold and conveyed the land in question to Cass, and took their encumbrance upon the land for the purchase money, the surplus arising upon a sale in foreclosure was made personal property. Dunn acquired title subject to the arrangement made by the complainant with Cass. He never acquired a dowable title to the land. *Kauffman* v. *Peacock*, 115 Ill. 214; *Walters* v. *Walters*, 132 id. 481; *Selb* v. *Montague*, 102 id. 450; *Hugunin* v. *Cochrane*, 51 id. 305; *Baker* v. *Copenbarger*, 15 id. 104; *Rankin* v. *Rankin*, 36 id. 299; *Jennings* v. *Smith*, 29 id. 121; *Haward* v. *Peavey*, 128 id. 435; *Matter of Corrington*, 124 id. 367; *Cox* v. *Garst*, 105 id. 348; *Stribling* v. *Ross*, 16 id. 122; *Nicoll* v. *Ogden*, 29 id. 377; *Atkin* v. *Merrell*, 39 id. 75; *Strawn* v. *Strawn*, 46 id. 412.

The Superior Court had no power to change the decree of sale after the term at which it was rendered. *Doane* v. *Walker*, 101 Ill. 637; *Allen* v. *Allen*, 112 id. 329; *Donoghue* v. *City*, 57 id. 238; *Lilly* v. *Shaw*, 59 id. 76.

Messrs. H. T. & L. HELM, for the defendant in error, Louisa Dunn:

On the foreclosure of a mortgage in which the wife has released her dower, she is entitled to dower in the surplus as against other creditors having liens. *Bank of Commerce* v. *Owens*, 31 Md. 320; 1 Washburn on Real Prop. 165, 182, 246.

The rule allowing dower in equities of redemption prevails generally in the United States. 1 Scribner on Dower, 467, 472, 474; *Waters* v. *Stewart*, 1 Caines' Cas. 47.

An equity of redemption is liable to sale on execution. *McClure* v. *Engelhardt*, 17 Ill. 47; *Roberts* v. *Hughes*, 81 id. 130.

But the interest of the mortgagee in the land is not subject to sale. *Jackson* v. *Williams*, 4 Johns. 41; *Nicholson* v.

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Walker, 4 Bradw. 404; *King* v. *Cushman*, 41 Ill. 31; Freeman on Executions, secs. 118, 184.

The surplus in this case is not personal property but realty. Leigh & Dalzell on Equitable Conversion, 89; 5 Law Lib. 146; *Brown* v. *Bigg*, 7 Ves. 279; *Matson* v. *Smith*, 8 Beav. 374; *Wright* v. *Rose*, 2 Sim. & Stu. 323; *Kauffman* v. *Peacock*, 115 Ill. 212; *Titus* v. *Neillson*, 4 Johns. Ch. 452.

In equity the prior payment of mortgage debt not necessary to assignment of dower. *Bell* v. *Mayer*, *etc.*, 10 Paige, 55; *Bank* v. *Owens*, 31 Md. 320.

The decree of sale was not changed or modified. The decree of foreclosure did not assume to divest Mrs. Dunn of her then inchoate right of dower. It was impossible that it could have that effect.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The first question, and, in our opinion, the controlling one upon this record, is whether the mortgaged property, upon the death of Dunn, after decree of sale, but before sale made pursuant thereto, descended as real estate to his widow and heirs at law.

The doctrine of equitable conversion as recognized in *Baker* v. *Copenbarger*, 15 Ill. 104; *Rankin* v. *Rankin*, 36 id. 299; *Jennings* v. *Smith*, 29 id. 121; *Haward* v. *Peavey*, 128 id. 435, and *Matter of Corrington*, 124 id. 367, cited by counsel on behalf of plaintiff in error, can, manifestly, have no application to this question, for the reason that the conversion directed by the decree of sale was conditional — that is, it merely authorized the power of sale to be exercised for the purposes contemplated by the mortgage — and did not require a sale absolutely, as was required in those cases. The property was to be sold under the decree only in the event that the amount due on the mortgage, and the costs, should not be paid at or before the time of the sale. Payment of those sums at any time before sale completed would satisfy the decree, extinguish the

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power of sale, and thus prevent the conversion. And so, necessarily, until after sale, there could be no certainty that there would be a sale, and the interest of the owner in the land would remain simply burdened with the decree — to be sold if the money should not be paid as provided by the decree, and not to be sold if that money should be thus paid. The decree simply authorized the power of sale to be exercised — it did not compel it to be exercised at all events — and so, in principle, the case is not different than it would have been without decree before the enactment of our present statute requiring such mortgages to be foreclosed.

Dunn's purchase and assumption of the mortgage debt placed him in the shoes of Cass. 1 Jones on Mortgages, sec. 740. His title was good as to everybody but the mortgagees. Their interest is merely the right to subject the land to the payment of their debt, and before entry for condition broken, on purchase under sale, pursuant to decree, it is not such an interest in land as may be sold on execution or mortgaged. *King* v. *Cushman*, 41 Ill. 31. But Dunn's title was such an interest. *Finley* v. *Thayer*, 42 Ill. 350.

And being such an interest, it was the subject of dower under our statute. Sec. 1, chap. 41, R. S., 1874.

Dunn having died before sale made, there was no conversion of the estate, and it must, therefore, have descended as real estate to his widow and heirs in precisely the same condition in which he held it after decree rendered. Suppose that it had been found practicable, at the sale, to have satisfied the mortgage by the sale of a divisible part of the land, and it had been thus satisfied. This, it is clear, would have disencumbered the property not sold; and it must be equally clear that the property thus disencumbered would have belonged to the widow and heirs under the statute of descents. No one but the mortgagee could have objected to such a sale. So, it can, upon like principle, concern no one but the widow and heirs and the mortgagee, whether the mortgagee, or other purchaser at

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the sale, instead of bidding the amount of the mortgage debt and costs for a part of the property, bids a sum greater than that amount for the whole of the property. The excess must represent and take the place of so much property as it is for; and as was the interest in the original property, so must the interest be in this money — its representative. *Pickett* v. *Buckner*, 45 Miss. 236. And this is in accordance with the ruling in *Titus* v. *Neillson*, 4 Johns. Ch. 452.

It is unnecessary to consider what would have been the relative rights of these parties, under certain circumstances, had redemption been made from the sale; for there is no perceivable connection between rights in the excess above the indebtedness, paid at a mortgage sale, and the rights growing out of a redemption from such a sale. The widow and heirs of Dunn stand, as respects the sale and a redemption from it, precisely where he would have stood had he lived. Since, therefore, if he had lived and not redeemed from the sale, he would not have been thereby deprived of the excess paid at the sale above the amount of mortgage debt and costs, it is impossible that they can be.

The question of the rights of the widow in the excess paid at a sale under a mortgage, subsequent to the death of her husband, was not presented by the record in *Pahlman* v. *Shumway*, 24 Ill. 131.

We do not regard it material to determine that the encumbrance, under which the sale was here effected, was, strictly speaking, a purchase money encumbrance. We deem it enough that it was an encumbrance which had priority over the claims of all others, and that, except as to that encumbrance, Louisa Dunn was entitled to dower in the lands affected by it.

It is objected that it was erroneous to modify the decree entered in the lifetime of Dunn. When that decree was entered, Louisa's claim to dower was inchoate only. It could not then be certainly known that it would ever be consum-

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mate, and that decree, therefore, did not have and could not have the effect of depriving her of dower.

She does not seek a readjudication of questions passed upon by that decree, but simply the assertion of rights with respect to its subject-matter which have arisen since.

The decree is affirmed.

Decree affirmed.

ALPHONSO GOODRICH

v.

DANIEL K. TENNEY *et al.*

Filed at Ottawa, January 19, 1893.

1. CONTRACTS — *contrary to public policy.* An agreement between a person and an attorney representing creditors of an absconding debtor, that such person will procure for the attorney the affidavits of the debtor and two other persons, showing that a sale made by the debtor was fraudulent and without consideration, to be used on a motion for a new trial in a case on a creditor's bill, and also the deposition or testimony of such debtor and two other persons to the same effect, to be used in said litigation, for which such person is to be paid twenty-five per cent of the debt so collected, is contrary to public policy, and, therefore, illegal and void.

2. An agreement or contract to pay money to influence legislation; one founded upon violation of public trust and confidence; to pay public officers for the performance of official duty; for the buying or selling of public office; for the purpose of stifling criminal prosecutions and agreements relating to civil proceedings involving anything inconsistent with the full and impartial course of justice therein, or that tend to prevent the course of justice or its pure administration by the courts, are justly deemed contracts of turpitude, contrary to sound public policy, and void.

3. SAME — *illegal — defense upon grounds of public policy.* The courts of justice will not enforce the execution of illegal contracts, nor aid in the division of the profits of an illegal transaction between associates. In such case the maxim "*melior est conditio possidentis*" applies Neither party *in pari delicto* can have assistance from the courts; but the objection against the legality of a contract may be made by a party *in pari delicto.* The defense is not allowed in behalf of the party objecting, but upon principles of public policy.

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Statement of the Case.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county, the Hon. LORIN C. COLLINS, Judge, presiding.

This was a proceeding on the equity side of the court. Only such parts of the bill need be given as will raise the single point decided. It is alleged that one Smith, a merchant at Omaha, Neb., had become indebted to divers persons, banks and firms, in sums aggregating $275,000, and transferred his business, stock of goods, "and all that apparently pertained to the same," to one Lowey, and immediately absconded to Canada, leaving his debts unpaid. Suits had been brought by certain Nebraska creditors, and in one, at least, affecting the validity of such transfer, a verdict or finding had been rendered adversely to the creditors, and was, at the time of making the contract referred to, pending on motion for new trial. That it was desired by the creditors concerned in such litigation, "and in which was involved the question of the fraudulent character of the transfer of said property," * * * "that said Smith should give his testimony in said cause, and should furnish affidavits showing the alleged fraudulent character of said transfer by said Smith to said Lowey." Appellees, a firm of Chicago lawyers, were employed by and represented certain Chicago and other creditors, and they, representing such creditors, also desired, "that the testimony and co-operation of said Smith * * * should be secured in their behalf, for the purpose of sustaining the litigation as to the fraudulent transfer of said property by said Smith to said Lowey."

The bill then alleges the business and friendly relations existing between appellant and said Smith, and the fact that correspondence had been maintained between them since his absconding, which led appellees to confer with appellant to interest him to induce Smith to return to the United States, and give such affidavits and testimony, in the Omaha litigation, and in such other suits as might be instituted by or on behalf

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of the creditors of Smith, to reach said property or the avails thereof, in the hands of Lowey, or others. As a result appellant twice visited Smith in Canada, on the last visit being accompanied by appellee, D. K. Tenney. The proposals were laid before Smith, and such negotiations had, that on the last visit the affidavit of Smith was obtained, brought to Chicago and delivered by appellant to said Tenney. Thereupon the contract, the terms of which had been previously agreed upon, was drawn up and signed, a copy of which purports to be attached to the bill as an exhibit. It is alleged to bear date and to have been executed May 5, 1886, and provides that appellees, or said Tenney, should endeavor to get control of all of the claims against said Smith, with power to compromise the same, as follows: "The claim of J. V. Farwell & Co., and A. S. Gage & Co. at par; the claims of the Omaha banks, at fifty cents on the dollar; claims of other attaching creditors, up to the amount of $78,000, at thirty cents on the dollar, and all other claims, at twenty cents on the dollar." And appellant undertook and agreed on his part, as alleged, "to furnish the affidavits of L. L. Smith, Fred W. Fuller, *alias* Pullen, and Frank C. Moies, of the facts of the sale by Smith to Lowey, *showing clearly that no consideration was paid by Lowey and that he knew of Smith's insolvency*, to be used on motion for new trial in the case of *Cole* v. *Miller*, *and that the testimony of said witnesses*, either in person or by depositions, *should be given of like tenor*, to be used upon the next trial, or any other legal proceedings instituted by said Tenney against said Lowey." And "that for such consideration it was agreed that your orator (said Goodrich) should have one-quarter of all money realized upon their said claims out of the property transferred by said Smith to said Lowey, or in any litigation with said Lowey or Cole, in respect to the same, and the same should be paid to said Goodrich (appellant) as fast as the money should be collected, $2000 thereof to be retained by said Tenney on account of costs and expenses; Smith to be released by the

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consenting creditors from any right they might have to arrest him, and from their claims entirely, when such evidence should be procured and given," etc.

The bill alleges that appellant obtained the affidavits of said Fuller and Moies, and the farther affidavit of Smith, and delivered them to said Tenney, "and which were accepted and approved by said Tenney as, in all respects, according to the wishes and purposes of said defendants (appellees), and a satisfactory compliance with the terms and conditions of said agreement;" and that appellees, by means of a circular letter addressed to Smith's creditors, etc., had, by the 17th day of May, 1886, obtained control of claims to the amount of $125,000; that Smith, under an arrangement procured by appellant with certain of his creditors, that they would procure persons to go bail for him if he should be arrested by other creditors, had returned to Chicago, and on said day executed and delivered to said D. K. Tenney, as trustee for creditors, his judgment note for the sum of $125,500, the sum of $500 being added as an attorney's fee; that judgment was entered up thereon, and an execution being returned *nulla bona*, a creditor's bill was filed against said Smith, Lowey and others, to subject said property transferred by Smith to Lowey, and the avails thereof, to the payment of said judgment, upon the ground that said transfer was without consideration, and fraudulent as against creditors.

It is further alleged, that appellant "gave diligent attention to the securing of the testimony of the said Smith and said Fuller, *alias* Pullen, and the said Moies, to be used on the hearing of said cause and in the progress thereof, and all such affidavits as were called for or required by said defendants (appellees) during the progress of said cause, and did and performed to the satisfaction of said defendants all that was required by them * * * under and pursuant to the terms of * * * said agreement." It is alleged that Smith, Fuller and Moies each attended and gave testimony and affi-

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davits in said cause when required to do so, etc. The result is alleged to have been a decree, on the 28th of May, 1888, two years after filing the bill, in favor of Tenney, etc., and against Lowey, for the sum of $117,416.66, and which was on the 6th day of December, 1888, received by said Tenney, amounting at that date, principal and interest, to $120,500, "or thereabouts." Thirty thousand dollars, or one-fourth of the sum collected, less $500, presumably the attorney fee included in the note, is alleged to have become immediately due and payable to appellee under said contract. And it is to enforce an accounting and payment of this sum under said contract alone that this bill is filed. There is no pretense in the bill of any other or different agreement by which said money, or any part of it, would become payable to appellant, or any consideration, other than performing said agreement on his part, moving to appellees for its payment. Other parts of the bill are sufficiently noticed in the opinion of the court. A demurrer was interposed and sustained, and decree entered dismissing the bill. On appeal to the Appellate Court this decree was affirmed, and the complainant prosecutes this further appeal.

Messrs. H. T. & L. HELM, for the appellant:

The contract was not within itself immoral. Case distinguished from *Gillett* v. *Logan Co.*, 67 Ill. 256; *Neustadt* v. *Hall*, 58 id. 172; *Liness* v. *Hesing*, 44 id. 113; *Arter* v. *Byington*, id. 468; *Skeels* v. *Phillips*, 54 id. 309.

The question of the validity of the original contract is not necessarily involved in this case. All that was agreed to be done, was done, and the object sought has been accomplished, and the appellant was entitled to recover his share of the fund. *Wilson* v. *Owen*, 30 Mich. 474; *McBlair* v. *Gibbs*, 17 How. 235; *Tenant* v. *Elliot*, 1 B. & P. 3; *Farmer* v. *Russell*, id. 296; *Tracy* v. *Talmage*, 14 N. Y. 162; *Curtis* v. *Leavitt*, 15 id. 9; Pomeroy's Eq. Jur., sec. 403 and note 2 and cases cited on pages 440–442; *Thompson* v. *Thompson*, 7 Ves. 470;

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Brooks v. *Martin*, 2 Wall. 70; *Murray* v. *Vanderbilt*, 39 Barb. 141.

Mr. WILLIAM E. CHURCH, for the appellees:

The contract on which the bill is based is against public policy, and no rights can be founded thereon by any of the parties thereto. *Patterson* v. *Donner*, 48 Cal. 369; *Gillett* v. *Logan Co.*, 67 Ill. 256.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

It is probable that the demurrer was properly sustained upon the ground, that if the complainant had a right of recovery, his remedy was complete at law, and possibly also upon the ground of *laches*, but we will consider the single question of the validity of the contract sought to be enforced.

No good purpose can be served by a consideration of the allegations of this bill, setting up the confederacy and fraud by which appellant was induced to surrender the written contract to Tenney. It is alleged that it was expressly agreed, that the surrender of the writing should not abrogate the contract, or make any difference as to the rights of appellant thereunder, but that his interest should remain the same. If the allegations of the bill are true, the surrender was made to destroy the written evidence of appellant's interest, because of the pretended fear that his interest under such a contract, if known, would prejudice Tenney's case against Lowey, and to enable the attorney to more safely, but falsely testify, if called therein, that no such contract existed. So with those allegations, which are explanatory of why appellant, himself, falsely denied that there was any such contract, or that he had any interest in the litigation against Lowey, as it is alleged he did, when called and examined in said creditor's bill proceeding. And the same is true of the allegations setting up the fraudulent and oppressive acts and conduct, by which, after the rendition of the decree against Lowey, appellant was induced to execute and

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deliver to Tenney an absolute release and acquittance of all claim or right whatsoever, to the money derived under said decree. If the utmost that can be claimed in respect of such allegations be conceded, they amount to no more than that, because of the fraud practiced, the surrender was ineffectual to abrogate or destroy the contract; that appellant should not be estopped from now asserting his rights under said contract by his false denial of its existence; and that said release is, as between appellant and appellees, fraudulent and should be set aside, and the contract as originally made be held to be in full force and effect. The specific prayer of this bill is, "that the said contract so delivered to said defendants may be restored to your orator, and the rights in and under the same may be established and confirmed, and the said release so fraudulently extorted from your orator be cancelled and annulled and for naught held, and the said defendants may be required to pay to your orator the amount that shall be found due and owing * * * under and pursuant to the terms of said agreement," etc. The right of recovery, if it exists, is, therefore, predicated solely upon and involves the enforcement of the contract set up in the bill. It is under and by virtue of that contract alone, that it is sought to establish appellant's right to the money, and there is nothing, except said agreement, that would give him any right, either at law or in equity, to demand the payment of the twenty-five per cent of the amount collected of Lowey.

The English reports, as well as American, abound with cases holding that contracts are illegal when founded upon a consideration, *contra bonos mores*, or against the principles of sound public policy, or founded in fraud, or in contravention of the provisions of some statute, (2 Kent's Com. p. 466); and we need not review the cases illustrating the application of the rule. Thus, contracts to pay money to influence legislation, (*Marshall* v. *B. & O. R. R. Co.*, 16 How. 314; *Mills* v. *Mills*, 40 N. Y. 543; *McBratney* v. *Chandler*, 22 Kans. 692;

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Bryan v. *Runnels*, 5 Wis. 200; *Powers* v. *Skinner*, 34 Vt. 366); agreements founded upon violations of public trust or confidence, (*Cooth* v. *Jackson*, 6 Vesey, 12–35); contracts to pay public officers for the performance of official duty, (*Odineal* v. *Barry*, 24 Miss. 9); contracts for the buying, selling or procuring of public office, (*Chesterfield* v. *Jansen*, 4 Atk. 352; *Boynton* v. *Hubbard*, 7 Mass. 119; *Waldon* v. *Martin*, 4 B. & Cress. 319); agreements for the purpose of stifling criminal prosecutions, (*Gorham* v. *Keys*, 137 Mass. 583; *Henderson* v. *Palmer*, 71 Ill. 579; *Richet* v. *Harvey*, 106 Ind. 564; *McMahon* v. *Smith*, 47 Conn. 221; *Roll* v. *Raguet*, 4 Ohio, 400); agreements relating to civil proceedings involving anything inconsistent with the full and impartial course of justice therein, (*Dawkins* v. *Gill*, 10 Ala. 206); or that tend to pervert the course of justice or its pure administration by the courts, (*Gillett* v. *Logan Co. et al.*, 67 Ill. 256; *Patterson* v. *Donner*, 48 Cal. 369), and many others, are justly deemed contracts of turpitude, contrary to sound public policy and void. 1 Story's Eq. Jur. secs. 293–300; 3 Am. & Eng. Enc. of L. 875–881, and notes. In *Gillett* v. *Logan Co.*, *supra*, the contracts were to pay for procuring testimony showing that a certain number of votes cast at an election were illegal, and we said that: "On account of their corrupting tendency we must hold them to be void as inconsistent with public policy." It was also there said, in effect, that such contracts created a powerful inducement to make use of improper means to procure the testimony contracted for, to secure the desired result; that they led to the subornation of witnesses, to taint with corruption the atmosphere of courts and to pervert the course of justice. In *Patterson* v. *Donner*, *supra*, it was agreed among other things that a certain sum of money should be paid, etc., provided the party procured "two witnesses to testify that they had seen what purported to be a genuine grant" of the land mentioned, etc., and it was held that the stipulation was immoral, against public policy and void.

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Courts of justice will not enforce the execution of illegal contracts, nor aid in the division of the profits of an illegal transaction between associates. *Neustadt* v. *Hall*, 58 Ill. 172. It is there said: "In the language of Lord ELLENBOROUGH in *Edgar et al.* v. *Fowler et al.*, 3 East, 222, 'we will not assist an illegal transaction in any respect; we leave the matter as we find it and then the maxim applies, *melior est conditio possidentis*.'" It may be insisted that it is unjust as between the parties for Tenney to raise the question, and very dishonest toward appellant for him to take advantage of it, but the contract being illegal no rights can be enforced under it. As said by Lord MANSFIELD, in *Halman* v. *Newland*, Cowper, 417, "no court will lend its aid to a man who founds his cause of action upon an illegal or immoral act." The maxim *ex turpi contractu non oritur actio* applies in all such cases, and neither party, if *in pari delicto*, can have assistance from courts of justice in enforcing the contract. And the objection may be made by a party *in pari delicto*, for the defense is not allowed because the party raising the objection is entitled to the relief, but upon principles of public policy and to conserve the public welfare.

No better illustration can perhaps be found of the soundness and wisdom of the rule, and the dangers to be apprehended from its relaxation, than is shown in this case. It is apparent that Lowey was in equal peril of recovery against him, whether he had paid full and honest value upon purchase of the goods from Smith, or had taken them in fraud of the rights of the creditors. Smith, a dishonest debtor, after cheating his creditors, absconded. The appellant, as alleged, in consideration of the agreement of Tenney to pay him twenty-five per cent, practically, of whatever should be collected from Lowey, undertook and agreed to procure the affidavit of said Smith, of one Fuller with an *alias*, and one Moies "of the facts of the sale by Smith to Lowey, showing clearly that no consideration was paid by Lowey, and that he knew of Smith's insolvency," "and that

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the testimony of said witnesses, either in person or by deposition, should be given of like tenor," etc. Copies of the affidavits alleged to have been furnished, and which, it is alleged, were received as a satisfactory fulfillment of appellant's contract in that regard, are attached to the bill as exhibits, and show that the witnesses testified up to the high mark set by the contract. Smith was brought back from Canada, secured immunity from arrest for his fraud, his debts cancelled, if he would testify as required, and it is apparent from the bill that he at least claimed a portion of the money, and was actually paid $14,000; and this under the direction and control, if the bill be true, of an attorney who deliberately laid the foundation for the commission of perjury with safety by himself, if called to testify, and advised the commission of perjury by appellant, and framed the language in which he should commit it. And the testimony was procured by appellant, who, after planning with the attorney as to the wording of his false testimony, deliberately gave it, for no other reason, than that he was led to believe that his telling the truth, would endanger the chances of success in the litigation against Lowey. If transactions of this kind should receive sanction, and contracts based upon them be enforced, the suborner of perjury would become a potent, if not a necessary, factor in litigation. The fact that purchase was made in good faith would be no protection to the buyer; premium would be offered to the dishonest and unscrupulous, and would result in the perversion of justice and bringing its administration into deserved disrepute. It is not enough that the parties may have intended no wrong, or that the testimony produced in the case may have been true, it is the tendency of such contracts to the perversion of justice, that renders them illegal. It is perhaps a singular fact, however, though unimportant, that this bill nowhere alleges that either the attorney or appellant believed, or had any reason to believe, the testimony of Smith was in fact true. That, so far as this bill goes, seemed to have been a matter not considered.

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That this contract falls directly within the maxim before quoted is unquestionable; and by all the authorities the courts can do nothing to enforce it by either party.

But it is said that Tenney having received the money must account for it to appellant. And, we are referred by counsel to a line of cases, holding that although the money may have been realized in an illegal transaction, yet where the liability of the defendant to pay it to the plaintiff arises upon some new or independent consideration, unaffected with illegality, and the enforcement of the illegal contract is not involved, there may be a recovery. None of the cases referred to have any application to the case at bar. As said in *Dent* v. *Ferguson*, 132 U. S. 50, in commenting upon this line of cases: "In all those cases the court was careful to distinguish and sever the new contract from the original illegal contract. Whether in the application of this principle some of them do not trench upon the line which separates the cases of contracts void in consequence of their illegality, from new and subsequent contracts arising out of the accomplishment of the illegal object, is not the subject of inquiry here." It is to be remembered, the contract was, as alleged, with the defendant D. K. Tenney, and signed by him, and who collected the money of Lowey as trustee for the creditors of Smith. If the money had been paid to a third person for the use of appellant, or there were collateral circumstances, disconnected with the illegal contract, out of which an implied promise to pay the money to appellant would arise, the cases referred to would apply. But the fact that Tenney received the money upon the decree against Lowey would, independently of the contract, raise no implied assumpsit in appellant's favor.

The controversy here arises between the parties to the illegal agreement, and appellant must, if at all, assert his claim to the money in Tenney's hands, through and under that contract. Treat that as void, as if never made, and there is nothing upon which appellant can base a claim to the money. The case

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principally relied upon by appellant, as sustaining his contention, is *McBlair* v. *Gibbs et al.*, 17 How. 252. In that case one Goodwin had an interest in a claim held by the Baltimore Company, for supplies furnished in fitting out a military expedition against dominions of the Spanish government, under a contract in violation of the neutrality laws of the United States, and therefore illegal. 11 How. 529. In 1829 Goodwin, for an independent valuable consideration, assigned his right and interest in the claim to one Oliver. Under the convention of 1839 "for the adjustment of claims of citizens of the United States against the Mexican Republic," the illegality of the contract was waived and the claim paid. The question at issue was, whether the assignment to Oliver was valid. The court found, that, in determining that question, the illegality of the contract with the Mexican General, Mina, upon which the claim against Mexico was based, was not involved; its illegality had been waived by the Mexican government and payment of the claim made. The court finding that the assignment was made for a valuable consideration paid by Oliver, and was in itself untainted with illegality, after review of the authorities, held, that it passed whatever rights Goodwin had, which might be nothing if the illegality of the contract was interposed, or all that was claimed if the promisor saw fit to waive it. It seems clear that this case in principle can have no application to the case at bar, and is clearly distinguishable from a case where it is sought to enforce the illegal contract, or to enforce one made in aid or furtherance of a contract so infected. Appellant also relies upon *Wilson* v. *Owen et al.*, 30 Mich. 474. There the defendant received money as treasurer of a horse-fair association, for entrance fees, stock subscriptions and commissions on pools sold, which he refused to pay over. It was conceded that the business in which the money was earned was unlawful. The plaintiffs, who had organized the association, brought an action for money had and received. It was held, that the defendant having in fact received the money for the plaintiffs'

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use, he could not appropriate it to himself but must account for it. The plaintiffs' case was made out, when they showed that the defendant had received the money for their use. And the court distinguished the case from that of *Bronson* v. *Ramsdell*, 24 Mich. 441, where the attempt was to collect money earned by illegal means, and where the recovery must be had, if at all, in furtherance of the illegal transaction. In *Tenant* v. *Elliott*, 1 B. & P. 3, a broker procured illegal insurance; upon loss, the insurance company paid the money to the broker, who refused to pay it over to the insured, setting up the illegality of the insurance. The plaintiff was held entitled to recover, upon the ground that the implied promise of the defendant, arising from the receipt by him of the money, was a new undertaking unaffected by the illegality of the insurance. So in *Sharpe* v. *Taylor*, 2 Ph. Ch. Rep. 801, a bill was filed to recover a moiety of freight money earned by a vessel engaged in trade in violation of the navigation laws and illegal, which money had come into the hands of one of the joint owners. The illegality of the trade was set up as a defense, but it was answered by the Lord Chancellor that the plaintiff was not seeking the enforcement of an illegal agreement, or compensation for the performance of an illegal voyage, but was seeking his share of the profits realized and in the hands of the defendant joint owner. It there required no enforcement of an illegal contract or agreement, to hold the defendant liable to account to the other joint owner. The liability arose from the receipt of the money as the agent of the plaintiff in respect of his moiety. The cases of *Tenant* v. *Elliott*, *supra*, and *Furneer* v. *Russell*, 1 B. & P. 296, are referred to as sustaining the distinction in this case. A farther reference to this line of cases will not be necessary. The distinction between the enforcement of the illegal contract, and asserting title to money arising therefrom, where there is an express contract to pay upon sufficient consideration, or where the collateral circumstances are such as to raise an implied promise to pay to the

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plaintiff, is recognized and carefully made, in practically all of the cases. In the case of *Thompson* v. *Thompson*, 7 Vesey, 470, Sir WILLIAM GRANT, master of the rolls, drew the distinction with great clearness. A sale of the command of an East India Company ship was made to the defendant, who agreed to pay therefor an annuity of £200. Under regulations adopted by the company to prevent such sales, the defendant subsequently relinquished the command, and was allowed £3500; £2040 of which was delivered to an agent of the defendant. A bill was filed by the annuitant for the purpose of procuring a decree declaring the value of the annuity, and enforcing its payment out of the allowance to the defendant. The master of the rolls found the agreement for the payment of the annuity to be illegal, and admitting there existed an equity against the fund, if it could be reached through a legal agreement, said: "You have no claim to this money, except through the medium of an illegal agreement, which, according to the determinations, you cannot support. I should have no difficulty in following the fund, provided you could recover against the party himself." And after citing *Tenant* v. *Elliott*, *supra*, as authority for the position that, if the company had paid the money into the hands of a third person for the use of the plaintiff, he might have recovered, further observed: "But in this instance it is paid to the party, — for there can be no difference as to the payment to his agent, — then how are you to get at it, except through this agreement? There is nothing collateral, in respect of which, the agreement being out of the question, a collateral demand arises. Here you can not stir a step but through the illegal agreement, and it is impossible for the court to enforce it." So here, the right of appellant to recover of appellees depends solely upon the contract, the provisions of which can not be enforced in a court of justice.

The unfortunate delay of appellant in disclosing the fact alleged, for more than three years after the facts occurred, will

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probably prevent their investigation where they could receive that attention their merit demands, and the bill not being verified, forms no basis for further investigation in this court.

The bill was properly dismissed and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHARLES E. TAYLOR *et al.*

v.

ARMENIA J. TAYLOR.

Filed at Ottawa, January 19, 1893.

1. HUSBAND AND WIFE — *ante-nuptial contract set aside for unfairness.* A marriage contract was entered into four days before marriage of the parties, by which the intended wife, in consideration of $2000, to be paid two years after the husband's death, released all the rights given her by law in his estate, including dower and homestead, and by which he also released all rights in the wife's estate, and it appeared that she had no property or expectation of property, which provision for the wife was shown to be very inadequate, taking into consideration his means. There was no proof of the circumstances attending the execution of the contract, or that the wife was made acquainted with the extent of property owned by her intended husband: *Held*, that the agreement was one-sided and unfair to the wife, and did not bar her right of dower in the husband's lands and estate.

2. While it may be conceded that an intended wife has the legal capacity to make an ante-nuptial contract, and that marriage is a sufficient consideration to support it, yet in the absence of clear and satisfactory proof, it will not be presumed that she would, with full knowledge of all the circumstances, enter into such a contract which makes an inadequate provision in her favor.

3. SAME — *burden of sustaining ante-nuptial contract.* Parties to an ante-nuptial contract occupy a confidential relation toward each other. While they may lawfully contract with each other when there is full knowledge of all that materially affects the contract, yet when the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises the presumption of designed conceal-

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ment and throws the burden upon those claiming in his right to prove that there was a full knowledge in her of all that materially affects the contract.

4. Where the provision made for the intended wife is inadequate to the husband's means, the burden will be on his heirs to prove by satisfactory evidence that she had full knowledge of the character and extent of her intended husband's property, and of the provisions of the contract, or at all events that the circumstances were such that she reasonably ought to have had such knowledge at the time the contract was executed.

5. SAME — *ante-nuptial contract construed — after-born children.* An ante-nuptial contract provided that if any children should be born of the marriage, and survive the husband, such issue should inherit all his estate equally with any issue of him by any former marriage, "the same as if no contract existed between the parents:" *Held*, that such provision created no contract in behalf of after-born children, but was intended to leave the inheritance of the husband's property, as respects his children by his intended wife, unaffected by the contract.

6. BILL FOR DOWER — *ante-nuptial agreement in bar — competency of widow to testify.* On bill for dower in which an ante-nuptial agreement is set up in bar, which the widow claims is unreasonable, she will not be competent to testify to the circumstances attending the making of the agreement, for the purpose of impeaching its fairness.

7. ASSIGNMENT OF DOWER — *decree construed — homestead rights of minor child.* A decree for the assignment of a widow's dower directed the commissioners to give her dower "without prejudice to the homestead rights of the minor child of her deceased husband," and directed the widow to be let into the possession of the premises "so assigned to her as dower:" *Held*, that the decree did not ignore the homestead rights of the minor heir. Her possession of the homestead is in subordination to the rights of the heir, and absolute as to the other lands set apart to her.

APPEAL from the Circuit Court of Peoria county; the Hon. THOMAS M. SHAW, Judge, presiding.

Armenia J. Taylor, widow of Burtis S. Taylor, late of Peoria county, deceased, filed her bill in the Circuit Court of that county for the assignment of dower in lands whereof he died seized. The heirs at law of Burtis S. Taylor were made defendants, and they answered denying that the complainant was ever entitled to dower in the lands whereof Burtis S. Taylor

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died seized, because, before her marriage with him, they entered into an agreement as follows:

"This agreement, made and entered into this 18th day of October, 1883, between Burtis S. Taylor, of Princeville, Peoria county, State of Illinois, party of the first part, and Armenia Pardee, of the city of New York, State of New York, party of the second part, witnesseth:

"That, whereas a marriage is about to be had and solemnized between the said parties, and the said parties are desirous of making a settlement of their property, both real and personal, prior to said event, it is agreed between the parties that said party of the first part is to provide for the said party of the second part all the necessaries of life, including medical care and nursing during sickness, in all cases to support and care for her in such manner as his means will permit, during his life, and should she, the party of the second part, survive the party of the first part, then and in that case the estate of the said party of the first part shall pay the party of the second part the sum of two thousand ($2000) dollars in full payment and discharge of any and all claims she may have to dower in the real estate of the said party of the first part, or specific allowance as his widow, or interest or share she may have in his personal property, and is to be received by her in full discharge of any and all such claims, dues or demands whatever.

"It is further agreed between the parties that said party of the first part shall hold any and all of his real estate during the time of their married life, free and clear of any encumbrance or dower or homestead of the party of the second part, and should it become necessary in the transaction of business for the party of the first part to sell or dispose of any of the real estate now owned by him, or which he may hereafter purchase, the party of the second part hereby agrees to sign all deeds relinquishing all right of dower and homestead she may have in and to any and all such real estate, meaning and intending by this agreement that each shall have and hold any real

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estate that they may have or own at the time said marriage is solemnized, or which either may subsequently purchase or obtain during said marriage, free and clear from the claims or control of each other, and to be owned and controlled in the same manner as though no marriage relations existed between the said parties.

"It is further agreed between the parties that should said party of the second part wish to dispose of any real estate which she may own at the time of said marriage, or which she may subsequently obtain by purchase, devise or otherwise, the party of the first part hereby agrees to sign any and all deeds of conveyance, thereby relinquishing any and all rights he may have to dower or homestead in and to said real estate.

"It is further agreed between the parties hereto that should any children be born of said marriage, and survive the party of the first part, that said issue shall inherit all the estate of the party of the first part, equally with any issue the party of the first part may have from former marriage or marriages the same as if no contract existed between the parents.

"It is further agreed between the parties that should the party of the second part survive the party of the first part, the payment to her of the sum of two thousand ($2000) dollars shall be made within two (2) years from the decease of the party of the first part, and shall be made a preferred claim against his said estate, and shall be paid out of the proceeds of his estate next to the funeral expenses, and is hereby made a lien upon said estate until paid.

"In witness whereof the said parties have hereunto set their hand and seals the day and year first above written.

BURTIS S. TAYLOR, [SEAL]
ARMENIA JEANE PARDEE. [SEAL]"

On final hearing the court decreed that this agreement was "free from fraud or undue influence so far as shown by the evidence, except in so far as said fraud or undue influence may

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be inferred from the fact that the said contract did not make a fair and reasonable provision for his wife upon his death, taking into account the circumstances of the parties and the condition of the estate of the said husband, but the same was inadequate, inequitable and unreasonable, and not such a contract as a court of equity will hold to be an equitable bar of the widow's dower, and the same does not bar her dower and homestead." The decree further appointed commissioners to assign dower, directing them to assign dower to complainant in all the lands whereof Burtis S. Taylor died seized, giving her, without prejudice to the homestead rights of the minor child of the said Burtis S. Taylor, the homestead or dwelling house, if she so desired. The commissioners assigned dower and reported their action to the court, which report was approved by the court. Damages were thereafter assessed to complainant for the detention of her dower, amounting to $880.20.

The defendants bring the case to this court by appeal.

Messrs. MCCULLOCH & MCCULLOCH, for the appellants:

A married woman ought to be bound by her contracts the same as other persons. *Barth* v. *Lines*, 118 Ill. 374; *Wentworth* v. *Wentworth*, 69 Me. 244; *Andrews* v. *Andrews*, 8 Conn. 79; Bishop on Law of Married Women, sec. 423; *McNutt* v. *McNutt*, 116 Ind. 545.

Marriage alone is not only a sufficient consideration for an ante-nuptial contract, but is the highest consideration known to the law. 1 Parsons on Contracts, 554; *Barth* v. *Lines*, 118 Ill. 374; *Otis* v. *Spencer*, 102 id. 622; *Previtt* v. *Wilson*, 103 U. S. 22; *McGee* v. *McGee*, 91 Ill. 548; *Magniac* v. *Thompson*, 7 Pet. 348; *Herring* v. *Wickham*, 29 Gratt. 628; *Charles* v. *Charles*, 8 id. 426; *Peck* v. *Peck*, 12 R. I. 485; *Ludwig's Appeal*, 101 Pa. St. 535; 2 Scribner on Dower, 409, 413.

Ante-nuptial contracts are not only lawful, but are favored by the courts. *Spencer* v. *Boardman*, 118 Ill. 553; *Barth* v.

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Lines, supra; McMahill v. *McMahill*, 105 Ill. 596; 113 id. 461; *Weaver* v. *Weaver*, 109 id. 225; *Brenner* v. *Gauch*, 85 id. 368; *Phelps* v. *Phelps*, 72 id. 545; *McGee* v. *McGee*, 91 id. 548.

Any reasonable provision, whether secured out of realty or personalty, which an adult person, previous to marriage, agrees to accept in lieu of dower, will be a good jointure in equity, and operate as a bar to any subsequent claim to dower. *McGee* v. *McGee*, 91 Ill. 548; *Jordan* v. *Clark*, 81 id. 465; Bacon's Abr., p. 230, "Jointure."

The provision made for appellee was fully equal to some provisions that have been sustained by this court. *McMahill* v. *McMahill*, 105 Ill. 596; *Spencer* v. *Boardman*, 118 id. 553.

A widow may part with her right of homestead by an ante-nuptial contract, where there is no interference with the rights of minor children. R. S., chap. 52, secs. 1, 2 and 4; *Spencer* v. *Boardman, supra; Kingman* v. *Higgins*, 100 Ill. 319.

Appellee is an incompetent witness to impeach the marriage contract. *Forbes* v. *Snyder*, 94 Ill. 374.

Mr. W. T. WHITING and Mr. LESLIE D. PUTERBAUGH, for the appellee:

The right of homestead is not affected by an ante-nuptial agreement. *McMahill* v. *McMahill*, 105 Ill. 596; *McGee* v. *McGee*, 91 id. 548; *Phelps* v. *Phelps*, 72 id. 545; Thompson on Homesteads, sec. 447.

Before the wife can be deprived of her dower and other rights, the agreement must be executed in her favor. *Weaver* v. *Weaver*, 109 Ill. 225; *Brenner* v. *Gauch*, 85 id. 368; *Johnson* v. *Johnson*, 23 Mo. 56; *S. C.*, 30 id. 72.

There must be a consideration other than marriage for an agreement not to claim dower. *Curry* v. *Curry*, 10 Hun, 360; *Power* v. *Shiel*, 1 Molloy, 311; 12 Eng. Ch. Rep. 147.

A close confidential relation existed between the parties, which required, on the husband's part, the utmost good faith.

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Taylor, occupying such a position, under the facts shown, the presumption is against the validity of the agreement, and the burden of proof is thrown upon appellants to show that the contract was fairly procured, and that it is a righteous one. *Beiser's Appeal*, 92 Pa. St. 267; *Pierce* v. *Pierce*, 71 N. Y. 154; *Kline* v. *Kline*, 57 Pa. St. 57; *Rockafellow* v. *Newcomb*, 57 Ill. 1, 86; *Tiernan* v. *Reims*, 92 Pa. St. 248; *Darlington's Appeal*, 86 id. 512.

The rule is, that if influence is acquired it must be kept free from taint and overreaching bargains. If confidence is reposed it must be faithfully acted upon, and preserved from any mixture of imposition or cunning, and where these relations exist, equity will not suffer a party standing in a situation where he can avail himself of his influence, to derive any advantage from that circumstance. It may also be stated as a general rule that relief will be afforded in equity in all transactions in which influence has been acquired and abused, in which confidence has been reposed and betrayed. Story's Eq. Jur., sec. 308; *Smith* v. *Kay*, 7 H. L. Cas. 750; Bispham's Prin. of Eq., sec. 231; *Sands* v. *Sands*, 112 Ill. 229; *Haydock* v. *Haydock*, 34 N. J. Eq. 70; *Todd* v. *Grove*, 30 Md. 188.

Parties to an ante-nuptial contract occupy a confidential relation toward each other. *Kline's Estate*, 64 Pa. St. 124; *Tarbell* v. *Tarbell*, 10 Allen, 278; *Fay* v. *Rickman*, 1 N. C. Eq. 278; *Woodward* v. *Woodward*, 5 Sneed (Tenn.), 49.

An ante-nuptial agreement to bar dower must be entered into *bona fide* and make provisions for the wife which are reasonable, fair and just. *Grogan* v. *Garrison*, 27 Ohio St. 65; *Stilley* v. *Falger*, 14 id. 647; *Beiser's Appeal*, 92 Pa. St. 267; *Kline* v. *Kline*, 57 id. 120; *Kline's Estate*, 64 id. 124; *Pierce* v. *Pierce*, 71 N. Y. 159.

A jointure or marriage settlement, to bar dower, must be adequate to her support; at all events, a fair equivalent to the dower in her husband's estate. 3 Redfield on Wills, chap. 14,

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sec. 44; *Drury* v. *Drury*, 3 Br. P. C. 492; *McCarter* v. *Tollo*, 2 Paige, 511.

A jointure to be a bar must be something conceded to the wife. 1 Washburn on Real Prop. 270, sec. 22; *Blackburn* v. *Blackburn*, 16 Ala. 633.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Excluding as we must, on the objection of appellant, the testimony given by appellee upon the hearing, there is no evidence in the record of the circumstances attending the making of this agreement. No one witnessed its execution, and no one was informed that such an instrument had been executed until long after its execution. Some expressions of Taylor and admissions of complainant that such an instrument had been executed, are proved; but Taylor's expressions were as to the effect of the instrument, making no explanation of the circumstances attendant upon its execution, and the admissions of the complainant are accompanied by the explanation, that if she had known, at the time the instrument was executed, what she knew at the time of making the admission, she would not have signed it.

The parties were married four days after the date of this agreement — October 22, 1883 — and Taylor died on the 30th of June, 1889.

At the time of Taylor's death, he was seized of real estate estimated to be of the value of $28,000, of most of which he was seized at the time the agreement was executed. His personal estate, at the time of his death, was estimated to be of the value of $13,000. How much of this he owned at the time the agreement was executed does not appear. The parties were cousins — both had been previously married — he twice and she once. She had one daughter then married and living apart from her. He had three sons and three daughters, two or three of whom were minors, but not of a very tender age. The complainant was born and raised in the city of New

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York and resided there until she came to Peoria county shortly previous to her marriage. She had no property, either real or personal, and maintained herself by dressmaking. Taylor had been a resident of Peoria county for many years, but we think there is competent evidence in the record clearly proving that, at the time this agreement was executed, he knew that complainant had no property. There is not a particle of evidence in the record tending to show that it was anticipated by the parties, when this agreement was executed, that the complainant would or could in any understood way, acquire a separate property subsequent to her marriage.

In view of these facts that must be taken into consideration in connection with the making of the agreement, the agreement is one-sided and unfair to the complainant. It is a virtual relinquishment on her part of dower in his real estate, and of her claim for a personal allowance in his personal property, and of what she would take in his personal estate under the statute of descents, for $2000, to be paid to her within two years after his decease. Having no separate property and the acquisition of none in contemplation, the surrender of his rights as to such property is meaningless. Nor do we agree with counsel that the provision that children to be born of the contemplated marriage shall inherit equally with his other children, amounts to a contract in behalf of such children. The language is: "Should any children be born of said marriage, and survive the party of the first part, said issue shall inherit all the estate of the party of the first part equally with any issue the party of the first part may have from former marriage or marriages, *the same as if no contract existed between the parents*," plainly intending not to restrict the power of disposition by sale or devise, but to leave the inheritance of his property, as respects his children by her, unaffected by the agreement; and so they were as well off without as with this stipulation. The sum to be paid is not above one-half, if indeed it is that, of what complainant would have received as widow from the personal

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estate alone, in the absence of any agreement, and it is to be received at a date no earlier than she would have received it in the absence of an agreement.

It is unnecessary to say that complainant was not competent to enter into such an agreement. It may be conceded that she had the legal capacity to make such a contract, and that marriage was a sufficient consideration to support it. But, in the absence of clear and satisfactory proof, it is not to be presumed that she would, with full knowledge of all the circumstances, have entered into such a contract. Parties to an ante-nuptial contract occupy a confidential relation toward each other. *Kline's Estate*, 64 Pa. St. 124; *Pierce* v. *Pierce*, 71 N. Y. 154; *Rockafeller* v. *Newcomb*, 57 id. 86. While they may lawfully contract with each other, where there is full knowledge of all that materially affects the contract, yet where the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises the presumption of designed concealment and throws the burden upon those claiming in his right to prove that there was full knowledge on her part of all that materially affected the contract. Cases cited *supra*; *Beirer's Appeal*, 92 Pa. St. 267; *Tiernan* v. *Reims*, id. 248; *Spurlock* v. *Brown* (Tenn.), not yet reported (18 S. W. 868). The burden here was, therefore, upon appellants to prove by satisfactory evidence that appellee had knowledge of the character and extent of her intended husband's property, and of the provisions and effect of this instrument, or, at all events, that the circumstances were such that she reasonably ought to have had such knowledge at the time this instrument was executed. In our opinion, they failed to make such proof.

It is further contended that there is error in the decree in awarding the homestead to complainant as part of her dower, without recognizing the existing rights of William G. Taylor therein. In our opinion, this is a misapprehension of the effect of the decree. It expressly directs that the commissioners shall give her, "without prejudice to the homestead rights

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of the minor child of the said Burtis S. Taylor," who is William G. Taylor, "the homestead or dwelling-house of her husband," etc.

The clause directing her to be let into possession is subordinate to this. She is to be let into possession of the premises "so assigned to her as dower;" that is, in those where William G. Taylor, the minor, has a homestead right, without prejudice to that right, as well as absolutely into those where there are no conflicting rights.

The decree is affirmed.

Decree affirmed.

CRAIG and MAGRUDER, JJ., dissenting.

THE CITY OF CHICAGO

v.

E. A. CUMMINGS *et al.*

Filed at Ottawa, January 19, 1893.

1. SPECIAL ASSESSMENT — *paving street — street railway — benefits assessed to abutting property.* By ordinance of a city a street railway company was required to pave its right of way, being sixteen feet, along a street. By another ordinance the paving of the street its entire width was required, and the commissioners appointed for that purpose reported that they had made an estimate of the cost of such improvement: *Held*, that the cost of paving the center sixteen feet of the street was wrongfully included in the estimate of the cost of the improvement to be charged upon the property benefited, and that judgment of confirmation of the assessment roll was properly denied.

2. In such case the ordinance for the improvement of the entire street is not void, if so much was required for the public convenience; but the city having required the street railway company to "fill, grade, pave and keep in repair during all the time," it has the privilege of using the street, sixteen feet in width, when a double track is used, "in accordance with such ordinance as the city council may pass respecting such filling, grading, paving or repairing," and requiring the same to be done by the railway company with like material, in like manner, and at the time as required in respect of the rest of the street, the cost of paving so much of the street should have been excluded from the estimate.

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APPEAL from the County Court of Cook county; the Hon. GEORGE W. BROWN, Judge, presiding.

Mr. CHARLES C. GILBERT and Mr. JOHN S. MILLER, for the appellant.

Mr. RICHARD PRENDERGAST, for the appellee.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The common council of the city of Chicago passed an ordinance for the curbing, grading and paving of West Lake street in said city, from Homan avenue to Crawford avenue; the cost thereof to be paid by special assessment, to be levied upon the property benefited thereby, to the amount the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation in accordance with article 9 of the Cities and Villages act.

Objection is made, that the nature and character of the improvement are not sufficiently specified in the ordinance, which we do not deem important in this case to determine. It was shown that the middle sixteen feet of the street was occupied by the Chicago West Division Railway Company with double tracks. An ordinance was introduced in evidence, on the hearing for the confirmation of the assessment roll, making it the duty of said railway company to grade, pave, and keep in repair that portion of the street occupied by it. It was also shown that the street was of the width of eighty feet, and another ordinance of the city was introduced in evidence, prescribing the width of sidewalks upon each side of streets of that width, at eight (8) feet, and thereby establishing the width of the street between curbstones at sixty-four feet.

The ordinance requiring the paving, as before mentioned, is wholly silent in respect of the occupancy of said street by said railway company, simply requiring that the street be paved its entire width between the points named, and designating the

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materials to be used and the manner of constructing the improvement.

Commissioners were appointed by the city council to estimate the cost of the improvement, who reported the same at $27,328.28. The commissioners report the entire cost of making said improvement as contemplated in the ordinance, and there is, therein, no exclusion of the sixteen feet in the center of the street occupied by the railway company. The report of commissioners having been approved, a petition was filed in the County Court, under the statute, and commissioners appointed to assess the cost of making said improvement, and apportioning the same according to benefits upon property benefited thereby, etc.

Said commissioners made and filed an assessment roll, in which the entire cost of said improvement is assessed against lots and tracts of land so far as they were found to be benefited, and the balance of the cost apportioned to the city to be paid by general taxation. It thus appears that the railway company was relieved of paying any portion of the cost of said improvement, and the whole thereof assessed against adjacent property owners, or to the city to be paid from its general revenues. If the ordinance providing that the railway company shall grade, pave, and keep in repair the portion of the street occupied by it, is valid, then only so much of the cost of grading, curbing and paving the street outside of the sixteen feet occupied by the railway, should have been assessed against the property benefited, or required to be paid by general taxation. The validity of said ordinance is not questioned in this proceeding. We understand it to be admitted by counsel for the city, that it was intended to exclude from the assessment, the cost of paving that portion of the street occupied by the railway, and it is urged that the commissioners making the estimate, being officers of the city council, must be presumed to have known of the ordinance requiring the railway to pave the center sixteen feet, and it must, therefore, be

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further presumed, that they did in fact exclude such portion of the cost from their estimate. No such presumption can be indulged upon this record. As already seen, the ordinance requires the paving of the street its entire width, and the commissioners report that they have made an estimate of the cost of *such* improvement. It is manifest, therefore, that the cost of paving the center sixteen feet of the street, was wrongfully included in the estimate of the cost of the improvement, to be charged upon the property benefited, and the court correctly ruled, in denying judgment of confirmation of the assessment roll, for that reason.

It does not follow, as seems to be supposed, that the ordinance providing for the improvement is, therefore, void. It properly required the improvement of the entire street, if, in the opinion of the municipality, so much was required or necessary to the public convenience, but the city having required the railway company "to fill, grade, pave and keep in repair during all the time," it has the privilege of using said streets, sixteen feet in width, where a double track is used, etc., "in accordance with such ordinance as the city council may pass respecting such filling, grading, paving or repairing," and requiring the same to be done by the railway company with like material, in like manner, and at the time it is required in respect of the rest of the street, etc., the cost of paving so much of said street should have been excluded from the estimate. Taking this view of the case, it is unnecessary for us to discuss or determine the further objection, that there was no assessment of benefits to the railway property in the street. There is no evidence tending to show that the expense of paving the sixteen feet, would not be a fair and adequate apportionment of cost according to benefits accruing to the property of the railway in the street by the improvement. Or, in other words, it does not appear that the benefits to the railway property, would exceed the cost of paving said sixteen feet. If it would not, and the railway company was required

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to pave that portion, it is clear that no additional burden would be cast upon the property benefited, by requiring it to bear the cost, so far as benefited, of the residue of the improvement. See *Kuehner* v. *Freeport*, 143 Ill. 92; *Chicago* v. *Baer*, 41 id. 306; *Railway Co.* v. *Chicago*, 90 id. 573; *Parmelee* v. *Chicago*, 60 id. 267.

The judgment of the County Court, refusing confirmation of the assessment roll, as against objector's property, will be affirmed.

Judgment affirmed.

ASAHEL GAGE

v.

CHARLES A. GENTZEL *et al.*

Filed at Ottawa, January 19, 1898.

1. BURNT RECORDS ACT — *bill to establish title — allegations and proofs.* On bill to establish title under the Burnt Records act, it is not necessary for the petitioner to allege or prove the destruction of the evidence of his chain of title, but only that the records, or material part thereof, have been destroyed by fire or otherwise so that a connected chain of title can not be deduced therefrom.

2. On such a bill it is competent to show a perfect possessory title in the petitioner, without making any proof of title antecedent to the possession taken.

3. The fact that it is alleged in such petition that particular deeds were lost, will not prevent their introduction in evidence upon the hearing, as they may have been found since the filing of the bill.

4. The bill in a proceeding, under the Burnt Records act, to establish complainant's title, is not required to set forth or charge that a defendant's title is illegal. It is only necessary that adverse claimants be made defendants, and the burden is on them to establish their title to the property.

5. SAME — *of the decree.* On bill to establish title, under the Burnt Records act, the court is required to decree, not what the records showed before they were destroyed, but in whom the title is vested.

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6. In a proceeding under the Burnt Records act a defendant, whose tax title is set aside, can not complain of the failure of the court to require the complainant to refund to him, with interest, the money paid by him in acquiring his tax deed, when he fails to introduce any evidence in respect to such title.

7. SAME — *decree conclusive on all parties as to all claims that might have been made.* A decree on a bill, under the Burnt Records act, establishing the title in fee in the complainant, is conclusive upon all adverse claimants who are made parties, and a bar to their ever afterward setting up any title or claim they may have, as much so as if their claim or title was expressly declared invalid. A title condemned, and a failure to establish title, where a party claims rights under it, and upon whom rests the burden of establishing it, will equally leave him without title.

APPEAL from the Circuit Court of Cook county; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. GAIL E. DEMING and Mr. AUGUSTUS N. GAGE, for the appellant:

The bill, though ostensibly filed under the Burnt Records act, is, in fact, a bill under the Chancery act to remove a cloud from title. *Gage* v. *McLaughlin*, 101 Ill. 155.

The decree does not require appellees to repay appellant the amount of money advanced by him at the tax sales. This was error. *Farwell* v. *Harding*, 96 Ill. 32; *Moore* v. *Wayman*, 107 id. 192; *Gage* v. *Nichols*, 112 id. 269; *Alexander* v. *Merrick*, 121 id. 606.

Messrs. LACKNER & BUTZ, for the appellees:

The decree does require appellees to pay the advances of money made by Gage in and about his tax titles. The cases cited by appellant are not in point.

Counsel also referred to and commented upon *Gage* v. *Caraher*, 125 Ill. 447; *Gage* v. *DuPuy*, 134 id. 132; *Gage* v. *McLaughlin*, 101 id. 155; *Smith* v. *Hutchinson*, 108 id. 662.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellees filed their petition against appellant and others in the Cook Circuit Court to establish their title to real

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estate under the Burnt Records act. They alleged in their petition that they are owners of the property; that the character of their estate was a fee simple; that the public records of Cook county, so far as they relate to the title to said lands, were totally destroyed by fire October 9, 1871, and that the original title deeds, conveyances and instruments of writing relating to the title to said lands had been lost or destroyed, and are not in their power to produce in this cause; that they and their tenant are in possession, and no other person is in possession; that the only person to whom said land has been conveyed since the destruction of the records, and which conveyance has been recorded, is Asahel Gage, who resides at Vineland, N. J.; that Asahel Gage claims an estate in fee, and no other person except your orators and said Asahel Gage owns or claims an estate, in fee or otherwise, in said lands or any portion thereof; that they derive their title as follows: Niels H. Ellickson and wife conveyed said property to Heinrich Gottfried Gentzel, March 31, 1856, by warranty deed, duly executed and delivered, and recorded September 22, 1856, in book 113, at page 671; that at the time of said conveyance said Ellickson was in possession, deriving title thereto from the United States through a complete chain of *mesne* conveyances; that Heinrich Gottfried Gentzel conveyed an undivided half to Charles A. Gentzel, his brother, by warranty deed, September 7, 1859, and recorded January 2, 1861, in book 204, page 540; that Charles A. Gentzel died intestate prior to January 1, 1865, seized of an undivided half of said lots and leaving him surviving, complainants, Charles A. Gentzel and August Gentzel, children and only heirs; that an administrator was appointed, proof of heirship made and his estate duly administered upon and settled in the County Court prior to the destruction of the records, and that complainants, Charles A. Gentzel and August Gentzel, inherited together the undivided half of said property; that Heinrich Gottfried Gentzel entirely disappeared in the year 1864, and has never since been heard of, and by presumption

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of law is considered to be dead; that he died intestate prior to 1872, seized of an undivided half of said property, leaving him surviving Friedericke Schmitz, his sister, and complainants, Charles A. Gentzel, his nephew, and August Gentzel, his nephew, his only heirs at law; that August Gentzel died intestate July 9, 1888, seized of an undivided three-eighths of said property, and leaving complainant, Charles A. Gentzel, his brother, his only heir at law; that the complainants, with their ancestors and grantors, have been in the actual possession of said property, under the deed from said Ellickson, since 1856, and are now in possession; alleges, on information and belief, that the city of Chicago claims some interest under a certain condemnation proceeding; and your orators further state that by reason of the destruction of said records as aforesaid the title of your orators (as hereinbefore respectively set forth) is rendered insecure, uncertain and unsafe, in consideration whereof relief is prayed. The petition was afterward amended so as to describe the deeds under which appellant claimed.

There was an appearance and answer by the appellant, and the court decreed on the hearing, among other things, as follows: " * * * This cause came on for final hearing upon the original petition as amended, and upon the answer of Asahel Gage (and others) and the replication thereto, and upon the depositions, proofs and documentary evidence and testimony offered and obtained in open court, the court having considered the evidence and arguments of counsel and being duly advised in the premises finds that it has jurisdiction of the parties and subject-matter; that the public records were destroyed by fire October 9, 1871; that at said time the original petitioners were in possession of the property claiming title, and that their title was derived as follows: Niels H. Ellickson and wife conveyed to H. G. Gentzel by warranty deed March 31, 1856; H. G. Gentzel conveyed an undivided half to his brother, C. A. Gentzel, by warranty deed September 7, 1859; that C. A. Gentzel

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died intestate April, 1865, seized of an undivided half, and leaving him surviving Marie Maggie Gentzel, his widow, and C. A. Gentzel, petitioner, and August Gentzel, his sons, only heirs at law; that letters of administration were issued April 24, 1865, upon his estate to Gottlieb Wagner, and that the proceedings of the court were destroyed by the fire; that H. G. Gottfried has never been seen since 1864; that he is now dead; that he was never married; that he died intestate prior to 1872, seized of an undivided half of the property, leaving Friedericke Schmitz, his sister, and C. A. Gentzel, his nephew, and August Gentzel, his nephew, his only heirs at law; that after the death of the said C. A. Gentzel, his widow married Gottlieb Wagner; that seven children were born of the marriage, one of whom died, the remaining six, William, Edward, Lena, Julia, Lisa and Henry, were living at the time of the death of their mother, who died October 27, 1886; that August Gentzel died July 9, 1888, seized of an undivided three-eighths; that Henry Wagner died September, 1891, intestate and seized of an undivided three fifty-sixths.

"The court further finds that H. G. Gentzel was in actual possession of the property in the year 1856 under his deed from N. H. Ellickson; that he, with his brother Charles, was then residing upon the property and continued so until his death, claiming to be the owners and exercising acts of ownership; that the petitioners were born upon the property and lived thereon all their lives and continued to live upon said property together with Gottlieb Wagner and children to the time of the commencement of this suit, and are now living there claiming to be the owners thereof, as above set forth, and that they, with their ancestors, have been in possession upon the premises as their homestead, claiming to be the owners continuously since 1856. * * *

"The court finds that a certain tax deed made by the city of Chicago to Asahel Gage, dated September 9, 1868, in book 471, page 361, and re-recorded May 12, 1874, in book 392, page 192,

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purporting to convey the east half of lot 17, is null and void, and it is ordered that the same be and it is hereby set aside and declared to be no lien upon said property.

"The court further finds that a tax deed from George W. Wheeler, county clerk, to Asahel Gage, dated October 19, 1872, recorded February 15, 1873, book 183, page 90, purporting to convey said property, is null and void, and it is ordered by the court that the same be set aside upon the payment of the sums hereinafter provided to be paid to said Gage.

"The court finds that a tax deed from E. F. C. Klokke, county clerk, to Asahel Gage, dated July 16, 1879, and recorded July 19, 1879, in book 905, page 60, purporting to convey said property is null and void, and it is ordered that the same be set aside upon the payment of the sums hereinafter provided to be paid to said Gage, but it is ordered by the court that the owners of said property, as hereinafter found by the court here, pay to said Asahel Gage, within ninety days from this date, the several sums of money actually paid by him for taxes on said property as evidenced by the two last mentioned tax deeds, to-wit: the tax deed, dated October 18, 1872, and the tax deed, dated July 16, 1879, being the only tax deeds offered by the defendant, Asahel Gage, in evidence in this cause, together with six per cent interest on said sums of money from the several dates of payment by said Asahel Gage to this date, and also the sum of any payments made by said Gage for taxes or assessments with like interest thereon from the date of such payments.

"The court thereupon finds, subject to the moneys aforesaid, the title of the property to be in the petitioners aforesaid in the proportions in said decree mentioned; and that said parties are entitled to a decree herein, establishing and confirming their title in the premises above set forth. It is, therefore, ordered, adjudged and decreed by the court that the title of said parties to said premises be and the same is hereby confirmed and forever established in fee simple in the proportions above set

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forth and the cause is referred to the master in chancery to ascertain the amount due Asahel Gage for moneys paid by him for said two tax deeds and interest, and subsequent taxes and interest, interest to be computed to date.

"Thereupon it is by the parties stipulated in order to save the time and expense of the reference to the master, that upon a reference the master would find and report the said amounts paid by said defendant Asahel Gage for said two tax deeds and subsequent taxes mentioned in the foregoing order of reference to be as follows, that is to say (here follows a schedule of taxes, interests and totals):

"And it is stipulated that the stipulation may be considered as a report of said master, and thereupon, on motion of the complainants, the said stipulation is so considered and approved."

It is contended that although the evidence disclosed that the public records were destroyed, it also appeared therefrom that all the title deeds, alleged in the petition to have been destroyed, were, in fact, in existence, and were produced as evidence upon the hearing, and that there was, therefore, no reason for proceeding under the Burnt Records act.

This contention is a little broader than the facts warrant. There was neither a patent nor a deed introduced for the purpose of proving title in Niels H. Ellickson; yet, it has been seen, it was alleged in the petition that he derived title to the property from the United States "through a chain of *mesne* conveyances," and the allegation of the destruction of the records comprehends this "chain of *mesne* conveyances," as well as the conveyances subsequent thereto. It was not necessary to allege or prove the destruction of the evidences of the chain of title, but only "that the records, or any material part thereof, * * * had been destroyed by fire, or otherwise, so that a connected chain of title could not be deduced therefrom." See secs. 6, 11 and 15, chap. 116, R. S., 1874.

The court, in such cases, is required to decree, not what the record showed before it was destroyed, but in whom the title

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is invested. Sec. 15, *supra*. And it was, therefore, competent, as was here done, to show a perfect possessory title without making any proof of title antecedent to the possession. See *Robinson* v. *Ferguson*, 78 Ill. 538.

The fact that it was alleged that particular deeds were lost did not prevent the introduction of such deeds in evidence upon the hearing, since, for aught that is here shown, they may have been found subsequent to the filing of the bill, and before the hearing.

Gage v. *McLaughlin*, 101 Ill. 155, is not analogous to the present case. There the petitioners claimed, by virtue of a foreclosure and sale under a mortgage executed subsequently to the fire, while here the title deed under which the petitioners claim was executed before the fire.

The proceeding being under the Burnt Records act, it is unnecessary to set out that defendant's title was illegal and wherein it was so. It was only necessary that adverse claimants be made defendants, and the burden was upon them to establish title to the property. *Gage et al.* v. *Caraher*, 125 Ill. 447; *Gage* v. *DuPuy*, 134 id. 132.

It is also contended that the decree does not require the appellees to repay to appellant the amount of money advanced by him because of the tax sales.

As to the first tax deed named in the decree, the record shows that appellant failed to introduce any evidence in respect to it. He failed to furnish any basis upon which a decree could be rendered in respect to it. Concede that the court went too far in setting it aside, still, since the decree is conclusive against appellant's asserting any rights under that deed — he having had his day in court and failed to assert them — the effect is in no wise different from what it would have been had the decree made no allusion to it, for a title condemned, and a failure to establish title, where a party claimed rights under it, (and the burden is upon him to establish it), equally leave the party without title.

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As to the two other deeds, the decree expressly finds that the rights of appellees are subject to the sums due for taxes paid by appellant and interest thereon, and the decree setting these deeds aside is conditional upon the payment of those sums. If appellees shall not comply with the decree, they can assert no rights under it.

All other objections urged in argument against the decree are sufficiently answered by *Gage* v. *Caraher* and *Gage* v. *DuPuy*, *supra*.

The decree is affirmed.

Decree affirmed.

THE PEORIA AND PEKIN UNION RAILWAY COMPANY

v.

THE PEOPLE, *ex rel.* Charles Jaeger, etc.

Filed at Ottawa, March 31, 1893.

1. HIGHWAY COMMISSIONERS — *making roads and bridges in incorporated cities and villages — levying tax therefor.* The commissioners of highways, under the act of 1883, section 16 of which was amended in 1889, have no power to engage in the making or improving roads or constructing bridges within the incorporated limits of a city or village, or to make a levy to raise funds to enable them to make improvements in the roads and bridges within such city limits, and any attempt by the commissioners of highways to levy a tax for such a purpose may be enjoined.

2. When a city is organized under a special charter, which gives to it the management, care and control of the streets, highways and bridges within its corporate limits, the commissioners of highways of the town of which the city forms a part have no power to make or improve any highway or bridge in such city, or to interfere with the city in its management and control of the streets, or any improvement to be made in or upon such streets.

3. SAME — *extending tax levy for roads and bridges over property in cities and villages.* The commissioners of highways, in levying a road and bridge tax for their town, have the power to extend the levy over the entire town, including property in an incorporated city within such

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town, and are not limited to such parts of the town as lie outside of the city limits, unless the charter of such city prohibits the township authorities from levying such tax within the city limits.

4. ROAD AND BRIDGE TAX — *on property in cities and villages — how used.* The road and bridge tax on city property, after it is collected and paid over to the city treasurer, is a fund to be used for road and bridge purposes within the city, and should the city authorities undertake to devote such fund to any other purpose, any tax payer of the city, upon a proper showing, would have the right to enjoin the misappropriation of the fund.

5. SAME — *not a city tax — section 16 Road and Bridge law, valid.* The proviso in section 16 of the Road and Bridge law, as amended in 1889, which requires all the road and bridge tax levied and collected within the limits of a city of thirty-five thousand inhabitants or more, shall be paid to the city treasurer "for city purposes," does not render the statute unconstitutional, as such levy is made by the commissioners of highways for road and bridge purposes. The words "for city purposes," as used, are intended to require the tax to be paid to the city treasurer for road and bridge purposes only.

6. CONSTRUCTION OF STATUTES — *purpose considered.* In the construction of a statute courts are not confined to the words used, but may regard the purpose, and, when necessary to give effect to the meaning of the law, words may be rejected and others substituted.

APPEAL from the County Court of Peoria county; the Hon. SAMUEL D. WEAD, Judge, presiding.

Messrs. STEVENS & HORTON, for the appellant:

Commissioners can not collect a road and bridge tax to be expended within the city. Under provisions such as are found in the charter of the city of Peoria the care and charge of the streets and highways within the city are vested in the city authorities exclusively. *County of Cook* v. *G. W. R. R.*, 119 Ill. 223.

Where the city has exclusive control over the streets, the rule that highway commissioners have no authority to levy a road and bridge tax on property within the city does not violate the requirement that all taxes shall be uniform. There is nothing in the present constitution which requires the territorial jurisdiction of a town in respect to taxation for road and

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bridge purposes to be uniform or co-extensive with the territorial limits of the town. *Butz* v. *Kerr*, 123 Ill. 659.

The general words of the Road law, including the act of 1883, giving road commissioners powers within their respective towns, are not to be construed as authorizing them to collect a tax to be expended on the streets or bridges within the city. These decisions are in point because this tax is to be expended within the city by the terms of the law itself. It is as much so as if the commissioners had levied it for that express purpose. *Ottawa* v. *Walker*, 21 Ill. 605; *Commissioners, etc.*, v. *Baumgarten*, 41 id. 254; *People* v. *Supervisors*, 111 id. 527; *People* v. *C. & N. W. Ry. Co.*, 118 id. 520; *Snell* v. *Chicago*, 133 id. 440; *Village of Marseilles* v. *Howlin*, 23 Bradw. 107.

The act of 1883 was not intended to modify the provisions of city charters, and the commissioners have no greater power than before the passage of that act. *Butz* v. *Kerr*, 123 Ill. 659.

The law is unconstitutional. If it was intended that the commissioners should levy a tax on property within the city, then the provision that the amount so levied shall be used for city purposes renders the law unconstitutional, because (1) it authorizes the commissioners to levy a tax for other than the corporate purposes of said town; and (2) because it authorizes a tax to be levied for city purposes by other than the corporate authorities of the city. Constitution, art. 9, secs. 9 and 10; *Wetherell* v. *Divine*, 116 Ill. 631, 635; *Cornell* v. *People*, 107 id. 372; *Weightman* v. *Clark*, 103 U. S. 256; *Snell* v. *Chicago*, 133 id. 440.

The "corporate authorities" intended by the constitution are such municipal authorities as are either directly elected by the people of the municipality, or appointed in some mode to which they had given their consent. *Snell* v. *Chicago*, 133 Ill. 440; *Cornell* v. *People*, 107 id. 372.

The "corporate purpose" intended by the constitution is such purpose as is germain to the object of the creation of the

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municipality. *Supervisors* v. *Weider*, 64 Ill. 427; *Trustees* v. *T. W. & W. Ry.*, 63 id. 299; *Sleight* v. *People*, 74 id. 47.

The "city purposes" mentioned in section 16 of the Road law are foreign to the purposes of the commissioners of highways.

Sections 9 and 10 of article 9 of the constitution not only limit local or corporate tax to local or corporate purposes, but were also intended as a limitation upon the power of the legislature. *Harward* v. *Levee, etc., Co.*, 51 Ill. 130.

Mr. W. T. WHITING and Mr. CULBERTSON, for the appellees:

The tax under the constitution was properly extended over the whole town, and all the tax within the city, when collected, is, by the act of 1889, required to be paid over to the city treasurer for city purposes. *Cooper* v. *Ash*, 76 Ill. 11; *Baird* v. *People*, 83 id. 387; *O'Kane* v. *Treat*, 25 id. 557.

The commissioners having authority under the statute to levy a tax within the township of Peoria for road and bridge purposes, the legislature had the power to direct that the money derived from such tax should be put into the city treasury. *Sangamon Co.* v. *City of Springfield*, 63 Ill. 66; *The People, ex rel.*, v. *Power*, 25 id. 187; *Logan County* v. *City of Lincoln*, 81 id. 156; *Coles* v. *County of Madison*, Breese, 154–160.

It was not the intention of the law to confer authority on the commissioners to construct and maintain roads and bridges within the limits of an incorporated city or village. The town authorities have no control over that part of the tax collected from within the limits of a city or village, for it is required to be paid into the city treasury. R. S., chap. 121, secs. 16 and 83; *People* v. *Suppiger*, 103 Ill. 434; *President, etc.*, v. *Rushville*, 32 Ill. App. 320.

The levy by the commissioners of highways of the town "for road and bridge purposes," and also to "liquidate road and ditch damages," is for one of the corporate purposes for

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which the town was created, and was legal, and did not contravene any provisions of the constitution of the State. *Wetherell* v. *Devine*, 116 Ill. 631; *The People ex rel.* v. *Dupuyt*, 71 id. 651-656.

If in the construction of a statute it becomes necessary to reject some of the words of a statute and substitute others in order to arrive at the intention of the legislature, it should be done, if possible, to harmonize the literal meaning of the words used with the true intention of the law maker. And this will always be done before the courts will declare an act of the legislature void or unconstitutional. *Anderson* v. *C., B. & Q. Ry. Co.*, 117 Ill. 26; *The People ex rel.* v. *Hoffman*, 97 id. 234; *Perry Co.* v. *Jefferson Co.*, 94 id. 214; *Perry* v. *Skinner*, 2 M. & W. 471.

In *Anderson* v. *C., B. & Q. Ry. Co.*, on page 29 in the opinion, the court said: "A thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers. 4 Bacon's Abr. Stat. 468 (45). In determining the meaning of a statute we are not confined to its words, but may regard its purposes."

In *The People* v. *Hoffman*, *supra*, on page 237 of the opinion, Mr. Justice CRAIG said: "In *Walker* v. *City of Springfield*, 94 Ill. 364, it was held that when it becomes necessary to reject one of two words in the statute and to substitute another to give force to the meaning of the law, it should be that which effectuates the legislative intent, and the court should look to the object in view."

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an application at the March term, 1892, of the County Court of Peoria county, for judgment against the property of appellant for delinquent taxes for the year 1891. The facts are undisputed. Before the hearing of the cause upon the agreed facts appellant filed a number of objections to the various items of taxes assessed against its property as shown

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by the delinquent tax list. On June 23, 1892, the County Court entered an order sustaining the objections to all the items of taxes, except the road and bridge tax of the township of Peoria. From this judgment of the court an appeal was taken. The road and bridge tax, extended against appellant's property which is involved in this proceeding, was levied by the commissioners of highways of the town of Peoria, for the year 1891, under the act of 1883, as amended by the act of June 3, 1889, Laws of 1889, page 228. In the stipulation of facts filed on the hearing it was, among other things, agreed that Peoria township embraces within its limits all of the city of Peoria; that there are about seven and one-half miles of highway in said township of Peoria outside the city of Peoria; that in order to raise money enough from the portion of the road and bridge tax to be collected from the property in the township outside the city, to keep in repair the roads in said township outside the limits of the city, the commissioners of highways levied a tax of sixty cents on the $100 for the year 1891.

A proper certificate was made out by the commissioners, filed with the town clerk, and a certified copy forwarded to the county clerk who extended a tax denominated in the tax books as a road and bridge tax for Peoria township of sixty cents on the $100 against the property in the township situated both within and without the limits of the city of Peoria. The tax, as extended against the property of appellant, amounted to $1480.87, of which $1280.62 is against appellant's property situated within the city.

At the time the tax was levied the city contained a population of over thirty-five thousand inhabitants.

That at the time of the levy of said tax, said city of Peoria was organized under a special charter, in force February 20, 1869, but had adopted article 9 of the General City Incorporation law; that among other powers given to said city by said charter were the following:

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To control and regulate the streets and alleys, and to remove and abate any obstructions and encroachments thereon.

To control, regulate, repair, amend and clear the streets and alleys, bridges, side and crosswalks, and open, widen, straighten, extend, vacate and name streets and alleys, and establish and alter the grade thereof and prevent the encumbering of the streets in any manner, and protect the same from any encroachment and injury.

To appropriate money and provide for the payment of the debts and expenses of the city.

To establish, erect and keep in repair bridges.

To lay out public streets, alleys, lanes, avenues and highways in said city and extend, repair, widen, construct, straighten and discontinue the same.

To cause any street, alley, lane, avenue or highway to be filled, graded, leveled, paved, curbed and graveled, macadamized or planked, and keep the same in repair.

In the argument of appellant's counsel it is said "these admitted facts present for decision two important questions:

First. Did the legislature intend to empower highway commissioners to collect road and bridge taxes within the limits of a city incorporated, as in this case, to be expended within the city limits?

Second. Is a law constitutional which provides that the amount realized from the levy of the commissioners on property within the city shall be paid to the city for city purposes; or, in other words, can the legislature, directly or indirectly, empower highway commissioners to levy taxes for city purposes?"

When the levy was made, the act of 1883, in regard to roads and bridges in counties under township organization, was in force, except so far as section 16 of the act had been amended by the act of 1889. The question, therefore, presented involves a construction of the act of 1883, as amended by the act of June 3, 1889. Laws of 1889, page 228.

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Section 2 of the act of June 23, 1883, in regard to roads, highways and bridges, provides: "The commissioners of highways shall have charge of the roads and bridges of their respective towns and it shall be their duty to keep the same in repair and to improve them so far as practicable." Section 13 provides: "That the commissioners shall meet semi-annually on the same day and place of meeting as the board of town auditors. At the meeting immediately preceding the annual meeting of the county board the commissioners shall determine what per cent of tax shall be levied on the property of the town for road and bridge purposes and for the payment of any outstanding orders * * * which levy shall not exceed sixty cents on each one hundred dollars." Section 14 provides for a greater levy when needed, in view of some contingency, by and with the consent of the board of town auditors. Section 16, as amended by the act of June 3, 1889, provides: "That the commissioners at the semi-annual meeting shall make a certificate of the rate per cent agreed upon by virtue of sections 13 and 14, which shall be delivered to the town clerk, and the town clerk shall certify the items of levy to the county clerk to be extended as a tax on the collector's book, to be collected as other taxes, and when collected, paid over to the treasurer of the commissioners; provided, that one-half of the tax collected for road and bridge purposes on the property lying within an incorporated village, town or city in which the streets are under the care of the corporation, shall be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of roads, streets and bridges, either within or without said village, town or city, and within the township, under the direction of the corporate authorities of such village, town or city; and provided, that when any of said tax is expended beyond the limits of said village, town or city, it shall be with the consent of the road commissioners of the town; provided, that in all cities of thirty-five thousand inhabitants or upwards, all of said tax required to be levied and collected under said sections 13

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and 14 within the limits of said city shall be paid over to the treasurer of such city, for *city purposes.*"

In *Town of Ottawa* v. *Walker*, 21 Ill. 605, where the town of Ottawa in its corporate capacity levied a tax for the purpose of building a bridge in the city of Ottawa, it was held that the city had exclusive control over the streets within its corporate limits, and that the township authorities had no power to levy a tax for the purpose of erecting a bridge within the city. The ruling in this case was approved in *Commissioners of Highways* v. *Baumgarten*, 41 Ill. 254, where a similar question arose. So, also, in *Commissioners of Highways of the Town of Ottawa* v. *The Board of Supervisors of La Salle County*, 111 Ill. 527, on a petition for *mandamus* to compel the county to contribute one-half of the expense of building a bridge over Fox river, it was held that a town has no power to levy and collect a tax for the building of a bridge within the incorporated limits of a city which has itself the power to establish, construct and repair bridges within its own limits. The question again arose in *The People* v. *C. & N. W. Ry. Co.*, 118 Ill. 522, and on the authority of the cases *supra*, the same rule was declared. This case came under the act of 1883, but it will be observed, as stated in the opinion, that "the record shows, and it is a conceded fact, that the tax in question was levied for the improvement of certain roads, a part of each of which lies within an incorporated village in said town."

The foregoing cases have been cited and relied upon to establish the proposition that the commissioners of highways had no power to levy a tax on property within the city limits. But it is apparent that the cases do not go to the extent claimed by counsel. In each one of the cases, as will be seen upon examination, the commissioners were attempting to make an improvement within the incorporated city, and a levy was made to aid them in making such improvement. That is not the case here. The commissioners of highways, as we understand the record, did not attempt to engage in mak-

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ing or improving roads or constructing bridges within the incorporated limits of the city of Peoria, nor did they make the levy to raise funds to enable them to go on and make any improvements on the roads and bridges within the city limits. If they had, their action would be condemned by the cases cited. At the time the tax was levied, the city of Peoria was organized under a special charter which conferred upon the city the management, care and control of the streets, highways and bridges within the incorporated limits, and the commissioners of highways had no power to make or improve any highway or bridge in the city, or interfere with the city in its management and control of the streets, or any improvement to be made in or upon such streets. But while this is true, the question remains whether the commissioners of highways in levying a road and bridge tax for and in behalf of the town have the power to extend the levy over the entire township, or are they restricted to such parts of the town as lie outside of a city which may be located in the township.

We find no provision of the charter of the city of Peoria which exempts property lying within the city from taxes authorized under the provisions of the Road and Bridge law of the State, or which prohibits the town in which the city is located from levying a road tax within the city limits; if any such provision existed, that would end the controversy and the case would fall within the rule declared in *Butz* v. *Kerr*, 123 Ill. 659. In the case just mentioned it was held, that the town of Kankakee was not authorized to levy or collect a road tax within the incorporated limits of the city of Kankakee, but there was an express provision in the charter of the city, which prohibited such levy by the town, and the decision of the case was placed on the prohibition contained in the charter. These commissioners were elected by the voters of the entire township of which the city of Peoria was a part. There is no provision in the act under which they levy a road and bridge tax, which empowers them to confine their levy to property outside

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of the city limits. Section 13 of the act provides, in plain terms, that the commissioners at the meeting at the time and place of the meeting of the town board, shall determine what per cent of tax shall be levied on the property of the town for road and bridge purposes, etc., which shall not exceed sixty cents on each $100. Section 16 of the Road and Bridge act in R. S., 1874, provided that "the commissioners of highways shall assess a road tax on all real estate and personal property, liable to taxation, of the town, * * * not exceeding forty cents on the $100, * * provided that the tax on property lying within any incorporated village, town or city in which the streets * * * are under the care of the corporation shall be paid to the treasurer of such incorporation, to be appropriated to the improvement of roads, * * * under the direction of the corporate authorities." A tax having been levied and collected under this section of the statute in a township in which the city of Morrison was located, the collector refused to pay the city the tax collected on property lying within its limits, and we held that the city was entitled to collect it; and in disposing of the case it is said, "Why should the city expect any part of the tax with which to pay damages by reason of the opening, altering or laying out of new roads? To our minds the answer is obvious. The city is burdened with the entire expense of laying out, improving, repairing, etc., all avenues of travel within its limits, whether they be called streets, boulevards, avenues, alleys or roads or highways, and of constructing and repairing bridges, culverts, etc.; and it was deemed by the legislature to be unjust to burden it also with the expense incident to the public highway system beyond its limits. But the township system frequently necessarily includes cities within the towns, which are created as subdivisions of the counties, and for which commissioners of highways are elected. In levying the taxes the commissioners of highways observe the constitutional mandate of 'uniformity within the jurisdiction of the body imposing the same,' and

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thus extended the tax alike within as beyond the city limits throughout the town, but when collected, that arising from the property within the city is to be used within the city, and that from property beyond its limits is to be used beyond its limits."

If the law of 1874 is valid, and a levy under it upon all property within the township authorized, upon the same principle and for the same reason, a levy under the act of 1883 on the property of the entire township must be sustained. In *Cooper* v. *Ash*, 76 Ill. 17, although the question presented in the last case cited was not involved, the same reasoning is used.

But it will be observed that at the time the levy was made, the city of Peoria contained within its incorporated limits over thirty-five thousand inhabitants, and hence all that part of the road and bridge tax collected within the city would be controlled by the last proviso of section 16, if valid. It is, however, insisted in the argument: "If it was intended that the commissioners should levy a tax on property within the city, then the provision that the amount so levied shall be used for city purposes renders the law unconstitutional, because (1) it authorizes the commissioners to levy a tax for other than the corporate purposes of said town; and (2) because it authorizes a tax to be levied for city purposes by other than the corporate authorities of the city."

It may be conceded that a tax can only be levied for city purposes by the corporate authorities of the city, and that the commissioners of highways cannot levy a tax for other than corporate purposes of the township. But the levy here involved was for road and bridge purposes, and that such a purpose is a corporate purpose for which the town was created can not be questioned or denied. The real question, however, is whether the language of the proviso in section 16, which declares that the tax required to be levied and collected within the limits of the city shall be paid over to the treasurer of the city for city purposes, renders the tax a city tax. We do not regard that as the proper construction to be placed on the lan-

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guage of the proviso. In order to determine the intention of the legislature in the enactment of the proviso, the different provisions of section 16, and the remaining portions of the act of 1883 must all be considered. The first part of section 16, as amended, declares: "The commissioners, at said semi-annual meeting, shall make a certificate of the rate per centum finally agreed upon by virtue of sections 13 and 14 of this act; also the amount to liquidate road and ditch damages, and shall cause such certificate to be delivered to the town clerk." By going back to section 13, referred to, it declares: "The commissioners shall meet, etc. * * * At the meeting immediately preceding the annual meeting of the county board, the commissioners shall determine what per cent of tax shall be levied on the property of the town for *road* and *bridge purposes*, and for the payment of outstanding orders drawn by them on the treasurer, which shall not exceed sixty cents on each $100." These provisions, which confer the power to make the levy, show the object and purpose for which the levy is made; and that purpose is for road and bridge purposes, payment of orders, and to liquidate road and bridge damages, and nothing else. There is here no intimation that the tax or any part of it is levied as a city tax to be devoted to city purposes. Keeping, therefore, in view these provisions of the statute which lie at the foundation of the levy, the construction to be placed upon the language of the last clause of the proviso is obvious; that is, the words, "for city purposes," were intended to require the tax to be paid to the city treasurer for road and bridge purposes. The tax, after it is collected and paid over to the city treasurer, is a fund to be used for road and bridge purposes within the city, and should the authorities of the city undertake to divert the fund to any other purpose, any tax payer of the city, upon a proper showing, would have the right to enjoin the misappropriation of the fund. In the construction of a statute, courts are not confined to the words used, but may regard the purpose, and when necessary to give effect to the meaning

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of the law, words may be rejected and others substituted. *Perry County* v. *Jefferson County*, 94 Ill. 214; *The People* v. *Hoffman*, 97 id. 234; *Anderson* v. *C., B. & Q. R. R. Co.*, 117 id. 26.

The judgment of the County Court will be affirmed.

Judgment affirmed.

MAGRUDER, J.: I do not concur.

CHARLES W. BATCHELLER *et al.*

v.

NOAH H. BATCHELLER.

Filed at Ottawa, January 19, 1893.

1. SPECIFIC PERFORMANCE — *of contract without valuable consideration.* A written agreement for the conveyance of an interest in land, if made without any valuable consideration received or to be received, can not be specifically enforced.

2. SAME — *burden of proof as to consideration.* On bill for the specific performance of a bond for a deed, which recites a money consideration, the burden of proof rests upon the defendant to establish his defense of a want of consideration for his agreement by clear and satisfactory evidence.

3. CONTRACTS — *bond for a deed — without consideration.* Where an indebtedness is paid by the conveyance of land in Dakota, and subsequently the debtor, by a distinct agreement, gives a bond for a deed to the creditor for the conveyance of other land to indemnify him against loss on a sale of the Dakota land, the bond given under the subsequent agreement will be purely voluntary and without consideration.

4. SAME — *bond for a deed — security for existing debt.* To show that a bond for a deed of a party's interest in an estate is, in fact, a security for a subsisting debt, it is not enough that the proof shall merely show a parol agreement to reconvey. There must be a continuing valid indebtedness secured by it which may be enforced by the holder of the bond in an action at law.

5. When a party claims that his written contract to convey real estate was given as a security for the payment of a debt, the burden of proof will be on him to prove the fact.

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Statement of the Case.

6. PAROL EVIDENCE — *to establish express trust.* Parol evidence is inadmissible to establish an express trust in real estate where the statute of frauds is pleaded.

7. APPEALS AND WRITS OF ERROR — *reversing a decree for insufficient evidence.* To justify this court in reversing a decree, it must not only find that it is not sustained by a preponderance of the evidence recited in the record, but this after making due allowance for the effect of whatever there may have been peculiar in the giving of oral testimony that may have legitimately affected the credibility of the several witnesses with the chancellor.

APPEAL from the Circuit Court of La Salle county; the Hon. DORRANCE DIBELL, Judge, presiding.

This was a bill by Noah S. Batcheller against Charles W. Batcheller and Annie Batcheller, his wife, for the specific performance of the following contract:

"We, Charles W. Batcheller and Annie Batcheller, his wife, of the county of Yankton, in the Territory of Dakota, in consideration of the sum of one thousand dollars, to us in hand paid by Noah S. Batcheller of the county of La Salle and State of Illinois, do hereby agree and bind ourselves to execute, acknowledge and deliver unto the said Noah S. Batcheller within reasonable time after the death of Wesley Batcheller, father of the said Charles W. Batcheller and Noah S. Batcheller, our quit claim deed of all the right, title and interest which I, the said Charles W. Batcheller, may or shall have in the real estate of the said Wesley Batcheller at the time of his decease; having received from the said Noah S. Batcheller full payment for all of the real estate which we apprehend we shall become entitled to out of the estate of the said Wesley Batcheller, upon his decease, we do hereby agree to execute such deed or writings after his decease as will perfect in the said Noah S. Batcheller our title in said real estate.

"Witness our hands and seals this fifth day of July, A. D., 1879.

(Signed) CHARLES W. BATCHELLER [SEAL]
ANNIE BATCHELLER [SEAL]

"In the presence of C. J. B. Harris, T. P. Redaelli."

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Statement of the Case.

Appended was a certificate of acknowledgment in due form of law. The bill shows that Wesley Batcheller, father of Noah and Charles, made his last will and testament in and by which he devised to Charles and another brother a certain tract of land, which is described, and afterward died, whereby Charles became seized in fee of the undivided half of that tract; and it charges that Noah had paid Charles therefor $1000.

Answer was filed denying that Noah had paid Charles $1000 for the land — and setting up these facts — "That in the year 1872 Charles W. Batcheller became indebted to Noah S. Batcheller in the sum of $2047 or thereabouts, which was evidenced by two promissory notes, the first dated February 21, 1872, for $1687, which was executed by Charles W. and Annie Batcheller, and payable to complainant on or about the 15th day of March, 1873; the second note bearing date October 12, A. D. 1872, for $360, payable twelve months after date and executed by Charles W. Batcheller. That on or about the 11th day of April, A. D. 1879, these defendants made settlement with said Noah S. Batcheller of all indebtedness in the manner following: That complainant and defendant computed the interest and agreed that the total indebtedness, principal and interest, was a little less than $3200; that the defendant Charles W. Batcheller and wife deeded to complainant three hundred and twenty acres of land, situated in the county of Yankton, in what was then the Territory of Dakota, but now State of South Dakota, at the agreed value of $10.00 per acre, or $3200, in full settlement and payment of said indebtedness, and complainant surrendered to defendant the said two promissory notes; copy of deed annexed marked 'Exhibit A.' Answer further says defendants believed said lands would rapidly increase in value and soon become worth much more than said indebtedness, and so made known their belief in that regard to complainant, whereupon it was further agreed between complainant and defendant that all complainant wanted was full payment of said

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indebtedness, and that in the event of said lands becoming more valuable, so that they were of more value and worth more than the said debt so owing by defendant to complainant, including interest at the rate of seven per cent, that then and in that case, whatever balance there might be made from the sale of said lands after paying said indebtedness should by the said Noah S. Batcheller be returned to defendant Charles W. Batcheller; and that at said time said complainant professed to believe that said lands might not increase in value, and that said Noah S. Batcheller might not receive from the same the full payment of said indebtedness with interest at seven per cent per annum, and in that connection represented to defendant that the interest of defendant Charles W. Batcheller in the estate of his father, Wesley Batcheller, on account of certain reasons then and there alleged by said complainant, would be very small, if anything; and the said complainant asked and requested of these defendants that they would give him, the said Noah S. Batcheller, as further security for said indebtedness, and for any loss that might be sustained by him, because of the failure of said land, so conveyed to him, to increase in value from year to year, such interest as this defendant, Charles W. Batcheller, might have in the estate of his father, the said Wesley Batcheller; this in further security for any loss that complainant might so sustain. And accordingly it was agreed between complainant and these defendants that some instrument which in effect would be a mortgage lien upon such interest as the defendant Charles W. Batcheller might have in the estate of his father, should be executed as such security for any possible loss which might accrue to the said Noah S. Batcheller in the way above recited; and accordingly, in order to secure said Noah S. Batcheller against any possible loss that might arise in the manner above stated, the agreement as before recited was executed. The answer further states that said agreement was intended and designed by these defendants and by the complainant to be held

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only as having the force and effect of a mortgage lien upon such interest as the defendant Charles W. Batcheller might have in the estate of his father, to secure any possible loss that might accrue to complainant, on account of a failure of said land so conveyed to complainant to rise in value as fast as the interest on said indebtedness might accumulate, as above stated; denies any other consideration of any kind or character for said contract. Charges that said lands so conveyed to complainant have largely increased in value, and that they are worth to day $25 per acre, and will sell for that amount on the market; that their real value to day is about $8000, which far exceeds said indebtedness and interest thereon to date; that said complainant has, therefore, suffered no loss, but has received much more than his just and fair due for and on account of said loan; that no contingent loss has occurred, and that, therefore, said contract is without any consideration whatever.

The defendants Charles W. and Annie Batcheller also filed a cross-bill, setting up the same facts alleged in their answer, and praying for an account and that the contract be cancelled as a cloud upon their title.

Messrs. REEVES & BOYS, for the appellants.

Messrs. SNYDER & STEAD, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The burden was upon appellants to prove that this agreement was in fact a security for a subsisting indebtedness. It is not enough that the proof shall merely show a parol agreement to reconvey; there must be a continuing valid indebtedness secured by it, which may be enforced by appellee in an action at law, or it is not a mortgage, whatever else it may be. *Fisher* v. *Green*, 142 Ill. 80; *Freer* v. *Lake*, 115 id. 662; *Sutphen* v. *Cushman*, 35 id. 186; 3 Pomeroy's Equity (2d ed.), sec. 1195, note 1.

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The agreement here recites that Charles W. and Annie Batcheller have been paid by Noah S. Batcheller $1000, in consideration whereof they undertake to make the conveyance. And it again recites that, "having received from Noah S. Batcheller full payment for all of the real estate" which Charles W. and Annie "apprehend they shall become entitled to out of the estate of the said Wesley W. Batcheller upon his decease," they do thereby agree to execute deed, etc. Noah S. Batcheller's testimony is in conformity with this recital. He shows a previous indebtedness which, as will hereafter be seen, is admitted by Charles W., and that Charles W. made conveyance of certain lands in Dakota, and executed this agreement in payment and satisfaction of that indebtedness.

Charles W., in his testimony, disagrees with this testimony only in saying that the agreement was not made in satisfaction of any part of the indebtedness. He says the indebtedness was paid and its evidence surrendered to him, and a mortgage securing the major part of it cancelled of record before this agreement was made, and that this agreement was subsequently made to protect Noah S. against loss on account of what he had accepted in payment of the indebtedness, namely, certain lands in Dakota.

He testified: "On the 5th day of July, 1879, I was the owner of the W. ½ of the S. E. ¼ and the E. ½ of the S. W. ¼ of section 5, and the S. W. ¼ of section 9, all in town 93, range 54, in the county of Yankton, then Territory of Dakota, 320 acres. I remember making my brother, Noah S. Batcheller, a deed of this land. At that time I owed my brother $2047 principal, and with the interest added it lacked $8.55 of being $3200. Two notes, marked Exhibits B and C, shown witness. These are the notes representing the indebtedness which I owed my brother. I was not owing my brother any money at any time other than what was evidenced by these two notes. We made a settlement of this indebtedness on or about the 5th day of July, A. D. 1879. We computed the interest and

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arrived at an agreement that the amount that was owing on these notes was $8.55 less than $3200. We agreed to figure these notes at seven per cent.

"Exhibit B. Note for $360. Dated October 12, 1872. Executed by C. W. Batcheller, payable to the order of N. S. Batcheller, twelve months after date, interest 10 per cent. Endorsed on back as follows: 'Paid in full, July 5, 1879.' Exhibit C. Promissory note, dated February 21, 1872. Executed by C. W. Batcheller and Annie Batcheller, for $1687, payable to the order of N. S. Batcheller on or before the 15th day of March, 1873. Endorsed on back as follows: 'Paid in full July 5th, 1879.'

"I took the notes up at that time. At that time I paid these notes in property, the half section of land described in the deed, marked Exhibit A, and the notes were surrendered to me. The transaction took place in the office of C. J. B. Harris, in Yankton, Dakota. He is an attorney and real estate agent. Noah offered to settle at that time at seven per cent interest if I would pay him cash, and I started for Mr. Edmund's bank; as we came to the corner across the street from the bank, he says: 'Stop; you have gone far enough. I will take part of your land.' Saying that he gave me the benefit of my intentions in settling as though I had given him cash. This occurred in Yankton. Noah was with me. Noah was at our home several days on a visit and settling up. Immediately after this conversation we went and executed the deed. After we had executed this deed and the notes had been surrendered to me, we had a talk with reference to the land that I might inherit from my father in La Salle county, Illinois. He wished my interest in the real and personal property that might come to me from my father's estate. I said: 'I will not give you the personal property, but will give you the other as security.' That was put in as security, as having the force and effect of a mortgage. He had allowed me a fair price for my Dakota land, but was not

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certain that it would be worth what I would be owing him, computing interest up to the time that father died, so he wished this paper that I gave him as protection in case the property at father's death was not worth as much as the principal and interest up to that time. He said, furthermore, if there was anything over what would be really coming to him he would pay it back, he did not want any more than enough to pay the debt and interest. After having this conversation we entered into the contract upon which this suit is instituted."

On cross-examination he said:

"The note for $1687 was made in Yankton. It is not in my handwriting. I gave to secure that note a mortgage on my home where I live in Yankton. It was afterwards released when we made the settlement in July, 1879. I made no payments on the note prior to July, 1879, nor on the $360. My home, at the time I gave the mortgage, ought to have been worth $2000. * * * I told Mr. Harris that I had arranged with Noah to let him have that half section of land, and I wished to deed it to him, and wanted him to draw the deed. He drew the deed, only Mr. Harris, my brother and I present at that time. When this was done, Mr. Harris wrote on the back of the two notes 'paid in full, July 5, 1879.'

"Mortgage did not include any other property than my residence. At the time of the settlement my brother released that mortgage, July 5, 1879. After all that was done, then something was said about what I should get from my father's estate in La Salle county, Illinois. At that time my brother said that the land there (Dakota), as the land there might not be worth enough to satisfy his just claim against me at the time father would die, or might not satisfy his just claim against me, he wished me to give him this release obligation, as I have called it, a quitclaim of my interest. * * * This contract was taken to make the land good, to make the half section good, when it come to be sold, for what I owed him. As he had taken the half section in full settlement, not

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being certain that it would be enough at the time of father's death to satisfy fully his claim, for which that had been received by him and given by me, or sold by me to him, he took this contract with reference to my interest in father's real estate so that it would make up any deficiency, having the force and effect of a mortgage. The half section of land was to be sold at the time of my father's death. No time set, but that was the time as I understand it."

The substance and effect of all this may be paraphrased thus: Charles W. was indebted to Noah S. by his two promissory notes, one dated October 12, 1872, payable twelve months after date, for $360, and the other dated February 21, 1872, payable March 15, 1873, for $1687. Both bore interest at the rate of ten per cent per annum, and the latter was secured by mortgage on a house and lot, the homestead of Charles W., in Yankton, Dakota, of the value of $2000. No payments of principal or interest having been made on either note, in July, 1879, the parties had a settlement, and then agreed that Charles W. should convey, by warranty deed, to Noah S. a half section of land in Dakota, which Noah S. should accept in payment of the amount due upon these notes. This agreement was executed on both sides, the conveyance was made, the notes were marked paid and surrendered to Charles W., and the mortgage on the homestead of Charles W. in Yankton, securing the payment of the larger note, was released on the record thereof. Plainly then Charles W. owed Noah S. nothing. Thereafter Noah S. could have maintained no suit against Charles W. on the notes, for they had been paid and surrendered. There was no subsequent indebtedness incurred by Charles W. to Noah S., and Charles W. was indebted to him on no other or different account. Then, after this indebtedness was thus paid, it was agreed between the parties that Charles W. should convey whatever interest he might have in their father's estate to secure Noah S. against loss on account of the Dakota lands which he had taken in payment. The transactions thus appear

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to have been entirely distinct, and the security is not taken for an existing indebtedness, but as against a loss where there was no legal liability in the event of loss; in short, the agreement to make the conveyance is purely voluntary, and without any consideration. The other evidence introduced on behalf of appellants has no tendency to prove that the original indebtedness from Charles W. to Noah S. was kept alive after the conveyance of the Dakota land, but its tendency is directly to the reverse. Thus William Laning testified: "He"—that is, Noah S.—"came to my house on a visit, and he told me that he had taken Charles' land down on the bottom to pay him for borrowed money that he had borrowed of him some years before.

He said that the land—he did not know whether it would be worth as much if it was sold right then as the debt would amount to or not, but he said it would soon be worth $15 per acre, and then it would be worth more to him than the money out at interest. He said that Charles was willing to give him other security, but he either said that he would not take anything more from Charles than the land, or that he was satisfied with the land, for he thought it would be better than the money at interest. Said that Charles was willing to give him other security, and he didn't know but what he would let him make out some other papers, but he did not think he would ever use them, because he was satisfied that the land in a short time would be worth as much, or more, than the debt, and he was willing to take it."

On cross-examination he repeated: "In the conversation in relation to the land he told me that he had taken the land from Charles to pay the debt that he was owing him, and that he was satisfied to take the land, although Charles was willing to give him other security in case the land did not improve in value."

The testimony of Chester Laning is, in substance, to the same effect. John W. Batcheller, son of Charles W., testified

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to an admission of Noah S. to the effect that there would be something coming back to Charles W. if the Dakota land brought $25 per acre, but what amount was not stated, nor was it stated why it would be, and that assumed, too, that this agreement should be carried out.

The parol evidence is inadmissible to establish an express trust, for the statute of frauds is pleaded.

Clearly, then, the court properly refused the relief prayed in the cross-bill.

We concede that it does not follow that because relief ought not to have been granted on the cross-bill, it ought to be granted upon the original bill, for if the agreement was without any valuable consideration, received or to be received by Charles W., it cannot be specifically enforced. But the burden is upon appellants to establish that defense by clear and satisfactory evidence, and we are unable to say that the court below erred in holding that they have not done so.

In the first place, it is not pretended that there was either fraud, accident, or mistake in executing this instrument. Charles W. does not pretend that he did not knowingly sign it, or that he was by artifice prevented from knowing what he was signing. Why was it not made to speak the truth as respects the purpose for which it was executed? Charles W. gives no explanation.

Charles W., his son, John W., and Noah S. Batcheller, each testified orally before the chancellor, and so he had those opportunities of judging of the relative truthfulness of witnesses which are afforded by an oral examination — and they are denied us. To justify us in reversing this decree, therefore, we must not only find that it is not sustained by a preponderance of the testimony recited in the record,— but this, after making due allowance for the effect of whatever there may have been peculiar in the giving of the oral testimony that might have legitimately affected the credibility of the several witnesses with the chancellor.

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To our minds, the story told by Noah S. has more inherent probability of truthfulness than that told by Charles W.

Not being convinced that the decree granting the prayer of the original bill is contrary to the preponderance of the evidence, the decree is affirmed.

Decree affirmed.

LEROY PAYNE *et al.*

v.

JAMES IRVIN.

Filed at Ottawa, March 31, 1893.

1. LANDLORD AND TENANT — *keeping premises in repair.* Where the owner of a building leases a room thereof to be used as a blacksmith shop, at a monthly rental, reserving the entire control of the other parts of the building, including the roof, and of a large sign fastened to the roof, the landlord, as to that portion of the building and appurtenances over which he retains control, will be held to retain also the responsibility to keep the same in reasonable repair in respect of all persons, including the tenants of the room.

2. When a landlord rents a room in a one story building, at a monthly rental, which building has a sign-board attached to the roof, not used by the tenant in any way, but which is used by the former for his own use, and he suffers the fastenings of the sign to get out of safe repair, in consequence of which it is blown down and a serious injury is thereby inflicted upon the person of the tenant, who has exercised ordinary care to save himself from the injury, the landlord will be liable to such tenant for the damages received by him.

3. APPEALS AND WRITS OF ERROR — *directing what the verdict shall be — question on appeal to the Supreme Court.* In an action based on the negligence of the defendants, resulting in a personal injury, the defendants asked and the court refused an instruction requiring the jury to find in their favor: *Held*, that the question presented to this court on appeal was, whether there was evidence tending to establish a right of recovery, and that it was confined to the simple question whether there was evidence from which the jury might have legitimately found for the plaintiff.

4. SAME — *reviewing questions of fact — negligence of landlord.* Where a tenant sues his landlord for a personal injury caused by the

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blowing down of a sign-board from the top of a building, a part of which was occupied by the plaintiff as a tenant of defendant, on the ground of neglect to keep the sign-board properly fastened, the questions of negligence on the part of the plaintiff in removing a brace which supported the board, and of notice to him of the insecure condition of such board, and whether the falling of the same was the result of an extraordinary wind which reasonable foresight could not have guarded against, are all questions of fact, not reviewable in this court on appeal from the Appellate Court.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. GEORGE F. WESTOVER, for the appellants:

In the absence of express contract on the part of Payne, he, as lessor, was not charged with the duty of keeping the part of the building occupied by the tenant in safe repair. *Plett* v. *Farney*, 16 Bradw. 216.

There is no evidence that would show that the sign-board was a nuisance in 1885, and there was no agreement on the part of Payne to repair. *City of Peoria* v. *Simpson*, 110 Ill. 294.

If the sign-board was not in safe condition just before it fell it would by no means follow that it was unsafe three years previous to that time, when Irvin hired and went into possession of the premises, and if not then in dangerous condition the lessor would not be liable.

If the fastenings of the sign-board had become unsafe, and if a customer of Irvin, when approaching or leaving the shop, had been injured by reason of the defective condition of the fastening, Irvin, as a tenant in possession, would have been liable unto the injured person. He would have been the negligent party. If an action would lie against him on account of what damage the sign may have done, it can not lie in his favor. He can not sue another, in other words, for his own fault. Shearman & Redfield on Negligence, 504.

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A tenant who has been in possession of premises for years must be supposed to know of defects, if they exist, and must use such increased care as the defective nature of the thing requires, and can not excuse himself for want of such care by the plea that he was not responsible for the defect. Shearman & Redfield on Negligence, 504.

Payne had no right of entry upon any portion of the building leased to Irvin and his partner, against the consent of the lessees, not even to repair, and can not, therefore, be made liable for any accidents occasioned by a want of repair in that part occupied by the lessees. *Veder* v. *Veder*, 1 Denio, 257; *Gridley* v. *City of Bloomington*, 68 Ill. 47.

If the landlord expressly agreed to repair he would be liable to third parties. *Union Br. Mfg.* v. *Lindsay*, 10 Bradw. 583.

But there is no implied contract on the part of the landlord that he will repair, or that the premises are in safe condition for occupancy. *Mendel* v. *Fink*, 8 Bradw. 378; *Greene* v. *Hogue*, 10 id. 598.

When there is equal negligence on both sides, without any intentional wrong on the part of either, or if the plaintiff, whether by his own negligence or otherwise, has contributed substantially to produce the accident, no action lies. Taylor's Landlord and Tenant, sec. 199.

One who complains of another's negligence should himself be without fault as to the particular delinquency complained of. *Brownell* v. *Flagler*, 5 Hill, 282. And see authorities cited in note 3, to section 199, Taylor's Landlord and Tenant.

If Irvin or his partner removed a brace from the sign-board in making changes or repairs for their own use and convenience, they assumed all responsibility as to the safety of the remaining fastenings, and the lessor would not be liable, either to them or third parties, for any injury thereafter caused by the insecurity of the structure. *Ryan* v. *Wilson*, 87 N. Y. 471; *Bard* v. *N. Y. & H. R. R. Co.*, 10 Daly, 520; *Crandall* v. *Loomis*,

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56 Vt. 664; *Stone* v. *Codman*, 15 Pick. 297; *Earl* v. *Hall*, 2 Met. 353.

If the lack of fastenings caused the sign to fall, then removing one of the braces was the proximate cause of the injury to plaintiff. *King* v. *O. & M. Ry. Co.*, 25 Fed. Rep. 799.

Messrs. WEIGLEY, BULKLEY & GRAY, for the appellee:

Negligence is not a legal question, but one of fact. *Great Western R. R. Co.* v. *Haworth*, 39 Ill. 353; *C. & A. R. R. Co.* v. *Pennell*, 94 id. 455; *Penn. Co.* v. *Conlan*, 101 id. 106.

The affirmance of the judgment by the Appellate Court conclusively settles all controverted questions of fact in favor of such judgment. *Alphin* v. *Working*, 132 Ill. 484; *Brownell* v. *Welch*, 91 id. 523; *Germania Fire Ins. Co.* v. *McKee*, 94 id. 494; *Brant* v. *Lill*, 96 id. 608.

"Where there is evidence on the trial tending to prove the issues of fact in favor of the successful party, and the Appellate Court affirms the judgment below, this court must take the affirmance as a finding of the facts as they were found by the Circuit Court." *Hewitt* v. *Board of Education*, 94 Ill. 528; *Sconce* v. *Henderson*, 102 id. 376; *Bennett* v. *Connelly*, 103 id. 50.

"All matters relating to the character, force and effect of the testimony are settled by the judgment of the Appellate Court, and are not open for review in this court." *Fitch* v. *Johnson*, 104 Ill. 111.

"Whether there is a conflict of evidence or not, this court can not reverse a judgment on the ground that issues of fact were improperly decided below, when the judgment has been affirmed by the Appellate Court." *Insurance Co.* v. *Barrel Co.*, 114 Ill. 103.

"The judgment of the Appellate Court is final, not only in respect to the principal and ultimate facts upon which the right of recovery is claimed, but also in respect to the evidentiary and subordinate facts. *Hamburg-American Packet Co.*

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v. *Gattman*, 127 Ill. 608, and cases cited. Nor can the court go behind the judgment of the Appellate Court and consider what inferences might arise from particular facts appearing in the bill of exceptions." *Montgomery et al.* v. *Black et al.*, 124 Ill. 64; see also, *Cothran* v. *Ellis et al.*, 125 id. 502–5; *Illinois Central R. R. Co.* v. *Frelka*, 110 id. 501.

It is a general rule of law that it is the duty of the owner or occupant of a building to keep it in such a state that his neighbor may not be injured by its fall. *Vincett* v. *Cook*, 4 Hun, 320; *Benson* v. *Suarez*, 43 Barb. 408; *Graham* v. *Gross*, 125 Mass. 232; *Kappes* v. *Appel*, 14 Bradw. 170; *Mullen* v. *St. John*, 57 N. Y. 567.

Where the landlord retains control of the building, and the tenant has only rooms, the landlord is liable to the tenant for any injury caused by neglecting to keep the building or parts of the building under his own control in proper repair. *Toole* v. *Beckett*, 67 Me. 544; *Looney* v. *McLean*, 129 Mass. 35; *Eagle* v. *Swayze*, 2 Daly, 140; *Bold* v. *O'Brien*, 12 id. 160; *Center* v. *Davis*, 39 Ga. 210; *Watkins* v. *Goodall*, 138 Mass. 533; *Priest* v. *Nichols*, 116 id. 407; *Ward* v. *Fagan*, 28 Mo. App. 116; *Glickauf* v. *Maurer*, 75 Ill. 289; *B. B. C. Co.* v. *Rees*, 69 Wis. 442; *Sawyer* v. *McGillicuddy*, 17 Atl. Rep. 124.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

Counsel for appellants, in his brief filed in this court, says: "I admit that the sole question before this court is whether, as a matter of law, the facts in proof will support the verdict."

On the trial appellants asked, and the court refused, an instruction requiring the jury to return a verdict for the defendants, and thereby the court was asked to say, as a matter of law, that the facts proved, with all the inferences legitimately arising therefrom, were insufficient to sustain a verdict for appellee. Under this state of the case, the question presented for our consideration is, whether there was evidence tending to

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establish a right of recovery. The weight and credit to be given the evidence was within the province of the jury, and they having found for plaintiff, and the finding having been approved by the trial and Appellate Courts, we are not permitted to enter that domain, but are confined to the simple question whether there was evidence from which the jury might, legitimately, have so found.

Appellants rely, in this court, chiefly upon two grounds: *First*, it is said that no negligence is attributable to appellants; and *second*, if negligence is chargeable to them, that appellee was guilty of negligence contributing to the injury, and, therefore, can not recover.

On the 11th day of June, 1888, a sign-board, four or five feet wide and about sixty feet long, was blown from a one story building on Michigan avenue, in Chicago, striking appellee and seriously injuring him. Appellee was the tenant of appellant, Leroy Payne, of a room, in said one story building, of twenty-five or thirty feet front and fifty or sixty feet deep, and used by him, appellee, as a blacksmith shop. The sign in question extended on top of the front wall of said one story building, and over the entire part occupied by appellee. The evidence tended to show that the renting by appellee was from year to year, at a monthly rental. It also tended to show that appellee and his partner were to put the room in repair for the uses to which they designed it. It pretty clearly appears that nothing was said about who should keep the roof and the outside of the building in repair. It was, however, understood between the parties that the tenants desired to use no part of the sign-board, and that it was appropriated by the landlord, who had painted thereon a sign advertising his business, carried on in the residue of that building and an adjoining one.

The jury were justified in finding, from the conduct of the parties, that it was a renting of the room only. By the agreement, the tenants were given the right to extend upward

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a chimney above the roof, etc. The renting was in 1884, and the landlord, during the intervening years prior to the injury, on different occasions, repaired the roof, put glass in the skylights, etc., without consulting the tenants. The tenants, at no time, assumed or exercised any control over the building, other than in the room which they occupied. The jury were instructed, at the instance of appellants, that unless they found it was understood between the parties, that the landlord was to keep the building in repair, they must find for the defendant. We are of opinion, that there was ample evidence, derived from the conduct of the parties, that such was the understanding. There was no renting of the sign-board, or of the roof of the building, or any agreement on the part of the tenants to keep the same in repair. As before said, the landlord during the entire term and from year to year, exercised control over and took charge of the repairs upon the outside of the building. The landlord was not, therefore, exonerated from responsibility to keep in reasonably safe and secure condition, that portion of the building over which he retained control; and we think the duty devolved upon him to keep the sign-board, in question, in such condition and state of repair. The landlord, as to that portion of the building, and appurtenances, over which he retains control, must be held to also retain the responsibility to keep the same in reasonable repair in respect of all persons, including the tenants of the building. *Toole* v. *Becket*, 67 Me. 544; *Looney* v. *McLean*, 129 Mass. 35; *Eagle* v. *Swayze*, 2 Daly, 140; *Bold* v. *O'Brien*, 12 id. 160; *Center* v. *Davis*, 39 Ga. 210; *Priest* v. *Nichols*, 116 Mass. 407; *Ward* v. *Fagan*, 28 Mo. App. 116; *Bissell* v. *Lloyd*, 100 Ill. 214; *Kirby* v. *Boylston M. Assoc.*, 14 Gray, 249.

It will not be necessary to note the cases announcing the general doctrine, that the tenant, or occupier, of the premises is, in respect of the public, bound to keep the building and structures upon the streets and highways in such repair that

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persons may pass with safety. The distinction between cases arising between the tenant and landlord, where the injury has resulted from the failure of the landlord to keep in repair portions of the building, such as stairways, passage ways, signs and the like, over which he retains control for his own use or for the general use of the tenants of his building, and cases arising under the general rule, is well defined.

The evidence tended to show that the sign-board was kept in position by wooden braces nailed to the top of the sign-board and to blocks nailed to the roof. It is insisted that the evidence shows that appellee, or some one acting for him, removed a long brace, and thereby contributed to weakening the fastening, by which the sign board was retained in place, and ought not, therefore, to recover. Whether such brace was so removed was a controverted question of fact, in respect to which the jury were told by the court, at the instance of appellants, that if they found, "from the evidence, that the plaintiff's firm removed any substantial brace, stay, or support from the sign-board, then the duty devolved upon them to see that, notwithstanding such removal, the sign-board was still properly braced and supported, and the plaintiff can not recover in this action." The question of fact, having been properly submitted to the jury, the finding thereon is conclusive.

It is also insisted, that appellee knew of the condition and mode of fastening of the sign-board upon the wall of the building, and if it was unsafe, was chargeable with notice thereof. The evidence shows that appellee could and did see the manner of staying the sign-board from the windows of an adjoining building, practically every day during the occupancy of the blacksmith shop by him. But it is not shown, or pretended, that he could know, from such casual observation, the condition of the wood forming the braces and supports, which, the evidence tended to show, had decayed so as to form insufficient stays. The questions of whether appellee was chargeable with notice of the insecure condition of the sign-board, and whether

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its falling was the result of an extraordinary wind, which reasonable foresight could not have guarded against, were each fairly submitted to the jury as questions of fact, by instructions of the court as favorable to appellants as they asked, or could ask under the rules of law applicable.

We find no error of law in this record, and the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

THE NIAGARA FIRE INSURANCE COMPANY

v.

ARIANNA E. SCAMMON.

Filed at Ottawa, October 31, 1891.

1. INSURANCE — *condition against alienation of the property insured — invalid sale will not avoid policy.* Under a clause in a policy of insurance of a building against loss by fire, that any sale, transfer or change of title in the property, or foreclosure of a mortgage, shall avoid the insurance, a merely voidable sale will not constitute such an alienation or change of title as will defeat a recovery of a loss accruing before the sale is set aside, when the assured has done nothing to ratify such sale.

2. A voidable deed made by direction of a court, or by a master in chancery, or under a power, where the insured still retains possession, and has the same interest in the property that he had before the making of such deed, does not constitute an alienation of the property within the meaning of a clause in a policy of insurance against any sale or change in the title of the property insured.

3. A trustee under a mortgage containing a power of sale can not become a purchaser at his own sale, either directly or indirectly, by procuring another to purchase for his benefit, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such sale will not defeat his rights under a policy of insurance against loss of the mortgaged premises by fire, which declares that any sale, etc., shall defeat the insurance.

4. SAME — *alienation that will avoid policy.* An alienation or change of title that is made without the act or consent of the insured will not create a breach of a condition in a policy against a sale or change of title,

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unless there has been an actual sale or alienation of the property that is valid against the insured.

5. SAME — *right to insist on a forfeiture — burden of proof.* The right of the insurer to insist upon a forfeiture under a clause in the policy against alienation or change of title is *stricti juris*, and such right must be brought clearly within the forfeiting clause. The burden of proof is upon the insurance company to establish a valid and not a voidable sale, or one which divests the title of the assured and leaves him no insurable interest.

6. SAME — *clause against other insurance — construed.* A condition in a policy of insurance provided that, "if the assured or any other person or parties interested" shall have existing, during the continuance of this policy, any other contract or agreement for insurance, whether valid or not, against loss," etc., on the property, or any part thereof, "not consented to by this company in writing," then this insurance shall be void: *Held*, that an insurance taken out by a third party on what he claimed an insurable interest, and who had no interest in the original policy could not affect the rights of the assured under the first policy.

7. The designation, "any other person or parties interested," in such a condition, includes only persons or parties interested in the insurance merely; and the words "any other contract or agreement for insurance" do not apply to insurance procured by a third person without the knowledge and consent of the assured, such third person claiming an insurable interest in the property, and having no interest in the policy issued to the assured.

8. SAME — *clause for apportionment of loss between different companies.* A clause in a policy of insurance that, if there shall be other insurance upon the property, the insured shall receive of the company in case of a loss no greater portion of the loss sustained than the amount therein insured shall bear to the whole amount of such contracts for insurance, applies only to cases where the several insurances cover the same interest, and not to a case where the second insurance is upon a different interest claimed in the property.

9. The fact that the party first insuring files his bill to set aside an invalid sale of the property, on which the sale is set aside as fraudulent, and the purchaser is declared a trustee *ex maleficio*, and required to account to the complainant for the insurance money received on a second insurance, will not constitute a ratification of the second insurance, so as to require an apportionment of the loss between the two insurance companies.

10. The mortgagor of property insured the same in the sum of $5000, after which an invalid sale thereof was made under a power, and the purchaser, who was also the seller, insured his interest in the property for a like sum in another company. The mortgagor filed his bill against such purchaser, under which the sale was set aside and a redemption allowed, and the purchaser was required to account to the mortgagor

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for the insurance money paid him on the loss of the property: *Held*, in an action by the mortgagor on his policy of insurance, that the defendant company was not entitled to any deduction for the money received on the second insurance under a clause for apportionment.

11. SAME — *of the alienation which will defeat a recovery for a loss.* The rule laid down by Wood on Insurance to the effect that a sale, which is merely voidable, is such an alienation as will defeat a recovery for a loss occurring before the sale is set aside, is not correct when applied to an involuntary sale, such as a sale under a power contained in a mortgage or deed of trust, otherwise an insurance company might take advantage of the illegal act of a third party to avoid its liability when the insured has been guilty of no wrong or negligence whatever.

12. CONTRACT AND SALE — *when void, and when voidable.* A contract is void when it is without any legal effect, and voidable when it has some effect, but is liable to be made void by one of the parties, or a third person. These definitions are also applicable to sales and other acts which may be void or voidable.

13. A sale of property under a power contained in a mortgage which is voidable, at the instance of the mortgagor, becomes absolutely void when set aside by a decree of a court of competent jurisdiction, and such sale becomes void *ab initio.*

14. SALE — *voidable — void from what date.* A transaction which is capable of being rescinded on the ground of fraud or irregularity is to be treated as good until rescinded, and not as bad until confirmed, but the agreement or sale is not to be considered as rescinded only as of the date of the decree of the court setting the same aside, but as of the date of the unequivocal, open declaration of the injured party that he demands a rescission, followed, upon refusal, by a prompt application to the court.

15. So, when the validity of a sale under a power in a mortgage is promptly denied by the mortgagor, and he continues in possession asserting his continued ownership, and he takes prompt steps by which he has the sale set aside, but the premises are destroyed by fire before the decree setting the sale aside, the sale will be held as void from the beginning, and will not defeat a recovery by him of the loss, from the insurance company.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. HENRY C. MILLER, for the appellant:

Under the condition of the policy a change of title to the property insured terminated the risk. The person succeeding

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to the title of the assured can, by reason of such title, though fraudulently acquired, take out insurance upon the property which he may collect. *Phenix Ins. Co.* v. *Mitchell*, 67 Ill. 43; *Savage* v. *Howard Ins. Co.*, 52 N. Y. 504; *Dix* v. *Ins. Co.*, 22 Ill. 272.

The change of title by the sale and conveyance under the mortgage defeated the insurance. *Home Mutual Ins. Co.* v. *Hamiline*, 60 Ill. 521; *Langdon* v. *Ins. Co.*, 22 Minn. 193; *Foote* v. *Ins. Co.*, 119 Mass. 260; *Hitchcock* v. *Ins. Co.*, 26 N. Y. 68.

The sale to Babcock through Rees was not void, but voidable only. *Roberts* v. *Fleming*, 53 Ill. 193; *Gibbons* v. *Hoag*, 95 id. 46; *Farrar* v. *Payne*, 73 id. 86; *McHaney* v. *Schenck*, 88 id. 358; *Hamilton* v. *Lubukee*, 51 id. 415; *Harper* v. *Ely*, 56 id. 193; *Mulvey* v. *Gibbons*, 87 id. 368; *Hewitt* v. *Clark*, 91 id. 605; *Munn* v. *Burges*, 70 id. 604.

Mr. CHARLES F. WHITE and Mr. MARTIN L. WHEELER, for the appellee:

No change of title to the premises had at the time of the fire taking place within the meaning of the policy. *Ins. Co.* v. *Scammon*, 126 Ill. 364; *Ayres* v. *Ins. Co.*, 17 Iowa, 176; *Loy* v. *Ins. Co.*, 24 Minn. 315; *Orvell* v. *Ins. Co.*, 24 id. 315; *Jackson* v. *Ins. Co.*, 16 B. Mon.; *Stephens* v. *Ins. Co.*, 43 Ill. 327; *Aurora F. Ins. Co.* v. *Eddy*, 55 id. 219; *Ross* v. *Demoss*, 45 id. 452; *Roberts* v. *Fleming*, 53 id. 200.

The policy was not avoided by the second insurance. May on Ins. 558, sec. 372; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385; *Ins. Co.* v. *Howe*, 2 N. Y. 235; *Acer* v. *Ins. Co.*, 57 Barb. 68.

A provision for apportionment of the loss in case of other insurance only applies to insurance covering the same interest. If the mortgagor and mortgagee each has separate insurance, the condition for apportionment does not apply. *Fox* v. *Phœnix Ins. Co.*, 52 Me. 333.

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A policy made by the mortgagor to cover the interest of the mortgagee, without his knowledge or consent, is not other insurance. *Johnson* v. *N. British Ins. Co.*, 1 Holmes (U. S. C. C.), 117.

The assured can not be chargeable for the acts of a third person over whom he has no control. *Carpenter* v. *Prov., etc., Ins. Co.*, 16 Pet. 501; *Ætna F. Ins. Co.* v. *Tyler*, 12 Wend. 385; *Acer* v. *Merchants' Ins. Co.*, 57 Barb. 68; *Pitney* v. *Glens Falls Ins. Co.*, 61 Barb. 385; *Nichols* v. *Fayette Mut. F. Ins. Co.*, 1 Allen, 63; *Burbanks* v. *Rockingham, etc., Ins. Co.*, 24 N. H. 550.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This suit was upon a policy of insurance for $5000, issued by appellant to the testator of appellee, insuring a building in the city of Chicago against loss or damage by fire. At the time the policy was issued the insured premises, with other contiguous property and the buildings thereon, were encumbered by a mortgage for $220,000 to the United States Mortgage Company; for default in the payment of an interest coupon, the mortgage company in February, 1874, declared the whole amount secured by the mortgage due, and assumed to advertise and sell the whole of the mortgaged premises under a power contained in the mortgage. The sale took place on March 31, 1874, between two and three months after the above mentioned insurance policy was issued, and the mortgaged premises were struck off to one James H. Rees, and a deed therefor executed to him. On April 20, 1874, Rees made a deed for all of the property to Samuel D. Babcock, the president of the mortgage company. J. Young Scammon, the testator of appellee, remained in actual possession of all the mortgaged premises, and claimed to be owner, and refused to acquiesce in the alleged mortgage sale, and insisted that the sale was illegal and did not amount to anything and that he would disregard it, and notified Babcock and his attorneys that he would proceed to

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set said sale aside. While this was the condition of affairs, and on July 14, 1874, the insured property was destroyed by fire. Thereafter, said Scammon filed his bill to set aside the alleged foreclosure sale, and such proceedings were had in that suit, that in March, 1886, a decree was entered therein setting aside said sale and permitting him to redeem from the mortgage. It was also ordered by the decree that Babcock should account to Scammon for any insurance moneys he had collected on account of the mortgaged buildings.

The principal contention of the appellant is that the sale and conveyance to Rees, and the subsequent deed of Rees to Babcock, constituted a change of title within the meaning of the clause in the policy of insurance relating thereto, and that consequently the policy was not in force at the time of the loss.

The building covered by the policy in this case was contiguous to the building insured by the policy in litigation in the case of *The Commercial Union Assurance Company* v. *Scammon*, 126 Ill. 355, and both buildings were destroyed by the same fire. Both buildings and the lots on which they stood were portions of the premises covered by the mortgage at issue in that case. The chancery proceeding and decree that were considered in that case also embraced the premises that are in question here. It is urged, however, that the decision of the court in that case is not applicable to the case now in hand, because the language in respect to alienation of the policy involved in that case is different from the language used in the clause of the policy respecting alienation here in question.

In the Commercial Union Assurance Company policy the language in which the condition was expressed was as follows: "If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * in every such case this policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named

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has ceased, this insurance on said property shall immediately terminate." The policy upon which this action is brought contains the following provision: "In case of any sale or transfer, or change of title in the property insured by this company, or of any undivided interest thereof, or the entering or foreclosure of a mortgage, * * * this insurance shall immediately cease."

Excluding from consideration said second clause, contained in the policy issued by the Commercial Union Assurance Company, it is manifest that the provisions in the two policies in regard to a sale or transfer of the property or change in the title thereto, are substantially the same. The existence of said second clause was one of the circumstances in that particular case, and was taken into consideration in its decision. It was held that the two clauses should be considered together, that the second clause was intended to explain and qualify the meaning of the words of the first clause, and define what sort or nature of transfer or conveyance of the property and change of title was contemplated and provided against. We there said: "Reading the two clauses together, the conclusion is inevitable, that it was intended that an alienation of the property, to avoid the policy, must be such that all interest or liability on the part of the assured therein named, has ceased." The decision was, to some extent, based on the phraseology of said second clause, but we do not understand that said clause was of controlling importance and essential to the judgment that was rendered.

The contention of the then appellant was, that a sale that is merely voidable is an alienation or change of title that defeats a recovery for a loss occurring before the sale has been set aside. It was conceded by the court, that where a party has himself made a deed which he may avoid or not, as he shall elect, and a loss has occurred after he has made such deed and before he has elected to avoid it, there is strong reason in favor of holding that such an alienation, and especially under

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some circumstances, will avoid a policy under a clause against a sale, transfer or change of title. But the cases relied upon by said appellant as establishing its contention were critically examined, and we there said: "In none of them (the cases) is it held that a voidable deed, made by direction of a court or by a master in chancery, where the assured still has possession and the same interest in the property that he had before such deed was made, constituted an alienation of the property, within the meaning of the clause under consideration."

In the same case, we quoted with approval from the opinion of the Supreme Court of Iowa, in *Ayres* v. *Hartford Ins. Co.*, 17 Iowa, 176, this language: "But if the real ownership remain the same; if there is no change in the fact of a title, but only in the evidence of it, and this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not vitiated." And in the same case we said: "It is difficult to perceive how the insured, whose property has been illegally sold, and who is entitled to have the sale declared void, occupies a different position than that occupied by him who owns a mere equity of redemption. This court held, in *Roberts et al.* v. *Fleming et al.*, 53 Ill. 196, a trustee, under a mortgage containing a power of sale, can not become a purchaser at his own sale, either directly or indirectly, by procuring another to purchase for his benefit; and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made. And so, here, the interest of the insured remained, notwithstanding the sale, precisely as it was before."

In the same case we said, the case here, in brief, is simply this: "A trust deed is made of property to secure a debt. Afterwards, the maker of the deed takes out a policy of insurance upon the same property, in which there is a clause prohibiting its alienation. The trustee, without his consent, and against his protest, sells the property to the *cestui que trust.*

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The maker of the trust deed is in possession when the deed is made, and remains in possession until after the sale, and asserts his right of possession and of ownership, and within a reasonable time institutes legal proceedings to set the sale aside. As to him, the sale is void, and he is entitled to redeem, notwithstanding the sale, and his interest since the sale is just as great as it was before. The same motives which can be presumed to have urged him to protect the property and preserve it from destruction before the sale, urge him to protect and preserve it from destruction after the sale."

The legal principles upon which the decision in *The Commercial Union Assurance Company* case was based, were two. *First*, The principle announced in numerous former decisions of this court, that a trustee, under a mortgage containing a power of sale, can not become a purchaser at his own sale, either directly or indirectly, and that if he does so become the purchaser, and there has been no ratification of the sale by the mortgagor, the rights of the mortgagor will remain precisely the same as though no sale had taken place. *Second*, That an alienation or change of title, that is made without the act or consent of the insured, will not create a breach of a condition in a policy against a sale or change of title, unless there has been an actual sale or alienation of the property that is valid against the insured.

This being so, the present case falls within the rule announced in *The Commercial Union Assurance Company* case and is governed by it.

There appellee's testator held only an equity of redemption in the insured premises when the policy of insurance was taken out, and notwithstanding the sale and subsequent deeds he still continued to be the owner of said equity of redemption, and "his rights remained precisely the same as though no sale had been made." The right to insist upon a forfeiture under a clause against alienation or change of title is *stricti juris*, and such right must be brought clearly within the for-

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feiting clause. *Aurora Fire Insurance Co.* v. *Eddy*, 55 Ill. 213. Such a clause is couched in language of the insurance company's own selection, and its tendency is to narrow and limit the obligation of the company and defeat the indemnity which it was the purpose of the assured to obtain. The burden of proof was upon appellant to establish that there had been a change of title that was valid as against the insured. This it did not do. The sale that appears in the record was made without the consent of Scammon, and he expressly repudiated it and remained in possession of the premises, claiming to be owner. The sale, without a ratification of it by Scammon, was invalid, and he never ratified it by acquiescence or otherwise.

It is urged, that several months before the loss Babcock took out a policy for $5000 upon the property here in question, in the Commercial Union Assurance Company, to which the appellant company never consented, and that the risk covered by this policy was thereby terminated. The provision of this policy involved in behalf of this claim is as follows: "If the assured or any other person as parties interested shall have existing during the continuance of this policy any other contract or agreement for insurance (whether valid or not), against loss or damage by fire on the property hereby insured or any part thereof, not consented to by this company in writing, and mentioned in or endorsed upon this policy, then this insurance shall be void and of no effect." Babcock, at the time he procured his policy, claimed an insurable interest in the property, and he did not have, and never had any interest in the policy now in suit. The designation, "any other person or parties interested" includes only persons or parties interested in the insurance merely. *Acer* v. *Merchants' Ins. Co.*, 57 Barb. 68. The expression, "any other contract or agreement for insurance," found in this policy, does not apply to insurance procured by a third person, without the knowledge and consent of the assured, said third person having or claiming an insur-

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able interest in the property and no interest in the policy issued to the assured. May on Insurance, secs. 365, 372; 2 Wood on Insurance, sec. 377; *Ætna Ins. Co.* v. *Tyler*, 16 Wend. 385; *Mutual Safety Ins. Co.* v. *Howe*, 2 N. Y. 235; *Burton* v. *Gore Dist. Ins. Co.*, 17 N. C. (Q. B.) 342. We think that the policy in suit was not terminated by the issuance of the subsequent policy to Babcock.

It appears from the evidence that the loss upon the property covered by this policy was $6500, and that the insurance upon the premises destroyed was $10,000, *i. e.*, $5000 insured by the Scammon policy, and $5000 insured by the Babcock policy. It is claimed that it was error in the trial court to refuse to hold as law applicable to the case the following proposition: "It appearing from the evidence that the amount of insurance upon the property described in the policy at the time of the loss was $10,000, and that the policy in suit was for $5000, the plaintiff can not, in any event, recover in this action more than one-half of such loss." Said proposition of law was predicated upon a provision contained in the policy sued on, that "if there shall be other insurance upon the property, the insured shall not be entitled to demand or recover of this company any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount of such contracts or agreements for insurance."

It is to be noted that the provision for an apportionment is only to become operative "if there shall be other insurance upon the property." And as we have seen, insurance which is obtained by a third person and upon another distinct and insurable interest can not be regarded as "other insurance." We understand the rule to be, that a provision for apportionment of loss, if there is other insurance, applies only to cases where the insurance covers the same interest.

It is suggested, however, that the insurance to Babcock was, at the instance of Scammon, decreed by the Court of Chancery to have been an insurance of the trustee of Scammon, and of

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which Scammon had the benefit, and that it was an insurance of the property within the meaning of this clause in the policy, as much so as it would have been if the policy had been issued to Scammon instead of Babcock. This claim proceeds upon the assumption that the relation of Babcock to Scammon was that of an express trustee, created by voluntary act, but it appears from the record and the decree that he was found by the Chancery Court to be a trustee *ex maleficio* for Scammon, and it was held that he could make no profit from his own wrongful act. In *Commercial Union Assurance Company* v. *Scammon*, *supra*, we had under consideration a policy of insurance issued to Scammon, and a subsequent policy on the same property issued to Babcock, and in speaking of the latter policy we said: "Appellee had nothing to do with the issuing of that policy. He made no claim of rights under it. He could have done nothing to enforce it. He was in no way bound by anything done by Babcock or the mortgage company. He in no legal sense ratified anything done by him, or it, in procuring the policy. All that he had a right to do, and all that he did do, was to ask a court of equity to require Babcock to account to him for any money actually received by him under his false claim of ownership. * * * As between the parties, it was sufficient for the chancellor to know that Babcock had actually received money as rent, insurance money or otherwise, under a claim of ownership which was fraudulent and invalid, to authorize a decree requiring him to pay it over to the rightful owner." This language seems to be applicable to the case at bar, and to the particular matter now under consideration.

Babcock, at the time of the issuance of the Commercial Union Assurance Company policy, which is at issue in this case, and at the time of the loss, had an insurable interest. Said company paid the loss to him. It would seem that neither the taking out of that insurance, nor the payment of that loss would, under any of the provisions contained in the prior policy issued by appellant to Scammon, either invalidate the

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insurance of Scammon or lessen the amount due him under the terms of his policy. Afterwards, the Court of Chancery found that Babcock was a trustee *ex maleficio*, and decreed that he should make no profit by his tort, and should account to Scammon for the insurance money which he had received under a claim of ownership which was fraudulent and invalid. As was said by us in *The Commercial Union Assurance Company* case, Scammon, in obtaining this decree, "in no legal sense ratified anything done by Babcock in procuring the policy," and "was in no way bound by anything done by Babcock." And, if this be so, then there is no reasonable or plausible theory upon which the insurance covered by the Babcock policy can be regarded as "other insurance" within the meaning of the policy here in suit, or upon which an apportionment of the loss can be based. There was no error in refusing to hold the proposition of law submitted by the appellant.

Some other grounds of objection to the judgment that was entered by the Circuit Court are submitted by the briefs, but we think it unnecessary to discuss them in detail. Suffice it to say that we find in the record no substantial error for which the judgment should be reversed.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Subsequently, upon an application for a rehearing, the following supplemental opinion was filed:

WILKIN, J.: Since filing the foregoing opinion, upon consideration of a petition on behalf of appellant for a rehearing, we have thought it proper to again examine the question as to whether the sale and conveyance by the United States Mortgage Company to Rees, and the deed to Babcock by the latter, so changed the title to the insured property as to exonerate appellant from liability under the condition in its policy against alienation; and for that purpose this rehearing was allowed.

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It is insisted that, in holding *The Commercial Union Assurance Company* v. *Scammon*, 126 Ill. 355, decisive of the foregoing question, proper regard is not paid to the distinction between clauses in policies of insurance, against a mere change of *interest*, and those which forbid any alienation, change or transfer of *title*. That there is a well defined distinction between the two classes of alienation clauses no one will deny, and it is further conceded that those against change of title are generally held to be the stronger of the two. See note to *Morrison, Adm'r*, v. *Ins. Co.*, 59 Am. Dec. 304.

The first branch of the opinion in *The Commercial Union Assurance* case undoubtedly proceeds upon the theory that the policy then in suit only prohibited a change of interest, but it was also there insisted, as it is here, that that policy forbade any change of title, and, therefore, the insurance had ceased before the loss occurred; and so the last branch of that opinion deals with the question of change of title, and not merely change of interest.

We there distinctly held that the rule contended for by counsel for the appellant, based on the authority of Flanders on Fire Insurance, 406, and Wood on Fire Insurance, sec. 513, was inapplicable where the sale, though only voidable, was made without the consent of the owner, he continuing in possession of the insured property and asserting his title thereto until he obtained a decree of court avoiding the sale. This we can make no clearer than is done by the foregoing opinion of Justice BAKER. Hence we have found it necessary, in deciding this case, to address ourselves to a reconsideration of the decision in that, and having done so, feel reassured of the correctness of the conclusion there announced.

Although the sale in question was only voidable in its inception, still, when it was set aside by the decree of a court of competent jurisdiction, at the instance of the insured, it became *void*. Bishop in his work on Contracts, sec. 611, says: "A contract is void when it is without any legal effect, voidable

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when it has some effect, but is liable to be made void by one of the parties or a third person." These definitions are applicable to sales or other acts which may be void or voidable, as well as to contracts, and applied to this case, the sale and deeds to Rees and Babcock, which were voidable at the instance of Scammon, became absolutely void as to him when set aside. It becomes important then, under the contention of appellant's counsel, to determine at what date they shall be deemed to have become void, because from that time forward Scammon's title was as complete as though no sale or conveyances had been made; and it is well settled that, although he may have been temporarily divested of his title, still, if he had regained it at the time the loss occurred, there was no breach of the condition prohibiting a change of title which would defeat the insurance. *Lane* v. *Maine Fire Ins. Co.*, 12 Me. 44 (28 Am. Dec. 150).

The rule laid down by Mr. Wood, to the effect that a sale which "is merely voidable is an alienation that defeats a recovery for a loss occurring before the sale has been set aside," seems to proceed upon the theory that such a sale, as between the insurer and insured, must be deemed valid to the date of the decree declaring it void. Certainly, that theory is not correct when applied to an involuntary sale like the one here relied upon by appellant. If it is, the insurance company can take advantage of the illegal act of a third party, to avoid its liability, when the insured has been guilty of no wrong or negligence whatever. In view of the decree setting the sale aside, Scammon must be held to have acted with proper diligence in asserting his right to avoid the illegal and voidable act of the mortgage company in its attempt to deprive him of his property; and to say that, because that property was destroyed before he could succeed in obtaining his decree, therefore, appellant shall be relieved from all liability on its policy, would be unjust and unreasonable in the extreme. Suppose that sale did enable Babcock to get other insurance, and that one of the objects in inserting the clause against change of

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title was to prevent the obtaining of other insurance, Scammon was in no way to blame for that result. He did all the law required him to do, to have the illegal title declared void. It was not his fault that in the meantime other insurance was obtained. Suppose the loss had occurred immediately after the sale, would it have been contended that the rule above quoted from Wood could have been invoked to defeat the insurance?

We entertain no doubt that, as between these parties, said sale and conveyances, upon the decree setting them aside, became void from the beginning, and left Scammon's title as absolute, at the time of the loss, as though no sale had been made. But, even if it could be said that the sale should be treated as a transaction to which Scammon was a party, in the nature of a voidable agreement between parties, we think the voidable title became void, as of a date prior to the loss here sued for. In Bispham's Principles of Equity, sec. 472, it is said: "A transaction which is capable of being rescinded, on the ground of fraud, is to be treated as good until rescinded, and not as bad until confirmed." The author then goes on to say: "Mr. Willish, in his argument in *Oaks* v. *Turquand*, before the House of Lords, put the following inquiry: 'When you say that an agreement is voidable and not void, and when the complainant endeavors to insist upon his right to treat it as void, is the agreement to be taken as valid until rescinded, or when rescinded, to be taken to have been void from the first?' And this inquiry was answered by the tribunal to which it was addressed, to the effect that the agreement was to be taken as subsisting until rescinded; but with this important qualification, that it was not to be considered as rescinded only as of the date of the decree of the court setting the transaction aside, but as of the date of the unequivocal, open declaration of the injured party, that he demanded a rescission, followed, upon refusal, by a prompt application to the courts."

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Before the fire Scammon informed Babcock that his claim of title to the insured premises was illegal, and would not be recognized by him, and he also notified both Babcock and his attorney that he would take steps to set aside said title. He remained in possession of the property, in defiance of Babcock's claim of ownership, until he succeeded in obtaining a decree sustaining his claim, and overthrowing that of Babcock. The latter's title then at most became void from the time of these open and unequivocal declarations and acts of the insured. Especially is the fact that the insured remained in possession of the insured property until after the loss, claiming title thereto, an important element in the case, in determining when the voidable sale should be treated as becoming void, between the parties to this suit.

There is no view of the question under consideration consistent with reason and justice, which will permit appellant to take advantage of that illegal and unauthorized sale, to avoid liability upon its contract of insurance.

Being satisfied that all other questions raised on this record were properly disposed of on the former hearing, the judgment of the Appellate Court will again be affirmed.

*Judgment affirmed.**

* THE COMMERCIAL UNION ASSURANCE COMPANY
v.
ARIANNA E. SCAMMON.

APPEAL from the Appellate Court for the First District.

Per CURIAM: The conditions in the policy on which this action was brought are identical with those in the one sued on in *Commercial Union Assurance Co.* v. *Scammon*, 126 Ill. 355.

The substantial grounds upon which a reversal of the judgment below is urged upon this record were considered and decided adversely to the contention of counsel for appellant in the above-mentioned case, and that of *Niagara Fire Ins. Co.* v. *Arianna E. Scammon, Ex.*, in which a final opinion has been filed at the present term.

On the authority of those cases the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

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Syllabus.

PETER SVANOE *et al.*

v.

AXEL JURGENS.

Filed at Ottawa, March 31, 1898.

1. AGENCY — *agent holds money of his principal in trust.* An agent who receives the money of his principal will hold the same in trust, and must be held strictly to the liability of a trustee as between himself and the party for whom he acts. But in the case of ordinary agency no preference is given to such moneys over other claimants against the estate of the debtor.

2. ADMINISTRATION OF ESTATES — *classification of debts — money in hands of an agent.* Where an agent of a bank sold its drafts on foreign countries, and received the moneys paid by the purchasers of such drafts, which he was to account for to his principal, and died with money in his hands from such sales unaccounted for: *Held*, that such money was not held by such agent as "in trust for any purpose," within the meaning of clause 6, of section 70, of chapter 3, Revised Statutes, and that the allowance of a claim for such indebtedness as of the sixth class was erroneous.

3. STATUTE CONSTRUED. *Section* 70, *of chapter* 3, *Revised Statutes*, giving a preference of claims against estates when they are for money received by the decedent "in trust for any purpose," was not intended to embrace all kinds of trusts in the broadest meaning of the term, as including factors, agents, etc. The word "trust" is used in the more restricted sense of the term as referring to special trusts, and not those which the law implies from the contract.

4. APPEALS AND WRITS OF ERROR — *amount involved.* The Appellate Court affirmed the judgment of the Circuit Court, allowing a claim of $1219 against an estate, and directed its payment as a sixth class claim. The estate was able to pay all the sixth class claims, but not the seventh class claims in full, and the administrators appealed to this court: *Held*, that this court had jurisdiction of the appeal. The right of a party to a judgment in the Appellate Court to bring the case to this court by appeal or writ of error, is not limited by the amount affected by the error assigned, but by the amount involved in the action.

APPEAL from the Appellate Court for the First District;— heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

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Statement of the Case.

The appellee presented in the Probate Court of Cook county his claim for $1219.81 against the estate of I. T. Relling, deceased, of which the appellants are administrators, and it was allowed as of class 7. He took an appeal to the Circuit Court of said county, where a jury was waived by agreement and the cause submitted for trial to the court without a jury, and a judgment for the same amount was rendered in his favor on February 1, 1892, as of the sixth class of claims enumerated in the statute to be paid in due course of administration. The administrators took an appeal to the Appellate Court, where the judgment of the Circuit Court has been affirmed. The case is brought here by appeal from the Appellate Court.

I. T. Relling died on February 5, 1891. In his lifetime he kept a book store on Milwaukee avenue in Chicago, selling Scandinavian books and publishing a Norwegian newspaper. He also sold drafts on foreign banks for appellee, who was the western passenger agent of the American Steamship Company. The general agents of this company in Philadelphia were Peter Wright & Sons, and the representative of the latter in Chicago was Jurgens, the appellee, who had an office and bank at 88 LaSalle street in Chicago. Appellee would send to Relling at his store a book of blank drafts drawn on foreign banks by Peter Wright & Sons, to be sold by Relling. The book usually contained about twenty-five of these drafts for limited amounts. The drafts were numbered, and when sold, would be filled up with the amounts and names of the payees. They usually came back from Europe to Wright & Sons in from two to four months, and appellee was responsible to them for the money. Relling would sell the drafts and turn over the proceeds to the appellee. He received no commissions for making the sales, but was to remit at certain rates mailed to him monthly by appellee. These rates varied according to the fluctuations of the market. Appellee kept a memorandum of the numbers of the drafts, and would call upon Relling at intervals of several months to see how many drafts were sold or remained unsold.

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No discrepancies were ever found between the drafts on hand and the reports of sale. Relling was charged with the drafts delivered to him by their numbers and credited with the money remitted when a draft was sold. Appellee accounted monthly with Wright & Sons for the drafts received by him. Business was done in this way between appellee and Relling for a number of years prior to July, 1890, but there is no proof of what took place between the latter date and Relling's death. Prior to this period "he reported the drafts on the same day that he sold them." It is agreed that the estate of Relling is insolvent.

Messrs. RICHOLSON, MATSON & PEASE, for the appellants:

The delivery of the drafts by Jurgens to Relling, and the sale of the same by Relling, did not constitute a trust fund for Jurgens as *cestui que trust*. *Taylor* v. *Turner*, 87 Ill. 296.

This is not a trust fund, as it has been mingled with the other assets of the estate and its identity thereby lost. *Union National Bank* v. *Goetz*, 138 Ill. 127; *School Trustees* v. *Kirwin*, 25 id. 73; *Wilson* v. *Kirby*, 88 id. 566.

Messrs. BLANKE & CHYTRAUS, for the appellee:

Unless it appears from the record in this suit that the amount involved is not less than $1000, we submit that this court has no jurisdiction of this appeal, and the motion filed herein by appellee that the appeal be dismissed should be granted.

It has repeatedly been held by this court that it must affirmatively appear from the record that this court has jurisdiction. *McGuirk* v. *Burry*, 93 Ill. 118; *Lewis* v. *Shear*, id. 121; *Hancock* v. *Tower*, id. 150; *Piper* v. *Jacobson*, 98 id. 389.

"The party claiming the right to appeal must show that it is authorized by the law." *McGuirk* v. *Burry*, 93 Ill. 118.

The rule has been laid down by this court for such cases, that "the record must affirmatively show the amount in controversy is as much at least as $1000." *Umlauf* v. *Umlauf*, 103 Ill. 651.

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The relation between the principal and agent for sale is fiduciary. The proceeds belong to the former. *Baker* v. *N. Y. Exchange Bank*, 100 N. Y. 31; *Blair* v. *Sennott*, 134 Ill. 78.

It is not necessary for a claimant, who desires to bring himself within class sixth, to trace the identical money. If there is a trust, the claim should be allowed as of the sixth class, although the deceased may have mingled the money with his own. *Fitzsimmons* v. *Cassell*, 98 Ill. 332; *S. C.*, 104 id. 352; *Tracey* v. *Hadden*, 78 id. 30.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The question in this case is, whether the claim of appellee for $1219.81 should be preferred by being placed in the sixth class mentioned in section 70 of the "Act in regard to the administration of estates," or whether it should be placed in the seventh class therein named. If it is placed in the former class, it will be paid in full. If it is placed in the latter class, it will share *pro rata* with the other creditors, as it is conceded that the estate is not able to pay in full all the demands against it.

Section 70 above referred to provides, that all demands against the estate of any testator or intestate shall be divided into classes in the manner following, to-wit: *First* — Funeral expenses. *Second* — The widow's award, &c. *Third* — Expenses of last illness, &c. *Fourth* — Debts due the common school fund, &c. *Fifth* — Expenses of proving the will and taking out letters and settling the estate, &c. *Sixth* — "Where the decedent has received money in trust for any purpose, his executor or administrator shall pay out of his estate the amount thus received, and not accounted for." *Seventh* — All other debts and demands, &c. (1 Starr & Cur. Ann. Stat. chap. 3, page 220).

Just when the indebtedness of $1219.81 accrued is not shown by the evidence. It appears, however, that such indebtedness arose out of the sales of drafts on foreign banks made

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by Relling for appellee and as the latter's agent between July, 1890, and February 5th, 1891, the date of Relling's death. There is nothing to show at what periods between these two dates, or how long before the latter date, the proceeds of such sales came into the hands of the deceased. Nor does it appear whether the money thus realized by the sales of the drafts was kept by the deceased as a separate fund, or whether it was mingled with his own money. Under such circumstances was the money received from these sales by the deceased, as appellee's agent, money received "in trust for any purpose" within the meaning of the clause defining the sixth class of claims as above quoted?

We gave a construction to this clause in *Wilson et al.* v. *Kirby, Ex'r*, 88 Ill. 566, where it was held that the expression, "in trust for any purpose," was not intended to embrace all kinds of trusts in the broadest meaning of the term, as including factors, agents, &c., but that the word, "trust," is here used in the more restricted sense of the term, as referring to special or technical trusts, "and not those which the law implies from the contract." The same distinction is noted and pointed out in the following cases: *Weer* v. *Gand*, 88 Ill. 490; *Kirby* v. *Wilson*, 98 Ill. 240; *Pierce* v. *Shippee*, 90 Ill. 371; *Doyle* v. *Murphy*, 22 Ill. 502; *Steele* v. *Clark*, 77 Ill. 471; *Taylor* v. *Turner*, 87 Ill. 296; *Union Nat. Bank* v. *Goetz*, 138 Ill. 127; *Wetherell* v. *O'Brien*, 140 Ill. 146.

Where the deceased testator or intestate has in his life-time received money in his capacity as administrator, executor or guardian, there is no doubt that the money so received is money "in trust for any purpose" within the meaning of the statute. In such cases there is a special trust in favor of the creditors, distributees or wards. (*Wilson* v. *Kirby, Ex'r, supra; Tracy* v. *Hudden*, 78 Ill. 30; *Fitzsimmons* v. *Cassell*, 98 Ill. 332). Prior to the passage on April 1, 1872, of the present act in regard to the administration of estates, the clause in regard to the sixth class of claims read as follows: "Where

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an executor, administrator or guardian has received money as such, his executor or administrator shall pay out of his estate the amount so received and not accounted for." (Gross' Stat. of 1871, chap. 109, sec. 151, page 822). We have held that, by the change thus made in the law, and by the use of the phrase "in trust for any purpose," the legislature "intended to *extend* the class of preferred claims." (*Wilson* v. *Kirby, Ex'r, supra*). If the statute as changed extended the trusts named in the former statute, then money received by the decedent in his life-time as executor, administrator or guardian was necessarily included in money received "in trust for any purpose."

There is, therefore, no conflict between those cases, like *Tracy* v. *Hadden, supra*, and *Fitzsimmons* v. *Cassell, supra*, which hold that money received by the decedent in his capacity as executor, administrator or guardian must be paid out of his estate as a preferred claim under the sixth class, and those other cases, like *Wilson* v. *Kirby, Ex'r, supra*, and *Weer* v. *Gand, supra*, which hold that money received by the decedent as a mere agent does not belong to the preferred class of claims. Cases of the former character refer to special or technical and, in some instances, express trusts, while the latter refer to implied trusts, and trusts "where a mere confidence has been reposed or a credit given." (*Doyle* v. *Murphy, supra*).

The distinction here pointed out between the two classes of trusts is recognized and discussed in many cases decided by the Federal Courts and courts of the different States, giving a construction to certain provisions of the Bankrupt acts passed by Congress in 1841 and 1867. The Bankrupt law of 1841 provided for the discharge of "all persons * * * owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any other fiduciary capacity." (*Wilson* v. *Kirby, Ex'r, supra*). The Bankrupt

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law of 1867 provided that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy." (Rev. Stat. U. S. sec. 5117). A definite interpretation was given to the words, "while acting in any other fiduciary capacity," as used in the act of 1841, by the Supreme Court of the United States in the leading case of *Chapman* v. *Forsyth*, 2 How. (U. S.) 202. The weight of authority is in favor of giving the same interpretation to the words, "while acting in any fiduciary character" as used in the act of 1867, although there is much conflict among the decided cases, as will be seen by reference to 2 Am. & Eng. Enc. of Law, page 722, note 3, and 7 Am. & Eng. Enc. of Law, page 957, note 5.

The definition of "fiduciary capacity" as laid down in *Chapman* v. *Forsyth*, *supra*, was adopted and applied by this Court in *Wilson* v. *Kirby, Ex'r*, *supra*, in order to determine the meaning of the expression "in trust for any purpose," made use of in the Illinois Statute. There cannot be any very material difference between the interests and obligations of a person who acts in a fiduciary capacity or character, and those of a person who receives or holds money in trust. Webster defines the adjective, "fiduciary," as follows: "Holding or held or founded in trust;" he defines the noun, "fiduciary," as follows: "One who holds a thing in trust for another; a trustee." Bouvier in his Law Dictionary says: "Fiduciary may be defined: in trust, in confidence."

The decisions, which point out what kinds of trusts are involved in relations of a fiduciary character, exclude factors and ordinary agents. In *Chapman* v. *Forsyth*, *supra*, it was said: "The second point is, whether a factor, who retains the money of his principal, is a fiduciary debtor within the act. If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and indeed all cases where the law implies an obligation from

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the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, the defalcation of a public officer, executor, administrator, guardian or trustee, are not cases of implied but special trusts, and the other fiduciary capacity mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." The doctrine here laid down, that the debt due from a factor for the proceeds of goods sold for his principal is not a fiduciary debt, has been adopted in many subsequent cases, among which are the following: *Hayman* v. *Pond*, 7 Metc. 328; *Cronan* v. *Cotting*, 104 Mass. 245; *Woodward* v. *Towne*, 127 Mass. 41; *Neal* v. *Clark*, 95 U. S. 704; *Commercial Bank* v. *Buckner*, 2 La. Ann. 1023; *Woolsey* v. *Cade*, 54 Ala. 378; *Kaufman* v. *Alexander*, 53 Tex. 562; *Scott* v. *Porter*, 93 Pa. St. 38; *Green* v. *Chilton*, 57 Miss. 598; *Palmer* v. *Hussey*, 87 N. Y. 303.

In *Woodward* v. *Towne*, *supra*, Mr. Chief Justice GRAY said: "The clause in the recent bankrupt act exempting &c., * * * 'debts created while acting in any fiduciary character' * * * includes only technical trusts and not trusts implied by law from contracts of agency or bailment."

In *Palmer* v. *Hussey*, *supra*, it was said by Mr. Justice FINCH: "It is settled * * * that the 'fiduciary capacity' intended by the Bankrupt Act relates to cases of technical trust; not merely such as the law implies from the contract, but actual and expressly constituted. * * * The affidavits and evidence show no other or different trust or fiduciary relation than such as may be said always to exist in a case of agency. In every such case there is an element of trust and confidence,

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so that a breach of duty may be said to be a breach of trust, but the agent is nevertheless not a fiduciary within the meaning of the Bankrupt Act."

In *Taylor* v. *Turner*, *supra*, we said: "It seems to us to be a simple case of the bailment of property to a factor to sell, and his refusal to pay over the proceeds of the sale to the owner of the property, and we know not why the legal remedy of an action for money had and received is not ample." Again in *Weer* v. *Gand*, *supra*, we said: "Where one person employs another as an agent, loans money or sells property on credit, a confidence and trust is reposed to a greater or less extent, and yet such transactions have never been regarded by courts as falling within any recognized class of trusts."

Where, however, a person receives money as guardian, executor or administrator, his obligation to pay the same is unquestionably a fiduciary debt. (*Simpson* v. *Simpson*, 80 N. C. 332; *Crisfield* v. *The State*, 55 Md. 192).

We agree with counsel for appellee, that an agent, who receives the money of his principal, holds the same in trust, and must be held strictly to the liability of a trustee as between himself and the man for whom he acts. (*Blair* v. *Sennott*, 134 Ill. 78, and authorities cited). But the trust in the present case is one which arises out of an ordinary agency, and therefore does not come within the meaning of the statute above quoted. Natural justice and equity would seem to require, that a provision, which awards to some of the creditors of an estate a preference over all the others, should not be given any broader interpretation than the words used by the legislature actually demand. The legislative intent to enlarge the number of claims included in a preferred class should be clear and unambiguous. For the reasons thus stated, we think that the Circuit Court erred in ordering that the claim of appellee should be paid as of the sixth class, and are of the opinion that it should have been placed in the seventh class.

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It is furthermore claimed by the appellee, although he has made no motion in this Court to dismiss the present appeal, that we have no jurisdiction of this appeal from the Appellate Court, upon the alleged ground that the amount involved does not affirmatively appear to be $1000.00, or over. It is said that the only amount here in dispute is the difference between what the appellee will receive, if his claim is paid as of the sixth class, and what he will receive as his *pro rata* share if he is paid as of the seventh class along with the non-preferred creditors; and that such difference may turn out to be less than $1000.00. There is nothing in the record from which it can be ascertained what the difference here referred to would be, or whether it would be less or more than $1000.00. It may as well be presumed that it would be more as that it would be less. We think the record shows that the amount involved is more than $1000.00. The judgment of the Circuit Court is that the claimant "recover of said estate said sum of $1219.81 as of the sixth class," &c., and the appeal to the Appellate Court was from this judgment. In *City of Chicago* v. *Palmer*, 93 Ill. 125, we said: "Where the judgment or decree is for money, and it is for $1000.00 or more, or where the verdict shows a finding for that sum, or more, there can be no doubt of the right to appeal, or to prosecute error, and the fact in such case appears from the record." Where a decree disposed of a fund of $2214.50 in the hands of a trustee, it was held that, as the amount disposed of by the decree exceeded $1000.00, this Court had jurisdiction although the plaintiff in error only questioned the application of $951.67 of such fund. (*Longwith* v. *Riggs*, 123 Ill. 258). The right of appeal and to sue out a writ of error is not limited, it will be observed, by the amount affected by the error assigned, but by the amount involved in the action. (*Woolley* v. *Lyon*, 115 Ill. 296; *R. R. Co.* v. *Faught*, 129 Ill. 257).

We are, therefore, of the opinion, that this Court has jurisdiction of the appeal.

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The judgments of the Appellate and Circuit Courts are reversed and the cause is remanded to the latter Court for further proceedings in accordance with the views here expressed.

Judgment reversed.

ELIZABETH LAMBERT

v.

CHARLES WILTSHIRE *et al.*

Filed at Ottawa, January 19, 1893.

1. CAPIAS AD SATISFACIENDUM — *discharge of defendant — satisfaction of the judgment.* The discharge of any debtor under the provisions of the act of 1853, entitled "An act in relation to committals to jail upon writ of *ca. sa.*," is no discharge or satisfaction of the debt, damages or costs named in such writ, but the judgment will continue in full force and effect against the property and effects of such debtor. That statute extends to cases of malicious torts as well as to cases of contracts, and the placing its sections in the revision of 1874 under the head of "insolvent debtors" did not change the meaning in this respect.

2. The discharge of a defendant on a *capias ad satisfaciendum*, issued upon a judgment for a malicious tort, because of the failure of the plaintiff in the judgment to advance and pay to the jailer the fees for receiving, or for the board of such defendant, is such a discharge as removes the presumptive satisfaction of the judgment by reason of the arrest and imprisonment of the defendant.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Mr. FRANK A. JOHNSON, for the appellant.

Mr. JOHN N. JEMISON, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Charles Wiltshire recovered a judgment in an action on the case for slander against Elizabeth Lambert, and caused her to

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be arrested and imprisoned upon a *capias ad satisfaciendum* issued upon that judgment. She was afterwards discharged from imprisonment on *habeas corpus*. The present bill prays that the collection of the judgment be enjoined, for the reason that it was satisfied by her arrest and imprisonment. It is to be inferred that the discharge on *habeas corpus* was because of the failure of Wiltshire to advance and pay to the jailer his fees for receiving, or for boarding her, or for both, because it is not negatived in the bill that the decree was in consequence of such failure; and so the question is presented whether the discharge of a defendant, arrested on a *capias ad satisfaciendum* issued upon a judgment for a malicious tort, because of the failure of the plaintiff in the judgment to advance and pay to the jailer the fees for receiving or for the board of such defendant, is such a discharge as removes the presumptive satisfaction of the judgment by reason of the arrest and imprisonment of the defendant.

An act of the General Assembly, entitled "An act in relation to committals to jail upon writs of *ca. sa.*" was approved on the 12th of February, 1853. Laws of 1853, p. 258. The first section enacts: "That in all cases where any person shall be committed to the jail of any county upon any writ of *capias ad respondendum*, or *capias ad satisfaciendum*, issued in a civil suit, it shall be the duty of the creditor in such writ to pay the keeper of the jail the fees of the jailer or sheriff for receiving the same, and his board for one week at the time the debtor shall be committed to such jail, and before the jailer shall be bound to receive the debtor, and in default of such payment such debtor may be discharged from such arrest." * * *

And it is enacted in the second section that, "should such debtor be detained in jail under such writ for more than one week, it shall be the duty of such creditor at the commencement of each week to advance and pay to such jailer or sheriff the board of such debtor for each succeeding week that such

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debtor may be detained in such jail, and in default of such payment in advance, said debtor may be discharged by such jailer or sheriff. * * * The discharge of any debtor under the provisions of this act shall be no discharge or satisfaction of the debt, damages or costs named in such writ; but the same shall be in full force against the property and effects of said debtor."

No one, we presume, would claim that this statute does not extend to cases of malicious torts as well as to cases of contracts, for its terms are as broad and comprehensive as can be employed.

The title of the act shows that it is to apply to *all* cases of "committal to jail upon writs of *ca. sa.*," for there are no qualifying or restrictive words. And the statute is express that "in *all cases* where any person shall be committed to the jail of any county upon any writ of *capias ad respondendum* or *capias ad satisfaciendum*, issued in a civil suit," its terms shall apply. It is surely supererogation to affirm that actions for malicious torts are civil suits, and so within this language. These enactments have remained in force since their approval, but in the revision of 1874 they are placed under the head of "insolvent debtors" as sections 30, 31, 32, 33 and 34 of that chapter, (see R. S., 1874, pages 588 and 589); but it is impossible that they can mean anything different by the mere fact of placing them thus in the statutes. What they meant when enacted, on the 12th of February, 1853, they must now mean. And since they then extended to malicious torts, they must now extend to them. And so the judgment in favor of Wiltshire and against Lambert is necessarily unsatisfied and still in force, notwithstanding her arrest and imprisonment.

The judgment is affirmed.

Judgment affirmed.

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Syllabus.

ELIZABETH J. SHAW

v.

THE CHICAGO SASH, DOOR AND BLIND MANUFACTURING COMPANY.

Filed at Ottawa, March 31, 1893.

1. MECHANIC'S LIEN — *statute construed — sworn statement by contractor.* There is nothing in section 35 of the Lien law, as amended in 1887, which makes it the duty of the owner of a building to require of the contractor the sworn statements therein provided for. But it is made the duty of the contractor, whenever any payment of money becomes due to him, to furnish such statement to the owner, and takes from him the right of action or to a lien against the owner until the statement is made, and it finally, for the protection of the owner, authorizes him, at any time during the progress of the work, to demand such statement of the contractor, and imposes a penalty upon the latter for a failure to furnish it.

2. Section 35, as amended, provides that any payment made by the owner before any such statement is made, or without retaining sufficient money, if that amount is due or to become due, to pay the sub-contractors, etc., as *shown by the statement*, shall be considered as illegal and made in violation of the rights of the persons intended to be benefited by the act, and the rights of such sub-contractors, etc., to a lien shall not be affected thereby. Under this clause, when no statement under oath is made by the contractor, payment by the owner is not made illegal so as to give a lien to sub-contractors, etc., who may thereafter give notice of their claims.

3. By section 35 sub-contractors and material-men are given a lien from the time the statement of the contractor is served upon the owner, without being required to give the notice provided by section 30, and all moneys due or to become due to the original contractor are stayed in the owner's hands for their benefit, but no such advantages are given to sub-contractors or material-men in the absence of a statement by the original contractor, or when their names do not appear on the statement when made.

4. The words "the persons intended to be benefited by this act," as used in section 35, should be construed as referring only to such sub-contractors and material-men as are named in the original contractor's statement to the owner, and of whose claims the owner shall thereby be notified, and, consequently, no other sub-contractor or material-man can claim any rights under that section.

5. SAME — *duties and liabilities of the owner — rights of sub-contractors — notice to owner.* Where the contractor, employed to build a

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house, failed to give the owner a sworn statement of the claims of sub-contractors and material-men, as required in section 35, as amended in 1887, and there was nothing due from the owner at the time he was served with notice of the claim of a sub-contractor under section 33, the latter will have no lien on the building.

6. Section 35 merely requires the owner to retain in his hands sufficient money to pay the sub-contractors and material-men, "as shown by the statement," and provides that payments made by him, whether before or after the statement is made, shall be deemed illegal and in violation of the rights of such sub-contractors or material-men, and not affecting their right to a lien. The rights of sub-contractors or material-men, notice of whose claims is not brought home to the owner by the contractor's statement, can not be affected by the payment of money by the owner to the contractor. Until the service of notice under section 30 they will have no lien, either perfected or incipient and they will, therefore, have no right to the money in the hands of the owner, which may be violated by its payment to the original contractor.

7. Sub-contractors and material-men whose names do not appear on the sworn statement delivered by the original contractor must proceed under section 30 of the act as amended, and there is nothing in section 35 showing an intention to modify, as to them, the provision of section 33, giving them a lien only for so much as the owner may be indebted to the contractor at the time of the service of notice, or may afterwards become indebted to him.

8. SAME — *statute strictly construed.* The statute in relation to mechanics' liens, being in derogation of common right, should be strictly construed. It should not be enlarged by implication or by uncertain construction, but should be given only such force as clearly belongs to it. To say that a right claimed under such a statute is doubtful is, substantially, tantamount to saying that it does not exist.

APPEAL from the Appellate Court for the Second District; — heard in that court on writ of error to the Circuit Court of Kankakee county; the Hon. JOHN D. CRABTREE, Judge, presiding.

Mr. SHERWOOD DIXON, for the appellant:

Under the statutes of the State relating to mechanics' liens, in order that a sub-contractor may acquire a lien, he must serve a notice upon the owner before the latter has paid the original contractor in full, or he must have been named, together with the nature and amount due or to become due him, in the affi-

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davit which the statute allows the owner to exact from the original contractor. 2 Starr & Curtis' Statute, 1529; Hurd's Statutes of 1891, p. 913.

Subsequent to the amendments of the law respecting mechanics' liens, which were adopted in 1887, the Supreme Court so construed the law. *Butler et al.* v. *Gain et al.*, 128 Ill. 23.

Their right to a lien does not depend upon the omission of the owner to do or perform any act, but does depend upon something they must themselves do. Id. 28.

Section 33 of the act above cited, was not expressly repealed by the amendments adopted in 1887. Laws 1887, page 221.

It can not be held that section 33 was repealed by implication.

Before a court will pronounce an act repealed by implication, the later act must be irreconcilably inconsistent with the earlier one. *Gunnarssohn* v. *City of Sterling*, 92 Ill. 569; *Covington* v. *East St. Louis*, 78 id. 552.

Repeals by implication are not favored. *Wragg* v. *Penn Tp.*, 94 Ill. 13.

Repeal by implication only takes place when the provisions of the two acts are repugnant; if a construction can be given by which both may stand, it will be adopted. *Chicago* v. *Quimby*, 38 Ill. 274.

The repugnance must be such that the two acts can not be reconciled. *Hume* v. *Gossett*, 43 Ill. 297.

Payments made by the owner of the building, of just debts on the orders of the contractor, in favor of sub-contractors, accepted verbally before notice of lien of another sub-contractor is served on the owner, are good, though the payments are made after the service of the notice. *St. Louis N. S. Yards* v. *O'Reilly*, 85 Ill. 546.

If before any liens were filed the contractor had been paid in full or had assigned his interest in the fund in good faith and for a valuable consideration, in payment of a claim of a

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sub-contractor, and the owner is notified thereof, no subsequent liens could operate to affect the owner with any further liability. After notice of an order of that kind the owner is bound to apply the fund to its payment and to no other purpose. *Lauer et al.* v. *Dunn*, 115 N. Y. 405; *Carman* v. *McInrow*, 13 id. 70.

Mr. RUDOLPH D. HUSZAGH, for the appellee:

The amendments to the lien statute in 1887 are remedial and as such should receive a liberal construction to advance the remedy. *Jackson* v. *Warren*, 32 Ill. 331; *Hadley* v. *Morrison*, 39 id. 393.

That it is the duty of a sub-contractor to furnish a notice to the owner of his right to a lien, providing the original contractor fails by a statement to do so, is not denied.

In this case appellee did serve its notice in the form and at the time pointed out by sections 30 and 31, and appellee claims that by doing so, it became entitled to the benefits of section 35.

The law did not require appellee to give any notice whatever of its rights, until within forty days from the completion of its sub-contract, and having been served within that period, was in proper time. A notice before or after such period, would have been useless, if relied upon in this action.

But two methods are designated by which the rights of sub-contractors, material-men, etc., are to be brought to the notice of the owner. One is shown by section 30, the actual notice of the sub-contractor, and the other by section 35, the notice acquired indirectly through the statement of the original contractor.

Undoubtedly, there are various other ways in which an owner can keep himself informed, but it is claimed by appellee that one or the other of the notices mentioned by these two sections, is the kind that appellant had a right to rely and insist upon, because by either notice only could appellee enforce its lien. *Butler & McCracken* v. *Gain*, 128 Ill. 23.

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Section 35 gave appellant a right to insist upon a sworn statement from Schmidt, which would have given her a complete report of his sub-contracts with others connected with her building, including the sub-contract of appellee, together with the nature and amount thereof. And a failure on his part so to do, would have deprived him from recovering any part of his contract, making his account as far as he was concerned not actionable, and subjecting him to an additional penalty, provided for by said section.

True, section 31 limits the lien of a sub-contractor to the indebtedness of the owner to the original contractor at time of giving notice. But section 29, to which it refers, expressly intimates that the owner will be obliged to pay a greater sum than the price stipulated, if he or she make payments to the original contractor or to his order, in violation of the rights of persons intended to be benefited by section 35; and said section declares that payments, made without requiring the statement therein mentioned, shall be considered illegal, and shall not affect the lien of sub-contractors intended to be benefited; that is, such as have been mentioned in statements already furnished by the original contractor, or those who have given, or who may give the notice required by section 30, in apt time. Such illegal payments, therefore, can not be taken into account by the owner, and to the extent of such illegal payments, the owner is still indebted to the original contractor, for the purpose of satisfying the lien of the sub-contractor who brought himself within the provision of the law.

Mr. CHIEF JUSTICE BAILEY delivered the opinion of the Court:

This was a proceeding brought by the Chicago Sash, Door and Blind Manufacturing Company against Elizabeth J. Shaw, for the establishment and foreclosure of a sub-contractor's lien. The facts, about which there is very little if any controversy, are, in substance, as follows: On the 15th day of May, 1889,

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the defendant, being the owner of two lots in the city of Dixon, entered into a contract with William C. Schmidt for the construction of a dwelling-house thereon. By the terms of the contract, Schmidt was to furnish the labor and materials, and to erect, complete and deliver the dwelling house to the defendant on or before September 1, 1889, and was to receive therefor the sum of $4750, payable in monthly installments as the work should progress, the residue to be paid within thirty days after the completion of the work.

About July 6, 1889, Schmidt entered into a contract with the petitioner, by which the petitioner agreed to furnish the sash, doors and certain other mill-work to be used in the construction of the building, for the sum of $675. Under this contract, the petitioner commenced furnishing materials August 23, 1889, and finished delivering the same October 8, 1889, and also furnished certain extra materials and labor, amounting to $76.20, the last item being furnished October 15, 1889, making in all $751.20, the sum for which a lien is now sought to be established.

Under date of August 14, 1889, the petitioner wrote to the defendant's agent as follows:

"Mr. W. C. Schmidt, the carpenter building your house, has ordered of us the mill-work for same, the amount of his contract being $675, barring extras. This is the first work we do for Mr. S., and as we are unable to get reliable information as to his financial standing, we inform you of his liability for account of your building. Please inform us whether you will see our bill paid when job is completed."

To this the agent replied, under date of August 16, 1889:

"Your favor of the 14th inst. at hand. I can not agree to do anything in reference to the contract of W. C. Schmidt for building the house of Elizabeth J. Shaw. I will state, however, that she will doubtless keep her agreement with him, and she probably will also see that there are no unpaid liens of sub-contractors under the mechanics' lien statute. Hoping

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that there will be no difficulty in your carrying out your sub-contract, I remain," etc.

During the time the work was in progress, Schmidt made out and delivered to the defendant two sworn statements, as required by section 35 of the Mechanics' Lien Law, showing the various amounts due or to become due for labor or materials, the first of these statements being rendered July 6, 1889, and showing various claims unpaid, aggregating $300.01, and the second being rendered August 3, 1889, showing unpaid claims aggregating $1,190.02. No further statements seem to have been rendered by Schmidt to the defendant, but the defendant paid, from time to time, to laborers and material-men, on Schmidt's orders, various sums of money, which, together with some small sums paid directly to Schmidt and certain orders of Schmidt in favor of laborers and material-men, which she had accepted, amounted to the entire contract price for the erection of the house. These payments had all been made and orders accepted before October 23, 1889, the date of the service by the petitioner upon the defendant of the notice prescribed by section 30 of the Mechanics' Lien Law. On that day notice was served, and it is not disputed that the petitioner took all subsequent steps prescribed by the statute to perfect his lien. One other sub-contractor, to whom $135.16 was due, also served notice, and his claim has been paid in full.

Upon these facts the Circuit Court held that the petitioner was not entitled to a lien, and entered a decree dismissing the petition at its costs for want of equity. On appeal to the Appellate Court that decree was reversed, and the cause was remanded to the Circuit Court with directions to enter a decree in favor of the petitioner. The defendant, by a further appeal, now brings the record to this court for review.

The right of the petitioner to a lien must depend upon the construction to be placed upon the Mechanics' Lien Law of 1874, as amended by the act of March 25, 1887, that being

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the law in force at the time the rights of the parties to this suit accrued. It is claimed on the part of the petitioner that, as a large portion of the payments made by the defendant were made without requiring of the contractor a statement under oath, giving the names of the sub-contractors and persons furnishing materials, and the terms of the contracts with them, and the amounts due or to become due to them respectively, such payments were made in violation of the rights of the petitioners and other sub-contractors, and that the defendant is therefore not entitled to credit for such payments, in determining whether she was indebted to the original contractor, at the time the notice of the petitioner's lien was served upon her. The defendant, on the other hand, insists that the statute, when properly construed, leads to no such result, and that she is entitled to all payments made prior to the service of notice of the petitioner's lien, and as nothing was then due from her to the principal contractor, there is nothing upon which the lien can operate.

The portions of the statute which it will be necessary for us to consider are sections 29, 30, 33 and 35. Section 29, which is one of the sections amended by the act of 1887, provides that, every sub-contractor, etc., who shall, in pursuance of the purpose of the original contract between the owner of any lot or piece of ground and the original contractor, perform any labor or furnish any materials in building any house or other building on such lot, shall have a lien for the value of such labor and materials, upon the lot, to the extent of the right, title and interest of the owner, at the time the original contract was made. "But the aggregate of all the liens hereby authorized shall not exceed the price stipulated in the original contract between such owner and the original contractor for such improvements. In no case shall the owner be compelled to pay a greater sum for or on account of such house, building or other improvement, than the price or sum stipulated in said original contract or agreement, unless payments be made to

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the original contractor, or to his order, in violation of the rights and interests of the persons intended to be benefited by section 35 of this act."

Section 33, which was not amended by the act of 1887 but remains as originally enacted, provides that no claim of a sub-contractor shall be a lien, except so far as the owner may be indebted to the contractor at the time of giving notice of the lien, or may afterwards become indebted to the contractor. Section 30, which was amended, prescribes the form of the notice, and provides that such notice shall not be necessary, where the sworn statement of the contractor provided for by section 35 shall serve to give the owner notice of the amount due and to whom due. Section 35 as amended is as follows:

"The original contractor shall, whenever any payment of money shall become due from the owner, or whenever he desires to draw any money from the owner, lessee or his agent on such contract, make out and give to the owner, lessee or his agent, a statement, under oath, of the number, name of every sub-contractor, mechanics or workmen in his employ, or person furnishing materials, giving their names and the rate of wages or the terms of contract, and how much, if anything, is due or to become due to them or any of them for work done or materials furnished, and the owner, lessee or his agent shall retain out of any money then due or to become due to the contractor, an amount sufficient to pay all demands that are due or to become due such sub-contractors, mechanics and workmen or person furnishing materials, as shown by the contractor's statement, and pay the same to them, according to their respective rights, and all payments so made shall, as between such owner and contractor, be considered the same as if paid to such original contractor. Until the statement provided for in this section is made in manner and form as herein provided, the contractor shall have no right of action or lien against the owner on account of such contract, and any payment made by the owner before such statement is made or

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without retaining sufficient money, if that amount be due or is to become due, to pay the sub-contractors, mechanics, workmen or persons furnishing materials, as shown by the statement, shall be considered illegal, and made in violation of the rights of the persons intended to be benefited by this act, and the rights of such sub contractors, mechanics, workmen or persons furnishing materials, to a lien shall not be affected thereby. In order that the owner, lessee or his agent may be protected, he may, at any time during the progress of the work, demand in writing of the contractor the statement herein provided for, which shall be made by the contractor and given to the owner, lessee or his agent, and if such contractor fail to furnish such statement within five days after demand made, he shall forfeit to such owner the sum of $50 for every such offense, which shall be recovered in any action of debt before any justice of the peace."

It will readily be seen that the language of section 35 is not altogether clear and free from difficulty, but we are of the opinion that when carefully scrutinized, it will be found that it does not bear the construction which the petitioner is seeking to put upon it. In the first place, there is nothing in its provisions which make it the legal duty of the owner to require of the contractor the statements provided for. But it is made the duty of the contractor, whenever any payment of money becomes due to him, to furnish such statement to the owner, and the section takes from him the right of action or to a lien against the owner until the statement is made, and it finally, for the protection of the owner, authorizes him, at any time during the progress of the work, to demand such statement of the contractor, and imposes a penalty upon the latter for a failure to furnish it.

The petitioner relies in support of his contention upon this clause of the section: "And any payment made by the owner before such statement is made, or without retaining sufficient money, if that amount is due or to become due, to pay the sub-

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contractors, mechanics, workmen or persons furnishing materials, *as shown by the statement*, shall be considered illegal, and made in violation of the rights of the persons intended to be benefited by this act, and the rights of *such* sub-contractors, mechanics, workmen or persons furnishing material to a lien shall not be affected thereby." The construction sought to be put upon this clause is, that where no statement under oath is made by the contractor, every payment by the owner is illegal, and is no bar to any sub-contractor or material-man who may thereafter give notice and seek to establish his lien. Such construction we think is unwarranted.

In seeking to determine the force properly belonging to this clause, we should keep in view the rule so frequently enunciated by this court, that the statute in relation to mechanic's liens, being in derogation of common right, should be strictly construed. A statute which gives to a particular class of creditors special and exceptional rights and remedies, and which derogates from the common law right which every man has to enter into such lawful contracts as he pleases, and to perform his contracts when made according to their terms, should not be enlarged by implication, or by uncertain construction, but should be given only such force as clearly belongs to it. To say that a right claimed under such statute is uncertain, is substantially tantamount to saying that it does not exist.

The first and perhaps the determining question here is, as to the parties referred to by the words, "the persons intended to be benefited by this act." Whoever they are, they are manifestly the parties referred to and provided for by section 35. In section 29, the same parties are designated as "the persons intended to be benefited by section 35 of this act." But in section 35, we find nothing, except it be by a remote and uncertain inference, indicating an intention to make any provision in favor of any sub-contractors or material-men, except such as are shown by the sworn statement of the original contractor. They are given a lien from the time the statement is served,

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without being required to give the notice provided for by section 30, and all moneys due or to become due to the original contractor are stayed in the owner's hands for their benefit. But no such advantages are given to sub-contractors or material-men in the absence of a statement by the original contractor, or where their names do not appear on the statement when made. They must proceed under section 30, and there is nothing in section 35 evidencing an intention to modify as to them the provision of section 33 giving them a lien only for so much as the owner may be indebted to the contractor at the time of the service of notice or may afterwards become indebted to him. Section 35 merely requires the owner to retain in his hands sufficient money to pay the sub-contractors and material-men "as shown by the statement," and provides that payments made by him, whether before or after the statement is made, shall be deemed illegal and in violation of the rights of such sub-contractors and material-men, and not affecting their right to a lien. It is difficult to see how, in any proper legal sense, the rights or interests of sub-contractors or material-men, notice of whose claims was not brought home to the owner by the contractor's statement, could be affected by the payment of money by the owner to the contractor. Until service of notice under section 30, they would have no lien, either perfected or incipient, and they would therefore have no right to the money in the hands of the owner which would be violated by its payment to the original contractor.

We are of the opinion then that the words, "the persons intended to be benefited by this act," as used in section 35, should be construed as referring only to such sub-contractors and material-men as should be named in the original contractor's statement to the owner, and of whose claims the owner should thereby be notified, and consequently that no other sub-contractors or material-men can claim any rights under that section. It follows that the petitioner's right to a lien can not be founded upon the provisions of that section, but must rest solely upon

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the provisions of sections 30 and 33, and as the defendant, at the time of the service by the petitioner of notice of his lien, was not indebted to the original contractor in any sum, and did not thereafter become indebted to him, there was nothing upon which the petitioner's lien could operate.

Substantially the same view as to the force to be given to section 35 we have here expressed was taken in *Butler* v. *Gain*, 128 Ill., 23. We there held that a payment to the original contractor is in violation of the rights and interests of the sub-contractor or person furnishing materials, when the owner has notice of such person's rights, either under section 30, or from the sworn statement of the original contractor provided by section 35.

We are of the opinion therefore that the petitioner has failed to establish any right to a lien as against the defendant, and that his petition should be dismissed for want of equity. The judgment of the Appellate Court will be reversed, and the decree of the Circuit Court will be affirmed.

Judgment reversed.

SIMEON F. HALL *et al.*

v.

JOHN D. COX.

Filed at Ottawa, January 19, 1893.

1. APPEALS AND WRITS OF ERROR—*reviewing questions of fact—amount of damages.* The judgment of the Appellate Court, affirming that of the Circuit Court, is conclusive, as to all the questions of fact involved in the case, upon this court. The amount of damages is a question of fact, and the judgment of the Appellate Court in relation thereto can not be reviewed by this court.

2. SAME—*preserving questions of law.* Where no exception is taken as to the admission of evidence in the trial of a cause before the court alone, and no propositions of law are submitted to the court to be passed upon before or at the time of rendering judgment, no questions of law will be presented, and the judgment will be affirmed.

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APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

Messrs. KNIGHT & BROWN, for the appellants.

Mr. WALTER W. ROSS, for the appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action of assumpsit begun on February 6th, 1891, in the Circuit Court of Cook County by the appellee against the appellants. The appellee is a banker, doing a banking business at Polo, Caldwell County, Missouri, under the name of the Exchange Bank of Polo. The appellants are partners under the firm name of Hall Bros., Griffith & Co., engaged in the business of selling cattle on commission at the Union Stock Yards in Chicago, Illinois. Appellants had agents named John Akin and A. B. Akin, the latter being the son of the former, in said Caldwell County, whose business it was to buy cattle and ship them to appellants at Chicago. Drafts, signed "A. B. Akin by John Akin, agent," were drawn by Akin on the appellants for the cost of cattle consigned to them. Quite a number of drafts so drawn, and upon which the appellee advanced the money to Akin, were paid by the appellants in October, 1890, in pursuance of agreements to pay them embodied in telegrams sent by appellants to appellee.

The declaration contains one special count and the common counts. The special count alleges, that the defendants agreed with the plaintiff to accept and honor Akin's drafts for cost of stock consigned to them in certain quantities, in consideration that plaintiff would advance the money to Akin to be paid for the cattle so consigned; that, on November 8th, 1890, at Polo in Missouri, A. B. Akin by John Akin, agent, drew his draft of that date upon defendants for $1907.75 payable at sight to the Exchange Bank or order, and delivered it to said

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bank, which endorsed it and forwarded it to a Bank in Chicago for collection; that plaintiff at said time and place paid the said sum of money to Akin; that said draft was presented to defendants at their office in Chicago and payment demanded, which was refused, &c. The plea of the general issue was filed.

The case was tried before the court without a jury by agreement. The finding and judgment of the trial court were in favor of the plaintiff, and such judgment has been affirmed by the Appellate Court.

The judgment of the Appellate Court is conclusive upon all the questions of fact involved in the case. Our attention is called to no question arising upon the trial in regard to the admission or exclusion of evidence. It is strenuously urged, that the damages allowed were excessive, but no part of the testimony as to the amount of damages was objected to, and no exception was taken to the admission of such testimony. (*Merchants' Des. Trans. Co.* v. *Joesting*, 89 Ill. 152; *Deitrich* v. *Waldron*, 90 Ill. 115; *Caveny* v. *Weiller*, 90 Ill. 158). We have repeatedly held, that the amount of damages is a question of fact, and that the judgment of the Appellate Court in relation thereto cannot be reviewed by this Court. (*J., A. & N. Ry. Co.* v. *Velie*, 140 Ill. 59, and cases there cited).

It is said in the books, that a new trial will be less readily granted on account of excessive damages allowed by the verdict, where the amount of damages is somewhat a matter of opinion merely, than where the law recognizes fixed rules and principles in determining such amount. (16 Eng. & Am. En. of Law, page 583 and notes). But if the amount of damages in this case is in any sense a question of law, the defendants below did not take the proper steps to bring that question, or any other question of law, before this Court. No written propositions to be held as law by the court in the decision of the case were presented to or passed upon by the trial court before or at the time of rendering judgment, as provided for by section 42 of the Practice Act in cases of trials before the

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court without a jury. Therefore, no question of law is presented by the record for our determination. (*Mutual Aid Association* v. *Hall*, 118 Ill. 169; *Bank of Michigan City* v. *Haskell*, 124 Ill. 587; *Myers* v. *Union National Bank*, 128 Ill. 478).

The judgment of the Appellate Court is accordingly affirmed.

Judgment affirmed.

ROBERT S. INGALLS

v.

JOSEPH C. ALLEN.

Filed at Ottawa, January 19, 1893.

1. APPEALS AND WRITS OF ERROR — *reviewing question of fact — amount of damages.* The amount of damages to be assessed in a given case presents only a question of fact for the jury under proper instructions, and this court, on appeal from the Appellate Court, will refuse to review such a question.

2. SAME — *and herein of a remittitur.* And so, whether a *remittitur* of a part of the damages assessed by the jury covers the entire amount of excess in the verdict beyond what should have been returned, is a question of fact for the trial court, which this court is concluded by the judgment of the Appellate Court from considering.

3. SPECIAL INTERROGATORIES — *modification by the court.* The modification of special interrogatories asked to be submitted to the jury, by the omission of certain queries relating only to evidentiary facts, is not error.

4. SAME — *findings of the jury not responsive — remedy.* If the findings of the jury are not responsive to the interrogatories submitted, the counsel complaining should object to the receiving of the verdict, and ask the court to direct the jury to find specifically in the respect wherein their finding is not sufficient.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

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Mr. FRANK J. CRAWFORD, for the appellant.

Messrs. CROCKER & PEBBLES, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This case was before us at a former term, and will be found reported as *Ingalls* v. *Allen*, 132 Ill. 170.

The last trial in the Circuit Court resulted, as did the first, in a judgment in favor of the plaintiff below. It is not contended that the errors for which the judgment was reversed when the case was here before were repeated upon the last trial. The briefs before us are those only which were prepared for the argument of the case when it was before the Appellate Court, and the questions therein discussed are chiefly of fact which are eliminated from the case by the decision of that court.

It is insisted that appellee was improperly allowed $150 for selling a farm belonging to appellant, in Kansas. A remittitur of that amount was entered before the Circuit Court gave judgment; but it is argued this did not cure the error in the amount of the verdict, because it also included allowances for other amounts not sufficiently proved by the evidence. It is conceded, tacitly, at least, that there is no error of law either in the admission of evidence or in the instructions to the jury. The contention is that the jury disregarded the instructions of the court. The amount of damages to be assessed in a given case presents only a question of fact for the jury, under proper instructions, and we, therefore, refuse to review such a question on appeal from the Appellate Court. *Bangor Furnace Co.* v. *Magill*, 108 Ill. 656. And so, necessarily, whether the remittitur covered the entire amount of excess in the verdict of the jury beyond what should have been returned, is a question of fact for the trial judge, and concluded by the judgment of the Appellate Court.

A second insistence, on behalf of appellant, is that the trial court erred in refusing to submit to the jury certain special

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interrogatories as asked on his behalf, but modified them by omitting matters of query, the answer to which was deemed material to his defense, and, as thus modified, submitted them to the jury. The queries so omitted were in regard to evidentiary facts only, and were, therefore, properly omitted. *C. & N. W. Ry. Co.* v. *Dunleavy*, 129 Ill. 132; *C., R. I. & P. Ry. Co.* v. *Clough*, 134 id. 586.

If the findings of the jury were not responsive to the interrogatories submitted, counsel for appellant should have objected to receiving the verdict, and have asked the court to direct the jury to find specifically in the respect wherein their finding was insufficient.

We are unable to discover any error of law for which the judgment should be reversed. It is, therefore, affirmed.

Judgment affirmed.

THOMAS CORRIGAN *et al.*

v.

CITY OF CHICAGO *et al.*

Filed at Ottawa, March 31, 1893.

1. LANDLORD AND TENANT — *title divested by the power of eminent domain — eviction of tenant.* A tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain. He takes the term as any other interest in land is taken, subject to the exercise of that power. If he suffer loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right the same as his landlord holds his title. Hence, it has been held that a taking under the power of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to an eviction.

2. While a condemnation proceeding may not amount to a technical eviction, yet when the entire tract of land or lot is taken, its effect is to abrogate the relation of landlord and tenant. Whatever title the ten

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ant, as well as the landlord, has in the land passes to the State or corporation in whose behalf the right of eminent domain is exercised. The effect is an absolute extinguishment of the right and title of both in or control over the subject of the demise. It is in effect eviction by paramount right, coupled with a conveyance by the owners of their respective interests.

3. SAME — *and herein of the liability of the tenant to pay rent.* When the title of both the landlord and tenant is extinguished in the whole estate demised during the term by condemnation for the public use, the liability of the tenant to pay rent also ceases, and in any action brought by the landlord for the rent accrued after the termination of his estate, the tenant may plead such termination in defense.

4. When a portion of leased premises is taken for the public use and a part remains which is susceptible of occupation under the lease, the covenants of the lease are not abrogated, and the tenant will be bound to payment according to the terms of the covenants in the lease. The lessee will not be entitled to apportionment or abatement of the rent for the part of the land taken, but is bound to pay rent for the whole of the premises demised.

5. SAME — *tenant denying title of landlord — extinguishment of title during the term.* The doctrine is well settled, that although the lessee can not show that his lessor had no title to the premises when the tenancy began, he may show that he had a limited estate only, which is determined by its own limitation before the cause of action accrued, as when he held the estate for the life of another, or the like, which expired during the term, or that he has sold and conveyed the land, or has been evicted by title paramount, or that his title has been sold under execution and conveyed. This rule applies whether the action be for the recovery of the premises or for rent accrued after the extinguishment of the landlord's title.

6. EMINENT DOMAIN — *condemnation of leased land — value of respective interests of landlord and tenant.* The interest of the lessor in premises leased is the value of his reversion and the rents; that is, the reversion with the rents added. The interest of the lessee in the premises is the value of his term, subject to the rents, and each should receive compensation accordingly. Upon the judgment of condemnation being entered, the money awarded will stand in lieu of the land taken or damaged, to be apportioned upon the several interests in the property.

7. Where the entire leasehold interest of the lessee is taken under the power of eminent domain, his compensation is the value of the leasehold estate, subject to the rent covenanted to be paid. If the value exceeds the rental, he will be entitled to recover the excess. If it does not exceed the rent, he will be entitled to nothing.

8. If the covenant to pay rent is not affected by judgment of condemnation, the lessor will be entitled, as compensation, only to the

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present value of his reversion which he holds subject to the term created by his lease, and the lessee continuing personally liable, but losing his estate and right to its enjoyment, will be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents *in futuro;* that is, he should receive the value of his term subject to the rent, and such further sum as would be considered a present equivalent for the rent thereafter to be paid.

9. SAME—*and herein of tenant's interest in buildings.* Where the lessee covenants with the lessor not to remove any buildings or other improvements from the premises without the written consent of the lessor, and that at the termination of the lease he will deliver all the buildings and improvements, placed thereon, to the lessor, in good condition, etc., on a proceeding to condemn the leased premises, the lessee or holder of the leasehold will not be entitled to receive as part compensation the value of such buildings in addition to the fair cash value of the leasehold interest.

10. Where a lease for a term of years provides that the buildings and other improvements made by the tenant shall not be removed, but shall be delivered to the lessor at the expiration of the term in good repair and condition, usual wear and inevitable accident alone excepted, the right of the lessees in such buildings will not extend beyond the use of the same during the term, and the lessor takes a present estate in such buildings, subject to the user by the tenants during the term.

APPEAL from the Circuit Court of Cook county; the Hon. R. S. TUTHILL, Judge, presiding.

An ordinance of the city of Chicago was duly passed, ordering the widening of Congress street from State street to Michigan avenue in said city and that the north thirty-four feet of sublot one, lot two, block two, in fractional section fifteen addition to Chicago, and other property be condemned therefor. Appellants owned the north forty feet of the west eighty-seven and eight-tenths feet of the east one hundred and thirty-eight feet of said sublot one. Appellee, Emma Brinkworth, on the 31st day of May, 1888, became the lessee of appellants for the north twenty feet of said tract for a term ending the 30th day of April, 1914, at an annual rental for the first year of $960, payable in installments of $80 per month; if, however, any portion of the building to be erected on said premises was ready for occupancy before the expiration of said year, the rent

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was to be increased to $175 per month from the time the building was so ready, and for the next succeeding ten years, that is from April 30, 1889, to April 30, 1899, $2100 per annum, payable in monthly installments of $175; and it was stipulated that for the purpose of fixing the amount of rent to be paid for the ten years from April 30, 1899, to April 30, 1909, an appraisement by parties indifferently chosen, etc., should be made after the month of February, 1899, without the buildings, and six per cent thereon should be the yearly rent for said period. And in like manner appraisement should be made after February, 1809, and six per cent thereon should be the yearly rental of the residue of the term. Specific covenants, in respect of such appraisements, are included in said lease but need not be mentioned here. The lessee to pay taxes in excess of $78 until 1899, and for that year and thenceforward all taxes. The buildings and improvements to become the property of the lessors upon the termination of the lease. It is expressly covenanted, that upon the termination of the lease all buildings, improvements and fixtures that may have been placed on the demised premises shall be delivered to the lessors in good condition, ordinary wear and tear and inevitable accident excepted; and further, that the lessee will not remove any buildings or other improvements from said premises without the written consent of the lessors. Lien is declared upon the buildings and improvements on said premises, etc.

Appellee, McCarty, on the same day, May 31, 1888, leased of appellants the south twenty feet of said forty-foot tract, for a term ending April 30, 1914, and covenanted and agreed to pay for the first year $600, in monthly installments of $50 each; if, however, the building to be erected on said premises was ready before the expiration of the year, the increase of rent to $125 a month from the time it was ready for occupancy, and for the next ten years of said term, that is from April 30, 1889, to April 30, 1899, the sum of $1500 per annum, in equal monthly installments, and with like provisions as in the Brinkworth

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lease for fixing the rent to be paid for the ten years beginning April, 1899, and ending April 30, 1909, and also for the five years from April 30, 1909, to April 30, 1914, with like provisions in respect of taxes, except that the lessee was to pay the taxes for the years 1888 and 1889 in excess of $222. The lease is in other respects the same as the Brinkworth lease, with like agreements and covenants to deliver the premises in good repair to the lessors at the end of the term.

Just compensation for the thirty-four feet of the property taken was found by the verdict of the jury to be $102,000, and the same was awarded to appellants, less the value of said leasehold estates, which was found to be $30,225.79, and the value of improvements on said premises, $4527.75. Of said sum allowed as the value of the leasehold estates, there was awarded to Emma Brinkworth, as owner thereof, in the north twenty feet of said thirty-four feet taken, $17,631.71, and for the value of her improvements thereon, $2327.75, and to said McCarty, as owner of the leasehold estate of the south twenty feet, as the value of his leasehold estate, $12,594.08, and for his improvements on the same, $2200.

Motion for new trial having been overruled, the court found "that the respective sums of money awarded by the jury, in and by their said verdict, to the owners of said lots, pieces and parcels of land and property, are, and each of them is, a just compensation to the owner or owners thereof for the taking and damaging" of the same by the proposed improvement. "And said owner or owners shall, respectively, accept from said city of Chicago such sum or sums as are so awarded on account of the lots, pieces and parcels of land and property so owned by him, her or them respectively. * * * And that upon payment into this court by the said city of the said several sums of money for the use of the owner or owners of any or each of the said lots, pieces and parcels of land and property, or upon proof made to or before the court that the said sums of money, or any of them, have been paid to the

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owner or owners respectively of said lots, pieces and parcels of land and property, the city of Chicago shall have the right, at any time thereafter, to take possession," etc., of said property, in respect of which "such compensation shall have been so paid or deposited." The fee owners alone appeal and assign for error that the court erred in overruling their motion for a new trial, and in entering judgment; *second*, that the court erred in giving each instruction in behalf of respondent, William McCarty; *third*, that the court erred in giving instructions in behalf of Emma Brinkworth.

Messrs. WARVILLE, WALSH & MADDEN, for the appellants.

Mr. EDWIN BURRITT SMITH and Mr. SOLON D. WILSON, for the appellee McCarty.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

No objection is made, or urged, to the finding of the amount to be paid by the city as just compensation for the land taken, nor to the entry of judgment therefor, or in authorizing the entry of the city into the thirty-four feet strip condemned, upon payment of that sum. The verdicts and judgments are to be regarded as separate and distinct. *Stubbings* v. *Evanston*, 136 Ill. 37. The controversy here, so far as made by counsel, and insisted upon in this court, relates solely to the distribution of the sum found to be just compensation between the owners of the leasehold estates and the fee owners. The judgment of condemnation, and fixing the compensation to be paid by the city, will be affirmed; so, there remains open for consideration the judgments distributing the compensation between and among the parties holding the several estates in the premises only.

The lease to the defendant, Emma Brinkworth, expires April 30, 1914, and was upon a fixed annual rental until April 30, 1899, and after that the rental was to be fixed by appraise-

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ment of the land. The whole of the property included in her lease was taken by the city. The court instructed the jury, at her instance, "that the taking of property held by a tenant, under a lease existing at the time of filing the petition to condemn, does not release the tenant from the payment of rent, or any part thereof." That "the leasing of real estate to a tenant for a term of years is a conveyance to him of an interest in the land; and if the premises, or any part thereof, be taken by such a proceeding as this, the tenant is entitled to compensation for the damages, if any, to his leasehold estate, in respect of the unexpired part of the term." And further, that the taking of the leasehold premises of said Brinkworth does not release her from the obligation to pay the full amount of rent required by the lease, etc.

The correctness of these instructions is challenged.

That the tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain, is not questioned. The lessee takes the term as every other interest in land is taken, subject to the exercise of that power, whenever the public necessity and convenience demand it. He holds and enjoys the estate granted, subject to the exercise of the sovereign power to appropriate his land to a public use, upon making to him just compensation; and if he suffers loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right, as his landlord holds his title. Hence, it has been held that a taking under the right of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to an eviction. *Folts* v. *Huntley*, 7 Wend. 211; *Parks* v. *City of Boston*, 15 Pick. 193; *Foote* v. *City of Cincinnati*, 11 Ohio, 408; *Patterson* v. *Boston*, 20 Pick. 159; *Dyer* v. *Wightman*, 66 Pa. St. 245; *Frost* v. *Earnest*, 4 Whart. 90; *Ross* v. *Dysart*, 9 Casey, 452; *S. & D. Ry. Co.* v. *Schmede*, 7 P. F. Smith, 271.

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And when a portion only of the land is taken, and a portion remains, which is susceptible of occupation under the lease, we have held, following what we regard as the weight of authority, that the covenants of the lease are not abrogated, and that the tenant is bound by his covenant to pay full rent according to its terms. *Stubbings* v. *Village of Evanston*, 136 Ill. 37. And that in such case the lessee would not be entitled to apportionment or an abatement of the rent for the part of the land taken, but was bound to pay rent for the whole of the premises demised. In that case we refrained from expressing any opinion in respect of the rule governing in cases where the entire tract, or lot of land embraced in the lease, is taken for the public use. That question is now presented to this court for the first time.

If the covenant to pay rent is not affected by the proceedings and judgment of condemnation, it is clear that the lessor would be entitled as compensation only to the present value of his reversion, which he holds subject to the term created by the lease; and the lessee continuing personally liable but losing his estate, and right to its enjoyment, would be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents payable *in futuro*. That is, he should receive the value of his term subject to the rent, and such further sum as would be considered a present equivalent for the rent thereafter to be paid, and the lessor would receive correspondingly less. The cases thus holding proceed upon the theory that the condemnation of the land leaves the lease in full force, at least in so far as there are covenants to pay rent. We think, that while the condemnation proceeding may not amount to a technical eviction, that where the entire tract of land, or lot, is taken, the effect is to abrogate the relation of landlord and tenant. By virtue of such proceeding, whatever title the tenant has in the land passes to the State, or corporation, in whose behalf the right of eminent domain is exercised; and precisely the same

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is true of the landlord's estate or interest. The effect is an absolute extinguishment of the right and title of both in, or control over, the subject of the demise. It is in effect eviction by paramount right, and has all the force of an eviction by a paramount title, coupled with a conveyance by the owners of their respective interests. If the lessee should be held in such case entitled to receive compensation growing out of his liability to pay rent for the remainder of the term, after the extinguishment of his title, it will not be contended that the measure of such compensation would be the gross rents. It is clear that if the lease have fifty years to run at an annual rental of a thousand dollars, that an annual interest of two per cent upon the gross sum of the rents would discharge the installments as they fell due, and leave the tenant the gross sum of $50,000 profit at the expiration of the term. To this he would not be entitled; he is to receive compensation only. Compensation would be made by the payment to him of a sum, the present equivalent of the sum of the rents payable during the term, with a proper discount in payment. If this be so, the effect is simply to take the money which really belongs to the lessor, pay it over to the lessee, that he may pay it back to the lessor in installments, and this is to be done without profit to either, and under a lease which, for all other purposes, has been absolutely extinguished.

We are of opinion that reason and the weight of authority are opposed to the establishment of such a rule. The interest of the lessor in the premises, is the value of his reversion, and the rents; that is, the reversion with the rents added. The interest of the lessee in the premises, is the value of his term, subject to the rents, and each is to receive compensation accordingly. Upon the judgment of condemnation being entered, the money awarded would stand in lieu of the land taken, or damaged, and to be apportioned upon the several interests in the property.

We are referred to a single case only (*Foote* v. *City of Cincinnati*, 11 Ohio, 408) where it has been held, that the tenant's

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liability to pay rent to his landlord continues unimpaired, after condemnation of the entire tract of land included in the lease, or where so much thereof has been appropriated, that the residue was incapable of occupation for any purpose consistent with the lease, and that case is placed upon the principle that the right of eminent domain, or the right of appropriating land to public uses, is not a technical incumbrance on the land, and that such appropriation is not an eviction; and the only cases cited in support of the decision are, *Folts* v. *Huntley*, 7 Wend. 211; and *Parks* v. *City of Boston*, 15 Pick. 198, in each of which cases, the demised premises were only partially taken, and the tenant remained in possession of the residue under his lease.

In *O'Brien* v. *Ball*, 119 Mass. 28, where the city of Boston, under an act authorizing it, acquired the title to a tract of land which had been leased by O'Brien to Ball, and the title of the lessor had been divested in the whole tract, the lessor brought suit against the lessee for rent accruing after divestiture of his title. The court held the lessor not entitled to recover and say: "But, even without eviction by, or attornment to, the holder of the new title, the liability to pay the rent reserved, ceased with the termination of the plaintiff's estate."

Barclay v. *Pickels*, 38 Mo. 143, was an action by the lessor to recover rent reserved in a written lease. The defendant offered to prove, that after the making of the lease, and before the rent sued for accrued, the city of St. Louis had, in a proceeding instituted in the opening of Choteau avenue, in said city, etc., taken the leased property for the opening of said street, and that the title to the property had thereby become vested in the city, etc., which was rejected. The court held the testimony admissible and say: "As a general rule, whenever the estate which the lessor had at the time of making the lease is defeated or determined, the lease is extinguished with it. If, therefore, a lot of land, or other premises, under lease, is required to be taken for city, or other public improvements, the

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lease, upon confirmation of the report of the commissioners condemning the property, becomes void. When the lessor ceases to have any interest in the property, the rent becomes annihilated." Citing Taylor's Landlord and Tenant, sec. 519. See *S. & D. Ry. Co.* v. *Schmede*, *supra*; *Carthburt* v. *Keehn*, 3 Whart. 357.

In these cases, the discharge of the lessee from liability is placed upon the ground that the landlord's title is absolutely extinguished in the leased estate, and he can not, therefore, enforce the contract for the payment of rent after its extinguishment. "The tenant's covenant is only to pay a certain sum as rent," says GRAY, C. J., in *Sampson* v. *Clarkson*, 113 Mass. 348; "and, in the words of DODRIDGE, in 3 Bulst. 274, 'if it be so that the estate be ended, the contract for the rent will end also, this being but *quid pro quo*, *sic*, the rent of the land.'" The doctrine is well established, that although the lessee can not show that his lessor had no title to the premises when the tenancy began, he may show that he had a limited estate only, which was determined by its own limitation before the cause of action accrued, as where he held the estate for the life of another, or the like, which expired during the term (*Sampson* v. *Clarkson*, *supra*; *Wells* v. *Mason*, 4 Scam. 84; *St. John* v. *Quitzow*, 72 Ill. 334); or that he had sold and conveyed the land, or has been evicted by title paramount, or that his title has been sold under execution and conveyed. *Franklin* v. *Palmer*, 50 Ill. 202; *Supervisors* v. *Herrington*, id. 232; *Tilghman* v. *Little*, 13 id. 239; Taylor's Landlord and Tenant (8th ed.), sec. 708, and notes.

This rule applies whether the action be for the recovery of the premises, or for rent accrued after the extinguishment of the landlord's title, (Taylor's Landlord and Tenant, sec. 627–708, and cases cited); and whether the estoppel sought to be set up arises *in pais*, or by deed. The estoppel *in pais* arises, if at all, because of the tenant's having entered under the title at the beginning of the lease. This he admits. But it is not

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inconsistent therewith to plead and prove that such title has subsequently expired.

And so where the estoppel is by deed, "the rule is well settled that a tenant is not allowed to dispute his landlord's title after having accepted possession under him. A lessee by indenture is technically estopped from denying it; and this, if not the origin of the rule, seems to have been the only occasion of its occurrence under the early common law. But it is now of general application, whenever possession has been taken under any species of tenancy, whether the action be assumpsit, debt, covenant, or ejectment. A lessee may, however, plead that, although the lessor had an interest in the premises at the time of making the lease, his interest terminated before the alleged cause of action arose." Taylor's Landlord and Tenant, sec. 629 and sec. 708, notes 3, 4, 5 and 6; *Langford* v. *Selmes*, 3 Kay & J. 220; *Salaman* v. *Agburow*, 1 Ral. R. 441; 3 Bulst. 272-5; *Den* v. *Ashmore*, 2 Zab. 261; *Presstman* v. *Silljacks*, 52 Md. 647; *Hardin* v. *Forsythe*, 99 Ill. 312. And the rule applies whether there has been an eviction in fact, or the tenant has attorned in good faith to the owner of the paramount title or not. It would seem, therefore, that where the title of the landlord is extinguished in the whole estate during the term, the liability of the tenant to pay rent also ceases; and that in any action brought by the landlord for the rent accrued after the termination of his estate, the tenant may plead such termination in defense.

We are of opinion that the better rule is, that where the estate of the landlord, in the whole of the demised premises, as well as that of the tenant, is extinguished by the condemnation proceedings, the liability of the tenant to pay rent ceases upon the termination of such estates.

It follows that the court erred in giving the instructions before quoted. The measure of compensation for the estate of the tenant taken is the value of her leasehold estate, subject to the rent covenanted to be paid. If the value exceeds the

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rental she will be entitled to recover the excess. If it does not exceed the rent reserved, she will be entitled to nothing.

Like instructions were given at the instance of the defendant McCarty. In his case fourteen feet out of the twenty feet fronting on State street, and extending eighty feet in depth, were taken under the condemnation proceeding. A portion of the lot being six feet front on State street and eighty feet on Congress street, as widened, was not taken. By looking into the record, it is seen that the evidence shows that the part so remaining may be occupied for purposes consistent with the lease, although at a decreased rental value. In such case the rule laid down in *Stubbings* v. *Village of Evanston*, *supra*, applies. No restatement or discussion of the rule is required. The instructions, in respect of the matter under consideration as applied to the facts shown in McCarty's case, were in accordance with the rule there stated, and were not, therefore, in our opinion, erroneous.

We agree with counsel for defendant McCarty, that the jury could not, in view of the facts proven, have been misled into allowing compensation for the value of the leasehold estate, after the 30th of April, 1899. The evidence very properly was limited to the value of the leasehold estate to that date.

There is, in our judgment, however, an erroneous ruling affecting the judgments in favor of both McCarty and Brinkworth, which will necessitate a reversal of each. By the leases which, in the respect now being considered, are alike, the lessee covenants and agrees not to remove any buildings or other improvement from said premises without the written consent of the lessor, and at the termination of the lease all the buildings, improvements and fixtures that may have been placed and erected on said demised premises shall be delivered to the lessor in good condition, ordinary wear and tear and inevitable accident excepted. By the third instruction, given at the instance of defendant McCarty, the jury were directed that: "The question for you to determine as to such leasehold

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interest is, to what extent, if any, shown by the evidence, the tenant is injured or sustains damage by taking a part of the leasehold premises, and it is the duty of the jury to award him the fair cash value of such leasehold interest * * * including the value of any building belonging to him and situated thereon, as shown by the evidence or by your view, so far as taken or destroyed, deducting only the fair cash value to him for use under the lease of the six feet of said premises remaining." A like instruction was given on behalf of the defendant Brinkworth, except they were required to determine the damages sustained by the taking of the entire leasehold premises, "including the value of any building belonging to her and situated thereon," etc. The buildings on the lots at the time of filing the petition for condemnation had been erected by the tenants, severally, under their leases, and as we have seen, were to be delivered to the landlords at the expiration of the leases, with the premises, in good repair and condition, usual wear and tear and inevitable accident only excepted. The buildings so erected would, under the lease, become fixtures, and the tenant expressly covenanted not to remove from the premises any buildings or improvements placed thereon without the consent of the landlords, which there is no pretense had been given. It is manifest that the right of the tenants in respect of such buildings consisted only in their use and enjoyment during their respective terms; and that all their right and interest therein ceased at the expiration of the term. The landlords took a present estate in such buildings and improvements, subject to the user by the tenants during the term. 2 Taylor's Landlord and Tenant, sec. 549 and note 2. It was error, therefore, to instruct the jury that the tenants, as compensation for their leasehold estates in the land, were entitled to the value of the buildings placed thereon.

That this was prejudicial error, of which appellants here may complain, is clear. The jury by their verdict found the Brink-

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worth leasehold estate for the term, to be of the value of $17,631.71, and found that the value of her improvements on the same was $2327.75; and there was awarded to the defendant McCarty, as owner of his leasehold estate, $12,594.08; and for his improvements thereon $2200. It is clear, we think, that the true measure of the compensation, as their rights and interests are defined and fixed by the leases, was the value of their respective leasehold estates in their condition at the time of the filing of the petition for condemnation, including the use and enjoyment of the buildings and ground, and deducting in the McCarty case the value of the use of the premises not taken, and in the Brinkworth case estimating the value, subject to the rents reserved as before indicated.

For the errors mentioned the judgments in favor of said defendants, Brinkworth and McCarty, are severally reversed and the cause remanded. They to pay the costs of this court in equal parts.

Judgment reversed.

E. T. GLENNON

v.

FRANK BURTON.

Filed at Ottawa, January 19, 1893.

1. CERTIORARI—*at common law—when it lies—its effect.* A writ of *certiorari* at common law to review the record of a justice of the peace for illegality in the proceeding does not lie until the justice has rendered a final judgment. The writ can not be made to operate as an injunction and restrain a tribunal from acting beyond its jurisdiction.

2. The common law writ of *certiorari* does not lie to review the record of the proceedings of an inferior tribunal, if the party seeking its issue has any other mode of review.

3. This writ will not lie merely because proceedings have been commenced before a tribunal that has no jurisdiction, when the tribunal has not taken final action on them, and has made no order which must,

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of itself, injuriously affect the party suing out the writ, unless it shall be annulled by a court of review.

4. JUSTICE OF THE PEACE — *order not a final judgment.* In a proceeding to condemn gambling implements before a justice of the peace, a simple finding by the justice that the property seized is "gambling implements and devices," and a continuance of the case to a future day named, is not a final judgment that may be reviewed on *certiorari*. No final process can issue on such an order.

APPEAL from the Circuit Court of Cook county; the Hon. S. P. MCCONNELL, Judge, presiding.

Mr. CHARLES B. OBERMEYER and Mr. JOHN S. MILLER, for the appellant:

The writ of *certiorari* should not have been issued in this case. *Drainage District* v. *Griffin*, 134 Ill. 340; *People* v. *Betts*, 55 N. Y. 141.

Mr. EDWARD H. MORRIS, for the appellee:

Certiorari, as at common law, is the proper way to set aside the action of inferior tribunals in cases where they have proceeded without jurisdiction, exceeded their jurisdiction, or otherwise proceeded in violation of law. *People* v. *Wilkinson*, 13 Ill. 660; *Commissioners* v. *Supervisor*, 27 id. 140; *Hyslop* v. *Finch*, 99 id. 171.

The rule is the same whether the proceedings before the inferior court be civil or criminal. *Dean* v. *The State*, 63 Ala. 153; *Memler* v. *State*, 75 Ga. 576; *Ex parte Lange*, 18 Wall. 163.

The writ may be allowed before the final determination of the case in the inferior court. *Mowery* v. *Camden*, 4 Cent. Rep. 566.

Appellant rather earnestly contends that *certiorari* will not lie because it was within the power of appellee to have appealed from appellant's order as justice of the peace in the case of *The People, etc.*, v. 75 *Custom House Place*, and in

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support of his position cites section 62, of chapter 79, of Revised Statutes of Illinois.

The above section applies only to civil cases and actions of debt for penalties, and gives no right of appeal in criminal cases. *Edwards* v. *Vandemack*, 13 Ill. 633; *Ward* v. *People*, id. 635; *Town of Partridge* v. *Snyder*, 78 id. 519.

The law which gives the right of appeal from a justice's judgment in a criminal case is division 9, chapter 38, section 449 of Criminal Code, Starr & Curtis' Statutes, page 854.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is from a judgment of the Circuit Court of Cook county, quashing, on *certiorari*, the record of a justice of the peace of that county in a case wherein the People, etc., are plaintiffs, and No. 75 Custom House Place is defendant. The transcript of the record, certified as a return to the writ, shows that no final judgment had been given in the case when the writ was sued out, and that the case was still pending before the justice of the peace for final decision when the Circuit Court gave judgment quashing the record.

The transcript recites, in that respect, as follows: "Court adjudged the property seized on search warrant to be gambling implements and devices. Case continued to December 18, 1892." Manifestly, no final process of any kind can issue on this order. No judicial effect legally follows from the simple finding of fact that the property seized is "gambling implements and devices." It may be that when final judgment shall be given, the justice will adjudge that the property seized be released. Certainly, nothing in this transcript precludes, or is inconsistent, with the giving of such judgment. We can not assume, in advance of its action, that a tribunal will exercise a power with which it is not lawfully invested. Nor can *certiorari* be made to operate as an injunction, and restrain a tribunal from acting beyond its jurisdiction, however well grounded may be apprehensions in that respect. The office of

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the writ is only to bring before the court issuing it the record of the inferior tribunal for review. And it is elementary that the party suing out the writ shall have no other mode of review. *People* v. *Wilkinson*, 13 Ill. 660. Here, however, for aught that we can discover, the party suing out the writ has a complete mode of review, in that he may have the justice before whom the proceeding is pending decide that the property seized be released. It is, undoubtedly, competent for the justice to decide that he has no jurisdiction in the case, or that, for other reasons, the property seized shall not be destroyed; and if he shall decide, in this respect, correctly, there can be no reason for resorting to *certiorari*. It is nowhere asserted to be the law that *certiorari* will lie merely because proceedings have been begun before a tribunal that has no jurisdiction of them, when the tribunal has not taken final action upon them, and has made no order which must, of itself, injuriously affect the party suing out the writ, unless it shall be annulled by a court of review. This writ was prematurely sued out. *Gerdes* v. *Champion*, 108 Ill. 137; *Lynde* v. *Noble*, 20 Johns. 80; *Haines* v. *Backus*, 4 Wend. 219.

The judgment of the Circuit Court is reversed, and the cause is remanded to that court, with directions to enter an order dismissing the writ.

Judgment reversed.

ROSALIE WOLFER

v.

JOHN HEMMER *et al.*

Filed at Ottawa, March 31, 1893.

1. WILLS — *devise in fee — devise over, void.* A testator, by the first clause of his will, devised and bequeathed to his wife, "her heirs and assigns," certain city lots, and by the second clause bequeathed to her all his remaining estate, both real and personal, to be by her used and

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disposed of during her natural life, the same as he might do if living, and gave her "full power to sell, mortgage, exchange, invest and reinvest the same in the same manner I (the testator) might do if living, and to distribute the same by gift or otherwise among my children at any time during her life as to her shall seem meet and proper, and to appoint the same among my children by will after her decease according to her own judgment and discretion." The will then provided that if any of the testator's estate, real or personal, should remain undisposed of by his wife at the time of her decease, then he gave and devised all such residue and remainder of his estate to be equally divided among his children then living, etc.: *Held*, that the wife took an estate in fee in the lands, and that the devise over was void, however clearly it was expressed.

2. If there be an absolute power of disposition given by a will to the first taker, as if an estate be devised to A. in fee, and, if he dies possessed of the property without lawful issue, the remainder over to the heirs of the testator, the devise of the remainder over is void, because of the preceding fee; it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise can not subsist under an absolute power of disposition in the first taker.

3. When the first devisee has the absolute right to dispose of the property in his unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void as being inconsistent with the first gift.

4. SAME — *a devise to a person and "his heirs."* The words in a will, "I give, devise and bequeath unto my beloved wife, A. H., her heirs and assigns, the following described real estate," amount to a devise of the title in fee. A devise to one, "his heirs and assigns forever," or "to him and his heirs," will pass the title in fee simple. In either form the words "his heirs" are words of limitation, and vest the absolute title.

5. SAME — *when construed according to intention of testator.* While it is always the first object of the courts, in construing wills, to give effect to the intention of the testator, they can only do so when that intention does not run counter to the established rules of law. When the words of a will pass an estate in fee simple the court can not, by construction, limit a less estate.

6. RULE IN SHELLY'S CASE — *a rule of property.* The rule in *Shelly's* case is in force in this State as a rule of property, and must prevail whenever a devise or conveyance, by the terms of the will or deed, falls within it, regardless of the otherwise expressed intention of the testator or grantor.

7. STATUTES CONSTRUED. *Section* 13 *of chapter* 30, *relating to conveyances*, which prescribes that "every estate in lands, which shall be

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granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not used, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law," has no application to cases where the words heretofore essential to pass an estate of inheritance are used. It is only where such words are wanting that the courts are authorized to inquire whether an estate less than the fee is limited by express words or not.

APPEAL from the Superior Court of Cook county; the Hon. KIRK HAWES, Judge, presiding.

Messrs. BLANKE & CHYTRAUS and Mr. WM. VOCKE, for the appellant:

Where an estate is devised to one and his heirs and assigns, and there is added, either by express words or by implication, an absolute power to dispose of the estate, a limitation over is void, because it is inconsistent with the absolute property reposed in the first taker. 4 Kent's Com. (11th ed.) 270; 2 Washburn on Real Property (5th ed.), 782; 2 Redfield on Wills, 277; 2 Jarman on Wills (5th Am. ed.), 495, note 3; *Ide* v. *Ide*, 5 Mass. 500; *McDonald* v. *Walgrave*, 1 Sandf. Ch. 274; *Jendevine* v. *Jendevine*, 61 Vt. 596; *Babcock* v. *Whitney*, 24 Pick. 146; *Jackson* v. *Robbins*, 16 Johns. 589.

The validity of the rule has been recognized repeatedly by this court. *Welsh* v. *Belleville Savings Bank*, 94 Ill. 203; *Hamlin* v. *U. S. Express Co.*, 107 id. 448; see, also, *Walker* v. *Pritchard*, 121 id. 221; *Johnson* v. *Johnson*, 98 id. 564; *Henderson* v. *Blackburn*, 104 id. 227.

Mr. ROBERT H. MCMURDY and Mr. FRANK G. ALLEN, for the appellees:

The whole will is to be considered to determine what estate is in fact granted to the first taker. If it is plainly a fee, the limitation over is void; if it is a life estate with power to dispose of the fee, the limitation over is valid. R. S., chap. 24, sec. 13; *West* v. *Fitz*, 109 Ill. 436.

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Mr. JUSTICE WILKIN delived the opinion of the Court:

Appellees brought their action of ejectment, against appellant and certain tenants holding under her, to recover possession of lots 24 and 25, etc., in the city of Chicago. A trial in the Superior Court of Cook county, on a plea of the general issue, resulted in a judgment for the plaintiffs for the said lots in fee, and from that judgment the defendant below prosecutes this appeal.

The premises in controversy were formerly owned by one John Hemmer, who died in June, 1872, leaving the following last will and testament which, after his death, was duly probated.

"*First.* I give, devise and bequeath unto my beloved wife, Angela Hemmer, her heirs and assigns, all the following described real estate, located in the city of Chicago, Cook county and State of Illinois, and known and described as follows, to-wit: Lots numbered twenty-four (24) and twenty-five (25), in the northeast corner of the southeast quarter of section twenty (20), in township thirty-nine (39) north, range fourteen (14), east of the third principal meridian; also lots ninety-nine (99) and one hundred (100), in Given and Gilbert's subdivision of the fifteen acres in section fourteen (14), township thirty-nine (39), range thirteen (13).

Second. I give, devise and bequeath unto my beloved wife, Angela Hemmer, all my remaining estate, both real and personal, in whatever it may consist or wherever it may be situated at the time of my death, to be by her used and disposed of during her natural life precisely the same as I myself might do were I living; and giving my said wife full power to sell, mortgage, exchange, invest and reinvest the same, in the same manner I might do if living; and to distribute the same, by gift or otherwise, among my children, at any time during her life, as to her shall seem meet and proper, and to appoint the same among my children by will after her decease, accord-

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ing to her own judgment and discretion. But if any of my said real estate or any of my personal estate shall remain undisposed of by my said wife at the time of her decease, I give, devise and bequeath all such residue and remainder of my said estate to be equally divided among my children who shall be living at that time, and the issue of any child who may have been then deceased, such issue taking the share to which such deceased child would be entitled if living. This proviso is to apply to all my estate.

Lastly, I hereby appoint my said wife, Angela Hemmer, sole executrix of this, my last will and testament, and she shall not be required to give any bond as such executrix.

In testimony whereof I have hereunto set my hand and seal this 29th day of May, A. D. 1872.

Signed: JOHN HEMMER. [SEAL.]"

Subsequently his widow Angela intermarried with one Lorenz Wolfer and died intestate having made no disposition of said lots, and leaving appellees and one Leopold Wolfer (a child of the last named marriage), her only children and heirs at law. Said Leopold died in infancy leaving his father, Lorenz Wolfer, and appellees his heirs at law. Said Lorenz thereafter married appellant Rosalie, and died intestate leaving an only child Josephine C., surviving him, his sole heir at law, and this child, thereafter, also died intestate, leaving appellant, her mother, her sole heir at law.

No issue of a deceased child of John Hemmer survived his widow Angela, and at her death appellees were his only living children.

Under this state of facts appellees insist that upon the death of their mother they took the title to said lots in fee, under said will. This claim is based upon the theory that, properly construed, the will gave their mother only a life estate in those lots, with a power of disposition, and that upon her death the title in fee to the same, or so much thereof as remained undis-

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posed of, vested in them. On the contrary, appellant contends that by the terms of said will the wife Angela took said lots in fee, and upon her death the title thereto became vested in her heirs, under our statute of descents, appellant taking an interest in the same as tenant in common with appellees. The only question, therefore, presented for our decision is, did the wife of John Hemmer, under his said will, take the title to these lots in fee simple, or was her estate therein for life only, with a power to dispose of the same.

That the language in the first clause, "I give, devise and bequeath unto my beloved wife, Angela Hemmer, her heirs and assigns, the following described real estate," amounted to a devise of the title in fee cannot be seriously questioned. It is said in Redfield on Wills, vol. 2, p. 326: "The usual form of creating a devise in fee simple is by giving the property to the devisee, his heirs and assigns forever, but to him and his heirs is all that is technically required."

In either form of expression the words "*her heirs*," as here used, would be words of limitation, the fee vesting in the devisee, Angela Hemmer. *Baker et al.* v. *Scott*, 62 Ill. 86; *Brislain* v. *Wilson*, 63 id. 173; *Beacroft et al.* v. *Strawn, etc.*, 67 id. 28; *Butler* v. *Huestis et al.*, 68 id. 594; *Wicker et al.* v. *Ray*, 118 id. 472; *Ryan et al.* v. *Allen*, 120 id. 648; *Carpenter* v. *Van Olinder*, 127 id. 42; *Griswold* v. *Hicks et al.*, 132 id. 494; *Hageman* v. *Same*, 129 id. 164; *Fowler* v. *Black et al.*, 136 id. 363. But counsel for appellees say, "if the intention of the testator, upon a fair construction of the whole instrument, is such as to warrant the construction, the fee granted will be cut down to a life estate, with a power of disposition of the fee, and the subsequent words in that way will be given effect," and upon this proposition rests their entire case. Manifestly the position is irreconcilable with the rule in *Shelly's* case, which, as shown by the cases above cited, is in force in this State as a rule of property, and must prevail whenever a devise or conveyance by the terms of the will or

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deed falls within it, regardless of the otherwise expressed intention of the testator or grantor.

Here there is no pretense that John Hemmer used the words, "her heirs," in any other than the strict legal sense, and, therefore, the devise made by the first clause of his will vested the fee to the lots in question in the wife, even though an intention to give her but a life estate therein can be said to appear from the second clause. *Carpenter* v. *Van Olinder*, *supra*; *Griswold* v. *Hicks et al.*, *supra*; *Hagaman* v. *Same*, *supra*; *Fowler* v. *Black*, *supra*.

It is clear, then, that the fee being devised to the wife by the express terms of the first clause, a devise over, as is claimed by the second, could only take effect as an executory devise. But, as is said in Redfield on Wills, vol. 2, p. 277, "It is a settled rule of American as well as English law that, when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons, or classes, an estate over is void as being inconsistent with the first gift." The same rule is announced in Kent's Commentaries, vol. 4, p. 270, thus: "Nor can an executory devise, or bequest, be prevented or destroyed by any alteration whatsoever, in the estate out of which, or subsequently to which, it is limited. The executory interest is wholly exempted from the power of the first devisee or taker. If, therefore, there be an absolute power of disposition given by the will to the first taker, as if an estate be devised to A in fee, and if he dies possessed of the property without lawful issue, the remainder over, or remainder over of the property which he, dying without heirs, should *leave*, or without *selling* or *devising* the same, in all such cases the remainder over is void as a remainder, because of the preceding fee; it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied

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by the will. A valid executory devise can not subsist under an absolute power of disposition in the first taker."

Numerous decisions might be cited approving and following this rule, and our attention has been called to none to the contrary. It has been expressly recognized by this court in *Fairman* v. *Beal*, 14 Ill. 244; *Welsch* v. *Belleville Savings Bank*, 94 id. 203; *Hamlin et al.* v. *U. S. Express Co.*, 107 id. 448.

More comprehensive language to confer an unlimited discretionary power of disposition, could not be commanded, than was used by the testator in the second clause of this will.

The wife is given "full power to sell, mortgage, exchange, invest, and reinvest the same in the same manner I (the testator) might do if living, and to distribute the same, by gift, or otherwise, among my children at any time during her life as to her shall seem meet and proper, and to appoint the same among my children by will after her decease according to her own judgment and discretion." The devise over would, therefore, under the foregoing authorities be void, however clearly expressed. Counsel for appellee seem to understand that section 13, chapter 30, of our statute entitled "Conveyances," which provides that "every estate in lands which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not used, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law," authorizes a court, in *every* grant, conveyance or devise, to inquire whether an estate less than the fee is limited by express words, etc.

But by the express terms of the statute such inquiry can only arise if "*words heretofore necessary to transfer an estate of inheritance be not used.*" Here we repeat, as to lots 24 and 25, the essential words to pass an estate of inheritance are used, and, therefore, the statute has no application. Had the

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property in controversy been devised under the second clause of the will, the argument of counsel would have been pertinent, and the decisions of this court cited in support of it would be in point. In the second clause words necessary to transfer the fee are not used, but under the foregoing section of the statute an estate of inheritance would pass if it did not appear, upon a consideration of the whole instrument, that a less estate was limited. In *Walker* v. *Pritchard*, 121 Ill. 221, speaking of cases falling within the provisions of the statute, we said: "In the absence of limiting or qualifying words, it is a fee, but with such words the instrument is to be construed so as to give effect to the intention of the testator, as manifested by the phraseology of the entire instrument, *and hence* arbitrary rules of common law, applicable to cases where, before the enactment of the statute, a fee was clearly technically given, are not pertinent, for in those cases there is no question in the first instance what estate is given, but it is — a fee being given — what effect have subsequent words of limitation." And so here, the question as to what title passed to the wife, of all the remaining real estate mentioned in the second clause, is one of construction and intention, but the title in fee to lots 24 and 25, having been clearly and technically given to her, the only question is, what effect, if any, have subsequent words of limitation upon that title.

Keeping in mind the distinction between the first devise in said will, and cases in which the gift to the first taker was a life estate only, or made without using words necessary at common law to pass a fee simple title, none of the authorities relied upon by counsel for appellees will be found to conflict with the views here expressed.

While it is not entirely clear that the testator intended the second clause of his will to apply to the devise made in the first, we concede that, taken as a whole, the will is susceptible of that construction; but while it is always the first object of courts, in construing wills, to give effect to the intention of

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the testator, they can only do so when that intention does not run counter to the established rules of law. Here, John Hemmer, in making the first devise in his will, selected and used words which, under the inflexible rules of law, vested the title to the lots in controversy in his wife in fee simple, and he will be conclusively presumed to have so intended. It follows that the trial court erred in adjudging appellees to be the owners of said lots, to the exclusion of appellant, and its judgment must, therefore, be reversed.

Judgment reversed.

CRAIG, J., dissenting.

EDMUND A. CUMMINGS *et al.*

v.

THE CITY OF CHICAGO.

Filed at Ottawa, March 31, 1893.

1. STATUTES — *whether special legislation — law depending on the population of a city.* Section 55 of the act of April 29, 1887, to amend article 9 of the Cities and Villages act, in force July 1, 1872, after providing that the amount of any special assessment for any local improvement in any city, incorporated town or village, may be divided into installments when so provided by the ordinance for the making of such improvement, and fixing the manner of payment of the same, etc., has this proviso: "Provided, that in cities containing a population of fifty thousand or more, this and the following sections shall not apply, except in cases where any such special assessment exceeds, in the aggregate, the sum of fifteen thousand dollars": *Held*, that the effect of the proviso is not such as to render the act special legislation within the meaning of section 22, article 4 of the constitution, and, therefore, void. The proviso can not, therefore, be rejected.

2. It has become the settled rule of construction in this State, that an act, general in its terms and uniform in its operation upon all persons and subject-matter in like situation, is a general law, and not obnoxious to the objection that it is local or special legislation. This case distinguished from *Devine* v. *Commissioners of Cook County*, 84

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Ill. 590. In that case the power given by the act necessarily, not only by the limitation of population but by the wording of the statute and the purposes and objects declared, related to a single county.

WRIT OF ERROR to the County Court of Cook county; the Hon. FRANK SCALES, Judge, presiding.

Messrs. WILSON, MOORE & MCILVAINE, for the plaintiffs in error.

Mr. JOHN S. MILLER and Mr. GEORGE A. DUPUY, for the defendants in error.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This proceeding is a special assessment by the city of Chicago, made under article 9 of the "Cities and Villages" act, divided into installments pursuant to the act of April 29, 1887, providing for such division in payment of assessments. The assessment aggregated over $300,000 and no objection is made thereto, other than its division into installments. The question presented is, whether section 55 of the act of April 29, 1887, entitled "An act to amend article 9 of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872, in force July 1, 1872, by adding thereto the following sections" (paragraph 170a, 3 S. & C.) is in violation of the constitution. The objection to the act is, that, after providing that the amount of any special assessment for any local improvement in any city, incorporated town or village, may be divided into installments, when so provided for by the ordinance providing for said improvement and fixing the manner of payment of the same, etc., there is added: "Provided, that in cities containing a population of fifty thousand or more, this and the following sections shall not apply, except in cases where any such special assessment exceeds, in the aggregate, the sum of $15,000," thereby limiting the effect of the act so that in unincorporated towns and villages, of any population, it will apply to assessments irrespective of the amounts; and in cities contain-

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ing less than fifty thousand population, the act will apply to all assessments, but in cities containing a population of fifty thousand inhabitants or more, the act shall not apply to assessments aggregating less than $15,000. It is objected that the effect of the proviso is, to create a classification of cities by population, and to render the act special legislation within the meaning of section 22, article 4 of the constitution.

That the act is general in its terms, authorizing the division into installments, of special assessments in any city, incorporated town or village within the State, is not questioned. And the question presented is, whether the limitation contained in the proviso, by which cities of fifty thousand or more inhabitants are excluded from the operation of the act, unless the assessment aggregates $15,000 or more, renders the act unconstitutional. The purpose of the constitutional provision was to correct the evils of special legislation generally, and to prevent, as far as practicable, dissimilarity in the organization and powers of cities, towns and villages, and to bring about uniformity in the charters of the municipalities of the State. It is evident, however, that the framers of the constitution, recognizing the dissimilarity in condition of the different municipalities, did not contemplate absolute uniformity. While it was provided that a general incorporation law was to be passed, it was within the contemplation of the constitution that cities, towns and villages might thereafter exist under dissimilar charters previously granted. And so we have held in numerous cases, that the general act for the incorporation of cities, towns and villages was not unconstitutional, although applicable to none of the cities, towns or villages of the State, until adopted by the same, and leaving it optional to adopt the general law or not, as the municipality might determine. In the case of *Knickerbocker* v. *The People*, 102 Ill. 218, the question was as to the validity of the act establishing probate courts, in all counties having a population of one hundred thousand or more, and the amendatory act of 1881, extending the

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provisions of the former act, to all counties in the State having a population of seventy thousand or more; and it was held constitutional, notwithstanding section 20 of article 6 of the constitution, which declares: "The general assembly may provide for the establishment of a probate court in each county having a population of over fifty thousand;" and notwithstanding there were counties in the State containing a population of over fifty thousand and less than seventy thousand. And this notwithstanding the general words of the constitution that: "All laws relating to courts shall be general and of uniform operation." See, also, *Hawthorn* v. *People*, 109 Ill. 302; *People* v. *Hazelwood*, 116 id. 319; *Coal Run Co.* v. *Finlen*, 124 id. 666; *People* v. *Hoffman*, 116 id. 587; *West Chicago Park Com.* v. *McMullen*, 134 id. 170. In *Chicago West Park Com.* v. *McMullen*, an act was passed applying to cities having parks under the control of park commissioners. There was but one such city in the State. The act was, however, general in its terms, applicable to all cities that then had, or might thereafter have, parks under such control, in pursuance of the general park acts, and was held to be a general and not a local or special law. In *People* v. *Hazelwood*, the question was as to the validity of an act authorizing county boards, in counties under township organization, to create into a town "the territory embraced within any city in such county" * * * "provided such territory shall have a population of not less than three thousand," etc., and providing that "the territory of any city now organized, within the limits of any county under township organization, and not situated within any town, shall be deemed to be a town." The objection urged was, that the law was local or special, "in that the townships affected by the act are essentially different from townships existing in territory unaffected by the act, and that it is, for that reason, unconstitutional." And it was held, that classification, owing to the different conditions affecting towns situated in cities, and those lying wholly in the county, was not only allowable, under the constitution, but to a large extent inevitable from such

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conditions and circumstances. Without further examination of the cases, it is sufficient to say, that in all of them it has been determined and has become the settled rule of construction in this State, that an act, general in its terms, and uniform in its operation upon all persons and subject-matter in like situation, is a general law and not obnoxious to the objection, that it is local or special legislation.

It is, however, objected that the classification here made is upon the basis of population only, and the case of *Devine* v. *Commissioners of Cook County*, 84 Ill. 590, where it was held that an act "designating counties as a class according to a minimum population, which makes it absolutely certain but one county in the State can avail of the benefits of a law applicable to such class, can not but be regarded as a mere device to evade the constitutional provision forbidding special legislation," is cited as holding that a classification upon that basis necessarily brings the law within the prohibition of the constitution. It was there said, that the act by its "very terms precludes it from having any application to any county except the county of Cook." And the court say farther: "That it is a 'local or special law,' applicable only to Cook county, is a proposition so plain it will bear no discussion." We, by no means, intend to depart from the holding in that case. The legislature may not do by indirection what it is prohibited from doing by the constitution. There the power given by the act, necessarily, not only by the limitation of population, but by the wording of the statute and the purposes and objects declared, related to the single county. And moreover the right to exercise the powers granted was limited to six years, within which time it was impossible that any other county could reach the population designated. Numerous instances might be given where classification by population has been held valid, but perhaps one will suffice. Section 1, of article 4, of the constitution provides that judicial power "shall be vested in one Supreme Court, circuit courts, county courts,

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* * * and in such courts as may be created by law in and for cities and incorporated towns." By the act entitled "Courts," in force July 1, 1874, it is provided that: "A city court, consisting of one or more judges, not exceeding five, and not exceeding one judge for every fifty thousand inhabitants, may be organized and established under this act in any city which contains at least three thousand inhabitants," etc., and such courts are given concurrent jurisdiction with circuit courts within the territorial limits prescribed by the act. Such courts have been established in various cities of the State, and the legality of their organization and jurisdiction maintained. *People* v. *Aurora*, 84 Ill. 157; *Hercules Iron Works* v. *J. E. & E. Ry. Co.*, 141 id. 491. In numerous other cities of the State having the requisite population no such courts have been organized. It is apparent that, under this legislation, the classification is by population. Other instances will readily suggest themselves.

We need not pursue this branch of the subject-matter farther. The subject-matter of the proviso is so intimately connected with that of the act itself that it can not be presumed the legislature would have passed the one without the other. They are so essentially connected in substance that it must be presumed that the legislature intended the enactment to take effect in the manner prescribed. The proviso can not, therefore, be rejected. Cooley's Const. Lim. *178, and cases cited. Before the court will be justified in declaring the act void, because in conflict with the constitutional provision, the repugnance must be clear and irreconcilable. When the act under consideration was passed, the proviso was presently applicable to at least two of the cities of the State; that is, the city of Chicago and the city of Lake View, whilst other cities of the State, if they had not then reached the limit of population fixed by the proviso, were pressing closely upon it, and in the near future the proviso would become applicable, in the natural course of events, to such cities also. The legislature, for rea-

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sons appearing satisfactory to it, saw fit not to apply to the smaller assessments, in the larger cities of the State, the somewhat cumbersome mode of collecting the same, provided for in the act under consideration. Whether this was wise or unwise is a question for legislative consideration. Reasons for the distinction existing, in the legislative contemplation, it was lawful for the legislature to thus discriminate, if enacted into a general law, uniform in its application to all cities of the State similarly situated. We are of opinion that the act, considered as a whole, is not in conflict with the constitution, and may be enforced in all the towns, cities and villages of the State.

The judgment will be affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

ROBERT LAW *et al.*

Filed at Ottawa, March 31, 1893.

1. SPECIAL ASSESSMENTS — *power of city to raise money thereby.* The power of taxation by special assessment can not be exercised by a city or any other corporate authority unless the power has been expressly and clearly conferred by the legislature. In no case can a city resort to the taxation of property by special assessment unless the power has been clearly conferred.

2. The first section of article 5 of the act relating to cities and villages contains ninety-six distinct paragraphs specifying the different powers of the city council, but there is nothing in that article or any of its sections or clauses which confers authority to make a special assessment to raise money to enable the city to carry out any of these different powers.

3. SAME — *widening navigable river.* Under section 1 of article 9 of the same act, a city has the right to levy special assessments to pay for the opening, grading and paving streets and alleys, and to pay for the making of sidewalks, sewers and other like improvements; but it has not the right under that section to make a special assessment to pay for

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the widening of a navigable river of the United States which is under the control of the general government. Such an improvement has none of the elements of a local improvement, such as incorporated cities and villages have been in the habit of making by special assessment, but is one in which the general public have an interest.

4. The grant of power to cities and villages to deepen, widen, dock, cover, wall, alter or change the channel of water-courses, does not authorize them to resort to special assessment to raise money to put such power in execution.

5. When Congress has taken no action on the subject, the city, under the grant of legislative power, will have the right to make such improvement in a navigable river within its limits in aid of navigation as in its judgment may be required; but after Congress has passed an act on the subject, and has thus assumed jurisdiction over the subject, the city can only act in conformity to the act of Congress.

6. So when the act of Congress has declared it unlawful for the city of Chicago to make any improvement of the Chicago river until the plan of its work is submitted to and approved by the secretary of war, the city will have no power to improve that river, except by procuring the approval of the secretary of war.

7. SAME — *by whom may be challenged.* Where an improvement is ordered which is manifestly one not pertaining to the locality, but one designed to be a great benefit to the country at large, an assessment therefor may be challenged by the property owner whose property may be assessed, and the court may refuse to confirm such assessment and dismiss the proceeding.

8. COMMERCE — *power of Congress to regulate.* Under the constitution of the United States Congress is clothed with power to regulate commerce, and, as commerce includes navigation, the improvement of harbors and navigable waters is included within the power.

APPEAL from the Circuit Court of Cook county; the Hon. S. P. MCCONNELL, Judge, presiding.

Mr. CHARLES S. GILBERT and Mr. JOHN S. MILLER, for the appellant:

The ordinance provides for a local improvement within the meaning of section 1, article 9 of the act of 1872, relating to cities and villages.

Par. 30, sec. 1, article 5, act of 1872, *supra*, provides that the common council of cities and villages shall have power to deepen, widen, dock, cover, wall, alter or change the channel

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of water-courses. See, also, *Elston* v. *Chicago*, 40 Ill. 514; *Wright* v. *Chicago*, 20 id. 253.

Section 1, article 9, of same act, provides that the corporate authorities shall have power to make local improvements by special assessment.

The statute does not define what shall be considered a local improvement. That question is left solely to the determination of the city council. Its decision as to the utility of an improvement, and whether it is to be treated as a local improvement for the purpose of raising funds by special assessment to pay for it, is final, in the absence of fraud. *L. & N. R. R. Co. et al.* v. *The City of East St. Louis*, 134 Ill. 656, citing *Fagan et al.* v. *City of Chicago*, 84 id. 227.

The River and Harbor act of September 19, 1890, does not deprive the city of the power to pass the ordinance and make the improvement. See Act of Congress, sec. 7; *Hyde Park* v. *Borden*, 94 Ill. 26; *Sands* v. *Manistee River Co.*, 123 U. S. 295; *County of Mobile* v. *Kimball*, 102 id. 691; *Escanaba Case*, 107 id. 683; *Nolton* v. *St. of Mo.*, 91 id. 275; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Pound* v. *Turck*, 95 U. S. 459; *Cardwell* v. *American Bridge Co.*, 113 id. 205; *Hamilton* v. *Vicksburg, etc., R. R. Co.*, 119 id. 280; *Huse* v. *Glover*, 119 id. 543–546; *Brown* v. *Maryland*, 12 Wheat. 419; *Gibbon* v. *Ogden*, 9 id. 187; *The Genesee Chief*, 12 How. 443.

Messrs. WILSON, MOORE & MCILVAINE, Messrs. MATZ & FISHER, for the appellees, and Messrs. WILLIAMS, HOLT & WHEELER, Messrs. UNDERWOOD & BUTLER, Messrs. HUTCHINSON & LUFF, Mr. WILLIAM M. JOHNSTON, Mr. STEPHEN D. FISHER, and Messrs. MASON BROTHERS, of counsel.

The proposed widening is not a "local improvement" within the meaning of the statute, and a special assessment proceeding will not lie for it. *Wright* v. *Chicago*, 20 Ill. 254.

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If the State has authorized the city to widen the Chicago river in the manner proposed, this right is subject to a condition imposed by the United States which has not been complied with.

The legislature has created another municipality with jurisdiction over the Chicago river, which supersedes that of the city.

Messrs. OSBORNE & LYNDE, for the Chi. & W. Ind. Ry. Co.:

The city has no power or authority to excavate or fill, or in any manner alter or modify the course, location, condition or capacity of the channel of the Chicago river, unless approved and authorized by the secretary of war. *County of Mobile* v. *Kimball*, 102 U. S. 697; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Cardwell* v. *American River Bridge Co.*, 113 U. S. 205; *Miller* v. *Mayor*, 109 id. 385.

The court must hold that it was not the intention of the legislature to give to the Sanitary District and the city of Chicago a conflicting power and authority as to the improvement of the Chicago river; and that, in case of such conflict, the latter grant supersedes the prior. As analogous we refer to *State* v. *Clarke*, 20 N. J. L. 54; *State* v. *Trenton*, 36 id. 198; *South Chester Road*, 80 Pa. St. 370; *Gallagher* v. *Head*, 72 Iowa, 173.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

On the 18th of July, 1890, the city of Chicago filed its petition in the Circuit Court of Cook county for the purpose of widening the south branch of the Chicago river north and south of West Eighteenth street, by condemning therefor certain lots and parcels of ground lying and being in canal trustees' subdivision of west half (W. ½) of section 21, township 39 north, range fourteen (14) east of the third P. M., and so much of the north-east quarter (¼), as lies west of the south branch of Chicago river.

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It appears from the record that a jury awarded some $80,000 for the land condemned, that commissioners were appointed to levy the special assessment, and that they have returned an assessment roll into court. This roll assesses less than $1000 upon the city to be paid by general taxation, and spreads the remaining $79,000 exclusively upon property fronting on the river and its slips, beginning a few blocks east of Eighteenth street and running west to the end of navigable water on both forks of the south branch.

The appellees, property owners whose property was assessed, appeared and filed objections to the confirmation of the assessment, and entered a motion to dismiss the petition, upon the ground that the petitioner had no power to make the improvement and the court is without jurisdiction to confirm the assessment therefor. In the argument filed by appellees their position in support of the motion is stated as follows:

1. That the legislature of Illinois has not granted to the city of Chicago the power to widen the Chicago river *by special assessment*, and that the proposed widening is not a "local improvement" within the meaning of the Special Assessment act, but is made for the benefit of navigation and of commerce, generally, and the cost thereof ought to be borne by the community at large, and not solely by the owners of river frontage.

2. That Congress has assumed exclusive jurisdiction over the Chicago river, and that even if the State had granted to the city the power to widen the river by special assessment, the national government has declared it *unlawful* to excavate or fill or in any manner to alter or modify its course, location, condition or capacity until the plans for the proposed work have been submitted to the secretary of war and have been by him approved; that the city has no power to make the improvement except upon a condition precedent with which it has not complied.

3. That since the act which conferred upon the city such powers as it has, the legislature has delegated the control of

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this stream and all works done upon it to the Sanitary District of Chicago, which has, by appropriate action, assumed jurisdiction over the Chicago river and the south branch thereof, for the purpose of widening and improving the same to a capacity of three hundred thousand cubic feet per minute, and that this jurisdiction is now exclusive.

On the hearing of the motion it was admitted by the parties that the Chicago river from its mouth, where it flows into Lake Michigan, to, and at the point where said improvement is proposed to be made, and both north and south thereof is, and was when said ordinance was passed, a navigable stream, and that the United States government, or the authorities thereof, have never in any way improved or expended any money upon the improvement of the Chicago river, except near the mouth thereof and two miles and upward from the improvement in question herein, and that the city of Chicago has at different times, from year to year, expended divers large sums of money in the improvement of said river, and that said river has been greatly enlarged by the city of Chicago for the convenience of its commerce; and it was further admitted, for the purpose of this case only, that no application has been made by or on behalf of the city of Chicago to the secretary of war of the United States government to approve of or consent to the proposed improvement, or any plans or specifications therefor, and that no such approval or consent has been made or given.

It was further admitted by the parties hereto that the Sanitary District of Chicago was duly organized according to law and that it had properly and legally passed the following resolutions:

"Resolutions of the Sanitary District of Chicago, passed April 21, 1891.

Resolved, That this board hereby orders that the Sanitary District of Chicago do forthwith enter upon, use, widen, deepen and improve the Chicago river from its mouth at Lake Michi-

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gan to the south branch thereof, and also the south branch thereof, together with the south and west fork thereof, so as to make the same a proper and sufficient supply channel for the main channel heretofore surveyed from the Chicago river to Joliet; and, further, that the acting chief engineer be, and he is hereby, directed immediately to investigate and report upon the capacity of said river and its south branch and forks for that purpose, and also as to any changes that should be made therein; and that a copy of this resolution, certified by the clerk, be forthwith transmitted to the mayor and common council of the city of Chicago and the secretary of war of the United States, which resolution was by the said objectors offered in evidence."

Section 1, of article 9, of the act of 1872, relating to cities and villages, provides that the corporate authorities of cities and villages shall have power "to make local improvements by special assessment, or by special taxation, or both, of contiguous property, or general taxation or otherwise as they shall by ordinance prescribe."

Paragraph 30, of section 1, of article 5, act of 1872, *supra*, provides that the common council of cities and villages shall have power to deepen, widen, dock, cover, wall, alter or change the channel of water-courses.

Under these sections of the statute it is claimed that the city of Chicago had the power to make the special assessment in question for the purpose of raising money to pay the cost of widening the south branch of the Chicago river. Article 5, or rather the first section of the article, contains ninety-six distinct paragraphs specifying the different powers of the city council, including paragraph 30, *supra*, but we find nothing in the article or any of its sections or clauses which confers authority to make a special assessment to raise money to enable the city to carry out any of these different powers. The fact that the legislature has conferred the power on the city to deepen or widen a water-course or navigable river, does not

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authorize the conclusion that a special assessment may be resorted to, to raise money to put that power into execution. The power of taxation by special assessment can not be exercised by a city or any other corporate authority, unless the power has been expressly and clearly conferred by the legislative department of the government. In no case can a city resort to the taxation of property by special assessment unless the power has been clearly conferred. In *Wright* v. *City of Chicago*, 20 Ill. 252, where authority was given by the charter to widen, straighten and deepen water-courses, but there being no provision for levying a special assessment for deepening, it was held that the city had no power to resort to that mode of raising money to pay for deepening the river. So far, therefore, as paragraph 30 is concerned, we do not think it confers any power on the city to resort to taxation by special assessment. Under the other section it is plain that the city has the undoubted right to make special assessments to pay for the opening, grading and paving of streets and alleys, and to pay for the making of sidewalks, sewers and other like municipal improvements, but whether the city, under that section of the statute, has a right to make a special assessment to pay for the widening of a navigable river within the city limits presents entirely a different question. The river is a navigable stream of the United States; it connects with Lake Michigan, and by means of the lake with the country at large; the Federal government has assumed jurisdiction over it, and expended money, as appears from the admitted facts, for its improvement; it is one of the channels over which the commerce of the country passes, and this improvement was instituted for the purpose of increasing its power as one of the navigable streams of the country. It was undertaken in the interest of the commerce of the country. Was it ever intended that a few land owners bordering on one of the navigable streams of the country should be compelled to pay for an entire improvement in a river, the object of which is to benefit the public at large rather than

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the locality where the improvement is made? Here the contemplated improvement was one to widen the river in order that boats and vessels might pass up and down the river with greater facility — one calculated to increase the navigable qualities of the river; an enterprise wholly public in its nature. If one of the cities located on the banks of the Mississippi river should undertake to remove obstructions from that navigable stream of water, to enable boats to run up and down the river with greater facility, and pay for the improvement by special assessment on property fronting on the river, it would not, we apprehend, be contended that an assessment of that character could be sustained under the provisions of the statute above cited, and yet there is no substantial difference between the supposed case and the one under consideration. The proposed improvement has none of the elements of a local improvement, such as incorporated towns and cities have been in the habit of making by special assessment. The term, "local improvement," is one which has been recognized as applying in cities and incorporated towns to the opening, grading, paving and otherwise improving streets and alleys, making sidewalks, the construction of drains and sewers and other improvements of this character,— improvements designed to be of benefit to the locality where they are made. But the improvement here involved was of a different character. It was not ordered to benefit specially the locality, and thus local, but it was ordered to be made to benefit the public at large, and it was thus a national, rather than a local, improvement. It is true the statute contains no definition of a local improvement, and it may be regarded as a discretionary matter for the city to determine when and where it will make local improvements by special assessment, but when an improvement has been ordered which is manifestly one not pertaining to the locality, but an improvement designed to be a great benefit to the country at large, an assessment may be challenged by the property owner whose property may be assessed, and the court

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may refuse to confirm such an assessment and, as was done in this case, dismiss the petition. *City of Bloomington* v. *C. & A. R. R. Co.*, 134 Ill. 457, is somewhat in point. In that case it was attempted to build a railroad bridge as a local improvement. It was, among other things, there said: "No one will contend that power is conferred by the statute upon corporate authorities of cities to make improvements other than of a public nature and for the benefit of the corporation." *L. & N. R. R. Co.* v. *City of East St. Louis*, 134 Ill. 656, has been cited as an authority to sustain the assessment. That was a case, in its facts, where there could be no doubt that the improvement was a local improvement, within the meaning of the statute, as was held by the court, and what was said in that case must be confined to the facts presented by the record then under consideration.

We now come to the second question. On the 19th of September, 1890, Congress passed an act, the seventh section of which provides that it shall be unlawful to build any structure in any navigable waters of the United States, and to thereafter "excavate, or fill, or in any manner to alter or modify the course, location, condition or capacity of the channel" of any navigable waters of the United States, unless approved and authorized by the secretary of war.

Under the constitution of the United States, Congress is clothed with power to regulate commerce, and as commerce includes navigation, the improvement of harbors and navigable waters is embraced within the power. The power of the general government to control the improvement of navigable waters, and the extent to which the State might act was considered in *County of Mobile* v. *Kimball*, 102 U. S. 697. In the decision of the case it is, among other things, said: "As commerce embraces navigation, the improvement of harbors and bays along our coast, and of navigable waters within the States connecting within them, falls within the power.

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The subjects upon which Congress can act under this power are of infinite variety. * * * Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the States; others are local or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities."

After holding that, as to the first class, Congress only has power to act, and, as to the other class, the States may act in the absence of action by Congress, it is further said:

"State action upon subjects can constitute no interference with the commercial power of Congress, for when that acts, State authority is superseded. Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, is not to be taken as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority.

"The improvement of harbors and navigable rivers within the States falls within the last category of cases. The control of Congress over them is to insure freedom in their navigation so far as that is essential to the exercise of its commercial power. Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement. The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations." See, also, 12 Howard, 311. Had Congress taken no action on the subject, the city of Chicago would have had the undoubted right to make such improvement in the river in aid of navigation as in its judgment was required; but after Congress had passed a law on the subject, and thus assumed jurisdiction over the subject, we think the city of Chicago could only act in conformity to the act of Congress, and as the act of Congress made it unlawful for the city to make the improvement until the plan of the

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work was submitted to and approved by the secretary of war, the city had no power to make the improvement.

After the passage of the act of Congress the authority which the legislature had conferred upon the city to change the channel of the river was subject to a condition which the city was bound to observe before it was empowered to act.

But it is said that the United States can alone raise this question, and as the government has not complained, the property owner can not interpose an objection. We do not concur in this view. The question is one of power, and before the city is authorized to act it must have the approval of the secretary of war. We do not think the city had the power to make the special assessment, and as this disposes of the case, it will not be necessary to consume time in disposing of the third ground relied upon to defeat the assessment.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

SOLOMON J. RHOADS

v.

THE CITY OF METROPOLIS.

Filed at Mt. Vernon, November 4, 1891.

1. FORMER ADJUDICATION — *effect of a general verdict and judgment in a case presenting several issues of fact.* In an action of trespass *quare clausum fregit* against a city, the city interposed three pleas: Not guilty; that the alleged close was a public street of the city, and the statute of limitations, and introduced evidence in support of the two latter pleas, and a verdict and judgment of not guilty were rendered: *Held*, that the verdict and judgment were, at least, *prima facie* evidence that all the issues presented by the pleadings were found in favor of the defendant.

2. SAME — *presumption when there are several issues.* When several issues are presented and contested, and a general verdict is rendered,

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the presumption is that all the issues were found in favor of the prevailing party, but whether such presumption may be rebutted by proof is not decided.

WRIT OF ERROR to the Appellate Court for the Fourth District; — heard in that court on appeal from the Circuit Court of Massac county; the Hon. R. W. MCCARTNEY, Judge, presiding.

Mr. C. L. V. MULKEY, for the plaintiff in error:

The doctrine of estoppel is not to be extended beyond the reasons on which it is founded. 1 Greenleaf on Evidence, sec. 204; 2 id. sec. 22.

A former judgment, relied upon as a bar, prevents parties from relitigating, not only every ground of recovery and defense actually presented in the former action, but also every ground that might have been presented in that action.

The cause of action in this suit is not identical with the cause of action in the trespass suit. Would evidence sufficient to entitle Rhoads to a judgment in this case, if offered by him on the trial in the trespass suit, have entitled him to a judgment in that suit? If yes, the causes of action are the same and the former judgment is a bar.

"A judgment is a bar if the cause of action is the same. And the cause of action is the same when the same evidence will support both actions; or rather the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgment for the plaintiff in the present action would have authorized a judgment for him in the former." *Taylor* v. *Castle*, 24 Cal. 371.

Would proof of title by Rhoads in the trespass suit have authorized a judgment for him in that action? Without further comment, we submit the following authorities on this branch of the case: Freeman on Judgments, sec. 259; 7 Robinson's Practice, 168; Bigelow on Estoppel, 34, 54, 109, notes; *Miller* v. *Maurice*, 6 Hill, 114.

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In cases of this class it is immaterial whether the subject-matter in the two suits is the same, or whether the cause of action is the same in both actions. But it is absolutely necessary to show that the specific matter of fact sought to be raised has been already put in issue, litigated and found against a party, before he can be precluded from raising it in a subsequent suit. *Outram* v. *Morewood*, 3 East, 346; *Cromwell* v. *County of Sac*, 94 U. S. 351; *Hanna* v. *Read*, 102 Ill. 596; Bigelow on Estoppel, 36.

We rest our case on this proposition of the law:

In the absence of a special finding on a matter material to the issue, a verdict and judgment thereon are conclusive as an estoppel by verdict only as to facts without a determination of which the verdict could not have been rendered. Freeman on Judgments, secs. 256, 257, 276.

Messrs. COURTNEY & HELM, for the defendant in error:

The former verdict and judgment is *res judicata* on the question of highway between these parties. It is a fundamental principle that a matter, whether consisting of one or more questions, which has been adjudicated by a court of competent jurisdiction, shall be finally and conclusively settled in any subsequent litigation between the same parties where the same question or questions arise. *Hanna* v. *Read*, 102 Ill. 596; Bigelow on Estoppel, 45; *Outram* v. *Morewood*, 3 East, 346; *Miller* v. *Maurice*, 7 Hill, 115.

It is not necessary that the form of action in the suits be the same. *Hanna* v. *Read*, *supra*; Freeman on Judgments, sec. 355; *Cist* v. *Zeigler*, 16 S. & R. 282; *Demarest* v. *Darg*, 32 N. Y. 281.

Neither is it required that the subject-matter of the two suits be the same. Freeman on Judgments, sec. 253; *Castle* v. *Noyes*, 14 N. Y. 329.

All that is necessary is that the matter has been adjudicated between the same parties in a former trial; if so, it is conclu-

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sive without regard to the form of the action or the subject-matter of the two suits. *Hanna* v. *Read*, *supra*; *Conawell* v. *County of Sac*, 4 Otto (U. S.), 351; *Gardner* v. *Buckbee*, 3 Cow. 120.

In *Harmon* v. *Auditor*, *etc.*, 123 Ill. 133, it is said that "a former judgment is conclusive as to all questions within the issue. It extends not only to all questions of fact which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented."

And in the case of *Riverside Co.* v. *Townsend*, 120 Ill. 9, it is said that "a former judgment constitutes an absolute bar to a subsequent action, concluding parties not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

Where several issues are presented and contested and a general verdict is rendered, the presumption is that all of the issues were found in favor of the prevailing party. Freeman on Judgments, secs. 272, 276; Abbott's Trial Evidence, 832; Herman on Estoppel and Res Judicata, secs. 212, 227, 125; *Shelden* v. *Edwards*, 35 N. Y. 288; *Merchants' Steam Line* v. *Lyon*, 12 Fed. Rep. 63; *White* v. *Simonds*, 33 Vt. 178; *Day* v. *Vallette*, 25 Ind. 42; *Hames* v. *Water Co.*, 5 Sawyer, 287; *Rockwell* v. *Langley*, 19 Pa. St. 502; 2 Smith's Leading Cases, 773.

This presumption is not conclusive but *prima facie* only, and may be rebutted by showing that no evidence was offered on one or more of the issues. *Steam Packet Co.* v. *Sickles*, 24 How. 333; *Seddon* v. *Tutop*, 6 T. R. 607; *Sawyer* v. *Woodbury*, 7 Gray, 499; *Preston* v. *Peeke*, 1 Ellis, Bl. & El. 336.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

The city of Metropolis brought suit against Solomon J. Rhoads, before a police magistrate, for a violation of a city

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ordinance, such violation consisting, as is alleged, in erecting two fences across a certain public street of said city, thereby obstructing said street. The police magistrate imposed upon the defendant a fine of $10 and rendered judgment against him for that sum and costs, and the defendant thereupon removed the cause to the Circuit Court by appeal. In that court a jury was waived, and a trial *de novo* was had before the court upon the following stipulation as to the facts:

"*It is agreed and stipulated* by and between the parties to the above entitled suit, which is a prosecution for the recovery of a penalty for the violation of a city ordinance in obstructing a street within said city, that the same shall be tried upon the following agreed state of facts:

"It is agreed that, in the year 1885, the above named defendant brought an action of trespass *quare clausum fregit* against the city of Metropolis for removing the soil from the alleged street and grading the same. To this action of trespass the city pleaded: 1st. The general issue with notice that evidence would be offered under the general issue to prove that the *locus in quo* was a public highway within the corporate limits of the city. 2nd. The Statute of Limitations. 3rd. That the *locus in quo* was the property of the city. Issue was taken on all the pleas. Evidence was offered by both parties on all the issues made by the pleadings, and also evidence was offered by both parties under the notice that the *locus in quo* was a public highway within said city. That is to say, under the notice evidence was given to the jury by the city that the *locus in quo* was a public highway within the city, and that the acts done were in repairing the same. Rhoads gave evidence to the jury that the *locus in quo* was not a public highway. But no evidence was offered by the city under the general issue. The plaintiff Rhoads offered evidence to prove the allegations in his declaration. The jury found the defendant in that suit not guilty, and at the April term, 1887, of said court, a judgment was rendered for the defendant on the general verdict of not guilty.

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"Now, if the above verdict and judgment thereon concludes and estops Rhoads from offering evidence in the present suit to prove that the *locus in quo* or the alleged street, which is the same identical property in controversy in the trespass suit, is not a public highway, or estops him from proving the property to be the property of himself, then the court is to render a judgment for the city of Metropolis and assess a penalty against Rhoads, under the ordinance, for ten dollars and costs. But if such judgment does not operate as an estoppel as above set forth, then, and in that event, the court shall render a judgment in this suit in favor of Rhoads, and assess costs thereon against the city of Metropolis."

The foregoing stipulation was all the evidence offered on said trial, and on said stipulation the court found the defendant guilty, and rendered judgment against him for a fine of $10 and costs. The defendant having excepted to said finding and judgment, appealed to the Appellate Court, where said judgment was affirmed, and he now brings the record to this court by writ of error to the Appellate Court.

The only contention made here is, that the courts below erred in holding, that the verdict and judgment in the action of trespass *quare clausum fregit*, mentioned in said stipulation, should have the effect of an estoppel upon the defendant in this suit, to deny that the *locus in quo* of the alleged obstructions is a public highway, within the corporate limits of and the property of said city. In that action, as the stipulation shows, the plaintiff, who is the defendant here, charged the city with trespass in breaking and entering his close, which is the *locus in quo* of the present controversy, and digging up and removing the soil therefrom. The city, by its pleadings, set up three distinct defenses, 1. that presented by the plea of not guilty, which in that form of action constituted merely a denial of the acts of trespass complained of; 2. that raised by the notice filed with the general issue, that the city would prove on the trial that said *locus in quo* was a public highway

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within and the property of the city, thus presenting, in substance, the defense of *liberum tenementum*, and, 3. the Statute of Limitations. It is admitted that evidence applicable to all of these defenses was introduced at the trial, except that the city gave no evidence in support of its plea of not guilty. The verdict of the jury was not guilty, which, as must be admitted, was in form at least if not in substance and effect a general verdict in favor of the defendant upon all the issues submitted, and on such verdict judgment was rendered in favor of the city.

The plaintiff in error insists that, as there were several distinct defenses presented by the pleadings, either of which, if sustained by the evidence, justified a verdict of not guilty, it can not now be determined upon which of said defenses the jury in fact based their verdict. It is therefore argued that the verdict and judgment are not inconsistent with the theory that the city may have failed to prove its title, but succeeded in proving that the trespasses with which it was charged were committed at such time that an action therefor was barred by the statute, and consequently that no conclusive presumption arises that the defense of *liberum tenementum* was sustained.

The decisions of the courts of the different States are not altogether uniform as to the effect, as an estoppel, of a verdict and judgment in favor of a defendant, in a case where several distinct and separate defenses are presented by the pleadings, but in our opinion the preponderance of authority sustains what seems to us to be the better and more reasonable rule, that where evidence upon all the issues is heard, a general verdict in favor of the defendant is *at least prima facie* evidence, that all the issues presented by the pleadings were found in his favor. *White* v. *Simonds*, 33 Vt., 178, is quite in point. That was an action of assumpsit on three promissory notes, and the defendants relied for their defense upon a judgment in their favor in the State of Massachusetts in a suit on the same notes, in which two issues were tried, one denying the merits of the plaintiff's claim and the other only presenting a tem-

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porary bar to the plaintiff's recovery. It appeared that upon the trial of that case, evidence was introduced by the defendants on both issues, and that a general verdict was returned in their favor, on which a general judgment was rendered. Such former verdict and judgment were held to be conclusive of the issue denying the merits, the court saying: "When a case is submitted to the jury, involving two or more issues, with evidence tending to sustain them all, and a general verdict is rendered, such verdict is *prima facie* evidence that all the issues were found in favor of the party for whom the verdict is rendered. And when, as in this case, a judgment on such verdict is presented by the defendants to defeat a recovery in a subsequent suit, brought on the same cause of action, the burden of showing that the verdict in the first suit was rendered upon an issue presenting only a temporary bar, and that such bar has since been removed, or has ceased to operate, is thrown upon the plaintiff."

In *Day* v. *Vallette*, 25 Ind., 42, a general verdict and judgment in favor of the defendants was pleaded in bar, and it appeared that the issues joined in the former suit involved the same questions presented in the suit on trial, but that there were also other issues in the former suit, which if found for the same party would have produced the same result, even though the issues involved in the suit on trial had been decided the other way, and it was held that while the former verdict and judgment were not necessarily a conclusive bar to the second suit, they were so *prima facie*.

In *Sheldon* v. *Edwards*, 35 N. Y., 279, the defendant in a former suit, had, under the provisions of the New York Code, joined in his answer what amounted to a plea in abatement with a plea to the merits in bar, and it was held that a general verdict and judgment in favor of the defendant in such former suit was a bar in his favor in a subsequent suit, as to both defenses.

In *Merchants' International Steamboat Line* v. *Lyon*, 12 Fed. Rep., 63, the trial court charged the jury that, where two

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defenses are set up in an answer, and evidence is submitted to a jury upon the trial of the action tending to support both defenses, and a general verdict is rendered for the defendant, such verdict and judgment is a bar in another action upon the same demand. On motion for a new trial heard by both the Circuit and District Judges it was held that said charge was correct. See Freeman on Judgments, sec. 276.

It should be observed that in the case at bar there is no attempt to rebut the presumption arising from the verdict and judgment, and it is therefore unnecessary for us to consider whether said presumption is anything more than *prima facie*, or whether it is subject to be rebutted by proof that the jury in fact found but one of the issues in the former suit in favor of the city. It is difficult however to see how a party, after admitting that evidence in support of both defenses was submitted to the jury, could show *aliunde* that the verdict was found upon one and not both defenses, without inquiring into the secret deliberations of the jury room, and that is seldom if ever admissible.

We are of the opinion that the Circuit and Appellate Courts adopted the correct rule in the premises, and the judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

ADELAIDE M. HARDING

v.

GEORGE F. HARDING.

Filed at Ottawa, October 31, 1892.

1. SEPARATE MAINTENANCE — *alimony — pendente lite.* It is no objection to the allowance of suitable alimony to a wife pending her bill for a separate maintenance, that the husband denies the facts alleged by her; but the court may, if it deems it necessary, enter into a sufficient examination of the case, to determine the good faith of the complainant

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Syllabus.

in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings, of which the court may require verification. And the court will, in the exercise of its judicial discretion, make or withhold the allowance as it shall appear that the wife has or has not shown a meritorious cause, and is or is not proceeding in good faith.

2. SAME — *wife entitled to support pending her suit.* In a divorce or separate maintenance suit, while the matters in issue are being litigated, the wife will be presumed to be entitled to support until it is shown by the result of the trial that her claim is forfeited. This rule grows out of the duty of the husband to maintain and support his wife and protect her from oppression and wrong. The statute authorizes the court to give provisional alimony in addition to the award of a sum to enable the wife to employ counsel and meet the expenses of the litigation.

3. The same reason exists why a wife, who is living apart from her husband without fault, shall receive that reasonable support that he is bound by law to provide her pending her bill for maintenance, that exists when she sues for divorce. It is the intention of the statute to place bills by a wife for separate maintenance and bills for divorce upon the same footing in this respect.

4. SAME — *amount of temporary alimony.* Whether an allowance shall be made or not in the nature of temporary alimony rests in the judicial discretion of the court, to be exercised in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal.

5. The amount of the allowance will, ordinarily, when the husband has any considerable estate, be less than would be allowed as permanent alimony in divorce proceedings, and less than the permanent maintenance allowed in suits for separate maintenance. But the amount is usually arrived at in the same manner as in awarding permanent alimony or maintenance; that is, by considering the joint income of the husband and wife. The husband's income, the estate of the wife, as well as the ages and conditions in life of the parties, their ability to care for themselves, whether they are subject to the support and education of minor children, and indeed all the circumstances affecting the property of the allowance, will be considered.

6. The ordinary rule of temporary alimony is to allow the wife one-fifth of the joint income, deducting the income from the wife's separate estate. However, the amount allowed by the courts is by no means uniformly in the proportions indicated by the text writers. It varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third and even a half of the income of the husband. Some cases hold that no allowance shall be made from the income of the husband while the wife has property remaining which she may

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subject to the payment of the litigation and to her support, but these cases can not be considered as authority in this State.

7. And it is undoubtedly the rule that, where there is slight income, and the payment of the allowance will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. But if the husband has committed breaches of his marital obligations, entitling her to a divorce, or she is living separate and apart from him through his fault and without fault on her part, and her suit is in good faith, she will be entitled to be maintained and supported consistently with her station in life and his ability, if the money required therefor be not more than a just and equitable proportion of the joint income of herself and her husband.

8. It would seem equitable and just that a wife, who is prosecuting her suit in good faith, should be placed upon an equality with the husband; and if her income be insufficient to maintain her and to carry on the litigation, his income should be required to contribute before she is required to exhaust her estate.

9. If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose, but if her income is insufficient and that of the husband is ample, equitable considerations and the weight of authority require that such a sum shall be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably, pending the litigation, in the station of life to which he has accustomed her.

10. SAME — *allowance for attorney's fees and expenses of litigation pendente lite.* In order that a wife suing her husband for a separate maintenance may have a fair opportunity to present her cause, it is necessary not only that she be suitably maintained, but she must be enabled to employ counsel and make proper preparation for trial. In making such allowances, due regard should always be had to the character of the litigation, the services necessarily to be performed, the probable expense to be incurred, and all other circumstances which the court can see may tend to lessen or increase the probable expense of the litigation.

11. SAME — *support of minor children pending litigation.* On a bill by a wife against her husband for separate maintenance, it is error to decree payment to the wife for the support of their minor children in the absence of any order of court giving her their custody, when it appears that the husband is willing and amply able to support them, and he is guilty of no neglect of them. The father is entitled to the custody of his minor children until the right to their custody is awarded by the court to some other person, and he can be deprived of such control only by the order of a court having jurisdiction to make the same.

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Brief for the Appellant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F TULEY, Judge, presiding.

Messrs. STILES & LEWIS and Mr. JOHN S. COOPER, for the appellant:

Appellant made a *prima facie* showing to warrant the order for temporary alimony and suit money. *Johnson* v. *Johnson*, 125 Ill. 510; *Sharp* v. *Sharp*, 116 id. 509; *Wahle* v. *Wahle*, 71 id. 510; *Hawes* v. *Hawes*, 33 id. 286; *McGee* v. *McGee*, 10 Ga. 477; *Daiger* v. *Daiger*, 2 Md. Ch. 335; *Porter* v. *Porter*, 41 Miss. 116; *Litowich* v. *Litowich*, 19 Kan. 451; *Scoggins* v. *Scoggins*, 80 N. C. 318; *Cowan* v. *Cowan*, 10 Col. 545; *Wright* v. *Wright*, 1 Edw. Ch. 62; *Smith* v. *Smith*, id. 255; *Kennedy* v. *Kennedy*, 73 N. Y. 369; *Story* v. *Story*, Walker's Ch. 421; *Lisbey* v. *Lisbey*, 2 Tenn. Ch. 1; *Methvin* v. *Methvin*, 15 Ga. 664; 2 Bishop Marriage and Divorce, secs. 384, 406, 423; Stewart on Marriage and Divorce, secs. 383, 386; Brown on Divorce, 244; Poynter on Marriage and Divorce, 247; Shelford on Marriage and Divorce, 587.

Pending the litigation it will be presumed that the wife is entitled to temporary alimony. *Methvin* v. *Methvin*, *supra*; *Newman* v. *Newman*, 69 Ill. 167; *Jenkins* v. *Jenkins*, 91 id. 167; *Burgess* v. *Burgess*, 25 Ill. App. 525; *Umlauf* v. *Umlauf*, 22 id. 580; *Foss* v. *Foss*, 100 Ill. 576.

The right of a wife to temporary alimony is not barred by the fact that she has means of her own, nor is she obliged to exhaust such means before an allowance will be made. Bishop on Marriage and Divorce, secs. 460, 375, 394; Stewart on Marriage and Divorce, sec. 388; Brown on Divorce, 175; *Rose* v. *Rose*, 53 Mich. 585; *Miller* v. *Miller*, 73 N. C. 70; *Merritt* v. *Merritt*, 99 N. Y. 643; *Kreemer* v. *Kreemer*, 26 Ind. 330; *Westerfield* v. *Westerfield*, 36 N. J. Eq. 195.

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Brief for the Appellee.

Mr. WILLIAM J. AMMEN, for the appellee:

On motion for alimony *pendente lite* upon bill, answer and affidavits taken on both sides, it is proper for the court to look into the merits. *Bigbie* v. *Bigbie*, 7 N. J. Eq. 98; 60 Am. Dec. 674, note.

It must appear that the suit is brought in good faith, and not for the purpose of obtaining money. *Kerrigan* v. *Kerrigan*, 15 N. J. Eq. 146; *Litowich* v. *Litowich*, 19 Kan. 451.

Injury and a meritorious cause of action must be shown before alimony *pendente lite* will be granted in a suit for such a divorce. Notes, 60 Am. Dec. 678, citing *Worden* v. *Worden*, 3 Edw. Ch. 387; *Solomon* v. *Solomon*, 28 How. Pr. 218; *Davis* v. *Davis*, 75 N. Y. 271; *Boubon* v. *Boubon*, 3 Robt. 715; *Dougherty* v. *Dougherty*, 8 N. J. Eq. 540.

When it is apparent that there is no probability that the wife will succeed ultimately in obtaining the decree of separation prayed for, alimony *pendente lite* will be withheld. Notes, 60 Am. Dec. 678, citing *Snyder* v. *Snyder*, 3 Barb. 621; *Hollerman* v. *Hollerman*, 1 id. 64; *McDonough* v. *McDonough*, 16 How. Pr. 593.

Query. Is not a divorce from bed and board, under the English law, very similar to a decree for separate maintenance under our statute?

The award of temporary alimony, solicitor's fees, etc., was error, because it was not shown that appellant needed the same, the showing being that she had abundant resources of her own. Stewart on Marriage and Divorce, sec. 372; *Methvin* v. *Methvin*, 60 Am. Dec. 68.

When the wife has sufficient separate property, the reason for giving her alimony or suit money does not exist, and she is not entitled to either. *Westerfield* v. *Westerfield*, 36 N. J. Eq. 195; *S. C.*, 15 Rep. 352. Therefore, in fixing the amount of alimony *pendente lite*, the amount of the wife's separate estate is to be considered. *Jeter* v. *Jeter*, 36 Ala. 391; *Killiam*

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v. *Killiam*, 25 Ga. 186; *Corey* v. *Corey*, 81 Ind. 469. And if she be found to have sufficient separate property or means of her own to provide for her separate maintenance, no alimony, temporary or permanent, will be awarded her. *D'Aquiler* v. *D'Aquiler*, 1 Hagg. Ecc. 773; *Belcher* v. *Belcher*, 1 Curt. Ecc. 444, 446; *Bremner* v. *Bremner*, 3 Sw. & Tr. 249; *Powell* v. *Powell*, L. R., 3 P. & D. 55, 56, 186, 192; *Eaton* v. *Eaton*, 2 id. 51, 52; *George* v. *George*, 1 id. 554, 555; *Turner* v. *Turner*, 44 Ala. 437, 451, 452; *Pinckard* v. *Pinckard*, 22 Ga. 31, 32; *Stillman* v. *Stillman*, 99 Ill. 196, 202, 204; *Morse* v. *Morse*, 25 Ind. 156, 163; *Kenemer* v. *Kenemer*, 26 id. 330, 332; *Logan* v. *Logan*, 2 B. Mon. 142, 149; *Gaines* v. *Gaines*, 9 id. 295, 303; *Coles* v. *Coles*, 2 Md. Ch. 341, 347; *Daiger* v. *Daiger*, id. 331, 338; *Brown* v. *Brown*, 22 Mich. 242, 245; *Stevens* v. *Stevens*, 49 id. 504; *Porter* v. *Porter*, 41 Miss. 116, 118; *Willing* v. *Willing*, 16 N. J. Eq. 389, 391; *Westerfield* v. *Westerfield*, 36 id. 195; *Collins* v. *Collins*, 80 N. Y. 1; *S. C.*, 2 Paige, 9, 10; *Maxwell* v. *Maxwell*, 28 Hun, 566; *Hoffman* v. *Hoffman*, 7 Robt. 494; *Miller* v. *Miller*, 75 N. C. 70; *Converse* v. *Converse*, 9 Rich. Eq. 425; *Lishey* v. *Lishey*, 2 Tenn. Ch. 1; *Coad* v. *Coad*, 40 Wis. 392, 393.

"A reference to a master to ascertain the resources of the wife in order that the court, in granting temporary alimony, may be informed in this regard, is proper." *Maxwell* v. *Maxwell*, 28 Hun, 566.

The Illinois decisions as to temporary alimony and suit money are: *Foss* v. *Foss*, 2 Bradw. 411; *Johnson* v. *Johnson*, 20 Ill. App. 495; *S. C.*, 125 Ill. 510; *Foss* v. *Foss*, 100 id. 576; *Stillman* v. *Stillman*, 99 id. 196; *Jenkins* v. *Jenkins*, 91 id. 167; *Trotter* v. *Trotter*, 77 id. 510; *Newman* v. *Newman*, 69 id. 167; *Burgess* v. *Burgess*, 20 Ill. App. 525; *Wheeler* v. *Wheeler*, 18 Bradw. 330; *Becker* v. *Becker*, 15 id. 247; *Bowman* v. *Bowman*, 24 Ill. App. 165; *Umlauf* v. *Umlauf*, 22 id. 580.

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It was error to make the allowance for the support of the children. Schouler on Domestic Relations, secs. 245, 248; *People* v. *Turner*, 55 Ill. 280; *Hewett* v. *Long*, 76 id. 390; *Umlauf* v. *Umlauf*, 128 id. 378.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

Appellant filed her bill in the Circuit Court of Cook county, for separate maintenance, alleging that she was living separate and apart from her husband, appellee, without fault on her part. The bill, among other things, alleged that two daughters, issue of the marriage between appellant and appellee, and aged respectively eleven and fifteen years, were living with appellant and supported by her, and prayed for their custody. Answer was filed, admitting the marriage and putting in issue other material allegations of the bill, to which replication was filed. Issue being thus formed, appellant filed her petition for temporary alimony, praying that there be allowed her out of the estate of appellee a suitable sum to pay for the necessary support and maintenance of herself and the said two daughters from the time of the separation to the filing of the petition, and farther suitable and proper alimony *pendente lite* for the support and maintenance of herself and said two daughters, and an allowance for solicitor's fees and other expenses of the litigation. On hearing of the petition for temporary alimony, the court, by its decree, ordered appellee to pay appellant $900 for support of herself and said daughters to that date, and the farther sum of $300 on the first day of each and every month, commencing on a day named, for her own support and maintenance, and the farther sum of $180 per month, beginning at the same date, for the support of the daughters mentioned, pending the litigation; and the farther sum of $1000, solicitor's fees, and $400 for other expenses of her suit. No order was made in respect of the custody of the daughters, that question being expressly reserved to the final hearing.

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On appeal to the Appellate Court, the order of the Circuit Court was reversed *in toto*, and the case is brought to this court by the appeal of the complainant.

It is first insisted that there was not a sufficient showing on this preliminary hearing that appellant was living separate and apart from her husband, without her fault, to warrant the entry of the order of the court. Section 1 of the statute entitled "Separate Maintenance," provides: "That married women who, without their fault, now live, or hereafter may live, separate and apart from their husbands, may have their remedy in equity in their own names, respectively, against their husbands for a reasonable support and maintenance while they so live, or have so lived, separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition of the parties in life and the circumstances of the respective cases; and the court may grant allowances to enable the wife to prosecute her suit as in cases of divorce." It is not questioned that the allegations of appellee's original and amended bills are sufficient, if proved, to entitle her to relief. The answer denied these allegations, thus forming issues, in the trial of which counsel must be retained, evidence taken, and other expenses necessarily be incurred. And pending the trial the complainant must live, and, if entitled to the relief, will ultimately be entitled to such an amount by way of separate maintenance as would have supported her in the station in life in which she was entitled to be supported, as appellee's wife. It is no objection to the allowance being made that the husband denies what the wife alleges. To ascertain the truth in respect of the issues made by the bill and answer is the purpose of the trial, and to enable the wife to properly present her cause, the purpose of the allowance. To hold that the mere denial by the defendant of the matters alleged would put the complainant upon proof would be subversive of the whole theory upon which the allowance of temporary alimony is based. *McGee* v. *McGee*, 10 Ga. 477; *Wilson* v. *Wilson*, 2 Dev. & Bat. L. R.

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377; *Daiger* v. *Daiger*, 2 Md. Ch. 335; *Wright* v. *Wright*, 1 Edw. Ch. 62; *Porter* v. *Porter*, 41 Miss. 116; *Litowitch* v. *Litowitch*, 19 Kan. 451; *Scoggin* v. *Scoggin*, 80 N. C. 318. The court should enter into a sufficient examination of the case to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings, of which the court may and should, if other proof be not made, require verification. And the court will, in the exercise of its judicial discretion, make or withhold the allowance as it shall appear that the wife has or has not shown by her pleadings a meritorious cause of action or defense, and is or is not proceeding in good faith. Bishop on Marriage and Divorce, 384, 406, 423; Stewart on Marriage and Divorce, secs. 383–386; Brown on Divorce (Am. ed.), 244; Poynter on Marriage and Divorce, 247. In *Newman* v. *Newman*, 69 Ill. 167, we said: "In a divorce suit, while the matters in controversy are being litigated, the wife will be presumed to be entitled to support until it is shown by the result of the trial that her claim is forfeited." *Jenkins* v. *Jenkins*, 91 Ill. 167; *Foss* v. *Foss*, 100 id. 576. The rule grows out of the duty of the husband to maintain and support his wife and protect her from oppression and wrong. In this case the complainant filed her petition for alimony, in which, among other things, it is stated "that she had read the original bill and amendments thereto and knows the contents thereof, and that the same are true, except as to the matters and things stated on information and belief, and, as to such matters and things, she believes them to be true." The petition is verified by the oath of complainant. This was sufficient, if the court believed her, to warrant the exercise of the discretion of the court in finding that she was proceeding in good faith.

It is, however, insisted, in effect, that in proceedings in equity under the statute the court is not justified or authorized in awarding provisional alimony; that the statute authorizing an allowance "to enable the wife to prosecute her suit," the

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award must be confined to the actual expenses of the litigation, or what is sometimes called suit money. We are not disposed to give this remedial statute so narrow and restricted a construction. By the common law, the duty rested upon the husband to provide for his wife a reasonable support; but the wife was without remedy by the common law to enforce her right, or to compel observance by the husband of that duty. The statute, recognizing the obligation of the husband, and the defect in the common law, gives to the wife a remedy in her own name, in equity, whenever she is living apart from her husband without fault on her part. The remedy is given in equity, and when the aid of that jurisdiction is properly invoked, it necessarily calls into activity all of the ordinary powers of the court necessary to render the remedy efficacious and complete. Upon bills for separate maintenance, as in divorce cases, the court is required to deal with the rights and duties of the parties, growing out of their marital relations, and in the jurisdiction to determine the causes, there necessarily exists the power to compel the doing of such acts by the parties as are necessary to effectuate the purpose for which the jurisdiction is conferred. Thus, in speaking of the power to grant provisional alimony, independently of statute authorizing it, Bishop says: "It springs necessarily from the legal relation of the parties, and the condition of facts appearing of record before the court to which the application is made." By reference to the authorities cited, it will be found that the uniform practice of the Ecclesiastical Courts of England, where divorces *a mensa et thoro* only were granted, was to allow provisional alimony and suit money upon proper application. This statute is to be liberally construed to advance the remedy. There is the same reason why the wife, who is compelled to live apart from her husband, without fault, should receive that reasonable support that he is bound by law to provide her, pending the determination of her suit that exists when she is complainant in a divorce proceeding. To refuse to allow her a reasonable

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support *pendente lite* would, in many cases, be to deny her the right to prosecute her suit altogether. The legislature have intended to place bills of this character upon the same footing, in the respect being considered, as proceedings for divorce, and we are of opinion that the court is warranted, in proper cases, in granting such allowance to the wife as is usual and proper in divorce proceedings. And such has, as we understand, been the uniform practice in this State since the passage of the statute referred to.

It appears that appellee is a man of great wealth, a millionaire at least. His gross annual income is placed as high as $120,000, his net income from $15,000 to $50,000. The former and smaller figure is the sum probably placed by appellee, but in the account rendered of expenditures there are many items for betterments placed upon his property, and they include the purchase of some land, furnishing of houses, and the like, which, if we understand correctly, means simply a devotion of so much of his income to principal of the estate. An analysis of the testimony, excluding items that may be regarded as investments, will show an income largely in excess of $30,000 per annum net. On the other hand, it appears that appellant is the owner of a considerable amount of property, consisting mainly of notes, bonds and stocks. The income derived from this property by appellant, and unclaimed by appellee, amounts, as appears, to $958.40 per annum. The parties had seven children, ranging from thirty-one years down to eleven years, at the time the bill was filed, and all but the three younger having reached their majority.

The principal question discussed by counsel is, whether, under these circumstances, the wife having property in her own right, the court could, or if it could it ought, in the exercise of sound discretion, make the wife an allowance out of the husband's estate *pendente lite*.

Whether an allowance shall be made or not, in the nature of temporary alimony, rests in the judicial discretion of the court,

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to be exercised in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal. *Andrews* v. *Andrews*, 69 Ill. 609; *Ressor* v. *Ressor*, 82 id. 442; *Rose* v. *Rose*, 53 Mich. 595; *Sparhawk* v. *Sparhawk*, 120 Mass. 200; *Powell* v. *Powell*, 53 Ind. 513.

The amount of the allowance will ordinarily, where the husband has any considerable estate, be less than what would be allowed as permanent alimony in divorce proceedings, and less than the permanent maintenance allowed in suits like the one at bar, but the amount is usually arrived at in the same manner as in awarding permanent alimony or maintenance; that is, by considering the joint income of the husband and wife. The husband's income, the estate of the wife, as well as the ages and condition in life of the parties, their ability to care for themselves, whether they are subjected to the support and education of minor children, and indeed all the circumstances shown affecting the propriety of the allowance, will be considered. *Plaster* v. *Plaster*, 67 Ill. 93; *Call* v. *Call*, 65 Me. 407; *Bergen* v. *Bergen*, 22 Ill. 187, and cases *supra*. Mr. Bishop, in treating of the considerations which blend with the faculties of the husband, in determining the amount of alimony to be allowed, says (secs. 455, 456): "Another important thing is the income of the wife * * * arising from her separate estate, if such she has. And the method of computation is to add the wife's annual income to her husband's, consider what, under all the circumstances, should be allowed her out of the aggregate, then from the sum so determined deduct her separate income and the remainder will be the annual allowance to be given her." And farther (sec. 460) the same author says: "The ordinary rule of temporary alimony is to allow the wife about one-fifth of the joint income, deducting of course the income from the wife's separate estate in the way already explained. This is regarded as a fair medium, though the propor-

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tion will vary, as we have seen, according to circumstances." See, to same effect, Stewart on Marriage and Divorce, 388; Brown on Divorce (4th ed.), 175. In a large number of reported cases falling under our observation the rule above laid down has been recognized and substantially followed. See cases cited, Am. & Eng. Ency. of Law, Alimony, 447. However, the amount allowed by the courts is by no means uniformly in the proportion indicated by the text-writers. It will be found that it varies from a sum sufficient to meet the actual wants and necessities of the wife in some cases, to a third or even a half of the income of the husband. *Germond* v. *Germond*, 4 Paige, 643; *Denton* v. *Denton*, 1 Johns. Ch. 364; *Forest* v. *Forest*, 3 Bosw. 672; *Wright* v. *Wright*, 1 Edw. Ch. 62; *Williams* v. *Williams*, 4 Des. 183; *Amos* v. *Amos*, 3 Greene Ch. 171; *McGee* v. *McGee*, *supra*; *Collins* v. *Collins*, 29 Ga. 529; *Williams* v. *Williams*, 29 Wis. 517.

The fifteenth section of the Divorce act (chap. 40), among other things, provides that "in every suit for divorce, the wife, when it is just and equitable, shall be entitled to alimony during the pendency of the suit." When it is just and equitable will necessarily depend upon the conditions and circumstances of the particular case, when considered in the light of, and the questions arising determined according to, the established rules of chancery practice in like cases. In other words, "when it is just and equitable," that the wife be allowed temporary alimony will be judicially determined according to the established principles of the court.

Some adjudged cases are to be found going to the extent of holding, with more or less directness, that no allowance will be made from the income of the husband, while the wife has property remaining which she may subject to the payment of the expenses of the litigation and to her support. They are, however, opposed to the great weight of authority and can not be considered authority in this State. Alimony, in its technical sense, related to the income, a sum to be paid from

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the income of the husband, not by exhaustion of the *corpus* of his estate. And it is undoubtedly the rule that where there is no income, and the payment of the allowance will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. But if the husband has committed breaches of his marital obligation entitling her to a divorce, or she is living separate and apart from him through his fault, and without fault herself, which, if the prosecution of her suit be in good faith, must, on these applications, be assumed, she is entitled to be maintained and supported consistently with her station in life and the ability of the husband, if the money required therefor be not more than a just and equitable proportion of the joint income of herself and husband.

It would seem equitable and just that the wife, who is prosecuting her suit in good faith, should be placed upon an equality with the husband, and if her income be insufficient to maintain her, and to carry on the litigation, his income should be required to contribute before she should be required to exhaust her estate. We do not deem it necessary to enter upon a discussion of the reasons underlying the rule, entitling the wife to a proportion of the joint incomes, when necessary for her support. If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose. But if the income of the wife be insufficient, and that of the husband be ample, equitable considerations and the weight of authority require, as we think, that such a sum should be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably pending the litigation in the station in life to which he has accustomed her.

It is clear that the income of appellant was insufficient to thus support her, and the income of appellee being ample to properly maintain his family in the station in life in which

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he had kept them, an allowance for the wife's support was properly made. The court allowed $900 for support of appellant from the separation to the filing of the petition, being about $200 per month. We do not understand, if any allowance was proper, that the amount here allowed is questioned. We purposely refrain from a discussion of the alleged conditions rendering this allowance necessary and proper.

The court, as seen, in addition allowed appellant $300 per month, to be paid by appellee as and for her support *pendente lite*. When this sum is added to the income of appellant, it can not be said that it will amount to more than a fair and reasonable proportion of the joint income of both. It is probably less than one-sixteenth of the husband's income alone, and quite certainly less than one-sixth of it. Nor can we say, in view of the station of these people in life, the manner in which appellee had maintained his family, and the large sums annually expended to sustain their manner of living, that this amount is unreasonable for her support and maintenance, or that there was an abuse of the discretion in respect thereof reposed in the court.

It is also urged that the court erred in allowing for solicitors' fees and other expenses of litigation any sum whatever. What has already been said disposes of the principal objection. Appellee will be able to make a very determined and expensive contest. In order that his wife may have a fair opportunity to present her cause, it is necessary, not only that she be suitably maintained, but she must be enabled to employ counsel and make proper preparation for trial. In making such allowances, due regard should always be had to the character of the litigation, the services necessarily to be performed, the probable expense to be incurred, and all other circumstances which the court can see may tend to lessen or increase the probable expense of the litigation. It can not be said, we think, that the allowance of $1,000 as solicitors' fees, and of $400 for other expenses of the suit, is so excessive, in

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view of the facts disclosed, as to warrant the interference of an appellate jurisdiction, upon the ground that it was an abuse of the discretion reposed in the Circuit Court. It follows that we are of opinion that the decree of the Circuit Court, in so far as it relates to allowances for fees of solicitors, for other expenses of suit, and for the maintenance of the wife *pendente lite*, was properly entered, and that the Appellate Court erred in reversing the same.

We are, however, of opinion that the Circuit Court erred in making the allowance for the support of said minor daughters. The father is by law entitled to the custody of his minor children, and is responsible for their support and maintenance. That a court of equity, having obtained jurisdiction of the parties, may, when dealing with their marital rights, make such order for the custody and maintenance of the minor children as under the circumstances of the case may appear just, and in the interest of such minor children, may be conceded; but the father can not be deprived of his right of custody and right to maintain them at his home, if he have one, except by the order or decree of a court of competent jurisdiction. Here no such order was made, and by the decree the question of the custody of the children was expressly reserved until the hearing. That the court might, upon a hearing had upon that matter, have made an order committing their temporary custody to the mother, in no way aids the decree. The only cause alleged in the bill why the children mentioned are not residing with the father is that they are of tender years and require a mother's care. There is no charge that appellee has failed to suitably provide for them, or neglected or mistreated them. It appears he has an elegant and comfortable home, presided over by an elder daughter, and a housekeeper who was the nurse of these minors; that appellee never consented to their leaving his home, and has frequently requested and is desirous for their return. As seen, no evidence was heard upon the question of their custody, and no order made

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in respect thereof. Under these circumstances appellee should not be required to furnish money to keep these minor daughters at hotels or elsewhere than at his home. If appellant desires to retain the custody of these daughters, she should maintain them until she can procure an order of the court committing them to her custody.

The judgment of the Appellate Court is affirmed in so far as it reverses the decree of the Circuit Court, making an allowance of $180 per month for the support of said minor children, and in all else is reversed, and the decree of the Circuit Court, except as to the said allowance of $180 per month, is affirmed and the cause remanded.

Judgment affirmed in part, and in part reversed.

PATRICK O'SULLIVAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa, October 31, 1892.

1. PRACTICE IN THE SUPREME COURT — *entry of judgment nunc pro tunc, after party's death.* This court has the power of causing its judgments to be entered of record in cases pending therein, after the death of a party to the record, subsequent to the submission for decision, as of a day before his death, when the delay in causing judgment to be entered has been purely for the convenience of the court or of some of its members.

2. WRIT OF ERROR — *when it does not abate by party's death.* The common law rule, that a writ of error does not abate by the death of the plaintiff in error after error joined, has no application to criminal cases, as the rule rests upon the right of the defendant in error to have the judgment revived against the personal representatives of the plaintiff in error, and to thus enforce the judgment against him whom they represent.

3. There is no right to prosecute a writ of error in any case unless it is affirmatively given, either by a rule of the common law or a statutory

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enactment. Our statute in relation to the prosecution of writs of error by executors and administrators has application to judgments in civil cases only.

4. SAME — *abatement by death.* The death of a party convicted of crime, after he has sued out a writ of error to reverse the judgment, abates the writ, even though there is joinder in error; and this result can not be prevented by the entry of judgment, *nunc pro tunc*, as of a date prior to his death.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. S. P. MCCONNELL, Judge, presiding.

Mr. WILLIAM S. FORREST, Mr. RUSSELL M. WING, DANIEL DONAHOE and Mr. JOHN A. QUALEY, for the plaintiff in error.

Mr. GEORGE HUNT, Attorney General, and Mr. J. M. LONGENECKER, State's Attorney, for the People.

PER CURIAM: Patrick O'Sullivan and others were convicted, in the Criminal Court of Cook county, of the crime of murder and sentenced to be punished therefor by confinement in the penitentiary. He sued out of this court a writ of error upon the record. Errors were assigned on his behalf upon that record, and there was joinder in error by the Attorney General, and the questions thus presented were discussed in printed arguments presented to us at our March term, 1891. But the record being unusually voluminous, and the questions discussed numerous and requiring for their examination and solution the careful reading of hundreds of printed pages of evidence and many legal authorities, it was impossible for us to give judgment thereon at that term, and so we then took the case under advisement. It is now made known to us that on the 5th day of May, 1892, and before we had caused judgment to be entered upon the record, or in any manner indicated to the parties or the public what our judgment would be, Patrick O'Sullivan died intestate, leaving personal property which has been administered upon pursuant to law. It has been suggested to us by one of the attorneys representing O'Sullivan

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in his lifetime, as *amicus curiæ*, that we now cause judgment to be entered in the case, *nunc pro tunc*, as of our March term, 1891, or as of some day subsequently, but before the death of O'Sullivan; and the administrator of O'Sullivan's estate, by his attorneys, makes a motion to that effect.

We do not question either our power or the propriety of our causing judgments to be entered of record in cases pending before us, after the death of a party to the record, subsequent to the submission of the case to us for decision, as of a day before his death, where the delay in causing judgment to be entered has been purely for the convenience of the court or of some of its members, and in certain other cases, where injustice will otherwise result to one or both of the parties to the record, provided the judgment thus to be entered of record can be operative and effective, as a judgment, from the day as of which it is entered. But no case has been cited to us which holds that a judgment should be entered *nunc pro tunc*, when it can be no more operative and effective than where it is entered of record as of a present date, and since a court is never required to do a useless act, we do not think that any well-reasoned case so holding can be found.

Judgments in civil cases, whether in actions upon contracts or upon torts, are for the recovery or the denial of something, either specifically or in the form of damage, of some pecuniary value. If the plaintiff recovers he thereby becomes entitled to have, and the defendant must lose, something which, but for that recovery, he would not have had and the defendant would not have lost. But in criminal cases, under indictments for felonies, the sole purpose of the action is, not to give the people anything, but to punish the defendant in his person, and the primary judgment, when the defendant is found guilty, is simply the defendant being found guilty, that he be punished, specifying how. It is true that, under our statute, judgment is also rendered for costs, but this is incidental only, and it stands or falls with the primary judgment that the de-

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fendant be punished. The inquiry upon the trial is only whether the defendant be guilty and, if guilty, the punishment that shall be inflicted upon his person, the question of costs being neither submitted nor considered, and the judgment therefor resulting solely as a legal consequence of the primary judgment. It is, therefore, apparent that in judgments in civil cases property rights are more or less directly affected, and such rights, under statutes, are made to descend to and be obligatory upon the representatives after death of either or all of the parties to the judgment. But in criminal cases, where judgments are rendered against the defendants under indictment for felony, the people acquire no property rights, and the representatives of the defendant do not take that which is affected by the primary judgment, namely, the person of the defendant.

It would, therefore, seem to inevitably follow that the common law rule in civil cases, that a writ of error does not abate by the death of the plaintiff in error, after error joined (2 Tidd's Practice, 1086), can have no application to criminal cases, since that rule rests upon the right of the defendant in error to have the judgment revived against the personal representatives of the plaintiff in error, and to thus enforce against them the judgment against him whom they represent.

The only instance found in the books in which a writ of error can, at common law, be prosecuted by the representatives of a deceased person, upon the record of his conviction in a criminal case, is that of an attainder for treason or felony. The effect of such attainder, at common law, was forfeiture of all estate, both real and personal, and corruption of blood. 4 Blackstone's Commentaries, 382. And it was held that a writ of error may be brought by the party attainted, "or, after his death, by his heirs or executors, to reverse an attainder of treason or felony, but by no other persons, whatever interest they may claim in the reversal." 1 Chitty's Criminal Law, 746, *747. But since our constitution provides that "no convic-

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tion shall work corruption of blood or forfeiture of estate" (Const., art. 2, sec. 11), there can be no attainder for treason or felony here, and, hence, no case upon which the heir or executor can prosecute a writ of error to reverse an attainder. The principle, upon which the heir or executor was allowed to prosecute a writ of error to reverse the attainder, was that the direct effect of the attainder was to take from them and give to the government property belonging to them, as representatives of the person attainted. And so it is said by Bishop, in his work on Criminal Procedure, vol. 1, sec. 1363, after quoting from Chitty's Criminal Law what we have quoted *supra:* "As the rights of the heir and the executor grew out of their interest in the forfeited estate, we may presume that they could not bring a writ of error with us, where forfeiture is unknown, the rule being to permit it only to 'him who would have had the thing if the erroneous judgment had not been given.'" Citing, in support of the language marked by him with quotation points, as last above, 2 Williams' Saunders, 5th ed. 46, note c.

There can nowhere be found affirmative authority, in the common law, for the prosecution of a writ of error by the representatives of a deceased person, upon a judgment rendered against the deceased in his lifetime, under an indictment for felony, in any other instance, and when it is reflected that at common law no motion could be made nor judgment rendered on such writ of error, in the absence of the plaintiff in error (1 Chitty's Criminal Law, 751, *752), it is manifest that it was impossible that there could have been such prosecution of a writ of error. True, we hold that in this State, under our statute, it is not required, nor, indeed, practicable, that the plaintiff in error in a criminal case shall be personally present in this court when the case is being prosecuted and heard. *Fielden et al.* v. *The People*, 128 Ill. 595. But no statute of this State assumes to supplement or change the rule of the common law by allowing that writs of error may be prosecuted

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in criminal cases by representatives of deceased persons where that could not be done at common law.

There is no right to prosecute a writ of error in any case, unless it is affirmatively given, either by a rule of common law or a statutory enactment. Such common law rule or statutory enactment is not pointed out in the present case. On the contrary, in *Herrington* v. *The State*, 53 Ga. 552, we have a case, as stated by the reporter, precisely analogous to the present case, in which the right of the representative of a deceased person to prosecute a writ of error upon the record of a judgment in a criminal case against such deceased person is denied. The reporter states the decision thus: "Where, after the argument of a criminal case in this court" (*i. e.*, the Supreme Court of Georgia), "but before the judgment is pronounced, the defendant dies, the proceedings abate and no decision will be pronounced." Nor can it be said the common law rule does not extend thus far, simply because at common law there was no judgment for costs, to be paid out of the estate of the defendant — for fines for misdemeanors were, at common law, collectible out of the estate of the defendant, and a *levari facias* would issue for their collection (1 Chitty's Criminal Law, 809, *810), and, upon the death of the defendant, the executor or administrator was chargeable with their payment out of assets of the deceased in his hands for administration. 2 Williams on Executors (7th ed.), 1740. And yet we have hunted in vain for authority, common law or statutory, for an executor or administrator of a deceased person convicted and fined for a misdemeanor, in his lifetime, to prosecute a writ of error upon the record of such conviction.

Our statute, in relation to the prosecution of writs of error by executors and administrators, has application to judgments in civil cases only. Chap. 3, R. S., 1874, sec. 125, and chap. 1, sec. 24 of same statute.

The same reason which applies to an administrator or executor, in regard to suing out or prosecuting a writ of error,

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must obviously apply to their prosecuting such writ when previously sued out by the deceased. If judgment could not be entered for or against them in the one case, very clearly it could not be in the other. And we have found no authority sanctioning such a distinction.

If this motion shall be granted, we must either affirm the judgment below and order it to be executed, or reverse it and arrest it, or order a new trial of the defendant. But, in either case, the order can be effective only upon the assumption that some one representing or standing in the place of the dead man can be affected by it. A judgment can not be enforced when the only subject matter upon which it can operate has ceased to exist. When the defendant, ordered to be punished, is dead, the execution of that order is absolutely arrested; — for the future it is as entirely a nullity as any subsequent judgment arresting it can possibly make it to be. There can not be a new trial with the executors or administrators as parties, if a new trial should be awarded, because the common law admits the trial of no one for felony who is not personally present at the trial. It would seem, therefore, to be clear that to now order either of these things to be done as of some day during the life of the deceased, and after he had sued out the writ of error, would be as vain and useless as to order them to be done now. The judgment being purely personal can not, by any possibility, after the death of the person, be made to relate back and have had an effect on his person which in fact it did not have; that is, it can not make him actually have had an opportunity for a new trial, or have arrested his punishment, or have denied his right in these respects.

We think the conclusion is inevitable that the writ of error abated upon the death of O'Sullivan, and that a judgment *nunc pro tunc* can not prevent that result.

The motion to enter judgment *nunc pro tunc* is overruled. The writ of error is abated. No judgment will be entered for the costs of either party.

Writ of error abated.

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Syllabus.

MATTHEW TELFORD

v.

LIVONIA J. PATTON.

Filed at Mt. Vernon, November 3, 1892.

1. PROMISSORY NOTE — *certificate of deposit.* A certificate of deposit showing the deposit in bank of a sum of money payable to the order of the depositor, in current funds on its return one year after date, with six per cent interest for the time specified, but no longer, is, in law and in fact, a promissory note.

2. SAME — *disposal of by gift.* A promissory note is not the subject of disposal as a gift, either *inter vivos* or *mortis causa*, without an actual delivery of it.

3. GIFT — *donatio causa mortis — its requisites.* There are three requisites to constitute a *donatio causa mortis:* (1) The gift must be with a view to the donor's death; (2) it must have been made to take effect in the event of the donor's death by his existing disorder; and (3) there must be an actual delivery of the subject of the donation.

4. SAME — *inter vivos — requisites of.* It is essential to a donation *inter vivos* that the gift be absolute and irrevocable; that the giver part with all present and future dominion over the property given; that the gift go into effect at once, and not at some future time; that there be a delivery of the thing given to the donee, and that there be "such a change of possession as to put it out of the power of the giver to repossess himself of the thing given."

5. SAME — *of the delivery.* To make such a gift the delivery of the thing given must be made with the intent to vest the title in the donee. But the delivery may be constructive, as of a key, or a part for the whole. It may be to a third person for the benefit of the donee, instead of being made directly to the donee himself.

6. SAME — *gift inter vivos distinguished from a gift causa mortis.* A gift *inter vivos* is chiefly distinguished from a gift *causa mortis* by the facts that the former is not made in view of expected or impending death, and that it is not revocable in its nature.

7. A certificate of deposit may be the subject of a valid gift *causa mortis*, but it must be indorsed and delivered to the donee so as to vest in him complete title, or so delivered without indorsement as to create an equitable assignment of the fund it represents, divesting the donor of all control and dominion over it.

8. SAME — *delivery to third party as agent.* When a delivery is made to a third party, in order that the latter may deliver the subject

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of the gift to the donee, as agent of the donor, the gift is not complete until there is an actual delivery to the donee; and until the gift is completed by delivery, the donor can revoke the agent's authority and resume possession of the gift. The death of the donor before delivery by the agent revokes the agent's authority, and he can not then make a valid delivery.

9. When the delivery is to a third person as trustee for the donee, and not as agent for the donor, such delivery completes the gift, and the death of the donor will not revoke it; but, to make out such a case, the circumstances should show a full relinquishment of dominion over the property to the trustee for the purposes of the trust.

10. SAME — *deposit of money in the name of another.* Where money is deposited in bank in the name of a third person, but the deposit book or certificate of deposit is retained by the depositor in his own possession, the title to such fund will not pass to such person in the absence of any declaration of trust or circumstances showing an intention to vest the title.

11. A man deposited in a bank $2600 in the name of an intimate lady acquaintance some eight months before his death, taking a certificate of deposit in her name, which he never delivered to her or to any one for her. At the time of the deposit he made no declaration of trust in her favor, and never wrote to her on the subject, and she was ignorant of any such deposit until after his death: *Held*, that there was no gift of the money to the party in whose name it was deposited, and that the certificate of deposit passed on his death to his administrator.

12. TRUST — *evidence of — deposit of money in name of another.* To constitute a trust there must be either an explicit declaration thereof, or circumstances showing beyond a reasonable doubt that one was intended to be created. It can not be implied from a mere deposit of money by one person in the name of another.

13. CERTIFICATE OF DEPOSIT — *taken by one in the name of another — evidence of ownership.* Where a party made a deposit in bank in the name of another, but never delivered the certificate thereof to such other person, and made no declaration of trust at the time or afterward, in an action of replevin by such person against the administrator of the depositor, the court instructed the jury that, if they believed, from the evidence, such party deposited the money in the name of and for the use and benefit of the plaintiff and took from the bank a certificate of deposit payable to the plaintiff, then the plaintiff was entitled to recover: *Held*, that the instruction was erroneous, as ignoring the question of delivery, and leaving it to the jury to find whether or not the deposit was made for the use of the plaintiff, in addition to and separate from the finding as to whether or not such deposit was made in the name of the plaintiff, there being no proof of a deposit for her use and benefit in addition to or separate from the mere fact that the plaintiff's name was inserted in the

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certificate, and also for the reason that the instruction presented the question whether or not a trust was established, when the real question was, whether or not there was a gift to the plaintiff.

APPEAL from the Appellate Court for the Fourth District; — heard in that court on appeal from the Circuit Court of Jefferson county; the Hon. C. S. CONGER, Judge, presiding.

This is an action of replevin, begun on January 14, 1891, in the Circuit Court of Jefferson county, by the appellee against the appellant, who is the administrator of the estate of Samuel Telford, deceased, to recover the possession of the certificate of deposit hereinafter described. The declaration contains four counts, two of which are in trover. The pleas are *non cepit*, *non detinet*, not guilty, and special pleas alleging property in Samuel Telford at the time of his death, and in his said administrator since his death. The certificate was placed in the hands of the clerk of the court, to be held subject to the order of the court. The case was tried before a jury, who found the issues for the plaintiff, and that the right of possession of the certificate and of property therein was in the plaintiff. By the judgment of the Circuit Court, which has been affirmed by the Appellate Court, the clerk was ordered to deliver the certificate to the plaintiff. The case is brought here by appeal from the Appellate Court.

The certificate in question is as follows: "First National Bank of Springfield, Mo. May 1, 1889. L. J. Patton has deposited in this bank $2600.00, payable to the order of himself, in current funds, on return of this certificate, one year after date, with six per cent interest for the time specified, and no longer. A. J. Clements, Cashier. No. 2603." The proof tends to show that on May 1, 1889, said Samuel Telford deposited $2600 of his own money in said bank, and received therefor said certificate; that on January 15, 1890, said Samuel Telford died intestate at Eureka Springs, Arkansas, a bachelor,

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and sixty-five years old; that this certificate, so far as is known, never left his possession from the day of its date to the day of his death, and was found, together with other certificates of deposit issued to him in his own name, aggregating over $12,000, and some notes, mortgages, etc., in a pocket-book taken from the inside pocket of a vest which he wore when he died; that he never communicated to the bank officers, or to any other person, any facts concerning said certificate, or his intentions in relation thereto; that he never wrote or spoke to appellee about it, and that she had no knowledge of its existence until after his death; that he was one of a family of eight or nine children who lived in Marion county and the adjoining counties, and had at one time acted for three or four years as deputy sheriff of Marion county; that he was a peculiar man, living most of the time away from his relatives; economical, reticent, and so secretive that even his most intimate friends knew nothing about his business or affairs; that he had known appellee, now over forty-eight years old, from her girlhood; that for twenty years before his death he visited her, wrote to her when he was away from her, sent her his photograph, paid no attentions to any other woman, she receiving no attentions from any other man, though there is nothing to show that any engagement of marriage ever existed between them; that his effects at the time of his decease amounted to about $27,000, including said certificate; that a few days before his death he was observed to "sign or endorse some papers, bank papers of some kind," saying that he was doing so in order that the money might be drawn without the appointment of an administrator, but he made no endorsement or memorandum of any kind upon the certificate in question; that he kept a daily expense account, and made annual statements of his assets, investments, gains and expenses, etc.; that about two weeks before his death he made such a statement, found in his pocket-book, showing that he was worth $27,140.46, that amount corresponding with the notes, certificates, money, etc.,

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found in his room by including the amount of the certificate therein.

The proof also tends to show that the appellee herein has a brother named Lewis J. Patton, living in Kansas. This brother, however, testifies that he is not the L. J. Patton referred to in the certificate; that he never made a deposit in said bank; that he never had any business with deceased, and makes no claim to the money. The appellee, Livonia J. Patton, claims that she is the person referred to in the certificate, although it recites that it is "payable to the order of *himself*" and not of *herself*. The cashier of the bank, who testifies that he kept the books, and that deceased had $10,000 on deposit on May 1, 1889, and $5000 when he died, says: "The money can not be drawn on the certificate from the bank without its presentation, endorsed by the party in whose favor it is issued. I do not know who made the deposit, but think it was one Samuel Telford from evidence obtained since the deposit was made and since the death of the party. It is customary to obtain signatures of depositors when deposit is made. We have no signature of L. J. Patton — have no knowledge of or acquaintance with L. J. Patton * * * or our bank had no dealings with or knowledge of Miss Livonia J. Patton before the death of Samuel Telford."

Upon the trial the court refused all the instructions asked by both plaintiff and defendant, and gave one of his own motion, the third paragraph of which is as follows:

"If you believe from a preponderance of the evidence that Samuel Telford, on the 1st day of May, 1889, deposited in the First National Bank of Springfield, Mo., the sum of $2600 in the name of and for the use and benefit of the plaintiff, and received from the bank a certificate of deposit payable to the plaintiff, then such money and the certificate representing it would be the property of the plaintiff and she would be entitled to recover the possession of such certificate after demand."

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Brief for the Appellant.

Mr. ALBERT WATSON and Mr. GEORGE B. LEONARD, for the appellant:

In this case no gift will be declared for Telford as he has never so declared himself, and if he had made such a declaration he had never carried it into effect by delivery, without which there can be no gift. *Spencer* v. *Vener*, 57 Mo. 427; *Atkins* v. *Hulse*, 62 id. 577; *Doring* v. *Keegmore*, 86 id. 588; *Vogal* v. *Geist*, 20 Mo. App. 104.

Under the laws of Illinois a certificate of deposit is held to be a promissory note. *Bank of Peru* v. *Farnsworth*, 18 Ill. 565; *Laughlin* v. *Marshal*, 19 id. 390; *Hunt et al.* v. *Divine*, 37 id. 137.

And here Telford made this loan and took this promise to pay with six per cent interest — clearly a note.

This court has held that where a father took three promissory notes, payable one to each of his three daughters, which were delivered to and retained by the father until his death, never being delivered to the daughters, that these notes belonged alone to the father. *Fanning* v. *Russell*, 94 Ill. 386, which authority certainly is on all fours with this case and must control it.

"Personal chattels, bonds or choses in action may be subjects of disposal as gifts either *inter vivos* or *causa mortis*, but it is indispensable in every case that the thing intended to pass should be actually delivered." *Blanchard* v. *Williamson*, 70 Ill. 650; *Badgley* v. *Votrain*, 68 id. 25.

"But like anything else which does not lie in grant, but in livery, the title to a promissory note can only vest by its delivery to the payee." *First Nat. Bank of Centralia* v. *Strang et al.*, 72 Ill. 559; *Chamberlain* v. *Hopps*, 8 Vt. 94.

Actual delivery is necessary to complete a gift *donatio causa mortis*, and the delivery must be such as in case of a gift *inter vivos* would invest the owner with title. *Barnes* v. *The People*, 25 Bradw. 136; *Olney* v. *Howe*, 89 Ill. 556; *Williams* v. *Forbes*,

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114 id. 171; *Pratt* v. *Trustees*, 93 id. 475; *Roberts* v. *Draper*, 18 Ill. App. 167; *Wilson* v. *Keller*, 9 Bradw. 347; 2 Kent, 439.

A gift *inter vivos* must be absolute and irrevocable, and the property must be delivered. *Roberts* v. *Draper*, 18 Bradw. 167; *Jackson* v. *Railway Co.*, 88 N. Y. 520; *In re Crawford*, 113 id. 560.

The question of gifts in connection with deposits in banks has of late years been frequently considered by the courts in various States. The preponderance of authority seems to be against the appellee in this case. See *Robinson* v. *Ring*, 72 Me. 140; *Burton* v. *Bank*, 52 Conn. 398; *Mercey* v. *Amezcen*, 61 N. H. 131; *Schick* v. *Grote*, 42 N. J. Eq. 352; *Scott* v. *Bank*, 140 Mass. 157; 8 Am. & Eng. Ency. of Law, tit. "Gifts," and the cases there cited in the notes.

Mr. F. F. NOLEMAN and Messrs. CASEY & DWIGHT, for the appellee:

When Samuel Telford deposited $2600 in the First National Bank of Springfield, Mo., and took therefor a certificate of deposit in the name of L. J. Patton, this was a delivery of the money, and the gift to the appellee was complete.

When a sum of money or other personal property is delivered to one person as a gift to another, it is not necessary to the validity of the gift that the donee shall assent thereto, as that will be presumed. *Forbes* v. *Jansen*, 6 Bradw. 395; Bishop on Contracts, sec. 352; *Morrison* v. *Kelly*, 22 Ill. 610; *Rawson* v. *Fox*, 65 id. 200; *Crocker* v. *Lowenthal*, 83 id. 579.

The deposit of the money was, in law, a complete delivery of the gift, and nothing more remained to be done to transfer the money, and it was not necessary to deliver the certificate to the appellee or give her charge of it. 1 Swift's Dig. 439.

When a party deposits money in a bank in trust for another and causes entries to be made in the bank's books in conformity, it raises the presumption that it was the money of the donee and not that of the donor; but, even if the money originally

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belonged to the donor, this appropriation of it was sufficiently definite and complete to make it a gift. *Millspaugh* v. *Putnam* (N. Y.), 16 Abb. 380.

The deposit being in the name of L. J. Patton, and no other person being named as the payee, in the absence of proof to the contrary, it will be presumed to have been made for her use and benefit. *Howard* v. *Bank*, 40 Vt. 597; *Millspaugh* v. *Putnam*, *supra*.

Where a person deposits money in a bank in his own name as trustee for another, or in another's name and retains the voucher in his possession, and dies without giving the donee notice of the same, it is a complete and valid gift. *Martin* v. *Funk*, 75 N. Y. 134; *Minors* v. *Rodgers*, 40 Conn. 512; *Kerrigan* v. *Rantigan*, 43 id. 17; *Howard* v. *Bank*, 40 Vt. 597; *Millspaugh* v. *Putnam*, *supra*; *Gardner* v. *Merritt*, 22 Md. 78; *Devol* v. *Dye*, 123 Ind. 321; 1 Daniel's Negotiable Instruments sec. 24a; *Grangiac* v. *Arden*, 10 Johns. 293; *Grover* v. *Grover*, 24 Pick. 261.

The retention of the certificate, which was simply the voucher for the money, must be deemed to have been as trustee or agent for L. J. Patton, and was not inconsistent with the completeness of the gift, nor was notice to her necessary. *Martin* v. *Funk*, 75 N. Y. 134; 1 Daniel's Negotiable Instruments (4th ed.), secs. 24a and 24b; *Minor* v. *Rodgers*, *supra*.

It was not necessary that the appellee should have constituted the cashier of the bank her bailee or trustee, nor that she should have known of the intended gift or of the delivery in order to make it an effectual delivery to him as her trustee; the gift being beneficial to the donee, her acceptance of it is presumed until renounced. *Blasdel* v. *Locke*, 52 N. H. 238; *Darland* v. *Taylor*, 52 Iowa, 503; *Devol* v. *Dye*, *supra*; *Forbes* v. *Jansen*, 6 Bradw. 395.

Where a person deposits money in another's name in a bank, and he does not appear upon the bank records to be connected

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with the deposit in any way, it is a much clearer case of gift than where he deposits the money in his own name as trustee for the donee. *Gardner* v. *Merritt*, 32 Md. 78; *Howard* v. *Bank*, 40 Vt. 597; *Smith* v. *Lee*, 2 N. Y. Sup. Ct. 291.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The questions of law in the case are raised by the third paragraph of the instructions given by the Court. There are no material facts in the record, except those recited in the statement preceding this opinion, which explain the reason why Samuel Telford procured the certificate to be issued in the name of L. J. Patton, or which tend in any way to solve the question whether the certificate belongs to the appellee, or to the administrator of the deceased.

The certificate of deposit may be considered either as a promissory note, or as the written evidence of a deposit, like a bank pass-book, or deposit-book.

We have decided, that a certificate of deposit, such as the one above set forth, "is, in fact and in law, a promissory note for the payment of money." (*Bank of Peru* v. *Farnsworth*, 18 Ill. 563; *Laughlin* v. *Marshall*, 19 Ill. 390; *Hunt* v. *Divine*, 37 Ill. 137). A promissory note is not the subject of disposal as a gift, either *inter vivos* or *mortis causa*, unless there is an actual delivery of it. (*Blanchard* v. *Williamson*, 70 Ill. 647; *Badgley* v. *Votrain*, 68 Ill. 25; *First N. Bank Centralia* v. *Strang et al.*, 72 Ill. 559). Here, if it be conceded that the note or certificate was payable to the order of appellee, there was no actual delivery of it to her; it never passed out of the possession of Samuel Telford and was found upon his person when he died. Title in the appellee cannot be supported upon the theory that there was a gift *causa mortis*.

There are three requisites necessary to constitute a *donatio causa mortis:* 1. the gift must be with a view to the donor's death; 2. it must have been made to take effect only in the

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event of the donor's death by his existing disorder; 3. there must be an actual delivery of the subject of the donation. (1 Story's Eq. Jur. 607a; *Keniston* v. *Sceva*, 54 N. H. 24; *Roberts* v. *Draper*, 18 Bradw. 167; *Barnes* v. *The People*, 25 Ill. App. 136; *Ridden* v. *Thrall*, 125 N. Y. 572). The deposit was made and the certificate was issued on May 1, 1889; and, if there was any delivery, either constructive, or in trust for the benefit of appellee, it must have taken place at that time. There is, however, no proof tending to show, that the deceased was then under the apprehension of death from any existing disease or other impending peril. He lived for more than eight months thereafter; and the record is barren of any evidence whatever, that the certificate was to be operative only in the event of his death from a disorder existing when the deposit was made. It follows, that there are lacking the first and second requisites of a gift *causa mortis*.

Was there a gift *inter vivos*?

It is essential to a donation *inter vivos*, that the gift be absolute and irrevocable, that the giver part with all present and future dominion over the property given, that the gift go into effect at once and not at some future time, that there be a delivery of the thing given to the donee, that there be "such a change of possession as to put it out of the power of the giver to repossess himself of the thing given." (1 Parsons on Cont., marg. page 234; *Dole* v. *Lincoln*, 31 Me. 422; *Robinson* v. *Ring*, 72 Me. 140; *Northrop* v. *Hale*, 73 Me. 66; *Grover* v. *Grover*, 24 Pick. 261). The delivery must be made with the intent to vest the title in the donee. (*Jackson* v. *Twenty-third St. Ry. Co.*, 88 N. Y. 520). As a verbal gift is an executed contract, delivery of the subject matter of the gift is of the essence of the title. (*Grover* v. *Grover*, *supra*; *Wilson* v. *Keller*, 9 Bradw. 347). The delivery may be constructive, as of a key, or of a part for the whole. (1 Pars. on Cont., *supra*). The delivery may be to a third person for the benefit of the donee, instead of being made directly to the donee him-

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self. (*Dole* v. *Lincoln, supra; Barnes* v. *The People, supra*). It has been held in some cases that, where there has been a delivery to a trustee for the benefit of the donee without the knowledge of the latter, acceptance by the donee is presumed, the gift being beneficial to him. (*Blasdel* v. *Locke*, 52 N. H. 238; *Darland* v. *Taylor*, 52 Iowa, 503; *Devol* v. *Dye*, 123 Ind. 321). A gift *inter vivos* is chiefly distinguished from a gift *causa mortis* by the facts, that the former is not made in view of expected or impending death, and that it is not revocable in its nature. (3 Pom. Eq. Jur., 1146 to 1150 and cases cited; 8 Am. & Eng. Ency. of Law, 1313 to 1330).

It is not denied by the appellee, that there was no actual delivery of the certificate to herself as donee, but it is claimed in her behalf, that Telford delivered the money to the bank as a trustee for her, and that the certificate was the mere evidence of a deposit in her favor. It is to be observed, that there was no special deposit of money, as in *Devol* v. *Dye, supra*. The money deposited was mixed with the funds of the bank. The bank did not assume any obligation to return the same money which was deposited with it, but was liable only to pay $2600.00 in current funds. The bank thereby became a creditor, and executed its note for so much borrowed money and interest thereon. We cannot see, that the position of the bank is any different from that of a borrower of money, who gives a note for his debt, or from that of a purchaser of land, who gives a note for what he owes on account of purchase money. It cannot be said, that in such cases the borrower holds the money loaned to him in trust for the lender, or for the transferee of the note given to the lender; or that the purchaser of the land holds his indebtedness in trust for the seller, or for the party to whom the seller has assigned the purchase-money note. In *Fanning* v. *Russell*, 94 Ill. 386, where a father in his life-time conveyed land to his sons and took back notes payable to his daughters, but retained the possession of them himself and did not deliver them to his daughters, it was

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said: "No doubt it was the intention of the father that his daughters should each have the benefit of one of the notes * * *, but so long as he retained the possession of such notes they were his own property, notwithstanding they were made payable to his daughters. Until the notes were delivered, it was his privilege to change his purpose and withhold the gifts he may have intended to make. The daughters had no vested interest in the gifts their father may have proposed to make them * * *. It does not appear the notes were ever delivered to the beneficiaries named, by the father holding them."

The case of *Cook* v. *Patrick*, 135 Ill. 499, does not conflict with the views expressed in the *Fanning* case. The main point decided in the *Cook* case was, that, where a person buys land and pays the consideration money, and takes the deed in the name of another, parol evidence is admissible to show that the real purchaser is not intended to be the beneficiary of the resulting trust, and to indicate who is the donee of the beneficial interest under such trust. There, an uncle bought land and took deeds in the names of his nephews and nieces, and loaned money and took notes and mortgages in their names, retaining possession of such deeds and notes and mortgages; but it appears, that he announced to the vendors and borrowers that he was buying the property or loaning the money for his nephews and nieces, and intended the land or money to be theirs. His acts in taking the deeds and notes in the names of other parties were accompanied by declarations evincing his intention to vest the title thereto in such parties. In the present case, there is no evidence that any declarations of any kind were made by Telford to the bank at the time of the deposit and issuance of the certificate or to any other persons at any other time. There is no proof, based upon either acts or words, that it was his intention to vest the title to the deposit, or the certificate, in L. J. Patton, except what appears upon the face of the paper itself. It is said in Daniel on Neg. Ins.,

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sec. 24a (4th ed.): "A certificate of deposit may also be the subject of a valid gift *causa mortis*, but it must be endorsed *and delivered* to the donee so as to vest in him complete title, or so delivered without endorsement as to create an equitable assignment of the fund it represents, divesting the donor of all control and dominion of it." (*Basket* v. *Hassell*, 107 U. S. 613; *Ames* v. *Witt*, 33 Beav. 619; *Westerlo* v. *Dewitt*, 36 N. Y. 340; *Emery* v. *Clough*, 63 N. H. 552).

In the absence of any proof of declarations made by Telford to the bank, and in the absence of any proof as to his intentions in obtaining the certificate, it cannot be said that he was ever wholly divested of control and dominion over the deposit so long as the certificate remained in his possession. The bank did not have the signature of L. J. Patton, and did not know who L. J. Patton was, but did know that Samuel Telford made the deposit, and had no reason to suppose, so far as the proof shows, that he may not have been merely calling himself by another name, or using another name, for some private purpose of his own.

Where a delivery is made to a third party, in order that the latter may deliver the subject of the gift to the donee as agent of the donor, the gift is not complete until there is an actual delivery to the donee; and, until the gift is completed by delivery, the donor can revoke the agent's authority and resume possession of the gift. (*Devol* v. *Dye*, *supra*; 8 Am. & Eng. Ency. of Law, page 1318). If in this case there was a gift to the bank as agent of the deceased for the purpose of a future payment or delivery to appellee, then as there was no payment or delivery to appellee before Telford's death, the authority of the bank was revoked by the death, and the gift failed for the want of completion and delivery. Where the delivery is to a third person as trustee for the donee, and not as agent for the donor, such delivery completes the gift and the death of the donor will not revoke it; but, to make out such a case, the circumstances should show a full relinquishment of dominion

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over the property to the trustee for the purposes of the trust. (*Devol* v. *Dye*, *supra*; 8 Am. & Eng. Ency. of Law, page 1318, and cases cited). Such a full relinquishment is not shown by the circumstances in this case.

If the certificate of deposit be regarded as a mere voucher for the money deposited, of no higher grade as an evidence of indebtedness than the ordinary bank-book, it must still be held that the gift in this case was incomplete for want of delivery, though there is some contrariety among the decisions upon the subject of bank pass-books.

Where money is deposited in the name of a third person, but the deposit-book is retained by the depositor in his own possession without delivery to such third person, does the latter take title to the deposit? Some authorities answer this question in the negative, and others in the affirmative. Where the answer is in the affirmative, the proof must be clear that a gift was intended. The mere fact that a deposit is made in the name of a third person is not conclusive proof of a valid gift. In such case there must be further evidence of the depositor's intention to pass the title to the money. In some cases, where the deposit is made in the name of the depositor as trustee for a third person, the title has been held to pass, notwithstanding there was no delivery of the pass-book, on the grounds that the mode of entering the deposit amounted to a declaration of trust in favor of the donee, and the retention of the book was consistent with an intention to make a gift, inasmuch as the legal title remained in the depositor as trustee, although the beneficial interest had passed to the *cestui que trust*. (*Martin* v. *Funk*, 75 N. Y. 134; *Minor* v. *Rogers*, 40 Conn. 512). Where a deposit was made in the name of a guardian without delivery of a bank-book, but it appeared that the depositor at once informed the guardian that the money had been placed in the bank for the ward, it was held that there was a valid gift. (*Kerrigan* v. *Rantigan*, 43 Conn. 17). In *Gardner* v. *Merritt*, 32 Md. 78, the depositor accompanied the

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acts of depositing with express declarations, that the money was put in the bank for the parties in whose names the deposits were made. The strength of the *Gardner* case is weakened by the subsequent case of *Taylor* v. *Henry*, 48 Md. 550, where "the fact of the supposed donor retaining control of the fund was considered as evidence to prove that no gift was intended." In *Grangiac* v. *Arden*, 10 Johns. 293, the gift was sustained on the ground that a delivery might be inferred by the jury from the declarations and acknowledgments of the donor. The case, which more nearly than any other sustains the position of the appellee, is *Howard* v. *Savings Bank*, 40 Vt. 597; but even there the deposit was treated by both the bank and the depositor as belonging to the party in whose name it was made, and there were peculiar provisions in the by-laws of the bank which placed the money beyond the control of the depositor.

We have thus reviewed a few of the cases, which hold that there may be a valid gift of the fund deposited, where the deposit is made in the name of a third party, although there has been no delivery of the deposit-book. A careful examination of these cases will show, that they are distinguishable from the case at bar. But we think that the weight of authority sustains the opposite view, namely, that, where the deposit is in the name of a third person, and there is no delivery of the bank-book, the title to the fund does not pass to such person in the absence of any declaration of trust, or circumstances showing an intention to vest the title. This subject has been recently reviewed in an exhaustive opinion by the New York Court of Appeals in the case of *Beaver* v. *Beaver*, 117 N. Y. 421. We concur in the views expressed in that case, which are supported by the authorities hereinafter mentioned. There, a father made a deposit in a bank in the name of his son and received a pass-book with a similar entry, which he kept in his possession until his death, it not appearing that, before his death, his son ever had possession of the pass-book, or knew of the deposits. The solution of the question, whether the de-

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posit belonged to the son, or to the executor of the father's estate, is made to depend upon the question, whether there was a trust in favor of the son as to the money deposited, or a gift to him of such money. The court held, that there was no trust because there was no declaration of trust in terms at the time of the deposit or afterwards, and that none could be implied from a mere deposit by one person in the name of another; that to constitute a trust there must be either an explicit declaration thereof, or circumstances, showing beyond a reasonable doubt that one was intended to be created. Upon the subject of a gift the Court say: "The elements necessary to constitute a valid gift are well understood * * *. There must be on the part of the donor an intent to give and a delivery of the thing given, to or for the donee, in pursuance of such intent, and on the part of the donee, acceptance * * *. In case of bonds, notes or choses in action the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention * * *. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor purporting to transfer title to the donee, or there may be the most explicit declaration of an intention to give, yet, unless there is delivery, the intention is defeated. * * * We are of the opinion that there are lacking in this case two of the most essential elements to constitute a gift * * * viz., an intent to give and a delivery of the subject of the alleged gift. * * * The form of the account is the essential fact upon which the plaintiff relies. It may be justly said, that a deposit in a savings bank by one person, of his own money, to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding, that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor re-

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ceived at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit. We cannot close our eyes to the well-known practice of persons depositing in savings banks money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons; * * * the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that, to infer a gift from the form of the deposit alone would, in a great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor. * * * We think for the reasons stated that the plaintiff failed to establish a gift. * * * The question of gifts in connection with deposits of savings banks has of late years been frequently considered by the courts in various states. The preponderance of authority seems to be in favor of the views we have expressed." (*Young* v. *Young*, 80 N. Y. 438; *Jackson* v. *Railway Co.*, 88 N. Y. 520; *In re Crawford*, 113 N. Y. 560; *Williams* v. *Guile*, 113 N. Y. 343; *Ridden* v. *Thrall*, *supra*; *Robinson* v. *Ring*, 72 Me. 140; *Burton* v. *Bridgeport Savings Bank*, 52 Conn. 398; *Marcy* v. *Amazeen*, 61 N. H. 131; *Schick* v. *Grote*, 42 N. J. Eq. 352; *Scott* v. *Berkshire Co. Savings Bank*, 140 Mass. 157; 8 Am. & Eng. Enc. of Law, tit. "Gifts," pages 1324 to 1330; 5 Pom. Eq. Jur., secs. 1148, 1149 and notes; *Brabrook* v. *Bank*, 104 Mass. 228; *Broderick* v. *Bank*, 109 Mass. 149).

Whether the instrument sought to be recovered in this case be regarded as a promissory note, or as a voucher for a bank deposit, the appellee has failed to establish a gift thereof to her

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self, or for her benefit, the proof failing to show either an intent to make a gift, or a delivery of the subject of the gift. We are of the opinion that the instruction as above quoted was erroneous. It ignores the subject of delivery. It leaves it to the jury to find whether or not the deposit was made for the use and benefit of the plaintiff, in addition to and separate from the finding as to whether or not such deposit was made in the name of the plaintiff. In this respect the instruction was not based upon the evidence, as there was no proof of a deposit for her use and benefit, in addition to or separate from the mere fact, that the name of L. J. Patton was inserted in the certificate. The instruction presents the question whether or not a trust was established in favor of the plaintiff, whereas the real question in the case was whether or not there was a gift to her. There was no evidence, either by way of a declaration or otherwise, from which the jury could be warranted in finding the existence of a trust.

The judgments of the Appellate and Circuit Courts are reversed and the cause is remanded to the Circuit Court for further proceedings in accordance with the views herein expressed.

Judgment reversed.

THE ROCK ISLAND AND PEORIA RAILWAY COMPANY

v.

LAERTES F. DIMICK.

Filed at Ottawa, October 31, 1892.

1. SPECIFIC PERFORMANCE — *proof and clearness of the contract.* To entitle a party to specific performance, the contract must be clearly proved and be certain and unambiguous in all its parts and terms.

2. INJUNCTION — *jurisdiction of a court of equity to protect party's rights.* Where a party granted a right of way over his land to a railway company, taking back an agreement in writing to perpetually maintain certain openings under the road as passage-ways for stock, and a

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successor of the company, through a judicial sale, was about to close such passage-ways, it was *held*, that a court of equity had jurisdiction to protect the land owner in the enjoyment of his rights under his contract by enjoining the closing up of such openings or passage-ways.

3. CONTRACT — *for passage-ways under railroad — its certainty.* When at the time of the execution of a deed granting a railway company a right of way across the grantor's farm, and the execution by the company of an agreement to make and maintain two passage-ways under its road, the road was graded and built, leaving open two such passage-ways, it will be presumed that the contract relates to the ways then existing, and such contract will be as capable of being enforced as if the size, nature and location of the passage-ways had been definitely inserted in the contract.

4. POSSESSION — *notice of possessor's rights.* The open and exclusive possession of lands under an apparent claim of ownership, is notice to those subsequently dealing with the title, of whatever interest the possessor has in the premises, whether the interest be legal or equitable in its nature. And if the grantor of land remains in possession after conveyance, purchasers from the grantee will be affected with notice of the grantor's rights in the land.

5. SAME — *as notice of an easement reserved.* The doctrine that the tenant in possession will not be permitted to assert a claim inconsistent with his recorded deed, does not apply to the reservation of an easement or right of way or passage in the land conveyed, where the grantor retains title to adjacent lands, and the easement or right of way is appurtenant to the adjacent premises, the title to which remains in the grantor.

6. NOTICE — *by facts sufficient to put purchaser on inquiry.* If the facts and circumstances apparent are sufficient to put a purchaser of land on inquiry, he will be chargeable with notice of all that such inquiry would have shown.

7. SAME — *of existence of a right of way or easement by user.* Ordinarily, where an easement or right of way only is claimed, in the very nature of the right, the use or occupation of the land will be intermittent, and, strictly speaking, not capable of that continuous possession of which lands are ordinarily susceptible. In such cases, notice is necessarily afforded, if at all, by the continued and uninterrupted user, which is analogous to, and in a sense, possession.

8. A land owner granted to a railway company a right of way across his farm, and retained the title to the land on each side of the right of way, and he afterward, under an unrecorded contract with the company, used two openings under the road as passage-ways to and from the several parts of his farm, and built his fences so as to leave such ways open for use: *Held*, that his user of such ways and fencing with a view to their use, was notice to a subsequent purchaser of the railroad of the possessor's rights.

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Statement of the Case.

APPEAL from the Circuit Court of Henry county; the Hon. JOHN J. GLENN, Judge, presiding.

This was a bill by the appellee in the Circuit Court of Henry county against appellant, to enjoin the closing of two cattle-ways under appellant's railroad, upon appellee's farm.

Appellee being the owner of an eighty-acre tract of land and fifty-seven-acre tract adjoining, July 20, 1870, made a deed to the Peoria and Rock Island Railroad Company, conveying a right of way for its road across the eighty-acre tract, for the expressed consideration of $300, which was recorded. It is alleged in the bill, the real consideration for said deed was $300 in money and the written agreement of the grantee to forever maintain and keep open, at its own expense, two passage-ways for stock under its road through appellee's farm. The railroad embankment was built across appellee's land, and the two ways under it left open before the deed was executed. The road cut the farm triangularly, leaving a considerable portion on either side of it. The contract was not recorded, and before bill filed, had been destroyed by fire. Appellant acquired title to the railroad under foreclosure of mortgage executed by the Peoria and Rock Island Railroad Company in October, 1877, went into possession and has since operated it. Both passage-ways were left open, without interference therewith, except as hereinafter stated, until about the time of filing the bill, when appellant was about to fill in and close the south passage-way. In 1889 (June 29), appellant then having operated the road over eleven years, asked permission of appellee to fill up part of the passage-way most northerly, and an agreement in writing was entered into, by which the right was granted to appellant to fill up all but eight feet thereof, which it covenanted to keep open and maintain, as a cattle way for appellee, during the continued occupation, etc., of the road. In said agreement in writing last mentioned, it was alleged and shown that a mistake was made in the description of the

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tract of land, and the bill prays, among other things, for its reformation.

The answer, admitting appellee's ownership of the land, the construction of the railway, the making of deed for right of way, denies the making of said first-mentioned agreement, and admits that when the railroad was first built, openings in its embankments were left, but denies they were so left by virtue of any contract with appellee; but, on the contrary, it is alleged, the embankments were so built that openings were left at sloughs and natural depressions, to allow the surface water to pass through under its track, in the usual manner to allow drainage, and for no other reason or cause whatever. Admits its corporate existence, and that it succeeded by purchase, etc., to all the rights, franchise and property of the Peoria and Rock Island Railroad Company, and avers that said purchase was made in good faith, and for value, without notice of the equities now set up by appellee, etc. Admits that it closed up, by consent of appellee, the north opening, except eight feet thereof, and is about to close up the southerly opening entirely, etc. Replication was filed, and on hearing, the injunction was made perpetual, and the railroad company appeals.

Mr. HENRY CURTIS, for the appellant:

The alleged contract of July 20, 1870, applied to the north opening only, and not to the south one.

The proof is not sufficient to establish the contents of the contract with requisite certainty. To entitle a party to specific performance the contract must be certain and unambiguous in all its terms and parts; the proof must be clear and certain, and especially so when the contract is lost. *Rector* v. *Rector*, 3 Gilm. 105; *Long* v. *Long*, 118 Ill. 638; *Hamilton* v. *Harvey*, 121 id. 471; *Padfield* v. *Padfield*, 92 id. 198; *Langston* v. *Bates*, 84 id. 524; *Worth* v. *Worth*, id. 442; *Car-*

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ver v. *Loseter*, 36 id. 182; *Clark* v. *Clark*, 122 id. 388; *Brix* v. *Ott*, 101 id. 70.

Even if the contract was as claimed, yet the same is void for the reason that appellant, through Cable, purchased the railway in good faith for value, without knowledge or notice, express or constructive, of said unrecorded contract.

In order to charge a subsequent purchaser with constructive notice of a prior unrecorded conveyance or contract, or to put him upon inquiry concerning the same, such facts and circumstances must exist as to render their disregard by the purchaser willful and an act of bad faith and fraud against the prior purchaser. The proof of notice must be clear and positive. The purchaser is not bound to follow mere suspicions or possibilities. *Doyle* v. *Teas*, 4 Scam. 202, 243, 248–250; *McConnel* v. *Reed*, id. 123; *Rogers* v. *Wiley*, 14 Ill. 65; *Rupert* v. *Mark*, 15 id. 542; *Harper* v. *Ely*, 56 id. 194; *C., R. I. & P. R. R. Co.* v. *Kennedy*, 70 id. 361; *Grundes* v. *Reid*, 107 id. 311.

"Enough must be shown to impute to the subsequent purchaser bad faith, so as to taint his purchase with fraud in law." *Anthony* v. *Wheeler*, 130 Ill. 135.

"Such notice should always be clearly proved, and should be of such character that a disregard of it would be a fraud." *Pittman* v. *Sofley*, 64 Ill. 156–157; *Slattery* v. *Rafferty*, 93 id. 285.

A right of way or of passage, where its use is intermittent, is not, perhaps, the subject of possession, strictly speaking. Knowledge or notice of it must necessarily come in most part from its user, but this is analogous to possession, and, as to the latter, the rule is that, to afford notice, it must be open, visible and (according to its nature) exclusive. *Truesdale* v. *Ford*, 37 Ill. 220; *Smith* v. *Heirs of Jackson*, 76 id. 254; *Partridge* v. *Chapman*, 81 id. 137.

The contract of July 20, 1870, even if as claimed to be by appellee, should not, under the circumstances, be specifically enforced, but appellee left to his remedy for damages. *Louisville, E. & St. L. R. R. Co.* v. *Chalcraft*, 14 Ill. App. 516.

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Brief for the Appellee. Opinion of the Court.

Mr. JOHN P. HAND, for the appellee:

A court of equity will assume jurisdiction to prevent a deprivation of rights connected with real estate, as the rights to easements, without the allegation of facts showing the damages to be irreparable and that there is no adequate remedy at law. *McClann* v. *Day*, 57 Ill. 101; *Morrison* v. *King*, 62 id. 30; *McPherson* v. *Holdridge*, 24 id. 38; *Craig* v. *People*, 47 id. 487; *C. & E. Ry.* v. *Hay*, 119 id. 493; *Deene* v. *Cole*, 118 id. 165; High on Injunctions, secs. 886, 894, 895.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

In 1870, appellee executed his deed to the Peoria and Rock Island Railroad Company, conveying a right of way for its railroad across his lands, for the expressed consideration of $300. At the time of the execution of the deed, the railroad had been graded through appellee's land, and two openings left in the embankment for said road built on said land. The one designated the north passage-way was at a slough, and was fifty to sixty feet long, and which would be spanned with a bridge or trestle work. Practically a thousand feet south of that one was another opening, near the south line of appellee's land, ten or twelve feet wide, over which a bridge was to be constructed. It is alleged in the bill that, as part consideration for the conveyance of the right of way, the grantee agreed with appellee to keep open and perpetually maintain said two openings, under its track, as passage-ways for the passage of appellee's stock to and from his lands lying on each side of the right of way granted in and by said deed of conveyance. That said agreement was, cotemporaneously with the execution of the deed, reduced to writing and duly executed and delivered to appellee, but has since been destroyed, etc., without having been recorded. The answer denies these allegations and avers that the $300, admitted to have been paid, was the sole consideration for said deed.

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No good purpose will be served by discussion of the evidence. It leaves no doubt whatever that an agreement in writing was executed for and on behalf of said railroad company and delivered to appellee, relating to the maintenance of a passage-way or passage-ways under the railroad track through appellee's farm, for the accommodation of the farm in the passage of stock from one side of the railroad to the other, or that such written agreement was made and delivered to appellee, cotemporaneously with and as part of the transaction of making and delivering the deed. This is abundantly shown by the testimony of Mr. Page, who was, at the time, a director and attorney of the railroad, and who wrote the agreement at Dimick's house, executed it and took, at the same time, the acknowledgment of the deed, as well as by that of Dimick and other witnesses. There is, however, some difficulty as to the terms of the written agreement, but not in respect of any matter affecting the substantial merits of this controversy. Mr. Page's recollection is, that the contract was to apply to one passage-way only, that is, that the railroad company was to maintain "a passage-way," not two passage-ways, but says, he is not certain, may be mistaken, and that appellee carefully read the contract in his presence, and would be fully as likely to remember the real facts. Appellee testifies, that the contract related to the maintenance of the two passage-ways then open through the railroad embankment on his farm, and the contract provided for their perpetual maintenance by the railroad company. But if the recollection of Mr. Page be conceded to be correct, it clearly appears from his testimony that the opening contracted for was the south opening, which is the principal subject of controversy in this case. He says (quoting from the abstract): "When the road was constructed there were two passage-ways left under the track through which stock could pass and repass. One, at what was called the slough, and the other farther south. The north passage was located in a slough. The south opening is the

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principal opening contracted for. He was to have such an opening that stock could pass and repass at all times. The north opening would not answer at all times on account of the slough." He also says the construction of the south opening was as provided for in the contract. The testimony of Mr. Gould, another director of the railroad company, at the time, although relating largely to information derived by him from Mr. Page, in the course of the business of the construction etc., of the road, and in consultations between them during the negotiations for the right of way over appellee's land, is strongly corroborative of the contention of appellee. He says (again quoting from the abstract): "Had conversation with Dimick during the time I was surveying and grading the road. Dimick complained the road would interfere with his feeding lots; it was compromised by giving him a race-way or drive-way under the railroad at the first draw north of the public road. Dimick wanted some contract in writing, or put in the deed. Page and I consulted and came to the conclusion it ought to be done. Page reported to me he had got a deed for the right of way with that * * * agreement with Mr. Dimick. It was conceded there would be a bridge at the big slough, consequently an opening, with not much danger of being filled up. It was calculated that it would remain as a crossing, so Page and I didn't have much talk about that. * * * When road was graded the south crossing was left open for the passage of cattle." He says that Dimick was very much dissatisfied and the engineer suggested giving him a "passage-way under the road, that would not injure him in regard to his cattle, and he (Dimick) finally consented, with that understanding." The south crossing, as this witness terms it, is the passage-way under the track, which appellant now proposes to fill up, and is practically "at the first draw north of the public road." It is evident from the testimony of all these witnesses that the opening at the slough was not made by the railroad company, as a cattle-way for appellee, but because of

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the nature of the ground, it was thought desirable and necessary to leave an opening in the embankment. It is true that when there was not enough water in the slough to prevent, cattle could pass through, but, as said by Mr. Page, it would "not answer at all times on account of the slough." This is much strengthened by the testimony of the superintendent of appellant's road. In 1889, under an agreement between the parties to this record, appellant filled in all but eight feet of the north opening, and appellee insisted that the railroad company agreed to put a pipe or tile in the eight-foot opening left, so as to make the way dry for the passage of stock.

The superintendent says he never agreed to do so, for, upon looking over the ground carefully, he saw the slough "drained a vast amount of territory, and decided that nothing less than a six-foot pipe would be safe in there." Without further discussing the testimony in this regard, it may be said, that the conditions and circumstances shown, corroborate the contention of appellee that, while the north passage-way was by the agreement to be kept open for his use, he was to have the south opening maintained also, as a passage-way for stock. That the written agreement was made to conform to the understanding and agreement of the parties at the time, is shown by Page and appellee and controverted by no one.

It is said that these witnesses are discredited, in effect, by the fact that the south opening in the embankment was only of sufficient height to admit of the passage of hogs and sheep, when the road was first constructed, and only became high enough to permit other stock to pass, upon the roadbed being raised by appellant some years later. This, if true, is by no means controlling. It may be that the opening as originally made, if appellant's contention be accepted, was all that appellee required, or was sufficient, with the slough in condition so his cattle and horses could pass, to accommodate him in its use. But, while it is a circumstance proper to be considered, it can not have the effect of casting discredit upon the testimony of

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at least two witnesses, who testify affirmatively to the fact, that the agreement was that said south opening was to be kept open and maintained as a passage-way for appellee's stock.

In 1889, appellant, desiring to better its roadbed by filling in the north opening, entered into a written contract with appellee, in which, by way of recital, it expressly recognized that appellee had an agreement in writing, entitling him to a passage-way for stock under that bridge, and it was then agreed "that all of said bridge may be filled up by the company, except a space eight feet in width, which space shall be kept open and free for a passage-way for live stock, for the benefit of said Dimick, his successors and assigns, for as long time as a railway is maintained and operated over and across said land." This related wholly to the north passage-way. The only consideration for its execution was the covenant of the railroad company to keep the eight feet opening in its embankment open and free for a passage-way for appellee's stock. He acquired no new right that had not before been granted him, but consented that the volume of water might be narrowed into an eight-foot channel. This is inconsistent with the conduct of appellee throughout, as shown by the evidence, unless he relied upon the right to the continued use of the south passage-way. Again, the fact that from 1870 no change was made in these openings, and that they were openly and notoriously used by appellee for the purposes of passage-ways for his stock, that when the railroad fenced its road, the fence was so built as to preserve the free passage through both, are circumstances strongly corroborating appellee. We think the finding of the court is fully sustained by the evidence.

It is insisted also that the contract is not established with the requisite certainty to entitle appellee to its enforcement as to the south passage-way. It is true, as said by counsel, that to entitle a party to specific performance, which is, in effect, the relief granted by the decree rendered, the contract must be clearly proved, and be certain and unambiguous

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in all its parts and terms. *Rector* v. *Rector*, 3 Gilm. 105; *Long* v. *Long*, 118 Ill. 638; *Clark* v. *Clark*, 122 id. 388. We think it can not be said that the contract as proved is either uncertain or ambiguous. When it was finally reduced to writing and executed, the substructure of the railroad had, as we understand, been completed through appellee's farm. The two openings, and no other, had been made, or left, and all parties knew their size, character and location, and it was in respect of these openings, thus physically existing, that the parties contracted, as it is alleged and proved. It was these then existing passage-ways through its embankment, that the railroad company was to keep and maintain as passage-ways for appellee's stock. The south opening was left, as shown by a decided preponderance of the evidence, under an understanding, if a cattle-way was there provided and maintained, appellee would be satisfied and would convey the right of way; and the north passage-way was left, as a necessity, or for the convenience of the railway company and could, ordinarily, likewise be used by appellee as a passage-way for his stock. That the parties acted in conformity with the contract as thus shown, until appellant sought and obtained the right to fill in a part of the north passage-way in 1889, seems established by this record. The contract as alleged and proved, therefore, is as certain and as capable of enforcement as if the size, nature and location of the passage-ways had been definitely inserted in the contract. It is contended that the contract of July 20, 1870, under which appellee claims right to the south passage-way, if established, can not be enforced against appellant, for the reason that it, through Mr. Cable in 1877, purchased the railroad in good faith for value, and without notice of said contract, or of the rights claimed by appellee thereunder.

The law is well settled in this State, as generally elsewhere, when not changed by the recording acts, that open and exclusive possession of lands, under an apparent claim of ownership, is notice to those subsequently dealing with the title of what-

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ever interest the possessor has in the premises, whether the interest be legal or equitable in its nature. Wade on Notice, sec. 273; *Davis* v. *Hopkins*, 15 Ill. 519; *Truesdale* v. *Ford*, 37 id. 210; *Smith* v. *Jackson's Heirs*, 76 id. 254; *Partridge* v. *Chapman*, 81 id. 137. It has been held also in this State, that if the grantor remains in possession after conveyance, purchasers from the grantee are affected with notice of the grantor's rights in the land. *White* v. *White*, 89 Ill. 460; *Ford* v. *Marcall*, 107 id. 136. Nor does the doctrine, that the tenant in possession will not be permitted to assert a claim inconsistent with his recorded deed, (Wade on Notice, secs. 298–9; *Smith* v. *Jackson's Heirs*, *supra*), where otherwise applicable, apply to the reservation of an easement or right of way or passage in the land conveyed, where the grantor retains title to adjacent lands, and the easement or right of way is appurtenant to, and essential to the full enjoyment of the adjacent premises, the title to which remains in the grantor. Wade on Notice, sec. 300, and cases cited. Ordinarily, where an easement or right of way only is claimed, in the very nature of the right, the use or occupation of the land will be intermittent and, strictly speaking, not capable of that continuous possession of which lands are ordinarily susceptible. In such cases, notice is necessarily afforded, if at all, by the continued and uninterrupted user, which is analogous to, and in a sense, possession. And the same rule applies, the user must be open, visible and so far exclusive, as to put persons seeing the premises, upon notice thereof.

In this case, appellee retained title to the land on each side of the right of way deeded to the Peoria and Rock Island Railroad Company, and, according to the testimony, so fenced his land that these passage-ways under the railroad were necessarily used in passing from one part of his farm to another. The south opening connected the land lying east of the track with a small pasture field lying west of the railroad, which was separated from his remaining land, on the west side of the

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track, by a hedge fence. The north passage-way connected the land lying east of the railroad with another pasture, also lying west of the track. Between these pastures, west of the railroad, was a cultivated field. The only access, unless through this field, between one of said pastures and the main farm, was by the south opening, and from the other by the north passage-way.

It appears that shortly after the railroad was completed and in operation, in 1871, probably, the hedge on the right of way having been cut down, appellee with the brush made a fence on each side of the right of way, leaving openings for unobstructed passage through each of such passage-ways. It is shown by two of the appellee's witnesses that in 1878, when appellant fenced the road, a year and more after its purchase, some of this brush fence was remaining, and while much dilapidated and insufficient to turn stock, was visible.

Under his contracts, appellee was restricted in his use of these openings to passage-ways for his stock; that he made that use of them seems reasonably clear. Being fenced in with, and forming uninterrupted connection between his fields, he had open, visible and exclusive possession and use thereof for such purpose. We agree with the chancellor, that a purchaser of the railroad and right of way, seeing the mode in which appellee's land was fenced, and his use of the openings in the only way the owner of the adjacent lands, who had deeded the right of way, could use them, and seeing that such passage-ways were not fenced up by the railroad, but left open for free and uninterrupted use by such adjacent owner, as a means of communication and passage-way between his fields, would be put upon inquiry as to the rights and title by and under which they were so used. No reasonable man would purchase under such circumstances without inquiry or investigation.

It is familiar, that if the facts and circumstances apparent were sufficient to put appellant, or Cable, through whom it purchased, on inquiry, appellant is chargeable with notice of all

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such inquiry would have shown. In *Swan* v. *Burlington, Cedar Rapids & N. Ry. Co.*, 72 Iowa, 650, the plaintiff granted the right of way across his land to a railway company, on condition that it would construct and maintain "a pass-way for cattle and teams under its track." The railway company constructed a passage-way as contemplated, and the plaintiff used it substantially twenty years. The railroad passed to the defendant under foreclosure sale. In a proceeding to restrain defendant from closing the passage-way, it was insisted that the agreement was not binding on the purchaser. The court said: "That its (the passage-way) occupancy by the plaintiff was sufficient to charge the defendant, a purchaser at judicial sale, with notice of the plaintiff's rights thereto arising from the agreement." See, also, *McCann* v. *Day*, 57 Ill. 101.

We are of opinion that the court had jurisdiction to protect appellee in the enjoyment of his rights under his contract. High on Injunctions, secs. 868 and 895; *Deere* v. *Cole*, 118 Ill. 165; *C. & E. I. Ry. Co.* v. *Hay*, 119 id. 493; *Morrison* v. *King*, 62 id. 30; *Green* v. *Green*, 34 id. 320.

Other errors are assigned, which we have carefully examined, but do not deem it necessary to discuss. We are of opinion that appellee has shown himself entitled to the equitable relief granted by the decree, and the same will, accordingly, be affirmed.

Decree affirmed.

JULIUS SPEYER

v.

JOSEPH DESJARDINS *et al.*

Filed at Ottawa, October 31, 1892.

1. STATUTE OF FRAUDS — *compliance with the statute presumed.* In this State the doctrine is, both at law and in equity, that compliance with the statute of frauds is presumed, and the party plaintiff is not required to set out compliance in his declaration or bill.

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Syllabus.

2. SAME — *when advantage of, taken by demurrer.* The benefit of the statute of frauds, as a defense, can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied on is not evidenced by a writing duly signed.

3. When the allegation of a bill in chancery is that the complainant and defendant "entered into an agreement to purchase" certain lots and "to erect thereon" certain specified buildings, it will be presumed that the agreement was in writing and properly signed by the parties, and if the bill states a case for equitable relief, it will be error to sustain a demurrer to it on the ground it is not stated that the contract is in writing.

4. SAME — *to what agreements it applies.* It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute of frauds, but an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the statute, and the fact of the existence of the partnership and the extent of each partner's interest may be shown by parol evidence.

5. PARTNERSHIP — *partnership lands — treated as personal property.* The real estate of a partnership is treated and administered in equity as between the partners, and for all the purposes of the partnership, as personal property and partnership assets, and for this reason it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole, nor is it material whether the partnership was already formed and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself.

6. Where the facts of the existence of the partnership and that the lands were acquired and used for partnership purposes are shown by parol, it will be immaterial whether such partnership was formed by written articles or by parol.

7. SAME — *agreements not within statute of frauds.* Partnership agreements and partnership lands, as between the partners, and for all partnership purposes, are not within the statute of frauds.

8. SAME — *a partnership agreement.* An agreement between two parties by which they agree to purchase certain lots and erect buildings thereon, each party to contribute one-half of the money necessary for the enterprise, the lots and buildings then to be sold, and the profits or loss arising from the enterprise to be divided equally between them, is clearly a partnership agreement.

9. RESULTING TRUST — *created in the purchase of partnership land with partnership funds.* Where an agreement for a part-

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nership in the purchase of lots and the erection of buildings thereon for sale at a profit, provided that all liabilities created by either partner in furtherance of the enterprise, should be treated as joint liabilities to be shared by them equally, and one of the partners raised money by mortgage on the lots, out of which he paid the purchase-money of the lots, and took the title thereto in his name for convenience: *Held*, that the money paid for the lots was partnership money, and that a resulting trust at once arose out of the transaction in favor of the partnership.

APPEAL from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

Julius Speyer, the appellant, exhibited in the Circuit Court of Cook county his bill in chancery against Joseph Desjardins and the other appellees; and the court sustained a demurrer to said bill, and dismissed it for want of equity.

The substance of the case made by the bill is as follows: On October 31, 1889, appellant and Joseph Desjardins entered into an agreement to purchase from one John Johnston certain lots situate in Cook county, and to erect thereon six buildings, according to plans and specifications prepared by appellant, who was an architect; the purchase and the erection of said buildings to be made with a view to the sale and disposition of the same, and the equal division between appellant and Desjardins of the profits arising from the enterprise, or, in case of loss, such loss to be shared by them equally. It was agreed that appellant should furnish, or cause to be furnished, one-half of the money necessary for the enterprise, and Desjardins the other half; all liabilities created by them or either of them to be, as between them, treated and considered as their joint liabilities, to be met and shared by them in equal shares; and all moneys advanced by either to be treated as advanced for and in behalf of both. It was further agreed that when the buildings were completed, the lots and buildings should be sold, or so many of them as it might be necessary to sell, in order to pay the liabilities and expenditures, and that whatever remained, of either money or real estate, after payment of liabilities and expenditures, and after reimbursing any excess that

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either should have advanced over and above his one-half of the cost, should be equally divided between them, and that if there was any loss, it should be equally divided between them.

In pursuance of the agreement the lots were purchased for $3,750, and for convenience, the deed of conveyance made to Desjardins alone. At the same time with such purchase a loan of $12,000 was procured through one Giddings, and such loan secured by promissory notes and deeds of trust on the premises, all of which were executed by Desjardins, said Desjardins acting, however, in behalf and for the joint benefit of both himself and appellant.

The purchase price of the lots was paid out of the money raised on the notes and deeds of trust, such payment being made for the joint benefit of both parties, and the balance of said money, except as hereafter stated, was used in the erection of the buildings on the lots.

Appellant superintended, as architect, the construction of the buildings, and Desjardins did the carpenter work thereon, and it was agreed, for the purposes of an accounting between them, that appellant should be allowed three per cent on the cost of construction, and Desjardins the sum of $5,400. The other work on the buildings was performed by other parties, under contracts. The buildings were completed about the month of August, 1890.

In their construction appellant furnished his services as architect, at the agreed price of $400, and expended in cash $450, and personally assumed payment of $451 of liabilities incurred, making $1,391 in all, no part of which has ever been paid by Desjardins to him.

Upon the completion of the buildings Desjardins refused to account with appellant, and took exclusive possession of the lots and buildings, and collected all the rents, issues and profits, and entirely excluded appellant therefrom, and declared himself to be the sole owner of the property, and that appellant had no interest therein.

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The bill, among its numerous averments, contains these: "Your orator further says that the said Joseph Desjardins has not only advanced no money of his own for the purchase of said lots and the erection of said buildings, but that, on the contrary, he has failed to apply a considerable portion of the money belonging to himself and to your orator, and procured by said loan, to the purpose for which it was borrowed as aforesaid, and has fraudulently converted the same to his own use, for the purpose of cheating and defrauding your orator out of your orator's just proportion of the profits of said enterprise. Your orator further says, that although your orator verily believes, and so charges the fact to be, that said Joseph Desjardins has advanced no money whatever for your orator in and about said enterprise; nevertheless, your orator is ready and willing and hereby offers to pay to the said Joseph Desjardins any amount that may be found to be due him upon an accounting with your orator, and to contribute your orator's just proportion to the satisfaction of all outstanding liabilities, as aforesaid, and generally to do all that upon a final hearing hereof the court may find your orator equitably bound to do under said contract."

The prayer of the bill is for an accounting, and "that a decree may be entered for a sale of said property, or of so much thereof as may be necessary to pay and satisfy said outstanding liabilities, and to adjust the accounts between your orator and the said Joseph Desjardins, and for a division of whatever may remain, either of money or real estate, after satisfying said liabilities and adjusting said accounts, between your orator and the said Joseph Desjardins according to their respective rights as they may be made to appear, or in case the said property is insufficient to provide for the said liabilities and adjust said accounts, that the losses arising from said enterprise may be fixed and your orator and the said Joseph Desjardins may be required to provide for and share the same according to their respective rights; that the respective rights of your orator and

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the said Joseph Desjardins may be determined and declared by the decree of this court; that a receiver may be appointed by this honorable court to take charge of said property and collect the rents, issues and profits thereof and preserve the same until the further order of this court; and that your orator may have such other and further relief in the premises as equity may require and to your honor may seem meet."

Messrs. DUNCAN & GILBERT, Mr. W. J. HYNES and Mr. E. F. DUNNE, for the appellant:

The facts set forth in the bill created a resulting trust. Perry on Trusts, sec. 133; *McDonough* v. *O'Neil*, 113 Mass. 92; *Kindall* v. *Mann*, 93 id. 15; *Jackson* v. *Stevens*, 108 id. 84; *Page* v. *Page*, 8 N. H. 187; *Wallace* v. *Carpenter*, 85 Ill. 590; *Allison* v. *Perry*, 130 id. 9; *York* v. *Clemens*, 41 Iowa, 95.

It was unnecessary, in any event, that the bill should allege that the agreement was in writing.

Mr. HENRY MEISELBAR, for the appellees:

The bill fails to show a valid and enforceable trust. *Smith* v. *Hollenback*, 51 Ill. 223; *Rogers* v. *Simmons*, 55 id. 82; *Perry* v. *McHenry*, 13 id. 227; *Adams* v. *Adams*, 79 id. 518; *Allen* v. *Woodruff*, 96 id. 11; *Scott* v. *Harris*, 113 id. 446; *Stevenson* v. *Crapnell*, 114 id. 21; *Donlin* v. *Bradley*, 119 id. 420.

Do the facts set out in the bill show a resulting trust? *Perry* v. *McHenry*, 13 Ill. 227; *Sheldon* v. *Harding*, 44 id. 68; *Holmes* v. *Holmes*, id. 171; *Greene* v. *Cook*, 29 id. 193; *Remington* v. *Campbell*, 60 id. 516; *Bruce* v. *Roney*, 18 id. 72; *Rogers* v. *Murray*, 3 Paige, 398; *Loomis* v. *Loomis*, 28 Ill. 456; *Ward* v. *Armstrong*, 84 id. 151.

Averments, when equivocal, must be taken most strongly against the pleader. *Simpson* v. *Wright*, 21 Ill. App. 67.

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Mr. JUSTICE BAKER delivered the opinion of the Court:

Appellees assume that, since the bill of complaint fails to affirmatively allege that the contract between appellant and Desjardins was in writing, therefore, under the primary rule of pleading that allegations must be taken most strongly against the pleader, it is to be regarded as sufficiently appearing upon the face of the bill that said agreement was not in writing, and rested entirely in parol. Appellees are wrong in this assumption. While in England, prior to recent changes by acts of Parliament, the presumption, that prevails in actions at law, that the statute of frauds has been complied with, did not obtain in suits in equity, and the complainants in such suits were bound either to aver compliance with its provisions, or allege facts that took the case out of the statute, yet, in this country, the doctrine is, both at law and in equity, that compliance with the statute is presumed, and the party plaintiff is not required to set out compliance in his declaration or bill. In Indiana and Iowa, and possibly in a few other States, special statutory requirements change or modify that which may be regarded as the American rule, but no such statute is in force in this State. See Am. & Eng. Ency. of Law, vol. 8, p. 745, and cases cited in note 7.

The rule then is, that the benefit of the statute, as a defense, can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied on was not evidenced by a writing duly signed. Here the allegation simply is, that the complainant and Desjardins "entered into an agreement to purchase" certain designated lots and real estate, and "to erect thereon" certain specified buildings. It must be presumed from these averments that the agreement was in writing and properly signed by the parties. This being so, and there being no question but that the bill, if based on an agreement made in conformity with the requirements of the statute, states a case for equitable relief clearly within the jurisdiction of

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a court of equity, it necessarily follows that it was error to sustain the demurrer and dismiss the bill for want of equity.

To simply reverse the decree and remand the cause for the error stated, without any expression of opinion in regard to the principal matter of contention between the parties, would be unadvisable. It would likely be of little benefit in the future progress of the cause upon the remandment, that the decree was reversed on a point which only incidentally arose, that which is evidently the real controversy being ignored.

The theory of the bill is that there is a partnership between appellant and Desjardins, and that the lots and the buildings erected thereon are partnership property; and the claim of appellant is that the statute of frauds has no application to such a case.

It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute. But it has been a mooted question whether a partnership can be created by parol for the purpose of buying and selling lands for profit. There is a very considerable conflict in the cases upon that question, but the decided weight of authority seems to have answered it in the affirmative. That an agreement for a partnership, for the purpose of dealing and trading in lands for profit, is not within the statute, and that the fact of the existence of the partnership, and the extent of each party's interest, may be shown by parol is now quite generally accepted as the established doctrine. *Dale* v. *Hamilton*, 5 Hare, 369; *Essex* v. *Essex*, 20 Beav. 449; *Holman* v. *McCrary*, 51 Ind. 358; *Richards* v. *Grinnell*, 63 Iowa, 44; *Chester* v. *Dickerson*, 54 N. Y. 1; *Black* v. *Black*, 15 Ga. 449; *Fall River Whaling Co.* v. *Borden*, 10 Cush. (Mass.) 458; *Bunnel* v. *Taintor*, 4 Conn. 568; *Pennybacker* v. *Leary*, 65 Iowa, 220; *Gibbons* v. *Bell*, 45 Texas, 417; *Perronette* v. *Pyme*, 34 N. J. Eq. 26.

It is useless to restate the arguments *pro* and *con* bearing on the point under consideration; and it is hardly probable

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that we could now make any suggestion that has not already been fully considered. The leading and more important cases are discussed or referred to in Browne on the Statute of Frauds (4th ed.), section 259 *et seq.* and notes, and are also cited in notes to pages 700 to 704 of vol. 8 of Am. & Eng. Ency. of Law.

The cases we have cited, and many others, proceed upon the theory that the real estate of a partnership is treated and administered in equity, as between partners and for all the purposes of the partnership, as personal property and partnership assets. From its status in equity, of being stock in trade and partnership assets, it is readily deducible that it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole; that it is not material whether the partnership was already established and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself which is in question; and that the facts of the existence of the partnership, and that the lands were acquired and used for partnership purposes, being shown by parol, it is immaterial whether such partnership was formed by written articles or by parol. Browne's Stat. Frauds, sec. 261a.

The doctrine of the cases we have cited, so far as it involves the provisions of the statute of frauds, seems to proceed upon the ground of a trust implied from the relation of co-partnership.

The matter here at issue is a close question and beset with difficulties whichever view is taken. It seems difficult to demonstrate, to a certainty, that the doctrine above stated should prevail and take partnership agreements and partnership property out of the statute, and equally difficult to satis-

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factorily demonstrate that such agreements are within the statute, as held in *Smith* v. *Burnham*, 3 Sumner, 437; *Bird* v. *Morrison*, 12 Wis. 138, and other cases. Upon the whole, we are inclined to follow the view which seems to obtain in England and in most of the States of the Union, that partnership agreements and partnership lands, as between the partners and for all partnership purposes, are not within the statute.

The bill in the case at bar shows that the parties agreed to purchase the five lots and erect buildings thereon, each party contributing one-half of the money necessary for the enterprise, the lots and buildings then to be sold, and the profit or loss arising from the enterprise to be divided equally between them. This was manifestly a partnership agreement. The bill then shows that the parties purchased the lots "in pursuance of the agreement," and that, at the same time and as a part of the same transaction, money was raised by placing mortgages on the lots and the purchase price of the lots paid with such money. Whose money, then, was it that was applied in payment of the lots? It is admitted that, by the terms of the partnership agreement, all liabilities that the partners, or either of them, should create in furtherance of the enterprise, were to be, as between the partners, treated and considered as joint liabilities to be met and shared by them in equal shares. This would seem to stamp the money that was received on the mortgages and paid on the lots as partnership money. Since, then, the money, by force of the agreement, was partnership money, it follows that, when $3750 of it was, at the time of the purchase, paid as the purchase money of the lots, a resulting trust at once arose by operation of law, out of the transaction, in favor of the partnership. See *Wallace* v. *Carpenter*, 85 Ill. 590.

Our conclusion, therefore, is that, without regard to the question whether or not the partnership agreement mentioned in the bill of complaint was in writing, a proper case for the

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interposition of a court of chancery was stated in the bill, and it was error to sustain the demurrer and dismiss said bill.

The decree is reversed, and the cause is remanded with directions to overrule the demurrer.

Decree reversed.

MADS C. MONSON *et al.*

v.

MARTIN JACQUES.

Filed at Ottawa, March 31, 1898.

APPEAL from the Appellate Court for the First District; — heard in that court on appeal from the Superior Court of Cook county; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. CONSIDER H. WILLETT, for the appellants.

Messrs. RUBENS & MOTT, for the appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The facts and evidence in this case, except the dates and amounts, and also the questions of law arising out of such facts and evidence, are substantially the same as those presented by the record in the recently decided case of *Monson* v. *Kill*, *ante*, 248. Hence, the decision here must follow the decision there. For reasons stated in *Monson* v. *Kill*, *supra*, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

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Syllabus.

THOMAS ROGERS *et al.*

v.

JOHN R. TYLEY.

Filed at Ottawa, October 31, 1892.

1. COSTS — *discretionary in chancery cases.* The awarding of costs in a court of chancery is a matter of discretion with the court, and the exercise of that discretion will not be reviewed except for abuse.

2. SAME — *proceeding under Burnt Records act.* A proceeding to establish title under the Burnt Records act is a chancery proceeding and the rule in chancery as to costs is applicable.

3. Section 20 of the Burnt Records act does not make it the duty of the court to limit the costs, but simply fixes the maximum fees which officers and employees may charge, or be allowed, for services rendered in proceedings under that act. If costs have been taxed in violation of the section, the remedy is by motion in the court below to re-tax them.

4. TRUSTS AND TRUSTEES — *declaration, as giving interest in land.* A., the holder of the legal title to land, executed a writing, declaring that B. had an equitable title to an undivided eighth of the same, with the privilege of taking another eighth thereof, and in which he agreed to convey to the latter an undivided eighth, or quarter part of the tract, whenever a deed should be demanded, or in case a sale should be made of the property, the latter should be entitled to one-eighth or one-quarter of the proceeds of such sale, subject to the mortgage of the holder of the legal title given for the purchase money: *Held*, that this invested B. with an interest in the land, and A., the trustee, had no power to divide the land and sell what might be considered one-eighth or one-quarter of it, and require B. to accept the proceeds in satisfaction of his interest in the whole tract.

5. SAME — *whether beneficiary takes interest in land or its proceeds.* When several persons purchase land, each agreeing to pay his proportion of the price, and to take an undivided interest therein, and the legal title is taken to one of them, who gives his notes for the price, secured by a mortgage on the land, and the latter agrees to convey to the others their shares on demand, and to divide the proceeds in case of a sale, each of the others will take an interest in the land and not in its proceeds.

6. SAME — *sale of land on request of cestui que trust.* A trustee holding the legal title to land may convey the same at the verbal request of the *cestui que trust* to a third person and pass the title. The statute of frauds has no application to such a case; such request may be shown by circumstances or parol proof as well as by writing.

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Statement of the Case.

7. WITNESS — *competency as against persons suing or defending as heirs.* A person, though interested in the event of a suit, is a competent witness in a suit against the heirs of a deceased person to testify to facts and transactions occurring after the death of the ancestor.

8. EVIDENCE — *sufficiency to show a letter is not genuine* Where a letter purporting to have been written many years before the trial, having the appearance of being written at its date, is found in the possession of the person to whom it is addressed and resembles the handwriting of the person alleged to have signed it, the fact of his denial of its execution, when it is evident that he is in doubt as to his writing the same, will not be sufficient to reverse a finding of the genuineness of such letter.

9. SAME — *opinions of experts as to genuineness of signature.* The rule that, when the matters in issue do not so far partake of the nature of a science as to require a previous course of study in order to a knowledge of them, the opinion of experts is not admissible, has no application where the genuineness of writings and signatures is in issue. Whether two instruments were written by the same person, or whether signatures are the same, is clearly the subject of expert testimony.

10. SAME — *proof of handwriting by comparison.* The general rule that the genuineness of a handwriting can not be proved or disproved by comparison, is subject to the exception, that if the instrument to be used as a standard is properly in evidence in the case for other purposes, then the signature or paper in question may be compared with it by the jury.

APPEAL from the Circuit Court of Cook county; the Hon. L. C. COLLINS, Judge, presiding.

This is a proceeding under the "Burnt Records act" by appellee against appellants and others, to establish his title to the W. ½ of the E. ½ of the N. W. ¼ of the N. E. ¼ of the S. W. ¼ of sec. 35, T. 40 N., R. 13 E., Cook county, Illinois, being two and one-half acres of land. The petition sets out the chain of title with great particularity, which, briefly stated, is as follows: The government of the United States, by *mense* conveyances to James Fitzsimmons, the E. ½ of said S. W. ¼ of said sec. 35. On November 12, 1855, Fitzsimmons conveyed said 80-acre tract, to Benjamin W. Vandervoort, and he on March 7, 1856, conveyed the south half thereof, to one Hugh T. Reid. He also conveyed on July 20, 1858, to Charles R.

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Day, the undivided ½ of the N. ½ of said 80 acre tract. On March 8, 1869, Henry A. Williams, as executor of said Vandervoort, by a power contained in his will, conveyed to Dwight F. Cameron the undivided ¼ of the W. ½ of the E. ½ of said E. ½ of the S. W. ¼. On May 1, 1873, Cameron conveyed the undivided ¼ of the N. E. ¼ of said S. W. ¼ to George B. Griffin. Subsequently in a partition proceeding by said Griffin, against the heirs and executor of said Vandervoort, and the heirs and executors of said Charles R. Day, there was set off to him, Griffin, the N. W. ¼ of the N. E. ¼ of said S. W. ¼; to the executor of said Vandervoort, the S. W. ¼ of the N. E. ¼ of said S. W. ¼, and to the heirs of said Day, the east half of the N. E. ¼ of the said S. W. ¼. On August 1, 1876, said Griffin conveyed the ten acres so set off to him to Edward Maynard. On Jan. 13, 1877, Maynard conveyed the said W. ½ of the E. ½ of the N. W. ¼ of the N. E. ¼ of the S. W. ¼, being the premises in controversy, to Ephraim A. Otis and he subsequently conveyed the same to appellee.

It is alleged in the petition that said 80 acre tract was purchased from said Fitzsimmons, under and in pursuance of a certain contract or agreement, whereby the said Benjamin W. Vandervoort was to be the owner of three undivided eighths, Jason Rogers, then living, the owner of one undivided eighth, with the privilege of taking another undivided eighth, John B. Russell and Isaac H. Trabue to be the owners of one undivided half of said property, the title to be taken in the name of said Benjamin W. Vandervoort. That under and in pursuance of said last mentioned agreement, the said Benjamin W. Vandervoort executed a declaration of trust in writing, duly signed by him as follows, to-wit:

"I, Benjamin W. Vandervoort, of the city of Paterson, State of New Jersey, purchased of James Fitzsimmons of the city of Chicago and State of Illinois, a certain tract of land known and described as the east half of the south-west quarter

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of section thirty-five (35), township forty (40) north, range thirteen (13), containing eighty (80) acres, situated in Cook county, State of Illinois, as described in deed bearing date herewith, and whereas the title of said land property is standing in my name, I do hereby acknowledge, declare and affirm that Jason Rogers is interested and hath an equitable title to an undivided eighth of the purchase of said tract of land, with the privilege of taking another eighth of above described land, and I hereby further agree and covenant on my part that I will convey to him an undivided eighth or quarter part of said tract of land whenever a deed shall be demanded by him, or in case a sale shall be made of said property, then he shall be entitled to one-eighth or one-quarter of the proceeds of said sale, subject to the mortgage held by the said James Fitzsimmons on said land.

(Signed) B. W. VANDERVOORT."

And the said John B. Russell, Isaac H. Trabue and Jason Rogers executed an agreement in writing, duly signed by them as follows, to-wit:

"Whereas B. W. Vandervoort, of Paterson, in the county of Passaic, and State of New Jersey, this day purchased from James Fitzsimmons, a certain tract of land in the county of Cook, known and described as the east half of the south-west quarter of section (35) thirty-five, township (40) forty north, range (13) thirteen, containing eighty (80) acres, situated in Cook county, Illinois.

"And, whereas, the said Benjamin W. Vandervoort has given unto J. B. F. Russell and Isaac H. Trabue, of the city of Chicago, and Jason Rogers, of Paterson, an agreement in writing, acknowledging that they are jointly interested in the said purchase with the said Vandervoort; and, whereas, the said Vandervoort has given his certain three promissory notes for three thousand dollars, payable in one, two and three years each; and, whereas, the said Russell and Trabue are, by the

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aforesaid agreement and writing, made by the said Vandervoort, entitled to the one-half of the lands purchased, and the said Rogers to the one-eighth part of the lands purchased: Now, we, the said Russell and Trabue, and the said Jason Rogers, do severally agree, on our part, to pay unto the said Benjamin W. Vandervoort, our proportion of the said notes when they become due and payable; that is, the said Russell and Trabue the one-half, and the said Rogers the one-eighth part of the said notes.

"CHICAGO, Nov. 12, 1855. "J. B. F. RUSSELL,
[Signed] "ISAAC H. TRABUE,
"JASON ROGERS."

While it is alleged that said declaration of trust and agreement were never recorded, it is not averred that petitioner, or any of the parties through whom he deraigns his title, took the same without notice of the trust. The allegations of the petition as to the extinguishment of said Rogers' interest in the land are as follows:

"That on or about the 20th day of July, 1858, said Jason Rogers sold his interest in said south-west ¼ of said section 35, being ¼ interest, including his said option therein, to one Charles R. Day, and in pursuance, and in fulfillment of said sale, and at the express request of said Jason Rogers, said Benjamin W. Vandervoort, and Mary D. Vandervoort, his wife, on the 20th day of July, 1858, by warranty deed of said last mentioned date, duly acknowledged and recorded, * * * conveyed to one Charles R. Day, one undivided ½ of the north ½ of the east ½ of said south-west ¼ of said section 35. That said conveyance, so made, as aforesaid, at the express request of said Jason Rogers, was accepted by said Rogers, in full payment and satisfaction of all claim, right, title, interest, and demand, in and to the whole, and every part of said land, so purchased from said James Fitzsimmons, the title of which,

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by agreement, so as aforesaid, was taken in the name of said Benjamin W. Vandervoort."

It is further alleged, that this deed was duly recorded in the office of the recorder of deeds of Cook county, about the time of its execution and delivery, and again after the fire of October 8 and 9, 1871, and that in said deed it was "incorrectly recited that the same was held in trust by said first party (meaning thereby, said Vandervoort), for J. B. F. Russell, Isaac H. Trabue and Jason Rogers, the fact being that said Jason Rogers had only a one-quarter interest, and said Russell and Trabue had only a one-half interest in said eighty acres."

The allegation upon which the prayer for relief is based is as follows: "But your petitioner further shows unto your Honor, that by reason of the recital as aforesaid in the deed before mentioned of the 20th of July, 1858, by said Benjamin W. Vandervoort and Mary D. Vandervoort, his wife, to said Charles R. Day, of the undivided one-half, of the north one-half, of the east half, of said south-west quarter, of said section thirty-five, and the record thereof, referring to the interest of said John B. F. Russell, Isaac H. Trabue and Jason Rogers, it might be claimed that there were real, or apparent interests in, or claims to, the premises so owned and vested in your petitioner, in John B. F. Russell, Isaac H. Trabue and Jason Rogers, or in their respective heirs or devisees."

It also appears from said petition that the said Jason Rogers died August 25, 1868, testate; that by his will he made no mention of the said premises, but devised all his real estate in trust, appellants being the only present trustees under said will. All the defendants to the petition, except these appellants, by their answers, admitted the allegations of the petition to be true. Appellants take no exception to the sufficiency of the petition, nor do they deny any of its allegations. They simply say, they have no knowledge of the matters and things therein set forth, but demand strict proof thereof. They also pleaded

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the statute of frauds to that part of the petition which avers that the deed from said Vandervoort to Charles R. Day was made at the request of said Jason Rogers.

The decree below was according to the prayer of the petition adjudging all the costs against appellants. From that decree this appeal is prosecuted.

Mr. LYNDEN EVANS and Mr. FREDERICK ARND, for the appellants:

The decree awarding costs is erroneous. They cannot be allowed unless they are fixed by law. R. S., ch. 33, sec. 7; ch. 116, sec. 20; *Smith* v. *McLaughlin*, 77 Ill. 596.

Appellee has not produced any written consent by Rogers to Vandervoort, authorizing a sale of his, Rogers', interest in the land.

Expert testimony was not admissible as to the genuineness of the handwriting. *Snyder* v. *McKee*, 10 Ill. App. 188; *Penn. Co.* v. *Conlan*, 101 Ill. 93; *White* v. *Ballou*, 8 Allen, 408; *N. E. Glass Co.* v. *Lovell*, 7 Cush. 321.

It was error to allow Tolman to testify at all as to genuineness of signature by comparison. *Kernin* v. *Hill*, 87 Ill. 209; *Melvin* v. *Hodges*, 71 id. 425; *Getchell* v. *Ryan*, 24 Ill. App. 372; *Snow* v. *Wiggin*, 19 id. 542.

The Vandervoort heirs were not competent witnesses. *Lowman* v. *Auberoy*, 72 Ill. 619.

Mr. CHARLES E. POPE, for the appellee:

As to the jurisdiction of the court to determine the title to land, see *Gage* v. *DuPuy*, 134 Ill. 132; *Gage* v. *DuPuy*, 127 id. 216; *Gage* v. *Caraher*, 125 id. 447; *Heacock* v. *Lubuke*, 107 id. 396; *Robinson* v. *Ferguson*, 78 id. 538; *Bradish* v. *Grant*, 119 id. 603; *Gormley* v. *Clark*, 134 U. S. 338.

The proceeding is a chancery one. *Gage* v. *DuPuy*, 127 Ill. 216; *Gormley* v. *Clark*, 134 U. S. 338.

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The discretion of the court in awarding costs can not be reviewed, except in cases of abuse. *Otis* v. *Gardner*, 105 Ill. 436; *Howe* v. *Hutchinson*, id. 501; *Askew* v. *Springer*, 111 id. 662; *Sapp* v. *Phelps*, 92 id. 588; *Field* v. *Oppenstein*, 98 id. 68; *Schultze* v. *Houfes*, 96 id. 335; *Ling* v. *King*, 91 id. 571; *Converse* v. *Rankin*, 115 id. 398; *Gage* v. *Bailey*, id. 646.

As to the interest of the parties to the declaration of trust, see *Morrill* v. *Colehour*, 82 Ill. 618; *Nicoll* v. *Ogden*, 29 id. 323; *Nicoll* v. *Miller*, 37 id. 389; *Nicoll* v. *Todd*, 70 id. 295; *Nicoll* v. *Mason*, 54 id. 281; *Mauck* v. *Mauck*, id.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

The proof introduced on behalf of the petitioner clearly establishes the fact that the trust in said Vandervoort was correctly stated in the declaration signed by him, at the time of the execution of the deed. The recital in the Day deed, to the effect that he held the title in trust for the benefit of Russell, Trabue and Rogers alone, was therefore untrue, and if the petitioner has succeeded in showing a valid title in himself with that erroneous recital corrected, the decree below is clearly right and must be affirmed.

In support of the allegation in the petition that the deed from said Vandervoort to Charles R. Day was made in pursuance of a sale by said Jason Rogers to the latter of his interest in said land, the petitioner introduced in evidence a letter of which the following is a literal copy.

"MORRISANIA, Sept. 9, 1863.

Mrs. D. Rally, Madam. Yours of the 7th is just received. Mr. Vandervoost purchased 80 acres of land from Mr. Fitzgerald one mile from the city of Chicago when we were in the west. I think he paid about $3080.00 for the 80 acres. I purchased one ⅛ of the above land for $375. I sold my interest in the land to Mr. Charles R. Day of Newark, or Orange,

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N. J., for $400. Mr. Vandervoost purchased no other land out west at that time. By addressing a letter to the clerk of county of Cook at Chicarco, Illinois, and he will send you full particulars. I think the land was purchased in September, 1855, any further information I will cheerfully give if required. Yours respectfully, Jason Rogers per Thos. Rogers.

P. S. I do not know the value of the land at the present time. When he bought it was cheep."

This letter was produced by Germain Breant Vandervoort, a son of said Benjamin W. Vandervoort, who testified that he obtained it from Mrs. D. Rally, residing in Paris, France, who is his aunt. He testified: "When I heard that Mr. Pope was going to commence this proceeding, I wrote to my aunt, who resides in Paris, France, asking her whether she had any papers or letters relating to this property of my father, and she sent me, in a short time afterwards, some letters of my father, and this letter which I hold in my hand. This letter is written to Mrs. D. Rally, who, on the death of my father, took out papers of guardianship in reference to my mother's estate, and she wanted to know something about how my father's estate stood. She wrote to a number of parties in reference to it, and this is a letter that she received in answer to a letter written to Mr. Rogers." The only controverted question of fact in the record is the genuineness of this letter. Appellants insist it is a forgery. They introduced as a witness on their behalf Thomas Rogers, one of appellants, a son of Jason Rogers, and the Thomas Rogers who, it is admitted, wrote the letter if it is genuine, and by him attempt to prove that he did not write it. The testimony of the witness Vandervoort, as to how he obtained the letter, and how it came to be written, was not objected to, nor is there any evidence whatever, either in his cross-examination or otherwise, tending to discredit him in that regard, except the evidence of said Thomas Rogers, to the effect that he did not write the letter.

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Counsel for the appellee contend that the decree of the court below should be affirmed, without reference to this letter, on the ground that, by the facts proved in regard to the trust in Vandervoort in favor of Rogers, the latter's interest in said eighty acres of land was not in the realty, but in the proceeds thereof, as personalty. In support of this contention it is insisted the case is like that of *Morrill* v. *Colehour*, 82 Ill. 618, and the *Nicoll* dower cases reported in 29 id. 323; 37 id. 284; 70 id. 295, and 49 id. 358. We do not think this position tenable. The case made by the petition is wholly unlike the cases cited. The agreement under which it is alleged the purchase from Fitzsimmons was made, the declaration of trust by Vandervoort, and the agreement signed by Russell, Trabue and Rogers to pay their proportionate part of the purchase money, all show that the land was not purchased with partnership money for partnership purposes, or held by Vandervoort as such, but that each of the four parties paid a proportionate part of the purchase money, and were to have an undivided interest in the land to be conveyed to them by Vandervoort if they requested it.

It may be, if Vandervoort had sold the entire purchase, Rogers, under the latter clause of the declaration of trust, could only have claimed one-eighth or one-quarter of the proceeds, but certainly, under that clause, the trustee had no power to divide the land and sell what he might consider one-eighth or one-quarter of it, and require Rogers to accept the proceeds in satisfaction of his interest in the whole tract. He could do that only with the consent of Rogers, the *cestui que trust*, and that is clearly the theory of this petition. The question then recurs, was the court below justified by the evidence in finding that the conveyance to Day was made at the instance and request of Jason Rogers; and both parties concede that this question turns upon the genuineness of the Rally letter.

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Julian Watkins Vandervoort, another son of Benjamin W. Vandervoort, testified on behalf of the petitioner to a conversation with Thomas Rogers at the Palmer House in Chicago, after this suit was brought, and says, "I asked Mr. Rogers if he recollected writing that letter. He said, 'Well, it is so many years back that it is too long for me to remember, but it is very likely. I may have written a letter, as at that time I was my father's secretary, and wrote his letters.' His father at that time was either in bad health or infirm." He also says Mr. Rogers expressed a desire at that time to see the letter, and that he telegraphed his brother at Kansas City to bring it on to Chicago, but before the brother arrived, Rogers had left the city. We do not think it can be seriously questioned that the evidence on behalf of petitioner, *prima facie*, proves that Thomas Rogers wrote the letter. Testifying in his own behalf, in his examination in chief, he at no time positively denies that fact. When asked by his counsel, "Did you, or did you not, sign that letter 'Jason Rogers, per Thos. Rogers?'" He answered, "I never signed a letter 'Jason Rogers, per Thos. Rogers.'" Again, he says, "I never signed my name Thos. Rogers, but Thomas Rogers."

To the interrogatory, "Please look again at that signature, and say whether or not it is your signature," he answers, "I never remember signing my name Thos. Rogers." To the direct question, "Did you sign that letter marked Exhibit 9?" he replied, "To the best of my knowledge, I did not." Manifestly, that which raises the belief in the mind of the witness, that he did not write the letter, is the fact, that his name is written Thos. instead of Thomas, as he was in the habit of writing it. He does not deny that the writing is similar to his. He does not say, from recollection, that he did not write letters, about that time, for his father. In another part of his evidence he admits that the writing is like his, and while he denies that he told the witness Vandervoort, that he was in the habit of writing letters for his father, or was his secretary,

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he admits that he may have written one or two letters for him, and does not say this may not be one of them. He was at his father's house at Morrisania, the date of the letter. On cross-examination he gives, as an additional reason for the belief that he did not write the body of the letter, the misspelling of the word Chicago, and spelling it in different ways in the same letter. Nothing can justly be said against the fairness and candor of Mr. Rogers as a witness. His answers appear to be frank and candid, but it is clear, from the whole of his testimony, that he is in doubt as to whether or not he wrote this letter, and from certain features of it, not consistent with his habit, and what he now thinks he would have done had he written it, his belief is, that he did not write it.

He was asked, on the cross-examination, to reproduce the letter in his handwriting by sentences, which he did. He also in his examination in chief produced two of his signatures, written about the date of the letter, which, he swears, are his genuine signature of that period, and which he took from books belonging to him, in which he had written his name, for the purpose of showing that they belonged to him. One Henry L. Tolman was introduced by the petitioner as a microscopical expert, and testified that, in his opinion, the signature of Thomas Rogers to his deposition filed in the case, and the signature, Thos. Rogers, to the Rally letter, were written by one and the same person. Also that the letter and the reproduction of it, on cross-examination, were written by one and the same person. He also gave it as his opinion that the two signatures taken from books by Mr. Rogers, were not written by the same person who signed the deposition and reproduced the letter, though he says there is some resemblance in the writing. He gives his reasons at length for the opinion that the letter and signature were written by the same hand which signed the deposition, and re-wrote the letter, and some of them, at least, give force to that opinion. The original "Rally letter" by agreement of parties is attached to the record for

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our inspection. Also the two book signatures above referred to. The letter itself has all the appearances of having been written about the time of its date. We are unable to discover anything in it calculated to cast suspicion upon its genuineness. It is said Rogers would not have used the names Vandervoost and Fitzgerald, for Vandervoort and Fitzsimmons. It may be replied, neither would one forging such a letter. There are certainly many features of resemblance between the handwriting in the letter, and the reproduction of it by Mr. Rogers. The marked difference between the book signatures, and that to the "Rally letter," and to the reproduced sentences of it is, that those taken from the books are much smoother, and seemingly done with a better trained hand. In other words, those taken from the books are by far the better written. This difference can be accounted for, in part at least, by the fact that they were in all probability written with more care. However that may be, we are of the opinion that the weight of the evidence is in favor of the finding of the Circuit Court as to the genuineness of that letter.

There is no force in the objection that the Vandervoorts were incompetent to testify against appellants on account of interest. Even if it had appeared that they were interested in the event of the suit, they testified to no fact occurring prior to the death of Jason Rogers, and as to subsequent events and transactions they were clearly competent.

It is also objected that the expert testimony of the witness Tolman was incompetent. Singularly, this objection is based in part upon the declaration of counsel, that "the similarity between the writing in the Rally letter, and Mr. Rogers' mature handwriting, shown by the reproduction, is so marked that it simply needed a person not blind to notice it." Therefore it is said "the rule that, where men of ordinary intelligence can judge, expert testimony will not be received," should have been applied. Citing *Pennsylvania Co.* v. *Conlan*, 101 Ill. 93, and similar cases. It was held in the *Pennsylvania Co.*

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case that, "as to matters which do not so far partake of the nature of a science as to require a course of previous habit, or study, in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible." Certainly that rule has no application when the genuineness of writings and signatures is in issue. Whether two instruments were written by the same person, or whether signatures are the same is clearly the subject of expert testimony. It will not be pretended that appellants would not have had the right to offer expert testimony to prove that, notwithstanding the similarity of the writings, they were written by different hands. The question to Tolman was not whether the two writings resembled each other, but whether, in his opinion, the same person wrote both. But, it is said, admitting his testimony, over the objection of appellants, was violative of the rule, "that the genuineness of handwriting can not be proved or disproved by comparison." The general rule in this and other States of the Union is doubtless as above stated, but wherever that rule prevails, there is also the exception, that if the instrument to be used as a standard is properly in evidence in the case, for other purposes, then the signature, or paper in question, may be compared with it by the jury. To this effect is *Brobston* v. *Cahill*, 64 Ill. 356. Where other writings, admitted to be genuine, are already in the case, comparison may be made by the jury, with or without the aid of experts. 1 Greenleaf on Ev., sec. 578.

We do not deem it important to inquire how far the *laches* of Jason Rogers and his representatives, the appellants, should estop them from now claiming title to the premises in question. The fact that he, during his lifetime, made no claim to the premises, and left his executors in ignorance of any claim of title thereto, so that, until the filing of this petition, they were wholly ignorant of the fact that he ever owned it, are circumstances strongly corroborative of the statements made in the "Rally letter."

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The further point is suggested that the sale could only be made by Vandervoort, so as to bind Jason Rogers, by the written consent of the latter, and, therefore, the decree below is erroneous, there being no proof of such written consent. No authority is cited in support of the proposition, and we find none. We know of no reason why his consent might not be shown by circumstances or parol proof, as well as by writing. The statute of frauds has no application to the case. If, as stated in the Rally letter, Jason Rogers sold his interest in the trust property to Day, to whom the proof shows the trustee conveyed, it would be most unreasonable and unjust to allow him or his executors to now repudiate that sale and conveyance because his consent was not given in a particular manner.

It is also insisted the court below erred in adjudging all the costs against appellants. It is contended, first, that there is no authority of law for taxing costs against a defendant in such a proceeding. That a proceeding under the "Burnt Records act" to establish title is a proceeding in chancery, is settled by the decisions of this court. *Gage* v. *DuPuy*, 127 Ill. 216; *Same* v. *Same*, 134 id. 132.

By section 18, ch. 33, R. S., entitled "Costs," it is provided that "in all cases in chancery, not otherwise directed by law, except where the bill is dismissed by the complainant, or for want of prosecution, it shall be in the discretion of the court to award costs or not." The awarding of costs in a court of chancery is a matter of discretion with the court. *Frisby et al.* v. *Ballance et al.*, 4 Scam. 287. It is also well settled that the exercise of that discretion will not be reviewed, except for abuse. The litigation in this case was caused by the appellants interposing a claim to the premises in question, which the court below deemed to be unfounded, and as we have seen, that decree was justified by the evidence. It can not, therefore, be seriously contended that the court below abused its discretionary power in ordering them to pay the costs.

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It is again insisted that under section 20 of the "Burnt Records act," the court should have limited the costs to "two-thirds of the ordinary costs at law." This is a clear misapprehension of the scope of that section. It does not make it the duty of the court to limit the costs, but simply fixes the *maximum* fees which "officers and employees" may charge, or be allowed for services rendered in proceedings under that act. If costs have been taxed in violation of the section, the remedy of appellants is by motion in the court below to retax the same.

We find no reversible error in this record, and the decree of the Circuit Court will be affirmed.

Decree affirmed.

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ADVANCEMENT.

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1. *How the presumption may be rebutted.* Where one purchases land with his own money and the legal title is taken in the name of his wife or child, the law will presume that it was intended as an advancement. This presumption may be rebutted or supported by evidence of antecedent or contemporaneous acts, facts or circumstances connected with the purchase, or so soon thereafter as to be fairly considered a part of the transaction itself. *Smith* v. *Smith et al.*, 299.

2. Where a husband buys land with his own means, if his wife, by fraud or wrongful act against his intention, obtains a conveyance to be made in her name, the presumption of an advancement will be rebutted, and the presumption that she holds in trust will arise. Ibid. 299.

3. *The burden of proof.* The presumption of fact, when a deed is made to the purchaser's wife, that it was intended as a gift or advancement, must prevail until overcome, or rebutted by proof of such facts and circumstances as will satisfy the conscience of the chancellor that the conveyance was, in fact, taken to the wife for the benefit of the husband. The burden of proof is on the party claiming a resultant trust to show that an advancement was not intended. Ibid. 299.

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1. *Must be strictly pursued.* The owner of land gave a real estate broker written authority to sell the same within six months for $12,000, one-half to be paid in cash, and the balance in one, two and three years with six per cent interest, payable annually, secured by notes and mortgage on the property. The agent made a contract of sale which recited that the purchaser had paid $500 purchase money to be applied on the purchase when consummated, and had agreed to pay within ninety days after the title had been examined and found good, the further sum of $5500, and to pay the balance in three equal installments of $2000, due separately on or before one, two and three years after the date of the contract, and stipulating that the notes should provide that payments might be made on or before the time named in the notes, with six per cent interest, etc. *Held*, that the authority to sell for one-half cash in hand was in no sense complied with by a sale on ninety days' time, and that the authority to sell and make the balance over and above the cash payment payable in one, two and

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AGENCY. AGENT'S AUTHORITY. *Continued.*

three years, did not authorize the making of a contract that such payments might be made on or before such times, at the option of the purchaser. *Monson et al.* v. *Kill*, 248.

2. A written authority to an agent to sell land of his principal within six months for a fixed net price, one-half to be paid in cash and the balance in one, two and three years, with six per cent interest, payable annually, secured by notes and mortgage on the property, is not complied with by a sale on ninety days' time. In such case the authority to sell is special and limited, and the purchaser will be required to know that the authority has been strictly pursued. Ibid. 248.

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5. *Administration — classification of agent's indebtedness to principal.* Where an agent of a bank sold its drafts on foreign countries, and received the moneys paid by the purchasers of such drafts, which he was to account for to his principal, and died with money in his hands from such sales unaccounted for: *Held*, that such money was not held by such agent as "in trust for any purpose," within the meaning of clause 6, of section 70, of chapter 3, Revised Statutes, and that the allowance of a claim for such indebtedness as of the sixth class was erroneous. Ibid. 507.

ALIENS.

INHERITING LANDS.

1. *Treaty with Bremen — rights of alien heirs thereunder — treaty construed.* By section 7 of the treaty of the United States with the Hanseatic Republic of Bremen, concluded on December 20, 1827, where a citizen of the United States dies intestate, owning land and leaving non-resident alien kindred, residing in and citizens of Bremen, who would be his heirs but for their alienage, there is granted to such kindred the term of three years within which they may dispose of such lands and remove the proceeds. *Schultze* v. *Schultze et al.*, 290.

2. The word "representatives" in the second clause of section 7 of such treaty refers to all who take by will or descent, including devisees and heirs as well as executors and administrators; other-

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ALIENS. INHERITING LANDS. *Continued.*

wise there is no antecedent to which the word "said" before the word "heirs" in the third clause can refer. The second clause may be construed to mean that the representatives or heirs of American citizens, being citizens of Bremen, shall succeed to personal goods. It follows that by the terms of the third clause the heirs of American citizens who are citizens of Bremen have the prescribed term of three years to dispose of real estate, which they would have inherited but for their alienage. *Schultze* v. *Schultze et al.*, 290.

3. *Treaty suspends the statute.* The effect of the treaty of the United States with Bremen is to suspend, during the period of three years, the operation of the alien law of this State, which makes non-resident aliens incapable of taking lands by descent; and the right of the resident heir or of the heirs capable of taking under the State law, and the right of the State to take the land by escheat in default of heirs capable of holding the same, are also suspended during the term of three years named in the treaty. Ibid. 290.

4. *Title of non-resident alien heirs to lands inherited — partition.* Where non-resident alien heirs of an American citizen are granted, by treaty of the United States, three years within which to sell lands they would have inherited but for their alienage, and to remove the proceeds, they will take a fee in such lands determinable by the non-exercise of the power of sale within three years. They will have such an interest in the lands as will entitle them to maintain a proceeding for partition. Ibid. 290.

5. In such a case the fee vests in the non-resident alien heirs, and they will have the rights of ownership in the property and all the advantages of its use and possession for the purpose of making sale of the same. By such a treaty the alien heir is clothed for the period granted, for the purpose of making sale, with the same rights that he would enjoy if he was a resident heir, being subject simply to the obligation to sell and convey the fee to some other party capable of holding. The right to sell and dispose of land at pleasure and dispose of the proceeds can not be exercised unless the donee is vested with title or the complete ownership. Ibid. 290.

ACT OF 1887.

6. *Right of aliens to hold land.* See DESCENTS, 1 to 7.

7. *Act construed.* See STATUTES, 1 to 6.

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SET ASIDE FOR UNFAIRNESS. See DOWER, 8 to 11.

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APPEALS AND WRITS OF ERROR.

WHAT MATTERS TO BE CONSIDERED.

1. *Failure to assign cross-errors.* Where the appellee fails to assign for cross-error the finding of a special contract against him, and that there is a variance between the complainant's allegations in his bill and the proofs, those questions will not be before this court for consideration. *Vose* v. *Strong et al.*, 108.

2. *Appeal by the people.* A defendant having been arrested for a criminal offense, tried before a competent court and acquitted, can not, on the application or appeal of the people, be tried a second time. This applies as well to misdemeanors as to felonies. *The People* v. *Miner et al.*, 308.

3. *Provision for appeal, unconstitutional.* Section 14 of the fish law of 1885 and 1887, which provides for an appeal from a judgment, acquitting one charged with a breach of that law, and for his trial on appeal, is in violation of section 10, article 2 of the constitution, which provides that no person shall twice be put in jeopardy for the same offense. Ibid. 308.

4. *Questions of law.* Where no exception is taken as to the admission of evidence in the trial of a cause before the court alone, and no propositions of law are submitted to the court to be passed upon before or at the time of rendering judgment, no question of law will be presented and the judgment will be affirmed. *Hall et al.* v. *Cox*, 532.

AMENDMENTS.

5. *Amending bill of exceptions — in matter of form.* An amendment of a bill of exceptions filed at a succeeding term, in a matter of form, when it appears in the record that there is enough to amend by, will not be stricken from the files in this court. *Guertin* v. *Mombleau*, 32.

OF THE AMOUNT INVOLVED.

6. *Does not depend on the errors assigned.* The Appellate Court affirmed the judgment of the Circuit Court, allowing a claim of $1219 against an estate, and directed its payment as a sixth class claim. The estate was able to pay all the sixth class claims, but not the seventh class claims in full, and the administrators appealed to this court: *Held*, that this court had jurisdiction of the appeal. The right of a party to a judgment in the Appellate Court to bring the case to this court by appeal or writ of error, is not limited by the amount affected by the error assigned, but by the amount involved in the action. *Svanoe et al.* v. *Jurgens*, 507.

REVIEWING THE FACTS.

7. *Directing what the verdict shall be.* In an action based on the negligence of the defendants, resulting in a personal injury, the defendants asked and the court refused an instruction requiring the

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APPEALS AND WRITS OF ERROR. REVIEWING THE FACTS. *Cont'd*
jury to find in their favor: *Held*, that the question presented to this court on appeal was, whether there was evidence tending to establish a right of recovery, and that it was confined to the simple question whether there was evidence from which the jury might have legitimately found for the plaintiff. *Payne et al.* v. *Irving*, 482.

8. Where a tenant sues his landlord for a personal injury caused by the blowing down of a sign-board from the top of a building, a part of which was occupied by the plaintiff as a tenant of defendant, on the ground of neglect to keep the sign-board properly fastened, the questions of negligence on the part of the plaintiff in removing a brace which supported the board, and of notice to him of the insecure condition of such board, and whether the falling of the same was the result of an extraordinary wind which reasonable foresight could not have guarded against, are all questions of fact, not reviewable in this court on appeal from the Appellate Court. Ibid. 482.

9. *Amount of damages.* The judgment of the Appellate Court, affirming that of the Circuit Court, is conclusive, as to all the questions of fact involved in the case, upon this court. The amount of damages is a question of fact, and the judgment of the Appellate Court in relation thereto can not be reviewed by this court. *Hall et al.* v. *Cox*, 532.

10. The amount of damages to be assessed in a given case presents only a question of fact for the jury under proper instructions, and this court, on appeal from the Appellate Court, will refuse to review such a question. *Ingalls* v. *Allen*, 535.

11. *Sufficiency of a remittitur.* And so, whether a *remittitur* of a part of the damages assessed by the jury covers the entire amount of excess in the verdict beyond what should have been returned, is a question of fact for the trial court, which this court is concluded by the judgment of the Appellate Court from considering. Ibid. 535.

VALIDITY OF A STATUTE.

12. Where the only question presented by the record is the constitutionality of a statute, an appeal lies directly from the trial court to this court. *The People* v. *Miner et al.*, 308.

PRAYER FOR APPEAL DENIED.

13. *Record treated as an answer to a writ of error.* Where the trial court refuses to grant an appeal from its judgment, to the plaintiff, who causes to be filed in this court a transcript of the record upon which errors are assigned, if the other party appears and files briefs, the record may be treated as filed in answer to a writ of error, and there being no appeal, a motion to dismiss the appeal can not be allowed. Ibid. 308.

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APPEALS AND WRITS OF ERROR. *Continued.*

WRIT OF ERROR.

14. *Abated by the death of a party to the record.* The death of a party convicted of crime, after he has sued out a writ of error to reverse the judgment, abates the writ, even though there is joinder in error; and this result can not be prevented by the entry of judgment, *nunc pro tunc*, as of a date prior to his death. *O'Sullivan* v. *The People*, 604.

15. The common law rule, that a writ of error does not abate by the death of the plaintiff in error after error joined, has no application to criminal cases, as the rule rests upon the right of the defendant in error to have the judgment revived against the personal representatives of the plaintiff in error, and to thus enforce the judgment against him whom they represent. Ibid. 604.

16. There is no right to prosecute a writ of error in any case unless it is affirmatively given, either by a rule of the common law or a statutory enactment. Our statute in relation to the prosecution of writs of error by executors and administrators has application to judgments in civil cases only. Ibid. 604.

JURORS.

17. *Challenge overruled — subject to review.* See JURY, 19.

ARCHITECT'S CERTIFICATE.

CONDITION PRECEDENT.

To payment on building contract. See CONTRACTS, 4.

ASSIGNMENT.

OF CONTRACT.

For sale of homestead. See HOMESTEAD, 8.

ATTACHMENT.

RECOGNIZANCE.

1. *Its purpose and effect.* The purpose and effect of giving a recognizance by the defendant in attachment, as provided in section 15 of the Attachment act, is to enable the defendant to obtain control of the property attached or in the hands of garnishees, upon giving security for the payment of the judgment to be recovered in the attachment suit. Upon giving the bond or recognizance, the case proceeds *in personam* and the judgment entered is a personal judgment, the recognizance standing as security for its payment. *Sharpe* v. *W. J. Morgan & Co.*, 382.

2. *Liability of surety — judgment against administrator.* The surety in a recognizance given to release the property attached, or to release the garnishee from liability, becomes liable to pay the judgment that may be recovered against the administrator of the defendant in the action on final trial thereof. In such case the judgment against the personal representative of the sole defend-

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ATTACHMENT. RECOGNIZANCE. *Continued.*

ant in the same proceeding is a judgment against such defendant within the meaning of the statute. Ibid. 382.

DEATH OF DEFENDANT.

3. *Does not abate the action.* By section 11 of the Abatement act, the death of the sole defendant does not abate the action in cases where the cause of action survives, but, upon suggestion of the death, summons may issue against his administrator and the cause will then proceed as if the same had been originally commenced against him. Ibid. 382.

ATTORNEY AT LAW.

NEGLECT OF CLIENT'S INTERESTS.

1. *Is negligence of the client.* The negligence of an attorney at law in failing to avail of a legal defense to an action at law, is the negligence of the client, and will preclude relief in equity, although the attorney may be insolvent. *Bardonski* v. *Bardonski et al*, 284.

2. *Whether ground for setting aside default.* See PRACTICE, 7.

ADVICE OF COUNSEL.

3. *As a defense in an action for malicious prosecution.* See MALICIOUS PROSECUTION, 2 to 6.

BANK DEPOSIT.

AS A GIFT. See GIFT, 9 to 12.

BENEFIT SOCIETIES.

WHO MAY BE BENEFICIARIES.

1. A statute for the formation of associations for charitable or benevolent purposes, provided that a corporation organized thereunder may, "for the purpose of assisting the widows, orphans, *or other persons dependent upon deceased members*," provide in its by-laws for the payment by each member of a fixed sum, to be held by the corporation until the death of a member occurs, and then to be forthwith paid to the person entitled thereto, etc. A by-law of such a society required that each applicant for membership should enter upon his application the name or names and relationship or dependence of the members of his family, or those dependent upon him, to whom he might desire his benefit paid, and provided that a benefit might be made payable to a member's wife, children, etc.; and lastly to any other person dependent upon him: *Held*, that the statute and by-laws contemplated that the fund might be paid to a person dependent upon a member, even though such person was not in any way related to him. The dependency required in such case is not necessarily a legal dependency. *Alexander et al.* v. *Parker*, 355.

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BENEFIT SOCIETIES. WHO MAY BE BENEFICIARIES. *Continued.*

2. "*Dependent*" *defined.* A dependent, as the term is used in reference to these benefit societies, is one who is sustained by another. The maintenance of dependents is such support as consists in the furnishing of "food, clothing, lodging or education." Maintenance in the matter of clothing does not refer to occasional gifts of clothing, but to such a regular supply of clothing as may be reasonably necessary to make the body comfortable. *Alexander et al.* v. *Parker*, 355.

3. A lady in March, 1883, became engaged to be married to a member of a benefit society, she being about forty years of age, and receiving at that time a salary of about $500 per year as clerk or bookkeeper in the office of the collector of internal revenue. She was engaged in that office from 1878 to June 30, 1887, and her salary up to July 1, 1882, was $400 per year. From that time up to July 1, 1884, it was $500 per year, and from the latter date to June 30, 1887, was $600 per year. She had no children and lived with her mother and sister. After the last date she worked for a time in a bank at a salary of one dollar a day, awhile for a safe and lock company for three dollars a week, and awhile in a store for twenty dollars a month, receiving during this time assistance and support from her mother and sister. The member to whom she was engaged failed in business in 1885, from which time he was poor and earned but little, and during the last three years of his life he never saw his affianced wife more than twice. He paid nothing toward her board, and gave her only a few presents, but paid seventy-five dollars a year in assessment on his certificate of membership: *Held*, that the affianced was not a dependent upon the member. Ibid. 355.

4. The fact that a woman is the affianced wife of a deceased member of a benefit society does not, as a matter of law, make her dependent upon him for support, etc., within the meaning of the statute relating to such a corporation, which authorizes the payment of a sum of money to any one dependent upon him. The mere engagement to marry a woman imposes no obligation on the promisor except to carry out his contract. Ibid. 355.

5. The fact that the person named in the certificate of membership may receive occasional gifts of clothing, jewelry, money, etc., does not make such person dependent upon the member making such presents. But the dependent person need not be wholly dependent on a member, but may be dependent in part only. Trivial or casual or perhaps wholly charitable assistance will not create a relation of dependency within the meaning of the statute or by-laws. Ibid. 355.

6. Where the statute and the charter of a benefit association provide for the payment of benefit funds to persons dependent upon the members, the word "dependent" means some person or

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BENEFIT SOCIETIES. WHO MAY BE BENEFICIARIES. *Continued.*

persons dependent for support in some way upon the deceased. Dependence for favor, or for affection, or for companionship, or as servants or retainers, is excluded. *Alexander et al.* v. *Parker*, 355.

7. *Dependence is a question of fact — "affianced wife."* The designation of the person named in the certificate of membership as the "affianced wife" for the beneficiary, is not sufficient to preclude an examination of the evidence for the purpose of determining whether, as matter of fact, the person so named was really dependent upon the deceased member or not. Whether a person is included among the dependents of a member of a benefit society is a question of fact, and each case must be decided on its own merits. Ibid. 355.

8. *"Affianced wife" — not a "widow" or "relative," within the statute.* Under a statute authorizing the accumulation of a mortuary fund for the benefit of widows or relatives of deceased members, an affianced wife can not be made a beneficiary. She being bound to the deceased by no other tie than that of an engagement of marriage, is not a relative within the meaning of such a statute. Ibid. 355.

9. *Authority to pay benefits to persons not within the classes designated by law.* Where the statute under which a benevolent corporation is organized, and its charter adopted in pursuance of such statute, designate certain classes of persons as those for whom a benefit fund is to be accumulated, a person not belonging to either or any of such classes is not entitled to take the fund. The corporation will have no authority to create a fund for other persons than the classes specified in the law, nor can a member direct the fund to be paid to a person outside of such classes. Ibid. 355.

10. *Rights of beneficiaries designated by law — against others designated by the member or society.* Neither the act of a member in naming a person who is not within the classes to be benefited, nor the act of the corporation in making the certificate which it issues payable to such person, can deprive the beneficiaries designated by the law of their right to or interest in the fund. The designation of any one not within such class as the beneficiary is void. Ibid. 355.

LIABILITY TO MEMBERS.

11. *Contract with members — how evidenced.* The contract between a benefit society and its members is contained in the certificate, if one be issued, taken in connection with the constitution and by-laws of the organization and the statutes of the State under which it is formed. Ibid. 355.

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BILL OF EXCEPTIONS.

STIPULATION.

1. *Right of parties to change.* See PRACTICE, 14, 15.

AMENDMENT.

2. *At a subsequent term.* See APPEALS AND WRITS OF ERROR, 5.

BOND FOR A DEED.

WHETHER A MORTGAGE. See CONTRACTS, 6, 7.

BUILDING CONTRACT.

ARCHITECT'S CERTIFICATE.

Condition precedent to payment. Same title, 1 to 5.

BURNT RECORDS ACT.

BILL TO ESTABLISH TITLE.

1. *Making deceased persons parties — how taken advantage of.* If a bill for the confirmation of title under the Burnt Records act shows on its face that two persons made defendants were dead before the bill was filed, the irregularity should be taken advantage of by demurrer, so as to afford the complainant an opportunity to dismiss as to such persons. If so taken, the court will be called upon to rule in respect of the costs occasioned by making deceased persons parties. *Jackson* v. *Glos*, 21.

2. *Preserving evidence — after demurrer to bill is overruled.* When the defendant, under the Burnt Records act, demurs to the bill and abides the same when overruled, he can not afterward object that no evidence was given in support of the allegations of the petition. In such a case the statute does not require the evidence heard to be set forth and preserved. Ibid. 21.

3. *The allegations and proofs.* On bill to establish title under the Burnt Records act, it is not necessary for the petitioner to allege or prove the destruction of the evidence of his chain of title, but only that the records, or material part thereof, have been destroyed by fire or otherwise so that a connected chain of title can not be deduced therefrom. *Gage* v. *Gentzel et al.*, 450.

4. On such a bill it is competent to show a perfect possessory title in the petitioner, without making any proof of title antecedent to the possession taken. Ibid. 450.

5. The fact that it is alleged in such petition that particular deeds were lost, will not prevent their introduction in evidence upon the hearing, as they may have been found since the filing of the bill. Ibid. 450.

6. The bill in a proceeding, under the Burnt Records act, to establish complainant's title, is not required to set forth or charge

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BURNT RECORDS ACT. BILL TO ESTABLISH TITLE. *Continued.*

that a defendant's title is illegal. It is only necessary that adverse claimants be made defendants, and the burden is on them to establish their title to the property. *Gage* v. *Gentzel*, 450.

7. *Of the decree.* On bill to establish title, under the Burnt Records act, the court is required to decree, not what the records showed before they were destroyed, but in whom the title is vested. Ibid. 450.

8. *Setting aside tax deed — refunding taxes paid.* In a proceeding under the Burnt Records act a defendant, whose tax title is set aside, can not complain of the failure of the court to require the complainant to refund to him, with interest, the money paid by him in acquiring his tax deed, when he fails to introduce any evidence in respect to such title. Ibid. 450.

9. *Decree — how far conclusive.* A decree on a bill, under the Burnt Records act, establishing the title in fee in the complainant, is conclusive upon all adverse claimants who are made parties, and a bar to their ever afterward setting up any title or claim they may have, as much so as if their claim or title was expressly declared invalid. A title condemned, and a failure to establish title, where a party claims rights under it, and upon whom rests the burden of establishing it, will equally leave him without title. Ibid. 450.

COSTS THEREUNDER.

10. *Statute construed.* See COSTS, 3, 4.

CAPIAS AD SATISFACIENDUM. See IMPRISONMENT, 1, 2.

CARRIERS. See RAILROADS, 3 to 14.

CERTIFICATE OF DEPOSIT.

OF MONEY IN BANK.

1. *A promissory note.* See PROMISSORY NOTES, 2.

2. *Gift thereof.* See GIFT, 5 to 12.

CERTIORARI.

WHEN IT LIES.

1. *Reviewing judgment of a justice of the peace.* A writ of *certiorari* at common law to review the record of a justice of the peace for illegality in the proceeding does not lie until the justice has rendered a final judgment. The writ can not be made to operate as an injunction and restrain a tribunal from acting beyond its jurisdiction. *Glennon* v. *Burton*, 551.

2. The common law writ of *certiorari* does not lie to review the record of the proceedings of an inferior tribunal, if the party seeking its issue has any other mode of review. Ibid. 551.

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CERTIORARI. WHEN IT LIES. *Continued.*

3. This writ will not lie merely because proceedings have been commenced before a tribunal that has no jurisdiction, when the tribunal has not taken final action on them, and has made no order which must, of itself, injuriously affect the party suing out the writ, unless it shall be annulled by a court of review. *Glennon* v. *Burton*, 551.

4. *Order not a final judgment.* In a proceeding to condemn gambling implements before a justice of the peace, a simple finding by the justice that the property seized is "gambling implements and devices," and a continuance of the case to a future day named, is not a final judgment that may be reviewed on *certiorari*. No final process can issue on such an order. Ibid. 551.

CHANCERY.

SPECIFIC PERFORMANCE.

1. *Contract without valuable consideration.* A written agreement for the conveyance of an interest in land, if made without any valuable consideration received or to be received, can not be specifically enforced. *Batcheller et al.* v. *Batcheller*, 471.

2. *Burden of proof as to consideration.* On bill for the specific performance of a bond for a deed, which recites a money consideration, the burden of proof rests upon the defendant to establish his defense of a want of consideration for his agreement by clear and satisfactory evidence. Ibid. 471.

3. *Proof and clearness of the contract.* To entitle a party to specific performance, the contract must be clearly proved and be certain and unambiguous in all its parts and terms. *Rock Island & Peoria Ry. Co.* v. *Dimick*, 628.

4. *Contract for passage-ways under railroad—its certainty.* When at the time of the execution of a deed granting a railway company a right of way across the grantor's farm, and the execution by the company of an agreement to make and maintain two passage-ways under its road, the road was graded and built, leaving open two such passage-ways, it will be presumed that the contract relates to the ways then existing, and such contract will be as capable of being enforced as if the size, nature and location of the passage-ways had been definitely inserted in the contract. Ibid. 628.

5. *Jurisdiction of a court of equity to protect party's rights.* Where a party granted a right of way over his land to a railway company, taking back an agreement in writing to perpetually maintain certain openings under the road as passage-ways for stock, and a successor of the company, through a judicial sale, was about to close such passage-ways, it was *held*, that a court of equity had jurisdiction to protect the land owner in the enjoyment of his rights under his contract by enjoining the closing up of such openings or passage-ways. Ibid. 628.

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CHANCERY. *Continued.*

JUDGMENT AT LAW.

6. *Enjoining its enforcement.* It is well settled that a court of equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmixed with fault or negligence on his part. *Bardonski* v. *Bardonski et al.*, 284.

7. Where a party, when sued at law with another, relies solely on the promise of his co-defendant to take care of his interest and make a defense for both, and pays no retainer fee to his co-defendant, who is also an attorney at law, and nearly two years thereafter the suit is dismissed as to the co-defendant, and judgment entered by default against the other, who employs no one and takes no steps to present his legal defense, his negligence will be such as to preclude him from enjoining the collection of such judgment. Ibid. 284.

CREDITOR'S BILL.

8. *Essential allegations and proof.* In a creditor's bill for the purpose of reaching equitable assets of the defendants, and to subject them to the complainant's judgment, it is necessary to allege and prove that the complainant's remedy at law has been exhausted before the filing of the bill. *Wisconsin Granite Company* v. *Gerrity et al.*, 77.

9. But when the real scope and effect of the bill is simply to set aside and remove out of the way of the complainant's execution upon his judgment at law, certain conveyances executed by the judgment debtor after he became debtor to the complainant, without any valuable consideration and purely voluntary, it is not necessary to allege and prove the exhausting of his legal remedy, but the creditor may file his bill as soon as he recovers his judgment. Ibid. 77.

BILL TO REMOVE CLOUD ON TITLE.

10. *Contract for sale of land — by an agent — in excess of his authority.* The record of a contract for the sale of land made by an agent not in pursuance of his authority, but in excess thereof, being such as to interfere with the sale by the principal, will be treated in equity as a cloud upon the title of the latter and set aside. *Monson et al.* v. *Kill*, 248.

11. *Must allege possession or that the land is unoccupied.* A bill seeking to remove a cloud upon the title to land is defective if it fails to allege that the complainant is in the possession of the land, or that he claims to be the owner thereof, and that it is unimproved and unoccupied, and is subject to a special demurrer. Ibid. 248.

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CHANCERY. BILL TO REMOVE CLOUD ON TITLE. *Continued.*

12. *Waiver of defects in bill to remove.* If the complainant in a bill to remove a cloud on title is in the possession of the land at the time of filing the bill, that fact should be alleged. But if the defendant fails to demur specially for that cause, and answers and proceeds to hearing without objection, he will waive the defect in the bill. *Monson et al* v. *Kill*, 248.

BILL OF REVIEW.

13. *When it lies.* If there has been an erroneous application of the facts found by a decree, a court of equity may revise or reverse the decree by bill of review. *Jackson et al.* v. *Jackson et al.*, 274.

14. *Must be brought within five years.* A decree in a suit for partition which finds the several interests of the parties, and appoints commissioners to make partition, is a final decree, though no partition is ever made, which may be reviewed by writ of error or bill of review in five years after the rendition of the same. The fact that the case remains on the docket several years later than the decree, can not affect the rule requiring a bill of review to be filed within that time. Ibid. 274.

15. *Minority of party excluded from the five years' limitation.* A bill of review, for error apparent on a decree or the record, must be brought within the time allowed for suing out writs of error, which is five years. In such case the minority of the party filing the bill will be excluded from the five years the same as on a writ of error. Ibid. 274.

PRESERVING THE EVIDENCE.

16. *Recitals in a decree — how far conclusive.* One of the usual modes of preserving the evidence of a fact in a chancery suit, is by the finding of such fact in the decree. In such case, the evidence must be preserved in the record by a certificate, if its sufficiency to establish the fact is questioned. When the evidence is not preserved by certificate, the findings of fact in the decree will be conclusive on this court. *Kohlsaat* v. *Crate*, 14.

17. *Demurrer to the bill, overruled — abiding by the demurrer.* When the defendant, under the Burnt Records act, demurs to the bill and abides the same when overruled, he can not afterward object that no evidence was given in support of the allegations of such petition. In such a case the statute does not require the evidence heard to be set forth and preserved. *Jackson* v. *Glos*, 21.

BILL UNDER BURNT RECORDS ACT.

18. *Making deceased persons parties — how taken advantage of.* If a bill for the confirmation of title under the Burnt Records act shows on its face that two persons made defendants were dead before the bill was filed, the irregularity should be taken advantage of by demurrer, so as to afford the complainant an opportunity to

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CHANCERY. BILL UNDER BURNT RECORDS ACT. *Continued.*

dismiss as to such persons. If so taken, the court will be called upon to rule in respect of the costs occasioned by making deceased persons parties. *Jackson* v. *Glos*, 21.

COSTS.

19. *Discretion of the chancellor.* The taxing of costs in a chancery proceeding is always within the sound legal discretion of the chancellor, and his decree in that regard will only be reversed when it is shown that such discretion has been abused. *Waterman et al.* v. *Alden et al.*, 90.

MASTER'S REPORT.

20. *Overruling exceptions to immaterial items.* There is no error in overruling an exception to a master's report for a failure to find that money loaned belonged to the complainant, where the title to the note taken on such loan, or the money it represents is not involved in the suit. *Herbert* v. *Herbert*, 115.

CHANCERY PRACTICE.

21. *Decree nunc pro tunc.* There is no error in entering a decree *nunc pro tunc*, thereby restricting the time in which to perfect an appeal, when the party is not thereby prevented from perfecting his appeal. *Monson et al.* v. *Kill*, 248.

MISAPPYLING CORPORATE FUNDS.

22. *Power of courts of equity to restrain municipal corporations.* Tax payers and property holders may resort to equity to restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from misapplying the moneys of the corporation and from making payment of illegal claims. But, as a general rule, the restrictions upon the right of a court of equity to interfere with the action of municipal bodies extend to cases where these bodies are exceeding their lawful powers. *Stevens et al.* v. *St. Mary's Training School et al.*, 336.

MUNICIPAL CORPORATIONS.

23. *Enjoining the passage of resolutions and ordinances.* The weight of authority and the tendency of the more recent decisions are in favor of the position that the restraining power of the courts should be directed against the enforcement, rather than the passage of unauthorized orders and resolutions or ordinances by municipal corporations. Ibid. 336.

24. There are instances when this restriction upon the power of the courts will sometimes be disregarded, as when the corporate body is exercising mere business or ministerial, rather than legislative, powers, or is wrongfully disposing of property held by it as trustee for the public, or is attempting to act upon matters not, by its charter or by the law, subject to its jurisdiction. Ibid. 336.

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CHANCERY. MUNICIPAL CORPORATIONS. *Continued.*

25. It is well settled that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations. *Stevens et al.* v. *St. Mary's Training School et al.*, 336.

26. A court of equity has not the power to enjoin a county board from passing a resolution that an illegal contract be made by the county, and from making an order that an illegal claim be allowed against the county, where no irreparable injury is likely to ensue therefrom, but it may enjoin the execution of such contracts when made and the payment of such claims after their allowance. Ibid. 336.

REFORMING CONTRACT.

27. *Imperfect contract for sale of homestead.* See HOMESTEAD, 4, 5.

JURISDICTION.

28. *To charge trustees with losses.* See TRUSTS AND TRUSTEES, 8.

29. *To remove trustees or compel them to act.* Same title, 6, 7, 8.

CLOUD ON TITLE.

BILL TO REMOVE.

Agent's unauthorized contract. See CHANCERY, 10.

COMMON LAW.

ACTS OF THE BRITISH PARLIAMENT.

1. *How far in force in this State.* The common law of England, so far as applicable and of a general nature, and also all statutes or acts of the British Parliament made in aid of and to supply the defects of the common law prior to the fourth year of James the First, are in force in this State, except so far as they are changed by legislative authority. *Wunderle* v. *Wunderle*, 40.

CONFLICT OF LAWS.

TREATY PROVISIONS.

Conflicting with statutory provisions. See TREATY, 1 to 4.

CONGRESS.

HARBORS AND NAVIGABLE WATERS.

Regulating the improvement thereof. See NAVIGABLE WATERS, 1, 2, 3.

CONSIDERATION.

ESSENTIAL.

For specific performance of contract. See CHANCERY, 1, 2.

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CONSTITUTIONAL LAW.

ALIEN ACT OF 1887.

1. *Whether special legislation. The Alien act* of 1887 is not a special law within the meaning of the State constitution. It is sufficiently general in its terms to embrace all non-resident aliens, except those included in the exception specified in section 1 thereof. A limitation of its general application arising from the exercise of the treaty-making power by the general government does not make it special within the meaning of the State constitution. *Wunderle et al.* v. *Wunderle*, 40.

2. If that act had, in express terms, excepted from its operation those citizens or subjects of foreign countries, to whom the right to take and hold lands in the United States had been secured by existing treaties, it would still be a general law as to a large number of non-resident aliens not embraced within the class so excepted. Ibid. 40.

3. The law of 1887, relating to non-resident aliens, does not contravene the constitutional prohibition of special legislation changing the law of descents. Ibid. 40.

4. The object of the exception in section 1 of the act of 1887 was to save the rights of those aliens who had already acquired lands in this State, subject to the laws thereof; that is to say, subject to the provisions of the act of 1851, and the embodiment of such reasonable exception in the act of 1887 did not make that act a special law within the meaning of the State constitution. Ibid. 40.

SPECIAL LAWS.

5. *Distinguished from general laws.* Laws are not special when general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation. Ibid. 40.

6. *Application of the constitutional prohibition.* It is not clear that the constitutional prohibition against special legislation was intended to refer to the operation of State laws upon different classes of foreigners, but only to their operation upon different classes among the citizens of the State; and, more especially, is it not clear that discrimination among different classes of non-resident aliens was intended to be forbidden by the prohibition of special legislation changing the law of descents. Ibid. 40.

STATUTE UPHELD.

7. *Unless clearly unconstitutional.* A statute ought to be upheld by the courts unless it is clear that it conflicts with the constitution. Ibid. 40.

SPECIAL LEGISLATION.

8. *Sec.* 55, *Art.* 9, *chap.* 24, *R. S.* See STATUTES, 9, 10.

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CONSTITUTIONAL LAW. *Continued.*

QUALIFICATIONS OF JURORS.

9. *Sec.* 14, *chap.* 78, *R. S.* See JURY, 10 to 18.

CONSTITUTIONAL GUARANTY.

10. *Impartial jury.* Same title, 2.

AUTHORIZING WOMEN TO VOTE.

11. *For school officers.* See SCHOOLS, 1.

SECTION 16 OF THE ROAD AND BRIDGE LAW.

12. *Proviso as to* 35,000 *inhabitants.* See TAXATION AND TAX TITLES, 2.

APPEAL BY THE PEOPLE.

13. *Fish law of* 1885 *and* 1887. See APPEALS AND WRITS OF ERROR, 2, 3.

APPROPRIATING FUNDS.

14. *In aid of sectarian schools.* See COUNTIES, 10, 11.

CONSTRUCTION.

OF STATUTES.

1. *General rule.* See STATUTES, 10.

OF A TREATY.

2. *Alien land laws.* See TREATY, 5 to 8.

CONTRACTS.

BUILDING CONTRACT.

1. *To pay on architects' certificate — its conclusiveness.* Where a building contract provides that the contract price etc., agreed to be paid for the erection of a building, shall be paid by the owner to the contractors "upon the presentation of certificates signed by" the architects therein named, who are to settle all disputes and adjust the accounts, a recovery may be had upon the execution of the architects' certificates of the sum due, without first presenting the same to the owner of the building. In such case the presentation of the certificate is not one of the substantial requirements of the contract, but the decision in writing by the architect of the sum due is the substantial part thereof. *Arnold et al.* v. *Bournique*, 132.

2. In such case, when the architec has adjusted the accounts, determined the amount due from the owner to the contractor, and has delivered to the latter a final certificate of such sum so found due and owing, the rights of the parties will thereby become fixed, and the fact that the contractor does not keep such certificate, or hands it back to the architect, will not change the relations or rights of the parties, nor will such act affect the validity of the certificate, but its validity will remain the same after it is returned as before. Ibid. 132.

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CONTRACTS. BUILDING CONTRACT. *Continued.*

3. Where a building contract provides that in case of a disagreement relating to the extra work or work to be deducted, or in regard to the performance of any covenant, the decision of an architect in respect thereto shall be final, the execution and delivery of a certificate by him of the value of the extra work and work deducted, and of the sum due the contractor, will be conclusive on both parties to the contract, unless fraud or mistake is shown. *Arnold et al.* v. *Bournique*, 132.

4. *Architects' certificate—condition precedent.* Where, by the terms of a contract under which materials are furnished and labor is performed in the erection of a building, it is provided that payment shall only be made upon the certificate of an architect, the law is well settled that the obtaining of such certificate is a condition precedent to the payment of the money, and an action can not, as a general rule, be maintained to recover the money until the certificate has been obtained from the architect. Ibid. 132.

5. *Certificate fraudulently withheld.* If, however, the materials have been furnished and the work completed according to the contract, and a certificate has been demanded from the architect and fraudulently withheld by him, the contractor will be relieved from the necessity of procuring the architect's certificate. Ibid. 132.

WITHOUT CONSIDERATION.

6. *Bond for a deed.* Where an indebtedness is paid by the conveyance of land in Dakota, and subsequently the debtor, by a distinct agreement, gives a bond for a deed to the creditor for the conveyance of other land to indemnify him against loss on a sale of the Dakota land, the bond given under the subsequent agreement will be purely voluntary and without consideration. *Batcheller et al.* v. *Batcheller*, 471.

7. *Security for existing debt.* To show that a bond for a deed of a party's interest in an estate is, in fact, a security for a subsisting debt, it is not enough that the proof shall merely show a parol agreement to reconvey. There must be a continuing valid indebtedness secured by it which may be enforced by the holder of the bond in an action at law. Ibid. 471.

8. When a party claims that his written contract to convey real estate was given as a security for the payment of a debt, the burden of proof will be on him to prove the fact. Ibid. 471.

VOID AND VOIDABLE.

9. *When void, and when voidable.* A contract is void when it is without any legal effect, and voidable when it has some effect, but is liable to be made void by one of the parties, or a third person. These definitions are also applicable to sales and other acts which may be void or voidable. *Niagara Insurance Co.* v. *Scammon*, 496.

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CONTRACTS. VOID AND VOIDABLE. *Continued.*

10. A sale of property under a power contained in a mortgage which is voidable, at the instance of the mortgagor, becomes absolutely void when set aside by a decree of a court of competent jurisdiction, and such sale becomes void *ab initio*. *Niagara Insurance Co.* v. *Scammon*, 490.

11. *Voidable — void from what date.* A transaction which is capable of being rescinded on the ground of fraud or irregularity is to be treated as good until rescinded, but the agreement or sale is to be considered as rescinded only as of the date of the decree of the court setting the same aside, but as of the date of the unequivocal, open declaration of the injured party that he demands a rescission, followed, upon refusal, by a prompt application to the court. Ibid. 490.

12. So, when the validity of a sale under a power in a mortgage is promptly denied by the mortgagor, and he continues in possession asserting his continued ownership, and he takes prompt steps by which he has the sale set aside, but the premises are destroyed by fire before the decree setting the sale aside, the sale will be held as void from the beginning, and will not defeat a recovery by him of the loss, from the insurance company. Ibid. 490.

CONTRARY TO PUBLIC POLICY.

13. *Whether enforcible.* An agreement between a person and an attorney, representing creditors of an absconding debtor, that such person will procure for the attorney the affidavits of the debtor and two other persons, showing that a sale made by the debtor was fraudulent and without consideration, to be used on a motion for a new trial in a case on a creditor's bill, and also the deposition or testimony of such debtor and two other persons to the same effect, to be used in said litigation, for which such person is to be paid twenty-five per cent of the debt so collected, is contrary to public policy, and, therefore, illegal and void. *Goodrich* v. *Tenney et al.*, 422.

14. An agreement or contract to pay money to influence legislation; one founded upon violation of public trust and confidence; to pay public officers for the performance of official duty; for the buying or selling of public office; for the purpose of stifling criminal prosecutions and agreements relating to civil proceedings involving anything inconsistent with the full and impartial course of justice therein, or that tend to prevent the course of justice or its pure administration by the courts, are justly deemed contracts of turpitude, contrary to sound public policy, and void. Ibid. 422.

15. *Grounds of defense.* The courts of justice will not enforce the execution of illegal contracts, nor aid in the division of the profits of an illegal transaction between associates. In such case the maxim "*melior est conditio possidentis*" applies. Neither party

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CONTRACTS. CONTRARY TO PUBLIC POLICY. *Continued.*

in pari delicto can have assistance from the courts; but the objection against the legality of a contract may be made by a party *in pari delicto*. The defense is not allowed in behalf of the party objecting, but upon principles of public policy. *Goodrich* v. *Tenney et al.*, 422.

MUTUALITY OF UNDERTAKING.

16. *Contract signed by a third person not named therein.* Where a third person merely annexes his name to a contract, which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature can only be regarded as an expression of his assent to the act of the parties making the contract, and may perhaps operate as an estoppel against his assertion of title. *Lancaster et al.* v. *Roberts et al.*, 213.

17. So, when a written contract recited that A agreed to sell, and B agreed to purchase, a lot at a price named, and contained a covenant to convey by a good and sufficient warranty deed on payment, and the contract was signed by A, C and D as well as by B, it was held that C and D could not be held bound by the covenant or be treated as signing as joint vendors of A any more than that they signed as joint purchasers. Ibid. 213.

18. In such a case there is a want of mutuality in the contract as between B, the purchaser on the one side, and C and D on the other, as the latter could not enforce the contract as to B. Ibid. 213.

19. Where a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other. Ibid. 213.

DEFINITENESS.

20. *Sufficient to maintain specific performance.* See CHANCERY, 3.

ANTE-NUPTIAL CONTRACT.

21. *In lieu of dower.* See DOWER, 9 to 12.

OF SALE.

22. *Construed against vendor.* See VENDOR AND PURCHASER, 4, 5.

23. *Waiver as to time of performance.* Same title, 6, 7, 8.

24. *Option to rescind or demand performance.* Same title, 1, 2, 3.

CONVEYANCES.

ACKNOWLEDGMENT OF DEED.

1. *Before a notary — out of his county.* A notary public is authorized by the statute (sec. 9, chap. 99), to take the acknowledg-

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CONVEYANCES. ACKNOWLEDGMENT OF DEED. *Continued.*

ment of a deed in a different county from that in which he resides. *Guertin* v. *Mombleau*, 32.

MARRIED WOMAN.

2. *After-acquired title.* In 1872, and before the Act of 1874, enlarging the powers of married women, a husband and wife made a deed purporting to convey the title to certain lots which the wife claimed, but as to part of which she had no title. It was held that an after-acquired title of the wife passed to the grantee. Ibid. 32.

3. *Release of dower.* See DOWER, 1.

SUBJECT TO A MORTGAGE.

4. *Rights of grantee.* When a person takes a conveyance of land subject to a mortgage of the vendor, which the purchaser assumes to pay, he will be placed in the shoes of his vendor, and his title will be good as to everybody but the mortgagees. *Holden* v. *Dunn et al.*, 413.

ESTATE CONVEYED.

5. *Sec.* 13, *chap.* 30, *R. S., construed.* See STATUTES, 8

NAMES — IDEM SONANS.

6. *Presumption as to identity of person.* See NAME, 1.

EQUITABLE TITLE.

7. *Declaration of trust.* See TRUSTS AND TRUSTEES, 15.

TO WIFE OR CHILD.

8. *Advancement presumed.* See ADVANCEMENT, 1.

COSTS.

IN CHANCERY.

1. *Discretion of the chancellor.* The taxing of costs in a chancery proceeding is always within the sound legal discretion of the chancellor, and his decree in that regard will only be reversed when it is shown that such discretion has been abused. *Waterman et al.* v. *Alden et al.*, 90.

2. The awarding of costs in a court of chancery is a matter of discretion with the court, and the exercise of that discretion will not be reviewed except for abuse. *Rogers et al.* v. *Tyley*, 652.

3. A proceeding to establish title under the Burnt Records act is a chancery proceeding and the rule in chancery as to costs is applicable. Ibid. 652.

4. Section 20 of the Burnt Records act does not make it the duty of the court to limit the costs, but simply fixes the maximum fees which officers and employees may charge, or be allowed, for services

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COSTS. IN CHANCERY. *Continued.*

rendered in proceedings under that act. If costs have been taxed in violation of the section, the remedy is by motion in the court below to re-tax them. *Rogers et al.* v. *Tyley*, 652.

TRUSTEES.

5. *Liability of trustees for costs.* See TRUSTS AND TRUSTEES, 10.

COUNTIES.

THEIR POWERS.

1. A county has power to do all acts in relation to its property and concerns necessary to the exercise of its corporate powers; and each county board has power to manage the county funds and the county business, and to examine and settle all accounts against the county. *Stevens et al.* v. *St. Mary's Training School et al.*, 336.

2. *Judicial control.* Counties are public corporations created for the purpose of convenient local government, and possess only such powers as are conferred upon them by law. Their powers are more limited than those of incorporated cities and villages. But in the exercise of such discretionary or legislative powers as are conferred on them by law, they are as much beyond judicial control as other municipal corporations. Ibid. 336.

3. *Power of courts of equity to restrain them.* Tax payers and property holders may resort to equity to restrain municipal corporations and their officers from making unauthorized appropriations of the corporate funds, and from misapplying the moneys of the corporation and from making payment of illegal claims. But, as a general rule, the restrictions upon the right of a court of equity to interfere with the action of municipal bodies extend to cases where these bodies are exceeding their lawful powers. Ibid. 336.

4. The weight of authority and the tendency of the more recent decisions are in favor of the position that the restraining power of the courts should be directed against the enforcement, rather than the passage of unauthorized orders and resolutions or ordinances by municipal corporations. Ibid. 336.

5. There are instances when this restriction upon the power of the courts will sometimes be disregarded, as when the corporate body is exercising mere business or ministerial, rather than legislative, powers, or is wrongfully disposing of property held by it as trustee for the public, or is attempting to act upon matters not, by its charter or by the law, subject to its jurisdiction. Ibid. 336.

6. It is well settled that courts of equity will not attempt to control the discretionary or legislative powers vested by law in municipal corporations. Ibid. 336.

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COUNTIES. THEIR POWERS. *Continued.*

7. *Whether estopped to aver their own incapacity.* A municipal corporation which has entered into a void contract will not be estopped from taking advantage of its own incapacity when suit is brought upon such contract, or other efforts are made to secure its execution. *Stevens et al.* v. *St. Mary's Training School et al.*, 336.

COUNTY BOARDS.

8. *Exercise of legislative powers — interference of courts of equity.* Where county boards are acting within the boundaries of their legislative powers, the courts will not only refrain from interfering with the passage of resolutions or orders by them, but will also refuse to enjoin the enforcement of such resolutions and orders, except in certain cases where they are unreasonable. Ibid. 336.

9. A court of equity has not the power to enjoin a county board from passing a resolution that an illegal contract be made by the county, and from making an order that an illegal claim be allowed against the county, where no irreparable injury is likely to ensue therefrom, but it may enjoin the execution of such contracts when made, and the payment of such claims after their allowance. Ibid. 336.

SECTARIAN SCHOOLS.

10. *Appropriating funds in aid of sectarian schools.* The county boards in this State have no power to appropriate county funds in aid or support of sectarian schools, or of any school controlled by a church or religious denomination, as that is prohibited in express terms by section 3 of article 8 of the constitution. Ibid. 336.

11. The direction in the constitution that no county shall appropriate or pay any of the public funds to a school controlled by a church, involves the ascertainment of a fact. It must be ascertained by the county board whether the school applying for the appropriation or payment is or is not controlled by a church. The court can not assume in advance that the county board will ignore the real facts and violate the fundamental law by making illegal contracts or payments. It is time enough for a court of equity to interfere when the attempt is made to enforce the unconstitutional act. Ibid. 336.

CRIMINAL LAW.

TWICE IN JEOPARDY.

1. *Appeal by the people.* A defendant having been arrested for a criminal offense, tried before a competent court and acquitted, can not, on the application or appeal of the people, be tried a second time. This applies as well to misdemeanors as to felonies. *The People* v. *Miner et al.*, 308.

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CRIMINAL LAW. *Continued.*

FISH LAW.

2. *Provision for appeal, unconstitutional.* Section 14 of the fish law of 1885 and 1887, which provides for an appeal from a judgment, acquitting one charged with a breach of that law, and for his trial on appeal, is in violation of section 10, article 2 of the constitution, which provides that no person shall twice be put in jeopardy for the same offense. *The People* v. *Miner et al.*, 308.

OF THE TRIAL.

3. *Absence of judge from the bench, during argument.* Under the law a person on trial for a serious crime, which may deprive him of his liberty, has the right to the presence of the presiding judge during the argument of the case to the jury, and his absence during the closing remarks of the State's Attorney, so as not to be able to pass upon objections to statements made by the attorney, is an error of such magnitude as to call for a reversal of a judgment of conviction. *Thompson v. The People*, 378.

4. On the trial of a criminal case before a jury the defendant has the right to be heard before the jury in person or by counsel, as he may elect. This is a right guaranteed by law. Indeed, the argument before the jury is a part of the trial of the cause, as well as the introduction of evidence to prove the guilt or innocence of the defendant, or any other fact at issue on the trial. Ibid. 378.

WRIT OF ERROR.

5. *Abatement — by death of defendant.* See APPEALS AND WRITS OF ERROR, 14.

IMPARTIAL JURY.

6. *Right of defendant to an impartial jury.* See JURY, 2.

CRIMINAL PROSECUTIONS.

7. *Favored by the law.* See MALICIOUS PROSECUTION, 1.

CURTESY.

ESTATE BY THE CURTESY.

1. *When it arises at common law.* At common law where a man marries a woman seized, at any time during coverture, of an estate of inheritance, and has issue by her born alive, which might by possibility inherit the same estate as heir to the wife, and she dies in the lifetime of the husband, he will hold the land during his life as tenant by the curtesy. *Jackson et al.* v. *Jackson et al.*, 274.

2. *Interest of husband in the lands of his wife — at common law.* Under the common law there were two interests which, under the marriage relation, a husband might acquire in the lands of the wife: *first*, by virtue of the marriage alone the husband had the right to occupy the lands of which the wife was seized and to re-

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CURTESY. ESTATE BY THE CURTESY. *Continued.*

ceive the rents and profits during coverture; *second*, upon the birth of a child capable of inheriting, the husband became invested with an estate in the lands, which, during the life of the wife, was denominated initiate, and upon her death became consummate. *Jackson et al.* v. *Jackson et al.*, 274.

3. A woman married in 1858 acquired title to eighty acres of land and had issue born capable of inheriting in 1859, and also in 1860. *Held*, that her husband took a vested estate in the land as a tenant by the curtesy initiate, which he might have conveyed, and one which might have been sold on execution against him, and that it was not within the power of the legislature to deprive him of such vested estate by any subsequent act. Ibid. 274.

4. *Married Woman's act of* 1861 *and* 1874 — *abolishing estate by curtesy.* Where a married woman in 1873 acquired title to a tract of land, it was held that her husband was, by the Married Woman's act of 1861, precluded from acquiring any estate in such land during the coverture, and the wife not dying until after the act of 1874 took effect, he took only dower in such land. During his wife's life the husband had no vested estate in his wife's land, acquired since the act of 1861, and the legislature had the right to abolish the estate by curtesy. Ibid. 274.

DESCENTS.

WHO MAY INHERIT.

1. *Non-resident aliens — sec.* 1, *chap.* 39, *R. S.* If a citizen of the United States dies intestate seized of land in this State, leaving no issue, but leaving a widow, who is a resident citizen, and a brother and sister, who are non-resident aliens and incapable of taking by inheritance, and no other kindred capable of taking are shown, the widow, under clause 6 of section 1 of chapter 39 of the Revised Statutes, will take the whole of the land as the sole heir. The kindred referred to in such statute refers to such kindred as are capable of inheriting. *Wunderle et al.* v. *Wunderle*, 40.

2. *Subject to legislative control.* Citizens of the United States are not deprived of the right to transmit their lands by devise or descent merely because certain of their kindred, who are non-resident aliens, are declared to be incapable of inheriting real estate. The law-making power can direct who shall be regarded as heirs, and where land shall go in default of heirs. When a subject or citizen dies intestate, the presumption of law is that he has heirs capable of inheriting. Ibid. 40.

3. *Legislative power — law at the time of descent cast — vested rights.* Rules of inheritance are the creatures of municipal or civil law, and except as to rights already vested, may be changed and modified at pleasure. The legislature has power to change the course

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of descents, and such change will operate instantly upon all estates which may subsequently descend. The law existing at the time of descent cast governs the right to inherit. A mere expectation of property in the future is not considered a vested right. *Wunderle et al.* v. *Wunderle*, 40.

4. Neither citizens nor aliens have vested rights in the estates of their living kindred. But aliens who had acquired lands in this State before the act of 1887 went into effect, had vested property rights which could not be confiscated or taken from them. Ibid. 40.

5. *Common law — aliens incapable of taking by inheritance.* The right of inheritance is an incident of allegiance or citizenship, and an alien can not take lands by descent nor transmit them to others as his heirs, by the common law. By that law aliens had no inheritable blood and were incapable of taking by inheritance. Ibid. 40.

6. *Aliens taking lands by act of parties — title at common law.* At common law, though aliens could not take by operation of law, they could take by the act of the parties. Not taking by descent, they could take by grant or devise until "office found;" that is to say, an alien could hold lands conveyed or devised to him until it was ascertained by inquiry or inquest of office whether or not such lands belonged to the sovereign by reason of the alienage of the holder. Ibid. 40.

7. Hence it is generally held that in the absence of express statutory provisions to the contrary, an alien's title to land purchased by him or devised to him, is valid against everybody but the State, and can be divested only by "office found" or by some other act or proceeding taken by the State for the purpose of acquiring possession. Ibid. 40.

ALIEN ACT OF 1887.

8. *Escheats at common law — and under the act of* 1887. The act of 1887 in enacting that "a non-resident alien * * * shall not be capable of acquiring title to, or taking or holding any lands or real estate by descent," is merely declaratory of the common law. By that law, if a man leaves no other relatives but aliens, his lands will escheat to the sovereign without office found. In such case a proceeding in the nature of office found is not necessary to vest in the sovereignty the title to land escheated for want of heirs. But a proceeding may be required, not to give title, but for information of title already passed. Ibid. 40.

9. Such a proceeding is the Illinois statute in regard to escheats, the first section of which declares, among other things, that the estates of persons dying seized of real estate without any devisees or heirs capable of inheriting the same, shall escheat. Titles by escheat must be established in accordance with the provisions of this statute. Ibid. 40.

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DESCENTS. ALIEN ACT OF 1887. *Continued.*

10. As under the act of 1887, the lands of a deceased intestate in this State can not descend to his non-resident alien kindred, they will escheat to the State or county, if he leaves no resident kindred capable of inheriting. *Wunderle et al.* v. *Wunderle*, 40.

11. If a citizen of this State dies intestate leaving lands in the State and his next heirs are aliens who can not take, the inheritance will descend to the next of kin who are competent to take, in like manner as if no such aliens had ever existed, and the lands will not escheat. Ibid. 40.

REAL ESTATE.

12. *Title passes according to the lex rei sitæ.* It is a general rule of the common law that the title to real property must be acquired and passed according to the *lex rei sitæ*. This rule not only applies to alienations and acquisitions made by the act of the parties, but also to estates and rights acquired by operation of law. And the descent and heirship of real estate are governed by the law of the country where it is located. Ibid. 40.

13. This principle, originally applicable between countries entirely foreign to each other, prevails as among the States of the American Union, and from it results the doctrine that the title of aliens to land within the limits of the several States is a matter of State regulation. Ibid. 40.

SURVIVING HUSBAND OR WIDOW.

14. *Must be capable of taking, in order to inherit.* The statute (chap. 39, sec. 1) which makes the surviving husband or widow of a decedent an heir when there is no descendant left, applies to cases where the surviving widow or husband is capable of taking, and not to cases where there is incapacity by reason of alienage. *Schultze* v. *Schultze et al.*, 290.

ALIEN HEIRS INCAPABLE OF TAKING.

15. *Estate will descend to nearest heir who is capable of taking.* In the absence of any treaty of the United States with a foreign country providing otherwise, the interest that a non-resident alien heir of a citizen of this State would take but for his alienage, will not escheat to the State or the county, if there is a resident heir capable of taking by descent, as such heir will take the entire estate of such decedent, and hence the State or county is not a necessary party to a bill for partition. Ibid. 290.

STATUTES CONCERNING.

16. *How affected by conflicting treaty provisions.* See TREATY, 1 to 4.

FORECLOSURE SALE.

17. *Payment of mortgage debt — right of heirs to surplus.* See DOWER, 8.

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DIVORCE AND ALIMONY.

ALIMONY.

Pending suit for separate maintenance. See HUSBAND AND WIFE, 1 to 9.

DOWER.

CONVEYANCE.

1. *Deed sufficient to release.* Where a deed of a husband is signed and acknowledged by his wife without mention of her name in the same, her signature will operate as a relinquishment of her dower, although the deed does not mention her as a grantor, or her dower in any way whatever. This depends upon the provisions of our statutes which are construed as giving to the signature or acknowledgment of the wife or husband such effect. *Lancaster et al.* v. *Roberts et al.*, 213.

PROCEEDS OF MORTGAGED PREMISES.

2. *After payment of mortgage under foreclosure sale.* Where a person purchases land subject to a mortgage, which he assumes to pay and discharge, and dies after decree that the property be sold under a power of sale if the sum found to be due is not paid within the time fixed therein, but before any sale is made, the mortgaged premises will descend to his heirs, subject to the encumbrance of the decree, and his widow will be entitled to dower in any surplus of the sale money after satisfying the decree as against judgment creditors of her husband. *Holden* v. *Dunn et al.*, 413.

3. If, on a sale of land under a decree of foreclosure, the mortgaged premises sell for a greater sum than is necessary to satisfy the mortgage debt, the excess will represent and take the place of so much property as it is for. In such case the money in excess of the mortgage debt is the representative of the land, and will pass to the widow and children of the owner of the equity of redemption, if the sale is not made before his death, and not to the administrator. Ibid. 413.

4. The interest of a mortgagee is merely the right to subject the mortgaged premises to the payment of his debt, and before entry for condition broken, or purchase under sale pursuant to decree, it is not such an interest in land as may be sold on execution or mortgaged, but the mortgagor's title is such an interest, and, being such, it is subject to dower under our statute. Ibid. 413.

5. *Intervening petition of widow for dower in surplus.* Where a decree was entered against a husband and wife for the foreclosure of a mortgage, which was a prior lien, and against which the wife had no right of dower, and the decree directed the payment of the proceeds in satisfaction of the mortgage and the surplus money to other creditors of the husband, as to whom there was no release of dower, and he died before any sale, whereby the widow

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DOWER. PROCEEDS OF MORTGAGED PREMISES. *Continued.*

was entitled to dower against such other creditors, it was held no error, on her intervening petition, to so modify the original decree as to give her dower in any surplus of the proceeds of the sale, after payment of the mortgage debt. *Holden* v. *Dunn et al.*, 413.

6. *Surplus distributed as realty.* A conditional decree authorizing the sale of land under a power, in the event that the amount found to be due on a mortgage is not paid, will not operate as an equitable conversion of the mortgaged premises into personalty. Ibid. 413.

ANTE-NUPTIAL CONTRACT.

7. *In bar of dower — competency of widow to testify.* On bill for dower in which an ante-nuptial agreement is set up in bar, which the widow claims is unreasonable, she will not be competent to testify to the circumstances attending the making of the agreement, for the purpose of impeaching its fairness. *Taylor et al.* v. *Taylor*, 436.

8. *In lieu of dower — set aside for unfairness.* A marriage contract was entered into four days before marriage of the parties, by which the intended wife, in consideration of $2000, to be paid two years after the husband's death, released all the rights given her by law in his estate, including dower and homestead, and by which he also released all rights in the wife's estate, and it appeared that she had no property or expectation of property, which provision for the wife was shown to be very inadequate, taking into consideration his means. There was no proof of the circumstances attending the execution of the contract, or that the wife was made acquainted with the extent of property owned by her intended husband: *Held*, that the agreement was one-sided and unfair to the wife, and did not bar her right of dower in the husband's lands and estate. Ibid. 436

9. While it may be conceded that an intended wife has the legal capacity to make an ante-nuptial contract, and that marriage is a sufficient consideration to support it, yet in the absence of clear and satisfactory proof, it will not be presumed that she would, with full knowledge of all the circumstances, enter into such a contract which makes an inadequate provision in her favor. Ibid. 436.

10. *Burden of sustaining ante-nuptial contract.* Parties to an ante-nuptial contract occupy a confidential relation toward each other. While they may lawfully contract with each other when there is full knowledge of all that materially affects the contract, yet when the provision secured for the intended wife is disproportionate to the means of the intended husband, it raises the presumption of designed concealment and throws the burden upon those claiming in his right to prove that there was a full knowledge in her of all that materially affects the contract. Ibid. 436.

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DOWER. ANTE-NUPTIAL CONTRACT. *Continued.*

11. Where the provision made for the intended wife is inadequate to the husband's means, the burden will be on his heirs to prove by satisfactory evidence that she had full knowledge of the character and extent of her intended husband's property, and of the provisions of the contract, or at all events that the circumstances were such that she reasonably ought to have had such knowledge at the time the contract was executed. *Taylor et al.* v. *Taylor*, 436.

12. *Construed — after-born children.* An ante-nuptial contract provided that if any children should be born of the marriage, and survive the husband, such issue should inherit all his estate equally with any issue of him by any former marriage. "the same as if no contract existed between the parents:" *Held*, that such provision created no contract in behalf of after-born children, but was intended to leave the inheritance of the husband's property, as respects his children by his intended wife, unaffected by the contract. Ibid. 436.

ASSIGNMENT OF DOWER.

13. *Decree construed — homestead rights of minor child.* A decree for the assignment of a widow's dower directed the commissioners to give her dower "without prejudice to the homestead rights of the minor child of her deceased husband," and directed the widow to be let into the possession of the premises "so assigned to her as dower:" *Held*, that the decree did not ignore the homestead rights of the minor heir. Her possession of the homestead is in subordination to the rights of the heir, and absolute as to the other lands set apart to the widow. Ibid. 436.

DOWER OF HUSBAND.

In lands of his wife. See CURTESY, 4.

DRAINAGE LAW.

OWNER OF DOMINANT HERITAGE.

1. *Right to drain through a natural water-course.* Under section 4 of the act of 1885, relating to drainage, the land owner may drain his land in the course of natural drainage and discharge the water into any natural water-course, or into any natural depression, whereby the water will be carried into some natural water-course. *Lambert et al.* v. *Alcorn*, 313.

2. The owner of a higher tract of land has the right to have the surface water falling or naturally coming on his premises by rains or melting snows pass off through the natural drains, upon or over the lower or servient lands next adjoining; and the owner of the dominant heritage has the right by ditches and drains to drain his own land into the channel provided by nature, even if the quantity of water in that way thrown upon the next adjoining lower lands is thereby increased. Ibid. 313.

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DRAINAGE LAW. *Continued.*

WATER-COURSE.

3. *Defined.* If the conformation of the land is such as to give to the surface water flowing from one tract to the other a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its flow is a water-course within the meaning of the rule applicable to that subject. *Lambert et al.* v. *Alcorn*, 313.

4. But such water-course can exist only where there is a ravine, swale or depression of greater or less depth, and extending from one tract to the other, and so situated as to gather the surface water falling upon the dominant tract, and to conduct it along a defined course to a definite point of discharge upon the servient tract. Ibid. 313.

5. It is not important that the force of the water flowing from one tract to the other has not been sufficient to wear out a channel or canal having definite and well marked sides or banks. That depends upon the nature of the soil and the force and rapidity of the flow of the water. If the surface water, in fact, uniformly and habitually flows off over a given course, having reasonable limits as to width, the line of its flow is, within the meaning of the drainage law, a water-course. Ibid. 313.

6. *Right to improve.* A natural water-course is not required to be used only in its natural state, but may be improved, either by being deepened or widened by artificial means, or by the construction along its course of a channel or drain beneath its surface for the purpose of more effectually carrying off the surface water from the land. The construction of such improvement does not create a substantively new water-course or amount to an abandonment of the natural water-course. Ibid. 313.

PONDS.

7. *Their outlet.* Where ponds, situate on uplands, are surrounded with what may be called a rim with a slight depression at some point over which the water escapes when their basins are full, such point will constitute their outlet. Ibid. 313.

EASEMENT.

NOTICE THEREOF. See NOTICE, 4, 5.

EJECTMENT.

JURISDICTION.

1. *Involves only legal rights.* In the action of ejectment the courts can deal only with the legal title, and have no power to investigate or adjust partnership accounts, or protect mere equitable rights. *Stafford* v. *Woods*, 203.

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EJECTMENT. *Continued.*

SCIRE FACIAS.

2. *To revive judgment — its allegations.* See PLEADING, 2, 3.

ELECTIONS.

OF SCHOOL OFFICERS.

Right of women to vote. See SCHOOLS, 1 to 4.

EMINENT DOMAIN.

CONDEMNATION OF LEASED LAND.

1. *Value of respective interests of landlord and tenant.* The interest of the lessor in premises leased is the value of his reversion and the rents; that is, the reversion with the rents added. The interest of the lessee in the premises is the value of his term, subject to the rents, and each should receive compensation accordingly. Upon the judgment of condemnation being entered, the money awarded will stand in lieu of the land taken or damaged, to be apportioned upon the several interests in the property. *Corrigan et al. v. City of Chicago et al.*, 537.

2. Where the entire leasehold interest of the lessee is taken under the power of eminent domain, his compensation is the value of the leasehold estate, subject to the rent covenanted to be paid. If the value exceeds the rental, he will be entitled to recover the excess. If it does not exceed the rent, he will be entitled to nothing. Ibid. 537.

3. If the covenant to pay rent is not affected by judgment of condemnation, the lessor will be entitled, as compensation, only to the present value of his reversion which he holds subject to the term created by his lease, and the lessee continuing personally liable, but losing his estate and right to its enjoyment, will be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents *in futuro;* that is, he should receive the value of his term subject to the rent, and such further sum as would be considered a present equivalent for the rent thereafter to be paid. Ibid. 537.

4. *Tenant's interest in buildings.* Where the lessee covenants with the lessor not to remove any buildings or other improvements from the premises without the written consent of the lessor, and that at the termination of the lease he will deliver all the buildings and improvements, placed thereon, to the lessor, in good condition, etc., on a proceeding to condemn the leased premises, the lessee or holder of the leasehold will not be entitled to receive as part compensation the value of such buildings in addition to the fair cash value of the leasehold interest. Ibid. 537.

5. Where a lease for a term of years provides that the buildings and other improvements made by the tenant shall not be removed,

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EMINENT DOMAIN. CONDEMNATION OF LEASED LAND. *Continued.*

but shall be delivered to the lessor at the expiration of the term in good repair and condition, usual wear and inevitable accident alone excepted, the right of the lessees in such buildings will not extend beyond the use of the same during the term, and the lessor takes a present estate in such buildings, subject to the user by the tenants during the term. *Corrigan et al.* v. *City of Chicago et al.*, 537.

EQUITABLE RIGHTS.

ADJUSTING IN EJECTMENT. See EJECTMENT, 1.

ESCHEATS.

LAW OF DESCENTS.

1. *Failure of resident heirs.* See DESCENTS, 8 to 15.

ALIEN HEIRS.

2. *Whether capable of taking.* Same title, 15

ESTATES IN LAND.

OF THE NATURE THEREOF.

1. *Estate by the curtesy.* See CURTESY, 2, 3.

2. *Homestead estate.* See HOMESTEAD, 6, 7.

3. *Non-resident alien heirs.* See TREATY, 8 to 10.

4. *Joint ownership of land.* See TRUSTS AND TRUSTEES, 15, 16.

ESTOPPEL.

MUNICIPAL CORPORATION.

Averring its own incapacity. See COUNTIES, 7.

EVIDENCE.

VALUE OF REAL PROPERTY.

1. *Estimating by comparing with actual sales.* In arriving at the value of a house and lot in a city at a particular time, what similar property in the neighborhood sold for in the market about the same date, is competent evidence. Therefore, it is competent to show by a witness fixing a valuation, that his estimate is based upon what he had been paying for similar property in the neighborhood. *Chicago & Great Western R. R. Co.* v. *Wedel*, 9.

GENUINENESS OF WRITING.

2. *Sufficiency to show a letter is not genuine.* Where a letter purporting to have been written many years before the trial, having the appearance of being written at its date, is found in the possession of the person to whom it is addressed and resembles the handwriting of the person alleged to have signed it. the fact of the denial of the latter of its execution, when it is evident that he is in doubt

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EVIDENCE. GENUINENESS OF WRITING. *Continued.*

as to his writing the same, will not be sufficient to reverse a finding of the genuineness of such letter. *Rogers et al.* v. *Tyley*, 652.

3. *Opinions of experts as to genuineness of signature.* The rule that, when the matters in issue do not so far partake of the nature of a science as to require a previous course of study in order to a knowledge of them, the opinion of experts is not admissible, has no application where the genuineness of writings and signatures is in issue. Whether two instruments were written by the same person, or whether signatures are the same, is clearly the subject of expert testimony. Ibid. 652.

4. *Proof of handwriting by comparison.* The general rule that the genuineness of a handwriting can not be proved or disproved by comparison, is subject to the exception, that if the instrument to be used as a standard is properly in evidence in the case for other purposes, then the signature or paper in question may be compared with it by the jury. Ibid. 652.

DECLARATIONS OF MORTGAGOR.

5. *To show acquiescence in mortgage sale.* See MORTGAGES AND DEEDS OF TRUST, 6.

EXPLOSION.

LOSS BY EXPLOSION.

Whether covered by insurance policy. See INSURANCE, 4 to 7.

FELLOW-SERVANTS.

WHETHER THE RELATION EXISTS.

1. In an action by a section foreman of a railroad company for a personal injury caused by the negligence of its servants in running a freight train upon a bridge being repaired, the court instructed the jury for the plaintiff that, if, at the time of the injury, the plaintiff and the men in charge of the freight train were employed in different departments and were not associated with each other in the performance of their duties, but were wholly separated and disconnected from each other in the performance of their duties, they were not fellow-servants. *Held*, that the instruction was proper. *Peoria, Decatur & Evansville R'y Co.* v. *Rice*, 227.

2. The fact that a section foreman engaged in the repair of a railway bridge has the right to flag a freight train approaching such bridge, and it is the duty of the engineer to obey the signal, in no way tends to establish the relation of fellow-servants between them. Ibid. 227.

FISH LAW.

APPEAL BY THE PEOPLE.

Whether constitutional. See APPEALS AND WRITS OF ERROR, 3.

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FORMER ADJUDICATION.

SEVERAL ISSUES OF FACT.

1. *General verdict and judgment.* In an action of trespass *quare clausum fregit* against a city, the city interposed three pleas: Not guilty; that the alleged close was a public street of the city, and the statute of limitations, and introduced evidence in support of the two latter pleas, and a verdict and judgment of not guilty were rendered: *Held*, that the verdict and judgment were, at least, *prima facie* evidence that all the issues presented by the pleadings were found in favor of the defendant. *Rhodes* v. *City of Metropolis*, 580.

2. When several issues are presented and contested, and a general verdict is rendered, the presumption is that all the issues were found in favor of the prevailing party, but whether such presumption may be rebutted by proof is not decided. Ibid. 580.

DECREE IN CHANCERY.

3. *How far conclusive.* Where a bill in chancery is prosecuted in the name of one, at the instance or for the benefit of another, the adjudication or decree entered therein will be conclusive as to the latter, not only as to what was determined in such suit, but also as to all other matters involved which might have been raised and determined in it. The decree will equally bind one acquiring title after such suit, in the subject-matter of the suit. *Cheney* v. *Patton et al.*, 373.

4. The real party in interest to an action or bill in chancery, whether brought in his name or in the name of another for his use and benefit, with his knowledge and consent, will be bound by the judgment or decree rendered in the case. Ibid. 373.

PLEA — HELD GOOD.

5. To a bill to foreclose a second mortgage one of the defendants pleaded a former decree dismissing a bill to foreclose the same mortgage filed by another person, and alleged that, before the filing of the first bill, the complainant in the last bill assigned and transferred the notes and mortgage to the complainant in the first bill; that the latter had notice of the filing of the prior bill and of the pendency of that suit; that the prior suit was prosecuted with the knowledge and consent of the latter and in his interest and for his benefit; and that after the commencement of such prior suit the complainant in the last bill acquired from the complainant in the first bill, and was reinvested with the legal title to said notes and mortgage and was in privity with the title of the latter: *Held*, that the plea was a bar to the second suit. Ibid. 373.

6. The question in every such case must be, was the party sought to be concluded the real party in the action pleaded in bar, and if he was, whether the action was openly so conducted, or his connection therewith concealed, is immaterial. Ibid. 373.

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FORMER ADJUDICATION. *Continued.*

BURNT RECORDS ACT.

7. *Decree, how far conclusive.* See BURNT RECORDS ACT, 9.

FORMER DECISIONS.

SPECIAL LEGISLATION.

1. An act, general in its terms and uniform in its operation upon all persons and subject-matter in like situation, is a general law, and not obnoxious to the objection that it is local or special legislation. This case falls within these terms and is distinguished from *Devine* v. *Commissioners of Cook County*, 84 Ill. 590. In that case the power given by the act necessarily, not only by the limitation of population but by the wording of the statute and the purposes and objects declared, related to a single county. *Cummings et al.* v. *City of Chicago*, 563.

CONSTRUCTION OF TREATY.

2. A treaty of the United States with a foreign nation will receive a liberal, rather than a restrictive, construction, following *Hauenstein* v. *Lynham*, 100 U. S. 483. *Schultze* v. *Schultze et al.*, 290.

FRAUDULENT CONVEYANCES.

IN THE NATURE OF A GIFT.

1. *From a husband to his wife.* In this case a wife saved out of money given her by her husband for family expenses, $1,000, which she deposited in bank in her own name. Afterward, the husband needed the money to pay for property which he was purchasing, and she gave it to him, and still afterward, feeling that his life was uncertain, he made two deeds to her of certain real estate, so that in the event of his death, the property should belong to her and their children: *Held*, that the transaction was totally wanting in the indispensable elements of a bargain and sale of the property, and was purely a gift to the wife by the husband, which, though good as between them, was fraudulent as to the existing creditors of the husband. *Wisconsin Granite Company* v. *Gerrity et al.*, 77.

2. In such case, the fact that the husband retains other property, but which is not of sufficient value over and above the incumbrances thereon to satisfy the creditor's judgment, will not prevent the setting aside of the deeds to the wife as in fraud of the judgment creditor. Ibid. 77.

FREIGHT TRAINS.

CARRYING PASSENGERS THEREON. See RAILROADS, 11 to 14.

GIFT.

ITS REQUISITES.

1. *Donatio causa mortis.* There are three requisites to constitute a *donatio causa mortis:* (1) The gift must be with

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GIFT. ITS REQUISITES. *Continued.*

a view to the donor's death; (2) it must have been made to take effect in the event of the donor's death by his then existing disorder; and (3) there must be an actual delivery of the subject of the donation. *Telford* v. *Patton*, 611.

2. *Inter vivos.* It is essential to a donation *inter vivos* that the gift be absolute and irrevocable; that the giver part with all present and future dominion over the property given; that the gift go into effect at once, and not at some future time; that there be a delivery of the thing given to the donee, and that there be "such a change of possession as to put it out of the power of the giver to repossess himself of the thing given." Ibid. 611.

3. *Of the delivery.* To make such a gift the delivery of the thing given must be made with the intent to vest the title in the donee. But the delivery may be constructive, as of a key, or a part for the whole. It may be to a third person for the benefit of the donee, instead of being made directly to the donee himself. Ibid. 611.

4. *Gift inter vivos distinguished from a gift causa mortis.* A gift *inter vivos* is chiefly distinguished from a gift *causa mortis* by the facts that the former is not made in view of expected or impending death, and that it is not revocable in its nature. Ibid. 611.

5. A certificate of deposit may be the subject of a valid gift *causa mortis*, but it must be indorsed and delivered to the donee so as to vest in him complete title, or so delivered without indorsement as to create an equitable assignment of the fund it represents, divesting the donor of all control and dominion over it. Ibid. 611.

6. *Delivery to third party as agent.* When a delivery is made to a third party, in order that the latter may deliver the subject of the gift to the donee, as agent of the donor, the gift is not complete until there is an actual delivery to the donee; and until the gift is completed by delivery, the donor can revoke the agent's authority and resume possession of the gift. The death of the donor before delivery by the agent revokes the agent's authority, and he can not then make a valid delivery. Ibid. 611.

7. When the delivery is to a third person as trustee for the donee, and not as agent for the donor, such delivery completes the gift, and the death of the donor will not revoke it; but, to make out such a case, the circumstances should show a full relinquishment of dominion over the property to the trustee for the purposes of the trust. Ibid. 611.

8. *Deposit of money in the name of another.* Where money is deposited in bank in the name of a third person, but the deposit book or certificate of deposit is retained by the depositor in his

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GIFT. ITS REQUISITES. *Continued.*

own possession, the title to such fund will not pass to such person in the absence of any declaration of trust or circumstances showing an intention to vest the title. *Telford* v. *Patton*, 611.

10. A man deposited in a bank $2600 in the name of an intimate lady acquaintance some eight months before his death, taking a certificate of deposit in her name, which he never delivered to her or to any one for her. At the time of the deposit he made no declaration of trust in her favor, and never wrote to her on the subject, and she was ignorant of any such deposit until after his death: *Held*, that there was no gift of the money to the party in whose name it was deposited, and that the certificate of deposit passed on his death to his administrator. Ibid. 611.

11. To constitute a trust there must be either an explicit declaration thereof, or circumstances showing beyond a reasonable doubt that one was intended to be created. It can not be implied from a mere deposit of money by one person in the name of another. Ibid. 611.

12. *Certificate of deposit — taken by one in the name of another — evidence of ownership.* Where a party made a deposit in bank in the name of another, but never delivered the certificate thereof to such other person, and made no declaration of trust at the time or afterward, in an action of replevin by such person against the administrator of the depositor, the court instructed the jury that, if they believed, from the evidence, such party deposited the money in the name of and for the use and benefit of the plaintiff and took from the bank a certificate of deposit payable to the plaintff, then the plaintiff was entitled to recover: *Held*, that the instruction was erroneous, as ignoring the question of delivery, and leaving it to the jury to find whether or not the deposit was made for the use of the plaintiff, in addition to and separate from the finding as to whether or not such deposit was made in the name of the plaintiff, there being no proof of a deposit for her use and benefit in addition to or separate from the mere fact that the plaintiff's name was inserted in the certificate, and also for the reason that the instruction presented the question whether or not a trust was established, when the real question was, whether or not there was a gift to the plaintiff. Ibid. 611.

IN FRAUD OF CREDITORS.

13. *Conveyance set aside.* See FRAUDULENT CONVEYANCES, 1, 2.

HANDWRITING.

EVIDENCE OF GENUINENESS. See EVIDENCE, 2, 3, 4.

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HIGHWAYS.

HIGHWAY COMMISSIONERS.

1. *Making roads and bridges in incorporated cities and villages — levying tax therefor.* The commissioners of highways, under the act of 1883, section 16 of which was amended in 1889, have no power to engage in making or improving roads or constructing bridges within the incorporated limits of a city or village, or to make a levy to raise funds to enable them to make improvements in the roads and bridges within such city limits, and any attempt by the commissioners of highways to levy a tax for such a purpose may be enjoined. *Peoria & P. U. Ry. Co.* v. *The People ex rel.*, 458.

2. Where a city is organized under a special charter, which gives to it the management, care and control of the streets, highways and bridges within its corporate limits, the commissioners of highways of the town of which the city forms a part have no power to make or improve any highway or bridge in such city, or to interfere with the city in its management and control of the streets, or any improvement to be made in or upon such streets. Ibid. 458.

3. *Extending tax levy for roads and bridges over property in cities and villages.* The commissioners of highways, in levying a road and bridge tax for their town, have the power to extend the levy over the entire town, including property in an incorporated city within such town, and are not limited to such parts of the town as lie outside of the city, unless the charter of such city prohibits the township authorities from levying such tax within the city limits. Ibid. 458.

HOMESTEAD.

HOW CONVEYED.

1. *Following statutory requirements.* All deeds or other instruments for the alienation of the homestead of a party, whatever may be their language, are invalid as affecting the homestead, unless it shall be released or waived in the manner prescribed by the statute. *Stodalka et al.* v. *Novotny*, 125.

2. *Contract for the sale of a homestead — its essentials.* A contract for the sale or conveyance of land which is a homestead, must not only contain a special release of the homestead right, but it must also be in writing and subscribed by the person in whose favor the homestead exists, with his or her wife or husband, if he or she has one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged. Ibid. 125.

3. *Assignment of contract.* The holder of an estate of homestead in land held by him under a contract of purchase, can not transfer the same by his assignment of the contract in which his wife does not join. By such an assignment the assignee will acquire no right of possession which can prevail against the homestead

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HOMESTEAD. How conveyed. *Continued.*

estate, which he can assert against either the assignee or his widow after his death, she still continuing to occupy the premises. *Stafford* v. *Woods*, 203.

Imperfect contract of sale.

4. *Reforming and enforcing specific performance.* Where the written contract of a husband and wife for the conveyance of their homestead contains no release of the right of homestead, and is not acknowledged as required by law, a court of equity can not specifically enforce the same by reforming the same in accordance with the verbal contract, although the omission of such release and acknowledgment may be the result of mistake or ignorance of the officer drafting the same. *Stodalka et al.* v. *Novotny*, 125.

5. A court of equity has no power to reform a contract for the sale of a homestead by the insertion therein of a release of that right and an acknowledgment, and then to enforce specific performance. Such court can not give life to an instrument which has no vitality in itself. Ibid. 125.

Extent of estate.

6. *Limited to the life of the estate to which it is incident.* The estate of homestead can in no case be more extensive than the interest to which it attaches and of which it forms a part. If the householder has an estate in fee, the estate of homestead may likewise be a fee, but if he has only an estate for life or for years, the estate of homestead will expire at his death or at the expiration of the term for years. *Stafford* v. *Woods*, 203.

7. So, where the householder has merely an equitable interest under a contract of purchase which is liable to be terminated by his non-performance of the contract, anything having the legal effect of terminating the right of possession under the contract, will at the same time and for a like reason terminate the estate of homestead. Ibid. 203.

Vendor's lien.

8. *May defeat the estate.* Where the vendor of land, by the terms of the contract of sale, has the option, in case of non-payment of the purchase money as therein provided, to declare the contract forfeited and determined, and to re-enter and take possession of the premises sold, such forfeiture and re-entry will defeat the estate of homestead of the purchaser, and the vendor may maintain ejectment against the widow of such purchaser upon failure to make payments of the purchase money. And the grantee of such vendor will have the same right to re-enter or maintain ejectment. Ibid. 203.

9. By section 3 of the Homestead act of 1872 no homestead can exist against a claim for the purchase money of the land to which

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HOMESTEAD. VENDOR'S LIEN. *Continued.*

it is attached. Whether, then, the vendor of premises sold on credit, or his grantee, be regarded as the owner of the fee subject to a contract of sale which he has the right to rescind, or, as a mortgagee in possession, he may recover possession by action of ejectment as against the widow of the purchaser. *Stafford* v. *Woods*, 208.

HUSBAND AND WIFE.

SEPARATE MAINTENANCE.

1. *Alimony—pendente lite.* It is no objection to the allowance of suitable alimony to a wife pending her bill for a separate maintenance, that the husband denies the facts alleged by her; but the court may, if it deems it necessary, enter into a sufficient examination of the case, to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings, of which the court may require verification. And the court will, in the exercise of its judicial discretion, make or withhold the allowance as it shall appear that the wife has or has not shown a meritorious cause, and is or is not proceeding in good faith. *Harding* v. *Harding*, 588.

2. *Wife entitled to support pending her suit.* In a divorce or separate maintenance suit, while the matters in issue are being litigated, the wife will be presumed to be entitled to support until it is shown by the result of the trial that her claim is forfeited. This rule grows out of the duty of the husband to maintain and support his wife and protect her from oppression and wrong. The statute authorizes the court to give provisional alimony in addition to the award of a sum to enable the wife to employ counsel and meet the expenses of the litigation. Ibid. 588.

3. The same reason exists why a wife, who is living apart from her husband without fault, shall receive that reasonable support that he is bound by law to provide her, pending her bill for maintenance, that exists when she sues for divorce. It is the intention of the statute to place bills by a wife for separate maintenance and bills for divorce upon the same footing in this respect. Ibid. 588.

4. *Amount of temporary alimony.* Whether an allowance shall be made or not in the nature of temporary alimony rests in the judicial discretion of the court, to be exercised in view of the conditions and circumstances of each case, and an abuse of the discretion is necessarily subject to review. Unless, however, there is clearly an abuse of the discretion, the decree will not ordinarily be disturbed on appeal. Ibid. 588.

5. The amount of the allowance will, ordinarily, when the husband has any considerable estate, be less than would be allowed as permanent alimony in divorce proceedings, and less than the per-

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HUSBAND AND WIFE. SEPARATE MAINTENANCE. *Continued.*

manent maintenance allowed in suits for separate maintenance. But the amount is usually arrived at in the same manner as in awarding permanent alimony or maintenance; that is, by considering the joint income of the husband and wife. The husband's income, the estate of the wife, as well as the ages and conditions in life of the parties, their ability to care for themselves, whether they are subject to the support and education of minor children, and indeed all the circumstances affecting the propriety of the allowance, will be considered. *Harding* v. *Harding*, 588.

6. The ordinary rule of temporary alimony is to allow the wife one-fifth of the joint income, deducting the income from the wife's separate estate. However, the amount allowed by the courts is by no means uniformly in the proportions indicated by the text writers. It varies from a sum sufficient to meet the actual wants and necessities of the wife, to a third and even a half of the income of the husband. Some cases hold that no allowance shall be made from the income of the husband while the wife has property remaining which she may subject to the payment of the litigation and to her support, but these cases can not be considered as authority in this State. Ibid. 588.

7. And it is undoubtedly the rule that, where there is slight income, and the payment of the allowance will result in diminishing the estate from which the income is derived, it will not ordinarily be permitted to extend beyond providing for the actual wants and necessities of the wife. But if the husband has committed breaches of his marital obligations, entitling her to a divorce, or she is living separate and apart from him through his fault and without fault on her part, and her suit is in good faith, she will be entitled to be maintained and supported consistently with her station in life and his ability, if the money required therefor be not more than a just and equitable proportion of the joint income of herself and her husband. Ibid. 588.

8. It would seem equitable and just that a wife, who is prosecuting her suit in good faith, should be placed upon an equality with the husband; and if her income be insufficient to maintain her and to carry on the litigation, his income should be required to contribute before she is required to exhaust her estate. Ibid. 588.

9. If the income of the wife be sufficient to suitably support her, there will ordinarily exist no reason for making an allowance for that purpose, but if her income is insufficient and that of the husband is ample, equitable considerations and the weight of authority require that such a sum shall be allowed from the husband's income as will, when added to her own, enable the wife to live comfortably, pending the litigation, in the station of life to which he has accustomed her. Ibid. 588.

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HUSBAND AND WIFE. SEPARATE MAINTENANCE. *Continued.*

10. *Allowance for attorney's fees and expenses of litigation pendente lite.* In order that a wife suing her husband for a separate maintenance may have a fair opportunity to present her cause, it is necessary not only that she be suitably maintained, but she must be enabled to employ counsel and make proper preparation for trial. In making such allowances, due regard should always be had to the character of the litigation, the services necessarily to be performed, the probable expense to be incurred, and all other circumstances which the court can see may tend to lessen or increase the probable expense of the litigation. *Harding* v. *Harding*, 588.

11. *Support of minor children pending litigation.* On a bill by a wife against her husband for separate maintenance, it is error to decree payment to the wife for the support of their minor children in the absence of any order of court giving her their custody, when it appears that the husband is willing and amply able to support them, and he is guilty of no neglect of them. The father is entitled to the custody of his minor children until the right to their custody is awarded by the court to some other person, and he can be deprived of such control only by the order of a court having jurisdiction to make the same. Ibid. 588.

HUSBAND'S ESTATE.

12. *In the lands of his wife.* See CURTESY, 2, 3, 4.

CONVEYANCE TO WIFE.

13. *Presumption of advancement.* See ADVANCEMENT, 1, 2, 3.

ILLEGAL CONTRACTS.

WHETHER ENFORCEABLE. See CONTRACTS, 13, 14, 15.

IMPRISONMENT.

CAPIAS AD SATISFACIENDUM.

1. *Discharge of defendant — satisfaction of the judgment.* The discharge of any debtor under the provisions of the act of 1853, entitled "An act in relation to committals to jail upon writ of *ca. sa.*," is no discharge or satisfaction of the debt, damages or costs named in such writ, but the judgment will continue in full force and effect against the property and effects of such debtor. That statute extends to cases of malicious torts as well as to cases of contracts, and the placing its sections in the revision of 1874 under the head of "insolvent debtors" did not change the meaning in this respect. *Lambert* v. *Wiltshire et al.*, 517.

2. The discharge of a defendant on a *capias ad satisfaciendum*, issued upon a judgment for a malicious tort, because of the failure of the plaintiff in the judgment to advance and pay to the jailer the fees for receiving, or for the board of such defendant, is such a discharge as removes the presumptive satisfaction of the judgment by reason of the arrest and imprisonment of the defendant. Ibid. 517.

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INFANT.

STATUTE OF LIMITATIONS.

1. *Does not run against infants.* See CHANCERY, 15.

INFANTS' SUPPORT.

2. *Pending action for separate maintenance.* See HUSBAND AND WIFE, 11.

INJUNCTIONS.

OF THE BOND.

1. *Dissolution of the injunction—amount of damages recoverable.* Section 12 of chapter 69, R. S., relating to injunctions, does not, either expressly or by implication, limit the amount of damages to be assessed against the complainant on the dissolution of an injunction, to the penalty of the bond given. On the contrary, it implies the assessment of such damages as will compensate the injured party for such losses as are directly occasioned to him, and such expenditures as are necessarily occasioned, by the wrongful suing out of the injunction, whether any bond is given or not. *Kohlsaat* v. *Crate*, 14.

2. The office of an injunction bond is not to create or measure the liability of the complainant for damages, but to secure the payment of such damages up to the amount of the penalty of the bond. Ibid. 14.

3 *Amount of the bond.* The statute (sec. 9, chap. 69) authorizes the granting of an injunction without bond in cases, for good cause shown, when the judge or master is of the opinion that the injunction ought to be granted without any bond. The statute fixes the amount of the bond only in cases where the collection of judgments is sought to be enjoined. In all other cases the penalty of the bond is discretionary with the judge or master awarding the writ. Ibid. 14.

PENDENTE LITE.

4. *Made perpetual as to matters not litigated.* To a bill to enjoin a defendant from draining *all* his land across the complainants' land, the defendant answered denying any purpose or present intention of draining a fifty-acre tract of his over the complainants' premises, and claiming the right to drain his other land over the same. On the hearing the court dissolved the injunction as to all the land except the fifty acres, and as to that made the injunction perpetual: *Held*, that in the absence of proof showing, at least, a *prima facie* case as to the fifty acres, the complainant was not entitled to the relief sought, and that as the right to extend the drain over the fifty-acre tract was not litigated, the bill should be dismissed without prejudice. *Lambert et al.* v. *Alcorn*, 318.

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INJUNCTIONS. PENDENTE LITE. *Continued.*

5. *Partial dissolution — damages.* Damages may properly be assessed and awarded to the defendant on a partial dissolution of an injunction, and such assessments have been sustained by this court. *Lambert et al. v. Alcorn*, 313.

6. *Dissolution — solicitor's fees as damages.* A defendant may recover, as damages on dissolution of an injunction, the solicitor's fees which he has paid, or become obligated to pay, for services rendered in obtaining a dissolution of the injunction, but not for those rendered in the general defense of the suit. When the evidence fails to discriminate between services rendered in the case generally and those strictly necessary to procure a dissolution of the injunction, the allowance of the fees of counsel can not be sustained. Ibid. 313.

7. Where a bill seeks for a perpetual injunction against the laying of a tile drain, an injunction *pendente lite* is a mere ancillary writ which may be applied for or not, its only office being to preserve the matters in their original condition until a final hearing. Ibid. 313.

8. When such a bill is prosecuted without a preliminary injunction, the defendant may proceed without being liable for contempt, but in that case he acts at the risk of having his acts *pendente lite* declared illegal, and of being compelled to restore everything to its original condition. Ibid. 313.

MUNICIPAL CORPORATIONS.

9. *Power of courts to enjoin legislative action.* See CHANCERY, 22 to 26; COUNTIES, 2 to 9.

10. *Appropriating funds in aid of sectarian schools.* See COUNTIES, 10, 11.

INSOLVENT DEBTORS.

IMPRISONMENT ON A CA. SA.

1. *Act of* 1853 *not changed by the revision of* 1874. See IMPRISONMENT, 1.

2. *Satisfaction of debt by imprisonment.* Same title, 1, 2.

INSURANCE.

AGAINST LOSS BY FIRE.

1. *Exemption from liability for loss by explosion.* A clause in a policy of insurance against loss by fire, that the company shall not be liable for any loss caused by explosion of any kind, unless fire ensues, contemplates the existence of more than one kind of explosion, and is broad enough to include an explosion produced by the

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INSURANCE. AGAINST LOSS BY FIRE. *Continued.*
ignition and combustion of the agent of explosion as well as an explosion without combustion. *Heuer* v. *North-Western Nat. Ins. Co. of Milwaukee*, 393.

2. So where an explosion was produced by the lighting of a match in the basement of a building which was filled with illuminating gas, causing the falling of the floor of the store above where the insured had his goods, and there was no damage to the goods by the actual burning or scorching of them, but they were injured by the falling of the floor, it was *held*, that the insurance company was not liable under a policy containing such an exemption clause for the damage to the goods so resulting. Ibid. 393.

3. *Determining whether a loss is caused by fire or explosion within the meaning of the policy.* It is a well-settled principle in the law of insurance, that the proximate and not the remote cause of the loss must be regarded in order to ascertain whether the loss is covered by the policy or not. If a lighted match is applied to a keg of powder or to illuminating gas confined in a room, and an explosion thereby occurs which causes damage, but is not followed by combustion, the explosion will be the proximate cause of the injury, and the lighted match only the remote cause. In such case the lighted match is not a fire in the meaning of a policy of insurance against loss by fire. Ibid. 393.

4. The determination of the question whether a loss is attributable to fire or to explosion will sometimes depend upon the further question, whether the fire is an incident to the explosion, or whether the explosion is an incident to the fire. The effects of explosion will be included in the loss occasioned by a precedent fire producing the explosion, if the fire is the direct and efficient cause of the loss and the explosion is but the incident. Ibid. 393.

5. A loss other than by combustion, resulting from an explosion, when the explosion itself is caused by a destructive fire already in progress, comes within the general risk of a policy against fire only. In the application of this principle, it makes no difference whether the fire operating as the principal cause of the loss, and to which an explosion occurring during its progress is a mere incident, originates in the building where the insured property is located or out of it. Ibid. 393.

6. If a policy merely insures property against loss by fire generally, without making any exception of a loss by explosion, the flame of a lighted match or burning gas jet may be such a fire as is embraced within the terms of the policy, and the loss resulting from an explosion caused by the contact of the lighted match or burning gas jet with gun-powder or illuminating gas or other explosive substance, may be covered by the policy. Ibid. 393.

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INSURANCE. AGAINST LOSS BY FIRE. *Continued.*

7. When there is no exception of a loss by explosion, the fire producing the explosion is a cause of the loss, so as to come within the meaning of the policy. *Heuer* v. *North-Western Nat. Ins. Co. of Milwaukee*, 393.

CONDITION AGAINST ALIENATION.

8. *Invalid sale will not avoid the policy.* Under a clause in a policy of insurance of a building against loss by fire, that any sale, transfer or change of title in the property, or foreclosure of a mortgage, shall avoid the insurance, a merely voidable sale will not constitute such an alienation or change of title as will defeat a recovery of a loss accruing before the sale is set aside, when the assured has done nothing to ratify such sale. *Niagara Fire Insurance Co.* v. *Scammon*, 490.

9. A voidable deed made by direction of a court, or by a master in chancery, or under a power, where the insured still retains possession, and has the same interest in the property that he had before the making of such deed, does not constitute an alienation of the property within the meaning of a clause in a policy of insurance against any sale or change in the title of the property insured. Ibid. 490.

10. *Trustee purchasing at his own sale.* A trustee under a mortgage containing a power of sale can not become a purchaser at his own sale, either directly or indirectly, by procuring another to purchase for his benefit, and if he does so become the purchaser, the rights of the mortgagor will remain precisely the same as though no sale had been made, and such sale will not defeat his rights under a policy of insurance against loss of the mortgaged premises by fire, which declares that any sale, etc., shall defeat the insurance. Ibid. 490.

11. *Alienation that will avoid the policy.* An alienation or change of title that is made without the act or consent of the insured will not create a breach of a condition in a policy against a sale or change of title, unless there has been an actual sale or alienation of the property that is valid against the insured. Ibid. 490.

12. *Right to insist on a forfeiture — burden of proof.* The right of the insurer to insist upon a forfeiture under a clause in the policy against alienation or change of title is *stricti juris*, and such right must be brought clearly within the forfeiting clause. The burden of proof is upon the insurance company to establish a valid and not a voidable sale, or one which divests the title of the assured and leaves him no insurable interest. Ibid. 490.

13. *Of the alienation which will defeat a recovery for a loss.* The rule laid down by Wood on Insurance to the effect that a sale, which is merely voidable, is such an alienation as will defeat a

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INSURANCE. CONDITION AGAINST ALIENATION. *Continued.*

recovery for a loss occurring before the sale is set aside, is not correct when applied to an involuntary sale, such as a sale under a power contained in a mortgage or deed of trust, otherwise an insurance company might take advantage of the illegal act of a third party to avoid its liability when the insured has been guilty of no wrong or negligence whatever. *Niagara Fire Insurance Co.* v. *Scammon*, 490.

14. Where the validity of a sale under a power in a mortgage is promptly denied by the mortgagor, and he continues in possession asserting his continued ownership, and he takes prompt steps by which he has the sale set aside, but the premises are destroyed by fire before the decree setting the sale aside, the sale will be held as void from the beginning, and will not defeat a recovery by him of the loss, from the insurance company. Ibid. 490.

15. *Terms of the policy construed.* A condition in a policy of insurance provided that, "if the assured or any other person or parties interested" shall have existing, during the continuance of this policy, any other contract or agreement for insurance, whether valid or not, against loss," etc., on the property, or any part thereof, "not consented to by this company in writing," then this insurance shall be void: *Held*, that an insurance taken out by a third party on what he claimed an insurable interest, and who had no interest in the original policy could not affect the rights of the assured under the first policy. Ibid. 490.

16. The designation, "any other person or parties interested," in such a condition, includes only persons or parties interested in the insurance merely; and the words "any other contract or agreement for insurance" do not apply to insurance procured by a third person without the knowledge and consent of the assured, such third person claiming an insurable interest in the property, and having no interest in the policy issued to the assured. Ibid. 490.

17. *Clause for apportionment of loss between different companies.* A clause in a policy of insurance that, if there shall be other insurance upon the property, the insured shall receive of the company in case of a loss no greater portion of the loss sustained than the amount therein insured shall bear to the whole amount of such contracts for insurance, applies only to cases where the several insurances cover the same interest, and not to a case where the second insurance is upon a different interest claimed in the property. Ibid. 490.

18. The fact that the party first insuring files his bill to set aside an invalid sale of the property, on which the sale is set aside as fraudulent, and the purchaser is declared a trustee *ex maleficio*, and required to account to the complainant for the insurance money received on a second insurance, will not constitute a ratifi-

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INSURANCE. CONDITION AGAINST ALIENATION. *Continued.*

cation of the second insurance, so as to require an apportionment of the loss between the two insurance companies. *Niagara Fire Insurance Co.* v. *Scammon*, 490.

19. The mortgagor of property insured the same in the sum of $5000, after which an invalid sale thereof was made under a power, and the purchaser, who was also the seller, insured his interest in the property for a like sum in another company. The mortgagor filed his bill against such purchaser, under which the sale was set aside and a redemption allowed, and the purchaser was required to account to the mortgagor for the insurance money paid him on the loss of the property: *Held*, in an action by the mortgagor on his policy of insurance, that the defendant company was not entitled to any deduction for the money received on the second insurance under a clause for apportionment. Ibid. 490.

LIFE INSURANCE.

20. *Benefit societies.* See BENEFIT SOCIETIES, 1 to 11.

JUDGMENTS AND DECREES.

FINAL JUDGMENT.

1. *Finding of a justice of the peace.* See CERTIORARI, 4.

JUDGMENT NUNC PRO TUNC.

2. *Power of court — criminal cases.* See PRACTICE IN THE SUPREME COURT, 5; APPEALS AND WRITS OF ERROR, 14.

JUDGMENT FOR A TORT.

3. *Whether satisfied by imprisonment.* See IMPRISONMENT, 1.

JURY.

IMPARTIAL JURORS.

1. *What constitutes.* It was a cardinal rule of common law that the jurors, to be impartial, should stand indifferent between the parties. A juror was required to have such freedom of mind that he should stand indifferent. He should be wholly free, even from the suspicion of bias. *Coughlin* v. *The People*, 140.

2. *Constitutional guaranty.* The constitution must be construed as guaranteeing to every defendant accused of crime a trial by an "impartial jury," as that term was understood at common law. Ibid. 140.

3. *Test of impartiality.* When the opinion of the juror is only slight or transient, or is hypothetical, considerable reliance is placed upon his statement under oath that his opinion is not of such character as will interfere with his action as a juror, and such statement is one of the most satisfactory tests of his impartiality. Ibid. 140.

4. *Opinions which disqualify.* But when it is once clearly shown that the juror has a fixed and positive opinion as to the

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JURY. IMPARTIAL JURORS. *Continued.*

merits of the case, or as to the guilt or innocence of the defendant, his statement that, notwithstanding such opinion, he can render a fair and impartial verdict according to the law and the evidence, has little, if any, tendency to establish his impartiality. His statement that he can render a fair and impartial verdict does not tend to show that he is not partial, as it does not tend to show the non-existence of the fixed and decided opinion to which he has already confessed. *Coughlin* v. *The People*, 140.

5. Where the examination of a juror showed clearly that he had fixed and settled opinions as to the guilt or innocence of a party on trial for murder, and as to most of the facts and circumstances relied on by the prosecution to show defendant's guilt, and disclosed a prejudice against the defendant and the members of a society to which he belonged, it was held that the juror was incompetent, notwithstanding his statement, drawn out by cross-examination, that he thought he could render a fair and impartial verdict, according to the law and the evidence. Ibid. 140.

6. If a juror has made up a decided opinion on the merits of the case, either from a personal knowledge of the facts, from the statements of witnesses, from the relations of the parties or either of them, or from rumor, and that opinion is positive and not hypothetical, and such as will probably prevent him from giving an impartial verdict, a challenge to him should be allowed. But if the opinion be merely of a light and transient character, such as is usually formed by persons of every community upon hearing a floating report, and which may be changed by the relation of the next person met with, and which does not show a conviction of the mind and a fixed conclusion thereon, or if it is hypothetical, the challenge ought not to be allowed. Ibid. 140.

7. If the judgment of the juror is convinced, if his belief is established from facts, of the truth of which he has no reasonable doubt, of the guilt or innocence of the accused, or that one party or the other should recover, or the existence of certain facts has been so established in his mind as to produce conviction, he is incompetent. Neither party should be put to the necessity of producing proof to remove a preconceived opinion. Ibid. 140.

8. No case in this State can be found where the juror, after admitting the existence in his mind of a positive opinion upon the merits, has been permitted to establish his own competency by testifying that, notwithstanding his opinion, he can or will render a fair and impartial verdict. But such opinion has uniformly been held to be a disqualification *per se*, and is incapable of being removed by the testimony of the juror, or other evidence tending to show that it will not affect his verdict. Ibid. 140.

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JURY. IMPARTIAL JURORS. *Continued.*

9. A decided and positive opinion as to the merits of the case raises such manifest presumption of partiality as at common law would constitute a principal cause of challenge. The incompetency of the juror follows as a necessary legal consequence which is incapable of being rebutted. *Coughlin* v. *The People*, 140.

STATUTE PRESCRIBING QUALIFICATIONS.

10. *Constitutionality of sec.* 14, *chap.* 78, *R. S.* The proviso to section 14 of chapter 78 of the Revised Statutes, declaring that a juror shall not be disqualified from acting as such in a criminal case, from the fact that he has formed an opinion or impression, based upon rumor or upon newspaper statements, about the truth of which he has formed no opinion, "if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and *the court shall be satisfied* of the truth of such statement," is not in violation of the constitutional rights of one tried on a charge of crime. Ibid. 140.

11. *Construed.* Under that statute, as framed, the competency of a juror remains as it was before, a judicial question, to be determined by the court from the evidence, and the court must be satisfied now, the same as before the statute was passed, of the impartiality of the juror before deciding to overrule the defendant's challenge. Ibid. 140.

12. The constitutional guarantee of the right to a trial by an impartial jury has the same force since that statute as before, and hence the statute can be construed and enforced only in subordination to that provision of the constitution. The statute can not in any degree change the essential qualifications, which jurors must possess, but it merely furnishes a new test by which those qualifications are to be determined. Ibid. 140.

13. That statute makes the statement of the juror that he can render a fair and impartial verdict according to the law and the evidence, competent, as bearing upon the question of his impartiality, and requires the court to hear and consider such statement, if the juror sees fit to make it. The result is to make the competency of the juror as affected by his opinions based upon rumor or newspaper statements a question of fact. But the statute does not attempt to determine in the least what shall be the probative force of the statement of the juror when made or how far it shall have the effect of relieving him of the disqualification arising from his opinion. Ibid. 140.

CHALLENGE OF JURORS.

14. *At common law.* Challenges to jurors, based upon an allegation of bias, favor or partiality, were, at the common law, divided into two classes, viz., principal challenges and challenges to the

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JURY. CHALLENGE OF JURORS. *Continued.*

favor. A principal challenge was grounded on such manifest presumptions of partiality that if the fact alleged was proved to be true, the disqualification of the juror followed as a legal conclusion, incapable of being rebutted. On challenge to the favor, the disqualification arose as a question of fact to be determined by the triers, the evidence adduced in support of the challenge leading to no presumption not subject to rebuttal by other evidence. *Coughlin* v. *The People*, 140.

15. *Principal cause of challenge — at common law.* Among the principal causes of challenge were consanguinity or affinity of the juror with either of the parties within the ninth degree; that the juror was godfather to the child of either party, or *e converso;* that the juror was of the same society or corporation with either party, or had an action implying malice depending between him and the other party; or was tenant or within the distress of either party; or was master, servant, counselor, steward or attorney of either party; or after he was returned he ate and drank at the expense of either party, or had been chosen as arbitrator by either party. By most of the authorities it was held to be ground of principal challenge that the juror had formed and declared his opinion touching the matter in controversy. Ibid. 140.

16. *Right to controvert.* When the matter alleged was ground for principal challenge, all the challenging party was required to do was to prove the existence of the ground, and that, on being shown, rendered the juror incompetent, and no inquiry was permitted as to whether, notwithstanding the fact shown, he could sit as a juror and render a free and impartial verdict. Ibid. 140.

17. *Absolute disqualification under our law.* Most of the objections to jurors which at common law were held to be ground of principal challenge, are held with us to be absolute disqualifications; that is, upon mere proof of the fact alleged, the disqualification follows as a legal conclusion, and evidence is not admitted to show that, notwithstanding the fact proved, the juror is really impartial. Ibid. 140.

18. *Burden of proof.* The party interposing a challenge to a juror has the burden of sustaining it by proof. Ibid. 140.

CHALLENGE TO THE FAVOR.

19. *Challenge overruled — subject to review.* The rule of the common law making the decision of the triers of jurors challenged to the favor final, and not subject to review on error, has not obtained in this State, and the action of the trial court in overruling a challenge to a juror for partiality is subject to review by this court. It is the duty of this court to review the action of the trial court in all cases as to the competency of jurors. Ibid. 140.

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JURY. *Continued.*

CRIMINAL LAW.

20. *Right of defendant to be heard.* See PRACTICE, 18.

JUSTICE OF THE PEACE.

REVIEWING RECORD BY CERTIORARI. See CERTIORARI,

LACHES.

OF MORTGAGOR.

1. *Bill to redeem.* See MORTGAGES AND DEEDS OF TRUST, 5.

OF VENDEE.

2. *Caused by acts of vendor.* See VENDOR AND PURCHASER, 7, 8.

LANDLORD AND TENANT.

LIABILITY OF LANDLORD.

1. *Keeping premises in repair.* Where the owner of a building leases a room thereof to be used as a blacksmith shop, at a monthly rental, reserving the entire control of the other parts of the building, including the roof, and of a large sign fastened to the roof, the landlord, as to that portion of the building and appurtenances over which he retains control, will be held to retain also the responsibility to keep the same in reasonable repair in respect of all persons, including the tenants of the room. *Payne et al.* v. *Irvin*, 482.

2. When a landlord rents a room in a one story building, at a monthly rental, which building has a sign-board attached to the roof, not used by the tenant in any way, but which is used by the former for his own use, and he suffers the fastenings of the sign to get out of safe repair, in consequence of which it is blown down and a serious injury is thereby inflicted upon the person of the tenant, who has exercised ordinary care to save himself from the injury, the landlord will be liable to such tenant for the damages received by him. Ibid. 482.

CONDEMNATION PROCEEDINGS.

3. *Estate taken under the power of eminent domain — eviction of tenant.* A tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain. He takes the term as any other interest in land is taken, subject to the exercise of that power. If he suffer loss, or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right the same as his landlord holds his title. Hence, it has been held that a taking under the power of eminent domain is not a breach of the covenant for quiet enjoyment, and does not technically amount to an eviction. *Corrigan et al.* v. *City of Chicago et al.*, 537.

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LANDLORD AND TENANT. CONDEMNATION PROCEEDINGS. *Cont'd.*

4. While a condemnation proceeding may not amount to a technical eviction, yet when the entire tract of land or lot is taken, its effect is to abrogate the relation of landlord and tenant. Whatever title the tenant, as well as the landlord, has in the land passes to the State or corporation in whose behalf the right of eminent domain is exercised. The effect is an absolute extinguishment of the right and title of both in or control over the subject of the demise. It is in effect eviction by paramount right, coupled with a conveyance by the owners of their respective interests. *Corrigan et al.* v. *City of Chicago et al.*, 537.

5. *Liability of the tenant to pay rent after condemnation.* When the title of both the landlord and tenant is extinguished in the whole estate demised during the term by condemnation for the public use, the liability of the tenant to pay rent also ceases, and in any action brought by the landlord for the rent accrued after the termination of his estate, the tenant may plead such termination in defense. Ibid. 537.

6. When a portion of leased premises is taken for the public use and a part remains which is susceptible of occupation under the lease, the covenants of the lease are not abrogated, and the tenant will be bound to payment according to the terms of the covenants in the lease. The lessee will not be entitled to apportionment or abatement of the rent for the part of the land taken, but is bound to pay rent for the whole of the premises demised. Ibid. 537.

7. *Condemnation of leased lands.* See EMINENT DOMAIN, 1 to 5.

TENANT DENYING LANDLORD'S TITLE.

8. *Extinguishment of title during the term.* The doctrine is well settled, that although the lessee can not show that his lessor had no title to the premises when the tenancy began, he may show that he had a limited estate only, which is determined by its own limitation before the cause of action accrued, as when he held the estate for the life of another, or the like, which expired during the term, or that he has sold and conveyed the land, or has been evicted by title paramount, or that his title has been sold under execution and conveyed. This rule applies whether the action be for the recovery of the premises or for rent accrued after the extinguishment of the landlord's title. *Corrigan et al.* v. *City of Chicago et al.*, 537.

LEASEHOLD ESTATE.

EXTINGUISHMENT.

Under condemnation proceedings. See EMINENT DOMAIN, 2; LANDLORD AND TENANT, 3 to 6.

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LIENS.

MECHANIC'S LIEN.

1. *Statute construed — sworn statement by contractor.* There is nothing in section 35 of the Lien law, as amended in 1887, which makes it the duty of the owner of a building to require of the contractor the sworn statements therein provided for. But it is made the duty of the contractor, whenever any payment of money becomes due to him, to furnish such statement to the owner, and takes from him the right of action or to a lien against the owner until the statement is made, and it finally, for the protection of the owner, authorizes him, at any time during the progress of the work, to demand such statement of the contractor, and imposes a penalty upon the latter for a failure to furnish it *Shaw* v. *Chicago Sash, Door, etc., Manuf'g Co.*, 520.

2. Section 35, as amended, provides that any payment made by the owner before any such statement is made, or without retaining sufficient money, if that amount is due or to become due, to pay the sub-contractors, etc., as *shown by the statement*, shall be considered as illegal and made in violation of the rights of the persons intended to be benefited by the act, and the rights of such sub-contractors, etc., to a lien shall not be affected thereby. Under this clause, when no statement under oath is made by the contractor, payment by the owner is not made illegal so as to give a lien to sub-contractors, etc., who may thereafter give notice of their claims. Ibid. 520.

3. By section 35 sub-contractors and material-men are given a lien from the time the statement of the contractor is served upon the owner, without being required to give the notice provided by section 30, and all moneys due or to become due to the original contractor are stayed in the owner's hands for their benefit, but no such advantages are given to sub-contractors or material-men in the absence of a statement by the original contractor, or when their names do not appear on the statement when made. Ibid. 520.

4. The words "the persons intended to be benefited by this act," as used in section 35, should be construed as referring only to such sub-contractors and material-men as are named in the original contractor's statement to the owner, and of whose claims the owner shall thereby be notified, and, consequently, no other sub-contractor or material-man can claim any rights under that section. Ibid. 520.

5. *Duties and liabilities of the owner — rights of sub-contractors — notice to owner.* Where the contractor, employed to build a house, failed to give the owner a sworn statement of the claims of sub-contractors and material-men, as required in section 35, as amended in 1887, and there was nothing due from the owner at the time he was served with notice of the claim of a sub-contractor under section 33, the latter will have no lien on the building. Ibid. 520.

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LIENS. MECHANIC'S LIEN. *Continued.*

6. Section 35 merely requires the owner to retain in his hands sufficient money to pay the sub-contractors and material-men, "as shown by the statement," and provides that payments made by him, whether before or after the statement is made, shall be deemed illegal and in violation of the rights of such sub-contractors or material-men, and not affecting their right to a lien. The rights of sub-contractors or material-men, notice of whose claims is not brought home to the owner by the contractor's statement, can not be affected by the payment of money by the owner to the contractor. Until the service of notice under section 30 they will have no lien, either perfected or incipient, and they will, therefore, have no right to the money in the hands of the owner, which may be violated by its payment to the original contractor. *Shaw* v. *Chicago Sash, Door, etc., Manuf'g Co.*, 520.

7. Sub-contractors and material-men whose names do not appear on the sworn statement delivered by the original contractor must proceed under section 30 of the act as amended, and there is nothing in section 35 showing an intention to modify, as to them, the provision of section 33, giving them a lien only for so much as the owner may be indebted to the contractor at the time of the service of notice, or may afterwards become indebted to him. Ibid. 520.

8. *Statute strictly construed.* The statute in relation to mechanics' liens, being in derogation of common right, should be strictly construed. It should not be enlarged by implication or by uncertain construction, but should be given only such force as clearly belongs to it. To say that a right claimed under such a statute is doubtful is, substantially, tantamount to saying that it does not exist. Ibid. 520.

LIMITATIONS.

COLOR OF TITLE.

1. *After-acquired title in grantor.* Where a person not having the title to land, or the whole of the title, conveys the same by a deed, which purports to convey the title, a subsequent deed to such person, by one having title, will inure to the benefit of the holder under the first deed, and can not be relied on as color of title under the limitation law by the grantor in such subsequent deed. *Guertin* v. *Mombleau*, 32.

ACT OF 1839.

2. *Facts essential to constitute a bar.* To constitute a bar under the Limitation act of 1839, three things must concur; — color of title acquired in good faith, and possession and payment of taxes for seven successive years. The absence of either requisite is fatal to the defense. Ibid. 32.

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LIMITATIONS. *Continued.*

WHEN THE STATUTE BEGINS.

3. *Action against carrier—for neglect in transporting goods.* An action against a common carrier for an alleged neglect of duty to properly bill, direct and transport goods delivered to the carrier, is barred in five years from the date of the alleged tort or breach of duty, and not from the time when the damages actually ensue. This is when the action is not brought upon any written contract. *Pennsylvania Co.* v. *Chicago, Mil. & St. P. Ry. Co.*, 197.

LACHES.

4. *Caused by acts of vendor.* See VENDOR AND PURCHASER.

BILL OF REVIEW.

5. *Barred in five years.* See CHANCERY, 14.

6. *Time extended to minors.* Same title, 15.

MALICE.

WHAT CONSTITUTES.

1. The evil quality of the heart which prompts a man to make a false charge against another for the purpose of private gain or advantage, is legal malice. *Neufeld* v. *Rodeminski*, 83.

MALICIOUS PROSECUTION.

ACTION THEREFOR.

1. *Advice of counsel as a defense.* The law upholds and favors prosecutions under the public laws of the land, and shields and protects parties instituting them in good faith and from proper motives. So, when a party consults with counsel of good standing, and lays before him fully the facts within the party's knowledge, and then acts in good faith and in the honest belief that the party charged is probably guilty of the criminal offense, he will not be held responsible, if it shall turn out that the party is not guilty. *Neufeld* v. *Rodeminski*, 83.

2. *Advice of counsel as a shield — not acted on in good faith.* But this rule supposes always that the party seeking counsel does so in good faith, and also that he has made to his counsel a full and honest statement of the facts. If counsel is sought simply for protection against indulging his malice, or to enable him to use the criminal laws for unjust and oppressive uses for his private gain and advantage, it will afford no defense to the party causing the arrest, but will be rather an element of increased damages. Ibid. 83.

3. If a criminal prosecution is instituted by a party maliciously, and not in good faith upon the advice of legal counsel that a crime has been committed, he will be liable for a malicious prosecution, and the advice of counsel will not avail as a defense. Ibid. 83.

4. So, if, notwithstanding the advice of counsel, a criminal prosecution is instituted for the purpose of forcing the collection

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MALICIOUS PROSECUTION. ACTION THEREFOR. *Continued.*

of a debt, without probable cause that a crime has been committed, the party so prosecuting can not shield himself behind the advice of counsel. *Neufeld* v. *Rodeminski*, 83.

5. If a criminal prosecution is instituted against one for the mere purpose of coercing him into the payment of a debt, or the surrender of some right claimed, and not in the interest of public justice, or to vindicate the law and punish crime, and the charge is falsely made, the fact that the prosecutor procured the advice of counsel will not shield him from an action for malicious prosecution. Ibid. 83.

6. There must be both malice and want of probable cause, and the advice of counsel sought and acted upon in good faith will constitute a defense to an action for malicious prosecution. Such advice, acted upon in good faith, constitutes probable cause; but if, without acting upon such advice, the party prosecutes for the mere purpose of collecting his debt, or to harass or annoy the person charged, it can not be said that the advice of counsel created probable cause in the mind of the prosecutor. Ibid. 83.

MARRIAGE CONTRACT.

IN LIEU OF DOWER. See DOWER, 8 to 12.

MARRIED WOMAN.

CONVEYANCE OF LAND.

After-acquired title. See CONVEYANCES, 2.

MECHANICS' LIEN. See LIENS, 1 to 8.

MINOR CHILDREN.

THEIR SUPPORT.

1. *Pending action for separate maintenance.* See HUSBAND AND WIFE, 11.

LIMITATIONS.

2. *Statute does not run against infants.* See CHANCERY, 15.

MORTGAGES AND DEEDS OF TRUST.

MORTGAGE WITH POWER OF SALE.

1. *Publication of notice — statutory requirements.* The statute (R. S., chap. 95, sec. 14) requiring notice of sale under a power in mortgages and deeds of trust, to be published once in each week for four successive weeks, controls the mortgagee in giving notice, although the mortgagor may have provided for a different notice by the terms of the mortgage. *Cornell* v. *Newkirk et al.*, 241.

2. A mortgage, to secure a debt, provided for a sale in default of payment, after the publication of thirty days' notice thereof in a

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MORTGAGES AND DEEDS OF TRUST

MORTGAGE WITH POWER OF SALE. *Continued.*

newspaper, etc. The statute in force at the time of the sale required the notice should be given by publication once in each week for four successive weeks. The notice of the sale was published thirty days before the sale but only once. *Held*, that while the provision of the statute was not complied with, the failure to comply with the statute did not render the sale void, but only voidable. *Cornell* v. *Newkirk et al.*, 241.

3. *Legislative power to require notice.* In the absence of any statute on the subject, the mortgagee could only be required to give such notice of a sale, on default of payment, as may be prescribed by the terms of the mortgage. But the legislature has the right to determine by statute that mortgaged lands shall not be sold by a mortgagee or trustee in any case, unless a decree of sale shall be entered in some competent court, and having such power it may authorize a sale without a decree upon such terms and conditions and upon such notice as it may deem best. And such statutory regulation of sales and powers will control the stipulations of the parties. Ibid. 241.

4. *Irregularity of sale thereunder — right of mortgagor to affirm or avoid sale.* Where an irregularity occurs in the sale of mortgaged premises under a power in a mortgage or deed of trust, which does not render the proceeding void, but only voidable, the mortgagor will have the right to affirm the sale or set it aside by instituting proceedings for that purpose in apt time. Ibid. 241.

5. *Defective notice of sale thereunder — laches of mortgagor.* Where land was sold by a trustee under a power of sale upon a defective notice, and the mortgagor abandoned all claim to the premises for over four years and paid no taxes, and finally made a deed without consideration, and the purchaser had made valuable improvements on the property before any bill was filed to set aside the sale, it was held that the *laches* of the mortgagor and his grantee were such as to bar the equitable relief sought. Ibid. 241.

6. *Sale under a defective notice — declarations of mortgagor, showing acquiescence.* In such case the declarations of the mortgagor before he made a conveyance of the property, that he claimed no title, and the fact that he executed his deed without consideration, were held proper evidence to be considered in determining the question whether he had acquiesced in the sale. Ibid. 241.

MORTGAGE SALE.

7. *Surplus distributed as realty.* A conditional decree authorizing the sale of land under a power, in the event that the amount found to be due on a mortgage is not paid, will not operate as an equitable conversion of the mortgaged premises into personalty. *Holden* v. *Dunn et al.*, 413.

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MORTGAGES AND DEEDS OF TRUST. *Continued.*

CONVEYANCE.

8. *Subject to a mortgage—rights of grantee.* When a person takes a sale or conveyance of land subject to a mortgage of the vendor, which he assumes to pay, he will be placed in the shoes of his vendor, and his title will be good as to everybody but the mortgagees. *Holden* v. *Dunn et al.*, 413.

FORECLOSURE SALE.

9. *Dower in surplus after payment of mortgage debt.* See DOWER, 2, 3.

BOND FOR A DEED.

10. *Whether a mortgage.* See CONTRACTS, 7.

MUNICIPAL CORPORATIONS.

POWER OF COURTS.

1. *To restrain their legislative action.* See COUNTIES, 2, 3.

ULTRA VIRES.

2. *Averring their own incapacity.* Same title, 7.

3. *Improving navigable waters.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 7, 8; NAVIGABLE WATERS, 1.

NAME.

IDEM SONANS.

1. *Identity of person.* Where land is conveyed to Mitchell Allen, and a deed is given by Mitchell *Allain*, the latter will pass the title that was in Mitchell Allen. The names "Allen" and "Allain," being *idem sonans*, it will be presumed that they are the names of the same person. *Guertin* v. *Momblecau*, 32.

NAVIGABLE WATERS.

IMPROVEMENT THEREOF.

1. *Power of municipal corporation.* When Congress has taken no action on the subject, the city, under the grant of legislative power, will have the right to make such improvement in a navigable river within its limits in aid of navigation as in its judgment may be required; but after Congress has passed an act on the subject, and has thus assumed jurisdiction over the subject, the city can only act in conformity to the act of Congress. *City of Chicago* v. *Law et al.*, 569.

2. So when the act of Congress has declared it unlawful for the city of Chicago to make any improvement of the Chicago river until the plan of its work is submitted to and approved by the secretary of war, the city will have no power to improve that river, except by procuring the approval of the secretary of war. Ibid. 569.

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NAVIGABLE WATERS. IMPROVEMENT THEREOF. *Continued.*

3. *Power of Congress to regulate.* Under the constitution of the United States, Congress is clothed with power to regulate commerce, and, as commerce includes navigation, the improvement of harbors and navigable waters is included within the power. *City of Chicago* v. *Law et al.*, 569.

NEGLIGENCE.

ACCIDENT AND NEGLIGENCE.

1. *Efficient cause of the injury.* Where a horse, while being driven along a street, in consequence of the opening of the bits in its mouth, runs away, without fault on the part of the driver or the plaintiff, whereby the plaintiff is thrown from the vehicle at a place where the street was left in an unsafe condition and injured, neither the running away of the horse nor the defect in the street being alone sufficient to produce the injury, but it is produced by the combination of both, and they become, therefore, in combination, the efficient and proximate cause, in such case the causal relation is direct between the defective street, occasioned by the negligence or omission of duty by the city, and the injury to the plaintiff, and without any intervening efficient cause. *City of Joliet* v. *Shufeldt*, 403.

2. If the accident of a team running away, without fault or negligence, would not have caused the injury to the plaintiff, but for a defect in the street, and such defect is the result of carelessness or negligence on the part of the city, it will be liable for the injury. Ibid. 403.

3. *Injury by the combined result of accident and negligence.* If a party, while observing due care for his personal safety, is injured by the combined result of an accident and the negligence of a city or village, and without such negligence the injury would not have occurred, the city or village will be held liable, although the accident be the primary cause of the injury, if the consequences could, with common prudence and sagacity, have been foreseen and provided against by the city. Ibid. 403.

4. The general doctrine is that it is no defense, in an action for injuries resulting from negligence, that the negligence of third persons, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause, without which the injury would not have occurred. Ibid. 403.

5. *Instruction assuming ordinary accident.* In an action against a city for an injury caused by a wall at a street crossing not being of sufficient height to prevent a person being tipped over the same by a horse running away, from a defect in the bits of the bridle so as to be beyond the control of the driver, it is not preju-

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NEGLIGENCE. ACCIDENT AND NEGLIGENCE. *Continued.*

dicial error for an instruction to assume that the accident by which the horse became uncontrollable was an ordinary accident likely to occur, as the breaking of bridles and harness and of vehicles is of constant occurrence, and is a matter within common knowledge and experience, and needs no proof. *City of Joliet* v. *Shufeldt*, 403.

PERSONAL INJURY CASE.

6. *Degree of care required of person injured.* Where a plaintiff, through no fault of his, is suddenly placed in a position of great danger of losing his life, and exercises such care for his safety as ordinary care and prudence may require of one in his situation, his right of action, otherwise good, will not be defeated by the fact that it might have been possible for him to have escaped by a different course, in safety. *Peoria, Decatur & Evansville Ry. Co.* v. *Rice*, 227.

7. Where a plaintiff jumped from a hand-car on a bridge to the ground to avoid being run over by a train, an instruction that does not hold him to the exercise of reasonable care in selecting his means of escape, but is calculated to lead the jury to believe that the court intended to limit their inquiry to the care exercised by him in making the jump from the hand-car, would be clearly erroneous. Ibid. 227.

8. *Instruction as to care.* An instruction in such a case, telling the jury they must believe from the evidence that the plaintiff, "while in the exercise of due care, caution and prudence, * * * was forced to jump from a hand-car," can not be held to mean less than that the plaintiff was required to show that he was exercising due care in being on the car at the time and place he was forced to jump. Its reasonable interpretation is not merely that plaintiff must have made the jump with due care, but that he was exercising due care when forced to jump. Ibid. 227.

9. *Instruction as to cause of the injury.* An instruction that if the jury believe from the evidence that the plaintiff, while in the employ of the defendant as section foreman, and while in the performance of his duty in helping to repair a bridge and while in the exercise of due care, etc., was forced to jump from a hand-car on such bridge to the ground to save his life, "through the neglect and wrongful acts proven of the servants of the defendant in wrongfully running a freight train," etc., is not open to the objection that it assumes the defendant was guilty. The instruction would have been better if the word "proven" had been omitted. Ibid. 227.

GROUND OF RECOVERY.

10. *Action limited to negligence charged in the declaration.* An instruction told the jury that the negligence the evidence must show in order to sustain a recovery is, "in wrongfully running a freight

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NEGLIGENCE. GROUND OF RECOVERY. *Continued.*

train upon said bridge," which is the negligence charged in the declaration. The negligence of the defendant's employés mentioned in the subsequent part of this, and the other instructions given for the plaintiff, refers to the running of the freight train: *Held*, that the instructions were not obnoxious to the charge of directing the jury that they might find the defendant liable for acts of negligence different from those alleged in the declaration, especially when an instruction for the defendant puts the burden upon the plaintiff to prove his case, as charged in the declaration. *Peoria, Decatur & Evansville Ry. Co.* v. *Rice*, 227.

FELLOW SERVANTS.

11. *Relation established.* See FELLOW SERVANTS, 1, 2.

NEGLECT TO MAKE DEFENSE.

12. *In an action at law—judgment conclusive.* See CHANCERY, 7.

OF CARRIER.

13. *Toward its passengers.* See RAILROADS, 8 to 14.

OF ATTORNEY AT LAW.

14. *Is the negligence of his client.* See ATTORNEY AT LAW, 1.

OF TRUSTEE.

15. *Neglect to collect notes.* See TRUSTS AND TRUSTEES, 2 to 5.

NOTARY PUBLIC.

ACKNOWLEDGMENT OF DEED.

Out of his county. See CONVEYANCES, 1.

NOTICE.

POSSESSION.

1. *Notice of possessor's rights.* The open and exclusive possession of lands under an apparent claim of ownership, is notice to those subsequently dealing with the title, of whatever interest the possessor has in the premises, whether the interest be legal or equitable in its nature. And if the grantor of land remains in possession after conveyance, purchasers from the grantee will be affected with notice of the grantor's rights in the land. *Rock Island & Peoria Ry. Co.* v. *Dimick*, 628.

2. *Notice of an easement reserved.* The doctrine that the tenant in possession will not be permitted to assert a claim inconsistent with his recorded deed, does not apply to the reservation of an easement or right of way or passage in the land conveyed, where the grantor retains title to adjacent lands, and the easement or right of way is appurtenant to the adjacent premises, the title to which remains in the grantor. Ibid. 628.

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NOTICE. *Continued.*

WHAT WILL CONSTITUTE.

3. *Facts sufficient to put purchaser on inquiry.* If the facts and circumstances apparent are sufficient to put a purchaser of land on inquiry, he will be chargeable with notice of all that such inquiry would have shown. *Rock Island & Peoria Ry. Co.* v. *Dimick*, 628.

4. *Existence of a right of way or easement by user.* Ordinarily, where an easement or right of way only is claimed, in the very nature of the right, the use or occupation of the land will be intermittent, and, strictly speaking, not capable of that continuous possession of which lands are ordinarily susceptible. In such cases, notice is necessarily afforded, if at all, by the continued and uninterrupted user, which is analogous to, and in a sense, possession. Ibid. 628.

5. A land owner granted to a railway company a right of way across his farm, and retained the title to the land on each side of the right of way, and he afterward, under an unrecorded contract with the company, used two openings under the road as passage-ways to and from the several parts of his farm, and built his fences so as to leave such ways open for use: *Held*, that his user of such ways and fencing with a view to their use, was notice to a subsequent purchaser of the railroad of the possessor's rights. Ibid. 628.

OF MORTGAGE SALE.

6. *Sale under defective notice.* See MORTGAGES AND DEEDS OF TRUST, 4, 5, 6.

7. *Statutory requirements — legislative power.* Same title, 1, 2, 3.

"OFFICE FOUND."

WHETHER NECESSARY. See DESCENTS, 6, 7, 8.

ORDINANCE.

FOR SPECIAL ASSESSMENT.

1. *Whether sufficient.* See SPECIAL ASSESSMENTS — SPECIAL TAXATION, 1, 2.

2. *Paving street with railroad in the center.* Same title, 3, 4.

PARTIES.

IN INTEREST.

1. *Estopped by decree.* See FORMER ADJUDICATION, 4.

IN PARTITION PROCEEDINGS.

2. *Alien heirs, incapable of taking.* See DESCENTS, 15.

DECEASED PERSONS.

3. *Made parties — how taken advantage of.* See CHANCERY, 18.

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PARTITION.

PARTIES.

Alien heirs incapable of taking. See DESCENTS, 15.

PARTNERSHIP.

AGREEMENT TO PURCHASE LAND.

Statute of frauds — resulting trust. See STATUTE OF FRAUDS, 8 to 12; TRUSTS AND TRUSTEES, 14.

PARTNERSHIP ACCOUNTS.

ADJUSTING IN EJECTMENT. See EJECTMENT, 1.

PASSENGERS.

ON FREIGHT TRAINS.

Risks assumed. See RAILROADS, 11, 12.

PHYSICAL EXAMINATION.

OF PLAINTIFF.

In a personal injury case. See PRACTICE, 11.

PLEADING.

SCIRE FACIAS.

1. *To revive a judgment — writ stands as a declaration.* On *scire facias* to revive a judgment, the writ stands in the place of a declaration and must aver every material fact necessary to entitle the plaintiff to the judgment of revival asked for. *Wilson* v. *Trustees of Schools*, 29.

2. *To revive judgment in ejectment — of its allegations.* Where the allegations of a *scire facias* to revive a judgment in ejectment affirmatively show that the judgment sought to be revived, not only adjudged the plaintiff to be entitled to the possession of the premises, but also to be the owner thereof in fee simple; that the recovery was not for a term of years, but for the entire estate: that such judgment remained unexecuted, and that execution therein remained to be made to the plaintiff, the same will be sufficient to entitle the plaintiff to judgment of revival. The plaintiff need not allege that he has not parted with his title by conveyance. Ibid. 29

3. A *scire facias* to revive a judgment in ejectment need not aver in terms that the title of the plaintiff has not expired, where the judgment recites that the recovery was for the fee simple title, and not for a term of years. Ibid. 29.

PLEA OF FORMER ADJUDICATION.

4. *Bill to foreclose.* See FORMER ADJUDICATION, 5.

STATUTE OF FRAUDS.

5. *Question raised by the pleadings.* See STATUTE OF FRAUDS, 5.

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PONDS.

THEIR OUTLET. See DRAINAGE LAW, 7.

POSSESSION.

NOTICE OF POSSESSOR'S RIGHTS. See NOTICE, 1, 2.

PRACTICE.

TIME TO OBJECT.

1. *Incompetent evidence — objection too late on appeal.* If the averments in a declaration in an action by a lot owner against a railway company to recover damages, caused by the construction and operation of railroad tracks in the street fronting the lot, are insufficient to admit proof of a permanent injury, and a recovery for a depreciation of the market value of the property, the introduction of such proof should be objected to when offered on the trial. The objection comes too late when made for the first time on appeal or error. *Chicago & G. W. R. R. Co.* v. *Wedel*, 9.

2. *Excepting to instructions.* A plaintiff can not avail of an error in giving an instruction to the jury to find for the defendant, unless he has excepted to the instruction in the trial court. An objection to an instruction made for the first time in this court comes too late. *Stock Quotation Tel. Co.* v. *Chicago Board of Trade*, 370.

DIRECTING WHAT THE VERDICT SHALL BE.

3. Although the plaintiff's evidence may wholly fail to establish a cause of action under one count of his declaration, yet if it is sufficient to make a *prima facie* case under another count, it will be error to instruct the jury to find for the defendant. *Arnold et al.* v. *Bournique*, 132.

4. If the plaintiff fail to introduce in evidence the contract upon which the suit is brought, he can not recover, and there will be no error to instruct the jury to find for the defendant. *Stock Quotation Telegraph Co.* v. *Chicago Board of Trade*, 370.

SPECIAL INTERROGATORIES.

5. *Modification by the court.* The modification of special interrogatories asked to be submitted to the jury, by the omission of certain queries relating only to evidentiary facts, is not error. *Ingalls* v. *Allen*, 535.

6. *Findings of the jury not responsive — remedy.* If the findings of the jury are not responsive to the interrogatories submitted, the counsel complaining should object to the receiving of the verdict, and ask the court to direct the jury to find specifically in the respect wherein their finding is not sufficient. Ibid. 535.

SETTING ASIDE DEFAULT.

7. *Sufficiency of affidavit — negligence of attorney.* An affidavit filed on a motion to set aside a judgment by default, although it

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PRACTICE. SETTING ASIDE DEFAULT. *Continued.*

may show a meritorious defense, is insufficient, if it fails to show any other reason why plea was not filed in time, than that the defendant's attorney failed to do so "through press of business and inadvertence." The negligence of the attorney in failing to file a plea, is the negligence of the client. *Schultz* v. *Meiselbar*, 26.

8. *For censurable act of plaintiff — not prejudicial to defendant.* Two or three weeks before judgment by default, the attorney of the defendant withdrew the declaration and papers in the case, giving his receipt to the clerk of the court therefor. While the papers were still out of the clerk's office the plaintiff improperly obtained possession of such receipt and took judgment by default: *Held*, that while the abstraction of the receipt was highly censurable, it afforded no ground for setting aside the judgment by default, such act not operating prejudicially to the defendant. Ibid. 26.

JUDGMENT BY DEFAULT.

9. *Papers in possession of defendant's attorney.* It is not error to take judgment by default for want of a plea, where the defendant's attorney had withdrawn the declaration and papers from the files two or three weeks before, and still had them at his office. A party can take no advantage by reason of his own improper act. Ibid. 26.

DEMURRER BY SEVERAL DEFENDANTS.

10. *Good as to some and bad as to others.* Where there are several defendants, if they all join in one demurrer to a bill, the demurrer may be good and be allowed as to one of the defendants, and be bad and disallowed as to the other defendants, as the defense may be good as to one person and be wholly inapplicable to another. *Lancaster et al.* v. *Roberts et al.*, 213.

PERSONAL INJURY CASE.

11. *Ordering plaintiff to submit to a physical examination.* There is no error in refusing to order the plaintiff, in an action for a personal injury, to submit to a physical examination by the defendant's physician to ascertain the extent of the injury. The court has no power to require the injured party to submit to a personal examination against his will. *Peoria, Decatur & Evansville Ry. Co.* v. *Rice*, 227.

PRESIDING JUDGE.

12. *Absence from the bench, during argument.* Under the law a person on trial for a serious crime, which may deprive him of his liberty, has the right to the presence of the presiding judge during the argument of the case to the jury, and his absence during the closing remarks of the State's Attorney, so as not to be able to pass upon objections to statements made by him, is an error of such magnitude as to call for a reversal of a judgment of conviction. *Thompson* v. *The People*, 378.

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PRACTICE. *Continued.*

ARGUMENT OF COUNSEL, TO THE JURY.

13. *Part of the trial — rights of defendant.* On the trial of a criminal case before a jury the defendant has the right to be heard before the jury in person or by counsel, as he may elect. This is a right guaranteed by law. Indeed, the argument before the jury is a part of the trial of the cause, as well as the introduction of evidence to prove the guilt or innocence of the defendant, or any other fact at issue on the trial. *Thompson* v. *The People*, 378.

BILL OF EXCEPTIONS.

14. *Stipulation as to evidence.* Parties have the right to stipulate, before the bill of exceptions is signed, what evidence was introduced before the jury, and the evidence so agreed upon may be incorporated into the bill of exceptions, and all evidence thus incorporated in the bill, when signed by the judge, will become a part of the record. *Stock Quotation Telegraph Co.* v. *Chicago Board of Trade*, 370.

15. *Right of parties to change.* Any matter embodied in the bill of exceptions under the seal of the court is a part of the record, and the parties have no right to change or add to the record of the court by stipulation, and if they do, such matters can not be regarded by this court. Ibid. 370.

PRACTICE IN THE SUPREME COURT.

ERROR WILL NOT ALWAYS REVERSE.

1. *Admission of improper evidence.* When a particular fact is so well shown by the evidence as that the improper admission of other evidence will not add any weight to the proof of that fact, such admission will afford no ground for a reversal. *Chicago & G. W. R. R. Co.* v. *Wedel*, 9.

2. *Error waived.* If it is error for the court to deny defendant's motion, made at the close of the plaintiff's evidence in chief, to dismiss for want of evidence sufficient to authorize a recovery, it will be waived by the defendant's introducing evidence and asking instructions on the merits. Ibid. 9.

3. *Faulty instruction considered with the series.* A judgment will not be reversed for a faulty instruction when, taking it in connection with the series given, there is no prejudicial error. *Neufeld* v. *Rodeminski*, 83.

4. *Error committed at the instance of the party complaining.* This court will not determine the admissibility of evidence introduced on the trial or the correctness of the rulings in the submission of the case, when the holding is as favorable to the party complaining as he asked, or could ask under the most liberal of the adjudged cases, and which, if error, was made at his instance. *McNeil et al.* v. *Shober & Carqueville Lith. Co.*, 238.

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PRACTICE IN THE SUPREME COURT. *Continued.*

JUDGMENT NUNC PRO TUNC.

5. *After death of a party to the record.* This court has the power of causing its judgments to be entered of record in cases pending therein, after the death of a party to the record, subsequent to the submission for decision, as of a day before his death, when the delay in causing judgment to be entered has been purely for the convenience of the court or of some of its members. *O'Sullivan* v. *The People*, 604.

AMENDMENT TO BILL OF EXCEPTIONS.

6. *Striking from the files.* An amendment of a bill of exceptions filed at a succeeding term, in a matter of form, when it appears in the record that there is enough to amend by, will not be stricken from the files in this court. *Guertin* v. *Mombleau*, 32.

MOTION TO DISMISS APPEAL.

7. *Refusal of trial court to grant an appeal.* See APPEALS AND WRITS OF ERROR, 13.

PRESUMPTION.

OF PARTIALITY OF JUROR.

1. *Subject to rebuttal.* See JURY, 14.

OF AN ADVANCEMENT.

2. *To wife or child.* See ADVANCEMENT, 1.

PROMISSORY NOTE.

LIABILITY THEREON.

1. *Signed by president and treasurer of a corporation.* A promissory note signed "Malcom McNeil, President World's Pastime Exposition Company, Albert F. Dexter, Treasurer," is *prima facie* the note of McNeil and Dexter. *McNeil et al.* v. *Shober & Carqueville Lith. Co.*, 238.

CERTIFICATE OF DEPOSIT.

2. A certificate of deposit showing the deposit in bank of a sum of money payable to the order of the depositor, in current funds on its return one year after date, with six per cent interest for the time specified, but no longer, is, in law and in fact, a promissory note. *Telford* v. *Patton*, 611.

GIFT THEREOF.

3. *Delivery essential.* A promissory note is not the subject of disposal as a gift, either *inter vivos* or *mortis causa*, without an actual delivery of it. Ibid. 611.

4. A certificate of deposit may be the subject of a valid gift *causa mortis*, but it must be indorsed and delivered to the donee so as to vest in him complete title, or so delivered without indorsement as to create an equitable assignment of the fund it represents, divesting the donor of all control and dominion over it. Ibid. 611.

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PUBLIC POLICY.

CONTRACTS CONTRARY THERETO.

Not enforcible. See CONTRACTS, 13, 14, 15.

PURCHASERS.

JOINT PURCHASERS OF LAND.

1. *Several interest therein.* See TRUSTS AND TRUSTEES, 14; STATUTE OF FRAUDS, 8 to 12.

FAILURE OF VENDOR'S TITLE.

2. *Option to rescind — or to abatement on purchase money.* See VENDOR AND PURCHASER, 1, 2.

QUO WARRANTO.

SUFFICIENCY OF THE PLEA.

1. *By persons assuming to be school directors.* A plea to an information in the nature of *quo warranto* against persons assuming to act as school directors of an alleged school district in two or more townships, that at the regular meeting in April, 1890, of each of the boards of trustees of each of said townships, a petition for the formation of the new district was presented to said respective boards, and that they, upon due consideration, granted the prayer of the petition, is not sufficient. It is but a statement of a conclusion, and sets forth no facts from which it can be seen what was done by the several boards. *Rayfield et al.* v. *The People ex rel.*, 332.

RAILROADS.

IN A PUBLIC STREET.

1. *Whether a damage to abutting property.* If the construction and operation of a railroad and side track along a public street in front of a house and lot will not have the effect to decrease the market value of the property, but the same will sell for more money in the open market than if the tracks of the railroad had not been constructed and operated, there will be no damages and no cause of action. *Chi. & Gt. West. R. R. Co.* v. *Wedel*, 9.

2. *Fixing amount of damages to abutting property — expert testimony.* In an action by the owner of a house and lot to recover damages caused to his property by the construction and operation of a railway in a street just in front of the house, a witness was called by the plaintiff, who had seen the premises and location of the railroad, but who was not present when any trains had passed, and was asked this question: "From the proximity of the railroad track, can you tell whether the smoke and cinders and gases from passing locomotives would enter these premises — enter the house?" and he answered, "Yes, sir, very likely." *Held*, that if the witness had at any time seen trains pass the premises, it would have been proper for him to state any facts which had come to his knowledge, but that he could not assume the position of an expert and give his opinion to the jury as evidence. Ibid. 9.

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RAILROADS. *Continued.*

CARRIER OF PASSENGERS.

3. *Duty to stop its trains for passengers to alight.* It is the duty of a railway company carrying passengers on a freight train, in reaching the station of the passenger's destination, to bring the train to a full stop, with due and proper care and caution with reference to the personal safety of the passengers; and, thereupon, not to start or move forward such train in an improper and dangerous manner at a time when such passengers may rightfully, in the exercise of due care, arise from their seats and prepare to leave the train at such station. *Chicago & Alton R. R. Co.* v. *Arnol*, 261.

4. The implied contract of a railway carrier of passengers to carry them safely to their destination, includes the duty of furnishing a reasonable opportunity to alight from the train in safety at the end of the journey. Ibid. 261.

5. *Conduct of its servants — ordinary care of passenger.* If the conduct of those operating a freight train, to which was attached a caboose, and their management of the train, amounted to an invitation for passengers to alight at a station for the discharge of passengers, and would be so understood and acted upon by reasonable and prudent persons, and a passenger acting in good faith upon such invitation, arises, upon the train coming to a standstill for that purpose, and is injured by a sudden start of the train, the jury will be justified in finding that he was in the exercise of ordinary care for his safety at the time of the injury. Ibid. 261.

6. If, by reason of such apparent invitation, the passenger was placed in peril from the further movement of the train, the duty of the railway company will at once arise to stop its train a sufficient length of time to permit him to leave it in safety, or to warn him of the danger in time to avert injury. In such case it will not be material whether the shock to the train producing the injury was an incident of the ordinary operation of the train, or was extraordinarily and unnecessarily violent. Ibid. 261.

7. *Measure of duty of carrier.* The duty of the carrier is to be measured by the peril to the passenger whom it has accepted and undertaken to safely carry, and who has been induced by the conduct of its servants to assume a position of danger. Such duty relates to the place where the passenger has been induced by the conduct of its servants and the stopping of the train to believe he was to alight, and not to the final stopping of the train after the injury, a few feet further on at the same platform. Ibid. 261.

8. *Due care of passenger — a question of fact.* Whether a passenger on a freight train was justified in assuming that it was the intention of those in charge of the train to discharge passengers at the first stop of the train at the station of his destination, and in attempting to get off, is a question of fact for the jury, in a suit

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RAILROADS. CARRIER OF PASSENGERS. *Continued.*

by the passenger to recover for a personal injury caused by starting the train with a sudden jerk without warning. *Chicago & Alton R. R. Co.* v. *Arnol*, 261.

9. *Degree of care required.* Ordinarily carriers of passengers for hire, while not insurers of absolutely safe carriage, are held to the exercise of the highest degree of care, skill and diligence practically consistent with the efficient use and operation of the mode of transportation adopted. This rule applies in the absence of a valid contract limiting the liability of the carrier whenever the relation of passenger and carrier is established. Ibid. 261.

10. While it is said that the utmost care and the highest degree of diligence is to be exercised, it is to be understood that the care and diligence exacted is not such as will exclude all possible peril, or required to be of that degree that will render the use of the instrumentalities of transportation known to be employed, impracticable; but it always has relation to the mode of conveyance accepted, and the conditions and circumstances necessarily attendant. Ibid. 261.

11. *Carrying passengers on freight trains — rights and hazards of the passenger.* A passenger taking passage upon a freight train or in a caboose or car attached to such a train, can not expect or require the conveniences, or all the safeguards against danger that he may demand upon trains devoted to passenger service. He will be held to have accepted the accommodations provided by the company, subject to all the ordinary inconveniences, delays and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains and managed with proper care and skill. Ibid. 261.

12. The passenger has the right to presume that the train is thus made up and equipped, and that the cars, machinery and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such a train. Ibid. 261.

13. If a railway company consents to carry passengers for hire, by freight trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. It is only the hazards incident to such trains which the passenger assumes in taking a freight train, and not hazards or peril arising from the negligence or want of proper care of those in charge of it. Ibid. 261.

14. In the operation of freight trains, the primary object is the carriage of freight, and the appliances used are, and are known by passengers to be, adapted to that business, and the carrier is not, when transporting passengers thereon, held to a degree of care in its operation, that would destroy the use of the train for its primary purpose. But the law requires that the highest degree of care be

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RAILROADS. CARRIER OF PASSENGERS. *Continued.*

exercised that is practicable and consistent with the efficient use of the means and appliances adopted; and the carrier is held to the same strict accountability for negligence of its servants, injuriously affecting the passengers, as it would be if the transportation had been by a train devoted to passenger service exclusively. *Chicago & Alton R. R. Co.* v. *Arnol*, 261.

REAL PROPERTY.

TITLE THERETO.

Passes according to lex rei sitæ. See DESCENTS, 12, 13.

RES JUDICATA. See FORMER ADJUDICATION, 1 to 6.

RESCISSION.

RIGHT OF VENDEE.

1. *Failure of vendor to perform.* See VENDOR AND PURCHASER, 1.

VOIDABLE CONTRACT.

2. *When rescission takes effect.* See CONTRACTS, 11, 12.

RESULTING TRUST.

CONVEYANCE TO WIFE OR CHILD. See ADVANCEMENT, 1, 2.

ROAD AND BRIDGE TAX. See TAXATION AND TAX TITLES, 1, 2; HIGHWAYS, 1, 2, 3.

RULE IN SHELLY'S CASE.

A RULE OF PROPERTY. See WILLS, 7.

SALES.

BY AGENT.

1. *Authority must be strictly pursued.* See AGENCY, 1, 2.

2 *Parol authority to sell land.* See STATUTE OF FRAUDS, 2.

BY ALIEN.

3. *Power of non-resident alien heir.* See ALIENS, 5.

VOIDABLE.

4. *Set aside — when the sale becomes void.* See CONTRACTS, 9 to 12.

OF A HOMESTEAD.

5. *Essentials of the contract.* See HOMESTEAD, 2.

6. *Specific performance of contract.* Same title, 4, 5.

OF PROPERTY INSURED.

7. *Invalidating insurance policy.* See INSURANCE, 8 to 14.

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SALES. *Continued.*

FAILURE OF TITLE.

8. *Right of rescission of contract.* See VENDOR AND PURCHASER, 1, 2.

SCHOOLS.

ELECTION OF SCHOOL OFFICERS.

1. *Right of women to vote.* Since the passage of the act of June 19, 1891, entitled "An act to entitle women to vote at any election held for the purpose of choosing any officer under the general or special school laws of this State," women above the age of twenty-one and having the qualifications required in that act, are entitled to vote at any election of school offices, except that of superintendent of public instruction and county superintendents of schools. *Plummer et al.* v. *Yost et al.*, 68.

2. At the election of the State and county superintendent of schools, the qualifications of the voters must be those prescribed in sec. 1 of art. 7 of the constitution, but the constitution contains no direction as to what other school offices shall be created, or as to the mode in which the incumbents of those offices shall be designated and chosen. Ibid. 68.

SCHOOL ELECTIONS.

3. *Power of legislature to determine the qualification of voters.* The General Assembly, having complete control of the subject, has the power to provide for the designation of all school officers, except the two named in the constitution, by appointment or by popular vote, but such election is not necessarily a proceeding identical with the elections provided for by the constitution, nor is it necessary that the qualifications of those voting for school officers shall be the same as those of electors as defined by the constitution. Idid. 68.

4. *Discretion of legislature.* Section 1 of article 8 of the constitution requiring the General Assembly to provide for a system of free schools, leaves to the legislature the discretion as to the mode in which the system shall be organized, and the officers by whom it shall be controlled and directed, and its affairs administered. The only school officers expressly provided for by the constitution are a county superintendent and a State superintendent of public instruction. Ibid. 68.

FORMING NEW DISTRICTS.

5. *Territory in different townships.* Under section 51 of article 8 of the revised School law of 1889 the several boards of trustees of different townships, in forming a new district by detaching territory from two or more districts in different townships, must act

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SCHOOLS. FORMING NEW DISTRICTS. *Continued.*

in conformity with that section. The different boards must act concurrently upon the petition and not jointly. *Rayfield et al.* v. *The People et al.*, 332.

TRUSTEES OF SCHOOLS.

6. *Of several townships — holding joint meetings.* There is no authority of law given to call or organize joint meetings of the trustees of schools of several townships, or for the transaction of business by such a body. Ibid. 332.

QUO WARRANTO.

7. *Against acting school directors — sufficiency of plea.* A plea to an information in the nature of *quo warranto* against persons assuming to act as school directors of an alleged school district in two or more townships, that at the regular meeting in April, 1890, of each of the boards of trustees of each of said townships, a petition for the formation of the new district was presented to the said espective boards, and that they, upon due consideration, granted the prayer of the petition, is not sufficient. It is but a statement of a conclusion, and sets forth no facts from which it can be seen what was done by the several boards. Ibid. 332.

SECTARIAN SCHOOLS.

8. *Appropriating public funds in aid thereof.* See COUNTIES, 10, 11.

SCIRE FACIAS.

TO REVIVE A JUDGMENT.

Writ stands as a declaration — sufficiency. See PLEADING, 1, 2, 3.

SEPARATE MAINTENANCE. See HUSBAND AND WIFE, 1 to 11.

SHELLY'S CASE — RULE IN. See WILLS, 7.

SPECIAL ASSESSMENTS — SPECIAL TAXATION.

LOCAL IMPROVEMENTS.

1. *Ordinance therefor — void for uncertainty.* An ordinance for making a system of sewers, etc., under which a special assessment was made, among other things, provided that, "for all rock excavations, in addition to his price per foot of sewer, the contractor is to receive a compensation of —— dollars per cubic yard," which blank was nowhere filled, and also that "the commissioner of public works reserves the right to make any changes in the foregoing plans and specifications that the said commissioner may deem desirable or necessary, and the contractor shall furnish any additional materials, or do any additional work required by such changes at the rate said department shall determine to be just:" *Held*, that the ordinance was invalid. *Lake Shore & Mich. South. Ry. Co. et al.* v. *Chicago*, 391.

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SPECIAL ASSESSMENTS — SPECIAL TAXATION.

LOCAL IMPROVEMENTS. *Continued.*

2. *Ordinance authorizing commissioner to reject any and all bids, invalid.* An ordinance for the construction of a local public improvement, which provides that the commissioner of public works reserves the right to reject any proposal, etc., of bidders for a contract to do the work, etc., at his discretion, is in conflict with section 50 of chapter 24 of the Revised Statutes, which requires all contracts for making any public improvement, when the expense thereof shall exceed $500, shall be let to the lowest responsible bidder. *Lake Shore & Mich. South. Ry. Co. et al.* v. *Chicago*, 391.

3. *Paving a street — street railway — estimating the cost.* By ordinance of a city a street railway company was required to pave its right of way, being sixteen feet, along a street. By another ordinance the paving of the street its entire width was required, and the commissioners appointed for that purpose reported that they had made an estimate of the cost of such improvement: *Held*, that the cost of paving the center sixteen feet of the street was wrongfully included in the estimate of the cost of the improvement to be charged upon the property benefited, and that judgment of confirmation of the assessment roll was properly denied. *City of Chicago* v. *Cummings*, 446.

4. In such case the ordinance for the improvement of the entire street is not void, if so much was required for the public convenience; but the city having required the street railway company to "fill, grade, pave and keep in repair during all the time," it has the privilege of using the street, sixteen feet in width, when a double track is used, "in accordance with such ordinance as the city council may pass respecting such filling, grading, paving or repairing," and requiring the same to be done by the railway company with like material, in like manner, and at the time required in respect of the rest of the street, the cost of paving so much of the street should have been excluded from the estimate. Ibid. 446.

SPECIAL ASSESSMENT.

5. *Power of city to raise money thereby.* The power of taxation by special assessment can not be exercised by a city or any other corporate authority unless the power has been expressly and clearly conferred by the legislature. In no case can a city resort to the taxation of property by special assessment unless the power has been clearly conferred. *City of Chicago* v. *Law et al.*, 569.

6. The first section of article 5 of the act relating to cities and villages contains ninety-six distinct paragraphs specifying the different powers of the city council, but there is nothing in that article or any of its sections or clauses which confers authority to make a special assessment to raise money to enable the city to carry out any of these different powers. Ibid. 569.

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SPECIAL ASSESSMENTS — SPECIAL TAXATION.

SPECIAL ASSESSMENT. *Continued.*

7. *Widening navigable river.* Under section 1 of article 9 of the same act, a city has the right to levy special assessments to pay for the opening, grading and paving streets and alleys, and to pay for the making of sidewalks, sewers and other like improvements; but it has not the right under that section to make a special assessment to pay for the widening of a navigable river which is under the control of the general government. Such an improvement has none of the elements of a local improvement, such as incorporated cities and villages have been in the habit of making by special assessment, but is one in which the general public have an interest. *City of Chicago* v. *Law et al.*, 569.

8. The grant of power to cities and villages to deepen, widen, dock, cover, wall, alter or change the channel of water-courses, does not authorize them to resort to special assessment to raise money to put such power in execution. Ibid. 569.

9. *Authority therefor, may be challenged.* Where an improvement is ordered which is manifestly one not pertaining to the locality, but one designed to be a great benefit to the country at large, an assessment therefor may be challenged by the property owner whose property may be assessed, and the court may refuse to confirm such assessment and dismiss the proceeding. Ibid. 569.

10. *Payable in installments — construction and validity of the statute. See* STATUTES, 9.

STATUTES.

STATUTES CONSTRUED.

1. *Alien act of* 1887 — *non-resident aliens holding real estate.* By the act of 1887, relating to aliens, the non-resident alien is not merely forbidden to "acquire or own, hold or possess," but it is expressly declared that he "shall not be capable of acquiring title to or holding" real estate: *Held*, that this language could not be construed as permitting the non-resident alien to hold a defeasible title, subject to be divested only by forfeiture in favor of the State. *Wunderle et al.* v. *Wunderle*, 40.

2. The act specifies what aliens may hold defeasible titles, such as the heirs of aliens who had theretofore acquired lands, and resident aliens declaring their intentions to become citizens, and creditor aliens seeking to enforce liens on judgments. From this it must be presumed that the legislature intended to withhold such right from the aliens not embraced in those classes, and who are declared to be incapable of taking or holding. Ibid. 40.

3. *Act of* 1887 — *alien heirs of citizens — exception in section* 1. The act of 1887, relating to aliens, can not be so construed as to extend the exception in section 1 to the alien heirs of citizens, as well

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STATUTES. STATUTES CONSTRUED. *Continued.*

as the heirs of aliens, and thereby give the non-resident alien kindred of citizens the right to take lands by descent or devise, and hold the same for three or five years so as to make sale or acquire an actual residence in the State. *Wunderle et al.* v. *Wunderle*, 40.

4. The exception in section 1 of the act of 1887, relating to non-resident aliens, should not be so construed as to embrace others than the class of persons therein specifically designated. Ibid. 40.

5. The words "heirs or aliens who *may* acquire lands," etc., in section 1 of the act of 1887, relating to aliens, refer to the case specified in section 8 of the act, where a non-resident alien owning lands in this State at the time the act took effect, disposes of the same during his lifetime, and takes security for the purchase money, and afterward he "or his non-resident heirs" again obtain the title on sale made under a judgment or decree rendered in order to enforce the payment of any part of such purchase money. These words of exception do not apply to heirs of a citizen and resident of the United States. Ibid. 40.

6. *Sec.* 1, *chap.* 39, *R. S.* — *heirship of surviving husband or widow.* The statute (chap. 39, sec. 1) which makes the surviving husband or widow of a decedent an heir when there is no descendant left, applies to cases where the surviving widow or husband is capable of taking, and not to cases where there is incapacity by reason of alienage. *Schultze* v. *Schultze et al.*, 290.

7. *Section* 70, *of chapter* 3, *Revised Statutes*, giving a preference of claims against estates when they are for money received by the decedent "in trust for any purpose," was not intended to embrace all kinds of trusts in the broadest meaning of the term, as including factors, agents, etc. The word "trust" is used in the more restricted sense of the term as referring to special trusts, and not those which the law implies from the contract. *Svanoe et al.* v. *Jurgens*, 507.

8. *Section* 13 *of chapter* 30, *relating to conveyances*, which prescribes that "every estate in lands, which shall be granted, conveyed or devised, although other words heretofore necessary to transfer an estate of inheritance be not used, shall be deemed fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed or devised by construction or operation of law," has no application to cases where the words heretofore essential to pass an estate of inheritance are used. It is only where such words are wanting that the courts are authorized to inquire whether an estate less than the fee is limited by express words or not. *Wolfer* v. *Hemmer et al.*, 554.

9. *Special legislation — law depending on the population of a city.* Section 55 of the act of April 29, 1887, to amend article 9 of

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STATUTES. STATUTES CONSTRUED. *Continued.*

the Cities and Villages act, in force July 1, 1872, after providing that the amount of any special assessment for any local improvement in any city, incorporated town or village, may be divided into installments when so provided by the ordinance for the making of such improvement, and fixing the manner of payment of the same, etc., has this proviso: "Provided, that in cities containing a population of fifty thousand or more, this and the following sections shall not apply, except in cases where any such special assessment exceeds, in the aggregate, the sum of fifteen thousand dollars": *Held*, that the effect of the proviso is not such as to render the act special legislation within the meaning of section 22, article 4 of the constitution, and, therefore, void. The proviso can not, therefore, be rejected. *Cummings et al.* v. *City of Chicago*, 563.

10. It has become the settled rule of construction in this State, that an act, general in its terms and uniform in its operation upon all persons and subject-matter in like situation, is a general law, and not obnoxious to the objection that it is local or special legislation. This case is distinguished from *Devine* v. *Commissioners of Cook County*, 84 Ill. 590. In that case the power given by the act necessarily, not only by the limitation of population but by the wording of the statute and the purposes and objects declared, related to a single county. Ibid. 563.

11. *Prosecution of writ of error by administrator.* See APPEALS AND WRITS OF ERROR, 15.

12. *Section* 20, *Burnt Records act — costs.* See COSTS, 3, 4.

13. *Sec.* 14, *chap.* 78, *R. S.— impartial jury.* See JURY, 10 to 13.

14. *Sec.* 3, *Homestead act of* 1872. See HOMESTEAD, 9.

15. *Sec.* 14, *chap.* 95, *R. S. — notice.* See MORTGAGES AND DEEDS OF TRUST, 1.

16. *Fish law of* 1887 — *appeal by the people.* See APPEALS AND WRITS OF ERROR, 2, 3.

17. *Sec.* 51, *art.* 3, *chap.* 122, *R. S.— School law.* See SCHOOLS, 5.

18. *Attachment — recognizance and death of defendant.* See ATTACHMENT, 2.

19. *Mechanic's lien.* See LIENS, 1 to 8.

RULE OF CONSTRUCTION.

20. *A statute will be construed as passed by the legislature.* It is not the province of the judiciary to make laws, but to construe and interpret them and pass upon their validity. A construction will not be adopted which will make the legislature say what it has not said. A construction of a statute, variant from the strict

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STATUTES. RULE OF CONSTRUCTION. *Continued.*

and literal meaning, is only justified upon the ground that it effectuates the intention of the legislature manifestly disclosed by a consideration of the whole context. *Wunderle et al.* v. *Wunderle*, 40.

21. *Purpose considered.* In the construction of a statute courts are not confined to the words used, but may regard the purpose, and, when necessary to give effect to the meaning of the law, words may be rejected and others substituted. *Peoria & P. U. Ry. Co.* v. *The People, ex rel.*, 458.

OPERATION SUSPENDED.

22. *By conflicting treaty.* See TREATY, 1.

OF THE BRITISH PARLIAMENT.

23. *In force in this State.* See COMMON LAW, 1.

VESTED RIGHTS.

24. *Legislative power to abolish estate by curtesy.* See CURTESY, 2, 3, 4.

25. *Rights of inheritance.* See DESCENTS, 2, 3, 4.

STATUTE OF FRAUDS.

AUTHORITY TO AGENT.

1. *To sell land — varying its terms.* If an agent, having written authority to sell lands of his principal, sells the same at a less price, or on different terms than he is authorized, he must have a new and further authority, which must also be in writing under the statute of frauds. A verbal consent of the principal for him to sell on other terms is invalid under the statute. *Kozel* v. *Dearlove et al.*, 23.

2. The owner of lots, in writing, authorized his agent to sell the same at certain prices and upon certain terms. The agent made a sale at a less price and on more favorable terms, and communicated that fact to the principal, who assented to the sale and verbally directed the agent to execute the contract, which he did: *Held*, that as the agent's authority to make such a contract was not in writing, the same was void and not enforcible. Ibid. 23.

AGENT'S COMPENSATION.

3. *Contract for a share in the increase in the value of lands.* A claim of an agent that he was to have a certain percentage in the increase in value of the lands of his principal for his looking after the same and collecting the rents, etc., being in the nature of a lien upon or interest in such lands, is within the statute of frauds. *Vose* v. *Strong et al.*, 108.

PERFORMANCE.

4. *Taking the case out of the statute — proof required.* Even where there is performance of an oral contract sufficient to take the case out of the statute, a court of equity will not enforce such contract, unless the proof of its terms is clear and satisfactory. Ibid. 108.

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STATUTE OF FRAUDS. *Continued.*

AS A DEFENSE.

5. *Compliance with the statute presumed.* In this State the doctrine is, both at law and in equity, that compliance with the statute of frauds is presumed, and the party plaintiff is not required to set out compliance in his declaration or bill. *Speyer* v. *Desjardins et al.*, 641.

6. *When available, on demurrer.* The benefit of the statute of frauds, as a defense, can be taken by demurrer only when it affirmatively appears from the bill that the agreement relied on is not evidenced by a writing duly signed. Ibid. 641.

7. When the allegation of a bill in chancery is that the complainant and defendant "entered into an agreement to purchase" certain lots and "to erect thereon" certain specified buildings, it will be presumed that the agreement was in writing and properly signed by the parties, and if the bill states a case for equitable relief, it will be error to sustain a demurrer to it on the ground it is not stated that the contract is in writing. Ibid. 641.

PARTNERSHIP AGREEMENTS.

8. *The statute applied.* It is well settled that an oral contract by two or more persons to purchase real estate for their joint benefit is within the statute of frauds, but an agreement for a partnership for the purpose of dealing and trading in lands for profit is not within the statute, and the fact of the existence of the partnership and the extent of each partner's interest may be shown by parol evidence. Ibid. 641.

9. *Partnership lands — treated as personal property.* The real estate of a partnership is treated and administered in equity as between the partners, and for all the purposes of the partnership, as personal property and partnership assets, and for this reason it is immaterial whether the legal title to the partnership land is in all the partners, or in one, or in some number less than the whole, nor is it material whether the partnership was already formed and engaged in its business when the land was acquired and brought into the partnership stock, or whether the partnership was established and the land acquired and put in contemporaneously, or whether the partnership was established for the express and special purpose of dealing in and making profit out of the very land itself. Ibid. 641.

10. Where the facts of the existence of the partnership and that the lands were acquired and used for partnership purposes are shown by parol, it will be immaterial whether such partnership was formed by written articles or by parol. Ibid. 641.

11. *Agreements not within statute of frauds.* Partnership agreements and partnership lands, as between the partners, and for all partnership purposes, are not within the statute of frauds. Ibid. 641.

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STATUTE OF FRAUDS. PARTNERSHIP AGREEMENTS. *Continued.*

12. An agreement between two parties by which they agree to purchase certain lots and erect buildings thereon, each party to contribute one-half of the money necessary for the enterprise, the lots and buildings then to be sold, and the profits or loss arising from the enterprise to be divided equally between them, is clearly a partnership agreement. *Speyer* v. *Desjardins et al.*, 641.

STREETS.

RAILROAD IN STREET.

1. *Damage to abutting property — expert testimony.* See RAILROADS, 1, 2.

2. *Estimating cost of paving.* See SPECIAL ASSESSMENTS — SPECIAL TAXATION, 3.

DEFECTIVE.

3. *Injury therefrom.* See NEGLIGENCE, 1 to 5.

TAXATION AND TAX TITLES.

ROAD AND BRIDGE TAX.

1. *On property in cities and villages — how used.* The road and bridge tax on city property, after it is collected and paid over to the city treasurer, is a fund to be used for road and bridge purposes within the city, and should the city authorities undertake to devote such fund to any other purpose, any tax payer of the city, upon a proper showing, would have the right to enjoin the misappropriation of the fund. *Peoria & P. U. Ry. Co.* v. *The People, ex rel.*, 458.

2. *Not a city tax — section* 16 *Road and Bridge law, valid.* The proviso in section 16 of the Road and Bridge law, as amended in 1889, which requires all the road and bridge tax levied and collected within the limits of a city of thirty-five thousand inhabitants or more, shall be paid to the city treasurer "for city purposes," does not render the statute unconstitutional, as such levy is made by the commissioners of highways for road and bridge purposes. The words "for city purposes," as used, are intended to require the tax to be paid to the city treasurer for road and bridge purposes only. Ibid. 458.

TORTS.

JUDGMENT THEREFOR.

Whether satisfied by imprisonment. See IMPRISONMENT, 1.

TREATY.

BETWEEN U. S. AND FOREIGN GOVERNMENTS.

1. *Its effect on conflicting statutory provisions.* While it is true that the right of foreigners to acquire and hold title to real estate is entirely dependent on the laws of the State in which the land is

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TREATY. BETWEEN U. S. AND FOREIGN GOVERNMENTS. *Continued.*

situate, it is also true that the State law must give way, if it conflicts with any existing treaty between the government of the United States and the government of the country of which such foreigner is a subject or citizen. *Wunderle et al.* v. *Wunderle*, 40.

2. *Removing statutory disqualification to hold real estate.* But the treaty which will suspend or override the statute of a State, must be a treaty between the United States and the government of the particular country of which the alien, claiming to be relieved of the disability imposed by the State law, is a citizen or subject. A treaty with some other country of which such alien is not a citizen or subject can not have the effect of removing such disability. Ibid. 40.

3. Under article 6 of the Federal constitution, provisions in regard to the transfer, devise or inheritance of property are fitting subjects of negotiation and regulation by the treaty-making power of the United States, and such a treaty will control or suspend the statutes of the States whenever it differs from them. Hence, if the citizen or subject of a foreign country is disqualified under the laws of a State from taking, holding or transferring real property, such disqualification will be removed, if a treaty between the United States and such foreign government confers the right to take, hold or transfer real property. Ibid. 40.

4. The disability imposed upon non-resident aliens by the first section of the act of 1887 is not removed by any existing treaty between the United States and the Grand Duchy of Baden, or between the United States and the German Empire. Ibid. 40.

5. *Liberally construed.* Where a treaty of the United States with a foreign nation admits of two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred, following the case of *Hauenstein* v. *Lynham*, 100 U. S. 483. *Schultze* v. *Schultze et al.*, 290.

UNITED STATES TREATY WITH BREMEN.

6. *Rights of alien heirs thereunder — treaty construed.* By section 7 of the treaty of the United States with the Hanseatic Republic of Bremen, concluded on December 20, 1827, where a citizen of the United States dies intestate, owning land and leaving non-resident alien kindred, residing in and citizens of Bremen, who would be his heirs but for their alienage, there is granted to such kindred the term of three years within which they may dispose of such lands and remove the proceeds. Ibid. 290.

7. The word "representatives" in the second clause of section 7 of such treaty refers to all who take by will or descent, including devisees and heirs as well as executors and administrators; otherwise there is no antecedent to which the word "said" before the

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TREATY. UNITED STATES TREATY WITH BREMEN. *Continued.*

word "heirs" in the third clause can refer. The second clause may be construed to mean that the representatives or heirs of American citizens who are citizens of Bremen have the prescribed term of three years to dispose of real estate, which they would have inherited but for their alienage. *Schultze* v. *Schultze et al.*, 290.

8. *Treaty suspends the statute.* The effect of the treaty of the United States with Bremen is to suspend, during the period of three years, the operation of the alien law of this State, which makes non-resident aliens incapable of taking lands by descent; and the right of the resident heir or of the heirs capable of taking under the State law, and the right of the State or county to take the land by escheat in default of heirs capable of holding the same, are also suspended during the term of three years named in the treaty. Ibid. 290.

9. *Title of non-resident alien heirs to lands inherited — partition.* Where non-resident alien heirs of an American citizen are granted, by treaty of the United States, three years within which to sell lands they would have inherited but for their alienage, and to remove the proceeds, they will take a fee in such land determinable by the non exercise of the power of sale within three years. They will have such an interest in the land as will entitle them to maintain a proceeding for partition. Ibid. 290.

10. In such a case the fee vests in the non-resident alien heirs, and they will have the rights of ownership in the property and all the advantages of its use and possession for the purpose of making sale of the same. By such a treaty the alien heir is clothed for the period granted, for the purpose of making sale, with the same rights that he would enjoy if he was a resident heir, being subject simply to the obligation to sell and convey the fee to some other party capable of holding. The right to sell and dispose of land at pleasure and dispose of the proceeds can not be exercised unless the donee is vested with title or the complete ownership. Ibid. 290.

TRUSTS AND TRUSTEES.

TRUST ESTATES.

1. *Degree of skill required of trustees.* Trustees must discharge the duties of their trust to the best of their skill and ability, with such care and diligence as men fit to be entrusted with such matters may fairly be expected to put forth in their own business of equal importance. *Waterman et al.* v. *Alden et al.*, 90.

2. *Liability of trustees — for neglect to collect notes.* When trustees, to whom a testator devised his property in trust, consisting of notes, among other things neglect to take proper steps to collect or secure the same, which might have been collected or secured by proper care and diligence, whereby the debt secured thereby is lost, they will be chargeable with the amount of the loss from their neglect of duty. Ibid. 90.

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TRUSTS AND TRUSTEES. TRUST ESTATES. *Continued.*

3. The fact that the relations existing between the testator or payee of the notes and their makers may have been such that the former would, if living, rather lose the debt than press its collection, will furnish no excuse for the trustees to neglect or fail to use all reasonable diligence in the matter. Their duties are fixed by the law, and a violation of them renders them personally liable. *Waterman et al.* v. *Alden et al.*, 90.

4. In such a case it does not follow, because the trustees were guilty of negligence in not collecting the notes as executors, that they are not also guilty of neglect of duty in that regard as trustees. The executors and trustees being the same persons, it is impossible that there should be an act of fraud or breach of duty by the executors which is not consented to and acquiesced in by them as trustees. Ibid. 90.

5. *Failure of trustees to collect notes — defense therefor.* Trustees of a fund, who are also the executors of an estate, will not be held personally liable for a failure to collect a note constituting part of the estate and trust property, where it does not appear that they could have secured or collected it, however prompt and diligent they might have been, and defense to the note is shown. Ibid. 90.

6. *Equity jurisdiction — to remove trustees or compel them to act.* Courts of equity have a very broad jurisdiction over trust estates and trustees, and will remove the latter for a failure through neglect, or from willfulness, to perform their duties, or will compel them to carry out the trust which they have been appointed to and have accepted, as shall appear, under all the circumstances of a given case, for the best interest of the estate and all the parties interested in the same. Ibid. 90.

7. It is not every mistake or neglect of duty or inaccuracy of conduct of trustees which will induce a court of equity to remove them; but the act or omission must be such as to endanger the trust property, or to show a want of honesty, or a want of proper capacity to execute the duties, or want of reasonable fidelity. Ibid. 90.

8. Courts of chancery have jurisdiction generally on the application of beneficiaries of a trust fund, to charge trustees with losses occurring through their negligence or mismanagement, and the fact that trustees are also executors of a will of the testator who created the trust, will not deprive a court of equity of its jurisdiction, when the bill does not seek to remove any part of the administration of the estate from the County Court. Ibid. 90.

9. *Right of trustees to legal counsel — attorney's fees chargeable to estate.* Where an estate is devised to executors in trust for the benefit of certain beneficiaries, and it becomes a matter of difficulty to determine what property belongs to the principal and

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TRUSTS AND TRUSTEES. TRUST ESTATES. *Continued.*

what to income, the trustees will be entitled to the advice of legal counsel, and, if necessary, the aid of a court of equity, to properly settle that question, and to charge the estate with reasonable attorney's fees. *Waterman et al.* v. *Alden et al.*, 90.

10. *Liability of trustees for costs.* Where trustees of an estate are responsible for the most expensive part of the litigation on bill by the beneficiaries to remove them and to charge them for losses resulting from their neglect of duty, and it appears that they failed to keep proper accounts of their trusteeship, there will be no error in charging them with the principal part of the costs and expenses of such litigation. Ibid. 90.

WITNESSES.

11. *Bill charging trustees with neglect to collect notes — competency of makers of the notes.* On bill by the beneficiaries of a trust fund against trustees holding the trust property to charge them with notes which were not collected, the makers of such notes are competent witnesses to show that they had a valid defense against their collection. Ibid. 90.

RESULTING TRUST.

12. *Degree of proof — purchasing land with money belonging to another.* If a man purchases and pays for land with money belonging to a woman living with him as his wife, and without her sanction or consent has the land conveyed to himself, a court of equity will compel him to convey it to her. But the evidence must fairly establish that the woman furnished the money that paid for the property. *Herbert* v. *Herbert*, 115.

13. Where a man, through a series of years, placed all his earnings in the hands of a woman, living with him as his wife, for safe keeping, except enough to defray his personal expenses, and out of part of such money which she turned over to him, he bought property for their home, and took a deed in his own name with her knowledge of that fact, it was *held* that there was no resulting trust created in favor of the woman, and that a bill by her to compel him to convey to her was properly dismissed. Ibid. 115.

14. *Created in the purchase of partnership land with partnership funds.* Where an agreement for a partnership in the purchase of lots and the erection of buildings thereon for sale at a profit, provided that all liabilities created by either partner in furtherance of the enterprise, should be treated as joint liabilities to be shared by them equally, and one of the partners raised money by mortgage on the lots, out of which he paid the purchase-money of the lots, and took the title thereto in his name for convenience: *Held*, that the money paid for the lots was partnership money, and that a resulting trust at once arose out of the transaction in favor of the partnership. *Speyer* v. *Desjardins et al.*, 641.

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TRUSTS AND TRUSTEES. *Continued.*

EQUITABLE TITLE.

15. *Declaration, as giving interest in land.* A, the holder of the legal title to land, executed a writing, declaring that B had an equitable title to an undivided eighth of the same, with the privilege of taking another eighth thereof, and in which he agreed to convey to the latter an undivided eighth, or quarter part of the tract, whenever a deed should be demanded, or in case a sale should be made of the property, the latter should be entitled to one-eighth or one-quarter of the proceeds of such sale, subject to the mortgage of the holder of the legal title given for the purchase money: *Held*, that this invested B with an interest in the land, and A, the trustee, had no power to divide the land and sell what might be considered one-eighth or one-quarter of it, and require B to accept the proceeds in satisfaction of his interest in the whole tract. *Rogers et al.* v. *Tyley*, 652.

16. *Whether beneficiary takes interest in land or its proceeds.* When several persons purchase land, each agreeing to pay his proportion of the price, and to take an undivided interest therein, and the legal title is taken to one of them, who gives his notes for the price, secured by a mortgage on the land, and the latter agrees to convey to the others their shares on demand, and to divide the proceeds in case of a sale, each of the others will take an interest in the land and not in its proceeds. Ibid. 652.

17. *Sale of land on request of cestui que trust.* A trustee holding the legal title to land may convey the same at the verbal request of the *cestui que trust* to a third person and pass the title. The statute of frauds has no application to such a case; such request may be shown by circumstances or parol proof as well as by writing. Ibid. 652.

CREATING A TRUST.

18. *Depositing money in trust.* See GIFT, 11.

TRUSTEE.

19. *Purchasing at his own sale.* See INSURANCE, 10.

UNITED STATES TREATY. See TREATY, 1 to 8.

VENDOR AND PURCHASER.

OF THE RIGHT OF RESCISSION.

1. *Failure of vendor to comply — option of vendee.* A contract for the sale of land provided that the purchaser should be furnished with a complete abstract of the title, and that in case the title should be found to be materially defective within ten days thereafter, then unless such defects should be cured within sixty days

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VENDOR AND PURCHASER. OF THE RIGHT OF RESCISSION *Con'd.*

after written notice thereof, the earnest money should be refunded, and the contract become void: *Held*, that on the failure of the vendor to obviate the defects in the title within sixty days after notice, the purchaser had the right to treat the contract as inoperative and demand the return of the cash payment, or to tender the balance of the purchase money and demand a deed of the premises, in the exercise of his legal option to take the defective title. *Lancaster et al.* v. *Roberts et al.*, 213.

FAILURE OF VENDOR'S TITLE.

2. *Right of purchaser to waive failure of vendor—and to abatement out of purchase money.* In suits by the purchaser for a specific performance where the vendor is unable to make a complete title, it is a general rule that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description or other matter touching the estate. Ibid. 213.

3. *Vendor's power to rescind.* Where the vendor of land is in no position to compel a specific performance of the contract by the vendee by reason of the failure of the vendor to remove incumbrances from the title, and his inability to make a good title, he can not rescind the contract. Ibid. 213.

CONDITIONS AS TO TITLE.

4. *Construed most strongly against vendor—option of purchaser.* A condition in a contract for the sale of land, by which the sale is to become void in case the vendor can not deduce a good title, is to be taken most strongly against him, because he alone is able to judge of the necessity of making the condition before he offers the property for sale. Such a condition gives an option, not to the vendor, but to the purchaser, to avoid the contract for failure to deduce a good title. Ibid. 213.

5. It is a familiar rule that the vendor of land can not force the purchaser to pay his money and receive a defective title, but the purchaser may elect to take a title which is defective. Ibid. 213.

WAIVER AS TO TIME.

6. *Promises by vendor to cure defective title.* If the vendor, from time to time, after the lapse of the sixty days, promises to cure the defects in the title, which promises are accepted, this will amount to an arrangement between the parties for an extension of the time fixed by the contract for the curing of the defective title, and such arrangement will involve a waiver on the part of the vendor of the requirement that the purchaser should either take

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VENDOR AND PURCHASER. WAIVER AS TO TIME.

back the earnest money or pay the balance of the purchase money at the expiration of the sixty days. Time, though the essence of a contract, may be waived. *Lancaster et al.* v. *Roberts et al.*, 213

7. *Laches of purchaser — caused by acts of vendor.* The vendor of land can not take advantage of the purchaser's neglect to promptly rescind the contract, or take steps to enforce specific performance, when such delay is caused by the vendor's repeated promises to cure the defects in the title to the property, and thereby retain the earnest money. Ibid. 213.

8. Where the purchaser of land is induced to delay filing his bill for specific performance, by the promises of the vendor to cure the defects in the title, such promises will excuse a delay of about two years in filing the bill. Ibid. 213.

CONTRACT OF SALE.

9. *Signed by a third person not named therein.* Where a third person merely annexes his name to a contract, which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature can only be regarded as an expression of his assent to the act of the parties making the contract, and may perhaps operate as an estoppel against his assertion of title. Ibid. 213.

10. So, where a written contract recited that A agreed to sell, and B agreed to purchase, a lot at a price named, and contained a covenant to convey by a good and sufficient warranty deed on payment, and the contract was signed by A, B, C and D, it was held that C and D could not be held bound by the covenant or be treated as signing as joint vendors of A any more than that they signed as joint purchasers. Ibid. 213.

WAIVER.

DENYING MOTION TO DISMISS.

1. *Error waived by afterwards introducing evidence.* See PRACTICE IN THE SUPREME COURT, 2.

AS TO TIME.

2. *By failure to perform.* See VENDOR AND PURCHASER, 6, 7, 8.

WATER-COURSE.

DEFINED — RIGHT TO IMPROVE. See DRAINAGE LAW, 1, 2.

WIDOW'S ESTATE OF HOMESTEAD. See HOMESTEAD, 3, 8.

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WILLS.

CONSTRUED.

1. *Devising the same land to different persons.* Where a testator in the several parts of his will devises the same land to different persons in fee, and there is nothing in the will to show that he intends the last named devisee to take to the exclusion of the first, the two devisees will take the land concurrently as tenants in common. In such case there is not such a clear and irreconcilable repugnancy between the two devises as to make the later one abrogate the prior one. *Day et al.* v. *Wallace*, 256.

2. *Devise over — after devise in fee.* A testator, by the first clause of his will, devised and bequeathed to his wife, "her heirs and assigns," certain city lots, and by the second clause bequeathed to her all his remaining estate, both real and personal, to be by her used and disposed of during her natural life, the same as he might do if living, and gave her "full power to sell, mortgage, exchange, invest and reinvest the same in the same manner I (the testator) might do if living, and to distribute the same by gift or otherwise among my children at any time during her life as to her shall seem meet and proper, and to appoint the same among my children by will after her decease according to her own judgment and discretion." The will then provided that if any of the testator's estate, real or personal, should remain undisposed of by his wife at the time of her decease, then he gave and devised all such residue and remainder of his estate to be equally divided among his children then living, etc.: *Held*, that the wife took an estate in fee in the lands, and that the devise over was void, however clearly it was expressed. *Wolfer* v. *Hemmer et al.*, 554.

3. If there be an absolute power of disposition given by a will to the first taker, as if an estate be devised to A in fee, and, if he dies possessed of the property without lawful issue, the remainder over to the heirs of the testator, the devise of the remainder over is void, because of the preceding fee; it is void by way of executory devise, because the limitation is inconsistent with the absolute estate or power of disposition expressly given, or necessarily implied by the will. A valid executory devise can not subsist under an absolute power of disposition in the first taker. Ibid. 554.

4. When the first devisee has the absolute right to dispose of the property in his unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void as being inconsistent with the first gift. Ibid. 554.

5. *A devise to a person and "his heirs."* The words in a will "I give, devise and bequeath unto my beloved wife, A. H., her heirs and assigns, the following described real estate," amount to a devise of the title in fee. A devise to one, "his heirs and assigns

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WILLS. CONSTRUED. *Continued.*

forever," or "to him and his heirs," will pass the title in fee simple. In either form the words "his heirs" are words of limitation, and vest the absolute title. *Wolfer* v. *Hemmer et al.*, 554.

6. *When construed according to intention of testator.* While it is always the first object of the courts, in construing wills, to give effect to the intention of the testator, they can only do so when that intention does not run counter to the established rules of law. When the words of a will pass an estate in fee simple the court can not, by construction, limit a less estate. Ibid. 554.

RULE IN SHELLY'S CASE.

7. *A rule of property.* The rule in *Shelly's* case is in force in this State as a rule of property, and must prevail whenever a devise or conveyance, by the terms of the will or deed, falls within it, regardless of the otherwise expressed intention of the testator or grantor. Ibid. 554.

STATUTE CONSTRUED.

8. *Sec.* 13, *chap.* 30, *R. S., relating to estate devised.* See STATUTES, 8.

WITNESSES.

COMPETENCY.

1. *Bill charging trustees with neglect to collect notes — competency of makers of the notes.* On bill by the beneficiaries of a trust fund against trustees holding the trust property to charge them with notes which were not collected, the makers of such notes are competent witnesses to show that they had a valid defense against their collection. *Waterman et al.* v. *Alden et al.*, 90.

2. *To prove contract between witness and testator.* The complainant in a bill against the executors of the will of a deceased person for an accounting of the sum due him from the testator at the time of his death is, under section 2, chapter 52, of the statute, incompetent to testify in his own behalf as to the contract between himself and the testator. *Vose* v. *Strong et al.*, 108.

SUING OR DEFENDING AS HEIRS.

3. *Competency as to occurrences after death of ancestor.* A person, though interested in the event of a suit, is a competent witness in a suit against the heirs of a deceased person to testify to facts and transactions occurring after the death of the ancestor. *Rogers et al.* v. *Tyley*, 652.

COMPETENCY OF WIDOW.

4. *To testify as to ante-nuptial contract.* See DOWER, 7.

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WORDS AND PHRASES.

"DEPENDENT."

1. *Defined.* See BENEFIT SOCIETIES, 2.

"HIS HEIRS."

2. *Words of limitation.* See WILLS, 5.

"IN TRUST FOR ANY PURPOSE."

3. *Clause* 6, *sec.* 70, *chap.* 3, *R. S.* See ADMINISTRATION OF ESTATES, 1.

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