REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

VOLUME 185.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN APRIL AND JUNE, 1900, AND CASES IN WHICH REHEARINGS WERE DENIED AT THE JUNE TERM, 1900.

ISAAC NEWTON PHILLIPS,
REPORTER.

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1900.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

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CARROLL C. BOGGS, CHIEF JUSTICE.*

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*Mr. Justice Boggs became Chief Justice at the June Term, 1900.

†Richard F. Buckham was appointed clerk of the Supreme Court for the Southern Grand Division, vice Jacob O. Chance, deceased, on March 23, 1900.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

THE INDIANA, ILLINOIS AND IOWA RAILROAD COMPANY

v.

ADOLPH STAUBER *et al.*

Opinion filed April 17, 1900.

1. EMINENT DOMAIN—*section 6 of the Eminent Domain act construed.* Section 6 of the Eminent Domain act, (Rev. Stat. 1874, p. 476,) providing for the calling of a jury of freeholders to assess damages in condemnation, applies only where the petition is heard in vacation, and not at a regular term.

2. SAME—*juror in condemnation case heard in term time need not be a freeholder.* Where a condemnation petition is filed in term time, with a summons returnable on the first day of the succeeding term, and no order is entered fixing a day for hearing, the case may be tried at the succeeding term by a jury from the regular panel, who need not be freeholders.

3. SAME—*increased cost of insurance is an element of damage.* The increase in the cost of insuring buildings upon property not actually taken for right of way by reason of construction and operation of the railroad may be shown by expert witnesses in condemnation.

4. SAME—*increased danger from fire which lessens value of property may be shown.* Increased danger from fire by reason of the operation of the railroad, which lessens the salable value of the property, or the value of the use to which the property is put or to which it is adapted, is an element of damage in condemnation.

APPEAL from the County Court of LaSalle county; the Hon. H. W. JOHNSON, Judge, presiding.

This was a proceeding commenced by the Indiana, Illinois and Iowa Railroad Company, in the county court of LaSalle county, to condemn the right of way for appellant's railroad company across the land of appellees. The petition was filed on the 17th day of October, 1899, in the office of the clerk of the county court, on one of the regular days of the September term of the LaSalle county court, but was addressed to the November term, the next succeeding term of that court. Summons was issued on the same day the petition was filed, and was returned served personally on Adolph Stauber and Mary Stauber, the appellees, and commanded them to appear on the first day of the November term of the county court. The record shows that the petition was not presented to the county judge in vacation, and shows that no order made by him fixing a day for hearing the same in vacation, or any special venire for jurors. The trial was begun on the first day of the November term before a regular panel of jurors duly summoned for the trial of cases at that term.

The amount of land proposed to be taken for right of way is about three-twentieths of an acre near the outskirts of the city of Streator, in LaSalle county, and it passes within about ten feet of appellees' factory. This factory building is constructed of brick, about forty-five feet wide by one hundred and twenty feet long and three stories high. It is fitted with machinery for the purpose of manufacturing pantaloons, linen suits and shirts, and it requires from one hundred and fifty to two hundred employees to carry on appellees' business.

Appellee Adolph Stauber filed a cross-petition, setting up that on the said tract of land, and immediately adjoining the strip of land sought to be condemned, is situated this large three-story factory, and that the south

line of the factory, at the south-east corner, will be but ten feet from the right of way and that the south-west corner thereof will be about ten feet from that point; that immediately west of the factory and about eighty feet from it is situated a large two-story frame building used by cross-petitioner as a warehouse for the storing of his clothing and woolen goods manufactured, and also partly used as a stable; that between these two buildings stands the engine house used in and about the business; that the warehouse building will, at the south-west corner, be only about one foot from the proposed right of way and that the south-east corner will be less than three feet therefrom; that immediately north of the buildings is his residence; that the taking of this strip of land by the railroad will cut off his access to his factory and warehouse and property on the south side thereof, and will greatly inconvenience and damage him in and about the operation of his property, and will greatly lessen the value thereof and depreciate its value; that the factory and warehouse will be in great danger of being set on fire by engines passing to and fro, and will be greatly damaged by dust, cinders, ashes and gases and by smoke thrown out upon the premises and into the factory and warehouse by engines and cars passing over and along the railroad; that the insurance rate will be advanced about twenty-five per cent more than he is at present obliged to pay, which will be a lasting and continuing damage and loss to cross-petitioner; that the construction and operation of the railroad over and upon the strip of ground will greatly depreciate in value all his properto thereto adjoining, in addition to the amount of compensation to be assessed for land actually taken.

A hearing was had and the cause submitted to a jury, who returned a verdict fixing the compensation to be paid defendant Adolph Stauber for the land actually taken as right of way through his land at $87.50, and for damages sustained to the tract of land and to all other real

estate owned by him or in which he has an interest, and which is described in the petition and cross-petition, and not actually taken for right of way, at $1000. Motions for a new trial and in arrest of judgment were overruled, and petitioner appealed.

CARY & WALKER, and REEVES & BOYS, for appellant.

P. J. LUCEY, and V. J. DUNCAN, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

It is first insisted upon by appellant that the court erred in holding that when a condemnation proceeding is heard by a jury chosen from the regular panel it is not an essential qualification of a juryman that he should be a freeholder. By the statute on eminent domain (Rev. Stat. chap. 47, sec. 2,) the corporate or municipal authority, public body, officer, agent, person, etc., desiring to take private property for public use without the owner's consent, where the compensation to be paid for cannot be agreed upon by the parties interested, may "apply to the judge of the circuit or county court, either in vacation or term time, where the said property or any part thereof is situate, by filing with the clerk a petition, setting forth, by reference, his or their authority in the premises, the purpose for which said property is sought to be taken or damaged, * * * and praying such judge to cause the compensation to be paid to the owner to be assessed," etc. If the application is to the judge in vacation, more than the *filing* of the petition is required. Section 3 provides: "If such petition be presented to a judge in vacation, the judge shall note thereon the day of presentation, and shall also note thereon the day when he will hear the same, and shall order the issuance of summons to each resident defendant, and the publication of notice as to each non-resident defendant, and the clerk of the court shall at once issue the summons and give

the notices accordingly." Section 6 provides for calling a jury in vacation where the judge has fixed the time for hearing the petition in vacation, and applies only in such cases, and there is no provision made for obtaining a jury where the cause is to be heard in term time.

It was said in *Hercules Iron Works* v. *Elgin, Joliet and Eastern Railway Co.* 141 Ill. 491 (on p. 496): "There is no provision made for obtaining a jury where the cause is to be heard in term time, and it follows, necessarily, we think, that the compensation is to be ascertained by the jury regularly impaneled for the term. The panel having been selected according to the statute regulating the selection and choosing of jurors for the court, a jury is provided for the ascertainment of compensation as 'prescribed by law.' * * * In the case last cited (*Haslam* v. *Galena and Southern Wisconsin Railroad Co.* 64 Ill. 353,) we held that section 6 should be construed to read, that 'in cases fixed in vacation for hearing it shall be the duty of the clerk,' etc., and it is clear that without the order of the judge fixing a day for the hearing there is no power or authority to draw a special jury in accordance with that section of the act. It is the order of the judge, in vacation, fixing a day for the hearing, etc., that determines its character as a proceeding in vacation. But when the petition is filed with the clerk, in vacation, and no order is made by the judge fixing a day for the hearing, it is correct practice, under the statute, for the clerk to issue summons returnable to the ensuing term of court, as in other cases and as was here done. The application is then treated as made to the judge in term time, and stands for hearing upon the docket of the term at any time not less than ten days after due service of process. Rev. Stat. chap. 47, sec. 5; *Bowman* v. *Venice and Carondolet Railway Co.* 102 Ill. 459; *Johnson* v. *Freeport and Mississippi River Railway Co.* 111 id. 413."

The petition in the case under consideration being heard in term time, by a jury selected from the regular

panel, it becomes necessary to determine the qualifications of petit jurors regularly impaneled for the trial of causes in courts of record.

Section 2 of the act concerning jurors, approved and in force February 11, 1874, (Rev. Stat. chap. 78, p. 630,) gives the qualifications of petit jurors to be selected by the county board from the jury list, as follows: "First, inhabitants of the town or precinct not exempt from serving on juries. Second, of the age of twenty-one years or upwards, and under sixty years old. Third, in the possession of their natural faculties, and not infirm or decrepit. Fourth, free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language." This statute nowhere provides that it is a necessary qualification of a juror that he be a *freeholder*, when chosen from the regular panel for the term, and the court did not err in holding that in the trial of the case under consideration, to condemn a right of way, where the petition was filed with the county clerk but no order was made by the judge fixing a day for the hearing, and the summons was returnable to the first day of the next (November) term of court, and the case was tried before a jury chosen from the regular panel for the term, it was not an essential qualification of a juryman that he be a freeholder. This court has expressly held in the case of *Kerwin* v. *People*, 96 Ill. 206, that the fact that a person is not a freeholder does not disqualify him from serving on a jury and is not a ground of challenge.

It is insisted the court erred in admitting evidence pertaining to the question of increase of insurance rates upon the property by reason of the building and operation of the railroad, and in giving the seventh instruction on the part of appellees. The evidence shows that the right of way sought to be condemned by appellant comes within nine feet of the south-east corner of the factory building and within one foot of the south-west

corner of the stable building or warehouse; that the main track, as it appeared upon the plat, was about twenty-eight feet from the south-east corner of the stable building or warehouse and 30.2 from the south-east corner of the factory building, and the length east and west along defendant Stauber's property was 337½ feet. The three witnesses called by appellees to give their opinion were all men who had had experience in insuring property, and were at the time, and for several years prior to their being called as witnesses had been, actively engaged in the insurance and real estate business, and their testimony may be regarded in the nature of expert testimony. After some preliminary questions the following question was asked George W. Rose: "As an insurance agent, and experienced in insurance matters as you are, what, in your judgment, will be the effect on the building and operation of this line of railroad and the right of way,—the right of way involved in this proceeding,—so far as it affects the insurance placed upon the premises by Mr. Stauber?" Objection was made by appellant and overruled, and exception was taken to the ruling of the court. The answer of the witness was: "I think it will increase the hazard. Increasing the hazard would increase the premium." He was then asked: "To what extent, in your judgment, would the premiums be increased by reason of it?" (Objection, overruled, and exception.) He answered: "I am unable to say positively; in my judgment, probably about twenty per cent." Hypothetical questions were asked Colwell and Warner, two other witnesses who were engaged in the business of insuring property, and their answers were to the same effect, except they fixed the increase in premiums from twenty to twenty-five per cent; that it would raise the rate from $1.50 to $1.70 or $1.75 per $100.

This evidence was proper. The increase of the cost of insurance may be given in evidence as affecting the amount of recovery. In the case of *Webber* v. *Eastern*

Railroad Co. 43 Mass. (2 Metc.) 147, which was a proceeding upon a petition for a jury to assess the damages sustained by the petitioner by the laying out of the Eastern railroad over his land, one of the exceptions by the respondents was to the testimony of John W. Proctor, called as a witness by the petitioner. The witness was called to give his opinion upon the question whether the proximity of a railroad would be likely *to increase the rate of premium on insurance against fire,* when it did not appear that his acquaintance with the subject was such as would warrant him to give his opinion in evidence. The court says: "It is true that in answer to a cross-interrogatory Mr. Proctor answered that he did not profess to be an expert. But his statement of his experience and means of knowledge in estimating the risks against fire, from his long having been secretary of a fire insurance office and having been charged with the duty of examining buildings, and taking into consideration all circumstances bearing upon the risk and the rate of premium, rendered him, we think, quite competent to give his opinion as evidence to the jury upon that subject." *Wooster* v. *Sugar River Valley Railroad Co.* 57 Wis. 311; 10 Am. & Eng. R. R. Cases, 499.

Instruction No. 7 comes clearly within the rule laid down by this court in *Centralia and Chester Railroad Co.* v. *Brake,* 125 Ill. 393, where we said (p. 398): "If by reason of the proximity of buildings, fences and the like to the track of the railroad the market value of the farms, as a whole, was depreciated, or if, from the ordinary and usual manner of the operation of the road, the danger from fire had a tendency to lessen the value of the premises for sale, or for the use to which they were appropriated by the owner or to which they are adapted, that fact would become an important element in fixing the just compensation to be awarded the owner for the appropriation of his land to the uses of appellant company."

It is urged by appellant that the verdict is contrary to the evidence. The petition represented, in the usual form, that it was necessary to enter upon and appropriate certain lands of appellees. Appellees filed their cross-petition to have the property damaged, but not described in the petition, assessed. This included the factory and other buildings. A large number of witnesses were called by petitioner to show the value of the strip of land taken, which varied from $100 to $500 per acre. The amount contained in the strip was three-twentieths of an acre. Many of petitioner's witnesses thought the property of appellees was benefited by the railroad. Appellees called about the same number of witnesses, who fixed the value of the land at from $500 to $800 per acre, and the damages to the property—the depreciation in its market value—from $1000 to $5000. The verdict of the jury fixed the compensation to be paid to appellees for the right of way at $87.50, and fixed the damages to the tract of land described in the petition, and to other real estate described in the petition and cross-petition and not actually taken, at $1000. The jury viewed the premises, and were instructed that it was their right, in determining the damages, to take into account their own observation resulting from the view made by them of the premises, in connection with all the other testimony in the case; and in arriving at their verdict they had the right, in connection with all the other testimony, to give to their own observation thus made such weight as in their judgment they believed such observation was entitled to. As this court said in *Pittsburg, Fort Wayne and Chicago Railway Co.* v. *Lyons*, 159 Ill. 576: "The jury themselves viewed the property, and amid such conflicting testimony were probably largely influenced, in making up their verdict, by their own calculations made from a personal inspection of the premises. * * * We do not know what weight the jury may have given to the testimony of the witnesses for appellees and appellant,

respectively, or to what extent they relied upon the evidence obtained by them from their own view of the premises. We cannot therefore say whether the damages are excessive and against the weight of the evidence or not. *Maywood Co.* v. *Village of Maywood*, 140 Ill. 217; *Kiernan* v. *Chicago, Santa Fe and California Railway Co.* 123 id. 188; *Chicago and Iowa Railroad Co.* v. *Hopkins*, 90 id. 316."

We do not regard the damages as grossly excessive under the evidence in this case, and it is the settled doctrine of this court that the damages awarded by a jury in a condemnation proceeding will not be disturbed where the evidence is conflicting and the jury viewed the premises. *Rock Island and Peoria Railway Co.* v. *Leisy Brewing Co.* 174 Ill. 547.

Finding no error in the record the judgment of the county court is affirmed.

Judgment affirmed.

S. A. MAXWELL *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. SPECIAL ASSESSMENTS—*record of proceedings should show when notices were mailed.* Notices of confirmation should be mailed to property owners ten days before the first day of the return term, and that fact should appear from the affidavit. (*Sheridan* v. *City of Chicago*, 175 Ill. 421, followed.)

2. SAME—*when bill of exceptions is not necessary to show provisions of ordinance.* Whether an ordinance is insufficient in its description may be determined by a court of review where a copy of the ordinance is attached to the assessment petition, since such copy is part of record. (*Lundberg* v. *City of Chicago*, 183 Ill. 572, followed.)

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This writ of error was sued out by S. A. Maxwell and others to reverse a judgment of the county court of Cook county confirming a special assessment for grading, paving and curbing Wabash avenue from Sixty-sixth street to Seventy-first street. The proceedings were confirmed by default except as to the property of S. A. Maxwell and Helen Maxwell, and their objections having been overruled, the assessment on their property was also confirmed.

The errors assigned by all the plaintiffs in error are, that the ordinance is invalid because it does not give the height of the curb; and by all except S. A. and Helen Maxwell, that the record does not show when the notices were mailed to the land owners. The Maxwells, who appeared, waived this defect in the notice, but as to the other plaintiffs in error the error is well assigned. The notices should have been mailed ten days before the first day of the return term, and it should have been shown by the affidavit that they were so mailed. *Perry* v. *People*, 155 Ill. 307; *Sheridan* v. *City of Chicago*, 175 id. 421.

Defendant in error does not contend that the ordinance as set out in the petition is sufficient, but insists that the ordinance is no part of the petition, and that in the absence of a bill of exceptions the court cannot know what the provisions of the ordinance were. We have held otherwise. (*Lundberg* v. *City of Chicago*, 183 Ill. 572; *Holden* v. *City of Chicago*, 172 id. 263.) This insufficiency of the ordinance is an error available to all of the plaintiffs in error. The judgment, as to their respective lots and property, is reversed and the cause remanded.

Reversed and remanded.

PHILIP KNOPF v. THE PEOPLE *ex rel.* City of Chicago and SAME v. PEOPLE *ex rel.* Board of Education *et al.*

Opinion filed April 17, 1900.

1. CONSTITUTIONAL LAW—*prohibition against special laws in enumerated cases is absolute.* Under the last clause of section 22 of article 4 of the constitution, providing that "in all other cases where a general law can be made applicable no special law shall be passed," the legislature may determine whether the specified condition exists, but as to the enumerated subjects in the preceding clauses the prohibition against special legislation is absolute.

2. SAME—*section 49 of Revenue act of 1898 is a special law upon a prohibited subject.* The provision of section 49 of the Revenue act of 1898, which attempts to limit the aggregate amount of tax levies which may be certified to the county clerk by municipalities in counties containing 125,000 or more inhabitants to five per centum, is in violation of that clause of section 22 of article 4 of the constitution which absolutely prohibits the passage of any special law "incorporating cities, towns or villages or changing or amending the charter of any town, city or village."

3. SAME—*whether law upon particular subject is against constitutional prohibition is for the court.* The question whether a particular law upon a subject enumerated in section 22 of article 4 of the constitution is within the prohibition against the passage of special laws upon such subject is for the court, and not for the legislature.

4. SAME—*Cook county cannot be singled out for special law upon enumerated subjects.* Within the subjects enumerated in section 22 of article 4 of the constitution Cook county cannot be singled out for legislation upon the ground that its circumstances and conditions are different from other counties, nor can the city of Chicago be made the subject of special legislation upon such subjects.

5. SAME—*legislature is not the final interpreter of constitutional limitation on legislation.* The General Assembly, upon which an absolute limitation on particular subjects of legislation is imposed, is not the final judge of such limitation, but when the question arises in a judicial proceeding the court must compare the particular act with the fundamental law, and if found to be in conflict the limitation must be enforced.

6. SAME—*section 49 of the Revenue act affects special charter of town of Cicero.* The restriction limiting the rate of taxation, contained in section 49 of the Revenue act of 1898, is not only an attempted amendment of the general Incorporation act as to cities in Cook county, but also of the special charter of the town of Cicero, which is within the terms and the necessary operation of such law.

7. SAME—*reasons for enacting law do not aid its invalidity.* The reasons which may have operated upon the minds of legislators when enacting a law furnish no ground for upholding such law if it is in violation of a constitutional provision.

8. TAXES—*taxes for educational and for building purposes should be levied separately.* Items for educational purposes which are improperly included in the levy for building purposes cannot be held valid, even though the tax levied for educational purposes does not equal the amount authorized by law, since the funds for the two purposes cannot be commingled and taxes levied for one purpose cannot be applied to the other.

9. SAME—*effect where court rejects proper building items in awarding mandamus.* Where, in *mandamus* proceedings to compel the extension of taxes, the levy for building purposes includes items for educational purposes but furnishes no means of showing what portion of the levy is legal, the relator cannot compel the extension of any portion of such tax, and hence cannot complain that, in order to award the writ, the court, in ascertaining the amount legally assessed for building purposes by inspecting the records of the board of education, excluded certain items which might properly have been allowed for building purposes.

MAGRUDER, J., dissenting.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

PENCE, CARPENTER & HIGH, for plaintiff in error:

There is a difference in the condition, situation and circumstances of the people of Cook county, and of the county and its sub-municipalities, when compared with other counties and municipalities of the State, and hence section 49 of the Revenue act of 1898 is constitutional.

The legislature has the power to determine whether there is such difference, and having so determined and legislated accordingly, the courts cannot run a race of right reasoning with the legislature or review such action.

This court has held that counties may be classified, for the purpose of legislation, upon any subject, and particularly as to assessments. The reduction of the aggregate rates of all municipalities in the county is a part of the execution of and making effectual the assessment, and hence section 49 of the Revenue act of 1898 is con-

stitutional, as it does not interfere with the municipal authorities in their right to levy a tax.

A law is constitutional and general whose operation affects all those in like situation, and such operation may depend upon any indifferent contingency. Said section 49 is not unconstitutional as amending another law, directly or by implication, without referring to the same. *Insurance Co.* v. *Swigert*, 104 Ill. 653; *Wilson* v. *Trustees*, 133 id. 459; *Insurance Co.* v. *Swigert*, 128 id. 245; *Insurance Co.* v. *Durfee*, 164 id. 193; *People* v. *Hoffman*, 116 id. 587; *People* v. *Simon*, 176 id. 179.

Whether laws are general or not does not depend upon the number of those within the scope of their operation. They are general, not because they operate upon every person in the State,—for they do not,—but because every person who is brought within the relations and circumstances provided for is affected by the laws. Nor is it necessary, in order to make a statute general, that it should be equally applicable to all parts of the State. It is sufficient if it extends to all persons doing or omitting to do an act within the territorial limits described in the statute. *People* v. *Hoffman*, 116 Ill. 587; *Cummings* v. *Chicago*, 144 id. 566; *West Chicago Park Comrs.* v. *McMullen*, 134 id. 177; *Trausch* v. *County of Cook*, 147 id. 536; *Chicago* v. *Stratton*, 162 id. 501; *People* v. *Hill*, 163 id. 191; *People* v. *Simon*, 176 id. 179.

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. *Cummings* v. *Chicago*, 144 Ill. 563.

JULIUS A. JOHNSON, County Attorney, (FRANK L. SHEPARD, of counsel,) also for plaintiff in error:

It is said that section 49 of the Revenue act of 1898 is special and local legislation because it in substance makes a separate class of municipalities in Cook county

and does this by classifying counties, and that there is no sufficient and natural basis for this classification. The legislature, and not the court, is the judge of what is a sufficient basis for classification. This court, in *Cummings* v. *Chicago*, 144 Ill. 569, said: "The legislature, for reasons appearing satisfactory to it, saw fit not to apply to the smaller assessments in the larger cities of the State the same cumbersome mode of collecting the same provided in the act under consideration. Whether this was wise or unwise is a question for legislative consideration."

Constitutions, like statutes, must receive a reasonable construction, and in accordance with this view it has been determined, and has become the settled law of construction in this State, that a law general in its terms and uniform in its operation upon all persons and subjects matter in like situation is a general law, and not obnoxious to the objection that it is local or special legislation. *People* v. *Onahan*, 170 Ill. 459.

CHARLES M. WALKER, Corporation Counsel, COLIN C. H. FYFFE, DANIEL J. MACMAHON, and JOHN J. HERRICK, (FRANK J. LOESCH, and ALBERT B. FORCE, of counsel,) for defendants in error:

The provisions of the Revenue act of 1898 which impose on municipalities in counties containing 125,000 or more inhabitants the limitations provided as to amount of indebtedness to be contracted and the amount of taxes to be levied for the corporate purposes of the municipality are special legislation, and therefore in violation of section 22 of article 4 of the constitution.

An act which in terms applies to Cook county alone, (except so far as special legislation as to Cook county is expressly authorized by the constitution,) is a special and local law, within the meaning of the provision. *People* v. *Meech*, 101 Ill. 200; *Devine* v. *Cook County*, 84 id. 590.

The constitutional provision against special legislation cannot be evaded by singling out some particular

county or municipality for legislation by some general designation, which, while general in form, as certainly distinguishes it as if it had been mentioned by name. *Devine* v. *Comrs. of Cook County*, 84 Ill. 590.

The prohibition against special or local laws extends to provisions for the levy and collection of taxes by municipalities, and all legislation affecting the powers of cities, towns or villages must be by general laws. If the result of an act is to establish dissimilarity in the powers and modes of different cities in the levy and assessment of taxes it is in violation of the constitution, and void. *People* v. *Cooper*, 83 Ill. 585.

While it is in the power of the legislature to classify counties and municipalities for the purpose of legislation, (as by population,) and a law based on such classification will be valid, a so-called classification cannot be made the means of evading the constitutional provision; and if, therefore, the attempted classification has no foundation in actual differences in situation or circumstances, and there is no reasonable relation between the classification and the purposes to be attained, the law will be held void. *Dupee* v. *Swigert*, 127 Ill. 494; *People* v. *Martin*, 178 id. 611; *People* v. *Knopf*, 183 id. 410.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

In each of these cases a petition was filed in the circuit court of Cook county against the plaintiff in error, county clerk of said county, alleging that the provision of section 49 of the act for the assessment of property, in force July 1, 1898, limiting the aggregate of all the levies certified by the municipalities of said county to said county clerk to five per centum, under which the county clerk claimed the right to act, was unconstitutional and void, and praying for a writ of *mandamus* to compel him to compute the rates and extend the taxes due the relators in accordance with the law. In one case

the petition was filed on the relation of the city of Chicago and in the other on the relation of the board of education of said city. The defendant interposed a demurrer to each petition, which was overruled, and he standing by the same, judgments were entered and writs ordered compelling him to compute and extend said taxes in accordance with the prayers of the petitions. Writs of error were sued out from this court to review the judgments, and the causes have been heard together.

In the case of *People ex rel.* v. *Knopf*, 183 Ill. 410, we considered the same question raised in these cases as to the validity of said provision of section 49, and were reluctantly compelled, on the clearest grounds, to hold it unconstitutional and void, as a direct and palpable violation of the prohibition against special and local laws. It is not necessary to repeat here the well-worn and fundamental rules there stated, but counsel for plaintiff in error have presented some arguments which they insist have not been before presented or considered and which they claim are sufficient to sustain the act, and these will receive due consideration.

One of these arguments is, that the prohibition of the constitution against local or special laws does not apply where the conditions, circumstances or situations of municipalities differ, so as to require or permit a classification of such municipalities; that the question whether the county of Cook, including its various municipalities, is different in conditions, circumstances or situations from other counties, is one which the legislature must determine for themselves as a fact before they legislate, and in the ascertainment of the fact may adopt their own rules of evidence; that the legislature decided that there was such a difference in the circumstances and situations of counties having a population of over 125,000, when compared with other counties of the State, as required legislation applicable only to municipalities in such counties, and that their decision of that question cannot

be reviewed by this court. The effect of the argument is, that the legislature are the final judges of the meaning and effect to be given to the constitution, and that it shall be binding on them only so far as they decide it shall be. It is true that under the general provision that a special or local law shall not be passed where a general law can be made applicable, the existence of the specified condition may be determined by the legislature. Under that provision a special law may be enacted where a general law cannot be made applicable, and that preliminary question may be decided by the legislature. (*Owners of Lands* v. *People*, 113 Ill. 296.) As to certain subjects, however, the People, in the fundamental law, made a hard and fast rule, not subject to any condition or exception, prohibiting the enactment of special or local laws. Section 22 of article 4 of the constitution prohibits the General Assembly from passing local or special laws in certain enumerated cases. As to those subjects the prohibition is absolute, and not conditional. Among them is, "incorporating cities, towns or villages, or changing or amending the charter of any town, city or village," which is violated by section 49. It was never intended to put a law passed in violation of the prohibition beyond the power of review by the courts, and the question whether a particular law upon such a subject is within the prohibition is for the courts, and not for the legislature. (Sutherland on Stat. Const. sec. 117.) Within the enumerated subjects Cook county cannot be singled out for legislation on the ground that its circumstances and conditions are different from other counties, nor can the city of Chicago be singled out and separated from other cities of the State and made the subject of special legislation. (*Devine* v. *Board of Comrs.* 84 Ill. 590; *Kingsbury* v. *Sperry*, 119 id. 279; *People* v. *Meech*, 101 id. 200; *People ex rel.* v. *Board of Trustees*, 170 id. 468.) If the legislature can pass a law for Cook county, as contended, it could single out for special legislation each county in the State other

than Cook county, and each city as well as the city of Chicago, on the ground of alleged differences in circumstances and conditions,—and this would be to nullify the constitutional provision. The legislature may, however, in the enactment of general laws, classify counties and other municipalities, and we have sustained legislation relating to counties classified on the basis of the population of counties, laws relating to cities where the classification was based on the population of cities, and laws affecting towns where towns were classified according to population. In any case, it cannot be that the legislative body on which an absolute limitation is imposed shall finally determine the question of such limitation, but when the question arises in a judicial proceeding the court must compare the law with the fundamental law, and if it is found to be in conflict, must enforce the limitation. Judge Cooley, in speaking of this power, says: "The right and the power of the courts to do this are so plain, and the duty is so generally,—we may now say, universally,—conceded, that we should not be justified in wearying the patience of the reader in quoting the numerous authorities on the subject." (Cooley's Const. Lim. 45.) Indeed, counsel, at the conclusion of their argument on this point, admit that, manifestly, if there is no distinction in the conditions and circumstances of the municipalities situated in Cook county from those situated in other counties, the legislature would have no power or jurisdiction to determine that there was, but they say that if there is a difference the court should not go into an examination of the extent of such difference.

Another argument is based upon the proposition of counsel stated as follows: "The legislature, by section 49, did not attempt to take away any power from any individual municipality to levy a tax at a certain rate as established by the general law. Section 49 does not touch that power, but it simply undertakes to provide that, in making such assessment, if the aggregate rates which

were permissible under the general law (not the individual rates) should exceed five per cent, that then such aggregate rates must be reduced to five per cent." It is said, in substance, that the powers of the various municipalities to levy taxes up to a certain rate are not affected; that they may levy taxes and certify their levies to the clerk, but the law simply provides that the clerk shall not put the taxes on the books, and merely interferes with and prohibits the collection. The argument is, that therefore the provision is not obnoxious to the constitutional prohibition, because it does not amend any charter or repeal any charter power. Section 1 of article 8 of the general Incorporation act, under which the relator, the city of Chicago, and many municipalities in Cook county, are organized, provides that the city council or boards of trustees may, by ordinance, levy the total amount of appropriations, to be collected from the tax levy of the fiscal year, not exceeding two per cent of the valuation, exclusive of the amount levied for the payment of bonded indebtedness or interest thereon, upon all the property subject to taxation within the city; that a certified copy of such ordinance shall be filed with the county clerk, and that he shall extend the tax upon the collector's books. Section 2 provides that the tax so assessed shall be collected and enforced in the same manner and by the same officers as State and county taxes, and shall be paid over to the treasurer of the city or village. To say that the provision of section 49 that the county clerk shall not extend the tax certified to him but shall reduce it *pro rata*, so that the aggregate, with all other taxes, shall not exceed five per cent, and that no more shall be collected, is so plainly an attempt to amend this charter provision that no argument can make it plainer. The town of Cicero, in Cook county, is organized under a special charter, and is not subject to the limitation of two per cent in the general Incorporation act. (*Town of Cicero* v. *McCarthy*, 172 Ill. 279.) The re-

striction of section 49 is not only an attempted amendment of the general Incorporation act as to cities and villages located in certain counties, but also of the special charter of said town. The town of Cicero is within the terms and the necessary operation of the act which attempts to add to such charter the restriction in question.

Again, it is insisted that there are actual grounds of difference between the municipalities or taxing districts in Cook county and those outside of that county, which support the restriction. The first of these is, that in Cook county there are a greater variety and number of different taxes, and of corporate authorities authorized to levy taxes, than in other portions of the State. In that county there is taxation by the sanitary district and for the public parks, and taxation to pay the indebtedness for the Columbian Exposition, which other portions of the State do not have to pay. It is urged that these facts furnish a ground for the restriction upon the aggregate rate. If that fact could have any effect, it seems that it would be a reason for allowing a larger aggregate to meet these additional requirements and to support the additional burdens, and that it would furnish no ground for reducing such aggregate. Surely, it is no reason for restricting the taxes below those common to the municipalities of the State. Another alleged ground is, that the taxable wealth of the municipality of Cook county is much greater than outside of that county. The fact does not appear from the record, but counsel give figures in their brief from which it appears that the equalized valuation of property in Evanston for the purpose of taxation averages $195.30 per capita, while in the city of Aurora it is $192.79, in the city of Quincy $113.35, and in the city of Joliet $105.71. If these figures are accepted, they show that there is no substantial difference between Evanston, in Cook county, and Aurora, in Kane county, and that the act is special; and by the same reasoning the city of Aurora could be singled out for separate and distinct legis-

lation, on the ground that the equalized valuation per capita is nearly double that of the city of Joliet. The statement destroys the argument. By the same process of reasoning all the counties and cities in the State might be separated. The county or city having the next largest valuation to Cook county could be separated from the others and made the subject of special law. But a conclusive answer to both these supposed grounds of difference is, that if the number of taxing authorities or the taxable wealth of the municipalities would justify different legislation, the act is not based on any such grounds of difference. It proceeds on no supposed difference of that kind, but necessarily excludes it from the classification. It applies equally to every county of a certain population, regardless of wealth, and to every municipality or taxing district in such county, regardless of the population, wealth or any other characteristic of the municipality or taxing district, except its location in such a county. It assumes to regulate the powers of small municipalities with a population of 1500 and the city of Chicago with a population of 2,000,000. The legislature did not provide that districts with a certain number of taxing authorities or with certain wealth should be included, and did not bring or attempt to bring within its operation all municipalities or taxing districts in the same situation or circumstances in that regard.

It is also said by counsel that the legislature had in view what they say is a notorious fact—that in Cook county vast amounts of personal property had never been returned by the owners and had gone entirely untaxed; that to induce the people to be honest, and not to make false returns of their taxable property but to bear their just portion of the public burdens, the legislature might properly provide that they would not have to pay more than a certain rate in the aggregate; that it was known that any truthful return of property in that county would enormously increase the assessment, and that these facts

furnish a natural and reasonable basis for this special law. It is further asserted that the legislature enacted the provision in question as a promise to the tax-payers of that particular county that if they would make honest returns of their property they should have the benefit of the limitation; that the offer was largely accepted and the anticipated result realized, and that the courts should adhere to the bargain. None of these statements have any foundation in the record, and if they had, the reasoning is not applicable on the question of the constitutionality of the statute, which is the only question before the court. The reasons which counsel say operated on the minds of the legislators in enacting the statute can not be ground for holding valid a law passed in violation of a constitutional provision. Whatever merit there may be in an argument that tax-payers of a particular county have been accustomed to make false returns of their property and to escape the burdens of taxation, which the law contemplates shall fall equally upon all in proportion to the value of their property, and that they have been deceived and betrayed into truthful disclosures and obedience to the law because of the supposed bargain, there is no evidence whatever of the facts so alleged and insisted upon by counsel. We are unable to consider such argument or make it a basis for our decision. If the law is local and special in its character and within the enumerated cases prohibited by the constitution, we must declare it invalid.

These are all the arguments in support of the provision, and none of them are sufficient to sustain it.

In awarding the writ in the case of the board of education, the circuit court deducted from the amount levied by the city council for building purposes the sum of $625,500, and the defendant in error in that case assigns a cross-error upon that action of the court. The board of education is required to communicate to the city council of the city of Chicago respecting the schools and school

funds and the management thereof, and the law authorizes the city council, in making its appropriations for school purposes and levying taxes, to levy a tax not exceeding two and a half per cent for educational and two and a half per cent for building purposes. The board of education in this case made a requisition for the fiscal year for educational purposes (less the revenue from the school fund) of $5,524,161.17, which was appropriated and levied by the city council, and about this tax there is no dispute. The board also made requisition for $2,000,000, which purported to be for building purposes and other expenses which, under the law, are not building purposes. The council made the appropriation of $2,000,000 accordingly, and included it in the ordinance levying taxes in a lump sum. The court made an investigation of the separate amounts which, by the record of the board of education, went to make up the $2,000,000, and allowed that portion which was for the purchase of school house sites, new buildings and permanent improvements and *pro rata* of loss and cost of collection, but deducted the other items amounting to said sum of $625,500. The argument in support of the cross-error assigned is, that the city council had power to levy a tax not exceeding two and a half per cent for educational purposes alone; that the entire tax levied for educational and building purposes was less than said rate of two and a half per cent, and that therefore the items for educational purposes included in the total for building purposes are valid.

It is true that the council had power to levy as much as the whole amount which was levied, and might have levied it for educational purposes alone if required for that purpose, but it was not all required or levied for that purpose. The statute authorizes a levy for two separate purposes, and requires the amount to be levied for each to be levied separately in specific sums. The certified copy of the ordinance was the only warrant to the defendant for extending the tax, and some of the items

included in the gross sum for building purposes show for themselves that they were not for such purposes, and there was no way for the clerk to separate them. Under such a levy the defendant was not required to extend any of the tax of $2,000,000. The ordinance showed that a part of that sum was for general repairs, incidental expenses and other things not included in building purposes. The ordinary expenses of the school and ordinary repairs are included within the tax levied for educational purposes, and the tax for building purposes is to provide means necessary to meet the building of school houses. (*O'Day* v. *People*, 171 Ill. 293.) The relator could not have compelled the defendant to extend any portion of the tax where the levy furnished no means of showing what was legal and what was not, and the action of the court in making the investigation and compelling a levy of that portion which was actually intended for building purposes was in their favor. Some of the items excluded may have been fairly included under the head of building purposes, but we do not consider that question, for the reason that the court might properly have refused relief as to the whole. We cannot assent to the proposition that because the board of education might have levied a tax which would have been valid, a tax not authorized by the statute should be held valid. To say that a city council or board of education may commingle the educational and building funds, or levy sums for one purpose and apply them to another, would defeat the intention of the statute and be disastrous to the tax-payer.

The judgment of the circuit court is affirmed.

Judgment affirmed.

MR. JUSTICE MAGRUDER: I do not concur in all that is said in this opinion.

PHILIP D. ARMOUR *et al.*

v.

HENRY F. GOLD *et al.*

Opinion filed April 17, 1900.

1. VOLUNTARY ASSIGNMENT—*when proceeding may be lawfully discontinued.* A voluntary assignment may be discontinued where the requirements of the statute have been followed without fraud, so that all creditors not consenting to such discontinuance may have precisely the same rights against the insolvent and his estate which they had at the time of the assignment.

2. SAME—*when plan of discontinuance is not fraudulent.* A discontinuance of assignment proceedings brought about by a promise to pay consenting creditors fifty per cent of their claims is not fraudulent, where the property is not pledged or encumbered to pay consenting or favored creditors, but is returned to assignor, except that administered, subject to the same rights possessed by creditors at the time of the assignment.

Armour v. *Gold*, 85 Ill. App. 394, affirmed.

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

A. R. URION, and A. B. STRATTON, for appellants.

CRATTY, JARVIS & CLEVELAND, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

H. F. Gold & Bro., a partnership composed of Henry F. Gold and Fred H. Gold, made a voluntary assignment of their partnership property for the benefit of creditors July 7, 1898. The assignment proceeding was carried on until the time allowed for filing claims had expired, after which the insolvents filed a petition asking that the proceeding might be discontinued, the assignee discharged and the assets not disposed of returned to them. The

petition was accompanied with the assent in writing of a majority of the creditors in number and amount. Appellants objected to the discontinuance, but their objection was overruled. The proceeding was discontinued, the assignee was ordered to surrender to the insolvents all money and property in his possession, and it was ordered that all parties should be remitted to the same rights and duties existing at the date of the assignment, except so far as such estate had already been administered and disposed of. The Appellate Court has affirmed the order.

It appeared on the hearing of the petition in the county court that the insolvents had sent to each of their creditors a letter making this proposition: "We will pay to our creditors, except our former lessors, fifty (50%) per cent of their respective claims, provided that they will agree within seven days to accept that sum in full settlement, the same to be paid on or before October 31, 1898. This offer is conditioned on the assignment proceedings being dismissed and the money and property returned to us." Accompanying this letter was an acknowledgment by the cashier of the First National Bank of Chicago that Charles A. Zahn, brother-in-law of the insolvents, had deposited with him $4500 as security for the faithful performance of the undertaking of the insolvents as set forth in the letter, and the amount so deposited was sufficient for that purpose.

Creditors who file their claims against the estate of an insolvent being administered in the county court acquire rights in the estate, and are entitled to have such administration proceed and the estate be distributed in accordance with the provisions of the statute, unless the proceeding shall be discontinued in conformity with such statute. The discontinuance can only be allowed by the court upon the conditions that a majority of the creditors in number and amount consent in writing, and the parties are remitted to the same rights and duties existing at the date of the assignment, except so far as the es-

tate shall have already been administered. The law will not permit an insolvent to use the proceeding under the statute, or the estate in the custody of the court, as a means to compel reluctant creditors to compromise their claims or to sacrifice a portion of their legal demands. No arrangement will be tolerated which will defeat the intention of the statute that the estate, so far as not administered, shall, upon a discontinuance of the proceeding, be returned to the insolvent in such a way that all creditors may enjoy the same rights existing at the date of the assignment. They cannot have the same rights if the estate is encumbered, sold or pledged to accomplish a dismissal of the proceeding. If, however, there is a compliance with the terms of the statute without fraud, so that every dissenting creditor may have precisely the same rights against the insolvent and his estate which such creditor had at the time of the assignment, the proceeding may be lawfully dismissed. *Kelley* v. *Leith*, 176 Ill. 311.

In this case the plan of discontinuance was, that all the property which had not been administered was to be returned to Gold & Bro., to be theirs absolutely in the same manner as they held it at the time of the assignment, subject to attachment or to judgment liens, or to any legal or equitable proceeding which the objecting creditors might see fit to institute, to the same extent and in the same manner as at the time of the assignment. There was nothing in the arrangement to encumber the estate or abridge the rights of such creditors to resort to the property for the recovery of their claims. All were left on the same basis, and the brother-in-law who deposited the money as security did not thereby acquire, and was not to acquire, any claim against or interest in the property which could hinder or delay any creditor. The property was not pledged, assigned or encumbered to pay those who assented or any favored creditor. The promise to pay fifty per cent to the creditors who agreed

to a dismissal did not in any manner affect those who did not consent, and who preferred to be replaced, with respect to the insolvents and their property, in the same position and with the same rights and duties existing at the date of the assignment.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

THE BEST BREWING COMPANY

v.

KUNIGUNDA KLASSEN.

Opinion filed April 17, 1900.

1. CORPORATIONS—*corporation can only exercise express or implied powers.* A corporation can do only those acts which are within the scope of its charter, and if an act is not originally within the express or necessarily implied powers of the corporation it is void, and no subsequent act can make it valid by way of estoppel.

2. SAME—*brewing company has no express or implied power to become surety on bonds of third parties.* A corporation organized to manufacture and sell beer, ale and porter and carry on a general brewing business, has no implied or express power to become surety on an appeal bond in a forcible detainer suit between third parties, where it is not shown that such act was reasonably necessary to accomplish the end for which the corporation was formed.

3. APPEALS AND ERRORS—*to make Appellate Court's judgment conclusive of facts there must be evidence tending to prove them.* Whether there is any evidence tending to establish that the execution of an appeal bond by a corporation was reasonably necessary to accomplish its corporate purpose is open to review in the Supreme Court as a question of law, under the trial court's refusal to instruct for the defendant in a suit on the bond, even though the Appellate Court has affirmed.

Best Brewing Co. v. *Klassen*, 85 Ill. App. 464, reversed.

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

BLUM & BLUM, for appellant.

F. L. SALISBURY, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action of debt upon an appeal bond. In a forcible entry and detainer proceeding before a police magistrate, in the city of Chicago, appellee, as plaintiff, recovered a judgment against Ruel G. Rounds for restitution of certain property. Rounds appealed to the county court of Cook county, filing an appeal bond as required by the statute. This bond was for $2000, conditioned as provided by statute in such cases, and was signed by Rounds and appellant as his surety, the latter's execution of it being as follows:

"THE BEST BREWING COMPANY OF CHICAGO, (Seal.)
By CHARLES HASTERLIK, *its President.* (Seal.)"

In the county court judgment was again rendered for the plaintiff. Upon the failure of Rounds or the brewing company to comply with the terms of that judgment, this proceeding was commenced in the circuit court of Cook county to recover on the appeal bond. In defense to the action, the brewing company, by its pleadings, denied that the bond was its deed; alleged that the making of the same, as to it, was unauthorized, and that such act was not within the power of the corporation. Issues were joined and a trial had by jury. At the close of plaintiff's evidence, and again at the close of all the evidence, a motion was made to instruct the jury to find for the brewing company, but these motions were overruled. The court then took the case from the jury by instructing it to render a verdict for the plaintiff, Klassen, for $1321.50. This being done, judgment for that sum was duly entered, and appellant appealed to the Appellate Court for the First District, where the judgment below was affirmed, and it now brings the case here upon further appeal.

The chief error insisted upon by appellant is, that the circuit court held the bond sued on to be its act and deed, the contention being, that the powers of the company, as a corporation, are limited by its charter to those which are express or implied; that its express powers are to "manufacture and sell beer, ale and porter and carry on a general brewing business in all its branches;" that the implied powers it possesses are only those which may be implied as necessary to carry into effect one or more of those expressed, and that the signing of this appeal bond comes under neither of these heads, but was an act *ultra vires*, and therefore not binding upon the corporation. Appellee insists, first, that the act was within the corporate power of appellant; or, second, although in excess of its corporate power, yet, having made the bond and enjoyed certain benefits arising therefrom, it is now estopped to make the defense of *ultra vires*.

The general rule is that a corporation can do only those acts which are within the scope of its charter, and if the signing of the bond in question as surety was an act not originally within the express or necessarily implied powers of the corporation it is void, and no subsequent act could make it valid by way of estoppel. It was so held in *National Home Building Ass.* v. *Home Savings Bank*, 181 Ill. 35, where the decisions of this court are reviewed, and we there said (p. 44): "If there is no power to make the contract there can be no power to ratify it, and it would seem clear that the opposite party could not take away the incapacity and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power." In that case it is also said: "The cases in this court where the corporation has been held to be estopped have been

where the act complained of was within the general scope of the corporate powers." In the case of *Heims Brewing Co.* v. *Flannery*, 137 Ill. 309, relied upon by appellee, the defense of *ultra vires* was invoked, and it was held the corporation was estopped to make that defense, inasmuch as it had enjoyed the benefit of the act; but there the act in question (which was the leasing of a building in which to conduct a saloon) was within the express power of the corporation.

We think the primary question here is not whether appellant has reaped a benefit from the act of becoming surety for Rounds upon the bond, but whether the act of signing it was within the scope of its corporate authority. The purpose of the corporation, as expressed in its charter, is to manufacture and sell ale, beer and porter and carry on a general brewing business. It would seem no acts could be more unlike than the doing of those authorized by the charter of the company and the signing of appeal bonds as surety. The instrument was executed in a suit not by or against the corporation, but by a third person against another to recover possession of a house. *Prima facie* the signing by the company of an appeal bond in such a suit was an act beyond the purpose for which it was organized, and consequently illegal. If it had been shown that it was executed clearly for the purpose of promoting or protecting its own business of brewing or selling beer, etc.,—that is to say, if the act had been reasonably necessary to accomplish the end for which the corporation was formed,—it would have been within the scope of the corporate power. But it cannot be held that every act in furtherance of the interests of a corporation is *inter vires*. Many acts can be suggested which, though beneficial to the business of a corporation, are too remote from its general purposes to be deemed reasonably within its implied powers. What is and what is not too remote must be determined according to the facts of each case. The rule has been stated to be: In exercising powers

conferred by its charter, a corporation "may adopt any proper and convenient means tending directly to their accomplishment, and not amounting to the transaction of a separate, unauthorized business." *Clark* v. *Farrington*, 11 Wis. 340.

In the case of *Lucas* v. *White Line Transfer Co.* 70 Iowa, 541, (59 Am. Rep. 454,) where a corporation chartered for the purpose of doing a "general freight and transfer business and such other business as may not be inconsistent therewith," was sued upon a bond executed by it as surety with another corporation, the Supreme Court of that State said: "The plaintiff seeks to recover contribution from the corporation as co-surety on the bond of the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers; and (2) that if it were not within the defendant's corporate powers, it has so acted on the contract as to now estop it from pleading *ultra vires*. * * * Whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture." Quoting from other authorities, it is there further said: "It is no part of the ordinary business of commercial corporations, and, *a fortiori*, still less so of non-commercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether in the indirect form of going on accommodation bills or otherwise becoming liable for the debts of others.—Green's Brice's Ultra Vires, 252; *Madison Plankroad Co.* v. *Watertown Plankroad Co.* 7 Wis. 59." These authorities are clearly in point here, and lead to the conclusion that the act of appellant in

signing this bond, instead of being the exercise of a delegated authority, was an attempt to execute powers not conferred upon it, either expressly or by implication.

In reaching this conclusion we have not overlooked the contention of appellee that the execution of the bond by appellant was in furtherance of its business, and that this fact has been found adversely to appellant by the Appellate Court and is therefore not open to review here. This position is based upon the assumption that Rounds was, at the time of the suit against him for possession of the premises, engaged in selling beer in the house and that appellant was furnishing him the beer; that the bond was executed on the part of the brewing company in order to enable him to retain possession of the property and continue his business therein and to make further purchases from the company. If all this were true, the benefits to accrue to the corporation would certainly be of the most precarious and remote character. But we have searched the record in vain for evidence tending to support the assumption. The testimony wholly fails to prove, nor does it fairly tend to prove, that Rounds was engaged in any occupation calculated to promote the business of appellant, or that the business of the corporation was promoted or benefited, in any degree, by reason of the execution of the bond. Treating these as questions of fact material to the decision of the case, they are open to review in this court as a question of law, under the assignment of errors questioning the ruling of the trial court in refusing the motion of defendant for a peremptory instruction to find for it, made at the close of all the evidence.

Plaintiff below wholly failed to make out a cause of action against this appellant, and the circuit court improperly refused to instruct the jury to return a verdict in its favor. The judgment of the Appellate Court will accordingly be reversed.

Judgment reversed.

HENRY BEST

v.

THE FULLER & FULLER COMPANY.

Opinion filed April 17, 1900.

1. DEBTOR AND CREDITOR—*conveyance intended merely as security is void as against creditors.* A conveyance of property which is absolute on its face, but which is intended merely as security, is fraudulent and void as to creditors.

2. SAME—*secret understanding for benefit of vendor is in fraud of creditors.* A secret understanding or agreement between the parties to a sale, for a benefit to accrue or be reserved to the vendor, the sale being absolute in terms, is a fraud upon creditors of the vendor.

3. SAME—*what not a sufficient change of possession.* As against creditors a change of possession is not sufficiently shown by a small sign upon which the vendee's name appears as successor to the vendor, where the vendor conducts the business as before the sale, acting as sole owner, while the vendee manifests no interest in the property except to sign a subsequent bill of sale to a third party.

4. SAME—*when debtor's vendee is personally liable to creditor.* A vendee in a fraudulent bill of sale who has re-sold the property to an innocent purchaser and received the full proceeds thereof, which greatly exceed the amount of his claim against the debtor which the original bill of sale was intended to secure, is personally liable to a creditor of the original vendor, where the effect of the last transfer is to defeat the collection of the creditor's judgment.

Fuller & Fuller Co. v. *Gaul*, 85 Ill. App. 500, affirmed.

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

In a bill and supplemental or amended bill filed by appellee January 14, 1898, it is alleged that appellee, on January 5, 1898, recovered a judgment against Adolph Gaul for the sum of $1440.51, which was for drugs sold by complainant to Gaul; that at said date it sued out execution on the said judgment and delivered the same to the sheriff, who made a demand on Gaul, notifying him to file a schedule, and returned the execution January 12, 1898, endorsed "no property found and no part satisfied."

The bill alleges that on or about December 10, 1897, Gaul was engaged in the drug business in the store No. 657 North Clark street, in the city of Chicago, and about that date transferred to the defendant, Henry Best, his father-in-law, his entire stock of drugs, furniture and fixtures, including a soda fountain and cash register, and that Best is pretending to be in possession; that the transfer was made to place the property transferred beyond the reach of creditors and to enable Gaul to control and enjoy the same; that since the transfer he has exercised authority as usual, and there is no evidence of change of possession except a small card hung in the store; that the stock and fixtures were worth $8000 at the time of transfer, and that since the transfer, Best, in various conversations, admitted that Gaul owed him only $2300 at the time of the transfer, and that he had no interest in the transferred property except as security for said sum; that said property constituted the entire estate of Gaul, and that at the time of the transfer Gaul owed other creditors besides complainant, which facts were known to Best; that Best and Gaul conspired to defeat complainant's claim, and that the transfer was fraudulent; that the soda fountain transferred to Best was worth $3000; that on or about September 1, 1898, Gaul and Best, or one of them, made a pretended transfer of said stock of drugs, or such portion of them as remained in the store, to John J. Johnson, who is now in possession and conducting said business, which transfer was merely colorable, etc., and on August 31, 1898, said Johnson executed to William G. King a chattel mortgage of the said property purporting to secure a note for $2360, which mortgage was without consideration, etc., and that J. E. Nórling claims an interest in said property as a member of the firm of J. J. Johnson & Co., composed of Johnson and Norling. The bill prays that the transfer to Best and to Johnson be decreed to be fraudulent; that the chattel mortgage be set aside as fraudulent; that Best

may be decreed to be personally liable for the full amount of Gaul's indebtedness to complainant, in case complainant should fail to realize its judgment because of transfers, etc.

Answers were filed by all the defendants and replications to the answers. The evidence was heard in open court, and the court dismissed the bill and the amended or supplemental bill for want of equity. The recovery of judgment by complainant, and the issuing and return of execution, as averred in the bill, and that judgment was for drugs sold by the appellee to Gaul prior to the transfer to Best, are facts proven by the evidence and not controverted.

B. M. SHAFFNER, for appellant:

A debtor has a right to sell his stock of goods to a creditor in satisfaction of his debt. The mere doubt of the fairness of such transaction is not sufficient. Fraud must be proved by a preponderance of evidence. *Dryer* v. *Durand*, 80 Ill. 561; *Waterman* v. *Donelson*, 43 id. 29; *Nelson* v. *Smith*, 28 id. 495; *Holbrook* v. *Bank*, 10 Ill. App. 140; *Railroad Co.* v. *Watson*, 113 Ill. 196.

The presumption of law is that dealings between relatives are fair and honest, without any wrongful or fraudulent intent, and no presumption of fraud attaches to such dealings. *Schroeder* v. *Walsh*, 120 Ill. 403; *Baldwin* v. *Freydendall*, 10 Ill. App. 106; *Mey* v. *Gulliman*, 105 Ill. 272.

CHARLES LANE, for appellee:

The relationship of the parties to a conveyance under questionable circumstances is calculated to awaken suspicion, and the transaction will be closely scrutinized. Wait on Fraud. Con. (2d ed.) sec. 242; Bump on Fraud. Con. (4th ed.) sec. 67; *Martin* v. *Duncan*, 156 Ill. 274; *Lehmann* v. *Greenhut*, 88 Ala. 478; *Johnson* v. *Dick*, 27 Miss. 277.

On a sale of personal property the change of ownership and possession must be indicated by such outward,

open, actual and visible signs as can be seen and known to the public or persons dealing with such property, and such possession must be exclusively in the vendee. Wait on Fraud. Con. (2d ed.) sec. 253; *Martin* v. *Duncan*, 156 Ill. 274; *Beaver* v. *Danville Shirt Co.* 69 Ill. App. 320; *Gilbert* v. *Stoddart*, 30 id. 231; *Weeks* v. *Prescott*, 53 Vt. 57; *Claflin* v. *Rosenberg*, 42 Mo. 439; *Potter* v. *Payne*, 21 Conn. 360; *Lowe* v. *Matson*, 35 Ill. App. 602.

On a sale and conveyance of property by an insolvent debtor, with a reservation of an advantage or benefit to him, the conveyance is fraudulent as to his creditors. *Blodgett* v. *Webster*, 24 N. H. 92; *Gordon* v. *Reynolds*, 114 Ill. 118; *Stiner* v. *Lowrey*, 98 Ala. 208; *Moore* v. *Wood*, 100 Ill. 451; *Johnson* v. *Whitewell*, 24 Mass. 71; *Stephens* v. *Regenstein*, 89 Ala. 561; *Dalton* v. *Currier*, 40 N. H. 237.

A conveyance of property with the intent to disturb, hinder, delay or defraud creditors of the grantor or vendor of such property, is void as against such creditors. Starr & Cur. Stat. chap. 59, sec. 4; *Beaver* v. *Danville Shirt Co.* 69 Ill. App. 320; *Hanchett* v. *Goetz*, 25 id. 445.

Where a creditor secures a preference by having property conveyed to him of greater value than his debt, the preference is void. *Chipman* v. *Glennon*, 98 Ala. 263; *Smith* v. *Boyer*, 45 N. W. Rep. 265; *Kellogg* v. *Cline*, 54 Fed. Rep. 696; *Reynolds* v. *Weinman*, 25 S. W. Rep. 33; *Savings Bank* v. *McDonnell*, 89 Ala. 434; *Hanchett* v. *Goetz*, 25 Ill. App. 458.

Per CURIAM: In deciding this case, the Appellate Court, after making a full statement of the facts and evidence, delivered the following opinion, (the appellant here being the appellee in the Appellate Court, and the appellee here being the appellant in that court):

"There is no evidence that Best assumed to pay any part of the back rent as part of the consideration of the sale to him. 'A conveyance of property which is absolute on its face, but which is really intended as a mortgage or security, is well enough as between the parties,

but the settled doctrine is that such a transfer of property is fraudulent and void as to creditors.' (*Beidler* v. *Crane*, 135 Ill. 92, 98.) The reason given for the doctrine is, that in such case there is necessarily a secret trust for the benefit of the vendor, and that the natural and necessary effect of the instrument, in not disclosing the trust, is to mislead, deceive and defraud creditors. (Ibid.)

"That Gaul executed the bill of sale as security is proved by his own testimony. He testified: 'There wasn't anything left for me to do but to sell him the store to secure my indebtedness to him.' What Best wanted was his money or security, and Best's statements to Pierce, which were not denied, show conclusively that he regarded a bill of sale as merely a security,—else how could he say to Pierce that he was an honest man, and all he wanted was the $2300; that Gaul told him the store was worth $8000; that he thought it worth $6000, and that, if he could sell it for that amount, he wanted to pay all creditors? And why did he state to Lane that he had no disposition to beat any one, and that he believed that if the store should be held until summer and then sold, all Gaul's creditors would be paid? This language would be appropriate coming from one who held the property in trust for creditors, but would be not only inappropriate, but absurd, if used by a purchaser of the property absolutely and in good faith.

"We are of opinion, from the evidence, that the actual intention of the parties was to hinder and delay creditors other than Best, and that the bill of sale was made for that purpose and to secure Gaul's indebtedness to Best. The evidence shows clearly that Best knew that Gaul had other creditors; that the property in the store was all Gaul had; that he was in a 'bad fix.' He also believed, as he himself says, that the property was worth $6000, and he as well as Gaul must have known, on the hypothesis that they were moderately endowed with common sense, that for Best to take an absolute deed of the prop-

erty merely as security, and continue the business with Gaul as manager, would necessarily hinder and delay Gaul's other creditors. Gaul testified that at the time of the execution of the bill of sale he knew that it would delay appellant in the collection of its debt. The consideration for the alleged purchase was grossly inadequate, if the bill of sale is to be regarded as absolute in fact and not merely as a security. Best only claims that Gaul owed him $2300. The evidence is overwhelming that the property, when the bill of sale was executed, was worth, net, between $5000 and $6000. Gaul, the only witness for appellees as to value, testified that it was worth only $1730, but we do not think his evidence entitled to much credit. Gaul testified that he told Best, before the transfer, that under favorable circumstances the store might bring $5000, and Best told Pierce that Gaul told him it was worth $8000, and his testimony in other particulars is inconsistent with his statement that the property was worth only $1730.

"'A vendee who purchases property of an insolvent debtor for less than its value, thereby deprives the creditors of the difference and defeats their just expectations.' (Bump on Fraudulent Conveyances,—3d ed.—p. 44. See, also, *Dodson* v. *Cooper*, 50 Kan. 680, and *Mobile Savings Bank* v. *McDonnell*, 89 Ala. 434.)

"'Insolvency means a general inability to answer, in the course of business, the liabilities existing and capable of being enforced.' (*Brouwer* v. *Harbeck*, 9 N. Y. 589, 593, and cases cited.) That such inability existed in Gaul's case was fully proven.

"But in addition to the sale having been made as security to Best and to hinder and delay creditors, the evidence tends strongly to show that another object was to secure a benefit or advantage to Gaul. Best testified that he wanted to secure himself and give Gaul some employment so long as he had the store; that Gaul had no income except what he had from the store. The only

objection that Best made when Pierce, appellant's representative, suggested to him to turn over the store to appellant, and that he should first be paid from the proceeds of the business, was, that it would throw Gaul out of employment; that if Gaul could not stay there and run the store he would be on his, Best's, hands, with his family, and he would have to take care of him. Best also stated to Pierce and Lane that at the time of the transfer it was understood that Gaul should continue as manager of the store. Gaul was retained in the store as manager, and was paid, or rather paid himself, $75 per month for what he could do before business hours in the morning and after five, six or seven o'clock in the evening,—which is certainly a very suspicious circumstance. A secret understanding or agreement between the parties to a sale for a benefit to accrue or to be reserved to the vendor, the conveyance being absolute in terms, is a fraud as to creditors of the vendor. (*Moore* v. *Wood*, 100 Ill. 451, and cases cited.)

"Appellant's counsel contends that there was no such change in the possession of the property as the law requires, and we are inclined to that view. In *Martin* v. *Duncan*, 156 Ill. 274, certain property was attached as the property of the defendant in error, George W. Duncan. The goods were claimed by Robert Duncan, a brother of George. The attachment was levied May 28, 1891, and on the 16th of that month George had executed to his brother, Robert, a bill of sale of the goods. The court thus states the case: 'George W. Duncan, against whom the suit was brought, lived in Dixon and had two stores, —one in Dixon and one in Ottawa. His brother, Robert Duncan, the defendant in error, lived in Ottawa, and managed the store in the latter place from September, 1888, to May 16, 1891, when the transfer hereinafter mentioned is alleged to have been made. The defendant in error, in the management of the Ottawa store for his brother, George, sold goods, handled the money, made

deposits, paid for goods, paid bills by checks, took out insurance, had no clerk, kept such books as were kept, and had an agreement that he was to receive for his services $25 per month and his board. George Duncan came to Ottawa only occasionally, although the store was run in his name and advertised as his, and the stock levied upon is conceded to have been his until May 16, 1891. Up to that date Robert Duncan was merely the agent and representative of his brother, George, and his possession was, until then, the possession of George.' The court say: 'Up to May 16 defendant in error had been in possession as agent of his brother, and if on May 28 he was in possession for himself, the change in the character of the possession should have been indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods. (*Claflin* v. *Rosenberg*, 42 Mo. 439.) * * * When the known and previously recognized agent of an alleged vendor remains in possession, the appearance to the world is the same as though the vendor himself remained in possession, unless there are substantial and visible signs of change of title.'

"In the present case, Gaul, who prior to the execution of the bill of sale was the owner, continued in possession and managed and controlled the business as he had done prior to the alleged sale, sold goods to customers labeled 'Adolph Gaul,' and made out bills to customers headed 'In account with Adolph Gaul.' He kept his accounts in the books formerly used by him. He retained in his employ Hessler, his former drug clerk, until April 30, 1898,—nearly five months after the alleged sale,—and told Hessler that Best had nothing to do with it; that he, Hessler, was working for him, and finally sold the goods *en masse* without any intervention on the part of Best, except that the latter signed the bill of sale. Best says that he left the whole matter of the sale to Johnson, including agreement as to consideration, to Gaul. The formal signing of the bill of sale to Johnson was substan-

tially the sole act of Best in relation to the property, after the alleged sale from Gaul to him. Concisely stated, Gaul acted in all respects as if he were the sole owner of the store, and Best as if he had no pecuniary interest in it. Gaul testified that Best had no key to the store and was ignorant of the combination of the safe.

"Counsel for appellees relies on the signs as indicating a change of ownership. It may be true that the card sign over the cash register, the one in the perfumery case, and the small one on the front door with the words 'Henry Best, Successor to' on it, placed over the former sign of Adolph Gaul, might indicate to one observing them that there had been a change in the business, but we think the effect of such signs more than counterbalanced by the manner in which the business was conducted. Besides, the primary question is, was there in fact a change of possession from Gaul to Best?—because if there was not the signs were as deceptive as was the bill of sale.

"There is no evidence that Johnson, at the time he purchased the property, had any knowledge of the circumstances under which the alleged sale to Best was made or that his purchase was not in good faith. This being true, and appellee Best having received the proceeds of the sale of property worth between $5000 and $6000, appellant is entitled to a personal decree against Best. (*Coale* v. *Moline Plow Co.* 134 Ill. 350, 358.)

"The judgment will be reversed and the cause remanded, with directions to enter a personal decree in favor of appellant, the Fuller & Fuller Company, and against appellee Henry Best, for the sum of $1440.51, with interest at the rate of five per cent per annum from January 5, 1898, until the date of the decree."

We concur in the foregoing views and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

HENRY B. KEPLEY *et al.*

v.

ROBERT SCULLY *et al.*

Opinion filed April 17, 1900.

1. ADVERSE POSSESSION—*when several possessions may be tacked.* Successive possessions of several persons may be tacked, so as to make one continuous possession, if there is privity of estate or the several titles are connected.

2. SAME—*privity of estate may be effected by deed or parol agreement.* The privity necessary to constitute successive possessions continuous may be effected by deed or conveyance or by parol agreement or understanding.

3. SAME—*when possessions are continuous though deeds have defective descriptions.* If each grantee succeeds to possession of his grantor there is such privity between the occupants that their several possessions may be referred to one entry, even though their deeds contain such defective description as requires correction.

4. SAME—*title by twenty years' adverse possession may be used for purposes of attack.* Title acquired by adverse possession for twenty years may be enforced by an action of ejectment against a third party or the original owner, who has succeeded in obtaining possession after the bar of the statute was complete.

5. EVIDENCE—*effect where plaintiff fails in undertaking to prove more than is required.* Plaintiff in ejectment who proves twenty years' adverse possession is entitled to recover though he fails in his attempt to prove a connected chain of title from the State; nor are the deeds offered for such purpose improperly admitted, as they show character of possession and intent with which it was held.

6. TAX DEEDS—*section 194 of Revenue act, concerning process for sale, construed.* Section 194 of the Revenue act, as amended in 1879, (Laws of 1879, p. 249,) which makes the county clerk's certificate to the delinquent list process for sale, contemplates that such certificate be made on the day of the sale, and if the certificate is not made at the time required by statute it is void as process, and tax deeds based on a sale under such void process are void.

7. EJECTMENT—*intruder cannot set up title in himself or third party.* The holder of a conflicting title who induces the tenant of one in peaceable possession of the land to surrender it to him is an intruder, who cannot, when sued in ejectment, set up title in himself or in a third party to defeat the action.

WRIT OF ERROR to the Circuit Court of Effingham county; the Hon. SAMUEL L. DWIGHT, Judge, presiding.

This is an action of ejectment, begun on August 6, 1895, by defendants in error, Robert Scully and Rachel Lilly, against plaintiffs in error, Henry B. Kepley and James Phifer, to recover the possession of lots 9 and 10, in block 2, in the western addition to the town, now city, of Effingham, in Effingham county. The plea of not guilty was filed by both defendants below, and a separate plea was filed by Henry B. Kepley, denying possession of the premises at the time of bringing suit, and denying that demand for possession of the same was made of him before the suit was brought. A jury was waived, and the cause was tried by the court, who heard the evidence for the parties, and found the issues for the plaintiffs below, and rendered judgment in their favor against the defendants below, the present plaintiffs in error, for the possession of the premises, and costs of suit.

HENRY B. KEPLEY, for plaintiffs in error.

S. F. GILMORE, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

In this action of ejectment the defendants in error proved that they and the parties, under whom they hold, were in adverse possession of lots 9 and 10 for a period of more than twenty years before the commencement of the action, to-wit: from February, 1868, to some time in 1890 or 1891. On February 24, 1868, Thomas R. Dutton and wife conveyed lot 9 by warranty deed to Jesse Jennings. Theretofore, on October 23, 1867, Alfred Dixon and wife by a warranty deed had conveyed lot 10 to Jesse Jennings. Jesse Jennings was in possession of the lots up to January 9, 1880, when he and his wife conveyed the same by warranty deed to Mary E. Scully, afterwards Mary E. Claytor, she having married M. W. Claytor. By deeds made in October, 1889, and July, 1890, and March, 1893—the last two deeds having been executed to correct

some slight mistake in the description contained in the first deed—Mary E. Claytor conveyed the lots to her son, Robert Scully, and her daughter, Rachel Lilly, formerly Rachel Scully, said Robert and Rachel being the defendants in error. From January 9, 1880, Mary E. Scully, afterwards Mary E. Claytor, and her children, the defendants in error, were in possession of the lots down to 1890 or 1891.

The possession of Mrs. Scully and her children from January 9, 1880, can be tacked to the possession of Jennings prior to that date, in order to make the full period of twenty years of adverse possession. Where several persons enter on land in succession, the several possessions can be tacked, so as to make a continuous possession where there is privity of estate, or the several titles are connected. This privity thus required to constitute continuous adverse possession may be effected by deed or conveyance, or parol agreement or understanding. (*Weber* v. *Anderson*, 73 Ill. 439; *Faloon* v. *Simshauser*, 130 id. 649; *Ely* v. *Brown*, 183 id. 575; Buswell on Lim. & Adv. Poss. secs. 239, 240). When Jennings deeded the lots to Mary E. Scully on January 9, 1880, he at the same time delivered to her, possession of the premises. So, also, when she executed the deed to her children, the defendants in error, she delivered the possession of the premises to them. Even though the deed, made by Jennings to her, and the deed, made by her to defendants in error, may have contained such a defective description as to require correction, yet there was such privity between the successive occupants, that the several possessions may be referred to one entry, because there was a parol delivery of possession by Jennings to Mrs. Scully and by Mrs. Scully to defendants in error. This was sufficient to maintain the continuity of the possession, as each subsequent occupant succeeded to the possession of the preceding occupant. The possession may not have been maintained at all times during the period aforesaid by the parties in

person, but, when absent themselves, they were in possession through their tenants. The house, occupied by the parties or their tenants, was upon lot 10; but lot 9 was used in connection with the house, and as a part of the premises upon which the house stood. There is some conflict in the testimony as to whether lot 9 was enclosed during the whole of the twenty years. There is proof on the part of the defendants in error that it was so enclosed, and there is proof on the part of the plaintiffs in error that it was not enclosed at all times. But there was evidence enough in favor of such enclosure to justify the court below, before whom the case was tried without a jury, in finding in favor of the defendants in error upon this issue.

It being established that the defendants in error were in adverse possession of the lots for more than twenty years, they are entitled to recover in an action of ejectment upon the title acquired by such possession. It is now well settled, that an adverse possession for a period of twenty years may not only be used as a defense to the title thereby acquired, but it may be enforced by affirmative action, either against a third party or against the original owner, where the latter succeeds in obtaining possession after the bar of the statute has become complete. In other words, title by an adverse possession of twenty years may be used as a sword to attack with when such possession is disturbed. (*Riverside Co.* v. *Townshend*, 120 Ill. 9; *Faloon* v. *Simshauser*, *supra;* Angell on Limitations, sec. 381; Newell on Ejectment, p. 719; Buswell on Lim. & Adv. Poss. sec. 231).

Besides the deeds already mentioned, the defendants in error sought to establish a chain of title by a regular series of conveyances from the State of Illinois to themselves. Without entering into particulars, we think that they failed thus to establish a record title. But, as they proved an adverse possession for twenty years, the deeds introduced, though failing to show a connected chain of

title, were not improperly admitted, as they show the character of the possession and the intent with which it was held. (*Barger* v. *Hobbs*, 67 Ill. 592; *Coombs* v. *Hertig*, 162 id. 171). The mere fact, that the defendants in error undertook to prove more than was required, could not affect their right to recover. (*Coombs* v. *Hertig*, *supra*).

To maintain their defense, the plaintiffs in error, upon the trial below, introduced two tax deeds: First, a tax deed to Henry B. Kepley, dated October 10, 1889, for lot 10 and the east one-tenth of lot 9, made by virtue of a tax sale of said property on June 1, 1887, under a judgment and order of sale, entered against said lots by the county court of Effingham county, on May 16, 1887; second, a tax deed to said Kepley, dated July 25, 1890, for the west nine-tenths of lot 9, made by virtue of a sale of said property on June 1, 1888, under a judgment and order of sale, entered by the said county court on May 12, 1888.

Several objections are urged by defendants in error to these tax deeds, but we deem it necessary to notice but one of them; and that is, that there was no valid precept or process for a sale in the case of either of said tax judgments or tax sales. Section 194 of the Revenue act provides as follows: "On the day advertised for sale, the county clerk, assisted by the collector shall carefully examine said list upon which judgment has been rendered, and see that all payments have been properly noted thereon, and said clerk shall make a certificate to be entered on said record following the order of court that such record is correct, and that judgment was rendered upon the property therein mentioned for the taxes, interest and costs due thereon, which certificate shall be attested by the clerk under seal of the court and shall be the process on which all real property or any interest therein shall be sold for taxes," etc. (3 Starr & Cur. Stat. —2d ed.—p. 3480). There is then given the form of a certificate to be used by the clerk. Section 194 evidently requires, that the clerk shall make the certificate therein

referred to on the day of the sale. He is to carefully examine the list, and see that all payments have been properly noted thereon. A reference to sections 188 and 189 of the Revenue act will show, that the property owner has the right to pay his tax at any time between the rendition of the judgment and the making of the sale. As payments may be made up to the day of the sale, the clerk must examine and see whether any payments have been made between judgment and sale. This is the reason why the statute requires the examination to be made on the day of sale; his certificate as to the correctness of the record must necessarily follow such examination. He could not certify that the record was correct without seeing that all the payments made up to the day of sale had been properly noted. It necessarily follows, that the certificate required by section 194 should be dated as of the day of the sale. Both certificates, however, in the case of the two tax deeds here referred to, bear the same dates as the days on which the tax judgments were rendered, and not as of the days on which the sales were made. The first certificate is dated May 16, 1887, the date of the judgment, instead of June 1, 1888, the date of the sale. The second certificate is dated May 12, 1888, the date of the second judgment, and not June 1, 1888, the date of the sale. The presumption is that the certificates were made at the times when they bear date. They are not, therefore, in conformity with the statute. The validity of a tax title depends upon strict compliance with the statute. (*Gage* v. *Mayer*, 117 Ill. 632). A title to be made under a tax deed is one *stricti juris*. (*Wisner* v. *Chamberlin*, 117 Ill. 568). Such a title is a purely technical one as distinguished from a meritorious title. (*Gage* v. *Waterman*, 121 Ill. 115; *Stillwell* v. *Brammell*, 124 id. 338). "Where the law expressly directs that process shall be in a specified form and issued in a particular manner, such a provision is mandatory. (*Sidwell* v. *Schumacher*, 99 Ill. 426). This rule applies to that which stands in the place of process

and performs its office.—(*Eagan* v. *Connelly*, 107 Ill. 458)." (*Ames* v. *Sankey*, 128 Ill. 523). In this case, the certificates were not made at the times required by the statute, and, therefore, the process under which the officer making the tax sales was authorized to act, was not valid.

There was also introduced, on the part of the plaintiffs in error at the trial below, a tax deed executed by the sheriff of Effingham county to Edward Roby, dated May 28, 1870, conveying lot 9 and executed in pursuance of a sale of said lot on May 25, 1868, under a judgment rendered by said county court on May 18, 1868. The certificate of the clerk, which constituted the process on which this last tax sale was made in 1868, bears date May 30, 1868. The date of the certificate is thus subsequent both to the date of the judgment and to the date of the sale. The statute, which was in force May 25, 1868, required "that the clerk of the county court shall, before the day of sale, make a correct record of the lands and town lots against which judgment is rendered in any suit, for taxes due thereon, and which shall set forth the name of the owner, etc., * * * and shall attach thereto a correct copy of the order of the court, and his certificate of the truth of said record, which record, so attested, shall hereafter constitute the process on which all real property shall be sold for taxes, as well as the sales of such property." (Gross' Stat. of Ill. of 1871, pp. 604, 605). The clerk was required to make his certificate before the day of sale, whereas it was made five days after the day of sale. Therefore, under the authorities above referred to, the process, on which the sale was made, was void.

Inasmuch as the process upon which all three of the sales were made was void, the tax deeds introduced in evidence by plaintiffs in error were void, and constituted no valid defense to the action of defendants in error.

Deeds were introduced, tending to show the conveyance of the tax title acquired by Roby to the plaintiff in error, Kepley. But the latter disclaims any intention

of relying upon title in himself under the tax deed executed to Roby. His contention is, that the tax deed in question put the title to lot 9 in Roby, and divested the former owner thereof, and that, in ejectment, it is sufficient to defeat the action to show that the legal title is not in plaintiff, or that the title is in a third party. (*Kirkland* v. *Cox*, 94 Ill. 400). The evidence, however, shows that some time in 1890 or 1891, the plaintiff in error, Kepley, induced one Holt, who was in possession of the premises as a tenant under the defendants in error, to attorn to Kepley and take a lease from him. This was an abandonment by Holt of his landlords, the defendants in error.

"A tenant in possession under one title can make no valid attornment to any one not in privity with that title." (Taylor on Landlord and Tenant—8th ed.—sec. 180). "As a tenant is not permitted to resist the recovery of his landlord, by virtue of an adverse title acquired during the tenancy, if he takes a lease from a third person, it is void, and cannot work an adverse possession against his landlord." (Ibid. sec. 705; Angell on Limitations—5th ed.—sec. 446). In *Hardin* v. *Forsythe*, 99 Ill. 312, we said (p. 320): "The same principle, which forbids a tenant to dispute the title of his landlord, applies to any person who may acquire the possession from, through or under the tenant. If, by collusion with the tenant, or through other means, he is induced to vacate and surrender the possession to a stranger, such person will acquire no greater rights than the one who occupied as a tenant." Where a tenant takes advantage of his position to turn over the land occupied by him to the holder of a conflicting title, such holder will not be regarded otherwise than as an intruder; and an intruder upon the possession of one in quiet and peaceable possession of land cannot, when sued in ejectment, set up title under a third party, or in himself, to defeat the action. A defendant, who invades the plaintiff's possession and ousts his tenant, has no right, when sued in ejectment, to defend by prov-

ing an outstanding title. (*Hardin* v. *Forsythe, supra; Anderson* v. *Gray*, 134 Ill. 550). It follows that neither the plaintiff in error, Kepley, nor the plaintiff in error, Phifer, holding under him, can show an outstanding title in Roby, under the tax deed executed to the latter, for the purpose of defeating the present action by the defendants in error.

After a careful examination of the record, we have come to the conclusion that the defendants in error were entitled to recover, and that the judgment of the court below in their favor was correct. Accordingly, the judgment of the circuit court is affirmed.

Judgment affirmed.

JOHN I. WARMAN *et al.*

v.

THE FIRST NATIONAL BANK OF AKRON, OHIO.

Opinion filed April 17, 1900.

1. PRACTICE—*section 33 of Practice act construed.* The affidavit required by section 33 of the Practice act (Rev. Stat. 1874, p. 779,) in order to put the plaintiff upon proof of the execution of a written instrument must be made by the defendant charged with the execution of the instrument, and cannot be made by his agent.

2. SAME—*proviso to section 33 does not sanction affidavit by stranger to record.* The proviso to section 33 of the Practice act, permitting a denial of the execution of a written instrument on information or belief, where the party making the denial is not the one charged with the execution of the instrument, does not authorize an affidavit of denial by a stranger to the record.

3. BANKS—*when bank is not an innocent purchaser of note.* A bank does not become an innocent purchaser of a negotiable note, so as to entitle it to protection against infirmities of the paper, by merely discounting the same for a person not indebted to it and crediting him with the proceeds by way of deposit, as such deposit, so long as it is not withdrawn, is subject to equities of prior parties.

4. EVIDENCE—*what makes a prima facie case in a suit on note.* The introduction in evidence, by the plaintiff, of the notes sued upon, endorsed in blank by the payee, is *prima facie* evidence that the plaintiff has acquired them in good faith, for value, in the usual course of business, before maturity and without notice of defenses; and such proof cannot be overcome by showing merely that the

original transaction between the plaintiff and the payee did not, of itself, amount to a purchase of the notes.

5. SAME—*what must be shown to cut off rights of bank as an innocent purchaser.* Defendants to a suit on a note, brought by an endorsee bank, in order to sustain their claim that the bank is not entitled to protection as an innocent purchaser, must show, not only that the bank merely credited the proceeds of the discounted note by way of deposit in favor of the payee and that the payee was not then indebted to the bank, but must also prove that the amount due upon such deposit, if any, had not been drawn out at the time of the trial, there being no claim of an earlier notice to the bank of such defense. (MAGRUDER, J., dissenting.)

Warman v. *First Nat. Bank*, 70 Ill. App. 181, affirmed.

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.

BEACH & BEACH, for appellants.

PADEN & GRIDLEY, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is a suit brought against appellants by appellee, endorsee of two promissory notes claimed to have been executed by appellants, payable to the Diamond Rubber Company, and by it endorsed and discounted with appellee. A plea of the general issue was filed in the court below, and with it the following affidavit:

"STATE OF ILLINOIS, } ss.
County of Cook. }

"S. I. Yoder, being first duly sworn, on oath says that he is agent of the above named defendants in this behalf; that said defendants have a just and meritorious defense to the whole of plaintiff's demand; that he has read the foregoing plea and knows the contents thereof, and verily believes the same to be true.

S. I. YODER.

"Subscribed and sworn to," etc.

A second plea denied the assignment, by endorsement, of the notes to the plaintiff before their maturity. The fourth alleged want of consideration for the execution of

said notes, and knowledge thereof on the part of plaintiff at the time of their assignment to it. The fifth alleged total failure of consideration for the notes by reason of the breach of warranty of the goods sold to defendants by the payee, and knowledge of such total failure of consideration on the part of the plaintiff at the time of the alleged assignment of the said notes to it. The sixth alleged total failure of consideration for the reasons stated in the fifth plea, and that the notes sued upon were assigned to and taken possession of by the plaintiff after maturity of the same. The seventh alleged want of consideration for the notes, and that the same were assigned to the plaintiff after their maturity. By replications, issue was taken upon each of these special pleas.

On the trial the notes were introduced in evidence, over the objection of defendants, without proof of their execution, and the defendants, after showing that the notes in question were discounted by the payee of the same with the plaintiff, and that at the time of such discount the proceeds thereof were credited to the payees, attempted to introduce evidence in support of their pleas, but on objection it was excluded by the court and exceptions taken. An instruction to the jury to find the issues for the defendants was refused, and one to find for the plaintiff and assess the damages at the sum of $1915.58 was given. A verdict for that amount was accordingly rendered. After overruling defendants' motion for a new trial the court rendered judgment on the verdict. That judgment has been affirmed by the Appellate Court.

The amount for which the jury was directed to return a verdict was the amount due on the notes, and it is not claimed that the court erred in giving that peremptory instruction if its rulings upon the admissibility of testimony was correct. It is, however, insisted that error was committed in that regard, first, in overruling defendants' objection to the introduction of the notes in evidence without proof of their execution. This assignment of

error is based upon the assumption that the affidavit attached to the plea of the general issue was sufficient to bring it within the provisions of paragraph 34 of the Practice act. (Rev. Stat. p. 779.) It will be seen by reference to that statute that the affidavit necessary to put a party upon proof of the execution of an instrument sued on, must, if to a plea, be the affidavit of the defendant. Here, neither of the defendants to the action swears to the plea. They are the parties charged with the execution of the notes upon which the action is brought, and they alone could, within the meaning of the statute, make affidavit that they did not so execute them. They could not do so by an agent. *Stevenson* v. *Farnsworth*, 2 Gilm. 715; *Warren* v. *Chambers*, 12 Ill. 124; *Davis* v. *Scarritt*, 17 id. 202.

But counsel insist the affidavit is sufficient under the proviso to the foregoing section. This position is also untenable. Under the proviso the one making the affidavit must still be a party to the suit. "The party making such denial" is fixed by that part of the section preceding the proviso. There is nothing, either in the body of the statute or proviso, authorizing a third party,—*i. e.*, one not a party plaintiff or defendant,—to deny the execution of an instrument upon which an action is brought.

The second and only other ground of reversal urged is the refusal of the trial court to admit evidence offered by the defendants in support of their special pleas. This assignment of error is based solely upon the proposition that under the evidence produced upon the trial the plaintiff was not such an innocent holder of the notes as to be entitled to protection against defenses existing against the payee. The president of the bank, being called by the defense, testified that the $1500 note was discounted July 3 and the $400 note August 19, and was then asked the question, "Will you tell just what was done when you say they were discounted?" and he answered: "I have the duplicate deposit tickets here, showing the credit to the parties for whom we discounted them, of the proceeds,

upon those days." Upon this evidence counsel lay down the legal proposition "the plaintiff cannot claim the protection of an innocent purchaser of said notes for value before maturity," and they say: "The bank parted with nothing of value to the payee in said notes, but merely extended additional credit to the said payee. Until it appears that said credit was used and the bank account drawn upon or exhausted by the said payee, the bank has parted with nothing of value." The Appellate Court declined to pass upon the point, on the ground that it was not raised by the pleas filed. The question is, however, treated by both parties as before us, and while we think there is force in the position taken by the Appellate Court, we shall pass upon it as properly raised.

We think the authorities fully sustain the proposition that a bank does not become a purchaser of negotiable paper by discounting the same for one not indebted to it at the time, and merely placing the amount which the assignor is to receive to his credit by way of deposit. It is well understood that by a general deposit in bank the relation of debtor and creditor, merely, is created between the bank and depositor; and if in this case the bank only became such a debtor to the rubber company, and if that indebtedness continued to exist at the time of the trial, it could have protected itself, if the defenses set up prevailed against the notes, by refusing to pay the deposit, and therefore could not claim the protection of being an innocent holder for value, or if it had paid any part of the deposit it would be entitled to protection *pro tanto*. *Drovers' Nat. Bank* v. *Blue*, 110 Mich. 31; *Central Nat. Bank* v. *Valentine*, 18 Hun, 417; *Fox* v. *Kansas City Bank*, 30 Kan. 441; *Mann* v. *Second Nat. Bank*, id. 412; *Manufacturers' Nat. Bank of Racine* v. *Newell*, 71 Wis. 309; *Dougherty* v. *Central Nat. Bank*, 93 Pa. St. 227; *Lancaster County Nat. Bank* v. *Hewer*, 114 id. 216.

The more difficult question here is, did the defendants prove the plaintiff to be within the rule announced, by

merely showing that no money was paid for the notes at the time of the discount, or were they not bound to go farther and prove the state of the account between the rubber company and the bank. The theory of appellants is, that the proof offered by them showed *prima facie* that the plaintiff did not become a purchaser of the notes by the discount, and that the plaintiff could only claim the benefit of an existing indebtedness by the rubber company, or the subsequent payment of the deposit, by proving it. The position is untenable. The rule deducible from the authorities on which the defense is based is accurately stated in 4 Am. & Eng. Ency of Law, (2d ed.) p. 298, as follows: "Where a bank discounts paper for a depositor who is not in its debt, and gives him credit upon its books for the proceeds of such paper, it is not a *bona fide* holder for value, so as to be protected against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor, and so long as that relation continues and the deposit is not drawn out the bank is held subject to the equities of prior parties, even though the paper has been taken before maturity and without notice."

The plaintiff was in possession of the notes endorsed by the payee and introduced them in evidence on the trial. That was sufficient *prima facie* proof that it acquired them *bona fide* for value, in the usual course of business, before maturity, and without notice of any fact or circumstance impeaching their validity, and that it was the owner of them and entitled to recover the full amount due thereon against the makers. On the introduction of the notes the plaintiff therefore properly rested its case. (*Palmer* v. *Nassau Bank*, 78 Ill. 380; Daniel on Neg. Inst. sec. 812.) Possession of the notes endorsed in blank by the payee was *prima facie* evidence that the bank was the proper

owner of them, and nothing short of fraud,—not even gross negligence, if unattended with *mala fides*,—would have been sufficient to overcome the effect of that evidence or to invalidate the title thus shown. (*Collins* v. *Gilbert*, 94 U. S. 753.) Both upon principle and authority the defendants could not overcome the *prima facie* case thus made by merely showing that the original transaction between the plaintiff and the payee did not, of itself, amount to a purchase of the notes.

It will be seen that one of the requisites of the rule as quoted above is that the depositor is not in the bank's debt at the time of the discount, and proof of that fact would therefore be necessary to bring a defense within its provisions. The defense here insisted upon has received careful consideration by the Supreme Court of the State of Kansas in the several cases above cited; and in *Mann* v. *Second Nat. Bank*, *supra*, it was held that mere evidence that, at the time when such an instrument was discounted by a bank, the bank merely gave credit for the amount of the instrument to the person selling the same, who had an account with the bank, without showing the state of the account at that or at any other time, will not, of itself and alone, prove that the bank was not a purchaser for value, the court saying: "If we should assume that the bank did not pay the value of the note at the time it was discounted, but simply gave a credit to the Champion Machine Company therefor, still there would be nothing to show whether at that time the bank owed the Champion Machine Company or the machine company owed the bank. The machine company, for anything that appears in the case, may have owed the bank more than $143 at the time the note was discounted, and if it did, the bank would have obtained the note unaffected by the equities existing between the antecedent parties of which it had no notice. (*Draper* v. *Cowles*, 27 Kan. 484.) And the Champion Machine Company may have continued to owe the bank ever since."

We think the defendants could not claim that the bank did not become a purchaser of the notes sued upon, without proving, not only that it took the notes upon a discount, crediting the payee with the amount as a deposit, but what the state of the account between the bank and the payee was at the time of the discount, and that the amount due on that deposit, if any, had not been drawn out prior to the trial, there being no claim that notice of the defenses set up in the special pleas came to the plaintiff prior to the trial.

We do not think it can be said that the state of the account between the bank and the payee of the notes was a fact so peculiarly within the knowledge of the plaintiff that the burthen of proof should be cast upon it. The defendants, having the president of the bank on the witness stand, could have as readily proved by him the state of the account as they could just what was done at the time the bank got the notes, by asking him to state the fact, or if it was necessary to prove the fact by the bank books, they had ample power by the process of the court to compel the production of them in court.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER, dissenting:

I concur in the views expressed in this opinion, except the holding that appellants were obliged to prove that the amount of the credit had not been drawn out before the trial. I cannot subscribe to the correctness of this ruling, and therefore do not agree to the conclusion reached. It is claimed by the appellee, that it was the duty of the appellants in this case not merely to prove that credit was given to the Diamond Rubber Company by the appellee when the notes were discounted, but to go further and prove that the amount of the discount, as credited, was not drawn out by the rubber company before the beginning of this suit, because, when it was

drawn out before notice to the bank of the defense, the bank had paid a valuable consideration. Under the circumstances of this case such proof, if it could be made, should have come from the appellee. The officers of the appellee bank could more easily prove, whether or not the amount had been drawn out by the rubber company, than the appellants. The books of the bank were within the control of the bank itself, and not within the control of the appellants. It was difficult for the appellants to prove a negative.

It is true that, when the appellee introduced its notes upon the trial below, its mere possession of them imported *prima facie* that the bank had acquired the notes in good faith for full value in the usual course of business before maturity, and without notice of any circumstances impeaching their validity; and that the bank was the owner of the notes and entitled to recover the full amount due thereon. The production of the notes *prima facie* established the bank's case, and it was entitled to rest after such production. (Daniel on Neg. Inst. sec. 812; *Palmer* v. *Nassau Bank*, 78 Ill. 380). When notes are thus produced, nothing short of fraud, not even gross negligence, if unattended with bad faith, is sufficient to avert the effect of the evidence, or to invalidate the title of the holder. (*Collins* v. *Gilbert*, 94 U. S. 753; *Hodson* v. *Eugene Glass Co.* 156 Ill. 397). Where the maker of the note shows that it was obtained from him by fraud, the burden of proof is shifted from him to the holder, and the latter must show that he acquired it in good faith for value in the usual course of business, and in such a way as not to create a presumption of knowledge of its invalidity. (*Hodson* v. *Eugene Glass Co. supra*).

But, in the case at bar, although the defendants did not offer to prove fraud in the execution of the notes, yet they did prove, under the issue whether or not the appellee was purchaser of the notes in good faith before maturity for value, that the appellee actually paid no

money for the notes, but merely gave the rubber company a credit upon its books for the amount, for which the notes were discounted. When the defendants introduced this proof, it was natural to assume that the credit, given to the rubber company on account of the notes, had not been paid by the bank when this action was commenced. (*Manufacturers' Nat. Bank of Racine* v. *Newell*, 71 Wis. 315). After the proof, thus made by the appellants, the bank could not be regarded as a *bona fide* purchaser for value of the notes by reason of the mere discount and credit. The defense, which it was sought to prove, was substantial, and went to the merits, and was sufficient to bar any recovery under the circumstances. It was, therefore, error for the court below to refuse to receive evidence in support of the pleas, which set up a failure of consideration. It was within the discretion of the court to require from the appellee evidence, if such evidence existed, that the amount of the credit had been drawn out prior to the maturity of the notes, or prior to the beginning of the present suit, before the introduction of evidence by the appellants impeaching the consideration of the notes. If appellee had produced such proof, the action of the court, here complained of, would have been correct. Or, the court might have permitted the appellants to introduce their proof as to the failure of the consideration, and then allowed the appellee upon rebuttal to show, if it could, that the amount of the credit had been drawn out of the bank. But the court should have pursued the one course or the other. (*Drovers' Nat. Bank* v. *Blue*, 110 Mich. 31).

For the error thus indicated, I think that the judgments of the Appellate Court and circuit court should be reversed, and that the cause should be remanded to the circuit court for further proceedings.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

FRANK KEEGAN *et al.*

Opinion filed April 17, 1900.

1. BURNT RECORDS—*section 9 of Burnt Records act construed.* Section 9 of the Burnt Records act, (Rev. Stat. 1874, p. 841,) which provides that instruments appearing by the abstract of title to have been executed shall be presumed to have been executed and acknowledged according to law, except as against persons "in the actual possession of the lands or lots described therein at the time of the destruction of the records, * * * claiming title thereto otherwise than under a sale for taxes or special assessments," contemplates an adverse, continous possession for twenty years.

2. POWER OF ATTORNEY—*presumption as to continuance of life of principal.* In the absence of proof to the contrary, the maker of a power of attorney will be presumed to have been alive five years later, at the time of the execution of a deed in his name by the attorney in fact appointed under such power.

3. EVIDENCE—*what not a valid objection to admission of deeds of corporation.* In ejectment by a corporation entitled to hold real estate for any purpose, the deeds under which it claims title cannot be denied admission in evidence upon the alleged ground that the corporation exceeded its powers in taking the conveyances, since that question can be raised only by the State.

4. EJECTMENT—*when refusal of plaintiff's instruction is error.* Where the defense to ejectment is adverse possession and the plaintiff has made out a connected chain of title, it is error to refuse an instruction that the deeds and papers introduced in evidence by the plaintiff authorize a recovery, unless the defendant has established his defense of adverse possession.

5. SAME—*plaintiff need not trace title of canal lands to United States.* The court will take judicial notice that the United States was the original proprietor of lands granted to Illinois, in pursuance of an act of Congress, for canal purposes, when the same are the subject of litigation in ejectment, and the plaintiff need not trace title further back than the State.

6. INSTRUCTIONS—*when erroneous instruction is not cured by a proper one.* An erroneous instruction is not cured by a proper one for the opposite party where they are entirely variant, and there is nothing to show the jury which to adopt, and it is impossible to say from the evidence that the jury did not follow the erroneous one.

7. SAME—*when instruction in ejectment is erroneous.* An instruction for the defendant in ejectment is erroneous and misleading which

holds that certain deeds from the defendant to his wife conveyed to her whatever title he had to the property, including the legal possession, where, at the time of such conveyance, he was a mere squatter or trespasser, having no real title or right of possession against the true owner.

8. ADVERSE POSSESSION—*previous possession is of no avail after interruption.* If the continuity of an adverse possession is broken but for a single day before the period of limitation is complete, the possession of the true owner constructively intervenes and the previous possession is unavailing.

9. SAME—*what will break continuity of adverse possession.* The execution of a deed to a third person by one in the adverse possession of land, which is unaccompanied by a delivery of possession to such third person, breaks the continuity of possession and interrupts the running of the Statute of Limitations, even though such third person conveys the property the same day to the wife of his grantor.

10. SAME—*when husband's taking of lease binds wife to recognition of true owner's title.* Where a trespasser conveys the property to his wife and they continue to reside upon the premises with their children, her possession is subordinate to that of her husband since she takes no title by such conveyance, and his subsequent taking of a lease from the true owner is binding upon the wife in so far as it operates as a recognition of the true title.

Special concurrence by BOGGS, J.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. CHARLES G. NEELEY, Judge, presiding.

This is an action of ejectment, begun on December 2, 1886, by the plaintiff in error against the defendants in error, Frank Keegan and his wife, Catherine H. Keegan, now deceased—the latter having died since the beginning of the suit—to recover possession of a piece of ground in the city of Chicago, lying between Archer avenue and the south end of a slip (now filled up) between lots 2 and 3 in Brainard & Evans' subdivision, being part of said lots 2 and 3 in said subdivision in canal trustees' subdivision of south frational section 29, 39, 14, east. On December 21, 1886, both defendants filed a plea of not guilty. The case was tried without a jury, and the plaintiff took a new trial under the statute. The case was re-tried without a jury, and afterwards, on appeal to this court, was

reversed and remanded, as will be seen by reference to *Chicago and Alton Railroad Co.* v. *Keegan*, 152 Ill. 413, in which the opinion was filed October 29, 1894. On November 17, 1898, the defendant in error, Frank Keegan, filed a separate plea denying the possession of the premises at the time of the beginning of the suit or since or for five years prior thereto. The case was then again tried before the court and a jury, and a verdict was returned finding the defendants not guilty on December 5, 1898. Motions for new trial and in arrest of judgment were denied, and judgment was rendered upon the verdict so returned on February 4, 1898. The present writ of error is sued out for the purpose of reviewing this judgment.

LEE & HAY, (WILLIAM BROWN, of counsel,) for plaintiff in error.

SULLIVAN & MCARDLE, and P. L. MCARDLE, for defendants in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The original tract of land, of which the premises here in controversy are a part, was the south fraction of section 29, township 39, north, range 14, east of the third principal meridian, which was conveyed to the canal trustees in 1845 by the State for the purposes of the Illinois and Michigan canal, and by them subdivided into blocks and lots in 1848. Upon the trial below, the plaintiff in error sought to establish its title by a regular chain of conveyances from the State of Illinois. The defendants in error set up, as a defense, an alleged possession of twenty years under the Statute of Limitations.

It is assigned as error by the plaintiff in error that the trial court refused to give instruction No. 13 asked by the plaintiff in error. That instruction is as follows:

13. "The court instructs the jury that the deeds and papers introduced in evidence by the plaintiff in this case are sufficient to vest the legal title to the whole of the land described in the declaration in the plaintiff, and to authorize it to take possession of the whole of that tract of land, unless the defendants have shown an adverse possession to the same or to some part thereof, as explained in these instructions, for a period of twenty years or more before the commencement of this suit, or some valid legal right to the possession of the premises claimed, or some part thereof, by a preponderance of the evidence."

We are of the opinion that the refusal of instruction No. 13 was erroneous. In *Toledo, Wabash and Western Railway Co.* v. *Brooks*, 81 Ill. 245, we said (p. 247): "If the court were to instruct the jury that the plaintiff's evidence was better than the defendant's, or the converse, we presume all would say that it would amount to an instruction to find in favor of the better evidence, and thus take the whole case from the consideration of the jury. It is not error for the court to thus instruct in case of records, writings or other evidence which is in its nature conclusive, or cannot be contradicted." Plaintiff in error showed title in itself, and was entitled to recover unless defendants in error proved a possession of the premises for a period of twenty years prior to the commencement of this suit.

The premises in controversy are parts of lots 2 and 3 in Brainard & Evans' subdivision of block 2, the east part being in lot 2, and the west part being in lot 3. As to the portion of the premises situated in lot 3, we held in *Chicago and Alton Railroad Co.* v. *Keegan*, 152 Ill. 413, that plaintiff in error had established its title, and was entitled to recover. The evidence as to lot 3 is precisely the same as it was when the case was here before, and need not be reviewed. We are content with the conclusion

already reached as to the title of plaintiff in error to the portion of the premises situated in lot 3. On June 19, 1852, Daniel Brainard, being the owner of lots 2 and 3 in block 2, conveyed an undivided half of said lots to John Evans, and on April 8, 1856, a subdivision was made by Brainard and Evans of block 2 into three lots with a street and a slip. On the same day an original partition deed was made between Brainard and Evans, setting off lot 2 in Brainard & Evans' subdivision to Brainard and lot 3 to Evans. On February 2, 1886, John Evans deeded to George Straut that portion of lot 3 here in controversy, and on November 17, 1886, George Straut deeded the same to the plaintiff in error, the Chicago and Alton Railroad Company.

On August 1, 1862, Brainard and his wife deeded to Edwin A. Welsh that part of lot 2 in said subdivision south of the railroad. Abstracts of title introduced by the plaintiff in error show a power of attorney, dated April 4, 1863, from Welsh to Edward G. Asay; a deed of the same date from Welsh by Asay, his attorney, to Edgar F. Griffin; a quit-claim deed, dated April 14, 1863, from Edgar F. Griffin to Augustus Griffin; a power of attorney, dated April 23, 1860, to convey real estate from Augustus Griffin to Edward W. Griffin; and a quit-claim deed, dated June 15, 1865, from Augustus Griffin by Edward W. Griffin, his attorney in fact, to David Dows. Plaintiff in error then introduced an original warranty deed from David Dows and wife to the Chicago and Alton Railroad Company, conveying for the consideration of $25,000.00 all of said lot 2. The chain of conveyances thus shown by the plaintiff in error established a good *prima facie* title in itself, unless some one or more of the objections made to said *prima facie* title by the defendants in error are good.

The abstracts of title introduced by the plaintiff in error are objected to by the defendants in error upon the alleged ground that, at the time of the destruction of the

records of Cook county in October, 1871, the defendants in error were in possession of the portions of lots 2 and 3 here in controversy, and were then claiming title otherwise than under a sale for taxes or special assessments. It is, therefore, urged that, under section 9 of the Burnt Records act, the presumption as to due execution and acknowledgment of the instruments shown by the abstract cannot prevail. The portion of section 9 here referred to is as follows: "In all cases in which any abstracts, copies, minutes and extracts, or copies thereof shall be received in evidence under any of the provisions of this act, all deeds or other instruments of writing appearing thereby to have been executed by any person or persons, or in which they appear to have joined, shall (except as against any person or persons in the actual possession of the lands or lots described therein at the time of the destruction of the records of such county, claiming title thereto otherwise than under a sale for taxes or special assessments,) be presumed to have been executed and acknowledged according to law; * * * and any person alleging any defect or irregularity in any such conveyance, acknowledgment, sale, judgment, decree or legal proceeding shall be held bound to prove the same." (Hurd's Stat. 1897, p. 1292). It is said that the presumption does not exist as against the defendants in error, because they were in the actual possession of the premises in October, 1871, when the records were destroyed, claiming title thereto otherwise than under a sale for taxes or special assessments. But the proof does not show, nor is it claimed on the part of the defendants in error, that, when the records of Cook county were destroyed in October, 1871, they had been in possession of the premises in question for twenty years. At that time they had been in possession, if at all, not much more than six years. Hence, the case of defendants in error does not come within the exception of section 9 or 14. In *Smith* v. *Stevens*, 82 Ill. 554, we said: "It is claimed by

appellant his case comes within the exception of section 14 of the act in question, and the abstract, therefore, not admissible against him, he being in possession, claiming title otherwise than under a sale for taxes or special assessments. If appellant's views were correct, the statute would, in very many cases, be ineffectual for relief and remedy. Possession of a tract of land, claiming title, cannot defeat the real owner of the title unless such possession is adverse and has so continued for twenty years. It cannot be claimed that possession short of that period can prevail against a title, the record of which has been destroyed by fire. Independent of the statute, the plaintiffs, on general principles, would have a right to rely on secondary evidence to establish title, and nothing short of a legal defense could prevail against it." It follows that the first objection of the defendants in error to the *prima facie* title established by the plaintiff in error is not tenable.

Defendants in error also make objection to that portion of the abstract of title showing a quit-claim deed from Augustus Griffin by Edward W. Griffin, his attorney in fact, to David Dows upon the alleged ground that the power of attorney, executed by Augustus Griffin to Edward W. Griffin, was dated April 3, 1860, and no evidence was introduced to show that Augustus Griffin, the grantor in the power of attorney, was alive on June 15, 1865, when the deed was executed to David Dows. As Augustus Griffin was alive April 3, 1860, when he gave the power of attorney to Edward W. Griffin, the law presumes, in the absence of any proof to the contrary, that he was living on June 15, 1865, when the deed was executed in his name and stead by Edward W. Griffin. "When a person is shown to have been living at a given time the continuance of life will be presumed, until the contrary is proved or is to be inferred from the nature and circumstances of the case." (1 Jones on Law of Evidence, sec. 56).

The testimony shows that the abstract of title was made from the records of Cook county and from an examination of judgments in the courts there, and the record of tax sales, and we do not regard the certificate to such abstract as justifying the inference that it was made from the private indices of the abstract makers. So far as the certificate is based upon their private indices, it shows that the conveyance to Dows was taken from the record.

It is also claimed, that the original deeds to the plaintiff in error, executed by its immediate grantors, should not have been received in evidence upon the alleged ground, that the railroad company was not entitled to acquire the land described under its charter. It is said that its charter vested it with power to acquire any extension of its road by lease, purchase or otherwise, by or with the written consent of its stockholders, and that such consent was not shown, and no proof was introduced that the land acquired was an extension of the company's road. A corporation has power to acquire and hold such real estate as is necessary for the purposes of its business, and the State alone can question the right of a corporation to own real estate. In *Cooney* v. *Booth Packing Co.* 169 Ill. 370, we held "that if a corporation has power to take and hold real estate for any purpose, when the deed to it is executed the title passes to it, and whether the corporation exceeded its powers in accepting the conveyance was a question which could only be raised by the State."

It is claimed, however, that instruction No. 13, by the use of the words, "some valid legal right to the possession of the premises claimed, or some part thereof," submitted the law to the jury. The instruction may have been defective so far as it told the jury that the plaintiff was entitled to recover, unless the defendants showed some valid legal right to possession. But this defect in the instruction could have done the defendants in error

no harm. On the contrary, it was an error which was favorable to the defendants in error, because the only defense which they set up in the case was that of possession for twenty years; and if the instruction presented the matter to the jury in such a way, as to lead them to believe that there was some other defense upon which the defendants in error might rely, the latter were benefited and not injured.

Inasmuch as instruction No. 13 merely told the jury that the plaintiff in error had made out a title to the premises in question, unless the defense of adverse possession was established, the instruction should have been given, and it was error to refuse it.

The plaintiff in error furthermore assigns as error that the court gave, at the request of the defendants in error, instruction No. 36. Instruction No. 36 is as follows:

36. "As against the defendant, Catherine H. Keegan, the burden is upon the plaintiff to entitle it to recover to prove by a preponderance of the evidence a connected chain of title from the United States down to itself."

This instruction was clearly wrong. The source of title was in the State of Illinois, and judicial notice is taken that the United States was the original proprietor and granted the land to the State. The land in controversy was a part of the canal lands shown in the selection by the President of the United States, pursuant to the act of Congress in 1827, donating lands in Illinois for the purposes of the Illinois and Michigan canal, and conveyed by the Governor of the State to the canal trustees. There was, therefore, no burden upon the plaintiff in error to go farther back than the State of Illinois in proving its chain of title. In *Smith* v. *Stevens*, 82 Ill. 554, we said: "It was, therefore, necessary to commence at the source of title, which, in this case, was the State of Illinois. We take judicial notice of the fact that the United States were the proprietors of section 17, township 39, north, range 14, east, and that they granted the same to

this State." We think that instruction No. 36 authorized the jury to find against the plaintiff in error, if they considered that the plaintiff in error had not shown a connected chain of title from the United States down to itself, when it was only necessary for it to show a chain of title from the State of Illinois to itself. It is said, however, on behalf of defendants in error, that the error in giving instruction No. 36 was cured by instruction No. 30, which was given on behalf of plaintiff in error. Instruction No. 30 is as follows:

30. "The jury are instructed, as matter of law, if you believe from the evidence that the land in question in this case is a portion of the south fractional half of section twenty-nine (29), * * * that the source of title to such land is in the State of Illinois, and that in proving title to the land in question it is not necessary for the plaintiff to commence with the United States, or to go further back than the State of Illinois as a starting point in making out its chain of title to said land."

The two instructions, Nos. 36 and 30, are irreconcilable, and there is an absolute conflict between them. The jury were obliged, in determining the question as to the true source of plaintiff in error's title, to discard one of these instructions and to adopt the other. The giving of a correct instruction upon one point in a case will not obviate an error in an instruction on the other side, where they are entirely variant, and there is nothing to show the jury which to adopt. (*Illinois Linen Co.* v. *Hough*, 91 Ill. 63). An erroneous instruction cannot be said to be cured by a proper instruction on the other side, when, from the evidence, it is impossible to say that the jury did not follow the erroneous one. (*Kankakee Stone and Lime Co.* v. *City of Kankakee*, 128 Ill. 173). Error in giving an instruction is not always cured by the giving of an instruction contradictory of the one erroneously given. (*Pardridge* v. *Cutler*, 168 Ill. 504). The cases, in which it has been held that a bad instruction may be cured by

another, are cases where the bad and good instructions, when read together, clearly state the law, and where it can be clearly seen that the bad instruction has worked no harm.

It is assigned as error by the plaintiff in error that the trial court gave instruction No. 40 at the request of the defendants in error. Instruction No. 40 is as follows:

40. "If the jury believe from the evidence that in the year, 1870, Frank Keegan made a quit-claim deed of the premises in question to one Alfred Randall and acknowledged the same and at the same time said Randall made a quit-claim deed of the premises to Catherine Keegan, the defendant, and acknowledged the same, and that said two quit-claim deeds were recorded in the recorder's office of Cook county, Illinois, and that said quit-claim deeds were delivered to said defendant, Catherine Keegan, then the jury are instructed that said deed conveyed whatever title, if any, Frank Keegan had in said property at the time of the execution and delivery of said deeds to Catherine Keegan, including the legal possession of said premises therein described."

The evidence, upon which instruction No. 40 was based, was substantially as follows: Frank Keegan testified, that he made a deed to Alfred T. Randall, which was dated March 23, 1870, and that, on the same day, Randall executed a deed to Catherine H. Keegan, conveying "the premises 497 Archer avenue." Mrs. Keegan testifies that she saw these deeds and had them in her possession, and gave them to Randall to record. The deeds themselves were not produced, but affidavit was made as to their loss.

The testimony shows that Frank Keegan commenced to fill in the slip between lots 2 and 3, located partly on each lot, in 1864, but that he did not enter upon the premises in question with his family until June, 1865. When the deeds were made by Frank Keegan to Randall, and by Randall to Mrs. Keegan, in March, 1870, Frank Keegan had no right whatever to the premises, and had only been

in possession thereof about five years. Instruction No. 40 told the jury that the deeds in question conveyed to Mrs. Keegan whatever title Frank Keegan had in the property at the time of their execution and delivery, including the legal possession of said premises. This statement in the instruction was erroneous, because, at that time, he had no legal or lawful possession, as he had only occupied the premises about five years, and not for a period of twenty years. Until twenty years had passed, he was a mere squatter, or trespasser, and had no real title as against the true owner of the property.

In addition to this, there is proof tending to show that whatever possession Frank Keegan had to these premises prior to March 23, 1870, was not an adverse possession, but a mere permissive one. The Griffins and David Dows, owners of the paramount title from 1863 to 1866, were in possession of lot 2, and had a packing house thereon. Frank Keegan worked in this packing house for these owners of lot 2 as foreman, or in some other capacity, from some time in 1863 to September, 1866 or 1868. By his own admission he entered upon the premises in 1864, and began to fill in the slip by an agreement with one of the Griffins. He obtained the house, which he put upon these premises, from one of the Griffins. The portion of lot 2, which he occupied, was only about twenty-five feet from the packing house, and, according to the testimony of several of the witnesses for the defendants below, the part of lot 2 occupied by Keegan was a part of the packing house premises and enclosed with them. One of the witnesses testified that the premises occupied by Keegan adjoined the packing house. Keegan swears that he took his family into the house in question in June, 1865, while he was working for the owners of lot 2 in their packing house, and not very long after he had begun to work upon said premises by an arrangement with its owners. In the same month of June, 1865, lot 2, including that portion of the same claimed by the

Keegans, was conveyed by Edward W. Griffin, as attorney in fact, to David Dows. If Frank Keegan's possession was at that time anything more than a permissive possession on the part of the owners of lot 2, it is difficult to understand why said owners should have conveyed away to David Dows the portion then occupied by Keegan. In other words, there is a considerable amount of testimony, and testimony, too, which comes from the witnesses of the defendants in error, to the effect that up to March 23, 1870, Frank Keegan was occupying the premises not adversely to the owners of the paramount title, but in subordination to their title. Inasmuch as he entered upon the premises under some kind of agreement or arrangement with one of the Griffins, who owned lot 2 and the packing house thereon, it would be presumed that his continuance in possession of the premises was also in pursuance of such arrangement or agreement. "The rule is, where the entry is made with the consent of the owner, and subservient to his claim of title, the law will presume that the continual (continued) possession was in subordination to the title of the true owner." (*Timmons* v. *Kidwell*, 138 Ill. 13).

If Frank Keegan entered upon these premises in June, 1865, with his family in subordination to the title of the true owners and continued his possession in subordination thereto until March, 1870, then, even if, at the latter date, he made a valid transfer of his possession to his wife, Catherine H. Keegan, no possession for a period of twenty years has been established. Twenty years did not elapse after March 23, 1870, before this suit was begun on December 2, 1886. In view of the fact that there was testimony tending to show that the possession up to March, 1870, was merely permissive and not adverse, instruction No. 40 was calculated to mislead the jury to the prejudice of the plaintiff in error. The effect of that instruction was to impress upon the minds of the jury the belief, that the possession after March 23, 1870, tacked

to the possession theretofore, would make a full period of twenty years of adverse possession; whereas they had a right to consider from the evidence before them the question, whether or not the first five years of the period in question was a mere permissive, and not an adverse, possession.

But even if the possession, which Frank Keegan had before 1870, had been an adverse possession, the execution of the deed to Randall at that time broke the continuity of his possession. It is true that a deed is not necessary to transfer the possession of land held adversely to the owner, and that where one person succeeds to the possession of another and it becomes necessary to connect the possessions of the two to make the period required to bar the owner, the transfer of possession may be shown by parol evidence. (*Weber* v. *Anderson*, 73 Ill. 439). But Frank Keegan did not transfer his possession in March, 1870, directly to his wife, but he executed a deed to Alfred J. Randall. It is not shown that Randall was ever in possession of these premises at all. Frank Keegan did not deliver to Randall with the deed the possession to the property. The deed conveyed to Randall the right of possession. The holder of the legal title is the owner of the right of possession. While Randall held the title, the claim of right in the property, or ownership of the property, was in him. An adverse possession of twenty years, in order to bar the assertion of the paramount title, must not only be an actual, visible, and exclusive possession, but it must be acquired and claimed under title inconsistent with that of the true owner. "It is enough that the party takes possession of the premises claiming them to be his own; and that he holds the possession for the requisite length of time, with the continual assertion of ownership." (*Turney* v. *Chamberlain*, 15 Ill. 271). An adverse and hostile possession "is a possession inconsistent with the possession, or right of possession, by another," "and must be continued under a

claim of right." (1 Am. & Eng. Ency. of Law—2d ed.—p. 789; *Weber* v. *Anderson*, *supra*; *Ely* v. *Brown*, 183 Ill. 575; *Hines* v. *Rutherford*, 67 Ga. 606). It is quite evident that when the deed was made to Randall, Frank Keegan relinquished his claim of ownership and right of possession, and, inasmuch as he thereby parted with his claim of ownership and right of possession without passing over the possession of the property to Randall, the continuity of his adverse possession was broken, and could not begin to run again, either in his own favor or that of his wife, except from and after March 23, 1870. It makes no difference that Randall held the title only for a short time. If the continuity of the possession is broken for a single day before the twenty years have elapsed, the previous possession goes for nothing, and the wrongdoer must commence *de novo*. (*Olwine* v. *Holman*, 23 Pa. St. 279; *Bullen* v. *Arnold*, 31 Me. 583). Whenever the running of the statute is interrupted, the possession of the true owner constructively intervenes, and the previous possession is unavailing. (*Reusens* v. *Lawson*, 91 Va. 226; *Davies* v. *Collins*, 43 Fed. Rep. 31; *Armstrong* v. *Morrill*, 14 Wall. 120; *Clark* v. *Lyon*, 45 Ill. 388; *Sullivan* v. *Eddy*, 154 id. 199).

Frank Keegan in his testimony claims to have been in possession of the premises with his family from 1865 to the time of the beginning of this suit, and yet it is claimed, on the part of defendants in error, that Catherine H. Keegan, and not her husband, was in possession of the premises during the period aforesaid. Frank Keegan was certainly not in adverse possession of the premises during said period, because the possession to be adverse must be under claim of right and claim of ownership, whereas, in 1882 and 1884, he disclaimed any ownership in the property to parties representing the owners of the paramount title thereto. Again, on April 20, 1885, he took a lease from Evans and Dows, the owners of the property, acting through one Lunt as their agent. We stop not to consider whether Lunt had authority to

execute the lease as agent for Evans and Dows. It is sufficient to show, as was held in *Chicago and Alton Railroad Co.* v. *Keegan*, 152 Ill. 413, that this lease was an admission by Frank Keegan, in writing and under seal, of the title of Evans and Dows, the grantors of the plaintiff. If Frank Keegan's possession was adverse, it did not begin to be adverse before June 15, 1865, and as he admitted the title to be in Evans and Dows in April, 1885, he did not have such possession, as the law holds to be adverse, for a period of twenty years.

It is insisted, however, that Mrs. Keegan refused to sign the lease to Evans and Dows, and that, under the deed from Randall, she was the owner of the adverse possession. Here is a man, who was the head of a family and in possession of certain premises with that family. After the possession had run about five years, he makes a deed to a third party and that third party deeds to his wife. If it be admitted that these deeds transferred the possession directly from him to his wife, the question arises, whether, under such circumstances, the wife is entitled under the law to be regarded as the holder of an adverse possession for twenty years. Mrs. Keegan had possession for only about sixteen years after March 23, 1870. To make the twenty years the previous possession of five years by her husband must be tacked to her possession. The husband cannot retain possession by taking a lease from the real owner of the property, and thereby lulling the latter to sleep, and subsequently claim that his giving of the lease was no acknowledgment of title in the real owner, because the real party in possession was his wife and not himself. It must be observed that Frank Keegan did not transfer any title to the property to his wife because he had no title. Where the wife owns the fee of homestead property, she may be so far considered the head of the family as to be called a householder. (*Zander* v. *Scott*, 165 Ill. 51; *Brokaw* v. *Ogle*, 170 id. 115). But where the wife receives no title from

her husband, and they are in possession of the premises together with their children, her possession is simply subordinate to her husband's possession. In such case, his admission of ownership in the holder of the paramount title is an admission which binds her also. Where the husband is the head of the family, as he is in the eye of the law, his taking a lease of the property is binding upon her, so far as it operates as a recognition of the title of the true owner. (*Davies* v. *Collins*, 43 Fed. Rep. 31; *Frink* v. *Alsip*, 49 Cal. 103; *Meier* v. *Meier*, 105 Mo. 411).

Instruction No. 40 was, therefore, erroneous, because it instructed the jury that the deeds from Keegan to Randall and from Randall to Mrs. Keegan transferred to the latter the legal possession, independent of the questions, fairly raised by the evidence, whether or not there was an interruption of the continuity of the possession by the deed to Randall, and whether or not the execution of the lease in question, and other admissions made by Frank Keegan, did not amount to such recognition of title in those, under whom the plaintiff in error holds, as was binding upon Mrs. Keegan as well as her husband.

Other errors in relation to the admission and exclusion of evidence are urged upon our attention, but we do not consider it necessary to consider the same. In view of the errors in the instructions as above indicated, the judgment of the circuit court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

Mr. JUSTICE BOGGS: I concur in the conclusion reached in the above opinion, but not in all that is said in the opinion in support of such conclusion.

STEPHEN W. RAWSON *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. PUBLIC IMPROVEMENTS—*in cities of over 25,000, board need not follow improvement petition.* In cities of over 25,000 inhabitants the board of local improvements may recommend an ordinance calling for a brick pavement though the property owners' petition is for a cedar-block pavement, since, under section 7 of the Improvement act of 1897, the board may originate or determine the character of an improvement whether a petition therefor is presented or not.

2. SAME—*when description of termini of improvement is not uncertain.* An ordinance for a pavement on a certain street from the "south line of the street railway right of way on West Harrison street to the north line of the street railway right of way on West Twelfth street" is not uncertain in its description of the termini, where the street car tracks are laid in such streets, and the ordinances under which they were laid, and which were introduced in evidence by the objectors, specify the width of the strip which the street railway company shall keep in repair.

APPEAL from the County Court of Cook county; the Hon. M. W. THOMPSON, Judge, presiding.

HOLDEN & BUZZELL, (WILLIAM H. HOLDEN, of counsel,) for appellants.

CHARLES M. WALKER, Corporation Counsel, and ARMAND F. TEEFY, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from a judgment of the county court of Cook county, overruling objections to the confirmation of a special assessment and confirming said special assessment.

The appellants objected to the confirmation of the special assessment upon two grounds.

The first ground is, that the board of local improvements, by resolution adopted by them and by the terms

of the ordinance recommended by them, provided for the making of a brick pavement, instead of a cedar-block pavement as petitioned for by the property owners. The contention of the appellants is, that, inasmuch as the property owners presented to the board a petition for a cedar-block pavement, the board had no right to ignore their wishes and substitute a brick pavement for the one petitioned for.

The improvement, for which the special assessment in this case was levied, is the improvement of a street in the city of Chicago. The city of Chicago is a city of more than 25,000 inhabitants. Under section 7 of the act of June 14, 1897, "concerning local improvements," the board of local improvements in cities, having a population of more than 25,000, have the power to originate a scheme for any local improvement to be paid for by special assessment or special tax either with or without a petition. In *City of Bloomington* v. *Reeves*, 177 Ill. 161, this court said (p. 167): "We find no provision of the act which requires a petition signed by the owners of a majority of the property to be presented before the council can pass an ordinance for a local improvement in cities of a population of 25,000 or more. The requirement applies only to smaller cities. That clause of section 7, *supra*, which says the board may originate a scheme for any local improvement, either with or without a petition, evidently means that the board may originate a local improvement with a petition where one is required by the act, and without a petition where none is required."

In the case at bar, as we understand the record, the board of local improvements adopted a resolution describing the proposed improvement as being a pavement to be made with brick, and caused an assessment of the cost of the improvement to be made upon the basis of the construction of a brick pavement. Inasmuch as the board had the power to originate a scheme for the improvement, either with or without a petition, it was immaterial that a

petition was presented to the board requesting the pavement to be made of cedar blocks. Under the terms of section 7, the board seems to have the power to determine the character of the improvement, irrespective of any petition which may be presented to it by the property owners. It is only in cities having a population of less than 25,000 where the ordinance is required to be preceded by a petition of a majority of the property owners, etc. In *Whaples* v. *City of Waukegan*, 179 Ill. 310, we said (p. 313): "The provision of section 7, to the effect the board shall have the power, with or without a petition, 'to originate a scheme for any local improvement,' has no potency to authorize the boards in cities and villages having a population of less than 25,000 to act in the absence of a petition, but only in such cities to originate a scheme for an improvement which it has by petition been asked to recommend to the city council."

Even in cases where such a petition is required to be filed, the petition need only indicate in general terms the improvement desired to be secured by the petitioners. The description of the improvement must be incorporated in the resolution adopted by the board, but it is only necessary that the petition should indicate in a general way the nature and locality of the improvement. (*Patterson* v. *City of Macomb*, 179 Ill. 163; *Whaples* v. *City of Waukegan*, *supra*). If it be true that the board can originate a scheme for a local improvement, either with or without a petition, in cities having a greater population than 25,000, and that that petition need only indicate in general terms the nature of the improvement, it necessarily follows that the board of local improvements may themselves select the character of the pavement to be laid down; and if, in their judgment, a brick pavement would better subserve the interests of the public and the property owners, they would have the right to recommend an ordinance providing for a brick pavement, instead of a cedar-block pavement. We are, therefore, of the opinion

that the objection to the confirmation of the assessment upon the first ground insisted upon by the objectors was not tenable.

In the second place, the confirmation of the assessment was objected to upon the alleged ground that the ordinance providing for the improvement was void on account of indefiniteness in not prescribing the nature, character, locality and description of the improvement.

The ordinance in question describes the improvement as follows: "That the roadway of South Western avenue from the south line of the street railway right of way on West Harrison street to the north line of the street railway right of way on West Twelfth street, said roadway being forty-four feet in width, and also the roadways of all intersecting streets and alleys extending from the curb line to the street line produced on each side of South Western avenue between said points, be and the same are hereby ordered improved as follows," etc.

The indefiniteness in description is alleged to consist in the bounding of the termini of the improvement by a "right of way" of the street railroad, when no right of way was granted to the street railroad company. It is claimed by appellants, that the street railroad company only had a license to lay and operate upon the streets railroad tracks, subject to the duty to keep a strip of the street, defined in width, but located, in repair. In other words, it is said that the alleged "right of way" of a street railroad in the public highway is not a boundary of the local improvement. It is conceded that the railroad company is required to keep in repair a certain strip of the street, which is definite in width. It was stipulated and agreed by the parties to this proceeding, that the street railroad tracks were laid and in use both upon West Harrison street and West Twelfth street. The ordinance, pertaining to street railways in those streets, granted permission "to lay down, maintain and operate a single or double track street railroad;" and provided that the

company "shall keep eight feet in width where a single track shall be laid, and sixteen feet in width where a double track shall be laid, in good condition and repair." The West Harrison street and the West Twelfth street ordinances were introduced in evidence by the objectors.

It may be true, that a street railroad has no absolute right of way in a street in the strict technical meaning of the term "right of way." But it is unnecessary to apply to the words, "right of way," as here used, the exact legal definition of a right of way. The limits to the right of passage by a street railroad company are the corporeal tracks laid in and upon the streets, upon which the cars of the company go and come. It would seem to follow, therefore, that the limits of this proposed improvement were fixed with sufficient definiteness in the ordinance by the use of the words, "from the south line of the street railway right of way on West Harrison street to the north line of the street railway right of way on West Twelfth street." Counsel for the appellants say, that the north line of the street railroad right of way may be the north rail, or the north line covered by the cars as they pass along, or the north line of the strip of land to be kept in repair by the company; and that, inasmuch as it may be either one of these three, the description is indefinite. We think it sufficiently appears, that the portion of the street to be paved is to begin on the south line of the strip of land in use by the street railway company on West Harrison street which is to be kept in repair by the company, and is to extend to the north line of the strip of land used by the company and to be kept in repair by it on West Twelfth street. As the street railway tracks are conceded to be already laid in the street, they constitute fixed boundaries which could be easily seen and acted upon by the contractors making bids for the work of paving the roadway.

We are, therefore, of the opinion that the ordinance in question is not void for indefiniteness, as is contended

by the appellants, and that, therefore, the county court committed no error in overruling the objection based upon that ground. Accordingly, the judgment of the county court is affirmed.

Judgment affirmed.

THE WEST CHICAGO STREET RAILROAD COMPANY

v.

BERNHARD KROMSHINSKY.

Opinion filed April 17, 1900.

CARRIERS—*carrier should use highest degree of care toward passengers.* An instruction that it is the duty of a street railroad company to use the highest degree of care, consistent with the practical operation of the road, for the safety of passengers, is proper, and will not be held as misleading the jury into believing that passengers are not required to use ordinary care, where other instructions correctly present that question in plain terms.

West Chicago St. R. R. Co. v. *Kromshinsky*, 86 Ill. App. 17, affirmed.

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

JOHN A. ROSE, and LOUIS BOISOT, Jr., (W. W. GURLEY, of counsel,) for appellant.

C. HELMER JOHNSON, (JOHN F. WATERS, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This is an action on the case by Bernhard Kromshinsky, against the West Chicago Street Railroad Company, to recover damages for personal injuries sustained by plaintiff while a passenger on one of defendant's cars. The declaration consists of four original counts and one

additional count. To the declaration defendant pleaded not guilty, and on a trial before a jury a verdict was returned assessing plaintiff's damages at $2800. The court entered judgment on the verdict, and upon appeal to the Appellate Court the judgment was affirmed. From this judgment of affirmance defendant appeals to this court and relies for reversal on the following errors: First, the giving of plaintiff's first instruction; and second, the refusal to admit in evidence the trip-sheet offered by the defendant.

The instruction complained of was as follows:

"The court instructs the jury that it is the duty of a railroad company to exercise the highest degree of care and caution, consistent with the practical operation of the road, for the safety and security of passengers while being transported."

The instruction declares a correct proposition of law, as has often been held by this court. *West Chicago Street Railroad Co.* v. *Johnson*, 180 Ill. 285, and cases cited; *Chicago and Alton Railroad Co.* v. *Byrum*, 153 id. 134; *Chicago, Burlington and Quincy Railroad Co.* v. *Mehlsack*, 131 id. 62.

It is, however, claimed in the argument that the instruction declares a rule applicable only to cases where the person injured is in the exercise of ordinary care. The instruction did not direct the jury that plaintiff could recover if the defendant failed to exercise the highest degree of care and caution, but it merely declared what degree of care was required by law of a common carrier of passengers. Other instructions given by the court at the request of the appellant stated in plain terms the care required of the plaintiff, and that if he failed to exercise that care he could not recover. Under these instructions, when considered in connection with the instruction of plaintiff, the jury could not have arrived at the conclusion that the plaintiff could recover unless he exercised ordinary care to avoid the injury. The instruction complained of could not have misled the jury.

In regard to the trip-sheet offered in evidence and excluded by the court, it was a mere memorandum made by the conductor. It was no record required by law to be kept. It was not even shown to have been made in the usual course of business, and we are aware of no rule of law under which it was admissible in evidence. But if it was admissible, no harm was done by its rejection, as the conductor testified on the trial to all the facts disclosed by the paper, and his evidence was not contradicted.

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

Judgment affirmed.

JOHN BLACKABY

v.

JULIA P. BLACKABY *et al.*

Opinion filed April 17, 1900.

1. ADVERSE POSSESSION—*what necessary in order that possession by co-tenant be adverse to other.* In order that the possession of one co-tenant may be held to be adverse to the other's rights, there must have been some overt act by the former sufficient to constitute an ouster of the latter.

2. SAME—*what not sufficient to constitute adverse possession by co-tenant.* One who, with knowledge of the rights of his co-tenant, pays the taxes upon the land, makes improvements and takes entire control of the property, does not by such acts become the owner of the whole property, though such control be continued for twenty years.

3. ACCOUNTING—*co-tenant entitled to credit for taxes and improvements.* Upon a bill by the heirs of one co-tenant against the other for partition and for an accounting for rents and profits, the defendant is entitled to an accounting for the taxes paid and improvements made by him upon the land.

4. PRACTICE—*when case should be referred to master to state account.* Upon decreeing partition in favor of the heirs of one co-tenant against the other, who has paid all the taxes upon the land and made all the improvements, the court should not attempt to set off the defendant's claims for such items against the complainant's claim for rents and profits, but should refer the matter to the master to state the account between the parties.

WRIT OF ERROR to the Circuit Court of Fulton county; the Hon. JOHN A. GRAY, Judge, presiding.

This was a bill in chancery filed by the defendants in error, as the widow and devisees of Inmon Blackaby, deceased, against John Blackaby, plaintiff in error, for the partition of certain premises and for an accounting of the rents, issues and profits therefrom.

In 1863 Inmon Blackaby, Robert Blackaby and John Blackaby, brothers, became the owners, by purchase, of one hundred and sixty acres of land in Fulton county, as tenants in common. At that time John Blackaby went into possession of the premises and remained in the actual, visible, exclusive and continuous possession thereof from that time to the present. In 1867 he purchased the undivided third owned by his brother Robert. During his occupany he has paid all the taxes assessed against the land, and has built a house, barn, fences and other improvements, costing from $6000 to $8000, but has paid no rent for the share not owned by him. In 1877 he conveyed to a third party one-half acre out of the north-west corner of the quarter section, by warranty deed.

To the bill plaintiff in error pleaded both the five and twenty year statutes of limitation, and also answered setting up twenty years' adverse possession in himself, and denying that Inmon Blackaby, at the time of his death, was seized in fee of any part of the premises, or that defendants in error have any interest in the rents and profits, and setting up the improvements made by him and payment of taxes. Replication was filed and the cause heard by the circuit court and a decree rendered granting the partition as prayed, and, without any statement of the account, finding that plaintiff in error, by improvements placed on the premises and by payment of taxes, had paid the rents and profits which would otherwise have been due on the share of Inmon Blackaby. To reverse that decree this writ of error is prosecuted.

A. M. BARNETT, and M. P. RICE, for plaintiff in error.

P. W. GALLAGHER, and D. ABBOTT, for defendants in error

Mr. JUSTICE WILKIN delivered the opinion of the court:

The chief contention of plaintiff in error is, that he acquired title to the whole of the premises in question by more than twenty years' open, exclusive, continuous and adverse possession of the same, under the twenty year statute of limitations. It is admitted that he has been in the actual, open possession of the land from the date of the original purchase by himself and brothers, but it is denied that his possession has been adverse to his co-tenant, Inmon Blackaby, so as to bar him, and those claiming under him, of their rights in the premises.

In the case of *McMahill* v. *Torrence*, 163 Ill. 277, we said (p. 281): "Possession by him (a co-tenant) and payment of taxes, however long continued, would not constitute a bar under the statute, as one tenant in common cannot set up the statutory bar against his co-tenant. The reason of this rule is, that the possession of one tenant, in contemplation of law, is the possession of the others; and this is especially so where all the parties derive title from the same deed or from the same ancestor. The possession of one co-tenant will not be adverse to the other where there is a mere possession of the premises and an appropriation of the rents. Something more is required. It is not sufficient that he continues to occupy the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the lands and pays the taxes, for all this may be consistent with the continued recognition of the rights of his co-tenants. To constitute a disseizin there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-

tenants that an adverse possession and an actual disseizin are intended to be asserted against them."

There is no exception to the rule thus stated. In the case at bar, at the time John Blackaby went into possession of the premises his possession was also the possession of Inmon Blackaby, and unless there has been some overt act on his part sufficient to constitute an ouster of the co-tenant his contention of adverse possession can not be sustained. The evidence may be conceded to be conflicting on that point. The chancellor heard the witnesses testify, and had opportunity to observe their demeanor and to judge of their character for veracity, and found the issue adversely to plaintiff in error, and we are not prepared to say that finding was erroneous. To have justified a decree in his favor the proof of the ouster of his co-tenants should have been clear and convincing. While it is true that plaintiff in error paid the taxes on the land, spent his money in making valuable improvements thereon and had entire control and exclusive possession of the same during these years, yet he did so knowing his brother, as his co-tenant, owned a one-third interest therein. He may rightfully claim against him, or his heirs, compensation by way of an accounting for such taxes and improvements, himself accounting for rents and profits; but he cannot, by the acts shown, become the owner of the whole of the land.

The circuit court erroneously attempted to dispose of the question of accounting between the parties by offsetting the claims of one against those of the other, instead of referring the matter to the master to state the account, and for that error the cause must be remanded to the circuit court, with directions to proceed in conformity to the views herein expressed.

Reversed and remanded.

JEREMIAH H. WILLIAMS
v.
LISTER ANDREW *et al.*

Opinion filed April 17, 1900.

1. SALES—*personal property may be sold without a memorandum in writing.* It is not necessary to the validity of a sale of personal property that there be a bill of sale or memorandum in writing.

2. DEBTOR AND CREDITOR—*vigilance, without fraud, is favored in law.* A creditor who, without fraud, induces the debtor to turn over his property to him in part satisfaction of his demand, and who takes possession of such property, is entitled to protection against a subsequent attaching creditor.

Williams v. *Andrew*, 84 Ill. App. 289, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Vermilion county; the Hon. H. VANSELLAR, Judge, presiding.

C. M. BRIGGS, and WILSON & BUCKINGHAM, for appellant.

W. J. CALHOUN, and H. M. STEELY, for appellees.

PER CURIAM: In deciding this case the Appellate Court delivered the following opinion:

"This case was first tried in the circuit court of Vermilion county at the January term, 1896, resulting in a verdict and judgment in favor of appellee Watson. On appeal to this court, at the May term, 1896, that judgment was reversed and the case remanded. (71 Ill. App. 130.) At the October term, 1897, of the Vermilion county circuit court this cause was again tried before a jury, resulting in verdict against appellee Watson, and that verdict was set aside and the case continued. At the October term, 1898, the case was again tried by jury, resulting in a verdict and judgment in favor of appellee Watson, from which this appeal is prosecuted by the appellant, who urges a reversal of that judgment for the

reason that the verdict is against the evidence and that the court erred in its instructions to the jury.

"The record shows that the appellant, a farmer, on the 14th, 15th and 16th of October, 1895, delivered to one Andrew, a grain buyer at Rossville, Illinois, 4080 bushels of corn, which was placed in his elevator and for which Andrew was to pay him twenty-seven cents per bushel. On the 17th of October, 1895, Andrew absconded, and five days thereafter appellant sued out of the circuit court of Vermilion county a writ of attachment against Andrew to recover the amount due him for the corn, and on the same day caused a levy to be made thereunder on certain cars of grain loaded from said elevator. Appellee came into this attachment proceeding by interpleader, claiming to own the grain levied upon, by purchase from Andrew on the 16th of October, 1895, of all the grain in the elevator, and that he had taken possession of same on the 21st of the same month. Appellant denied this claim, and on the issues thus raised all the trials have been had.

"The evidence shows that on September 4, 1894, appellee Watson, a banker in Rossville, Illinois, leased to Andrew his (Watson's) elevator in that place, and agreed to loan to Andrew money, at the rate of seven per cent interest, with which to buy grain; that on the 16th of October, 1895, Andrew was insolvent, and indebted to Watson in the sum of $13,881.59 for money loaned him to buy grain. The evidence further shows that on the 21st of October, 1895, before the writ of attachment was levied, Watson took possession of all the grain in the elevator, including the grain afterwards levied upon, and was in such possession when the levy was made.

"The decision of this case rests upon the question of fact as to whether or not Andrew did sell to appellee Watson the grain in question in satisfaction of his indebtedness to Watson. On this question the jury found in favor of Watson. We have carefully considered the evidence in this case, and while there is a conflict as to

this fact, yet we think the evidence preponderates in favor of the appellee Watson, and the jury were warranted in finding, as they did, in his favor, hence their verdict should not be disturbed unless for some error committed by the circuit court in its rulings on the instructions of which complaint is made.

"It is insisted that the court erred in refusing to give to the jury two instructions offered by appellant. The first of these was properly refused, because it erroneously told the jury, in effect, that there could be no sale of personal property except by bill of sale or memorandum in writing. As to the second refused instruction of appellant, we will say that, without commenting upon the correctness of the legal propositions therein contained, it is sufficient to say there was no evidence upon which to base it, hence it was properly refused.

"Appellant urges no specific objection to instructions given on behalf of appellee Watson, except that several of them repeat the same proposition. We find that, upon examination, the court below was quite liberal in giving instructions on both sides, but on the whole we think the jury was fairly instructed.

"Appellant and appellee Watson were each *bona fide* creditors of Andrew, and Watson, being the more vigilant, succeeded in getting Andrew to turn over to him all of his (Andrew's) property, worth only about one-third of Watson's claim against him. Such vigilance the law favors when no fraud is practiced, and the evidence fails to show any fraud was perpetrated by Watson in this case to the prejudice of the appellant.

"Finding no reversible error in this record we affirm the judgment appealed from."

We concur in the foregoing views, and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

Mr. JUSTICE BOGGS took no part in this decision.

JAMES HOLLENBECK
v.
ALBERT HOLLENBECK.

Opinion filed April 17, 1900.

1. DEEDS—*delivery is a question of intent.* The mere placing of a deed in the hands of the grantee does not establish a valid delivery thereof, irrespective of the intent of the parties.

2. The court reviews the evidence in this case, and sustains the finding of the chancellor that the proof failed to establish a delivery of the deed in question to complainant or the payment by him of consideration for the conveyance.

APPEAL from the Circuit Court of Grundy county; the Hon. CHARLES BLANCHARD, Judge, presiding.

E. L. CLOVER, and N. E. COLES, for appellant.

CORNELIUS REARDON, and SAMUEL RICHOLSON, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The decree appealed from dismissed a bill in chancery filed by the appellant against the appellee. It was essential to the maintenance of the bill the appellant should prove a certain deed signed and acknowledged by William H. Curtis, deceased, and Jane, his wife, also deceased, on the 8th day of October, 1875, purporting to convey to him a certain tract of land containing eighty acres, had been delivered by the grantor. The deed was never recorded and was in the possession of the grantor therein, William H. Curtis, at the time of his death, which occurred on the 23d day of September, 1897,—a period of about twenty-two years after the execution of the deed.

The appellant, the appellee and one Reuben Hollenbeck are brothers. Their mother, after the death of their father, intermarried with the grantor, William H. Curtis, but the mother had no interest in the tract of land here involved, other than such as accrued from the marriage

relation with said grantor, Curtis. Albert was the elder and the appellant the younger of the brothers. At the time the deed appellant here seeks to enforce was signed and acknowledged, the grantor also signed and acknowledged a deed to the said appellee and a deed to Reuben Hollenbeck, each of his step-sons, conveying to them, respectively, certain tracts of land. Each of the three deeds contained the following statement as to the consideration thereof: "That the said party of the first part, for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in the further consideration of the natural love and affection borne by the said party of the first part towards the said party of the second part," etc. Each also contained the following condition: "Upon the conditions that said premises shall not be subject to the debts of the said party of the second part, nor be sold, aliened or conveyed by the said party of the second part during the natural lives of the said party of the first part or of the life of the survivor of them." It is conceded the deed to said Reuben and that to the appellee were never delivered. Appellant testified the deed to him was delivered to him and remained in his possession for some months and was then returned by him to his mother, the wife of the grantor. It is undisputed that neither of the three deeds ever passed out of the possession and custody of the grantor, unless the deed to appellant was in the possession of the appellant for a period of a few months, as testified to by him. Appellee contends all three of the deeds remained constantly in the possession of the grantor therein and that neither of them was ever out of his custody.

On the 3d day of March, 1891, the said grantor in the said three deeds executed three other deeds: (1) To the appellant, conveying to him certain town lots in the town of Morris, on which was situate a dwelling house; (2) a deed to the appellee for certain tracts of land, including

the tract described in the deed made to the appellant in 1875; and (3) a deed to Reuben Hollenbeck for certain other tracts of land. These last mentioned deeds were all delivered to and accepted by the respective grantees therein. On the 5th day of May, 1894, the grantor, William H. Curtis, had in his possession the three deeds first mentioned, and on that day he endorsed on each of said deeds the following:

"This deed and two others of the same date were never delivered, but were retained by me until they finally, with other papers belonging to me, went into the possession of A. Hollenbeck, and I make this memorandum that no question may arise concerning them after my death.

W. H. CURTIS.

MORRIS, ILL., *May 5th, 1894.*

S. C. STOUGH, Witness."

We think the decree should be affirmed on the ground the chancellor was justified in refusing to find, from the evidence, that the deed in question was delivered to the appellant. It may be conceded the testimony of the appellant, standing alone, would establish that the deed was delivered to him, though the inference is fairly deducible from his testimony that such possession as he had of the deed (if any he had) was not given on the part of the grantor with the intent that the custody of the deed should remain permanently with the appellant or that the deed should become presently operative as a conveyance of the land. The mere placing of a deed in the hands of the grantee does not conclusively establish a delivery thereof, within the legal meaning of that word. Delivery is a question of intent, and depends upon "whether the parties at the time meant it to be a delivery to take effect at once." (*Jordan* v. *Davis*, 108 Ill. 336.) Other testimony tended very strongly to show the grantor in said three deeds retained all of them in his custody and that neither of them was ever delivered or intended to be delivered by him. At the time he signed and acknowledged the deeds he no doubt contemplated making disposition of the lands as mentioned in the deeds. He permitted each

of the persons named in the deeds, the appellant and his two brothers, to enter into possession of the lands described in the deeds to them, respectively, but under agreements which required each of them to pay him stipulated sums per annum for the use of the lands. The appellant lived upon the tract described in his deed for about three and a half years, and then, in 1878, removed with his family to the town of Morris, and there, with his family, made his home in a house which belonged to the grantor in the deed he seeks here to have enforced. The title to the house was in his mother, but it had been purchased and paid for by her husband, Mr. Curtis, and is the same property which was afterwards conveyed to the appellant by his step-father and his mother. The appellant, after removing to Morris, rented the land described in the deed of 1875, and collected the rent therefrom for two years, 1879 and 1880, accounting to his step-father according to the contract between them relating to the use of the land. The appellant and his family continued to reside in Morris until July, 1882, but the evidence tends to show his step-father rented the lands in controversy and received the rents therefrom for the years 1881 and 1882. In July, 1882, the appellant moved to Audubon, in the State of Iowa, and from that date it appeared beyond controversy he never, at any time prior to the filing of the bill herein, in 1898,—a period of sixteen years,—had or sought to have any control or beneficial use of the lands he now seeks to recover. Mr. Curtis, grantor in the deed appellant now seeks to enforce, rented the said land and collected and received the rents therefor from 1881 until 1891. Mrs. Curtis, mother of appellant and wife of the grantor in the deed here involved, died in 1891. On the day of her death her husband and herself executed three deeds: one to the appellant, conveying to him the property in Morris; one to the appellee, conveying to him certain tracts of land, including the tract here sought to be recovered by the appellant; and one to Reuben,

conveying to him certain other tracts of land. These deeds were delivered to the grantees, respectively, and accepted by them. The appellant, accompanied by his wife, came to Morris to attend the funeral of his mother, and returned to his home in Iowa without preferring any claim to the land he now seeks to recover, or asserting any interest therein or in the rents accruing therefrom, though he was then in straightened circumstances, being unable to defray the expenses of his wife on the return trip to their home in Iowa. The appellee entered into possession of the lands described in the deed executed to him in 1891, which included the tract here involved, made lasting and valuable improvements thereon, enjoyed the use and rents of the land and paid taxes assessed against the same. The appellant made no claim to the land until after the death of Mr. Curtis, in September, 1897.

The conduct of the appellant and that of the grantor with reference to the possession of the lands, and the endorsement made by the step-father, the grantor, on the face of the deeds, are inconsistent with the claim of the appellant that the deed to the tract of land in question was delivered to him in 1875 and that he became invested with title by virtue of the deed at that time.

The chancellor evidently did not regard as proven appellant's contention that he paid $900 in part consideration for the land described in the deed made to him in 1875. There appears no reason we should overrule the conclusion of the chancellor on the point. Appellant was then twenty-three years old. He testified he held the note of Mr. Curtis, his step-father, for $500, given to him, as he asserted, in payment for two years' labor on the farms of his step-father; that he sold five cows belonging to his wife for $100, and received $300 in cash from the sale of lands belonging to his father's estate, and that he surrendered the note and paid the $100 and the $300 to his step-father in part consideration for the land. Other testimony tended to show he did not per-

form the labor for his step-father as he claimed; that his wife did not have five cows, and that he received a pair of horses for his interest in his father's land. Moreover, the claim that he had $900 invested in the land can hardly be reconciled with his conduct in abandoning all claim upon it from 1882 until after the death of Mr. Curtis, in 1897,—a period of fifteen years or more.

The chancellor was fully justified by the proof in concluding that the three deeds dated in 1875 were signed and acknowledged by the grantor in contemplation of a voluntary settlement of that portion of his property upon his three step-sons, but that he retained the deeds in his possession and subsequently determined upon and carried out a different disposition of his property. The property conveyed by the deeds executed in 1891 is not entirely the same, in any instance, as would have been effected by the conveyance prepared and signed in 1875.

The decree is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* Charles Dickerson

v.

M. O. WILLIAMSON, County Clerk.

Opinion filed April 17, 1900.

1. ELECTIONS—*section 4 of the Election act of 1891 construed.* Under section 4 of the Election act of 1891 (Laws of 1891, p. 108,) any political party which polled two per cent of the total vote cast at the next preceding general election held throughout the State is entitled to have its nominees placed upon the official ballot for any election held in the State, or in any electoral division or district of the State, until such party at some future general election held throughout the State shall fail to poll two per cent of the vote.

2. SAME—*right of party to have nominees placed on ballot not affected by intervening judicial election.* A political party which polled two per cent of the total vote cast at the next preceding general election held throughout the State is entitled to have its nominees for office placed upon the official ballot, without regard to the participation or non-participation of such party or its voters in a judicial

election for a particular district coming between two general elections held throughout the State.

3. SAME—*provisions of section 4 concerning per cent of vote in electoral districts construed.* The provisions of section 4 of the Election act of 1891, relating to the requirement that the polling of two per cent of the total vote cast at elections held in electoral divisions or districts or municipalities shall be necessary to the right of a political party to have its nominees placed upon the official ballot for elections in such divisions, districts or municipalities, refer only to political parties which did not poll two per cent of the total vote cast at the last general election held throughout the State.

ORIGINAL petition for *mandamus.*

This is a petition filed in this court, praying that a writ of *mandamus* issue, commanding the respondent, Williamson, county clerk of the county of Knox, in this State, to receive and file in his official capacity, as such clerk, a certain certificate of the nomination of the relator, Dickerson, as a candidate for the office of clerk of the circuit court of said county of Knox, to be voted for at the general election to be held in said county on the first Tuesday after the first Monday in the month of November, 1900.

The allegations of the petition, in substance, are, that on the 12th day of April, 1900, a convention of delegates representing the democratic party duly nominated the relator as the candidate of such party for the said office of clerk of the circuit court of said Knox county, and that a certificate of such nomination, signed by the presiding officer and secretary of said convention, and containing all that is required by the statute in such cases to be incorporated in a nomination certificate, was on said 12th day of April, 1900, presented to said respondent, Williamson, as such county clerk, with the request it be received and filed by him, as such clerk, as the certificate of the nomination of the relator as a candidate for said office of circuit clerk, in order that the name of the relator, as such candidate for said office, should be placed on the official ballot to be printed and to be voted

at the general election to be held in said county and State on the said 6th day of November, 1900; that said respondent, as such county clerk, refused to receive and file such certificate of nomination for the reason set forth in the following written objections signed by said respondent, viz.:

"I, M. O. Williamson, clerk of the county court of Knox county, Illinois, hereby refuse to file said nomination certificate of Charles Dickerson for the office of circuit clerk of Knox county, Illinois, for the following reasons: The election at which the nominee for said office of circuit clerk will be voted for under the law will be held in November, A. D. 1900. A general election for the election of a supreme judge of the fifth judicial district is to be held on June 4, 1900, and I have at this time no means of knowing whether the political party known as the democratic party, and by which party the said Charles Dickerson in said nomination papers claims to be nominated for said office, will, at said general election to be held June 4, 1900, poll at least two per cent of the entire vote cast in said fifth judicial district general election for the election of supreme judge; the said general election for supreme judge in the fifth judicial district being the next preceding general election to the general election for State and county officers, including that of circuit clerk of Knox county, Illinois, November 6, 1900.

M. O. WILLIAMSON, *County Clerk.*"

The Attorney General interposed a demurrer to the petition, and the cause was submitted on the issue of law raised by the petition and the demurrer thereto.

WILLIAMS, LAWRENCE & WELSH, for petitioner.

E. C. AKIN, Attorney General, for respondent.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The position taken by the respondent, Williamson, is, that in order to entitle the relator, as the nominee of the said political party, to be placed on the official ballot as a candidate for a county or district office, it is essential the said political party making the nomination should have polled, at the general election next preceding the election at which such nominee is to be voted for, at least

two per cent of the total vote cast in said Knox county; that the election to be held on the first Monday in June, 1900, in the fifth supreme judicial district for the election of a judge of the Supreme Court, (the said county of Knox being one of the counties included in said supreme judicial district,) will be the general election next preceding the November election in the year 1900 at which the relator desires to be voted for, and that as it is not and cannot be known whether the said political party which nominated the relator for said office will poll two per cent of the entire vote polled in the said county of Knox at said judicial election, it cannot now be known whether the relator, as such nominee, can be lawfully placed on the official ballot to be voted in said Knox county at said election to be held in November, 1900.

The view so entertained by the respondent arises out of a misconception of the true meaning of the statute which regulates the matter of the admission of candidates to places on the official ballot. By the act of the General Assembly in force July 1, 1891, entitled "An act to provide for the printing and distribution of ballots at public expense and for the nomination of candidates," etc., (Hurd's Stat. 1899, p. 802,) the State adopted the policy of providing at public expense the ballots to be cast by voters at general elections in the State. It was deemed proper to direct the mode and manner in which those desiring to become candidates should become entitled to have their names appear on such official ballots as such candidates. Two methods were prescribed by the act: First, through the medium of nominations by political parties; second, by means of nomination papers or petitions bearing the signatures of designated numbers of individual voters. The right asserted by the relator is based upon alleged compliance with the former of these methods,—nomination by a political party. Whether he is so entitled to have his name printed as a candidate on the official ballot to be used at the said election to be

held in November, 1900, depends upon the true construction to be given to section 4 of said act, that being the section which prescribes and regulates the method of certifying the nominations of political parties for places on the official ballot. Section 4 reads as follows:

"Sec. 4. Any convention of delegates, caucus or meeting representing a political party which at the general election next preceding polled at least two per cent of the entire vote cast in the State, *or* in the electoral district or division thereof or the municipality for which the nomination is made, may for the State, or for the electoral district or division thereof or municipality for which the convention, caucus or meeting is held, as the case may be, by causing a certificate of nomination to be duly filed, make one such nomination for each office therein to be filled at the election. Every such certificate of nomination shall state such facts as are required in section 6 of this act, and shall be signed by the presiding officer and by the secretary of the convention, caucus or meeting, who shall add to their signatures their places of residence," etc.

Though but to regulate the mode and manner of preparing the official ballot, this statute relates to and involves the exercise of the elective franchise by those entitled to vote in the State. It is therefore to be liberally construed, to the end the freedom of electors shall not be unnecessarily abridged or their rights and privileges as electors in any degree improperly restricted. The section provides, "any convention of delegates, caucus or meeting representing a political party which at the general election next preceding polled at least two per cent of the entire vote cast in the State, *or* in the electoral district or division thereof or the municipality for which * * * the convention, caucus or meeting is held, * * * may make nominations" to be placed on the official ballot. It is thus seen the basis for the test of the right of a political party to secure recognition

for its nominees on the official ballot is the support the nominees of that party receive at previous general elections in the State at large or in electoral divisions or districts of the State or municipalities in the State. It will be observed said section 4 was so framed as to express in a single sentence the authority or privilege to make nominations possessed by a political party which had at the next preceding general election held throughout the entire State, polled at least two per cent of the total vote cast in the State, and also the authority or privilege to make nominations possessed by a political party which had, at the next preceding general election, polled two per cent of the vote cast in one or more of the electoral districts or divisions of the State or municipality therein, but had not at any general State election cast two per cent of the entire vote polled in the State. The incorporation, in the same sentence, of the legislative intent as to each of such political parties did not conduce to clearness of expression or meaning, but a careful reading and study of the section leaves the matter free from doubt.

Our construction of the section is, that a political party which polled two per cent of the total vote cast in the entire State at the next preceding general election held throughout the State may certify its nominations and have its nominees placed as candidates on the official ballot for any and all offices to be filled at any and all elections held in the State, or in any electoral division or district of the State, until such party shall at some future general election held throughout the State fail to poll two per cent of the total vote cast in the entire State, and that such authority so possessed by such political party to certify its nominations for places on the official ballots at all elections is not lost or affected by the failure of such party to poll two per cent of the votes cast at an election held in a judicial district of the State after the said next preceding general State election and prior to the next succeeding general State election. The

right acquired by a political party, by reason of having polled two per cent of the total or entire vote cast in the State at a general election held throughout the State, to have its nominees appear upon the official ballots can only be lost by the failure of such party, at a future general election held throughout the State, to cast two per cent of the vote polled at such future general State election.

Said section 4 also confers upon a political party or political parties which have not polled two per cent of the entire vote cast in the State at a general State election, but which polled two per cent of the vote cast at a general election in some one or more electoral divisions or districts of the State or in some municipality therein, authority to certify its nominees as candidates on the official ballot for offices to be filled by elections in such electoral divisions or districts or municipalities wherein such party cast two per cent of the total vote polled in such electoral divisions or districts of the State or municipalities, and the provisions of the section relating to the requirement that two per cent of the total vote polled in electoral divisions or districts or municipalities shall be requisite to the right to certify nominees on the official ballot have reference only to such political parties as shall have failed to poll or did not poll two per cent of the entire vote cast in the State at the election held throughout the State. It is conceded the democratic party polled two per cent of the entire vote cast in the State at the next preceding general election held in the State. It follows from what has been said, the nominations made by that party of candidates for election to the offices to be filled at the next general election to be held in the State in November, A. D. 1900, are (upon proper certificates and compliance with the provisions of the statute) entitled to appear as candidates of said party on the official ballot to be prepared for the electors at said ensuing November election, and that, wholly with-

out regard to the participation or non-participation of the said party, or the voters thereof, in the judicial election to be held in said fifth supreme judicial district of the State in the month of June in the present year.

The writ will be awarded as prayed in the petition, commanding the respondent to receive and file the said certificate of the nomination of the relator as the candidate of the democratic party for the office of clerk of the circuit court of Knox county at the said November election in the year 1900.

Writ awarded.

MORITZ KAUFMAN

v.

THE PEOPLE *ex rel.* Henry Bonnefoi.

Opinion filed April 17, 1900.

1. JUSTICES OF THE PEACE—*Governor cannot change successorship designated by judges of Cook county.* The power of judges of Cook county to recommend a person for justice of the peace includes the designation of the particular person whom he is to succeed, and the Governor must either appoint or reject as recommended, and cannot appoint a person recommended but change his successorship. (*People* v. *O'Toole*, 164 Ill. 344, followed.)

2. SAME—*when judges' recommendation does not amount to a double designation of successorship.* A recommendation by the judges of Cook county to the Governor that a certain person be appointed to succeed himself as justice of the peace but to hold the office which was held by another justice of the peace four years before is not a double designation of successorship, where the latter justice has held over without appointment, being the person designated in the judges' recommendation four years previous to be succeeded by the former, who was duly appointed as a justice of the peace but whose successorship as recommended was changed by the Governor.

Kaufman v. *People*, 85 Ill. App. 421, affirmed.

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

The State's attorney of Cook county filed in the superior court an information in the nature of a *quo warranto*, in substance as follows:

"Said State's attorney, for and on behalf of the People, upon the relation of Henry Bonnefoi, comes into court and gives the court to understand and be informed that said Moritz Kaufman unlawfully held, at the time of the filing of this information, and executes, without any warrant or right whatsoever, the office of justice of the peace for the town of Lake View, in Cook county; that he has usurped, and still usurps, the rights and duties of said office, to the prejudice of the People, etc.; that on June 13, 1891, said Kaufman was duly commissioned justice of the peace for the town of Lake View by the Hon. Joseph W. Fifer, Governor of the State of Illinois, to have and hold the office until his successor shall be appointed and qualified to office; that it was duly entered of record in the county clerk's office on the 16th day of June, 1891, by Henry Wolff, county clerk of Cook county; that prior to the execution of said commission and the delivery thereof to the said Kaufman, he, together with John A. Mahoney, C. J. Whitney, Henry J. Sampson and Vincent S. Boggs, were recommended as such justices of the peace by a majority of the judges of Cook county to the then Governor of the State of Illinois, and that the names of the said aforementioned parties were recommended by the Governor for confirmation by the Senate of Illinois; that said names were confirmed by said Senate as such justices of the peace for the town of Lake View; that by said recommendation, nomination and confirmation said Moritz Kaufman, and the other parties named, became justices of the peace for the said town; that said Moritz Kaufman and the said other parties, respectively, took the oath of office as such justices of the peace, and in all things complied with the laws of the State of Illinois requisite to the holding of said office, and the said Kaufman has acted as justice of the peace, and continues so

to act, notwithstanding the matter and things hereinafter set forth; that since the 13th day of June, 1891, said Kaufman has not been nominated by a majority of the judges of the circuit, superior, county and probate courts of Cook county to the office of justice of the peace, nor has he since said date been nominated by the Governor or confirmed by the Senate of the State of Illinois; that he unlawfully continues to hold the office, and claims as his warrant to do so that no successor has been duly and legally appointed or has duly qualified to the office so held by him by virtue of his commission dated June 13, 1891.

"It is further shown to the court, that on the 19th of April, 1895, a majority of the judges of the aforementioned courts recommended to Governor Altgeld, of the State of Illinois, the names of five persons for the respective offices of justice of the peace for the town of Lake View, aforesaid, as follows: Henry Bonnefoi to succeed Moritz Kaufman; Mibra James to succeed Henry J. Sampson; Niles E. Olson to succeed Vincent S. L. Boggs; John A. Mahoney to succeed himself, and C. J. Whitney to succeed himself; that the names of said persons so recommended to said Governor were so named and transferred to the said Governor in a written communication signed by the aforesaid judges; that subsequently thereto said Governor nominated three persons from the list so recommended to him by said judges, and the names of said three persons so nominated are as follows: John A. Mahoney to succeed himself; Henry B. Bonnefoi to succeed Henry J. Sampson; Niles E. Olson to succeed C. J. Whitney; that the names of the persons so nominated were sent in a written communication addressed to the Senate; that subsequently to the transmission of said names by said Governor to the said Senate, the secretary of said Senate notified the secretary of the State of Illinois that the Senate had confirmed the nominations made by the Governor; that subsequently said Bonnefoi took the oath

of office and received a commission from said Governor Altgeld, and in all things complied with the law of the State of Illinois in that behalf; that said commission was duly recorded in the office of the county clerk of Cook county; that said Henry Bonnefoi immediately entered upon the duties of said office by virtue of his commission; that subsequently, on the 8th of April, 1899, a majority of the judges of said superior, circuit, county and probate courts of the county of Cook recommended and certified to the Governor of the State of Illinois the name of Henry Bonnefoi as justice of the peace of said town of Lake View, and that said judges then and there recommended said Henry Bonnefoi *to succeed himself as justice of the peace in and for the town of Lake View, and to hold the same office which was held by Moritz Kaufman on June 1, 1895;* that said recommendation was certified to the Governor by said judges; that subsequently said Governor nominated said Henry Bonnefoi to succeed himself as justice of the peace, and to hold said office held by Moritz Kaufman on the first day of June, A. D. 1895, and transmitted the said nomination to the Senate of Illinois for confirmation; that subsequently to said nomination the secretary of said Senate notified the Governor that said Senate had confirmed the name of said Henry Bonnefoi, as made by the Governor; that subsequently, on April 24, 1899, said Bonnefoi took the oath of office as such justice of the peace and received from the Governor of the State of Illinois his commission; that said commission was duly recorded in the office of the county clerk of Cook county on the 24th day of April, 1899; that said Bonnefoi took the oath of office as such justice of the peace and complied with all things requisite to the holding of said office, and from thenceforward has continued, and still continues, to hold the said office; that notwithstanding the appointment of said Henry Bonnefoi to succeed himself and to hold said office which was held by said Moritz Kaufman as such justice on June 1, 1895, said Kaufman

still holds and executes, without any warrant whatsoever, the office of said justice of the peace of the town of Lake View, as aforesaid, and thus usurps the rights and privileges of said office, to the damage of said People," etc.

There was a prayer for answer; demurrer by respondent; demurrer overruled, and judgment for the People.

ADOLPH MOSES, for appellant:

The judges of the several courts of Cook county who have assumed the right to designate the successorship of Justice Kaufman act only in a ministerial or political capacity, and they have no warrant, in law, to appoint a successor. The constitution commands them only to recommend, and the statute has not attempted to enlarge this authority. Const. art. 6, sec. 28; Acts of 1871, 1895, 1899; *Morgan* v. *People*, 90 Ill. 558.

Justices of the peace hold their offices for four years and until their successors have been commissioned and qualified. Const. art. 6, sec. 28; *Soucy* v. *People*, 115 Ill. 109.

Even if it were conceded that the judges possess the power to recommend a successor, they have no power to dispose of the office of some other justice at the same time. The power to recommend a successor, once exercised, is exhausted.

The judges of Cook county, in acting under section 28 of article 6 of the constitution, and the statutes made conformable to it, do not act in a judicial capacity but only in a ministerial or political capacity, and hence they cannot exercise any implied powers whatsoever, except as explained in *Field* v. *People*, 2 Scam. 79.

The judges had no power, after recommending a justice "to succeed himself," also to make disposition of the office of another justice of the peace. The latter involves a question of law, which can only be decided after a hearing and in a proper legal proceeding.

Under the constitution of Illinois, justices of the peace form a part of the judicial department of the State, and

such an officer is a good officer, although, unrecommended, he may hold office until there is a legally appointed successor. Const. art. 6, sec. 1.

The case of *People* v. *O'Toole*, 164 Ill. 344, does not control the question whether the judges of Cook county have the right to recommend a successor, and even if it did, the contention is maintained herein that that part of the decision ought to be overruled. The recommendation of a successorship by the judges, and the act of the Governor in adopting and of the Senate in confirming the successorship, are one and all acts without warrant of law, because not authorized by any statute, and they do not exist as an implied power.

CHARLES S. DENEEN, State's Attorney, and F. L. BARNETT, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

The superior court overruled appellant's (Kaufman's) demurrer to the information, and rendered judgment of ouster against him and for a fine of $100 and costs of suit. The Appellate Court has affirmed the judgment, and Kaufman took his further appeal to this court.

The case differs somewhat from *People* v. *O'Toole*, 164 Ill. 344, but it must be governed by the principles there announced. Kaufman has held over from 1895 without appointment, and claims the right to continue to hold the office of justice of the peace, because, as he says, no successor to him has been appointed. In the *O'Toole case* we held that the office held by each justice of the peace was distinct from every other, and that the power and duty of the judges to recommend fit and proper persons for appointment to such office included the designation of the particular office, and that the Governor had no power to change the designation as to successorship made by the judges; that he could only appoint as recommended, or reject. Appellant contends, in an elaborate

and able argument, that the views we there expressed are erroneous and should be recalled. We have fully considered all that has been said on the subject and see no reason to depart from the conclusion reached and announced in that case, where the question was carefully considered after exhaustive arguments, both oral and written.

It follows, that when Bonnefoi was recommended to the Governor by the judges of Cook county, in 1895, to succeed Kaufman, the Governor had no power to make the change attempted and to appoint him to an office for which he was not recommended. In the *O'Toole case* we held that it took the three agencies of government,—the judges to recommend, the Governor to appoint and the Senate to confirm,—to constitute, in the manner provided by law, a justice of the peace in the city of Chicago, and that all these agencies must join in the manner provided by the constitution. It is to be observed that the judges recommended Bonnefoi, in 1895, to succeed himself, but that the Governor sent his name to the Senate as one appointed to succeed one Sampson, another justice of the peace of said town, and the Senate confirmed the appointment and Bonnefoi was commissioned a justice of the peace of the town of Lake View. Kaufman continued to act as a justice holding over until his successor should be appointed. Four years later, in 1899, the judges, in their recommendations to the Governor for appointment, recommended Bonnefoi *to succeed himself and to hold the office held by Kaufman on the first day of June, 1895*, and he was so appointed by the Governor and confirmed by the Senate, and was commissioned as a justice of the peace of the town of Lake View by the Governor. Of course, if it be true, as contended, that the judges' power was exhausted when they recommended to the Governor five fit and competent persons for appointment as justices of the peace of the town of Lake View, and that they could not designate or recommend any one to any particular

successorship, then the recommendation of Bonnefoi to succeed Kaufman amounted to nothing more than a recommendation that he be appointed one of such justices, and the designation of successorship might have been properly wholly disregarded. But we think the law is otherwise, and, as before said, it was so held in *People* v. *O'Toole, supra.*

It is, however, contended by counsel for Kaufman, that even if the *O'Toole case* be applicable to the case at bar, the effect of the recommendation of Bonnefoi in 1899 was to make him his own successor, only, and not the successor of Kaufman, and that therefore Kaufman is still "a good justice" and cannot be ousted in this proceeding. The contention is that the judges had no power to make a double designation, and to recommend Bonnefoi not only to succeed himself but to hold the office of Kaufman, when they, Bonnefoi and Kaufman, had both been acting as justices of the peace for the preceding four years; that the powers of the judges were exhausted when they recommended him to be his own successor, and that the further recommendation that he be appointed to hold the office held by Kaufman in 1895 was unauthorized and void. This reasoning is more plausible than sound, and implies that in 1899 Bonnefoi and Kaufman lawfully held two of the five distinct and separate, lawfully created, offices of justice of the peace of the town of Lake View, and that the judges recommended Bonnefoi as a fit and competent person to fill both of them. It must be presumed that the judges, the Governor and Senate, all of whom united in using this alleged double designation in the appointment, intended to appoint Bonnefoi to one office only, and that one a lawfully created office. Doubt was cast upon the title of Bonnefoi in his appointment in 1895 because of the change in the designation of successorship made by the Governor, and also, as well, upon the title of Kaufman as a hold-over justice after that date. But there was no doubt that Kaufman was both a

de facto and a *de jure* officer on the first day of June, 1895, and it was clearly the intention to appoint Bonnefoi to that office, and thus supersede Kaufman and end the confusion which had arisen in these offices. That was the office to which Bonnefoi was recommended in 1895, and, whether duly appointed to it or not, he had acted as a justice and doubtless kept a record of his acts as provided by law, and if the appointing power regarded him as having been lawfully appointed as Kaufman's successor in 1895 notwithstanding the change made by the Governor, and therefore considered that in re-appointing him to the same office he would be his own successor and entitled to retain his records, the use of that part of the designation "to succeed himself" would be explained. At all events, in view of all of the circumstances there is no uncertainty in the meaning of the designation in the recommendation and appointment of Bonnefoi, in 1899, to succeed himself and to hold the same office held by Moritz Kaufman on June 1, 1895. Nor was it an attempt to appoint him to two offices. If, in fact or law, the office of justice, as Bonnefoi's successor, and the office held by Kaufman in June, 1895, were two distinct offices, still the special designation of the office as the one so held by Kaufman in June, 1895, must control the more general one of successorship. The terms used by the judges, the Governor and the Senate in making the appointment, when considered in the light of the circumstances surrounding them at the time, leave it sufficiently certain that Bonnefoi was appointed to fill the office held by Kaufman on the first day of June, 1895, and that is the only question that can concern appellant in this case, it being immaterial to him here whether Bonnefoi was lawfully appointed in 1895 or not.

The judgment of the Appellate Court will be affirmed

Judgment affirmed.

FRANCIS M. BACON *et al.*
v.
CHRISTIAN SCHEPFLIN *et al.*

Opinion filed April 17, 1900.

1. PLEADING—*non-maturity of debt may be shown under general issue.* The non-maturity of the plaintiff's demand at the commencement of the suit may be shown as a defense under the general issue, except where such non-maturity is the result of an agreement extending the time of payment, in which case the defense must be raised by plea in abatement.

2. SAME—*filing a plea in abatement does not waive defense admissible under general issue.* A defense which may be shown under the general issue is not waived because it has been made the basis of a plea in abatement which has been held bad.

3. SAME—*a plea in abatement is not amendable.* A plea in abatement, being dilatory in character, is not amendable; nor is it proper to file a second plea in abatement after the court has disposed of one of the same character.

4. RES JUDICATA—*a judgment does not conclude after acquired rights.* A judgment against plaintiff because his action was prematurely brought is not a bar to a suit instituted after the cause of action has accrued.

5. VERDICT—*when verdict in favor of "defendant" instead of "defendants" is not invalid.* A verdict in favor of the "defendant" instead of the "defendants" is not invalid for uncertainty, where the defendants are partners, whose liability is joint, their rights identical and their defense the same, so that no issue involved in the pleadings is not settled by the verdict.

Bacon v. *Schepflin*, 85 Ill. App. 553, affirmed.

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

This is an action, commenced on March 21, 1895, by the appellants, doing business in New York, against the appellees, composing the firm of Schepflin, Schultz & Co., doing business in New Jersey, to recover the sum of $3464.73. The suit was begun in the superior court of Cook county by a writ of attachment, alleging, as the

ground of attachment, the non-residence of appellees; and Henry W. King & Co. were served as garnishees. The answer of the garnishees, filed on April 1, 1895, admitted an indebtedness to the attachment defendants of $1650.78.

Appellees filed a plea in abatement, alleging the non-maturity of the debt sued for at the time of the beginning of the suit, and that the debt would not become due and payable before June 6, 1895. A demurrer to the plea in abatement was overruled, and final judgment was entered in favor of the appellees. But this judgment was, on appeal to the Appellate Court, reversed, and the case was remanded, as may be seen by reference to the case of *Bacon* v. *Schepflin*, 63 Ill. App. 17. After the cause was redocketed in the superior court, the demurrer to the plea in abatement was sustained, and the appellees then filed a plea of the general issue. The case was tried again upon the issue formed by the plea of the general issue.

An interpleader was filed by one James F. McDonald, assignee under a deed of assignment alleged to have been made to him on March 23, 1895, by the appellees, as insolvents, in the State of New Jersey. An answer was filed to the interpleader by the appellants herein, and replication was filed to the answer. But there was no trial upon the interpleader, and no question is raised in relation thereto.

Appellants, upon the trial, introduced a certified copy of the deed of assignment, dated March 23, 1895, and delivered by the appellees to McDonald, assignee, attached to which was a sworn list of creditors including the appellants, Bacon & Co., as being creditors to the amount of $3386.20 upon open account. The testimony, however, of the appellants did not show the date of the maturity of their claim against the appellees.

The claim was for goods sold by the appellants to the appellees. The appellees proved, that the goods were sold on credit, and that, on March 21, 1895, when the suit

was commenced, the price of the goods so sold had not become due or payable from appellees to appellants, and that the purchase money therefor would not become due and payable for several months after the date of the beginning of the suit. Objections were made by appellants to the introduction of the testimony showing the non-maturity of the indebtedness sued upon. These objections were overruled, and exceptions were taken to the admission of the testimony. The exceptions were upon the ground that the defense of non-maturity can not be introduced under the plea of the general issue.

The court refused to instruct the jury, as requested by the appellants, that the alleged defense of the non-maturity of the account of the appellants could not be raised under the plea of the general issue; and also refused to instruct the jury, at the request of the appellants, to find the issues for them and assess their damages at $3386.20. On the contrary the court gave to the jury the following instruction: "The court instructs the jury to find the issues submitted to them in this case for the defendants." The giving of this instruction was excepted to by appellants. The jury returned a verdict in accordance with the instruction of the court, and, after overruling motions for new trial and in arrest of judgment, judgment was rendered upon the verdict.

An appeal was taken from this judgment to the Appellate Court where the judgment has been affirmed. The present appeal is taken from such judgment of affirmance.

MOSES, ROSENTHAL & KENNEDY, for appellants.

ARTHUR W. UNDERWOOD, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—This suit was brought before the claim sued upon was due; and the main question in the case is, whether the non-maturity of the claim at the time of the

beginning of the suit can be proved as a defense to the suit under the plea of the general issue. The court below permitted such proof to be introduced, and, it appearing that the indebtedness sued upon had not matured at the beginning of the suit, the jury were instructed to find for the defendants. The contention of the appellants is, that the non-maturity of the debt sued for can only be pleaded in abatement, and not in bar.

No rule is better established than that a plaintiff can not recover for money not due at the institution of the suit. (*Hamlin, Hale & Co.* v. *Race*, 78 Ill. 422, and cases there referred to). It would seem to follow from the rule, that the cause of action must be in existence when suit is brought, that the defense of non-maturity of the debt at the beginning of the suit can be pleaded as a bar thereto, and, therefore, can be proven under the general issue.

In *Daniels* v. *Osborn*, 71 Ill. 169, the action was assumpsit by the appellees against the appellant for the price of goods sold and delivered, and we there said: "This was assumpsit for goods sold and delivered. The general issue was pleaded. It appears, by the showing of the plaintiffs below, that the goods sold and in question were not to be paid for until the 9th day of October, 1872, yet this suit was commenced on the 11th day of July, 1872, before the credit expired. It was prematurely brought, and the judgment must be reversed and cause remanded."

In *McCoy* v. *Babcock*, 1 Ill. App. 414, where suit was brought on a note before it was due, but where the contention was made that advantage should be taken of that fact by plea in abatement, the Appellate Court held that such was not the law, and that "a plaintiff is required to show that the defendant was indebted to him at the time of the commencement of the suit, or he fails in his action."

In *Collins* v. *Montemy*, 3 Ill. App. 182, suit was brought upon a note which was not yet due, and the contention was made that the non-maturity of a note could only be set up by plea in abatement, but the Appellate Court,

speaking through the late Mr. Justice BAKER, said: "Such is not our understanding of the law. * * * The cause of action must exist at the time of the institution of the suit, and where the demand has not matured at the time of the institution of the suit and the general issue is pleaded, the defendant may avail himself of the objection on the trial. (*Harlow* v. *Boswell*, 15 Ill. 56; *Nickerson* v. *Babcock*, 29 id. 497; *Daniels* v. *Osborn*, 71 id. 169; *Hamlin, Hale & Co.* v. *Race*, 78 id. 422, and authorities there cited). In this latter case the Supreme Court say: 'We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit.' It is a good plea in abatement to the action of the writ that it was prematurely brought, but, as this is ground of demurrer or non-suit, it is very unusual to plead it in abatement.—1 Chitty's Pl. 422, 453."

In *Kahn* v. *Cook*, 22 Ill. App. 559, the Appellate Court, speaking through the late Mr. Justice BAILEY, said (p. 561): "The suit was commenced only six days after the date of the purchase, and, of course, if the defendant bought the goods on a credit of thirty days, the suit was prematurely brought. The first instruction given for the plaintiffs was erroneous in ignoring the question as to whether the indebtedness sued for was due at the time the suit was commenced. It held that the only issue to be tried was whether, at the time of the commencement of the suit, the defendant was indebted to the plaintiffs, and that, if such indebtedness existed at that time, whether due or not, the plaintiffs were entitled to recover. That such is not the law seems to us to admit of no argument. A plaintiff's cause of action arises only upon the failure of his debtor to pay a debt at maturity, and an indebtedness not yet due constitutes no cause of action, and furnishes no ground for a recovery. As said in *Nickerson* v. *Babcock*, 29 Ill. 497, 'no rule of practice is more uniformly recognized than that a suit cannot be

maintained before a demand is due.'" In *Kahn* v. *Cook*, *supra*, the court, after making the statements above quoted, refers to the cases of *Daniels* v. *Osborn*, *supra*, and *Hamlin* v. *Race*, *supra*, and then proceeds as follows: "But it is claimed that, to avail himself of the defense that the suit was prematurely brought, the defendant should have pleaded that fact in abatement. This position is manifestly untenable. The fact, that the demand was not due at the commencement of the suit, is not, properly speaking, a matter of defense, but it is incumbent on the plaintiff, in order to recover, to establish a demand which had matured at the time his suit was brought. The cause of action must exist at the time of the institution of the suit, and where the demand had not then matured and the general issue is pleaded, the defendant may avail himself of the objection at the trial. (*Collins* v. *Montemy*, 3 Ill. App. 182). It is always proper to show, under the plea of *non assumpsit*, that the plaintiff never had a cause of action. In *Daniels* v. *Osborn*, and *Hamlin* v. *Race*, above cited, the plea was *non assumpsit*, and the objection, that the suit was prematurely brought, was allowed."

In view of the authorities above quoted, we are inclined to think that the defense of non-maturity of the debt sued upon can be made under the plea of the general issue.

Certain cases decided by this court are referred to by counsel for the appellants as holding a contrary doctrine. Among these are *Archibald* v. *Argall*, 53 Ill. 307; *Culver* v. *Johnson*, 90 id. 91; *Palmer* v. *Gardner*, 77 id. 143; *Guard* v. *Whiteside*, 13 id. 7; *Pitts Sons' Manf. Co.* v. *Commercial Nat. Bank*, 121 id. 582. But in all of these cases except *Palmer* v. *Gardner*, *supra*, the facts show that the actions therein were prematurely brought, not because the original debt had not matured, but because there was an agreement to extend the time of payment which had not elapsed at the time of the bringing of the suit. An

agreement based upon a valid consideration, to extend the time of payment of the debt to a date beyond the time when the suit is brought, cannot be pleaded in bar of the action, but only in abatement, and cannot, therefore, be shown under the general issue. Such is the doctrine of the cases referred to by counsel, and, hence, they are not applicable to the state of facts existing in the present case, where there has been no agreement for the extension of a debt which has matured by its terms, but where the debt itself is sued upon before it has ever actually matured.

In cases where the agreement was merely to extend the time of payment, and suit was brought before the time of extension had passed, the cause of action had become complete, and the claimant was entitled to proceed, as his rights were fixed. In such case, he merely agrees to give a further day of payment and delay suit. The proof of such an agreement to extend the time of payment does not tend to show, that no cause of action ever existed; a cause of action, complete and matured, has existed, and the agreement to extend the time merely postpones the exercise of a remedy already completely vested. The proceeding in such a case is a dilatory one, seeking merely to delay the assertion of a right of action, and, as it is dilatory merely, it should be set up by plea in abatement, and not by plea in bar. In such a case, however, as the one at bar, there has never at any time been any cause of action; it is not certain, that any cause of action will ever arise, because the debtor may pay his obligation before the creditor acquires the right to demand payment.

The distinction thus referred to is pointed out and commented upon by Mr. Justice BAKER in *Collins* v. *Montemy*, *supra*, where the cases of *Archibald* v. *Argall*, *supra*, and *Palmer* v. *Gardner*, *supra*, are shown not to be inconsistent with the rule here held to be applicable to the present case.

In *Culver* v. *Johnson, supra*, the same distinction is indicated by this court where it is said: "According to the decision of this court in *Archibald* v. *Argall*, 53 Ill. 307, when an action is prematurely brought, because of an agreement to extend the time of payment which has not elapsed, it is matter in abatement only, and not in bar of the action; and such defense cannot be interposed after a plea in bar. It may be, if the defense had been that at the time of the institution of the suit the money was not due by the terms of the contract sued on, a different rule would apply."

In *Pitts Sons' Manf. Co.* v. *Commercial Nat. Bank, supra*, which was an action on promissory notes, the plea was that the plaintiff and other creditors had agreed to an extension of the time of payment and not to sue on the notes until the extension had expired; and it was held, that such a contract for extension could not be pleaded in bar of an action before the time, as extended, had expired, but must be pleaded in abatement. The general observations, made in that case in regard to the distinction between pleas in bar and pleas in abatement are unquestionably correct, but must be limited to the nature of the agreement, shown by the facts of that case to have there been relied upon. What is there said is not in opposition to the position here taken.

It is said by counsel for appellants that evidence of the non-maturity of the debt sued upon should not be admitted under the general issue, upon the alleged ground that the judgment based thereon would bar a later suit brought on the claim when due. The answer to this contention is, that "a judgment against a party because the action was prematurely brought, * * * is no bar to a suit subsequently brought, after the cause of action properly accrued." (*Brackett* v. *People*, 115 Ill. 29; 1 Freeman on Judgments, secs. 268, 269). A final judgment, where a plea in bar has been filed, is conclusive as to the cause

of action involved and existing at the time of bringing suit; but it is a well settled principle in relation to the subject of *res judicata*, that a former adjudication never affects after acquired rights. Rights, which had not accrued to either party at the time when the judgment is rendered, cannot be prejudiced thereby. Rights, which did not exist at the time of the rendition of the judgment, could not have been then passed upon; and, if they did not exist at the time of the former judgment, the causes of action in the two suits could not be similar. (*State of Wisconsin* v. *Torinus*, 26 Minn. 1; *Wood* v. *Faut*, 55 Mich. 185; *Palmer* v. *Temple*, 9 Ad. & El. 508; *Drake* v. *Vorse*, 42 Iowa, 653). The issues involved in the first suit, which is set up as a bar to the second suit, may, when necessary, be shown by parol, and where the evidence shows the issue in the first suit to have been that the action was prematurely brought, the former judgment forms no obstacle to the recovery when the debt is sued upon after maturity. An action, brought for the price of goods before credit has expired, will not prevent a recovery of the same goods after that period.

Counsel for appellants claim that, inasmuch as appellees filed a plea in abatement which was held by the Appellate Court to be defective, (*Bacon* v. *Schepflin*, 63 Ill. App. 17), appellees should have asked leave to amend their plea in abatement, and that, because they did not do so, they have lost the right to defend upon the ground of the non-maturity of the debt. It may be said in reply to this contention, that pleas in abatement are not amendable, because they are dilatory, and do not go to the merits of the action. (*Dunaway* v. *Goodall*, 3 Ill. App. 197; 1 Ency. of Pl. & Pr. p. 26). Moreover, when the defendant has filed a plea in abatement, and the court has disposed of it, it is irregular to file another plea of the same character, and, if such a plea is filed, it may be stricken from the files. (*Cook & Brownell* v. *Yarwood*, 41 Ill. 115).

We see no reasonable ground for the insistence made by appellants, that the right to prove the non-maturity of the debt under the general issue was waived because such defense was first pleaded in abatement. The defense might be the subject of a valid plea in abatement, but it could also be shown under the general issue. It is a general rule, that a dilatory plea must be interposed at the earliest opportunity, and, hence, it is too late to interpose it after a prior dilatory motion has been overruled, or a prior dilatory plea has been held to be bad. (*Holloway* v. *Freeman*, 22 Ill. 197; *Grand Lodge* v. *Cramer*, 164 id. 9). But this principle has no application here, because the validity of a defense under the general issue could not be determined by the time of the filing of the general issue. The right to file the general issue, or to interpose evidence under it, could not be waived by the previous filing of a plea in abatement which has been declared to be bad. If the defense is admissible under the general issue, it will continue to be so, no matter what prior steps in the pleadings may have been taken.

Second—The verdict of the jury in this case was, that they found the issues for the "defendant," and, inasmuch as there was more than one defendant, it is claimed by appellants, that the verdict did not dispose of the issue as to all of the appellees, and, for that reason, did not authorize the entry of a judgment.

Here, the court instructed the jury to find the issues submitted to them "for the defendants." By some carelessness, or slip of the pen, the verdict of the jury used the word, "defendant," instead of the word, "defendants," their verdict being, "We, the jury, find the issues for the defendant." This objection is disposed of by what is said by the Appellate Court in *Daft* v. *Drew*, 40 Ill. App. 266: "As to irregular and informal verdicts, the rule is that if, by looking into the record, the verdict can be seen to be responsive, it will be sustained. Looking into the record, it appears that there were two parties plaintiff.

There is no uncertainty about this verdict; it finds the issues for the plaintiff and assesses the damages at $112.40. (*Smith* v. *Johnson*, 3 Tex. 418; *Matson* v. *Connelly*, 24 Ill. 143; *Allwood* v. *Mansfield*, 33 id. 452; *Brown* v. *Keller*, 38 id. 63; *Phelps* v. *Reeder*, 39 id. 172; *Hamm* v. *Culvey*, 84 id. 56; *Bates* v. *Williams*, 43 id. 494; *Reardon* v. *Smith*, 36 id. 204). The defendant was in nowise prejudiced by the informality in the verdict, nor by the entry of judgment thereon, and the judgment is affirmed."

There are cases, where a verdict, returned for the "defendant," instead of the "defendants," has been held to be defective; but these cases proceed upon the ground that the defendants are severally, as well as jointly, liable, and, therefore, by the terms of the verdict, it would be uncertain which one was found to be guilty. Here, however, the rights of appellees were identical. Their pleadings were joint, and a judgment could not be for or against either alone. The verdict settled all the rights involved, and was responsive to the issues. Although there was more than one defendant, there was but one defense. The instruction of the court required the jury to find the issues for the "defendants," and not for the "defendant" alone. By the judgment of the court it is considered, "that the defendant do have and recover from the plaintiffs its costs and charges in its behalf expended." The defendants were a firm, and evidently the word, "defendant," is used in the judgment as a collective noun, intended to include all the parties defendant. There was no issue involved in the pleadings, which was not determined by the finding of the verdict. The technical omission of the letter "s," indicating thereby the singular instead of the plural number, cannot vitiate the validity of the verdict, as the real issue was found in favor of both of the appellees, or the defendants below. (*Davis* v. *Shuah*, 136 Ind. 237; *Waddington* v. *Dickson*, 17 Col. 223).

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

A. RUHSTRAT
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 17, 1900.

1. POLICE POWER—*limits of exercise of police power.* The exercise of police power by the legislature is limited to enactments tending to promote the public health, morals, safety or general welfare.

2. SAME—*what is the subject of police power is a judicial question.* It is for the legislature to determine when an exigency exists for the exercise of police power, but what is the subject of such exercise is a judicial question.

3. SAME—*police power does not authorize arbitrary invasion of personal rights or liberty.* The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights or liberties of a citizen.

4. SAME—*legislature is not sole judge as to what business regulations are reasonable.* The legislature is not the sole judge as to what is a reasonable or just restraint upon the right of a citizen to pursue his own calling and to exercise his own judgment as to the manner of conducting and advertising his business.

5. TRADE—*"liberty" includes right to choose and follow a particular business.* The term "liberty," as used in the Bill of Rights in the constitution, includes the right of every citizen to choose and follow a particular business and to conduct and advertise it in any legitimate manner, subject only to the restraints necessary to secure the common welfare.

6. SAME—*use of flag trade-mark or label is not harmful in itself.* The use of the likeness of the national flag upon a label or trade-mark for advertising purposes cannot be regarded as an act which is harmful in itself.

7. SAME—*right to use flag trade-mark is a "privilege."* The use of the likeness of the national flag for trade-marks and labels has been sanctioned by the Federal authorities in charge of the enforcement of the trade-mark laws, and the absence of Congressional prohibition thereof has created a "privilege" which citizens of the United States may enjoy free from State interference.

8. CONSTITUTIONAL LAW—*Flag law of 1899 is unconstitutional.* The Flag law of 1899 (Laws of 1899, p. 234,) is unconstitutional, not only as infringing upon the personal liberty guaranteed by the constitution, but as depriving citizens of the United States of a "privilege," in contravention of section 1 of the fourteenth amendment to the Federal constitution.

WILKIN and CARTER, JJ., and CARTWRIGHT, C. J., dissenting.

WRIT of ERROR to the Criminal Court of Cook county; the Hon. JONAS HUTCHINSON, Judge, presiding.

The plaintiff in error was prosecuted and convicted for violation of an act of the legislature of Illinois, entitled "An act to prohibit the use of the national flag or emblem for any commercial purposes or as an advertising medium," approved April 22, 1899, in force July 1, 1899. (Laws of Ill. 1899, p. 234). The following is a copy of the act in question:

"Sec. 1. It shall be unlawful for any person, firm, organization or corporation to use or display the national flag or emblem, or any drawing, lithograph, engraving, daguerreotype, photograph or likeness of the national flag or emblem, as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character or for any other purpose intended to promote the interests of such person, firm, corporation or organization.

"Sec. 2. Nothing in this act shall be construed as affecting either public or private exhibitions of art, or shall in any way restrict the use of the national flag or emblem for patriotic purposes.

"Sec. 3. All prosecutions under the provisions of this act shall be brought by any person in the name of the People of the State of Illinois, against any person or persons violating any of the provisions of this act, before any justice of the peace of the county in which such violation is alleged to have taken place, or before any court of competent jurisdiction; and it is hereby made the duty of the State's attorney to see that the provisions of this act are enforced in their respective counties, and they shall prosecute all offenders on receiving information of the violation of any of the provisions of this act; and it is made the duty of the sheriffs, deputy sheriffs, constables and police officers to inform against and prosecute all persons whom there is probable cause to

believe are guilty of violating the provisions of this act; one-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county in which the said conviction is obtained.

"Sec. 4. All prosecutions under this act shall be commenced within six months from the time such offense was committed, and not afterwards.

"Sec. 5. Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $10 nor more than $100 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail at the rate of one day for each dollar of fine and costs imposed."

Plaintiff in error, A. Ruhstrat, and his partner, Allen S. Curlett, are co-partners under the firm name of Ruhstrat & Curlett in the wholesale and retail cigar business in the city of Chicago. They used pictures of the national flag upon cigar box labels for the purpose of advertising and selling certain brands of their cigars by means of such advertisement. Plaintiff in error was arrested for a violation of said act, and, on trial before a justice of the peace, was fined $50.00 and costs. He took an appeal to the criminal court of Cook county, and, upon trial of the case in the latter court, he was found guilty and fined $10.00. Motions for a new trial and in arrest of judgment were made and overruled. Judgment was rendered upon the finding of the court, a jury having been waived, and plaintiff in error was fined $10.00 and costs. The present writ of error is prosecuted from this judgment of the criminal court of Cook county.

Specimens of the labels used by the plaintiff in error upon his cigar boxes are in the record. One of these labels is a pictorial representation with a female head in the center and a picture of the American flag in the upper

left-hand corner. Another of the labels is a pictorial representation with the likeness of Nansen, the explorer, in the center of a wreath, around one side of which is entwined an American flag. Another label is a pictorial representation with a likeness of President Lincoln in the center, and a view of the capitol building at Washington in the distance; and upon the right-hand of the representation is a picture of the American flag. Still another label is a pictorial representation with a female figure in the center, holding in her right hand a shield containing upon it a picture of the American flag.

The plaintiff in error, upon the trial below, submitted to the court, to be held as law in the decision of the case, certain propositions to the effect, that the act in question was illegal and void as being in violation of the constitutions of the State of Illinois and of the United States. These propositions were refused, and exception was taken to the refusal of the same. The reasons, assigned in support of the motions for a new trial and in arrest of judgment, were also the alleged invalidity of the act as being in conflict with the Illinois and Federal constitutions.

HOFHEIMER & PFLAUM, for plaintiff in error:

The flag is the property of the people of the United States, and is emblematic of national as distinguished from State sovereignty. U. S. Rev. Stat. secs. 1791, 1792.

The nation is a sovereign power, separate and distinct from State sovereignty. *Lane County* v. *Oregon*, 7 Wall. 71; *Collector* v. *Day*, 11 id. 113; Wilson's Works, 7, 8.

The act is in conflict with the fourteenth amendment to the Federal constitution and article 2 of the constitution of the State of Illinois. *People* v. *Gilson*, 109 N. Y. 389; *In re Jacobs*, 98 id. 98; *Slaughter-house cases*, 16 Wall. 113; *Braceville Coal Co.* v. *People*, 147 Ill. 66.

The passage of the Flag law cannot be justified under the police powers of the legislature. Acts passed under this power must be "clearly necessary for the safety,

comfort and welfare of society." They must be reasonable. What are the subjects of the exercise of the police power is a judicial question. Tiedeman on Lim. of Police Power, sec. 3, p. 12; *In re Jacobs*, 98 N. Y. 108; *Civil Rights cases*, 109 U. S. 11; *People* v. *Gilson*, 109 N. Y. 389; *Ex parte Whitwell*, 32 Pac. Rep. 870; Cooley's Const. Lim. (6th ed.) 606, 607, 744; *Frorer* v. *People*, 141 Ill. 171; *Mugler* v. *Kansas*, 123 U. S. 623; *Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Lake View* v. *Rose Hill Cemetery*, 70 Ill. 191.

CHARLES S. DENEEN, State's Attorney, and F. L. BARNETT, for the People:

Plaintiff in error, to maintain his contention that the law is in violation of the constitution of Illinois, must indicate the constitutional provision which is violated. *People* v. *Wiccard*, Legal News, Oct. 7, 1899.

The Flag law does not conflict with the Federal constitution. State enactments under the police power are supreme unless there is a grant of exclusive authority to Congress. *Slaughter-house cases*, 16 Wall. 77; *Patterson* v. *Kentucky*, 97 U. S. 604; *Ex parte Siebold*, 100 id. 371; *Bank* v. *Commonwealth*, 9 Wall. 853; *Mugler* v. *Kansas*, 123 U. S. 664; *Bank* v. *New York City*, 67 id. 610.

The act in question is the valid exercise of the police power of the State. Its purpose is to promote the welfare of society. The law must be presumed to be constitutional, and all doubts must be resolved in its favor. *Holden* v. *Hardy*, 37 L. R. A. 106; *Newland* v. *Mann*, 19 Ill. 384; *Railroad Co.* v. *Smith*, 62 id. 271; Cooley's Const. Lim. (5th ed.) 202.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The provisions of the constitution of Illinois, which the terms of the act of April 22, 1899, known as the "Flag law," are alleged to contravene, are sections 1, 2 and 4 of article 2 and section 22 of article 4. Section 1 of ar-

ticle 2 is as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights—among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed." Section 2 is as follows: "No person shall be deprived of life, liberty or property, without due process of law." Section 4 of the same article provides, that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty," etc. Section 1 of article 14 of the amendments to the constitution of the United States is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The expression, "life, liberty, and the pursuit of happiness," is general in its character, and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of "liberty." The happiness here referred to may consist in many things or depend on many circumstances, but it unquestionably includes the right of the citizen to follow his individual preference in the choice of an occupation. (Black on Const. Law, p. 404). "The right of every man to choose his own occupation, profession, or employment, though not expressly guaranteed by the constitutions, is included in the right to the pursuit of happiness." (Ibid. p. 411).

In *Powell* v. *Pennsylvania*, 127 U. S. 678, the general proposition, that the enjoyment by the citizen, upon terms of equality with all others in similar circumstances,

of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is a general part of his rights of liberty and property as guaranteed by the fourteenth amendment, was assented to by the Supreme Court of the United States, as embodying a sound principle of constitutional law. In the latter case, it was also held, that, although the power and discretion which a State legislature has in the matter of promoting the general welfare and of employing means to that end are very large, yet such power must be so exercised as not to impair the fundamental rights of life, liberty, and property.

In *Allgeyer* v. *Louisiana*, 165 U. S. 578, it was said: "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such in the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition, that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; and that among these are life, liberty, and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." It was also said in this case that "the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States." It was also there said: "If it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen." (*Butchers' Union Co.* v. *Crescent City Co.* 111 U. S. 746).

In *Braceville Coal Co.* v. *People*, 147 Ill. 66, we said (p. 71): "Liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and re-

straint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare." (*Frorer* v. *People*, 141 Ill. 171; *Perry* v. *Commonwealth*, 155 Mass. 117; *People* v. *Gillson*, 109 N. Y. 389; *Live Stock Ass.* v. *Crescent City*, 1 Abb. 388; *Slaughter-house cases*, 16 Wall. 36; *Goodcharles* v. *Wigeman*, 113 Pa. St. 431; *State* v. *Goodwill*, 33 W. Va. 179).

The plaintiff in error was engaged in the wholesale and retail cigar business. This was certainly a lawful and respectable business. Under the authorities referred to and under the interpretation of the constitution there made, plaintiff in error had not only the right to choose the business, in which he was engaged, as his occupation, but he had the right to pursue and carry on that business in any way and by any methods which were lawful and proper. Included in "the right to choose one's occupation is the right to be free from unlawful interference or control in the conduct of it." (Black on Const. Law, p. 412). In these days of commercial enterprise, advertising is an important factor in business pursuits. It cannot be denied that the plaintiff in error had a right to advertise his business in any legitimate manner, so as to attract the attention of the public. Nor can it be denied that the plaintiff in error had the right to design and make use of a trade-mark. The use of trade-marks is as old as commerce itself. The conventional trade-mark is a part of what is called "the symbolism of commerce." (Browne on Trade-marks,—2d ed.—secs. 1, 26).

It is allowable to use a picture as a trade-mark; and a picture made up of many objects in many colors may be a trade-mark. (Ibid. secs. 258, 259). Browne, in his work on Trade-marks (sec. 265) says: "Color may be of the essence of a mark of manufacture or commerce, known as a trade-mark. National flags are sometimes blended with other objects to catch the eye. They are admirably

adapted to all purposes of heraldic display, and their rich glowing colors appeal to feelings of patriotism, and win purchasers of the merchandise to which they are affixed. * * * One flag printed in green may catch the eye of a son of the Emerald Isle; * * * another flag, with stars on a blue field and stripes of alternate red and white, may secure a preference for the commodity upon which it is stamped."

The right of the citizen to pursue the calling which he has chosen, and to advertise his business in a legitimate way by the use of labels or trade-marks, is not improperly exercised by making a picture of the national flag a part of such labels or trade-marks, unless thereby the public safety, welfare or comfort is interfered with.

It is claimed on the part of the People, that the Flag law in question was enacted by the State legislature in the exercise of its police powers. The law is justified upon the alleged ground, that it is an enactment under and by virtue of the police power of the State; and that, being enacted under and by virtue of that power, the courts cannot exercise a supervision over the wisdom and judgment of the legislature in its passage. It is claimed that the law tends to elevate the morals and promote the welfare of the public; and that, as such, it is a valid exercise of legislative power.

The police power is limited to enactments which have reference to the public health or comfort, the safety or welfare of society. Laws, which impose penalties on persons and interfere with the personal liberty of the citizen, cannot be constitutionally enacted, unless the public health, comfort, safety or welfare demands their enactment. It is for the legislature to determine when an exigency exists for the exercise of this power, but what are the subjects of its exercise is clearly a judicial question. The exercise of legislative discretion is not subject to review by the courts when measures adopted by the legislature are calculated to protect the public health

and secure the public comfort, safety or welfare; but the measures so adopted must have some relation to the ends thus specified. (*Ritchie* v. *People*, 155 Ill. 98). The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure, and whether it is appropriate for the promotion of such objects. When the police power is exerted for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling, and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. (Tiedeman on Lim. of Police Power, sec. 3; *In re Jacobs*, 98 N. Y. 108; *People* v. *Gillson*, *supra;* Cooley on Const. Lim.—6th ed.—pp. 606, 607, 744; *Ex parte Whitwell*, 32 Pac. Rep. 872; 98 Cal. 73; *Frorer* v. *People*, *supra; Town of Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191; *Ritchie* v. *People*, *supra*).

In *Mugler* v. *Kansas*, 123 U. S. 623, it was said: "If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and thereby give effect to the constitution." In *Eden* v. *People*, 161 Ill. 296, we said (p. 308): "If the act

were one calculated to promote the health, comfort, safety and welfare of society, then it might be regarded as an exercise of the police power of the State. In *Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 Ill. 37, it was held that, if the law prohibits that which is harmless in itself, or requires that to be done which does not tend to promote the health, comfort, safety or welfare of society, it will, in such case, be an unauthorized exercise of power, and it will be the duty of the courts to declare such legislation void."

It is difficult to see how the Flag law of April 22, 1899, tends in any way to promote the safety, welfare or comfort of society. The use of a likeness of the flag upon a label or as part of the trade-mark of a business man in the lawful prosecution of his business, cannot be regarded otherwise than as an act which is harmless in itself. It may violate the ideas, which some people have of sentiment and taste, but the propriety of an act, considered merely from the standpoint of sentiment and taste, is a matter, about which men of equal honesty and patriotism may differ.

The act in question is severe in its terms. It makes it the duty of the State's attorney to prosecute all persons guilty of a violation of the provisions of the act, and makes it the duty of sheriffs, deputy sheriffs, constables, and police officers to inform against all persons "whom there is probable cause to believe are guilty of violating the provisions of this act; one-half of the amount recovered in any penal action under the provisions of this act shall be paid to the person filing the complaint in such action, and the remaining one-half to the school fund of the county. * * * Any persons violating the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than $10.00, nor more than $100.00 and costs, and in default of payment of said fine and costs imposed shall be imprisoned in the county jail," etc. What is the offense

for which these penalties are imposed? The using or displaying of the national flag or emblem or any drawing or likeness of the same "as a medium for advertising any goods, wares, merchandise, publication, public entertainment of any character or for any other purpose intended to promote the interests of such person, firm, corporation or organization," so using or displaying the same. Section 2 of the act provides that the use of the national flag or emblem for patriotic purposes shall not in any way be restricted. It is not altogether clear that a person might not make use of or display the national flag or emblem for a purpose intended to promote his own interests, and yet, at the same time, for an entirely patriotic purpose. It is not clear that the prohibition, leveled against the use or display of the flag, tends in any way to elevate the morals or promote the welfare of the public.

The flag is used, in the prosecution of commerce upon the high seas, as a symbol of nationality. The nationality of a ship is determined by the flag which it carries. A ship, navigating under the flag and pass of a foreign country, is to be considered as bearing the national character of the country under whose flag she sails. Under what is called, in international law, "the law of the flag," a ship-owner, who sends his vessel into a foreign port, gives notice by his flag to all who enter into contracts with the ship-master, that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all. (1 Bouvier's Law Dic.—Rawle's Rev.—pp. 799, 800).

It is a doctrine of international law that a ship becomes hostile so soon as she hoists the enemy's flag; and while the cargo of the ship does not necessarily take character from the flag, yet the general rule is that the goods under such flag follow the fate of the vessel. (11 Am. & Eng. Ency. of Law, p. 480, note 3). It is difficult to see why, if in the prosecution of foreign commerce

or trade, the flag is used to protect a ship and cargo and designate its character, it should be a desecration of the same flag to use a likeness of it upon a label or trademark in the prosecution of domestic trade or business.

A flag is emblematic of the sovereignty of the power which adopts it. The American flag is emblematic of the sovereignty of the United States. Congress, by sections 1791 and 1792 of the Revised Statutes of the United States, has provided as follows: "The flag of the United States shall be thirteen horizontal stripes, alternate red and white; and the union of the flag shall be thirty-seven stars, white in a blue field. On the admission of a new State into the Union, one star shall be added to the union of the flag; and such addition shall take effect on the fourth day of July then next succeeding said admission."

In *The Collector* v. *Day*, 11 Wall. 113, it was said: "The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States." The State of Illinois has never adopted a flag emblematic of its sovereignty. The flag is the flag of the United States as a sovereignty. The United States, acting through its Congress, has adopted a flag emblematic of national sovereignty. Presumably, the national flag was adopted for the use of the citizens of the United States. There is a difference between the privileges and immunities belonging to the citizens of the United States as such, and those belonging to the citizens of each State as such. The privileges and immunities of citizens of the United States are those, which arise out of the nature and essential character of the national government, the provisions of

its constitution, or its laws and treaties made in pursuance thereof; and it is these rights which are placed under the protection of Congress by the fourteenth amendment. (*People* v. *Loeffler*, 175 Ill. 585; *Slaughter-house cases*, 16 Wall. 36). The right to use or display the flag would seem to be a privilege of a citizen of the United States, rather than the privilege of a citizen of any one of the States. The national government, in the exercise of its inherent power to establish a flag or emblem symbolic of national sovereignty, has passed sections 1791 and 1792 above referred to, and has thereby taken jurisdiction of the subject matter of a national flag, and has legislated upon it. Congress has passed no legislation restricting the use of the flag, or confining its use to any particular purpose. It would seem that, if it had been the intention of Congress to restrict or confine such use, some provision to that effect would have been embodied in the act prescribing and describing the national flag.

The use of the flag of the United States, as embodied in advertising sheets and placards and labels and in common law trade-marks, has received the unqualified approval of the whole commercial world. It has also received the sanction of those having in charge the execution of the trade-mark laws of the United States. The usage and practice of employing a flag for commercial purposes have been indulged in by citizens of the United States with the knowledge of the national government. The absence of Congressional prohibition against the usage and practice, thus indulged in with the knowledge of the general government, has created a "privilege" in the citizens of the United States to continue such use until withdrawn by the competent authority. An act of legislation, passed by a particular State, which deprives the citizen of such privilege, contravenes that clause of the amendment to the national constitution which forbids any State to abridge the privileges and immunities of a citizen of the United States. If the State legislature can

restrict the use of the national flag, and permit its use for one purpose, and prohibit its use for another purpose, it would have the right to prohibit its use altogether within the limits of the State. But it cannot be pretended that the State of Illinois has authority to prohibit the use of the national flag altogether. It necessarily follows that it has no authority to prohibit its use for certain purposes.

We are of the opinion that this law is unconstitutional, not only as infringing upon the personal liberty guaranteed to the citizen by both the Federal and State constitutions, but also as depriving a citizen of the United States of the right of exercising a privilege impliedly, if not expressly, granted to him by the Federal constitution.

The act is also unduly discriminating and partial in its character. It exempts from penalties imposed by the act persons who may choose to make use of the national flag or emblem for either public or private exhibitions of art. The exhibitor, who engages in public or private exhibitions of art, may do so not merely for the public benefit, but for the promotion of his own interests. By thus excluding artists or exhibitors from the inhibitions of section 1 of the act, the act thereby creates a class or classes of persons who are exempted from the penalties embraced therein. Legislation of this kind has frequently been condemned by the courts in this country. The legislature clearly has no power to deny to plaintiff in error the right to use the national flag to advertise his business, or, in other words, to deny to all persons following particular occupations the right to use the national flag, and, at the same time, to permit artists or art exhibitors to use the same. The manner, in which the act thus discriminates in favor of one class of occupations and against all others, places it in opposition to the constitutional guaranties hereinbefore referred to. (*Millett* v. *People*, 117 Ill. 294; *Ritchie* v. *People*, 155 id. 98).

For the reasons herein set forth the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

WILKIN and CARTER, JJ., and CARTWRIGHT, C. J., dissenting.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

SPECIAL ASSESSMENTS—*assessment cannot be levied to pay for work done prior to passage of ordinance.* A special assessment cannot be levied to pay for an improvement constructed prior to the passage of the ordinance and which is not shown to have been authorized by any prior ordinance whatever.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

E. PARMALEE PRENTICE, for appellant.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an appeal by appellant from a judgment of the county court of Cook county confirming a special assessment against its lands for curbing with concrete combined curb and gutter, grading and paving with cedar-block pavement, Fifth avenue from Thirty-ninth street to Root street, in the city of Chicago. The ordinance upon which the assessment is based was passed June 12, 1899. A portion of the work authorized by it, the payment of which

is sought to be enforced by this proceeding, was done a year or a year and a half prior to its passage. The evidence shows that the combined curb and gutter, and grading, being the work already done, is similar to that designated in the ordinance.

The chief objection urged below, but overruled, and now insisted upon here, is, that, the greater part of the grading and curbing authorized by this ordinance having been done prior to its passage, the city could not legally levy an assessment for the cost of the portions of the work so done. We held in *Pells* v. *City of Paxton*, 176 Ill. 318 (on p. 326): "A city council has no right to make an improvement, and then, after the improvement is made, pass an ordinance providing for the making of the improvement. The passage of the ordinance must precede the making of the improvement, and the making of the improvement and all steps thereafter are absolutely void unless preceded by a valid ordinance." We also said in *City of East St. Louis* v. *Albrecht*, 150 Ill. 506, where the same rule is announced (p. 511): "One of the controlling reasons for requiring an ordinance to be passed prior to making the improvement is, that from the nature, character, locality and description of the same, which the statute requires every such ordinance to specify, an intelligent estimate of the cost of the material, labor, etc., may be made, both as a protection to owners of property and as a restraint upon the municipal authorities." See, also, *City of Carlyle* v. *County of Clinton*, 140 Ill. 512.

Appellee insists, however, that under the decisions of this court a municipality can pass an ordinance for work already done, where it was done in good faith and under a valid ordinance. That is true; and an assessment could also be made to pay for work which has been already performed, even under an insufficient ordinance. (Hurd's Stat. 1897, chap. 24, par. 564.) But this case does not fall within either of those rules. It appears that an ordinance had been passed in January, 1896, providing for a

similar improvement, (and afterwards repealed,) but it is not shown the work already done was performed under that or any other ordinance whatever, and the absence of such showing is pointed out and insisted upon by counsel for the city. The facts presented by this case, then, simply show an attempt on the part of the municipal authorities (without reference to any former ordinance) to levy an assessment to pay for work some of which had been already done. This is in direct violation of the rule followed in the cases above cited.

For the error in failing to sustain the objection of appellant the judgment of the county court will be reversed.

Judgment reversed.

MAUD M. HULL *et al.*

v.

THE WEST CHICAGO PARK COMMISSIONERS.

Opinion filed April 17, 1900.

1. SPECIAL ASSESSMENTS—*new assessment ordinance for completed improvement need not give detailed description.* An ordinance passed under section 20 of the Park act of 1895, (Laws of 1895, p. 289,) authorizing a new assessment to be levied on property benefited by an improvement already completed under an assessment ordinance which has been held invalid, need only describe the locality of the improvement so as to identify it with the completed improvement.

2. SAME—*effect where estimate mis-states date of ordinance.* Where the preamble to the commissioners' estimate of cost mis-states the date of the ordinance, but the date is correctly averred in the assessment petition, truth of such averment is admitted by default; nor can an objection based on such mis-statement be first raised on appeal.

3. SAME—*reversal of an order dismissing petition leaves prior judgment by default in force.* The reversal of an order of the county court dismissing an assessment petition leaves in full force judgments of confirmation entered by default previous to the order of dismissal, and no *nunc pro tunc* order re-confirming such default is necessary.

WRIT OF ERROR to the County Court of Cook county; the Hon. W. F. HODSON, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

FRANCIS A. RIDDLE, H. S. MECARTNEY, and ENOCH J. PRICE, for defendants in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The ordinance adopted by the defendant in error commissioners on the 28th day of March, 1893, authorizing the improvement of Douglas boulevard by special assessment, in so far as it provided for the division of the assessments into installments and that the deferred installments should bear interest, was held to be void in *Culver* v. *People*, 161 Ill. 89. The improvement contemplated by the ordinance had been, however, fully completed by the commissioners, acting in good faith under the belief the ordinance so held to be void in the respect named was a valid enactment. On the 14th day of July, 1896, the defendant in error commissioners, acting under the authority given them by section 20 of the act of the General Assembly approved June 24, 1895, entitled "An act to enable park commissioners or park authorities to make local improvements," etc., (Hurd's Stat. 1899, par. 159, p. 1244,) adopted an ordinance providing that a new special assessment on the property benefited by the improvement so as aforesaid completed under the prior ordinance should be levied, assessed and collected. This is a writ of error to bring in review the judgment of confirmation entered under the latter ordinance.

The ordinances referred to in section 5 of said act of June 24, 1895, (Hurd's Stat. 1899, par. 144, p. 1242,) are those authorizing a contemplated improvement to be made. The ordinance here involved was framed under the provisions of section 20 of that act, which section authorizes a special assessment to be levied and assessed on property benefited by an improvement which had been completed under a former ordinance which was found to be defective and void as to the provision thereof divid-

ing the assessment into installments. It is not necessary to the validity of an ordinance for this purpose it should describe the nature, character and description of the improvement contemplated by the ordinance so found to be void. The ordinance in question described the locality of the completed improvement, and thereby identified it as the improvement completed, and purported to be authorized to be completed, by a former void ordinance, and otherwise described the improvement in general terms only. The objection a description in compliance with the provisions of said section 5 was necessary is groundless.

It is complained the estimate made and returned by the commissioners of the cost of the improvement computes the cost of "several items" not comprehended in the general terms of description of the ordinance. Counsel do not, in stating the complaint or otherwise in the brief, point out or indicate any of said "several items" referred to. Nor is it complained any item in the estimate is not comprehended within the description of the nature, character, locality or description of the improvement set forth in the invalid ordinance under which the improvement was made, or that the estimate includes the cost of any work or material which did not enter into the improvement in question.

The preamble to the estimate of the commissioners mis-recited the date of the passage of the ordinance. The petition, however, contained an averment that the ordinance was adopted on the true day of its passage. The plaintiffs in error, except Knapstein, made default and thereby confessed the truth of this averment of the petition. The plaintiff in error Knapstein filed numerous objections in the county court, but the objection as to the error in the date in the estimate was not among them. It is manifest from the entire record the date was merely a clerical error. Had attention been called to it in the trial court it could have been obviated by an amendment, hence it cannot be raised for the first time in this court.

The next complaint is stated as follows in the brief of counsel: "The assessment roll herein was made by the petitioners herein, the West Chicago Park Commissioners, and the record fails to show that they were ever appointed to act as such commissioners by the order of the court." Counsel overlook section 10 of the act of June 24, 1895, (Hurd's Stat. 1899, par. 149, p. 1243,) which provides the park commissioners shall make and certify an assessment roll to the court.

Judgment by default was entered against the plaintiffs in error, except Knapstein, on the 26th day of September, 1896. On April 27, 1897, the court sustained the objections preferred by the plaintiff in error Knapstein and other owners of property and ordered the petition be dismissed. The defendant in error commissioners prosecuted an appeal to this court, and the order dismissing the petition was reversed and the cause was remanded. (*West Chicago Park Comrs.* v. *Farber*, 171 Ill. 146.) The cause having been re-docketed, the county court, on motion of the defendant in error commissioners, ordered the judgment of confirmation which had been previously rendered by default "be re-entered and re-confirmed *nunc pro tunc*." It does not appear from the record the plaintiffs in error against whom the judgment by default was ordered to be re-entered were notified and given opportunity to be heard in opposition to the *nunc pro tunc* order. The judgment of this court reversing the order of the county court dismissing the petition left the judgment of confirmation by default in full force, and the *nunc pro tunc* order was wholly unnecessary to the validity of such judgment by default.

The judgments brought in review by the writ of error are affirmed.

Judgment affirmed.

ELIZABETH WAGGONER

v.

THE WABASH RAILROAD COMPANY.

Opinion filed April 17, 1900.

1. RAILROADS—*when condition of right of way contract is not enforcible.* A condition in a contract granting right of way that a depot should be constructed upon the land, cannot be enforced by grantees of the then owner of the land.

2. SAME—*actual occupation of all parts of right of way with structures is not essential.* It is not essential to the possession of a strip of land granted for right of way that the railroad company occupy all parts of the land with tracks or other structures.

3. SAME—*building corn-cribs on right of way does not defeat company's rights.* The building of corn-cribs or other temporary structures upon the right of way so as not to interfere with the company's use is not such adverse possession as defeats the company's rights under its right of way agreement or stops the running of the Statute of Limitations in its favor.

4. SAME—*when grantee is bound by grantor's right of way agreement.* Where an agreement between a land owner and a railroad company for conveyance of right of way has been acted upon and the railroad constructed, the provisions of the agreement are binding upon the land owner and his grantee with notice.

5. SAME—*a grantee with notice cannot complain of company's laches waived by grantor.* A purchaser of land with notice of a railroad company's right of way across the same cannot complain of *laches* of the railroad company, which has been waived by permitting the company to enter under a contract.

WRIT OF ERROR to the Circuit Court of Moultrie county; the Hon. W. G. COCHRANE, Judge, presiding.

WALTER EDEN, for plaintiff in error.

I. A. BUCKINGHAM, for defendant in error.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action of ejectment by plaintiff in error, against defendant in error, begun in the circuit court of Moultrie county August 30, 1898, "to recover possession

of one hundred feet of land on each side of the railroad track of the defendant, as located over the north half of the north-west quarter of section 1, township 12, north, range 5, east of the third principal meridian, in Moultrie county, Illinois." The pleas were not guilty and twenty years' limitation. Plaintiff filed an affidavit of title from a common source, viz., Samuel Scott. A trial by jury resulted in a verdict for the defendant, on which judgment was entered, to reverse which this writ of error is prosecuted.

It appears from a statement of the case by counsel for plaintiff in error, that about the year 1871 or 1872 one Samuel Scott was the owner of the land in controversy; that at that time the Bloomington and Ohio River Railroad Company, being about to build a railroad across said land, procured from the said Samuel Scott an agreement in writing, by which he released to said company the right of way through any and all lands owned by him along the line of said road in the State of Illinois, of necessary width for embankments, excavations, slopes, spoil-banks and burroughing-beds, and agreed with the company to convey, upon the construction and completion of the railroad, to it, by deed in fee simple, the strip of ground in controversy, and in the meantime, until said road was constructed, he authorized the company to enter upon said lands by its contractors, agents or servants, and do any and all things necessary for the construction of the railroad. It was further provided by this written agreement that the company should erect and maintain a depot or station house and side-track on said land. Thereupon, about the year 1871 or 1872, the railroad was built, either by the Bloomington and Ohio River Railroad Company or by the Chicago and Paducah Railroad Company, the evidence being silent upon the question as to which company constructed said road. On the 8th day of April, 1876, Samuel Scott conveyed to Martin L. Waggoner, the husband of plaintiff in error, all of said eighty

acres of land, and he, being joined by his wife, on the 20th day of November, 1877, conveyed to William H. Waggoner, by deed, the same land, and on the same day the latter, being joined by his wife, conveyed it to Elizabeth Waggoner, plaintiff in error, each of these deeds being duly recorded. On April 2, 1880, M. L. Waggoner conveyed, by warranty deed, to the Chicago and Paducah Railroad Company, the strip of land in controversy, and by this deed the railroad company agreed to maintain a station house or depot and side-track on said land, and this deed was duly recorded. The Chicago and Paducah Railroad Company succeeded the Bloomington and Ohio River Railroad Company, but there is no documentary evidence introduced in the case of any transfer of the rights of one company to the other. The Wabash, St. Louis and Pacific Railway Company succeeded to the latter company, and on or about the 23d of June, 1880, the railroad property was conveyed by deed, by John M. Cook, James C. Parrish and Charles Ridgely, to the Wabash, St. Louis and Pacific Railway Company, under a decree of the United States court rendered January 21, 1880. The Wabash Eastern Railroad Company succeeded to the Wabash, St. Louis and Pacific Railway Company, but no formal transfer of the rights of the latter has been introduced in evidence in this case. The Wabash Railroad Company, defendant in error, succeeded to the Wabash Eastern Railway Company, but no formal transfer of the rights of the latter appears in the evidence. The several successions are shown by parol proof. The time of the transfers is not shown, except that to the Wabash, St. Louis and Pacific Railway Company. On the 18th of April, 1879, M. L. Waggoner caused to be surveyed and recorded a plat of the town of Bruce, being a tract of land east of the land in controversy and adjoining thereto, and on this plat the land in controversy is designated as railroad land, one hundred feet wide on each side of the track.

It is admitted that the evidence shows the defendant in error "to have been in possession since 1871 or 1872, continuously, of a parcel of ground on which the railroad track and the side-tracks are located and also that part of the ground occupied by stock pens." There is therefore no controversy between the parties as to the fact that the defendant's predecessor, the Bloomington and Ohio River Railroad Company, or its successor, the Chicago and Paducah Railroad Company, entered upon the premises as early as 1871 or 1872 and constructed the railroad side-tracks and stock pens upon the same, and that the different companies have been continuously in possession of that part of the right of way contracted for, from that time to the bringing of the suit. It is, however, insisted that certain parts of the strips of land on either side of the track were not then taken possession of or since occupied by the defendant or other companies. These parts are designated as the land which lies north of the station house and west of the track, and that which lies south of the station house and west of the track. That part lying north of the station house and east of the track, it is admitted, was used, in the construction of the road, for placing material thereon, and the south part, north of the station house and east of the track, is claimed to have been occupied by various parties with corn-cribs during a greater part of the period since the construction of the road to the bringing of the suit. Also, it is admitted that the part north of the station house and east of the track, lying north of the cribs and south of the public highway on the north end of the track, has never been occupied with anything, being rough and unsuitable for use; that a small part west of the track and south of the station house was used for a time by third parties in cultivating potatoes; that a house was built by a third party west of the track and occupied for a time by permission of the plaintiff's husband, etc. No attempt is here made to give any description of either

of the parts so claimed to have been unoccupied by the defendant or in the possession of others.

While it is insisted that the court improperly admitted in evidence, over the plaintiff's objection, the deed from Cook *et al.* to the Wabash, St. Louis and Pacific Railway Company of date June 23, 1880, because it did not contain a description of the premises, it is not denied that the evidence, independently of that deed, (which was not objected to,) clearly shows that the several railroad companies succeeded each other in the occupancy, control and operation of said railroad, and that defendant, in its succession to the preceding companies, has been in continuous possession of the parts above named, using them for tracks, etc., since 1871 or 1872.

Three defenses were relied upon by the defendant: First, the contract between Samuel Scott and the Bloomington and Ohio River Railroad Company; second, the twenty year statute of limitations; and third, the seven year statute of limitations under color of title, possession and payment of taxes.

We are at a loss to perceive how, under the conceded facts, the jury could have found a different verdict than the one returned by it. The first named railroad company entered upon and took possession of a part of the premises in 1871 or 1872, and constructed the road-bed and tracks thereon under its agreement with Scott, the then owner; and that it and its successors, including the defendant, continued to occupy, use and operate the railroad thereon, continuously, to the bringing of this suit, is admitted. As to that part taken possession of and occupied under the Scott contract, it is clear the possession was lawful, and, therefore, as to it the action could not be maintained. *Sands* v. *Wacaser*, 149 Ill. 530, citing *Turpin* v. *Baltimore, Ohio and Chicago Railroad Co.* 105 id. 11.

There is some controversy between the parties as to whether the condition in the Scott agreement (that a depot or station house should be erected and maintained

on the land) had been complied with until a few years prior to the bringing of the suit, but the law of this State is that the condition was void. (*Mobile and Ohio Railroad Co.* v. *People*, 132 Ill. 559.) If valid, it could have been availed of only by Scott or his heirs. His grantees, either before or after the breach, acquired no right to enforce it against the defendant. (*Boone* v. *Clark*, 129 Ill. 466; *Mott* v. *Danville Seminary*, 129 id. 403; 3 Elliott on Railroads, sec. 942, notes 4, 5; 6 Am. & Eng. Ency. of Law,—2d ed.—506-508.) Moreover, it is conceded that long prior to the bringing of this action it had been complied with. Neither is it claimed that the plaintiff, or any of the parties under whom she claims, at any time demanded from the defendant, or its predecessors, a performance of that stipulation. In no view of the law and the evidence can it be said the possession of the several railroad companies, confessedly lawful in its inception, became wrongful because of a failure to perform that condition.

A verdict in favor of the plaintiff for the whole of the premises would have been manifestly unauthorized. In fact, as we understand the argument of counsel for plaintiff in error, the main contention is that plaintiff was entitled to recover, not the whole, but only such parts of the premises described in her declaration. It is utterly impossible to frame a description of such parts from the evidence, and no attempt is made to do so in the argument. For instance, the metes and bounds of "that part of the premises lying north of the station house and west of the railroad" cannot be determined from any facts proved on the trial. One witness stated incidentally that the depot is about the center of the forty acres, doubtless meaning about half the distance across the forty north and south; but such an indefinite location of the station house furnishes no datum for ascertaining the description of land north of it. Nor is there any evidence whatever tending to show the dimensions of the station house,

or how much ground is occupied by it, the side-tracks or stock pens; and so the quantity and description of such of the parts which it is claimed were not occupied is wholly undetermined and undeterminable from the proofs. The fifth clause of section 30 of chapter 45 (Hurd's Stat. 1899, p. 730,) provides: "If the verdict be for a part of the premises described in the declaration, the verdict shall particularly specify such part as the same shall have been proved." Manifestly this requirement could not have been complied with under the evidence in this record.

We are, however, of the opinion that the weight of the evidence is to the effect that the defendant, and the companies under which it holds, have held such legal possession as should entitle it to the benefit of the Scott agreement to the whole of the premises described in the declaration. The objects and purposes of railroad rights of way are such that an actual occupancy of every part of it at one and the same time is impracticable, not to say impossible, and the rule is: "If the character and extent of the possession, and the acts of the company, considered with reference to the nature of railroads, are such as to clearly indicate an adverse claim to a right of way of a certain width, a right of way to that extent may be acquired by prescription, although it is not all occupied by track or any other structures."

The fact that the right of way here in controversy was never fenced by the railroad companies, especially on the east side, is explained by the fact that a station was located on the land and a village platted. Side-tracks were laid on the east of the main track, and there was more or less shipping done from that point.

The evidence clearly establishes the fact that soon after the execution of the Scott agreement he moved his fence one hundred feet from the location of the track, thereby manifesting an intention to carry out the contract on his part. The company, in the construction of

its road, according to the testimony of at least some of the witnesses, used the strips of land on the west for placing building material and laying its track. On the east side parts of the ground was similarly occupied during the construction, and has since been devoted to such uses as appear to have been necessary in operating the railroad. The building of cribs and other structures upon the right of way, whether by the consent of the railroad company or the owner of the adjoining lands, did not amount to such adverse possession by others as to defeat the rights of the railroad companies under their agreement with the original owner or stop the running of the Statute of Limitations in their favor. Some of the structures were temporary in their character, and none of them were shown to be such, as they were occupied and used, as to interfere with the use of that portion needed for right of way. It cannot be seriously contended that the temporary cultivation of a small portion of a right of way in potatoes, without objection on the part of a railroad company, should have the effect to deprive it of its right to the land under agreement with the owner.

In the *Sands-Wacaser case, supra*, it was held that where an agreement of a land owner and a railway company for the conveyance of a strip of land for a right of way is once acted upon without objection and the railroad constructed, its provisions will be binding upon the original owner and his grantee with notice. It was also there held that a purchaser of land with notice of a railway company's right of way across the same cannot be heard to complain of the *laches* of the company, which his grantor had waived by permitting the company to enter under the contract. It is impossible to distinguish this case from that. There is no pretense that the plaintiff below did not have full knowledge of the claim of the defendant to this right of way at the time she took the title. Her husband fully recognized that claim by his warranty deed to the Chicago and Paducah Railroad

Company on April 2, 1880, and by his plat of the village; and while these acts, being after the conveyance to his wife, would not, without notice and acquiescence, bind her, they do tend to show that the use of the right of way had been such as to apprise others of the title and claim thereto by the railroad.

We think the evidence in this record authorized the verdict of the jury upon the ground that the defendant was rightfully in possession of the premises under the contract of its predecessor, the Bloomington and Ohio River Railroad Company, with Samuel Scott, and in view of that contract, and the subsequent acts of the several companies, a clear right by prescription to the whole of the premises had become vested in the defendant. It is unnecessary, therefore, to consider the third defense relied upon below, and all question as to the payment of taxes under claim of color of title may be considered as eliminated from the case.

Many objections are urged to the ruling of the court in giving and refusing instructions, to which we have given careful attention; and while some just criticism may be made upon one or more of those given on behalf of the defendant, the defects are not of such a character, in the foregoing view of the merits of the case, as to materially affect the rights of the plaintiff. Those which were asked by the plaintiff and refused were either given in others or were objectionable in form. Besides this, being satisfied that no other verdict than that which was returned could have been properly rendered, we would not reverse the judgment below for error in the giving of instructions.

The judgment of the circuit court is in conformity with the law and facts of the case, and will accordingly be affirmed.

Judgment affirmed.

FRANK H. COOPER

v.

WINIFRED B. COOPER.

Opinion filed April 17, 1900.

1. ALIMONY—*court need not go into merits of case on motion for temporary alimony.* The proposition that a less sum should be given when the wife's misconduct has contributed to the separation has no application to temporary alimony, since upon such a motion the court will not look into the merits further than to determine whether the wife's bill is exhibited in good faith.

2. SAME—*extent to which court will investigate upon motion for temporary alimony.* Upon motion for temporary alimony the court's investigation of the question of good faith will ordinarily be confined to an examination of the pleadings, which should be verified if no other proof is offered.

3. SAME—*right of wife to temporary alimony.* The wife's right to temporary alimony is not affected by her ownership of non-income-producing property, but if her income is insufficient and that of the husband ample the court may allow her such sum as will, when added to her own income, enable her, pending the litigation, to live comfortably in the station of life to which she is accustomed.

4. SAME—*discretion in allowing temporary alimony not disturbed in absence of abuse.* Whether temporary alimony shall be decreed, and the amount thereof, are questions resting in the judicial discretion of the chancellor; and while such discretion is reviewable, the decree will not be disturbed unless such discretion is abused.

Cooper v. *Cooper*, 85 Ill. App. 575, affirmed.

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

This is an appeal from a judgment of the Appellate Court affirming an order allowing temporary alimony and suit money to appellee, pending a suit for separate maintenance by her against appellant, her husband.

The original bill was filed October 24, 1898, and an amended bill November 17, 1898. In both the original and amended bills it is averred that August 14, 1888, the

parties were married, and that October 19, 1898, appellant willfully and without cause, and without fault on the part of appellee, deserted and abandoned her and declared he would no longer live with her; that she was living separate and apart from her husband, and that she had no property or income of her own to enable her to pay necessary living expenses and to maintain herself in a condition adapted to the station of life to which she had been accustomed. The amended bill states the circumstances under which appellee alleges the appellant abandoned her, and also acts of misconduct on the part of appellant. It is averred in both the original and amended bills that appellant is the owner of real and personal estate of the value of, to-wit, $1,500,000, and has an annual income of about $250,000. The original and amended bills are both verified by affidavit of appellee.

Exceptions were filed to the amended bill by appellant, which were overruled by the court, and appellant answered both bills. Appellant, in his answers, denies that he abandoned appellee without cause or without fault on her part; denies the charges of misconduct made in appellee's amended bill, and states the circumstances under which, October 20, 1898, he ceased to live with appellee. Appellant denies that he is the owner of property or has an income of the amount stated in appellee's bills, or anything like said sums. Replications were filed to the answers. For reasons which will hereafter appear it is unnecessary to state the pleadings more fully.

November 30, 1898, the court, on motion of appellee, and on the bills and answers and affidavits in support of and against the motion, ordered that $600 per month be paid by appellant to appellee as temporary alimony, the first payment to be made December 1, 1898, until the further order of the court, and that appellant should also pay, for the use of appellee, the rent of the premises No. 150 Pine street, Chicago, and of the private barn adjacent thereto, until the further order of the court, and

also ordered that appellant should forthwith pay to appellee the sum of $1500 as and for preliminary solicitor's fees to enable her to prosecute her suit.

In appellee's affidavit in support of her motion she states that heretofore she has been allowed by appellant, for the support and maintenance of herself and household, between $1500 and $2000 per month, in addition to which appellant paid the rent of the premises occupied by her, and of the barn, and the wages of the coachman, for feed for the horses, and all repairs and expenses pertaining to the barn; that appellant owns nearly thirty per cent of the stock of a business corporation in Chicago known as Siegel, Cooper & Co., the capital stock of which is fixed at $1,000,000, and that he is also a large stockholder in another corporation known as the Siegel-Cooper Company, doing business in the city of New York, which two corporations are doing a large business and have been accumulating annually large profits, and that appellant has received large dividends on his said stock, ranging from fifteen to fifty per cent per annum on said stock, and has been receiving a salary as vice-president of $12,000 per annum; that affiant has been reliably informed and charges, that during the last year appellant has earned in salary, dividends and undivided profits, by reason of his interest in said corporations, $500,000, and that the market value of his stock has increased, making his total earnings and profits during the last year, at a fair estimate, $750,000; that appellant has other large investments amounting to many thousands of dollars, the precise amount of which is unknown to affiant; that during the year 1893 appellant's dividend in Siegel, Cooper & Co. of Chicago amounted to $140,286; that he withdrew cash from said concern, during said year, $101,104.77, and has since then withdrawn from said concern other large sums each year independently of money drawn for living expenses and the support of affiant, which sums have been devoted to outside investments; that the amounts

withdrawn by appellant for personal and household expenses have been between $40,000 and $50,000 per annum; that appellant, after he left his home, ordered the horses, carriages and other vehicles theretofore reserved for affiant's use, removed to the barn of Siegel, Cooper & Co., and that when notice was served on him of the present motion he sent her a check for $500, with the announcement that he would not allow her any more, except the rent of the apartment she occupied and the rent of the barn, $25 per month; that appellant is reasonably and fairly worth $1,500,000; that affiant's available means consist of only $10,000, which yields her less than six per cent per annum; that she has a daughter by a former marriage, about sixteen years old, and that all of said income is used in the education and support of the said daughter and is insufficient for said purposes, and that no part of the income from said $10,000 is available for affiant's use; that affiant received as allowances toward her support and maintenance, in the following months of the year 1898: March, $1095; April, $500; June, $900; July, $805; August, $1500; September, $1000, and in addition appellant presented her with a carriage which cost $1015; that said allowances did not include coachman's wages, horse feed, rent of barn, rent of living apartment and other expenses, amounting in all to $200 per month; that appellant's dry goods, dresses and other articles of wearing apparel cost about $6000 per annum, and her household expenses amounted to $350 per month, etc.

Appellant, in his affidavit in opposition to the motion, denies that he is possessed of property worth $1,500,000, or anything like said sum, and denies that his annual income is $250,000, or anything like said sum, and avers that he has been receiving a yearly salary of $12,000, which is the only salary he receives; that the statement that during the last year his earnings and profits amounted to about $750,000 is absolutely untrue and a gross exaggeration; that outside of his interest in the

two corporations heretofore mentioned, and his interest as stockholder in one piece of property connected with said business, he has no investment of any value to him; denies that he has received any dividend from the Siegel-Cooper Company at any time, and avers that the allegation that he withdrew from Siegel, Cooper & Co., in the year 1893, over $100,000, is untrue; avers that, since the expiration of about six months from the fall of 1896, affiant has allowed $500 per month for household expenses, in addition to which, on special occasions, he has presented appellee with divers sums of money, and paid the rent of the barn and of the living apartments, the salary of the coachman and feed of horses; avers that he has five children by a former marriage, three of whom are single, and that he is at considerable expense on their account; that appellee is extravagant, etc.; that about November 1 last he sent a check to appellee for $500; that within a week prior to October 19 last, on appellee's solicitation and her representations that she was in debt, he gave her $1000, and that, since the suit was commenced, bills have been presented to him for debts of appellee aggregating $557.92; that the horses and carriages are his property and he had a right to remove them, but that since said removal appellee replevied and now has them; that November 5, 1898, affiant paid to appellee $11,000, money of appellee which she derived from her father's estate, and which she still has, so far as appellant is advised; that appellee has at least $15,000 worth of jewelry and silverware purchased by affiant, also a farm in Iroquois county, Illinois, worth, as affiant is advised, about $8000, from which she receives rental; also some twenty-five or thirty town lots in the town of Sheldon, Illinois, of considerable value; also a whole or half interest in a cultivated farm of three hundred acres near the city of Dallas, in Texas, of considerable value, which was purchased by affiant with his own money and given to appellee, and from which affiant is informed she receives

income, but the amount thereof he does not know; also that appellee owns eleven shares of West Chicago City Railway stock of the par value of $100 per share, on which she receives six per cent dividends. Affiant denies that he announced to appellee, when he sent her, November 1, the $500 check, that the sum would be all he would allow her for her separate support, and avers that he sent her the following letter:

"CHICAGO, *Oct. 31, 1898.*

"*Mrs. Winifred B. Cooper, 150 Pine St., Chicago, Ill.:*

"I enclose check for $500, your usual monthly allowance, and will continue to pay rent of flat and barn. I do this notwithstanding your suit just begun for separate maintenance, and in doing this I do not waive any of my rights in that suit or otherwise, and deny your right to begin or sustain any such action. It is not my fault that you are living apart from me.

F. H. COOPER."

In another affidavit, filed by appellant in reply to appellee's affidavit, he denies that ever, in any year while the parties lived together, he allowed appellee or that she expended for wearing apparel $6000, or any sum approximating that amount, and avers that $500 per month, with house rent paid, is ample to cover all reasonable expenditure for appellee's living expenses of all kinds.

S. S. PAGE, and A. BINSWANGER, for appellant.

J. ERB, for appellee.

Per CURIAM: In deciding this case, the Appellate Court, after stating the facts as set forth in the preceding statement, delivered the following opinion:

"It will be observed from the affidavits that appellant does not disclose the value of his property or the amount of his annual income, but simply denies that he is worth as much or has income as great as appellee in her sworn bill and her affidavit avers. This omission, his counsel say, was expedient for business reasons, which may be true; but the amount of his income was an essential fact in determining appellee's motion, and his omission to in-

form the court of that fact is certainly not a circumstance favorable to him. It is apparent that the appellant is very wealthy, and that appellee has, while living with her husband, been accustomed to having large amounts expended on her account. It is not denied that the amounts alleged by appellee to have been expended in the months heretofore mentioned, in 1898, were expended by appellant, as averred by appellee. Appellant's answer to appellee's affidavit that in the year 1893 he withdrew $101,104.77 from Siegel, Cooper & Co. is a negative pregnant. He says that the allegation that he withdrew over $100,000 is untrue, impliedly admitting that he withdrew $100,000.

"It appears from the affidavits that appellant provided horses and carriages for the use of appellee, which, in view of appellant's means, certainly cannot be said to have been unsuited to her condition in life. Appellant's own estimate of the allowance which should be made for appellee's support is but little less than that allowed by the court. In his affidavit he says that $500 per month, with house rent paid, is ample to cover all reasonable expenditures for the complainant's living expenses of all kinds. In his letter to appellee of October 31, 1898, written the seventh day after the suit was commenced, he says: 'I enclose check for $500, your usual monthly allowance, and will continue to pay rent of flat and barn.' The court allowed $600 per month and the rent of the flat and barn,—only $100 more than what appellant estimated would be sufficient. It would seem that, in so far as the order for temporary alimony is concerned, there is but little about which to litigate.

"Counsel for appellant have filed an elaborate argument, citing numerous cases, which we cannot avoid thinking unnecessary, as every principle applicable to the case is announced in the very thorough, well supported and exhaustive opinion of the court in *Harding* v. *Harding*, 144 Ill. 588. The propositions of appellant's

counsel are as follows: First, complainant must show that she has a meritorious case before alimony *pendente lite* is allowed; second, when a wife has sufficient means to maintain herself and conduct her suit, alimony *pendente lite* will not be allowed; third, the court can take into consideration the circumstances of the case in fixing the amount of alimony; fourth, the court should give a less sum when the wife's misconduct has contributed to the cause of separation; fifth, the amount allowed by the court is excessive.

"In *Harding* v. *Harding* the court say: '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.' The court further say: 'The petition is verified by the oath of the 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.' The court further holds: 'It is no objection to the allowance being made that the husband denies what the wife alleges.' In the present case, not only was appellee's bill verified by her oath, but she made a separate affidavit in support of her motion for temporary alimony, and the court evidently found that her bill was exhibited in good faith.

"Whether temporary alimony should or not be allowed does not depend on the wife's ownership of non-income-producing property. In the case cited, the court held that if the income of the wife is insufficient to maintain her and enable her to carry on her suit, and that of the husband is ample, she should be allowed from her husband's income such sum as will, when added to her own, enable her to live comfortably, pending the litigation, in the station in life to which her husband has accustomed her.

"That the court, in fixing the amount of alimony, may take into consideration the circumstances of the case is a sound proposition, but the proposition that a less sum should be given when the wife's misconduct has contributed to the separation has no application to a motion for temporary alimony and suit money. On such motion the court will not look into the merits, (2 Bishop on Marriage and Divorce, etc. sec. 940,) but will only investigate sufficiently to determine whether the complainant's bill is exhibited in good faith. Whether the complainant has, in fact, a meritorious case, whether the truth in respect to the issues is on her side, cannot be determined until the proof shall have been put in and a hearing had. (*Harding* v. *Harding*, *supra*).

"Whether temporary alimony should be allowed, and, if so, how much, are questions resting in the judicial discretion of the court 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. (*Harding* v. *Harding*, *supra*). In the present case, the wife's annual income, so far as appears from the affidavits *pro* and *con*, consists of less than six per cent on $10,000 and six per cent on the par value of $1100 of stock, or not in exceess of $666 in all, while the husband's income is ample, in view of which we deem the allowance of temporary alimony fair and reasonable.

"Neither can we say that there was clearly an abuse of discretion in allowing the sum of $1500 to complainant for solicitor's fees or suit money, considering the issues involved, the pecuniary ability of appellant to contest the averments of the bill, and his answers, which clearly indicate that he intends so to do. In the *Harding case* the sum of $1000 was allowed as solicitor's fees and $400 additional for other expenses of suit. In the present case nothing has been allowed for expenses of suit

other than solicitor's fees, and appellee may be compelled to expend, for such other expenses, some of the money awarded to her on account of solicitor's fees. The money, when paid, will be hers—not that of her solicitor.

"The order will be affirmed."

We concur in the foregoing views and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

CLARKSON W. FREEMAN

v.

JOHN I. RINAKER, Jr.

Opinion filed April 17, 1900.

1. MECHANICS' LIENS—*nothing can be inferred in support of a mechanic's lien.* One seeking to enforce a mechanic's lien must bring himself strictly within the terms of the statute, since nothing can be inferred in his favor.

2. SAME—*law authorizes mechanic's lien for services of architect in drawing plans.* Section 1 of the Mechanic's Lien law of 1895, (Laws of 1895, p. 226,) that any person who, by contract with the owner of a lot, shall prepare materials *for the purpose of* or in building a house on such lot, "or perform services as an architect for any such purpose," authorizes a lien in favor of an architect for services in preparing plans for a proposed building.

3. SAME—*written contract must contain provision as to time for completing work or making final payment.* Under section 6 of the Mechanic's Lien law of 1895, if the contract is in writing no lien can be had unless the contract provides for the time for completing the work or for making final payment, since under such section, which is a substantial re-enactment of the act of 1845, a reasonable time cannot be implied in the absence of a specified time.

4. SAME—*when architect's contract is not sufficient basis for mechanic's lien.* An architect's written contract is not sufficient basis for a mechanic's lien where it contains no provision as to the time for completing the work or for making final payment, and the provision for his compensation is a certain per cent upon the cost of the building, but the cost is not specified and the building is not constructed.

Rinaker v. *Freeman*, 84 Ill. App. 283, reversed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. OWEN P. THOMPSON, Judge, presiding.

This is a petition for a mechanic's lien, filed by the appellee, John I. Rinaker, Jr., an architect, against the appellant, Clarkson W. Freeman, to enforce a mechanic's lien for the services of appellee as such architect upon a lot owned by the appellant, situated in the city of Springfield, and upon which the appellant proposed to build a hotel. Appellee prepared plans for a hotel building to be constructed upon the said property. These plans had been under consideration by appellant and appellee for some months, and appear to have been several times changed by the appellee at the request of the appellant. Thereupon, the following instrument in writing was executed by the appellant and delivered to the appellee:

"SPRINGFIELD, ILL., *Dec. 19, 1895.*

"It is hereby agreed between C. W. Freeman, of Springfield, Illinois, and John I. Rinaker, Jr., of Springfield, that said J. I. Rinaker, Jr., shall prepare plans and specifications for a hotel building for said C. W. Freeman on his lot 80x157, corner Fourth and Jefferson sts., city, for a compensation of two and one-half per cent, and shall superintend the construction thereof for a compensation of two per cent on the cost of the building, amounts payable to be paid by said C. W. Freeman as the work progresses.

C. W. FREEMAN."

The claim for a lien is based upon the foregoing contract. After the plans and specifications were prepared, appellant sought and obtained bids thereon for the construction of the proposed hotel. The lowest bid received was for the sum of $145,000.00. The bids received were rejected by the appellant. It was ascertained that the lowest amount, for which he could procure the building to be erected by a local contractor was $135,000.00, but his proposition was to expend only $125,000.00 in the erection of the building. There was some conversation

about changing the plans and specifications, in order to reduce the cost of the building to $125,000.00. Appellee prepared to make such changes with the assent of appellant. On April 26, 1896, proceedings were instituted for the "incorporation of Freeman's Fire-proof Hotel Company;" both appellant and appellee and others were to be stockholders in this new corporation. The transfer of the site of the proposed hotel was about to be made to the company so organized by the appellant, when, on May 4, 1896, the appellee filed his claim for a mechanic's lien. Thereupon, appellant discharged the appellee and abandoned the hotel project. Appellant alleges in his answer to the petition that the act of filing the claim for a mechanic's lien by the appellee was unlawful, and warranted and justified his discharge of appellee and his abandonment of the project for building the hotel.

The cause was referred to a master in chancery, who reported in favor of appellee. The master's report found that appellee was entitled to a lien upon the premises for $3125.00, being two and one-half per cent upon $125,000.00 as compensation for appellee's services in preparing the plans and specifications; but the report found against the allowance of a lien for the compensation of two per cent for superintendence.

On final hearing, the circuit court sustained exceptions to the master's report, and rendered a decree dismissing the bill. An appeal was taken from this decree to the Appellate Court. The Appellate Court has reversed the decree of the circuit court, and remanded the cause with directions to the circuit court to enter a decree in accordance with the views expressed by the Appellate Court in its opinion. The present appeal is prosecuted from such judgment so entered by the Appellate Court.

ROBERT H. PATTON, and PATTON, HAMILTON & PATTON, for appellant.

BURKE VANCIL, and CONKLING & GROUT, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The appellee is an architect, and drew certain plans and specifications for and at the request of appellant to be used in the construction of a building upon appellant's property. The testimony shows that all the plans and specifications for the building were not actually drawn, but that certain plans, called details, intended to indicate the exact dimensions and construction of the separate portions of the work, were not made by appellee. There is proof tending to show that such details are not made use of, until the building is well advanced.

The proposed hotel building was not constructed, but the project for the construction thereof was abandoned by the appellant, owner of the property. The lien, which the appellee seeks to enforce, is for services as an architect in drawing plans for a building, when nothing was done towards the actual construction of the building. Under the mechanic's lien laws of the various States, it has often been held that an architect is entitled to a lien, when he furnishes plans and specifications and superintends the actual erection of the building, proposed to be constructed in pursuance of such plans and specifications. But the decisions have been conflicting upon the question whether an architect is entitled to a lien, where he provides only plans and specifications, but does nothing in the way of supervision and superintendence of the building. (2 Am. & Eng. Ency. of Law,—2d ed.—p. 824). The rule has generally been that an architect, who simply provides the plans and specifications for a building, is not entitled to a lien for such services in the absence of any express statutory provision in his favor. (Phillips on Mechanics' Liens,—3d ed.—sec. 158; Boisot on Mechanics' Liens, sec. 116; *Price* v. *Kirk*, 90 Pa. St. 47; *Rush* v. *Able*, id. 153; *Raeder* v. *Bensberg*, 6 Mo. App. 435; *Foster* v. *Tierney*, 91 Iowa, 253).

Section 1 of the Mechanic's Lien law of Illinois, adopted in June, 1895, provides as follows: "That any person who shall, by any contract with the owner of a lot or tract of land, * * * furnish or specially * * * prepare materials * * * for the purpose of, or in building * * * any house * * * on such lot * * * or perform services as an architect for any such purpose * * * shall be known under this act as a contractor, and shall have a lien upon the whole of such tract of land or lot * * * for the amount due to him for such * * * services or labor, and interest from the date the same is due," etc. (2 Starr & Cur. Ann. Stat.—2d ed.—p. 2537). It was evidently the intention of the legislature, by the act of 1895, to give architects a lien for their services for drawing plans and specifications for a building, as well as for their services in superintending the same. The words in section 1, "perform services as an architect for any such purpose," refer back to the previous words, "for the purpose of, or in building any house." In other words, the lien is given for services as architect, not only in building any house, but for the purpose of building any house. When an architect draws plans and specifications for a building, even though he does not superintend its construction, he performs services for the purpose of building it.

The contract, however, which was made between the parties to this litigation on December 19, 1895, furnishes no basis for ascertaining the amount of compensation to be received by the appellee in case of a failure to construct the proposed hotel. By the terms of the contract appellee was to receive a compensation of two and one-half per cent "on the cost of the building, the amounts payable to be paid by the said C. W. Freeman as the work progresses." The meaning evidently is that appellee is to be paid a percentage upon the actual cost of the building, and not upon the proposed cost. This is apparent from the fact that he is to be paid "as the work

progresses." The reference here is not to the work of preparing the plans and specifications, but to the work of constructing the building. He was to be paid his percentage as the construction of the building should progress. But as no building was ever constructed, it is not possible to say what the cost of the building was, and if appellee's compensation was to be paid as the building progressed, it cannot be determined when such payments were to be made, as there was no progress in the construction of the building.

The lien given to the architect is for the "amount due to him" for his services. This contract furnishes no basis for ascertaining what amount was due to him in the event of a failure to erect the building proposed. The contract itself does not fix the cost of the building, and the actual amount, which it was to cost, does not seem to have been definitely determined. It would seem, therefore, to have been the intention of the parties, that, so far as the enforcement of any lien was concerned, the architect's fees were only payable in case of the actual construction of the building. Undoubtedly, the appellee would be entitled to recover in an action at law for his services in drawing the plans and specifications, but such recovery is very different from the enforcement of a mechanic's lien against the lot itself, upon which the building was to be erected.

No lien can be enforced for the appellee's services under this contract, for the reason that the contract is in writing, and contains no provision as to the time within which the work was to be performed or the money to be paid.

Section 6 of the act of 1895 provides as follows: "If the work is done, or materials are furnished under a verbal contract, no lien shall be had by virtue of this act unless the work shall be done or materials furnished within one year from the date of the contract, and final payment therefor is to be made within such time. If the

contract be written, no lien shall be had by virtue of this act, if the time stipulated for the completion of the work or furnishing materials is beyond three years from the date of the contract, or the time of payment beyond one year from the time stipulated for the completion thereof." (2 Starr & Cur. Ann. Stat.—2d ed.—pp. 2551, 2552.)

Provisions of a statute like those above quoted from section 6 of the act of 1895, were in force in 1845. In other words, the act of 1895, in the respect now under consideration, is, in legal effect, the same as was the statute of 1845. Section 2 of the mechanic's lien law of 1845 contained the proviso, "that the time of completing the contract shall not be extended for a longer period than three years, nor the time of payment beyond the period of one year, for the time stipulated for the completion thereof." (Rev. Stat. of Ill. 1845, p. 345). Under the statute of 1845 as above quoted, there could be no lien where the contract had no provision as to time for completion of the work or making of payment. The omission of the agreement as to time for completion and payment was conclusive as against the right to a lien.

In *Cook* v. *Heald*, 21 Ill. 425, we said in reference to said provision (p. 428): "This provision obviously requires that the time for its performance and the payment of the money shall be determined at the time when the contract is entered into, and not by alterations and changes which may be made in the agreement after it is entered into. And if there shall be no time fixed and agreed upon in the contract for the performance of the labor or furnishing the materials, within three years from its execution, and for the payment within one year from the completion of the labor or furnishing the materials, a lien would not attach. The lien is given by statute, and is in derogation of the common law and is opposed to common right, and should be strictly construed." (See, also, *Belanger* v. *Hersey*, 90 Ill. 70; *Adler* v. *World's Pastime Exposition Co.* 126 id. 373).

Under the mechanic's lien laws of 1861 and 1874, it was held that, where the contract contained no provision as to time, there was an implied agreement as to time, and, if the work was actually done within one year, the contractor could have a lien; but such decisions were all based upon the provisions then in force, which provided for a lien where the contract was implied, or partly implied and partly expressed. Those provisions, however, in relation to implied contracts, or contracts partly implied and partly expressed, are omitted from the act of 1895. (*Belanger* v. *Hersey, supra; Clark* v. *Manning*, 90 Ill. 380; *Driver* v. *Ford*, 90 id. 595; *Grundeis* v. *Hartwell*, 90 id. 324; *Orr* v. *Northwestern Mutual Life Ins. Co.* 86 id. 260).

In view, therefore, of the language of section 6 in the act of 1895 and of the construction given by this court to similar language in the act of 1845, it cannot be said, that, because no time was expressed in the contract between the parties in the case at bar, a reasonable time should be implied. The contract here was an expressed contract as distinguished from an implied contract, and no time was agreed upon for completion of the work. The law cannot imply any time for completion under such circumstances, and, therefore, the appellee was not entitled to a lien.

The remedy by a mechanic's lien is cumulative to the ordinary remedy given by the common law, and is a privilege enjoyed by one class of the community above all other classes; and, therefore, a party seeking to enforce it must bring himself strictly within the terms of the statute. Nothing can be inferred in his favor, but the law must be strictly construed. (*May Brick Co.* v. *General Engineering Co.* 180 Ill. 535).

For the reasons above stated the judgment of the Appellate Court is reversed, and the decree of the circuit court, which dismissed the appellee's petition, is affirmed.

Judgment reversed.

HENRY BALDWIN

v.

ELLEN E. BEGLEY *et al.*

Opinion filed April 17, 1900.

1. BENEFIT SOCIETIES—*effect of agreement to obey laws in force or subsequently enacted.* An agreement by a member of a benefit society to obey all by-laws in force or subsequently enacted by the society subjects the member and his beneficiary to the operation of a subsequent by-law, passed to carry into force the provisions of a statute, restricting payments of insurance to the family of the member, his heirs, blood relations, affianced wife or persons dependent upon him. (*Voigt* v. *Kersten*, 164 Ill. 314, distinguished.)

2. SAME—*heirs take insurance where beneficiary is ineligible.* Heirs-at-law of a member of a benefit society are entitled to the insurance, where the person designated as beneficiary is outside the classes of persons capable of taking under the laws of the society.

Baldwin v. *Begley*, 84 Ill. App. 674, reversed.

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

This is a bill of interpleader, filed on October 7, 1897, by the High Court of the Independent Order of Foresters of the State of Illinois, one of the appellees herein, for the purpose of determining the rightful claimant to an insurance fund of $1000.00, due from said order upon the death of one William G. Turner. The defendants to the bill were the appellees, Ellen E. Begley and Ella Veronica Hinchey, and the appellant, Henry Baldwin, a nephew of William G. Turner, deceased, and certain other persons who were the nephews and nieces of said Turner. The only contest in the case is between the appellant, Henry Baldwin, and the appellee, Ellen E. Begley, each claiming said fund of $1000.00. Answers were filed to the bill by the appellee, Ellen E. Begley, and by the appellant, Henry Baldwin, and the other nephews and nieces of

Turner; and an answer was also filed for Ella Veronica Hinchey, a minor, by her guardian *ad litem*, J. C. Porter. It was shown by the proof, and is conceded, that all the other nephews and nieces of Turner, except Henry Baldwin, assigned whatever interest they had to the fund in question to the appellant, Henry Baldwin.

On July 18, 1898, after hearing had, the superior court of Cook county rendered a decree, finding that the appellee, Ellen E. Begley, was entitled to the fund, and that the other parties had no interest therein, and decreeing that the complainant below, said Independent Order of Foresters, should pay to Ellen E. Begley the said sum of $1000.00, less costs of suit, etc. From this decree an appeal was taken to the Appellate Court. The Appellate Court has affirmed the decree of the superior court, and the present appeal is prosecuted from the judgment of affirmance so entered by the Appellate Court.

The facts disclosed by the pleadings and decree are as follows: The appellee, the High Court of the Independent Order of Foresters, is a fraternal beneficiary society, organized under the laws of Illinois on or about February 1, 1882, under the act "concerning corporations," approved April 18, 1872, in force July 1, 1872, as amended by the act of March 28, 1874, concerning "corporations not for pecuniary profit." (1 Starr & Curt. Stat.—2d ed.—pp. 988, 1020, 1021; Public Laws of Ill. 1871-72, p. 96; id. 1873-74, p. 74). On January 30, 1885, the said William G. Turner signed a written application for membership in said society, which application made among others the following statements, to-wit: "I direct that, in case of my decease, all benefit to which I may be entitled from the Independent Order of Foresters of the State of Illinois be paid to Mrs. Mary Turner, related to me as wife, subject to such future disposal of the benefit to my widow, orphans, heirs or devisees as I may hereafter direct, in compliance with the laws of the order. * * * I agree to make punctual payments of all dues and as-

sessments for which I may become liable, and to conform in all respects to the laws, rules, and usages of the order now in force, or which may hereafter be adopted by the same."

Attached to the said application was a written obligation signed by the said Turner, which contained among others the following promise, to-wit: "I do of my own free will and accord, most solemnly promise that I will strictly comply with all laws, rules, and usages of this fraternity established by the High Court of the Independent Order of Foresters of the State of Illinois."

In pursuance of said application and obligation, and on June 22, 1885, said society or order issued to said William G. Turner an endowment certificate for $1000.00, payable on his death to his wife, Mary Turner, which certificate was accepted and signed by him, and was as follows:

"This certificate is issued to William G. Turner, a member of Court Enterprise No. 36, I. O. F. of Illinois, upon condition that the statements made by him in his application for membership in said court, and the statements certified by him to the medical examiner, be and they are hereby made a part of this contract, and upon condition that the said member complies in the future with the laws, rules and regulations now governing the said order or that may hereafter be enacted by said high court. These conditions being complied with the said high court of the I. O. F. of Illinois hereby promises and binds itself to pay to Mary Turner, his wife, one thousand dollars upon satisfactory evidence of the death of said member and upon the surrender of this certificate, provided that said member is in good standing in this order at the time of his death, and provided also, that this certificate shall not have been surrendered by said member and another certificate issued at his request, in accordance with the laws of this order.

"In witness whereof the High Court of the Independent Order of Foresters of the State of Illinois has hereunto affixed its seal, and caused this certificate to be signed by its high chief ranger, and attested and recorded by its high secretary at Chicago, Ill., this 22d day of June, A. D. 1885.

R. M. OLIVER, *High Chief Ranger.*"

On March 6, 1895, said Mary Turner died, the said certificate being then still standing in her name, and payable to her. On April 1, 1895, William G. Turner endorsed on the back of said certificate a surrender thereof, and returned it to the high court of said order, and directed that a new certificate should be issued to him, payable to Ella Veronica Hinchey, "related to him as niece."

On May 18, 1897, William G. Turner made and signed an affidavit, swearing that the certificate issued to him for $1000.00, payable to Ella Veronica Hinchey, his niece, had been either lost or destroyed, and petitioning for the issue of another certificate, to be made payable to Ellen E. Begley, "related to him as niece."

On May 20, 1897, Turner executed a codicil to his will, which will was dated May 17, 1897, and by said codicil bequeathed said sum of $1000.00 to Ellen E. Begley, daughter of Michael J. Begley.

On May 26, 1897, William G. Turner died, a member of said order in good standing, and his will and codicil were duly admitted to probate in the probate court of Cook county. On May 28, 1897, two days after Turner's death, said society made and executed an endowment certificate, in pursuance of his petition presented on May 18, 1897, which certificate was payable to the appellee, Ellen E. Begley.

It was found by the court below, and is not denied that neither Ella Veronica Hinchey nor Ellen E. Begley was a niece of William G. Turner, or otherwise related to him, but that both of them were nieces of his wife. Neither of them was a member of his family, or his affianced wife, or a person dependent upon him.

On January 30, 1885, when Turner made the application above referred to, and on June 22, 1885, when the first endowment certificate was issued to him, payable to his wife, Mary Turner, the laws, rules, and regulations of the society provided as follows: "1. The endowment benefit of this order shall be $1000.00. 3. On the death

of a member of this order in good standing, the endowment shall be paid: First, to such persons as he may designate in his last will and testament or endowment certificate; second, to his widow; third, to his orphans; fourth, to his heirs."

The laws, rules, and regulations of said order duly enacted in August, 1894, by the high court of the order at its regular annual meeting, and which were in force from and after January 1, 1895, until the death of said Turner, provided as follows: "Payments of death benefits shall only be made to the families, heirs, blood relations, affianced wife of, or to persons dependent upon the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person. This endowment law shall go into full force and effect on January 1, 1895."

"All members in good standing under the old endowment law on January 1, 1895, shall without further examination become members of the second, or one thousand ($1000.00) endowment class, under the new endowment law. * * * The old endowment law, as now in force, shall be the law and guide for the payment and collection of assessments and payment of death claims, until December 31, 1894, in all subordinate courts, such accounts to be continued in the old account books of the subordinate courts and high court, but on and after January 1, 1895, new and separate accounts shall be opened with the members of such subordinate courts, in such books as may be adopted by the high board of directors, and new and separate accounts be opened for such courts in the high court."

JAMES F. CRAHEN, (SAMUEL ADAMS, of counsel,) for appellant.

KEENAN & HEAP, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

On April 1, 1895, when the deceased William G. Turner surrendered the certificate theretofore issued on June 22, 1885, to his wife, Mary Turner, and petitioned for the issuance of a new certificate to Ella Veronica Hinchey, and on May 18, 1897, when he made affidavit as to the loss of said last named certificate, and requested the issuance of a new certificate to Ellen E. Begley, and on May 20, 1897, when, in the codicil of his will, he bequeathed the $1000.00 due him from said order, to Ellen E. Begley, the act of the legislature of Illinois, of June 22, 1893, in regard to fraternal beneficiary societies, was in force. Section 1 of the latter act provides that "payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person." (Laws of Ill. 1893, p. 130). At these dates, also, there was in force a law or rule of said order, framed in the language of section 1 of the act of 1893, as above set forth. The laws, rules, and regulations of the order enacted in August, 1894, as they are set forth in the statement preceding this opinion, were in force in 1895 and 1897. It is clear, therefore, that the application for the issuance of an endowment certificate to the appellee, Ellen E. Begley, or the bequeathing of the same to her in the codicil of the will, and the issuance of a certificate payable to her after the death of Turner, were not in accordance with the act of 1893, or with the laws, rules and regulations of the order adopted after the passage of that act. By the terms of said act and of said laws, rules, and regulations, payments of death benefits can only be made to the families, heirs, blood relations, and affianced wife of, or persons dependent upon the member of the society; and such benefits cannot be willed, assigned or otherwise transferred to

any other person. Ellen E. Begley was a niece of Mrs. Mary Turner, the deceased wife of William G. Turner, and did not belong to the family of Turner himself, nor was she his affianced wife, or a person dependent upon him, or an heir, or blood relation of his. Hence, the certificate to her was issued to the wrong person, and the bequest made to her in the will was made to the wrong person under the statutory law then in force, and under the laws, rules and regulations of the order then existing. It would seem to follow, therefore, that the decree of the trial court, which ordered the endowment fund to be paid to the appellee, Ellen E. Begley, was erroneous.

It is, however, claimed on the part of the appellee, Begley, that, in 1885 when Turner made his application to become a member of the society, and signed his obligation to comply with its laws and rules, and obtained the issuance of the original endowment certificate payable to his wife, Mary Turner, the act of the legislature of Illinois of June 18, 1883, providing for the organization of societies for the purpose of furnishing life indemnity or pecuniary benefits to widows, orphans, heirs, relatives, and devisees of deceased members, was in force. Section 1 of the latter act provides "that corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits to the widows, orphans, heirs or relatives by consanguinity or affinity, devisees or legatees of deceased members, * * * and where members shall receive no money as profit, and where the funds for the payment of such benefits shall be secured, in whole or in part, by assessment upon the surviving members, may be organized," subject to the conditions named in the act. (1 Starr & Curt. Ann. Stat.—1st ed.—p. 1348). It is also said that, in January and June, 1885, there were in force the laws, rules, and regulations of the order, which provided that, on the death of a member in good standing, the endowment should be paid: First, to such persons as he might designate in his last will and tes-

tament or endowment certificate; second, to his widow; third, to his orphans; fourth, to his heirs. The position of the appellee, Begley, is, that, under the act of 1883, she being the niece of Mrs. Turner, was a relative of Turner's by affinity, and was a devisee or legatee of the endowment fund under his will; and that by the terms of the laws, rules, and regulations of the order in force in 1885, she was a person designated in his last will and testament and also in the endowment certificate issued on May 28, 1897.

The statute of 1883 is alleged to have become a part of the organic law of the society, and, therefore, as alleged, a part of Turner's contract as if it were written into the contract. Undoubtedly, the contract between the benefit society and its members is contained in the certificate, (when the certificate is issued), taken in connection with the constitution and by-laws of the order and the statute of the State under which it is formed. (*Alexander* v. *Parker*, 144 Ill. 355; *Wallace* v. *Madden*, 168 id. 356). It is, therefore, argued that, under the act of 1883, the society had no right to change the class of beneficiaries, by any law, rule or regulation that it might make, to whom Turner might choose to have an endowment certificate issued. When he joined the order in 1885 and procured the issuance of the first certificate payable to his wife, the object, for which the society was organized, as recited in its constitution and by-laws, was to secure pecuniary aid for the widows, orphans, heirs, and devisees of deceased members of the order. It is claimed, that his right to designate a devisee as a benficiary was a vested right, which could not be taken from him by the subsequent statute passed in 1893, or by the subsequent by-laws adopted in August, 1894. This position is unquestionably sound, if there was nothing in his contract with the society which obliged him to be bound, in the matter of designating a beneficiary, by such laws, rules, and regulations as the society should subsequently adopt.

Counsel for the appellee, Begley, refer to and rely upon the case of *Voigt* v. *Kersten*, 164 Ill. 314, in support of their contention upon this subject. In the *Voigt case*, Voigt, who was named in the certificate, claimed that under the act of June 22, 1893, the right of the deceased to name another beneficiary than himself, was restricted to one of the class of persons included within the terms of the act, while Kersten contended that the contract between the deceased and the order was such that the deceased had the right to change the beneficiary at any time that he saw fit, so long as he complied with the terms of the contract on his part to be performed; and that such right was not and could not be affected by a change in the statute made subsequent to the contract. It was held in that case, that the right to make this change was one of the considerations entering into the contract when the deceased obtained his certificate, and that it was a material right which could not be taken away by the legislature. The doctrine, as thus laid down, is unquestionably correct. A vested right, acquired under a contract made in pursuance of one statute, cannot be impaired by a subsequent statute. When a contract is made, a right is vested in each party to have it remain unaltered and to have it performed. But, as we understand the record, the appellant here claims nothing under the act of 1893, or under any other statute. The question here is not whether the contract made with the benefit society by Turner in 1885 can be changed by a subsequent statute, but whether the contract then made by him can be enforced or not.

A party cannot claim the right to have a contract remain unaltered when the contract itself provides that it may be changed. Here, Turner agreed in his application made in 1885 that he would "conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same." In the certificate issued to him on June 22, 1885, the condition

was imposed "that the said member complies in the future with the laws, rules, and regulations now governing the said order, or that may hereafter be enacted by said high court." It thus appears, by the terms of Turner's contract with the benefit society, that he agreed to comply with such laws, rules, and regulations, as might be enacted by the high court of the society in the future. No such contract as this was involved or brought to the attention of the court in the *Voigt case*. The law or rule of the society, which was adopted in August, 1894, and which went into effect on January 1, 1895, and which provided that the payment of death benefits should only be made to the families, blood relations, heirs, affianced wife of, or to persons dependent on the member, and that such benefit should not be willed, assigned or transferred to any other person, comes within the terms of the contract made by Turner, and cannot be otherwise regarded than as one of those future laws or rules with which he agreed to comply. The new by-law of the order, which thus restricts the beneficiaries to the same classes as those designated by the act of 1893, unquestionably follows the terms of the latter act, and was passed in accordance with the policy of the legislature as therein indicated. But the mere fact that the terms of the by-law correspond with the terms of the statute, does not make it any the less such a future by-law as the contract contemplated.

In *Supreme Lodge Knights of Pythias* v. *Kutscher*, 179 Ill. 340, we have recently held, that a by-law forfeiting claims for the death of a member of a benefit society, where the death of the member has resulted from suicide, binds a member joining the society before the passage of such by-law, when his contract requires compliance with by-laws "now in force or hereafter to be enacted."

In *Supreme Lodge Knights of Pythias* v. *Trebbe*, 179 Ill. 348, it was held that the enactment of a law by the supreme lodge of a benefit society, which provides for the

forfeiture of an endowment certificate upon the death of a member by suicide, binds a member whose contract requires compliance with all laws "now in force" or "hereafter enacted by the supreme lodge."

Again, in *Fullenwider* v. *Royal League*, 180 Ill. 621, the same doctrine was laid down. In the latter case, we said (p. 625): "The power to enact by-laws for the government of a corporate body is an incident to the existence of a body corporate and is inherent in it. The power to make such changes as may be deemed advisable is a continuous one. Where the contract contains an express provision reserving the right to amend or change by-laws, it cannot be doubted that the society has the right so to do, and where, in a certificate of membership, it is provided that members shall be bound by the rules and regulations now governing the council and fund, or that may thereafter be enacted for such government, and those conditions are assented to, and the member accepts the certificate under the conditions provided therein, it is a sufficient reservation of the right in the society to amend or change its by-laws. * * * The contract requiring compliance with any by-laws that might be thereafter enacted, and the certificate being accepted with such a clause therein, there is no vested right of having the contract in the certificate remain unchanged, because the recognition of the power to make new by-laws is necessarily a recognition of the right to repeal or amend those theretofore made."

Inasmuch, therefore, as Turner in his contract with the society agreed to be bound by such laws as should thereafter be enacted by it, and inasmuch as the society did thereafter enact a new by-law naming different persons who should be designated as beneficiaries, and inasmuch as, in his last application for a certificate, Turner did not designate as a beneficiary a person belonging to any of the classes named in the new by-law and procured a certificate to be issued to the appellee, Begley, a person

who did not belong to any of such classes, such application and certificate must be regarded as void. It follows that the appellee, Begley, cannot take the fund in controversy.

Accordingly, the appellant is entitled to the fund in his own right, and as assignee of the nephews and nieces of Turner, his blood relations. Upon the death of a member, where the person claiming to be his designated beneficiary is outside of the classes eligible as beneficiaries of his insurance, the member's heirs-at-law, who are within such classes, are entitled to the insurance. There being no selection of a beneficiary authorized to take, the fund goes to them. (*Palmer* v. *Welch*, 132 Ill. 141; *Alexander* v. *Parker*, 144 id. 355).

The judgment of the Appellate Court and the decree of the superior court of Cook county are reversed, and the cause is remanded to the latter court with directions to enter a decree requiring the fund to be paid to the appellant herein.

Reversed and remanded.

EDWARD P. BAKER

v.

JOHN A. PREBIS.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*Appellate Court may assess damages for prosecuting appeal for delay.* Under section 23 of the act on costs, when read in connection with section 10 of the Appellate Court act, the Appellate Court may assess damages against a party who has prosecuted an appeal or writ of error merely for delay.

2. SAME—*Supreme Court will not disturb unabused exercise of Appellate Court's discretion.* The Supreme Court will not review the exercise of the Appellate Court's discretionary power in assessing damages for prosecuting an appeal for delay, in the absence of any showing that such power has been abused.

Baker v. *Prebis*, 86 Ill. App. 334, affirmed.

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

CHARLES PICKLER, for appellant.

LACKNER, BUTZ & MILLER, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court, affirming a decree of foreclosure entered by the superior court of Cook county. In the judgment of the Appellate Court, the decree of the court below is affirmed, and the judgment then proceeds as follows: "It is further considered by the court that the said appellee recover of and from the said appellant the sum of $100.00, being a sum less than two per centum on $5179.27, the amount found due by the decree of the superior court, and his costs," etc. The only error assigned is, that the Appellate Court erred in assessing $100.00 as statutory damages against appellant.

The sole ground, upon which the judgment for damages is claimed by the appellant to be erroneous, is, that the statute, providing for the allowance of such damages, refers to the Supreme Court, and not to the Appellate Court.

Section 23 of chapter 33 of the Revised Statutes in relation to costs is as follows: "In every such case" (that is, on appeal or writ of error), "if the judgment or decree be affirmed in the whole, the party prosecuting such writ of error or appeal shall pay to the opposite party a sum not exceeding ten per centum on the amount of the judgment or decree so attempted to be reversed, at the discretion of the court, and in addition to the costs shall have judgment and execution therefor: *Provided*, the Supreme Court shall be of opinion that such appeal or writ

of error was prosecuted for delay." The preceding section 22 commences with the following words: "If any person shall sue out a writ of error, or take an appeal to the Supreme Court," etc. (Hurd's Stat. 1897, pp. 466, 467). Upon the face of the statute, damages can only be assessed against a party prosecuting an appeal or writ of error, when such appeal or writ of error is prosecuted to or from the Supreme Court of the State. The act in regard to costs above referred to went into force July 1, 1874. But section 10 of the act establishing Appellate Courts, which went into force July 1, 1877, is as follows: "The process, practice and pleadings in said court shall be uniform, and shall be the same as the process, practice and pleadings now prescribed or which may hereafter be prescribed in and for the Supreme Court of this State so far as applicable; and the judges of said Appellate Court may establish such uniform rules for the keeping of dockets, records and proceedings for the regulation of said court as shall be deemed most conducive to the due administration of justice, except as otherwise provided by law." (Hurd's Stat. 1897, p. 507).

When the Appellate Court act was passed in 1877, the provision in regard to damages, contained in section 23 of the act in regard to "Costs," was a part of the practice then prescribed in and for the Supreme Court of the State. Hence, by the terms of section 10, as above quoted, the Appellate Courts became clothed with the same power to allow the damages provided for in said section 23, as was then vested in the Supreme Court. We are, therefore, of the opinion that the Appellate Court, as well as the Supreme Court, may compel a party, prosecuting an appeal or writ of error, to pay the damages provided for in section 23.

No complaint is here made of the amount of the damages assessed against appellant, nor is it contended that the appeal in this case was not prosecuted for delay. The sum allowed as damages does not exceed two per

centum upon the amount found due by the terms of the foreclosure decree. The assessment of such damages is to be made under section 23 at the discretion of the court, and when the court is of opinion that the appeal or writ of error has been prosecuted for delay. The presumption is that, in awarding statutory damages against appellant, the Appellate Court was of opinion that the appeal was prosecuted for delay. There is nothing in the record, or urged by counsel for the appellant in his argument, to show that the Appellate Court has in any way abused its discretion. We are not prepared, therefore, to say that there is any error in requiring appellant to pay the sum of $100.00, in addition to the amount due by the terms of the decree. In *Baker* v. *Jacobson*, 183 Ill. 171, this court was asked to enter judgment against the appellant there for damages to the full amount allowed by the statute, and held that the record did not present a case justifying the entry of a judgment for damages. There, however, the application was an original one to this court to exercise the discretion conferred upon it by section 23. But in the case at bar we are asked to review the exercise of discretion in this matter by the Appellate Court. We forbear to review the exercise of a discretionary power by a lower court, unless it appears in some way that there has been an abuse of such discretionary power. There being no evidence of any such abuse here, we decline to reverse the judgment of the Appellate Court so far as it allows the damages in question, even though our own conclusion in regard to the matter might be different if the application for the assessment of damages was an original one addressed to this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

RANDALL H. WHITE

v.

MILO H. WAGAR.

Opinion filed April 17, 1900.

1. JUSTICES OF THE PEACE—*justice has no powers not conferred by statute.* A justice of the peace can exercise no powers except those conferred by the statute, and whenever he assumes jurisdiction in a case not provided for by statute his acts are null and void.

2. FORGERY—*labels and trade-marks are not the subject of forgery.* The simulation of trade-marks, labels, names or signatures used by a merchant or manufacturer in and about the sale or advertisement of his goods is not forgery, but, under sections 115 and 116 of division 1 of the Criminal Code, is a misdemeanor.

3. SEARCH WARRANTS—*justice of peace cannot issue search warrant for forged labels or trade-marks.* Paragraph 1 of section 2 of division 8 of the Criminal Code, authorizing a justice of the peace to issue a search warrant for counterfeit or spurious coin, forged bank notes "and other forged instruments," does not authorize a search warrant for forged labels and trade-marks. (*Langdon* v. *People*, 133 Ill. 382, distinguished.)

4. SAME—*when search warrant is illegal and void.* A search warrant is void which fails to command the officer to bring with him the person in whose possession the property is found; nor is this defect cured by the voluntary appearance of such party.

5. CERTIORARI—*when certiorari will lie.* A common law writ of *certiorari* will lie where the inferior tribunal has exceeded its jurisdiction as well as where it has proceeded illegally and no appeal or writ of error is allowed.

White v. *Wagar*, 83 Ill. App. 592, affirmed.

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

This is an appeal from a judgment of the Appellate Court affirming a judgment of the circuit court of Cook county, wherein the circuit court, upon the petition of Milo H. Wagar, the appellee, for a writ of *certiorari* as at common law, entered a judgment that "the record and

proceedings brought before it in the case of the People of the State of Illinois against No. 265 Fifth Avenue, Chicago, Cook county, Illinois, before Randall H. White, a justice of the peace in and for the town of South Chicago, in the county of Cook and State of Illinois, are manifestly illegal, erroneous and void in law and wholly without effect, and that such proceedings are hereby vacated, annulled and set aside." Randall H. White, the appellant, was the justice of the peace before whom the judgment was rendered which is called in question by the petition for *certiorari*.

The complaint made before the justice, as shown by the petition, was substantially as follows: "William M. Copeland, being duly sworn, upon his oath deposes and says that certain forged and counterfeit trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures, purporting to be the true and genuine trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures of James E. Pepper & Co., of Lexington, Kentucky; the same as to J. A. Gilka, of the city of Berlin, Germany; also Dr. J. G. B. Siegert & Hijos, of Port of Spain, Island of Trinidad, British West Indies; John DeKuyper & Son, Rotterdam, Holland; Martell & Co., of Cognac, France; Benedictine Co., of Fecamp, France; W. A. Gaines & Co., of Frankfort, Kentucky; Coates & Co., Plymouth, England; Booth & Co., London, England; Martini & Rossi, Italy; Joseph F. Boll, of Isere, France; John Jameson & Son, (Limited,) Dublin, Ireland; G. H. Mumm & Co., Reims, France; Edward Pernod, Couvet, Switzerland; H. Underberg-Albrecht, Rheinberg, Germany; Field, Son & Co., of London, England; Louis Roederer, of Reims, France; Paris, Allen & Co., of New York City; Axel Bagge & Co., of Goteborg, Sweden; Jorgen B. Lysholm, of Throndhjem, Norway; John Ramsay, of Port Ellen, Islay, Scotland; L. Garnier, of France; E. H. Taylor, Jr. & Co., of Frankfort, Kentucky; Hiram Walker &

Sons, (Limited,) of Canada; E. & J. Burke, (Limited,) of Dublin, Ireland; Cook, Bernheimer & Co. of New York City; also certain tools, machinery and printing presses, cuts, type and other materials used for making the said forged and counterfeit trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures. Which said forged and counterfeit trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures, and the tools, machinery, printing presses, cuts, type and other materials for making the same, were forged and counterfeited, and used for the unlawful purpose of cheating and defrauding some person, body corporate, by some person or persons unknown to this affiant. And he verily believes that a large number of said forged and counterfeit trade-marks, labels, bottles, caps, corks, cases, boxes, dies, stamps, stencils, plates, names and signatures, and the tools, machinery, printing presses, type, cuts and other materials for making the same, are now concealed in and about the building and premises of No. 265 Fifth avenue, and the basement connected therewith, all in the city of Chicago, county of Cook and State of Illinois, and that the following are some of the reasons for such belief: First, that one of the agents of said affiant reports to him that he, said agent, saw shipped away from said premises on the 18th day of January, 1898, about twenty cases of counterfeit and bogus Martini & Rossi vermouth, having stamped thereon forged marks and signatures purporting to be the true and genuine marks and signatures of Martini & Rossi; and also reports that he saw on said date a large number of forged and counterfeit cases, purporting to be the true and genuine cases of James Hennessy & Co., stored on said premises."

Upon the complaint so made the justice issued a warrant, which, among other things, contained the following: "We therefore command you, with necessary and proper assistance, to enter in the daytime the said premises and

there diligently search for said goods and chattels, and if the same or any part thereof be found on such search, that you bring the goods and chattels so found before the said justice, or, in case of his absence, before some other justice of the peace in said Cook county, to be disposed of according to law." The warrant was delivered to William Breen, a constable, and by him returned on January 20, 1898, with the following endorsement thereon:

"Executed the within writ by searching the within mentioned premises between sunrise and sunset of the 19th day of January, 1898, and taking therefrom articles found in the possession of M. H. Wagar, to-wit: Fifty-two bottles alleged Hennessy brandy having forged and counterfeit labels attached; twenty-three bottles alleged chartreuse having forged and counterfeit labels attached; one case alleged Angostura Bitters, pint bottles, as described in complaint; one case alleged Angostura Bitters, quart bottles, having forged and counterfeit labels, as shown in the complaint; one quart bottle alleged Angostura Bitters having forged and counterfeit labels attached, as described in the complaint.

"Dated this 20th day of January, 1898.

"Costs and expenses, eight men and team, $20.

WM. BREEN, *Constable.*"

The articles seized, in part, having been brought before the justice of the peace, a hearing was had, and the justice adjudged the labels, trade-marks, names and signatures attached to certain of the bottles so seized to be forged and counterfeit labels, trade-marks, names and signatures, and directed that said labels, trade-marks, names and signatures attached to said bottles so produced be safely kept by said William Breen so long as necessary, for the purpose of being produced or used in evidence on any trial, and, as soon as might be afterwards, to be burned or otherwise destroyed under the direction of the said justice of the peace, appellant herein; and that as to the other labels, trade-marks, names and signatures attached to the articles as mentioned in said constable's return, adjudged that each and all were

forged and counterfeit labels, trade-marks, names and signatures attached to bottles, as alleged and found upon appellee's premises.

RANDALL H. WHITE, *pro se*, and CHARLTON & COPELAND, for appellant:

The office of common law *certiorari* is, in strictness, merely to bring up the record of the proceedings in an inferior court or tribunal to enable the court of review to determine whether the former has proceeded within its jurisdiction, and not to correct mere errors in its proceedings. *People* v. *Betts*, 55 N. Y. 600.

A common law *certiorari* will issue only where there is no other mode of review, by appeal or otherwise. *School Trustees* v. *Shepherd*, 139 Ill. 114; *Wright* v. *Highway Comrs.* 150 id. 138; *Mayor of Harvey* v. *Dean*, 62 Ill. App. 41.

The common law writ of *certiorari* is not grantable of common right, but rests largely in the discretion of the court. *Lees* v. *Drainage Comrs.* 125 Ill. 47.

A writ of *certiorari* will issue only where the court, upon investigation and in the exercise of sound legal discretion, can see that justice requires it. *People* v. *School Trustees*, 42 Ill. App. 650.

The search warrant did not command the officer to bring any person before the justice, but actual notice was given to appellee, and he responded in person and by his attorneys, and appeared in person and by his attorneys pursuant to adjournment, and took the witness stand and produced witnesses in his behalf and in behalf of the things taken, and resisted the prosecution by his sworn testimony and the testimony of his witnesses, made motions in the progress of the hearing and obtained the rulings and judgment of the court thereon. What purpose would have been served to have brought him into court that was not served by his coming as he did? *Tewalt* v. *Irwin*, 164 Ill. 592; *Drainage Comrs.* v. *Griffin*, 134 id. 348; *Houston* v. *Clark*, 112 id. 350; *Baldwin* v. *Murphy*, 82 id. 485;

Miles v. *Goodwin*, 35 id. 53; *Scott* v. *People*, 59 Ill. App. 112; *Schofield* v. *Pope*, 104 Ill. 130.

Section 2 of division 8 of our Criminal Code authorizes search warrants to be issued "to search for and seize counterfeit and spurious coin, forged bank notes and other forged instruments, or tools, machinery or materials prepared or provided for making either of them." Forged labels, trade-marks, names and signatures are covered by the words "other forged instruments," used in said section of the Criminal Code. *Langdon* v. *People*, 133 Ill. 382; *Commonwealth* v. *Dana*, 2 Metc. 329; *Glennon* v. *Britton*, 155 Ill. 232.

COLLINS & FLETCHER, for appellee:

A justice of the peace in Illinois is a court of limited jurisdiction, having no common law powers. The statute is the charter of its authority, and whenever it assumes jurisdiction in a case not conferred by the statutes its acts are null and void. Moore's Justice, (3d ed.) p. 18, sec. 36; Haines' Justice, (14th ed.) 24; *Ex parte Bollman*, 4 Cranch, 93; Brown's Jur. sec. 12; *Dillard* v. *Railway Co.* 58 Mo. 74; 1 Cowen's Civil Jur. of Justices of the Peace, (2d ed.) 551; *Bowers* v. *Green*, 1 Scam. 42; *Robinson* v. *Harlan*, id. 237; *Crow* v. *Gilbert*, 54 Ill. App. 137; *Vogel* v. *People*, 37 id. 388; *Stuckey* v. *Churchman*, 2 id. 585; *Stafford* v. *Scroggin*, 43 id. 48; *Evans* v. *Pierce*, 2 Scam. 468; *Cox* v. *Groshong*, 1 Pinney, 311; *Bates* v. *Buckley*, 7 Gilm. 366; *Telegraph Co.* v. *Bank*, 74 Ill. 219.

Justices of the peace have no jurisdiction to issue search warrants save in those cases specifically authorized by statute, as there is no common law jurisdiction in a justice of the peace to issue a search warrant in any case. Moore's Crim. Law, sec. 141; *State* v. *McDonald*, 3 Dev. 471; Cowdery's Justice Treat. sec. 2249; *Robinson* v. *Richardson*, 13 Gray, (Mass.) 455; *State* v. *Mann*, 5 Ired. L. 47; Black's Const. Law, 437-440; 1 Chitty's Crim. Law, (4th Am. ed.) 464*a*; Cooley's Const. Lim. (6th ed.) 364;

Entinck v. *Carrington*, 19 State Tr. 1029; 2 Wilson, 275; Broom's Const. Law, 558; 4 Coke, 176; Dalton's Justice, chap. 169, p. 577; Campbell's Lives of Chief Justices, (Boston, 1873,) 316; *Wilkes* v. *Wood*, 19 State Tr. 1153; Broom's Const. Law, 551.

There is no statute in Illinois authorizing the issuance of a search warrant for bogus or counterfeit labels or trade-marks, or any of the things mentioned in the search warrant in question, or conferring upon a justice of the peace the right to issue a search warrant for such purpose. 2 Bishop on Crim. Law, (8th ed.) sec. 536; *Regina* v. *Smith*, 8 Cox's C. C. 32; *Regina* v. *Closs*, 7 id. 494; *Queen* v. *French*, L. R. 1 Crown Cas. Res. 217; *State* v. *Smith*, 16 Yerg. 151; *Waterman* v. *Weisiger*, 41 Ky. 214; *Commonwealth* v. *Chandler*, Thach. Crim. Cas. 187; 2 Bishop on New Crim. Law, sec. 523; *Foulkes* v. *Commonwealth*, 2 Rob. (Va.) 836.

The search warrant is void because it does not command the officer to bring before the justice the person in whose possession the goods were found. Hurd's Stat. 1898, chap. 32, div. 8, sec. 3; Cooley's Const. Lim. (6th ed). 369; *State* v. *Leach*, 38 Me. 433; Bishop on New Crim. Proc. sec. 243; *People* v. *Holcomb*, 3 Park. Cr. 669; *State* v. *Whalen*, 27 Atl. Rep. 349; *Railway Co.* v. *Small*, 27 id. 349; Waples on Proc. in Rem, sec. 43; *Gould* v. *Jacobson*, 58 Mich. 288.

Mr. JUSTICE CRAIG delivered the opinion of the court:

A justice of the peace in this State is a court of limited jurisdiction. It has and can exercise no powers except those conferred by the statute, and whenever it assumes jurisdiction in a case not conferred by the statute, its acts are null and void. (Moore's Justice, p. 18, sec. 36; *Robinson* v. *Harlan*, 1 Scam. 237; *Bowers* v. *Green*, 1 id. 42; *Evans* v. *Pierce*, 2 id. 468.) It is also well settled that a justice of the peace has no jurisdiction to issue a search warrant except in cases provided by law. (Moore on Crim. Law, sec. 141; Cooley's Const. Lim.—6th ed.—364.) It therefore becomes important to determine what power

has been conferred upon justices of the peace to issue search warrants.

The authority to issue a search warrant in this State will be found in division 8 of chapter 38 of the Criminal Code, section 1 of which provides that a warrant may issue for stolen or embezzled goods. Section 2 provides that any judge or justice may, on like complaint made on oath, issue search warrants, when satisfied that there is a reasonable cause, in four instances: (1) "To search for and seize counterfeit or spurious coin, forged bank notes and other forged instruments, or tools, machinery or materials prepared or provided for making either of them;" (2) obscene books; (3) lottery tickets, etc.; (4) gaming apparatus.

The appellant, as we understand the argument, relies upon the following clause of the statute: "To search for and seize counterfeit or spurious coin, forged bank notes and other forged instruments, or tools, machinery or materials prepared or provided for making either of them," as conferring the power to issue the search warrant in question. The contention is that forged and counterfeit trade-marks, labels, caps, corks, cases, bottles, boxes, dies, stamps, stencils, plates, names and signatures, together with tools, machinery, printing presses, type, cuts and other materials for making the same, are embraced within the meaning of the clause "other forged instruments," and it is insisted that the words "other forged instruments" are sufficiently comprehensive to include such articles. If, however, labels and trade-marks are not properly embraced within the subject of forgery, then they will not fall within the designation of forged instruments.

The weight of authority seems to be that labels and trade-marks are not the subject of forgery at common law. In Bishop on Criminal Law (vol. 2, 8th ed. sec. 536,) the author says: "In England it was the business of one Borwick to put up for the market, enclosed in printed

wrappers, two kinds of powders, called, respectively, 'Borwick's Baking Powders' and 'Borwick's Egg Powders.' Another printed wrappers of his own, imitating these, and put in them his own powders, selling them as Borwick's. For this he was indicted as for forgery, but the judges deemed that though he was probably criminally liable in another form, what he did came short of this offense. And plainly not so. In words employed by the learned judges, the genuine label put by Borwick upon his powders could not be deemed a writing of legal validity, however useful it was to him as an advertisement or a trade-mark."

Rex v. *Smith*, 8 Cox's C. C. 32, is a leading case on the question. In the decision of the case, Pollock, C. B., said: "The defendant may have been guilty of obtaining money under false pretenses; of that there can be no doubt. But the real offense here was the issuing of a false wrapper and inclosing false stuff within it. The issuing of this wrapper without the stuff therein would be no offense. In the printing of these wrappers there is no offense. The real offense is the issuing of them with the fraudulent matter in them. * * * They are merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things which are essentially different. It might as well be said that if one tradesman used brown paper for wrappers of the same description as another tradesman he could be accused of forging the brown paper." Justice Willes said: "This is not one of the different kinds of instruments which may be the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present the remedy is well known. The prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, and he

may also bring an action at law for damages, or he may indict him for obtaining money under false pretenses, but to convert this into the offense of forgery would be to strain the rule of law."

As establishing a contrary doctrine we have been referred to 8 Am. & Eng. Ency. of Law, (478,) where the author says: "The false writing of any instrument calculated to deceive, and which, if genuine, might subject the person signing it to damages, is forgery, such as * * * trade-marks or labels, where it could be made the basis of an action for deceit or warranty against the alleged issuer." In support of the doctrine announced *Rex* v. *Smith*, *supra*, is cited, but, as has been seen, that case lays down a different rule. Wharton on Criminal Law (10th ed. sec. 690,) is also cited, where the author in substance says that when a trade-mark or label can be made a basis for a suit against the alleged issuer in an action for deceit or warranty, then to falsely appropriate such trade-mark or label is forgery. But here, whether the trade-marks or labels are of the character named by the author, so as to bring them within the rule indicated by him, does not appear from the proceedings before the justice. As we understand it, forgery, at common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy or a foundation of legal liability. (2 Bishop on Crim. Law, sec. 523.) The trade-marks and labels in question do not, as we understand it, fall within the definition indicated.

But it is argued that the articles mentioned in the complaint upon which the search warrant was issued, may be and are included within the words of the statute "other forged instruments," and hence if the warrant is not authorized at common law it is by statute. In *Shirk* v. *People*, 121 Ill. 61, following a well established rule of the construction of statutes, it was held that under a statute making it criminal to make or pass a fictitious

bill, note or check, or other instrument in writing for the payment of money, the words "other instruments in writing" will only include such instruments as are of the same class or kind as those enumerated, such as money, bonds, due bills, and other instruments in writing containing an absolute, unconditional promise or obligation to pay a sum of money or personal property. The same doctrine was reiterated in the late case of *Gundling* v. *City of Chicago*, 176 Ill. 340. The same rule was declared in *Cecil* v. *Green*, 161 Ill. 265, and *Wilson* v. *Sanitary District*, 133 id. 443. See, also, *Sandiman* v. *Beach*, 7 B. & C. 99.

Langdon v. *People*, 133 Ill. 382, has been cited as an authority sustaining appellant's position. There is, however, nothing in that case in conflict with the authorities above cited. There Langdon was indicted for forging the signature of a county judge, under section 114 of division 1 of the Criminal Code, which provides that "every person who shall * * * forge or counterfeit the signature of any public officer * * * shall be imprisoned in the penitentiary," etc., and it was held that the words "other forged instruments" were broad enough to cover a forged certificate of a county judge. But there is a wide difference between an instrument containing the forged signature of a public officer, and trade-marks and labels. A person found guilty of forging the former, under section 114 of division 1 of the Criminal Code, shall be imprisoned in the penitentiary not less than one year nor more than twenty years, but the falsification of the latter articles, under sections 115 and 116, is not forgery but a mere misdemeanor, for which a fine not exceeding $200 may be imposed.

We find no provision of the Criminal Code that the simulation of trade-marks and labels or names and signatures is forgery. They are not of the same class or kind as counterfeit or spurious coin and forged bank notes, and hence they cannot be regarded as forged instruments, within the meaning of the statute. In the

Langdon case the public document had been seized and taken from the possession of the defendant under a search warrant, and the vital question was whether it should be admitted in evidence, and in the decision of the case we held that although papers may be illegally taken from the possession of a party against whom they are offered, it is no objection to their admissibility if they are pertinent to the issue. The court will not take notice of how they were obtained. If, therefore, the statute did not authorize a search warrant for bogus trade-marks, labels, names and signatures, as we are satisfied it did not, the justice of the peace had no jurisdiction to issue a search warrant, and his action was void.

There is another fatal defect in the proceeding. The search warrant issued by the justice directed the officer to diligently search for the goods and chattels, and if the same or any part thereof be found, to bring the same before the justice of the peace, but the warrant nowhere contains a direction that he shall also bring with him the person in whose possession the goods are found. Section 3 of division 8 of the Criminal Code (Hurd's Stat. 1897,) expressly provides that the warrant shall direct the officer "to bring such stolen property or other things, when found, and the person in whose possession they are found, to the judge or justice of the peace who issued the warrant." In Bishop on New Criminal Procedure (sec. 243) the rule is laid down that a search warrant must contain every statutory requirement. In Cooley's Constitutional Limitations (6th ed. 369,) it is said: "The warrant must also command that the goods or other articles to be searched for, if found, together with the party in whose custody they are found, be brought before the magistrate, to the end that upon further examination into the facts the goods, and the party in whose custody they were, may be disposed of according to law." In *State* v. *Leach*, 38 Me. 433, under a statute similar to ours, the Supreme Court of that State held that where

the warrant failed to require the officer to bring before the justice the person in possession of the goods seized, the proceeding was illegal and void. The fact that the person in possession of the articles did appear will not cure the difficulty. In a proceeding of this character, before the premises of the citizen may be invaded and searched, a strict observance of the requirements of the statute must appear from the proceeding itself, otherwise the proceeding will be void. *State* v. *Whalen*, 27 Atl. Rep. (Me.) 349.

It is, however, claimed in the argument that appellee had the right to appeal from the judgment of the justice, and as the right of appeal existed the writ of *certiorari* cannot issue. As no judgment was rendered against appellee his right to appeal might well be doubted. But we shall not stop to consider that question, as this court has held in numerous cases that the common law writ of *certiorari* may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally and no appeal is allowed or other mode provided for reviewing their proceedings. (*People* v. *Wilkinson*, 13 Ill. 660; *Doolittle* v. *Galena and Chicago Union Railroad Co.* 14 id. 381; *Smith* v. *Highway Comrs.* 150 id. 385; *Hyslop* v. *Finch*, 99 id. 171.) In the last case named it is said (p. 184): "There are two classes of cases in which, according to the previous decisions of this court, a common law *certiorari* will lie: First, whenever it is shown that the inferior court or jurisdiction has exceeded its jurisdiction; second, whenever it is shown that the inferior court or jurisdiction has proceeded illegally and no appeal or writ of error will lie."

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CARRIE KINSELLA

v.

IDA CAHN *et al.*

Opinion filed April 17, 1900.

1. PLEADING—*when foreclosure bill by trustee sufficiently indicates his representative character.* A bill to foreclose a trust deed filed by the holder of the notes and the trustee in the deed sufficiently indicates the representative character of the latter, though the word "as" does not precede the word "trustee," where such trustee has no other relation to the suit.

2. WAIVER—*objections to the service of process are waived by general appearance.* Objections to the service of process are waived by general appearance after the overruling of a motion to quash the return, entered under limited appearance.

3. APPEALS AND ERRORS—*when error in allowing item on foreclosure is not available on appeal.* Error in allowing the expense of continuing an abstract as part of the costs on foreclosing a trust deed can not be availed of on appeal, where the defendant made no objection to the item when evidence was offered before the master.

4. DAMAGES—*when damages for prosecuting appeal for delay will not be granted.* Damages for prosecuting an appeal for delay will not be allowed where there is palpable error in the proceedings, against which relief must be denied only because of delay in objecting.

Kinsella v. *Cahn*, 85 Ill. App. 382, affirmed.

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

L. M. ACKLEY, for appellant.

FELSENTHAL, D'ANCONA & FOREMAN, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The circuit court of Cook county entered a decree of foreclosure of a trust deed upon a bill filed by the appellees, Ida Cahn, owner of the notes secured, and Simon

Straus, trustee in said trust deed, against appellant, Carrie Kinsella, and others. The Branch Appellate Court for the First District has affirmed the decree.

The sheriff's return showed service of the summons by leaving a copy thereof with a member of the family, and Carrie Kinsella and other defendants entered a limited appearance and moved the court to quash the return. The grounds of the motion were, that the copy left was not certified to be a copy of the original summons, and that it was not, in point of fact, a copy because it had only a scrawl for a seal, which did not contain the words on the seal impressed on the original. The motion was overruled and the defendants were ruled to plead, answer or demur, after which they entered a full appearance and submitted to the jurisdiction of the court. Not saying that there was any merit in either of the points, we will not consider them because the objections were waived by the subsequent general appearance of the parties.

In commencing their bill, the complainants described themselves as "Ida Cahn and Simon Straus, trustee in the trust deed hereinafter more particularly described." A copy of the trust deed was annexed, and the bill alleged that the complainant Ida Cahn was the legal holder of the notes secured, and that she requested the complainant Simon Straus, trustee as aforesaid, to file a bill to foreclose said trust deed, and therefore he joined with her in filing the bill. It is argued that the decree should be reversed because the word "as" does not appear between "Straus" and "trustee," in the commencement of the bill. Counsel says, in the absence of this word the bill is not filed by the trustee and does not indicate his representative capacity. Where a party occupies two relations to the subject matter, the word is sometimes used to limit the relation or character in which such party appears; but Straus had no relation to the suit except as trustee, and there was no necessity for show-

ing that he did not file the bill in some other relation or by some other right.

It is next contended that the court erred in decreeing the payment of $400 as solicitor's fees provided for in the trust deed, $250 for insurance likewise provided for, and $17.50 for the continuation of an abstract. All of these items were claimed in the bill to be due under the terms of the trust deed and to be secured thereby. Issues were made by answers and referred to a master in chancery. The defendant, who is now alleging this error, appeared before the master and introduced evidence. The complainants offered evidence that the solicitor's fee, which was stipulated for in the trust deed, was the usual, customary and reasonable attorney's fee charged and paid in foreclosure proceedings. They also proved the payment of $258 for insurance premiums and $19.50 for the continuation of an abstract, of which latter sum they claimed $17.50. Receipts for said payments were offered and admitted, and a witness testified to the payments without objection. There was contradictory evidence as to the amount of a reasonable solicitor's fee, but no objection or exception was taken to the master's report as to either item. It is insisted that the trust deed did not authorize the allowance of any solicitor's fee; but the provision was the same as we have held sufficient for that purpose in *Abbott* v. *Stone*, 172 Ill. 634, following *Cheltenham Improvement Co.* v. *Whitehead*, 128 id. 279, and other cases. The same objection is now made respecting the allowance for continuation of the abstract, and this is a good objection if it can now be made. There is no warrant whatever in the trust deed for such an allowance, but we think that the defendant having appeared before the master should have objected to the evidence. It is not necessary to except to a report of a master on a question of law for error apparent on the face of the record, but where parties appear before a master and evidence is offered in support of a claim made in the bill, and there

is no objection, a party should be held to acquiesce in the claim. Under such circumstances the question can not be raised for the first time on appeal. *Jewell* v. *Rock River Paper Co.* 101 Ill. 57; *Singer, Nimick & Co.* v. *Steele*, 125 id. 426.

A motion has been made for an allowance of damages on the ground that the appeal was prosecuted merely for delay. The decree is affirmed for the amount paid for the continuation of an abstract, solely because, under the rules of practice, the appellant is not permitted to raise it. We are not disposed to assess damages against a party for complaining of palpable error where we are compelled to deny relief on account of delay in making the objection.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

ESTELLE SEELEY *et al.*

v.

JESSE H. BALDWIN *et al.*

Opinion filed April 17, 1900.

1. EQUITY—*when equity will not take jurisdiction to construe a deed.* Where only legal titles are involved, equity will not take jurisdiction for the purpose of construing the deed and declaring titles.

2. DEEDS—*evidence of mistake must be clear to warrant reformation.* A deed cannot be reformed in equity after the death of the grantor and the lapse of many years, so as to change the estate granted, except upon clear proof that the alleged mistake was mutual.

3. EVIDENCE—*that grantor wrote deed affords a presumption against mistake.* The fact that the grantor wrote the deed and deliberately employed the words afterwards alleged by the grantee to have been used by mistake, is strong evidence that he intended to grant the character of estate conveyed by the deed.

WRIT OF ERROR to the Circuit Court of Greene county; the Hon. OWEN P. THOMPSON, Judge, presiding.

FRANK A. WHITESIDE, for plaintiffs in error.

HENRY C. WITHERS, and THOMAS HENSHAW, for defendants in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Benjamin Baldwin executed a deed dated February 24, 1858, to the defendant in error Jesse H. Baldwin, for 283¾ acres of land in Greene county, Illinois, conveying the same "unto the said Jesse H. Baldwin and his children, the legal heirs of his body, forever." The said grantee, Jesse H. Baldwin, filed his bill in chancery in the circuit court of said county asking to have the deed construed, and in case the court should so construe the deed that he had any other title than an estate in fee in the lands described therein, alleging that the deed was so made by mistake, and praying that it might be reformed so as to give him such title.

When the deed was made, in 1858, complainant had two children, Leonidas T. Baldwin and Estelle Baldwin, (now Estelle Seeley, one of the plaintiffs in error.) He had been married a second time and afterward had three children, Georgiana M. Ellis, Ida M. Greer and Manford Baldwin. Complainant had mortgaged the lands to Edward T. North to secure a loan of $20,000, and the notes and mortgage had been assigned to Levi T. Whiteside, who had died, leaving Jane Whiteside, his widow, and Etta Griswold, his only child and heir-at-law, owners of the notes and mortgage. The Rosenbaum Bros. Company had recovered a judgment against complainant for $2000. Said children, with their husbands and wives, were made defendants to the bill, together with said owners of the notes and mortgage and judgment creditors. One of the defendants, the son Leonidas T. Baldwin, was insane, and a guardian *ad litem* was appointed for him and filed the usual answer. Manford Baldwin and his wife were de-

faulted, and the rest of the children answered denying that there was any mistake in the deed and setting up *laches*. Jane Whiteside and Etta Griswold answered admitting the averments of the bill except as to the value of the land and the amount of the mortgage indebtedness. After the commencement of the suit the mortgage was foreclosed, and there was due on it something over $13,000. The cause was referred to a master in chancery to take and report the evidence. The court heard the cause upon the evidence so taken, and entered a decree finding that the words used in the deed were so used by mistake, contrary to the terms of purchase and the intent of the grantor, and decreeing that the deed should be reformed and corrected so as to have the force of a conveyance of a fee simple absolute title to complainant.

The facts proved by competent evidence were substantially as follows: Benjamin Baldwin and wife conveyed to his son, the complainant, Jesse H. Baldwin, sixty acres of land and mill property in Warren county, Ohio, as a gift or advancement. In that deed the consideration was expressed as follows: "In consideration of assisting Jesse H. Baldwin (who is my son) to make a living and better his condition in life, have given, and do hereby give, grant and convey to him, the said Jesse H. Baldwin and his heirs forever, the following tract of land and all appurtenances (which is considered worth two thousand dollars.)" Complainant afterward sold said property for $2100, and with that and other means came to this State in 1853 to buy a farm and make a home. The father, Benjamin Baldwin, owned the premises now in question, which were then unbroken prairie and low, wet land. He sold them to complainant at that time for $3700 cash, which was the full market value of the lands. Complainant immediately took possession of the premises and tiled and improved the lands. He has paid all taxes and made valuable and lasting improvements. He built a good brick house on the premises, and out-build-

ings, and has resided on and controlled them ever since. No deed was made at the time of the purchase, in 1853. Benjamin Baldwin was a man of more than ordinary ability, and complainant had perfect confidence in him and awaited his pleasure about a deed. Finally Benjamin Baldwin wrote the deed in question, and, with his wife, signed and acknowledged it and delivered it to the complainant. The deed was his own production, and the words which were alleged to have been a mistake on his part were put in the deed by him. Benjamin Baldwin died in 1864, and his will contained the following provision: "I have given by deed in the State of Ohio land and mill property to my son Jesse H. Baldwin, which he sold and with its proceeds purchased the most of the farm on which he now resides. The land and mill property, together with a piece of land which will be described in item 12 of this will, is all the land that I design to give him to make his share equal." Item 12 of the will devised to complainant eighty acres of land in Greene county, Illinois. On account of the improvements and advance in value of land the lands are now worth over $20,000.

So far as construing the deed is concerned, only legal titles are involved, and equity will not take jurisdiction for the purpose of decreeing what they are. (*Harrison* v. *Owsley*, 172 Ill. 629.) So far as the question of the alleged mistake is concerned, there is no evidence that there was any mistake on the part of the grantor, Benjamin Baldwin. The deed could not be reformed on the ground of mistake, except upon the allegation and clear proof that the mistake was mutual and that the deed did not express the intention of the grantor as well as that of the grantee. (*Emery* v. *Mohler*, 69 Ill. 221.) The fact that the grantor wrote the deed and deliberately employed the words in question is strong evidence that he intended to grant the character of estate conveyed by the deed. There is some other evidence that he did so intend and none that he did not. His will shows that he regarded

this land as in the most part a gift or advancement, because the purchase price came mainly through the Ohio property that he had given complainant. He probably felt that he had some right to limit the estate and expressed his intention in the deed. There is an entire absence of evidence that the grantor did not intend to limit the estate precisely as he did in writing the deed. The fact that the full purchase price of the land was paid would imply that Benjamin Baldwin was to transfer the entire legal title, and if he had not done so there might be an inference of a mistake or fraud on his part, but he did convey the entire title without any reservation or any reversion to him or his heirs. The bill does not allege any fraud on the part of the grantor, and there is no evidence which would justify a finding of that sort. The fact that complainant paid the full purchase price of the property would not be evidence of anything except that the whole title was to be conveyed. Complainant took possession of the premises and has been in such possession for over forty years and has made valuable and lasting improvements, but the title which he had was in entire harmony with these acts. His possession, payment of taxes, making improvements and enjoyment of the rents and profits were incidents of the title actually conveyed by the deed. The finding that the words complained of were inserted in the deed by mistake and contrary to the intention of Benjamin Baldwin is unsupported by anything in the evidence. The deed could not be reformed after the death of the grantor and after such a lapse of time except upon very clear and satisfactory evidence of the alleged mistake, and we do not regard the evidence in this case of that character.

The decree is reversed and the cause remanded to the circuit court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

MARGARET AGNES URE

v.

ROBERT A. URE *et al.*

Opinion filed April 17, 1900.

1. TRUSTS—*Statute of Uses does not apply to personal property.* The title to personal property included in a trust devise of both real and personal property is not affected by the Statute of Uses.

2. SAME—*when trust is not executed by the Statute of Uses.* The Statute of Uses does not execute a trust created by a devise of both real and personal property to a trustee, who is to be the executor of the will and whose duty is to "hold and control" the estate, the income of which is to go to the *cestui que trust* for life and the estate, at his death, "to revert to his natural heirs."

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

L. H. JENNINGS, for plaintiff in error.

GILBERT & RIPLEY, for defendants in error.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The chancellor entered the decree here appealed from on the theory the trust created by the second clause of the will of Margaret Ure, deceased, was a passive or dry trust, and that the Statute of Uses instantly operated to vest the legal title to the real estate in the *cestui que trust.* Whether such is the true construction of the clause is the only question presented by the record. The clause reads as follows:

"*Second*—After the payment of such funeral expenses and debts, I give, devise and bequeath to my son John Francis Ure all my cows, bulls and calves, except one cow and my horses Rosy, Jessie and Doll, and the remainder of my real and personal estate equally to my two sons, Robert Arnold Ure and John Francis Ure: *Provided, however,* that the portion of my estate that I hereby give, devise and bequeath to my son Robert Arnold Ure

shall be held by a trustee, and said trustee to be the executor of this my will hereinafter named, to hold and control said property for said Robert Arnold Ure in trust, he, the said Robert Arnold Ure, to have the income, only, from said estate to his own use and benefit as long as he may live, and on his death said estate to revert to his natural heirs," etc.

The trust estate, as appears from the will, consisted of both real and personal property. The Statute of Uses has no application to personal property, and the title to that portion of the trust property was not affected by that statute. (27 Am. & Eng. Ency. of Law, p. 111, and cases cited in note 1; 3 Jarman on Wills, p. 51, note 2.) Speaking of the rule of construction adopted in some instances when a trust estate consists in part of property the fee whereof necessarily vests in the trustee, it is said in Jarman on Wills, (vol. 3, p. 85, 5th Am. ed.): "It seems that where a will is so expressed as to leave it doubtful whether the testator intended the trustee to take the fee or not, the circumstance that there is included in the same devise other property which necessarily vests in the trustee for the whole of the testator's interest affords a ground for giving the will the same construction as to the estate in question."

The income of the estate, both personal and real, is bequeathed to said Robert Arnold Ure during his lifetime and the remainder in fee devised to his "natural heirs." The trustee is empowered to "hold and control" the property in trust, etc., and these words measure and fix the duties of the trustee. The word "hold," which was a technical word as employed formerly in the tenendum clause of a deed, has now no technical meaning when used in such instruments. (Bouvier's Law Dic. "Tenendum;" *Wheeler* v. *County of Wayne*, 132 Ill. 599.) Among others, the following definitions of the word "hold" are given by Mr. Webster: "To derive title to; to retain in one's keeping; to be in possession of; to occupy; to maintain

authority over." The word "control" has no legal or technical meaning distinct from that given in its popular acceptation. Webster employs the word "superintendence" as expressive of the meaning of the word "control," and gives the word "control" as one of the synonyms of the word "superintendence." The same lexicographer defines the word "superintendence" as follows: "The act of superintending; care and oversight for the purpose of direction and with authority to direct." The word "manage" is defined to mean "to direct; control; govern; administer; oversee;" (Anderson's Law Dic.;) and the words "control" and "manage" have been held to be synonymous. *Youngworth* v. *Jewell*, 15 Nev. 48.

Power to hold and the duty to control the trust estate involve the custody and possession of the trust property, both real and personal, and such a trust is not merely passive. It is not indispensable to the power and duty of a trustee to rent the trust property and collect the rent thereon, the devise shall in express terms so empower him. It is enough if the intent to invest him with such power can be gathered from the will. (3 Jarman on Wills,—5th Am. ed.—p. 56.) It was manifestly the intention of the maker of the will here under consideration, the executor, as trustee, should enter into and retain possession of the trust estate during the lifetime of the said Robert Arnold Ure, and should diligently devote his energy, judgment and discretion to the management and control of the property, to the end that the greatest possible income should be secured therefrom. The Statute of Uses does not execute a trust of this character. *Meacham* v. *Steele*, 93 Ill. 135; *Kirkland* v. *Cox*, 94 id. 400; *Kellogg* v. *Hale*, 108 id. 164.

The decree must be reversed, and the cause will be remanded for further proceedings in accordance with the views here expressed.

Reversed and remanded.

CATHERINE S. SMITH

v.

MARY LYON ROUNTREE.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*when amount involved exceeds $1000 though judgment is for less.* The amount involved exceeds $1000, though the judgment in plaintiff's favor is less than that sum, if the amount of disallowed set-offs which there was evidence tending to prove, added to the amount of the judgment, exceeds $1000.

2. RES JUDICATA—*one pleading former adjudication has the burden of proof.* One relying upon a plea of former adjudication has the burden of showing, by clear and convincing proof, what was determined by the former judgment so relied upon.

3. SAME—*extent to which former judgment is an estoppel.* A former judgment is an estoppel only where it appears from the record or by extrinsic evidence that the precise matter in controversy in the suit at bar was raised and determined in the former proceeding.

4. TAXES—*when payment of taxes is not made under hostile title.* One who holds the legal title by voluntary and unsolicited conveyance from the owner may recover the amount of taxes paid, where such taxes were liens upon the land when paid and no action was at that time pending disputing the grantee's title, though the conveyance to him was afterwards set aside upon a bill filed by the grantor.

Smith v. *Rountree*, 85 Ill. App. 161, affirmed.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Lake county; the Hon. C. H. DONNELLY, Judge, presiding.

This is an action of assumpsit brought by defendant in error against plaintiff in error. The declaration consists of two special counts, each on a note for $100.00 executed by the plaintiff in error to the order of defendant in error, one dated March 1, 1890, and the other July 1, 1890, the former payable in one year from date and the latter on demand. The declaration also contains the common counts for money had and received, for money paid out and expended, and for money due and owing,

for goods, wares, and merchandise sold and delivered, for board, lodging, and nursing, and account stated.

The pleas filed by the plaintiff in error were non-assumpsit; payment; set-off for $2500.00 with common counts; and also former adjudication of the matters now in controversy in and by a decree of the circuit court of Lake county upon a bill filed May 4, 1892, by the plaintiff in error against the defendant in error and others, averring that the defendant in error answered said bill and, in her answer, set up, as a defense, the matters sued on in this case as causes of action; that the parties were and are the same persons, and that final decree passed in favor of plaintiff in error disallowing the claims of defendant in error. On the trial of the case, a stipulation was entered into between the parties, that all the evidence, which could be introduced under the special pleas, might be introduced under the general issue.

By agreement, a jury was waived, and the case was tried before the court without a jury, the plaintiff in error submitting to the court eight propositions to be held as law in the decision of the case. All of these propositions were refused by the court, and marked refused, except the first, which was modified and then held as modified. The court also held as law, in the decision of the case, two propositions submitted by the defendant in error.

On October 21, 1898, in open court, the court found the issues for the plaintiff in the sum of $866.29, being the sum of seven items, one of which was the amount of the principal and interest due upon said notes, and the others of which were for taxes and special assessments paid in February, 1891, and April, 1892.

Plaintiff in error excepted to the finding of the court, and moved to set aside said finding and for a new trial, which motion was denied, and the denial of the same was excepted to. The court thereupon rendered judgment upon the said finding in favor of the plaintiff in error for $866.29.

An appeal was taken from this judgment to the Appellate Court, and the judgment was there affirmed. The present writ of error is sued out for the purpose of reviewing said judgment of affirmance.

W. E. HUGHES, for plaintiff in error.

GEORGE HUNT, for defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—A motion has been made herein to dismiss the writ of error upon the ground that the sum involved is less than $1000.00. No certificate of importance was granted by the judges of the Appellate Court. The judgment of the trial court was for $866.29. The motion to dismiss was reserved to the hearing, and will now be disposed of.

Although the judgment is for less than $1000.00, yet the amount involved is more than $1000.00. The claim of the defendant in error was founded, not only upon the items made up of the amounts due upon the notes and the amounts paid out for taxes and special assessments, but also upon various items consisting of moneys expended for and advanced to plaintiff in error, and for goods, wares, and merchandise sold to her, and for board, lodging, and nursing. The plaintiff in error filed a plea of set-off for $2500.00. It is conceded by the defendant in error, that the plaintiff in error introduced testimony, tending to establish items of set-off amounting to $55.00. We think that there is also testimony, tending fairly to establish another item of set-off than those admitted by the defendant in error, which amounts to $150.00. These items of set off, aggregating about $200.00, when added to the amount of the judgment, $866.29, make the total amount involved more than $1000.00.

The legislature has provided that in all cases determined in the Appellate Court in actions *ex contractu*, wherein the amount involved is less than $1000.00 ex-

clusive of costs, the judgment, order or decree of the Appellate Court shall be final, etc. That provision would be evaded if nothing more is necessary than a mere averment of an amount, without regard to the actual sum in controversy. A plaintiff cannot, by merely alleging in his declaration that a trifling matter is of the value of over $1000.00, or by adding the common counts claiming more than that sum, secure the right of appeal or writ of error, where the amount actually involved may be only a few dollars. Nor can the defendant, by filing a plea of set-off and therein claiming a greater amount than $1000.00, secure a right of appeal or a writ of error, where the amount actually involved is much less than $1000.00. (*Lewis* v. *Shear*, 93 Ill. 121; *McGuirk* v. *Burry*, id. 118). But in the case at bar, although the amount of set-off, which the proof tends to establish, is greatly less than the amount of set-off claimed in the plea, yet, as matter of fact, there is testimony tending to prove items of set-off, aggregating at least $200.00, as above stated.

In *Lake Erie and Western Railroad Co.* v. *Faught*, 129 Ill. 257, we said (p. 260): "Where the defendant not only contests the plaintiff's cause of action, but pleads and gives evidence tending to prove a set-off, and the jury disallow the set-off and give their verdict for the plaintiff, then, if the plaintiff's recovery, added to the amount of the set-off claimed, exceeds $1000.00, it may be held that more than $1000.00 is involved within the meaning of the statute." (*Capen* v. *DeSteiger Glass Co.* 105 Ill. 185; *Moshier* v. *Shear*, 100 id. 469). In the case at bar, the court below, before whom the case was tried without a jury, disallowed the set-off of the plaintiff in error, and gave judgment for the defendant in error; and, inasmuch as the recovery of the defendant in error, added to the amount of the set-off which the evidence tends to prove, exceeds $1000.00, it must be held that more than $1000.00 is involved within the meaning of the statute. Accordingly, the motion to dismiss the writ of error is overruled.

Second—The plaintiff in error, upon the trial below, asked the court to hold as law certain propositions substantially to the effect, that the decree in the chancery litigation between the parties to this suit was an adjudication of the matters here in controversy. In other words, the bill, answer, and decree in said former chancery suit are presented in said propositions as constituting *res judicata*. We are of the opinion, that the defense of former adjudication was not sustained, and that, therefore, the trial court committed no error in refusing to hold as law the propositions submitted upon the subject.

Where a plea of former adjudication is relied upon, the burden of proving such plea is upon the defendant; it must be shown what was determined by the former judgment so relied upon, and such proof must be clear, certain, and convincing. (*Sawyer* v. *Nelson*, 160 Ill. 629; 21 Am. & Eng. Ency. of Law, p. 202). A judgment in a former proceeding is an estoppel only where it appears from the face of the record, or by extrinsic evidence, that the precise matter in controversy in the suit at bar was raised and determined in the proceeding, which is urged as an estoppel. (*Sawyer* v. *Nelson*, *supra*). A judgment in a former proceeding between the same parties only bars subsequent action on matters actually settled by it. The judgment in the chancery suit, here introduced in evidence, could not bar the right of the defendant in error to maintain her present action, unless it appears from said judgment or decree, or by extrinsic evidence, that the particular ground, now urged by the defendant in error for a recovery, was considered and passed upon in such former suit. (*Young* v. *People*, 171 Ill. 299; 21 Am. & Eng. Ency. of Law, p. 203). The estoppel of a judgment extends only to the questions involved in the issue, and not to any incidental matter, though it may have arisen and been passed upon. (*Lewis' Appeal*, 67 Pa. St. 153; *Land* v. *Curran*, 52 Mass. 341). If the former suit was disposed of on grounds which did not decide the merits of the mat-

ter in controversy, it does not bar the present proceeding, unless it appears that the present suit is based upon matters arising out of the same proceeding as that out of which the former suit arose, and that such matters have been fairly adjudicated in such former suit. (21 Am. & Eng. Ency. of Law, p. 266; *Smalley* v. *Edey*, 19 Ill. 207; *Riverside Co.* v. *Townshend*, 120 id. 9; *Cromwell* v. *County of Sac*, 94 U. S. 351).

An application of the foregoing rules to the facts of this case shows conclusively, that the matter here in controversy is not the same as the matter in controversy in the chancery suit, which is relied upon as a former adjudication. The issues involved in the chancery suit may be seen by reference to the case of *Rountree* v. *Smith*, 152 Ill. 493. It appears from the decision in that case, that the plaintiff in error executed certain deeds conveying certain lands to the defendant in error, and a bill was filed by the plaintiff in error to set those deeds aside. They were set aside upon the grounds that they were intended to be, and, in fact, were of the nature of testamentary dispositions, and void under the Statute of Wills; that they were executed in pursuance of a voluntary agreement and with the intention that they should not take effect unless security respecting certain matters was given; and that, inasmuch as the purpose of the plaintiff in error in executing said deeds was to make a voluntary conveyance, she could recede at any time from such purpose, the gift becoming executed only upon the offer and acceptance of the security. The deeds in that case were voluntary on the part of the plaintiff in error, and intended as mere gifts. It was nowhere held in that case, that any consideration had been paid to the plaintiff in error for said deeds. The deeds remained at all times subject to the control and right of revocation of the plaintiff in error, the grantor therein named.

On the contrary, the issue in the present case is as to the amount of indebtedness due from plaintiff in error to

defendant in error for moneys advanced by the latter to the former, and for work and services performed by the latter for the former. No issue was tendered or determined in the chancery suit as to any indebtedness between the parties.

Third—Plaintiff in error complains of the modification of the first proposition, which it submitted to the court below, and of the giving of such proposition as thus modified. The proposition, as given, told the jury that, under the stipulation between the parties, the Statute of Limitations was a defense to all of the demands of the defendant in error proven by the evidence, which accrued prior to October 12, 1890, except the two promissory notes, and that, if the evidence failed to show an express promise on the part of the plaintiff in error, "or facts and circumstances from which a promise may be implied," to pay such demands, or one or more of them since October 12, 1890, the defendant in error must fail in her suit as to each one of said demands other than said notes. The modification, made in the instruction as originally asked, consisted in conditioning the right of the defendant in error to recover upon her showing "facts and circumstances from which a promise may be implied."

Counsel for plaintiff in error invokes the rule, that there can be no ground for supporting the count for money paid, unless the payment is made at the express or implied request of the defendant, and that here there could have been no implied request by Mrs. Smith to Mrs. Rountree for the payment of any of the demands referred to in the instruction. (Chitty's Pl. p. 350; *Briscoe* v. *Power*, 64 Ill. 72). It is a sufficient answer to this contention to say that the instruction as modified refers only to such demands as accrued prior to October 12, 1890; and that the finding of the court, upon which this judgment is based, shows that the items, going to make up that finding, were all for payments made by the defendant in error for the plaintiff in error subsequent to October 12,

1890, that is to say, in 1891 and 1892, within five years before the beginning of this suit, which was begun on October 12, 1895. The proof, however, does show that there was an express request by the plaintiff in error to the defendant in error to pay all the items, upon which the judgment is founded, except one small item of $23.92. It is urged by the plaintiff in error, that the taxes paid in 1892 cannot be recovered because paid in support of a hostile title. The taxes were not paid in support of a hostile title, but they were paid while defendant in error held the title, which had been conveyed to her by the voluntary and unsolicited act of the plaintiff in error. When the payments were made, no action was pending disputing the title of defendant in error. The last payment was made April 28, 1892, and the bill in chancery was not filed until May 4, 1892. The taxes were paid by the defendant in error, and such payment inured to the benefit of plaintiff in error. The taxes were, when paid, liens upon the lands, and were properly paid by defendant in error, inasmuch as the latter then held the title. It is not contended that any of these taxes, so paid by the defendant in error, have been re-paid to her by the plaintiff in error. But it is unnecessary to decide the question whether or not there was an implied request by the plaintiff in error to the defendant in error to pay these taxes, because the instruction complained of, which refers to the subject of an implied promise, refers to the items prior in date to October 12, 1890, and not to the items, upon which the judgment of the court was founded. It is true that the Practice act, which provides for the submission of propositions of law in trials by the court, does not require the court to find any particular facts; nor are the reasons given by the court to sustain its decision any part of its judgment. (*First Nat. Bank* v. *Northwestern Bank*, 152 Ill. 296; 12 Am. & Eng. Ency. of Law, p. 6). But the fact, that the court found particular items and no others to be due to defendant in error, amounted

to an exclusion and rejection of all the other items, about which testimony was introduced. Inasmuch, therefore, as all the evidence in regard to the items which were prior in date to October 12, 1890, was rejected, and not acted upon by the court, the plaintiff in error suffered no injury from the modification of the instruction, whether such modification was correct, as matter of law, or not.

We perceive no substantial error in the judgment of the court below. Accordingly, the judgment of the Appellate Court is affirmed. *Judgment affirmed.*

FRANK H. CLARK

v.

DEWITT C. MALLORY *et al.*

Opinion filed April 17, 1900.

1. CONTRACTS—*contract must be enforced as written, if plain and unambiguous.* When the language employed in a written contract is plain and unequivocal there is no room for construction, and the instrument must be given its legal effect as written, even though the parties may have failed to express their real intention.

2. SAME—*intention of parties to a written contract is to be determined from the contract itself.* The intention of the parties to a written agreement is to be determined from the contract itself, and not from their previous understandings or agreements.

3. RELEASE—*the unconditional release of one joint debtor releases his co-obligor.* A plain, unconditional and unambiguous release of one joint debtor operates in law to discharge the co-obligor, and extrinsic evidence is not admissible to establish a contrary intention not appearing upon the face of the instrument or from the circumstances connected with its execution.

Clark v. *Mallory*, 83 Ill. App. 488, affirmed.

WRIT OF ERROR to the Branch Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. E. F. DUNNE, Judge, presiding.

In the summer of 1888 the firm of H. E. Mallory & Bro., composed at the time of Lucy Ann Mallory and DeWitt C. Mallory, became indebted to the Drovers' National Bank of Chicago. On December 1, 1888, the firm was dissolved, DeWitt C. Mallory retiring, and on March 23, 1889, Lucy Ann Mallory made and executed to the bank, in renewal of an unpaid balance of that indebtedness, a judgment note for $1933.27, signed "H. E. Mallory & Bro., Lucy Ann Mallory." On April 17, 1889, she made a second judgment note to the bank for $3000, and signed the same "Lucy Ann Mallory." These two notes evidenced the total unpaid balance due the bank from the firm of H. E. Mallory & Bro., and neither being paid, they were endorsed, for convenience, to Frank H. Clark. On November 11, 1889, judgment was entered upon the $3000 note, and on June 5, 1890, likewise upon the one for $1933.27. The last judgment, including interest, attorney's fees and costs, amounted to $2225.25. Subsequently, in February, 1896, plaintiff in error filed his creditor's bill, based on this latter judgment, making the defendants in error parties thereto, by which he sought to collect the amount of said judgment from DeWitt C. Mallory. On the hearing the circuit court dismissed the bill for want of equity and on appeal the Appellate Court affirmed the decree, from which judgment of affirmance plaintiff in error prosecutes this writ of error.

E. F. THOMPSON, and PLINY B. SMITH, for plaintiff in error:

A receipt given to one partner in satisfaction of all demands against him will not discharge his co-partners unless so intended. *Ex parte Good*, 5 Ch. Div. 46; 1 Lindley on Partnership, 435.

The technical rule by which a release of one joint debtor is made to operate as a discharge of all, is not to be extended to cases not within the reason and equity of

the rule. *Moore* v. *Stanwood*, 98 Ill. 605; *Parmalee* v. *Lawrence*, 44 id. 405; *Insurance Co.* v. *Preble*, 50 id. 335.

While formerly a more strict and technical rule prevailed, the weight of authority now is, that, although apt and technical words of release are used, if the parties, taking into consideration the circumstances of the case, their relation to each other and considering the instrument as a whole, cannot reasonably be supposed to have intended a release of the whole debt, it will be construed only as an agreement not to charge the party to whom the release is given, and will not be permitted to have the effect of a technical release. *Benton* v. *Mullin*, 61 N. H. 127; *Bonney* v. *Bonney*, 29 Iowa, 448; *McAllister* v. *Sprague*, 34 Me. 296; *Burke* v. *Noble*, 48 Pa. St. 168; *Curley* v. *Taylor*, 6 Johns. Ch. 343; *Couch* v. *Mills*, 21 Wend. 424; *Durrell* v. *Wendall*, 8 N. H. 872; *Thomason* v. *Clark*, 31 Ill. App. 454; *Murphy* v. *Halleran*, 50 Ill. App. 594.

PECK, MILLER & STARR, for defendants in error:

The instrument in question, if it releases one obligor, will operate to release the other joint obligor. *Parmalee* v. *Lawrence*, 44 Ill. 405; *Leland* v. *Winslow*, 128 id. 304; *Rice* v. *Webster*, 18 id. 331; *Benjamin* v. *O'Connell*, 4 Gilm. 536; *Struble* v. *Hake*, 14 Ill. App. 546; *Lovejoy* v. *Murray*, 3 Wall. 1.

The instrument executed by complainant is a plain, absolute, unconditional and unambiguous release of a joint judgment debtor, and cannot be impeached, varied or altered by evidence *aliunde*. *Miltimore* v. *Ferry*, 171 Ill. 225; *Ames* v. *Brooks*, 143 Mass. 344; *McClelland* v. *James*, 33 Iowa, 571; *Glendale Co.* v. *Insurance Co.* 21 Conn. 19.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The point is made and argued that the judgment upon which the creditor's bill of plaintiff in error is based is invalid because taken on a note executed by one of the partners in the firm name after the dissolution of the partnership of H. E. Mallory & Bro. The decisions of

the circuit and Appellate Courts do not seem to have turned upon or to have been influenced by that question, and as the judgment of the Appellate Court will be affirmed upon other grounds it is not necessary for us to consider the point.

It appears from the record that after the taking of judgment by confession on the notes referred to in our statement of the case, plaintiff in error had negotiations with Lucy Ann Mallory, (now Randolph,) through her attorney, looking to a settlement of the indebtedness due on these notes, which resulted in the making of the following instrument or instruments:

"Frank H. Clark, of Chicago, Ill., being the owner of two notes, one dated March 23, 1889, for $1933.27, signed H. E. Mallory & Bro. and Lucy A. Mallory, and also one dated April 17, 1889, for $3000, signed Lucy A. Mallory, and both running to Drovers' National Bank, which notes have each been put into judgment by said Clark, as plaintiff, against Lucy A. Mallory, in the circuit court for the county of Cook, in the State of Illinois, and said plaintiff having agreed upon a settlement of said judgments with said Lucy A. Mallory (now Randolph) so far as her liability thereon is concerned, and by virtue of which settlement she is to be forever released from all liability thereon, both as to damage and costs, the terms of said settlement is as follows: Said Lucy A. is to execute a quit-claim deed of lots 23, 24, block 14, and lot 9, block 5, Rhodes & Clark's subdivision, on Sec. 26 and 27, T. 40, N., R. 12, E., and lot 30, block 4, in A. F. Faucett's subdivision, etc., all in Cook county, Illinois; also N. E. ¼ of N. W. ¼, Sec. 33, T. 82, N., R. 26, W., in Boone county, Iowa, all of said land formerly owned by Herbert E. Mallory at the time of his death, and the interest that said Lucy A. has in said lands she derives through the will of Herbert E. Mallory, her former husband; also, said Lucy is to release to said Clark all claim she has for rent of house and lot 30 above referred to, from J. F. Waugh, present tenant of said lot; also to release to said Clark all claim that she has against A. Tremen & Son, of Omaha, Neb.; also all claim that she has against DeWitt C. Mallory growing out of a partnership between herself and said Mallory in the live stock business, as shown by the company's books now in the hands of A. D. Eddy, attorney, at Chicago, Ill., and she is also to pay said Clark $1500

cash. On the performance on her part of all the foregoing she is to be forever released and freed from all obligation and liability on said judgments and said notes upon which the same was founded, and said Clark agrees to accept the same in full satisfaction from her of all claim, right, title, interest and demand growing out of or founded upon said notes and judgments in any and every way,—said property and money being all that plaintiff has received on said claims in any way, and all that he is to receive, and the same being all that has ever been received by any one on said notes and judgments rendered thereon."

"March 13, 1891.—The settlement of the foregoing matters set forth notes and judgments this day concluded according to the above stated terms, and Mrs. Mallory is hereby released from all further liability on said judgments and notes."

"CHICAGO, *Mch. 13, '91.*

"Received of Mrs. Lucy A. Randolph, deeds, assignments and $1500 in cash in full settlement of all debts and demands, of every name and nature, to me due and owing from her.

FRANK H. CLARK."

"CHICAGO, *Mch. 13, '91.*

"The property assignments and cash this day received in settlement of the foregoing claims against Lucy A. Randolph are all that have been received on account thereof, and we have no further claims against any of her property on account of said indebtedness.

FRANK H. CLARK."

It is contended by the defendants in error that the execution and delivery of these instruments to Mrs. Randolph, releasing her from all further liability on the indebtedness of the firm of H. E. Mallory & Bro., operated, in law, to release her former partner and joint debtor, DeWitt C. Mallory. In reply, plaintiff in error insists it was not the intention of the parties by said instruments to release DeWitt C. Mallory, but that the same were mere personal acquittances or receipts given to Mrs. Randolph. In support of this view, plaintiff in error was permitted to introduce, over objection, his own testimony to the effect that it was not so intended, and a series of letters that passed between himself and Mrs. Randolph's attorney leading up to the execution of the instruments;

also the affidavit of said Lucy Ann Mallory to the same effect. In our opinion this extraneous evidence as to the intention of the parties was clearly incompetent. While courts will uniformly endeavor to ascertain the intentions of the parties in construing a contract between them, and for that purpose will look into the surrounding circumstances at the time the contract was executed if the language of the instrument is ambiguous or its meaning uncertain, still when the language employed is unequivocal, although the parties may have failed to express their real intention, there being no room for construction, the legal effect of the instrument will be enforced as written. Intention of the parties is not to be determined from previous understandings or agreements, but must be ascertained from the instrument itself which they execute as their final agreement, otherwise written evidence of an agreement would amount to nothing.

Referring to the instrument herein set out, Clark, the plaintiff in error, testified that the principal or first writing as above set forth was submitted to him by Mrs. Randolph's attorney, but that he refused to sign it for the reason that he feared by so doing he would also release DeWitt C. Mallory, and that he himself wrote the two short instruments and signed them, and that they represent the only agreement entered into between himself and Mrs. Randolph. It is evident from the language used in the two short writings that they have reference to the matters more fully set out in the first, and were so intended. But, conceding that Clark's statement is true, the instruments which he admits he executed are plain, certain, unambiguous statements that the cash and collaterals received from Mrs. Randolph were "in full settlement of all debts and demands, of every name and nature, to me due and owing from her," and that he had "no further claims against any of her property on account of said indebtedness." It certainly cannot be said that this language is not sufficient to absolutely release Mrs.

Randolph from any further liability to Clark, nor is there any ambiguity or indefiniteness therein to open the door to the introduction of extrinsic evidence to explain Clark's alleged intention not to thereby release DeWitt C. Mallory also. His claimed intention could very easily have been made to appear upon the face of the instrument which he admits he wrote himself, in which case the agreement might, as is now contended, properly have been construed as a covenant not to sue Mrs. Randolph but not affecting the right to further pursue DeWitt C. Mallory. The rule is as announced in the case of *Parmelee* v. *Lawrence*, 44 Ill. 405, "that where the release of one of several obligors *shows upon its face* and in connection with the surrounding circumstances that it was the intention of the parties not to release the co-obligors, such intention, as in the case of other written contracts, shall be carried out, and to that end the instrument shall be construed as a covenant not to sue." Here no such intention appears upon the face of the instrument or from the circumstances connected with its execution.

Another circumstance seems to strongly oppose the contention of plaintiff in error. It appears from his own testimony that at the time he executed the foregoing writings releasing Mrs. Randolph from further liability he delivered to her attorney the note which forms the basis of this suit. Had he not intended to release her joint debtor also, he would have retained the note for further use in a proceeding against DeWitt C. Mallory.

We think the instrument which plaintiff in error admits he executed is a plain, absolute, unconditional and unambiguous release of a joint debtor, which cannot be impeached, varied or altered by evidence *aliunde*, and being such, operates in law to discharge the co-obligor. *Parmelee* v. *Lawrence, supra; Winslow* v. *Leland*, 128 id. 304.

For the reasons indicated the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

C. FIGGE

v.

FRANK S. ROWLEN *et al.*

Opinion filed April 17, 1900.

1. JURISDICTION—*when findings of court as to jurisdictional facts are conclusive against collateral attack.* The findings of a court of general jurisdiction as to jurisdictional facts necessary to constitute service by publication are conclusive against collateral attack, unless such findings are irreconcilable with facts otherwise disclosed by the record.

2. SAME—*it is presumed evidence was heard to support the findings of jurisdictional facts.* In aid of findings of jurisdictional facts and of any apparent conflict in the record it will be presumed, in a collateral proceeding, that evidence was heard in the court below to support such findings, in cases where it would be competent to receive such evidence.

3. SAME—*effect of failure of foreign notary's certificate to show authority to administer oaths.* A decree canceling a mortgage as a cloud on title is not open to collateral attack because the certificate of the foreign notary to the affidavit of defendant's non-residence fails to state that he had authority to administer oaths, where the court found and recited in the decree that it appeared from the affidavit that defendant was a non-resident.

4. SAME—*when evidence on which court acted in holding affidavit good need not be preserved.* It is not necessary, upon collateral attack, that the evidence upon which the court acted in judicially determining that a certain instrument in writing was an affidavit within the legal meaning of that word, should be preserved in the record by bill of exceptions.

5. SAME—*error in exercising jurisdiction is not basis for collateral attack.* Where a court has jurisdiction of a particular class of cases it has power to determine whether the case disclosed by the bill entitles the complainant to relief of that character; and that the court falls into error in exercising its jurisdiction cannot be urged in a collateral proceeding to impeach the decree.

6. SAME—*effect of failure of bill to remove cloud to allege possession or vacancy.* That a bill to cancel a mortgage as a cloud on title fails to allege that the complainant is in possession or that the property is vacant and unoccupied is not ground for impeaching the decree in a collateral proceeding.

MAGRUDER, J., dissenting.

Figge v. *Rowlen*, 84 Ill. App. 238, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Saline county; the Hon. A. K. VICKERS, Judge, presiding.

CHOISSER, WHITLEY & CHOISSER, for appellant:

Each affidavit of non-residence introduced in evidence purports to be sworn to before a notary public in Allen county, Ohio, and in neither case does the notary public certify that he is authorized, under the laws of that State, to administer oaths. These affidavits are nullities. *Smith* v. *Lyons*, 80 Ill. 600; *Keefer* v. *Mason*, 36 id. 406; 2 Starr & Cur. Stat. sec. 6, p. 2825; *Ferris* v. *Bank*, 158 Ill. 237.

Statutes providing for giving notice by publication must be strictly followed in order to confer jurisdiction. Where the statute requires that the affidavit be filed before the publication of notice, the requirement is jurisdictional, and a judgment founded on a publication without such filing is void. 16 Am. & Eng. Ency. of Law, 817.

Where an affidavit of the non-residence of the defendant fails to comply with the statute the court acquires no jurisdiction over the person of the defendant, and a decree rendered against him is void. *Hartung* v. *Hartung*, 8 Ill. App. 156; *Campbell* v. *McCahan*, 41 Ill. 45.

The supposed affidavits in these cases stand as though they had not been sworn to before any officer. Where the affidavit of non-residence of defendants in chancery, upon which notice of publication is based, was not sworn to before any officer it is no affidavit, and gives no authority to the court to enter an order of publication. *McDermaid* v. *Russell*, 41 Ill. 489.

Where a summons is not issued for non-resident defendants, which is part of the statutory requirements, the court acquires no jurisdiction and all its proceedings are void. *McDaniel* v. *Correll*, 19 Ill. 226.

No publication is authorized until proper affidavit of non-residence is filed. 1 Starr & Cur. Stat. sec. 12, p. 568.

To give a court of equity jurisdiction of a bill solely to quiet title or to remove a cloud from title, the complainant must allege and prove possession of the premises or that they are unimproved and unoccupied. *Gage* v. *Parker*, 103 Ill. 529; *Hardin* v. *Jones*, 86 id. 313; *Oakley* v. *Hurlbut*, 100 id. 204; *Gage* v. *Abbott*, 99 id. 366; *Glos* v. *Randolph*, 133 id. 197; *Pratt* v. *Kendig*, 128 id. 302; *Robinson* v. *Wheeler*, 162 id. 566.

A judgment or decree rendered by a court which fails to acquire jurisdiction of either the person or the subject matter is so utterly void that it may be treated as a nullity at all times and under all circumstances. *Campbell* v. *McCahan*, 41 Ill. 45; *Morris* v. *Hogle*, 37 id. 150; *Harvey* v. *Drew*, 82 id. 606; *Johnson* v. *Johnson*, 30 id. 215.

R. S. MARSH, for appellees:

In collateral attacks it must be presumed that the pleadings and evidence were sufficient to sustain the finding and decree of the court. *Harris* v. *Lester*, 80 Ill. 307; *Barnett* v. *Wolf*, 70 id. 76; *Hertig* v. *People*, 159 id. 242.

A trial court has power to hear extrinsic evidence as to any defect in its process, and such evidence need not be preserved in the record. *Timmerman* v. *Phelps*, 27 Ill. 496; *Banks* v. *Banks*, 31 id. 164; *Moore* v. *Neil*, 39 id. 261.

Though one of the jurisdictional papers in a suit may appear defective when attacked collaterally, yet if it is a paper that is subject to amendment, and the defect could be cured by amendment, the court will presume that it was amended. *Booth* v. *Rees*, 26 Ill. 46.

In bills to quiet title it is only necessary to allege facts that show that a court of equity has jurisdiction and a court of law has not. *Gage* v. *Abbott*, 99 Ill. 367; *Pratt* v. *Kendig*, 128 id. 302.

A bill to remove a cloud from title on account of fraud need not allege the complainant is in the possession of the land or that it is unoccupied. *Booth* v. *Wiley*, 102 Ill. 113; *Phillips* v. *Kesterson*, 154 id. 572.

Mr. JUSTICE BOGGS delivered the opinion of the court:

On the hearing of the issues formed under a bill in chancery filed by the appellant, against appellees, to foreclose a mortgage on certain real estate in Saline county, the appellees, over the objection of the appellant, were permitted to introduce in evidence a decree entered in the circuit court of Saline county in a certain proceeding in chancery wherein the appellant was defendant and the grantor of appellee Fenwick was complainant, setting aside and declaring null and void the said mortgage sought by the appellant to be foreclosed herein and canceling the same as a cloud upon the true title to said real estate. If the ruling of the court as to the admissibility of such decree in evidence was correct, it is conceded the judgment of the Appellate Court here appealed from, affirming the decree entered by the circuit court dismissing the appellant's bill for foreclosure, should be affirmed by this court.

The grounds of objection to the admissibility of the decree in evidence are, that the court which rendered it did not have jurisdiction of the subject matter of the proceeding or of the person of the defendant thereto. Jurisdiction of the person of the defendant to the proceeding was assumed on the theory the defendant was a non-resident of the State of Illinois and had been duly notified by publication, as required by the statute in such instances. The decree recited it appeared "to the court, from the affidavit on file, that said defendant is not a resident of the State of Illinois, and that his place of residence is not known and on due inquiry cannot be found." The appellant offered in evidence the files in the cause wherein the decree in question was rendered, including an instrument filed by the complainant in the cause as an affidavit of the non-residence of the defendant therein, the appellant here. As to this instrument counsel for appellant, in their brief, say: "The affidavit

of non-residence is wholly void. It was sworn to before a notary public in Allen county, Ohio, and the notary does not state in his certificate that he is authorized, under the laws of the State of Ohio, to administer oaths."

The power to administer an oath is not incidental to the office of notary public. If possessed by a notary it is by force of the enactments of the State under which he holds his commission. (*Trevor* v. *Colgate*, 181 Ill. 129.) The enactments of a sister State may be proven by printed statute books purporting to be printed under the authority of such State, (Rev. Stat. sec. 10, chap. 51, entitled "Evidence and Depositions,") and the true meaning or construction of the statute of a foreign State, as declared by the courts of last resort of such State, may be proven by books of reports of decisions of such courts purporting to be published by authority, (chap. 51, sec. 12,) or by the testimony of witnesses learned in the law of such State. *Hoes* v. *VanAlstyne*, 20 Ill. 202.

The court found and recited in its decree that it appeared from an affidavit on file the defendant was not a resident of the State, etc. An affidavit is a declaration in writing signed by an affiant and sworn to by such affiant before some person who has lawful authority to administer oaths. (*Harris* v. *Lester*, 80 Ill. 307.) The finding of the court therefore involved consideration and judicial determination of the question of the authority of the notary public to administer the oath to the affiant. The decree was rendered by a court of general jurisdiction and the attack upon it is made in a collateral proceeding. In such instances, in the absence of proof to the contrary, nothing is presumed to be outside the jurisdiction of the court which rendered the decree. (*Swearengen* v. *Gulick*, 67 Ill. 208.) Service by publication was relied on to acquire jurisdiction of the person of the defendant in that proceeding. In determining as to the existence of facts necessary to constitute service by publication the court had lawful power to receive parol or

documentary testimony. (*Botsford* v. *O'Conner*, 57 Ill. 72; *Barnett* v. *Wolf*, 70 id. 76; *Swift* v. *Yanaway*, 153 id. 197; *Bickerdike* v. *Allen*, 157 id. 95; *Reedy* v. *Camfield*, 159 id. 254.) It is not necessary, in answer to a collateral attack, testimony received for that purpose should be preserved in the record, for the reason the legal presumptions arise in aid of the jurisdiction of the court that competent evidence was produced to warrant the finding the instrument in question was an affidavit, within the legal meaning of that word. (*Bickerdike* v. *Allen*, *supra*; *Reedy* v. *Camfield*, *supra*.) The rule to be deduced from the decisions of this court on the point is, that the findings of a court of general jurisdiction as to jurisdictional facts necessary to constitute service by publication are conclusive as against collateral attack unless such findings are irreconcilable with facts otherwise disclosed by the record, and that in aid of such finding and in aid of any apparent conflict in the record it will be presumed evidence was heard to support the finding in all cases where it is competent to receive evidence for that purpose.

The bill on which the decree here assailed is founded, prayed a decree canceling the mortgage which appellant in this proceeding seeks to foreclose, as a cloud on the title of the complainant in the bill, but it was not averred in the bill that the complainant had possession of the land or that it was vacant and unimproved. We have repeatedly held it is essential to the right of a complainant to maintain a proceeding in chancery to remove a cloud on the title to real estate, that it should be alleged in the bill and proved upon a hearing the complainant had possession of the land or that it was vacant and unoccupied. The appellant insists that in view of these holdings and of the lack of averment in the bill upon which the decree is founded, the court was lacking in jurisdiction of the subject matter to render the decree.

The jurisdiction of courts of equity to remove a cloud from title to real estate is of common law origin. (2 Am.

& Eng. Ency. of Law, 309.) Jurisdiction of the subject matter of a proceeding is conferred by law. The power to decide any particular case of the subject matter whereof the court has jurisdiction is conferred by the pleading. If the court has jurisdiction of the subject matter of a real cause of the character of the one attempted to be set forth in the pleading, it has jurisdiction of the subject matter of the controversy and judicial power to determine whether the case made by the pleadings is one within its jurisdiction. In *Bostwick* v. *Skinner*, 80 Ill. 147, we quoted with approval the remarks of Mr. Justice Allen in *Cox* v. *Thomas*, 9 Gratt. 323, as follows (p. 153): "The only question would seem to be whether the subject matter was within the jurisdiction of the court. If it was,—if the jurisdiction of the court extended over that class of cases,—it was the province of the court to determine for itself whether the particular case was one within its jurisdiction." In *People* v. *Seelye*, 146 Ill. 189, we said (p. 221): "If a court has jurisdiction of the subject matter and the parties, it is altogether immaterial, where its judgment is collaterally called in question, how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. * * * The court is invested with power to determine the rights of the parties, and no irregularity or error in the execution of the power can prevent the judgment, while it stands unreversed, from disposing of such rights as fall within the legitimate scope of its adjudication." The author of the article entitled "Jurisdiction," in 12 Encyclopedia of Pleading and Practice, (p. 129,) remarks: "But as a general proposition, jurisdiction of the subject matter is conferred by law, and does not rest upon averments in pleadings nor is affected by error in sustaining a pleading, and if the pleadings contain sufficient matter to challenge the attention of the court, and such a case is thereby presented as to authorize the court to delib-

erate and act, it is sufficient for the purpose of conferring jurisdiction."

The circuit court of Saline county, in chancery sitting, had jurisdiction of the subject matter of the proceeding in which the decree in question was rendered,—that is, it had jurisdiction of that class of cases wherein decrees may be lawfully rendered removing clouds from titles. It had jurisdiction and power to judicially consider and determine whether the case as disclosed by the bill entitled the complainant in the bill to relief of that character. That it fell into error in the exercise of its jurisdiction and power could not operate to deprive it of jurisdiction to act. An error in the exercise of jurisdiction cannot be urged to impeach its decree in a collateral proceeding. Having complete jurisdiction of the persons and of the subject matter it was clothed with lawful power to act, and its action, however erroneous, must be regarded as valid and binding in every collateral proceeding. (*Hobson* v. *Ewan*, 62 Ill. 146; *Wenner* v. *Thornton*, 98 id. 156.) "When jurisdiction has once attached, the court has a right to decide every question arising in the case, and errors of judgment or irregularities, however gross, which do not render the judgment absolutely void, are not available on collateral attack, but the judgment is valid until reversed or vacated by direct proceeding." 12 Ency. of Pl. & Pr. 197.

The judgment of the Appellate Court must be and is affirmed.

Judgment affirmed.

Mr. JUSTICE MAGRUDER, dissenting:

The decree in the former suit was not binding on the defendant, because he was served only by publication; there was no personal service. A man cannot be deprived of his property under the United States constitution, without due process of law. Service by mere publication, in such a case as is shown here, is not due process of law. (*Pennoyer* v. *Neff*, 95 U. S. 714).

HUGH McFARLANE *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. VIADUCTS—*a roadway is part of the approach to a viaduct.* The approaches to a viaduct include the retaining walls, filling and surface of the roadway, together with such improvements of the roadway as are necessary to make it suitable for the use for which it was intended.

2. SPECIAL ASSESSMENTS—*when abutting owners cannot be assessed for paving approaches to viaduct.* Under an ordinance requiring a railroad company, as a condition to granting permission to lay tracks, to pay the cost of constructing a viaduct "with all proper lateral and other approaches necessary thereto," and to keep the same in repair, the railroad company, and not the abutting owners, must bear the expense of paving the roadway of such approaches.

3. SAME—*whether ordinance is reasonable or not is a question for the court.* The reasonableness or unreasonableness of an improvement ordinance is a question to be determined by the court with regard to all the existing circumstances or contemporaneous conditions, the object sought to be attained and the necessity or want of necessity for its adoption.

4. SAME—*when an ordinance for brick pavement is unreasonable.* An ordinance for brick pavement is unreasonable as to a portion of the street at the end of the improvement which has a cedar-block pavement only four years old and in good condition, where it is not shown that the brick pavement is necessary in the particular locality, and other portions of the block pavement have been excepted from the improvement by the ordinance without explanation.

APPEAL from the County Court of Cook county; the Hon. O. H. GILMORE, Judge, presiding.

This is an appeal from a judgment of confirmation of a special assessment entered by the county court of Cook county, in favor of the city of Chicago and against lots 1, 2, 3, 4, 5, 10 and 11 and the east half of lot 12, in the subdivision of block 55, except the south-east quarter, in school section addition to Chicago, the property of Hugh McFarlane; and lot 4, (except street,) and that part

of lot 3 lying west of Canal street, in block 35, in canal trustees' subdivision of the west half and so much of the south-east quarter as lies west of the south branch of the Chicago river, in section 21, township 39, north, range 14, the property of William O. Tegtmeyer, for the curbing, grading and paving with vitrified brick, and plastering curb walls, of certain parts of South Canal street, from the south line of the street railway right of way of West Harrison street south to a line parallel with and one hundred and eighty feet south-easterly of the south-easterly line of Lumber street, in the city of Chicago. The ordinance for the improvement was passed by the city council of the city of Chicago on the 22d day of May, 1899. The petition was filed for the special assessment in the county court of Cook county on the 17th day of June, 1899, and a hearing had by the court on the 26th and 27th days of September, 1899.

The ordinance for the said improvement, between the points above referred to, excepted certain portions of the street, viz.: The east half of the roadway of South Canal street from the south line of the street railway right of way on West Harrison street to the north curb line of Polk street, and the east half of the roadway of South Canal street from the north line of West Twelfth place to the south line of West Thirteenth street, and the roadway of South Canal street from a line parallel with and sixty feet south of the south line of West Fifteenth street to the north line of West Sixteenth street.

The property of appellant Hugh McFarlane is located at the south-west corner of Harrison and Canal streets, part of it, viz., lots 1, 2, 3, 4 and 5, fronting east on Canal street on the line of the proposed improvement, and was assessed $729.75. Running east on Harrison street across Canal street is a viaduct, which crosses the tracks of the Chicago, Burlington and Quincy railroad and connects with the bridge over the river to the down-town portion of the city of Chicago. There is an approach to this via-

duct on Canal street to Harrison street, immediately in front of McFarlane's property. This approach forms a part of the street, and in front of his property the grade of the street is twelve feet above the surface of the surrounding ground. This approach on Canal street extends south gradually from the viaduct at West Harrison street for a distance of three hundred feet, when the natural surface of the street is again reached. The pavement proposed by the ordinance, when it comes to this point on Canal street, is to be laid on the approach to the Harrison street viaduct. Where Canal street intersects Polk street there is another viaduct extending easterly on Polk street, across the tracks of the Chicago, Burlington and Quincy railroad, easterly to a bridge over the Chicago river, which also connects with the down-town district. To this viaduct there is also an approach on Canal street, both north and south of Polk street, running up to Polk street to meet the grade of the viaduct, which is of a similar nature to the approach above referred to, at Harrison street. These approaches, both north and south of Polk street, are each about three hundred feet long, and at the grade of the viaduct have an elevation of about twelve feet, then slope gradually to the north and south on Canal street this distance of about three hundred feet, where the ground grade of the street is again reached. The proposed improvement provides for the paving of these approaches on Canal street, as well as the approach on the corner of Harrison and Canal streets. These approaches are filled in with dirt, and are held in place by retaining walls built on each side of the roadway, made of large blocks of rubble limestone, which hold the entire weight of the fill between them, upon which fill the present roadway now exists. This roadway is to be graded and then paved with brick. Both of these viaducts and their approaches were built in the year 1881. The viaduct and approaches over Polk street were built under an ordinance granted by the city of Chicago to the Chi-

cago, Burlington and Quincy Railroad Company, which was passed by the city council on the 20th of December, 1880, which authorized the railway company to construct the viaduct and approaches under certain conditions, and provided in section 3 as follows:

"Sec. 3. The permission and authority hereby granted are upon the express conditions that the said railroad company shall pay, or cause to be paid, to the city of Chicago the cost and expense of constructing and erecting a new viaduct on Polk street over the railroad tracks crossing said street, between Canal street and the Polk street bridge, together with all proper lateral and other approaches necessary thereto, the money necessary therefor to be paid by said company, as aforesaid, as fast as required by the city in paying for the construction of the said viaduct and the lateral and other approaches thereto, and shall maintain and keep the same in repair without expense or cost to the city of Chicago, such construction, maintaining and keeping in repair to be done pursuant to the direction of the city council, under the supervision of the commissioner of public works; and the permission and authority hereby granted are upon the further express condition that the said railroad company shall pay to the city of Chicago the expense of constructing, erecting, maintaining and keeping in repair viaducts over any of its tracks on any street or streets crossed by its tracks, except said Polk street above provided for, with proper approaches thereto, as the city council may from time to time require: *Provided, however*, that when any such viaduct, except said Polk street viaduct above provided for, cannot be constructed across the tracks of said railroad company without crossing the track or tracks of some other railroad company or companies, the said Chicago, Burlington and Quincy Railroad Company shall only be obliged to join such other railroad company or companies in paying the expense of erecting, constructing, maintaining and keeping in

repair such viaduct and approaches, and to pay its fair proportion of such expense as between it and such other company or companies; and if such other railroad company or companies shall not join said Chicago, Burlington and Quincy Railroad Company in paying said expenses, then, when the proportion of said other company or companies shall be otherwise provided, the said Chicago, Burlington and Quincy Railroad Company shall pay what would be its fair proportion of said expense in case such other company or companies should join with it in the payment of said expense as aforesaid. Said viaduct or viaducts, and approaches thereto, to be constructed according to the plans and specifications of the department of public works. Said Chicago, Burlington and Quincy Railroad Company shall furnish sufficient outlets for the private property bounded by Harrison, Twelfth, Beach streets and the south branch of the Chicago river."

South Canal street, from Lumber street to the river, on the side of the property of William O. Tegtmeyer, as appears from the record, is now paved with a cedar-block pavement, in good condition, having been laid only about four years. His assessment was $750. The court confirmed the assessment against McFarlane and Tegtmeyer, and they have appealed to this court and ask a reversal of the judgment.

SMOOT & EYER, and LACKNER, BUTZ & MILLER, for appellants.

CHARLES M. WALKER, Corporation Counsel, and ARMAND F. TEEFY, for appellee.

Per CURIAM: It is first contended that the court erred in holding that the property of appellants should be assessed for the paving of the approaches to the Polk street and Harrison street viaducts. The evidence shows that within the limits of the improvement provided by

the ordinance there are three approaches leading to the viaducts on Canal street, which extend east and west on streets intersecting Canal street. One of the approaches is at the north end of the improvement on Canal street and leads up to the viaduct on Harrison street; the other two approaches lead up to the viaduct on Polk street. These approaches are each about three hundred feet long. They are the full width of the pavement, and are supported by retaining walls of stone masonry, making about nine hundred lineal feet of pavement upon the approaches for which appellants insist they should not be assessed.

Section 1 of the foregoing ordinance of the city of Chicago, passed December 20, 1880, granted permission to the Chicago, Burlington and Quincy Railroad Company to construct tracks between West Harrison street and West Twelfth street. By section 3 of this ordinance the privileges granted by section 1 were "upon the express conditions that the said railroad company shall pay, or cause to be paid, to the city of Chicago the cost and expense of constructing and erecting a new viaduct on Polk street over the railroad tracks crossing said street, between Canal street and the Polk street bridge, together with all proper lateral and other approaches necessary thereto, the money necessary therefor to be paid by said company, as aforesaid, as fast as required by the city in paying for the construction of said viaduct and the lateral and other approaches thereto, *and shall maintain and keep the same in repair* without expense or cost to the city of Chicago, such construction, maintaining and keeping in repair to be done pursuant to the direction of the city council." It was further provided in this section that "the permission and authority hereby granted are upon the further express condition that the said railroad company shall pay to the city of Chicago the expense of constructing, erecting, maintaining and keeping in repair viaducts over any of its tracks on any street or streets

crossed by its tracks, except said Polk street above provided for, with proper approaches thereto, as the city council may from time to time require." There was also a further proviso that when any such viaducts could not be constructed across the tracks of said railroad company without crossing the track or tracks of some other railroad company, the Chicago, Burlington and Quincy Railroad Company should only be obliged to join such other railroad company in paying the expense of erecting, constructing, maintaining and keeping in repair such viaducts and its approaches, which were to be constructed according to the plans and specifications of the department of public works. In other words, in consideration that the railroad company should construct, maintain and keep in repair these viaducts and approaches the city council granted to the Chicago, Burlington and Quincy Railroad Company the right to lay its tracks in certain places named in the ordinance. The object of the city was to protect itself from erecting or maintaining these viaducts and approaches by reason of the concessions granted to the railroad. The evidence tends to show the viaducts and approaches were constructed in 1881, and paved with cedar blocks by the railroad company at that time. The word "approaches" must be held to include the retaining walls, the filling with dirt, and the paving and roadway, suitable for the use for which it was intended. This construction of the ordinance is further sustained by the fact that when the approaches were first constructed the pavement was not made by the property owners, but by the railroad company. The ordinance says the railroad company *shall maintain and keep in repair the approaches*,—not some particular portion thereof, but the whole structure, and without expense or cost to the city of Chicago. As counsel for appellants suggest, just as the word "bridge" would include the floor or roadway, so "approach" must include the pavement and roadway thereof.

The case of *Hayes* v. *New York Central and Hudson River Railway Co.* 9 Hun, (16 N. Y. Sup.) 63, seems to be in point. There an action was brought by Thomas Hayes against the New York Central and Hudson River Railway Company for injuries received by him by being thrown from his wagon on the north approach of the bridge crossing the defendant's tracks at West Albany. Upon condition that the railroad company would maintain the bridge, permission had been given to construct this bridge over the crossing at West Albany, and the bridge was constructed and maintained by the defendant. There were approaches to the ends of the bridge, which sloped up to them, and the surface of one of these approaches was out of repair, because of which plaintiff was injured. It was contended by the railroad company that the obligation to construct and maintain the bridge did not include the maintenance of the approaches, but the court held that the approaches were a necessary part of the bridge; that the railroad company could hardly be permitted to erect a bridge and not construct the means of reaching it, and that in undertaking to build the bridge they undertook to make it accessible, and that what they undertook to construct they should maintain in repair. It was further contended by the railroad company, that even though they might be obliged to maintain the approaches, the maintenance did not apply to the surface of the roadway, and that this should be kept in order by the commissioner of highways; but the court, following the case of *North Staffordshire Railway Co.* v. *Dale*, 8 E. & B. 836, held that maintaining the bridge included not only the substructure and the support of the approaches, but the roadway as well.

In the case of *North Staffordshire Railway Co.* v. *Dale*, 8 E. & B. (92 Eng. C. L.) 836, above referred to, the same question arose. In that case a railroad company had carried a road over the railway by a bridge and had

constructed approaches of earth, with embankments to support the same. The depth of the earthwork and embankment, measuring from the surface of the former road, was about fifteen feet on one side of the bridge and about twenty-one feet on the other. The bridge and the approaches were constructed pursuant to a special statute, and pursuant to this statute notice was given to the railway company to put the bridge and approaches in good condition and repair. The order was not complied with, and the question arose as to whether or not the railway company, under this particular act, was obligated by law to maintain in repair the whole of said road, or what part thereof. The phrase of the statute which imposed the duty upon the railway company is, that "such bridge, with the immediate approaches, and all other necessary work connected therewith, shall be constructed and at all times thereafter maintained at the expense of the company." Lord Campbell, C. J., says that it is clear that this section creates the obligation for which the respondent contends: "I cannot imagine language more conclusively creating an obligation. What is to be done in the first instance? It is said that the act distinguishes between a structure and a superstructure, but, clearly, the obligation which it imposes is not discharged by merely putting in arches. The work must be completed so as to be fit for the passage of carriages. Till then the act is not complied with. * * * But when constructed it is to be maintained, and the road as well as the superstructure was to be made. There is no inconvenience. On the contrary, the inconvenience would be the other way if different bodies had to maintain the bridge and the road."

Under the ordinance granting permission to the Chicago, Burlington and Quincy Railroad Company to construct tracks between West Harrison and West Twelfth streets on the express conditions that the railroad company should pay the expense of constructing and erect-

ing the viaduct on Polk street, with all proper laterals and approaches necessary thereto, and all viaducts over its tracks, *and of maintaining and keeping in repair such viaducts and approaches*, it was the duty of that railway company, or other railroads, as provided in the ordinance, to pave the approaches on Canal street to the Polk street and Harrison street viaducts, and it was error to assess the appellants' property for the paving of these approaches, as held by this court in *Cummings* v. *City of Chicago*, 144 Ill. 563.

It is also urged that the ordinance for the improvement is unreasonable, oppressive and void, for the reason that it provides for re-paving with brick that portion of South Canal street between the south-easterly line of Lumber street and the south branch of the Chicago river, now well and sufficiently paved. It appears from the record that that portion of South Canal street between the south-easterly line of Lumber street and a point one hundred and eighty feet south-easterly of that line is that portion of South Canal street lying between the south-easterly line of Lumber street and the river, and embraces the whole Canal street frontage of appellant Tegtmeyer's property. It also appears that portion of South Canal street is now paved with a cedar-block pavement, and is in very good condition, being put down about four years ago; that Tegtmeyer's property is not accessible from South Canal street on account of the approach to the bridge; that access to his property is wholly from Lumber street. It further appears that another portion of South Canal street—a viaduct—within the limits of this improvement, and extending about a block and a half, paved with wooden-block pavement, is omitted from the proposed improvement by the ordinance in question. Why it is excepted does not appear. The one hundred and eighty feet from Lumber street to the river, to which appellant Tegtmeyer objects, is the south end of the proposed pavement. It is not denied but that this cedar-block pave-

ment along the frontage of Tegtmeyer's property was in good condition when the ordinance was passed and at the time of the trial. Is it not unreasonable to compel him to pay for a brick pavement when there is a good pavement along the frontage of his property, which has been in use only about four years, and when it appears another piece of block pavement within the limits of the improvement is omitted? There is nothing in the evidence showing that a brick pavement is required in this particular locality, or that it is a better pavement than block pavement, or that the block pavement is in bad condition.

It appears to us that the ordinance in this case imposes an unreasonable burden on appellant Tegtmeyer, by compelling him to pay for a brick pavement when there is a good cedar-block pavement, which has only been laid about four years and is in good condition. In the case of *Hawes* v. *City of Chicago*, 158 Ill. 653, this court reversed a judgment of the county court of Cook county confirming a special assessment which provided for the laying of a cement sidewalk, because the owner of the property, about six months before, had put down a plank sidewalk in accordance with an order of the common council of the city of Chicago, and which was shown to be in good condition at the time of the passage of the ordinance for the cement sidewalk. We there said (p. 657): "An ordinance must be reasonable, and if it is unreasonable, unjust and oppressive the courts will hold it invalid and void. (*City of Chicago* v. *Rumpff*, 45 Ill. 90; *Tugman* v. *City of Chicago*, 78 id. 405.) The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.—*Toledo, Wabash and Western Railway Co.* v. *City of Jacksonville*, 67 Ill. 37; *City of Lake View* v. *Tate*, 130 id. 247; 1 Dillon on Mun. Corp. sec. 327." So

far as the ordinance affects the property of Tegtmeyer it is unreasonable and oppressive, and consequently void.

The judgment of confirmation as to the property of appellants, Hugh McFarlane and William O. Tegtmeyer, will be reversed and the cause will be remanded.

Reversed and remanded.

DAVID AYERS *et al.*

v.

THE CITY OF CHICAGO.*

Opinion filed April 17, 1900.

This case is controlled by the decisions in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Hurlbut* v. *City of Chicago*, 184 id. 455.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: In these cases judgments were entered confirming special assessments to pay for grading, paving and curbing certain streets in the city of Chicago. In each case the ordinance providing for the improvement is subject to the same objection as the ordinance passed upon in *Lusk* v. *City of Chicago*, 176 Ill. 207. Upon the authority of that case and *Hurlbut* v. *City of Chicago*, 184 Ill. 455, the judgments herein are reversed and the causes remanded.

Reversed and remanded.

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*With this case are determined Nos. 948, *Adam* v. *City of Chicago*, and 956, *Bass* v. *Same*.

DAVID E. TOWN

v.

BELLE E. ALEXANDER *et al.*

Opinion filed April 17, 1900.

1. DAMAGES—*Appellate Court may assess damages if appeal is prosecuted merely for delay.* Under section 10 of the Appellate Court act, (Laws of 1877, p. 71,) providing that the practice in said court shall be the same as in the Supreme Court, so far as applicable, the Appellate Court may assess damages if an appeal is prosecuted for delay, as provided in section 23 of the act on costs, (Rev. Stat. 1874, p. 300,) conferring such power on the Supreme Court.

2. SOLICITORS' FEES—*when solicitor's fee is properly allowed to first mortgagee.* A solicitor's fee may be allowed in pursuance of a provision of a first mortgage where the second mortgagee seeks foreclosure without making the first mortgagee a party, or seeking to affect his rights, and the first mortgagee has been permitted to answer the bill and to file a cross-bill to foreclose his mortgage. (*Shaffner* v. *Appleman*, 170 Ill. 281, followed.)

Town v. *Alexander*, 85 Ill. App. 512, affirmed.

APPEAL from the Branch 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.

This was a proceeding in the superior court of Cook county to foreclose a trust deed in the nature of a mortgage. The original bill was filed by the appellee Belle E. Alexander, the holder of the notes secured by the trust deed sought to be foreclosed, against the appellant, who is the grantee of the premises, and others. The trust deed covered the whole of a certain lot, the east fifty feet of which was covered by a prior trust deed given to secure notes held by appellee Martha J. Boardman. The latter was not made a party defendant to the original bill but came into the suit as a party defendant, answered the bill and also filed a cross-bill to foreclose the prior trust deed. The decree was in accordance with the prayers of the original and cross-bills, and on appeal to

the Appellate Court the decree was affirmed, with damages for delay. From that judgment of affirmance the appellant, David E. Town, prosecutes this appeal.

CHARLES PICKLER, for appellant.

GEORGE W. MILLER, JAMES R. MANN, and J. L. RAY, for appellees.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The first point urged by appellant as ground for reversal is, that the Appellate Court exceeded its jurisdiction in assessing statutory damages of two and one-half per centum against appellant, and in favor of appellees Alexander and Boardman, on the amounts found by the decree to be due them, respectively, for the reason that, in the opinion of that court, the appeal was prosecuted merely for delay.

Section 23 of chapter 33 of the Revised Statutes of this State provides in cases of appeal or writ of error, that if, in the opinion of the Supreme Court, such appeal or writ of error is prosecuted only for delay, the person prosecuting the appeal or writ of error shall pay to the opposite party a sum not exceeding ten per centum on the amount of the judgment or decree so attempted to be reversed, at the discretion of the court. Appellant contends that the Appellate Courts have no power, under that statute, to assess such damages. The statute was passed by the legislature in 1874. Subsequently, in 1877, the statute creating the Appellate Courts was enacted. Paragraph 10 of the latter act provides that "the process, practice and pleadings in said courts shall be uniform, and shall be the same as the process, practice and pleadings now prescribed or which may hereafter be prescribed in and for the Supreme Court of this State so far as applicable." The Appellate Courts were established to relieve the Supreme Court in the increased business, which rendered it impossible for it to promptly dispose of the

cases submitted to it for decision. In furtherance of that purpose the legislature enacted the foregoing statute,—that is, to prevent delays in the administration of justice,—and hence provided that the "practice" in those courts should be the same as that of the Supreme Court, "so far as applicable." Before the establishment of the Appellate Courts a dissatisfied litigant might appeal to this court, and it, in its discretion, could assess the statutory penalty for delay. With the creation of the intermediate courts of appeal there existed the same reasons for vesting in them the power to punish one who might appeal merely for delay. It is unreasonable to suppose that the legislature intended that an unsuccessful litigant might have one appeal for delay without becoming liable for damages, but if he prosecuted a further appeal to this court could be mulcted for his dilatory conduct. Appellant makes no complaint of injustice done him by the assessment of damages, and we are of the opinion that, construing together the two statutes referred to, the Appellate Court had full jurisdiction to so assess him. See *Baker* v. *Prebis*, (*ante*, p. 191.)

As for the second point urged by appellant, that the Appellate Court erred in affirming the decree of the trial court allowing a solicitor's fee to appellee Boardman, we held in the recent case of *Shaffner* v. *Appleman*, 170 Ill. 281, that where a second mortgagee seeks foreclosure subject to a prior mortgage without making the prior mortgagees parties to his bill or seeking to affect their rights, and the prior mortgagees are permitted to answer the bill and file a cross-bill to foreclose their mortgage, upon foreclosure being decreed a solicitor's fee might be allowed in pursuance of a provision in the prior mortgage and included in the amount found due thereunder. This case is decisive of the point herein urged by appellant.

No other errors are urged, and for the reasons stated the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

DANIEL H. BRIAR *et al.*

v.

COMMISSIONERS OF JOB'S CREEK DRAINAGE DISTRICT.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*when objections come too late on appeal.* Parties who appear before the county court and file objections to the merits of a petition to form a drainage district, cannot, on appeal, object that proper notice of the various proceedings had not been given or that the affidavit to the petition is insufficient.

2. SAME—*one assigning error by leave of court is bound by case made by appellants.* One who has not appealed, but is permitted, by leave of court, to assign errors on appeal, cannot have the judgment reversed on questions appellants could not raise upon the record.

3. DRAINAGE—*right of commissioners to make new outlet for natural stream.* As against land owners who have been compensated for the taking of their land, commissioners of a drainage district organized under the act of 1879, for the construction of ditches, drains and levees, have authority, under section 57 of that act as amended in 1889, to construct a channel through such land for the purpose of diverting a natural water-course to a new outlet, there being no question raised by the owners of land through which the natural stream ran before being diverted.

APPEAL from the County Court of Cass county; the Hon. J. F. ROBINSON, Judge, presiding.

LYMAN LACEY, Sr. & SON, and HENRY PHILLIPS, for appellants.

J. N. GRIDLEY, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

A petition was filed in the county court of Cass county for the formation of Job's creek drainage district. The petitioners allege that they are of lawful age, and are a majority of the owners and own more than one-third of all the lands in the proposed district; that said lands are annually damaged by the overflow of Job's creek, and can not be drained without digging a new ditch to carry off the water of said creek, and that said ditch is neces-

sary to reclaim and drain said lands. The lands were described, the boundaries of the district given and the location of the proposed ditch was stated. Affidavit was attached and notice by publication and posting given. Commissioners were appointed, who reported against the plan locating the ditch as proposed in the petition, but located it upon a line one-fourth of a mile further west, within the district. Their report was approved and the district organized and an assessment of damages and benefits made. The appellants, Daniel H. Briar and Margaret Briar, subject to a life estate of their mother, Nancy A. Briar, own each an undivided half of the tract of land through which the new ditch was constructed. Nancy A. Briar did not appeal, but was given leave to join appellants in the assignments of error in this court. The two appellants appeared in the court below at the time fixed for the hearing for the confirmation of the report and filed in writing their objection to the confirmation of the report, and asked that it be not approved, or that it be materially modified so as not to run the proposed drain over the land of the objectors, as proposed by the report.

These appellants now object that proper notices had not been given of the various proceedings, as required by the statute; and that the affidavit to the petition is not sufficient to show that the petition was signed by a majority of the land owners, and that they owned one-third of the lands in the district as finally organized. If appellants desired to raise these questions they should have raised them below, and it is too late to raise them here for the first time, after appearing in the court below and raising objections there which were confined to the merits of the cause. By their objections there, and the hearing on them, they sought to have the report rejected, or at least modified so as to prevent the location of the ditch upon their lands. In this they were defeated, the report was approved, the district was declared duly organized, and afterward the damages and benefits were

assessed as the statute provided. Appellants were allowed as damages, in excess of benefits, the total sum of $3200.40 to tracts through which the ditch was located. The evidence shows that amount was sufficient to cover all the damages which the land will sustain. Indeed, we do not understand that counsel for the appellants asked for a reversal on the ground that the damages were insufficient.

It is, however, insisted, that if the two appellants, Daniel and Margaret Briar, cannot question here for the first time the sufficiency of the notices given, and of the proof that the petitioners were a majority of the land owners and owned one-third of the land in the district, then Nancy A. Briar, who did not appear below nor join in the appeal but whom this court allowed to join with the appellants in the assignments of error as one of the owners of the land in controversy, not having waived any error below, may avail herself of them here. We do not so understand the effect of the leave granted to Nancy A. Briar. By permission of the court she, as one of the owners of the land, was permitted to come in and assign errors, but in doing so she was bound by the case as made by the appellants. She made their appeal her own. She could not be permitted, without appealing or bringing error herself, to come into their appeal and have the judgment reversed on questions which they could not raise.

The question, however, most seriously insisted upon is, that the law confers no power on drainage districts, or their commissioners, to change from its natural channel a natural water-course, and cause it to run in a new artificial channel to be cut through appellants' lands and to empty its waters at a new outlet. It appears from the record that Job's creek is a natural water-course coming from the hills adjacent to the bottom lands sought to be protected from its overflow waters, and flows through such lands by a circuitous route in a north-westerly di-

rection and empties into the Sangamon river; that it was impracticable, because of its length, the character of the outlet and the natural obstructions in the channel, to furnish the required protection to the lands by deepening the natural channel, but by changing the channel from the place where the creek entered upon these lands, into a new channel to be opened almost directly north to the river, the distance would be shortened one-third, the natural obstructions would be avoided, a better outlet obtained and the expense reduced. It is obvious, then, that the commissioners were justified, under the order of the court, in adopting this plan unless it was without authority of law. The work proposed also involved the construction of levees on each side of the ditch as a protection in times of extreme high water.

The district was organized under the act for the construction of drains, ditches and levees, approved and in force May 29, 1879. Section 57 of that act (Hurd's Stat. 1889, p. 557,) provides: "The word 'ditch,' when used in this act, shall be held to include any drain or water-course, and the petition for any drainage district shall be held to mean and include any side lateral spur or branch ditch drain open, covered or tiled, or any natural water-course into which such drains or ditches may enter for the purpose of outlet, whether such water-course is situated in or outside of the district. And to secure complete drainage of the lands within any drainage district, the commissioners are hereby vested with full power to widen, straighten, deepen, or enlarge any such water-course, or remove any driftwood, or rubbish therefrom, whether such water-course is situated in, outside of, or below any drainage district; and when it is necessary to straighten such natural water-course by the cutting of a new channel upon other lands, the value of such lands to be occupied by such new channel, and damages, if any, made by such work, may be ascertained and paid in the manner that is now or may hereafter be provided

by any law providing for the exercise of the right of eminent domain in force in this State."

This stream was straightened from the place where it entered upon these lands to its confluence with the Sangamon, and a new channel was authorized to be cut, all of which was, we think, authorized by the statute,—at least so far as these land owners are concerned. There is here no question raised by owners of land through which the natural stream ran, as to the right of the commissioners to divert the waters of the creek from their natural bed, but only as to the right to carry them through the district in a new channel to be cut through appellants' lands, for which compensation is made.

Finding no error the judgment will be affirmed.

Judgment affirmed.

GUSTAV A. KOEFFLER

v.

CHARLES A. KOEFFLER, Jr. *et al.*

Opinion filed April 17, 1900.

WILLS—*will construed as passing a determinable fee with the power of alienation.* A devise to the testator's son as "principal heir," which provides that he shall not come into possession until his twenty-fifth year, and further, that in case he dies without surviving issue after arriving at such age the property shall go to the testator's brother or his heirs, but that the son may dispose of the property after his twenty-fifth year, passes a determinable fee to the son, who may convey a fee title to a purchaser after reaching twenty-five, but in default of such conveyance or of issue surviving the son the fee will vest in the testator's brother or his heirs.

APPEAL from the Circuit Court of Cook county; the Hon. R. W. CLIFFORD, Judge, presiding.

This was a proceeding instituted in the circuit court of Cook county by Gustav Adolph Koeffler to obtain a construction of the will of Gustav A. Koeffler, deceased,

the father of the petitioner. The will was written by the testator himself, and was as follows:

"MY LAST WILL.

"I, the undersigned, am an American citizen. My estate is situated, besides a small portion thereof here, partly in Chicago, in the State of Illinois, partly in Milwaukee, in the State of Wisconsin, and I therefore wish that all precautions be taken that this document shall safely come into the possession of the proper authorities in Milwaukee.

"My dispositions are as follows: After my death my natural son, Gustav Adolph Koeffler, born on the 24th day of January, 1862, at Chicago, by Maria Ann Mayer, (now still living there,) and who has been educated by me, shall be my principal heir. Further, there shall be paid to my house-keeper, Mathilde Heinemann, of Geisa, ten thousand mark (mr. 10,000) in acknowledgment of her faithfulness and services, and immolating, loving nursing during my long illness; she is also yet to receive all of her wages since the first of October, 1874, at ten florins per month, and these sums shall be paid out of my estate here as far as the same may suffice, and the rest shall be paid (covered) by Gustav's guardian in Milwaukee.

"As guardian of my son, Gustav, I nominate my brother Carl August Koeffler, in Milwaukee, and as manager of my affairs here, Mr. Retired Col. Christian Weber, here.

"Believing that my son, Gustav, on arriving at his legal majority,—his twenty-first year of age,—will not be sufficiently able to thoroughly manage the estate to be inherited by him, I direct that he shall not come into possession of the same until his twenty-fifth year of age, to-wit, on the 24th of January, 1887, and my brother Carl shall up to that time have and discharge all the rights and duties of a guardian. Should my son, Gustav, die before his twenty-fifth year of age my brother Carl or his heirs shall be the heirs of my son, respectively of me; and the mother of my son, or her heirs, shall not be considered (or appear) as heirs of my estate. Should my son die later,—that is, after his twenty-fifth year of age,—without issue him surviving, then, too, the original estate, as on the 24th of January, 1887, it was and came into the possession of my son shall go over to my brother Carl August, or his heirs; but (moreover) it shall not be possible in any manner to hinder my son Gustav in the free disposition of his estate (vermoegen) after his twenty-fifth year of age.

"After my death my son, Gustav, shall, after everything here shall have been arranged, go forthwith to Milwaukee to his guardian. My son shall be allowed to keep those articles which have been particularly dear to me here and to dispose of the same at pleasure; all of the rest shall be sold. Prior wills by me made shall be hereby revoked.

"For the purpose of providing for the maintenance of my grave, there shall be paid by the guardian to the firm of August Weber & Co. the sum of one hundred mark per year up to and including the year 1887; later it shall be left to the piety of my son or his heirs to do something for this purpose. Should I die in Germany outside of Wiesbaden, I still wish to be buried in Wiesbaden.

"Should my brother Carl die before the expiration of the term of guardianship, his son Carl shall be entrusted with the guardianship of my son.

"I believe to comply with the requirements of the American laws if I request the signature of two witnesses in attestation of my signature. For this purpose I have requested Messrs. August Weber and his brother-in-law, Dr. Louis Cavet, to attach their signatures to the document.

"The foregoing testament has been written by me in my own hand.

"Done at Wiesbaden the 8th of January, 1879.

GUSTAV A. KOEFFLER.

"Present at the time of signing were August Weber, Dr. Louis Cavet."

It appears that the petitioner had executed a certain agreement with Bermann Subert, Charles Subert and Max Subert for the sale and conveyance of said premises, which sale has not yet been consummated. Petitioner makes said parties, and all whom it may concern, defendants, and prays that they may be summoned, and that a decree may be entered establishing and confirming the title to said land in the petitioner, and for other relief.

On the hearing the court, among other things, decreed as follows: "It is therefore ordered, adjudged and decreed by the court that the title of said petitioner, Gustav A. Koeffler, in and to the said premises, be and the same is hereby established and confirmed as a fee deter-

minable upon his death without issue him surviving, with full power and authority, nevertheless, to sell and convey not merely his fee determinable, but a good and indefeasible title and estate in fee simple absolute, by virtue of the provisions of the will of said Gustavus A. Koeffler, deceased, all, however, subject to the rights of said Bermann Subert, Charles Subert and Max Subert under their agreement aforesaid, and without obligation on the part of the said Bermann, Charles and Max Subert, or either of them, their heirs, representatives, executors or assigns, to see to the application of the purchase money."

LACKNER, BUTZ & MILLER, for appellant.

SIDNEY C. EASTMAN, for appellees.

Mr. JUSTICE CRAIG delivered the opinion of the court:

As has been seen, the circuit court decreed "that the title of said petitioner, Gustav A. Koeffler, in and to the said premises, be and the same is hereby established and confirmed as a fee determinable upon his death without issue him surviving, with full power and authority, nevertheless, to sell and convey not merely his fee determinable, but a good and indefeasible title and estate in fee simple absolute, by virtue of the provisions of the will of said Gustavus A. Koeffler, deceased." And it is insisted that the decree is erroneous because the court failed to decree that petitioner took, under the will, an absolute title in fee simple to the premises. The title involved depends upon a construction of the will, and in the construction of a will the important question always is to determine the intention of the testator, and that intention, when ascertained, should control, unless inconsistent with the established rules of law. The intention of the testator is to be determined from the language of the will, but every clause and provision should, if possible, be given effect. Adhering to the rule indicated, what was the intention of the testator?

Disregarding mere technicalities, and viewing the will as one written by a business man without the aid of legal assistance, it is apparent, when all the provisions of the will are considered and given proper weight, the testator desired, first, that his son, the petitioner herein, should be the principal heir or beneficiary of his estate, but not to receive it until twenty-five years of age; second, the testator did not desire that his son's mother should inherit the estate from the son; third, in the event that the son died without issue the testator desired that the estate should go to his brother or his heirs; fourth, the son is given the right to sell the property, if he desires. In brief, the foregoing is what the testator desired, and unless the rules of law stand in the way, the intention of the testator as declared in his will should be carried out.

It is, however, claimed in the argument that the testator devised an estate in fee simple to his son, and that the devise over to the testator's brother or his heirs in case the son died without issue him surviving is void, and that the clause containing a devise over should be rejected in the construction of the will. We think the will can be construed and the intention of the testator carried out without rejecting any one of its provisions, and when that can be done the settled rules of law require such a construction. As has been seen, in the first clause of the will the testator declares, "after my death my natural son, Gustav Adolph Koeffler, * * * shall be my principal heir." By this language the testator no doubt intended that his son should inherit his property, but the language of the devise is silent in regard to what kind of estate should be vested in the son as his heir. That was left to be settled by the succeeding provisions of the will, which declared: "Should my son, Gustav, die before his twenty-fifth year of age, my brother Carl or his heirs shall be the heirs of my son, respectively of me; and the mother of my son, or her heirs, shall not be considered (or appear) as heirs of my estate. Should my son

die later,—that is, after his twenty-fifth year of age,—without issue him surviving, then, too, the original estate, as on the 24th of January, 1887, it was and came into the possession of my son, shall go over to my brother Carl August, or his heirs." Then follows a clause giving the son power of disposition of the estate after he arrives at the age of twenty-five. The language thus used shows plainly that the testator did not intend to vest in his son an absolute fee simple title to the property, because if he had given him a fee simple, upon the death of the son the estate would have gone to the heirs of the son, whoever they might be. But such a disposition of the property is absolutely prohibited, as the will declares upon the death of the son without issue then the estate shall go to the brother of the testator. The estate devised, as we understand the language of the will, cannot be held to be an estate in fee simple absolute, but it is what is denominated an estate in fee determinable.

The devise over to his brother or his heirs limits the estate to a base or determinable fee, and brings this case within the rule laid down in *Friedman* v. *Steiner*, 107 Ill. 125. In that case the words of the will were as follows: "I give and bequeath all the rest and residue of my said estate unto my beloved wife, Rebecca Steiner, and unto her heirs and assigns forever, to the total exclusion of any and all person or persons whatsoever: *Provided, however*, upon the express condition hereby made by me, in case the said Rebecca Steiner, after my decease, shall die intestate and without leaving her surviving lawful issue, that then and in such event all the rest and residue of my said estate so bequeathed and devised unto her shall at once be converted into money by my executor, and the said money shall be paid over as follows, namely," etc. In giving a construction to the language of the will it was among other things said (p. 130): "The estate of Mrs. Steiner cannot properly be said to be merely a life estate with power to dispose of the fee by will, for by

the terms of the will the lands granted to her may, at her death, be inherited in fee simple absolute by heirs of her body. An estate held for the life of the tenant can never be inherited by heirs of the life tenant. Nor does Mrs. Steiner hold an estate in fee simple, for it is (by the will) in no event to descend to her collateral heirs, as a fee simple might. The limitation of the inheritance to the surviving heirs of her body excludes the idea of an estate in fee simple. We recognize the rule of law that 'conditions that are repugnant to the estate to which they are annexed are absolutely void,' yet in the construction of a will we must consider all the words of the will, including all provisos and conditions, for the purpose of ascertaining what estate the testator intended to confer by the granting words of the will; and, weighing the words of the proviso, we think they do qualify the granting words, and do show that the testator did not intend to confer upon his wife a fee simple absolute in this property. Kent says: 'Fee simple is a pure inheritance, clear of any qualification or condition, and it gives the right of succession to all the heirs generally.' And again: 'It is an estate of perpetuity, and confers an unlimited power of alienation.' Such an estate, we think, was here granted to Mrs. Steiner, except in so far as the same is qualified by the words of the proviso, and we think the words of the proviso do qualify the estate granted and reduce it below that of a fee simple estate; but this reduction below a fee simple absolute extends no farther than the express words of the proviso declare or necessarily imply. One of the qualities of a fee simple estate is the power to convey a fee simple estate to another, or, in the language of Kent, it 'confers unlimited power of alienation.' We find nothing in the words of the proviso to impair this unlimited power of alienation given by the granting words of the will. The words of the grant are so cogent that we cannot doubt that it was the intention of the donor to give to her, throughout her

life, a dominion over this property as full and as complete as if he had granted the same to her in fee simple absolute, without condition, limitation, restriction or qualification, and also had given her the power of disposition by will, and it was clearly the intention of the testator to give her an estate which might descend to her surviving lawful issue, and thereby become in them an estate in fee simple absolute. We have no doubt about the power of Mrs. Steiner to pass to a purchaser from her a fee simple absolute in the lands of the estate, subject, of course, to the charges imposed upon this property by the earlier provisions of the will. Under this will we think the interest of Mrs. Steiner in the lands of the estate of her deceased husband is not an estate in fee simple, but is 'an estate in fee determinable,' which estate may be perpetual, or may be determined by the death of Mrs. Steiner intestate, without surviving lawful issue and without previous alienation of the land by her, and, in that contingency, limited over to the beneficiaries mentioned in the proviso in item 13 of the will. (See 4 Kent's Com. p. 8, *et seq.*) One of the peculiarities of a 'fee determinable' is, that it may become a fee simple absolute upon the happening of any event which renders impossible the event or combination of events upon which such estate is to end."

The rule of interpretation in the case of *Friedman* v. *Steiner, supra*, was recognized in the case of *Lombard* v. *Witbeck*, 173 Ill. 396. It was there said, (p. 406,) after reciting the language of the will in *Friedman* v. *Steiner:* "This was held to convey to Rebecca Steiner a determinable fee. In *Summers* v. *Smith*, 127 Ill. 645, it was again held that a will containing a bequest, 'to my youngest son, Westley Clark Smith, to have and to hold to my said son and his heirs forever,' followed by the condition, 'in case any of my sons to whom I have bequeathed property in this my last will and testament should die without heirs of his body, the real estate I have bequeathed to

him shall go to his surviving brothers or brother and the personalty to all the other heirs equally,' vested in the son, Westley Clark Smith, a fee determinable. To the same effect is *Strain* v. *Sweeny*, 163 Ill. 603, and *Smith* v. *Kimbell*, 153 id. 368."

This rule of interpretation has, in effect, become a rule of property in this State, and in the will under consideration it must be held that the title of the son, Gustav Adolph Koeffler, is a fee determinable, which he can convey and make absolute in the purchaser, but upon his death without issue him surviving, the title to all the estate not disposed of would pass to the heirs of his deceased uncle, Carl August Koeffler.

The decree of the circuit court will be affirmed.

Decree affirmed.

WILLIAM L. COYNE

v.

HANNAH NEWBURG *et al.*

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*what necessary to authorize appeal from judgment of Appellate Court.* To authorize an appeal from the Appellate Court the judgment or decree of the trial court must be affirmed, or the judgment of the Appellate Court must be final, or such that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court.

2. SAME—*when judgment of the Appellate Court is not appealable.* A judgment of the Appellate Court reversing a foreclosure decree and remanding the cause, with directions to the chancellor "to enter an interlocutory decree referring the cause to the master to state the account, and for such other and further proceedings as to law and justice shall appertain," and giving specific direction concerning the allowance of interest, is not a final, appealable judgment, where one of the grounds of reversal is the allowance of solicitor's fees in excess of the amount claimed without amending the bill, upon which question no specific direction is given as to the course to be pursued by the chancellor.

Newburg v. *Coyne*, 85 Ill. App. 74, appeal dismissed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Rock Island county; the Hon. W. H. GEST, Judge, presiding.

J. T. & S. R. KENWORTHY, for appellant.

JESSE E. SPENCER, (SWEENEY & WALKER, of counsel,) for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is a motion by appellees to dismiss an appeal sought to be prosecuted by the appellant, Coyne, from a judgment entered by the Appellate Court for the Second District, reversing and remanding, with directions, a decree of foreclosure rendered in the circuit court of Rock Island county on a bill filed by the appellant, Coyne, against the appellees. The decree of the circuit court was in the sum of $4551.48, which included the sum of $600 allowed as the fees of the solicitor for complainant. The answer set up the defense of usury, and that the mortgagors had made payments upon the indebtedness in the aggregate amounting to the full amount of the indebtedness, the alleged usurious exactions being excluded. The appellees filed also a cross-bill, setting out the same facts, in substance, as set forth in the answer, and praying the complainant in the bill should be enjoined from disposing of the notes and that the notes and mortgage should be canceled. The decree of the circuit court was adverse to the defendants to the bill of foreclosure on the issues arising under their answer and their cross-bill. The cross-bill was dismissed and decree of foreclosure entered according to the prayer of the bill.

The judgment of the Appellate Court, after finding there is error in the decree entered in the circuit court, is as follows: "Therefore it is considered by the court that, for that error and others in the record and proceed-

ings aforesaid, the decree of the circuit court of Rock Island county in this behalf rendered be reversed, annulled, set aside and wholly for nothing esteemed, and that this cause be remanded to the said circuit court of Rock Island county, with directions to enter an interlocutory decree referring the cause to a master to state the account, and for such other and further proceedings as to law and justice shall appertain. Interest will be allowed on the original debt to the time when usury was first taken, at the contract rate, and after that at six per cent to July 1, 1891, and at five per cent since that date. But as to rents of other lands, if any, which may have been included in the mortgage in suit, interest thereon will be allowed at whatever rate was contracted for between the parties as to such rent."

The Appellate Court overruled the motion of the appellant, Coyne, for leave to remit the excess above $200 of the amount allowed by the decree for solicitor's fees.

Appellees insist this judgment is not a final judgment, and that for that reason the appeal should be dismissed. Section 90 of the Practice act authorizes an appeal from the judgment of the Appellate Court, if, under the judgment, no further proceeding in the cause can be had in the trial court except to carry into effect the mandate of the Appellate Court. Appellant insists the judgment of the Appellate Court is of that character, and that it is an appealable judgment. We think not. If the cause, under the remanding order, be re-docketed in the trial court and thus comes before the chancellor for disposition, the chancellor will look to the opinion of the Appellate Court in order to be advised as to the law of the case, and to the judgment entered by the Appellate Court in order to be advised as to the terms and conditions of the remanding order. He will find the law of the case as to the allowance of solicitor's fees expressed in the opinion of the court, as follows: "We think it was error to allow $600 for solicitor's fees, under the pleadings in

the case. The bill only claimed $200, and alleged that was a reasonable fee. There was no amendment to the bill, and on what principle a complainant is entitled to recover three times the amount he claims in his bill we are at a loss to see. We do not determine the question as to whether or not the fee was reasonable for the services rendered by the solicitors, aside from the allegations of the bill. What we hold is, that the bill only claiming $200, it was error to allow a greater sum without amendment." No specific directions with relation to the course to be pursued as to the issue on the question of solicitor's fees are found incorporated in the judgment of the Appellate Court. The direction of the judgment is not only that the chancellor shall enter an interlocutory decree referring the cause to a master to state the account, but also that the cause is remanded "for such other and further proceedings as to law and justice shall appertain." In the absence of any specific directions as to the course to be pursued with relation to the matter of the solicitor's fees, the chancellor would properly regard the cause as open upon that question for "such proceedings as to law and justice should appertain," and would, if requested, permit such amendments to be made to the bill as might be necessary to give application to the evidence found in the record upon that point. This might necessitate the granting of leave to amend the answer of the defendants and also their cross-bill in respect of the question of solicitor's fees. The chancellor then, in obedience to the specific directions found in the judgment, would enter an interlocutory decree referring the cause to a master, and would incorporate in such interlocutory decree the directions found in the judgment of the Appellate Court as to the rate and manner of computation of interest on the original debt, and would also give directions to the master to ascertain if amounts due for the rents of other lands had been included in the mortgage debt, and if he found such rents had been so included, to

compute interest on such amounts at the rate it should appear from the evidence had been contracted for between the parties as to such amounts for rents. On the coming in of the report of the master it would be the duty of the court to judicially hear and determine any exceptions preserved thereto, and to judicially review and determine the correctness of the account so stated by the master in view of the evidence upon which it was based, and then to render such decree as the account stated by the master, as finally revised by the court, should warrant. The decree which would follow might be a decree of foreclosure as prayed in the original bill, but for an amount greater or less than the decree first rendered in the cause, or a decree for the cancellation of the notes and mortgage as prayed in the cross-bill.

It is, therefore, apparent the judgment of the Appellate Court is not such that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court. In order an appeal may be prosecuted from a judgment of the Appellate Court to this court, the judgment of the Appellate Court must be either that the decree of the trial court is affirmed, or that final judgment is rendered in the Appellate Court, or that the judgment or decree of the Appellate Court is such that no further proceedings can be had in the court below except to carry into effect the mandate of the Appellate Court. (Starr & Cur. Stat. 1896, chap. 110, par. 91.) The judgment of the Appellate Court sought here to be appealed from does not fall within either of the classes of judgments permitted by the statute to be brought into this court by appeal.

The motion to dismiss the appeal is granted.

Appeal dismissed.

JOB PRINGLE
v.
MARY J. JAMES *et al.*

Opinion filed April 17, 1900.

APPEALS AND ERRORS—*when appeal should be taken to the Appellate Court.* An appeal from a decree in a creditor's bill proceeding should be taken to the Appellate Court, where the only questions involved are the subordination of complainant's lien on the tracts of land covered by the fraudulent deeds to the homestead and dower rights of the grantor's wife, the postponement of such lien, the finding of the existence of a resulting trust in favor of the grantor's wife, and the dismissal of complainant's bill as to certain tracts of land not covered by the fraudulent deeds.

APPEAL from the Circuit Court of Pike county; the Hon. HARRY HIGBEE, Judge, presiding.

WILLIAM MUMFORD, for appellant.

WILLIAMS & COLEY, for appellees.

Per CURIAM: The chancellor, on the hearing of the issues formed under a creditor's bill filed by the appellant, found that a certain deed executed October 17, 1895, by one George James, (since deceased,) and the appellee Mary J. James, his wife, to Jacob G. Hess, and a certain other deed executed by the said Jacob G. Hess on the same day to said Mary J. James,—both of which deeds purported to convey the south half of the south-west quarter of section 3 and the west half of the north-west quarter of section 35, all in township 6, range 4, in Pike county,—were fraudulent and void as against the rights and interests of the appellant, as a creditor of the said George James. The appellees have not appealed from said decree nor assigned cross-errors in this court.

The bill alleged the deceased, George James, was the owner of other lands, viz., the north-east quarter of the north-east quarter of section 9 and the south-east quarter of the south-east quarter of section 4, in the same town

and range as the other tracts hereinbefore mentioned, and prayed for a decree ordering that said last described tracts of lands should be sold and the proceeds of the sale applied to the discharge of the indebtedness due the appellant from the said George James, deceased. The court refused to grant such relief and decreed that in this respect the bill should be dismissed. The court also found and decreed that the lien of the appellant, as a creditor of said George James, deceased, on the tracts of land described in the fraudulent and void deeds, was secondary to and subject (to quote from the decree): "First, to the mortgage to Faith Dilworth for the sum of $1000, with interest from October 17, 1898, at the rate of six (6) per cent per annum; second, to the homestead and dower rights of Mary J. James; third, to a resulting trust for the amount of $750 in favor of Mary J. James; that the court further finds that the said resulting trust of $750 should not be required to contribute its proportionate part towards the extinguishment of said Dilworth mortgage and interest; that the enforcement of the lien above declared for the benefit of complainant shall be for the present postponed, and the date and manner of such enforcement is hereby expressly reserved for the future consideration and order of the court." The appellant conceded the mortgage to Dilworth constituted a superior lien as against the indebtedness due him, but questioned and prayed an appeal from that portion of the decree otherwise subordinating his lien on said tracts of land and postponing the same and dismissing his bill as to other tracts and decreeing a resulting trust in favor of Mrs. James.

The only questions here arising are those presented by this appeal of the appellant. None of these matters involve a freehold or other question which would give this court jurisdiction. The appeal should have been taken to the Appellate Court. *Hupp* v. *Hupp*, 153 Ill. 490.

The appeal will be dismissed with leave to the parties to withdraw the record, abstracts and briefs.

Appeal dismissed.

THE KEOKUK AND HAMILTON BRIDGE COMPANY
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*an appeal cannot be prosecuted as of right.* An appeal cannot be prosecuted as of right, but only when authorized by statute.

2. SAME—*right to appeal from decision of board of review is limited to exemption claims.* Paragraph 4 of section 35 of the Revenue act of 1898, (Laws of 1898, p. 48,) which authorizes an appeal from a decision of the board of review that property claimed to be exempt from taxation is not so exempt, denies by implication the right to appeal from decisions of the board upon other questions.

3. TAXES—*valuation of property for taxation is not subject to judicial supervision except for fraud.* The matter of the valuation of property for taxation is not subject to judicial supervision, further than that a court of equity has jurisdiction to grant relief against a fraudulent over-valuation.

4. Appellant's contention that part of its bridge across the Mississippi river assessed for taxation in Illinois is in the State of Iowa, and hence is exempt from taxation in Illinois, was determined adversely in *Keokuk and Hamilton Bridge Co.* v. *People*, 167 Ill. 15, and, the parties and the issues involved being the same as in that case, the question is *res judicata.*

APPEAL from Board of Review of Hancock county.

The appellant company, on the 9th day of June, 1899, filed its complaint with the supervisor of assessments of Hancock county, Illinois, in which it alleged, in substance, certain property owned by it, consisting of that portion of the Keokuk and Hamilton bridge over the Mississippi river which is situated in Illinois, of the length, as it asserted, of 707 feet, and a road or dyke leading to said bridge, had been fraudulently over-valued for assessment for the year 1899 by the assessor of the town of Montebello, in Hancock county, Illinois, and that a portion of the bridge of the length of 605 feet, located, as it insisted, in the State of Iowa and therefore exempt from taxation in Illinois, had been assessed for taxation

in the town of Montebello, Hancock county, Illinois, and prayed to be relieved against such alleged over-valuation and from the assessment of said portion of the bridge alleged to be in the State of Iowa. The supervisor of assessments did not grant the relief asked, and the appellant company prosecuted an appeal to the board of review of Hancock county. The appellant, on the hearing of the appeal, presented to the board of review the same grievances and complaints which had been presented to the supervisor of assessments. The board of review overruled the grievances and complaints and sustained the assessment as made by the assessors of the town of Montebello. The appellant prosecuted an appeal from the decision of the board of review, and the cause was presented to this court by the Auditor of Public Accounts.

G. EDMUNDS, for appellant.

S. P. LEMMON, State's Attorney, BERRY BROS. & MCCRORY, and FRANK HALBOWER, for the People.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Section 1 of article 9 of the constitution of 1870 provides: "The General Assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." We have construed this constitutional provision to invest the persons or body elected or appointed by the General Assembly to ascertain the valuation of property for purposes of taxation with sole power to determine such valuation, and have uniformly ruled that the decision of such persons or body as to the value to be fixed on property liable to assessment is not, in the absence of fraud, subject to

the supervision of the judicial department of the State. (*Spencer* v. *People*, 68 Ill. 510; *Republic Life Ins. Co.* v. *Pollak*, 75 id. 292; *People ex rel.* v. *Lots in Ashley*, 122 id. 297; *Ottawa Glass Co.* v. *McCaleb*, 81 id. 556.) In *Beidler* v. *Kochersperger*, 171 Ill. 563, we said (p. 567): "It is the policy of our law the whole matter of the valuation of property for taxation shall be committed to the control of the assessor, the board of review and the board of supervisors of the respective counties." The jurisdiction to grant relief against the fraudulent over-valuation of property for taxation, and to relieve against the assessment of property which is not subject to taxation, is possessed by courts of equity and has frequently been exercised by such courts. *Chicago, Burlington and Quincy Railroad Co.* v. *Cole*, 75 Ill. 591; *New York Stock Exchange* v. *Gleason*, 121 id. 502; *Porter* v. *Rockford, Rock Island and St. Louis Railroad Co.* 76 id. 561.

The board of review, whose action is here sought to be reviewed, was created by the act of the General Assembly entitled "An act for the assessment of property," etc., approved February 25, 1898, in force July 1, 1898. The powers and duties of the board are prescribed by section 35 of the act. (Hurd's Stat. 1899, p. 1452.) The section is divided into four paragraphs, each of the several paragraphs being devoted to distinct duties and powers of the board. The powers and duties set forth in the different paragraphs are, in substance, as follows: First, to assess taxable property which has been omitted by the assessors; second, to review and correct assessments of property on complaint of the owner thereof that such property has been assessed too high; third, to increase or reduce the entire assessment of real or personal property, or both, or of any class therein, and to equalize the assessment of the taxable property in the county, etc.; fourth, to hear and determine complaints that property which is exempt from taxation has been assessed. The only provision to be found in the statute authorizing an

appeal to be taken by a property owner from the decision of the board of review as to any of the matters which it is given authority to consider and decide, is incorporated in the said fourth paragraph of said section 35, and reads as follows: "If the board of review shall decide that property so claimed to be exempt is liable to be taxed, and the party aggrieved at the time shall pray an appeal, a brief statement of the case shall be made by the clerk, under the direction of the board and transmitted to the Auditor, who shall present the case to the Supreme Court in like manner as hereinbefore provided. In either case the collection of the tax shall not be delayed thereby, but in case the property is decided to be exempt the tax shall be abated and refunded."

The right thus given to appeal does not extend to any and all decisions which the board is empowered to make, but only to the decisions of the board that property claimed by the owner to be exempt from taxation is not so exempt but is liable to assessment for taxation. An appeal cannot be prosecuted as of right, but only when authorized or granted by the statute. The provision quoted above, which provides for an appeal to test the correctness of the decision of the board on one, only, of the contentions committed to it to decide, is a denial, by implication, of the right to appeal from any other of the decisions of the board. (2 Ency. of Pl. & Pr. 15.) We do not wish to be understood to hold that the law affords no remedy whereby the decision of a board of review that property has not been fraudulently assessed too high can not be reviewed, but only that the remedy is not by appeal to this court.

The appeal, then, only serves to bring before us the question whether any portion of appellant's bridge which is not in the State of Illinois has been assessed. Fifteen hundred and sixty-seven feet of the bridge was assessed as being in the State of Illinois. In the case of *Keokuk and Hamilton Bridge Co.* v. *People ex rel.* 167 Ill. 15, being

the same parties who are parties to the present record, this precise question was presented and determined. That assessment of the bridge there involved was for the year 1894. In that case, as in this, the assessor assessed 1567 feet of the bridge as being in the State of Illinois, and in that case, as in this, the issue was whether any part of the said 1567 feet of the bridge was in the State of Iowa. The contention was adjudicated adversely to this appellant, and is *res judicata*. *Mueller* v. *Henning*, 102 Ill. 646; *Jenkins* v. *International Bank*, 111 id. 462; *Johnson* v. *Gibson*, 116 id. 294; *Gould* v. *Sternberg*, 128 id. 510.

The decision of the board of review is affirmed.

Decision affirmed.

JOSEPH BICKERDIKE *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. SPECIAL ASSESSMENTS—*when the location of sewer out-fall is sufficiently shown.* An ordinance providing for the construction of a sewer westward from its out-fall "at the north branch of the Chicago river" will be taken as referring to the natural bed of such stream, and not to an imaginary one where there is no channel or water, created by an ordinance fixing the "north branch" at a point some four hundred feet east of its actual location.

2. SAME—*insufficiency of sewer outlet does not invalidate ordinance.* If a sewer ordinance on its face provides an outlet, objections to the sufficiency or nature of such outlet do not affect the validity of the ordinance or the right to levy the assessment.

3. SAME—*if dimensions of wall are given, size of each stone need not be stated.* If an ordinance specifies the length, height and top and bottom thickness of a rough-stone facing for strengthening a sewer out-fall, it is not necessary that the size of each stone and its kind and quality should be given.

4. SAME—*when ordinance need not specify height of man-holes.* Where an ordinance gives the dimensions and grade of a sewer throughout its entire length the height of the man-holes is determined by the difference in elevation between the sewer and the surface of the ground, and hence need not be specified.

5. SAME—*unsubdivided land cannot be assessed in character of lots.* A city cannot dictate to a land owner how he shall subdivide his land, nor can unsubdivided land be assessed in the character of lots.

6. SAME—*when house connection provision of sewer ordinance is unreasonable.* A sewer ordinance providing for house connections every twenty feet on both sides of the sewer is unreasonable in that respect, where the territory drained is unsubdivided land or is held in large tracts used mostly as hay land, and the whole territory is practically vacant, there being neither houses nor streets in most of the district.

7. SAME—*when non-abutting owners cannot be assessed for a sewer.* Property not abutting upon a sewer cannot be assessed for its cost unless there is a provision for draining the district in which it is located into the sewer, or the owner of the property is assured that he will have the benefits of the sewer.

8. SAME—*county court's apportionment of public and private cost is conclusive.* Section 47 of the Improvement act of 1897, (Laws of 1897, p. 119,) providing that the determination of the county court as to the correctness of the distribution of the cost of an improvement between private owners and the public shall not be subject to review on appeal or error, is not unconstitutional, since right of appeal from the conclusion of the county court on such question is within the legislative control.

APPEAL from the County Court of Cook county; the Hon. W. T. HODSON, Judge, presiding.

JOSEPH H. FITCH, MONTGOMERY & HART, BARKER & CHURCH, and CLARENCE KNIGHT, for appellants.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and DENIS E. SULLIVAN, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellants bring here for review the record of a judgment confirming a special assessment against their lands to pay for the construction of a sewer in West Addison street, in the city of Chicago, from the north branch of the Chicago river to a point about two and a half miles west of said river. The ordinance which is the basis of the assessment provides for a brick sewer of five and a

half feet internal diameter at its outlet, narrowing to two and a half feet at its terminus. The sewer is to be ten feet underground at the river and sixteen feet at the west end. Territory half a mile wide and two and a half miles long, of which Addison street is the center, is declared a drainage district for the purposes of the improvement, and upon this district the assessment is levied. The hearing in the county court was upon objections addressed to the court. They were overruled after reducing the assessment the amount estimated for four hundred feet of the sewer between the actual channel of the Chicago river and the supposed channel created by city ordinance. The objectors elected to stand by their said objections, waiving controversy as to the question of benefits to be tried by a jury, and judgment of confirmation was thereupon entered.

The first of said objections presented to us is, that the ordinance does not sufficiently specify the nature, locality and description of the improvement. The ordinance provides for the construction of a sewer westward from its out-fall at the north branch of the Chicago river, and on the face of the ordinance the locality of the out-fall is not ambiguous. But proof was made that the city of Chicago, in 1895, by an ordinance officially located the north branch at a point on Addison street about four hundred feet east of the actual channel. It is therefore argued that it is uncertain whether the ordinance refers to the actual channel or what counsel call the "official channel." The north branch of the Chicago river is a well defined and well known stream, with a natural bed and channel, which has not been changed by the city, and the ordinance can only be taken as referring to such existing north branch, and not to an imaginary one, where there is no channel and no water, supposed to be created by the ordinance. The description is certain. A further objection, that if the official channel was meant the assessment would be invalid because building the sewer

across the actual channel would dam the stream, is therefore not involved.

Another objection is, that an outlet at the natural channel will be insufficient, and that sewerage will accumulate and make the place a nuisance. Objections against the sufficiency of an outlet or its nature do not affect the validity of an ordinance or the right to levy the assessment. The ordinance is not invalid because the outlet has not in fact been constructed or made sufficient. The ordinance on its face provides for an outlet, and that is all that is required. *Burhans* v. *Village of Norwood Park*, 138 Ill. 147; *Payne* v. *Village of South Springfield*, 161 id. 285; *Ryder Estate* v. *City of Alton*, 175 id. 94.

Another particular in which it is contended that the description is insufficient is this: The ordinance provides that the out-fall shall be strengthened by a stone ashlar bulkhead, the sewer resting in a concrete saddle-back. The provision is as follows: "The out-fall of said sewer shall be strengthened by a stone ashlar bulkhead twelve feet wide, ten feet high, five feet thick at the bottom and three feet thick at the top, built upon a pile-and-timber foundation consisting of five rows of piles, six piles to each row, each pile to be twenty-five feet long; the top of the piles to be cut off four feet seven inches below city datum and capped with five twelve-inch by twelve-inch timbers fourteen feet long, which said timbers shall be covered with a flooring of four-inch by twelve-inch planks sixteen feet long, the front and two sides of said pile foundation to be protected by sheet piling sixteen feet long; all piles and timbers to be of the best quality white oak, securely bolted and spiked together. The five and one-half foot sewer hereinbefore described shall rest upon a concrete saddle, which shall extend nine feet six inches from the back of the stone bulkhead, and shall be twelve feet wide, five feet high at the sides, and shall rest upon the pile-and-timber foundation hereinbefore described." It is claimed that the size of each stone in

the bulkhead, and its kind and quality, should be specified, but in our opinion the objection is hypercritical, as calling for a description of petty details both unnecessary and burdensome. The description "stone ashlar bulkhead" is here used in the sense of a water face at the out-fall, built of rough-cut or squared blocks of building stone, which is within the defined meaning of the words. The wall is to be twelve feet wide, ten feet high, five feet thick at the bottom and three feet thick at the top, and must fulfill the purpose and object of such a bulkhead. The description is sufficient.

It is also objected that the height of the man-holes along the sewer is not specified. The height of the sewer throughout its whole length is shown, and the height of the man-holes can be determined by the difference in elevation between the sewer and the surface of the ground.

The next objection is, that the ordinance is unreasonable and oppressive in the size of the sewer and the number and location of the house-slants and street connections. The ordinance provides that house-slants shall be placed in both sides of the sewer opposite every twenty feet of lot frontage, and street openings every three hundred and thirty feet. But a small part of the property along the entire length of the sewer is subdivided, and a large part of that which is so subdivided is actually held in large tracts. The land is mainly used as hay land and the whole territory is practically vacant. There are a few scattered houses on or near Elston avenue and Milwaukee avenue, which cross Addison street, but, as we understand the evidence, there is only one house fronting on the street the whole length of the sewer. The street has all the characteristics of a country road, thrown up in the center so as to create ditches on each side, which carry off the surface water. The city engineer testified that he planned the sewer for a prospective house on every twenty-five foot lot in the whole district, with five people in each house. He assumed a population of about

40,000, and made provision for the sewerage as well as the average rainfall. The assessment amounts to $68,000. On most of the district there are now neither houses nor streets, and the house-slants and street connections at present are entirely useless appendages. They are to be put in upon the theory that they will be required at some time in the distant future, but there is no evidence sustaining the theory that house-slants will be required every twenty feet, but rather the contrary, so that these numerous and now useless connections will never fit the property if subdivided in the future. There is no law to compel an owner to subdivide his land into twenty-foot lots, and so far as appears it is generally subdivided into twenty-five foot lots. There is no evidence that if the property should ever be subdivided and used, the owners would choose or be likely to choose to subdivide it into twenty-foot lots. The city cannot dictate to an owner how he shall subdivide his land, and the property cannot be assessed in the character of lots when not subdivided. (*Warren* v. *City of Chicago*, 118 Ill. 329; *Cram* v. *City of Chicago*, 139 id. 265; *People* v. *Cook*, 180 id. 341.) It was error to confirm the assessment charging the cost of the sewer with these connections to the owners of the land under the evidence.

The other feature of the ordinance which is claimed to be unreasonable is the size of the sewer. It is intended to take care of water in the ditches along the street from territory west of the street. There is some evidence that, in the natural state of the land, water would not flow in that way, and the sewer is made larger on that account than would otherwise be required. The city had power to provide for carrying the water from lower land west of this territory by means of this sewer, and the only question which would arise would be as to the portion of public benefit which ought to be borne by the city and the portion chargeable to the land owners in this territory.

The next point is, that the assessment on non-abutting property is invalid because there is no provision for lateral sewers, or any assurance to the owners of such lands that they will have the use of the sewer or be benefited in any manner by it. These lands are now only fit for farming, and mainly for hay land. The ditches at the side of the road now carry off the surface water, and the only difference after the sewer is in will be that this surface water will be taken underground instead of in the ditches. So far as the evidence shows the sewer will not improve the surface drainage, and if the non-abutting property is considered as property that may be subdivided in the future, there is no provision for extension, or any plan which will permit the owners of such property to use the sewer or extend its benefits to them. The territory is declared to be a drainage district for the purpose of this improvement, but, so far as appears, this is only for the purpose of enabling the city to assess all the property. No rights whatever are assured to these property owners, and no rule of action is established which gives any assurance to them. The lands are as well provided with surface drainage as they will be after the sewer is put in, and such lands will not be benefited in any manner by merely putting the drainage underground instead of in the large ditches which now carry the water. The sewer is designed to some time serve the ordinary purposes of house sewerage along Addison street, but no rights are secured to non-abutting owners and no privileges specified by which they will ever derive any benefit from it. We have held that non-abutting property can not be assessed unless there is a provision for draining the district in which it is located, into the sewer, or the property owner is assured that he will in some way be entitled to the benefits of the sewer. (*Edwards* v. *City of Chicago*, 140 Ill. 440; *Title Guarantee and Trust Co.* v. *City of Chicago*, 162 id. 505; *Gray* v. *Town of Cicero*, 177 id. 459; *Mason* v. *City of Chicago*, 178 id. 499.) As to property not

abutting upon Addison street, the assessment for this reason should not have been confirmed.

It is next claimed that the distribution of cost between the public and the property assessed was not just or equitable, and that section 47 of the act of 1897, concerning local improvements, providing that the determination of the court on that question shall be conclusive and not subject to review on appeal or writ of error, is unconstitutional and void. The estimate was that there would be no public benefit from the sewer, and the entire cost was levied on private property. We have held under former laws that the decision on that question was conclusive. The proceeding is not a case within the meaning of the constitution, and the right to appeal from the conclusion of the county court is within the control of the legislature. The act is not in violation of the constitution, and we cannot review the decision on that question.

Appellants the North Chicago Electric Railway Company and the Chicago Electric Transit Company further assign as errors that their railroad rights of way cannot be assessed for the sewer because of an ordinance requiring them to grade, pave, macadamize, plank and repair a certain width in the streets and avenues occupied by them. The proportionate share of said specified improvements to be borne by the companies was fixed by the ordinances and their acceptance by the companies. (*West Chicago Street Railroad Co.* v. *City of Chicago*, 178 Ill. 339.) It is insisted that such ordinances also provided an equivalent for special assessments for sewers, but the commutation does not extend to other street improvements. (*Parmelee* v. *City of Chicago*, 60 Ill. 267; *Chicago City Railway Co.* v. *City of Chicago*, 90 id. 573.) A sewer was not included in the agreement, which applied only to surface improvements of the street.

For the errors pointed out, the judgment is reversed as to the property of appellants and the cause remanded.

Reversed and remanded.

THE PEOPLE *ex rel.* E. C. Akin, Attorney General,

v.

THE BOARD OF SUPERVISORS OF ADAMS COUNTY.

Opinion filed April 17, 1900.

1. MANDAMUS—*courts exercise judicial discretion in awarding or denying the writ.* In awarding or denying writs of *mandamus* courts exercise judicial discretion, and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice.

2. SAME—*mandamus will lie to compel county board to discharge duties enjoined by statute.* While the writ of *mandamus* cannot be invoked to control a county board in any matter in which its judgment and discretion are involved, it may be availed of to compel the discharge of duties specifically enjoined by statute.

3. COUNTY BOARDS—*power of county board to re-divide election district under order of court.* If a county board fails to act, at its July or August meeting, in the matter of re-dividing election districts, as provided in the act of 1899, amending section 30 of the Election acts of 1872 and 1895, (Laws of 1899, p. 209,) such board may take proper action, under authority of an order of court, at some other meeting, irrespective of its authority to act of its own motion at such time.

4. SAME—*county board must be governed by statute as to the number of voters in election district.* The act of 1899 (Laws of 1899, p. 209,) has fixed upon the number of votes cast at the preceding November election as the basis for re-dividing the election districts, and the county board cannot substitute its own judgment as to the number of votes likely to be cast at future elections.

5. CONSTITUTIONAL LAW—*the proviso concerning polling places at soldiers' and sailors' homes is constitutional.* The proviso to the act of 1899, (Laws of 1899, p. 210,) requiring county boards in counties where any State soldiers' and sailors' home is located to establish polling places, easy of access, on the grounds and within the enclosure where such home is located, is not in violation of section 22 of article 4 of the constitution, concerning special legislation.

6. ELECTIONS—*act of 1899, concerning polling places in soldiers' and sailors' homes, construed.* The general language of the act of 1899, (Laws of 1899, p. 210,) requiring polling places to be situated on a highway or public street, is qualified by and must give way to the second proviso to such act, which requires voting places for legal voters in soldiers' and sailors' homes to be established in convenient places upon the grounds and within the enclosures of such homes.

7. SAME—*right of persons not inmates to vote at polling places in soldiers' homes.* If, in re-dividing the election districts and providing polling places at soldiers' and sailors' homes, an election district shall contain more territory than is covered by any such home, the legal voters of such territory may resort to the voting place provided, without hindrance from those in charge of such home.

ORIGINAL petition for *mandamus.*

E. C. AKIN, Attorney General, (C. A. HILL, and B. D. MUNROE, of counsel,) for petitioner.

JAMES N. SPRIGG, for respondent.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is a petition filed originally in this court by the Attorney General, representing the People of the State of Illinois, in his official capacity, the prayer thereof being that a writ of *mandamus* issue out of this court commanding the supervisors of Adams county, in this State, to re-divide and re-adjust the election districts in the town of Riverside, which includes the Soldiers' and Sailors' Home, so that each district shall contain, as near as practicable, 400 voters, and not more in any case than 450 voters, each district to be composed of contiguous territory and in as compact a form as can be, for the convenience of the electors voting therein; to describe such districts, and each of them, by metes and bounds, and number them, and also to fix and establish a polling place in each of said districts, and where such districts include or embrace said Soldiers' and Sailors' Home, or any part thereof, upon which the inmates thereof reside or are located, that the said board of supervisors be commanded to fix and establish the polling places for the inmates of said home at some convenient and comfortable place or places, easy of access, on the grounds and within the enclosure where the said home is located, and that said board of supervisors may also be required to appoint judges of election in and for each election dis-

trict, and in all respects comply with the provisions of section 30 of the Election law, as approved April 24, 1899. The cause was submitted on a general and special demurrer filed by the respondent board to the petition and joinder in demurrer by the petitioner.

It appears from the averments of the petition that at and prior to the general election in November, 1898, the town of Riverside, in the said Adams county, was divided into four election districts, and that at said general election 1454 votes were cast in the said four voting districts in said town, and that more than 450 votes were cast at that election in district No. 2 in said town. Section 30 of an act of the General Assembly entitled "An act in regard to elections and to provide for filling vacancies in elective offices," approved April 3, 1872, as amended by an act approved April 4, 1895, made it the duty of the respondent board of supervisors, at the regular meeting of the board required by the statute to be held in the month of July next after each regular November election, to re-district or re-adjust election districts in each town in said county in which more than 450 votes had been cast at the polling place in any election district at the said preceding November election.

The General Assembly, at the session of 1899, adopted an act changing the time of the regular meeting of the boards of supervisors in counties under township organization to the second Monday of June. This act, by virtue of an emergency clause incorporated in it, became valid and effective on the 22d day of April, 1899,—the date of its approval by the Governor. It thereby became the duty of the respondent board, at its June meeting in the year 1899, to re-divide and re-adjust the election districts in the town of Riverside, for the reason at the preceding general election in November, 1898, more than 450 votes had been cast at one of the election districts in the town. It appears from the averments of the petition the respondent board, at the June term, 1899, in obedience

to the statutes then in force, entered upon the duty of re-dividing and re-adjusting the election districts in the town of Riverside. The petition, however, avers that the said board omitted, failed or refused to re-divide and re-adjust the said election districts in said town in such manner as that not more than 450 voters should be contained in any one election district, but that said respondent board divided the said town, which contained 1454 voters at the last general election, into but three election districts. It is but a matter of mathematical calculation to know that some or all of these three election districts must contain more than 450 voters. If the three election districts were so adjusted that one-third of the voters of the town were to vote at each polling place, the number of such voters would be 484 at each of the three districts. The legal duty of the board was to divide the town into such number of voting districts, so, to quote the statute, "that each district shall contain, as near as may be practicable, 400 voters, and not more in any case than 450." It is therefore beyond dispute the respondent board failed or omitted, at its June meeting in 1899, to perform a duty which it stood charged by law to perform.

At the session of the General Assembly for the year 1899, on the 24th day of April, 1899, being two days after the act of April 22 before mentioned was approved and in force, said section 30 of the act of the General Assembly approved April 4, 1895, hereinbefore mentioned, was amended by adding the following proviso: "*Provided further*, that it shall be the duty of the county board in each county where any State soldiers' and sailors' home or homes are located, the inhabitants of which are entitled to vote, to fix and establish the place or places for holding such election or elections at some convenient and comfortable place or places, easy of access, on the ground or grounds, and within the enclosure where such State soldiers' and sailors' home or homes are located," —and so amended was re-enacted and became effective

as law July 1, 1899. Said section 30, as so amended and re-enacted, provided that the action to be taken by boards of supervisors with reference to re-districting or re-adjusting election districts in a town in which more than 450 votes had been cast in any election district at the preceding November election should be had at the regular (or a special) meeting of the board in the month of July next after the general election in November, and if not made at such July meeting might be made at an adjourned or special meeting of the board to be held in the month of August thereafter. In view of this latter enactment the respondent board, at its July meeting, 1899, as appears from the averments of the petition, adopted an order re-affirming the action it had taken at its June term, 1899, with reference to the re-division and re-adjustment of the election districts of the town of Riverside. The result of these proceedings of the respondent board provided but three election precincts for the 1454 voters entitled to vote in the said town of Riverside. It is manifest the respondent board has not complied with the duty enjoined upon it by law to re-divide and re-adjust the election districts in that town so that "each district shall contain, as near as may be practicable, 400 voters, and not more in any case than 450."

It is, however, urged, *mandamus* cannot be resorted to to enforce the performance by the respondent board of its duty in this respect, for the reason, as counsel insist, the board is without power to re-district or re-adjust election districts except when convened in session in July or August of each year. It is argued, boards of supervisors, if empowered to divide, re-divide and re-adjust election precincts at any meeting, might exercise the power at a meeting less than thirty days preceding an election, and thus, it is urged, practically disfranchise electors in such district or precinct; and further, that the legislature, in specifically naming the months in which such action should be taken by boards of supervisors, intended the

boundaries of election districts should be permanently fixed thus far in advance of elections in order that voters might have ample time and opportunity to ascertain and be advised as to the location of the polling place at which they would be entitled to vote. If it were asked to coerce a board, by the writ of *mandamus*, to take action at a period intervening between the month of August and the date of the election to be held in November these arguments and considerations advanced by counsel would no doubt be worthy of consideration, for courts, in granting or refusing writs of *mandamus*, exercise judicial discretion, and are governed by what seems necessary and proper to be done in the particular instance for the attainment of justice. Courts, in the exercise of wise judicial discretion, may, in view of the consequences attendant upon the issuing of a writ of *mandamus*, refuse the writ though the petitioner has a clear legal right for which *mandamus* is an appropriate remedy. (*People* v. *Ketchum*, 72 Ill. 212; *Oaks* v. *Hill*, 8 Pick. 47; 14 Am. & Eng. Ency. of Law, 97.) Action by the board, if now ordered, would not be attended with any of the evil results mentioned by counsel.

Nor do we think the prayer of the petition should be denied upon the ground that the court cannot lawfully direct the board to act at terms other than those to be convened in July or August. The case here presented by the petition is that the county board, at a term at which it was required to perform an official duty, took action as in performance of that duty but which clearly was not performance thereof, and the question is, may the court order the omission to be corrected by official action at a subsequent term, even if it be conceded the board has no power, of its own motion, to take such action at such subsequent term. It is the general rule, *mandamus* will not be granted in anticipation of a default or failure of official duty, and if the writ may not be availed of after the omission or failure has occurred the writ will become

inoperative in all such cases as the one at bar, and the observance or non-observance of the statutory requirement becomes a matter resting wholly within the uncontrolled discretion of boards of supervisors. Without regard to the question whether boards of supervisors, of their own motion, may act in the matter of re-dividing election districts at other than the July or August meeting if they omit to act as the law requires at such meetings, such boards may, under the authority of an order and judgment of the court, perform such duty at any other term, if so directed by such order and judgment.

It follows the petition justifies the award of a writ of *mandamus* directing the board of supervisors to divide election precincts or districts in said Riverside town so that each district shall contain, as near as may be practicable, 400 voters, and not more in any district than 450. The number of voters in a town or election district is to be determined from the number of votes cast at the general election held in the month of November last preceding the time at which the board is to act. The statute has established that as the only basis for the action of the board, and that basis must stand until it is changed by the result of subsequent general elections. The board cannot, as was here attempted to be done, substitute its judgment as to the number of electors "liable" to vote in said town, but must accept the basis fixed by the statute.

The Soldiers' and Sailors' Home created by the act of the General Assembly approved June 26, 1895, (Hurd's Stat. 1897, p. 244,) is located in the said town of Riverside, and the petition prays that said respondent board shall also be commanded by such writ of *mandamus* "to fix and establish the polling places for the inmates of said home at some convenient and comfortable place or places, easy of access, on the grounds and within the enclosure where said home is located," as required by the said proviso to said section 30 of the election statute. Counsel for the respondent insists the proviso added as

an amendment to said section 30 of the Election law by the act of the General Assembly adopted April 24, 1899, in force July 1, 1899, is in contravention of certain provisions of section 22 of article 4 of the constitution of 1870, and for that reason is void. Said section 22 of the constitution prohibits the enactment of local or special laws in any of the cases or instances therein enumerated. Among other subjects of legislation enumerated in said section as to which local or special laws are prohibited are, (1) "the opening and conducting of any election, or designating the place of voting;" "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise," and "in all other cases where a general law can be made applicable." The proviso grants privileges, with reference to the establishment or location of voting places convenient, in a special manner, to electors who are the inmates of the State Soldiers' and Sailors' Home or homes in the State. It grants equal privileges to all such inmates and to all institutions of the kind in the State. In that respect it is a general law. But that feature of the legislation is not sufficient to constitute the enactment a general law to the extent necessary to place it beyond the ban of the constitution. Not only must the law operate generally upon all the individuals composing a class to whom privileges are granted, but there must be a sound basis, in reason and principle, for regarding the class of individuals as a distinct and separate class of electors. A class cannot be created by arbitrary declaration of the law-making power and endowed with special legislative favors. It is essential to the validity of the classification, in such instances, it shall be based on material distinctions in the situation and circumstances of the individuals who are to be embraced therein, and the grounds of distinction and classification must have relation, in reason and principle, to the privileges proposed to be granted to the individuals, as a class, by the pro-

posed legislation. *Lippman* v. *People*, 175 Ill. 101; *People* v. *Martin*, 178 id. 611; *People* v. *Knopf*, 183 id. 410.

The act to establish and maintain a soldiers' and sailors' home in the State of Illinois, approved June 26, 1885, in force July 1, 1885, as amended by the act approved April 22, 1899, in force July 1, 1899, (Laws of 1899, p. 354,) provides: "All honorably discharged soldiers and sailors who served in the army or navy of the United States in the war of the rebellion, the Mexican war and the Spanish-American war, and have been residents of this State for two years immediately preceding the date of application for admission to the home, unless the service of applicants is accredited to the State of Illinois, and who are disabled by disease, wound or otherwise and have no adequate means of support, and by reason of such disability are incapable of earning their living, shall be entitled to be admitted to said home." The statute relating to the rights of inmates of the home to vote is as follows: "Every honorably discharged soldier or sailor who shall have been an inmate of any soldiers' and sailors' home within the State of Illinois for ninety days or longer, and who shall have been a citizen of the United States and resided in this State one year, in the county where any such home is located ninety days, and in the election district thirty days next preceding any election, shall be entitled to vote in the election district in which any such soldiers' and sailors' home, in which he is an inmate thereof as aforesaid, is located, for all officers that now are or hereafter may be elected by the people, and upon all questions that may be submitted to the vote of the people: *Provided*, that he shall declare upon oath, if required so to do by any officer of election in said district, that it was his *bona fide* intention at the time he entered said home to become a resident thereof." (Laws of 1887, p. 172.)

The individuals so declared to be electors in the election district where a soldiers' and sailors' home is

located, and in whose behalf the legislation under consideration was enacted, must be inmates of a soldiers' and sailors' home maintained by the State. Inmates of such homes consist, as has been seen, only of "honorably discharged soldiers and sailors who served in the army or navy of the United States in the war of the rebellion, the Mexican war and the Spanish-American war, and have been residents of this State for two years immediately preceding the date of application for admission to the home, unless the service of applicants is accredited to the State of Illinois, *and who are disabled by disease, wound or otherwise* and have no adequate means of support, and by reason of such disability are incapable of earning their living." The class to be favored by the proviso to the said section 30 includes only such soldiers and sailors as "are disabled by disease, wound or otherwise and have no adequate means of support, and by reason of such disability are incapable of earning their living." Argument cannot be necessary to demonstrate that those individuals, upon sound grounds of reason, principle and justice, may be properly regarded as composing a separate and distinct class of electors, whose situation and circumstances, as inmates of a home provided and maintained by the State, are such as to warrant legislative consideration and action appropriate to them as a class. The enactment which is designed to secure polling places readily and easily accessible to them, at which they may, with convenience and without discomfort, cast their ballots, has relation to those distinctions and differences which operate to justify the classification of such individuals into a class unto themselves, viz., their disabled condition, by wound or otherwise. It appearing the classification rests upon grounds of just and reasonable distinction, and that the legislation in question has relation to such grounds of difference and distinction, and is general as to all falling within the class, it follows the act is not special or local, but is

general in character and operation, and therefore not in contravention of the provisions of the constitution. The proviso is therefore legal and effective, and, as such, part of the section to which it is appended.

As we construe the proviso, in connection with the rest of section 30, it was the legislative intent that the polling places should be so located that every inhabitant of any soldiers' and sailors' home legally entitled to vote as a resident of such home might lawfully cast his ballot at a voting place established at some convenient and comfortable place, easy of access, on the grounds and within the enclosure where such home is located. This proviso was added to said section 30 by the amendment of 1899. (Laws of 1899, p. 209.) Its obvious purpose was to so qualify the rest of the section relating to the location of the voting places, or of a sufficient number of them, as to enable the legal voters residing at any such home to vote at convenient and comfortable places, easy of access, on the grounds and within the home enclosure. In *City of Chicago* v. *Phœnix Ins. Co.* 126 Ill. 276, we said: "In *Boon* v. *Juliet*, 1 Scam. 258, this court, at an early day, held that a proviso in a statute is intended to qualify what is affirmed in the body of the act, section or paragraph." And in *Gaither* v. *Wilson*, 164 Ill. 544, we said: "Its office (of a proviso) is generally to except something, or to qualify or restrain the generality of the section, or to exclude some possible ground of misinterpretation." See, also, *People* v. *Fidelity and Casualty Co.* 153 Ill. 25, *Dollar Savings Bank* v. *United States*, 19 Wall. 237, and *Minis* v. *United States*, 15 Pet. 445, where the same views are expressed by the Supreme Court of the United States.

Such being the evident purpose of the legislature in adding the proviso in question, it seems clear that if effect cannot be given to the proviso and at the same time to that part of the section requiring the voting place or places to be so located as to have the entrance to the room where the election is held, in a highway or public

street, the latter requirement must give way to that of the proviso. In other words, the proviso requires that the voting place or places for the legal voters of soldiers' and sailors' homes shall be established at places which are convenient, comfortable and easy of access, upon the grounds and within the enclosure of the home, whether there be any highway or public street at such places or not. Any other interpretation would make the requirement in the section which is general as to all, control that of the proviso which is general only as to the class or classes to which it applies, when, as we have seen, the clear meaning of the legislature was that as to the class or classes to which the proviso relates it should control, otherwise the proviso would be a useless and meaningless appendage to the statute. It is not meant to be said that the whole section should not be construed together so as to give effect to the whole, as far as practicable, but only that the general language of the section relating to the fixing of polling places must, in its application to soldiers' and sailors' homes, be qualified by, and, if necessary, give way to, the requirements of the proviso relating to such homes. It surely could not be contended that the enforcement of the amendment or proviso must be made to depend on the question whether there are public streets or highways upon the grounds or within the enclosure of such homes, or not. From the nature of the case it would hardly be expected that public streets or highways, used for all public purposes, would run through such grounds, so that voting places convenient, comfortable and easy of access to disabled soldiers and sailors could be located in rooms opening upon such public highways or streets; and it might well be that there would be no public street or highway so located, adjacent to the home or grounds, as to make it possible to locate the voting places as required by the amendment or proviso to said section 30. All this the legislature must have

had in mind when it enacted the proviso as an amendment to and a qualifying clause of the original section.

If it be said that a voting place is a public place, and must be so located that citizens cannot be excluded by the trustees or others in charge of State institutions, it is sufficient to say that in establishing such voting places upon the grounds of the home, (which, for certain purposes, are already public,) and at such places as required by law and in the manner required by law, such voting places, and the walks and driveways on the grounds of the home leading from the gates and entrances of the grounds of the home to the voting places, become public ways and places on all days on which elections are held, where all citizens may without interruption go, the same as to other voting places. If the precinct include other territory, the legal voters thereof may resort to such voting place as in other cases, without hindrance from those in charge of the home.

It is urged that there is no allegation in the petition that there are buildings within the grounds of the Soldiers' and Sailors' Home at Quincy having front rooms on the ground floor, the entrance to which is upon a public street or highway. As we have seen, it is not essential that any such building of the home be so located with reference to a public street or highway.

We see no difficulty in fully carrying into effect the provisions of this statute. The law is so framed as to obviate any such difficulty. It does not take from the county board all discretion in forming districts and fixing voting places, but only prescribes certain requirements which must be complied with while exercising such discretion in other respects. If, in observing the requirements of the statute relating to soldiers' and sailors' homes, it is found that the distance which voters in other parts of the township would have to travel to reach the polling places provided for them would be too great, relief may be given under the first proviso, which provides:

"That the county board may, if it deem it to be for the best interest of the voters of any town or precinct, divide any election precinct which contains more than 300 legal voters into two election precincts, same precincts to contain as near 200 voters as is possible."

While the writ of *mandamus* cannot be invoked to control the board in any matter in which the judgment and discretion of the board are involved, it may be availed of to control in the discharge of duties specifically enjoined by the statute.

It is therefore ordered that a writ of *mandamus* issue herein as prayed for in the petition, commanding the board of supervisors of Adams county to re-divide and re-adjust the election districts in said town of Riverside, including said Soldiers' and Sailors' Home, so that each district shall contain, as near as practicable, 400 voters, (subject, however, to the provisions of the first proviso above mentioned to said section 30, if found necessary to be applied by the board,) and not more, in any case, than 450 voters, each district to be composed of contiguous territory and in as compact a form as can be for the convenience of the electors voting therein, describing such districts by metes and bounds and numbering them; and also to fix and establish a polling place in each of said districts, and where such district or districts are in or embrace said Soldiers' or Sailors' Home, or any part thereof where the residents of such home reside, that said board be commanded to fix and establish the polling places for the inhabitants of said home at some convenient and comfortable place or places, easy of access, on the grounds and within the enclosure where said home is located, providing judges and clerks of election as in other cases.

Writ awarded.

WILLIAM T. MASON *et al.*

v.

THE PEOPLE *ex rel.* Gordon, State's Attorney.

Opinion filed April 17, 1900.

1. SCHOOLS—*essentials of appeal where school boards deny petition to form new district.* Where part of the school boards of districts affected by the proposed formation of a new school district refuse to grant the prayer of the petition, the petition is defeated unless their decisions are reversed on appeal, and to that end appeals must be taken from the adverse decision of each board and must be taken to the same tribunal.

2. SAME—*school board whose decision is appealed from is entitled to notice.* The tribunal to which is taken an appeal from the decisions of school boards refusing to grant the prayer of a petition to form a new school district should give notice to the boards whose decisions are appealed from, and has no jurisdiction to grant the prayer of the petition unless the adverse decisions of all the boards are before it on the appeal.

3. SAME—*what essential to legal formation of new school district.* In order that the formation of a new school district from parts of others shall be legal, it must be alleged in the petition and be found as a fact that at least two-thirds of the legal voters living within the territory to be made into a new district signed the petition and that said territory contained at least ten families.

4. QUO WARRANTO—*what is not an estoppel to quo warranto against school directors.* That a school house site has been selected, contracts for work and materials made, bonds issued and sold and a teacher engaged does not operate as an estoppel against a proceeding by information in the nature of a *quo warranto* against school directors to test the legality of the organization of the district, where it does not appear that the bonds were sold or the money expended before the filing of the information, and the hiring of the teacher was after that time.

APPEAL from the Circuit Court of Henderson county; the Hon. JOHN A. GRAY, Judge, presiding.

RAUS COOPER, and KIRKPATRICK & ALEXANDER, for appellants.

JAMES W. GORDON, State's Attorney, (NORCROSS & TODD, and GRIER & STEWART, of counsel,) for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

By leave of court an information in the nature of *quo warranto*, signed by the State's attorney of Henderson county, was filed in the circuit court of said county against appellants, claiming to be school directors of a newly formed school district, charging that said alleged school district was not legally formed, and calling upon appellants to answer and show by what right or authority they claimed to exercise the franchise of a school district and to hold the office of school directors. The information contained five counts with no substantial difference between them, and defendants answered with six pleas, the first two setting out, as justification, proceedings for the organization of the district and their election, and the remainder alleging facts which the defendants claimed should prevent the court, in the exercise of a sound legal discretion, from proceeding to judgment of ouster. The court sustained a general demurrer to all the pleas and rendered judgment of ouster against the defendants, and for costs.

The two pleas of justification set up proceedings for the formation of a new school district composed of lands taken from five existing school districts lying in four different townships and two counties. Two of the townships were in Warren county and the other two in Henderson county. According to the pleas, petitions were presented to the trustees of schools of the several townships at the annual meeting of April 3, 1899, asking for the formation of the new district. The statute authorizes the formation of a district in such case at the April meeting by the concurrent action of the several boards of trustees in the townships in which the districts affected lie, each board being petitioned as provided for in the School law. To grant the prayer of the petition and form the district required favorable action by each of the four boards of trustees, but three of the boards de-

cided against the prayer of the petition and refused to grant it. The scheme to form the new district was therefore defeated, so far as the trustees of schools were concerned.

There was a right to appeal from the adverse decisions, and as the proposed district was divided by a county line, the appeal could be taken to the county superintendent of schools of either Warren county or Henderson county. The county superintendent to whom the appeal might be taken was required to give notice to the county superintendent of schools of the other county of the pendency of the appeal and of the time and place when and where it would be heard. Both county superintendents were then required to meet together at such time and place and hear and determine the appeal, and in case of disagreement were to call in the county judge of the county where the appeal was pending, and in that case the appeal was to be determined by the three. The pleas alleged that an appeal was taken from the decision of the trustees of the township which decided to grant the prayer of the petition, to the county superintendent of schools of Warren county, and that the record of the appeal was filed with the county superintendent April 7, 1899. This appeal was taken by three persons, legal voters, who appeared before the trustees and opposed the petition. Three of the four boards refused to grant the petition, and it was defeated, so that these parties had obtained precisely what they asked for and could not take an appeal. (*Gray* v. *Jones*, 178 Ill. 169.) The pleas aver that in one of the other townships where the trustees refused to grant the petition, William T. Mason appealed from their decision to the superintendent of schools of Warren county and gave the requisite notice therefor. The information alleges that he was one of the petitioners, and counsel say that he was a petitioner, but the pleas say that he was a legal voter who appeared and opposed the petition. If a petitioner, he had a right

to appeal from an adverse decision. The papers in his appeal were filed with the superintendent of schools of Warren county April 10, 1899. The pleas, however, also aver that said William T. Mason appealed from the decision of a board of trustees of another township that refused to grant the petition, to the superintendent of schools of Henderson county. According to the pleas, this other board adjourned from April 3 to April 8 and acted upon the petition at that time, when said Mason appealed to the superintendent of schools of Henderson county and perfected the appeal by filing his papers April 8. No appeal was taken by any one from the fourth board of trustees who refused to grant the petition. Nothing was ever done under the appeal to the superintendent of schools of Henderson county, which was perfected two days before the other appeal. The superintendent of Warren county gave notice to the superintendent of Henderson county that the hearing of the appeal would take place May 12, 1899, and on that day the appeal was heard, and the superintendents disagreed and called in the county judge of Warren county, who agreed with the superintendent of Henderson county and reversed the decision appealed from and granted the prayer of the petition.

Whatever may have been the effect of the prior appeal of William T. Mason to the county superintendent of Henderson county and its pendency there, there was no appeal by any one from the adverse decision of one township. It was necessary to reverse the decisions of the three boards which were against the petition. They would stand until reversed or set aside upon appeal, and the boards are the local authorities having jurisdiction of the question, so that an appeal at least implies that they will have notice and an opportunity to be heard if their decision is appealed from. There could be but one appeal or one place where the appeal would be pending, but the appellate tribunal could not reverse a decision

not appealed from, or reverse it without notice to the several boards deciding against the petition. Here, the pleas show that one appeal to the county superintendent of Henderson county was undisposed of, and no appeal was ever taken from the decision of one of the other boards.

The statute prohibits any change of districts unless petitioned for by two-thirds of the legal voters living within the territory to be made into a new district, which must contain not less than ten families. The pleas allege that the petition for the new district set out that it was signed by more than two-thirds of the legal voters living within the territory and that said territory contained more than ten families, but it was neither alleged as a fact nor averred that it was found by the boards of trustees or the superintendents and county judge that said territory contained ten families. These facts are jurisdictional, and must be set forth in the petition filed with the trustees and must exist. (*Carrico* v. *People*, 123 Ill. 198.) The pleas were insufficient to show jurisdiction in the board of trustees, or in the county superintendents on appeal, to form the new district. For aught that appears the adverse decisions of the boards of trustees may have been against the new district because there were not ten families living in it, and the superintendents and judge did not find the fact different. The pleas of justification are insufficient.

The remaining pleas, which attempt to set up grounds of estoppel or from which the court should not proceed to judgment, show that the decision of the county superintendents and judge was rendered May 12, 1899; that afterwards, on May 27, an election was held and appellants were elected school directors; that an election was held June 10 to select a school house site; that they made contracts for material and work and made expenditures; that on July 8 an election was held to authorize issuing bonds to the amount of $600, which were afterward sold,

and the money has been used in building a school house, and that on or about September 11, 1899, they engaged a teacher and commenced the school. Leave to file the information was granted July 17 and it was filed July 18. The hiring of the teacher was after that time, and the pleas do not show that the bonds were sold and the money expended before that date. The facts so alleged are not sufficient to operate as an estoppel or justify the court in refusing the remedy.

The judgment is affirmed. *Judgment affirmed.*

THE PEOPLE *ex rel.* John T. Hinch

v.

CARTER H. HARRISON, Mayor.

Opinion filed April 17, 1900.

MUNICIPAL CORPORATIONS—*Hyde Park ordinance requiring frontage consent to application for saloon license is in force.* The ordinance of the village of Hyde Park in force April 4, 1889, requiring frontage consent of a majority of the property owners on both sides of the street in the block where a dram-shop is proposed to be kept, as a condition precedent to the granting of a license, was not repealed, by implication, by the ordinance of May 8, 1889, which amended sections 5, 6 and 10 of chapter 15 of the Hyde Park municipal code, since the two ordinances are not repugnant.

ORIGINAL petition for *mandamus.*

S. S. GREGORY, for petitioner.

CHARLES M. WALKER, Corporation Counsel, WALKER & PAYNE, and EDWIN BURRITT SMITH, for respondent.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This was a petition filed in this court in the name of the People of the State, upon the relation of John T. Hinch, for a *mandamus* against Carter H. Harrison, mayor of the city of Chicago, to compel him to issue to relator a license to keep a dram-shop at No. 773 East Fifty-first

street, in the said city. The petition sets out in full chapter 15 of the municipal code of Hyde Park, passed March 28, 1887, which embraces in twenty-one sections the general subject of dram-shop licenses. Sections 5, 6 and 10 are as follows;

"Sec. 5. No person without a license to keep or maintain a liquor or beer wagon, shall, by himself or another, either as principal, agent, clerk or servant, directly or indirectly, sell or give away or deliver any intoxicating liquor in any less quantity than four gallons, by, from or with any liquor or beer wagon, or employ, control, manage or use any conveyance for such purpose.

"Sec. 6. The president and board of trustees, by resolution, may grant licenses to keep so many dram-shops, saloons or beer wagons in the village of Hyde Park, outside of prohibited districts, as they may think the public good requires; but they expressly reserve the power to revoke any license at their discretion, and whenever revoked for any violation of the laws of the United States or State of Illinois or ordinance of the village of Hyde Park, whether passed before or after the date of such license, the license fee shall be forfeited to the village of Hyde Park.

"Sec. 10. No person shall receive a license to keep or maintain a dram-shop, saloon or liquor or beer wagon within the limits of the village of Hyde Park except upon the payment in advance to the comptroller of the village, to be by him paid into the village treasury, of a sum at the rate of $500 per annum for each dram-shop, saloon, liquor or beer wagon."

On April 4, 1889, another ordinance relating to the granting of license was passed by the president and board of trustees of Hyde Park, as follows:

"*Be it ordained by the president and trustees of the village of Hyde Park:* Any person who shall desire to obtain a license to keep a saloon or dram-shop, shall, in addition to the requirements now provided by ordinance, present

his application in writing to the village comptroller for such license, in which shall be stated the name of the person or firm to whom the license is to be issued and the place where such saloon or dram-shop is to be kept, which application shall be signed by a majority of the property owners, according to frontage on both sides of the street in the block upon which such dram-shop is to be kept, and shall also be signed by a majority of the *bona fide* householders and persons or firms living in or doing business each side of the street in the block upon which such dram-shop shall have its main entrance: *Provided, however*, that any person or firm who shall have made application as aforesaid, and received a license to keep a dram-shop, shall not be required to present an application as above in order to obtain a renewal of the license to himself or firm until at least one-quarter (¼) of the property owners or *bona fide* householders, persons and firms doing business upon both sides of the street in the block upon which the said dram-shop has its main entrance, shall file with the village comptroller, at least thirty days (30) prior to the time for the renewal of such license, a notice stating that the signers thereof object to the granting or renewing of the license to said person or firm. Upon receiving such notice the village comptroller shall notify the captain of police that such notice has been filed, and the captain of police shall at once notify or cause to be notified the holder or holders of the license; but a failure to give such notification shall not be construed as a waiver of the necessity for filing the application as provided above."

The petition sets out that this ordinance was in full force and effect until the passage and adoption of the following ordinance, May 8, 1889:

"*Be it ordained by the president and board of trustees of the village of Hyde Park:* That sections five (5), six (6) and ten (10) of chapter fifteen (15) of an ordinance entitled 'The municipal code of the village of Hyde Park,' approved

by the president of the board of trustees the 28th day of March, A. D. 1887, be and they are hereby amended so as to read as follows:

"'Sec. 5. No person shall, by himself or another, either as principal, agent, clerk, servant or employe, directly or indirectly, sell, give away or deliver any spirituous, vinous or malt liquor in any less quantity than four gallons, in any one package, to any one, at any place other than a regularly licensed saloon or dram-shop, or from or with any liquor, beer or express wagon, or employ, control, manage or use any conveyance for such purpose; and hereafter no license shall be granted to keep or maintain any liquor or beer wagon within the village of Hyde Park. Any person violating any provision of this section shall, upon conviction, be fined not less than twenty dollars ($20) nor more than two hundred dollars ($200) for each offense.

"'Sec. 6. The president and board of trustees, by resolution, may grant licenses to keep so many dram-shops or saloons in the village of Hyde Park, outside of prohibited districts, as they may deem proper; but they expressly reserve the power to revoke any license at their discretion, and when so revoked may declare the license fee forfeited to the village of Hyde Park.

"'Sec. 10. No person shall receive a license to keep or maintain a dram-shop or saloon within the village of Hyde Park except upon payment in advance to the village comptroller, to be by him paid into the village treasury, of a sum at the rate of five hundred dollars ($500) per annum for each dram-shop or saloon, payable in three equal installments, on the first day of April, August and December of each fiscal year. Every license so granted, unless sooner revoked, shall expire at the end of the current fiscal year. Such license shall be dated as of the day of application, and no person shall be deemed duly licensed to whom a license has not been actually issued as herein provided.'

"Sec. 2. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed."

The petition avers that the ordinance of April 4, 1889, was, as matter of law, repealed by the ordinance of May 8, 1889, and at the time of the annexation of said village of Hyde Park to Chicago was of no force and effect in law; that said premises, No. 773 East Fifty-first street, are not within the territory mentioned in the village ordinances of Hyde Park within which no licenses to sell intoxicating liquors should be issued, but is within other territory in which licenses are permitted to be issued; that relator, for the year ending April 30, 1899, had such license duly issued by the said Carter H. Harrison, mayor, and under it conducted a dram-shop on said premises, but that shortly prior to the expiration of this license more than one-quarter of the property owners on the street in the block upon which the said dram-shop was located, filed with the proper authorities of the city of Chicago a protest or objection to the renewal of said license, as provided by the said ordinance of Hyde Park approved April 4, 1889, of which relator was notified; that relator applied on the first day of May, 1899, to the mayor for a renewal of his license for the year ending April 30, 1900, and tendered the customary bonds required by law and the ordinances, with good and sufficient sureties, which were filed with the city collector, and tendered and offered to pay the comptroller of Chicago the sum of $500 required for license; that Carter H. Harrison, mayor, refused to renew or issue such license to relator on account of the objection made by the property owners in the block upon which said dram-shop was situated; that said Carter H. Harrison insists the said ordinance is still in force, and refuses to consider or examine relator's application for a renewal of his license; prays for summons requiring respondent, Carter H. Harrison, to make answer, if any, why a peremptory *mandamus* should not issue requiring him to take and approve

the bonds and issue to relator a license, etc. The appearance of the respondent, the mayor, was entered and a demurrer interposed to the petition.

The only question involved in this proceeding is whether the ordinance of the village of Hyde Park in force April 4, 1889, requiring frontage consents of a majority of the property owners on both sides of the street in the block upon which a dram-shop is to be kept, as a condition precedent to the granting of license, has been repealed.

The ordinance of April 4 was intended to add additional restrictions to the ordinances then in existence, to the granting of license. The language of the ordinance is: "Any person who shall desire to obtain a license to keep a saloon or dram-shop, shall, *in addition to the requirements now provided by ordinance*, present his application in writing to the village comptroller for such license, * * * which application shall be signed by a majority of the property owners, according to frontage on both sides of the street in the block upon which such dram-shop is to be kept." This language shows it was not intended to repeal any part of the ordinances then in force, but the ordinance then adopted was intended as additional or supplementary to those then in force. Chapter 15 of the municipal code of Hyde Park (the original ordinance) provides for granting licenses to keep dram-shops, saloons and liquor or beer wagons, and sections 5, 6 and 10 were amended by the ordinance of May 8, 1889, which appellant claims repealed the ordinance of April 4, 1889. The title of the ordinance of May 8 shows it was not a general revision of the entire subject of the municipal code. The very words of the title disprove such a construction. The title is as follows: "Be it ordained by the president and board of trustees of the village of Hyde Park: That sections five (5), six (6) and ten (10) of chapter fifteen (15) of an ordinance entitled 'The Municipal Code of the Village of Hyde Park,' approved by the

president of the board of trustees the 28th day of March, A. D. 1887, be and they are hereby amended." The amendment was specific, covering only sections 5, 6 and 10 of chapter 15. On examining the original sections and comparing them with the amendment of May 8, it appears that these amended sections 5, 6 and 10 were entirely re-written but retained their numbers as in the original ordinance. The principal object of the amendment was *to abolish liquor and beer wagons*, and nothing else, and the sections amended are expressly specified. No allusion is made to the ordinance of April 4, 1889, for the reason, no doubt, it was not intended to change it in any respect.

The law does not favor the repeal of a statute by implication. In *Town of Ottawa* v. *County of LaSalle*, 12 Ill. 339, we said: "It is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earliest statute continues in force unless the two are clearly inconsistent with and repugnant to each other, or unless in the latest statute some express notice is taken of the former plainly indicating an intention to repeal it; and where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication. * * * So a subsequent statute which is general does not abrogate a former statute which is particular.—Dwarris, 674." The same rule is laid down in *Butz* v. *Kerr*, 123 Ill. 659, and also in the case of *Village of Hyde Park* v. *Oakwoods Cemetery Ass.* 119 Ill. 141. In Dwarris on Statutes and Constitutions (113, note 9,) it is said: "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of regulation on that subject." "Where the powers or directions under the several acts

are such as may well subsist together, an implication of repeal cannot be allowed." (Ibid. 530, *et seq.*)

The contention of counsel for petitioner that section 6 as amended gave unlimited or unrestricted power to the president and trustees to grant licenses outside of prohibited districts, and that, having such unrestricted power, the ordinance of April 4, being restrictive, is repugnant thereto, is not, in our opinion, tenable. In the case of *People ex rel.* v. *Cregier*, 138 Ill. 401, which was a proceeding for a *mandamus* against the mayor of the city of Chicago, ordering and requiring him to issue a license to keep a dram-shop on certain premises situated within the corporate limits of what was formerly the village of Hyde Park prior to its annexation to the city of Chicago, we held that the law providing for the annexation of the territory of a village to a city saves in force the ordinances of the village relating to dram-shops until they are done away with by a vote of those living in the annexed territory. We also held that the reservation of a discretion in an ordinance is valid, as follows (p. 419): "By passing a general ordinance on the subject the municipal authorities may determine when, to whom and under what circumstances licenses may be granted, and if such ordinance is not unreasonable the power of the executive officers of the municipality to issue licenses will thereafter be controlled and measured by its terms. If no discretion is reserved in relation to the number or location of the dram-shops to be licensed, * * * such discretion may be exercised by the officers charged with the duty of issuing licenses, and if the ordinance restricts the location of dram-shops to certain portions of the municipal territory said officers have no power to issue licenses except in obedience to said restrictions."

The very language of section 6 of the original ordinance shows it is restrictive,—the granting of the license, "as they" (the president and board of trustees) "may think the public good requires." In the amendment the lan-

guage is, "as they may deem proper." These expressions show that discretion must be exercised by the president and board of trustees in the granting of licenses. The ordinance of April 4, which requires, "in addition to the requirements now provided by ordinance," that the application for a license shall be signed by a majority of the property owners according to frontage on both sides of the street in the block, etc., is no more of a restriction upon the power to grant license than the provision that no person shall be licensed without, by section 8, first giving bond in the sum of $3000; by section 9, that he give an additional bond of $500, signed by two freeholders; by section 10, that he pay in advance the license fee of $500, and that in the opinion of the president and board of trustees the license should issue. These must all be considered as restrictions upon the president and board of trustees, and the ordinance of April 4 is of the same character, and there is no repugnance between the two ordinances.

In the case of *City of Chicago* v. *Quimby*, 38 Ill. 274, which was an action of debt to recover a penalty, the act of the legislature had given the power of inspection to an inspector appointed by the board of trade. The charter of the city of Chicago empowered the city to regulate the inspection of flour, etc., and an ordinance was passed which required every person or business firm bringing or receiving flour, etc., to or at the Chicago market to have the same inspected by the city flour inspector. It was contended that as the charter authorized the appointment of an inspector and the regulation of inspections, the power was exclusive in the city, and that the power granted to the board of trade was repealed by implication. This court said (p. 278): "Such a repeal only takes place when the provisions of the two enactments are repugnant in their provisions. But in all cases, if a construction can be reasonably given by which both acts may stand, it will be adopted; but when they are incon-

sistent and the provisions of but one of the acts can be executed, we must conclude that the legislature, in adopting the latter, designed to repeal the former."

In *People ex rel.* v. *Cregier*, *supra*, it was said (p. 418): "The Dram-shop act * * * declares the business of selling intoxicating liquors in quantities less than one gallon to be criminal, except so far as it is expressly authorized and made lawful by license. The tendency of the liquor traffic is so completely shown by all human experience, that from an early day said traffic has been subjected in this State to the surveillance and control of the police power, and we presume such has been the case in most, if not all, civilized communities. The right, therefore, to engage in this business and to be protected by law in its prosecution can no longer be claimed as a common law right, but is a right which can be exercised only in the manner and upon the terms which the statute prescribes. The refusal to license deprives no man of any personal or property right, but merely deprives him of a privilege which it is in the discretion of the municipal authorities to grant or withhold."

In the case of *Swift* v. *People*, 162 Ill. 534, this court sustained the validity of an ordinance creating a local option district in a certain portion of Chicago, which provided that unless the person applying for a license should present to the mayor, with his application, a petition signed by a majority of the legal voters of that portion of the city of Chicago described in the ordinance, and asking for the granting of license, the mayor could not grant the license.

The two ordinances of April 4 and May 8, 1889, not being in conflict with or repugnant to each other, the ordinance of April 4 was not repealed.

The demurrer to the petition for a peremptory *mandamus* is sustained, the *mandamus* denied, and judgment will be entered against relator for costs.

Mandamus denied.

JAMES PEASE, Sheriff, *et al.*

v.

JOSEPH B. DITTO.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*Appellate Court's recital should disclose facts upon which it acted.* Where the Appellate Court reverses without remanding, it is essential to the right of the defeated party that the recital in the Appellate Court's judgment disclose those facts upon which that court acted in applying the law and entering judgment against him.

2. SAME—*when Appellate Court's recital states legal conclusions instead of facts.* A recital by the Appellate Court upon reversing a judgment for the defendant in replevin, which states that the plaintiff at the time the suit was begun, "was entitled to the possession of the property in question and had such an interest therein that he was entitled to maintain said suit," presents conclusions of law only, and is not such a sufficient "finding of facts" as is contemplated by the statute.

3. REPLEVIN—*what essential to plaintiff's right of recovery.* It is essential to the right of recovery in replevin that the plaintiff prove his general or special ownership of the property or his right to its possession, which questions can only be determined by the application of rules of law to the facts proven.

4. SAME—*who may maintain replevin against sheriff taking mortgaged property.* The right to bring replevin against a sheriff taking mortgaged property from one who had possession thereof for the purpose of bringing it to sale under the mortgage, is in the mortgagee, unless the person having possession for the purpose of sale has a general or special interest in the property other than that of a mere servant of the mortgagee.

Ditto v. *Pease*, 82 Ill. App. 192, reversed.

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

NEWMAN, NORTHRUP & LEVINSON, for appellants.

MOSES, ROSENTHAL & KENNEDY, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This was replevin brought in the superior court of Cook county by the appellee, Ditto, against the appellant Pease, to recover possession of certain articles of ready-made clothing. The issues were submitted to the court for decision without the intervention of a jury. The only testimony produced was that in behalf of the plaintiff, Ditto. The court refused to hold the following proposition presented by the plaintiff as the law applicable to the facts of the case:

"The court is requested to hold, as a matter of law, that the issues joined herein are with the plaintiff, and that the right to the possession of the property taken under the writ of replevin in this case, at the time of the commencement of this suit, was in the plaintiff."

The finding and judgment of the superior court were adverse to the plaintiff, Ditto, and he appealed to the Appellate Court for the First District. The Appellate Court reversed the judgment of the superior court, refused to remand the case and entered judgment in replevin in that court in favor of the plaintiff, Ditto.

The Appellate Court incorporated in its judgment the following as its findings of facts in the case: "That appellant, at the time of the commencement of this suit in said superior court, was entitled to the possession of the property in question, and had such an interest therein that he was entitled to maintain said suit, and that the appellees were guilty of a wrongful taking and detention of said property."

When the Appellate Court reverses a judgment of the trial court for errors in its rulings of law the cause must be remanded by the Appellate Court for a new trial. (*Scovill* v. *Miller*, 140 Ill. 504.) The Appellate Court is, however, in actions of the character of that at bar, the final arbiter as to the facts in controversy, and if it finds the facts differently from the trial court, and reverses the judgment of the trial court for that reason, it need

not remand the cause but may enter final judgment in the Appellate Court, as was the course pursued in this instance. (*Commercial Ins. Co.* v. *Scammon*, 123 Ill. 601.) Section 88 of the Practice act makes it the duty of the Appellate Court, if it reverses a judgment of the trial court as the result of the finding of the facts different from that of the trial court and does not remand the cause, to recite in its final judgment the facts as found by the Appellate Court. In such cases the parties are concluded, as to all facts in controversy, by the facts as recited in the final judgment of the Appellate Court. But the decision of the Appellate Court as to the law arising out of the facts so recited in its judgment is not final. It may be reviewed in this court by appeal or on error. *Hawk* v. *Chicago, Burlington and Northern Railroad Co.* 138 Ill. 37.

By this appeal from the judgment of the Appellate Court entered in this cause, the appellant Pease is entitled to the judgment of this court as to the law applicable to the facts on which the Appellate Court acted in entering judgment against him. It is true, the only evidence produced on the hearing was that in behalf of the plaintiff. But it by no means follows there is no controversy as to the ultimate facts proven by such testimony. Different minds may draw different conclusions as to the facts established by the testimony, though it is all produced in behalf of but one of the litigants. This is demonstrated in this record, for the superior court and the Appellate Court, on consideration of the testimony produced solely on behalf of the plaintiff, arrived at different conclusions as to the ultimate facts established by such testimony. It is therefore essential to the rights of the appellant in this court, against whom final judgment was rendered in the Appellate Court, that the recital of the judgment of the Appellate Court shall disclose the facts upon which the Appellate Court applied the law and entered the judgment against him.

The action was replevin. The judgment of the Appellate Court is in favor of the plaintiff in the action. In order to entitle the plaintiff in replevin to recover, it is necessary it be proven the plaintiff is the general or special owner of the property replevined or is the person entitled to the possession thereof. (Rev. Stat. chap. 119, sec. 1.) In order to determine whether such plaintiff has a general or special property in the property replevined or whether he is entitled to the possession of such property, the facts relating to his claim of ownership or right of possession must be considered in the light of the rules of law applicable to those questions. The connection the plaintiff had with the property, or his relation to it, must be made to appear by the testimony. Whether the facts so disclosed by the evidence invested the plaintiff with a general or special property interest, or entitled him to the possession of the replevined goods, must be determined by the application of the rules of law to such facts. The trial court refused to hold that the state of facts disclosed by the proof entitled the plaintiff in the replevin suit, as a matter of law, to the possession of the property. The appellate Court differed with the trial court as to the state of facts disclosed by the evidence, reversed the judgment of the trial court and entered judgment for the plaintiff in the action. The correctness of this action of the Appellate Court depends upon the facts as that court found them to be from the evidence. We are to ascertain such facts from the judgment of the Appellate Court. But when we look into the judgment of that court we are unable to ascertain the facts to which the Appellate Court applied the law and rendered judgment adversely to the appellant. We find in that judgment the declaration that the plaintiff in the action was entitled to the possession of the property in question and had such an interest therein as he was entitled to maintain said suit. These declarations are not findings of fact, but are statements of legal rights which flow

from the existence of facts, or legal conclusions which arise out of certain facts. The Appellate Court should have stated the facts on which it based these conclusions of law, in order the parties might obtain the judgment of this court on the question whether the facts as found by the Appellate Court justified the legal conclusions reached by that court in entering its judgment. In this action chattel mortgages had been executed on the property in controversy, and such mortgages had been placed in the hands of the plaintiff by the mortgagees, for the purpose of bringing the property to sale under the terms and conditions of the mortgages. He took possession of the property, and the same was levied upon and taken out of his possession by the appellant Pease, as sheriff. If his control and possession of the property was merely that of a servant or employee of the mortgagees his possession of the property was that of those for whom he acted, and the right of action to recover that possession was in the mortgagees, unless he had a general or special interest in the property. That he was entitled to the possession of the property and had such interest therein that he was entitled to maintain replevin are legal conclusions to be arrived at upon consideration of the facts. The Appellate Court should, therefore, have incorporated in its judgment the ultimate facts upon which it based those conclusions. Had it done so, its judgment as to the law applicable to such ultimate facts could have been reviewed.

The judgment must, therefore, be reversed and the cause is remanded to the Appellate Court, with instructions to that court to recite in its judgment the ultimate facts upon which it bases the legal conclusion that the plaintiff was entitled to the possession of the goods, and had such property right and interest in said goods as entitled him to maintain the action of replevin.

Remanded to Appellate Court, with directions.

THE VILLAGE OF NORTH CHILLICOTHE
v.
ALLSTON BURR.

Opinion filed April 17, 1900.

1. EJECTMENT—*plaintiff must show the superior title where the source is common.* Where the plaintiff alleges common source of title, which is denied by the defendant but the proof shows such source to be common, the burden is upon the plaintiff to prove that his title is superior to that of the defendant.

2. DEDICATION—*in case of common law dedication grantee takes subject to easement.* In case of a common law dedication of land to the public, subsequent grantees of the original owner take subject to the easement created, and they cannot deprive the public of possession previously taken.

3. SAME—*effect where territory platted as addition to city is organized into village.* Where the streets indicated upon a platted addition to a city are dedicated to the public the rights of the public therein are preserved, even though the dedication is not accepted by the city, if the territory embraced in the plat is organized into a village, and the streets are recognized and worked by the village before the plat has been vacated or any steps taken to annul the dedication.

4. SAME—*statutory dedication does not fail because plat is made before incorporation.* A statutory dedication will not fail because the plat is made and recorded before incorporation of the territory, but the fee will remain in abeyance until the corporation is formed.

5. EVIDENCE—*what fact tends to show a completed dedication.* That the owner of land, after making and recording a plat, conveyed by general warranty deed certain of the lots, in which deed the subdivision of the tract into lots, blocks and streets and the recording of the plat are recited, tends to show a completed dedication.

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

WINSLOW EVANS, and COVEY & COVEY, for appellant:

If a party has no title at the time he dedicates the property, he and his grantees are still estopped from denying the fact of dedication. *Napa* v. *Holland*, 87 Cal. 84.

The acknowledgment and recording of a plat has all the force and effect of a grant. It operates by way of

estoppel, and concludes the former owner, and all claiming through or under him, from asserting title. *Canal Trustees* v. *Haven*, 11 Ill. 554.

If a plat is recorded before a town has a corporate existence the fee remains in abeyance, subject to vest in the corporation the moment it is created. *Canal Trustees* v. *Haven*, 11 Ill. 554; *Gebhardt* v. *Reeves*, 75 id. 301; *Brooklyn* v. *Smith*, 104 id. 429.

There is no higher evidence of dedication than a plat acknowledged and recorded. It informs the public that those spaces marked upon it as streets and alleys are for the use of the public, and until the town becomes incorporated they are under the control of the county authorities, to be worked and kept in repair, if necessary, for the public convenience. *Waugh* v. *Leech*, 28 Ill. 491.

When a town is regularly laid out, platted and the proper acknowledgment thereof made and recorded, the streets and alleys must preserve the width given to them by the plat, and not to be enlarged or contracted by any powers. The gift of the streets is to the public, with the width the proprietor may choose to give them. *Waugh* v. *Leech*, 28 Ill. 488.

The acceptance of a dedication need not be formal, but may be shown by circumstances, such as continued use by the public, by improvements and repairs of the highway, by grading or the like, or by taking charge of the highway by public officials. Jones on Easements, sec. 449; *Reese* v. *Chicago*, 38 Ill. 336.

Where the inhabitants of a town or village, after laying out the town into blocks, lots and streets, become duly incorporated, and from time to time thereafter elect requisite officers, and the authorities adopt ordinances, work upon the streets, etc., this will afford conclusive evidence of the acceptance of the streets. *Lee* v. *Mound Station*, 118 Ill. 304.

It is a familiar rule that in an action of ejectment the plaintiff must recover on the strength of his own title

and not on the weakness of the title of the defendant. *Agnew* v. *Perry*, 120 Ill. 655.

H. C. PETTETT, and STEVENS, HORTON & ABBOTT, for appellee:

A dedication can only be made by the owner of the land in fee. Jones on Easements, sec. 444; *Smith* v. *Young*, 160 Ill. 169.

A primary condition of every valid dedication is that it be by the owner of the fee. *Baugan* v. *Mann*, 59 Ill. 492.

In order to show a dedication it is necessary that the person alleged to have made the dedication was the owner, as no one but the owner of land can make a dedication of it. *Harding* v. *Hale*, 83 Ill. 501.

A dedication of property for public use is in the nature of a conveyance for the purposes of the use, but a person can convey no more or greater title than he holds. If he has no title, or his title is conditional and it fails, the dedication fails. *Elson* v. *Comstock*, 150 Ill. 303.

Dedication is not established where the evidence, in all its bearings, tends to prove the lack of any settled, definite purpose on the part of the owner of the land. *Mason* v. *Chicago*, 163 Ill. 351.

To constitute a valid dedication there must be both the intention to dedicate on the part of the donor and the acceptance of the dedication by the public authorities. *Hamilton* v. *Railroad Co.* 124 Ill. 363.

An intention to dedicate land must be clearly and unequivocally manifested by the owner. There must be an acceptance of the dedication. *Eckhart* v. *Irons*, 128 Ill. 577.

Mr. JUSTICE CARTER delivered the opinion of the court:

Appellee, Burr, brought ejectment against the appellant village to recover certain strips of land in the corporate limits of the village, and which had been designated on a plat and had also been improved and used as streets. The plea was not guilty. Burr, the plaintiff, filed an affi-

davit that the defendant and he claimed title through a common source,—that is, from one Samuel T. Howe,—and defendant filed an affidavit denying that it claimed title through said Howe as a common source with plaintiff, but stating that it claimed title through and from one E. B. Purcell. The case was tried by the court without a jury and judgment was given for the plaintiff. Defendant then took this appeal.

To prove his case the plaintiff gave in evidence three deeds to the property in controversy and other property: First, a quit-claim deed dated January 10, 1896, from Samuel T. Howe and wife to E. B. Purcell; second, a quit-claim deed dated January 20, 1896, from Purcell and wife to Howell Jones; and third, a quit-claim deed dated January 20, 1896, from Jones and wife to Allston Burr, the plaintiff. He then rested his case. The defendant then offered in evidence, in proper order, two certain plats, together embracing all of the land in controversy, certified to as owner of the land described therein and acknowledged by E. B. Purcell in November, 1887. The first plat was certified to by "C. A. Sias, Eng'r," which certificate stated that the plat was a true and correct plat of Santa Fe addition to the city of Chillicothe, as surveyed by him (Sias) on the 11th day of November, 1887, and stated also the starting point of the survey and described the boundaries. The second plat, of other lands but embracing certain streets sued for, and purporting to be Santa Fe third addition to the city of Chillicothe, was made in February, 1888, and certified to in substantially the same manner as the first. Each plat was, in the same month it was made and certified, filed for record in the office of recorder of deeds in Peoria county. These plats showed the subdivision of the land into lots and blocks, streets and alleys, gave the names of the streets, and also, as we think, with sufficient certainty, their width. The lots and blocks were numbered and their lengths and widths given as required by the statute.

It does not appear that the city of Chillicothe ever accepted the plats of these purported additions or extended its jurisdiction to the territory platted, but in 1890 the inhabitants of this and adjacent territory established, in the manner provided by law, the village of North Chillicothe, which then became duly incorporated and organized. Several of the streets as platted were thereafter improved and used as such by the public, and in 1895 the streets and parts of streets now in controversy were opened by the village authorities and plowed, preparatory to grading. This was all done before any of the deeds given in evidence by the plaintiff were made. There was some evidence that some of the land was in cultivation by somebody, and that one of the attorneys who appeared for plaintiff in the trial below objected to the opening of the streets and threatened to enjoin the village, but the plaintiff did not then have any interest in the land. Previous surveys of the streets had been made according to the plats and to the stakes set by the original survey. The evidence shows that the village authorities were in possession of these streets before the execution of any of the deeds in plaintiff's chain of title.

The plaintiff objected to the admission in evidence of the plats,—first, because it did not appear that Purcell was the owner of the property when they were made; second, because they were not certified or acknowledged according to law; third, because the widths of the streets and alleys were not shown by the plats; fourth, because it was not shown that the city of Chillicothe accepted the offer of dedication; and fifth, because the distances, courses and other marks on the plat were not explained by the certificate of the surveyor. The court admitted the plats subject to the objections, but later in the trial sustained the objections and excluded the plats.

Before considering these objections it is proper to consider the case as it stood when the plaintiff rested, as shown by the pleadings and proof.

The defendant having denied, on oath, that it claimed title through a common source with plaintiff, and having stated that it claimed title through E. B. Purcell, it was incumbent on plaintiff to prove title in himself as at common law. This he could have done in one of two ways: First, by showing such title derived from a paramount source of title, as from the government; or, second, by proving that he and the defendant did claim through a common source and that his was the better title. (*Smith* v. *Laatsch*, 114 Ill. 271.) But plaintiff made no attempt to trace his title back of Howe, nor to prove that Howe had any title or was in possession claiming title when he conveyed. Nor did he prove that Howe was the common source of title of himself and the defendant. The mere quit-claim deed from Howe to Purcell, considered in connection with the other two deeds, at most only tended to prove that that deed was the origin of the only title the plaintiff had. But these deeds, in connection with defendant's allegations and proof, did show that they both claimed title through a common source and that that common source was Purcell. Neither party, under these circumstances, did or could deny that Purcell had had title, and as the plaintiff was bound to recover, if at all, upon the strength of his own title and not on the weakness of the defendant's, it devolved on him to prove that his right was superior to the defendant's. But did he do this? As before shown, the plaintiff made no attempt to do so, except to give in evidence the quit-claim deed from Howe to Purcell. This was one step to prove his allegation that Howe was the common source of title, but as no proof was offered that defendant also claimed through Howe, this deed was ineffectual to prove a common source, and, as before said, it was, standing alone, no proof of title in Purcell. There was no proof that Purcell was in possession under that deed, to raise the presumption that that was the title under which he held, and, consequently, the title under which both parties

claimed. As we said in *Littler* v. *City of Lincoln*, 106 Ill. 353 (on p. 365): "Quit-claim deeds, and even warranty deeds, do not prove that the grantee had no prior title. It is within every day's experience that persons, out of abundance of caution, take deeds from different parties for the same real estate." The three deeds were made upon a nominal consideration, near the same time, in the State of Kansas, where Purcell, in his deed to Jones, described himself as residing, and they certainly contained nothing in themselves showing how Purcell derived the title under which both parties claimed as a common source. If plaintiff's chain of title from Howe had run through another than Purcell it would be incontrovertible that he failed to show a right of recovery, however weak the defendant's right may have been. But the alleged chain passing through Purcell, thereby, in connection with the defendant's claim, making him the common source of title of both parties, the plaintiff could at most recover only by sustaining the burden he had assumed, of showing that his title from Purcell was better than the defendant's from the same source. We say *at most*, for it is not necessary to consider whether, having alleged one common source, he could in the proof rely upon another. It is sufficient to sustain the error assigned that the plaintiff did not prove superior title in himself from Purcell.

In *Smith* v. *Laatsch*, 114 Ill. 271, this court said (p. 276): "Prior to the adoption of the present statute regulating the practice in this class of cases, the plaintiff, in order to relieve himself from the burthen or danger, as the case might be, of deducing title from the government of the United States, or some other independent source of title, was bound to show not only his own claim of title back to the common source, but that of the defendant also, and if, upon this showing, the plaintiff appeared to have the better title he would be entitled to recover, but not otherwise." And on page 279: "We are of the opinion that the object, and sole object, of the legislature in its

adoption was to relieve the plaintiff, in cases of this kind, from the burden of proving the defendant's chain of title as well as his own, unless the defendant would deny, by counter-affidavit, that he claimed from the alleged common source of title, in which event the burden still remained upon the plaintiff, just as it did before, of proving both chains of title, running back to a common source."

But even if it were held that when the plaintiff rested he had established *prima facie* a right to recover, the plats offered in evidence were sufficient to overcome any presumption raised in his favor. Even if the plats as made and certified were not, under the statute, sufficient to prove a statutory dedication, or a grant by Purcell, the common source of title, of the fee in the streets to the village, they were, with the other evidence, sufficient to establish a common law dedication to the use of the public, and if the fee passed from Purcell by his deed to Jones, and from Jones by his deed to the plaintiff, it was burdened with the easement in favor of the public, and the village could not be deprived of possession. (*Maywood Co.* v. *Village of Maywood*, 118 Ill. 61.) These plats were made, certified to and acknowledged by Purcell, describing himself as owner, and by the surveyor, describing himself as "C. A. Sias, Eng'r," eight years before plaintiff's quit-claim deeds were executed. Inasmuch as both parties claimed through Purcell, the first objection urged, without proof to support it, that he was not the owner when he caused the survey and plats to be made, certified and recorded, should not have prevailed.

Under the second objection urged, that they were not properly certified, it is argued here that the survey could, under the statute, have been made only by a competent surveyor, and that "Eng'r" does not necessarily mean "surveyor." It is a sufficient answer to say that this objection was not made when the plats were offered in evidence, and that if it had been, the defendant might

have been able to give explanatory proof of the technical significance of the term, which would have obviated the objection.

Nor do we think the objection should have prevailed that the width of the streets was not stated on or by the plat. The name of each street, and figures denoting its width, are given. But it is said that it is not shown whether the figures "66" denote feet, inches or chains. The certificates of the engineer and the owner, and the plat itself, taken as a whole, show that the distances, and the lengths and widths of the streets, blocks, lots and alleys, are given in feet. *Town of Lake View* v. *LeBahn*, 120 Ill. 92.

The next objection made to the plat is, that the offer of dedication was made to the city of Chillicothe and as an addition thereto, and not to the appellant village, nor, presumptively, to any village to be created or organized after the plat was made and recorded. It is urged that the owner might wish to have his said lands incorporated within the city of Chillicothe, to which they were adjacent, but not within a separate village to be thereafter organized. We have held in several cases that dedication as a statutory one will not fail because the plat is made and recorded before the incorporation, but that the fee will remain in abeyance until the corporation comes into existence. (*Village of Brooklyn* v. *Smith*, 104 Ill. 429; *Marsh* v. *Village of Fairbury*, 163 id. 401.) These plats were made and recorded in 1888, and the village embracing this territory was organized in 1890, and soon after some of the streets were re-surveyed and improved, and afterward, in 1896, those here in controversy, yet it does not appear that the owner vacated the plat or took any steps to revoke the dedication. It is to be borne in mind that the dedication of the use of the streets was to the public, and that the municipality, upon acceptance, became merely the trustee for the public, and held (if a statutory dedication) the fee in trust.

In *Rhodes* v. *Town of Brightwood*, 145 Ind. 21, (43 N. E. Rep. 492,) a similar dedication of a park had been made by the subdivision of a tract of land and the making and recording in 1872 of a plat of the Oak Hill addition to the city of Indianapolis. The city did not accept the proposed addition, and in 1876 the town of Brightwood was incorporated and in 1880 annexed the Oak Park addition to its own corporate territory. The court said: "Another contention made by counsel is, that the addition in which Morris Park is situated was made to the city of Indianapolis and not to the town of Brightwood, and that the town therefore had no claim upon the park so dedicated. Counsel forget that the dedication was made for the use of the public, and particularly the property owners and residents in the addition itself. The appellee town is but a trustee for the public. Any individual having a particular interest in the park might have taken the proper steps to maintain the dedication, if the town, as trustee, had failed to do so,"—citing Elliott on Roads, 88, and other authorities. We agree with the view there taken, and it disposes of the same question in this case. If the owner had intended that there should be no dedication unless accepted by the city of Chillicothe he could have vacated his plat as provided by law. But this he did not do.

While the plat cannot be set up as a model to be followed, we are of the opinion that there was a substantial compliance with the statute and that it is good as a statutory dedication, and under the statute operated as a grant with warranty of title in fee, by which Purcell and his subsequent grantees are bound and estopped. But, as before said, if the plat and other evidence established only a common law dedication the village could not be ousted of its possession by one who has not shown a superior right. Another fact tending to prove a completed dedication, appearing in the evidence but not referred to by counsel, is, that in 1888, after making and recording

the plats, Purcell and wife, by their deed of general warranty, conveyed to others certain of the lots described in the two additions, in which deed the subdivision of the tract into lots, blocks and streets, and the recording of the plats, are recited.

We are of the opinion that the court below erred in excluding the plats and in rendering judgment for the plaintiff, and that judgment should have been rendered for the defendant. The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

THE ILLINOIS TRUST AND SAVINGS BANK, Trustee,

v.

MONTVILLE WALDO HOWARD *et al.*

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*appeal will not lie to review mere interlocutory order.* No appeal will lie from a mere conclusion of law by the court or from decisions or rulings on mere questions of practice arising during the progress of the case.

2. SAME—*denial of motion to compel production of deed for inspection is not a final order.* The denial of a motion by defendant in an ejectment suit, preparatory to the trial of the cause, to compel plaintiff to produce his deed for inspection, in order that it might be submitted to experts on handwriting and its genuineness otherwise tested, is not a final order from which an appeal will lie.

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

PRUSSING & MCCULLOUGH, CRAFTS & STEVENS, and TENNEY, MCCONNELL, COFFEEN & HARDING, for appellant.

MORAN, MAYER & MEYER, and JESSE LOWENHAUPT, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant is one of the defendants in an action of ejectment brought by the appellees and now pending in the superior court of Cook county. The plaintiff Montville Waldo Howard claims title by a deed from John McCaffrey, deceased, of whose will the defendant, the Illinois Trust and Savings Bank, is trustee, and the other plaintiff is an attorney who claims a share by conveyance from Howard. Said defendant questions the genuineness of said deed from John McCaffrey, and preparatory to the trial of the cause moved the court to require said plaintiff Montville Waldo Howard to produce for inspection the said deed, that it might be exhibited to experts and persons familiar with the handwriting of John McCaffrey, and that photographs might be made and its genuineness tested in other ways. The motion was supported by affidavit that the defendant expected to be able to show upon such examination, from the face of the instrument, that it was not genuine. The superior court denied the motion, and an appeal was prosecuted to the Appellate Court for the First District. The Branch Appellate Court for that district dismissed the appeal, and this further appeal was prosecuted. The errors assigned are that the Appellate Court erred in dismissing the appeal and in not hearing the cause on its merits.

It is, of course, familiar to all that a mere interlocutory order cannot be reviewed on appeal. No appeal will lie from a mere conclusion of law by the court or from decisions or rulings on mere questions of practice arising during the progress of the case. This motion and the decision appealed from are of that nature. It is urged that the decision is final against the right to inspect the deed, and that such decision will certainly prejudice the

defendant in making its defense. If the decision is wrong and should have the effect claimed it would not be different in any respect from an order refusing a continuance or change of venue, or other decision which might prejudice a party to the suit. Whether the refusal of the court has prejudiced the defendant's rights in this case or injured the defendant in any way has not yet been determined. The defendant may succeed in the trial of the ejectment suit, and for aught that we know the judgment may be in its favor. Whatever the result may be, the order is clearly interlocutory, relating only to a matter of practice in the course of the proceeding, and the Appellate Court was right in dismissing the appeal. *Lester* v. *Berkowitz*, 125 Ill. 307.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

J. E. PERISHO

v.

THE PEOPLE *ex rel.* Gannaway, County Collector.

Opinion filed April 17, 1900.

SPECIAL ASSESSMENTS—*insufficiency of improvement petition cannot be shown on application for sale.* Extrinsic evidence to show that an improvement petition *prima facie* sufficient did not have the requisite number of signers cannot be first received on application for judgment of sale. (*Pipher* v. *People*, 183 Ill. 436, and *Leitch* v. *People*, id. 569, followed.)

APPEAL from the County Court of Coles county; the Hon. JOHN P. HARRAH, Judge, presiding.

A. J. FRYER, S. S. ANDERSON, CHARLES C. LEE, and W. E. ADAMS, for appellant.

EMERY ANDREWS, State's Attorney, AL. RAY, City Attorney, and J. H. MARSHALL, (NEAL & WILEY, of counsel,) for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court,

This is an application to the county court for a judgment of sale for non-payment of a special assessment under an ordinance of the city of Charleston for the paving of Jackson street in that city between Eighth street and Fourteenth street. The appellant filed objections to the rendition of judgment against his property for the first installment of the special assessment levied thereon in the matter of said improvement. These objections were overruled and judgment of sale was rendered against the property of the appellant, and this appeal is prosecuted from such judgment of sale.

The objection made to the entry of judgment of sale was, that the owners of a majority of the property in the contiguous blocks abutting on the portion of Jackson street which was ordered to be paved did not petition for the local improvement. In support of this objection the appellant offered in evidence testimony for the purpose of showing that the petition was not signed by the owners of a majority of the property in the contiguous blocks abutting upon the portion of the street to be paved. The court refused to receive the testimony thus offered, and ruled that he would not hear any evidence attacking the original assessment proceeding for any defect therein prior in date to the order of confirmation and which did not appear upon the record itself. To this ruling appellant excepted.

The same question presented by this record arose in *Pipher* v. *People*, 183 Ill. 436, and *Leitch* v. *People*, id. 569, and we there held that the evidence was not admissible, —that the judgment of confirmation was conclusive. The decision in those cases is conclusive of the question presented by this record, and for the reasons stated in those cases the judgment of the county court is affirmed.

Judgment affirmed.

THE CHICAGO CITY RAILWAY COMPANY

v.

ADAM MAGER.

Opinion filed April 17, 1900.

1. WITNESSES—*when witnesses are "interested" in the result of a suit.* As distinguished from prejudice or bias resulting from friendship, hatred, consanguinity or other domestic or social relation, an "interest" in the result of the suit is a legal, certain and immediate interest either in the cause itself or in the record as an instrument of evidence, to be used in the witness' own future litigation.

2. INSTRUCTIONS—*court may decline to give two instructions on the same point.* An instruction concerning the right of the jury to consider the "interest" of witnesses when considering their testimony may be refused, where an instruction on the same point, but applicable only to the plaintiff, has been given and there are no other "interested" witnesses.

3. STREET RAILWAYS—*when question whether car was supplied with proper brake is for jury.* Whether a street car supplied with a brake which, though in good order, could not be depended upon to control the car on a wet track, can be regarded as reasonably equipped with stopping appliances is a question of fact for the jury.

Chicago City Railway Co. v. *Mager*, 85 Ill. App. 524, affirmed.

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

WILLIAM J. HYNES, and W. J. FERRY, (M. B. STARRING, of counsel,) for appellant.

WILL B. MOAK, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The only alleged errors here urged are, that on the hearing of this cause, which was an action on the case by appellee to recover damages for personal injuries alleged to have been inflicted through actionable negligence on the part of the appellant company, the trial

judge erroneously refused to give to the jury instruction No. 23 asked by appellant, and so erroneously framed an instruction given by the court on its own motion as to authorize the rendition of a verdict against the appellant company on a ground of negligence not advanced by the declaration. Instruction No. 23 was as follows:

"The jury are instructed that in considering the evidence of the witnesses in this case and determining what weight shall be attached to the same, they have the right to take into consideration whatever interest, if any appears from the evidence, such witness or witnesses may have in the result of the suit."

Instruction No. 16 given at the request of the appellant company was as follows:

"The jury are instructed that while the law permits a plaintiff in a case to testify in his own behalf, nevertheless the jury have a right, in weighing his evidence and determining how much credence is to be given to it, to take into consideration that he is the plaintiff and his interest in the result of the suit."

Each of these instructions asked the court to direct the attention of the jury to the same class of witnesses, namely, those having an interest in the result of the suit. Mr. Greenleaf, in his work on Evidence, (vol. 1, sec. 386,) defines an interest in the result of a suit to be "some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record, as an instrument of evidence, in support of his own claims, in a subsequent action. It must be a legal interest, as distinguished from the prejudice or bias resulting from friendship or hatred, or from consanguinity, or any other domestic or social or any official relation, or any other motives by which men are generally influenced, for these go only to the credibility." It is not claimed any one who gave testimony, other than the appellee, had any such an interest in the result of the suit. The court was therefore justified in refusing instruction No. 23 as being but a repe-

tition of instruction No. 16. Counsel for the appellant company asked twenty-six instructions, twenty-one of which were granted. It was the province and duty of the court to decline to give a second instruction on the same point. If counsel for appellant desired the jury should be advised it was competent for them, in determining as to the weight and value proper to be given to the testimony of witnesses, to consider any bias or prejudice existing in the mind of the witness, arising from sentiments of friendship or hatred, if any such bias or hatred appeared, an instruction should have been so framed for that purpose.

It appeared a train of appellant's cars ran into and upon a wagon on which appellee was riding. He was thrown to the ground by the impact and injured in his person by the fall. The declaration averred the collision was occasioned by the carelessness and negligence of servants of the appellant company in the management and operation of the train. It is complained certain instructions given by the court upon its own motion authorized the jury to consider as an element of the right of recovery, whether the train was properly equipped with appliances for stopping the train. The contention is, (1) the declaration did not charge negligence in respect to the manner in which the car was equipped with appliances to control its motion; and (2) that there was no evidence that the brake or other appliance was defective.

The first contention is of a variance between the declaration and the proof. It was not raised in the trial court. Had it been presented there it could, if necessary, have been obviated by an amendment. We have frequently ruled objections as to a variance cannot be raised for the first time in this court.

The motorneer in charge of the car, when testifying as to the manner in which he operated the train at the time in question, stated: "When I saw him (appellee) turn his horses' heads toward the track I applied the

brake, and I saw the brake was not going to do, so I threw the brake off and reversed the current. * * *

Q. "What did you do—what movement did you make?

A. "I first applied my brake, and seeing the brake was not going to work I released the brake. I had my reverse handle and pulled on the power again and gave my car a backward action.

Q. "And after you applied the brake, and you found, as you say, that it would not work, you reversed it?

A. "Yes, sir."

Upon further examination the witness explained that he did not mean the brake was defective or could not be operated; that the brake was all right, but that the rails of the track of the road were wet with water from a sprinkling cart or from rain, and were for that reason so slippery the brake could not be depended upon to stop the train in time to avoid striking appellee's wagon,—the appellee, as the witness claimed, having suddenly turned his team and vehicle from the street onto the track in front of the train.

We are inclined to agree with the view urged by counsel for the appellant that all of the testimony of this witness considered together made it clear the witness did not mean to be understood that the brake was out of order or in any way defective. But it remained a fair question of fact for the jury to determine whether a car supplied with a brake which, though in perfect order, could not be depended upon to check and control the motion of the train under the circumstances, should, to adopt the language employed by the court in the instruction complained of, be regarded as "reasonably equipped at the time as to its stopping appliances."

The record is free from error reversible in character. The judgment of the Appellate Court is affirmed.

Judgment affirmed.

HENRY COHN

v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY.

Opinion filed April 17, 1900.

SOLICITORS' FEES—*when the amount allowed on foreclosure will not be deemed unreasonable.* An allowance of $781 for solicitor's fees in foreclosing a mortgage will not be set aside, on appeal, as unreasonable, where the amount of the mortgage indebtedness exceeds $15,000, and the defendant offers no proof to rebut the testimony of three witnesses for complainant, who testified that the amount allowed was reasonable, usual and customary.

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.

MOSES, ROSENTHAL & KENNEDY, for appellant.

HOYNE, O'CONNOR & HOYNE, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

This is an appeal from a judgment of the Appellate Court affirming a decree of the circuit court of Cook county foreclosing four mortgages given by appellant to the Northwestern Mutual Life Insurance Company to secure the payment of certain moneys therein named. At the time the decree was rendered the mortgage indebtedness amounted to the sum of $15,629.05. Each of the mortgages contained a provision that in case of foreclosure the mortgagor will pay to the mortgagee an adequate and reasonable sum as solicitor's fees, the amount thereof to be fixed by the court. Upon examination of the record it appears that there were more than fifty defendants to the bill, but no defense was interposed to the merits. Some of the defendants answered the bill but the most of them were defaulted. The appellant, in

his answer, neither admitted nor denied the allegations of the bill but called for strict proof. Replications were put in to the answers, and the case having been referred to the master to take and report the evidence, he filed a report showing that there was due complainant on the mortgages $15,629.05. The master also found there was due as solicitor's fees, under the provisions of the mortgages, $781.45. Exceptions were filed to the master's report, which were overruled, and the report was confirmed by the court. The court found in its decree that there was due the complainant from the appellant the sum of $781.45 as an adequate and reasonable solicitor's fee to the complainant's solicitor. The allowance of the solicitor's fee is the only error relied upon by appellant to reverse the decree.

In *Casler* v. *Byers*, 129 Ill. 657, where the amount of a solicitor's fee was involved, the court held that a reasonable attorney's fee may be allowed to a party foreclosing a mortgage by bill, when the mortgage so provides, and that what is a reasonable fee is a question of fact to be determined from the evidence in the case. In that case a fee of $500 was sustained where the amount of the mortgage indebtedness was only $5430. Here the mortgages exceeded $15,000, and three witnesses were called on behalf of the complainant, who all testified that the amount allowed by the decree was a reasonable, usual and customary fee. No evidence whatever was introduced by or in behalf of the appellant to contradict the testimony thus introduced by the appellee. Under such circumstances we cannot say that the amount allowed was excessive. If the appellant thought the amount found by the master was too large in view of the labor performed, it was his right and his duty to call witnesses and prove what would be an adequate and reasonable sum. Had he pursued this course, and shown by competent evidence that the amount was excessive, the court would no doubt have reduced the amount, but on appeal we cannot arbi-

trarily disregard the evidence and reverse a decree which seems to be sustained by the evidence.

As the judgment of the Appellate Court is warranted by the evidence it will be affirmed.

Judgment affirmed.

JOHN MYERS

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 17, 1900.

This case is controlled by the decision in *Ruhstrat* v. *People*, (*ante*, p. 133,) holding the Flag law of 1899 to be unconstitutional.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. A. N. WATERMAN, Judge, presiding.

JOHN MAYO PALMER, and ROBERTSON PALMER, for plaintiff in error.

CHARLES S. DENEEN, State's Attorney, and F. L. BARNETT, for the People.

Per CURIAM: The question involved in this case is the same as the question decided in the case of *Ruhstrat* v. *People*, (*ante*, p. 133,) to-wit: the constitutionality of the act of April 22, 1899, entitled "An act to prohibit the use of the national flag or emblem for any commercial purposes or as an advertising medium." The decision in the *Ruhstrat case* governs and controls the decision of this case.

Accordingly, the judgment of the criminal court of Cook county is reversed, and the cause is remanded to that court with directions to proceed in accordance with the views set forth in the case of *Ruhstrat* v. *People*, *supra*.

Reversed and remanded.

THE MERCHANTS' NATIONAL BANK

v.

GEORGE W. LYON *et al.*

Opinion filed April 17, 1900.

1. EVIDENCE—*degree of proof necessary to overcome sworn answer.* When the complainant requires an answer under oath, such answer can only be overcome by the evidence of two witnesses or by the testimony of one and circumstances equal to that of another.

2. SAME—*one alleging fraud has the burden of proof.* Complainant in a creditor's bill proceeding, who charges fraud in the conveyance of the debtor's property, has the burden of establishing such fraud by a preponderance of the evidence.

3. DEBTOR AND CREDITOR—*debtor is entitled to make a bona fide preference in favor of relative.* A son who is heavily indebted to his father may prefer the latter by conveying property to him in satisfaction of the debt, the fact of the relationship being merely a circumstance to excite suspicion, but not, of itself, proof of fraud.

4. SAME—*what facts tend to show that conveyance was bona fide.* That the value of property conveyed by a son to his father was less than the amount of his *bona fide* indebtedness to the father, that the latter carried out his part of the agreement by paying notes upon which he was security for the son, and that the property conveyed was subject to mortgages which the father assumed, are circumstances tending to show good faith in the transaction.

Lyon v. *Merchants' Nat. Bank*, 82 Ill. App. 598, affirmed.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

This was a creditor's bill filed by the Merchants' National Bank of Peoria on April 22, 1892, in the circuit court of Peoria county, asking for discovery and relief against George W. Lyon, Aaron Lyon, (now deceased,) Weston Arnold and Theodore Miller. The bill was based upon a judgment recovered on October 21, 1891, against George W. Lyon for the sum of $3438.65, upon certain

notes given the bank by him as renewals of prior notes of J. S. Ely & Co., of which firm he had been a member.

The bill charges that in November, 1889, George W. Lyon was the owner of certain lots and undivided interests in lands and lots in the city of Peoria, which are particularly described in the bill, but which property is for convenience known and referred to in the record as (1) the Jefferson Park subdivision; (2) the Peoria Fair subdivision; (3) the Highland Park addition; (4) the Lincoln Place subdivision; (5) the Selby Park subdivision; (6) the Washington street property; and (7) the homestead property, in Monson & Sanford's addition.

The bill alleged that in November, 1889, George W. Lyon, being largely indebted to complainant and others, in order to defeat his creditors executed a number of deeds, by which he transferred all the above real estate, —some of it to his father, Aaron Lyon, and the rest to his brother-in-law, Weston Arnold; that said deeds were fraudulent, for the purpose of hindering and delaying creditors, and without consideration; that the property was still held in trust for George W. Lyon, etc. The bill propounded to each defendant many specific interrogatories, called for an answer under oath, and asked a decree setting aside said deeds and subjecting the premises to the payment of complainant's execution. Each defendant filed a sworn answer, specifically answering the interrogatories, giving detailed statements of the deeds and the considerations therefor, and wholly denying the allegations of fraud, and denying that George W. Lyon had any further interest in the lands conveyed to Aaron Lyon and that they were held in trust for him. Complainant filed replications, and the cause was referred to a master to take and report the proofs with his conclusions. Evidence was taken before the master in 1893 and 1896, and in June, 1897, the master made a report holding all the conveyances fraudulent. Objections to the report were filed before the master, which he overruled.

He then filed his report in court, and defendants filed exceptions thereto.

The case was heard upon the bill, answers, replications and proofs, the report of the master and the exceptions, and upon the hearing the court sustained the defendants' exceptions, and found by its decree that George W. Lyon, on and prior to the 29th day of December, 1889, was justly indebted to the German-American National Bank of Peoria to the extent of $15,000, as set forth in the answer of Weston Arnold, and that to secure said indebtedness he executed and delivered to the said Arnold a warranty deed to the lots in Jefferson Park and fair association subdivisions, and found no fraud in said conveyance; that there was no equity in the bill so far as it attacks the validity of the conveyance to Arnold; and sustained the exceptions to that portion of the master's report and dismissed the bill so far as it related to said conveyance. The court also found that the conveyance of the Washington street property by Aaron Lyon to A. V. Thomas was fraudulent as to complainant, but that said Thomas was a *bona fide* purchaser of said property and unaffected by said fraud, and that complainant was entitled to no equity as against that property. As to the conveyances from George W. Lyon to Weston Arnold, and by Arnold to Aaron Lyon, of the undivided half of certain lots in Highland Park, and the conveyances from George W. Lyon to Aaron Lyon of the Lincoln Place, Selby Park and homestead properties, the court found they were made for the purpose of hindering and delaying the creditors of George W. Lyon, and were as to such creditors fraudulent and void, and overruled the exceptions to the master's report as to them, and adjudged and decreed the same to be subject to the lien of complainant's judgment, and that complainant was entitled to have the same sold on execution for the satisfaction of its judgment as though the legal title existed in George W. Lyon.

The case was appealed by George W. Lyon and Aaron Lyon to the Appellate Court for the Second District, which reversed the judgment of the circuit court and remanded the cause, with directions to dismiss the bill of complaint. Aaron Lyon died during the pendency of the suit in the Appellate Court, and an order was made, dated May 31, 1899, denying an appeal, and entering judgment *nunc pro tunc* as of January 3, 1899, on account of the death of Aaron Lyon, one of the defendants. A writ of error was sued out of this court by the Merchants' National Bank, the complainant in the original bill, making the heirs and executor of Aaron Lyon parties.

JACK & TICHENOR, for plaintiff in error:

In case of a conveyance by an insolvent debtor, if a near relationship exists between the grantor or grantee more vigilant and jealous scrutiny will be excited and clearer and more convincing proof required than when the transaction is between strangers. *Martin* v. *Duncan*, 156 Ill. 274.

When defendants, being relatives, are apprised by a bill in equity that a deed executed by them is to be impeached, it is incumbent upon them to contradict and explain every fact tending to throw suspicion upon it. *Alexander* v. *Todd*, 1 Bond, (U. S. C. C.) 175.

When the consideration is impeached and there are other circumstances attending the transaction throwing suspicion upon its good faith, the evidence of payment being in the possession of the parties to the contract, they should produce it. *Callan* v. *Statham*, 23 How. 477.

A secret trust between the parties is a badge of fraud. Where a secret trust and confidence exist for the grantor's benefit the sale is void, both as to precedent and subsequent debtors. *Gordon* v. *Reynolds*, 114 Ill. 118; *Jones* v. *King*, 86 id. 225; *Bostwick* v. *Blake*, 145 id. 85.

Where a number of transfers are made at the same time, constituting, in all, the entire property of the debtor,

it matters not that a valuable and an adequate consideration may have been received by the debtor for some of the gifts; if, still, the general effect is to delay creditors, the transaction may be annulled by them. 2 Bigelow on Fraud, 483; *Switz* v. *Bruce*, 16 Neb. 463; *Nickerson* v. *English*, 142 Mass. 267.

GEORGE B. FOSTER, for defendants in error:

The defendants having answered under oath, as required by the bill, the same must be taken as true, unless overcome by the testimony of two witnesses or what is equivalent thereto. *Catlett* v. *Dougherty*, 114 Ill. 568; *Mey* v. *Gulliman*, 105 id. 273.

To render a sale or conveyance fraudulent as to creditors of the vendor there must be mutuality or participation in the fraudulent intent on the part of both the vendor and the purchaser; and where the party proves a purchase of property which appears on its face to be free from fraud and shows the payment of a fair and adequate consideration, he makes a *prima facie* case, and it is incumbent on the part of the one attacking the same for fraud as to creditors, to establish the fraud by a preponderance of the evidence. *Schroeder* v. *Walsh*, 120 Ill. 403.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The Merchants' National Bank, the complainant in the original bill and the appellee in the Appellate Court, assigned no cross-errors in that court to the findings of the trial court that there was no equity in the bill so far as it attacked the validity of the conveyance by George W. Lyon to Weston Arnold of the property known as Jefferson Park and the lots referred to as being in Peoria fair subdivision, thus sustaining the exceptions to the master's report and dismissing the bill so far as it related to said conveyance. Neither were cross-errors assigned as to the finding of the court that A. V. Thomas was a *bona fide* purchaser of the Washington street property

and complainant was entitled to no equity against said property, hence that portion of the decree must be understood to be acquiesced in and is not before this court for review.

Did the Appellate Court err in reversing the decree of the circuit court and directing that court to dismiss the bill? The only question to be determined is whether the conveyances from George W. Lyon to Aaron Lyon for the Lincoln Place, Selby Park and homestead properties were fraudulent as to the creditors of George W. Lyon and were without consideration.

The evidence shows that George W. Lyon dealt quite extensively in real estate in Peoria and also was engaged in other business enterprises. He was a single man, and resided with his father, Aaron Lyon. Aaron Lyon was a man eighty years of age when he testified in the case. He had had a vigorous mind until his wife died, about ten years before, since which time his memory had not been good. He was regarded as a man of means, having inherited, in 1880, $40,000 from John B. Lyon, of Boston. He was able to collect some rents, but for the past fifteen or twenty years George W. Lyon had bought and sold and leased property for him and assisted him in loaning money. For several years, at different times, Aaron Lyon had loaned George W. Lyon money when he required it in his real estate business, and had taken the latter's notes, and Aaron Lyon had also become security for George W. Lyon on notes at banks and in some of his business transactions. It also appears in evidence that a settlement was had between Aaron Lyon and George W. Lyon in November, 1889, and it was found that George W. Lyon was indebted to Aaron Lyon, for money borrowed and upon notes upon which his father was security, in the sum of about $22,000, independently of a judgment in favor of W. L. Pierce & Co. against George W. Lyon for $2153, which was a lien upon the homestead, and also for a mortgage upon the homestead for $2380. It was

then agreed that George W. Lyon should convey the real estate in question to his father, said Aaron Lyon, the net value of which was estimated to be about $12,000, which was to be accepted by Aaron Lyon in full settlement of all notes and indebtedness then held by Aaron Lyon against George W. Lyon, and Aaron Lyon agreed to pay and satisfy all notes upon which Aaron Lyon was security for George W. Lyon, and Aaron Lyon agreed to pay the W. L. Pierce & Co. judgment, and he was also to pay the mortgage on the homestead. The conveyances were made and executed by George W. Lyon to Aaron Lyon, and Aaron Lyon surrendered to his son the notes held, and assumed the payment of the notes upon which he was security.

George W. and Aaron Lyon filed sworn answers denying that the conveyances from George W. to Aaron Lyon were fraudulent or designed to cover up the lands or lots, or the title thereto, to prevent complainant from recovering the amount of its said judgment, and denied that George W. Lyon fraudulently retained equitable interests and trusts therein that should be subjected to complainant's judgment. Theodore Miller and Weston Arnold also filed answers under oath.

The answer of George W. Lyon admits that November 29, 1889, he conveyed, by warranty deed, to his father, Aaron Lyon, certain lots in Lincoln Place subdivision, the consideration being placed in the deed at $5000, but avers that the actual consideration for the deed was that Aaron Lyon agreed that a certain indebtedness which the defendant then owed on a note held by the German-American National Bank of Peoria for the sum of $4600 and interest should be paid by Aaron Lyon from the proceeds of eight certain consolidated bonds of the Boston, Concord and Montreal Railroad Company, each for the face value of $1000, which had been pledged for the payment of said indebtedness by George W. Lyon, who had borrowed the bonds from his father, Aaron Lyon, the

owner of the same; and also that Aaron Lyon would cancel a certain indebtedness which he held against George, amounting to $800 or $900, and that Aaron Lyon afterward, in March, 1890, paid and discharged the indebtedness to the bank from and out of the proceeds of the sale of the bonds, to the amount of $4836.14, and took up and canceled the note. The answer denies that the real estate described in the deed of November 29, 1889, is under the absolute control of George W. Lyon, but avers that whatever control he had over the property or any property of Aaron Lyon since the date of said conveyance or conveyances has been as the agent, only, of his father and with his father's consent and direction, his father being a man of the age of eighty years and not sufficiently vigorous to conduct his own business, and that he relied on him, George W. Lyon, in caring for and managing his (Aaron Lyon's) property; admits that on the 9th day of November, 1889, he conveyed to his father, Aaron Lyon, for the express consideration of $2000, the tract of land described as the Selby Park property; that the same still stands in the name of Aaron Lyon, but denies the same is subject to the control of defendant, or is held in trust by Aaron Lyon for the use and benefit of defendant, but avers that the actual consideration for the conveyance, and certain other conveyances of the same date, and of certain real estate on Washington street, in the city of Peoria, was the payment and satisfaction by Aaron Lyon of two certain promissory notes which Aaron Lyon held against defendant, and which amounted, principal and interest, at the time to the sum of $7551.13, and that the deed was subject to a mortgage of $8000 on the property conveyed; admits that the title to lot 3, in block 92, in Monson & Sanford's addition to Peoria, (the homestead,) remained in defendant George W. Lyon until about the third day of October, 1891, when the defendant, for an expressed consideration of one dollar, (no money in fact being paid,) conveyed the same to his father, Aaron Lyon;

avers the fact to be that in February, 1891, Aaron Lyon purchased and had assigned to him a certain judgment obtained in the circuit court of Peoria county in favor of W. L. Pierce & Co. against the defendant for $2153 and costs, which was a lien upon any real estate defendant had at that time, and that he conveyed the homestead property subject to a mortgage upon the same amounting to about $2200; avers the property was not worth to exceed $2600, and that Aaron Lyon assumed the mortgage encumbrance and agreed to pay the same; denies that the conveyances, or any of them, were fraudulent or designed to fraudulently cover up the same so as to prevent complainant from recovering the amount of its judgment.

The answer of Aaron Lyon was under oath, and corroborates substantially the statements and averments of the answer of George W. Lyon. He answers the special interrogatories and gives detailed statements of the deeds and the considerations therefor. He says that the consideration for the Selby Park and the Washington street property conveyances, dated November 9, 1889, was the surrender to George W. Lyon of two promissory notes which he (Aaron) held against him,—one dated January 5, 1884, for the sum of $1600, and interest thereon at eight per cent, and the other dated January 20, 1889, for $4983, and interest thereon at eight per cent per annum, both amounting, principal and interest, to $7551.13; that these notes were surrendered up and canceled.

These conveyances appear to have been accepted by Aaron Lyon as absolute, and there is nothing indicating to us that any secret trust existed. The sworn answers of both George W. and Aaron Lyon deny that George W. Lyon retains any equitable interests and trusts in the lands and premises, or that said conveyances were designed to cover up the same to prevent the complainant from recovering the amount of its judgment. When the complainant requires the answer of a defendant under oath, and he so answers, it can only be overcome by the

evidence of two witnesses, or by the evidence of one and circumstances equal in weight to that of another. (*Myers* v. *Kinzie*, 26 Ill. 36; *Phelps* v. *White*, 18 id. 41.) Have the sworn answers of George W. Lyon and Aaron Lyon been overcome by the evidence of two witnesses, or that of one and circumstances equal to that of another? A careful examination of complainant's evidence fails to show that the conveyances to Aaron Lyon were fraudulent or without consideration, and the sworn answers are not overcome.

The testimony shows that Aaron Lyon was security for his son on several notes at the German National Bank, and paid one note of $4600 from the proceeds of bonds loaned to George and which were held as collateral by the bank. The fact that the notes that Aaron Lyon stated, in his answer, he surrendered up were not produced at the trial is regarded as a suspicious circumstance by complainant's counsel. The attorney who drew the answers of George W. Lyon and Aaron Lyon, testifies that he had the notes before him when he drew the answers, and they were described in the same. George W. Lyon swears that he had them until he took them to his attorney to use in preparing the answers, and that he afterwards took them home and laid them on a dresser; that the housekeeper threw some papers out on the ash pile in the rear of the house, and she told him they had blown on the floor and she threw them out there, and he went and hunted, and found a receipt that had been given him about the same time, but found no other papers.

The sworn answers not being overcome by the testimony of complainant, it must be held that Aaron Lyon was a purchaser for value and entitled to hold the property conveyed to him by George W. Lyon. The fact that George W. Lyon and Aaron Lyon were related does not prove fraud. As was said in *Wightman* v. *Hart*, 37 Ill. 123: "Nor does the fact that Albert and Charles were relatives prove fraud. It may be a circumstance to excite suspi-

cion, but of itself is not proof. Nor do we think, in connection with other circumstances, that it overcomes the sworn answer responsive to the allegations of the bill."

The surrender and cancellation of these notes and an account of $890 were a good consideration for the deeds. Besides, Aaron Lyon, who was security on notes with George W. Lyon, was jointly liable thereon, and he agreed to and did assume and treat them as his own, which was a good consideration. Every tract of land deeded was encumbered by mortgage, and the deeds from George W. Lyon to Aaron Lyon were made subject to these mortgages. The value of the property deeded Aaron Lyon, the evidence shows, was about $11,000, and the indebtedness due from George W. Lyon to his father was upwards of $13,000, so that it appears Aaron Lyon actually paid more than the property was worth at the time the conveyances were made.

George W. Lyon had a right to prefer Aaron Lyon. He had a right to turn out property in satisfaction of or to create a lien upon it for the security of a particular debt. In *Farwell* v. *Nilsson*, 133 Ill. 45, this court said (p. 48): "The right of a debtor to pay one creditor in preference to another, or to turn out property in satisfaction of or to create a lien upon it for the security of a particular debt, in preference to and to the exclusion of other liabilities, always existed at common law."

Complainant made Aaron Lyon its own witness and is bound by his testimony. He testified:

Q. "Was there any property of any kind included in any of the deeds from George to you that was not absolutely sold by him to you in payment of his indebtedness to you?

A. "That was the understanding.

Q. "Was not that the fact?

A. "Yes, sir. As near as I can come at it from the old stubs, George W. Lyon was owing me in November, 1889, at the time of the settlement, about $17,000 or $18,000.

I think the property deeded to me was worth less than the amount of his indebtedness to me."

The sworn answers of George W. Lyon, Aaron Lyon and Weston Arnold, and their testimony, deny all fraud and deny there was a secret trust, and not being overcome must be taken as true. We fail to find any sufficient testimony in the record, on the part of the complainant, which overcomes this evidence. Fraud being alleged, it must be established by a preponderance of the evidence. That was not done here.

We think the judgment of the Appellate Court was correct, and it will be affirmed. *Judgment affirmed.*

ELIOT C. CLARKE *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. PUBLIC IMPROVEMENTS—*sections 7 and 8 of Improvement act of 1897 construed.* Under sections 7 and 8 of the Improvement act of 1897 (Laws of 1897, pp. 104, 105,) at least ten days must elapse between the adoption of the resolution by the board of improvements and the submission of the ordinance to the council, since the ordinance cannot be submitted until after the public hearing, which must not be less than ten days after the adoption of the resolution.

2. SAME—*provisions as to contents of board's resolution and lapse of time are mandatory.* The provisions of section 7 of the Improvement act of 1897, requiring the resolution of the improvement board to fix a time for public hearing and to contain the engineer's estimate of cost, and also the provisions concerning the lapse of time between the adoption of the resolution and the submission of the ordinance, are mandatory and jurisdictional.

3. SPECIAL ASSESSMENTS—*when special assessment ordinance is void.* A special assessment ordinance passed under section 7 of the Improvement act of 1897 is void, where no public hearing was had and no provisions are contained in the resolution of the improvement board fixing a time for a public hearing or setting out the engineer's estimate of cost.

4. SAME—*when court is without jurisdiction to entertain assessment proceeding.* Where it is shown that no public hearing was held and that the resolution contained no estimate of cost by the engineer the void character of the ordinance is established and the court is without jurisdiction to entertain the proceeding, notwithstanding the attorney for the city moves to reduce the assessment roll to conform to the estimate contained in a former resolution for the same improvement, upon which a public hearing was had, an ordinance passed and assessment proceedings instituted, but which were abandoned because the estimate was deemed too low.

APPEAL from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

This is an appeal from a judgment of the county court, rendered on October 12, 1899, confirming a special assessment levied for the purpose of curbing, grading, and paving Clybourn avenue from the north curb line of Division street to the north line of North avenue in the city of Chicago.

On December 27, 1898, there was a regular meeting of the board of local improvements in the city of Chicago, at which a resolution was adopted for the making of the local improvement above referred to. The resolution thus adopted on December 27, 1898, gave, in the body of it, the estimate of the cost of the improvement, made by the city engineer, as being $25,500.00, and provided that Wednesday, January 18, 1899, at three o'clock P. M., at room 400, in the city hall, should be fixed as the time and place for public consideration of said resolution. There was a regular meeting of the board on January 18, 1899, at the place aforesaid, and a public hearing was then and there had upon the proposed improvement in accordance with the notices posted and mailed for the same. On February 9, 1899, there was an adjourned meeting of said board, at which, on recommendation of the superintendent of streets, a resolution was adopted that said local improvement be made and adhered to pursuant to prior resolutions theretofore passed by the board.

On March 6, 1899, an ordinance was passed by the city council providing for said improvement, and that the cost of the same should be raised by special assessment. On April 8, 1899, a petition was filed in the county court of Cook county, asking for the levying of a special assessment for said improvement, to which petition was attached a certified copy of said ordinance of March 6, 1899; and attached to said petition and ordinance were the recommendation of the board of local improvements that the improvement be made, and the estimate of the city engineer and engineer of the board, estimating the cost of the improvement at $25,500.00, which estimate was itemized. Section 2 of the ordinance of March 6, 1899, approved the recommendation of the board of local improvements and the estimate of the cost of the improvement so made by the engineer of said board. On the same day, April 8, 1899, the court entered an order that one John A. May be directed to make an assessment of the cost of the improvement upon the city and the property specially benefited by the improvement; and, also, on the same day made an order that the *Chicago Democrat* be designated as the newspaper for the publication of the special assessment notice.

The petition, so filed on April 8, 1899, with the ordinance of March 8, 1899, and the recommendation of the board of local improvements, and the estimate of the cost of the improvement at $25,500.00 thereto attached, remained pending and undisposed of until September 12, 1899. On the latter day, to-wit, September 12, 1899, the court made an order, that all judgments of confirmation theretofore entered in said proceeding shall be vacated and set aside, and the assessment roll withdrawn, and the petition for the assessment be dismissed.

The above facts appear from the testimony introduced in the present proceeding by the petitioner, the city of Chicago, and, also, by the present appellants, the objecting property owners.

During the period between April 8, 1899, and September 12, 1899, while the petition for a special assessment to pay the cost of the said improvement, estimated at $25,500.00, was pending, a new petition for a special assessment to pay for the same improvement, estimated at a cost of $29,500.00, was filed, which petition was the one in pursuance of which the judgment here appealed from was rendered; and the proceedings, preceding the filing of the said petition, which was filed on June 17, 1899, and following the filing of the same, were as follows:

On May 17, 1899, there was a regular meeting of the board of local improvements of the city of Chicago, at which the following resolution was adopted:

"Whereas, on the 27th day of December, 1898, a resolution was adopted by the board of local improvements providing for the improvement of Clybourn avenue from the north curb line of Division street to the north line of North avenue, which said resolution was based upon an estimate made by the city engineer; and whereas, afterwards, to-wit, a public meeting was had upon this proposed improvement in accordance with the statute; and whereas, at said public hearing it was decided by the said board to proceed with the said improvement, and a resolution was adopted accordingly, and in accordance therewith an ordinance was sent to the city council and duly passed, and a petition has been filed in the county court for the confirmation, praying that steps may be taken to confirm said assessment; and whereas, since the passage of said ordinance and the filing of such petition the prices of labor and material have so increased that in the opinion of the engineer of the board of local improvements the improvement cannot be constructed for the amount estimated; and whereas, in the opinion of the said board this improvement should be made; it is therefore

"*Resolved*, That the petition now pending in the county court providing for this improvement be dismissed, and that the city engineer and the engineer of the board of local improvements be directed to prepare a new estimate for the above improvement, and that a new ordinance be prepared and sent to the city council providing for this improvement, in accordance with the new estimate pursuant to the original resolution heretofore adopted."

On May 22, 1899, the board of local improvements submitted to the common council of the city a written recommendation for the improvement of Clybourn avenue in Chicago from the north curb line of Division street to the north curb line of North avenue, submitting therewith an ordinance for the said improvement, together with an estimate of the cost thereof, and recommending the passage of said ordinance and the making of said improvement. Attached to the latter ordinance, which was passed on May 22, 1899, was an estimate of the cost of the improvement, signed by the city engineer and engineer of the board of local improvements. The latter estimate, which was dated May 22, 1899, fixed the cost of the improvement at $29,500.00. Section 2 of the ordinance of May 22, 1899, approved of the recommendation of the board, dated May 22, 1899, and also the estimate of the cost of the improvement at $29,500.00. On June 17, 1899, the present petition was filed by the city of Chicago in the county court of Cook county, praying for the confirmation of a special assessment for the purpose of curbing, grading, and paving that portion of Clybourn avenue above mentioned, to which petition was attached a certified copy of said ordinance of May 22, 1899, together with the recommendation of the board of that date, and the itemized estimate of the cost of the improvement, fixing the cost of said improvement at $29,500.00. On June 19, 1899, the court ordered that John A. May be directed to make a true and impartial assessment, etc. On July 29, 1899, the verified assessment roll was filed. On August 10, 12 and 15, 1899, objections to the confirmation of the assessment were filed by the present appellants as to the property owned by them.

Up to this point in the proceedings for the new assessment, estimated at a cost of $29,500.00, the former proceeding for the levying of an assessment for the same improvement at a cost of $25,500.00, was still pending

said former proceeding not having been dismissed, as heretofore stated, until September 12, 1899.

On September 25, 1899, and in the present proceeding begun by the filing of the petition filed on June 17, 1899, the case at bar was heard on the legal objections made by the present appellants, which objections were taken under advisement by the court. On September 28, 1899, the objections made by the appellants were sustained by the court.

On October 6, 1899, the city made a motion to vacate the order of the court sustaining said objections, the hearing of which was continued. On October 12, 1899, the motion to set aside the order sustaining the objections was allowed, over the objection of counsel for the appellants, and exception was taken by the latter. Counsel for the city then offered in evidence upon the question of said objections a certified copy of the ordinance of May 22, 1899, together with the recommendation of the improvement and the estimate of the cost at $29,500.00 thereto attached, and also the affidavits of mailing and posting notices, the affidavit of publication, and the assessment roll, being the same affidavits theretofore offered by the city before the order, sustaining the objections, was vacated. The city then offered in evidence a portion of the former proceedings for the same improvement when its cost was estimated at $25,500.00, to-wit: the resolution and proceedings of December 27, 1898, January 18, 1899, February 9, 1899, and May 17, 1899, as the same have been hereinbefore set forth.

Then on the same day, viz.: October 12, 1899, the record shows the following motion by the counsel for the city and proceedings had thereon, to-wit: "I move that the assessment roll be reduced $4000.00. Objected to. Objection overruled. To which ruling and decision of the court the objectors by their counsel then and there duly excepted." Counsel for the objectors then intro-

duced in evidence the former petition filed on April 8, 1899, together with the ordinance of March 6, 1899, and the recommendation attached thereto, together with the estimate of the cost of the improvement at $25,500.00, and the orders entered on April 8, and September 12, 1899, as heretofore set forth.

Upon the second hearing of the objections thus had on October 12, 1899, said objections were overruled by the court, and a jury having been waived by agreement, and the objections triable by jury submitted to the court, the court thereupon found the issues for the petitioner, the city of Chicago, and entered an order confirming the assessment roll. From such judgment of confirmation the present appeal is prosecuted.

RICHARD S. FOLSOM, DAVID FALES, and SWIFT, CAMPBELL & JONES, for appellants.

CHARLES M. WALKER, Corporation Counsel, and ARMAND F. TEEFY, for appellee.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

The objections, filed by the appellants upon the trial below to the confirmation of the assessment, attacked the validity of the ordinance lying at the basis of the assessment, because of an alleged failure to comply with certain preliminary requirements of the statute.

It is contended on the part of the appellants that, before the passage of the ordinance under which the present assessment was levied, no estimate by the city engineer for the improvement was incorporated into the records of the board of local improvements, and no public hearing was held, at which the people could discuss the cost of this improvement; and ten days had not elapsed between the time of the passage of the authorizing resolution and the submission of the ordinance to the city council.

Section 7 of the act of June 14, 1897, "concerning local improvements," provides that the board of local improvements shall have the power to originate a scheme for any local improvement to be paid for by special assessment or special tax, either with or without a petition, and that, in either case, the board shall adopt a resolution describing the proposed improvement, which resolution shall be at once transcribed into the records of the board. The resolution so adopted shall fix a day and hour for the public consideration thereof, which shall not be less than ten days after the adoption of the resolution. The board shall also cause an estimate of the cost of the improvement to be made in writing by the public engineer to be itemized to the satisfaction of the board, and this estimate is required to be made a part of the record of said resolution. Notice is required to be given by posting, or by posting and mailing, of the time and place of the hearing, and this notice is required to contain the substance of the resolution adopted, and the estimate of the cost of the improvement. Section 8 provides, that, at the time and place fixed in the notice for the public hearing, the board shall meet and hear the representation of any person desiring to be heard on the subject of the necessity of the proposed improvement, the nature thereof, or cost as estimated; and after such hearing, the board shall adopt a new resolution abandoning or modifying or adhering to the proposed scheme, as they shall consider most desirable.

It thus appears, that, in its original resolution describing the proposed improvement, the board must fix a day and hour for public consideration of said resolution, and shall also make the estimate of the cost of the improvement, as made by the public engineer, a part of the record of the resolution. Inasmuch as the day and hour fixed for the public consideration of the resolution must be not less than ten days after the adoption of the resolution, and inasmuch as the board must cause an ordinance

for the improvement to be prepared after such hearing, it follows that ten days must elapse between the time of the adoption of the resolution, authorizing the improvement, and the submission of the ordinance to the council. This must be so, because it is after the hearing, when the board adopts the new resolution adhering to the improvement, "and thereupon, if the said proposed improvement be not abandoned, said board shall cause an ordinance to be prepared therefor to be submitted to the council." These preliminary requirements as to the contents of the resolution of the board of local improvements, and as to the lapse of the time between the adoption of the resolution and the submission of the ordinance, are mandatory and jurisdictional in their character.

Statutes, delegating the power to levy taxes or assessments, must be construed strictly. This power can not be rightfully exercised by corporate bodies, unless it is authorized either in express terms or by necessary and clear implication. Authority for its exercise must be found in statutory grant or requirement. Where the statute provides a particular mode for its exercise, that mode must be pursued, and no other can be substituted for it by the officials who undertake to exercise it. (*Webster* v. *People*, 98 Ill. 343). The proceeding under the act of June 14, 1897, is a statutory proceeding, and every step provided by the proceeding prior to the passage of the ordinance must be strictly complied with, subject to such qualification, as may be contained in section 9 of the act. (*McChesney* v. *People*, 148 Ill. 221; *City of Alton* v. *Middleton's Heirs*, 158 id. 442).

A resolution was adopted by the board of local improvements on December 27, 1898, providing for the improvement of Clybourn avenue between Division street and North avenue at a cost of $25,500.00. A public hearing was held on January 18, 1899, and an improvement, estimated at a cost of $25,500.00, was considered. Thereupon, an ordinance was prepared and submitted to the common

council, providing for an improvement to cost $25,500.00, and in reference to which a hearing had been had on January 18, 1899. A petition was then filed in the county court on April 8, 1899, to pay for the improvement estimated at a cost of $25,500.00; but this proceeding, after the entry of certain preliminary orders therein, was dismissed on September 12, 1899. The hearing had on January 18, 1899, which was with reference to the improvement estimated at a cost of $25,500.00, was the only hearing which was had or of which any notice was given. The resolution of December 27, 1898, fixed upon January 18, 1899, as the time for the public consideration of the improvement estimated at a cost of $25,500.00. Ten days elapsed after the hearing of January 18, 1899, before the ordinance of March 6, 1899, providing for the improvement at a cost of $25,500.00, was submitted to the common council. Ten days, however, did not elapse between the adoption of the resolution describing the present improvement and the submission of the ordinance therefor to the common council.

The resolution providing for the present improvement, estimated at a cost of $29,500.00, is the resolution which was adopted by the board of local improvements on May 17, 1899. That resolution, as will be seen by a reference to its terms, did not fix any day or hour for the public consideration thereof; nor did it contain any estimate of the cost of the improvement, made in writing by the public engineer over his signature. On the contrary, it merely resolved that the petition then pending in the county court, and which was filed April 8, 1899, providing for this same improvement, should be dismissed, and it directed that the city engineer and the engineer of the board should prepare a new estimate for the improvement, and that a new ordinance should be prepared and sent to the city council, providing for the improvement in accordance with the new estimate and pursuant to the original resolution theretofore adopted. The new

estimate, provided for in the resolution of May 17, 1899, was made five days thereafter, to-wit: on May 22, 1899, but was not made a part of the record of any resolution. There was no resolution, in which the estimate of the cost at $29,500.00 was embodied. The new ordinance, which the resolution of May 17, 1899, directed to be prepared and submitted to the council, was prepared and submitted and passed on May 22, 1899, five days after the adoption of the resolution of May 17, 1899, and not ten days after the adoption thereof. The property owners were not allowed to be heard upon the subject of the estimate of the cost of the improvement at $29,500.00. Section 8 provides that the public hearing shall be had, not only as to the necessity of the proposed improvement and the nature thereof, but also as to the "*cost as estimated.*" Manifestly, the estimate of the cost must be made before the hearing, and the property owners must be allowed to be heard upon the subject of that estimate. Here, an estimate of $29,500.00 was made, and the property owners were given no opportunity to be heard in reference to it. The resolution of May 17, 1899, should have fixed a day and hour for the consideration of that resolution, which should not have been less than ten days after its adoption, and that resolution also should have made the estimate of $29,500.00 a part of itself. Nothing of the sort was done. In reference to these requirements section 7 uses the word "shall," and is mandatory in character. The board was not vested with any discretionary power on the subject. The requirement, that the estimate should be made a part of the preliminary resolution was a necessary antecedent to the passage of the ordinance. The omission of the public hearing, the omission of the naming of the time for the public hearing from the resolution, the omission of any reference to an estimate of the cost of the improvement from the resolution, and the submission of the ordinance of May 22, 1899, to the city council, before ten days had elapsed between

adoption of the authorizing resolution and such submission of the ordinance, cannot be regarded otherwise than as such substantial variances as render the ordinance, upon which this proceeding is based, void. (*Ives* v. *City of Omaha*, 51 Neb. 136; *Landis* v. *Vineland*, 60 N. J. L. 264; *Gilmore* v. *Hentig*, 33 Kan. 156; *Hentig* v. *Gilmore*, id. 234).

Section 9 of the act provides that the "recommendation by said board shall be *prima facie* evidence that all the preliminary requirements of the law have been complied with, and if a variance be shown on the proceedings in the court, it shall not affect the validity of the proceeding unless the court shall deem the same willful or substantial." An act, which is willful, is an act which is designed and intentional. The resolution of May 17, 1899, shows, upon its face and by its terms, that the city engineer had made no new estimate in addition to the old estimate of $25,500.00, and, therefore, the omission of the new estimate from that resolution could not have been an accident. But whether the omission of the estimate from that resolution was willful or not, its omission certainly constitutes a substantial variance, because a substantial variance is a real and material variance in distinction from a merely technical variance, and the mandate of section 7 is positive that the estimate "shall" be made a part of such resolution. The notice, which is required to be given in advance of the hearing upon the necessity of the cost of the proposed improvement, is required to contain the substance of the resolution adopted by the board, and an estimate of the cost. Hence, the requirement that the estimate shall be made a part of the resolution is for the purpose of enabling the people at the public hearing to discuss intelligently the nature, necessity, and cost of the improvement. The legislature, in this act, intended that the property owner and taxpayer should have every opportunity to know or learn what improvement his property was to be assessed for, and what such improvement was to cost. Here, he was

given notice to attend a hearing upon the subject of an improvement that was to cost $25,500.00, but he was never given an opportunity to attend any hearing upon the subject of an improvement that was to cost $29,500.00. After the public hearing on January 18, 1899, the property owners rested under the belief, that the street was to be paved at a cost of $25,500.00, but subsequently the board of local improvements raised the cost $4000.00, without giving them a chance to be heard as to an improvement to be made at such a cost.

In cities like Chicago, whose population exceeds 25,000, the act in question does not provide for a petition by the majority of the property owners before the improvement can be made. That safeguard to the rights of the property owners is confined to towns, cities, and villages having a population less than 25,000. In cities, whose population is greater than 25,000, the board has power to originate a scheme for local improvements without a petition. In addition to this, the act clothes the board of local improvements with unwonted power, because, under section 5 of the act, the city council is prohibited not only from passing, but even from considering, any ordinance for a local improvement, unless the same is first recommended by the board of local improvements. The members of that board are appointed by the mayor and not elected by the people, as are the members of the city council. In view of these extraordinary powers conferred upon the board of local improvements, the requirements as to the preliminary steps to be taken before the passage of an ordinance for the improvement, should be strictly enforced. Here, the *prima facie* case, made by the recommendation of the board, is overcome by proof showing a substantial variance from the preliminary requirements of the law. When the proof showed that no public hearing had been held on this improvement, and that the estimate of the city engineer was no part of the authorizing resolution, the void character of the ordi-

nance was established. (*Merritt* v. *City of Kewanee*, 175 Ill. 537). Unless a valid ordinance is shown, there is nothing on which a subsequent assessment proceeding can rest. A valid ordinance is the foundation of any improvement by special assessment, and cannot be dispensed with. (*City of East St. Louis* v. *Albrecht*, 150 Ill. 506).

It is claimed, however, on the part of the appellee, that the objections here under consideration were cured by the motion made by the counsel of the city, upon the trial below, to reduce the assessment roll *pro rata* $4000.00. It is true that such a motion was made and objected to, and the objection was overruled, and the overruling of the same was excepted to. But there is nothing in the record to show, that the assessment roll was actually reduced by the sum of $4000.00, and the final judgment of confirmation, which was entered on October 12, 1899, confirms the assessment roll made out upon the basis of a cost of $29,500.00, and not as reduced in accordance with the motion.

But such a reduction, if made by the court upon the motion of the city at the time and under the circumstances under which this motion was made, would not cure the difficulty. The objections, which have here been considered, were jurisdictional in character, because, the ordinance being invalid for want of a preliminary hearing upon the question of the estimate made by the engineer, the court had no jurisdiction to entertain a proceeding based upon such an invalid ordinance.

For the reasons above stated, we are of the opinion that the court erred in not sustaining the objections made by the appellants to the confirmation of the assessment.

Accordingly, the judgment of the county court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed.

Reversed and remanded.

CORNELIUS W. LANE *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

This case is controlled by the decision in *Foss* v. *City of Chicago*, 184 Ill. 436.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: This is a special assessment proceeding instituted to pay the cost of curbing and paving Ashland avenue from Fifty-ninth street to Sixty-third street.

The plaintiffs in error claim the ordinance in the case at bar is void for uncertainty. On the other hand, it is submitted that the ordinance attached to the petition did not become a part of the record because not preserved by bill of exceptions, and is therefore not before this court for review. The same question arose in *Foss* v. *City of Chicago*, 184 Ill. 436, and we there held, where the ordinance was attached to the petition it became a part of the record without being preserved by bill of exceptions. The decision in that case is conclusive here, and for the reasons there stated the judgment will be reversed and the cause remanded.

Reversed and remanded.

JOHN CHARLES BIRKET *et al.*

v.

THE CITY OF PEORIA.

Opinion filed April 17, 1900.

1. PUBLIC IMPROVEMENTS—*sections 37, 38 and 39 of act of 1897 do not apply to special taxation.* Sections 37, 38 and 39 of the Improvement act of 1897, providing for the apportionment of the cost between the municipality and private owners by the superintendent of special assessments or some person appointed for that purpose, apply by express terms to special assessments, but do not apply where the improvement is to be made by special taxation.

2. SPECIAL TAXATION—*special tax ordinance may apportion public and private expense of improvement.* An ordinance providing for the construction of a local improvement by special taxation upon contiguous property is not void because it fixes the proportion of the cost to be borne by the municipality and private owners, but, on the contrary, such apportionment is properly made by the ordinance and is not subject to review by the court, since sections 47 and 48 of the act of 1897, relating to the court's power to review the apportionment of cost, apply only to special assessments.

3. SAME—*effect where one tenant in common had no notice of special tax.* That one tenant in common of property specially taxed for a local improvement was not notified, as required by statute, cannot be made the basis of an objection to confirmation by the other cotenants, since the latter may pay their proportion of the tax and relieve their individual interests in the property therefrom, as may be done by part owners of land in case of general taxes.

APPEAL from the County Court of Peoria county; the Hon. R. H. LOVETT, Judge, presiding.

JAMES A. CAMERON, for appellants.

W. V. TEFFT, City Attorney, and HENRY MANSFIELD, for appellee.

Mr. JUSTICE CARTER delivered the opinion of the court:

In October, 1898, the city council of Peoria passed an ordinance providing for the paving of Perry avenue, between Cornhill and Abington streets, with asphaltum,

and for putting in on each side of said avenue a combined curb and gutter, and that ninety-five per cent of the cost of the improvement should be raised by special taxation upon contiguous property according to frontage, and the remaining five per cent should be paid by the city out of its general funds. Certain lots fronting upon the avenue were owned, as tenants in common, by the appellants, and Maybell Birket, who has not appealed. The appellants, only, appeared and filed objections to the confirmation of the assessment, and on this their appeal from the judgment of confirmation they assign for error that the court erred in overruling their legal objection that the ordinance was void because it apportioned the cost between the city and the property to be benefited. Their contention is, that the statute provides that such apportionment must be made by the superintendent of special assessments, and not by the city council.

It is expressly provided by the act of June 14, 1897, (Hurd's Stat. 1897, secs. 36, 38, 39, p. 363,) that where the ordinance contains no provisions for condemnation, and provides that the improvement shall be paid for wholly or in part by special assessment, the court shall, upon the filing of the petition, enter an order directing the superintendent of special assessments to make a true and impartial assessment of the cost of the improvement upon the petitioning municipality and the property benefited by the improvement. Section 39 provides that "it shall be the duty of such officer to estimate what proportion of the total cost of such improvement will be of benefit to the public and what proportion thereof will be of benefit to the property to be benefited, and to apportion the same between the city * * * and such property, so that each shall bear its relative, equitable proportion." And sections 47 and 48 confer power on the court to determine whether or not the assessment as made and returned is an equitable and just distribution of the cost of the improvement between the public and the property, and to

change or modify such distribution, but its decision upon that question is not subject to review on error or appeal.

Under prior legislation we have uniformly held that the court had no power to change the distribution, made by or under the provisions of the ordinance, of the cost of the improvement between the public and the property assessed. (*Bigelow* v. *City of Chicago*, 90 Ill. 49; *Fagan* v. *City of Chicago*, 84 id. 227; *Watson* v. *City of Chicago*, 115 id. 78; *City of Sterling* v. *Galt*, 117 id. 11; *Billings* v. *City of Chicago*, 167 id. 337; *Walters* v. *Town of Lake*, 129 id. 23.) This rule was applied in both special assessment and special taxation proceedings, and it is clear that it was the intention of the legislature to change the rule as applied to special assessments, so that the court in which the proceedings shall be pending for confirmation of the assessment shall have power to revise and change the distribution of the cost of the improvement between the petitioning municipality and the property to be assessed, so as to make the assessment a just and equitable one. But it does not follow that it was the intention of the legislature to confer the same power on the court in proceedings where the ordinance provides that the cost of the improvement shall be raised by special taxation of contiguous property. Indeed, the language of the sections above referred to does not embrace special taxation, but special assessments only, and can be extended to special taxation only, if at all, by virtue of section 35 of the same act, which is as follows: "When the ordinance under which a local improvement shall be ordered shall provide that such improvements shall be made wholly or in part by special taxation of contiguous property, such special tax shall be levied, assessed and collected, as nearly as may be, in the manner provided in the section of this act providing for the mode of making, assessing and collecting special assessments: *Provided*, that no special tax shall be levied or assessed upon any property to pay for any local improvement in an amount in excess of the special bene-

fit which such property shall receive from such improvement. Such ordinance shall not be deemed conclusive of such benefit, but the question of such benefit and of the amount of such special tax shall be subject to the review and determination of the court, and be tried in the same manner as in proceedings by special assessment."

This section, without the proviso and without the words "as nearly as may be," is substantially the same as section 17 of article 9 as it originally stood in the general Incorporation act. (1 Starr & Cur. Stat. 491.) The proviso was added by the amendment of 1895, (Laws of 1895, p. 100,) and the whole, with but slight changes, was incorporated in the said act of 1897 as section 35, so that by virtue of this section as it now is no special tax can be levied on property in excess of the special benefit which it receives from the improvement, and that question is not concluded by the ordinance, but is open to review by the court as in special assessments. Still, the section as it now is confers no more power on the court to review and change the apportionment, as made by the ordinance, of the cost of the improvement between the public and the property to be specially taxed, than it did before the proviso was added and when our previous decisions on the subject were rendered. And it may be further observed that by the insertion in the section of the words "as nearly as may be," there is a clearer legislative recognition than formerly of the inapplicability of the procedure, as a whole, in cases of special assessment to cases of special taxation. It is no answer to say that by reducing the amount levied by the ordinance on contiguous property so that it shall not exceed the benefits the action of the court may result in increasing the amount to be paid by the municipality from its general funds, for that is a question which the municipality must deal with, and not the courts. As said in *Hull* v. *People*, 170 Ill. 246, the amendment of 1895 merely changed the rule which before prevailed by providing that the ordinance

should not be deemed conclusive of benefits, but that the land owner might, if dissatisfied, have that question submitted to the court and tried by a jury in the same manner as in proceeding by special assessments. See, also, *Pfeiffer* v. *People*, 170 Ill. 347.

It follows, therefore, that the ordinance was not void because it fixed the proportion of the cost of the improvement to be paid by the city out of its general funds. And had the ordinance authorized the superintendent of special assessments to make such apportionment, it does not follow that in cases of special taxation as this is, his apportionment, as between the public and the property, could be reviewed by the court; and the case of *City of Jacksonville* v. *Hamill*, 178 Ill. 235, relied on by appellants, does not so hold, but, on the contrary, that such apportionment is final and not subject to review. It was not intended by what was there said to decide that all of the provisions of the statute applicable to special assessment proceedings are also now applicable to special taxation. If it had been, it would not have been held that the action of the officer in making the apportionment of special taxes between the public and the property was final and conclusive, for, as we have seen, section 47 provides that as to special assessments the question may be reviewed by the court. We see no legal reason why, in cases of special taxation, the municipality may not, under the law as it now exists, as it has always heretofore done, determine conclusively for itself what part of the cost of the improvement it shall pay out of general taxes, and do so specifically by the ordinance itself, or by prescribing therein the basis upon which it shall be definitely ascertained and fixed by the officers or persons appointed to spread the taxes. Being of this opinion, it follows the ordinance was not invalid for the reason urged.

The next objection requiring notice is that Maybell Birket, one of the tenants in common of the property, was not notified as required by the statute, and that

the interests of appellants, the other tenants in common, are injuriously affected by the omission, inasmuch, as it is said, the appellants would be compelled to pay the entire assessment on the lots to relieve their interest in them from the burden. We are of the opinion that appellants cannot raise this question. We see no reason why they may not pay their proportion of the assessment and relieve their individual interest in the property therefrom in the same manner as may be done by part owners of lands assessed for taxes under the general revenue laws. Section 71 of act of June 14, 1897; Rev. Stat. chap. 120; *Lawrence* v. *Miller*, 86 Ill. 502; *LeMoyne* v. *Harding*, 132 id. 23.

It is also assigned for error that the tax upon appellants' lots which was confirmed by the court after trial and verdict exceeded the benefits the lots would receive by the improvement. This was a question of fact submitted to the jury upon conflicting evidence. The evidence justified the verdict, and no sufficient reason appears why we should set it aside.

The judgment must be affirmed.

Judgment affirmed.

BENJAMIN M. THOMAS

v.

THE JOHN O'BRIEN LUMBER COMPANY *et al.*

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*record, on appeal, must contain enough to present the errors assigned.* In removing a cause to an Appellate Court for review it is not necessary that the transcript of the record contain everything of record in the trial court, but it must be complete for the determination of the errors assigned, and be sufficient to fully and fairly present the questions involved.

2. SAME—*application for extension of time must be made on or before second day of term.* An application for further time to file the transcript of a record, required by section 72 of the Practice act to be

filed in the office of the clerk of the Appellate Court on or before the second day of the term, must be made on or before such day.

3. SAME—*when Appellate Court must dismiss appeal.* Under section 72 of the Practice act the record, so far as the appellant is concerned, is closed on the second day of the term, unless within that time the court has granted an extension of time to complete it, or there is an inadvertent diminution through mistake of the clerk.

4. SAME—*appellee may apply to have record completed after second day.* The appellee may, by leave of the court, applied for after the second day of the term, bring up omitted portions of the record.

5. SAME—*judgment of Appellate Court dismissing an appeal is a final judgment.* A judgment of the Appellate Court dismissing an appeal because the record was not filed in time is a final judgment, upon which the appellant has a right to assign error in the Supreme Court and have the judgment of the latter court thereon.

Thomas v. *John O'Brien Lumber Co.* 86 Ill. App. 181, affirmed.

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.

BENJAMIN M. THOMAS, *pro se.*

LEVI SPRAGUE, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

The superior court of Cook county granted to appellant an appeal to the Appellate Court for the First District from a decree establishing mechanics' liens against his premises in favor of the appellees. He complied with the condition of the order on April 18, 1898, by filing his appeal bond, and on October 5, 1898,—the second day of the next term of said Appellate Court,—he filed with the clerk thereof an authenticated copy of part of the record, consisting of the decree, the order allowing the appeal and his appeal bond. On October 14, 1898,—the eleventh day of the term,—he suggested a diminution of the record, and leave was given him to file a supplemental transcript of record, which he did. The cause was submitted

to the Appellate Court, and upon consideration of the errors assigned it was found that the original record, filed on the second day of the term, did not present any error so assigned, and the appeal was dismissed for failure of appellant to file a sufficient transcript of the record within the time required by law. Appellant prosecuted this further appeal from said judgment of dismissal.

A motion was made in this court by the appellee the John O'Brien Lumber Company to dismiss this appeal because the transcript of record was not filed in the Appellate Court within the time limited by the statute. Appellant having assigned as error that the Appellate Court erred in dismissing his appeal and entering judgment against him, he has a right to the judgment of this court on such alleged error. The judgment was final and dismissed the appeal out of the Appellate Court, and appellant had a right to prosecute this appeal to determine the propriety of that judgment. The motion was therefore denied.

In removing a cause to an Appellate Court for review it is not necessary that the transcript of the record should contain everything which is of record in the trial court, but it must be complete for the determination of the errors assigned and be sufficient to fully and fairly present the questions involved. More than twenty days intervened between the last day of the term at which the order or decree of the superior court appealed from was entered and the sitting of the Appellate Court, and section 72 of the Practice act required appellant to file his transcript in the office of the clerk of the Appellate Court on or before the second day of the term, unless further time had been granted by the Appellate Court upon good cause shown. It has always been held that the application for such further time must be made on or before the second day of the term. (*Rager* v. *Tilford*, Breese, 407; *Adams* v. *Robertson*, 40 Ill. 40; *Cook* v. *Cook*, 104 id. 98; *Patterson* v. *Stewart*, id. 104; *Gadwood* v. *Kerr*, 181 id. 162.) In

order to obtain further time, a transcript showing the existence of a judgment in the trial court and the formal requisites to transfer the cause from the trial court to the Appellate Court should be filed on or before the second day of the term. There should be enough to show a judgment or decree of the court, the allowance of an appeal and perfecting the appeal by the bond, so as to show the pendency of the cause in the Appellate Court on appeal. With such a transcript authorizing the Appellate Court to act, the appellant may make an application for an extension of time to complete the record. This rule was stated in *Cook* v. *Cook*, *supra*, where the court said: "The appellant should have filed in proper time a transcript of so much of the record as was then obtainable, had the cause placed upon the docket, and then entered a motion for further time in which to bring in the remaining portion of the record. Not having filed a complete transcript within the time prescribed by the statute, or a transcript of so much of the record as could be obtained, and asked for further time to complete the same, within the requirement of the rule, the appellee was entitled to have the appeal dismissed." So far as the appellant is concerned the record is closed on the second day of the term, unless within that time the court has granted further time to complete it, or there is a diminution of the record in some particular through accident or mistake or misprision of the clerk making the transcript. In case of such diminution the court may, in its discretion, permit the deficiency to be supplied. The opposite party is not barred in that respect, but may afterward, by leave of court, bring up omitted portions of the record. Here there was no substantial compliance with the statute.

The Appellate Court was bound to dismiss the appeal, and the judgment is affirmed.

Judgment affirmed.

WILLIAM ROSE

v.

LUCINDA HALE *et al.*

Opinion filed April 17, 1900.

1. WILLS—*transposition of clauses is only to be made when necessary to carry out the testator's clear intention.* Transposition of words and clauses in a will is only to be made when necessary to give effect to a meaning of the testator which is certain.

2. SAME—*the testator's intent must prevail though some words must be rejected.* The intention of the testator, if clearly disclosed by the will, must prevail, even though some words must be rejected.

3. SAME—*will construed as passing estate for life.* A devise to the testator's wife of his real estate and of all otherwise undisposed of personal property "whilst she remains my widow," passes no greater estate than one for life in both real and personal property, where, by eliminating a purposeless connecting word, the clause relating to real estate and that concerning personalty constitute a single sentence, qualified by the phrase "whilst she remains my widow."

4. APPEALS AND ERRORS—*an administrator cannot assign error on appeal involving only matters in which he is uninterested.* Where an administrator with the will annexed intervenes in a partition proceeding involving the construction of the will and files a petition for the sale of the land to pay claims, which petition is dismissed and an appeal taken but not perfected, he cannot, upon appeal by the defendant from the final decree in partition, assign for error the action of the court in dismissing his petition.

APPEAL from the Circuit Court of Fulton county; the Hon. JOHN J. GLENN, Judge, presiding.

JOHN S. WINTER, and H. M. WAGGONER, for appellant.

M. P. RICE, and T. C. ROBINSON, for appellees.

CHIPERFIELD, GRANT & CHIPERFIELD, and LUCIEN GRAY, for intervening petitioner.

Mr. JUSTICE BOGGS delivered the opinion of the court:

This is a bill in chancery filed by Lucinda Hale, Catherine Severns, Phedora Combs and Mariah Cluney, appellees, for the partition of certain real estate, the title

whereof formerly rested in one Reason Church, who died January 1, 1880. On the hearing the court construed the will of said Reason Church to invest a life estate, only, in the land sought to be partitioned, in Mariah Church, wife of the testator, and that the remainder in fee descended to the heirs-at-law of the said testator. The appellant by this appeal questions the correctness of the construction given said will by the court. He insists that the true construction of said will vested in the said Mariah Church the title to the lands in fee simple, subject to the condition she should not marry again, and defeasable on that condition. Said Mariah Church conveyed the land to the appellant and died without having again re-married. The position of the appellant is, the fee simple title to the said land rests in him.

The will of the deceased reads as follows:

"I, Reason Church, of Isabel, Fulton county, and State of Illinois, do make and declare this my last will and testament, in manner and form to-wit:

First it is my will that my funeral expenses and all my just debts be fully paid.

Second after the payment of my funeral expenses and debts I give devise and bequeath unto my beloved wife Mariah Church the farm on which we now reside, situate in said county and known and described as one hundred forty-five acres of the north-west quarter of section number thirty in township four north of range three east of the fourth principal meridian thirdly all the live stock horses cattle sheep hogs by me now owned and kept thereon also all the household furniture wagons, carriages and all my farming implements and all my personal property not herein enumerated or otherwise disposed of whilst she remains my widow. But if she should marry then it is my will that she divide the farm and give each of my children an equal share after taking her thirds and lastly I hereby constitute and appoint my said wife Mariah Church executor of this my last will and testament."

As to the true construction thereof it is said in the brief of appellant: "Any one who is acquainted with philology and grammatical construction of the English language, by reading said will will perceive its second

and third clauses, as written, consist of three sentences. If 'a sentence is the expression of a thought in words,' as it has been defined, then a construction of this will would be: (1) An absolute devise in fee of the farm on which they resided to his wife; (2) a bequest of all his personal property to his wife so long as she remained his widow; and (3) a limitation to the devise in fee of his farm to the wife; if she should marry again, she should divide the farm equally among his children, 'after taking her thirds.' That part of the third clause of said will in which the testator attempts to bequeath his personal property to his wife 'while she remains my widow' is obviously a parenthetical phrase, intervening between the devise in the second clause of the will and the concluding part of the third, limiting that devise to a third of the farm if his wife should marry, the remainder to be equally divided among his children. Certainly that intervening sentence could be omitted without destroying the meaning of the composition in which it is found, which is the usual test as to whether a phrase is parenthetical or not. By such transposition, and thus placing the first and third of said sentences in their apparent natural relation to each other, the intent of the testator in his will becomes clear and obvious,—that he intended to debase the devise of the fee of his farm to his wife from an absolute to a determinable fee, subject, however, to his wife's marrying again. The second clause clearly, in the first instance, was intended as a devise to his wife of an absolute fee to his farm; the first sentence of the third clause, by its position, should be taken as parenthetical, and considered as intended as a bequest of his personal property to his wife during her widowhood, and wholly disconnected with the devise in the second clause; and the second or concluding sentence of the third clause as intended as a limitation to the devise of the fee to the farm he had made to his wife in said second clause."

We agree with counsel for appellant that the unmistakable intention of the testator was to bequeath his live stock, etc., and all his personal property, to his wife "while she remained his widow." But we gather this intention by reading as one sentence that part of the will beginning with the word "second" and concluding with the word "widow." It will be observed that unless this part of the will is read as one sentence there is no gift or bequest of the live stock, etc., and personal property, for if the phrase relating to such personal property, etc., be regarded, as appellant insists it should, as but parenthetical and wholly disconnected from that portion of the will which relates to the real estate, then there are no words of gift, bequest or devise applicable to said personal property. The phrase referred to as but parenthetical has no meaning if transposed from the position it occupies in the will. It must be construed and read as a part of the sentence, as we before indicated, or rejected as meaningless and unintelligible. A clause or expression may be transposed if it is senseless and contradictory as it stands in a will, or if the transposition is necessary to give effect to an intention clearly expressed or indicated by the context. (1 Jarman on Wills, 499, 502.) But here the clause or expression proposed to be transposed may be given meaning if read in its place as we find it in the will and is rendered meaningless if removed from that position, and the proposed transposition is not only not necessary to give effect to the intention which all agreed animated the testator, namely, to bequeath his personalty to his wife while she remained his widow, but will operate to defeat that intention. Transposition is only to be made when necessary to give effect to a meaning and purpose of the testator which is certain. (*Latham* v. *Latham*, 30 Iowa, 294.) Clearly there is no warrant for removing the supposed parenthetical clause from the position given it in the will or for regarding it as a sentence complete within itself. It is in-

separably connected with that which precedes it in the will. The words "give, devise and bequeath," which precede the description of the real estate, refer to both real estate and personalty, as do also the words "whilst she remains my widow," which, as we construe the will, are the closing words of a single sentence in which the testator made known his wishes as to his property, both real and personal. If the word "thirdly" be omitted from the will all ground on which to base the contention of appellant disappears. The rule is, the intent of the testator, if clearly disclosed by his will, must prevail, even if some words must be rejected to give effect to such intention. (*Huffman* v. *Young*, 170 Ill. 290; *Whitcomb* v. *Rodman*, 156 id. 116.) In 2 Jarman on Wills (5th Am. ed. p. 53,) it is said: "It is clear that words and passages in a will which are irreconcilable with the general context may be rejected, whatever may be the local position which they happen to occupy, for the rule which gives effect to the posterior of several inconsistent clauses must not be so applied as in any degree to clash or interfere with the doctrine which teaches us to look for the intention of a testator in the general tenor of the instrument, and to sacrifice to the scheme of disposition so disclosed any incongruous words and phrases which have found a place therein." The word "thirdly" was doubtless inserted from the prompting of some vague conception or idea of legal formalities. It has no meaning there, and serves no purpose in connection with the manifest intention of the testator. It may therefore be omitted from consideration in arriving at the true construction of the will. Excluding the word, the devise and bequest of all the property, both real and personal, is expressed in a single sentence, and is to Mariah Church "whilst she remains the widow" of the testator. The estate thus created cannot be greater than an estate for life. *Willis* v. *Watson*, 4 Scam. 64; *Green* v. *Hewitt*, 97 Ill. 113; *Kaufman* v. *Breckinridge*, 117 id. 305; *Siddons* v. *Cockrell*, 131 id. 653.

During the pendency of the cause in the circuit court, Henry Phelps, administrator with the will annexed of the estate of the said testator, by leave of the court filed an intervening petition, praying for a decree authorizing him, as such administrator, to make sale of the lands for the purpose of providing a fund wherewith to pay claims which, as the petition alleged, had been duly presented and allowed against said estate in the probate court, to discharge which there were no other assets, as the petition alleged. On a hearing the chancellor dismissed the petition. The administrator prayed and obtained an order granting him an appeal to this court, but failed to comply with the terms and conditions of such order. The administrator has assigned in this court alleged erroneous rulings of the chancellor with reference to the questions which arose in the trial court under his petition for a decree authorizing him to sell the land. That part of the decree dismissing the petition of the administrator had no relation to that other part of the decree construing the will of the deceased and declaring the rights and interests of the parties complainant and defendant to the bill for partition. The different parts of the decree were, in effect, distinct and separate decrees, and an appeal prosecuted from one part of the decree had no effect upon the decree in any other respect. The administrator failed to perfect his appeal from that portion of the decree which touched upon his rights and interests, and thereby is deemed to have acquiesced in the disposition of his petition. The appeal perfected to this court by the appellant only brings in review the action of the court on that branch of the case in which the administrator had no interest. (2 Ency. of Pl. & Pr. 96.) He can not, therefore, on this appeal assign as for error the rulings or findings of the court with relation to matters not involved in the appeal. *Walker* v. *Pritchard*, 121 Ill. 221; 2 Ency. of Pl. & Pr. 157.

The decree is affirmed.

Decree affirmed.

SANFORD SELLERS

v.

WILLIAM F. THOMAS *et al.*

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*appeal lies to Appellate Court in proceeding for trial of the right of property.* An appeal may be taken to the Appellate Court from the judgment of the county court in a proceeding for the trial of the right of property under section 8 of the Appellate Court act, which repeals conflicting provisions.

2. SAME—*when Appellate Court is authorized to find the facts.* Section 87 of the Practice act authorizes the Appellate Court to make a finding of facts in its judgment only when such finding differs wholly or in part from the finding of the trial court.

3. SAME—*Supreme Court will determine whether the Appellate Court properly applied the law.* The Supreme Court will determine whether the Appellate Court properly applied the law to the facts found and recited in its judgment, and if the law has been improperly applied will reverse the judgment.

4. SAME—*presumption where Appellate Court's recital is silent as to part of facts.* If the Appellate Court's recital of facts is silent as to part of the matters of fact in controversy, it will be presumed as to such facts that the Appellate Court found them the same as the trial court.

5. MORTGAGES—*effect where note does not state that it is secured by a chattel mortgage.* The failure of a note secured by chattel mortgage to state upon its face that it is so secured, as is provided by the act of 1895, (Laws of 1895, p. 260,) does not invalidate the mortgage where the note has not been assigned. (*Hogan* v. *Akin*, 181 Ill. 448, followed.)

Thomas v. *Sellers*, 85 Ill. App. 58, reversed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the County Court of Putnam county; the Hon. JOHN M. MCNABB, Judge, presiding.

This is a proceeding instituted in the county court for the trial of the right of property in certain personal property and chattels under the "act providing for the trial of right of property," etc., approved April 9, 1875, in force July 1, 1875. (Hurd's Stat. 1897, p. 1614).

The appellees, William F. Thomas and Mattie A. Thomas, obtained a judgment against David Sellers and Isabel Sellers. By virtue of an execution issued out of the circuit court of Putnam county upon said judgment, the sheriff levied on the personal property and chattels in question. The appellant, Sanford Sellers, gave notice to the sheriff under section 1 of said act of April 9, 1875, that he claimed the property levied upon, and intended to prosecute his claim thereto. The property was claimed by the appellant under a chattel mortgage alleged to have been executed to appellant by said David Sellers.

Upon the trial before the county court, a jury was waived by agreement, and the cause was tried by the court. Judgment was rendered in favor of the appellant, claiming under said mortgage. The defendants below—the execution creditors, who are appellees here—took an appeal from the judgment of the county court to the Appellate Court. The Appellate Court reversed the judgment of the county court without remanding the cause. The present appeal is prosecuted from such judgment of the Appellate Court, a certificate of importance having been granted.

JAMES E. TAYLOR, and ALFRED R. GREENWOOD, for appellant.

L. C. HINCKLE, and ARTHUR KEITHLEY, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—A motion was made in the Appellate Court by the present appellees, who were the appellants in that court, to dismiss the appeal there upon the ground that the Appellate Court was without jurisdiction to hear and determine the cause. It is claimed, that the Appellate Court was without jurisdiction, because section 11 of the act of April 9, 1875, in relation to the trial of the right of property, etc., (Hurd's Stat. 1897, chap. 140*a*), provides

that appeals may be taken to the circuit court "as in other cases;" and, for this reason, the contention is made that the present appellees should have taken their appeal from the county court to the circuit court, instead of the Appellate Court.

Sections 122 and 123 of the act of March 26, 1874, in relation to county courts, provide that appeals may be taken from final judgments of the county courts to the circuit courts of their respective counties in all matters, except that appeals and writs of error may be taken and prosecuted from final judgments of the county court to the Appellate Court in proceedings for the confirmation of special assessments, in proceedings for the sale of lands for taxes and special assessments, "and in all common law and attachment cases, and cases of forcible detainer and forcible entry and detainer." Section 8 of the act of June 2, 1877, in regard to Appellate Courts, as amended in 1887, provides that the Appellate Courts shall have jurisdiction of all matters of appeal or writs of error from the final judgments of the county courts "in any suit or proceeding at law, or in chancery, other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute." (Hurd's Stat. 1897, pp. 506-527).

Section 8 of the Appellate Court act repealed by implication section 122 of the County Court act, in so far as the latter section conflicted with it. So, also, it must be held, that section 8 of the Appellate Court act repealed section 11 of the act of April 9, 1875, in regard to the trial of the right of property. Where there is a final judgment of the county court "in any suit or proceeding at law or in chancery," other than the cases already mentioned, such judgment may be taken by appeal or writ of error to the Appellate Court. While the present proceeding may not be regarded as a suit at common law, yet it is clearly a "proceeding at law." The trial of the right of property, as provided for in the act of April 9, 1875, is

merely another form of the action of replevin without formal pleadings. The views here expressed are sustained by the cases of *Union Trust Co.* v. *Trumbull*, 137 Ill. 146, and *Lynn* v. *Lynn*, 160 id. 307. We are, therefore, of the opinion that an appeal lay in the present case from the judgment of the county court to the Appellate Court, and that the Appellate Court committed no error in overruling the motion to dismiss the appeal for want of jurisdiction.

Second—The appellant, Sanford Sellers, claimed the property, levied upon under the execution of the appellees, by virtue of a chattel mortgage, held by him and dated January 4, 1898, to secure a promissory note for $834.00, executed by David Sellers, and payable in two years after date. The Appellate Court, in their judgment reversing the judgment of the county court without remanding the cause to that court, made a finding of facts to the effect "that the note intended to be secured by the mortgage bore upon its face the words 'secured by mortgage,' and did not show that it was secured by a chattel mortgage; * * * that appellee (appellant here) bases all his claim to the property on this supposed chattel mortgage." In other words, the Appellate Court, in their judgment, found that the note, secured by the chattel mortgage in question, did not show upon its face that it was secured by a chattel mortgage, and, upon this ground, held that the mortgage was invalid. The finding of facts by the Appellate Court in its judgment is only authorized by section 87 when its finding either wholly or in part of the facts concerning the matter in controversy is different from the finding of the trial court. (*Hogan* v. *City of Chicago*, 168 Ill. 551). The note in the present case recited that it was "secured by mortgage." It would appear, therefore, that the trial court held these words to mean, that the note was secured by a chattel mortgage, but, on the contrary, the Appellate Court has found that the note did not state upon its face that it was secured by a

chattel mortgage. If the finding embodied in the judgment of the Appellate Court is such a finding of facts as is contemplated by section 87, we may inquire whether the law has been correctly applied to the facts, and determine whether the refusal to remand the cause was proper. If it appears, that the law has been applied improperly upon the facts found by the Appellate Court and recited in its final judgment, it will be the duty of this court, on review of such question of law, to reverse the judgment of the Appellate Court. When the facts are found, it is a question of law as to what judgment shall follow. (*Hogan* v. *City of Chicago, supra; Hawk* v. *Chicago, Burlington and Northern Railroad Co.* 138 Ill. 37).

The act of July 1, 1895, entitled "An act to regulate the assignment of notes secured by chattel mortgages, and to regulate the sale of property under the power of sale contained in chattel mortgages," provides, in the first section thereof, "that all notes secured by chattel mortgages shall state upon their face that they are so secured, and, when assigned by the payee therein named, shall be subject to all defenses existing between the payee and the payor of said notes the same as if said notes were held by the payee therein named, and any chattel mortgage securing notes, which do not state upon their face the fact of such security, shall be absolutely void." (Laws of 1895, p. 260).

In *Hogan* v. *Akin*, 181 Ill. 448, where the act of July 1, 1895, was construed, we held that a chattel mortgage is not void under section 1 of that act for failure of the note to state upon its face that it is secured by a chattel mortgage, unless the note has been assigned. In the case at bar, the note had not been assigned, but was held by the appellant, the original payee therein. Under this decision, the mortgage was good as between the parties thereto, irrespective of the question whether the note did or did not recite upon its face that it was secured by a chattel mortgage. It is, therefore, immaterial whether

the note bore upon its face the statutory requirement or not, the provision of the statute having reference only to the assignment of such notes. The holding of the Appellate Court was, therefore, wrong, and the law was not properly applied to the facts found by that court in its judgment.

It is contended, upon the part of the appellant, that he took possession of the property before the lien of the execution attached. The rule is "that, if the mortgagee actually obtains the possession under a clause in the mortgage permitting him to do so, before any other rights attach, as respects the property, he will hold the same position he would if the possession had passed to him at the time the mortgage was given." (*Frank* v. *Miner*, 50 Ill. 444). On the other hand, it was contended on the part of appellees, that, at the sale under the chattel mortgage which took place on April 3, 1899, the appellant, the mortgagee, became a purchaser of most of the property, and that the property was permitted to remain on the farm of the mortgagor the same as before the sale. But we do not deem it necessary to pass upon these claims or contentions.

The recital in the judgment of the Appellate Court is as to one fact only, namely, that the note in question did not show upon its face that it was secured by a chattel mortgage. The recital in the judgment has no reference to any of the other contentions above named, namely, as to whether or not the mortgagee was a purchaser at his own sale, and as to whether or not the property after the sale was permitted to remain in the possession of the mortgagor. It will be presumed, therefore, that, as to these other questions not mentioned in the recital contained in its judgment, the Appellate Court found the facts the same as the county court found them; and the judgment of the county court was in favor of the present appellant upon these other issues. "Where there is a recital of the facts controlling some of the issues, and no

recital of facts as to other issues, it may be presumed that the Appellate Court found, in respect of the latter, as did the trial court." (*Hayes* v. *Massachusetts Mutual Life Ins. Co.* 125 Ill. 626; *Hawk* v. *Chicago, Burlington and Northern Railroad Co. supra*).

Inasmuch as the Appellate Court incorrectly found the mortgage to be invalid, it erred in entering a judgment reversing the judgment of the county court without remanding the cause.

Accordingly, the judgment of the Appellate Court is reversed, and the cause is remanded to that court with directions to affirm the judgment of the county court.

Reversed and remanded, with directions.

WILLIAM J. ROSS *et al.*

v.

FRANCIS SHANLEY.

Opinion filed April 17, 1900.

1. MASTER AND SERVANT—*foreman represents master in taking precautions for servant's safety.* The master's foreman in ordering a servant to work in a particular place is charged with the duty of seeing that such place is reasonably safe, and the servant may rely upon the foreman's performance of that duty without making a careful and critical examination of the surroundings.

2. VARIANCE—*when question of variance is avoided by amendment.* Where the defendants' proof in an action by a servant for injuries differs from the plaintiff's proof as to who employed and paid the servant, the amendment of the declaration by the plaintiff to conform to the proof offered by the defendants avoids all question of variance upon that point.

3. LIMITATIONS—*when amended declaration is not barred by two year statute.* An amended declaration in an action of tort is not barred by the two year Statute of Limitations, where the same acts of negligence are charged as were set forth in the original declaration filed in time, the only difference being the omission from the amended declaration of the names of certain parties made defendants in the original declaration.

Ross v. *Shanley*, 86 Ill. App. 144, affirmed.

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 W. BROWN, Judge, presiding.

Appellee recovered a judgment in the circuit court, against appellants, for $2000, which judgment was affirmed by the Appellate Court, and appellants now present the record to this court.

The action was case. The declaration charged that appellants were engaged in constructing a tunnel for the city of Chicago under the lake, and that appellee was employed as a bricklayer therein; that appellants were negligent in failing to furnish him a safe place to work, and set him to work in a place in the tunnel where the clay was not sufficiently propped and where no careful or prudent method was adopted to prevent the clay from falling upon him while so at work; that the place was dangerous, and known to be so to appellants but not to appellee, and that by the exercise of ordinary care he could not have known the fact, and that while so at work a lump of clay fell upon him and caused the injury complained of. In another count the negligence charged was that appellants failed to warn him of the hidden and unseen dangers and hazards in and about said work.

The suit, as originally brought, made as defendants the city of Chicago and William J. Ross, John McRae and John Ross, partners, under the style of Ross, McRae & Ross. On the trial the appellee dismissed as to the city and McRae, and amended the declaration so as to charge the appellants, Ross & Ross, partners, etc., in the same terms as had been charged originally against Ross, McRae & Ross.

The appellants filed to this declaration a plea of not guilty and a plea of the Statute of Limitations—two years. The appellee demurred to the latter plea and the court sustained the demurrer, to which action of the

court appellants excepted, and the cause then proceeded to verdict and judgment. At the close of the plaintiff's case, and at the close of all the evidence, the appellants asked the court to instruct the jury to find them not guilty, but the court refused each of these requests and appellants excepted to each of the rulings.

WALL & ROSS, for appellants.

JOHN F. WATERS, for appellee.

Per CURIAM: In deciding this case, the Appellate Court delivered the following opinion:

"Appellants' counsel, in his brief, makes twenty-one different points on account of which he claims that the judgment should be reversed. We think they may all be summarized under four different headings, viz.: First, that the negligence charged was not proven; second, that the hazard was assumed by appellee; third, that there was a variance between the proof and the allegations of the amended declaration; and fourth, that the court erred in sustaining the demurrer to the plea of the Statute of Limitations to the amended declaration.

"As we have seen, there is a conflict in the evidence as to the usual manner of shoring the tunnel in which appellee was placed to work, in order to make it safe, and there was also a conflict as to the manner of the shoring, both as to the placing of the crutches and the nearness to which the planks used in shoring came to the face of the tunnel, and we are not prepared to hold, after a careful and critical reading of the evidence, that the jury were not justified in finding that the shoring did not extend sufficiently near to the face of the tunnel, and that the crutch nearest the face of the tunnel was not sufficiently near to the end of the planks, to make a reasonably safe place in which appellee could do his work. Appellee was ordered by appellants' foreman to work where he did at the time of the accident. Appellants'

foreman, in ordering appellee to work where he did, was charged with the duty of seeing that the place was reasonably safe. He represented appellants, and for them was bound to take reasonable precautions for the safety of appellants' employees. (*Illinois Steel Co.* v. *Schymanowski*, 162 Ill. 447; *Consolidated Coal Co.* v. *Haenni*, 146 id. 614; *Hess* v. *Rosenthal*, 160 id. 621; *Chicago and Eastern Illinois Railroad Co.* v. *Hines*, 132 id. 161; *Cribben* v. *Callaghan*, 156 id. 549; *Hines Lumber Co.* v. *Ligas*, 172 id. 315; *Offutt* v. *World's Columbian Exposition*, 175 id. 472).

"But it is said that appellee assumed the risk of any dangers of his work, and, being an experienced man in tunnel work, was chargeable with knowledge of any defects in the shoring which existed; that he knew, or could have known by the exercise of ordinary care on his part, any such defects as well as appellants' foreman. This contention is not, in our opinion, tenable. Appellants' foreman was chargeable with a specific duty, to-wit, that of exercising reasonable care to see that the place where he sent appellee to work was reasonably safe, and appellee had the right to rely upon the performance of such duty by appellants' foreman before he gave the order for him to work where he did. Appellee was not required to make a critical and careful examination of his surroundings at the place where he was sent to work by the foreman. We think it was properly left to the jury to determine whether appellants' foreman exercised such reasonable and ordinary care to see that the place where he ordered appellee to work was reasonably safe before he sent him there to work, and also whether appellee knew, or should have known, the danger to which he was exposed. We cannot say the verdict is manifestly against the evidence. (*Schymanowski case, supra; Chicago and Eastern Illinois Railroad Co.* v. *Hines, supra; National Syrup Co.* v. *Carlson*, 155 Ill. 210; *Dallemand* v. *Saalfeldt*, 175 id. 310; *Chicago and Eastern Illinois Railroad Co.* v. *Knapp*, 176 id. 127; *McGregor* v. *Reid, Murdoch & Co.* 178 id. 464).

"We think the foregoing considerations sufficiently dispose of the first and second points.

"The third contention, that there is a variance between the allegation of the amended declaration and the proof, is not sustained by the record. It is true that the evidence on behalf of appellee shows that he was employed, worked for and was paid by the firm of Ross, McRae & Ross, and this conformed to the allegation of the original declaration. The evidence offered on behalf of the defendants showed quite conclusively that appellee was employed, paid by and worked for the appellants, Ross & Ross. When this proof was made, and while the case was being argued, appellee filed his amended declaration, the allegations of which conformed to the proof so made by the appellants. By thus amending, appellee avoided all question of variance, for the reason that the appellants' evidence supported the amended declaration in this regard.

"As to the fourth contention, that there was error in the ruling of the court in sustaining a demurrer to appellants' plea of the Statute of Limitations to the amended declaration, we are of the opinion it cannot be maintained. The amended declaration states the same cause of action as the original declaration, in all respects. The only difference between the two declarations is the omission of the names of the defendants McRae and the city of Chicago from the amended declaration, which names were included in the original declaration and are charged in it as joint tort feasors with the defendants Ross & Ross. It is elementary, and needs the citation of no authorities to establish the proposition, that in an action for a tort the plaintiff may sue any one or more of the joint tort feasors, and may have a judgment against any one or any number of the persons so sued who are shown to be guilty of the tort alleged. It seems clear, therefore, and beyond all controversy, that the amended declaration in this case did not state a new cause of action different

from the original, and that the ruling sustaining the demurrer to the plea of the Statute of Limitations was correct.

"The judgment of the circuit court is affirmed."

We concur in the foregoing views, and in the conclusion above announced. Accordingly, the judgment of the Appellate Court is affirmed. *Judgment affirmed.*

JOHN FUNK

v.

SIMON MOHR *et al.*

Opinion filed April 17, 1900.

1. CONTRACTS—*construction of contract for payment of portion of sum "realized" from litigation.* A contract providing for the payment by the first party to the second parties of five-twelfths of whatever he might "realize" out of certain litigation will be construed as meaning five-twelfths of the gross amount recovered, without deduction for the expense of litigation or settlement attending the transaction, where the suit mentioned was to recover money belonging to an estate in which the second parties were interested, and which the first party had paid out without right or authority.

2. EVIDENCE—*when attorney may testify without violating rule of privilege.* In a suit on a contract to pay the plaintiffs a portion of the amount realized by the defendant from certain litigation, the attorney who acted for the defendant in drawing the contract may testify as to the construction placed upon a certain provision by himself and his client, particularly where the attorney has bound himself personally, to the extent of his property, for the performance of the contract.

Funk v. *Mohr*, 85 Ill. App. 97, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of LaSalle county; the Hon. H. M. TRIMBLE, Judge, presiding.

FOWLER BROS., for appellant.

DUNCAN & DOYLE, for appellees.

Per CURIAM: This is an action of assumpsit begun by appellees in the circuit court of LaSalle county, resulting in a judgment in their favor, which has been affirmed by the Appellate Court. That court, in its opinion by CRABTREE, P. J., made the following statement of facts and decision:

"Prior to 1890 Elizabeth B. F. Reddick had departed this life intestate in LaSalle county, leaving as her heirs-at-law, the appellant, John Funk, who was her brother, and the appellees, who were the children of a deceased half-sister of said Elizabeth, and also one grandchild of said deceased half-sister. Appellant had obtained possession of all the real and personal estate of said Elizabeth, and certain litigation had been commenced by the appellees to establish their claim to one-half of the property. Appellant had commenced a suit against Daniel Evans, who was then the probate judge of LaSalle county, to recover the sum of $2500, which appellant claimed had been obtained from him by Evans on fraudulent claims and pretenses. For the purpose of procuring a settlement of the litigation between himself and appellees, appellant employed Judge Hiram T. Gilbert, an attorney at law, to go to Germany and endeavor to effect a compromise, giving Gilbert a power of attorney, which authorized him to make any agreement in writing which he might deem necessary to adjust differences between the parties and bring to an end all litigation then pending between them in the courts of LaSalle county. Gilbert proceeded to Germany, and, acting under this power of attorney, made a settlement between the parties, the agreement being reduced to writing and dated January 7, 1890, appellees being the parties of the first part and appellant the party of the second part. The agreement contained, among others, the following clause:

"'*Third*—That the said party of the second part agrees to pay to said parties of the first part five-twelfths of whatever he may realize out of the suit now pending in

the circuit court of LaSalle county, Illinois, brought by him against Daniel Evans, judge of the probate court of LaSalle county, to recover the sum of twenty-five hundred dollars ($2500) paid by said Funk to the said Evans.'

"After the making of this agreement the suit of *Funk* v. *Evans* was prosecuted to judgment in the circuit court of LaSalle county, which judgment was affirmed by this court (38 Ill. App. 441,) and by the Supreme Court. (*Evans* v. *Funk*, 151 Ill. 650.) On February 5, 1895, Gilbert, as Funk's attorney, collected as proceeds of this judgment $3146, and applied the same in payment of the amount he claimed was due him from Funk for fees, services and expenses in making the trip to Germany. Funk was notified of this application of the money by Gilbert. Subsequently one Lynden Evans commenced suit in the circuit court of LaSalle county against appellees to recover for services alleged to have been rendered by him on behalf of appellees in their litigation against Funk. This suit was defended by Gilbert and D. B. Snow, who were attorneys for appellant, employed by him for that purpose and paid by him. The result of the suit was a judgment in favor of appellees, which judgment was affirmed by this court and by the Supreme Court. (*Evans* v. *Mohr*, 42 Ill. App. 225; 153 Ill. 561.) Appellant having refused to account to appellees for any portion of the amount collected from Daniel Evans, they brought the present suit against him, and in the court below, where a jury was waived and a trial had by the court, they obtained a judgment for $1561.34, being five-twelfths of the $3146 collected from Evans, with interest thereon from February 5, 1895, the date when judgment was collected. To reverse this judgment appellant prosecutes this appeal.

"It was not disputed in the court below, nor is it here, that the sum of $3146 was collected as the proceeds of the judgment against Evans, but it is claimed by appellant that clause 3 of the contract above quoted required him to pay to appellees only five-twelfths of the net

amount he might recover from Judge Evans,—or, in other words, that he was only bound to pay appellees five-twelfths of the amount collected from Judge Evans after deducting the costs and expenses of collection, including attorney's fees. He also claims the right of set-off as to moneys paid out by him in defending appellees in the suit brought against them by Lynden Evans. On the other hand, appellees insist on the right to five-twelfths of the gross amount collected from Judge Evans, and contend that was the true amount 'realized,' and they deny the right of appellant to any claim of set-offs for money paid out in the defense of the Lynden Evans suit.

"We think it a fair deduction from the evidence, and that it may fairly be inferred from the whole contract, (which was procured for appellant's benefit and should be construed most strongly against him,) that the $2500 paid by appellant to Evans belonged to the estate of Elizabeth B. F. Reddick, in which appellees had an interest, and that appellant had paid it to Judge Evans without right or lawful authority so to do; and that he should recover it back at his own expense seems most consonant with justice and the spirit of the contract. The contract certainly does not limit the right of appellees to five-twelfths of the net amount collected. Had that been the intention of the parties it was a very simple matter to so express it. Under the definitions given by different lexicographers of the word 'realize,' either construction claimed by the parties herein might be given to the word as used in the contract; but placing ourselves as nearly as possible in the position they occupied when the contract was made, for the purpose of ascertaining what they meant by what they said, we are disposed to think the parties intended that five-twelfths of the gross amount recovered from Judge Evans should be paid to appellees. This was the construction placed upon the contract by the court below, and we hold it was right.

"As to the expenses and attorney's fees in the Lynden Evans suit, although the courts held there was no privity between Evans and appellees, yet it was undoubtedly a matter growing out of the Barnum contract, and within the spirit of the contract made by Judge Gilbert on behalf of appellant with appellees, and which provided that appellees should be protected from any liability which might in any way arise against them by reason or on account of the Barnum contract. This was the construction placed upon the contract by Judge Gilbert, who drew it and procured its execution for the benefit of appellant. The evidence shows that the contract was so explained by Judge Gilbert to appellant, that the latter adopted such construction, and acted accordingly by employing counsel and defending appellees against the Lynden Evans suit. Even if the question as to Judge Gilbert's testimony being competent is properly saved in the record, (of which we entertain some doubt,) still we are of the opinion it was competent and that there was no error in admitting it. It was not a disclosure of confidential matters the knowledge of which he obtained while attorney for the appellant, but it was a statement of facts in the case concerning which he had personal knowledge. Besides, in the contract under consideration Judge Gilbert had bound himself personally to the extent of his property and had a personal interest in the defense of the Lynden Evans suit, and we regard it as entirely competent for him to testify to the construction which was placed upon the contract by himself and appellant in relation to the defense of that suit."

Our examination of the briefs and arguments of counsel for the respective parties has resulted in the conclusion that every substantial question raised upon the record has been properly disposed of in this opinion, and it will therefore be adopted as the opinion of this court.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

BALTIMORE AND OHIO SOUTHWESTERN RAILWAY CO.

v.

GEORGE KECK.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*when error is harmless.* Error in refusing to instruct the jury to disregard certain counts in the declaration is harmless if there is one good count to which the evidence is applicable and which is sufficient to sustain the judgment.

2. PLEADING—*when defects in pleading are cured by verdict.* Defects and omissions in pleadings, in substance or form, which would have been available on demurrer, are cured by verdict, where the issues joined are such as necessarily require proof of the facts so defectively presented, and without which proof it is not to be presumed the court would have directed or the jury returned the verdict.

3. RAILROADS—*prior notice to repair farm crossing not necessary to a recovery for injuries from defects.* A prior notice to a railroad company to repair a farm crossing is not essential to the right of recovery for injuries resulting from its defective condition, since the purpose of the statute (Rev. Stat. 1874, sec. 3, p. 808,) as to notice is to enable the owner of the land to recover double the value of repairs made by him in case the railroad company fails to repair.

4. SAME—*crossing track ahead of approaching train—what is not negligence.* It is not negligence, as a matter of law, for one to attempt to cross a railroad track ahead of a train which he sees approaching, if he has an apparently reasonable time in which to cross.

5. COSTS—*when entering of rule to give bond for costs is discretionary.* The filing of a bond for costs in a personal injury case prosecuted for a minor by next friend is not a jurisdictional pre-requisite, and where a motion for such bond is made on the day set for hearing, without excuse for the delay, its allowance is discretionary.

6. TRIAL—*when objection to direction to return sealed verdict should be made.* Direction by the court to the jury, in the presence of counsel, that if they agreed upon a verdict they should put it in writing, sign it and deliver it in a sealed envelope to the officer in charge, should be objected to at the time, in order to preserve the question of the right to have the jury polled.

B. & O. S. W. Ry. Co. v. *Keck*, 84 Ill. App. 159, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. M. W. SCHAEFER, Judge, presiding.

Hamill & Lester, Kramer, Creighton & Schaefer, and Silas Cook, for appellant.

Ropiequet, Perrin, Baker & Canby, for appellee.

Mr. Justice Wilkin delivered the opinion of the court:

This is an action for a personal injury, begun by George Keck, a minor, in the circuit court of St. Clair county, against the Baltimore and Ohio Southwestern Railway Company. A trial by jury resulted in a verdict of $5000 for plaintiff. Upon appeal to the Appellate Court for the Fourth District that judgment was affirmed, and the case is brought here upon further appeal.

The declaration contains six counts, the third charging willful and wanton negligence on the part of defendant, while the others allege, in substance, that the appellee, a boy about fourteen years old, residing with his father, Philip Keck, lived on a farm which the appellant's road crossed in an east and west line; that there was a private way leading from Philip Keck's house across the railway track to the highway on the south side of the farm; that where this private way crossed the track there was a farm crossing maintained by appellant, and that it was the duty of appellant, under the statute, to keep the crossing in safe repair for those using it and residing on said farm; that appellant suffered it to become out of repair and unsafe for such use, in this, that the planks were rotten, worn down and not securely fastened, and that the space between the edge of the plank and the north rail of the track was so wide as to be unsafe for those passing over it, and that in consequence of the condition of the crossing the foot of appellee, George Keck, while on his way to school and exercising due care in crossing the said track, became caught and fast in the space between said plank and the north rail of the track, and while so caught he was struck by appellant's train,

improperly and negligently managed, causing the loss of his right leg below the knee. To these counts the defendant pleaded the general issue, and then, at the close of all the evidence, presented to the court six instructions, one directed to each count, instructing the jury to disregard it. These instructions were refused, and the refusal is assigned as error.

It is said the instruction directed to the first count should have been given because that count fails to allege in what respect defendant was negligent, and that the second, fourth and fifth should have been given because the counts to which they were directed fail to disclose any right in the plaintiff to use the crossing. Error in refusing to instruct a jury to disregard certain counts in a declaration is harmless where there is one good count in the declaration to which the evidence is applicable and which is sufficient to sustain the judgment. Conceding these counts were subject to the criticisms urged, the fifth count, which was good and to which no objection is made, will sustain the judgment. (*Chicago and Alton Railroad Co.* v. *Anderson*, 166 Ill. 572; *Consolidated Coal Co.* v. *Scheiber*, 167 id. 539; *Illinois Central Railroad Co.* v. *Weiland*, 179 id. 609.) Moreover, the defects in these counts, although they might have been fatal on demurrer, are, under the proofs, cured by the verdict. Defects and omissions in pleadings, in substance or form, which would have been available on demurrer, are cured by the verdict where the issues joined are such as necessarily require proof of the facts so defectively presented, and without which proof it is not to be presumed that the court would have directed or the jury would have given the verdict. (*Consolidated Coal Co.* v. *Scheiber*, *supra*, citing *Chicago and Eastern Illinois Railroad Co.* v. *Hines*, 132 Ill. 161.) As was said in the *Scheiber case*, the ruling of the court in refusing to give the instructions in question was not a decision "that the counts of the declaration to which the instructions severally applied were faultless,

but only that they were sufficient, after issue joined and in view of the evidence then before the court and jury, to support a verdict and judgment for the plaintiff."

It is said error was committed in giving the third instruction for plaintiff, directed to the third count, which alleged willful and wanton negligence on the part of defendant, it being urged that there was no evidence whatever tending to support that count. Upon examining the evidence we cannot say, as a matter of law, the trial court erred in giving that instruction. Without undertaking to pass upon its weight, it cannot be said there was no evidence tending to support the issue joined upon that count.

Instructions were asked on behalf of defendant stating that under the statute a railroad company is not required to repair a farm crossing until after notice from the owner or occupant of the adjoining land that it is in need of repair, and that no recovery can be had for an injury resulting from the use of such a defective crossing in the absence of such notice given. No error was committed in refusing these instructions. Section 62 of chapter 114, (Hurd's Stat. 1897, p. 1249,) being an act approved March 31, 1874, provides that railroad corporations shall construct farm crossings "when and where the same may become necessary, for the use of the proprietors of the lands adjoining such railroad." Section 65 following, provides that whenever a railroad "shall neglect or refuse to build or repair * * * farm crossings, * * * the occupant of the lands adjoining * * * may give notice in writing to such corporation * * * to build * * * such farm crossings within thirty days (or repair said * * * farm crossings * * * within ten days) after the service of said notice." The next section provides that in case the building or repairing is not done as specified by the act, the occupant of the land may build or make the repairs and recover double value, etc., and costs of suit. The contention that the statute contemplates repairs to be made only after notice is

without merit. It is clear the duty to build or repair is placed upon the railroad company, without regard to the written notice mentioned in the subsequent section. When the company fails to perform that duty the occupant of the adjoining land may do the work himself, and the prior written notice is required only for the purpose of enabling him to recover from the company double the value of the improvement as his compensation, and also as a penalty against the company for its failure to make the improvement.

It is insisted the court committed error in refusing to give the 46th and 47th instructions asked by defendant. They tell the jury, in substance, that if appellee, as he approached the crossing, saw the train coming, it was his duty to stop and let it pass, and that if he attempted to cross in front of the approaching train he was guilty of negligence. These instructions do not state the law correctly. If one reasonably appears to have time to do so, although he may observe the train approaching, he may attempt to cross a railroad track without waiting. The evidence here does not tend to show that the injury was caused by reason of plaintiff not having time to cross in front of the approaching train, but from the fact that he caught his foot in the defective crossing. These instructions ignore the element of time, and the fact that the boy was, or might have been, prevented from getting across the track by being caught, and for these reasons were clearly misleading and improper.

Other questions are raised with reference to the giving and refusing of instructions, but we are satisfied no error was committed in that regard. Those given stated the law fairly, and as favorably to appellant as it could legally ask.

On the day of the trial a motion was made by appellant to require a cost bond, inasmuch as appellee was suing by next friend. The record shows no action taken by the court upon the motion, and the case was not de-

layed on that account but the trial proceeded to verdict. Afterwards, a cross-motion, supported by affidavit, for leave to prosecute as a poor person, was filed and the motion allowed. It is said that the court erred in proceeding to trial without compelling the filing of a cost bond. From the record it is apparent the motion for cost bond was made on the same day the case was set for hearing, and no reason appears why the motion was made at so late a time. It was a matter within the sound discretion of the court whether the rule should be then entered and the trial delayed. At least no injury is here shown to have resulted to the defendant. The filing of a bond for costs in a case of this kind is not, as counsel seem to urge, a jurisdictional pre-requisite. *Illinois Central Railroad Co.* v. *Latimer*, 128 Ill. 163.

At the close of the trial, it being on Friday and the last case in which the jurors would be needed for that term, the court, in the presence of counsel for defendant, told the jury if they agreed upon a verdict they should reduce it to writing, all sign it, place it in a sealed envelope, deliver it to the officer in charge and then be discharged from further attendance for the term. No objection was made to this direction and it was followed by the jury. Counsel now urge that the verdict was irregularly presented in court, the jury not being present and no opportunity given to poll the jury. We have held in a similar case (*Powell* v. *Feeley*, 49 Ill. 143,) that failing to object to the course pursued by the court, at the proper time, waives the right to do so afterwards. A party cannot be allowed to remain silent, make no objection to the proceedings of the court, and then, after learning that the deliberations of the jury have resulted against him, make his objection for the first time. Counsel contend the objection was made at the first opportunity. We do not think so. It should have been made when the direction was given to the jury, and at that time, as the record expressly shows, counsel for defend-

ant was present. They entered no protest whatever, but apparently acquiesced in the directions.

From a careful examination of the whole record we fail to find any ground for disturbing the judgment of the Appellate Court affirming that of the court below.

Judgment affirmed.

JAMES KILMER

v.

LOUIS D. GARLICK.

Opinion filed April 17, 1900.

1. EQUITY—*right of equity to enforce execution sale where homestead was not set off.* If the purchaser of property resorts to equity to set aside an execution sale and sheriff's deed upon the ground that the property was exempt as a homestead, the court, if the property is divisible, may confirm sale as to so much as exceeds $1000 value.

2. HOMESTEAD—*homestead extends to entire tract though householder's interest in different parts is not the same.* The estate of homestead to the extent of $1000 extends to the whole tract of land enclosed and occupied as a residence, even though the householder owns the fee to one part of the land and has an interest in the other part under a contract of sale.

3. SAME—*how value of a homestead is determined where householder's interests are not the same.* Where a householder in possession of an enclosed tract of land owns one part in fee, subject to encumbrances, and has an interest in the other part under a contract of purchase, his homestead estate in the former part is the difference between its value and the encumbrances, and in the latter is the difference between its value and the amount due on the contract of purchase.

4. SAME—*judgment debtor may convey homestead free from lien of the judgment.* If the homestead estate of a judgment debtor is not worth more than $1000 he has the right to convey the same, and the purchaser takes free from the lien of the judgment.

5. SAME—*burden of proof where the execution lien is asserted against homestead.* Where an estate of homestead has not been set off or its value tendered when the property was sold on execution, one asserting the lien of the execution against a grantee of the judgment debtor has the burden of proving that the estate conveyed was worth more than $1000.

6. SAME—*purchaser's rights where execution sale is confirmed as to part of property.* Where a second mortgagee, who has purchased the property, seeks to set aside an execution sale under a judgment against the mortgagor, which sale was void at law because the homestead was not set off, but the court confirms the sale as to part of the property exceeding the value of $1000 and sets the same off to the defendant, the complainant is entitled to the amount of his own mortgage upon such part and the amount advanced by him to raise the first mortgage, and to the value of improvements placed by him upon such part in ignorance of the sale.

APPEAL from the Circuit Court of Will county; the Hon. JOHN SMALL, Judge, presiding.

GARNSEY & KNOX, for appellant:

Where the land is worth not to exceed $1000 over and above the encumbrances the homestead right is not subject to execution and sale. *Imhoff* v. *Lipe*, 162 Ill. 282.

The mortgage indebtedness existing at the time of the judgment must be deducted from the value of the interest of the party in the premises and the homestead estate calculated upon the residue. *Brokaw* v. *Ogle*, 170 Ill. 115.

The burden of proof that the estate of the debtor in the premises exceeded $1000 is upon the party asserting the lien, where, in a case like the present, he has not pretended to follow the provisions of the Homestead act. *Mueller* v. *Conrad*, 178 Ill. 276.

Appellant, by his purchase of the property from the homestead association and paying off the Bissell mortgage, became subrogated to all their rights, and as these liens, as well as his own mortgage, are superior to the judgment lien of Garlick, he is entitled to be paid these sums and interest. *Bressler* v. *Martin*, 133 Ill. 289; *Young* v. *Morgan*, 89 id. 200.

HALEY & O'DONNELL, and J. W. DOWNEY, for appellee:

Where relief is sought in chancery against a sale of a homestead, the chancellor may, in the exercise of his equitable powers, cause the property to be divided and

set aside the sale only as to so much of the property as shall be of the value of $1000. *Leupold* v. *Krause*, 95 Ill. 440; *Bach* v. *May*, 163 id. 547; *Loomis* v. *Gerson*, 62 id. 11.

The statute only exempts the lot of ground on which the debtor resides, and not that adjoining his, although in the same enclosure. *Sever* v. *Lyons*, 170 Ill. 395; *Raber* v. *Gund*, 110 id. 581; *Hay* v. *Baugh*, 77 id. 500.

Where the debtor occupies one tract, which is included with others in a sale in which the homestead is not set off, the creditor may tender a quit-claim deed of the tract actually occupied as a homestead, and equity will sustain the sale as to other tracts or pieces of land. *Sever* v. *Lyons*, 170 Ill. 395.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On March 28, 1891, the appellee, Louis D. Garlick, recovered a judgment in the county court of Will county against Samuel B. Hughes and Harriet Hughes, his wife. At that time Samuel B. Hughes was the owner of the interests hereinafter stated in lot 2 of Weeks & Munroe's subdivision of certain premises in Joliet, in said Will county. Lot 2 fronted north on Benton street, and was one hundred and thirty-two feet wide east and west and somewhere about two hundred and ninety-seven feet long north and south, running back to a narrow street called Wenberg street. Samuel B. Hughes was possessed of an estate in the north one hundred and forty-four feet of this lot under a contract with the People's Loan and Homestead Association of Joliet, owner of the fee, by which that association agreed to convey to Hughes said tract for the sum of $1500, payable in one hundred months' time, at $15 per month. Said Samuel B. Hughes was also the owner in fee of the remainder of said lot 2, except a rectangular piece in the south-east corner of the lot, forty-four feet wide east and west and one hundred and forty-four feet long north and south. This part of the

lot which Hughes owned in fee was subject to the liens of two mortgages, one made to secure a note dated July 20, 1885, payable to Martin C. Bissell, for $300, with eight per cent interest, and the other securing a note dated January 4, 1890, payable to the appellant, James Kilmer, for $200, with eight per cent interest. The whole of these premises in which Hughes had the interest under the contract and the estate in fee subject to said encumbrances were surrounded with a fence in one enclosure and were occupied as a homestead by him with his family. The dwelling house was situated on the north one hundred and forty-four feet for which he had the contract of purchase. Execution was issued on appellee's judgment and returned unsatisfied, no property found.

Samuel B. Hughes assigned said contract to Hattie May Adams, and she assigned it April 6, 1893, to appellant, who paid the People's Loan and Homestead Association the amount due on the contract, which was $939.57, and a deed was made from the homestead association to appellant April 6, 1893. Samuel B. Hughes and wife also conveyed the south one hundred and forty-four feet of the lot, except said piece in the south-east corner, to appellant, who, on April 7, 1893, paid to the estate of Bissell $485.13 in full of the first mortgage, which was released. Appellant held the second mortgage on that part of the lot, as before stated. After the conveyance to appellant an *alias* execution was issued on appellee's judgment on April 14, 1893, and the north one hundred and forty-four feet, together with the south one hundred and forty-four feet of the lot, except the tract in the south-east corner, were sold to appellee in one lot, without setting off the homestead or conforming to the requirements of the law relating to homesteads. Hughes did not abandon the premises, but continued to occupy them as his homestead as one entire tract until the sale to appellant. In pursuance of the execution sale a deed was made October 1, 1894, by the sheriff to appellee. Neither Hughes nor ap-

pellant had any knowledge of the sale or of the deed to appellee until after it was made. At that time appellant was building a house on the south end of the premises. The house cost about $650, and was finished the last of October or first of November, 1894.

Appellee, by virtue of his deed, commenced an action in forcible detainer before a justice of the peace against Hughes and appellant and appellant's tenant, and appellant filed his bill in this case for an injunction and to set aside said deed. About that time it was discovered that there was a strip about nine feet wide running east and west between the north and south parts of lot 2 which was not covered by the conveyance, and Hughes made a second deed August 2, 1895, quit-claiming to appellant all interest in the lot for the purpose of covering that strip. Appellee answered the bill and filed his cross-bill, alleging that the south part of the lot had been treated as a separate tract for the purpose of occupancy and conveyance, so that it was not subject to the homestead right, offering to pay the Bissell mortgage and to do equity in the premises, and praying that his title might be confirmed, subject to whatever equity the court might decree. The cross-bill was answered and the cause heard. Upon the conclusion of the argument appellee offered to execute to the appellant a quit-claim deed to the north one hundred and forty-four feet of the lot on which the dwelling house stood. The court decreed that the title to the north one hundred and forty-four feet on which the dwelling house was should be declared vested in appellant free from any lien or encumbrance by virtue of the judgment, sale or deed; that the title to the south one hundred and forty-four feet, except said east forty-four feet thereof, should be confirmed and vested in appellee upon the tender to appellant of a quit-claim deed of the north one hundred and forty-four feet and the payment to appellant of $485.13,—the amount advanced by him to pay the first mortgage to the estate of Bissell,—

and that the master in chancery should execute a deed to appellee of all the rights of appellant in the portion confirmed to appellee.

The homestead of Samuel B. Hughes, to the extent and value of $1000, was exempt from levy and sale on execution, and being so exempt he had a right to sell it to appellant, who would take it free from the lien of appellee's judgment. Appellant having resorted to a court of equity to set aside the sale and deed on the ground that the property was exempt as such homestead, the court might exercise its equitable powers, and, if the property was divisible, set aside the sale of so much, only, as was of the value of $1000. (*Loomis* v. *Gerson*, 62 Ill. 11; *Stevens* v. *Hollingsworth*, 74 id. 202; *Leupold* v. *Krause*, 95 id. 440.) The questions presented were whether the estate of homestead of Hughes extended to the whole tract enclosed and occupied by him or was confined to the north one hundred and forty-four feet, and if it extended to the whole tract, whether his estate was worth more than $1000 when it was conveyed to appellant.

On the first question the rule of law is, the estate of homestead, to the extent in value of $1000, extends to the whole of the lot of land and buildings thereon occupied as a residence, although it covers separate legal tracts or lots. In such a case the homestead will embrace all. (*Thornton* v. *Boyden*, 31 Ill. 200; *Boyd* v. *Fullerton*, 125 id. 437.) In this case the premises occupied did not constitute more than one legal subdivision and did not embrace separate tracts. There had been a separation in the nature of the estate, so that the estate of Hughes in one part was under his contract of purchase and in the other part it was a fee subject to the two mortgages, but the whole premises were enclosed and occupied as one tract and residence property. Hughes was in the occupation of the entire premises as his homestead, and the fact that his interest in the different parts was not the same would make no difference. It is necessary that

there shall be occupancy of the entire premises, (*Sever* v. *Lyons*, 170 Ill. 395,) but that was the case here.

The other question, whether the premises were worth more than $1000, is to be determined, as to the south part, by ascertaining the value at the time of the transfer and deducting the encumbrances, and the homestead estate is to be calculated on the residue. (*Imhoff* v. *Lipe*, 162 Ill. 282; *Brokaw* v. *Ogle*, 170 id. 115.) As to the north one hundred and forty-four feet, the interest of Hughes was the fair cash value of the premises less the amount due to the People's Loan and Homestead Association, which was $939.57. Where there was a homestead, as there was here, and the law was not conformed to and the homestead was neither set off nor its value tendered, the person asserting the lien has the burden of proving that the estate was worth more than $1000. The evidence does not show that the estate of Hughes, when conveyed to appellant, was worth more than $1000, and if not, he had a right to sell it to appellant, who would take it free from the lien of the judgment. The evidence did not prove that the interest of Hughes in the part which the court set off to appellant was worth $1000 when transferred, and if that fact had been shown, the decree was wrong in allowing appellant only the amount he paid the Bissell estate to discharge the first mortgage. He had as much right to the amount of his own mortgage as to that which he advanced, and as the sale was void at law and could only be confirmed as to any part of the premises in equity because appellant appealed to a court of equity, he would be entitled to the value of his improvements put on the south part in ignorance of the sale.

The decree is reversed and the cause remanded to the circuit court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

THE ODIN COAL COMPANY
v.
EFFIE DENMAN.

Opinion filed April 17, 1900.

1. MINES—*whether top of shaft is at surface of ground or above is a question for the jury.* Whether the top of the shaft of a particular mine is at the surface of the ground or has been established at a point above the surface by the erection of structures and by the manner in which the mine is operated is a question for the jury, under the evidence.

2. SAME—*intentional omission of statutory duty by mine owner is willful.* A mine owner is charged with knowledge of the provisions of the law concerning the safety of miners, and his intentional omission of a statutory duty, such as by substituting some plan of his own, is a "willful" omission, within the meaning of that word as employed in the act on mines.

3. NEGLIGENCE—*in action for omission of statutory duty contributory negligence cannot be invoked.* In an action for the death of a miner, alleged to have resulted from defendant's willful omission to furnish a sufficient light at the top of the shaft, as required by law, the contributory negligence of the deceased cannot be invoked.

4. EVIDENCE—*when evidence of intention to comply with the statute is inadmissible.* In an action against a mine owner for willful omission of a statutory duty, evidence of the defendant's intention to comply with the statute is inadmissible where the charge of the declaration does not involve evil or wrongful intent but only conscious acts of omission, and not mere inadvertence.

5. SAME—*when motion to exclude the evidence is properly denied.* In an action for damages for the death of a miner, alleged to have resulted from defendant's willful failure to provide a sufficient light at the top of the shaft, a motion to exclude the evidence and direct a verdict for defendant is properly denied, where it appears that the deceased attempted, according to custom, to step from the cage at the surface of the ground; that though it was night time there was no light, the lantern bearer being absent, and that, the cage having passed above the surface of the ground, the deceased failed to gain a footing and fell down the shaft.

Odin Coal Co. v. *Denman*, 84 Ill. App. 190, affirmed.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Marion county; the Hon. W. M. FARMER, Judge, presiding.

L. M. KAGY, and VANHOOREBEKE & LOUDEN, for appellant.

FRANK F. NOLEMAN, and W. F. BUNDY, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Charles Denman, husband of appellee, an employee in the coal mine owned and operated by the appellant company, was killed by falling into the opening of the shaft at the surface of the ground and thence to the bottom of the mine. The appellee recovered judgment against the appellant company in the circuit court of Marion county in the sum of $2000 on a declaration which, in the first count, charged the deceased came to his death by reason of the "willful failure" of the appellant company to furnish a sufficient light at the top of the shaft of the mine, as required by section 6 of chapter 93, entitled "Miners," (Hurd's Stat. 1889, p. 929,) and, in the fourth count, that the death of the decedent was occasioned by the "willful failure" of the appellant company to securely fence the top of the shaft by gates properly protecting the shaft, as is required by section 8 of the same chapter of the statute. The declaration contained other counts, but the verdict was rendered on the said first and fourth counts. The judgment was affirmed by the Appellate Court for the Fourth District, and this is a further appeal perfected to this court.

Deceased was one of a force of men called the "night shift," employed by the appellant company to work in the mine during the night. When going down the shaft of the mine the night shift entered the cage at the opening of the shaft at the surface of the ground, and when coming out they left the cage at the same opening. The company did not maintain a light at this opening of the shaft. It had, however, directed an employee to carry a lantern when its employees, the night shift, were going into or coming out of the cage at this opening, and

had arranged the windows of the engine room, which was some fifty or sixty feet away, so that light from that room would shine in the direction of this opening of the shaft. A fence had been constructed around a lot or space some ten feet wide and twenty feet long, and the opening of the shaft was within this enclosure. This fence was not erected for the purposes of protecting the opening of the shaft or as being in compliance with the statute, but for the purpose of enclosing a lot for the storage of hay and feed intended to be lowered into the mine. The company had constructed above the surface of the opening of the shaft an unenclosed framework of timbers, which supported a structure called the "tipple house," some twenty feet above the ground. These timbers composing the framework on which the tipple house rested were supplied with "slides and guides" for the cages, and the cages and coal brought out of the mine through the shaft could be hoisted to the tipple house. The "day shift" of workmen were accustomed to enter and leave the cages at the tipple house. Coal brought out of the mine was hoisted to the tipple house and there distributed to the screens, cars, etc., but coal was not brought out of the mine except in the day time. The appliances for raising and lowering the cages enabled the company to move the cages from the tipple house to the bottom of the shaft. On the occasion in question the husband of appellee and the other workmen composing the night shift, after the hours of work for the night were over, were hoisted from the bottom of the shaft in a cage to the opening of the shaft at the surface of the ground. It was yet dark and there was no one there with a lantern. In endeavoring to alight, the husband of appellee fell into the shaft and was precipitated to the bottom of the mine, a distance of 600 or 700 feet, and instantly killed. These are, in substance, the facts necessary to be known in order to determine whether the court erred

in refusing the motion of the defendant company to direct a verdict in its favor.

The statute relied upon by the appellee are sections 6, 8 and 14 of chapter 93. These sections read as follows:

"Sec. 6. * * * A sufficient light shall be furnished at the top and bottom of the shaft to insure as far as possible the safety of persons getting on or off the cage."

"Sec. 8. * * * The top of each and every shaft and the entrance to each and every intermediate working vein shall be securely fenced by gates, properly protecting such shaft and the entrance thereto."

"Sec. 14. For any injury to person or property occasioned by any willful violations of this act or willful failure to comply with any of its provisions, a right of action shall accrue," etc.

The contention of the appellant company is, (1) that the top of the shaft of its mine is not the opening of the shaft at the surface of the ground, but that the landing at the tipple house, where the cages and the coal are hoisted, is the top of the shaft to which the provisions of the statute apply; and (2) that, even if the opening of the shaft at the surface of the ground should be deemed the top of the shaft, there is an entire absence of proof of willful failure to comply with the requirements of the statute; and (3) that the evidence did not tend to establish the proximate cause of the death of the deceased was the alleged omission of the company to comply with the requirements of the statute.

If the "top of the shaft" of a coal mine is not the opening of the shaft at the surface of the ground, it is for the reason the construction of the structure around about such opening of the shaft, and the manner and mode of operating, entering and departing from the cages and delivery of coal from the shaft, have established the actual top of the shaft at some point above the surface of the ground. The most favorable view for the appellant company was that taken by the trial judge in ruling upon

the motion and passing on the instructions given to the jury, that the top of the shaft in this instance was to be determined by the jury as a question of fact. The tendencies of the evidence on the point demanded the submission of the question to the jury.

The appellant company stood charged with knowledge of the provisions of the law and with the duty of complying therewith. In operating its mine it employed the landing of the shaft at the surface of the ground in such manner as to expose the deceased and his fellow-workmen to all the perils which induced the enactment of the statutory provisions here involved. It recognized the existence of such perils, but instead of complying with the law and employing the means enjoined upon it by the legislature to protect its employees against those dangers, substituted other methods,—that is, it did not, in obedience to the statute, have the landing which it devoted to the uses of the "top of a shaft" furnished with a "sufficient light" to enable workmen to alight from the cage in the night time, but substituted the plan of ordering one of its servants to go to the landing with a lantern when the cages brought workmen from the mine to the surface of the ground. The omission was not through mere inadvertence, but was intentional. There was no evil intent operating to induce the failure, but that element is not a necessary ingredient of willfulness, within the correct meaning of the word "willful" as employed in this statute. As used in criminal and penal statutes, the word "willful" has frequently been interpreted to mean, not merely a voluntary act but an act committed with evil intent, etc. The statute here involved is not a penal statute. The recovery awarded is not a penalty in the nature of a fine or a forfeiture, nor is it awarded as a punishment, but is confined, by the express terms of section 14 of said chapter 93, to "the direct damages sustained" by reason of the omission or failure of which complaint is made. Compensation for injuries inflicted—

not punishment—is the ground of recovery. "'Willful' is a word of familiar use in every branch of law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing and intends to do what he is doing, and is a free agent." (29 Am. & Eng. Ency. of Law, 113.) An act consciously omitted is willfully omitted, in the meaning of the word "willful," as used in these enactments of our legislature relative to the duty of mine owners. In *Carterville Coal Co.* v. *Abbott*, 181 Ill. 495, we said (p. 502): "Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act, he willfully disregards its provisions and willfully disregards the safety of miners employed therein."

It is true, it is not sufficient, to maintain an action of this character, to establish merely a willful omission of statutory duty. It is necessary the injury complained of shall have resulted from the omission,—that the omission was the proximate cause of the injury. The testimony tended to show the occupants of the cage intended to leave the cage at the opening of the shaft at the surface of the ground, and that the deceased supposed the position of the cage was such he could step from the cage to the ground. The evidence tended to show the cage had passed above the level of the ground when the deceased sought to alight, and he did not gain secure footing on the ground and fell into the shaft. The servant of the company who, it is insisted, was charged with the duty of bringing a lantern to enable the occupants to alight with safety was not there. It was yet dark. There was no light there. There was a light in the engine

room, some fifty or sixty feet away, or is most probable there was, but the landing and mouth of the shaft were enveloped in darkness. Certainly there is no room for the contention the tendencies of the evidence were insufficient to warrant the submission to the jury of the question whether the proximate cause of the death of the deceased was the absence of a "sufficient light," to adopt the words of the statute with reference to the duty of the mine owner to supply a light at the top of the shaft of a mine. Even if the true or more immediate cause of the injury was the act of the deceased in stepping from the car after it had passed the landing, still the existing condition of darkness may have been the proximate cause of the injury. (5 Am. & Eng. Ency. of Law, p. 11.) In this connection it must also be borne in mind the doctrine of contributory negligence cannot be invoked by the appellant company. *Carterville Coal Co.* v. *Abbott, supra.*

The motion to exclude the evidence and direct a verdict for the company was properly denied.

It was not error to refuse to allow the president and superintendent of the appellant company to testify that they in good faith intended to comply with the provisions of the statute. The averments of the declaration the omission to observe the requirements of the statute were willful, did not, as we have seen, involve a charge of evil or wrongful intent, but only that the omissions were conscious acts of the mind and were not from mere inadvertence. In criminal proceedings, where it is designed to punish the defendant, and in that class of civil cases where a penalty is provided the amount whereof is fixed by statute as in the nature of punishment, or in those cases where, in addition to damages recoverable as indemnity to the plaintiff for the injury sustained, exemplary or vindictive damages may be assessed as punishment of the defendant, the intent of the defendant becomes material. In all cases in those classes the word "willful" is interpreted to include malice, evil intention

or other wrongful motive. In the case at bar the recovery is limited to actual or direct damages, and the amount to be recovered is not to be mitigated or aggravated by the presence or absence of the element of fraud, malice or evil intent. The word "willful," employed in pleadings in proceedings of this character, does not import any blameworthy motive and no issue of intent arises.

We need not notice in detail other objections preferred to the action of the court in admitting or excluding testimony and in granting or refusing instructions. They involve only the principles of law already herein discussed.

The judgment is affirmed. *Judgment affirmed.*

B. ESSROGER *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

1. SPECIAL ASSESSMENTS—*ordinance is void which fails to indicate height of curb.* An ordinance for constructing a combined curb and gutter is void which contains no data from which the height of the curb can be ascertained. (*Jacobs* v. *City of Chicago*, 178 Ill. 560, followed; *Lehmers* v. *City of Chicago*, id. 530, distinguished.)

2. APPEALS AND ERRORS—*one cannot question judgment he has asked to be entered.* One who withdraws his objections to an application to confirm a special assessment and requests the court to enter judgment of confirmation cannot afterward complain of such judgment on appeal or error.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

JAMES B. HEFFERNAN, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

This writ of error was sued out by B. Essroger, Mary McMurray and Annie Paisley to reverse a judgment confirming a special assessment levied to pay the cost and expense of putting in a concrete combined curb and gutter in St. Lawrence avenue and other streets in Chicago. The principal error assigned is that the ordinance contains no sufficient description of said combined curb and gutter, and is therefore invalid. The question arises from the following provision of the ordinance: "Said combined curb and gutter shall have a smooth, even surface on the parts exposed, and shall be laid in alternate blocks of six feet in length, and shall be six inches in thickness throughout. The gutter flag shall be eighteen inches in width, and shall be laid to a pitch corresponding with the angle toward the crown of the street, and the upper face corner of the curb shall be rounded to a radius of one and one-half inches." This ordinance was held invalid in *Jacobs* v. *City of Chicago*, 178 Ill. 560, where it was said that the ordinance was not distinguishable from the one declared invalid in *Holden* v. *City of Chicago*, 172 Ill. 263. The height of the curb cannot be determined from the ordinance nor from any data therein given. In this respect it differs materially from the ordinance held valid in *Lehmers* v. *City of Chicago*, 178 Ill. 530.

The judgments against the property of plaintiffs in error McMurray and Paisley were rendered by default, and as to their property the judgments must be reversed. But the record shows that Essroger, after having filed his objections to judgment against his property for the assessment, withdrew said objections and requested the court to enter judgment confirming the assessment. He cannot now be heard to complain of a judgment which he asked the court to render, and as to him and his said property the writ of error must be dismissed.

Writ dismissed as to part and judgment reversed and cause remanded as to part.

THE RICE & BULLEN MALTING COMPANY

v.

THE INTERNATIONAL BANK.

Opinion filed April 17, 1900.

1. BAILMENTS—*when delivery of warehouse receipt by pledgee does not affect his right to proceeds of sale.* The delivery of a warehouse receipt by the pledgee to the pledgor, to enable the latter to carry out a contract of sale as the pledgee's agent, does not affect his right to the proceeds of the sale as between the parties or as against the purchaser, where the latter was notified of the pledgee's rights before making payment.

2. EVIDENCE—*when fact of agency may be proved by conversations.* If the rights of the purchaser of goods are not injuriously affected by want of notice that the seller was acting as agent for another party who is suing for the purchase money, the fact of such agency may be shown by conversations between the principal and agent not in the presence of the purchaser.

3. INSTRUCTIONS—*when omission of element of time of giving notice is harmless.* Where the purchaser of goods admits having received notice of plaintiff's ownership before making payment to a third party, the fact that an instruction authorizing a recovery if notice was given fails to require the receipt of such notice before payment is not ground for reversal.

4. PAYMENT—*purchaser's contract to make payment to certain party does not excuse his disregard of notice.* That the purchaser of a quantity of malt had contracted with the seller to make payment to a third party, does not authorize him to make full payment to such party after receiving notice that the purchase price of part of the malt should be paid to another party, who, as pledgee, had authorized the sale under an agreement to receive the proceeds.

Rice & Bullen Malting Co. v. *Int. Bank*, 86 Ill. App. 136, affirmed.

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

FLOWER, SMITH & MUSGRAVE, for appellant:

Conversations between a principal and agent, not brought to the knowledge or attention of a party to a suit, are incompetent, and it is error to permit them to be

proven. *Adams Express Co.* v. *Boskowitz*, 107 Ill. 660; *Cottom* v. *Holliday*, 59 id. 176; *Boeker* v. *Hess*, 34 Ill. App. 332.

Where a person entrusted with goods as agent sells them to one who has no knowledge that he is agent, but is led to believe, from the manner that he has been allowed to deal with the goods, that they are his, the principal is bound by the contract made and by the equities of the purchaser. Mechem on Agency, secs. 279, 283, 284, 362, 709; Story on Agency, secs. 390, 444; 1 Am. & Eng. Ency. of Law, p. 410, note 2; *Koch* v. *Willi*, 63 Ill. 144; *Connelly* v. *McConnell*, 39 Atl. Rep. 773.

Where one person, for a consideration paid by another, agrees to pay a third person, the contract is binding, is not within the Statute of Frauds, and may be sued on directly by a third person. *Brown* v. *Strait*, 19 Ill. 88; *Insurance Co.* v. *Olcott*, 97 id. 439; *Walden* v. *Karr*, 88 id. 49.

A person has a right to determine with whom he will contract, and cannot have another thrust upon him. *Boston Ice Co.* v. *Potter*, 123 Mass. 28; *Connelly* v. *McConnell*, 39 Atl. Rep. 773.

Conveyances having the effect of a mortgage or lien upon personal property are invalid as to third persons, unless possession thereof be delivered to and remain with the grantee. Hurd's Stat. chap. 95, sec. 1; *Porter* v. *Dement*, 35 Ill. 478; *Frank* v. *Miner*, 50 id. 444.

A written pledge of personal property does not convey the legal title. It only creates a lien, which is terminated by a voluntary surrender of the property. Jones on Pledges, secs. 40, 47; *Union Trust Co.* v. *Rigdon*, 93 Ill. 458; *Cooper* v. *Ray*, 47 id. 53; *Way* v. *Davidson*, 12 Gray, 465; *Bodenheimer* v. *Newsom*, 69 Am. Dec. 775.

MORAN, MAYER & MEYER, for appellee:

The purchaser of property from an agent, who is notified before payment therefor that such person is only agent for a principal and that payment should be made to such principal, is liable to the latter. *Kelly* v. *Munson*,

7 Mass. 319; *Traube* v. *Milliken*, 2 Am. Rep. 14; *Mudge* v. *Oliver*, 1 Allen, 74.

The delivery of the warehouse receipt to appellee was a symbolic delivery of the property therein mentioned, and had the same effect as a delivery of the property itself. *Burton* v. *Curyea*, 40 Ill. 320; *Railroad Co.* v. *Kerr*, 49 id. 458; *Railroad Co.* v. *Phillips*, 60 id. 198; *Railroad Co.* v. *Wagner*, 65 id. 198; *Peters* v. *Elliott*, 78 id. 327; *Northrop* v. *Bank*, 27 Ill. App. 527; *Hanchett* v. *Buckley*, 27 id. 164; *Dock Co.* v. *Foster*, 48 Ill. 507; Jones on Pledges, sec. 280.

No complaint can be made of the failure of the jury to answer certain of the questions submitted, because no motion was made by appellant to send the jury back for the purpose of answering the questions. *Railway Co.* v. *Raymond*, 148 Ill. 251; *Railroad Co.* v. *Dorman*, 72 id. 505.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

In 1893 J. H. Pank & Co. were carrying on the business of making and selling malt, and had a malthouse and warehouse in Chicago. They executed two notes on October 21 and November 1 of that year, payable to their own order, and endorsed them and raised money on them. Among other collaterals to the notes they endorsed and delivered a warehouse receipt of the National Storage Company for six thousand bushels of malt stored in bin No. 1 at warehouse A, being the warehouse of Pank & Co. The National Storage Company measured the grain into the bin, put a seal over the mouth of the chute and a sign on the bin that it was leased to and property in the possession of the National Storage Company, as warehousemen. The malt and bin remained in exclusive possession of the storage company. The notes were purchased by appellee, the International Bank, in February, 1894, and the warehouse receipt was attached to one of the notes. J. H. Pank & Co. had also given to the Fort Dearborn

National Bank their promissory note for money borrowed, and as collateral thereto gave their own receipt for thirty thousand bushels of malt in store in their warehouses, subject to the order of said Fort Dearborn National Bank, which locked up the bins containing the malt pledged to it. J. H. Pank & Co. failed, and made an assignment to Carl C. Moeller. The appellant, the Rice & Bullen Malting Company, was engaged in the business of a maltster in Chicago, and its president, Patrick H. Rice, was a director of the Fort Dearborn National Bank. J. H. Pank, a member of the firm of J. H. Pank & Co., was directed by the Fort Dearborn National Bank to appellant as a probable purchaser of the malt pledged to said bank, and on April 6, 1894, he made an agreement to sell complainant twenty-five thousand bushels of malt at fifty-one cents per bushel. This purchase was made or induced, in part at least, from a motive on the part of Rice to aid the Fort Dearborn National Bank in realizing upon its said collateral. Nothing was said at the time of making the contract for the sale about appellee having any interest in the malt or anything to do with the sale. Pank went to appellee to obtain authority to sell the malt pledged to that bank by the warehouse receipt, and told the assistant cashier that he had made a sale of the malt to appellant at fifty-one cents a bushel. That officer told him that as there had been an assignment and the assignee had an equitable claim on the malt, he should get authority from such assignee, and he then brought the following order:

"CARL C. MOELLER & CO., GENERAL COMMISSION MERCHANTS,
234 LASALLE STREET, CHICAGO, *May 4, 1894.*

"*B. Neu, Cashier Int. Bk.:*

"DEAR SIR—Please credit enclosed note for $855.52, less discount on note for $7800. Also deliver to Mr. J. H. Pank the National Storage Co. receipt for bin No. 1, 6000, for delivery on sale to Messrs. Rice & Bullen. I will hold myself responsible for the full amount due you. "Yours truly,

CARL C. MOELLER, *Assignee.*"

It was then agreed that he should deliver the malt as agent for the appellee, which should receive the proceeds, and the warehouse receipt was delivered to him for that purpose. He first delivered to appellant the malt which he had pledged to the Fort Dearborn National Bank, amounting to about twelve thousand bushels. By means of the warehouse receipt he obtained from the storage company the malt for which it was given. The storage company broke the seal and delivered the malt in the same condition as when sealed up, and Pank delivered it to appellant. It amounted to 5818⅔ bushels, and he then delivered some other malt not involved in this case to complete the transaction. Appellee's malt was delivered f. o. b. cars at warehouse, and Pank sent the bills to appellant, on which was endorsed that they were payable to appellee. Appellant was also otherwise fully informed, before payment, that this malt belonged to appellee, and was notified to make payment to it. Appellant refused to make such payment, and paid the Fort Dearborn National Bank not only for the malt upon which that bank had a claim, but also for that pledged to appellee. Thereupon appellee brought this suit against appellant declaring in the common counts, and appellant pleaded the general issue. There was a trial, when the jury returned a verdict for the plaintiff, assessing its damages at $3646.67,—the purchase price of the malt represented by the warehouse receipt, with interest from the time of delivery. The jury also found, in answer to special interrogatories, that at the time of making the sale of the malt nothing was said about malt of the plaintiff or malt belonging to the plaintiff; that at the time of the delivery of the warehouse receipt to Pank, plaintiff knew that Pank had made a sale of the malt, and that such delivery was made for the purpose of having Pank deliver the malt called for by the receipt to the defendant, pursuant to the contract for the sale of the same.

The defense made at the trial was that defendant purchased the malt represented by the warehouse receipt with the understanding that it was to be paid for to the Fort Dearborn National Bank, and that it had paid said bank for the same. There was a direct contradiction between witnesses on the question whether the defendant was informed, before the delivery of the malt, that it belonged to the plaintiff, but there was no dispute that it was notified of plaintiff's rights and of all the facts before payment was made.

Plaintiff was permitted, against objection, to prove the agency of Pank for it in the transaction, and its assistant cashier was allowed to state the conversation between himself and Pank, to the effect that upon getting authority from the assignee the malt would be delivered to be sold to the defendant for plaintiff and the proceeds to be delivered to the plaintiff. It is argued that this ruling was error, and that conversations between the plaintiff and Pank, not in the presence of the defendant or brought to its knowledge, were incompetent. The plaintiff affirmed the relation of principal and agent between it and Pank, and the burden was upon it to make proof of such agency. The agency could be created verbally, as it was in fact created by the agreement between plaintiff and Pank, and there was no error in permitting plaintiff to make the required proof. It is not essential that an agency should be created in the presence of each party with whom the agent deals on behalf of his principal, nor that the agency should be made known to a party whose rights are not injuriously affected by the want of such notice. There may be questions as to the rights and liabilities of parties arising out of notice or want of notice of an agency, but no such question arises here. There was no dispute about any right which the defendant had as against Pank, and the only question was whom he was acting for. Plaintiff was

seeking the benefit of his dealings made as its agent and on its behalf, and it was proper to prove the agency.

Upon the cross-examination of the assistant cashier the defendant inquired what had become of the other collateral held by the bank with the notes. The court sustained an objection to that inquiry, and it is contended that defendant had a right to go into all the dealings between Pank & Co. and plaintiff to show how much, if anything, was due on the notes. The witness stated that the notes had not been paid, and there was evidence that a balance of $2704.01 was due upon them. The notes not being paid, it did not concern defendant how much was due. The defendant claimed no rights or equities against Pank or Pank & Co., and had no right to enter upon such an investigation. Plaintiff had a right to collect the collaterals that it might be ready to account for them, and if there was any balance, to pay it over to Pank & Co. It could make no difference to defendant how plaintiff and Pank & Co. should afterward settle, as defendant's rights could not be thereby affected. *Tooke* v. *Newman*, 75 Ill. 215.

The defendant asked an instruction requiring the jury to return a verdict in its favor, but the court refused to grant it. The evidence on the part of plaintiff established a good cause of action, and the instruction was properly refused.

Complaint is made of instruction No. 6 given to the jury at the request of plaintiff. It is as follows:

"The court instructs the jury, that if you find, from the evidence, that the International Bank, through its duly authorized officers or agents, or any one of them, directed J. H. Pank to sell the malt in question for it, and that said J. H. Pank, acting for and on behalf of said International Bank, did sell and deliver such malt to the defendant, Rice & Bullen Malting Company, at an agreed price of fifty-one cents per bushel, and if you further believe, from the evidence, that said malt belonged

to the plaintiff and that defendant was so notified, and that said defendant has not paid to the plaintiff, the International Bank, the price agreed to be paid for such malt, then it is your duty to find a verdict for the plaintiff for the amount of such sale, together with interest on said sum at the rate of five per cent per annum from the date of the delivery of said malt to the present time."

The main objection argued is, that the jury were told it would be their duty to find for the plaintiff if the defendant was notified that the malt belonged to the plaintiff, without regard to the time of notice, and even though the notice might have been after it had paid the Fort Dearborn National Bank. This would have been a fatal objection if it had not been confessed by defendant that it had notice before such payment. It was conceded that the notice was received, and before payment, and the jury could not have found that the notification came after payment. The omission of that qualification as to time in the hypothesis could not affect the defendant.

Defendant asked the court to give an instruction marked 5*b*, stating, in substance, that by the surrender of the warehouse receipt to Pank the plaintiff lost its lien, by virtue of said receipt, upon the malt therein mentioned, and that if the malt was sold and delivered by Pank without any agreement on the part of the defendant to pay the plaintiff therefor, and without any knowledge of any claim by the plaintiff in or to said malt at the time the defendant received the same, then the jury should find the issues in favor of the defendant. The court qualified the instruction so as to say that plaintiff lost said lien as against defendant, and that if the defendant was without knowledge of the claim of the plaintiff at the time defendant received or paid for the malt, the jury should find for the defendant. The modification is complained of. The instruction was not the law of the case, either as asked or given. It should have been refused as an attempt to misapply a rule of law. There

was no question in the case of the rights of a *bona fide* purchaser from Pank supposing that he had title to the malt. Defendant acquired a perfect title to the malt, and plaintiff authorized the transfer of such title and affirmed its validity. There were no equities of the defendant involved, and the only question was whether Pank acted for the Fort Dearborn National Bank or for the plaintiff. The right of the plaintiff to the proceeds was not lost, as between the parties or as against the defendant, by delivering the warehouse receipt to Pank in the character of agent for the plaintiff. *Cooper* v. *Ray*, 47 Ill. 53.

It is insisted, however, that when defendant agreed to buy the malt from Pank it agreed to make the payment therefor to the Fort Dearborn National Bank, and that this contract for the benefit of the bank, as a third party, was binding upon the defendant, and it was bound to pay said bank, regardless of the subsequent notice of the rights of the parties. The malt in fact belonged to the plaintiff, and even if Pank represented to the defendant that it was pledged to the Fort Dearborn National Bank, yet if, before payment, the defendant was notified of the truth, it would be a good defense to a suit by the Fort Dearborn National Bank. That bank could not have recovered from defendant upon a promise upon such a consideration. Defendant was neither a creditor of Pank nor an innocent purchaser for value without notice, and was not entitled to invoke any rule arising out of the fact that the warehouse receipt was surrendered to Pank.

Some other instructions are discussed in argument, but what we have said covers every question of law raised in the case.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JAMES E. CASSIDY

v.

THE AUTOMATIC TIME STAMP COMPANY *et al.*

Opinion filed April 17, 1900.

1. JUDICIAL SALES—*when execution sale may be set aside.* A defendant not served with summons may maintain a bill in equity to impeach the sheriff's return, cancel the judgment and set aside the execution sale, where the purchaser at the sale was the plaintiff's agent, who paid nothing on his purchase but conveyed to the plaintiff's attorney of record, who in turn conveyed to the plaintiff, in whom the title remains, unaffected by the rights of third parties.

2. JURISDICTION—*suing out writ of error does not acknowledge trial court's jurisdiction of person.* The suing out of a writ of error to reverse a judgment for errors apparent on the face of the record is not a recognition of the trial court's jurisdiction of the plaintiff in error, nor does the affirmance of such judgment bar a bill in equity to impeach the judgment for matters *dehors* the record brought into review by the writ of error.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding.

RUFUS COPE, and ROBERT GILRAY, for appellant.

ALLEN & BLAKE, and MARVIN E. BARNHART, for appellees.

Mr. JUSTICE BOGGS delivered the opinion of the court:

But a single error is assigned: that the chancellor erred in sustaining a demurrer to the bill in chancery filed herein by the appellant against the appellee. The bill prayed that a certain judgment entered in favor of the appellee company, against the appellant and the appellees Mary and Joseph Bachner, should be annulled, and that the sale of certain tracts of land and city lots made by virtue of an execution issued on the judgment should be vacated, on the ground that, as the bill alleged, the judgment was rendered without jurisdiction over the

persons of the defendants thereto, and that a number of different tracts of land and city lots, some of which belonged to the complainant individually and others to other defendants in the judgment, all being owned separately, were struck off and sold *en masse* at grossly inadequate prices, so that no one owner could redeem without redeeming the property of another owner. The bill averred a summons was issued in the suit which resulted in the judgment, but expressly denied service thereof was had on any of the defendants. The bill further alleged the complainant was advised that the appearance of the complainant and the other defendants was entered in the suit, but expressly denied that any one was authorized to make such entry of appearance, or that the complainant had any knowledge that such appearance was or was to be entered.

Construing the pleading most strongly against the pleader, it may be assumed it appeared from the return of the sheriff that the summons had been served on the defendants, and that it appeared from the recital of the judgment the appearance of the defendants had been entered by an attorney. The question then arises whether such return of the sheriff of service of the summons or the entry of appearance by an attorney can be impeached by evidence *dehors* the record in a proceeding of this character.

It was held in *Griggs* v. *Gear*, 3 Gilm. 2, and in *Anderson* v. *Hawhe*, 115 Ill. 33, a judgment entered on entry of appearance by a person purporting to have authority, as attorney, to enter such appearance, could be impeached by bill in equity on the ground the entry of appearance was unauthorized. In *Lancaster* v. *Snow*, 184 Ill. 163, such entry of appearance was held not conclusive but *prima facie* only, and therefore open to collateral attack by bill in equity. The general rule is, the return of the sheriff showing service of summons is conclusive except when directly attacked in a suit against the officer for a false

return. But there are exceptions to the rule. In *Owens* v. *Ranstead*, 22 Ill. 161, *Brown* v. *Brown*, 59 id. 315, *Hickey* v. *Stone*, 60 id. 458, and *Davis* v. *Dresback*, 81 id. 393, it was ruled that under the circumstances of those respective cases the return of a sheriff showing service of the process of summons could be impeached collaterally. In *Brown* v. *Brown*, *supra*, it was said: "It is perfectly well settled, as a general rule, that the return of an officer can not be disputed. Where it is sought to contradict the return collaterally, and after rights have been acquired upon its faith, or innocent persons are to be injuriously affected, courts should firmly apply the rule. Such has been the action of this court in cases of that character. While, however, this is the well established general principle, cases have occasionally occurred, and will continue to do so, which, in order to prevent the perpetration of a great wrong, must be treated as exceptional." In *Davis* v. *Dresback*, *supra*, we said: "Where third parties have not acquired rights upon the faith of a return of service by a sheriff, and none are to be affected except the parties to the record in the case in which the return is made, it is proper to resort to parol evidence for the purpose of impeaching the return of the sheriff." In *Rivard* v. *Gardner*, 39 Ill. 125, it was held parol evidence could not be admitted to contradict the return of the sheriff for the reason third parties had acquired rights on the faith of the return, but, speaking with reference to the ruling in the case of *Owens* v. *Ranstead*, *supra*, it was said (p. 128): "But that was not a case where the rights of third persons had intervened upon the faith of the record. It was a bill brought by the defendant in an execution against the plaintiff to enjoin its collection, upon the ground that the service and return were fraudulent and false, and that nothing was, in fact, due to the party who had obtained the judgment. None but the parties to the judgment could be affected by the impeachment of the sheriff's return; and we see no reason to doubt the correctness of

that decision, though we are not disposed to extend it." In *Hunter* v. *Stoneburner*, 92 Ill. 75, (a case cited and much relied on by appellees,) it is expressly stated the rule in question is subject to rare exceptions, and cases where some other portion of the record contradicts the sheriff's return are the only exceptions specially mentioned; but in that case, Hunter, the appellant, was not a party to the judgment entered on the return, but had acquired title to the land which was the subject matter of the litigation upon the faith of the correctness of the return and the validity of the judgment entered thereon. That case clearly was not within any exception to the rule.

It appeared from the allegations of the bill in the case at bar that the rights and interests of third parties had not intervened. The bill alleged the appellee company was the plaintiff in the judgment sought to be vacated; that the purchaser of the land and lots at the sheriff's sale made under the judgment bought as the agent of the said company; that said purchaser conveyed to the attorney of record for the plaintiff in that case, and that said attorney conveyed to the president of the appellee company, and that such title as passed by the sale now rests in the president of the said company, the plaintiff in the judgment now sought to be attacked; that the purchaser at the sale paid nothing for his purchase; that the conveyance to the attorney to whom said purchaser conveyed, and that made by said attorney to the president of the appellee company, were without consideration, and that the other parties defendant to the bill (appellees here) were the defendants to the judgment sought to be attacked, the purchaser at the sale and the attorney for the company. The facts as thus made to appear would seem to mark this as one of the cases within the exception to the rule noted in the cases hereinbefore cited.

The bill alleged the complainant therein and the other defendants to the judgment were informed for the first time of the rendition of judgment some seven months after

it had been entered and sale of lands thereunder made, and that they prosecuted a writ of error to the Appellate Court to procure the judgment to be reversed, and that the judgment was affirmed by the Appellate Court. It is urged the action of the appellant in suing a writ of error out of the Appellate Court must be regarded as a recognition of the judgment and of submission to the jurisdiction of the court which rendered it, and operates to estop the complainant from controverting the jurisdiction of the court which rendered the judgment against him. *Swingley* v. *Haynes*, 22 Ill. 214, and *Buettner* v. *Norton & Dickinson Manf. Co.* 90 id. 415, are cited in support of this contention. Those cases hold that the filing of an appeal bond by the defendant in a judgment entered before a justice of the peace is a waiver of all defects in the process, lack of process or want of service of process before the justice. The holdings are based solely on the provisions of the statute authorizing appeals to be taken from judgments entered by justices of the peace, and do not apply here.

Herman on Estoppel (sec. 289) is cited, to the effect that prosecuting an appeal from a judgment and giving bond is a recognition of the validity of the judgment, and estops the party so appealing from denying the jurisdiction of the court over his person. In order to prosecute an appeal from a court of record the party desiring to appeal must appear in the cause, pray an appeal and procure an order to be entered fixing the terms upon which he may perfect the appeal. The jurisdiction of such an appellant is acquired, in such instances, by his voluntary appearance in the cause. But if a judgment is rendered against a person without jurisdiction of his person he may challenge the validity of such judgment by writ of error, so far as error apparent on the face of the record is concerned, if any, or by bill in equity to impeach the judgment for matters *dehors* the record. His application for a writ of error is made to the court of review and his

appearance is in that court, and such appearance has no effect to clothe the court which rendered the judgment with jurisdiction of his person. If this were not so, the writ of error would be unavailing to reverse a judgment in any case for want of jurisdiction of the person of the defendant. The matters relied on in the bill to impeach the decree are matters *dehors* the record, and were not and could not have been adjudicated by the writ of error. The judgment entered in the Appellate Court affirming the judgment on writ of error does not bar a bill to impeach the judgment for errors not apparent on the face of the record of the judgment so brought into review by the writ of error. *Stunz* v. *Stunz*, 131 Ill. 210; *Karr* v. *Freeman*, 166 id. 299.

The bill alleged the action in which the judgment desired to be vacated was rendered was on an injunction bond given by one Joseph Bachner as principal and the complainant and Mary Bachner as securities; that the injunction bond was given in a suit in equity wherein Joseph Bachner was complainant and the appellee company was defendant; that the parties to that suit entered into an agreement in which they settled and adjusted the matters in dispute and agreed that the injunction in the case should be dissolved and the suit dismissed; that the injunction was dissolved, but that, in violation of the agreement, the suit was not dismissed but was retained upon the docket without the knowledge of the said Bachner, and in further violation of the terms of the agreement the appellee company procured an assessment of damages to be made as and for the fees of the attorney for the appellee company in the said injunction suit, in the sum of $930; that under the terms of the said agreement said Bachner was not liable to pay attorney's fees in any sum, or to pay any sum whatever, except certain costs in the said injunction suit, not exceeding $28 in amount; that the reasonable attorney's fees in said injunction suit would not exceed the sum of $200. These

allegations are referred to in answer to the suggestion of counsel for the appellee company that the demurrer should have been sustained in view of the rule stated in *Hier* v. *Kaufman*, 134 Ill. 215, that a court of equity will not set aside the judgment of a court of law for an alleged want of service of process unless the judgment is shown to be unjust and inequitable.

We think the demurrer should have been overruled. The decree will be reversed and the cause remanded.

Reversed and remanded.

THE PEOPLE *ex rel.* Talbot Paving Company

v.

THE CITY OF PONTIAC *et al.*

Opinion filed April 17, 1900.

1. SPECIAL ASSESSMENTS—*law in force when the first assessment was made governs subsequent mandamus proceeding.* Article 9 of the City and Village act, under which an assessment was made the proceedings in which were pending when the Improvement act of 1897 was passed, controls a subsequent *mandamus* proceeding to compel the levy of a new assessment after the first assessment has been set aside by the Supreme Court.

2. SAME—*when defect in assessment ordinance is subject to amendment.* An assessment ordinance which confers discretionary power upon the engineer with reference to matters of construction which may affect the cost of the improvement is invalid but not void, and upon the setting aside of the assessment by the Supreme Court such defect may be cured by amendment and a new assessment be made under section 46 of article 9 of the City and Village act.

3. MANDAMUS—*when city may be compelled to levy a new assessment.* Under section 46 of article 9 of the City and Village act a contractor may compel a city to levy a new assessment to pay for a completed improvement, where the first assessment out of which he was to be paid has been set aside by the Supreme Court because of defects in the ordinance which are subject to amendment, and the city has refused to make the new assessment or take any steps to pay for the improvement although enjoying its benefits.

ORIGINAL petition for *mandamus.*

This is a petition for *mandamus* to require the city of Pontiac to make a new assessment to pay the balance due petitioner, a contractor, for the construction of a local improvement under an ordinance of the city which had been held invalid by this court after the improvement had been constructed.

The facts alleged in the petition and admitted by the demurrer show that on June 27, 1895, the city of Pontiac passed an ordinance providing for the improvement of parts of certain streets in said city. A copy of said ordinance is made a part of the petition. This ordinance is explicit in specifying the nature, character and location of the improvement, and provides that the cost of the construction of the improvement, aside from the street intersections, should be paid for out of a fund raised by special taxation upon the property contiguous to the improvement, according to frontage. An estimate of the cost of the improvement was made in writing by the committee named in the ordinance, and reported to the city council and approved, and the council, by resolution, directed its attorney to file proceedings in the county court of Livingston county, Illinois, for the confirmation of the special tax assessment. The petition was filed in the county court on June 29, 1895. After all the necessary legal steps were taken to extend the special tax against the contiguous property, and all objections filed by the property owners were overruled and judgment confirming the special tax was entered, the city of Pontiac entered into a written contract with petitioner for the furnishing of all labor and material for the construction of the improvement for the sum of $15,168.90, a copy of which contract is attached to the petition and made part thereof. Under this ordinance and contract the improvement was constructed and completed and accepted by the city of Pontiac. The cost of the construction of the street intersections was paid the petitioner, and also the amount of one of the deferred installments of the special tax,

leaving a balance due the petitioner of $10,567.33, evidenced by four local improvement vouchers, bearing interest at the rate of six per cent, and due in one, two, three and four years,—a copy of which is set out in the petition. After the confirmation of the special tax assessment by the county court, some of the property owners whose property had been specially taxed for the improvement, and who had filed objections to the assessment, which had been overruled by the court, perfected an appeal to this court, and the judgment of the county court confirming the special tax was reversed and the cause remanded, for the reason that the ordinance conferred discretionary power, not authorized by law, upon the engineer in charge of the work during its construction. (*Bradford* v. *City of Pontiac*, 165 Ill. 612.) It is further set up in the petition that after the judgment of the county court confirming the special tax assessment was reversed and the cause remanded by the Supreme Court, the petitioner demanded in writing of the city of Pontiac that it proceed to make a new special assessment to pay the balance due the petitioner, but the city of Pontiac, by a vote of its city officials at one of its regular council meetings, absolutely refused to take any action to make a new special assessment, or to otherwise act to raise funds to pay the balance due petitioner on account of the construction and completion of said improvement by petitioner.

W. T. WHITING, for petitioner:

Under section 46 of article 9 of the City and Village act, after the reversal and remanding of the judgment of the county court confirming the special tax, it was the duty of the corporate authorities to proceed at once and without delay to make a new assessment upon the property contiguous to the improvement to raise funds to pay the balance due the contractor on account of said improvement. *Railway Co.* v. *Freeport*, 151 Ill. 451; *Davis* v. *Litchfield*, 155 id. 384; *East St. Louis* v. *Albrecht*, 150 id. 506;

West Chicago Park Comrs. v. *Farber*, 171 id. 146; *Carlyle* v. *County of Clinton*, 140 id. 512; *Murray* v. *Chicago*, 175 id. 340; *Ricketts* v. *Hyde Park*, 85 id. 150; *Alton* v. *Foster*, 74 Ill. App. 511; *Foster* v. *Alton*, 173 id. 587; *Morgan Park* v. *Gahan*, 136 Ill. 515.

W. C. GRAVES, City Attorney, A. C. NORTON, and F. W. WINKLER, for respondents:

A re-assessment can be made only when the original ordinance is valid but set aside by some court because of a defect in the mode of making the assessment. *Pells* v. *Paxton*, 176 Ill. 318; *Railway Co.* v. *Freeport*, 151 id. 451; *Davis* v. *Litchfield*, 155 id. 384; *West Chicago Park Comrs.* v. *Farber*, 171 id. 146; *East St. Louis* v. *Albrecht*, 150 id. 506; *West Chicago Park Comrs.* v. *Sweet*, 167 id. 326; *Burton* v. *Chicago*, 62 id. 179.

The ordinance in this case being void, and void for causes that preclude any amendment, there was no ordinance authorizing the construction of the improvement and the charging of the property owners therefor. A city cannot, by accepting and adopting an improvement of a street, compel property owners to pay for the same by special taxation. *East St. Louis* v. *Albrecht*, 150 Ill. 506; *Pells* v. *Paxton*, 176 id. 318; *Carlyle* v. *County of Clinton*, 140 id. 512.

If a re-assessment were made in the case at bar, it would necessarily have to be based on the old ordinance. The defects in that ordinance cannot be cured or remedied by making a new assessment and reporting under the invalid ordinance. *Chicago* v. *Wright*, 80 Ill. 579.

A re-assessment cannot be made where the original ordinance was invalid because it improperly delegated authority to the engineer. *Bowen* v. *Chicago*, 61 Ill. 268; *Workman* v. *Chicago*, id. 463; *Building Ass.* v. *Chicago*, id. 439.

City officers have no authority, after the bids have been opened, to alter the contract materially and then award it to one of the original bidders without a new

advertisement. *Pells* v. *Paxton*, 176 Ill. 318; 15 Am. & Eng. Ency. of Law, 1093.

In all the cases in which this court has said that a re-assessment could be made, the defects in the original proceedings were in the mode of assessment, in the levying of the assessment, or some other irregularity susceptible of amendment and not affecting the life of original ordinance. *Railroad Co.* v. *Freeport*, 151 Ill. 451; *West Chicago Park Comrs.* v. *Farber*, 171 id. 146; *Davis* v. *Litchfield*, 155 id. 384; *Foster* v. *Alton*, 173 id. 587; 74 Ill. App. 511; *West Chicago Park Comrs.* v. *Sweet*, 167 Ill. 326; *Murray* v. *Chicago*, 175 id. 340.

The right of the party asking for a peremptory writ of *mandamus* must be unquestionable. *Supervisors* v. *People*, 16 Ill. App. 305.

Where a duty is general, depending upon judgment and discretion, *mandamus* does not lie. *St. Clair County* v. *People*, 85 Ill. 396.

When there is no clear duty on the part of an officer to do an act, *mandamus* will not compel him to perform it. *Commissioners* v. *People*, 99 Ill. 587; *People* v. *Johnson*, 100 id. 537

The writ will not be granted to compel the corporate authority of a village to do an act it has never been asked to do. The petition should show a demand of the compliance of the act and the refusal. *People* v. *Hyde Park*, 117 Ill. 462; *Macoupin County* v. *People*, 58 id. 191.

Mr. JUSTICE CRAIG delivered the opinion of the court:

By an act of the legislature approved June 19, 1897, the law in regard to local improvements was changed. By the repealing clause of the new act the law then subsisting continued to govern as to all proceedings relating to local improvements then pending in any court. (Laws of 1897, p. 135.) Here the proceedings were pending when the act of 1897 became a law, consequently the law in force in 1895 must control in this case. Section 46 of

article 9 of the City and Village act (Hurd's Stat. 1889, p. 267,) provides: "If any assessment shall be annulled by the city council or board of trustees, or set aside by any court, a new assessment may be made and returned, and like notice given and proceedings had, as herein required in relation to the first; and all parties in interest shall have the like rights, and the city council or board of trustees and court shall perform like duties and have like power in relation to any subsequent assessment, as are hereby given in relation to the first assessment."

As has been seen, the assessment made in this case was set aside by this court upon the ground that certain parts of the ordinance conferred discretionary powers on the city engineer in three respects, to-wit: First, that the specifications, which were made a part of the ordinance, provided that inlets and catch-basin covers be placed at street corners where directed by the engineer; second, that cross-walks be built, in such form as directed by him, at street intersections and other points; third, that the specifications empower the engineer, in his discretion, to make certain alterations which increase or diminish the expense of the improvement. The assessment having been set aside by this court, the first question to be considered is whether the city of Pontiac had the power to remedy the defects existing in the ordinance and make a new assessment.

The language of section 46 is plain and free from ambiguity, and unless the language used is to be disregarded the power to make a new assessment is clearly conferred. Indeed, the question is not an open one in this court, but, on the other hand, we think it was settled in *Freeport Street Railway Co.* v. *City of Freeport*, 151 Ill. 451, *City of East St. Louis* v. *Albrecht*, 150 id. 506, *Foster* v. *City of Alton*, 173 id. 587, and other like cases. In the *Freeport case* it was said (p. 457): "The power of municipal authorities is not exhausted by the first assessment if it is annulled or set aside or for any reason proves inadequate for the pay-

ment of the improvement made, but such authorities have the right and may be compelled to make additional levies necessary to pay contractors for work done and material furnished under an ordinance authorizing the same. These decisions in no way conflict with *City of Carlyle* v. *County of Clinton*, 140 Ill. 512. Every contractor for a public local improvement is presumed to know that the municipality has attempted to exercise its power in the mode required by the statute to authorize the improvement, but he is not chargeable with knowledge of defects in the ordinance or the manner of its passage which may invalidate it, power being given by section 49, *supra*, to correct such defects by a re-assessment. The passage of a valid ordinance must undoubtedly precede the levy of every special assessment or special tax, whether it be an original levy or a re-assessment, but in the latter case such ordinance need not precede the doing of the work, —and to that effect is *Ricketts* v. *Village of Hyde Park*, 85 Ill. 110, and cases there cited."

In the *Albrecht case* it was said (p. 512): "It need only be observed, this case is wholly unlike those in which it has been held that where the improvement has been ordered by ordinance, and the assessment has been annulled by the city council or board of trustees or set aside by any court, a new assessment may be made, as provided in section 46 of article 9 of the City and Village act. In those cases the existence of an ordinance when the work was done is the basis of the re-assessment. Even where the original ordinance proves defective and insufficient to support the assessment, yet if not absolutely void it may be amended or the defect cured by a supplemental ordinance and a re-assessment made."

In the *Foster case* it was contended that the original ordinance for the improvement was void, upon the ground that it failed to describe any improvement, and that such an ordinance, after the improvement had been made, could not be the foundation for a new assessment.

But in disposing of the question the court said (p. 592): "Where there is an attempted ordinance which is absolutely void there is no ordinance at the time the work is done. But that is not the case here. The defect was not one which the city could not cure, but it could be remedied by amendment and the ordinance made perfect, so that a new and valid assessment could be levied. Section 46 of article 9 provides for such new assessment where an assessment has been set aside by any court; and where the ordinance is not a nullity but merely inadequate the new assessment may be levied."

Here the whole ordinance was not involved, but it was only in regard to a small portion thereof that objection was interposed and sustained. It is a well established rule in regard to by-laws and ordinances, that if a provision relating to one subject matter be void and as to another valid, and the two are not necessarily or inseparably connected, it may be enforced as to the valid portion as if the void part had been omitted. (*Wilbur* v. *City of Springfield*, 123 Ill. 395.) The defect in the ordinance in question in placing discretionary power in the engineer was one which could easily be eliminated from the ordinance by an amendment, and thus the ordinance could be made perfect, so that a new and valid assessment could be levied. Was it the duty of the city of Pontiac to make the amendment and follow the amendment by a new assessment, so that the petitioner might be paid for the work he had constructed for the city?

It appears from the petition that the petitioner had completed the improvement according to contract with the city and the work had been accepted by the city. The petitioner's labor and money have gone into the improvement and the city is enjoying the benefits to flow from the improvement, but the city has not paid for the improvement nor has it made any effort to do so since the assessment was set aside, but, on the other hand, when notified by the petitioner the city council refused

to take any steps to pay petitioner for his labor and materials invested in the improvement. It is true that under the contract petitioner was to be paid from and out of the money to be raised by the assessment, and it is also true that the city did not personally assume the payment for the improvement; but the city did assume the obligation to collect the assessment imposed to pay for the improvement, and that obligation, in connection with the other facts and circumstances in the case, required the city to use all reasonable efforts within its power to make and collect a new assessment to pay petitioner for the labor and materials used in the construction of the improvement, as provided in the contract. The defect was one which the city could cure by an amendment to the ordinance so that a new and valid assessment could be levied, and it was a duty resting on the city to make the amendment and follow that up with a new assessment.

From what has been said it follows that a writ should be awarded. A peremptory writ of *mandamus* will be ordered, as prayed for in the petition.

Mandamus awarded.

CHARLES E. JOHNSTON

v.

ABRAHAM M. HIRSCHBERG.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*when defect in instruction will not reverse.* If the instructions, as a whole, fairly present the law of the case, the fact that one instruction is subject to criticism for omitting certain elements in its summary of facts is not ground for reversal.

2. PRACTICE—*appellant is not entitled to use Appellate Court briefs in Supreme Court.* The rules of the Supreme Court are not complied with where appellant's brief consists of several briefs filed in the Appellate Court and re-filed in the Supreme Court.

Johnston v. *Hirschberg*, 85 Ill. App. 47, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Peoria county; the Hon. T. M. SHAW, Judge, presiding.

On October 17, 1895, Gans Bros. & Rosenthal sued out of the county court of Peoria county a writ of attachment against Isaac D. Hurwitz, and placed it in the hands of appellant, Charles E. Johnston, the sheriff of Peoria county, who levied upon and took possession of a quantity of tobacco in the possession of appellee herein, who claimed to own it. The ground for the attachment was that Hurwitz had fraudulently sold the property to Hirschberg for the purpose of defrauding his creditors. The sheriff removed the property, and it has not been returned to appellee. On January 11, 1896, appellee brought this action of trespass against appellant for unlawfully seizing and disposing of the tobacco. Appellant filed a plea of not guilty and pleas setting out the alleged fraudulent character of the sale by Hurwitz to appellee. Upon issues joined and trial by jury, judgment was rendered in favor of appellant, which, on appeal to the Appellate Court, was reversed and the cause remanded for new trial on account of erroneous instructions. A second trial resulted in a judgment for $1650 in favor of appellee. On appeal to the Appellate Court the judgment was affirmed, and appellant prosecutes this further appeal.

A complete statement of the case will be found in the opinion of the Appellate Court by DIBELL, J., (85 Ill. App. 47,) but the foregoing will suffice for a proper understanding of the questions cognizable in this court.

H. C. FULLER, (JAMES H. SEDGWICK, of counsel,) for appellant.

ISAAC C. EDWARDS, and ISAAC J. LEVINSON, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

The questions of fact involved in this controversy have been found adversely to appellant by the judgment of the Appellate Court, which finding is conclusive here.

The brief of appellant does not comply with the rule of this court, in that it consists of several briefs used in the Appellate Court, re-filed here. However, we have examined the cause upon its merits, and fail to find in the record any reversible error.

The only contention urged by appellant is, that the third instruction given for appellee was erroneous. That instruction was as follows:

"The court instructs the jury that if they believe, from the evidence, that the plaintiff was the owner of the tobacco in question, and that he had possession of the same, and the defendant, by his deputy, took and carried away the tobacco on a writ of attachment against one Isaac D. Hurwitz, the jury should find the issues for the plaintiff."

It is insisted it is defective in that it does not contain the element of purchase and possession in good faith. As said by the Appellate Court, it is subject to the criticism. The elements of fraudulent intent and want of good faith in the alleged sale and purchase were clearly stated in several instructions given at the instance of the plaintiff and at least one given on behalf of the defendant, and we concur in the view of the Appellate Court that the jury could not have been misled by the omission in the third. As a whole the instructions fairly presented the law of the case.

The judgment of the Appellate Court is right, and will be affirmed.

Judgment affirmed.

JACOB A. HENRY

v.

BENJAMIN F. STEWART.

Opinion filed April 17, 1900.

1. BROKERS—*broker entitled to commission though purchaser acts for third parties.* One employed to find a purchaser for property, who introduces to his principal a party to whom a sale is made, is entitled to his commission, whether the purchaser is buying for himself or for third parties.

2. APPEALS AND ERRORS—*what questions are settled by Appellate Court's affirmance of judgment for commissions.* A judgment of the Appellate Court affirming a judgment for commission on the sale of property settles the questions of fact that the plaintiff was employed by the defendant, that he was the efficient means of making the sale and earned his commission.

3. SAME—*one cannot complain of his own instructions.* That instructions given for the appellant do not harmonize with a correct instruction for the opposite party is not ground for reversal.

4. TRIAL—*when instruction to find for defendant must be refused.* An instruction to find for the defendant must be refused, where the evidence, if credited by the jury, is sufficient to sustain a verdict for the plaintiff.

Henry v. *Stewart*, 85 Ill. App. 170, affirmed.

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

GEORGE S. HOUSE, (EGBERT PHELPS, of counsel,) for appellant.

D. A. HOLMES, and E. MEERS, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellee secured a judgment for $8850 and costs against appellant in the circuit court of Will county for commissions on the sale of the capital stock and property of the Joliet Street Railway Company. The property

was sold for $262,500, upon which appellee claimed a commission of five per cent. A part of the consideration was paid by assuming a bonded debt and special assessment, and $2500 was paid by the purchaser to buy in fifty shares of stock not owned by appellant. The jury seem to have deducted these sums, amounting to $85,500, leaving a balance of $177,000 as the actual selling price of the property, and to have allowed five per cent upon that sum. The Appellate Court has affirmed the judgment.

The capital stock of the street railway company was $300,000, divided into 3000 shares, of which the appellant owned 2900. Plaintiff was in the employ of the Westinghouse Electric Manufacturing Company, in the street railway department, and furnished motors and other things for this street railway. He testified that he was employed by the defendant to sell the property, under an agreement that if he would bring defendant a customer he would pay him five per cent on the sale. Defendant admitted that the matter of selling the road was brought up between him and the plaintiff and that he talked with plaintiff several times about selling it, but denied that he ever employed him or agreed to pay him any commission. Defendant had an abstract of his books prepared, showing his receipts and disbursements from 1891, and furnished it to plaintiff, together with an inventory of the property. Plaintiff prepared a prospectus and wrote to parties in the east, and made journeys there to induce men of capital to come and look at the property. He was unable to sell the property, and the matter ran along, with occasional interviews with the defendant, until 1896, when the defendant became very anxious to dispose of the railway. Plaintiff made renewed efforts for a sale and called the attention of William B. McKinley to the property and induced him to go to Joliet, where plaintiff introduced him to defendant, and negotiations were commenced which ended in the sale of the property. About June 10, 1896, defendant gave McKinley an option for the

sale of $275,000 of the stock, the defendant to retain the balance. McKinley went to Portland, Maine, to present the matter to a syndicate there, and telegraphed the defendant from Portland that the option was accepted. It turned out, however, that the syndicate would not take the stock unless they could get all of it. They wanted to re-organize the company and consequently wanted all the stock, although they were willing defendant should have stock in the new organization. McKinley came back to Joliet, and with him came an attorney representing the syndicate. The $10,000 of stock not owned by defendant belonged to his son-in-law, Folk, and others, and the buyers insisted upon having that stock surrendered. Defendant could obtain the stock but refused to do so. An arrangement was finally made, by which, as McKinley testified, Folk took $5000 in bonds in the re-organized company and $500 in money for his stock. McKinley and the defendant each paid $2500 for the other $5000 of stock. In that way the stock was all secured and deposited with the Will County National Bank, and a contract was made between defendant and Henry P. Cox, acting by said attorney, for the sale of the property, and a transfer to such person or persons as Cox might designate. Cox was a member and representative of the syndicate. The property was paid for according to the agreement and a conveyance was made to McKinley. The corporation was re-organized with a capital stock of $300,000, and all the stock was subscribed for by McKinley, except seven shares held by other persons, each holding one share. Defendant denied the employment of plaintiff and testified that he supposed McKinley represented Mr. Cox, with whom the contract was made. The defense is stated by his counsel as follows: "Appellant's defense is, that Henry P. Cox, the purchaser, was presented by McKinley, and that McKinley negotiated the sale between appellant and Cox on his own account, independently, and not as the agent of appellee." Consid-

ered as a question of fact, the judgment of the Appellate Court is, of course, final, and it must be regarded as settled that defendant employed plaintiff to negotiate the sale, that plaintiff did so and was the active and efficient cause of such sale, and that he earned his commission.

At the trial Folk was a witness, and defendant asked him if he received any of the bonds of the new company, and he said he did. A further question as to whether they were bonds of the Joliet Railway Company was objected to and the objection was sustained. Defendant's counsel said he wanted to show by the answer that McKinley and Folk made the sale of the road and got their pay for it. Defendant testified that he understood McKinley represented Cox, the purchaser. He did not claim to have had any bargain with McKinley or Folk to sell the road for him, but he treated with McKinley as a purchaser. On his own testimony it was immaterial whether Folk got bonds of the company for services, and the question did not call for any information on the fact which counsel says he wanted to prove. There was no attempt to prove the employment of either McKinley or Folk by defendant, and no question was asked which would elicit information on that subject.

The defendant was examined and testified that he received $50,000 of stock in the new company, and that McKinley called for $15,000 of it and sent his man over to get it, and further said: "I don't know what he wanted with that. I suppose commissions." On objection, the court struck out the statement. The answer was nothing but a supposition of the witness, and not a fact. The witness said he did not know what McKinley wanted with the stock, and it was properly stricken out. It would make no difference if the defendant gave up some part of the purchase money to McKinley, or upon what terms he made the sale to him, except as a basis for determining the commission. McKinley testified that he did not act as a broker and had not retained $15,000 of the purchase

money, and had not retained anything as commission. There was no evidence tending to show that McKinley was the agent who made the sale or that the plaintiff did not make it.

At the close of all the evidence defendant presented an instruction directing a verdict in his favor, and the court refused it. The facts necessary to establish plaintiff's claim were testified to by him and by McKinley and corroborated by other evidence, and if such evidence was credited by the jury it was sufficient to justify a verdict. It was therefore proper to refuse the instruction and submit the issues to the jury.

Defendant asked the court to give to the jury the following instruction:

"If the jury shall believe, from all the evidence, that on or about the 24th day of June, A. D. 1896, the defendant in this cause, as party of the first part, contracted and agreed with one Henry P. Cox, of Portland, Maine, for the sale and transfer of the entire capital stock of the Joliet Street Railway Company, together with the possession, management and control of the property and franchises of said corporation, and that thereafter such contract was consummated by an execution thereof on the part of said defendant, then the plaintiff in this case cannot recover and the jury will so find."

There was no dispute that a contract was made with defendant by Henry P. Cox and that the contract was consummated, and the instruction stated these undisputed facts but ignored every fact which affected the rights of the parties to the suit. Although the contract was made with Cox and was carried out, yet if it was made under an agreement with plaintiff, and through his instrumentality, he was entitled to recover. The court was right in refusing the instruction.

It is complained that the court gave this instruction:

"The court instructs the jury that if you believe, from the evidence in this case, that the defendant employed

the plaintiff, Stewart, as his agent, to negotiate the sale of his, the defendant's, street railway property, and that the plaintiff undertook said employment and was instrumental in bringing together the buyer and the defendant, then and in that case the plaintiff is entitled, as a matter of law, to recover from the defendant compensation for his services, regardless of the fact that the defendant himself concluded the sale, and upon a price less and upon terms different from those at which the plaintiff was authorized to sell."

The instruction stated the law. (*Hafner* v. *Herron*, 165 Ill. 242.) It seems to be insisted by counsel that unless McKinley was the agent of the plaintiff in negotiating the sale the plaintiff could not recover. That is not so. If plaintiff, as agent for the defendant, offered the property to McKinley and thereby brought about a sale, it is wholly immaterial whether McKinley acted for himself, or for himself in connection with others, or for a syndicate. Whether he was himself the purchaser or an agent of the real purchaser was a matter of no concern to the defendant. The proof was undisputed that plaintiff introduced McKinley to the defendant and that the sale resulted from such act of the plaintiff. He found a buyer whom defendant was willing to accept, and did accept, whether such buyer was acting for himself or others.

The court gave two instructions at the instance of the defendant which were very favorable to such defendant, and which counsel says cannot be harmonized with the one above quoted, given for the plaintiff. The defendant could not object to those given at his instance, and if he is not able to harmonize them with the correct instruction given for the plaintiff it is not ground for reversal.

The defendant made a motion for a new trial on the ground of newly discovered evidence, supported by affidavits of himself and Folk. The evidence set forth was cumulative and not conclusive, and would not be ground for new trial. The affidavits amounted to but little more

than statements that the memory of the parties making them was better after the trial than at the trial. The motion was properly overruled.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

J. WALTER THOMPSON COMPANY

v.

H. L. WHITEHED, Assignee.

Opinion filed April 17, 1900.

1. APPEALS AND ERRORS—*appellee should assign cross-error to preserve trial court's rulings for review.* Upon appeal from a judgment of the Appellate Court reversing the decree of the trial court, the appellant cannot assign error upon rulings of the chancellor to which he made no objection in the Appellate Court.

2. VOLUNTARY ASSIGNMENTS—*a right to make common law assignment presumed to exist in foreign States.* The right to make a voluntary assignment for the benefit of creditors existed at common law, and is to be regarded as existing in each State of the Union unless shown to have been changed by the statute of such State.

3. CONFLICT OF LAWS—*when foreign voluntary assignment will be enforced in Illinois.* A common law assignment for the benefit of creditors generally, which is valid by the laws of the State where made, will be enforced in Illinois as against a non-resident creditor who has attached the property while in possession of the assignee.

4. CORPORATIONS—*when foreign corporation cannot be considered as a domestic creditor.* A foreign corporation which has not complied with the statute concerning the obtaining of a certificate authorizing it to do business in Illinois at the time of the levy of its attachment upon goods situated in Illinois but in the possession of a foreign assignee for creditors, cannot be regarded as a domestic creditor, nor does it acquire any rights by virtue of its levy, since the law denies its right, under such circumstances, to maintain any action in Illinois. (Laws of 1897, p. 174.)

Whithed v. *J. Walter Thompson Co.* 86 Ill. App. 76, affirmed.

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

This was a bill of interpleader filed by the Morgan Storage and Warehouse Company, against appellant, appellee and others, to determine the ownership of certain property in the hands of the warehouse company which is claimed by appellee, as the assignee of the North Dakota Milling Company, a Dakota corporation, and by appellant, a New Jersey corporation, as creditors of said milling company, by virtue of a writ of attachment which it caused to be levied thereon. By an interlocutory decree the complainant, the storage and warehouse company, was dismissed out of the case, and appellant and appellee were required to interplead and set up their respective claims to the property, or rather to the proceeds in the hands of the clerk of court arising from its sale, which had been ordered on petition of all the defendants. By stipluation the attachment suit was dismissed and the property in dispute sold, with the agreement the rights of the parties should attach to the proceeds of the sale and be adjusted in this proceeding.

It appears that April 16, 1897, the North Dakota Milling Company loaded the property in controversy, known as "Cream of Wheat," upon a car consigned to Cushman Bros. & Co., residents of the city of New York, who are now out of the case, and received from the agent of the railroad company a bill of lading in which the milling company was made a consignor. Three days thereafter the said North Dakota Milling Company voluntarily executed a common law deed of assignment, conveying to appellee, as assignee, for the benefit of all its creditors, all its property, of every name and nature, without preference. Appellee accepted the trust, and, as required by the deed of assignment, executed and delivered a bond for the sum of $25,000, running to the judge of the district court of the first judicial district of North Dakota, conditioned for the faithful discharge of the trust. He at once took possession of all the assets of the insolvent company and proceeded to administer the estate. Among

other assets received by him was the bill of lading covering the car-load of cream of wheat shipped by the assignor three days before to Cushman Bros. & Co. He forthwith forwarded said bill of lading, with two drafts, of $500 each, attached, to the said Cushman Bros. & Co., the consignees named in said bill of lading, but the drafts being returned to him dishonored, appellee at once caused the car-load of cream of wheat to be stopped in transit. It was found at or near Englewood, in this State, and on or about May 10, 1897, appellee caused it to be placed in storage with the Morgan Storage and Warehouse Company in Chicago, subject to his order. Early in May appellee directed the warehouse company to ship ten cases of the cream of wheat to a customer at Buffalo, New York, which was done, and shortly after appellee paid the storage charges to the warehouse company and demanded the remainder of the property. This demand was not complied with, apparently because a similar demand was made about the same time by Cushman Bros. & Co., the New York consignees, who had refused payment of the drafts accompanying the bill of lading. Matters remained in this situation until July 29, following, when the appellant company instituted its suit in attachment, and thereupon the bill of interpleader was filed. The circuit court entered a decree sustaining the attachment, dismissing appellee's interplea, and ordering the money in the hands of the clerk, the proceeds of the sale of the attached property, to be paid to the appellant company. On appeal the Appellate Court for the First District reversed the decree and refused to remand the cause but granted a certificate of importance. This is an appeal by the appellant, the J. Walter Thompson Company, to reverse the judgment of the Appellate Court.

LOUIS J. PIERSON, for appellant:

A non-resident or foreign creditor has the same rights under the Attachment act of Illinois as a resident citizen,

and may enforce that remedy to the same extent and in the same manner as a citizen of the State. *Rhawn* v. *Pearce*, 110 Ill. 358.

Neither the grantee nor the creditors of the grantor in a statutory or common law deed of assignment are purchasers. They are but volunteers. *Willis* v. *Henderson*, 4 Scam. 20; *Stow* v. *Yarwood*, 20 Ill. 499; *Hardin* v. *Osborne*, 94 id. 574; *Union Trust Co.* v. *Trumbull*, 137 id. 179.

A statutory assignee in North Dakota is not a purchaser, and the legality of such an assignment may be tested by attachment. His possession is not *custodia legis*. *Enderlin Bank* v. *Rose*, 4 N. Dak. 326.

No court will take judicial notice of the laws of a foreign country or State. They must be averred and proved as facts. *Shannon* v. *Wolf*, 173 Ill. 260.

While the validity of a contract is determined by the *lex loci*, if such law is not averred and proved the court cannot presume the foreign law to be different from our own, but must presume it to be the same as our own. *Shannon* v. *Wolf*, 173 Ill. 260.

A failing debtor in Illinois is only allowed to place his property beyond the reach of his creditors by attachment, by making a general assignment according to law. *Phelps* v. *Curts*, 80 Ill. 113; *Morrill* v. *Kilner*, 113 id. 321.

If a foreign assignment, if made in Illinois, would be set aside as contrary to the policy of our laws, our courts will not enforce it as against attaching creditors, whether foreign or domestic, although it may be valid in the State where made. *Woodward* v. *Brooks*, 128 Ill. 227.

Possession of the goods assigned must not only be actually changed to the assignee, but such change must be continued. Burrill on Assignments, (6th ed.) sec. 253, p. 329.

An assignee in a deed of assignment for the benefit of creditors takes no greater interest or better title than his assignor possessed. *Davis* v. *Dock Co.* 129 Ill. 187.

When a party has the choice between two inconsistent remedies or causes of action, and, knowing the facts on

which his rights rest, deliberately adopts one, such election becomes conclusive upon him and precludes him from subsequently adopting the other. *Kaehler* v. *Dobberpuhl*, 60 Wis. 261; *Warren* v. *Landry*, 74 id. 151; *Crook* v. *Bank*, 83 id. 41; *Terry* v. *Munger*, 121 N. Y. 167; *Nield* v. *Burton*, 49 Mich. 54; *Farwell* v. *Myers*, 59 id. 182.

ALDEN, LATHAM & YOUNG, for appellee:

Where an assignee under a common law deed of assignment once gets possession of property he can hold it against any attachment by creditors of his assignor, either foreign or domestic, and in whatever jurisdiction the property may be found. *Railroad Co.* v. *Packet Co.* 108 Ill. 317; *Long* v. *Forest*, 150 Pa. 413; *Reynolds* v. *Adden*, 136 U. S. 348; *Cole* v. *Cunningham*, 183 id. 97; *Cook* v. *Orange*, 39 Conn. 41; *Bank* v. *Steel Co.* 30 Atl. Rep. 545.

The attaching creditor in this case is a resident and citizen of the State of New Jersey. The common law deed of assignment was executed in North Dakota. This contest is between a New Jersey creditor of a North Dakota corporation and the assignee of such corporation. A voluntary assignment of a non-resident will effectually pass the title to a foreign assignee of property of the assignor situated in this State or in any State, as against subsequent attachment of such property by a creditor of the insolvent, a non-resident of this State, where the law of the State where the assignment is made is not inconsistent with or contrary to the policy of the law of this State. *Heyer* v. *Alexander*, 108 Ill. 385; *Townsend* v. *Coxe*, 151 id. 62; *Railroad Co.* v. *Packet Co.* 108 id. 317; *Juilliard* v. *May*, 130 id. 87; *Woodward* v. *Brooks*, 128 id. 222; *Rhawn* v. *Pearce*, 110 id. 350; *Tank Line Co.* v. *Collier*, 148 id. 259; *May* v. *Bank*, 122 id. 151; *Holbrook* v. *Ford*, 153 id. 633.

A common law deed of assignment executed by a corporation is valid wherever made, unless prohibited by statute. *Covert* v. *Rogers*, 38 Mich. 363; *Boynton* v. *Rowe*, 17 N. W. Rep. 257; *Union Trust Co.* v. *Trumbull*, 137 Ill. 146;

Howe v. *Warren*, 157 id. 227; *Blair* v. *Steel Co.* 159 id. 350; Burrill on Assignments, (6th ed.) sec. 45.

The right to make an assignment existed at common law, and now exists in every State unless prohibited by statute. *Union Trust Co.* v. *Trumbull*, 137 Ill. 146; *Hanchett* v. *Waterbury*, 115 id. 22; *Howe* v. *Warren*, 154 id. 227; *Winter* v. *Maddox*, 1 S. W. Rep. 168; *Egbert* v. *Baker*, 20 Atl. Rep. 466; *Barnhart* v. *Kennedy*, 147 U. S. 476; *Vanderpool* v. *Gorman*, 140 N. Y. 563.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The appellant company urges the chancellor erred in admitting in evidence, over its objections, proof of the enactments of the General Assembly of the State of North Dakota in relation to trusts and assignments. The appellant here was successful in the trial below and was appellee in the Appellate Court. It did not assign cross-errors on the record in the Appellate Court, and cannot be allowed to assign as for error in this court any ruling of the chancellor to which it made no objection in the Appellate Court. *Newell* v. *Sass*, 142 Ill. 104.

It was clearly proven the appellee assignee secured the possession of the goods in controversy and placed them in storage with the said Morgan Storage and Warehouse Company. This is not controverted. But appellant contends it was established by certain letters written by the appellee assignee to the storage company that said appellee abandoned all right or claim of possession or dominion over the goods, and did not claim the goods were in his possession at the time it caused the attachment writ to be levied. We have examined these letters and considered the statements therein contained, together with certain telegrams and other facts and circumstances disclosed by the evidence bearing on the point. These letters and telegrams were addressed to the Morgan Storage and Warehouse Company, and, with the exception of one of the letters, related solely to a

controversy between the appellee, as assignee, and the said Cushman Bros. & Co., who had asserted and were asserting a right to the possession of the goods as consignees, and had no reference whatever to any claim of the appellant company. The letter written after the levy of the attachment, was written in reply to notice given by the storage company that an attachment had been levied on the goods. The statements contained therein are, in substance, that the appellee's view is he should not defend the attachment suit but should require the storage company to pay him for the goods, but that he will refer the whole matter to his attorney. It does not appear the appellant company had any knowledge of any of these letters or telegrams when the attachment suit was brought or that its course was in any manner affected or controlled by them. It appeared from the proof on the point, the appellee assignee at all times claimed the ownership of the goods and the right to the possession thereof, and his intention to invoke all necessary legal remedies to protect his possession, or to recover the value of the goods if deprived of their possession. We think it clearly appeared from the proofs the possession of the goods by the storage company at the time the attachment writ was issued was the possession of the appellee assignee.

The question for decision then is, did the appellant company, a corporation organized under the laws of the State of New Jersey, by means of the attachment writ issued under the laws of this State, and the levy thereof on the goods in this State in the possession of the appellee as assignee, he being a resident of the State of North Dakota, obtain a lien on the goods superior to the right of the appellee as such assignee?

The appellant insists it appears from the enactments of the law-making power of the State of North Dakota offered in evidence, common law or voluntary assignments for the benefit of creditors are not permitted, but that

debtors desiring to make assignments for the benefit of creditors do so under the provisions of the code adopted by that State, governing, as appellant contends, the entire question of such assignments. The North Dakota code to which appellant refers applies only to a debtor whose aggregate indebtedness amounts to $500, and who takes advantage of the act for the "purpose of obtaining a discharge from his debts." It is in the nature of a bankruptcy act, having the effect to relieve the debtor of further liability to respond to his creditors, and is not available to debtors who do not owe at least $500 in the aggregate. The assignment is not made by the debtor, but by the clerk of the court to an assignee selected by the creditors. The filing of the petition in the district court is apparently the only voluntary act required of the debtor. Such a proceeding is a statutory one as distinguished from a voluntary assignment. We do not regard this enactment as affecting the right of a debtor resident in North Dakota to execute a common law deed of assignment for the benefit of his creditors, leaving him still liable to answer all demands not discharged in full out of the assigned estate. That code has no reference to a debtor who owes less than $500, nor to any debtor other than those who voluntarily invoke it in order to be discharged as to all their debts. We would not impute to the State of North Dakota the intention to require a debtor residing in that State to apply, under that statute, to be relieved from any and all obligations to his creditors, and to deny to such debtor the common law right to convey his property to an assignee for the benefit of his creditors, he also remaining liable to them. It was not proven common law assignments are expressly prohibited by the laws of North Dakota. This code does not prohibit such assignments directly or by implication. The right to make an assignment existed at the common law, and is to be regarded as existing in each of the States of the Union unless shown to have been changed

or abrogated by statute. The deed of assignment in question conveyed all the property of the debtor for the benefit of all of his creditors, without distinction or preference. In that respect it is not antagonistic to the policy of our laws. Our statute respecting voluntary assignments does not create the right to make such an assignment, but only places restrictions on the exercise of the common law right possessed by the debtor to so dispose of his property. (*Hanchett* v. *Waterbury*, 115 Ill. 220; *Union Trust Co.* v. *Trumbull*, 137 id. 146; *Howe* v. *Warren*, 154 id. 227.) The assignment to the appellee was not a statutory one, but a voluntary common law assignment on the part of the debtor. It was valid by the *lex loci*, and will be carried into effect here as against a creditor non-resident of this State who has levied a writ of attachment on property in the possession of the assignee under the authority of such assignment. *Heyer* v. *Alexander*, 108 Ill. 385, *May* v. *First Nat. Bank*, 122 id. 551, and *Townsend* v. *Coxe*, 151 id. 62, discuss the doctrine here involved and in principle support the conclusion here announced. See, also, 3 Am. & Eng. Ency. of Law, 571, 572.

Rhawn v. *Pearce*, 110 Ill. 350, did not involve the question here presented. In that case a firm resident in Illinois was indebted to one Landenberger, a resident of the State of Pennsylvania. An attachment writ was issued in this State at the instance of a foreign creditor of Landenberger, and the Illinois debtor firm was garnisheed and made answer admitting the indebtedness. Trustees appointed under the provisions of the statutes of Pennsylvania, with authority to receive the property of Landenberger and administer the same for the benefit of his creditors, interpleaded. It was held the fund was in Illinois and was subject to the remedies provided by our laws for the collection of debts by the process of garnishment, and that the attaching creditor secured prior right thereto. In the case at bar the subject matter of the litigation is personal property which the foreign

assignee had reduced to possession. Having possession, his right would be superior to that of a foreign creditor seeking to dispute such possession by the medium of the process of attachment.

It is urged the policy of our law does not permit the withdrawal of funds or property by a foreign assignee while the demands of creditors resident in the State remain unpaid, and it is insisted the appellant company is to be regarded as a domestic creditor and entitled to the benefit of the operation of this rule, and for that reason its lien should be regarded as superior to the right of the appellee assignee to the goods. It appeared the appellant company is a corporation organized under the laws of the State of New Jersey for the purposes of profit and gain; that at the time of the institution of the attachment suit, and for some four or five years previous thereto, it had maintained a branch office in this State and transacted its business here; that the indebtedness sought to be recovered by the process of attachment grew out of contracts for advertising entered into with the insolvent North Dakota corporation in the State of Illinois in the year 1896 and up to April, 1897. On the 26th day of May, 1897, an act of the General Assembly of the State of Illinois, (Laws of 1897, p. 174,) being an act to require every foreign corporation doing business in this State to have a public office or place where it transacted its business, and to file its articles of incorporation with the Secretary of State, etc., was approved. The act went into effect July 1, 1897. By section 1 of the act the appellant company was required, "before it shall be authorized or permitted to transact business in this State, or to continue business therein, if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corpora-

tion." By section 2 of the act it was required to "file in the office of the Secretary of State a copy of its charter or articles of incorporation, or in case such company is incorporated merely by a certificate, then a copy of its certificate of incorporation, duly certified and authenticated by the proper authority; and the principal or agent in Illinois of the said corporation shall make and forward to the Secretary of State, with the articles or certificates above provided for, a statement duly sworn to of the proportion of the capital stock of the said corporation which is represented by its property located and business transacted in the State of Illinois; and such corporation shall be required to pay into the office of the Secretary of State of this State, upon the proportion of its capital stock represented by its property and business in Illinois, incorporating taxes and fees equal to those required of similar corporations formed within and under the laws of this State. Upon a compliance with the above provisions by said corporation, the Secretary of State shall give a certificate that said corporation has duly complied with the laws of this State and is authorized to do business therein." Section 3 of the act, after providing for the imposition of a fine for the failure to comply with the provisions of sections 1 and 2, is as follows: "In addition to which penalty on and after the going into effect of this act, no foreign corporation, as above defined, which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort."

The attachment suit was instituted on the 29th day of July, 1897, and the levy was made on that day. The appellant company had not complied with the requirements of the act before mentioned. The provisions of that portion of section 3 of said act hereinbefore mentioned declared the appellant company should not, in

consequence of such non-compliance, be permitted to maintain any suit or action, legal or equitable, in any of the courts of the State on any demand, whether arising out of contract or tort. No reason is perceived why the provisions of this act should not have full operation. Given such operation, the appellant company had no standing in the courts of Illinois to enforce a demand, and the insistence it was entitled to the privileges accorded by the policy of our law to a domestic or resident creditor is wholly untenable. It had no right to invoke action of any kind, under the laws of this State, in aid of the enforcement of any contract or the collection of any debt. It was proven the appellant company applied to the Secretary of State on the 19th day of August, 1897, —which was previous to the hearing of this cause,— for a certificate of compliance with the provisions of the enactment under consideration, but did not complete its application to the satisfaction of the Secretary of State until September 11, 1897, upon which date it received its certificate. But its rights are to be determined (at the latest) as of the date of the levy of the writ. If it did not secure a lien upon the property in dispute by the levy of the writ of attachment it was powerless to interfere with the possession and control of the goods by the assignee. It had not then complied with the conditions fixed by the statute as a pre-requisite to its right to invoke the aid of the courts of this State, and the right of the appellee assignee to retain the possession of the goods was superior to any right which could be obtained by the appellant company by virtue of the writ issued in a suit which it had no legal standing to institute.

The judgment is affirmed. *Judgment affirmed.*

AMBROSE C. SELLARS

v.

MARGARET BARRETT *et al.*

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. TAXES—*"credits" are personal property, within the meaning of section 276 of Revenue act.* "Credits" are personal property, within the meaning of section 276 of the old Revenue act, providing for the assessment of "any real or personal property" omitted from the assessment of previous years.

2. SAME—*board of review may assess credits omitted in previous years.* Under section 276 of the old Revenue law, and section 35 of the Revenue act of 1898, which requires the board of review to assess "all property subject to assessment" which has been omitted by the assessor, the board of review may assess for the current year and previous years credits which have not been assessed and which were not omitted because offset by debts. (*Allwood* v. *Cowen*, 111 Ill. 481, distinguished and explained.)

3. SAME—*deductions from credits should be by verified statement.* Section 29 of the Revenue act (Rev. Stat. 1874, p. 862,) requires that when deductions are claimed from credits the assessor shall cause such deductions to be verified by oath of the person claiming the same, which statement is preserved in the office of the county clerk for two years.

APPEAL from the Circuit Court of Coles county; the Hon. FRANK K. DUNN, Judge, presiding.

This is a bill, filed by Margaret Barrett and seventy other persons, appellees herein, averring that they are residents of Coles county and tax-payers thereof; that the personal property owned by each of them was assessed by the town assessor in the town of Mattoon in said county in the years 1894, 1895, 1896, 1897, and 1898, and taxes were extended against each of them upon the property so assessed against them; that each of them paid the taxes for each of said years so assessed and extended against them; that the appellant and two others constituting the board of review, at the meeting of the board for the year 1899, claimed to have discovered credits other than of bank, banker, broker or stock jobber

omitted by each of the complainants for the years 1894, 1895, 1896, 1897, and 1898; and that they, as said board of review, are empowered by the statute to assess each and all the complainants, or appellees, upon credits other than of bank, banker, broker or stock jobber, so claimed by them to have been omitted for the years aforesaid, and have listed and assessed appellees upon credits other than of bank, banker, broker or stock jobber for said years, and for the amounts specified in the bill; that the appellees, each in person or by attorney, appeared before said board of review at its meeting in August, 1899, and objected to the listing and assessment of such credits by said board upon the ground that such assessment was illegal, that said board had not power or authority of law to assess such omitted credits for the years aforesaid; and that their acts in assessing were illegal and without authority of law, etc.; that the board has returned the assessment books to the appellant, Ambrose C. Sellars, county clerk of said county, that he may extend the taxes upon the assessments so made upon such credits, claimed by the board of review to have been omitted by appellees for the said years and assessed by said board, and the said Sellars, county clerk of said county, will extend the taxes upon said credits as listed and assessed by the said board for each of said years and against each of appellees, and add the same to the current taxes of each of appellees for the year 1899, together with a penalty of ten per cent interest upon said credits claimed to have been omitted, unless he is restrained by injunction; that the listing of such credits by said board is without authority of law, and that said county clerk has no legal right to extend said taxes against appellees. The bill prays for an injunction against the county clerk from extending the taxes against such return and assessments.

A demurrer was filed to the bill by the appellant, and hearing was had upon the demurrer. The court over-

ruled the demurrer, and sustained the bill as to appellant, Sellars, but sustained the demurrer as to the two other members of the board of review, who were made defendants below, and dismissed the bill as to them. The present appellant elected to stand by his demurrer. The court, therefore, decreed that the bill be taken as confessed against appellant, and that he be enjoined from extending said assessment against the appellees, etc. The present appeal is prosecuted from the decree of the court, so enjoining the tax upon said assessments.

J. H. MARSHALL, and H. A. NEAL, (EMERY ANDREWS, H. S. CLARK, A. J. FRYER, H. P. COFER, and S. S. ANDERSON, of counsel,) for appellant.

JAMES W. & EDWARD C. CRAIG, HENLEY & HENLEY, I. B. CRAIG, BENNETT & VOIGT, and BRYAN TIVNEN, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

It is admitted by counsel for both sides, that the demurrer to the bill, which was overruled, raises two questions: First, had the board of review any authority to assess any property omitted by the assessors prior to 1899? Second, if it had such authority in any case, had it any authority to assess credits for any year or years prior to 1899?

First—It must be held, in view of the language of the statutes and of a recent decision of this court interpreting those statutes, that the board of review had authority to assess property omitted by the assessors prior to 1899.

Section 276 of the Revenue act provides as follows: "If any real or personal property shall be omitted in the assessment of any year or number of years, or the tax thereon, for which such property was liable, from any cause has not been paid, * * * the same, when dis-

covered, shall be listed and assessed by the assessor and placed on the assessment and tax books. The arrearages of tax which might have been assessed, with ten per cent interest thereon, from the time the same ought to have been paid, shall be charged against such property by the county clerk." (3 Starr & Cur. Ann. Stat. p. 3516).

Section 35 of the Revenue act passed by the legislature at the extra session of 1898, entitled "An act for the assessment of property and providing means therefor and to repeal a certain act therein named," provides as follows: "The board of review shall: First—Assess all property subject to assessment which shall not have been assessed by the assessors. The board of review may make such alterations in the description of real or personal property as it shall deem necessary," etc.

In *People* v. *Sellars*, 179 Ill. 170, sections 276 and 35 above quoted came under the consideration of this court in connection with the first question raised by the demurrer here. In that case, which was a petition for *mandamus*, the petitioner, a citizen and tax-payer of Coles county, alleged that the assessor for the town of Mattoon had discovered personal property in his township omitted in the assessments for the years 1894, 1895, 1896, 1897, and 1898, upon which the taxes were not paid during said years, and that the town assessor had listed and assessed and placed on the assessment and tax books such property so omitted, and filed the same in the office of the county clerk, and had made demand upon the county clerk to extend such taxes. A demurrer was filed to the petition for *mandamus*, and the trial court sustained the demurrer and entered judgment against the petitioner, which judgment was affirmed by this court. It was there held, that the town assessor for the year 1898 had no authority under the foregoing statutes to make an additional assessment against the omitted property upon the ground that the power to assess such omitted property

had been conferred by the act of 1898 upon the board of review. In that case, we said (p. 175): "Under section 276 of the old Revenue law, where property has been omitted in an assessment of any year or years, when the omission has been discovered, the assessor was authorized to assess such omitted property and make return to the county clerk. But under section 35 of the new law section 276 of the old law is changed and modified so that the power to assess omitted property is taken from the assessor and conferred upon the board of review. The language, 'first, assess all property subject to assessment, which shall not have been assessed by the assessors,' is plain, and was doubtless intended to cover all cases where property liable to be assessed had for any cause been omitted from the assessment by the local assessor. Section 276 of the Revenue law was not repealed, but it was changed and modified, so that the power of assessing omitted property was taken from the local assessor and conferred upon the board of review."

The assessment in the case at bar was made by the board of review. When the power of assessing omitted property was taken from the local assessor and conferred upon the board of review, the power of the board was not confined to the assessment of the current year, but extended to property omitted from the assessment of prior years. The precise question in *People* v. *Sellars*, *supra*, related to the power of the assessor of Mattoon township for the year 1898 to assess omitted property for the years from 1894 to 1898 inclusive; and it was there said, in answer to the contention that the board of review created by the act of 1898 was only intended to review such assessments as might be made under that act, that the language of section 35 of the act as above quoted was "general, and broad enough to cover cases that may have arisen as well before the act took effect as afterwards." It follows that the first question propounded as above must be answered in the affirmative.

Second—Counsel for appellees, however, insist that, even if the board of review has power to assess all other kinds of property which have been omitted from the assessment of prior years, it has no power to assess "credits" which have been omitted. It is urged, as one of the reasons in support of this contention, that the words, "personal property," as used in the statute do not include credits. The language of section 276 is: "If any real or personal property shall be omitted in the assessment of any year or number of years," etc. Several provisions of the Revenue act are referred to as indicating that the legislature did not intend "credits" to be included in what is denominated "personal property."

The sixth clause of section 292 of the Revenue act is quoted. That clause defines "credits" thus: "Every claim or demand for money, labor, interest, or other valuable thing, due or to become due, not including money on deposit." It is said that "credits," as thus defined, cannot be included in the class of property designated as personal property. Section 1 of the Revenue act is also referred to. Section 1 provides "that the property named in this section shall be assessed and taxed, except so much thereof as may be, in this act, exempted: *First*—All real and personal property in this State. *Second*—All moneys, credits, bonds or stock," etc. It is claimed, that, by the language above quoted from section 1, the legislature intended to draw a distinction between "personal property" and "credits." There is some plausibility in the contention thus made by counsel, but other provisions of the act cannot be otherwise interpreted than as including "credits" under the head of personal property. Thus, section 24 of the Revenue act provides that "persons required to list personal property shall make out, under oath, and deliver to the assessor, at the time required, a schedule of the numbers, amounts, quantity, and quality of all personal property in their possession or under their control, required to be listed for taxation

by them. It shall be the duty of the assessor to determine and fix the fair cash value of all items of personal property, * * * and in assessing notes, accounts, bonds and moneys, the assessor shall be governed by the same rules of uniformity that he adopts as to value in assessing other personal property," etc. It will not be denied that notes and accounts are "credits," and yet section 24, by the use of the words, "other personal property," evidently intends to designate notes and accounts as personal property.

Again, section 25 provides that "such schedule," being the schedule of personal property referred to in section 24, "shall truly and distinctly set forth: * * * *Twenty-seventh*—The amount of credits other than of bank, banker, broker or stock jobber." (3 Starr & Cur. Ann. Stat.—2d ed.—pp. 3410, 3411). If it was not the intention to include credits so-called within the meaning of personal property, such credits would not be required to be set forth in a schedule of personal property. We are of the opinion that credits are personal property within the meaning of section 276 of the Revenue act, and, therefore, that the board of review had authority to assess omitted credits for any year or years prior to 1899, as well as any other omitted personal property.

But whether, under the language used in the Revenue laws, credits be regarded as personal property or not, section 35 of the act of 1898 provides that the board of review "shall assess all property subject to assessment which shall not have been assessed by the assessors." Certainly, the words, "all property" include any kind of property, whether real property, or credits, or personal property not embracing credits. It will not be contended that credits are not property of some kind; they must, therefore, come under the designation of "all property."

Counsel for appellees rely upon the case of *Allwood* v. *Cowen*, 111 Ill. 481, as sustaining their contention that the board of review has no power to assess credits which

have been omitted. The decision in that case is not susceptible of the construction given to it by counsel. In *Allwood* v. *Cowen*, *supra*, a bill was filed to enjoin a tax levied on credits alleged to belong to the complainant, and that were charged to have been omitted from the assessment made against him for the years 1877, 1878, and 1879, but there it was made to appear that the complainant had been assessed on his credits for the years 1877, 1878, and 1879, and had paid all the taxes so levied for those several years. It was there said that most articles of personal property are required by section 25 to be listed and assessed by the number of articles owned by the party to be assessed—as, for instance, the number of horses, cattle, hogs, wagons, watches, clocks, etc. The number of each of such articles must be separately stated by the owner when listing the same. Credits, however, are not assessed in that way, that is, by items, but the whole amount is ascertained, and from that amount the amount of *bona fide* debts, owing by the person to be assessed, may be deducted. This balance, after making such deductions, is subject to taxation. It was said in the *Allwood case*, that, in deducting the amount of *bona fide* debts from the amount of credits for the three years above named, the assessor exercised his judgment in ascertaining the facts, and that, under the statute, his acts were in the nature of judicial acts, and, therefore, not subject to review by his successor, even though his decision had been erroneous. We there said: "Ascertaining the amount of credits, after deducting *bona fide* debts owing by the party to be assessed, involves, in some degree at least, judgment and determination on the part of the assessor acting. No power is given by statute to his successor, whether he is his own successor or not, to correct, or in any manner revise, the judgment of his predecessor in such matters."

In *Allwood* v. *Cowen*, *supra*, section 276 was held to have no application to cases where deductions are made from

credits, and a balance for making such deductions is assessed as credits against the party to be assessed. The ascertainment of such a balance necessarily involves investigation; and if a subsequent assessor could enter into an investigation to discover what items, if any, were omitted in ascertaining the amount of credits assessed in any previous year, he would have the power to review the acts of his predecessor; but it was not the design of the statute to confer any such power.

In the case at bar, there was no assessment of any credits at all for the years from 1894 to 1898 inclusive, and, therefore, no ascertainment of a balance by the deduction of debts from credits. Where there has been no assessment whatever for credits for a number of years, and it is subsequently discovered that the citizen is the owner of a large amount of notes, upon which there is no pretense that any assessment has been made, or any taxes paid, or that he is or was entitled to any deduction, an entirely different case is presented from that, which was brought to the attention of the court in the case of *Allwood* v. *Cowen*, *supra*. The doctrine of that case is, that the acting assessor has no power to review the act of his predecessor in determining what debts are to be deducted from credits and in striking a balance between the two. But here the assessor was never informed, that the appellees owned the credits set up in the bill, or any other credits, and consequently the assessor took no action in reference thereto. The subsequent assessment by the board of review cannot, therefore, be a review of any discretionary action on the part of the former assessor. This view of the *Allwood case* was taken in the case of *People* v. *Sellars*, *supra*, where it was said *in arguendo:* "Suppose the property in question consisted of credits and the owner thereof had been assessed for credits in the town of Mattoon for the years specified in the petition, * * * under the rule as declared by this court

in *Allwood* v. *Cowen*, 111 Ill. 481, the assessor would have no right whatever to make an additional assessment."

Counsel for appellees say, that the assessor for the years mentioned might have found the credits equal to the deductions allowed for the *bona fide* debts owing by the tax-payer, and that, in such case, there would be no balance to be assessed. There is, however, no averment to this effect in the bill in this case. If such a fact existed, it was the duty of appellees to have averred it in their bill. Section 29 of the Revenue act provides that, in all cases where deductions are made for credits, the assessor shall require such deductions to be verified by the oath of the person claiming the same; and the statement of the deduction so claimed is required to be preserved by the assessor for a certain period of time. In reference to this very point we said in *Morris* v. *Jones*, 150 Ill. 542: "To say that they (the complainants) did not have it 'over and above their indebtedness' amounted to nothing. We are also of the opinion that if the item added to the schedule had been credits, instead of money, this bill would not lie, for even if the appellants had the right to deduct indebtedness, they must have done it in the manner provided by section 29 *supra*. If they were entitled to any such deductions, it was the fault of their agent that they did not get the benefit of them. It was not for him to say the indebtedness equaled or exceeded the credits, and, therefore, refuse to list the credits."

For the reasons above stated we are of the opinion that the second question raised by the demurrer to the bill must be decided in the affirmative.

The decree of the circuit court, overruling the demurrer to the bill, is reversed, and the cause is remanded to that court with directions to sustain the demurrer.

Reversed and remanded, with directions.

ANNA M. SCHNADT *et al.*

v.

CHARLES W. DAVIS.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. MASTERS IN CHANCERY—*master's fees are fixed by statute.* The fees which a master may lawfully charge depend upon the terms of the statute, and such statute must be strictly construed.

2. SAME—*master's fees for taking testimony are the same throughout the State.* The concluding portion of section 20 of the act on fees and salaries, which concerns masters in chancery in Cook county, does not affect the preceding portion of the section fixing the fee for taking testimony at fifteen cents per hundred words, and such fee is the lawful fee in all counties of the State.

3. SAME—*it is the master's duty to reduce testimony to writing and report it.* Under an order of reference to take proof and report the same together with conclusions of law and evidence, it is the duty of the master to cause the witnesses to be brought before him and examined, to have their testimony reduced to writing and to embody the same in his report, together with his conclusions.

4. SAME—*master cannot exact additional fees to pay stenographer.* If the master desires the services of a stenographer in taking testimony he must pay for such services himself, and neither the master nor the court has power to order the parties to pay a greater sum than fifteen cents per hundred words for testimony taken, in order to pay for the services of such stenographer.

5. SAME—*witnesses should be examined in presence of master.* It is the duty of the master to have the witnesses examined in his presence and to reduce the testimony to writing and report it to the court, and the practice of committing the hearing of testimony to a stenographer and of requiring the parties to present a transcript thereof to the master for his consideration is improper; nor can the parties be compelled to present a transcript of such testimony as a condition to the master's incorporating it in his report.

6. SAME—*master cannot arbitrarily fix amount for examining questions of law and fact.* A master in a county of the third class cannot arbitrarily fix his fees for examining questions of law and fact and reporting his conclusions, but before he is entitled to demand compensation it is his duty to have the court determine the amount he should receive, and the parties may be heard upon that question.

7. SAME—*hearing on master's fees should be after his report is complete.* The hearing upon the amount to be allowed the master for examining questions of law and fact and reporting his conclusions, in a

county of the third class, should be had after the master has considered the evidence, made his finding and completed his report, so that it may be filed upon payment of his fees.

8. SAME—*master's charge should not be in a lump sum.* The master should make an itemized statement of services rendered and the fees allowed therefor by statute, and if services have been rendered for which the fees are not fixed by statute the report should state such services and the action of the court in the matter of compensation, and should show whether such costs have been paid, and if paid, by whom.

9. SAME—*when record shows that master omitted testimony from report.* That the master omitted testimony from his report, as stated in the objections, sufficiently appears from the record which contains an order requiring the objector to submit a stenographic report of the testimony taken in his behalf, in default of which the master was to make his report from the stenographer's notes submitted to him, and the report, when made, contains no testimony in behalf of the objector, the master's certificate being limited to evidence "submitted" to him.

10. SAME—*exceptions to master's report need not be supported by showing of omitted testimony.* Where the master has omitted testimony from his report under authority of an order of court improperly entered, it is not necessary to the right of the party in whose behalf the omitted testimony was taken to have the report disapproved, that his exceptions to the master's action and report be supported by a showing of the omitted testimony.

Schnadt v. *Davis*, 84 Ill. App. 669, reversed.

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

This was a bill in chancery filed by appellee, Charles W. Davis, for a decree foreclosing a certain trust deed executed by appellants, Anna and Frederick Schnadt, to Aaron B. Mead, as trustee, to secure a certain principal note in the sum of $2500, and interest coupon notes attached, signed by said mortgagors and payable to one John L. Healy, the notes, as the bill alleged, having been assigned to the complainant.

The substance of the answer to the bill was, that said Charles W. Davis, the complainant in the bill, and the

said John L. Healy, whose name appears as payee of the notes, are employees of the firm of Mead & Co., and neither has or ever had any real interest in the indebtedness, but Healy, as payee of the note, and Davis, as present holder thereof, are but representatives of the said firm of Mead & Co.; that the said trustee, Aaron B. Mead, is, and was when the note and mortgage or trust deed were executed, a member of the firm of Mead & Co., the other partner in said firm being one Albert L. Coe; that on July 2, 1892, appellant Anna M. Schnadt bought the premises described in the mortgage, being then unimproved city lots, from the firm of Mead & Co., and arranged with that firm for a loan of $2500 wherewith to construct a building on said lots; that said firm agreed to make the loan, but on condition the same should be paid by them to the borrowers in installments, as the work on the buildings progressed; that one A. W. Syratt was then in the employ of the said Mead & Co. as manager of a branch office of the firm; that said branch office was located nearer the home of appellants and nearer the proposed new buildings than was the principal office, and it was arranged the said Syratt should determine the amount that should be paid appellants from time to time as the work on the buildings proceeded, and that the payments to appellants of such installments should be made through said Syratt, on the written order of the appellants; that said Healy was then in charge of the loan department of said firm of Mead & Co., and the note described in the bill was drawn payable to him and signed by appellants, and the mortgage described in the bill was then executed and both delivered to the firm of Mead & Co.; that no money was then paid to appellants, but that the same was to be paid from time to time as the work progressed on the buildings aforesaid; that various amounts were afterwards paid by said Mead & Co. on written orders of appellants, which they executed and delivered to said Syratt, as manager and agent of said

Mead & Co.; that said Syratt forged the names of appellants to orders for payments out of said sum to the amount of $1700, and that appellants did not receive any part of the moneys drawn on said forged orders; that said Syratt, when he forged said orders, was acting as the representative of said firm of Mead & Co., and was in charge of the branch office of that firm; that said Syratt was arrested and indicted for said forgeries and thrown into the jail, and that said Mead, acting for said Mead & Co., represented to appellant Frederick Schnadt that the firm had sustained other heavy losses by reason of the wrongful conduct of said Syratt, and that he wished to conduct negotiations for a settlement for all such losses; that said Mead & Co. did settle with said Syratt, and received notes secured by mortgages on property belonging to relatives of said Syratt to secure the amount of the defalcations and forgeries of Syratt, including amounts received by Syratt on orders to which the names of the appellants had been forged. The answer further averred the appellants had sustained damages by reason of the failure of Mead & Co. to pay them the money as borrowed, etc., in an amount equaling the sums paid them by said Mead & Co., and averred there was nothing due from them on the note. Replication was filed to the answer.

The cause was referred to a master in chancery, with directions to take and report the proofs, together with "his opinion of the law and the evidence." Afterwards, on motion of the solicitor for the complainant, the following order was entered: "Ordered, that the defendants, Anna M. Schnadt and Frederick L. Schnadt, submit or cause to be submitted to Thomas Taylor, Jr., Esq., one of the masters in chancery in this court, a stenographer's transcript of the evidence taken on behalf of defendants before said master on the reference herein, on or before the first day of March, A. D. 1898, and that in default thereof the said master shall make up and return to this

court his report upon the evidence a transcript of which shall have been then submitted to him, and none other."

The appellants filed with the master the following written objections: (The objections were afterward, by agreement of parties, presented to the master's report in the circuit court, the language being changed for that purpose:)

"*First*—The complainant introduced as witnesses in support of his case in this cause Aaron B. Mead, John L. Healy and Henry W. Buckingham, all of whom were examined on behalf of the plaintiff and cross-examined on behalf of the defendants, but upon making up the master's report no part of the testimony of Aaron B. Mead or J. L. Healy has been written up or taken into consideration by the master or reported in this cause.

"*Second*—The defendants offered as a witness in this cause Frederick L. Schnadt and A. W. Syratt, both of whom were examined on behalf of the defendants, and Frederick L. Schnadt was cross-examined at great length by the complainant, such cross-examination occupying two whole sessions before the master, of one-half day each, but no part of such testimony has been considered by the master or is presented in the master's report, or his certificate of evidence filed in this cause.

"*Third*—The only testimony considered by the master and contained in his report is that of Henry W. Buckingham, although four other witnesses testified in this cause before the master.

"*Fourth*—A rule was entered upon the defendants herein to close their proofs before the master at a certain fixed date, and in conformity thereto the defendants appeared before the master and closed their proof, but did not hire a reporter, and complied simply with the order of the master concerning the taking of such testimony, and were not bound to cause such testimony to be written up and submitted to the master, or to pay for the same.

"*Fifth*—The complainant herein having submitted his proofs to Master Taylor for the purpose of having testimony taken on both sides of said cause, and having obtained a rule on the defendants to appear and submit to an examination before such master, is compelled to present all the evidence taken before the master to said master, before the report of the master can be made, and the master is bound to take into consideration, in making up his report, all the testimony taken before him.

"*Sixth*—None of the questions raised by the defendants concerning the forgeries of certain orders for the purpose of fraudulently obtaining money from the said defendants have been considered by the master, although such evidence was submitted to the master."

The objections were overruled by the master. The master filed his report with his conclusions, to the effect there remained due on the note given to Healy, and the interest thereon, $3077.29, and for solicitor's fees the sum of $153.64. The report contains also the following statement: "Master's fee this report, $50." The only deposition returned to the court with the report was that of Henry W. Buckingham, successor to said Healy as manager of the loan department of said Mead & Co., taken in behalf of the appellee. The certificate of the master attached to the report is as follows: "I hereby certify that the pages following this, and which are part of this report, contain all the testimony submitted to me in this cause, and was produced before me by and on behalf of the complainant."

The objections presented to and overruled by the master were, by agreement of the parties and consent of the court, re-filed before the chancellor as objections to the approval of the report, but were overruled and decree entered in accordance with the action of the master. This is an appeal from the judgment of the Appellate Court affirming the decree.

W. N. GEMMILL, for appellants.

CHARLES H. HAMILL, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

Section 39 of chapter 22 of the Revised Statutes, entitled "Chancery," provides a cause may be referred to the master in chancery to take and report the evidence with or without his conclusions thereupon. In the case at bar the cause was referred to the master to take the proof in the cause and report the same, together with his "opinion of the law and the evidence." It was the duty of the master, under this order of reference, to cause the witnesses to be brought before him and examined, to have their testimony reduced to writing and to embody such testimony in his report, together with his conclusions as to the facts established by the testimony and his opinion as to the rights of the parties under the law applicable to that state of facts. "The document exhibiting the referee's or master's findings and conclusions is called his report, the object of which is to show the proceedings which have been had under the order of reference, the evidence which has been taken, and the findings and conclusions reached by the master or referee, according to the terms of the order of reference, in such a manner that intelligent action may be had thereon by the court." (17 Ency. of Pl. & Pr. 1033.) In *Hayes* v. *Hammond*, 162 Ill. 133, we said (p. 135): "In the absence of any statute the master did not report the evidence to the court, and it was necessary for the parties to apply to him for certified copies of such evidence as they might require, relating to matters excepted to; but by our statute the whole of the evidence is reported to the court, and the parties may select from it such portions as are relevant to the exceptions and present them to the court." In *Ronan* v. *Bluhm*, 173 Ill. 277, we said (p. 284): "The cause having been referred to the master to take and report the proofs

and his conclusions on points of law and fact, the proofs taken by the master should have been submitted with his report."

The master to whom this case was referred holds his office by virtue of appointment thereto under the provisions of section 1 of chapter 90 of the Revised Statutes, entitled "Masters in Chancery." Section 9 of said chapter 90 reads as follows: "Masters in chancery shall receive for their services such compensation as shall be allowed by law, to be taxed as other costs." Section 20 of chapter 53 of our statutes, entitled "Fees and Salaries," (Hurd's Stat. 1897, p. 830,) fixes the compensation to be allowed to be charged and collected by masters for their services. Said section 20, so far as it relates to services rendered by the master in this instance, is as follows:

"*Masters in Chancery.*—Sec. 20.—Fees of. * * * For taking depositions and certifying, for every one hundred words, fifteen cents. For taking and reporting testimony under order of court, the same fees as for taking depositions. * * * For examining questions of law and fact in issue by the pleadings, and reporting conclusions, whenever specially ordered by the court, a sum not exceeding ten dollars. * * * And no other fee or allowance whatever shall be made for services by masters in chancery. In counties of the third class, masters in chancery may receive for examining questions in issue referred to them, and reporting conclusions thereon, such compensation as the court may deem just, and for services not enumerated above in this section, and which have been and may be imposed by statute or special order, they may receive such fee as the court may allow."

The fees which masters are entitled to charge for official services in the matter of taking and reporting the evidence are enumerated in said section 20. The concluding portion of the section, which relates to the fees of masters in the county of Cook, that county being of the third class, changes the provision of the preceding

portions of the section relating to the fees to be allowed for examining questions in issue referred to them and reporting conclusions, but in no respect affects the provisions fixing the fees for taking and reporting testimony. The fees for taking and reporting testimony are the same in each of the counties of the State, viz., fifteen cents per hundred words. Said section 20 expressly prohibits the allowance to masters of any fee or allowance not provided for in the section. The fees which an incumbent of the office of master in chancery may lawfully exact depend upon the terms of the statute, and the rule is that such statutes are to be strictly construed. (4 Am. & Eng. Ency. of Law, 314.) "Neither court, jury nor referees can award costs unless authorized by law, and where the rule is fixed by statute it must be followed strictly." (4 Am. & Eng. Ency. of Law, 315.) "It may be safely asserted as a legal proposition, that fees or costs cannot be allowed or recovered unless fixed by law. * * * A witness or officer of the law has no legal right to recover on a *quantum meruit* for services rendered under the requirements of the law. For such services he is limited to the fee or compensation fixed by the statute." *Smith* v. *McLaughlin*, 77 Ill. 596.

If a master deems it desirable to have the services of a stenographer to enable him to perform the duty of taking or reporting the evidence, the services rendered by the stenographer are to the master, and the stenographer must look to the master,—not the parties, or either of them,—for his compensation. The compensation of the master fixed by the statute for taking and reporting testimony is fifteen cents per hundred words, and no more can be legally demanded of the parties, or either of them, for or on account of such services. Nor has the court power to order the payment of a greater sum or allowance for such service, or to order the parties, or either of them, to pay any sum to a stenographer for assisting the master in taking and reporting the proof. If the

court had been clothed with power to order the appellants to procure a transcript of the evidence from the stenographer, there would be force in the contention the amount to be received by the stenographer should have been fixed in the order,—that the appellants should not have been left wholly in the power of the stenographer as to the amount to be paid. The sense of justice is not always strong enough to moderate and restrain the desire for gain. But the stenographer is not an officer of the court, had no legal connection with the court, the master or the case. The law has not fixed his compensation or authorized the court to do so, and the order in its entirety must be reversed.

Counsel for appellee says: "The practice before the master uniformly contemplates the reduction of the testimony to writing by a stenographer. The stenographers do not work for nothing. When a party to litigation calls witnesses and examines them at length, with knowledge that their testimony is to be taken by the stenographer, he must expect that before a master can consider the evidence it shall be presented to him in writing. * * * The master cannot make up his report until the evidence is before him in written form." The duty of a master is to have the witnesses brought before him and examined in his presence. The testimony of the witnesses is presented to the master orally, and is thus before him for consideration. His duty is to reduce it to writing, or have it so reduced to writing, and report it to the court. It would seem from the statements of counsel for appellee it has become the practice of masters in Cook county to commit the duty of hearing the witnesses testify to a stenographer,—not in the presence and hearing of the master,—and of requiring the parties to produce a transcript of the testimony so taken for the consideration of the master, in order he may thereby be informed as to what has been testified to, and consider and weigh the testimony as disclosed by the transcript, and make his

findings from such transcript and use such transcript for his report of the testimony, and that the practice further is to impose upon suitors the burden of compensating the stenographer for doing work which it is the duty of the master to do, and for which the master also collects the full allowance authorized by the statute to be paid for such service. If such practice has obtained it should no longer be tolerated. When the order of reference requires no more than that the master shall take and report the evidence, the evil of the practice is the illegal exaction of the sum of money demanded from suitors as for the compensation of the stenographer, which, if not submitted to, shall, as counsel for appellee contends, be enforced by the denial of a hearing in the courts.

But the practice is fraught with another and not less serious evil when indulged in a case where, as here, the order of reference requires the master shall also make report of his conclusions of law and fact. In order to discharge the duty of arriving at conclusions as to the facts the master should see the witnesses and hear them testify. In 17 Ency. of Pl. & Pr. 1028, it is said: "One of the most important duties and powers of the referee is to hear the parties and such evidence as may be presented bearing upon the issues involved."

The order entered by the court, on the motion of the appellee, that the master should not consider the testimony which had been taken before him in behalf of the appellants unless the appellants should procure and submit to the master a stenographer's transcript of the said testimony, should not have been entered but the motion should have been denied. The action of the master in considering only the testimony of the appellee and forming his conclusions therefrom should not have been approved by the court, but the objections and exceptions in that respect presented to the report should have been sustained. It was the right of the master to demand compensation for taking and reporting the proof at the

statutory rate of fifteen cents per hundred words. For examining the questions of law and fact and reporting his conclusions thereon the master was entitled to such compensation as the court should deem just,—that is, such amount as the court, upon consideration of such services, should judicially determine to be just and reasonable and should order to be paid. The master cannot arbitrarily fix upon an amount to be paid him as his compensation for examining questions of fact and reporting his conclusions, but before he is entitled to demand the parties, or either of them, shall compensate him in any sum for such services, it is his duty to have the court determine the amount he is justly entitled to receive for such services. In the determination of that question the parties are entitled to be heard. The hearing should be had after the master has considered the evidence, made his finding of law and fact and completed his report, so that it is ready to be filed on payment of the amount the court finds should be paid for such services, for the reason an inspection of the report is necessary to enable the court to ascertain and determine as to the just compensation to be paid the master and by whom it shall be paid. The course is desirable for the further reason, before the master has acted he is, in a sense, clothed with power to declare judgment on the rights and interests of the parties, and their condition and relation to the master is such they should not then be required to accede to or contest his demands for services to be rendered in the matter of deciding for or against them. The report in this case as to the fees and charges of the master is as follows: "Master's fee this report, $50." This mode of reporting fees and charges can be easily made a cover for illegal and oppressive exactions. An itemized statement of services rendered, and the fees allowed therefor by the statute, should be made, and if services are rendered for which the fees are not fixed by the statute but are left to be determined by the chancellor, the report

should state such service and the action of the court in the matter of the master's compensation therefor, and also should show whether such costs had been paid, and if paid, by whom.

It is urged it does not appear from the record, otherwise than from the statements in the exceptions to the report of the master, that the witnesses named in such exceptions gave testimony before the master, or that the master did not consider all the testimony produced by the appellants on the hearing before the master. The court, on the motion of the appellee, ordered that the appellants should, on or before a day named, submit to the master a stenographer's transcript of the evidence taken on behalf of said appellants, and that in default of compliance with such order the master should make up and return his report upon the evidence appearing from transcripts of stenographer's notes submitted to him. This order clearly established that the testimony of witnesses produced by appellants had been heard and taken down in shorthand. The master's report contains no testimony taken on behalf of appellants. The certificate attached by the master to his report states, in express terms, the report contained all the evidence "submitted" to him and on which he acted, and that such evidence was that, only, which had been produced by and on behalf of appellee. That the master did not regard the testimony of witnesses taken under the order of reference but not transcribed into longhand as "submitted" and that he excluded such testimony from his report and from consideration, is too clear to admit of doubt or require discussion.

It is urged that the exceptions to the action and report of the master should have been supported by a showing of the testimony on behalf of the appellants which the exceptions allege was erroneously excluded from the report. This testimony had been produced before the master. It was the duty of the master to have embraced it within his report as a proper part of the

record of the cause. It was omitted from the report and excluded from consideration under authority of an order which the appellee procured to be improperly entered. It was enough for the appellants to show that the master had thus omitted the testimony produced in their behalf. On such showing the report should have been disapproved and the master ordered to make report of the testimony produced before him.

The judgment of the Appellate Court and the decree of the circuit court are each reversed, and the cause will be remanded to the circuit court, with directions to deny the motion entered by appellee to require the appellants to procure and submit to the master transcripts of the testimony produced before the master by the appellants, and to take such further proceedings in the cause as to justice and equity shall appertain.

Reversed and remanded, with directions.

ELLA BROUGHTON WOODS *et al. v.* ISABELLA B. ROBERTS,
and
SAME *v.* SAME.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. FIDUCIARY RELATIONS—*one occupying fiduciary relation must act with utmost fairness.* A step-mother stands in a fiduciary relation to her step-children, and, as executrix of their father's will, is bound to deal with them and their interests with the utmost fairness, and is incapacitated from dealing with them to her own advantage.

2. SAME—*burden of proof in transaction between parties in fiduciary relation.* Where a step-mother who is executrix of her husband's will purchases the interests of her step-children in the real estate, and in part settlement, by agreement, deducts from the purchase price the amount of certain notes held by her against the testator, the burden of proof is upon her to show that she paid full value for the interests of such step-children and that the estate was indebted to her on account of such notes.

Roberts v. *Woods*, 82 Ill. App. 630, reversed in part.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of DeKalb county; and writ of error to the Circuit Court of DeKalb county; the Hon. GEORGE W. BROWN, Judge, presiding.

CARNES & DUNTON, and A. G. KENNEDY, for appellants and plaintiffs in error.

JONES & ROGERS, and CHARLES WHEATON, for appellees and defendants in error.

Mr. JUSTICE CARTER delivered the opinion of the court:

Ella Broughton Woods, May Broughton and Ben Broughton, appellants in the appeal from the Appellate Court and plaintiffs in error in the writ of error from this court to the DeKalb circuit court,—which appeal and writ of error are here taken and considered together on the same record, abstracts and briefs,—brought their bill in equity in said circuit court against Isabella B. Roberts, (formerly Broughton,) John D. Roberts, her husband, and other defendants, to set aside a certain alleged arbitration and a sale and conveyance of real estate, and to compel said Isabella to account for moneys which she had received upon certain certificates of deposit, and for other relief.

The facts are too voluminous to be recited here *in extenso*, but a sufficient understanding of the case may be obtained from the following:

The said Isabella B. Broughton (now Roberts) was the third wife of Chauncey W. Broughton, who died testate May 8, 1893. There were born of said marriage two of the defendants to the bill, Charles B. Broughton and Chauncey W. Broughton, Jr., who were minors at their father's death, and for whom, by his will, their mother, the said Isabella, was appointed testamentary guardian. The said Ella, May and Ben Broughton, complainants in

the bill, were the issue of their father's second marriage, their mother having died when they were infants of tender years. Preston Broughton, also a defendant, was the oldest child of the testator and the only issue of his first marriage. These six were all of the children and heirs of the testator. The testator, at the time of his death and for many years before, resided on his farm of upwards of 832 acres, in DeKalb county. In addition to this land he owned considerable personal property, consisting principally of interest bearing notes, given for money loaned, somewhat in excess of $85,000, and, as claimed by the complainants, of upwards of $30,000 in banks, evidenced by certain certificates of deposit. There were also household goods and effects and certain chattel property upon the farm. The will, which is not in controversy, was made February 14, 1893,—less than three months before his death,—and gave Preston, his oldest son, $1000, and gave the rest of his property, lands, farming implements, stock, grain, household goods, all moneys, credits and personal property of every kind, to his wife, Isabella, and to his five children, Ella, May, Ben, Charles and Chauncey, equally,—excluding Preston. The will directed that the land should remain undivided, as a home for his widow and said five children; that there should be no appraisement of his personal estate, and that his widow and his son Ben should be executrix and executor of his will. The will was probated and the appointees qualified, but the widow took upon herself, exclusively, the control and management of the estate. She divided the $85,000 in notes among the legatees soon after said testator's death. The complainants received their respective shares of them, and as to such notes there is no controversy. But the complainants, by their bill, demand that she be compelled to account for the proceeds of the following securities collected by her after the testator's death, viz.: Two notes, one for $2000 and the other $160, executed by Ella D. Kelso, of Longmont, Colorado; four certificates

of deposit of the DeKalb National Bank, for $2000 each, dated March 27, 1893, payable to the testator's order, with interest at two per cent per annum if the money should be left on deposit three months; four certificates of the Waterman Bank, dated February 1, 1893,—one for $3000, one for $300 and two for $1000,—each payable in like manner to the testator's order; also eight certificates of the Barb City Bank at DeKalb, dated January 23, 1893, each for $2000, and six others of the same bank of different dates in March and April, 1893, and for different amounts, aggregating $3500, the last one being dated April 25, 1893, and for the amount of $400,—all of which fourteen certificates of said Barb City Bank, aggregating $19,500, were for moneys deposited by the testator or renewals of former certificates, and were payable to himself. There were also some notes of doubtful value which the said Isabella was to distribute when collected. An accounting was also sought of stock, grain and other personal property sold by the widow from the farm.

Said Isabella and her two children, Chauncey and Charles, and the three complainants, her step-children, continued to reside together on the farm, in accordance with the expressed wish of the testator, from his death, May 8, 1893, until some time in the fall of 1894; but about August 1, 1894, said Isabella, for herself and as guardian for her said two children, and the three complainants on their own behalf, entered into a written agreement, whereby said Isabella was to purchase the complainants' interest in the farm at the price which should be fixed by J. D. Roberts and J. H. Lewis, arbitrators, whom they had appointed, and was to pay for complainants' interest by deducting from the purchase price one-half of certain promissory notes, and interest thereon, which she claimed to hold against the testator, payable to herself, and to pay the balance in cash. The amount of such notes was not stated in the agreement. In consideration of such purchase she was to waive her award of $1846

which had been set off to her by the appraisers. The value of the land was fixed by the two arbitrators at $45 per acre, and the notes held by her against the testator, on being produced by her, were found to amount, principal and interest, to $17,700, which being deducted from the total, left upwards of $3000 due each of the complainants for their respective shares. She gave them her notes for these amounts and afterward paid them. One of the objects of the bill was to set aside this settlement, and the sale and conveyance of complainants' interest in the farm, on the ground of fraud and undue influence.

At the time of his death the testator was seventy-five years old, and he and the said Isabella had been married eighteen years. The bill alleged that the complainants during all that time lived with and formed a part of the family; that they were under the control of said Isabella, who took the place of mother to them, and that said Ben Broughton knew no other mother; that complainants were given but little education except what they obtained at the district school, but were kept at almost continuous labor, the said Ben upon the farm and the said Ella and May in household work; that by the acts and influence of said Isabella they were kept in ignorance of business affairs, and especially of the financial affairs of the family; that she was a woman of strong will and of extensive business knowledge, and by various expedients contrived to get possession of a large portion of their father's property; that she transacted much of his business and procured securities for moneys due him to be taken in her name; that for the last few years of his life he was infirm in body and nearly blind, and that during this period she transacted nearly all of his business, but kept all knowledge thereof, so far as possible, from complainants. Various acts of fraud and undue influence are alleged, which, so far as necessary to the decision of the case, will be stated in connection with the evidence bearing upon each. By an amendment

to the bill it was alleged by complainants that the said Isabella forged the name of their father upon the back of the certificates of deposit issued by the DeKalb National Bank and the Waterman Bank, and after his death wrongfully withdrew the money so deposited and converted it to her own use; that in each of the fourteen certificates of deposit issued by the Barb City Bank she caused the cashier, without the knowledge of their father, to interline after the words "payable to himself" the words "or Belle B. Broughton," and after his death withdrew said moneys from the bank and refused to account for the same; that she also forged their father's name to two paper writings purporting to be an assignment of said certificates from their father, and purporting to be witnessed by E. P. Orr and Henry H. Wann.

All allegations of forgery, fraud and undue influence were denied by the answer, and after a hearing in the circuit court on depositions and oral and documentary proof, a decree was entered which sustained the allegations of the bill as to the certificates of deposit of the DeKalb and Waterman banks, which, with interest to the time of the entering of the decree, amounted to $18,417.23, and ordered said Isabella to account also for $2819.68, the proceeds of the sale of chattel property on the farm, and also that she pay the costs. As to the item of $2819.68 all parties were satisfied, but from so much of the decree as required her to account for the $18,417.23, as proceeds of said ten certificates of the DeKalb and Waterman banks, and interest thereon, said Isabella appealed to the Appellate Court, in which court the complainants assigned cross-errors as to the findings of the decree which were against them. The Appellate Court reversed the decree and remanded the cause with directions, so far as it required said Isabella to account for the proceeds of said ten certificates,—that is, said item of $18,417.23,—and affirmed it in all other respects, holding, however, that the Appellate Court had no jurisdic-

tion of, and therefore it declined to consider, that part of the decree affecting the sale and conveyance of complainants' interest in the farm, because a freehold was involved, and declined also to consider the arbitration settlement involving the $17,700 of notes, that being a part of the same transaction. The complainants then sued out from this court a writ of error to the circuit court and appealed from the judgment of the Appellate Court, thus bringing before us all the questions involved except the finding as to the item of $2819.68, with which all are satisfied.

We shall consider first that part of the case involving the certificates of deposit, which, in the three banks, were twenty-four in number, and amounted, principal and interest, to more than $36,000.

The evidence shows that the testator was a man of strong mind and will, secretive about his business except with his said wife, who often aided him in his business affairs. He was mentally capable of transacting ordinary business when the alleged assignments were made and until a few days before his death. For the last year or more of his life his eye-sight was very defective, but he could see to write his name, and did sign with his own hand his will a few months before his death. He kept his valuable papers in a safe in his own house, to which his wife had access, and from which she would often, at his request, obtain and bring them to him. His wife also had a safe in the house in which she kept her valuable papers. Her familiarity with his papers and with his business affairs, and his defective eye-sight, afforded her ample opportunities for obtaining his signature by fraudulent means and for purposes of her own, but there is no sufficient evidence that she obtained the assignment of these certificates by fraud or by undue influence exerted over him. Indeed, as to the ten certificates of the DeKalb and Waterman banks the case as made by the complainants rests upon the charge in the amended bill that she

forged his name upon the back of each of said certificates, and much evidence was given tending to prove that the signatures in question, including those to the two separate written assignments, were not in his handwriting. Two expert witnesses of conceded ability, Marshall D. Ewell and Henry L. Tolman, testified in the most positive terms that in their opinion the signatures were not genuine; and other witnesses gave similar testimony. Many witnesses, however, who were acquainted with his handwriting, including bankers and business men with whom he had transacted business, testified that the signatures were in his handwriting. There were also given in evidence the said two assignments and a third paper, all witnessed by Orr and Wann, viz.:

"CARLTON, *Feb. 9, 1893.*

"I, Chauncey W. Broughton, do this 9th day of February, 1893, give to my wife, Isabella B. Broughton, all my bank certificates of deposit as her own property.

C. W. BROUGHTON.

Witnesses: E. P. ORR, H. H. WANN."

"CARLTON, *April 17, 1893.*

"I this day give to my wife, Isabella B. Broughton, all my bank certificates deposited since February 9, 1893, as her own personal property, and I transfer them to her.

C. W. BROUGHTON.

Witnesses: E. P. ORR, H. H. WANN."

"CARLTON, *April 17, 1893.*

"Belle B. Broughton will pay to the following heirs: Isabella B. Broughton, Ella Broughton, May Broughton, Ben Broughton, Charles B. Broughton, Chauncey W. Broughton, on all notes that they select, by my order, and sign my name.

C. W. BROUGHTON.

Witnesses: E. P. ORR, H. H. WANN."

The depositions of said Orr and Wann were also read. Each testified that both were present at each of the times when the assignments were executed, and that they saw Mr. Broughton sign the same, and saw him sign his name on the back of each of said certificates of the DeKalb and Waterman banks; that said Isabella wrote these instru-

ments above set out, except the signatures, at Mr. Broughton's dictation, and that they signed them as witnesses at his request, and that thereupon he delivered them to her and told her they were her property. It was afterward developed that these attesting witnesses were not at the home of Mr. Broughton, where they said these papers were made and signed, on the 9th day of February, when the first one appears to be dated, but testimony was given that they were there on the 11th of February and on the 17th day of April, and we cannot say that the mistake as to the date might not have been honestly made. It was not made to appear that these witnesses had any interest in the matter, nor was their testimony in any way impeached, although its strength was impaired somewhat on cross-examination and by circumstances proved. We cannot say that the allegation of forgery of these signatures was sustained by a preponderance of the evidence, and it is not, therefore, important to consider the question raised in the argument, whether or not it was necessary to prove the charge of forgery, as in criminal cases, beyond all reasonable doubt. Orr and Wann testified also that on one of these occasions Mr. Broughton spoke of the certificates of the Barb City Bank, which were then also produced and delivered to his wife, and that he said that it was not necessary to sign them over to her as they were already payable to her. These were the certificates in which the cashier had interlined after the words "payable to himself" the words "or Bell B. Broughton." The cashier of the bank and Mrs. Chanler, a sister of Mrs. Broughton, testified that he interlined these words in pursuance of a written request of Mr. Broughton which Mrs. Chanler brought with the certificate to the bank. Wann testified that the aggregate amount of all the certificates so delivered in his presence to Mrs. Broughton was between $30,000 and $34,000. The certificates having been delivered the title passed. But as to one certificate of the Barb City Bank for $400, it was not issued until

April 25, 1893, and could not have been delivered at either of the times mentioned by Orr or Wann, and there is no evidence it was ever delivered at all, and as to it, it must be held that it is the property of the estate and should be accounted for accordingly.

While many circumstances were shown casting suspicion upon the good faith of Mrs. Broughton (now Roberts) and upon these transfers, we do not find in the record sufficient evidence upon which to set the assignments aside and to compel her to account for these deposits, except as to said $400 certificate, and we think the Appellate Court, with this exception, decided correctly as to this part of the decree.

It is urged, also, that Mrs. Roberts should account for the $2160, and interest thereon, received by her after Mr. Broughton's death in payment of the Kelso notes. It was shown, principally by said Isabella's own letters to Etta D. Kelso, the maker of these notes, given in evidence by the complainants, that the notes for this indebtedness were originally payable to said Chauncey W. Broughton, but that she had purchased them from him and had taken new notes from Mrs. Kelso in her own name. The evidence relating to this transfer is meager, but it is clear from the evidence that said Isabella had moneys of her own when she married Broughton (how much the record does not show) and acquired more during her married life, and that she and Broughton often had business dealings with each other. She would lend him money when he needed it to make up some certain amount for a loan and would take his note for the amount, which he would afterwards pay. Other business transactions between them were shown. She bought eighty acres of land from him a short time before his death, for which she paid him $3500 and soon after his death sold it for upwards of $4000, and the complainants allege that by fraud and undue influence she obtained this eighty-acre tract at less than its value, and that she should account for the dif-

ference. But we find no sufficient evidence in the record of fraud and undue influence in respect to the purchase of either the Kelso notes or of the eighty acres of land. While it is clear from the evidence that she was a thrifty woman, even in her dealings with her husband, still, whatever may be said of other transactions mentioned in the record, there is not sufficient evidence to sustain the allegations of the bill relative to either the Kelso notes or the eighty acres of land. It may well have been that her husband was willing to have her make a good trade even with himself. It also appears that he was a man of sound mind and strong will and not easily influenced by any one.

But a very different aspect of the case is presented respecting Mrs. Roberts' dealings with the complainants. Over them her influence was paramount—that of the parent over the child. Not only such influence as may be presumed from that relation, but the evidence shows the fact was that they obeyed her without question, even after they had reached their majority, and that they never interposed their will or judgment against hers in matters relating to the estate or its distribution. She was the executrix of the will, and although the complainant Ben Broughton qualified to act with her, she took upon herself the control of the entire estate and its administration and received all of the assets, apparently without question by him or by the other complainants and doubtless with their full approbation. The evidence shows also that she frequently enjoined upon them the importance of keeping as a secret from "outsiders" all matters relating to the estate, and advised them not to consult others about their business affairs, and became angry with them when she suspected they had done so. Under these circumstances, and occupying such a position with respect to the complainants and the estate, she was bound to deal with them and with their interests with the utmost fairness to them. She was incapacitated

from dealing with them for her own advantage, and the relation appearing, the burden of proof was on her to show that, in acquiring any part of the estate which belonged to them, she conserved their interests and paid them full value. These principles of equity are too well understood to require elaboration or citation of authority, and the controversy over the arbitration settlement and the conveyances made by the complainants of their interest in the farm is one principally of fact. While we have read and considered all of the evidence, only the principal points established by it can be stated here.

It appears from the record that, notwithstanding the testator directed by his will that the farm should remain undivided as a home for the six devisees, there was, at the time the arbitration settlement was made, the mutual desire, as between Mrs. Broughton on the one side and the complainants on the other, to separate and to make some final adjustment of their property rights. About this time John D. Roberts, who resided with his family on his farm a few miles away, was an occasional visitor at the Broughton home, where he was sometimes consulted by Mrs. Broughton in her business affairs after her husband's death. The complainant Ben Broughton also consulted him about the best method of arriving at a settlement with Mrs. Broughton. Mrs. Broughton expressed a willingness to buy complainants' interests if the price should be satisfactory, but would not sell, inasmuch as the interests of her two minor children could not be disposed of by any agreement they could make. The result was the selection of Roberts by the complainants and of Lewis by Mrs. Broughton to fix the price which she should pay the complainants for the land. Lewis drew the agreement of arbitration, the contents of which we have stated. After the instrument was signed by the parties the price was fixed for the land by Roberts and Lewis at $45 per acre, and Mrs. Broughton then produced the notes, which were found to amount to $17,700,

and one-half of that amount was subtracted from the purchase price of complainants' lands. Neither of the arbitrators raised any question as to the justice of allowing these notes, although some of them were on their face barred by the statute, and both arbitrators knew that Mr. Broughton contracted but few debts,—that he was a man of abundant means and always paid promptly what he owed. None of the interested parties knew before what they amounted to. Mrs. Broughton testified that she did not know—that she had never counted them up. Ben, the youngest of the three complainants, and who seems to have acted for his sisters as well as for himself, had previously said to Mrs. Broughton that he supposed the notes would have to be allowed, but at that time she had told him, as he testified, that they would be about $10,000. Before that she had told Ella that they would amount to $5000 or $6000. It does not appear that the complainants objected at the time, or that they knew that they had any right to object, to anything the arbitrators did, and Mr. Lewis testified that he did not know that the settlement was unsatisfactory to any of the complainants until after the papers were all executed and he had stepped into the hall, where he found Ella Broughton in distress, when, in response to his inquiry as to her trouble, she said: "Mother hasn't done right; there's more of those notes than there ought to be," and further, in substance, that they were to have been canceled by the certificates. Lewis knew in advance from Mrs. Broughton that she expected him to get the land at as low a price as he could, but that she would pay at not to exceed the rate of $45 per acre, and we think the evidence tends to prove that she knew in advance that Roberts would agree with him upon that price. The preponderance of the evidence in the record is that the land was at that time reasonably worth $55 per acre. After this settlement, in August, Roberts became a more frequent visitor, and in October he obtained a divorce

from his wife and on the first of the following January married Mrs. Broughton, and thereafter resided with her on the Broughton farm and the complainants established themselves elsewhere.

While that part of the case relating to the chattel property on the farm is not now in controversy, Mrs. Roberts having acquiesced in the decree fixing the amount for which she should account, still the acts of herself and husband in dealing with it, and with the complainants' interest therein, clearly show they were willing to resort to deceit and unfair means to obtain advantage to themselves and against the complainants. One McGirr was procured by Roberts, at an expense of five dollars, to come to the farm at an appointed time, ostensibly to purchase the chattel property, which consisted largely of farm produce and some stock, for himself but really for Roberts. Ben endeavored to get McGirr to pay more than he offered, but Mrs. Roberts said he had offered enough and the property was accordingly sold to McGirr, who departed with his five dollars received from Roberts, and Roberts soon after sold the grain at a large profit. We cannot agree with counsel for the defendants that this transaction has nothing to do with the case because it is no longer in controversy. It was one of a series of acts, and throws light on others which preceded or followed. There was another transaction relating to the collection of a note called the McCleary note, which is not in controversy, as Mrs. Roberts accounted for the proceeds, but it showed that she had the disposition to acquire for herself property belonging in part to the complainants and to conceal it from them.

While the burden was on Mrs. Roberts to prove that she paid full value for complainants' lands, the evidence, as before stated, shows she did not pay full value. The burden of proof was also on her to show that the estate was indebted to her on account of the notes which she claimed to hold against the testator, and in this she

wholly failed. While the evidence does show that Mr. Broughton sometimes borrowed money of his wife temporarily, to make up certain amounts for loans he desired to make, it also shows he would again re-pay her, and she would bring him his note which he had given her and he would destroy it. But none of these notes were connected with any particular transaction nor was the signature to any of them proved. He was a man of large means and paid all of his obligations promptly. Before his death it appears that it was his purpose to have all his business affairs so adjusted as to give no occasion for dispute among those who would succeed to his property and as would require as few proceedings in the courts as possible. The evidence shows also that he expressed satisfaction that he had all of his affairs straightened up. While his will provided for funeral expenses, no mention in it was made of any debts. Nor is there any evidence in the record outside of the notes themselves,—or, rather, the copies of them, for the originals were lost before the hearing below,—that Mr. Broughton knew that his wife held any of these notes against him, or that she ever spoke of any of them to him or to any of the family prior to his death. There is evidence, however, that afterward, about the time of the division of the $85,000 of notes, she showed one of them to May and asked her if the signature looked like her father's; and at another, she said she had some notes but she did not intend to bring them up against the estate; at another, that she considered them paid by the certificates. Ben Broughton testified that after the division of the $85,000 of notes she showed him one of a little bundle of notes and said his father had given them to her, whereupon he asked her what she intended to do with them, and she replied that she did not intend to do anything with them—would never present them; that his father had given her a great deal and she never could present them; that she further said, "Just for the fun of it, add up the face value and see what

they amount to;" that he did so as she gave the amounts and they amounted to between $5000 and $6000. As a witness Mrs. Roberts denied that she ever mentioned the notes to any of the complainants until the day of the arbitration, except to Ben, when he agreed they should go in with the settlement, and stated that she had never computed them and did not know what they amounted to.

In compliance with the prayer of the bill the defendants set forth in their answer copies of all of these notes, they having been retained by Mrs. Broughton after they had been canceled by the arbitrators at the settlement. She and Roberts, her husband, produced them, with other papers, at the office of her attorneys, where the copies were made by their stenographer, and we think the evidence shows that she took them away from the office when the copies were finished. They were afterward lost in some way and were not produced when called for by complainants' solicitors in taking their proofs, nor upon the trial. Roberts testified that he had made diligent search among his papers at the bank where he had previously kept these notes for his wife but could not find them, and she testified that she had made similar search at their home and was equally unsuccessful. The disappearance of these notes from the hands of Mrs. Roberts at so important a period in the progress of the case was another circumstance proper to be considered, in connection with other evidence, upon the question of her good faith, and whether or not they constituted a *bona fide* indebtedness in her favor against the estate. The copies attached to the answer show no endorsement on any of the fifteen notes. Nearly all of them were payable on demand. The first two were for small amounts, dated in 1878, and drew ten per cent interest. The next two were dated in 1882,—one for $900 and the other for $2390,—and drew interest at eight per cent. The others, some in large and some in small amounts, bore dates, respectively, in each year from 1885 to 1893, the last one being for $970,

dated January 14, 1893, payable on demand, at six per cent. The daughter Ella testified that her father borrowed $70 of his wife in January before he died, to make up a certain amount for some purpose, and gave her his note for it, which witness read to him, and a few days afterwards he asked Mrs. Broughton to get the note, saying he would straighten it up; that she brought a note, which witness did not examine, and he tore his name off of it and destroyed it and then handed his wife some money across the table. This testimony was, however, denied by Mrs. Roberts, and the copies show no note dated in January, 1893, except the one for $970. She also denied the testimony of the complainants that she had told them that she kept copies of all her notes.

There are many facts and circumstances in the evidence which tend strongly to prove that Mrs. Roberts had no valid subsisting claim against the estate on account of these notes. During all the time that they appear to have been in existence Mr. Broughton had more than sufficient money to pay them on deposit in bank, drawing interest at a much less rate than the notes called for. The evidence shows that, even as between themselves, they transacted business in a strictly business way, and it is wholly inconsistent with Mr. Broughton's business methods shown by the evidence, and his evident desire to arrange for the settlement of his estate without litigation, that he would leave unpaid these old notes, amounting to so large a sum, in his wife's hands, and dispose of all of his property, giving his wife all of his moneys in bank, without saying anything about this indebtedness to her. He would have known that he could not leave a more fruitful source of discord and litigation to his family than that. Less than three months before he died, but when he was fully competent to transact business, he conveyed by deed to his wife eighty acres of land, for which she paid him $3500 in cash. It is hardly probable that she would have paid him this large sum if

he had owed her moneys long past due in more than four times the amount, nor that after his death she would have withheld the notes from the adjustment in the division of the other notes and personal property and left only the real estate out of which they could be satisfied. She did not file her claim in the probate court, but as the two years for presentation of claims had not elapsed when the arbitration settlement was made she could still have done so had that settlement not been made. Her influence over Ben, the youngest of the three complainants and who had never known any other mother, was very great, and it seems to have been her purpose to obtain through him the amount of these notes rather than to produce them in court. At all events, from the whole of the evidence we are satisfied that she had no valid claim against the estate on account of said notes, and that all indebtedness of the testator to her on account of them, or any of them, had been satisfied by him and discharged in his lifetime, and that in bringing them forward and obtaining credit for them in the purchase of complainants' interest in the farm she was guilty of fraud,—and that, too, upon those whose rights in the premises it was her duty to protect.

Mrs. Roberts' counsel say that the bill impeaching this settlement was not filed until after the two years for filing her claim in the probate court had passed, and that to sustain the bill now will deprive her of all remedy on the notes. The question has been as fully litigated and considered in this case as it could have been in the probate court, and if she has no claim against the estate,—and we so hold,—she has lost nothing by having the question finally determined here.

It is also insisted that by the arbitration agreement Mrs. Roberts waived her award set off by the appraisers, and that that will be lost to her if the settlement should be set aside. Such a result to the wrongdoer should in nowise deter a court of equity from setting aside a fraud-

ulent transaction. Complainants have offered and will be required to refund what she paid them for their lands, and she must abide whatever loss she may have brought upon herself by her own wrongdoing. (*Ames* v. *Witbeck*, 179 Ill. 458.) But the question whether or not her award will be lost to her by the setting aside of the arbitration agreement, settlement and deeds is not presented here for decision.

The judgment of the Appellate Court will be in all respects affirmed except as to the $400 certificate of the Barb City Bank dated April 25, 1893, but in affirming the decree as to said certificate the Appellate Court was in error, and the judgment to that extent, and that part of the decree below, are reversed. Upon the writ of error the decree of the circuit court in denying relief and dismissing the bill in respect to the arbitration agreement and settlement and in respect to the sale and conveyance to Isabella B. Roberts by the complainants of their respective interests in the lands devised to them by their father is reversed, and both branches of the cause, considered as one case, will be remanded to the circuit court, with directions to enter a decree setting aside said arbitration agreement and settlement and the sale and conveyances of said land so made by the several complainants, upon the condition that they refund to said Isabella B. Roberts the respective amounts received by them from her for the conveyance of said lands, and finding that said notes so presented by said Isabella and included in said arbitration settlement had been paid, and constituted, and do now constitute, no debt or claim in her favor against the estate or against the complainants, and finding for the complainants as to said $400 certificate, and that she, Isabella B. Roberts, account and pay the costs in the circuit court and also in this court.

Reversed in part and remanded.

OTIS H. EATON

v.

CHARLES G. SCHNEIDER *et al.*

Opinion filed April 17, 1900—Rehearing denied June 8, 1900.

1. FORFEITURE—*forfeiture will not be strictly enforced in equity.* In equity, forfeiture must yield to the principle of compensation where fair dealing and good conscience seem to demand.

2. SAME—*when forfeiture of bond for deed cannot be declared without notice.* Though the prompt payment of notes by the obligee in a bond for deed is made of the essence of the contract, yet if the parties treat the time clause as suspended pending negotiations for settlement, neither can insist upon a forfeiture without giving the other definite and specific notice.

3. NOTICE—*declaration of forfeiture on record of bond for deed is not legal notice.* An endorsement by the obligor upon the record of a bond for deed, declaring the bond forfeited for the obligee's failure to make payment, is not a legal notice of forfeiture.

4. SAME—*when subsequent purchaser is not without notice of rights of third party.* A recorded bond for deed is notice to the world of the obligee's rights thereunder, and a purchaser from the obligor can claim no greater rights upon the ground of forfeiture than can the obligor himself.

5. EVIDENCE—*obligor who has granted indulgence of time has burden of proving notice of forfeiture.* An obligor in a bond for deed who has granted a temporary indulgence of time to the obligee has the burden of proving that he gave the requisite notice of his intention to declare a forfeiture.

APPEAL from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

Appellant filed his bill in the circuit court of McLean county for an accounting of rents and to compel the specific performance of a contract to convey to him two lots in Normal, Illinois. In February, 1897, he purchased the lots from Charles G. Schneider, one of the appellees herein, and received from him a bond for a deed. The consideration for the proposed transfer was $3500, made up of an equity in a certain store-house property and the

stock of goods therein; of two mortgages, of $700 each, on the lots, which Eaton agreed to assume; and his own promissory note for $909.25, dated February 10, 1897, due in six months from date. The $909.25 note was not paid when it came due, but on the 27th day of August, 1897, appellant paid Schneider $375 in cash, gave him his two notes of $286.26 each, and received from him a new bond for a deed, Schneider retaining the store property and stock of goods and Eaton assuming the mortgages, as by the original contract. This second bond is the one which appellant seeks to enforce in this suit.

On the filing of the answers of appellees to the bill the cause was referred to a special master in chancery to take and report the proofs, with his conclusions. The master reported the facts as above stated, and further found that the bond for deed contained a clause making time of the essence of the contract; that appellant had failed to pay his notes at maturity, and did not, at any time before filing his bill herein, offer to pay them; that he had not complied with his part of the contract so as to entitle him to demand a deed for the lots; that there had been no waiver of the terms of the bond by appellees, and that on the first day of April, 1898, appellees Charles G. Schneider, and Lena C., his wife, conveyed the lots to Ida Berryman, one of the appellees, and that at the time of the conveyance to her she had no knowledge that appellant claimed any interest in the premises. Appellant filed exceptions to the report of the special master, which were overruled by the court and a decree was entered dismissing the bill. From that decree appellant prosecutes this appeal.

TIPTON & TIPTON, for appellant:

The right to declare a forfeiture rests in a contract and is one that may be exercised or waived by the vendor, and a failure to claim it may be regarded as a waiver of the right. Unless it is declared, the contract continues

mutually binding on the parties. *Heald* v. *Wright*, 75 Ill. 17; *Skinner* v. *Newberry*, 51 id. 205.

A court of equity will not permit a vendor of land to declare a forfeiture of the contract for a failure to make a payment on the day of its maturity, even though time is made of the essence of the contract, in violation of his agreement to give an extension of the time of payment without first demanding payment. It is not necessary that the agreement to extend the time of payment be founded upon a consideration in such a case. *Thayer* v. *Meeker*, 86 Ill. 470.

A contract, binding in equity, for the sale of lands, though in fact unexecuted, is considered as performed, so that the land becomes the property of the vendee and the purchase money that of the vendor. Adams' Eq. 305; Pomeroy's Eq. Jur. sec. 372; *Lanquel* v. *Benitz*, 23 Pa. St. 99.

Where time is stated to be of the essence of a contract to convey land, if both parties, by a mutual course of conduct, treat the time clause as waived or suspended, one of them cannot suddenly insist upon forfeiture, but must, in order to then avail himself of the time clause, give reasonable, definite and specific notice of his changed intention. *Monson* v. *Bragdon*, 159 Ill. 61; *Watson* v. *White*, 152 id. 365.

An agreement that time shall be of the essence of a contract may be waived or set aside,—and more especially so in the contemplation of a court of chancery,—either by the mutual consent or conduct of the parties or by the consent of the party in whose favor and for whose benefit such stipulation is made. *Allen* v. *Woodruff*, 96 Ill. 11; *Palmer* v. *Ford*, 70 id. 369; *Peck* v. *Brighton*, 69 id. 20; *Morgan* v. *Herrick*, 21 id. 481; *Watson* v. *White*, 152 id. 372; *Bishop* v. *Newton*, 20 id. 175.

WELTY & STERLING, for appellees:

Parties have a right to make their own contracts, making the time of their performance mutual, so that a

failure to perform at the time will avoid the agreement. *Kemp* v. *Humphreys*, 13 Ill. 573; *Chrisman* v. *Miller*, 21 id. 226; *Heckard* v. *Sayre*, 34 id. 142.

A court of equity has no power to enforce a specific execution of a contract contrary to the clearly expressed intention of the parties. *Kemp* v. *Humphreys*, 13 Ill. 573.

A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened. *Heckard* v. *Sayre*, 34 Ill. 142.

A party seeking the specific performance of a contract must show that he himself has always been ready and willing to perform on his part, even though time is not made essential by the contract. *Stow* v. *Russell*, 36 Ill. 18; *Cohn* v. *Mitchell*, 115 id. 124; *Phelps* v. *Railroad Co.* 63 id. 468.

A purchaser has no right to apply to a court of chancery to compel a conveyance, unless he has, previously to filing his bill, clothed himself with the right to demand a deed without any further thing being done on his part. *Doyle* v. *Teas*, 4 Scam. 202; *Cronk* v. *Trumble*, 66 Ill. 428; *Dupuy* v. *Williams*, 152 id. 102; *Gas Light Co.* v. *Lake*, 130 id. 42; *Weingaertner* v. *Pabst*, 115 id. 412; *Walters* v. *Walters*, 132 id. 467.

Specific performance will be denied because the defendants in this case had declared a forfeiture and conveyed to other parties who had no notice. *Wollensak* v. *Briggs*, 119 Ill. 453; 22 Am. & Eng. Ency. (1st ed.) p. 1018.

Mr. JUSTICE WILKIN delivered the opinion of the court:

By the express terms of the bond here sought to be specifically enforced by appellant time was made of the essence of the contract, and it is contended on behalf of the appellees that the appellant, Eaton, is not entitled to a specific performance by Schneider, for the reason that he, himself, failed to comply with the contract on his part within the specified time, by paying his notes

when they came due. Appellant contends that the time for payment was extended and thereby the condition waived. On this point the court below found adversely to appellant, and we think the testimony failed to establish any definite extension of time. It does, however, clearly show that appellee Schneider granted such indulgence to Eaton in permitting the time for payment to go by without declaring an immediate forfeiture, as might reasonably lead Eaton to believe that he did not intend to insist upon an immediate performance of the contract according to its terms, or that appellant's failure to do so should work a forfeiture of his right to a specific performance as against appellee Schneider. The evidence of Schneider himself is, that he granted appellant two days after maturity to fix the matter up, and, in fact, three weeks elapsed between the date of the maturity of Eaton's notes and Schneider's first act indicating an intention to declare a forfeiture. This indulgence, during which negotiations were pending for a new agreement, worked a suspension of Schneider's right to declare a forfeiture without notice. While his conduct was not necessarily an absolute, permanent waiver of that right, yet in a court of equity there was such a temporary suspension of the right as could be resumed only by giving definite and specific notice of an intention to that effect. (*Watson* v. *White*, 152 Ill. 364; *Monson* v. *Bragdon*, 159 id. 61.) Forfeiture is a harsh remedy, and in equity must yield to the principle of compensation, where fair dealing and good conscience seem to so demand. (*King* v. *Radeke*, 175 Ill. 72.) Where time is stated to be of the essence of a contract to convey land, if the parties treat the time clause as waived or suspended, one of them cannot suddenly insist upon a forfeiture, but must, in order to then avail himself of it, give reasonable, definite and specific notice of his changed intention. *Monson* v. *Bragdon*, *supra*.

In this case the burden of proof was upon Schneider to show that, after granting temporary indulgence to

Eaton, he gave him the requisite notice of his intention to declare a forfeiture. There was introduced on the hearing a paper which seems to have been intended as a notice by Schneider of his intention to declare a forfeiture of the contract, but the abstract of the evidence wholly fails to show any service of that notice upon appellant. Appellees also introduced, and claim as notice to the appellant, the record of the bond, upon which is endorsed:

"Default having been made in this bond, we declare this bond null and void. Default in payment of two notes past due.
CHARLES G. SCHNEIDER. [Seal.]"

This endorsement upon the record is a mere memorandum, not required by law, and hence in no sense legal notice to appellant of a forfeiture of his rights under the bond. A forfeiture can be declared, after waiver, only in the manner hereinbefore stated.

As to the rights of appellee Ida Berryman, we think the court below erred in finding she had no notice of appellant's rights. The bond for a deed to him was upon record and notice to the world of his rights thereunder. A subsequent purchaser could claim no greater rights on the ground that there had been a forfeiture than could Schneider himself. Neither could claim the benefit of a forfeiture of the bond without proof that such forfeiture had been legally declared. We think the court below erred in dismissing the bill.

It appears from the evidence that appellees have received rents of the premises, for which appellant claims an accounting.

For the reasons indicated, the decree of the circuit court will be reversed and the cause remanded, with directions to that court to re-instate the same for further proceedings in conformity to the views herein expressed.

Reversed and remanded.

THE UNIVERSITY OF ILLINOIS

v.

THE GLOBE SAVINGS BANK *et al.*

Opinion filed April 17, 1900—Rehearing denied June 8, 1900.

1. RECEIVERS—*when an assignee of securities is entitled to possession.* Where a receiver appointed in the interest of all parties for an insolvent bank takes possession, under an order of court, of securities belonging to the president of the bank in his own right, such possession is merely that of an officer of the court, and, in the absence of any legal or equitable right to the property existing either in the bank or the receiver, the right to possession of the securities by one who has taken an assignment thereof under an order of the court cannot be conditioned upon the refunding to the bank, for the benefit of its creditors, of a sum of money misappropriated by the president after the bank had closed its doors.

2. APPEALS AND ERRORS—*findings of decree taken as true if evidence is not preserved.* It is sufficient to uphold a decree in chancery that the facts as found by the court from the evidence are recited in the decree, and such findings must be taken as true where the evidence is not preserved in the record.

3. SAME—*one desiring to challenge findings of decree should preserve the evidence.* A party desiring to challenge the finding of a decree as to the existence of an adverse lien upon property claimed by him should preserve the evidence upon that point in the record.

APPEAL from the Circuit Court of Cook county; the Hon. MURRAY F. TULEY, Judge, presiding.

On and prior to April 3, 1897, Charles W. Spalding was president, principal stockholder and manager of the Globe Savings Bank, doing business in the city of Chicago. He was at the same time treasurer of the University of Illinois. On that day the bank closed its doors and Spalding left the State. On the fifth of the same month this litigation was begun in the circuit court of Cook county, by the cashier of the bank, George E. Churchill, filing a bill to settle its business and wind up the corporation. On the filing of that bill the Chicago Title and Trust Company was appointed receiver of the bank, and the latter's officers were ordered to turn over

to such receiver all its property. On April 8 an order was entered restraining Spalding from interfering with or opening certain safety deposit boxes in the Globe safety deposit vaults under the bank, to which he alone had access, and from assigning or transferring the contents thereof, until the further order of the court. On April 10 the receiver was ordered to open the safety deposit boxes and take possession of the contents "appearing to belong to the bank." On the 13th the order was so modified as to permit the University of Illinois to take any conveyance from Spalding, by way of security or otherwise, of any property which the bank did not own or have an interest in, but without prejudice to any rights the bank or its receiver might have by reason of the bill and amendments thereto. On the last named date the receiver reported to the court that upon opening said boxes it found therein and took possession of certain bonds known in the records as "endowment bonds," and also sixteen bonds of the town of Buckley, State of Washington, dated July 1, 1892, Nos. 4 to 19, both inclusive; seventeen bonds, of $1000 each, of the Marshalltown Light, Power and Railway Company, Nos. 11 to 17, inclusive, 27, 28, and 63 to 70, both inclusive; fifty-five bonds of the Idaho Canal Company, Nos. 79, 80, 95 to 100, both inclusive, 115 to 124, both inclusive, 237 to 248, both inclusive, and 250 to 274, both inclusive; twenty-three hundred and ninety shares of stock of the Idaho Canal Company, par value $100 per share; fifty bonds, of $1000 each, of the Pocatello Power and Irrigation Company.

On April 14 Spalding conveyed and assigned by deed to the university the bonds so reported, as security for an indebtedness by him to it. On the 19th the university filed two intervening petitions, by the first claiming the above mentioned "endowment bonds." By the second petition it was alleged that at the filing of the bill and the appointment of the receiver, and on April 14, 1897, (the date of the assignment,) Spalding was the owner of all

the securities taken by the receiver from the safety deposit boxes described in the petition, including the above named Buckley, Marshalltown and Idaho Canal Company bonds, and claimed the same under and by virtue of the conveyance to it by Spalding.

On the 24th of May, following, the Attorney General filed a bill on behalf of the State to settle the affairs of the bank and for the appointment of a receiver, and subsequently that suit and the one begun by Churchill were consolidated, the Chicago Title and Trust Company being again appointed receiver. On the hearing the court found, among other things, the following:

"The court having considered the two intervening petitions of the University of Illinois, filed herein April 19, 1897, and the issues made thereon and the evidence therein, and the rights and interests of said university and of its trustees, * * * finds as follows with reference to the rights, interests and obligations of the said University of Illinois in, about and concerning all and singular the property claimed by it, described in any of the pleadings herein and in its several petitions, and all matters and things included in this litigation in which the said university and said State officers, acting as aforesaid, are concerned. * * * The court further finds that at the time of the commencement of this suit and at the time of the appointment of the receiver herein the said Charles W. Spalding was the owner of certain bonds, stocks and other securities hereinafter specifically described, and that the same were in the private boxes of the said Charles W. Spalding at said time and in his exclusive and personal possession; that on April 14, 1897, the said Charles W. Spalding, by an instrument duly executed for that purpose, purported to convey, assign and transfer * * * to the said University of Illinois all the said bonds, stocks and securities, the same being specifically described therein, as follows: [Here follows a description of the bonds, etc., taken from said boxes, including

the Buckley, Marshalltown, Idaho canal and other bonds and stocks as above.]

"The court finds that by the assignment and transfer the said University of Illinois became the owner, for all the uses and purposes in the said instrument stated, of all and singular the said bonds, stocks and other securities mentioned and so transferred, but subject to the equities of the other creditors of said bank to have the said $15,000, hereinafter referred to as having been taken by the said Spalding from the moneys of said bank after its failure, returned to said bank or its receiver, which was appointed by this court prior to its transfer to the said University of Illinois, and that neither the said Globe Savings Bank, nor its said receiver, nor its creditors or depositors, had then, nor now have, any right, title or interest therein or any lien or charge thereon, with the exception following: Finds that three of said bonds of Pocatello Power and Irrigation Company had been in the possession of the said Globe Savings Bank as security for the note of E. H. Tillson, and that the said Globe Savings Bank had a lien or charge upon said three bonds for the payment of said Tillson note, but that after the closing of said bank and after the appointment of the receiver herein the same had been fraudulently taken out of the possession of the said Globe Savings Bank by Spalding and placed in his private box, and that the bank and its receiver were entitled to the possession of said three bonds; directs the receiver to sell the said three bonds for the payment of said Tillson note and apply the net proceeds thereof to the payment of said note, the balance, if any, to belong to the University of Illinois; finds that five bonds of the Idaho Canal Company, for $1000 each, are held by the receiver as security for a note of Frank W. Smith for $5000; directs the receiver to sell said five bonds of the Idaho Canal Company at public sale and apply the proceeds of said sale to the payment of said note, the balance, if any, to be paid to

the university; finds that fifty-five Idaho Canal Company bonds, numbered 79, 80, 95 to 100, both inclusive, 115 to 124, inclusive, 237 to 248, inclusive, and 250 to 274, both inclusive, which were, as above herein found and determined, in the private box of said Spalding and in his possession when the receiver herein was appointed, were part of an issue of three hundred bonds of like amount, date and tenor, secured by a trust deed of said company," setting forth the facts, showing the re-issue of bonds by the company, and stating: "That on the application for entry of this decree counsel for the University of Illinois, on behalf of said university and of the State officers authorized by law to receive the proceeds of this litigation, disclaimed any desire to claim or receive any of the Idaho canal bonds of said first issue, or any other bonds of said company except the specified fifty-five bonds so assigned to said university by said Spalding and numbered as aforesaid, and found by said receiver in the said Spalding's private box as aforesaid; * * * finds that at the time of the closing of said bank the said Spalding fled from the city of Chicago and concealed himself at the Calumet club grounds, in the State of Indiana.

"And the court further finds that at the time the said Globe Savings Bank was closed, on the 3d day of April, 1897, its available cash was reduced to about $30,000, and was known by said Spalding to be unable to resume business and to be insolvent, but said Spalding wrongfully and fraudulently appropriated $15,000 out of the cash funds of said bank, and afterwards used upwards of $7000 thereof in payment of debts and dues of the funds of the University of Illinois, and that such appropriation of the funds of said bank by said Spalding was a fraud upon the rights of other creditors of said bank, and that said Spalding cannot in equity demand the return of said bonds without first doing equity by restoring said sum of $15,000 so wrongfully appropriated by him, and said uni-

versity has no greater rights under or by virtue of the bill of sale or assignment from said Spalding.

"And the court further finds that said Globe Savings Bank had and has an equitable lien upon said fifty-five bonds of the Idaho Canal Company to enforce the payment to the receiver herein of said sum of $15,000. And it appearing to the court that the said fifty-five Idaho canal bonds now in the hands of said receiver in lieu of the ninety Idaho canal bonds so delivered by said Spalding to said Churchill, and by the latter to the receiver, as aforesaid, are insufficient, in case of the sale thereof, (if a sale be made as hereinbefore ordered,) to re-pay to said receiver the said $15,000 so fraudulently taken from the said assets of said bank after said failure; and that in equity and good conscience said University of Illinois should make good to said receiver said $15,000, or any deficiency, if any, that may arise from the sale of said fifty-five Idaho canal bonds, and that the said twenty-three hundred and ninety shares of stock of said Idaho Canal Company in the hands of said receiver which were taken possession of by said receiver from the private box of said Spalding, and said seventeen bonds of the Marshalltown Light, Power and Railway Company, and said sixteen bonds of the town of Buckley, which belonged to said Spalding prior to his transfer of the same to said University of Illinois on the 14th day of April, 1897, are sufficient, if sold, to reimburse said receiver for the said $15,000 so taken by said Spalding, or to supply any deficiency thereof which may arise if said fifty-five Idaho canal bonds be sold as aforesaid:

"It is ordered, unless the said university, or some person in its behalf, shall, on or before any such sale of said fifty-five Idaho canal bonds be made, pay to the said receiver said $15,000, with interest from the date of this decree, or shall, within five days after such sale, pay any deficiency there may be found from the sale not sufficing to pay said sum of $15,000 and interest, that said receiver

proceed to sell the said twenty-three hundred and ninety shares of Idaho canal stock and such Marshalltown and town of Buckley bonds at public sale, after five days' public notice in a newspaper published in said city of Chicago, and apply the proceeds of said sale, after paying the expenses of said sale, to the extinguishment of said equitable claim for the return of said $15,000 and interest, and pay the remainder, if any, over to said University of Illinois, or its solicitors, and that he retain possession of the said twenty-three hundred and ninety shares of stock and said Marshalltown and town of Buckley bonds until said $15,000 so taken by Spalding, with interest thereon, is paid, as aforesaid.

"It is therefore ordered, adjudged and decreed that unless the said Charles W. Spalding, the University of Illinois, or some other person, shall pay to the receiver herein the said sum of $15,000 within ninety days from the entry thereof, the receiver herein sell said fifty-five bonds of the Idaho Canal Company at public sale, or so many thereof as may be necessary to pay said $15,000 and costs of sale, and that said receiver apply the proceeds of sale to the payment of said sum of $15,000 and costs of sale, and deliver the balance, if any, of the said bonds so remaining unsold, to the University of Illinois or its solicitors. And it is further ordered that the said receiver be permitted to bid at the sale of any of the above described property such sum or sums as it may deem the same reasonably worth; and the court hereby reserves, until after the receipt by the receiver of said $15,000 and interest, by sale or otherwise, all questions as to what credit or dividend on account thereof, if any, any party in interest may be entitled to. It is further ordered, adjudged and decreed that the receiver herein and the clerk of this court deliver to the Governor, Auditor and Treasurer of the State of Illinois, on behalf of the State of Illinois, or to Wilson, Moore & McIlvaine, solicitors herein for the University of Illinois, on their

behalf, all and singular the said bonds, stocks, notes and other securities assigned by the said Spalding to the said university as above herein specifically mentioned, that is to say: Fifty-five Idaho Canal Company bonds, (new issue,) etc., giving their numbers and amounts; twenty-three hundred and ninety shares of stock of said company, par value $100 each; sixteen bonds of the town of Buckley; seventeen bonds of the Marshalltown Light and Power Company, upon the payment of said sum of $15,000 upon said dividend to said receiver in discharge of the said equitable lien, and in default thereof that he sell the same and apply the proceeds as hereinbefore directed." Then follows a description of all other bonds and securities, mentioned in the second petition, found in said boxes, as reported by the receiver.

By an amendment and supplement to the original bill the bank claimed an interest of Spalding in what is called "Ford's subdivision" of certain real estate, on the ground that it had been paid for out of the bank funds. This claim was resisted by the university.

The court found in its decree that although certain sums of money were taken by Spalding from the bank and used in making payment for the lands, the same, prior to the failure of the bank, had been repaid in cash from moneys of Spalding derived from his individual resources, and accordingly decreed in favor of the university on that issue.

Many other questions were involved in the action below and decided, but the foregoing is deemed sufficient for an understanding of the questions raised on this appeal.

E. C. AKIN, Attorney General, (WILSON, MOORE & MCILVAINE, of counsel,) for appellant.

JOHN W. SMITH, for appellee the Globe Savings Bank.

HENRY W. MAGEE, and MAX PAM, for appellee the Chicago Title and Trust Company, Receiver.

Mr. JUSTICE WILKIN delivered the opinion of the court:

From the decree of the circuit court the University of Illinois alone prayed and was allowed an appeal, and by its assignment of errors questions only the order requiring it to pay the bank, or receiver, the $15,000 wrongfully appropriated by Spalding, as a condition precedent to its receiving the above mentioned bonds and stocks. Appellees assigned cross-errors upon the record, by which they seek to question the ruling of the court below upon the first intervening petition by the university, in holding the university entitled to the bonds, securities, etc., claimed by the second petition, subject only to the lien for $15,000, and in refusing to sustain the bank's claim to the Ford subdivision interest. Notwithstanding these assignments of cross-errors, counsel have filed no abstract whatever of those parts of the record upon which they are based, and no certificate of the evidence or bill of exceptions has been filed by either party. We have, however, looked into the record,—especially the portions of the decree omitted from the abstract filed by appellant,—sufficiently to find that on the facts found none of the cross-errors are well assigned.

Going to the merits of all the claims made by the University of Illinois, it is said by counsel for the receiver, though not seriously insisted upon, that by an act of the legislature approved June 11, 1897, all its rights of action for such claims became vested in the State officers, and therefore it could not maintain the suit. The question is raised by neither of the assignments of cross-errors, and if it were, the contention is wholly without merit. The petitions of the university were pending when the act was passed, having been filed April 19 prior thereto, and issues joined thereon, and the statute does not purport to take away its right to prosecute the action, but clearly recognizes the then pending litigation and the right of the university to prosecute the same.

As to the Ford subdivision interest, the transaction, as found by the court, amounted to no more than a borrowing of money from the bank to invest in lands and re-paying the loan. Had Spalding failed to return the money, the bank, by tracing it into the land, might have enforced its claim against it, but no such case can be made out of the facts recited in the decree. The decree was in accordance with the facts found.

As to the bonds described in the first petition, the finding is that they were the property of the university, and in its possession, by its treasurer, at the bringing of the suit and when taken from the safety deposit boxes. As to those claimed by the second petition, except as to those specifically named, the finding is equally clear and explicit that Spalding was the absolute owner, his title being unaffected by any lien in favor of the bank when taken possession of by the receiver. As we understand counsel for appellees, their contention is, that although all these bonds were the property of the university, and of Spalding when he conveyed, the bank had some sort of an equitable lien upon them for the satisfaction of its creditors, and that before the university could claim them it should be required in equity to discharge such lien. No legal or equitable right to the property existing either in the bank or receiver at the time it was seized, the question must be, did the act of taking possession thereof under the order of the court give a specific lien in the bank's favor? As the facts are found the order of the court did not authorize the receiver to take the securities out of the boxes. It was ordered to take from them only such as appeared to belong to the bank, and when it took those owned by the university, and by Spalding in his individual right, its possession was clearly unauthorized and wrongful. But if they had been seized in strict obedience to that order the rights and interests of the parties therein would not have been changed. When it took them it simply had possession, as the officer of the court,

for the owners of the property from whose possession they were taken. It was appointed receiver, not for the bank alone, but on behalf of all parties interested. It could not deprive the university or Spalding of its or his right to the property seized or to the possession thereof, but could only hold it for them if they succeeded in establishing their ownership. (*Coates* v. *Cunningham*, 80 Ill. 467.) While the receiver so held them for the court and the benefit of those who should ultimately appear to be entitled thereto, the order of the 13th of April, permitting the university to take any conveyance from Spalding, by way of security or otherwise, as above stated, was entered, and in pursuance of that order the assignment under which the university claimed, in its second petition, was made. There is no feature of an equitable attachment in the case. The seizing of the bonds, stocks, securities, etc., in question, was the usual taking possession of property by a receiver under an order of the court, to be held pending the determination of the title thereto.

On the facts found, the decree of the circuit court as to the endowment bonds, and all the securities claimed by the second petition, except the three Pocatello Power and Irrigation Company bonds, the Idaho Canal Company bonds, the twenty-three hundred and ninety shares of stock of the same company, the seventeen bonds of the Marshalltown Light, Power and Railway Company and the sixteen bonds of the town of Buckley, was clearly right. Each of the cross-errors will accordingly be overruled.

As already stated, the errors specified by the appellant go only to those parts of the decree which give the bank a lien upon the fifty-five Idaho Canal Company bonds, the twenty-three hundred and ninety shares of stock in that company, the seventeen Marshalltown bonds and the sixteen town of Buckley bonds. As to all of these securities except the fifty-five Idaho Canal Company bonds no finding can be observed in the decree of

any lien in favor of the bank. But however that may be, from what has been said as to the other bonds, stocks and securities described in the second petition, the decree erroneously gave the bank a lien upon them.

As to the Idaho canal bonds, the finding is that five were held by the receiver as security for a note of Frank W. Smith for $5000, and the decree directs him to sell them and apply the proceeds in payment of that note, the balance, if any, to be paid to the university. The correctness of that finding and order does not seem to be questioned by the appellant. There were therefore only fifty of those bonds remaining to be disposed of, but the subsequent finding and order speaks of the whole number fifty-five. As to these the decree recites: "And the court finds that said Globe Savings Bank had and has an equitable lien upon said fifty-five bonds of the Idaho Canal Company to enforce the payment to the receiver of said sum of $15,000." It is sufficient to uphold a decree in chancery that the facts as found by the court from the evidence are recited in the decree, and such finding must be taken as true when the evidence has not been preserved in the record. (*Atkinson* v. *Linden Steel Co.* 138 Ill. 192; *Davis* v. *Christian Union*, 100 id. 313; *Knickerbocker* v. *McKindley Coal Co.* 172 id. 535; *Schuler* v. *Hogan*, 168 id. 369.) Under the foregoing finding, in the absence of the evidence, we see no reason for disturbing the decree of the circuit court as to the Idaho canal bonds. If the university desired to challenge the finding of the court as to the existence of an equitable lien against those bonds on the facts, it should have preserved the evidence in the record.

In so far as the decree below gives the bank a lien on the Idaho Canal Company stock, the seventeen Marshalltown bonds and the sixteen bonds of the town of Buckley it will be reversed, but in so far as it gives to the said bank a lien upon the Idaho Canal Company bonds it will be affirmed. It should, however, give a first lien for the $15,000 upon but fifty of those bonds. The cause will be

remanded to the circuit court, with directions to modify its decree as herein indicated and carry the same into effect, each party being required to pay one-half of the costs in this court.

Decree reversed in part.

CHARLES R. HOLDEN *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed April 17, 1900.

This case is controlled by the decisions in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Foss* v. *City of Chicago*, 184 id. 436.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: This was a proceeding by special assessment to pay the cost of curbing, grading and paving Ogden avenue from Warren avenue to West Twelfth street, in the city of Chicago. Judgments of confirmation were rendered in the county court against the property of the objectors, and they sued out this writ of error to reverse the judgment, on the ground that the ordinance fails to state the nature, character, locality and description of the improvement with sufficient certainty, as required in *Lusk* v. *City of Chicago*, 176 Ill. 207.

Upon looking into the record it will be found that the ordinance in question contains the same defect which was held to be fatal in the *Lusk case*, and for the reason stated in that case the judgment will have to be reversed.

It is, however, claimed, as the record contains no bill of exceptions the ordinance is not before the court. A copy of the ordinance was attached to the petition and made a part thereof, and in *Foss* v. *City of Chicago*, 184 Ill. 436, we held that was sufficient to make the ordinance a part of the record without a bill of exceptions. That case is conclusive of the question here.

For the error indicated, the judgment as to the property of plaintiffs in error will be reversed and the cause will be remanded.

Reversed and remanded.

HARRY E. STEVENSON *et al.*

v.

DAVID L. CAMPBELL *et al.*

Opinion filed April 17, 1900—Rehearing denied June 8, 1900.

1. FRAUD—*continued possession of grantor may be considered on question of good faith.* Though one in possession of premises may, by delivering a deed thereto, estop himself from relying upon his continued possession as notice to subsequent purchasers that he claims title, yet such possession is a circumstance to be considered in connection with other facts on the question of notice and good faith.

2. SAME—*only bona fide purchasers are protected against prior fraud.* Where a deed to land has been obtained by fraud, it is only a *bona fide* purchaser without notice who is protected against such fraud.

3. ESTOPPEL—*when acceptance of an alleged lease by defrauded party does not work estoppel.* That one who has been fraudulently induced to make a deed to his property, but who refuses to deliver possession to the party claiming to be a *bona fide* purchaser, accepts an alleged lease from the latter does not work estoppel, where the alleged lease is but an agreement for a sort of joint occupancy of the premises by the parties until their controversy is settled.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. FRANCIS M. WRIGHT, Judge, presiding.

WHITE & DOBBINS, for plaintiffs in error.

LEWIS & LEWIS, THOMAS J. SMITH, ROY WRIGHT, and HERRICK & HERRICK, for defendants in error.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Plaintiffs in error, Harry E. Stevenson and Mattie A. Stevenson, his wife, filed their bill in the circuit court of Champaign county to set aside a conveyance of their home in Champaign to defendant in error John R. Suma, and a deed by Suma and wife to defendant in error David L. Campbell, on the ground of alleged fraud, by which they were cheated out of the premises. The bill set forth the alleged fraud, and also charged a fraudulent attempt on the part of Campbell to estop them by obtaining a contract from the complainant Harry E. Stevenson in the form of a lease. David L. Campbell, John R. Suma, Cora R. Suma, his wife, and Charles L. Winslow, were made defendants, and answers were filed denying the fraud, and Campbell set up that he was an innocent purchaser of the premises for value without notice, and that complainant Harry E. Stevenson was estopped to deny his title because of the execution of said lease. The issues were referred to a special master in chancery to take and report the evidence with his conclusions. He reported the evidence, with the conclusion "that some of the material allegations of the complainants' bill, necessary to afford the relief prayed in said bill, are not proven by the evidence in the case," and that "the equities of the case are with the defendants." The court referred the cause back to the special master to find facts. The master filed an additional report, but did not find anything on the question of fraud alleged in the bill or as to the alleged fraud in obtaining the lease which was claimed as an estoppel, but reported that before the conveyance to Campbell he knew that complainants had conveyed the premises to the defendant Suma, his grantor, and that he had knowledge complainants were in possession of the premises,

but did not have any actual knowledge of the alleged fraud affecting the deed from complainants to Suma. The court heard the cause upon the report, and entered a decree finding that complainants affirmed the purchase of Campbell by taking a lease of the premises, and that Campbell had no actual notice of the alleged fraud, and dismissing the bill for want of equity at the cost of the complainants.

There is some contradiction in the evidence, but it is mainly on minor questions, and the facts as we find them from the evidence are substantially as follows: Complainant Harry E. Stevenson held the legal title of the lot in question, upon which there was a dwelling house occupied as a homestead, and his wife, the complainant Mattie A. Stevenson, had an equitable interest in the estate to about one-half. The property was worth about $2800 and was subject to a mortgage of $300, and it had been placed in the hands of Cyrus Paul, a real estate agent, for sale. About the first of January, 1898, Paul communicated with J. A. Richards, a real estate agent or trader living in Deland, Piatt county, and Richards, who was acting for the defendant Charles L. Winslow, offered to trade for the premises two notes secured by mortgage. One note was for $1500 and the other for $1650, and they were made by John West and Clara West, and purported to be secured by a mortgage of said John West and Clara West, of the town of Goose Creek, in Piatt county, upon one hundred and sixty acres of land, being lot No. 594 of plat No. 3 of the Alexander Walcott grant, in Johnson county, Kentucky. In pursuance of the offer the complainant Harry Stevenson met Richards in a real estate office in Champaign, and Richards stated that the defendant Winslow had sold this land in Kentucky to West and had taken the notes as part pay; that he had an abstract of the land, but he either said it was in Kentucky or that he had given it to Suma. He represented that Winslow, who had endorsed the notes in

blank, was good, and owned over one hundred and sixty acres in Piatt county; that the notes were good and the Kentucky land improved and cultivated, and worth $50 an acre. So far as these statements related to the value of the notes and mortgage they were all false. John West and Clara West were very poor and had gone to Arkansas. They owned no land and could not pay their board when they left this State, and their household goods were returned to the people from whom they bought them. Neither Winslow nor West ever owned the supposed land in Kentucky, and there was no such land there. If the supposed tract was ever conveyed to the Wests they paid no attention to it but went to Arkansas. Winslow had an interest in some land, but he was not worth anything, and the notes and mortgage were worthless.

The complainant Harry E. Stevenson agreed, on these representations, to make the trade if Richards would satisfy Mr. Garwood, a man who discounted paper, that the papers were all right so that he would discount them. At that time the defendant John R. Suma appeared on the scene, and Richards said that he had traded the papers to Suma. Suma took no interest in the trade, but assented to whatever was done by Richards, who was acting for Winslow; and Richards, Paul, Suma and Stevenson then went to see Garwood. Garwood looked at the papers and asked to keep them until after dinner. Richards and Suma say that Garwood pushed the mortgage aside and said that he cared nothing for that but wanted to look into the papers. Garwood went to the bank and was told by the cashier that Winslow was not strong financially; that he had to sue him for a judgment and that he did not consider the paper gilt-edged. The parties went back after dinner, and Garwood suggested that they should get a printed guaranty, used by the bank, stamped on the note with a rubber stamp and have Winslow sign it, and led Stevenson to believe that he would take the notes. The stamp guaranty was put on

and Richards went to Clinton, Illinois, to get Winslow's signature. He returned with it and the exchange was made, and the deed was made by complainants to Suma, who was a day laborer and had no property. He testified that he gave Winslow one hundred and sixty acres in Hays county, Nebraska, and a team worth $100, for the notes, and made a deed of the Nebraska land to Richards; that he made no inquiry about the Kentucky land and knew nothing about it, or whether it was worth $5 or $50; that he had never seen the Nebraska land which he traded and had not been told anything about it; that he did not know who was in possession; that he paid no taxes on it and did not get any rent for it, and did not know whether it was wild land or in cultivation. Suma did not go to see complainants' property, had never been in the house or on the lot, and did not have the abstract examined. Neither he nor Winslow knew anything about the property and paid no attention to it.

It is beyond controversy that the notes and mortgage of the Wests never represented, and were not intended to represent, any value. The transaction with complainants was a fraud from first to last. Garwood is dead, and there is no evidence, except hearsay, of his relation to the transaction. He refused to take the papers after the trade was closed. As to the parties guilty of the fraud, or any person who had notice of it, the complainants have an undoubted right to the relief prayed for.

The deed of complainants to John R. Suma was made January 8, 1898, and on the 27th day of the same month Suma and wife conveyed the premises to the defendant David L. Campbell for the stated consideration of $3000, subject to the mortgage of $300. Campbell gave for the premises two notes, of $600 each, and a tract of land in Kansas, the value of which is not shown, but Campbell testified that he traded a jackass for it, and that he could tell what the land was worth "if you can tell what a jackass is worth." Although Suma made the deed to

Campbell and claims that he was the purchaser from Stevenson, yet Campbell made the deed of the Kansas land and the notes to Richards. Winslow also claimed that he bought complainants' property and was up there to look at it with his agent, Richards, who managed the whole business. Campbell had never been in the house when he bought it, did not know the size of the lot, how many rooms there were in the house, how it was lighted or finished, whether with hard-wood or otherwise, whether it was supplied with gas or water or plumbing, or whether there was a well or cistern on the premises. He made no inquiry whether the taxes were paid or the interest on the mortgage. He lived in Champaign, about two and a half blocks from the house. The complainants were in possession, which they had never surrendered, and they had learned at that time that they had been swindled. There is much evidence that Campbell had actual notice of the fraud, but that he thought he could buy as a third party and hold the premises notwithstanding the fraud. He claims that he obtained his information of the fraud later, and that at the time of his purchase he did not know of it. He admits that he made no inquiry whatever of the parties in possession, paid no attention to the matters already detailed, which purchasers ordinarily do not disregard, and does not show that he paid anything like value for the property. It is true that a person in possession may, by delivering a deed of the premises, estop himself from relying upon his possession as evidence to subsequent purchasers that he claims title; but if the possession of complainants would not operate as absolute notice, it is a circumstance to be considered, in connection with other facts, on the question of notice and good faith. The law will protect a *bona fide* purchaser without notice, but in this case we think the evidence shows that Campbell did not occupy that position.

After Campbell got his deed he went to get possession of the premises, and Stevenson refused to give up possession because the controversy was unsettled. Stevenson and his wife occupied the upper part of the house and had been accustomed to rent the lower portion. Campbell got his deed in January, and the following April it was agreed that Stevenson should retain the upper portion and give Campbell possession of the lower part until the controversy was settled, but Stevenson was to have control of the question who should go in, and if not agreeable to him he was to put the tenant out. Stevenson was to have the use of half the garden and the use of the stable and other out-buildings. This agreement was put in the form of a lease April 4, 1898. This contract ran from April 4, 1898, to August 15, 1898, and contained the agreement that no rent was to be paid until September 1, 1898. Stevenson claimed that he was defrauded in obtaining the paper, but while it was put in the form of a lease no rent was to be paid, and the evidence shows that it was nothing but a compromise agreement between the parties, by which they were to have a sort of joint possession until the controversy was settled. Campbell had the house painted by the tenant who occupied the lower part, and he put a piece of tin over a leak in the roof. There was also an attempt to settle the matter by Stevenson offering to exchange some land in Effingham county with Campbell for the premises, but Campbell refused to do it. Stevenson was already in possession claiming title and claiming that he was defrauded, and Campbell had no possession to turn over to him. There is nothing in the agreement to estop him denying Campbell's title.

The decree is reversed and the cause remanded to the circuit court, with directions to grant prayer of the bill.

Reversed and remanded.

MINNIE CENTER

v.

THE ELGIN CITY BANKING COMPANY.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. MORTGAGES—*release of mortgage by mortgagee after his assignment thereof is recorded is of no effect.* After the first mortgagee has assigned the mortgage and the assignment has been recorded, his subsequent release of the mortgage is of no effect as against the assignee.

2. SAME—*when second mortgage does not release first mortgage.* Where mortgaged premises are conveyed to the wife of the mortgagee and the wife gives a mortgage, in which the husband joins, which recites that they "mortgage and warrant" the premises, the latter mortgage does not, in the absence of express words, operate to release the first mortgage.

3. COVENANTS—*husband releasing dower not liable upon covenants in wife's deed.* A husband who joins with his wife in the conveyance of her real estate for the purpose of releasing his dower is not liable upon the covenants contained in the deed.

CARTWRIGHT, J., dissenting.

Elgin City Banking Co. v. *Center*, 83 Ill. App. 405, affirmed.

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

CARNAHAN & SLUSSER, and HECKMAN, ELSDON & SHAW, for appellant.

BOTSFORD, WAYNE & BOTSFORD, and CUTTING, CASTLE & WILLIAMS, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

Each of the parties to this action holds a mortgage upon the same premises, and the controversy is as to which is entitled to the first lien. Appellant filed her bill in the circuit court of Cook county to foreclose her mortgage, making appellee, with others, a party defend-

ant, and claiming priority of lien. Appellee answered the bill and also filed a cross-bill, setting forth its mortgage and praying that the same might be declared a first lien and foreclosed as such. Issues being regularly joined upon both the original and cross-bills, the cause was referred to a master to take and report the evidence, with his conclusions. He reported in favor of the complainant in the cross-bill, this appellee, but the court sustained exception thereto by appellant and entered a decree declaring her entitled to priority of lien. On appeal to the Appellate Court that decree was reversed, the court holding the complainant in the cross-bill entitled to the first lien and remanding the cause to the circuit court, with directions to enter a decree accordingly. To reverse that judgment this appeal is prosecuted.

The material facts are not disputed, and, as shown by the master's report, are as follows: On the first day of March, 1892, Henry L. Rother, the owner of the lot, mortgaged it to Roland L. Morgan to secure his note for $1100, due three years after date, which mortgage was recorded on April 22 following. On the 24th of June following, Morgan sold and transferred the note, by endorsement, to appellee, the Elgin City Banking Company, and at the same time delivered to it the mortgage, but no formal assignment of the latter was made at that time nor until July 14, 1894, when Morgan executed and delivered to the bank a written assignment thereof, which was filed for record four days later. Soon after the execution of the mortgage Rother sold the premises to one Crawley, and on the first day of May, 1894, Crawley conveyed it to Emma L. Morgan, wife of the said Roland L. Morgan. The next day she, being joined therein by her husband, executed a second mortgage on the lot to one James F. Rogers to secure the payment of her note to him for $1000, and this mortgage and note were subsequently assigned to the appellant, Minnie Center, on May 5, 1894, the assignment being filed for record on the 31st day of the

same month. Subsequently, on August 23 of that year, Roland L. Morgan executed a release deed to Henry Rother, releasing all interest acquired by him under the first mortgage, and that release was recorded on the following day. Interest on the mortgage held by appellant not being paid when due, November 3, 1894, she, by virtue of a clause in the mortgage authorizing her to do so, elected to declare the whole sum of principal and interest due, and filed her bill to foreclose, as before stated.

The first mortgage having been on record at the time the second was taken, the holder of the latter took it with notice of the former and *prima facie* held subject to it. (*Sargent* v. *Howe*, 21 Ill. 148; *Stiger* v. *Bent*, 111 id. 328; *Union Mutual Life Ins. Co.* v. *Slee*, 123 id. 57.) This is not denied by the appellant, but her contention is that by the acts of the first mortgagee, Roland L. Morgan, that mortgage, as against the holder of the second, was released. The position is, that the failure of the bank to place upon record an assignment of the Morgan mortgage subjected it to all the rights which might be maintained by the owner of the second mortgage against Morgan himself, and that his acts in relation thereto are binding upon his assignee, the bank. As to the attempted release by him on the 23d of August, 1894, the position is untenable, for the reason that at the time the assignment by him was upon record, it having been executed in writing on the 14th of the previous July and recorded on the 18th of the same month. At least from and after that date he could do no act to the prejudice of his assignee, all parties being chargeable with notice of the assignment thereafter. Whether, in the absence of the recording of that assignment, the mortgage debt under the first mortgage not being due, the holder of the second lien would have been chargeable with notice of the rights of the bank, under the rule announced in *Keohane* v. *Smith*, 97 Ill. 156, it is unnecessary to consider and determine.

It is again insisted on behalf of the appellant, that the second mortgage, containing full covenants of warranty, operated as a release of the first by Roland L. Morgan, who, as the record showed, was then the holder of the same. It will be seen, however, that the title to the property was then in Emma L. Morgan and she was the mortgagor in the second mortgage, the language of the conveyance being, "Emma L. Morgan and Roland L. Morgan (her husband) mortgage and warrant to," etc. The instrument upon its face does not purport to affect the rights or interest of Roland L. Morgan in the property, except as to his inchoate right of dower. A husband who joins with his wife in a conveyance of her real estate merely for the purpose of releasing his dower is not liable upon the covenants contained in the deed. (*Strawn* v. *Strawn*, 50 Ill. 33; *Sanford* v. *Kane*, 133 id. 199.) We are clearly of the opinion that, in the absence of an express release of the first mortgage in the second, the latter cannot be construed as having that effect or being so intended.

We think the Appellate Court properly held that the bank was entitled to priority of lien over the appellant, and its judgment will accordingly be affirmed.

Judgment affirmed.

Mr. JUSTICE CARTWRIGHT, dissenting:

When the mortgage owned and sought to be foreclosed by appellant was executed and assigned to her, and when the mortgage and assignment to her were recorded, the public records showed that Emma L. Morgan held title to the mortgaged premises, and Roland L. Morgan, her husband, held the mortgage now sought to be foreclosed by appellee. This mortgage was made to said Roland L. Morgan by Henry Rother, a former owner of the premises; and the note secured by it had been sold and assigned to appellee and delivered to it with the mortgage, but no assignment of the mortgage had been executed.

So far as appeared from the records Roland L. Morgan was still the owner. Mr. Sills represented the Morgans, and secured from appellant $1000 on the note and mortgage owned by her, representing it to be a first mortgage. It was made to Rogers for convenience and assigned by him. The note secured was the joint and several note of said Emma L. Morgan and Roland L. Morgan, and the mortgage was executed by both of them. There is no reservation on the part of Roland L. Morgan and the conveyance is not limited to his inchoate right of dower, but the mortgage is in every respect sufficient to pass whatever estate, title or interest, legal or equitable, he had in the premises. Such was the effect of the conveyance. (*Donlin* v. *Bradley*, 119 Ill. 412.) The fact that his name was placed after that of his wife and he was described as her husband will not justify a holding that he only waived dower when he had a further estate in the premises. (*Lake Erie and Western Railroad Co.* v. *Whitham*, 155 Ill. 514.) So far as the public record showed he did have the further estate of a mortgagee in the premises conveyed. Appellant was justified in dealing with him as being the owner of the first mortgage, and between appellant and his secret assignee the case must be decided as though he were in fact the owner seeking to enforce his mortgage as a prior lien. It seems to me that his assignee, standing in his shoes, is precluded from asserting rights superior to those of appellant. There was no presumption of law that he had transferred the note or mortgage, and the agent of the Morgans represented that appellant's mortgage would be a first lien. Appellant had no actual notice of the rights of appellee, and I think she had a right to rely on the record. (*Ogle* v. *Turpin*, 102 Ill. 148.) Appellee might have protected itself by taking an assignment and having it recorded, but negligently failed to do so.

THE CITY OF AURORA

v.

JOHN H. SCOTT.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. NEGLIGENCE—*ordinary care under the circumstances is all the law requires.* One who knows of the rough and uneven condition of a street must use corresponding care in driving over it; but ordinary care under all the circumstances, and not the highest degree of diligence, is all that the law requires.

2. SAME—*question of negligence is for jury if minds of reasonable men would differ.* Whether one who knew the uneven condition of a street was negligent in attempting to drive over it at night, seated on top of a book-case loaded in a spring wagon with some books and firewood, is a question of fact for the jury, to be determined from all the facts and circumstances proved.

City of Aurora v. *Scott*, 82 Ill. App. 616, affirmed.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. CHARLES A. BISHOP, Judge, presiding.

W. J. TYERS, and ALSCHULER & MURPHY, for appellant.

HANCHETT & SCOTT, and HOPKINS, THATCHER & DOLPH, for appellee.

Mr. JUSTICE WILKIN delivered the opinion of the court:

This is an action at law by appellee, against appellant, to recover damages for an injury to his person, alleged to have been caused by the negligence of the city in failing to keep one of its streets in proper repair.

In the summer of 1896 a system of sewers was laid near the center of Galena street, in the city of Aurora, with a number of laterals extending diagonally across the highway. After the pipes were laid the excavations were filled up and the surplus earth ridged up over the

sewer, it being expected that by the settling of the earth the street would become level. After a rain, however, occurring prior to October 6, the ridges settled irregularly, some places below the level and at others remaining in ridges, leaving the surface of the street very uneven. On that day (October 6) appellee was driving along the street soon after dark, and there received the injury complained of, by being thrown from his wagon.

The declaration alleges that the defendant wrongfully and negligently left said street in such rough condition for an unnecessary and unreasonable time, by reason of which, while plaintiff was driving along the same, exercising reasonable diligence to avoid accident, he unavoidably drove his wagon upon said piles of dirt and into said holes, by means whereof he was thrown to the ground and injured, etc.

Upon the trial, at the close of plaintiff's evidence and again at the close of all the evidence, the court was asked to instruct the jury to find for the defendant, but the instruction was refused. The jury returned a verdict for the plaintiff for $2500, and judgment was thereupon entered in his favor for that amount, with costs of suit. The defendant appealed to the Appellate Court, where the judgment of the circuit court was affirmed, and it now prosecutes this appeal.

The chief error assigned and relied upon for a reversal of the judgment below is the refusal of the trial court to give the peremptory instruction asked by the defendant, taking the case from the jury. It is not denied that the evidence produced upon the trial was conflicting as to the fact of defendant's negligence in properly maintaining the street, and that, such being the case, the question was one properly submitted to the jury, but the contention is that the evidence, together with all the inferences which can reasonably be drawn therefrom, neither proves nor tends to prove that the plaintiff himself was at the time of the accident in the exercise of reasonable dili-

gence and care for his own safety. On this branch of the case the plaintiff testified, in substance, that he was returning to his home in Aurora from his farm, just after dark, driving along Galena street with a one-horse spring wagon, loaded with two book-cases, some books and firewood; that he had driven over the street in the morning, going to the farm, and then saw its condition; that in loading the wagon the seat was removed and the cushion placed on one of the book-cases lying on its side, which he occupied as a seat; that in passing over one of the rough places in the street the wagon pitched so far to one side that he was thrown off, striking the ground and receiving serious injury. He testified that he was driving in a walk, kept a tight line on the horse, gave all his attention to the driving, and drove slowly and carefully over the rough places.

It is contended on behalf of appellant that this testimony not only wholly fails to prove due diligence on the part of the plaintiff below to avoid the injury for which he sues, but shows that his own negligence contributed to the accident. The argument is that he was negligent in the manner he was seated upon the wagon, knowing, as he did, the rough condition of the street, and also in driving over the same in a careless manner. It is said his testimony that he drove "carefully" is but the statement of a conclusion, and wholly fails to prove the fact of due care. It will be observed, however, that he does state the manner in which he drove, and it cannot, we think, be seriously claimed that his evidence in that regard does not fairly tend to prove the exercise of proper diligence on his part. It is not contended that the street was so manifestly unsafe as a highway that it was negligence to attempt to pass over it at all. It cannot be fairly said that there was negligence in the manner of loading the wagon or in plaintiff's riding upon the book case as he did. Of course, with knowledge of the roughness of the road he was bound to use corresponding care

to avoid being thrown from his seat; but he was only required to use ordinary care under all the circumstances. He did not, perhaps, use the highest degree of diligence in that regard, but the law made no such demand upon him. Under the facts proved, reasonable minds might well differ upon the question whether he exercised reasonable care or not, which being so, the question was one of fact for the jury. (*Werk* v. *Illinois Steel Co.* 154 Ill. 427, and cases cited.) We are not prepared to say the Appellate Court erred in sustaining the ruling of the circuit court in refusing to direct the jury to find for the defendant.

The other errors alleged to have intervened upon the trial have received consideration and are not regarded of substantial importance. None of them are well assigned. They were properly disposed of by the Appellate Court.

The judgment below will be affirmed.

Judgment affirmed.

WARREN SPRINGER

v.

ROBERT LAW *et al.*

Opinion filed April 17, 1900—Rehearing denied June 8, 1900.

1. JUDICIAL SALES—*what not ground for refusing confirmation of foreclosure sale.* That no personal notice of a foreclosure sale was given the mortgagor, in accordance with an alleged promise of the master in chancery, and that the property sold for an inadequate price, are not grounds for refusing to confirm the sale, since the mortgagor's right of redemption gives him the same benefit as if he had been present at the sale and bid in the property at its full value.

2. SAME—*it is not necessary that written or printed notices of master's sale be posted.* Section 14 of the act on judgments and executions, (Rev. Stat. 1874, p. 623,) requiring written or printed notices of an execution sale to be posted, does not apply to a sale by the master in chancery under a decree, since a court of chancery may provide

for notice without complying with such conditions, provided such notice is reasonable.

3. SAME—*published notice of foreclosure sale by master need not state the amount to be realized.* A published notice of a foreclosure sale by a master in chancery is sufficient which gives the title of the cause and the date of the decree, and states that the sale will be made in pursuance of that decree, which latter showed the amount due.

4. SAME—*original foreclosure decree need not provide for deficiency decree.* Under section 16 of the Mortgage act a personal deficiency decree may be rendered conditionally at the time of decreeing foreclosure, or absolutely after sale and ascertainment of balance.

Springer v. *Law*, 84 Ill. App. 623, affirmed.

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

W. N. GEMMILL, for appellant.

QUIGG & BENTLEY, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellant filed objections to a master's report of a sale made February 4, 1898, by virtue of a decree foreclosing a trust deed made by appellant and his wife. The objections were overruled and the sale confirmed, and a personal decree against appellant for a deficiency was entered. The Appellate Court affirmed the order and decree.

The first objection to the sale was that no notice thereof had been given to or received by appellant, so that he had no opportunity to be present and bid on the premises or secure some person to bid. There was no provision of the decree requiring such personal notice, and there is no requirement of that kind in the law. Appellant, however, claimed that there was an understanding that he should have such notice, and filed the

affidavit of his solicitor that he was led by the master to believe that such notice would be given, and also affidavits of the appellant and others that the property was worth more than the amount for which it was sold. The affidavit of the solicitor did not show what statement or conduct of the master led him to such a belief, and was too indefinite to establish a promise on the part of the master or a reasonable belief induced by anything that the master did or said. The mere inadequacy of price shown by the other affidavits was not sufficient to refuse confirmation of the sale, since appellant had a right of redemption and could have the same benefit by the redemption of the property as if it had sold for its full value. For the same reason he suffered no injury through want of personal notice. He knew of the sale February 7, 1898,—three days after it was made. He could then redeem and realize the full value of the property. On that day the master told appellant's solicitor that it was his universal practice to send notice of sales to the parties, but that his clerk made a mistake in this case. If he had attended the sale and could have bid, as he insists he wanted to, he would have had to pay more for the property than what it was sold for, and pay it in cash. We cannot see that he was harmed in any way by want of personal notice or inadequacy of price.

The decree required the notice of sale to be published in a newspaper for three successive weeks, once in each week, and it was so published, the first publication being more than three weeks prior to the day fixed for the sale, but the appellant objected to the sale as illegal because written or printed notices were not posted as provided for in section 14 of chapter 77 of the Revised Statutes, and also because the notice did not state the amount of indebtedness to be realized from the sale. In *Crosby* v. *Kiest*, 135 Ill. 458, it was decided that the statute referred to does not apply to a sale under a decree by a master. The practice of giving notice equal to what the legis-

lature has deemed necessary in sales on execution was recommended, but the power of a court of chancery to prescribe notice without complying with such conditions was recognized, provided the notice is reasonable. In that case it was thought that such a notice as this was not unreasonable. It was therefore sufficient. The notice gave the title of the cause and the date of the decree, which showed the amount of the indebtedness, and stated that the sale would be made in pursuance of that decree. All the necessary information on that point was furnished by the notice, and we regard it as sufficient without specifying the amount to be made by the sale.

The sale was made for $33,000, and after applying the proceeds there was a deficiency of $3877 reported by the master. For this amount the court entered a personal decree against appellant. It is not contended that he was not liable personally for the debt, but the personal decree is objected to because the original decree did not provide for such personal liability or personal decree in case of a deficiency. Section 16 of chapter 95 of the Revised Statutes provides that such a decree may either be rendered conditionally at the time of decreeing the foreclosure, or absolutely after the sale and ascertainment of the balance due. The method adopted here is expressly authorized by the statute. If the decree for the deficiency had been provided for in the decree foreclosing the mortgage it would have amounted to nothing more than a formal finding that the complainant would be entitled to a decree in the event that the property should not sell for sufficient to pay the debt.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

JAMES MAXWELL *et al.*

v.

AGNES DURKIN.

Opinion filed April 17, 1900—Rehearing denied June 8, 1900.

1. TRIAL—*when improper conduct by appellee's attorney will not reverse.* Improper conduct in the trial court by the attorney for appellee is not ground for reversal where the appellant's attorney was equally responsible for the disorderly manner in which the trial was conducted.

2. EVIDENCE—*what evidence justifies refusal to direct a verdict for defendant.* In an action based upon the negligence of the defendants' coachman in permitting the defendants' horses to escape from the barn, testimony that the coachman left the horses untied while he went into an adjoining room to hang up the harness justifies an inference of negligence, and authorizes the refusal of an instruction to find for the defendants though such testimony is contradicted by the coachman.

3. SAME—*what evidence competent in rebuttal.* Where defendants' coachman has testified that he tied the horses after unharnessing them, evidence that the halters used upon the horses were of a different kind than those described by the coachman is admissible in rebuttal, as tending to contradict the witness upon a material matter and as affecting his memory or truthfulness as to what occurred at the time.

4. SAME—*admission of improper evidence without objection does not authorize its rebuttal.* The admission of improper or immaterial evidence on behalf of one party without objection by the other will not justify a resort by the other to improper or immaterial evidence to rebut it.

5. SAME—*court may admit evidence in chief after defendant has rested.* In an action based upon the negligence of defendants' coachman in leaving horses untied, in consequence of which they escaped from the barn, evidence that they had escaped on previous occasions when left untied by him would be competent as part of plaintiff's evidence in chief, and hence may be admitted at the close of defendants' evidence, even though the circumstances would not authorize its admission in the character of rebuttal evidence.

Maxwell v. *Durkin*, 86 Ill. App. 257, affirmed.

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

MEEK, MEEK, COCHRANE & MUNSELL, for appellants.

BRANDT & HOFFMANN, for appellee.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

On January 26, 1894, appellants' team of carriage horses were being unharnessed in a barn in Chicago by Frank Steiner, their coachman, and escaped from the barn through the back door into an alley, from which they passed into a public street of the city. While they were running back and forth in the street and the coachman and others were trying to stop them, one of them ran over appellee, a child eight years old, who was crossing the street at the regular place on her return from school. Her leg was broken and after her recovery was somewhat shorter than the other, and she brought this suit, by her next friend, to recover damages from appellants. She charged them with liability, first, on the ground that the horses were permitted to go at large in the street in violation of an ordinance of the city of Chicago; and second, because the coachman was negligent in permitting them to escape and go upon the street. There was a trial, at which appellee recovered a judgment, and it has been affirmed by the Appellate Court.

A general complaint is made that the defendants did not have a fair trial on account of the improper conduct of the attorney for plaintiff throughout the trial. The Appellate Court characterized the conduct of the attorneys on both sides as unbecoming and reprehensible, and said that orderly, dignified and respectful conduct on the part of both of them should have been enforced, and, if necessary, the court should have promptly imposed such punishment as would have secured that result, but declined to reverse the judgment, since the attorney for the defendants was equally to blame. We concur in all that was said by the Appellate Court on that subject. The

record is filled with the wrangles of counsel and frequent remonstrances of the trial court, and on one occasion a threat of punishment. It is the duty of a judge presiding at a trial to supervise it and to enforce respectful treatment of the court, the witnesses and the counsel, and it is to be regretted that it was not done in this instance. Witnesses and opposing counsel were insulted, and each attorney charged the other with untruthful statements and endeavoring to induce witnesses to testify untruthfully or of things of which they were ignorant, and the rulings of the court were not obeyed and were treated with no respect whatever. Such conduct, we believe, is not common in courts of record, and tends to injure and degrade the courts and the administration of justice. The proceeding was a disgraceful wrangle instead of a trial, and perhaps the defendants were the sufferers, but they are not entitled to complain. If the attorney for defendants had not been equally responsible for the manner in which the trial was carried on we should not hesitate to reverse the judgment.

There was an instruction asked by defendants at the close of the evidence directing a verdict in their favor. As to the liability alleged on the ground that the horses were at large contrary to an ordinance of the city of Chicago, the court instructed the jury that the plaintiff could not recover, but refused the general instruction. It is insisted that the evidence that the horses were loose upon the street made a *prima facie* case, but no cross-error was assigned upon the giving of the instruction which took that feature of the case from the jury. The court agreed with defendants' counsel that such evidence did not make a *prima facie* case, and the question whether it would or not is not involved here. The refusal to direct a verdict raises the question whether there was evidence fairly tending to establish a cause of action on the charge of negligence. No review of such a record as this for the purpose of determining such a question could be

entirely satisfactory to the reviewing court. So far as the accident is concerned, it was not disputed, and, aside from the measure of damages, the only controversy was whether the coachman negligently left the horses standing on the barn floor without tying or securing them, and on that subject there were but two witnesses,—the coachman, and Charles E. Smith, who was washing buggies in the barn. Out of this scanty material a record of over seven hundred pages was made, composed largely of material already alluded to, and alleged expert testimony on the subject of taking a collar off from a horse, and the usual, proper and customary method of taking a harness off. On the only material question affecting the liability of the defendants there is a direct dispute between the coachman and the witness Smith. The latter testified that the coachman left the horses standing, not tied, on the floor of the barn while he left the room with the harness and went into the adjoining wash-room to put it away. If the testimony of this witness was credited by the jury it would justify an inference of negligence in consequence of which the horses escaped from the building, and this testimony required a submission of the issue to the jury. It was not error to refuse to direct a verdict.

After the evidence for the defendants was closed, the plaintiff offered testimony that different halters were used upon the horses at the time of the accident from those testified to by the coachman, and also that he had left these horses standing on the barn floor, after they had been unharnessed, without halters on, at different times during two years prior to the accident, and that they had run out of the barn several times before this occasion. Objections were made to this testimony, which were overruled, and the rulings are assigned as error. The evidence that the halters used on the horses were not of the kind testified to by the coachman tended to contradict him in a material matter; and, as affecting his memory or truthfulness as to what occurred at the time,

was proper in rebuttal. It is contended that the other evidence was admissible, in rebuttal, to show general habits of carelessness on the part of the coachman, because there had been some evidence that he was considered a careful and competent man. The defendants had made inquiries of witnesses on the subject of his competency and habits of care, and plaintiff's objections in such cases were sustained and the evidence was not admitted. One of the defendants, however, stated in his testimony, without objection, that the coachman was a good driver, and he considered him a careful man and trusted his family with him. The court did not let defendants go into that subject when objection was made, and it would be manifestly unfair to exclude offered testimony of that kind, as was done, and then allow rebuttal evidence because one of the defendants made the statement in question without objection. If plaintiff was to be allowed to prove that the coachman was habitually careless, the defendants should have been allowed to introduce all their evidence tending to prove his competency and habits of care. Furthermore, this court has adopted the view that the admission of improper or immaterial evidence on behalf of one party without objection will not justify a resort by the other party to immaterial and irrelevant evidence to rebut it. The general rule is, that parties cannot create a right to try an immaterial issue or introduce irrelevant evidence by mere silence or consent, when they might have had the adverse evidence kept out or stricken out. It is in the power of a party, by objection, to prevent the introduction of evidence not relevant to the issue, or to have it excluded when introduced, or, by instruction, to direct the jury to disregard it, and the public interest demands that the time of the court shall not be wasted and the record filled with irrelevant or immaterial evidence. (*Wickenkamp* v. *Wickenkamp*, 77 Ill. 92; *Stringer* v. *Young*, 3 Pet. 320.) In the latter case Chief Justice Marshall declined to decide whether there might

be a case where irrelevant evidence introduced would be of such a character as to be ineffaceable from the minds of the jury by instructions or otherwise, so that a party is to be permitted to contradict it. But if there could be such a case this is not one. In this case the defendants were not charged with any negligence in employing an incompetent coachman, and the pleadings raised no issue upon his competency or habitual negligence. Evidence of his general habits in that respect was not relevant to any issue in the case. The ground of plaintiff's claim was that the coachman left these horses standing on the barn floor without halters on, and that such act was negligent. Evidence that he had previously left them standing in that way and that they escaped from the barn under such circumstances, we think would have been competent as a part of the evidence in chief for plaintiff, for the purpose of showing notice to the coachman of the probable result in case he left them standing in that way. If the horses had manifested a disposition to run out of the barn under such circumstances, and had actually done so on several occasions, the coachman might reasonably expect that the same result would ensue if they were so left on this occasion. Although the evidence was not proper in rebuttal, it was within the discretion of the court to admit it at the time it was admitted.

There was nothing wrong with the instructions, which were as favorable to the defendants as they could ask. All the propositions insisted upon that have the slightest merit were contained in instructions given to the jury, and as we find no error which would justify a reversal, the judgment must be affirmed.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

BELLE HOWARD

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. INDICTMENT—*effect of omitting words "thereby" and "then and there."* Under section 6 of division 11 of the Criminal Code, concerning the sufficiency of indictments, the omission of the word "thereby" from the allegation "with intent then and there to produce a miscarriage," and of the words "then and there" from the allegation "did thereby unlawfully * * * produce a miscarriage," is not a fatal defect.

2. EVIDENCE—*what sufficient to authorize putting of hypothetical question.* The court may permit a hypothetical question to be put to an expert witness if there is evidence tending to prove each of the facts stated in the question upon which the opinion of the witness is asked, since to require the court to determine in advance whether the question embraced all the facts would be an invasion of the province of the jury.

3. SAME—*when statements by injured person are not competent.* Declarations of an injured person as to when and by whom she was injured (if neither dying declarations nor a part of the *res gestæ*) are not competent to prove the innocence of one charged with inflicting the injury, since, if competent to prove innocence, they would be competent to prove guilt.

4. ABORTION—*one charged with murder in producing abortion may be convicted of manslaughter.* Under section 3 of division 1 of the Criminal Code, declaring that if the death of the "mother" results from an abortion the person producing it shall be guilty of murder, one charged with murder in producing an abortion upon "a woman pregnant with child" may be convicted of manslaughter, since the greater crime includes the lesser, and the word "mother" as so used means a woman pregnant with child.

5. The court reviews the evidence and declines to disturb the verdict finding the plaintiff in error guilty of manslaughter.

WRIT OF ERROR to the Circuit Court of Peoria county; the Hon. L. D. PUTERBAUGH, Judge, presiding.

ISAAC C. EDWARDS, and FRANK J. QUINN, for plaintiff in error:

No count charges in apt language either the crime of murder or manslaughter. No count sufficiently joins the

intent and overt act. The criminal intent and overt act must unite. *Slattery* v. *People*, 76 Ill. 217; *United States* v. *Riddle*, 5 Cranch, 311; *State* v. *Hollynay*, 41 Iowa, 200; *State* v. *Wilson*, 30 Conn. 500.

The intent and overt act must concur in point of time. *United States* v. *Fox*, 95 U. S. 670; *Clements* v. *State*, 50 Ala. 117; 4 Blackstone's Com. 21.

The weapon or instrument must be alleged to have been used with intent "thereby" to cause the injury. *Jones* v. *State*, 21 Tex. App. 349; *Anonymous*, 2 Hayw. (N. C.) 140; *People* v. *Aro*, 5 Cal. 208; *Williams* v. *State*, 19 Tex. App. 409.

The time and place of the infliction of the cause of death, and the death, should be set forth. *Commonwealth* v. *Hunt*, 45 Mass. 111; *People* v. *Wallace*, 9 Cal. 30; *People* v. *Cox*, id. 32; *Chapman* v. *People*, 59 Mich. 357; *State* v. *Lakey*, 65 Mo. 217; *Reggs* v. *State*, 26 Miss. 51; *State* v. *Parker*, 43 N. H. 83.

When life and liberty are at stake, every circumstance connected with the alleged crime, and which may tend to excuse or palliate the conduct of the party charged or explain the motives, should be submitted to the jury. *Williams* v. *People*, 54 Ill. 422; *Comfort* v. *People*, 54 id. 404; *Balkburn* v. *State*, 23 Ohio St. 146; *Siebert* v. *People*, 143 Ill. 511; *Railway Co.* v. *Sutton*, 42 id. 438; *Jones* v. *People*, 166 id. 264; *Cook* v. *People*, 177 id. 146.

The defense has a right to show the conversations between the parties a short time before the offense, even if the State introduced no evidence of the conversations. *Foster* v. *State*, 8 Tex. App. 248; *Mack* v. *State*, 48 Wis. 271.

A self-serving declaration is admissible when part of *res gestæ*. *State* v. *Walker*, 77 Me. 488; *United States* v. *Craig*, 4 Wash. C. C. 729; *State* v. *Crank*, 2 Bail. 66.

Representations made by a sick person to a medical attendant as to his symptoms are competent. *Johnson* v. *State*, 17 Ala. 618.

Evidence of other injuries is competent. *State* v. *Harris*, 63 N. C. 1.

A verdict for manslaughter cannot be based upon the allegation in the indictment.

E. C. AKIN, Attorney General, JOHN DAILEY, State's Attorney, (JOSEPH A. WEIL, and E. U. HENRY, of counsel,) for the People:

In the following cases the sufficiency of indictments for burglary was before the Supreme Court, and the word "thereby" was not used to qualify the intent: *Lyons* v. *People*, 68 Ill. 271; *Brennan* v. *People*, 110 id. 535; *Kincaid* v. *People*, 139 id. 213; *Watson* v. *People*, 134 id. 374; *Gillock* v. *People*, 171 id. 307. Why not necessary so to qualify any intent in an assault with intent to commit rape, (*Porter* v. *People*, 158 Ill. 370,) or assault with a deadly weapon, or assault to kill? *Allen* v. *People*, 82 Ill. 610; *Hamilton* v. *People*, 113 id. 34; *Myers* v. *People*, 156 id. 126.

Declarations are not admissible if they amount to no more than a mere narration of a past occurrence. 2 Jones on Evidence, sec. 348.

Declarations of a party to his physicians or to other persons as to the cause of the injury are not admissible when not made at the time of the injury. 2 Jones on Evidence, sec. 352, p. 782; *Railway Co.* v. *Sutton*, 42 Ill. 438; *Collins* v. *Waters*, 53 id. 485.

Declarations, to become a part of the *res gestæ*, must be contemporaneous with the principal fact sought to be proved. *Hayes* v. *State*, 40 Md. 635.

Under an indictment for murder by abortion a conviction for manslaughter will be sustained. *Earll* v. *People*, 73 Ill. 329.

Mr. JUSTICE WILKIN delivered the opinion of the court:

At the September term, 1899, of the circuit court of Peoria county, the plaintiff in error was convicted of the crime of manslaughter and sentenced to the penitentiary for an indefinite term, to reverse which judgment she prosecutes this writ of error.

The indictment, consisting of six counts, charged her with the crime of murder in causing the death of Etta Binkley, in violation of section 3 of the Criminal Code, fixing the penalty for the crime of producing an abortion.

Before the arraignment, counsel for defendant entered their motion to quash the indictment and each count thereof, which was overruled, and this ruling is the first assignment of error insisted upon. It is conceded that if there is any good count in the indictment upon which the conviction can be properly based the judgment below should not be disturbed although other counts might be held bad. It is also conceded upon the part of the People that under the evidence the verdict of the jury can only be sustained under the first or second count. It is only necessary, therefore, under this assignment of error, to consider these counts.

The first count alleges "that Belle Howard, *alias* Belle Shotwell, and Fred Patee, late of the said county, on the second day of April, in the year of our Lord one thousand eight hundred and ninety-eight, at and within the county aforesaid, did unlawfully, feloniously and willfully use a certain instrument to the grand jurors aforesaid unknown, by then and there forcing, thrusting and inserting the said instrument into the womb and private parts of one Etta Binkley, to-wit, Hughretta Binkley, then and there being a woman pregnant with child, and in the peace of the People, with intent then and there to produce the miscarriage of the said Etta Binkley, to-wit, Hughretta Binkley, and did thereby unlawfully, feloniously and willfully, with malice aforethought, cause the miscarriage of said Etta Binkley, to-wit, Hughretta Binkley, it not being then and there necessary to cause such miscarriage for the preservation of the life of the said Etta Binkley, to-wit, Hughretta Binkley, the said Belle Howard, *alias* Belle Shotwell, and Fred Patee, then and there well knowing the use of said instrument as afore-

said, at the time aforesaid, in the manner aforesaid, would produce such miscarriage, by reason whereof the said Etta Binkley, to-wit, Hughretta Binkley, from the second day of April aforesaid, in the year aforesaid, did languish, and languishing did live to the 19th day of April in the year aforesaid, on which 19th day of April aforesaid, in the year aforesaid, said Etta Binkley, to-wit, Hughretta Binkley, died, contrary to the form of the statute," etc.

It is insisted this count is fatally defective, because in the allegation, "with intent then and there to produce the miscarriage of the said Etta Binkley," the word "thereby" does not follow "then and there," the position of counsel being, that the charge should have been with intent, etc., "thereby" to procure the miscarriage. Forms of indictments are to be found to that effect, and the decisions of some courts go to the extent of holding that the use of the word here omitted is necessary, but no such rule exists in this State. It is further objected that in the next averment, "and did thereby unlawfully * * * cause the miscarriage of said Etta Binkley," the words "then and there" should have followed the word "thereby," the contention here being, that without the omitted words there is no sufficient charge as to the county or State in which the miscarriage was produced and the death occurred. This position is also unsound. Taken in connection with the preceding averments, the time and place of causing the abortion and the death of the deceased sufficiently appear. Section 6 of division 11, chapter 38, of the Revised Statutes, providing that every indictment which charges the offense so plainly that the nature of the offense may be easily understood by the jury, was intended to and does meet each of the foregoing objections to the first count. It is a copy of a similar indictment held good in *Beasley* v. *People*, 89 Ill. 571. The motion to quash it was properly overruled. The evidence being applicable to this count, it is unnecessary to consider the criticisms made upon the second.

The errors alleged to have been committed upon the trial are the rulings of the court in the admission and exclusion of testimony, and the giving of instructions to the jury on behalf of the People.

Etta Binkley, an unmarried woman about thirty-five years of age, was employed by the Patee Bicycle Company, in the city of Peoria, as a stenographer and type-writer, and performed those duties from about Christmas, 1897, until the evening of April 1, 1898. While thus employed she lived at the boarding house of George H. Lilly, occupying a room with his grown daughter. At the noon hour of the first day of April she called at the residence of the defendant, who was a practicing physician, having an office in her residence, about four squares from the Lilly boarding house, and there met the defendant and had a short conversation with her. Up to the time she quit work she had performed her duties each working day, to all outward appearances being in normal health. On the morning of the second of April, about half-past six o'clock, she again went to the house of defendant and was admitted by her and directed to a room on the second floor. Soon after, defendant sent her breakfast to the room. The girl brought with her that morning a hand-bag, containing a night dress, wrapper, a fountain syringe and a bottle containing about two ounces of ergot. One Ida Kennedy was then employed as a professional nurse by the defendant, and it appears, both from her testimony and that of the defendant herself, that about ten o'clock in the forenoon of that day the deceased went to the office on the first floor, where she remained alone with the defendant from twenty to thirty minutes and then returned to her room in care of the nurse. She suffered from hemorrhage of the private parts and gave evidence of pain. Prior to four or five o'clock in the afternoon the defendant visited her in her room, and soon after again called her to the office, where

she remained alone with defendant some twenty or thirty minutes. The nurse was then called and accompanied her to her room. She testifies that soon after returning to the room her pulse increased, and she experienced a copious discharge of blood and water. She remained in the house, being visited frequently by the defendant and attended by the nurse, until the following Saturday evening, April 9, when the defendant took her in a buggy back to the boarding house and left her alone on the porch, where Mr. Lilly found her as he was closing the doors previous to retiring, and describes her as being in a very helpless and distressed condition. He admitted her into the house, where she remained during the night, occupying the same room and bed with Miss Lilly. The next morning, Sunday, April 10, about nine o'clock, she went to the Cottage Hospital, four or five blocks distant, where she was received and immediately put to bed. A member of the medical staff, Dr. Otho B. Will, was immediately summoned. He describes her condition at that time as "trembling, breathing rapidly, pulse 140 per minute, temperature a fraction over 102; she was vomiting about once in every three minutes." From a further examination, followed by an operation, he discovered that a miscarriage had taken place, a portion of the placenta still remaining in the womb in a decayed condition, producing pus and a disagreeable odor. She remained in the hospital, in the care of nurses, under Dr. Will's treatment, until the 19th of the same month, when she died from puerperal septicæmia. The body was removed to the home of her parents in Dublin, Indiana, and then buried. On the 23d it was exhumed and a post mortem examination made, which showed that death had resulted from an abortion. Dr. Will gave it as his opinion, from the growth of the placenta, that the pregnancy was of about four months' duration. Other testimony of physicians was to the effect that she had been pregnant from four to five months.

So far there is no material disagreement between the attorneys for the respective parties. It is conceded that an abortion had been produced upon the deceased and her death caused thereby. The evidence of the attending physician at the hospital, and that of those who made the post mortem examination, clearly established that fact, and as to the abortion having taken place the defendant testified: "From my examination of her she had aborted before she came to my house; she might have aborted forty-eight hours before, and it might have been longer." Other parts of her testimony are to the same effect, her treatment, as she says, being for conditions resulting from a miscarriage.

The controversy upon the trial was as to when and by whom the abortion was produced, the theory of the prosecution being that it was caused by the defendant, in her office, on the second day of April, while that of the defense was that it had been previously produced, either by the deceased herself or some third party by her procurement, and that all the defendant did after taking charge of her was to treat her for the consequences of the act. On this issue the prosecution, having introduced testimony as to the apparent condition of the health of the deceased prior to her going to the defendant's house and of her having performed her usual duties as stenographer and type-writer, put to certain physicians these hypothetical questions: "State whether or not in your judgment a woman who has had an abortion performed upon her, or had performed one upon herself, could attend to her regular duties and there would be nothing in her condition to show any illness to her friends and acquaintances; and state whether or not an abortion could have been performed upon Etta Binkley under these circumstances, she being from four to four and one-half months in pregnancy, and not be observed by her friends." These and similar questions were objected to by counsel for the defendant upon the ground that they did not em-

brace all the facts. The objection was overruled, the defendant excepted, and it is now insisted that the evidence was improperly admitted.

There was evidence tending to prove each of the facts stated in the hypothetical questions upon which the opinions of witnesses were asked, and that was all that was necessary. (Thompson on Trials, sec. 604, *et seq.*) Whether the facts stated in a hypothetical question are sufficiently established by the proof is to be decided by the jury. "The fact that a question is a hypothetical one implies that the truth of some statement of facts is assumed for a particular purpose, and if such a question could be based upon undisputed facts alone it would never be asked in any case where an issue of fact arose." (Underhill on Evidence, p. 272.) To require the court to determine in advance that questions so put embraced all the facts would be to take from the jury the weight to be given to the evidence. We think the court properly overruled the objection.

The nurse, Ida Kennedy, having been examined on behalf of the People, on her cross-examination was asked a number of questions to which objections were sustained as not being proper cross-examination, and this also is urged as reversible error. No good purpose would be served by following counsel in their extended argument upon the competency of these questions. Our examination of the testimony in chief, and the cross-interrogatories to which objections were sustained, has satisfied us that no substantial error was committed in that regard. The material facts sought to be proved by the cross-examination were subsequently given in evidence on behalf of the defendant in chief. At least she was not deprived of the benefit of any such facts offered to be proved.

The alleged error in the exclusion of evidence most earnestly relied upon is the refusal of the court to allow the defendant, and the nurse, Ida Kennedy, to state con-

versations with and statements made by the deceased. The questions all called for answers tending to prove but the two facts in controversy: when, and where and by whom, was the abortion produced. We have fully considered the argument of counsel in their contention that the statements of deceased were competent for any such purpose, and are clearly of the opinion that it cannot be sustained. The position leads to the inevitable conclusion that statements of an injured person as to when and by whom she was injured, (being neither dying declarations nor those made at or so near the time of the injury as to be a part of the *res gestæ*,) are competent to prove the innocence of one charged with having inflicted the injury, and if competent to prove innocence, equally so to prove guilt. Each of the declarations here sought to be put in evidence was clearly within the rule which excludes mere hearsay testimony. The authorities in support of this conclusion are numerous, many of which are cited in *Siebert* v. *People*, 143 Ill. 571.

It is again assigned for error that the court improperly gave certain instructions to the jury at the request of counsel for the People. It is not, however, claimed that these instructions announced, in positive terms, erroneous rules of law, but that they were so drawn as to be misleading, to the prejudice of plaintiff in error. It may be conceded that some of them are more or less subject to criticism and should have been refused. Standing alone they might have misdirected the jury, though we think even that highly improbable. Every instruction asked on behalf of the defendant, twenty-one in number, was given, and they presented every feature of her defense, and announced the rules of law applicable thereto in the most favorable light to her. No one can read the entire series of instructions given to the jury as they appear in this record, and for a moment believe that the jury could have been misled thereby to the prejudice of the accused.

Another ground of reversal urged is that the court below erred in overruling defendant's motion in arrest of judgment, first, because a conviction of the crime of manslaughter could not be legally had under the indictment; and second, that the indictment itself was substantially defective. It is admitted that the first contention is contrary to the decision of this court in *Earll* v. *People*, 73 Ill. 329, but an attempt is made to avoid the force of that decision by pointing out certain differences in the language of the statute then in force and that of section 3, *supra*. We regard the language of the present statute as substantially the same as that of the former. The lesser crime, manslaughter, is included in the greater, murder. The word "mother," as used in section 3, means "a woman pregnant with child," and this we think so clear there can scarcely be two opinions upon the subject. The attempted argument on this point is entirely too technical and refined.

What we have already said as to the sufficiency of the first count of the indictment must dispose of the second ground of the motion in arrest.

It is finally insisted that the evidence produced upon the trial failed to sustain the verdict, and for that reason the motion for a new trial should have been sustained. Under this head it is asserted the evidence wholly fails to show that the abortion, if produced, was not done as necessary for the preservation of the mother's life. This contention is certainly made without due regard to the testimony. Not only the opinions of the physicians but the testimony of others as to the apparent healthy condition of Etta Binkley up to the time the abortion (by whomsoever committed) was produced, as well as her condition when she came under the treatment of defendant, testified to by the latter and the nurse and also as found by Dr. Will at the hospital, prove beyond a reasonable doubt that she had no other ailment than that which

resulted from the miscarriage. All this testimony is wholly unexplained and uncontradicted.

The other branch of this contention is, that the evidence failed to prove the defendant's guilt with that degree of certainty required by the rules of the criminal law,—and this we regard as the most important question raised in the case. We have endeavored to give it the most painstaking consideration. The unfortunate victim of the crime being dead, the prosecution was driven to rely upon circumstantial evidence to sustain the charge. There was testimony tending to show that when the deceased went to the house of defendant she was apparently well. She took with her articles of clothing indicating that she expected to remain there for a time and to be put under treatment. The conduct of the defendant in receiving her and immediately assigning her to a room, without conversation, strongly tends to prove that she went there by previous arrangement. The visits to the office during the day, as proved and not denied, afforded the defendant ample opportunity to commit the offense. The manner in which she subsequently removed her from her house, and the deplorable condition in which she left her alone at the boarding house, were acts inconsistent with her entire innocence. It is also in proof that about the time the deceased died, defendant left the State and remained absent until arrested and brought back on this charge. From the time she left her patient at the boarding house, almost dying, she manifested no interest or anxiety as to her welfare. As a physician she must have known that all the circumstances surrounding herself and the deceased were such as to cast suspicion upon her, and it is incompatible with her innocence that she should have taken no steps whatever to explain these circumstances or exculpate herself from suspicion. It is true, the evidence of Miss Lilly is to the effect that for two or three nights prior to the second of April the girl

was not in her usual health; that she had hemorrhages, which the witness presumed to be the result of her menstruation period. It also appears from the testimony of Ida Kennedy and the defendant that on the morning of the second of April, as she passed up the stairway to the room assigned her, drops of blood fell from her person on the carpet and matting, and this testimony, both of Miss Lilly and the nurse and defendant, is uncontradicted. Physicians were called to testify on behalf of defendant, who gave opinions to the effect that the miscarriage had taken place prior to these hemorrhages. The State offered the testimony of other physicians who stated that, although very unusual, women do menstruate during pregnancy, and it seems to be the theory of counsel that the hemorrhage observed by Miss Lilly, the nurse and the defendant on the morning of the second of April are explained in this manner. With that position we cannot agree. The extreme improbability of menstruation at her period of pregnancy, together with the fact that an abortion took place about that time, refutes to our minds the idea of those hemorrhages resulting from natural causes. We do not, however, think that it follows, from all the facts and circumstances in proof, that the miscarriage was produced prior to the time the deceased went to defendant's house, without any guilty knowledge or agency on the part of the defendant. The girl, in all probability, had, with or without the counsel of others, attempted to bring about the miscarriage, and the hemorrhages may have resulted from such attempts; but when all the facts and theories of physicians testified to (which necessarily are only theories or matters of opinion) are carefully weighed, it cannot be said that the jury were unwarranted in their conclusion that the defendant was guilty.

On the whole record there appears no reversible error, and the judgment of the circuit court must be affirmed.

Judgment affirmed.

GOMER E. HIGHLEY

v.

THE AMERICAN EXCHANGE NATIONAL BANK.

Opinion filed April 17, 1900—Rehearing denied June 7, 1900.

1. FRAUD—*judgment creditor may have previous colorable transfer set aside.* A judgment creditor may have a previous conveyance set aside as fraudulent where the transfer is merely colorable and a secret trust exists in favor of the debtor.

2. WITNESSES—*a party is not conclusively bound by statements of his witness.* The general rule that a party may not impeach the character of a witness he has voluntarily called is not infringed by the introduction of other testimony disproving the statements of such witness as to facts and circumstances involved.

3. EVIDENCE—*what will not overcome sheriff's return.* That it appears from the testimony in a creditor's bill proceeding that prior to the rendition of judgment the creditor had collateral security for the debt does not overcome the force of the sheriff's *nulla bona* return of the execution issued on the judgment.

4. The court reviews the evidence in this case at length, and holds that the assignment of stock sought to be set aside in this creditor's bill proceeding was merely colorable and that the real ownership remained in the debtor.

Highley v. *American Exchange Nat. Bank*, 86 Ill. App. 48, affirmed.

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.

STEERE & FURBER, (W. W. GURLEY, and H. G. STONE, of counsel,) for appellant.

SWIFT, CAMPBELL & JONES, for appellee.

Mr. JUSTICE BOGGS delivered the opinion of the court:

The Appellate Court for the First District affirmed the decree of the superior court of Cook county entered on the hearing of a bill in chancery to which the appellant, Highley, and Charles D. Hauk and others were de-

fendants and the appellee bank complainant. The decree was rendered by the superior court, and affirmed by the Appellate Court, on the theory the appellee bank became the judgment creditor of said Charles D. Hauk and that execution had been returned *nulla bona* on said judgment; that said Hauk was the owner of certain shares of the capital stock of the Mutual Fuel and Gas Company, held by the Illinois Trust and Savings Bank as collateral security for certain indebtedness of Hauk to the bank; that the appellant claimed to have purchased the said stock from the said Hauk and to be the owner thereof; that such contracts of purchase of said stock by appellant, Highley, were but colorable and fraudulent, and inoperative as against the rights of the appellee as a judgment creditor of the said Hauk, and that the proceeds of the sale of the stock (the stock having been sold during the pendency of the proceeding by mutual agreement of all the parties and reduced to money) should be applied first to the payment of the amount due from Hauk to the said Illinois Trust and Savings Bank, the remainder to the discharge of the indebtedness from Hauk to the appellee bank which had been reduced to judgment, as aforesaid,—that is, the bill was treated as a creditor's bill. The parties defendant to the bill (except appellant, Highley,) submitted to the decree of the superior court. Highley appealed to the Appellate Court, and to this court from an adverse decision of the Appellate Court.

We will consider the objections of appellant in the order presented in his brief.

First, appellant urges it did not appear the indebtedness of Hauk to the appellee bank was contracted prior to the alleged colorable transfer of the interest of Hauk in the stock to him, and that it is error to set aside an alleged, or even an actual, fraudulent transfer in favor of a creditor whose demand arose after the transfer had been made. In *Springer* v. *Bigford*, 160 Ill. 495, it was said (p. 500): "The rule is, that subsequent creditors cannot

have a conveyance set aside as fraudulent unless it is merely colorable and a secret trust exists in favor of the vendor, or it is made with a view of defrauding future creditors." If, then, the transfer in question was not a real transaction, but a mere pretense to enable Hauk to apparently dispossess himself of the ownership of the stock, the beneficial interest therein actually remaining in him, it is clear the objection of the appellant cannot be sustained. Whether such was the character of the transaction will be discussed in disposing of the second of appellant's objections.

Appellant's second objection is, the evidence is insufficient to sustain the finding that the transfer of the stock from Hauk to the appellant was merely colorable and fraudulent as to the appellee bank. The appellant was introduced as a witness by the appellee. The chancellor was fully justified in regarding his statements as to the purchase of the stock as improbable, unreasonable, and inconsistent with the view there was an actual sale and purchase of the stock. There were three hundred and eight shares of the stock. Two hundred and forty-eight shares had been deposited by Hauk in the Illinois Trust and Savings Bank as collateral security for indebtedness of Hauk to the bank, and sixty shares were afterwards issued and delivered to the bank under an arrangement which authorized the issuance of stock at par to holders of original stock. The appellant testified that in February, 1894, he purchased the two hundred and forty-eight shares then in the possession of the bank, and in September of the same year purchased sixty shares also then held by the bank; that he and Hauk were brothers-in-law and that Hauk made his home at his (witness') house; that he paid $2000 for the first block of stock; that he made the payment by his check drawn on his bank; that the check was returned to him in the usual course of business but that he did not know what became of it, but that he believed he had destroyed it, according to

his usual custom to destroy checks; that he had also destroyed the statement rendered to him by the bank on which he had drawn the check; that he did not have the check book from which the check was drawn; that it was his belief he had destroyed the check book at the end of the year, as that was his custom; that he had no account or memoranda of any kind relating to that payment and that he received nothing from Hauk showing the transfer to him; that he had no distinct remembrance of the time or place where the transaction occurred, but believed it was at his home; that the stock was not listed and had no market price; that he made no inquiry of any one about the value of the stock; that he did not go to the bank, where the stock was held as collateral, to ascertain whether the stock was there or the amount of the debt it was pledged to secure; that he knew nothing about the terms of the pledge of the stock to the bank except what Hauk told him, and that Hauk stated to him he had borrowed something over $30,000 on the stock, and that he took Hauk's statement as to the number of shares; that Hauk then owed him $9800, and that he knew Hauk could not pay it at that time and that he made no effort to secure it. The statements of the witness as to the details of the purchase of the sixty shares of stock were substantially the same as those made as to the purchase of the other shares. Other testimony tended strongly to establish the alleged transfer of the stock was colorable, merely, and that the real ownership remained in Hauk. It was proven that after the alleged purchase by the appellant of the two hundred and forty-eight shares of stock, in February, 1894, the Illinois Trust and Savings Bank loaned to Hauk additional sums of money on the collateral security of the two hundred and forty-eight shares of stock aforesaid, as follows: August 14, 1894, $2250; September 12, 1894, $2250; November 3, 1894, $4500; that on December 31, 1894,—which, it is to be observed, was after the date of both alleged purchases

of the stock by the appellant,—all the notes which the bank held against Hauk,—seven in number,—bearing various dates from November 19, 1892, to November 3, 1894, were consolidated into one new note amounting to $37,728.29, and upon the same date the bank made an additional loan to Hauk of $530.02, and took from him a separate note therefor, which was paid January 25, 1895, and all the three hundred and eight shares of stock aforesaid were held by the bank as collateral security for each and all of the aforesaid notes. It further appeared the dividends accruing on the stock were collected by the savings bank and applied in payment of the indebtedness due from Hauk, without any discrimination between loans made before or after the alleged purchase of the stock by the appellant.

Mr. Orr, cashier of the appellee bank, testified that on the 19th day of March, 1895, he sought to procure said Hauk to assign his interest in these shares of stock which still remained in the Illinois Trust and Savings Bank, to the appellee bank as security for Hauk's indebtedness to the appellee bank; that Hauk told him he had assigned his interest in that stock to the appellant to secure the sum of $9800 which he owed to Highley; that at witness' request Hauk brought the appellant, Highley, to the appellee bank and an interview occurred there between the witness and the appellant, in which the witness related to the appellant the conversation which had occurred between the witness and Hauk, which was to the effect that appellant held an assignment of the stock to secure the said sum of $9800 said to be due from Hauk to appellant. The witness testified he then asked the appellant to waive his claim on the stock as security for Hauk's indebtedness and to take instead certain securities based on the building and leasehold estate of the Rossmore Hotel, and that Highley refused to make the proposed change of securities, but did not make any denial of the statements made by Hauk with reference to the interest

or right of appellant in the stock in question. It further appeared that on the day of the conversation just referred to between the witness Orr and the appellant and Hauk, Hauk went to the Illinois Trust and Savings Bank and there caused formal assignment of all the stock to be made from Hauk to the appellant.

There is no force in the contention of the appellant the testimony of Mr. Orr was intended to impeach the appellant, whom the appellee had introduced as a witness, and that for that reason the testimony of Orr should have been excluded. A party is not conclusively bound by the statements made by a witness whom he has called to give testimony. He may call another witness to disprove such statements. (*Rindskoph & Co.* v. *Kuder*, 145 Ill. 607.) The general rule a party may not impeach the character of a witness he has voluntarily introduced is not infringed by the introduction of other testimony disproving the statements of such witness as to facts and circumstances involved in the hearing.

There was some evidence tending to show, and appellant insists was sufficient to establish, that Hauk advised the bank by letter, in April, 1894, that he had sold the two hundred and forty-eight shares of stock to appellant. Appellee contends it was not proven the letter was received by the bank. That view is the most probable in view of the conduct of both Hauk and the bank after the date of the letter. Hauk after that date continued to use the stock as security for loans obtained from the bank and the bank accepted the stock as security for such loans, which is irreconcilable with the view Hauk had notified the bank that he had no further interest in the stock and that it belonged to the appellant.

We think the chancellor was fully justified in reaching the conclusion the transaction between Highley, the appellant, and Hauk was merely colorable, and that the beneficial interest and real ownership of the stock remained in Hauk.

It appeared in the testimony of the witness Orr that the appellee bank held, as security for the indebtedness of Hauk, certain bonds secured by mortgage on the Rossmore Hotel property. Appellant contends it was essential to the right of the appellee bank to maintain a creditor's bill, it should have been proven that it did not have those bonds when the bill was filed. The remarks with relation to the bonds was but incidental, and the subject was not further pursued or referred to by either party. It was proven that the appellee bank obtained a judgment against Hauk after the time referred to by Orr when testifying as a witness relative to the bonds, and that execution on that judgment was afterwards returned *nulla bona*. The return of the sheriff on the execution establishes *prima facie* that Hauk had no property subject to levy at that time. The bill was filed at a later date, and the mere fact the bank had the bonds previous to the rendition of the judgment is not sufficient to overcome the return of the officer.

The decree will be affirmed. *Decree affirmed.*

THE CHICAGO EDISON COMPANY
v.
MARY MOREN, Admx.

Opinion filed April 17, 1900—Rehearing denied June 14, 1900.

1. TRIAL—*when peremptory instruction for defendant must be refused.* It is proper to refuse a peremptory instruction to find for defendant if there is evidence tending to establish the cause of action.

2. MASTER AND SERVANT—*servant may assume that he will not be exposed to unnecessary danger.* A servant ordered by one in authority to do a dangerous act is not required to balance the degree of danger and decide with absolute certainty whether he may safely do the act; and his knowledge of such danger will not defeat a recovery for injury, if, in obeying his master's command, he acted with that degree of prudence which an ordinarily prudent man would have used under the same circumstances.

Chicago Edison Co. v. *Moren*, 86 Ill. App. 152, affirmed.

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 A. TRUDE, Judge, presiding.

This is an appeal from a judgment of the Appellate Court affirming a judgment of the superior court of Cook county in an action brought by the appellee, against the Chicago Edison Company, to recover for the death of Thomas Moren, which occurred while the deceased was in the service of appellant as a laborer, removing brick from under a certain boiler belonging to appellant.

The facts resulting in the death of Thomas Moren, which led to the litigation, as stated by the Appellate Court, and which are borne out by the evidence introduced on the trial, are substantially as follows:

The Chicago Edison Company employed the Merchants' Transfer Company to take down and remove from the plant of the former its boiler and engines. The boiler weighed between 26,000 and 28,000 pounds, and was from eighteen to twenty feet in length, and rested on a brick foundation about three and a half feet high. By the terms of the contract between the companies the Merchants' Transfer Company had the exclusive right to determine the manner of removal of the boiler and the machinery and appliances with which such removal would be effected. The work of removing the brick foundation so that the boiler might be lowered onto skids preparatory to removal from the building was the work of appellant and was exclusively under its control and direction. The transfer company sent to the appellant's building its foreman, John Brown, with a gang of its men and the necessary appliances to hoist and remove the boiler. When Brown arrived with his men at appellant's building, appellant's foreman, Patrick Tully, was there with a gang of appellant's men, of whom Thomas Moren, appellant's intestate, was one. At that time the

brick had been removed from beneath one end of the boiler, and that end was temporarily supported by iron slabs or legs, and the south end rested in an arch in the brick foundation. It was hoisted in the usual way and by means of the usual appliances. John Brown, foreman of the transfer company, testified: "The chain we used was a three-quarter-inch chain. There were two drums to that boiler. We used two chains, each three-quarter-inch. Each chain was wrapped twice around each drum. Overhead they were fastened by a pulley and hook—fastened by a pulley. The pulley was fastened by the hook. These chains were around the different drums, and united up there in the hook that was fastened to a beam above. It was one chain, but three times in the hook. The chain was not only twice around each drum, but came together and hung double in the hook. The chains were iron, and capable, as was estimated, of supporting a weight of 29,000 pounds used singly and twice that weight when used as above described." VanCourt, treasurer and cashier of the Merchants' Transfer Company, and who had general supervision of the business of that company, was present when Brown, the foreman of the company, was ready to commence hoisting the boiler from the foundation, and seeing some of appellant's men working under the boiler, he spoke to Tully, appellant's foreman, telling him that he had better take his men from under the boiler until it should be hoisted and blocked up. The men then came from under the boiler. After so cautioning Tully, VanCourt went to lunch and did not return until after the accident hereinafter mentioned had occurred. After VanCourt left, the boiler was hoisted about six inches above the brick foundation and about four feet or a little more above the floor, no one at that time being under it. When it was hoisted, Brown and several of the men under him got on top of it and swung, surged and tested it, after which Brown says he said, "It is all right," and then the men went back under the boiler.

Tully, appellant's foreman, testified that Brown said, "All right; go ahead," and also testified that he (Tully) told Moren to go to work under the boiler after it was hoisted. In about five or ten minutes after Brown said it was all right the boiler fell. Moren at that time was under the south end of it, working at the brick foundation, and was crushed by the falling boiler and killed.

AMERICUS B. MELVILLE, and FRANK J. CANTY, for appellant.

JUDD & HAWLEY, for appellee.

Mr. JUSTICE CRAIG delivered the opinion of the court:

The declaration contained five counts, but all of the counts except the fifth were practically abandoned and a recovery was had under that count. In the fifth count it was in substance averred that defendant was engaged in removing a certain large boiler in Chicago; that the removal was made under the superintendence of the foreman of the Merchants' Transfer Company and the engineer of the appellant; that Thomas Moren was then and there in the employ of the appellant, the Chicago Edison Company, working as a laborer, and under the directions and orders of said foreman above mentioned and said engineer; that in order to remove said boiler a chain was placed around said boiler, and said boiler was lifted or hoisted a distance of six inches from the brick foundation upon which said boiler had previously rested, and the said Moren and other laboring men were instructed by the said foreman and the said engineer to proceed to work beneath the said boiler, which was of great weight, to-wit, the weight of eighteen tons, and to remove the brick foundation upon which said boiler had previously rested, which instructions the said Moren and his other fellow-laborers proceeded to carry out; that it was well known to the said foreman and the said engineer at the

time they instructed the said Moren to work beneath the said boiler that it was dangerous for any person to work beneath the said boiler swinging upon chains, as aforesaid, but such danger was unknown to said Moren, who was an ordinary laboring man and unfamiliar with machinery and mechanics; that it was then and there the duty of the defendant to have prevented the said Moren, or any other laborer or person, from going beneath or working beneath the said boiler, yet the said defendant, acting through its said servants and employees, willfully, knowingly, carelessly and negligently failed to prevent the said Moren from going beneath said boiler and working beneath said boiler, but, on the contrary, ordered the said Moren to go beneath the said boiler and work beneath the said boiler, which he, the said Moren, then and there did, and whilst the said Moren was thus working beneath said boiler the chain by which said boiler was suspended broke, and the said boiler fell upon the said Moren and crushed and killed him, without any fault on his part, and while he was using good care and diligence for his own safety, etc.

At the close of the evidence the appellant requested the court to instruct the jury to find for the defendant, but the court refused the instruction, and the ruling of the court is relied upon as error. We have often held that where there is evidence fairly tending to establish a cause of action it is not error to refuse a peremptory instruction to find for the defendant. Adhering to that rule, we cannot say the court erred here. In *Illinois Steel Co.* v. *Schymanowski*, 162 Ill. 447, it was held that a servant ordered by the master to perform a particular work has the right to assume that he will not be exposed to unnecessary perils and to rest upon the implied assurance that there is no danger. In *Chicago Anderson Pressed Brick Co.* v. *Sobkowiak*, 148 Ill. 573, it was held that where an act was performed by a servant in obedience to a command from one having authority, and the performance

of the act is attended with a degree of danger, it is not required that such servant shall balance the degree of danger and decide with absolute certainty whether he must do the act or refrain from it; and his knowledge of the attendant danger will not defeat his right of recovery, if, in obeying the command of the master, he acted with that degree of prudence that an ordinarily prudent man would have used under the circumstances. Here, Moren was in the service of appellant as a common laborer, working under one Tully, who was boss or foreman. He had nothing to do with the hoisting of the boiler, and he was not chargeable with inquiry whether the manner adopted in hoisting it was safe or unsafe. The foreman of appellant, Tully, ordered Moren and the other laborers who were working with him to go under the boiler after it had been hoisted, and remove the foundation brick, when he knew it was dangerous to work under a boiler suspended, as this one was, by chains, as he had been told that it was not safe for men to work under the boiler unless it was blocked. There was, in our judgment, ample evidence from which the jury might properly have found that appellant was guilty of negligence, and the instruction to take the case from the jury was properly refused by the court.

It is, however, said, if there is any liability it is upon the Merchants' Transfer Company. That company had a contract with appellant to move the boiler, but it had nothing to do with the removal of the brick from under the boiler. That part of the work belonged to appellant, and it was the removal of the brick from under the boiler, under the order of appellant's foreman, which caused the death of Moren.

The appellant, so far as appears, has had a fair trial. The record is free from substantial error, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

CHARLES B. EGGLESTON *et al.*

v.

HARRIET B. MORRISON *et al.*

Opinion filed April 17, 1900—Rehearing denied June 20, 1900.

APPEALS AND ERRORS—*conditional deficiency decree is not a final, appealable order.* The effect of a conditional deficiency decree entered in advance of a foreclosure sale is merely to establish that complainant will be entitled to a personal, money decree when the amount of the deficiency is ascertained, and hence such a decree is not a final one, from which an appeal may be taken.

Eggleston v. *Morrison*, 84 Ill. App. 625, affirmed.

APPEAL from the Branch 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.

N. M. JONES, for appellants.

STILLMAN & MARTYN, and EDGAR L. MASTERS, for appellees.

Mr. CHIEF JUSTICE CARTWRIGHT delivered the opinion of the court:

Appellants appealed from a decree of the superior court of Cook county for the foreclosure of a mortgage and directing the sale of the mortgaged premises, and the Branch Appellate Court for the First District affirmed the decree.

It is here complained that the decree is a joint one, for the gross sum of $4161.88, in favor of six different persons, as complainants, holding separate notes for different amounts, and including a joint solicitor's fee of $175. The decree finds the separate amount due each complainant on his note and orders payment to the complainants of the said sums due them, respectively, and so far as the debts are concerned counsel is in error in

his construction of the decree. There was a solicitor's fee allowed to the complainants jointly, but whether that was right or wrong is immaterial, because it did no harm to the defendants.

The foregoing are presented as minor propositions, and the principal complaint is that the court in the decree found that Eggleston, Mallette & Brownell were personally liable for the indebtedness, and ordered that in case of sale of said premises after the coming in and confirmation of the master's report of sale, in case any deficiency should be shown in the amount due complainants, they should be respectively entitled to execution therefor against said defendants and one Dawson, who was also found personally liable. Said defendants are grantees of the mortgaged premises subsequent to the execution of the mortgage, and the bill alleges that they assumed and agreed to pay the mortgage indebtedness.

It is urged against this feature of the decree that said defendants did not become personally liable, and that the decree is premature. The finding or conclusion of the court upon that subject in the decree is not premature, but the appeal from such finding is premature because the decree is not final in that respect but provisional merely. Section 16 of chapter 95 of the Revised Statutes provides that in foreclosure suits a decree may be rendered for any balance of money that may be found due to the complainant over and above the proceeds of the sale, and execution may issue for the collection of such balance. The decree may be rendered conditionally at the time of decreeing the foreclosure, or it may be rendered after the sale and the ascertainment of the balance due. Originally a mortgagee was relegated to his action at law to obtain a judgment for any deficiency that might be due him after the sale of the mortgaged premises, but this statute makes provision by which he may, in the same proceeding, obtain a decree *in rem* for a sale of the property and a decree *in personam* if there should be a

deficiency. While the statute authorizes the decree to be entered conditionally at the time of decreeing the foreclosure, its only effect is that of a finding that the complainant is entitled to a personal decree for any balance that may be due after the application of the proceeds of the sale. An appeal will not lie from a finding or conclusion, either of law or fact, not accompanied by any final judgment or decree, and there can be no personal decree until there is a judicial determination of the amount due. That amount can only be ascertained after the sale, and such a decree as this is not final in that respect. (*Cotes* v. *Bennett*, 183 Ill. 82.) This decree lacks all the forms of a personal decree for the payment of money, and no action could be brought upon it. Whether anything, or how much, will ever be due from the defendants is unknown. It has never been judicially determined that there is, or will be, any balance of money due over and above the proceeds of the sale. Unless a decree should be rendered against the defendants in the future, they will be entirely unaffected by the interlocutory finding or conclusion of the court that they will be liable for a deficiency in case it shall exist. The observations of the Appellate Court and their opinion on the subject of liability for a possible deficiency that may or may not exist, relate to an interlocutory finding and not a final decree. The question whether a personal decree will be valid in case there should be a deficiency and such a decree should be entered is a mere theoretical one. If a personal decree should ever be entered, it may not be for such an amount as would authorize the review of it in this court.

So far as the decree was final between the parties we find no error in it, and the judgment of the Appellate Court affirming it in those respects is affirmed.

Judgment affirmed.

E. A. SHERBURNE

v.

FRANK D. HYDE.

Opinion filed April 17, 1900—Rehearing denied June 20, 1900.

1. PRACTICE—*section 9 of Practice act, concerning scire facias, applies to partnership suits.* Section 9 of the Practice act, providing that where summons is served on one or more defendants, but not upon all, the plaintiff may proceed to trial and judgment against the defendants served and afterwards have a *scire facias* issued against those not served, applies to suits against partnerships. (*Sandusky* v. *Sidwell*, 173 Ill. 493, overruled in part.)

2. SAME—*scire facias provided for in section 9 is not an alias writ.* The *scire facias* provided for in section 9 of the Practice act, while a second summons, is a summons of a special character, and does not come within the term "*alias* writ."

3. ATTACHMENT—*section 9 of Practice act applies though partners are named as garnishees in attachment.* Where partners are named as garnishees in attachment but the writ is served on one, only, and returned "not found" as to the other, who is within the jurisdiction of the court, the plaintiff may proceed to judgment against the one served, and have a summons in the nature of a *scire facias* issued against the other to make him a party to the judgment.

BOGGS, C. J., and CARTWRIGHT, J., dissenting.

Hyde v. *Casey-Grimshaw Marble Co.* 82 Ill. App. 83, reversed.

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

E. A. SHERBURNE, JOSEPH W. MOSES, and WILLIAM CATRON RIGBY, for appellant:

At common law, where several defendants were sued on a joint undertaking, the plaintiff was not permitted to take judgment against any until all were served with process, or until those who could not be served were proceeded against to outlawry. Our statute has substituted the return of *non est inventus* for that of outlawry, and

authorizes judgment against defendants who are in court by the service of process. *Tiffany* v. *Breese*, 3 Scam. 499.

In actions on contracts against several, when all are served with process, the judgment must be against all or none, unless some of the defendants make a personal defense, as, infancy, lunacy, bankruptcy and the like. By statute, judgment may be taken against a part of the defendants who alone have been served with process. *Felsenthal* v. *Durand*, 86 Ill. 230.

When several defendants are sued, whether on a partnership or other obligation, and all the obligors or promisors are made defendants, and a part only are served and the process is returned not found as to the rest, the plaintiff may take judgment against the defendants who are before the court.

F. W. BECKER, for appellee:

Failure to serve one partner invalidated the attachment and gave the lower court no jurisdiction of the *res*. This defect is incurable, as an *alias* attachment cannot issue, (*Dennison* v. *Blumenthal*, 37 Ill. App. 385; *Pack* v. *Bank*, 172 Ill. 192;) nor a *scire facias*, which is only an *alias* summons, (*Sandusky* v. *Sidwell*, 173 Ill. 493,) and is not issuable in case of a firm obligation.

Where debts are due from two or more persons jointly, as, for instance, in partnership, instead of jointly and severally, all must be served. 8 Am. & Eng. Ency. of Law, (1st ed.) 1166; Shinn on Attach. and Gar. sec. 608; *Warner* v. *Perkins*, 8 Cush. 518; *Hoyt* v. *Robinson*, 10 Gray, 371; *Heith* v. *Pfeifle*, 42 Mich. 31.

Mr. JUSTICE CARTER delivered the opinion of the court:

The appellant, Sherburne, brought attachment in the superior court of Cook county against the Casey-Grimshaw Marble Company, a non-resident corporation, upon certain promissory notes and an open account which he

held against that company, and in the attachment writ named William Grace and Frank D. Hyde, as partners under the firm name and style of Grace & Hyde, as garnishees. The writ was served on Hyde and returned not found as to Grace. The defendant to the attachment not appearing, after statutory notice judgment by default was entered against it. Hyde answered the interrogatories to Grace & Hyde, that his said firm was indebted to the marble company upwards of $1000, but that he was informed and believed that at the time of the service of the writ said indebtedness had been assigned to August R. Meyer. Meyer appeared and filed his interplea, to which the court sustained a demurrer and rendered judgment against Grace & Hyde, garnishees, on Hyde's answer. This judgment was reversed by the Appellate Court because Grace had not been served, and the cause was remanded. (*Grace* v. *Casey-Grimshaw Marble Co.* 62 Ill. App. 149.) The cause having been re-docketed, the superior court rendered judgment against Hyde alone, as garnishee. On Hyde's appeal this judgment was reversed by the Appellate Court without remanding the cause. The judgment being less than $1000 a certificate of importance was granted, and the cause is before us on Sherburne's appeal.

The question presented for decision is, whether or not it was error to render judgment against Hyde alone for the partnership debt of Grace & Hyde. Had Grace appeared to the action or been served with process, it is settled law that the judgment must have been against both or neither. (*Kimmel* v. *Shultz*, Breese, 169; *Russell* v. *Hogan*, 1 Scam. 552; *Hoxey* v. *County of Macoupin*, 2 id. 36; *Felsenthal* v. *Durand*, 86 Ill. 230; *Byers* v. *First Nat. Bank*, 85 id. 423.) But as Grace did not appear, and, though within the jurisdiction and named in the writ, was not served, it is contended by appellant that it was proper practice to take judgment against Hyde alone, and have a summons in the nature of a *scire facias* issued against

Grace to cause him to appear in said court and show cause why he should not be made a party to the judgment, as provided in section 9 of the Practice act, (Rev. Stat. p. 776,) which reads: "If a summons or *capias* is served on one or more, but not on all of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and the plaintiff may, at any time afterwards, have a summons, in the nature of *scire facias*, against the defendant not served with the first process, to cause him to appear in said court, and show cause why he should not be made a party to such judgment; and upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally summoned or brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered, and the judgment of the court against such defendant shall be that the plaintiff recover against such defendant, together with the defendant in the former judgment, the amount of this debt or damages, as the case may be." Appellee contends, on the other hand, that that section applies only to obligations which are joint and several, where suit might be brought against one, only, and not to obligations of a co-partnership, and cites *Sandusky* v. *Sidwell*, 173 Ill. 493, where, in the language used by the court in the opinion, it was in substance so said.

Upon further consideration of the case at bar upon rehearing we have reached the conclusion that said section of the Practice act does apply to partnership contracts and obligations, as well as to other joint, or joint and several, contracts and obligations, and that what was said to the contrary in the case cited should be so far qualified. But, as we there held, section 3 of chapter 76 of the Revised Statutes, declaring, "all joint obligations and covenants shall be taken and held to be

joint and several obligations and covenants," has no reference to contracts of a co-partnership. (*Coates* v. *Preston*, 105 Ill. 470.) In other States, by statute, suits may be brought against one of several partners on a partnership contract. But not so in this State. Here all ostensible members of the co-partnership must be joined. (*Page* v. *Brant*, 18 Ill. 37.) They are declared against as partners, and the statute confers no authority to sue and declare against one, only, as in case of other joint debtors. But it does not follow that section 9 of the Practice act, above quoted, does not apply to suits against appellants, who are partners. It does not follow that because the plaintiff cannot elect to sue one, only, of several partners who are jointly liable, but must sue all, that judgment may not be rendered, as this section provides, against one, or more than one, who are served, and the prescribed steps then taken to bring in and make the remaining members of the firm parties to the judgment. A plaintiff cannot, in any case, bring his action against more than one and less than all of his joint debtors, but under this statute he may sue all, whether partners or not, and take judgment against so many as are served or who appear, and the rest may be made parties to the judgment by summons in the nature of *scire facias*. But whether they are so made parties to the judgment or not, the judgment is valid because the statute authorizes it. So it is seen that the power of the court to render judgment against one or more joint debtors where all are sued, and thus to produce a severance if it becomes necessary, does not depend on the right of the plaintiff to elect to produce such severance himself, by bringing his suit against a part, only. The reasons, therefore, for holding that it could not have been the intention of the legislature, by section 3, to declare partnership liabilities to be joint and several, would not be sufficient to authorize the conclusion that section 9 was not intended to apply to defendants sued as partners, and the section itself contains

nothing excluding such defendants from its operation. "At the common law, where several defendants were sued upon a joint contract, the plaintiff was not entitled to judgment against any of them until all were served with process or until those not served were prosecuted to outlawry. * * * But to remedy the inconveniences of the common law practice," the statute "has provided that a return of *non est inventus* as to a part of the defendants shall authorize the plaintiff to proceed to trial and judgment against those upon whom service has been had, and authorizes the issuing of a summons in the nature of a *scire facias*, to make the defendants not served parties to the judgment." (*Evans* v. *Gill*, 25 Ill. 100; *Davidson* v. *Bond*, 12 id. 84.) In *Felsenthal* v. *Durand*, 86 Ill. 230, which was a suit against several defendants as partners, it was said: "By statute, judgment may be taken against a part of the defendants who alone have been served with process," and we are of the opinion it should be so held, otherwise we would be compelled to hold, without sufficient warrant, that it was the intention of the legislature to exclude all defendants sued as partners from the operation of the statute, and as to them only to retain the common law practice of outlawry.

But the point is made that the case at bar was in attachment, and that Grace and Hyde were named as garnishees, and that the proceedings against them are controlled by the statutes relating to attachments and garnishments, and not by the Practice act, and *Pack, Woods & Co.* v. *Savings Bank*, 172 Ill. 192, is cited to support the contention that no second writ can issue against Grace. It was held in that case that the statute does not provide for the issuing of an *alias* writ of attachment, and it is urged here that another writ, if issued and served upon Grace, would necessarily be another garnishee process based upon the attachment, and would, upon the authority of the case cited, be unauthorized. But would a summons in the nature of a *scire facias*, if issued

in this case under the statute, be an *alias* writ? We think not, in the sense the term is employed. Section 8 provides for an *alias* common law writ. But while the *scire facias* authorized by section 9 would be another summons, yet it is one of a special character, which the statute authorizes only where a part, but not all, of the defendants have been served and judgment has been rendered against those served, and which commands the defendants not served by the first writ to appear and show cause why they should not be made parties to the judgment rendered against their co-defendants. Clearly, it does not come within the term "an *alias* writ." True, neither the Attachment nor the Garnishment act authorizes such a writ, yet section 26 of the former provides that "the practice and pleadings in attachment suits, except as otherwise provided in this act, shall conform, as near as may be, to the practice and pleadings in other suits at law." And while this section and the Practice act do not authorize an *alias* attachment writ, they do authorize a summons in the nature of a *scire facias* to make a defendant coming within their provisions, as Grace does in this case, a party to the judgment against his co-defendant. There is nothing in *Kirk* v. *Elmer Dearth Agency*, 171 Ill. 207, cited by counsel, which holds to the contrary. If, as there held, the Attachment act had made different provisions affecting the practice in question, it would control; but as it has not, the Practice act controls.

The judgment of the Appellate Court is reversed and the judgment of the superior court is affirmed.

Judgment reversed.

BOGGS, C. J., and CARTWRIGHT, J., dissenting.

SOLOMON FRIEDMAN *et al.*

v.

THEODORE PODOLSKI.

Opinion filed June 21, 1900.

JURISDICTION—*when county court cannot exercise chancery powers.* The county court has no general chancery powers, and hence has no jurisdiction to entertain a petition filed, in voluntary assignment, by certain parties to compel a third party to turn over to the assignee accounts of the insolvent which it is alleged such party has in his possession; nor can the court adjudicate as to whether the latter's title to such accounts is fraudulent.

Podolski v. *Friedman*, 85 Ill. App. 284, affirmed.

APPEAL from the Branch Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

The abstract of the record shows the following proceedings in this case: On May 31, 1898, the firm of S. Levy & Co., composed of S. Levy and I. Berkenfield, executed and delivered to A. L. Stone, as assignee, a voluntary assignment for the benefit of creditors. On June 1 following, the bond of the assignee was duly approved. On June 4, 1898, Sol Friedman & Co. filed in the county court their petition, alleging that Theodore Podolski has property, assets and effects of said insolvents in his possession that should be delivered to the assignee herein as his property; that Podolski is collecting accounts due and owing to the insolvents, which should be delivered to the assignee herein and which belong to the assignee. Prayer was made for a rule upon Podolski to show cause why he should not surrender and deliver said property and assets to said assignee; that he be restrained from disposing of said assets or collecting said accounts until the further order of the court, and for general relief. On the same day an order was entered by the court re-

quiring Podolski to answer the petition by June 6, at 9:30 A. M. On that day Podolski entered a limited appearance, objecting to the jurisdiction of the county court to grant the prayer of the petition, saving and reserving all objections, and praying that the petition may be stricken from the files. The several grounds of objection stated were, in substance, that the petition failed to show upon its face facts necessary to give the court jurisdiction. It seems from the bill of exceptions that on that day there was a hearing, defendant insisting that the cause stood upon the petition and demurrer thereto. Counsel for the petitioners inquired: "Do you now file a demurrer to the petition as amended?" To which counsel for defendant answered: "I will allow the original one to stand." Thereupon the court overruled the demurrer, or, as it is termed, plea to the jurisdiction, and entered a rule to answer, and leave was asked on behalf of the defendant to plead instanter. An answer was thereupon filed by which the respondent still objected to the jurisdiction of the court, specially limiting his appearance for answer. He denied that he was, at the date of the execution and delivery of the deed of assignment, in possession of or had any property, assets or effects of said insolvents, or any accounts of insolvents; that he had not since, nor at the time of the execution and delivery of the deed of assignment, received any property, assets, effects or accounts belonging to said insolvents, from said insolvents, or either of them, or the assignee, or any one representing them, or either of them, or the assignee; that he was absolute and sole owner on May 28, 1898, of all accounts in his possession, and that the insolvents, on and after that date, had no title or claim thereto, possession thereof or interest therein, in law or equity, wherefore, still protesting, etc., to the jurisdiction of the court, prays to be hence dismissed with costs. This answer was signed and verified by the affidavit of Podolski. It seems that the filing of this answer was regarded as

presenting an issue in the case, and a trial was then had. The only witness introduced on behalf of the petitioners was the respondent, Theodore Podolski, except that the attorney for the petitioners testified that the petitioners had a claim against the insolvents, S. Levy & Co., amounting to more than $600, which remained unpaid, and this was all the testimony offered by either party in the case.

The court granted the prayer of the petition, reciting in its order that it found all the substantial averments of said petition to be true; that the court had jurisdiction of the defendant and of the subject matter of the petition; that the defendant had accounts in his possession which should be delivered to the assignee, and he was ordered to "forthwith surrender and deliver all accounts by him received from said insolvents, or either of them, due and owing to said insolvents by various customers of said insolvents, to said assignee," and also restrained and enjoined him from collecting or interfering with said accounts. To the entry of this order the defendant duly excepted and prayed an appeal, which was first allowed upon his entering into bond in the sum of $250 within ten days; but this order was subsequently changed, requiring him to give bond not only running to said S. Friedman & Co., but to A. L. Stone, assignee, in the penal sum of $4000, which latter order was complied with and the case removed by appeal to the Appellate Court for the First District. It was there assigned to the branch court, where the order of the county court was reversed and the cause remanded, with directions to dismiss the petition. To reverse that judgment this appeal is prosecuted, A. L. Stone, the assignee, attempting to join in the appeal.

MOSES, ROSENTHAL & KENNEDY, and A. BINSWANGER, for appellants.

JOHN E. KEHOE, and JAMES R. WARD, for appellee.

Per CURIAM: The Appellate Court, by Mr. Justice HORTON, delivered the following opinion as to the law of the case:

"It will not be seriously contended but that, under said petition and answer thereto and the testimony heard by the county court, a question is presented which can be determined only by the application of chancery rules by a court exercising chancery jurisdiction. The county court has no general chancery jurisdiction or powers and none are conferred by the Assignment act. (*Ide* v. *Sayer*, 129 Ill. 230, 235; *Preston* v. *Spaulding*, 120 id. 208, 232; *Atlas Nat. Bank* v. *More*, 152 id. 528, 538.) 'The county court, proceeding under the Assignment act, derives its powers solely from the statute.' *Hooven* v. *Burdette*, 153 Ill. 672.

"There are certain issues as to which the county court has chancery powers which are specially conferred by the Assignment act. When property has come into the physical possession of the assignee under the provisions of the said act, that court has exclusive jurisdiction and power primarily to adjudicate and determine the rights of all parties claiming title thereto or an interest therein. That is the principle upon which the leading case of *Hanchett* v. *Waterbury*, 115 Ill. 220, was decided. In that case, as in the prior case of *Freydendall* v. *Baldwin*, 103 Ill. 325, the property was in the actual physical possession of the assignee. The county court has such jurisdiction, also, as to the disbursements and distribution of any fund in the hands of the assignee, but where the assignee has never obtained actual possession of the property in question, and where the title to such property is claimed by another who has possession thereof so far as physical possession is possible, the county court has no jurisdiction in a chancery proceeding to adjudicate as to such title. *Davis* v. *Chicago Dock Co.* 129 Ill. 180, 194; *Preston* v. *Spaulding*, 120 id. 208.

"The property in question in the case at bar (if we may call it property) consists of open or book accounts,

—choses in action. Of course, the assignee could never take physical possession of them. They had been formally assigned to the appellant by the insolvents, and such assignment had been delivered to him before the making of the assignment by reason of which the county court acquired jurisdiction. The appellant had thus acquired the equitable title to such accounts and the possession thereof so far as that was possible, and the legal right to collect the same and to enforce the collection thereof by proceedings at law. Even if the legal title to said accounts was vested in the assignee, as contended by the appellee, (as to which we express no opinion,) that does not change the rights of appellant. Neither does chancery jurisdiction for that reason attach to determine the question as to whether the title of appellant to said accounts is fraudulent and void. It seems to have been understood by counsel and by the court below that said accounts were in the possession of appellant, for the decree provides that he shall 'surrender and deliver' them to the assignee. The county court, however, had no jurisdiction to adjudicate as to whether appellant's title was fraudulent, and thus to determine the relative rights of the appellant and the assignee. *Davis* v. *Dock Co. ante*, (p. 194); *Preston* v. *Spaulding*, *ante*, (p. 232); *Ide* v. *Sayer*, *ante*, (129 Ill. 234.)

"As between the appellant and the insolvents, said assignments of accounts are valid and binding, so far as this record shows their respective rights. It is contended that such assignments are fraudulent. To determine that question is peculiarly within the province and jurisdiction of a court of chancery.

"As counsel have argued at length the question of the jurisdiction of the county court as though this was a case between the appellant and the assignee, we have thought it proper to consider the case thus far upon that theory. But the assignee is not a party, either in this appeal or in the county court. The case before this court is upon

the Friedman petition. As stated, that petition does not show that the petitioners have any interest in the matter. In so far as the form indicates the forum, it is a chancery proceeding. The prayer is for relief such as only a court exercising chancery jurisdiction can grant. The order appealed from says that the court doth 'order, adjudge and decree.' It was heard by the court without a jury and without the waiving of the right of trial by jury. It is perfectly apparent that court and counsel all regarded it as being a proceeding in chancery; but as that court had no general chancery jurisdiction, and as no jurisdiction or power was conferred upon it by the Assignment act to hear and determine any question or issue such as is here presented, that court had no jurisdiction whatever to entertain said petition or to enter the decree to reverse which this appeal is prosecuted."

We have carefully considered the extended arguments filed in this court on behalf of the respective parties, and concur in the foregoing views of the Appellate Court.

Manifestly, the petition upon which this whole proceeding must rest was insufficient to give the court jurisdiction, and the demurrer thereto should have been sustained. Treating the answer as waiving the demurrer, still it was wholly insufficient to give the court jurisdiction to render the decree made thereon. A. L. Stone, the assignee, was not a party to the proceeding in the county court or Appellate Court, and is improperly joined as an appellant in this court. Moreover, the testimony of defendant, who was introduced as the witness of petitioners, disproved every material allegation of the petition, and, as above stated, no other evidence was offered in support of these allegations. As shown by the bill of exceptions the court did not believe his evidence, and it is not for us to say that it was bound to do so; but his evidence being discredited, there was nothing upon which to base the decree except the naked allegations of the petition, and therefore, aside from the rule which denies

to a party the right to question the truthfulness of a witness introduced by himself, we are at a loss to perceive how it can be said that there is evidence in this record to support the decree of the county court. In any view of the case the judgment of the Appellate Court is correct and must be affirmed.

Judgment affirmed.

ADOLPH LARSON *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed June 21, 1900.

This case is controlled by the decisions in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Davidson* v. *City of Chicago*, 178 id. 582.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: The ordinance in this case contains the same defect which was condemned in the ordinances in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Davidson* v. *City of Chicago*, 178 id. 582. The decisions in those cases must control here.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

MARY E. SILL *et al.*

v.

C. B. SILL *et al.*

Opinion filed June 21, 1900.

1. APPEALS AND ERRORS—*right of guardian to appeal though guardian ad litem is appointed.* A guardian who is made a party to a suit for partition and assignment of dower, individually and as guardian for a minor heir, may appeal for herself and for the minor notwithstanding a guardian *ad litem* is appointed, who acts for the minor in the preparation of the case and at the trial.

2. DOWER—*heir cannot set up Statute of Limitations against dower right.* An heir cannot set up the Statute of Limitations against the dower right since it is his duty to assign dower, and for that reason his possession is not regarded as adverse to the owner of the dower estate.

3. SAME—*heirs are entitled to all the rents until demand for dower.* A husband's dower interest is a mere expectancy which rests in action, and he is entitled to his share of rents and profits as against the heirs or children of the wife only from the time his dower is legally demanded or set off or assigned, and if no demand is made or petition filed the heirs are entitled to the whole of the rents.

4. SAME—*adult heirs may assign dower by verbal agreement to share rents.* The owner of the dower estate may, by arrangement with adult heirs or devisees, permit them to rent the land upon the understanding that he is to receive one-third of the rent as his dower.

5. SAME—*neither minor nor guardian has power to assign dower.* A minor cannot make such an assignment of dower as will be binding upon him on arriving at age, nor has the guardian power to make such assignment for him, and hence a demand upon the guardian for dower is of no legal effect.

6. SAME—*when share of dower contributed by minor must be accounted for.* The amount of dower contributed by a minor from his interest, after demand upon the guardian, must be accounted for by the owner of the dower estate up to the time of his making a legal demand in the form of a prayer for assignment of dower in such minor's interest, which may be contained in his answer to a bill by an heir for partition and assignment of dower.

7. HOMESTEAD—*residence on land is essential to a homestead estate.* Under the statute a homestead can only be acquired in a farm or lot occupied by the householder as a residence.

APPEAL from the Circuit Court of Iroquois county; the Hon. R. W. HILSCHER, Judge, presiding.

This is a bill for partition and assignment of dower, filed on January 24, 1899, by Charles B. Sill, one of the appellees herein, against the appellee, Edmund Sill, and the appellant, Helen Irene Sill, and the appellant, Mary E. Sill individually and as guardian of Helen Irene Sill. The property sought to be partitioned is eighty acres of land in Iroquois county, being the south half of the south-east quarter of section 4, township 28, north, range 14 west, etc.

The facts as disclosed by the pleadings and proofs are substantially as follows: One Helen M. Sill died intestate on April 15, 1888, being then the owner seized in fee of said eighty acres, and leaving surviving her her husband, the said Edmund Sill, and her two sons, the appellee, Charles B. Sill, and one James W. Sill, since deceased, said sons being her only heirs-at-law. Upon the death of Helen M. Sill, Charles B. Sill and James W. Sill each owned an undivided one-half of said eighty acres subject to the dower of their father, Edmund Sill. James W. Sill died intestate on October 20, 1892, leaving the appellant, Mary E. Sill, his widow, and the appellant, Helen Irene Sill, his only child and heir-at-law. After the death of James W. Sill, and on January 24, 1893, a posthumous child was born to Mary E. Sill, named Bernice Sill. After the death of James W. Sill and the birth of said posthumous child, Helen Irene Sill and Bernice Sill, the only surviving heirs-at-law of James W. Sill, were the owners each of an undivided one-fourth part of said eighty acres, subject to the dower therein of their mother, Mary E. Sill, and also subject to the dower in the whole of the premises of their grandfather, Edmund Sill. On April 8, 1893, Bernice Sill died intestate, leaving her mother, Mary E. Sill and her sister, Helen Irene Sill, her only heirs-at-law. Upon the death of Bernice Sill, the interests of the parties in the eighty acres were as follows: Edmund Sill was entitled to an estate of dower in the whole of the eighty acres; Charles B. Sill was

owner of an undivided one-half of the eighty acres, subject to the dower of his father, Edmund Sill; Helen Irene Sill was the owner in fee of an undivided four-twelfths, or one-third, of the eighty acres, subject, first, to the dower of her grandfather, Edmund Sill, and subject, secondly, to the dower of her mother, Mary E. Sill; Mary E. Sill was the owner of an undivided one-sixth, or two-twelfths, of the said premises, subject to the dower of said Edmund and to her own dower interest.

On April 30, 1888, letters of administration were issued by the county court of said county on the estate of said Helen M. Sill to her husband, Edmund Sill; at the May term, 1894, said estate was fully settled and the administrator discharged. On February 21, 1894, letters of administration were granted by said court to Mary E. Sill on the estate of her husband, James W. Sill, and at the February term, 1897, of said court, said estate was settled, and the administratrix was discharged. Helen Irene Sill was born on April 7, 1891, and on June 12, 1894, her mother, Mary E. Sill, was, by said county court, appointed the guardian of said Helen Irene Sill, and is yet acting as such.

The bill sets up the facts as hereinbefore stated, and alleges that Edmund Sill and the parties hereto have received their respective shares of the rents derived from said land since the death of said Helen M. Sill, and up to and including March 1, 1899, according to their respective interests in the property, and that the share of said rents and profits due Helen Irene Sill has been duly settled and paid to her guardian, Mary E. Sill. The bill prays that dower be assigned to Edmund Sill and Mary E. Sill and that partition be made between Charles B. Sill, Helen Irene Sill, and Mary E. Sill according to their interests as above stated.

On March 14, 1899, James W. Kern was appointed guardian *ad litem* for the minor defendant, Helen Irene Sill, and filed an answer for her, and attended on her be-

half the taking of testimony in the case before a master in chancery. On March 7, 1899, Mary E. Sill for herself and as guardian of Helen Irene Sill filed an answer admitting all the material allegations of the bill, and, furthermore, admitting that there was no homestead in said land, and that Edmund Sill was entitled to dower therein, and that the rents and profits had been divided between the parties as alleged.

Subsequently, and on April 20, 1899, Mary E. Sill filed an affidavit setting up that she had not correctly advised her attorney of the rights of herself and her child in said property and asking for leave to file an amended answer. Thereupon, on April 20, 1899, Mary E. Sill, for herself and as guardian of her child, filed an amended answer admitting the interests of Charles B. Sill and herself and her daughter to be such as are above set forth, and in the proportions above stated, but averring that she, as the widow of James W. Sill, had an estate of homestead in the undivided one-half interest in said premises, which James W. Sill owned at the time of his death. In this answer, Mary E. Sill denied that Edmund Sill was entitled to any dower rights in said premises, though claiming that she was entitled to dower in the interest of her daughter therein. This amended answer averred that whatever dower rights Edmund Sill may have had in the premises were barred, and that no demand had ever been made by Edmund Sill for any dower interest therein. The amended answer also denies, that the rents and profits were properly divided as alleged in the bill, and charged that Charles B. Sill up to October 1, 1892, was in possession of the whole of said premises, and retained the whole of the rents and profits accruing between the death of Helen M. Sill on April 15, 1888, and October 1, 1892. The amended answer also charges that Charles B. Sill was in possession of said lands from March 1, 1893, to April 20, 1899, and had retained the entire rents and profits thereof. The amended answer also avers that

Mary E. Sill and her daughter have an estate of homestead in the interest of James W. Sill in said premises, and charges that Charles B. Sill should account for the rents and profits of said premises. The answer also asks, that the interests of Mary E. Sill and Helen Irene Sill may be duly assigned and set off to them, and that said homestead may be assigned, and that an account be taken against Charles B. Sill and Edmund Sill.

On April 20, 1899, Edmund Sill filed an answer to the original bill admitting all the material allegations thereof, and averring that, shortly after the death of Helen M. Sill, he demanded of his two sons James W. Sill and Charles B. Sill that his dower be set apart and assigned to him; that, in order to assist his sons financially, he entered into an arrangement with them by which he temporarily permitted them to take the whole of the rents and profits of the land, upon the condition that, when he should desire to take a share of the rents and profits thereof on account of his dower interest, he should be entitled to his said dower, that is to say, to a one-third part of said rents and profits, and that his dower should then be set off and assigned to him; that, under that arrangement and with that understanding, he permitted his sons to receive the whole of the rents and profits until the death of his son James W. Sill; that, shortly after the death of James W. Sill, he demanded that his dower should be assigned and set off to him, and that he should receive his share of the rents on account of his dower, and requested Charles B. Sill to notify the said Mary E. Sill and Helen Irene Sill of such demands; that, thereupon, Mary E. Sill and Helen Irene Sill were notified of the said demand for dower; that from the time of said demand up to the present time, he, Edmund, has received, with the knowledge and consent of the said Mary E. Sill, both individually and as such guardian, the sum of $80.00 per year clear of all taxes, the same being one-third of the rents derived from said lands; that Charles B. Sill

has paid the taxes upon said land; that the rents accruing from said lands from 1898 have been fully settled between himself and Charles B. Sill and Mary E. Sill, individually and as guardian; that the said Mary E. Sill, individually and as guardian, and said Helen Irene Sill are estopped from denying that he is entitled to have his dower assigned in view of the arrangement so made as aforesaid. The answer of Edmund Sill admits that the interests of the parties are such as have been herein set forth.

On April 25, 1899, the court entered a decree in favor of the complainant in the bill below, appointing commissioners and ordering partition of the eighty acres according to the interests stated in the bill, and also providing that the dower of Edmund Sill be assigned, and proper provision was made for the dower interest of Mary E. Sill. The decree also found that the rents, issues and profits arising from the premises had been fairly and fully adjusted, and that no accounting between the parties should be made. The decree also found that no person had any estate of homestead in said premises.

From the decree thus entered, Mary E. Sill for herself and Helen Irene Sill by her guardian prayed an appeal to the Supreme Court of the State. That part of the decree praying an appeal is as follows: "Mary E. Sill for herself and Helen Irene Sill by her guardian, Mary E. Sill, prays an appeal to the Supreme Court of the State of Illinois, which is allowed on said parties giving bond in the sum of $300.00 in thirty days, security to be approved by the clerk, and certificate of evidence in sixty days."

The present appeal is prosecuted from the final decree so rendered by the circuit court on April 25, 1899.

C. W. RAYMOND, for appellants.

MORRIS & HOOPER, and DOYLE & CRANGLE, for appellees.

Mr. JUSTICE MAGRUDER delivered the opinion of the court:

First—A motion was made by the appellees in this case at the October term, 1899, of this court to dismiss the appeal, taken herein in the name of Helen Irene Sill, the record having been filed at the June term, 1899, and the cause having been continued from the June term to the October term, 1899. The final decree entered in the cause recites as follows: "Mary E. Sill for herself and Helen Irene Sill by her guardian, Mary E. Sill, prays an appeal, * * * which is allowed on said parties giving bond in the sum of $300.00 in thirty days," etc. The bond was given within the time and in the amount required by the decree of the court, and, as it appears in the record, is signed by Mary E. Sill and by "Helen Irene Sill by Mary E. Sill, her guardian." The appeal has thus been perfected in accordance with the decree of the trial court which allowed the appeal, and the appeal bond has been made by the persons praying for and obtaining the appeal. (*Phœnix Ins. Co.* v. *Hedrick*, 69 Ill. App. 184; *Tedrick* v. *Wells*, 152 Ill. 214). The ground, upon which it is urged that the appeal should be dismissed, is not that the appeal bond is insufficient, or that the appeal was not taken in accordance with the order of the trial court, but it is said, that the appeal should be dismissed for the alleged reason, that Mary E. Sill had no lawful power and authority to take the appeal in the name of and for the infant, Helen Irene Sill. In other words, the ground, upon which the motion to dismiss the appeal taken in the name of Helen Irene Sill, is based, is, that the decree below was erroneous in allowing the guardian of the infant to take an appeal for the infant. Without stopping to decide whether this court will entertain a motion to dismiss an appeal for error appearing in the final decree of the trial court, the power of the guardian to take an appeal in the name of the infant ward will be considered.

Abundant authority exists for the position, that a guardian may take an appeal for the infant ward. "An appeal lies from judgments and final orders involving substantial rights, and when taken on behalf of the ward, who is regarded as the real appellant, is usually required to be prosecuted by the guardian." (9 Ency. of Pl. & Pr. p. 947). In *Miller* v. *Smith*, 98 Ind. 226, the Supreme Court of Indiana said: "We hold that a guardian of the person and estate of a minor, in an action for the partition of real estate in which his ward is interested, may, as such guardian, in behalf of his ward, appear and plead and appeal from the judgment rendered."

This is a proceeding for partition and assignment of dower. Section 21 of the Dower act provides that "when an infant or person under guardianship is a defendant, he may appear by guardian or conservator, or the court may appoint a guardian *ad litem* for such person, and compel the person so appointed to act." (2 Starr & Curt. Ann. Stat.—2d ed.—p. 1470). Section 18 of the act, entitled "Guardian and Ward," also provides for the appearance of the guardian for his ward and for the representation by the guardian of his ward in all legal suits and proceedings. (2 Starr & Cur. Stat.—2d ed.—p. 2083). As the guardian thus has the power under the statute to appear for and represent his ward, it would seem to follow that he has the power to take an appeal in behalf of the ward, when the interests of the latter require it.

Section 18 of the act, entitled "Guardian and Ward," provides as follows: "He (the guardian) shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend," etc. The contention of the appellees is, that a general guardian has no right or authority to prosecute or defend in the name of his ward, where, in the language of the statute, "another person is appointed for that purpose." Here, the minor, Helen Irene Sill, was a defendant to the suit, and one James W.

Kern, a lawyer, was appointed her guardian *ad litem*, and filed an answer for her, and appeared in her behalf, both in the taking of testimony before the master, and in the hearing of the cause. This being so, it is claimed that the appeal could only be taken by the guardian *ad litem*. It is true, that, under section 18 as above quoted, it is not absolutely necessary for the guardian to appear and represent his ward in a legal proceeding, where another person has been appointed as guardian *ad litem* for that purpose. But, in the present case, the complainant filing the bill for partition, not only made the minor, Helen Irene Sill, a defendant, but also made Mary E. Sill a defendant, both individually and as guardian of Helen Irene Sill. In other words, the guardian, as such, was made a defendant, and was served as such with process, and, as such, answered the bill. "Although it may not be necessary in all cases to make the guardian a party to an action or proceeding affecting the ward solely, yet it is usually proper to do so that he may protect his ward's interests." (9 Ency. of Pl. & Pr. p. 935). The record shows, that the guardian *ad litem* performed his duty in the preparation of the case for trial, and in the trial of the case, as the representative of the minor defendant. But when the proceeding was ended in the trial court by the rendition of the final decree, we see no reason why the court might not permit the appeal to be taken for the minor by the guardian, the latter being a party to the suit. It is true the appeal might have been taken by the guardian *ad litem* (*Sprague* v. *Beamer*, 45 Ill. App. 17), but, at the same time, the guardian, who was then before the court, had also the power under the statute to take the appeal.

Cases are referred to where it is said, that the guardian should not be allowed to represent the minor where the interests of the guardian are adverse to those of the minor. (*Roodhouse* v. *Roodhouse*, 132 Ill. 360; *Ames* v. *Ames*, 151 id. 280). But we are unable to see, that the interests of the guardian are opposed to those of the minor, so far

as the questions involved in this appeal are concerned. The first question involved is, whether or not the dower of Edmund Sill in the eighty-acre tract in question has been barred. The establishment of such a bar, if it could be established, would operate to the advantage of both the guardian, Mary E. Sill, and the ward, Helen Irene Sill. The second question involved in the appeal is, whether or not the appellees, Charles B. Sill and Edmund Sill, have properly accounted for the rents and profits derived from the land since October, 1892. Both the guardian and ward are interested in such accounting equally. A third question involved is as to the existence of an estate of homestead in the interest in the land, which James W. Sill owned at the time of his death; but, if the existence of such an estate was established, it would be for the benefit of the infant child, as well as for the benefit of her guardian and mother.

Upon the whole, we are of the opinion that the motion to dismiss the appeal for the reason alleged should not be granted. An order will accordingly be entered denying the motion.

Second—It is claimed by the appellees, that the right of Edmund Sill to dower in the eighty acres has been barred. The tract of eighty acres was owned by Helen M. Sill, the wife of Edmund Sill. When she died intestate on April 15, 1888, she left two sons, the appellee, Charles B. Sill, and James W. Sill since deceased. Charles B. Sill and James W. Sill each owned an undivided one-half in the eighty acres, subject to the dower of their father, Edmund Sill. James W. Sill died intestate on October 20, 1892. From April 15, 1888, to October 20, 1892, Charles B. Sill was in possession of the tract for himself and his brother, and they two, with the knowledge and consent of their father, Edmund Sill, divided the rents between them. The premises were rented for $3.00 per acre, or $240.00 per annum, before the death of James W. Sill, and have been rented for the same amount since his

death. Since the death of James W. Sill, Charles B. Sill has been in possession of the tract, and has collected the rents, and out of them has each year paid Edmund Sill the sum of $80.00, being one-third of the rents and being the amount of his dower in the premises.

The appellants claim, that Charles B. Sill should have rented the premises for a larger amount than $3.00 per acre, and have introduced testimony tending to show the rental value of the premises per year was $4.00 per acre. On the contrary, the appellees introduced testimony tending to show the rental value of the premises per year was not more than $3.00 per acre. The witnesses of the appellees upon this subject, who exceed in number those of the appellants, seem to be as credible and as well informed as the witnesses of the appellants. The trial court found that $3.00 per acre was a fair rental value for the premises, and we are not disposed to disturb this finding.

Shortly after the death of James W. Sill in October, 1892, Edmund Sill made a demand for his dower upon Charles B. Sill, and, through the latter, upon Mary E. Sill in her own right and as guardian of Helen Irene Sill. By an arrangement between Edmund Sill, and Charles B. Sill, and Mary E. Sill individually and as guardian, the rents of $240.00 per year were divided into three parts, of which $80.00 were paid to Edmund Sill on account of his dower; and $80.00 to Charles B. Sill on account of his one-half interest in the property, subject to Edmund Sill's dower, and after deducting one-half of said dower, to-wit: $40.00 out of $120.00, the share of the rents belonging to Charles B. Sill; and the remaining $80.00 was paid to Mary E. Sill for herself and her ward, being her interest of one-sixth in the premises after taking out the dower of Edmund Sill, and being the one-third interest of her ward therein after taking out the dower therein of said Edmund Sill.

In view of what has been said, it is manifest that the possession of the premises has never been held adversely

to Edmund Sill since the death of Helen M. Sill on April 15, 1888. On the contrary, the possession both in the lifetime of James W. Sill, and after that date up to the time of commencing this suit, has been subject to the dower estate of Edmund Sill.

The heir cannot set up the Statute of Limitations against the holder of the dower estate, because his possession is not adverse to the holder of said estate. It is the duty of the heir to assign dower, and, for this reason, his possession is not regarded as adverse to the owner of the dower estate, for, otherwise, he would be allowed to take advantage of his own wrong. It is only as against strangers, or a purchaser either from the deceased owner of the fee, or from his heir or heirs, that the Statute of Limitations can be pleaded as a defense to the enforcement of a dower right. "While the heirs of a deceased husband are in possession of his lands, the Statute of Limitations does not run against the widow's claim for dower; otherwise, where a purchaser is in possession holding adversely." (*Livingston* v. *Cochran*, 33 Ark. 294; *Stidham* v. *Matthews*, 29 id. 650; *Danley* v. *Danley*, 22 id. 263; *Hastings* v. *Mace*, 157 Mass. 499; *O'Gara* v. *Neylon*, 161 id. 140; *Hart* v. *Randolph*, 142 Ill. 521).

We have held in a number of cases that, where a stranger, or other person, or purchaser from the husband, or heir-at-law, or devisee, has been in possession of land under color of title for seven successive years, and paid all the taxes levied thereon during that time, and has thereby complied with the provisions of the first section of the Limitation act of 1839, or section 6 of the present Limitation act, he is entitled to be protected against the enforcement of the widow's dower. In other words, we have held that the widow's dower may be barred as against a stranger or purchaser, who has been in possession of the premises for seven years, and paid the taxes thereon, as required by section 6 of the Limitation act. (*Owen* v. *Peacock*, 38 Ill. 33; *Steele* v. *Gellatly*, 41 id. 39; *Whit-*

ing v. *Nicoll*, 46 id. 230; *Brian* v. *Melton*, 125 id. 647; *Miller* v. *Pence*, 132 id. 149; *Hart* v. *Randolph*, *supra*). But these cases all refer to such a bar to the widow's dower, as arises out of an adverse possession held for the statutory period by strangers or purchasers; they have no reference to the possession of the property by the heir, which is as a general thing not adverse to the estate of dower, but subject and subordinate to it. In *Owen* v. *Peacock*, *supra*, the view, that the possession is not adverse to the dowress when the parties claim under the same right, was held to be applicable to the heir-at-law upon whom the descent is cast, and that, when such view is so applied, the heir-at-law may be said to hold in subordination to the right of the widow to her dower, but that, as regards a purchaser from the husband or heir-at-law or devisee, the rule does not apply, as such purchaser, when he enters and occupies, should be deemed as holding adversely to all the world.

In the case at bar it cannot be said that the dower of Edmund Sill has been barred by any adverse possession on the part of the heirs of Helen M. Sill. Mary E. Sill and Helen Irene Sill, holding under the deceased James W. Sill, are privies in estate to Helen M. Sill. The appellants, Mary E. Sill and Helen Irene Sill, have never been in possession of the premises at all since the death of James W. Sill; and have therefore had no possession, which can be regarded as adverse to the dower estate of Edmund Sill. The appellee, Charles B. Sill, does not claim or set up that the dower of Edmund Sill is barred, and, under the arrangement already set forth, his possession cannot be considered as adverse.

We are, therefore, of the opinion that the dower estate of Edmund Sill in the premises in question has not been barred.

Third—It is claimed on the part of the appellants, that Edmund Sill and Charles B. Sill should account for the rents and profits received from the premises in ques-

tion since the death of James W. Sill on October 20, 1892. The arrangement between the parties has already been referred to. Edmund Sill's dower, amounting to $80.00 per year, was one-third of the total yearly rental of $240.00. This dower was apportioned by the arrangement in question among the parties according to their respective interests during the years from 1892 to 1898 inclusive. Charles B. Sill, being entitled to $120.00, or one-half of the rents, paid one-half of the dower, to-wit: $40.00 per year, leaving his own interest in the rents, after the deduction of the $40.00, the sum of $80.00 per year. Mary E. Sill, having a one-sixth interest in the premises as heir of her posthumous child, Bernice Sill, was liable to pay, and did pay, in each of said years, towards the dower of Edmund Sill one-third of her one-sixth interest, or one-third of $40.00, to-wit: $13.33⅓, leaving after deducting $13.33⅓ from $40.00 the sum of $26.66⅔, as the amount of the annual rents belonging to her. The minor, Helen Irene Sill, being the owner by inheritance from her father, James W. Sill, and from her deceased sister, Bernice Sill, of an undivided one-third of the premises, was, in case a proper demand had been made, liable for one-third of the dower due to Edmund Sill, to-wit: the sum of $26.66⅔ for each year, leaving, after making the deduction of that amount from her one-third interest of $80.00, the sum of $53.33⅓, as the share of the rents belonging to Helen Irene Sill. In other words, by the arrangement made, Charles B. Sill and Mary E. Sill contributed $53.33⅓ towards paying the dower during each of said years of Edmund Sill, and Mary E. Sill, as guardian, contributed $26.66⅔ each year towards the payment of Edmund Sill's dower out of the interest of the minor, Helen Irene Sill.

This arrangement was valid and binding so far as Charles B. Sill and Mary E. Sill in her own right were concerned. The proof shows, that the demand for his dower was made by Edmund Sill upon them shortly after

the death of his son, James W. Sill, in October, 1892. The dower interest of a surviving husband in his deceased wife's land is a mere expectancy, and rests in action only, until it is assigned. He is only entitled to one-third of the rents and profits of the land of his wife's property as against her children and heirs from the time his dower has been demanded, or set off, or assigned to him. Where no demand is made, or petition filed, for the assignment of dower, the heirs-at-law are entitled to the whole of the rents. Damages are allowed from the time of demand and a refusal to assign dower. One-third of the rents of the land in which there is dower forms a proper measure of such damages. Until demand is made, the surviving wife or husband is entitled to no damages. The filing of a petition for the assignment of dower against the heirs-at-law is a sufficient demand to give a claim to one-third of whatever rents have accrued since that time as damages. (*Bedford* v. *Bedford*, 136 Ill. 354; *Peyton* v. *Jeffries*, 50 id. 143; *Rawson* v. *Corbett*, 150 id. 466). The demand here made was sufficient so far as the adults, Charles B. Sill and Mary E. Sill, were concerned. Where the heirs are of age, they may legally assign the widow her dower in the premises. (*Strawn* v. *Strawn's Heirs*, 50 Ill. 256). Section 18 of the Dower act makes it the duty of the heir to assign dower in the lands in which any person is entitled to dower. (*Rawson* v. *Corbett*, *supra*). This assignment may be by parol, and when it is impracticable to assign dower by metes and bounds, an allotment may be made to the holder of the dower estate out of his or her proportionate share of the rents and profits arising from the entire property. The holder of the dower estate may, by an arrangement with the heir or devisee, suffer him to rent out the land with the understanding that such holder, in lieu of dower, is to receive one-third of his or her proportion of the annual rents. (*Lenfers* v. *Henke*, 73 Ill. 405; *Rawson* v. *Corbett*, *supra;* 10 Am. & Eng. Ency. of Law,—2d ed.—pp. 172, 175-178). The demand upon

Charles B. Sill and Mary E. Sill having been made shortly after the death of James W. Sill, and, in response thereto and in pursuance thereof a verbal arrangement having been made with Edmund Sill, by which he was to receive, in lieu of his dower, one-third of the annual rents to be derived from the interests of Charles B. Sill and Mary E. Sill, the decree of the court below was correct in refusing to allow an accounting, so far as the dower paid out of those interests was concerned. In other words, Edmund Sill is entitled to retain the $40.00 per year paid to him on account of his dower out of the one-half interest of Charles B. Sill during each of the years from 1892 to 1898 inclusive, and to retain the sum of $13.33⅓ per year paid to him on account of his dower out of the one-sixth interest of Mary E. Sill during each of the said seven years. As to Charles B. Sill and Mary E. Sill, the demand for dower was made in time to justify the retention of said rents, and the oral assignment of dower, being made by them as adults, was valid.

It is not claimed that any demand was made upon the minor child, Helen Irene Sill, for the assignment of dower in her interest. A demand, however, was made upon Mary E. Sill as guardian of Helen Irene Sill for the assignment of dower in the interest of her ward. But it is the settled doctrine of this court, that a minor cannot make such an assignment of dower as will be binding on him on arriving at age; nor has the guardian of a minor any power to assign dower. (*Bonner* v. *Peterson*, 44 Ill. 253; *Strawn* v. *Strawn's Heirs*, *supra*; *Atkin* v. *Merrell*, 39 Ill. 62; *Rawson* v. *Corbett*, *supra*; *Muller* v. *Benner*, 69 Ill. 108; *Shoot* v. *Galbreath*, 128 id. 214). In *Heisen* v. *Heisen*, 145 Ill. 658, we said: "Whatever may be the rule elsewhere, it is well settled in this State, as indeed it must be held under the statute, that a guardian has no power to assign dower."

In view of the fact, that neither the minor himself, nor his guardian, has any power to make an assignment of dower, a demand for such assignment upon the heir or

upon the guardian is useless, and not legal or binding. (*Bonner* v. *Peterson*, *supra*; *Strawn* v. *Strawn's Heirs*, *supra*). It follows, that the demand upon Mary E. Sill as guardian was invalid, and Edmund Sill was not entitled to dower out of the interest of the minor from the time of such demand. He did, as matter of fact, receive $80.00 per year on account of his dower for the seven years above named, and, of the amount so received in each year, $26.66⅔ came out of the rents derived from the one-third interest belonging to the minor. Inasmuch as Edmund Sill filed no petition for assignment of his dower out of the minor's interest, and no legal demand was made for assignment of dower out of such interest, the minor, or his guardian for him, was entitled to retain the sum of $26.66⅔ out of the rents derived from his interest for each of the said seven years, and Edmund Sill should be required to account for the same. His answer in this case was filed on April 20, 1899, and therein he asks that his dower in the minor's interest may be assigned to him. The filing of the petition thus contained in his answer is a sufficient demand to give a claim to one-third of the rents that have accrued out of the minor's interest since the filing of the answer. He is entitled to such rents since April 20, 1899, but not before. In stating the account there should be deducted one-third of the taxes paid by Charles B. Sill in each of the seven years above mentioned. (*Peyton* v. *Jeffries*, *supra*; *Walsh* v. *Reis*, 50 Ill. 477). We are of the opinion, that the decree of the court below was erroneous in not requiring Edmund Sill to account for the $26.66⅔ received by him out of the rents derived from the interest of the minor in said premises during each of the seven years above mentioned, after deducting therefrom one-third of the taxes paid for each year upon the whole of said premises.

Fourth—It is contended by the appellants, that Mary E. Sill and Helen Irene Sill have an estate of homestead in the one undivided half interest owned by James W.

Sill when he died. We cannot discover that any such homestead estate had any existence in fact. Prior to October 1, 1892, or thereabouts, James W. Sill had resided in Cook county, but about that time he came to Iroquois county with a view of living upon a farm in that county. There was an old house upon the eighty acres in question, and James W. Sill, having no place to stay, intended to occupy this house until the following spring, when he should take possession of the farm which he had leased. He never intended to live permanently in this house, but only temporarily, until he could get possession of the farm so leased. About October 1, 1892, he and his wife moved a few pieces of furniture into the house, and were preparing to occupy it when James W. Sill was taken sick while at his father-in-law's house and died there. Neither he nor his wife ever occupied the house upon these premises, or slept in it a single night. It cannot be claimed, therefore, that they ever acquired any homestead estate in it. Under the statute a homestead can only be acquired in a farm or lot occupied by the householder as a residence. The house upon the premises in question was never occupied by James W. Sill as a home or residence in his lifetime, nor by his wife or child at any time after his death. Even if the placing of a small amount of furniture in the house could be considered as occupying it, Helen M. Sill and her child after the death of James W. Sill left the premises in question, and never returned thereto. This amounted to an abandonment of the homestead, if there ever was a homestead. (*Hart* v. *Randolph*, *supra*).

For the error above indicated, the decree of the circuit court is reversed, and the cause is remanded to that court with directions to proceed in accordance with the views herein expressed.

Reversed and remanded.

EDWARD KRAMER

v.

THE NORTHERN HOTEL COMPANY.

Opinion filed June 21, 1900.

1. CONTRACTS—*when contract does not authorize recovery for settling of party wall.* A contract between a hotel company and the tenant of a building, whereby the company is given permission to re-build a foundation wall of such building, and which provides that the company shall support and sustain the wall "during the excavating and putting in of said foundation," does not impose upon the company the duty of lateral support after the completion of the work, so as to authorize a recovery for damages which are the natural and ordinary result of the location of the foundation and the placing of the superstructure thereon.

2. DAMAGES—*damages due to plaintiff's own action are not recoverable.* One who has licensed another to enter upon his premises for the purpose of making alterations needed for the construction of a building adjoining, cannot recover for damages sustained where the defendant would have completed the work before the damage occurred had the plaintiff not ordered defendant's workmen away and refused to allow them to put his building in repair.

Kramer v. *Northern Hotel Co.* 85 Ill. App. 264, affirmed.

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

BARNUM & BARNUM, and ROBINS S. MOTT, for appellant.

HUGH L. BURNHAM, for appellee.

Mr. JUSTICE PHILLIPS delivered the opinion of the court:

On May 13, 1890, the appellant as first party and appellee as second party entered into a written agreement, in which it was recited the hotel company was desirous of erecting a hotel building in the city of Chicago, the east line of which was to be contiguous with and adjoin-

ing the premises occupied by Kramer as a saloon and boarding house, and that it was desirous of extending its east foundation under the west wall and west portion of the basement of the building so occupied by him as tenant, and license so to do was therein given on the payment to Kramer of $1800, conditioned on the hotel company obtaining the written consent of the owner of the building, and permission was given to tear down such portion or portions of the west wall enclosing the basement as might be necessary, and to occupy the basement for the purpose of excavating and building the foundation of said hotel building, and so to use and occupy the said basement for forty-five consecutive days, and no longer, fixing therein the date of commencing such operations. It was further provided that five days' written notice should be given to the said Kramer of the time of commencing operations, so as to permit him to remove certain saloon fixtures. It was further provided that the hotel company should first, before commencing any other work, remove and restore on the other side of the basement all sewer, water and gas pipes, so that Kramer might not be in anywise disturbed in his use of the sewer, water and gas in said building; and also that the hotel company should not obstruct, in any manner, the entrance to the saloon or upper part of said building, and that the hotel company "will at its own expense support and sustain the west wall of the said building during the excavating and putting in of said foundations, and will restore said basement, including sewer, water, gas and waste pipes, and said west wall, to the party of the first part, at the conclusion of said work, in the same condition as the same now are, except only as to the saloon fixtures, which are to be removed by the party of the first part; that it will wholly finish and complete said operations within forty-five days," and providing for liquidated damages at $30 per day for each day that the basement should remain in an unfinished condition after forty-five

days from the commencing of work according to notice, "and that it will pay to the party of the first part any damages which he may sustain in and about the construction of said hotel building, and for which said party of the second part would be liable were it not for this instrument, other than such damages as may be sustained by him by reason of the use and occupation of the basement, and in addition thereto will pay any and all damages which may be sustained by the party of the first part by reason of the negligence of the party of the second part, its agents or servants, in or about any of the work or operations in or about the said basement." Time was made of the essence of the agreement.

Afterwards the appellant commenced his suit in assumpsit thereon, against the appellee, alleging certain breaches of the contract, to which the defendant pleaded not guilty. On the trial it was attempted to be shown that the foundation put in by defendant settled, causing cracks in appellant's building, and that thereby, and on account of failure to take care of the water falling on plaintiff's roof, and the removal of the down-spout which had formerly passed through plaintiff's west fire-wall, which extended some eighteen inches above the roof and thence down the side of his house, and failure by the defendant to supply another, the water came down through the various stories of plaintiff's house, thereby drenching his rooms, damaging his furniture and causing his boarders to leave.

The jury found the issues for the defendant, and also answered specially certain interrogatories, all of which supported their general finding. The judgment of the circuit court has been affirmed by the Appellate Court. No cause is shown by the errors assigned for a reversal of that judgment unless there was error in the giving of instructions offered by the appellee.

Appellant complains of certain instructions given, but we fail to find any reason, from his brief, for his conten-

tion that they are incorrect or the jury were misled by them. By the second instruction the jury were told that if they believed, from the evidence, that the defendant, before entering upon plaintiff's premises, received permission so to do and do certain work, including the removal of the down-spout and the placing of another in its stead to carry the water from the premises occupied by the plaintiff, and that it, by its servants, was making every effort to complete said work, and would have done so before the plaintiff's premises had been damaged but for the fact they were ordered from the premises by the plaintiff himself before said work was completed, thereby revoking the permission, and that defendant's servants had no right to stay longer, then the jury should find defendant not guilty for any damages caused by its failure to complete said work. And by the third instruction the jury were told, that even if they believed that the plaintiff ordered the agents or servants of the defendant away because having been told to do so by one John Root, the architect, and even if Root did give such advice, the plaintiff was not excused from the duty of permitting the defendant to repair the roof or down-spout, and that if the plaintiff refused to permit the workmen of the defendant from making such repairs he could not recover for any damages which happened after that time. These two instructions were based on the evidence, and there was no error in giving them.

By the fourth instruction the jury were told that no duty rested upon the defendant of preventing the plaintiff's west wall or building from sinking along with the defendant's own building; and by the fifth, that if they believed, from the evidence, that the defendant, at the end of the forty-five days, restored plaintiff's cellar, including the sewer, water, gas and waste pipes and the west wall of plaintiff's building, to as good a condition as they were in at the time when the defendant entered to build its foundation, and that the defendant afterwards

used reasonable care, in erecting its own building, not to injure plaintiff's premises, the plaintiff could not recover for any damages, if any there were, caused thereafter by reason of any sinking, settling or other injury to plaintiff's building resulting solely from the construction and settling of the wall and the building which the defendant built upon its own adjoining property. And by the sixth instruction they were told that the defendant was required to support plaintiff's west wall only while it or its agents were at work in the basement of plaintiff's premises, and on leaving said basement at the completion of their work they were only required to leave the support to said wall in as good condition as when they entered to begin their work, and that if they believed, from the evidence, that the defendant did these things, then the plaintiff could not recover for damages, if any there were, which resulted afterwards by reason of the sinking of said west wall of plaintiff's building.

It will be noted that by the terms of the contract the defendant was not absolved from the payment of damages sustained by the plaintiff other than those sustained by reason of the use and occupation of the basement, and that the defendant expressly agreed to pay such damages for which it might be liable were it not for the instrument. By the further terms of the instrument, however, the defendant was only required "at its own expense to support and sustain the west wall of said building (plaintiff's building) during the excavating and putting in of said foundation." This requirement would negative the idea that defendant was required to support plaintiff's wall so as to prevent it settling thereafter with the foundation upon which it stood. The relations sustained by the parties under the contract were not the same as parties to a party wall agreement. Plaintiff was a tenant, merely. Defendant was given the right to put down its foundation under his building, for which he received $1800. No recovery can be had for damages the

reasonable, natural and ordinary result of the location of this foundation and the placing of the superstructure upon it. No duty of lateral support rested upon defendant. *City of Quincy* v. *Jones*, 76 Ill. 231.

The remaining instruction did not go to the right but only to the extent of recovery.

Finding no error in the record the judgment of the Appellate Court for the First District is affirmed.

Judgment affirmed.

ARNOLD BROS. *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed June 21, 1900.

This case is controlled by the decision in *Holden* v. *City of Chicago*, 172 Ill. 263.

WRIT OF ERROR to the County Court of Cook county; the Hon. ORRIN N. CARTER, Judge, presiding.

GEORGE W. WILBUR, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and DENIS E. SULLIVAN, for defendant in error.

Per CURIAM: The ordinance in this case contains the same defect that was condemned in the ordinance in *Holden* v. *City of Chicago*, 172 Ill. 263, and the decision in that case and subsequent cases holding the same doctrine must control here.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

OTIS ELDREDGE, Conservator,

v.

JOHN C. PALMER *et al.*

Opinion filed June 21, 1900.

INSANITY—*when deed of insane person should not be set aside without restoring consideration.* A deed by one for whom a conservator is subsequently appointed should not be set aside without requiring restoration of the money paid by the grantee and the return of property or its equivalent, which he conveyed to a third party at the instance of the grantor in part consideration for his deed, where the grantee had no knowledge or notice of the grantor's infirmity or of any undue influence by the party to whom the grantee made his conveyance.

APPEAL from the Circuit Court of Edgar county; the Hon. H. VANSELLAR, Judge, presiding.

H. S. TANNER, J. W. HOWELL, and JAMES A. EADS, for appellant.

JOSEPH E. DYAS, for appellee John C. Palmer.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

On December 27, 1897, James Elledge executed a deed to appellee John C. Palmer of a lot, with a brick residence thereon, on North Central avenue, in Paris, Edgar county, and in payment therefor Palmer gave Elledge $1000, and by his direction conveyed to Jane O'Hair a house and lot on Jefferson avenue, in said city. A year afterward, on December 19, 1898, the appellant, Otis Eldredge, was appointed conservator for Elledge, and thereafter filed his bill in equity in this case to set aside the deed so executed to Palmer, charging that Elledge was in his dotage and of unsound mind and memory; that he executed the deed under undue influence of Jane O'Hair, and that the consideration paid was inadequate. The bill also stated that Jane O'Hair claimed that Elledge had

previously conveyed to her a life estate in the property deeded to Palmer, and complainant denied that any such deed was made, but alleged that if it was made it was procured by undue influence of said Jane O'Hair. Palmer answered admitting the conveyances as alleged, but denying that Elledge was of unsound mind or memory, or that said defendant had any knowledge or information of the alleged incompetency or of any undue influence exercised by said Jane O'Hair, and alleging that he paid a fair and adequate consideration for the property. Jane O'Hair answered, also admitting the conveyances, and denying that Elledge was of unsound mind or that she exercised any undue influence over him. She averred that she owned a life estate in the property conveyed by Elledge to Palmer, for which she received the house and lot conveyed to her, and stated that she had conveyed the property she had received to one Swango.

The court made up and submitted to a jury three issues of fact, and upon such issues the jury returned a verdict that the deed to Palmer was not the deed of Elledge; that at the time of executing the same, Elledge was not of sound mind and memory or of sufficient mental capacity to execute and deliver deeds, and that he was unduly influenced by Jane O'Hair to execute said deed. Afterward, further evidence was taken as to the rental of the pieces of property, repairs, taxes and insurance, and the court entered a decree charging the defendant Palmer with $300 rents and crediting him with $88.15 for taxes, repairs and insurance; finding the property conveyed to Jane O'Hair worth $900, and the rent of the same $140, and interest on the $1000 cash paid by Palmer $83.32. The decree provided that the complainant should, within ninety days, pay to Palmer $1011.47, and deliver to Palmer a deed conveying to him the property deeded by him to Jane O'Hair, or, in the alternative, should pay Palmer $1911.47, and thereupon Palmer should hold the property in trust for Elledge, but in default of complainant per-

forming either of said conditions the title of Palmer to the property should be absolute. This appeal is by the conservator, who claims that the property should be returned without terms, and that, in any event, he should not be required to restore what was deeded to Jane O'Hair, or the value thereof. The only question involved is whether the conveyance from Elledge to Palmer should be set aside without requiring the consideration to be returned.

Elledge had not been declared incompetent but was transacting his own business and managing his own affairs, and continued to do so for a year after the transaction, and the rule is, that if Palmer entered into the contract without knowledge or notice of any disability on the part of Elledge or undue influence of Jane O'Hair, in good faith and for a sufficient consideration, the conveyance should not be set aside without restoring the money paid and the property parted with. *Scanlan* v. *Cobb*, 85 Ill. 296; *Ronan* v. *Bluhm*, 173 id. 277.

The evidence was that James Elledge was about seventy-two years old. He was a widower, whose wife had been dead about eighteen years. He owned two hundred acres of land where he lived, which he rented out. Part of the time after the death of his wife, he and his married son, Vane Elledge, lived together on the farm, and after his son's death he continued to live there with his son's widow, Lizzie Elledge, and one year during that time he lived in Paris with her father and step-mother, John W. and Jane O'Hair. The defendant Jane O'Hair had great influence over him and was at the farm frequently, and he was continually doing something for the O'Hair family. He bought a buggy for her, and her husband got wood and supplies from the farm, and the next day after the transaction with Palmer he paid Palmer $225 on a note and mortgage on land belonging to Jane O'Hair. He made a deed to her of some interest in the property conveyed to Palmer, but it was not recorded and was lost or de-

stroyed, and at the time of the conveyance in question Jane O'Hair and her husband also made a conveyance of the property to Palmer. In December, 1897, when the deed was made to Palmer, Elledge had become very forgetful and manifested the weakness and feebleness of age, both in mind and body. He walked with much difficulty, with very short steps and a shuffling gait. He had been growing weaker, mentally and physically, with the advance of age, for two or three years. There were many witnesses who testified that they did not consider him capable of doing ordinary business. On the other hand, he attended to all his business and affairs, and a considerable number of witnesses regarded him as capable of transacting business. Among these witnesses were officers of banks and merchants with whom he did business and had done business for years, and they saw nothing in his talk or actions to show a want of capacity. The complainant, his conservator, who know him very well and saw him often at church and elsewhere, was not able to say he was unfit to transact business at that time, and first noticed something wrong with his mental condition about the time he was appointed conservator. Elledge conducted the negotiations with Palmer for the exchange, and there was nothing which occurred at that time indicating incapacity. Mrs. O'Hair came to Palmer's office with him and was there most of the time, but he acted independently, and there was no influence or persuasion on her part in the presence of Palmer.

It must be taken that Elledge was incapable of transacting business, but the evidence does not justify an inference that Palmer knew of such incapacity or of any circumstances which would lead to that conclusion, or any undue influence on the part of Jane O'Hair. Elledge had children and grandchildren near him who made no move to have a conservator appointed, and apparently did not consider it necessary for a year after this transaction, and during that time the property conveyed to

Jane O'Hair was transferred so that it could not be reached. Manifestly, the undue influence of Jane O'Hair was exerted to procure the conveyance to her and for her own benefit. So far as appears, she was not concerned except in obtaining the house and lot on Jefferson avenue for herself, and if that conveyance was secured without consideration, through undue influence, it might have been set aside.

So far as Palmer was concerned, there was no dependent or confidential relation between him and Elledge and no misrepresentation or imposition. On the question of setting aside the deed without restoring the consideration, the only argument that can be made is that the consideration paid by Palmer was inadequate. There was a great variety of opinion among the witnesses as to the value of the respective pieces of property, but there is no doubt that the exchange was quite an advantageous one for Palmer. Considering all the evidence, the advantage to him in the exchange was probably $500 to $1000, but we are inclined to the view that the consideration was not so grossly inadequate as to afford evidence of wrongdoing or bad faith on the part of Palmer, so as to justify depriving him of the consideration. So far as he knew, Elledge was entirely competent to deal independently and to agree upon the consideration for his property. It is conceded that the inadequacy of consideration, in combination with all the other circumstances, justified the court in setting aside the conveyance, but we cannot say that the court was in error in requiring the money paid and the property conveyed, or the value thereof, to be restored.

The decree of the circuit court is affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* Cory Miller
v.
EDWARD J. MURPHY.

Opinion filed June 21, 1900.

1. CRIMINAL LAW—*Indeterminate Sentence act construed.* One convicted of any crime, except murder and treason, whose punishment has been fixed by the jury at imprisonment in the penitentiary, is within the operation of the Indeterminate Sentence act of 1895, (Laws of 1895, p. 158,) notwithstanding the statute provides for an alternative punishment for such crime by imposing a fine.

2. SAME—*judgment of conviction need not set forth manner of applying parole law.* It is not necessary to the validity of a judgment of conviction that the mode and manner of applying the provisions of the Indeterminate Sentence act with reference to the parole and discharge of the defendant shall be set forth therein, and anything contained in a judgment concerning the discharge of the defendant from the penitentiary is surplusage.

ORIGINAL petition for *habeas corpus.*

FREDERICK S. BAKER, for the relator.

E. C. AKIN, Attorney General, CHARLES S. DENEEN, State's Attorney, and FERDINAND L. BARNETT, for the respondent.

Mr. CHIEF JUSTICE BOGGS delivered the opinion of the court:

This is a petition praying that a writ of *habeas corpus* issue out of this court commanding Edward J. Murphy, warden of the Illinois State penitentiary at Joliet, to produce one Cory Miller (an inmate of said penitentiary) before this court. It appears from the allegations of the petition the said Cory Miller was on the third day of February, 1898, placed on trial in the criminal court of Cook county under an indictment returned by the grand jury of said Cook county, charging that said Miller and another did feloniously, unlawfully and wickedly con-

spire, combine, confederate and agree together, in the peace of the people, etc., unlawfully, willfully, feloniously and of their malice aforethought to make an assault upon and kill and murder one Charles G. Meyer, etc.; that the jury to whom said cause was submitted returned the following verdict: "We, the jury, find the defendant, Cory Miller, guilty of conspiracy in manner and form charged in the indictment, and we fix the punishment of the said defendant, Cory Miller, at imprisonment in the penitentiary; and we further find, from the evidence, that the said defendant, Cory Miller, is not between the age of ten (10) and twenty-one (21) years, and that he is about the age of forty years;" that a motion entered on behalf of said Miller for a new trial and in arrest of the judgment were each overruled and sentence was pronounced by the court on the verdict, and that the judgment of conviction entered in said cause in said court is as follows: "Therefore, it is ordered and adjudged by the court that the said defendant, Cory Miller, *alias*, be and he hereby is sentenced to the penitentiary of this State at Joliet for the crime of conspiracy, whereof he stands convicted; and it is further ordered and adjudged that the said defendant, Cory Miller, be taken from the bar of the court to the common jail of Cook county, and from thence by the sheriff of Cook county to the penitentiary of this State at Joliet, and be delivered to the warden or keeper of said penitentiary; and the said warden or keeper is hereby required and commanded to take the body of the said defendant, Cory Miller, and confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof until discharged by the State Board of Pardons, as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced." The petition further alleged that said Miller, under this judgment of conviction, was committed to the peniten-

tiary at Joliet, and that he is now detained in such penitentiary by the said warden thereof.

The indictment constituted a charge of conspiracy under the provisions of section 46 of the Criminal Code, (Hurd's Stat. 1897, p. 553,) which section provides that any one convicted of offending against its provisions shall be "imprisoned in the penitentiary not exceeding five years, or fined not exceeding $2000, or both." It was under this section the said Miller was tried and convicted, and sentenced to be imprisoned in the penitentiary for an undetermined period.

Waiving, for the purposes of deciding the prayer of this petition, the question whether the said Miller should resort to a writ of error to bring the judgment of conviction before a court of review, we proceed to consider the contention of the petitioner that the verdict and judgment are void and his detention thereunder is unauthorized by law. Two grounds are presented in support of the contention:

First—That the act entitled "An act in relation to the sentence of persons convicted of crime and providing for a system of parole," affirmed June 15, 1895, has application only to persons convicted of such crimes as are punishable (to quote the language of counsel for the petitioner) "absolutely by imprisonment in the penitentiary," and has no application to this petitioner, who was convicted of an offense which is punishable either by imprisonment in the penitentiary, or by a fine, or by both.

Second—That this court held in *George* v. *People*, 167 Ill. 447, the board of penitentiary commissioners, who, as petitioner insists, were possessed substantially of the powers now possessed by the State Board of Pardons, were without power to "discharge a prisoner" from the penitentiary, and therefore that the judgment of conviction was void for the reason it adjudged the petitioner should be confined in the penitentiary at Joliet "until discharged

by the State Board of Pardons, as authorized and directed by law."

Neither of these positions is sound. Section 1 of the act in question (Hurd's Stat. 1897, Crim. Code, par. 498,) provides: "That every person over twenty-one years of age, who shall be convicted of a felony or other crime punishable by imprisonment in the penitentiary, excepting treason and murder, shall be sentenced to the penitentiary, but the court imposing such sentence shall not fix the limit or duration of the sentence." The word "punishable" means not must be so punished, but liable to be so punished or may be so punished. Such is the meaning given the word by legal lexicographers, (Anderson's Law Dic. p. 846; Bouvier's Law Dic. "Punishable;") and the word was defined to mean "liable to punishment" in *Commonwealth* v. *Pemberton*, 118 Mass. 36, and to mean "may be punished" in *State* v. *Watkins*, 7 Sandf. 94, and to mean not "must" but "may" be so punished in *State* v. *Nuemer*, 49 Conn. 233, and *Miller* v. *State*, 58 Ga. 200. In 19 Am. & Eng. Ency. of Law, p. 568, in defining the word "punishable" it is said: "If an offense may be punished by a certain penalty it is punishable by such penalty, although, at the discretion of the court or under different circumstances, other penalties may be imposed. Its meaning is not restricted to such an offense as must be so punished." In *In re Mills*, 135 U. S. 263, the words "punishable by imprisonment at hard labor," employed in the act of Congress approved March 1, 1889, defining the criminal jurisdiction of a United States court in the Indian Territory, were interpreted to embrace offenses which, although not imperatively required by statute to be so punished, might be punished in that manner.

The purpose of the enactment establishing the system of indeterminate sentences and paroles is the amelioration of the conditions of persons confined in the penitentiaries of the State, and its beneficial operation should not be restricted by mere construction. The phrase "crime

punishable by imprisonment in the penitentiary," etc., employed in the first section of the act, we construe to embrace every crime (except treason and murder) which, though not a felony, may be punished by imprisonment in the penitentiary, and not to mean only such offenses as must absolutely be so punished. It is true, as held by this court in *Lamkin* v. *People*, 94 Ill. 501, and other cases, the crime of which the petitioner, Miller, was convicted is a misdemeanor, but the question whether the act establishing the "parole system" or system of indeterminate sentences applies to him as a convict in the penitentiary does not depend upon the mere classification of the offense as a misdemeanor. The statute affixes punishment by imprisonment in the penitentiary as one mode of punishment which may be inflicted for the perpetration of the crime of which the petitioner is convicted. The crime is, therefore, one which is "liable to" or "may be" punished by such imprisonment,—that is, is a crime punishable in that manner. Though but a misdemeanor, it was lawful for the jury to determine that the petitioner should be punished by imprisonment in the penitentiary. That the jury might have determined the imposition of a fine would answer the demands of justice has no effect to remove the petitioner from the class of convicts who are entitled to the beneficial operation of the parole system. That the offense is classed as a misdemeanor is not the test of the application of the statute relating to indeterminate sentences, but whether the crime is punishable by imprisonment in the penitentiary. If the crime may be punished by that character of imprisonment and the perpetrator of the offense is condemned to suffer that mode of punishment, the act in question applies to the case and determines the course to be pursued by the jury and by the court in fixing his punishment, though the crime be but a misdemeanor.

The second ground advanced to justify the award of the writ is not tenable. It is not necessary to the validity

of the judgment of conviction the mode and manner of the application of the provisions of the act with reference to the parole or discharge of the defendant shall be set forth in the judgment. All that is contained in the judgment with reference to the discharge of the petitioner from the penitentiary is surplusage, and neither adds to nor detracts from the right of the petitioner, as a convict, to the full operation of the statute in his behalf.

The petition does not disclose a case entitling the petitioner to a writ of *habeas corpus*. *Writ denied.*

EDWARD B. QUINLAN *et al.*

v.

THE CITY OF CHICAGO.

Opinion filed June 21, 1900.

This case is controlled by the decisions in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Davidson* v. *City of Chicago*, 178 id. 582.

WRIT OF ERROR to the County Court of Cook county; the Hon. COLOSTIN D. MYERS, Judge, presiding.

WILLIAM F. CARROLL, and M. F. CURE, for plaintiffs in error.

CHARLES M. WALKER, Corporation Counsel, ARMAND F. TEEFY, and WILLIAM M. PINDELL, for defendant in error.

Per CURIAM: The ordinance in this case is like the ordinances condemned by this court in *Lusk* v. *City of Chicago*, 176 Ill. 207, and *Davidson* v. *City of Chicago*, 178 id. 582, and those cases are conclusive here.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

JACOB PHILLIPS *et al.*

v.

ADAM PHILLIPS *et al.*

Opinion filed June 21, 1900.

1. MINORS—*court should see that interests of minors are properly represented.* It is the duty of the court to protect the rights of minor defendants, not only by a proper guardian or guardian *ad litem* not having an adverse interest, but also by counsel distinct from those representing adverse and hostile interests.

2. SAME—*when it is error to proceed without guardian ad litem.* It is error to proceed without a guardian *ad litem* and distinct counsel for minor defendants, where the guardian and his solicitor, who act also for the minors, succeed in establishing not only the guardian's hostile claim for dower but also his claim for advances, for which he is allowed a lien, as well as a personal judgment against his wards with an order for execution against them.

3. ATTORNEYS AT LAW—*attorney should not administer oaths to his clients.* It is not proper practice for an attorney to administer oaths to his client in a suit in which he is employed, but such verification is not a nullity, and the objection to it may be waived if the opposite party does not take advantage thereof.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN BARTON PAYNE, Judge, presiding.

HAMLINE, SCOTT & LORD, for plaintiffs in error.

Mr. JUSTICE CARTWRIGHT delivered the opinion of the court:

Elizabeth Kloepfer, one of the defendants in error, filed her bill in the superior court of Cook county against plaintiffs in error and Adam Phillips, another defendant in error, alleging that plaintiffs in error were infants and tenants in common with her of certain real estate in the village of Winnetka, in Cook county, subject to the dower rights of said Adam Phillips. The bill prayed for the assignment of dower to Adam Phillips and partition of the premises. Plaintiffs in error, the infant defendants to the bill, answered the same by their guardian, the other

defendant, Adam Phillips. The guardian also answered in his own right, admitting the allegations of the bill, and, besides claiming dower in the premises, set up a claim for sums paid for special assessments to the amount of $1500 as a lien against the premises. The answer filed by the guardian for the infants and the one filed in his own right setting up his claims were signed by the same solicitor. The issue made by the bill and answers was referred to a master in chancery, who proceeded to take the evidence, with the same solicitor appearing for Adam Phillips and the infant defendants. The master reported, finding the allegations of the bill to be true and that Adam Phillips was entitled to dower and a lien on the premises for $1021.11. The report was approved and a decree was entered establishing the lien of Adam Phillips and for dower and partition, and commissioners were appointed to assign such dower and make partition. The commissioners reported that a division could not be made, and appraised the premises at the total value of $32,500. This report was approved and a decree for sale entered. Afterward, the decree and all orders were vacated and complainant was given leave to file an amended bill. The amended bill was substantially as before, but Peter Kloepfer, the husband of Elizabeth Kloepfer, was joined with her as a complainant. Adam Phillips answered the amended bill, claiming dower as before and a lien for advances to the amount of $1500. The infants also answered by Adam Phillips, their guardian, and both answers were signed, as before, by the same solicitor. After another reference to the master the court entered another decree finding the rights of the parties as before, and that Adam Phillips was entitled to dower and establishing his claim against the premises at $1068.46. Commissioners again reported that dower could not be assigned or the premises divided, and appraised the total value of the premises at $27,775. The court approved the report and ordered the premises sold. At the sale one of the solic-

itors for complainant bought the premises but paid nothing, alleging that he bid them off in the interest of the parties with the view of finding a purchaser at private sale. The court vacated the sale. Afterward, the complainant, Elizabeth Kloepfer, filed her petition to set aside the last report of the commissioners and decree for sale, and the court set them aside and discharged the commissioners. New commissioners were appointed, who filed a report showing an assignment of dower and partition of the premises. The report was approved and the property partitioned according to a survey and plat. The master was then directed to take proof and report the reasonable amount of solicitor's fees and the costs and expenses, and to apportion the same. The master reported, allowing complainant's solicitor $1000 and allowing costs taxed by the clerk at $467.75, which sums were apportioned among the parties. This report was approved and a decree was entered allowing said solicitor's fees and costs and apportioning the same. By the partition some of the minors were given lots with a frontage of 18½ feet on the Green Bay road and running back about 600 feet.

In all the proceedings in the court and before the master the same solicitor represented the interests of the infant defendants and the adverse claims of their guardian, Adam Phillips. It is the duty of a court to protect the rights of infant defendants and to see that their interests are represented, not only by a proper guardian or guardian *ad litem* not having an adverse interest, but also by counsel distinct from those representing hostile interests. In this case the infant defendants were not represented in the superior court or before the master. The interest of their father and guardian, Adam Phillips, was hostile and adverse to their interests, and they were represented only by him and by the same solicitor who acted for him in his individual right. He claimed a dower interest in their lands and established a claim for $1068.46,

for which he was not only allowed a lien but obtained a personal judgment against his wards and an order for execution against them. The guardian could not represent the minors in a matter where he had an adverse interest, and his solicitor could not serve opposite and conflicting interests with fidelity to each. It was error for the court to proceed without the appointment of a guardian *ad litem*. *Ames* v. *Ames*, 151 Ill. 280; *Roodhouse* v. *Roodhouse*, 132 id. 360.

It is apparent that injustice was done to the infants in the partition finally made. After two reports that the premises were not susceptible of division, new commissioners were appointed for the purpose of making partition, on the representation of complainant that it could be done. In the partition finally made, lots 18½ feet wide, running back about 600 feet from the street, were set off to the minors, and it is common knowledge there is no possible use or sale for a village lot of such dimensions.

It is also assigned as error that the original and amended bill, the petition of complainant and the report of the commissioners making partition were sworn to before complainant's solicitor, and that the same solicitor was at one stage of the proceedings appointed a commissioner to make partition, and acted as such. So far as we can discover, the commissioner had not acted as solicitor at the time he was appointed commissioner, and the report in which he joined was afterward set aside. The question whether he was eligible is not now material.

The various bills and a petition and the last report of commissioners were sworn to before the solicitor for complainant. By statute in Kansas and Michigan an attorney is made incompetent to act as an officer and administer oaths in a suit in which he is employed, and that practice is against the rules in England and New York, and is generally discountenanced. (*Linck* v. *City of Litchfield*, 141 Ill. 469; 2 Shinn's Pl. & Pr. sec. 1262.) We have held, however, that the verification in such a case is

not to be treated as a nullity, and the objection may be waived if the opposite party does not take advantage of it. Infants are generally presumed to avail themselves of all objections, and are not usually held bound merely by waiver. The case must be reversed on other grounds, and we content ourselves with saying that the action of the solicitor in administering the oaths to his client was improper.

All orders and decrees entered in the case are reversed and the cause is remanded to the superior court of Cook county, with directions to appoint a guardian *ad litem* for the infant defendants and to take such proceedings thereafter as may be proper. *Reversed and remanded.*

THE PEOPLE OF THE STATE OF ILLINOIS, for use, etc.

v.

JOHN REA *et al.*

Opinion filed June 21, 1900.

1. SCHOOLS—*what necessary to make school officers liable for money paid out.* In order that school officers shall be pecuniarily responsible, under section 11 of article 15 of the general School law, for failure to perform duties required by statute, there must be a loss by the school fund, resulting from such omission of duty.

2. SAME—*when school directors are not liable for expenditure.* School directors are not personally liable for a reasonable sum of money expended by them for necessary water supply for the school, even though they have proceeded illegally in acting without an order of the board of directors adopted at any meeting, since the school fund has in that case sustained no "loss" within the meaning of the statute, the transaction being one which might have been originally authorized or subsequently ratified at a board meeting.

Rea v. *People*, 84 Ill. App. 504, affirmed.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Hancock county; the Hon. JOHN A. GRAY, Judge, presiding.

LEMMON & MCMAHAN, D. MACK & SON, and W. D. HIBBARD, for appellants:

No business can be done by school directors except at a regular or special meeting. Any business not done at such regular or special meeting, or any contract so entered into by the directors when not assembled according to law, is void and cannot be enforced. Starr & Cur. Stat. chap. 122, art. 5, secs. 17, 18; *Lawrence* v. *Traner*, 136 Ill. 474; *People* v. *Smith*, 149 id. 549; *Railroad Co.* v. *People*, 171 id. 544; *School Directors* v. *Jennings*, 10 Ill. App. 643; *Pollard* v. *School District*, 65 id. 105; *People* v. *Frost*, 32 id. 242; *School Directors* v. *Sprague*, 78 id. 390; 21 Am. & Eng. Ency. of Law, 834; *Andrew* v. *School District*, 37 Minn. 96; *Currie* v. *School District*, 35 id. 163; *Doyle* v. *Gill*, 96 Wis. 518; *People* v. *Peters*, 4 Neb. 254; Bateman's Common School Decisions, p. 128, par. 139.

The powers of school directors are limited to those expressly granted. If they exceed those powers or do an act prohibited by law their action is void. *Stevenson* v. *School Directors*, 87 Ill. 255; *Stanhope* v. *School Directors*, 42 Ill. App. 570; *Wells* v. *People*, 71 Ill. 532.

Since the contract was void and entirely unauthorized by any legal authority, it could not be and was not ratified either by the district or by the directors. *Wells* v. *People*, 71 Ill. 532; *School Directors* v. *Fogleman*, 76 id. 189; *Glidden* v. *Hopkins*, 47 id. 525; 21 Am. & Eng. Ency. of Law, 834, 835; *Currie* v. *School District*, 35 Minn. 163; *Andrews* v. *School District*, 37 id. 96; *Honey Creek School* v. *Barnes*, 119 Ind. 213; *Kane* v. *School District*, 52 Wis. 502; *Johnson* v. *School District*, 67 Mo. 319; Dillon on Mun. Corp. sec. 464; *School Furniture Co.* v. *School District*, 50 Kan. 727; *McCortle* v. *Bates*, 29 Ohio St. 418; *Davis* v. *School*, 24 Me. 347.

The contract made for the well was entirely void and without authority of law, and no recovery could have been had upon the same against the district by the person performing the services. The district was in no sense liable for the same, and therefore the work could not be

paid from the school fund. If the two school directors drew an order for that for which the district was not liable in any sense, there was a perversion of the school fund of the district and the amount paid was a loss to the district, and the directors became liable for spending the public money in violation of law under the following statute and decisions: *Wahl* v. *School Directors*, 78 Ill. App. 403; Starr & Cur. Stat. chap. 122, art 15, sec. 11; *Moore* v. *Fessenbeck*, 88 Ill. 422.

SCOFIELD, O'HARRA & SCOFIELD, and BERRY BROS. & MCCRORY, for appellees.

Mr. JUSTICE CARTER delivered the opinion of the court:

A judgment was rendered against the appellees before a justice of the peace of Hancock county for $15.70 for moneys which it is claimed appellees, as directors of school district No. 3, township 6, north, range 7, west, in said county, illegally paid out of the school funds of said district for the digging and walling up of a well on the school grounds, for the use of the school. At the conclusion of the evidence on the trial in the circuit court, where the case was taken on appeal, the judge instructed the jury to find the issues for the plaintiffs and to fix the damages at $15.70. The jury returned their verdict as directed and judgment was entered accordingly. On appeal the Appellate Court reversed the judgment without remanding the cause, and, having granted a certificate of importance, the People took this appeal to this court.

The appellees and W. T. Whitcomb were the school directors, and the evidence shows that the well was dug and walled by the direction of appellees, as two of the directors, for the amount mentioned, without the order of the board of directors entered at any general or special meeting, and without any action respecting the matter having been taken by the directors, as a body, at any meeting. The money was paid out of the moneys of the

district upon the order signed by appellees, one as president and the other as director, and the suit was brought on behalf of the district to recover the amount from them. It was proved, and not controverted, that the well was necessary for water supply to the school and that the amount paid was reasonable, and the Appellate Court made a special finding of facts to that effect, and also found that the cost of the well was a proper charge upon the funds of the district, and that the district sustained no loss by reason of the acts of appellees or of their failure to comply with the statute.

The sections of the School law under which it is claimed the appellees are liable are as follows (Hurd's Stat. 1897):

137. "The clerk of such board of directors shall keep a record of all the official acts of the board, in a well bound book provided for that purpose, which record shall be signed by the president and clerk.

138. "The board of directors shall hold regular meetings at such times as they may designate; and they may hold special meetings as occasion may require, at the call of the president or any two members.

139. "No official business shall be transacted by the board except at a regular or special meeting.

285. "County superintendents, trustees of schools, directors and township treasurers, or either of them, or any other officer having charge of school funds or property, shall be pecuniarily responsible for all losses sustained by any county, township or school fund, by reason of any failure on his or their part to perform the duties required of him or them by the provisions of this act; or by any rule or regulation authorized to be made by the provisions of this act; and each and every one of the officers aforesaid shall be liable for any such loss sustained, as aforesaid, and the amount of such loss may be recovered in a civil action brought in any court having jurisdiction thereof, at the suit of the State of Illinois,

for the use of the county, township or fund injured; the amount of the judgment obtained in such suit shall, when collected, be paid to the proper officer for the benefit of said county, township or fund injured."

The question is thus presented as a matter of law, under the peremptory instruction given to the jury, whether, under the facts as settled, the school fund of the district sustained any loss, within the meaning of the statute, by reason of the failure of appellees, as such school directors, to comply with its provisions in the manner of procuring a necessary work to be done for the district at a cost which was reasonable.

It is contended on behalf of the district that the directors had no power to have this work done and to pay for it out of the funds of the district without proceedings taken in the manner provided by the statute, and that, the two directors having proceeded illegally, the district was not liable to pay for the work, and that so much of its moneys as were paid out for the same were lost to the district. It is undoubtedly true that these two directors, proceeding as they did, had no power to bind the district by any contract they might make. The statute expressly provides that no official business shall be transacted by the board of directors except at a regular or special meeting, and it necessarily follows that the contract which they made could not have been enforced by any one. Neither the district nor the contractor was bound by it. Still, it was not *ultra vires* the corporation. The directors of the district not only had the power, but it was their duty, to provide a proper water supply for the school, and sufficient of the funds of the district might have been lawfully applied for the purpose. Such supply of water was procured and a reasonable and necessary amount of such funds was expended to procure it, and the illegality in the transaction was in the methods pursued and not in the subject matter of the contract. There certainly was a failure on the part of these directors to comply

with the statute, but even if it were held that they were liable to removal from office under section 33 of article 5 of the School act, it would not follow that they are liable in this action under the sections of the statute above set out. In order to render them so liable, their failure to comply with the statute must have resulted in a loss to the school fund, as provided in paragraph 285. But can it be correctly said that there was a loss to the fund when only a reasonable amount of the fund was paid for a well which was necessary, and which, consequently, it was the duty of the directors to provide? It is the loss to the district resulting from their violation of the statute for which they are to be held pecuniarily responsible, and not simply the infraction of the statute in matters of procedure without loss to the district. The statute, so far as it is penal, must, like all such statutes, be strictly construed, and should not be extended to cases not clearly within its provisions.

Counsel for appellants cite cases involving contracts made by school directors for the hiring of teachers who had not procured the necessary certificates of qualification, and insist that the case at bar must be governed by the same principles. We see a marked distinction. By the express provisions of the statute the directors are forbidden to pay any public money to a teacher who does not hold the necessary certificate, and any moneys so expended would, by the plain meaning of the statute, be lost to the school fund, for the reason that such fund could not be used for such a purpose. But in the case at bar the contract was one that might have been ratified by the directors proceeding as required by the statute. If it had been ratified, no one would claim that the amount expended would have been lost to the district.

It is said, however, that whether the well was necessary or not was a question to be decided by the directors at a regular or special meeting, where each had the right to be heard, and where the question, after proper

consideration, would be decided by a majority, and that the defendants cannot proceed illegally and then shield themselves from liability by proving that the work was necessary and the cost reasonable. This contention is more plausible than sound, for, while it was the duty of the directors to determine whether or not such a well was necessary, their decision in the premises would not conclude the courts where it is shown that the necessity in fact existed. The fact that it was necessary and the cost reasonable is established in this case, and the finding is conclusive upon this court. Such fact could not, of course, shield appellees from any liability which the statute has fixed for the violation of its provisions, but it is important in determining whether or not the particular liability sued for,—that is, the alleged loss to the district,—has any existence or arose from the illegal action of the defendants. While such officers should be held to a careful compliance with the laws, there must, under the provisions of the statute in question, be a loss before there can be a recovery against them.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

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