No. 13911

Supreme Court of Illinois

Howe

vs.

South Park Commrs., Charles H. Lawrence et al.

IN THE

Supreme Court of Illinois,

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1886.

EDWARD HOWE, *Appellant,*
vs.
THE SOUTH PARK COMMISSIONERS, CHAS. H. LAWRENCE ET AL., *Appellees.*
} Appeal from the Circuit Court of Cook County.

CHAS. H. LAWRENCE, *Appellant,*
vs.
THE SOUTH PARK COMMISSIONERS ET AL., *Appellees.*
} Appeal from the Circuit Court of Cook County.

REPLY OF CHAS. H. LAWRENCE,

APPELLANT AND COMPLAINANT IN CROSS-BILL.

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MAY IT PLEASE THE COURT:

If the following suggestions shall seem voluminous as a reply, I trust I shall not be thought to have abused the favor of the court in granting me time beyond the rules; for your Honors will bear in mind that the questions involved are scarcely less numerous than the counsel arrayed against me, and as the latter respectively present the former in somewhat different aspects, it is necessary to notice each somewhat separately, and all conjointly, in order to bring into true relief and position the vital facts in the case.

In the briefs for appellees considerable is said (and much of it in a spirit that is scarcely creditable to one laying claim either to a christian or a high professional character), about the differences between the original bill as first filed and as finally amended. The argument and screed are made as bearing upon a question of limitation, and also as impeaching the testimony of Judge Evans and Mr. Swan in regard to the execution of February 5, 1840.

And, though I scarcely see by what equitable rule, it is sought to load the cross-bill with all the alleged weaknesses and immoralities heaped upon the original bill and those who drafted it.

It is claimed by appellees that the periods of limitation can be computed as running in favor of many of the defects in the Gardner and Cornell-Fellows proceedings up to the year 1885, notwithstanding the original bill was filed in 1871.

For instance, (pages 34 and 35, Mr. Fuller's brief), it is said the amended bill avers "that the execution of February 5, 1840, issued after the Municipal court was abolished, and should have issued out of the Circuit court of Cook county, but that, in fact, it issued, if at all, in the name of Hamilton, representing himself to be clerk of the Cook Circuit court, but under the seal of the Municipal court," the impression of which alone it bears, and that Hamilton's certificate is that it is the seal of the Municipal court, and that this is a new cause of action as compared with the averment of the original bill.

The averment of the original bill before amendment is that the 'said execution, dated February 5, 1840, was issued out of the Municipal court, as the records of said Muni-

cipal court show, and your orators aver that said Municipal court had been abolished by law before the issuing of said execution.' (Mr. Fuller's brief, 31.)

And Mr. Fuller insists that these two averments state different causes of action.

The rule is that liberal amendments will be allowed to avoid the running of a statute of limitations by restating the cause of action.

What is the cause of action here? The Harris heirs allege that they are the rightful owners of a certain tract of land, and that defendants claim title from a common source—Mark Noble, Jr.; that each of the diverging chains consists of two links, theirs a deed from Noble to Harris, and descent to them upon Harris' death; and those of their adversaries of the proceedings in *Gardner* v. *Noble*, and of the proceedings in the Cornell-Fellows suit, each of which adverse links, they allege, is unsound; that is, that neither one, nor both, have the strength to draw the Harris title to the defendants.

This is the gravamen of the bill—the gist of the cause of action—that Noble conveyed the tract of land—the *res*, which they lay claim to—to Harris; that the proceedings in *Gardner* v. *Noble* were ineffectual to divest this title, and the same of the Cornell-Fellows suit. It is claimed by defendants that in the original draft of the bill certain defects are pointed out, and in the amended bill certain other defects are pointed out, and that so far as the latter are to be considered in evidence a new cause of action is presented. But this cannot be the case. The complainants are still demanding the same *res*, and still averring that the same links in their adversaries' chain are insufficient to uphold their title. The entire legal effect is pleaded in

the first instance, both of their strength and defendants' weakness; what are claimed as new matters are merely *evidentiary* facts and not the *jurisdictional* facts of the case.

Suppose A replevies a horse from B, and in his declaration alleges that the animal was in B's possession under a claim by B that he had purchased the horse in "market overt" and afterwards should amend his declaration by alleging instead that B had stolen the horse; would the cause of action be changed thereby? A would still have the same horse delivered to him on the writ, and, though he might recover on the one state of facts, and be cast in his suit on the other, the horse would not have changed color or identity. The *res* sought is still the same—the $59\frac{3}{4}$ acres; the basis of claim is still the same —that by the deed from Noble, Harris took paramount title; the case being on the chancery side of the court the basis of defendants' claim is stated and negatived with the same legal effect in both instances.

Suppose the suit had been in ejectment, and on trial the Harris heirs had shown, in regard to *Gardner* v. *Noble*, only the facts alleged in the bill, as originally filed; that verdict was rendered, and judgment entered, and a period of limitation, say twenty years, expired within six months from the entry of judgment; that nine months after the judgment a new trial was taken under the statute, and on the second trial the Harris heirs should attempt to show the facts, as set forth in the amended bill, would they be excluded, on the ground that the statute of limitations had run?

Yet the only difference between the supposed and the actual case is that in the one they are stated in the pleading, as by inducement, for the purpose of ne-

gating the anticipated defense, and in the other are shown, by evidence, for the purpose of negating a presented defense. In neither case do they present "a new cause of action," or any "cause of action" at all. The starting point of relief—the cause of action—is the undisputed title to the land, resting on the deed from Noble to Harris.

But in no event can the objections of appellees affect the cross-cause, for the reason that the estoppel which appellees claim against complainants in original bill can also be invoked by me, and the source of knowledge of these defects was equally withheld from me; another reason is that I have all the time, since 1871, had an ejectment suit pending, under which I could take advantage of any and all defects in those proceedings when offered in evidence, and I am not to be prejudiced because I have been brought in to try my rights in a court of equity.

Perhaps better in this connection than elsewhere may be noticed the attacks upon the witnesses Swan and Evans, who drew the original bill, and who are charged with larceny, lying and fraud, the reason for which assault is most obvious.

It is not because of the difference between allegations and proofs, or two sets of allegations, that counsel would outlaw their hapless brothers, but because when they seek to overcome their testimony in regard to the execution of February 5, 1840, they find themselves without sufficient evidence, and resort to language which is only justifiable after a successful impeachment for want of truth and veracity, or where the facts are indisputably such as to leave no reasonable doubt of the moral turpitude of the culprit. Take the superlatively vituperative argument for appellees—that of Messrs. Sleeper & Whiton,

evidently from the pen of the senior partner. My christian brother talks of the borrowing of court files as "larceny of papers" and as destructive of veracity. When the signature of himself and partner to the agreed statement of facts in the Noble decree or suit was shown, he thought it necessary to put Mr. Whiton on the stand to show that he did not have the missing execution. Sleeper & Whiton were retained to defend against the bill of the Harris heirs about February 10, 1871, and the statement of Swan is that the last he saw of the missing execution was when it was carried back to the court house, and that when they went again to get it, it was gone; this was before the great fire.

Mr. Sleeper knows as well as he knows anything, that it was then customary for attorneys to borrow from the files any papers they wanted and keep them as long as wanted, and that Swan and Judge Evans did nothing unusual in this. There is one way of accounting for this missing paper. Sleeper & Whiton knew of this old suit, and were retained to defend the present one; the important paper disappeared after the bill was filed; Mr. Sleeper puts his partner on the stand, and whatever Mr. Whiton stated is honestly said. But why did not Mr. Sleeper go on the stand and clear his skirts? His first act after being retained would be to read the bill, his second to search the Gardner files; and if he had looked for them without finding them he would have told us so and given some substance to the airy estoppel claimed against the Harris heirs, because these files have been in possession of Swan or Evans for so long.

This is Mr. Sleeper's position. He is not entitled to any greater presumption of godliness or honesty either *prima facie*, or on this record, than Mr. Whiton, or the

probate judge of La Salle county, or Mr. Swan, who as a member of this bar has a certificate of good moral character. Mr. Sleeper takes the ground it is necessary for an honorable man like Mr. Whiton to purge himself, and puts him on the stand; but is it not equally so for Mr. Sleeper, his partner and the manager of this case for Clement & Morton? What then deterred him from testifying? Was it fear, or guilt?

Judge Evans and attorneys Swan and Whiton all admitted connection with these papers, and all told what they did, under oath, and I say that the presumption is as strong that Mr. Sleeper stole that execution as that Mr. Evans or Mr. Whiton, or Mr. Swan committed perjury; and I also say there is nothing in the record on which, as a gentleman, I would be willing to make either charge against either one.

Counsel talk about false statements in the pleadings, such as the allegation that no execution issued within a year and a day from the rendition of the judgment against Noble being made fraudulently and for the purpose of deceiving the court; the allegation was undoubtedly made as a statement of the legal status or effect of what was done, and all the appellants do here insist that none was so issued *quoad* the premises in controversy. Nor is any allowance made for the possibility of mistake which even brother Sleeper cannot do without.

In his screed against Swan and Evans, the senior counsel states that "Evans says that when he made the first copy of "the writ (February 5, 1840), he thought it was the seal of "the Circuit court, but on comparing it the next morn- "ing he came to the conclusion that the seal was the im- "pression of the seal of the Municipal court;" and then charges him with lying of record.

Unfortunately for brother Sleeper's *ex cathedra* way of disposing of character, Evans does not so swear. In testifying about that seal he says that when he first examined the device, late in the afternoon, he thought it bore a figure of justice with the scales, but next morning saw it was a human form with a sword. Mr. Sleeper, knowing that the Circuit court seal bore a standing figure of justice holding a pair of scales, and believing that the seal determines the character of the writ, may be said to have stated what he thinks is the legal effect of Evans' testimony; but it is neither a correct statement of Evans' words or ideas. Were I to borrow counsel's vocabulary, I should call some hard names (if there were any left); preferring my own, all I say is, that although Mr. Sleeper might write an edifying book with the title "ME and the men "I have taught," his attack upon Judge Evans and Mr. Swan ought not to convince "US and the court" (Brief, 30), that their testimony is not credible.

So much of appellee's case depends upon presumptions, and it will be necessary to test so many of them, that it may save time here to notice one or two rules relating to their nature and force.

In *Graves* v. *Colwell*, 90 Ill., 612, this court has fully stated the principles governing the force and application of presumptions as follows:

"It has been said, that presumptions of law derive their "force from jurisprudence and not from logic, and that "such presumptions are arbitrary in their application. "This is true of irrebuttable presumptions, and prima-"rily, of such as are rebuttable. It is true of the latter "until the presumption has been overcome by proof, "and the burden shifted, but when this has been

" done, then the conflicting evidence on the question of " fact is to be weighed and the verdict rendered, in civil " cases, in favor of the party whose proofs have most " weight—and in this latter process the presumption of " law loses all that it had of mere arbitrary power, and " must necessarily be regarded only from the standpoint " of logic and reason, and valued and given effect only as " it has evidential character. Primarily the rebuttable legal " presumption affects only the burden of proof, but if that " burden is shifted back upon the party from whom it " first lifted it, then the presumption is of value only as it " has probative force, except it be that on the entire case " the evidence is equally balanced, in which event the ar- " bitrary power of the presumption of law would settle " the issue in favor of the proponent of the presumption.

" Regarded in its evidential aspect, a given presumption " of law may have either more or less of probative value, de- " pendent upon the character of the presumption itself, and " upon the circumstances of the particular case in which " the issue may arise. Some legal presumptions are more " probable, and inherently stronger than others. So, also, " differing circumstances may give differing degrees of " probability to one and the same legal presumption. A " promissory note is made to A. B. and it turns out that " there are two persons of that name in the community— " a father and son. The question of identity arises, and " primarily, as fixing the burden of proof, the law says it " is presumed the father was intended.

" Thus far the presumption is judicial and arbitrary. " An issue is formed, and the son establishes, *prima facie*, " that he and not the father was indicated, and the father " then offers rebutting evidence. Now this issue, thus " made, is to be determined by the weight of evidence

"and upon the whole case, and in determining such issue "the presumption has lost (unless there be an equilibrium), "its merely arbitrary character, and is entitled only to its "logical value. If A. B., the son, was, at the date of the "transaction involved in the controversy, a mere infant of "tender years, wholly unacquainted with business affairs, "and the father was engaged in the active pursuits of life, "the probability that the father was meant is very great, "and the legal presumption would have much more of "probative force than it would have in a case where the "son was a mature man and in active business, and the "father aged and retired from business."

In *Hicks* v. *Silliman et al.*, 93 Ill., 262, this court say that it is the right and duty of courts, in determining what conclusions or results may be fairly drawn from testimony, to avail themselves of their own knowledge and experience in the practical affairs of life.

In *C. B. & Q. R. R. Co.* v. *Van Patten*, 74 Ill., 94, the doctrine is further asserted that when the *prima facie* controlling force of a legal presumption is once rebutted, (which may be either by proof of facts or by the presentation of some other legal presumption of equal force), then the *legal* presumption disappears from the case entirely.

I quote from the report an instruction given and the ruling upon it.

The instruction was as follows:

"The law presumes the deceased, in approaching the "mill crossing, exercised proper care and prudence; and "unless the jury believe from the evidence that the de- "ceased did not exercise care and prudence in approach-

"ing said crossing, he cannot be regarded as guilty of "negligence."

The Court discuss the ruling as follows:

"It may be, if there had been simply evidence of the "defendant's negligence, resulting in the injury complained "of, and no evidence of what the intestate's conduct was, "this instruction would have been unobjectionable. But "in view of the evidence as it was, the tendency of the "instruction was to mislead, and we doubt not it did mis- "lead the jury. They must have understood it applied to "the evidence before them, and, notwithstanding there "was clear proof of the plaintiff's negligence, still it must "be considered with reference to the legal presumption "that he was not negligent. When there is clear and "incontestable proof of a fact, no presumptions can be in- "dulged, except such as arise from the proof. How "much, or whether any evidence was sufficient, in the es- "timation of the jury, to overcome this legal presumption "that the intestate was not negligent, under the peculiar "form of the instruction, can of course only be conjec- "tured. It may, however, be inferred from their finding "that the presumption was of controlling importance, for "it is difficult otherwise to reconcile the verdict with the "evidence.

"The instruction should have been refused, and the "giving of it was error."

Perhaps the shortest way of replying to the various briefs of appellees is to take up the points of the case in their natural order, rather than to examine that of each of the counsel separately.

The first question is one of jurisdiction; the first defect

being the misdirection of the writ to the high constable, it being shown that Noble lived outside the city, in which case the summons should have issued to the sheriff. Mr. Woodbridge has fully discussed this; but I wish to call your Honors' attention to the position of Judge Tuley (Fuller's brief, 51), that the evidence is insufficient to establish Mark Noble's residence outside the city, reasoning by analogy from the rule that the evidence of one witness will not be permitted to overthrow the acknowledgment of a deed. The analogy does not exist.

In case of a deed, the witness is an interested party, and directly contradicted by an official certificate utterly inconsistent and irreconcilable with the witness' testimony.

Here the witness is entirely disinterested, and is not contradicted by the return made by the high constable; for it is consistent with the return that Noble lived outside the city, but occasionally visited it. There is no other evidence on this point than the testimony of John Noble and the return on the writ; the return creates only a legal presumption of the *presence*, not residence, of Mark Noble in Chicago, on a certain day, from which we are asked to presume a residence; the evidence as to actual residence being uncontradicted, the legal presumption disappears; and the return then has only the probative force of the conceded fact that Mark Noble was bodily present in Chicago, on a certain day, to weigh against the sworn statement of his brother (he being dead), that his residence was at that time elsewhere.

To meet this, Judge Tuley would presume a residence in the city for only a few hours; and that, in the absence of any proof of his having stayed here over night even,

with an immediate return to his former home. Such a presumption, based on so minute an abiding, might do for a midge, but not for a man, for it would require proof of something more than the declarations of the man himself to establish two changes of domicile in one day.

Messrs. Sleeper & Whiton endeavor to avoid this difficulty by the novel theory (page 3 of their brief), that as a summons is the first step in a case, and the clerk makes it, the clerk had jurisdiction to determine to whom the writ should issue, and that his determination was therefore an adjudication. It is generally supposed that a suit at law is commenced by the plaintiff's attorney lodging with the clerk a præcipe directing as to the form of the writ. I have not found, nor have counsel shown, where the ministerial officer, called the clerk, is invested with judicial powers; nor how a plea in abatement for want of jurisdiction, or a motion to quash the writ could be determined before the clerk should sign the summons.

The sole question is whether the provision is mandatory or directory, and the case of *Sidwell* v. *Schumacher*, 99 Ill., 433, seems sufficient on this point.

If we assume the writ to be good, the next question is, did the court acquire jurisdiction of Noble?

The form of the return has been sufficiently discussed; but Judge Tuley, who may without disrespect be called the leading counsel for appellees, his opinion being admirable as an argument, admits that the return does not show service of the writ (Mr. Fuller's brief, 53), but seeks to avoid this fatal fact by divers presumptions.

The first presumption he evokes is that the return is amendable, and therefore the judgment is erroneous, but

not void. Any return, I understand, may be amended to conform to the true state of facts; but until it is amended the jurisdiction must be determined by the return as it is, and not as it might be, if a different state of facts is shown.

Suppose a sheriff goes out to serve a summons on A and another on B, and finds and serves the latter but not the former, and that on going back to his office, by mistake he returns the writ against B, "not found," and service on A; that a judgment is rendered, by default, against B. There is no doubt that the return could be amended so as to show the truth—due service on B, which would make a valid judgment. And because of this possibility that the true facts are other than the record shows, and the possibility that the return may be amended, something with which every writ is pregnant, Judge Tuley would rule, and counsel argue, that a judgment based upon a writ with a return of "not found," was not void but only erroneous, and that a purchaser at an execution sale under such judgment would be protected; arriving at this conclusion by the aid of a whole litter of presumptions.

Certainly it must be true that there is no presumption that something that has a manifest existence is controlled or rendered nugatory by that which does not appear, and may not exist, or that silence preponderates over a positive statement.

Then as an officer is presumed to state the truth in his return, and the facts he states do not constitute service, what voice has silence to declare another state of facts? Where do counsel and Judge Tuley get their presumption of facts, on which it is presumed the return was

amended in contemplation of law? They don't find them in the record; and it is not worth while to guess what they might be; since, while in the presumption business, they will fit themselves out as suits their fancy.

In addition to what was said in *Clark* v. *Thompson*, *Botsford* v. *O'Connor*, and *Harris* v. *Lester*, this Court has said in *Barnett* v. *Wolf*, 70 Ill., 78:

"The question whether the solemn finding of the court, "as to its jurisdiction, can be contradicted by evidence "outside of the record, is presented in this case, and upon "its determination depend the rights of the parties. In "cases of summons and personal service, and where the "proof of service can only be shown by the return of the "officer, it has been held that, if the return contradicted "the finding of the court, it would overcome the finding "and prove the want of jurisdiction, even in a collateral "proceeding."

It is then claimed that although the return does not show jurisdiction of Noble, from the fact that a judgment was entered, it must be presumed that the court acquired jurisdiction in some other way, as appearance or otherwise.

As our experience teaches us that defendants only get into court by being served with summons (*Hicks* v. *Silliman*, 93 Ills., 262), and as it appears Noble would not come into court without an officer being sent for him, there is no presumption that he afterward filed a voluntary appearance. The probative force of the evidential facts renders it more likely that the court fell into the error, which Messrs. Sleeper & Whiton, and Messrs. Bisbee, Ahrens & Decker would have fallen into, of considering this a good return, than that Noble filed an appearance

without filing a plea. The court will not presume a paper was filed unless there is some proof tending to show the fact. Indeed in *Ins. Co.*, v. *Stayart*, 79 Ill., 259, the record in this court showing everything requisite to a judgment, except a declaration, afterwards a supplemental record was filed containing a declaration in the case without any file marks, and it was held that it would be presumed that the declaration was not filed.

Then again the presumption is claimed that another summons may have issued. But here again they are building without a foundation. There is nothing to indicate a second summons. Certainly one would not have been issued if the first or the service of it had been good or amendable—and counsel can't "bunch" these inconsistent presumptions to establish the same fact. And they are again seeking to overcome something by nothing.

And the mathematics of the case show the falsity of such a baseless presumption.

The præcipe is dated June 15.

The summons is dated June 16, to the July term, on the first Monday in July.

The pretended service was June 16, but the summons was not returned till June 28. Another writ could not then have been issued and served to the July term, at which judgment was rendered, as from June 28 to the first Monday in July could at most be only eight days. Judge Tuley says no one swears there was not another summons. Is there any presumption that there was another—there is no legal presumption, nor any facts proven which have probative force in that direction. We have a summons and a return, which counsel say shows

good service. There is no proof of another summons and "no presumptions can be indulged except such as arise "from the proof."

R. R. Co. v. *Van Patton*, 74 Ill., 94.

My adversaries must get some fact of record, instead of fancy, on which to base a presumption of another summons before being entitled to a presumption of due service of it.

Finally, so far as I shall notice the presumptions claimed for this judgment, it is urged, that the judgment may have recited that there had been due service of process.

It is admitted by all that there was some form of judgment entry; what it was is not shown, and appellees are doubtless entitled to some presumption as to its form.

But no form of judgment with any unusual recitals of appearance or of default for want of plea after appearance can be indulged, since there is no "proof from which they "can arise." They are entitled, in the absence of any proof on which to base a different one, only to a presumption of the ordinary form of judgment by default, which recites that it appearing to the court that defendant has been duly served with process more than ten days before the first day of this term, and being now three times solemnly called, comes not, but makes default.

Suppose that to be so, the recital must be consistent with the rest of the record, and therefore must rest upon the return on the summons, service of which can be proved in no other way; and the return under consideration would contradict and overcome such finding in the judgment and prove the want of jurisdiction, *Barnett* v.

Wolf, 70 Ill., 78; and no presumption can be indulged upon any speculative return when an actual one is proven; *R. R. Co.* v. *Van Patten*, 74 Ill., 94.

Judge Tuley evidently was of opinion that if the judgment recited due service of process that would control the return—which is not the law where there is personal service; nor can another summons be presumed, one being shown, because then a recital in the judgment could never be contradicted and overcome by the return, as this Court says in *Barnett* v. *Wolf*, may be done, for the reason that as fast as one writ was shown to be void a valid one would be presumed, and as the position taken is that the matter must be determined solely by the record itself, these presumptions controlling facts would never end; a logical result of presuming something from a fact which itself is only presumptive in order to defeat a fact which, is concrete and proven.

The refined speculations as to what constitute a record are immaterial since in this State a summons has always formed part of it, and is always found in a return to a writ of error.

If I have been correct in my apprehension of the law in regard to jurisdiction not having been obtained of Mark Noble, that would seem to be the end of the case; since, although a purchaser at judicial sale is only bound to see that there is a judgment, etc., he is bound to see that there is a judgment which is not void on the face of the record, for want of jurisdiction of the person.

Passing on to the next point, and assuming, while considering the various executions, that the judgment was valid, I have not much to add to what has been said in regard to the non-perpetuation of the lien, by the failure

to issue a proper execution within a year and a day. The only argument that Judge Tuley makes against this is that of inconvenience, and he says that the construction claimed would require two executions within the year, in order to give the judgment the same force as a Circuit court judgment, which the statute provided it should have. (Mr. Fuller's brief, 57.) Notwithstanding the law provided, in general terms, in all matters, that the Municipal court should be substantially a Circuit court, it must still be considered as different in some things, else it would be a Circuit court and not a Municipal court; and all that these provisions of the statute erecting the court mean, is that so far as is not inconsistent with its individuality and the special provisions in regard to it, it should be like a Circuit court. Now, property in different counties may be sold upon an execution issuing from a Circuit court, and in order to make the judgment of the Circuit court of Cook county a lien on the property outside the county, it is necessary to issue an execution to a different officer than the one to whom it would run if it were merely sought to perpetuate the lien in Cook county; and it seems it is only following the analogy provided for by the statute to say that although an execution, issuing to one officer, might perpetuate the lien as to property in one municipality, yet, to accomplish the same result in another, an execution must be issued to a different officer.

If, on a judgment in the Circuit court of Cook county, two executions could be out at the same time, one to the sheriff of Cook county, and one to the sheriff of Will county, there is no reason why two executions could not be out at the same time on a Municipal court judgment; one to the high constable and the other to the sheriff of Cook county; and if the position taken by Judge Tuley

is correct, that in case an execution should issue to the high constable just ninety days before the year expired, none other could issue to the sheriff until its return, whereby the right to perpetuate the lien on lands outside the city, but within the county, would be lost, then it must be also true that in case of a judgment in the Circuit court of Cook county, execution issued to the sheriff of Cook county, just ninety days before the expiration of the year, another execution could not be issued to Will county within that ninety days, and, therefore, the construction contended for, even on the hypothesis of Judge Tuley, would render the status of the two judgments the same.

The next point made by appellants is that by the failure of the plaintiff in execution to bid two-thirds of the appraised value of the property levied upon, under the execution of June 4, 1838, the lien of the judgment was thenceforth discharged as to all of Noble's lands. Even Judge Tuley has made no reply to this position. Messrs. Bisbee, Ahrens & Decker, page 22 of their brief, say, merely, that the law is not as claimed by us, because, they say, the provisos of the act are not properly applied by Mr. Woodbridge. Mr. Fuller, page 109, claims that the statute is ambiguous, and that because later laws leave the judgment creditor in the same position as other purchasers, the doubt in construction must be solved in favor of a like construction. But the fact that the legislature subsequently passed an act putting the judgment creditor on the same plane with other bidders, shows the intent of the act of 1825 to put him on a different one. Mr. Woodbridge calls attention to the act of 1825, which contains the provisos in question. It may add to a proper understanding of

them to consider the state of the law when that act was passed. By the twenty-second section of an act of March 22, 1819, entitled "An Act, subjecting real estate to exe- "cution for debt, and for other purposes," it was provided that all real estate that should be ordered to be sold under the provisions of that act should be valued by free-holders, etc., and that the sheriff should then proceed to sell the same, provided that the property should bring at least two-thirds of its appraised value; in case it should not bring two-thirds, the sale should be continued until the property should have been offered on three different days, with intervening periods of twenty days between consecutive offerings, unless the person in whose favor the execution issued should agree to take the same at its valuation. This act was amended February 15, 1821, by an act in which this court has said, in *Curtis* v. *Doe*, Breese, 140, that "the legislature assume the fact that real "estate cannot be sold on execution, unless it will bring "two-thirds of its valuation. The third section is intended "to authorize lands that have been already valued, and "not sold, for want of bidders, at two-thirds of that val- "uation, to be sold for one-half the valuation."

They then proceed as follows:

"The fourth section of the amended act is: 'That "when any real estate shall hereafter be levied upon, by "virtue of any execution hereafter to be issued, and shall "have been twice offered for sale under the provisions of "the act to which this is an amendment, and has not "brought the amount of its valuation, or two-thirds "thereof, upon the third or any subsequent offering, the "sheriff, or other officer, shall proceed to sell to the "highest bidder for what it will bring in ready money, "having first given fifteen days' notice as aforesaid.' My

"conclusion is, that the sheriff was bound to proceed, on "the execution mentioned in this case, according to the "directions of the 22d section of the original act, as mod- "ified by the fourth section of the amending act. From "which it will result that the sheriff's duty was to have "had the premises valued by three disinterested free- "holders on oath, and advertised for twenty days, when, "if two-thirds was not bid, he should again have adver- "tised for twenty days, and then if two-thirds was not "bid, he could, according to the above recited fourth "section, sell the premises for what they would bring in "ready money, having first given fifteen days notice of "the sale. Can the court presume that the sheriff com- "plied with these express provisions of the law? I think "not. Would not every lawyer be startled at the propo- "sition, whether the court would not presume in favor of "the sheriff's deed, that the sheriff had an execution? "And that the execution was based on a judgment? Yet "these presumptions appear as reasonable as the pre- "sumption that the sheriff has obeyed the mandates of "the statute, without showing the fact. Every agent, "whether public or private, must act within the powers "delegated to him, and must show that in all essential "particulars he has not varied from them. If a party is "to be deprived of his property without his consent, the "law that authorizes him to be dispossessed must be "obeyed, and he has a right to call for proof that he has "not been illegally divested of his estate. The argument "that good policy requires that public sales should be "supported, whether the provisions of the statute have "been substantially complied with or not, does not appear "to be entitled to much weight."

From all this it appears that the requirements of the act

of 1819, that the plaintiff must bid the whole valuation, or any other party two-thirds of the valuation, made a discrimination against the judgment creditor, and operated to prevent a satisfaction of judgments; the scale was too high, so by the third section of the act of 1821 it was provided that lands which had been theretofore appraised might be struck off at one-half, instead of two-thirds, of the appraisement which had been put upon them, and that lands thereafter to be appraised should, after having been twice offered, without bringing two-thirds of its valuation, be sold for the highest and best bid, without regard to the valuation, upon the third sale. Then when the act of 1825 was adopted, which did not contemplate these repeated adjournments of sale, the first proviso was made, so as to avoid a retrospective effect to the act, and the second proviso, and the body of the section, are then to be considered together, without regard to the first proviso, or the prior statutes. This then gives a plain and unambiguous reading of the act, that when any real estate should be levied upon it should be appraised, and should be struck off and sold the first day offered to the highest bidder for cash, but that if the plaintiff would not bid two-thirds of the appraisement, or take enough of the property at that rate to satisfy the judgment, the judgment should cease to be a lien as against all other judgments, or subsequent *bona fide* purchasers. It seems to me that this clears up all the ambiguity found by Mr. Fuller, and that there can be no doubt as to the meaning of the statute, as contended for by Mr. Woodbridge, and that when the property was sold under the execution of June 4, 1838, to third parties, for less than two-thirds of its appraised value, the judgment ceased to be a lien 'upon the premises in controversy, and Benjamin Harris' title of record then be-

came paramount to anything that might be claimed under this judgment.

The comments of Judge Breese, upon the presumptions that must be indulged to overcome the statute, are to be commended to counsel for appellees.

The next point in the case is the execution of February 5, 1840, of which I spoke in my original argument; but the claims of appellees in regard to the testimony as to the character of that document, and the witnesses who testified to it, are so extraordinary, so unjust, both to witnesses and the record of their testimony, and in some instances so absurd, as to make it proper to call attention to some of the things they have said.

The character of the witnesses has perhaps been sufficiently discussed. It is scarcely probable that a man like Judge Evans, who has been chosen by the community in which he has resided for many years, to administer, as probate judge, upon the property descending to widows and minors, is a man who is to be led, even by his interests in this case, which he has not attempted to conceal, to falsify, or commit perjury. Judge Tuley himself says that these witnesses are unimpeached, except as they are interested in the result of the suit, (Mr. Fuller's brief, page 58), which is no impeachment at all, nor a fitting remark for a judge to make when the statute allows interested parties to testify; or, if it is an impeachment, Mr. Cornell, Mr. Mulvey, Mr. Jameson, Mr. Shortall, Mr. Brown and Mr. Greenleaf, are all impeached, because they have all an interest in maintaining the case of the appellees. Not a direct money interest, it is true, but an interest in that which the law regards as property; reputation on the part of some, liability on covenants of war-

ranty as to others, and as to the abstract makers the fact that if they could be shown to have been negligent in making up their abstracts, they might be pecuniarily liable, and in any event would undoubtedly suffer a loss of business.

In order to discredit the testimony of complainants' witnesses, and to disregard their testimony, it is absolutely necessary to conclude that two lawyers, and the uncle of one of them, all reputable men, conspired, in the outset, to perpetrate a fraud, by the filing of the original bill in this case. The Chicago fire had not then occurred. They knew that the proceedings in Gardner against Noble had been examined by others, parties in the Noble dower suits. They could have no assurance, nor even the probability of an assurance, that the other parties in interest did not have copies of all those proceedings. They knew that the property had been subject to many transfers, and that in the ordinary course of business all those transfers would, if prudently made, be based upon examination of the records, which would show the truth in regard to those papers. So that the presumption was against the success of such a conspiracy, undertaken at the time it was. And if it had been a conspiracy—that is, if they were making the case out of whole cloth—is it conceivable that they would not, on their copies, have had a transcript of the device of the seal upon the execution of 1840, showing it to be the seal of the Municipal court? They being unimpeached, as Judge Tuley says, we have the testimony of four witnesses as to the language of the body of the writ, and the attestation clause, and the testimony of three witnesses as to the character of the seal, from positive recollection, and that of Judge Holbrook,

merely to the effect that it exists in his mind as corresponding with the statement of that execution.

In accordance with the case from the 90th Ill., already cited, the positive testimony of these witnesses overcomes the force of the presumptions, first, I will say, as to the language of the writ itself, for we have an exact and full copy; and the presumption claimed that the writ duly issued from the Circuit court then loses its legal force, and has nothing left but its probative force, if any proof can be found on which to base it. Not one of defendants' witnesses pretends to give the language, or the substance of the language of the attestation clause of this execution. Some of them swear to the legal effect of the whole instrument, but that is of no weight whatever. Three men produce sworn copies of this writ. A fourth, without having seen a copy of the language of the writ for years, gives it from memory, word for word, in accord with the copies of the other witnesses, and correctly gives the substance of the body of the writ. Here again it is not admissible to presume something from nothing; and the only presumptions which can be indulged are those which arise from the facts put in proof, and it must be taken as undeniably true, that the language of the writ is correctly shown by the appellants' proof.

This being so, how about the seal? I have already shown your Honors how mistaken Mr. Sleeper was in his quotation of Judge Evans' testimony, while indulging in his attack upon him. Judge Evans did not say he thought at first it was a Circuit court seal. He said he thought it was a figure of justice, with a pair of scales, but in the morning, by the better light, saw that it was a human figure, holding a sword, or something, downward in her hand. The

witnesses swear that the seal on that execution bore the same device as that upon the second execution, which is here in evidence, and is unquestionably the seal of the Municipal court. There is not a single witness offered by the defendants, who pretend to give a description of the device, or who can state, even in general terms, as a positive, instead of a negative, fact that it was the Circuit court seal. Mr. Brown swears it was a Circuit court seal, because he would have noticed it if not, but that is merely negative testimony. Now what is the presumption from the language of the writ? Counsel for appellees ask the court to presume that the clerk of the Circuit court lied when he stated that he affixed the seal of the Municipal court. That is, they seek by a presumption to control and negate a fact, which affirmatively appears of record by competent proof. There is no room for doubt, in the mind of any reasonable man that the attestation clause upon that writ was as shown in the copies of Evans and the two Swans, and as stated by Judge Holbrook. Then, on the authority of the case cited as to presumptions, the law will not indulge a presumption which will contradict the established fact, or, in the language of the Van Patten case, when "there is clear and incontestable "proof of a fact, no presumptions can be indulged, except "such as arise from the proof."

Your Honors will not presume that Richard J. Hamilton, clerk of the Circuit court, lied, when he said that he attached the seal of the Municipal court, and the presumption arising from that statement alone, in the absence of any proof at all, as to the seal, would be sufficient to establish it as the seal of the Municipal court, until some evidence should be adduced to show another seal.

When Judge Tuley says that all the presumptions of the law are against the fact that the seal of the Municipal court was attached, and that he who attacks the execution must overcome the presumption of the law "by proof "*which fully satisfies the mind*," that the execution was not such as the law required to be issued, he is taking a position inconsistent with the authority already cited as to presumptions; for, if we take the language of that writ, which is incontestably established, the presumption that any seal but that of the Municipal court was affixed at once disappears, by virtue of the statement in the writ; and whether or not that be so, it is sufficient to put the matter in doubt, as to whether or not the Municipal court seal was attached, and it is not necessary to fully satisfy the mind that the execution did not have the Circuit court seal, because when once the matter has been put in doubt, the presumptive force or the arbitrary force of the presumption disappears, and we are left to determine the question upon the testimony, and all that is then required is that there shall be a *preponderance* of evidence, which need not "fully satisfy the mind"; and in the weighing the arbitrary or legal force of the first presumption counts for nothing.

We also have the testimony of Mr. Cornell, as tending to support the claim that this was an execution of the Municipal court. On the direct examination (Abst., Vol. 2, page 221), he was asked this question by Mr. Fuller, which, by the way, like most of the questions asked this witness on direct examination, is leading:

"Q. And do you remember about the sheriff's deed, "whether the sheriff had given a deed to Gardner; that is "what I want to call your attention to?

"A. Well, Collins said that by the filing of the bill it "would correct the discrepancies in regard to the writs, "etc., pertaining to the title. I remember that, and the "description, as well."

Mr. Fuller saw the point, and at once steered the witness away, the next question being:

"Q. Would you remember the name of Jefferson "Gardner in connection with the title?

"A. Yes, sir. Oh, I remember the name of Jefferson "Gardner, of course.

"Q. Do you recollect about getting a sheriff's deed? "Do you remember that?" and so on.

Now what were the writs in which there were discrepancies which were to be fixed up by the filing of the Cornell and Fellows bill? The writs are all here, save two executions, one of which is unimportant, and the only discrepancies which anywhere appear are, first, the defective service of the summons, and second, the discrepancies in the execution of February 5, 1840.

Now, if Mr. Cornell was not then a good enough lawyer to know, Mr. Collins was, that a want of service of process could not be fixed up in that way. Therefore, there must have been some discrepancy in this only other writ in which it could be found, viz: the execution of February 5, 1840, "to be fixed up." Defendants' witness and we therefore agree that there were discrepancies in that writ. We point them out; defendants do not. Therefore the proof made by us must control as to the nature of the discrepancies, since there is no conflict.

Messrs. Sleeper & Whiton, page 38, say that the seal im-

pressed on the execution of February 5, 1840, was that of the Circuit court, because the writ bore teste in the name of the clerk of that court, whence it will be taken and deemed to have been sealed with its seal, until the contrary affirmatively appears by the writ itself; to which I reply, that the evidence of three sworn copies, each one of which is just as much entitled to credence as a certified copy, and the independent testimony of another witness, establishes that the contrary does affirmatively appear by the writ itself, and the statement of the clerk of the court to that effect. Counsel's second reason is that there is no sufficient proof of the loss of that writ to admit of secondary evidence of its contents, or its seal, which is an argument which reflects great credit upon the erudition and fairness of counsel. The only testimony on the point is that of Mr. Swan, that he took it back to the court, and when he went again to get it, it was not to be found. This was after brother Sleeper had been employed to defend in this suit. This being so, according to brother Sleeper, the presumption would be that the clerk had possession of it, and the court will take judicial notice that the records and files, and everything of that sort, were burned October 9, 1871. The third reason of counsel is because the evidence on the question of the seal is overwhelming in the proof of what the law presumes, which, although rather discouraging, we do not think a sufficient argument to convince "Us and the court" of what counsel claim.

Some of the counsel say that either Swan or Evans willfully suppressed or destroyed the original, or mislaid it among their papers while they had the files in their office, and made no search for it, and hence no foundation is made for the admission of copies. This statement is incorrect, and attributable either to a want of recollection

or examination of the testimony of the witness Swan, which is distinct and unequivocal, that he returned it to the clerk's office, and upon again going for it could not find it. The record shows that when Judge Evans found out that Swan had carried back the files and left them in court, he at once demanded whether he had obtained a certified copy, and on being told no, that he went at once with Swan to court to get a certified copy, and on finding that this execution was missing then took away the files, to preserve them from the predatory habits of some unknown party who was interested in the case, but who was neither Mr. Whiton, Mr. Evans, nor either of the Swans.

In Mr. Fuller's brief it is suggested, as bearing upon this point, that Mr. Swan's partner, Griffin, who had access to the files, and this execution, was not called. Mr. Swan's testimony is explicit that he took the execution back to the court, with all the files, and left it there, and when he went again it was gone. It did not disappear in his office, and by the same rule we observe that Mr. Whiton's partner, Mr. Sleeper, who had access to the clerk's office, and who knew about these files, was not called. I am not charging Mr. Fuller with any fraud in not calling Mr. Sleeper, whose connection with the case is shown, but I simply say that the thing is as broad as it is long. Mr. Fuller suggests that no search by the circuit clerk was requested, or made, and that none of the witnesses searched the clerk's office, which is a mistake, for the testimony shows that Swan did go there to get it, and could not find it. He says the proper foundation for secondary evidence is lacking, to which I say that the presumption is it was destroyed by the fire.

Considerable stress is laid by Mr. Fuller, and some of the other counsel, upon the fact that no copy of the seal—

that is, of the device of the seal—appears upon the copies made of the execution. I will venture to say that if your Honors will cause the clerk of your court to examine the transcripts of record on file, he will not find upon the transcript of any writ issued under the seal of the lower courts, a delineation of the device which the seal bore, or anything more than either the words "Seal" or "L. S.," or "Seal of the court." It is simply in accord with the ordinary practice in copying papers, as your Honors will know from your knowledge and experience in the practical affairs in life, which you have a right to avail yourselves of, as is stated in *Hicks* v. *Silliman*, 93 Ill., 262. The witnesses expected that the original document itself would be forthcoming. It was like another seal on another writ, which is produced. It bore out the language of the attestation clause, which stated that it was the seal of the Municipal court, and it has never been the practice in making copies of court papers to copy the device, or legend of a seal. They examined it with great care, and determined what it was. They could not make out on that one writ every particle of the device, but there were some portions which were unmistakable, and which identified the impression beyond a doubt with that of an execution which was saved, and is produced in this case, and which is the seal of the Municipal court. If these witnesses had formed a conspiracy, we would not have found the variance in their testimony, as to whether or not there were any interlineations in that writ of February 5, 1840. E. D. Swan, who had most to do with the paper, states that his recollection of the instrument is, it had interlineations at the bottom, although what they were he could not state. If he had been manufacturing a case, with intent to suppress the writ, he would have

known precisely what those interlineations were, and so would the other witnesses. This fact merely tends to strengthen, rather than weaken the evidence.

Mr. Fuller calls attention to Greenleaf's testimony, who was in the circuit clerk's office in 1852 or 1853, that the clerk kept the Municipal court execution docket straight along for executions issued from the Circuit court, on Municipal court judgments. This was more than ten years after the fact, and we know that many Municipal court executions were issued after that court was abolished, from the case of *Newkirk* v. *Chapron*, 17th Ill., 344, where it is stated that "the defendant further offered "in evidence a number of papers purporting to be process "of the Municipal court of the city of Chicago, dated after "the 15th day of February, A. D. 1839, and in no way "connected with, or having relation to, the title set up by "said defendant," which shows that the custom of issuing Municipal court process under the seal of that court, was kept up for a good while; and the process must have been execution, for certainly no summons, nor subpœnas, were being issued after the court had ceased to sit.

Mr. Fuller then catalogues the presumptions and proofs in favor of the South Park Commissioners, that this execution bore the Circuit court seal.

(*a.*) Is the presumption.

This I have already, I think, disposed of.

(*b.*) The judgment of the Circuit court, in January, 1848, ordering the sheriff's deed to issue to Gardner.

This is exceedingly unsatisfactory, for the reason that it is not an adjudication where any contest was made, or

anybody claiming under Harris could have been heard, and because the application was based, not on the execution, but upon the sheriff's certificate of sale. So that the execution was not before the court to be passed upon; and again, at that time, and up to the decision of the Supreme court in the case of *Newkirk* v. *Chapron*, it seems to have been the opinion in Cook county that process should continue to issue as the process of the Municipal court, upon judgments rendered in that forum. As already shown, a bundle of such documents was produced in *Newkirk* v. *Chapron*, and the decision in that case, in the Cook county court of Common Pleas, was in favor of that position. So that court would, without doubt, order the deed to issue, the execution having been that of the Municipal court. It would more likely have refused it, if it had been a Circuit court execution, in the light of history.

(*c.*) The bill of *Cornell and Fellows* v. *Harris*, taken pro confesso, as against Harris, and the decree thereon.

That might do as a matter of argument against the Harris heirs, but has not even that dignity as against me; and as against the Harris heirs, it is to be remarked, that neither the master nor the court had that execution before them, nor indeed the original certificate of sale, but merely a copy of it. This is shown by the statement in the master's report of what proofs were before him, and the fact that the report was confirmed upon motion.

(*d.*) The abstract by Shortall & Hoard, of September 14, 1868, which declares that the execution in question, dated February 5, 1840, issued out of the Circuit court of Cook county, which is in the same condition it was when it left the office to be delivered to Morton and Cle-

ment, as has been made clear by the testimony of Mr. Shortall.

This abstract was objected to, because of this erasure in a material part, to wit: the very part which Mr. Fuller now invokes as proof of this execution, and under the statute it was not admissible in evidence. The statute provides: "That any writings, &c., shall be rejected, and "not be admitted in evidence, unless the same appear "upon its face without erasure, blemish, alteration, inter- "lineation or interpolation, in any material part, unless the "same be explained to the satisfaction of the court, and "to have been fairly and honestly made in the ordinary "course of business." Now, what I say is, not that the evidence shows that that erasure was dishonestly made, after the abstract left the office of Shortall & Hoard, or dishonestly made prior to that time. There is no evidence of that; but there is likewise no evidence to explain why it was made, or who made it. Mr. Shortall don't know. He looks simply at his letterpress copy-book, and then at the abstract, and merely testifies that the copy-book shows the erasure was made before the document left their office. It don't appear that that abstract was an original abstract. It does appear by the testimony of Shortall and Brown and Greenleaf, that when an examamination or an abstract has once been made, and a copy kept of it, whenever there is subsequently occasion to go over the same ground, they merely copy the former abstract; and here we find, under this same head, Mr. Fuller's brief, page 125, "as additional proof in regard to the "seal, the Shortall & Hoard abstract, dated April 5, 1871, "to the same effect;" this by Mr. Shortall's own admission is merely a copy of the one of 1868.

(*e.*) The Gardner abstract, showing the deed issuing to him for property in Bickerdike's Addition, on his application to the Circuit court, which abstract declares the execution issued from the Circuit court.

I have already shown your Honors that that application to the court for the issuing of that deed was based upon the sheriff's certificate or a copy of it, and not on the execution itself. And the entry in that abstract as to the Gardner judgment does not state that the execution issued out of the Circuit court. That is only found in the memorandum of the recitals of the sheriff's deed. (Abst., Vol. 2, page 35.)

(*f.*) The certificate of the sheriff.

This is merely a subdivision or restatement in different form of the same thing.

That is the Gardner abstract, and the order of the court in 1848, directing the sheriff's deed to Gardner, for the property in Bickerdike's Addition, all rest upon the certificate of the sheriff; yet here the thing is sought to be transformed into a chimera, whose three heads will work destruction to their adversary.

(*g.*) Rees, Chase & Co. abstract, which has no note that the execution was otherwise than regular.

This scarcely amounts to the expression of a conclusion of law even on the part of the one who made it. We are not informed who made it, or what his notions would be of a regular and what an irregular execution, or by what rule he would determine the character of an execution.

(*h.*) The evidence of Brown.

He says that he examined the last execution, and while he has no recollection of it, as a matter of fact, testifies from his recollection that if there had been an erroneous seal he would have noticed and noted it. Your Honors will recollect, as I pointed out in my previous argument, his notion of regularity was that on a judgment in the Municipal court, the execution would necessarily run to the high constable, and that they always did so. (Abst., 191.)

(*i.*) The opinion (says Mr. Fuller) of Judge Beckwith, Mr. Whiton and others upon the title, without any suspicion of such a defect as is claimed.

We are not shown Judge Beckwith's opinion, and it is patent even from the statement of Mr. Fuller, that that matter was not discussed; and Mr. Whiton disclaims any recollection whatever of having seen that execution, though he thinks he may have done so.

(*j.*) The fact that a number of gentlemen, mentioned by name, all had something to do with this title, and yet knew of no defect of this kind, although thoroughly familiar with the case of *Newkirk* v. *Chapron*, which was commenced June 4, 1854, and decided at the June term, 1855.

If my recollection serves me right, none of these gentlemen had anything to do with this property after the decision in *Newkirk* against *Chapron*, that is, in regard to investigating the title, because Mr. Cornell and Mr. Fellows had got their scheme through before that case was decided.

What weighty proofs, as against the sworn copies produced, the statement of the writ itself, and the fact that it was only because Judge Evans and the Swans found that this was a Municipal court execution, that they consented to undertake, at their expense, this tedious and costly litigation.

In regard to Mr. Cornell there is one item of evidence which Mr. Fuller has not alluded to, and that is the pencil memorandum on the back of the abstract of title made in 1850, where, under the memorandum of the judgment of Gardner against Noble, we find this:

"Ex. No. 1407, Municipal."

The words quoted are in another handwriting, but the abstract comes from Mr. Cornell with that evidence that some one, who must be taken for his agent, put it there.

It does not appear in any way that Mr. McCagg, or Mr. Freer, or Judge Jameson, or Judge Barron, or Judge Goodrich, ever carefully examined that execution, although Judge Goodrich bid in the property at the sale. Mr. Collins, who advised about the bill may have examined it, but we don't know what his notion of the law was, or whether he himself drafted the bill, or saw anything but the copy of the sheriff's certificate of sale; and the same of Judge Jameson. Mr. Cornell seems to be in a position to know the contrary, and to have known the contrary.

So far as these abstracts are to be taken as bearing on the question of seal, the time at which they were made must be considered.

None of the abstracts made before the Cornell & Fellows decree state in the memorandum of the judgment that the execution of 1840 was a Circuit court execution.

After that and the making of the deed which followed the decree, resting upon a copy of the sheriff's certificate of sale as its only evidential basis, it would be quite natural for a clerk in an abstract office to act upon these recitals; the first thing such an examiner would find in running down the chain in the recorder's office would be the sheriff's deed, which would refer him to the Cornell-Fellows case; but all this evidence runs back only to the recital in the certificate of sale which the sheriff most likely put there because he saw the execution was signed by the clerk of the Circuit court, and which at its best is merely a statement of a conclusion of law.

We do not know by whom a single one of these later examinations was made nor, consequently, that the recitals in them were based upon an examination of the execution itself. The memoranda of date and number of execution were in the abstract office as shown by the exhibits of witness Greenleaf.

Here is the entry made by him in the abstract makers' judgment docket of Municipal court judgments, the matter above the line being on one page, that below on the opposite page.

No.	Names of Parties.	Judgment, etc.		Amount.
6852	Jefferson Gardner,	July 7, 1837.	A 51	
(77)	*vs.*	Defendant.	Dam. and costs.	$251 56
	Mark Noble, Jr.			18 06

Execution.	Date.	Return.	Remarks.
67	July 31, 1837	Returned by order of plff's atty.	Satisfied.
493	June 4, 1838	Made seventy-four and 72–100 dollars and costs by sale of real estate. *See Sales 274.*	
1407	Feb. 5, 1840	Satisfied in full by sale of real estate. *See Sales 336.*	

This shows that when Mr. Greenleaf wrote up this matter he did not consider it a Circuit court execution; it will be remembered he had no independent recollection whatever of the writ.

As to Limitations.

I am surprised to find in some of the briefs of appellees the claim that my title is barred by other statutes of limitation than that found in the bankrupt act, in view of the fact that Judge Tuley finds that these limitations were not made out. Mr. Fuller says (page 83) that the evidence of Mr. Cornell is not as clear as might be desired in reference to one of the years between 1848 and 1857. He had better have said so as to all of them, down to that date. Probably Mr. Fuller referred to 1852, as to which Cornell testified that he did not know any thing about it. There was not, until after 1852, at all events, a *possessio pedis* of any precise portion of the tract, which the court could ascertain and define from the evidence, if it were seeking to render a decree upholding the limitation as to such portion.

It is claimed for Stevens that he makes out seven years' payment of taxes. The trouble with this is that there is no proof that the taxes were paid by the person who claimed the color of title, and he must make it. *Chickering* v. *Failes*, 26 Ill., 508. Messrs. Bisbee, Ahrens & Decker say that payment by another enures. It is true, payment by a grantor enures to a grantee, upon conveyance, but a payment by a grantor, after conveyance, will not enure to the grantee, nor if the grantee has paid them before the conveyance will they enure to the grantor, and follow the title.

Jayne v. *Gregg*, 42 Ill., 413.

Mr. Fuller states (page 83) that a *pedis possessio* is necessary if the description is bad, but proceeds to argue that the description was good in the first instance, and that in any event it was made correct in June, 1855, by the decree in the Cornell and Fellows case. To this I answer that it was not good up to 1855, unless Messrs. Cornell and Fellows lied, or made the allegation found in their bill for a fraudulent purpose (either to obtain a footing in a court of chancery, or for something else), for the allegation of their bill is in substance that the description in the deeds from Draper to Noble, from Gardner to Watson, from Watson to Phillips, from Phillips to Electa Watson, were all erroneous, and insufficient to convey a good legal title. This description includes all the conveyances from Draper down to August 10, 1852, when Mr. Cornell bought from his clients an undivided one-half of the tract, in which conveyance it was correctly described. That is, they are estopped by their averments of record, and by the decree in the case under which all the defendants claim, from saying that they had a good and sufficient legal title, so that a possession of a part would draw to it the possession of the whole or which, the land being entirely vacant and unoccupied, would draw to it the possession of the tract. Nor, as against me, can it be said that the description was correct in 1855, because the parties then holding the title, under which I claim, were not made parties to that proceeding, and the whole of it is a nullity as to them and to me. And your Honors will please bear in mind, also, in relation to the color of title under which a limitation might be claimed, that it was averred in the Cornell and Fellows bill, and found by the decree of the court, that Nathan W. Watson, who appears to have had some sort of a tax deed, had no other

title to the premises than that derived by his deed from Gardner, at which date Gardner's only interest was a sheriff's certificate of sale, the deed not being made until 1856.

Appellees seem to rest their case largely upon what they suggest as the general equities of the case, and the fact that the complainants in the original bill, as is stated, do not come into court with clean hands. None of these matters, however, are or can be urged against me. I was pursuing my remedy in a court of law when brought into this suit, and not only had the right but am perhaps compelled to litigate it here. Nothing effective has been urged against my title that I can see. The South Park Commissioners are precluded, from their answer, from denying that I have a valid legal title of whatever estate was vested in Benjamin Harris. Their claim of divestiture is based upon a judgment, wherein, I think, it clearly appears the court had not jurisdiction of the person, wherein the lien, if perpetuated beyond the expiration of one year from the date of the judgment, was lost by the sale under the execution of June 4, 1838, and upon an execution which issued out of the Municipal court after it had been abolished.

Much is said about inattention to the title and the premises. There may have been considerable attention paid to the premises by those who sought to acquire the title otherwise than by deed from the lawful owners, but there was no legal title acquired in good faith down to the date of the sheriff's deed in 1856, for the reason that all the parties have said, and had it adjudicated by a decree, which is good as to them, though not to me, that Watson had no other title than that derived by the conveyance

from Gardner. That amounted merely to an assignment of the certificate of sale, which Gardner then held, and was not taken by Watson under the impression, or in honest faith, that he thereby acquired a legal title. Cornell and Fellows bought, the former in 1852, and the latter in 1853, from the widow and heirs of Watson, who held merely as volunteers, the deed from Watson to Phillips, and from him to Mrs. Watson, being made merely to avoid administration proceedings. When Mr. Cornell, the lawyer, purchased the property from his client he must certainly be presumed to have examined the records, or, at least, to have had an abstract. It seems that he was not in the habit of examining the records himself. An abstract made in 1850 is produced, with his handwriting upon it, with the memoranda of Judge Jameson upon it, which shows that it was in Mr. Cornell's possession, and with his writing upon it, as early as 1853, Judge Jameson swearing that he had not seen it since that time; and the two phrases, or pencil memoranda, made by Judge Jameson are supplementary to, and explanatory of, the memoranda which are in the handwriting of Mr. Cornell. In one Mr. Cornell had written "Jef-"ferson Gardner and wife, to N. W. Watson. Spcl. "W. Deed, &c."; under the words "Jefferson Gardner "and wife," are in Judge Jameson's handwriting, the name of the wife, "Mary A. Gardner," and after the word "deed" an inerlineation, written above the line, of the words "No date."

It is conclusively shown that this abstract was in his possession in 1853. Judge Jameson made the draft of that bill in the fall of 1853, but it was only filed to the June term, 1854. It raises a query why the bill was held so long, and as to what alterations were made in it before

it was filed. Very likely Judge Jameson drew it, according to the abstract which he had in his possession, and very likely that did not suit Mr. Cornell, and another draft was made during the six months in which it was withheld from the files. Certainly if Mr. Cornell purchased the title, without examining the records, or having an abstract, he cannot lay claim to such diligence and ordinary care as to entitle him to claim the position of a *bona fide* purchaser. He does not claim to have examined the records himself, and he shows no other abstract than the one which is identified as having been in his possession in 1853, and which he says may have come to him with the papers of Watson, which shows Harris' title and bears the pencil memorandum "Ex. No. 1,407 Municipal."

And how did the parties who made the examination of the record, and found the mortgage from Harris to Kercheval, come to be looking under the letter "H" in the grantor's and grantee's index? One of the counsel has stated that there were no such indexes, but in this he is directly disputed by Mr. Shortall, and, I think, by other witnesses. Certainly the law required them to be kept, and perhaps the defendants and I can agree here that the presumption is that the officer did his duty. If the examiner did look under "H," why did he do so, if not because that is where he found the memorandum of the conveyance from Harris to Kercheval? It must have been because he had already found the conveyance from Noble to Harris, and was trying to see what Harris had done with it.

None of the counsel have suggested any reason why they are not chargeable with notice of the bankruptcy of Benjamin Harris. The fact is suggested only as an ex-

cuse—a personal excuse, and not a legal one—for not making Cyrus F. Miller a party, that the records of the bankrupt court were at that time in Springfield; but none the less the adjudication in bankruptcy transferred the title to the assignee, and none the less the proceedings there showed that Miller had sold the property to Anson S. Miller. Counsel say they are not bound to examine all the files in the bankruptcy proceedings, to see what was done with the assets. However that might be in an ejectment suit, when they seek to avail themselves of equitable excuses, such as the distance from the record, they cannot deny the equitable effect of such notice. It must be remembered that all this time, up to the date of filing the Cornell and Fellows bill, the certificate of sale was nothing more than a secret lien. That was not filed in the place required by the statute, in order to charge anybody with notice of the fact of sale. Hence the deed from Gardner to Watson, being unconnected with the record title, was no notice to anybody, and, as claimed in the Cornell and Fellows bill, was ineffectual to convey a legal title.

In Mr. Kales' notes, which I suppose is what Mr. Fuller refers to as being perhaps the opinion on which the South Park Commissioners bought, if not on Judge Beckwith's, but which were found among Mr. Kales' papers, it is suggested that the parties under whom I claim have acquiesced in the execution sale, as regular and valid, and that the execution was issued out of the office of the clerk of the Circuit court, for the reason, first, that Early failed from 1839 to 1871 to assert any right or title to this property; to which there is an offset that Gardner, and those claiming under him, failed to assert any right or title to this property for a long period of years, and that

as Gardner did nothing, and the title of the assignee was notice, and equivalent to an affirmative assertion of his title by the assignee, especially when he made a sale, it would seem that there was little of acquiescence by him. Mr. Kales gives as another reason the omission of Harris to specify this property in his inventory in bankruptcy, in 1843. Harris did specify it, by stating he had conveyed all his assets to Early. The third reason is the omission of the assignee in bankruptcy to lay claim to this property, as part of the assets, or to record deeds. The fact is that Miller, assignee, had no deed to record. The decree in bankruptcy transferred the title, and the moment it was entered was recorded as to this property. The fourth specifies the omission of Harris and King, as grantees, to lay claim to this property. King, on the theory of Mr. Kales, could not lay claim to this property, or take possession of it, until the statute of limitation had run as against the debts, for the payment of which the conveyance had been made to Early. Fifth, the omission of King to lay claim to this property, he dying in 1860; but King had no notice that it was claimed by any one that this execution had issued out of the office of the clerk of the Circuit court. It is true he lived within reach of the summons which might have been issued on the Cornell and Fellows bill, but he was not notified. Sixth, the omission of all these parties to controvert the facts publicly of record.

Inasmuch as it was not a fact, it is difficult to see how they were bound to controvert it. Under the same head, Mr. Kales says that the execution is shown to have issued out of the Circuit court, as stated in the official and recorded certificate of the sheriff (which was not recorded where the law required it to be, and which was only a statement of the sheriff's legal conclusions), and as stated

in the bill and proceedings in the Cornell and Fellows suit (which was a nullity as to King or Miller, and which is nothing more than any bald assertion which may be incorporated into a bill), and finally as the records of that court itself, of which it could then presumptively take notice, prove; but the evidence shows that those records and files were not submitted to the court in the Cornell and Fellows case. Seventh, acquiescence. This cannot be predicated upon a proceeding which is a nullity as to those of whom it is sought to be said that they have acquiesced in it.

Judge Tuley has spoken in his opinion of an equitable estoppel, as to the Harris heirs, arising from the fact that in 1870, and probably in 1869, the alleged void execution, and the void summons, were off the files of the court at various times. That it devolved on the Harris heirs to show when they were on, and when they were off, and that if the park commissioners, or their grantors, purchased when the execution 1407 was off the files, then it was a lost execution as to them, and cites the provision of the statute, which makes the sheriff's deed *prima facie* evidence of the existence of a judgment, where the execution is lost. The statute don't seem to say anything about the deed being presumptive evidence of a summons having been duly served; but even if it did, this estoppel cannot be invoked against me, nor is it an estoppel which is set up in the pleadings, and on which the appellees have, therefore, a right to rely. Moreover it appears, or at least is claimed by the appellees, that they bought on the faith of an abstract. Clement and Morton, and the South Park Commissioners, on the abstract of Shortall and Hoard, which contains the erasure, and it is not shown by any one that they sought these files, and could

not find them; and it is not only adjudicated, but axiomatic law, that a person cannot claim an estoppel *in pais*, arising from the act of another party, unless the act of that other party has influenced his own action, and that is not shown, or claimed, or suggested here. Judge Tuley's enthusiasm as an attorney just there rather got the better of his calmness as a judge.

Judge Tuley also says, near the close of the opinion, that the grantees through the two assignments, having failed to record their deeds in Cook county, until after the present holders of the execution title had purchased, cannot set up their title as against those who purchased in good faith, upon a record title, apparently good. I should like to know, how, if one adverse conveyance appears of record, the case is varied by a string of a great gross of conveyances, deduced from that which does appear? There certainly was all the time from the date of Harris' adjudication as a bankrupt, record notice to everybody of the transfer of the title to Cyrus F. Miller, and it would have added nothing to the notice made by the adjudication if all the subsequent deeds, which only derived their validity from the first, were put upon record.

The defendants are seeking to claim on color of title, which I submit, was not acquired in good faith, and which though perhaps available at law in some cases, could never be in equity.

The defense of *laches* may be easily disposed of. I have shown to the court, I believe, that there is no legal limitation which could prevent a recovery of the premises by me in the pending suit, in ejectment, or indeed, in this cause, and I understand the rule to be that *laches* will not be enforced short of a statutory bar, except where *bona*

fide rights will be prejudiced. Certainly, from the adjudication of Harris, the bankrupt, to the present time, there has been notice to all the world that the Harris title had passed from him. The defendants themselves lay by so long before taking out their sheriff's deed, and that too, after having once taken out a sheriff's deed as to other property, sold under the same execution, that, under the authority of *Rucker* v. *Dooley*, they are not entitled to it, as against any one claiming under Harris' assignee. They all knew that Harris' assignee was not made a party. The two years' statute of limitations does not work against me, but in my favor, as I have shown in my original brief. The execution, and the judgment, one or both, being void, as shown, the defendants could not maintain their title at law, and it is shown incontestably, that Mr. Cornell, one of the South Park Commissioners, and a member of the land committee, must have known of Harris' title in 1855, or earlier when the abstract of 1850 first came into his possession, which was doubtless prior to his purchase in 1852. The abstract upon which the South Park Commissioners bought, in its most material part, as to the character of the execution, betrays an erasure, which no one has explained.

It is true the South Park Commissioners have spent a considerable sum of money in the purchase of the rights of certain parties to this suit. While I believe that my title is paramount to all the others, as disclosed in the record, that I could recover in an action of ejectment, I wish to steal no man's money—no man's land; and I offered upon the hearing below, if the court should deem it a proper condition to the granting of the relief prayed for in my cross-bill, to refund to the park commisioners whatever they have paid for said premises, or to perform

any other act which the court might deem to be a reasonable and just requirement. I stand here, offering to do that, or anything else which this court may consider proper conditions, or terms, to the granting of the relief sought, in case it shall seem to your Honors that the defendants hold a title acquired in good faith, with due diligence, and not with a persistent blindness to the facts as they exist.

In conclusion, I owe my acknowledgments to the other counsel in the case for their courteous treatment of me, being altogether mindful of the old adage concerning him who tries his own case. I had not expected to do this. The names of two other counsel are found in the record as appearing for me, one of whom has sat upon the bench occupied by your Honors, and either of whom would have made a fitting presentation of the case. Both of them have been removed from the cause, one by the sacrament of a sudden death, and the other after weary years of struggling with disease. Believing, however, that a court of equity whose office it is to aid all those who labor under any disability will embrace me within the rule, and trusting rather to the inherent merits of the case, and the calm and courageous consideration which I look for it to receive at the hands of your Honors, I confidently and respectfully submit the case to your Honors' care.

CHARLES H. LAWRENCE,
pro se.

IN THE

Supreme Court of Illinois,

CENTRAL GRAND DIVISION.

JANUARY TERM, A. D. 1886.

EDWARD HOWE, *Appellant*,
vs.
THE SOUTH PARK COMMISSIONERS, CHAS. H. LAWRENCE ET AL., *Appellees*.
} Appeal from the Circuit Court of Cook County.

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REPLY OF CHAS. H. LAWRENCE,

APPELLANT AND COMPLAINANT IN CROSS-BILL.

CHICAGO:
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MAY IT PLEASE THE COURT:

If the following suggestions shall seem voluminous as a reply, I trust I shall not be thought to have abused the favor of the court in granting me time beyond the rules; for your Honors will bear in mind that the questions involved are scarcely less numerous than the counsel arrayed against me, and as the latter respectively present the former in somewhat different aspects, it is necessary to notice each somewhat separately, and all conjointly, in order to bring into true relief and position the vital facts in the case.

In the briefs for appellees considerable is said (and much of it in a spirit that is scarcely creditable to one laying claim either to a christian or a high professional character), about the differences between the original bill as first filed and as finally amended. The argument and screed are made as bearing upon a question of limitation, and also as impeaching the testimony of Judge Evans and Mr. Swan in regard to the execution of February 5, 1840.

And, though I scarcely see by what equitable rule, it is sought to load the cross-bill with all the alleged weaknesses and immoralities heaped upon the original bill and those who drafted it.

It is claimed by appellees that the periods of limitation can be computed as running in favor of many of the defects in the Gardner and Cornell-Fellows proceedings up to the year 1885, notwithstanding the original bill was filed in 1871.

For instance, (pages 34 and 35, Mr. Fuller's brief), it is said the amended bill avers "that the execution of February 5, 1840, issued after the Municipal court was abolished, and should have issued out of the Circuit court of Cook county, but that, in fact, it issued, if at all, in the name of Hamilton, representing himself to be clerk of the Cook Circuit court, but under the seal of the Municipal court," the impression of which alone it bears, and that Hamilton's certificate is that it is the seal of the Municipal court, and that this is a new cause of action as compared with the averment of the original bill.

The averment of the original bill before amendment is that the 'said execution, dated February 5, 1840, was issued out of the Municipal court, as the records of said Muni-

cipal court show, and your orators aver that said Municipal court had been abolished by law before the issuing of said execution.' (Mr. Fuller's brief, 31.)

And Mr. Fuller insists that these two averments state different causes of action.

The rule is that liberal amendments will be allowed to avoid the running of a statute of limitations by restating the cause of action.

What is the cause of action here? The Harris heirs allege that they are the rightful owners of a certain tract of land, and that defendants claim title from a common source—Mark Noble, Jr.; that each of the diverging chains consists of two links, theirs a deed from Noble to Harris, and descent to them upon Harris' death; and those of their adversaries of the proceedings in *Gardner* v. *Noble*, and of the proceedings in the Cornell-Fellows suit, each of which adverse links, they allege, is unsound; that is, that neither one, nor both, have the strength to draw the Harris title to the defendants.

This is the gravamen of the bill—the gist of the cause of action—that Noble conveyed the tract of land—the *res*, which they lay claim to—to Harris; that the proceedings in *Gardner* v. *Noble* were ineffectual to divest this title, and the same of the Cornell-Fellows suit. It is claimed by defendants that in the original draft of the bill certain defects are pointed out, and in the amended bill certain other defects are pointed out, and that so far as the latter are to be considered in evidence a new cause of action is presented. But this cannot be the case. The complainants are still demanding the same *res*, and still averring that the same links in their adversaries' chain are insufficient to uphold their title. The entire legal effect is pleaded in

the first instance, both of their strength and defendants' weakness; what are claimed as new matters are merely *evidentiary* facts and not the *jurisdictional* facts of the case.

Suppose A replevies a horse from B, and in his declaration alleges that the animal was in B's possession under a claim by B that he had purchased the horse in "market overt" and afterwards should amend his declaration by alleging instead that B had stolen the horse; would the cause of action be changed thereby? A would still have the same horse delivered to him on the writ, and, though he might recover on the one state of facts, and be cast in his suit on the other, the horse would not have changed color or identity. The *res* sought is still the same—the $59\frac{3}{4}$ acres; the basis of claim is still the same —that by the deed from Noble, Harris took paramount title; the case being on the chancery side of the court the basis of defendants' claim is stated and negatived with the same legal effect in both instances.

Suppose the suit had been in ejectment, and on trial the Harris heirs had shown, in regard to *Gardner* v. *Noble*, only the facts alleged in the bill, as originally filed; that verdict was rendered, and judgment entered, and a period of limitation, say twenty years, expired within six months from the entry of judgment; that nine months after the judgment a new trial was taken under the statute, and on the second trial the Harris heirs should attempt to show the facts, as set forth in the amended bill, would they be excluded, on the ground that the statute of limitations had run?

Yet the only difference between the supposed and the actual case is that in the one they are stated in the pleading, as by inducement, for the purpose of ne-

gating the anticipated defense, and in the other are shown, by evidence, for the purpose of negating a presented defense. In neither case do they present "a new cause of action," or any "cause of action" at all. The starting point of relief—the cause of action—is the undisputed title to the land, resting on the deed from Noble to Harris.

But in no event can the objections of appellees affect the cross-cause, for the reason that the estoppel which appellees claim against complainants in original bill can also be invoked by me, and the source of knowledge of these defects was equally withheld from me; another reason is that I have all the time, since 1871, had an ejectment suit pending, under which I could take advantage of any and all defects in those proceedings when offered in evidence, and I am not to be prejudiced because I have been brought in to try my rights in a court of equity.

Perhaps better in this connection than elsewhere may be noticed the attacks upon the witnesses Swan and Evans, who drew the original bill, and who are charged with larceny, lying and fraud, the reason for which assault is most obvious.

It is not because of the difference between allegations and proofs, or two sets of allegations, that counsel would outlaw their hapless brothers, but because when they seek to overcome their testimony in regard to the execution of February 5, 1840, they find themselves without sufficient evidence, and resort to language which is only justifiable after a successful impeachment for want of truth and veracity, or where the facts are indisputably such as to leave no reasonable doubt of the moral turpitude of the culprit. Take the superlatively vituperative argument for appellees—that of Messrs. Sleeper & Whiton,

evidently from the pen of the senior partner. My christian brother talks of the borrowing of court files as "larceny of papers" and as destructive of veracity. When the signature of himself and partner to the agreed statement of facts in the Noble decree or suit was shown, he thought it necessary to put Mr. Whiton on the stand to show that he did not have the missing execution. Sleeper & Whiton were retained to defend against the bill of the Harris heirs about February 10, 1871, and the statement of Swan is that the last he saw of the missing execution was when it was carried back to the court house, and that when they went again to get it, it was gone; this was before the great fire.

Mr. Sleeper knows as well as he knows anything, that it was then customary for attorneys to borrow from the files any papers they wanted and keep them as long as wanted, and that Swan and Judge Evans did nothing unusual in this. There is one way of accounting for this missing paper. Sleeper & Whiton knew of this old suit, and were retained to defend the present one; the important paper disappeared after the bill was filed; Mr. Sleeper puts his partner on the stand, and whatever Mr. Whiton stated is honestly said. But why did not Mr. Sleeper go on the stand and clear his skirts? His first act after being retained would be to read the bill, his second to search the Gardner files; and if he had looked for them without finding them he would have told us so and given some substance to the airy estoppel claimed against the Harris heirs, because these files have been in possession of Swan or Evans for so long.

This is Mr. Sleeper's position. He is not entitled to any greater presumption of godliness or honesty either *prima facie*, or on this record, than Mr. Whiton, or the

probate judge of La Salle county, or Mr. Swan, who as a member of this bar has a certificate of good moral character. Mr. Sleeper takes the ground it is necessary for an honorable man like Mr. Whiton to purge himself, and puts him on the stand; but is it not equally so for Mr. Sleeper, his partner and the manager of this case for Clement & Morton? What then deterred him from testifying? Was it fear, or guilt?

Judge Evans and attorneys Swan and Whiton all admitted connection with these papers, and all told what they did, under oath, and I say that the presumption is as strong that Mr. Sleeper stole that execution as that Mr. Evans or Mr. Whiton, or Mr. Swan committed perjury; and I also say there is nothing in the record on which, as a gentleman, I would be willing to make either charge against either one.

Counsel talk about false statements in the pleadings, such as the allegation that no execution issued within a year and a day from the rendition of the judgment against Noble being made fraudulently and for the purpose of deceiving the court; the allegation was undoubtedly made as a statement of the legal status or effect of what was done, and all the appellants do here insist that none was so issued *quoad* the premises in controversy. Nor is any allowance made for the possibility of mistake which even brother Sleeper cannot do without.

In his screed against Swan and Evans, the senior counsel states that "Evans says that when he made the first copy of "the writ (February 5, 1840), he thought it was the seal of "the Circuit court, but on comparing it the next morn-"ing he came to the conclusion that the seal was the im-"pression of the seal of the Municipal court;" and then charges him with lying of record.

Unfortunately for brother Sleeper's *ex cathedra* way of disposing of character, Evans does not so swear. In testifying about that seal he says that when he first examined the device, late in the afternoon, he thought it bore a figure of justice with the scales, but next morning saw it was a human form with a sword. Mr. Sleeper, knowing that the Circuit court seal bore a standing figure of justice holding a pair of scales, and believing that the seal determines the character of the writ, may be said to have stated what he thinks is the legal effect of Evans' testimony; but it is neither a correct statement of Evans' words or ideas. Were I to borrow counsel's vocabulary, I should call some hard names (if there were any left); preferring my own, all I say is, that although Mr. Sleeper might write an edifying book with the title "ME and the men "I have taught," his attack upon Judge Evans and Mr. Swan ought not to convince "US and the court" (Brief, 30), that their testimony is not credible.

So much of appellee's case depends upon presumptions, and it will be necessary to test so many of them, that it may save time here to notice one or two rules relating to their nature and force.

In *Graves* v. *Colwell*, 90 Ill., 612, this court has fully stated the principles governing the force and application of presumptions as follows:

"It has been said, that presumptions of law derive their "force from jurisprudence and not from logic, and that "such presumptions are arbitrary in their application. "This is true of irrebuttable presumptions, and prima-"rily, of such as are rebuttable. It is true of the latter "until the presumption has been overcome by proof, "and the burden shifted, but when this has been

" done, then the conflicting evidence on the question of " fact is to be weighed and the verdict rendered, in civil " cases, in favor of the party whose proofs have most " weight—and in this latter process the presumption of " law loses all that it had of mere arbitrary power, and " must necessarily be regarded only from the standpoint " of logic and reason, and valued and given effect only as " it has evidential character. Primarily the rebuttable legal " presumption affects only the burden of proof, but if that " burden is shifted back upon the party from whom it " first lifted it, then the presumption is of value only as it " has probative force, except it be that on the entire case " the evidence is equally balanced, in which event the ar- " bitrary power of the presumption of law would settle " the issue in favor of the proponent of the presumption.

" Regarded in its evidential aspect, a given presumption " of law may have either more or less of probative value, de- " pendent upon the character of the presumption itself, and " upon the circumstances of the particular case in which " the issue may arise. Some legal presumptions are more " probable, and inherently stronger than others. So, also, " differing circumstances may give differing degrees of " probability to one and the same legal presumption. A " promissory note is made to A. B. and it turns out that " there are two persons of that name in the community— " a father and son. The question of identity arises, and " primarily, as fixing the burden of proof, the law says it " is presumed the father was intended.

" Thus far the presumption is judicial and arbitrary. " An issue is formed, and the son establishes, *prima facie*, " that he and not the father was indicated, and the father " then offers rebutting evidence. Now this issue, thus " made, is to be determined by the weight of evidence

"and upon the whole case, and in determining such issue "the presumption has lost (unless there be an equilibrium), "its merely arbitrary character, and is entitled only to its "logical value. If A. B., the son, was, at the date of the "transaction involved in the controversy, a mere infant of "tender years, wholly unacquainted with business affairs, "and the father was engaged in the active pursuits of life, "the probability that the father was meant is very great, "and the legal presumption would have much more of "probative force than it would have in a case where the "son was a mature man and in active business, and the "father aged and retired from business."

In *Hicks* v. *Silliman et al.*, 93 Ill., 262, this court say that it is the right and duty of courts, in determining what conclusions or results may be fairly drawn from testimony, to avail themselves of their own knowledge and experience in the practical affairs of life.

In *C. B. & Q. R. R. Co.* v. *Van Patten*, 74 Ill., 94, the doctrine is further asserted that when the *prima facie* controlling force of a legal presumption is once rebutted, (which may be either by proof of facts or by the presentation of some other legal presumption of equal force), then the *legal* presumption disappears from the case entirely.

I quote from the report an instruction given and the ruling upon it.

The instruction was as follows:

"The law presumes the deceased, in approaching the "mill crossing, exercised proper care and prudence; and "unless the jury believe from the evidence that the de- "ceased did not exercise care and prudence in approach-

"ing said crossing, he cannot be regarded as guilty of "negligence."

The Court discuss the ruling as follows:

"It may be, if there had been simply evidence of the "defendant's negligence, resulting in the injury complained "of, and no evidence of what the intestate's conduct was, "this instruction would have been unobjectionable. But "in view of the evidence as it was, the tendency of the "instruction was to mislead, and we doubt not it did mis- "lead the jury. They must have understood it applied to "the evidence before them, and, notwithstanding there "was clear proof of the plaintiff's negligence, still it must "be considered with reference to the legal presumption "that he was not negligent. When there is clear and "incontestable proof of a fact, no presumptions can be in- "dulged, except such as arise from the proof. How "much, or whether any evidence was sufficient, in the es- "timation of the jury, to overcome this legal presumption "that the intestate was not negligent, under the peculiar "form of the instruction, can of course only be conjec- "tured. It may, however, be inferred from their finding "that the presumption was of controlling importance, for "it is difficult otherwise to reconcile the verdict with the "evidence.

"The instruction should have been refused, and the "giving of it was error."

Perhaps the shortest way of replying to the various briefs of appellees is to take up the points of the case in their natural order, rather than to examine that of each of the counsel separately.

The first question is one of jurisdiction; the first defect

being the misdirection of the writ to the high constable, it being shown that Noble lived outside the city, in which case the summons should have issued to the sheriff. Mr. Woodbridge has fully discussed this; but I wish to call your Honors' attention to the position of Judge Tuley (Fuller's brief, 51), that the evidence is insufficient to establish Mark Noble's residence outside the city, reasoning by analogy from the rule that the evidence of one witness will not be permitted to overthrow the acknowledgment of a deed. The analogy does not exist.

In case of a deed, the witness is an interested party, and directly contradicted by an official certificate utterly inconsistent and irreconcilable with the witness' testimony.

Here the witness is entirely disinterested, and is not contradicted by the return made by the high constable; for it is consistent with the return that Noble lived outside the city, but occasionally visited it. There is no other evidence on this point than the testimony of John Noble and the return on the writ; the return creates only a legal presumption of the *presence*, not residence, of Mark Noble in Chicago, on a certain day, from which we are asked to presume a residence; the evidence as to actual residence being uncontradicted, the legal presumption disappears; and the return then has only the probative force of the conceded fact that Mark Noble was bodily present in Chicago, on a certain day, to weigh against the sworn statement of his brother (he being dead), that his residence was at that time elsewhere.

To meet this, Judge Tuley would presume a residence in the city for only a few hours; and that, in the absence of any proof of his having stayed here over night even,

with an immediate return to his former home. Such a presumption, based on so minute an abiding, might do for a midge, but not for a man, for it would require proof of something more than the declarations of the man himself to establish two changes of domicile in one day.

Messrs. Sleeper & Whiton endeavor to avoid this difficulty by the novel theory (page 3 of their brief), that as a summons is the first step in a case, and the clerk makes it, the clerk had jurisdiction to determine to whom the writ should issue, and that his determination was therefore an adjudication. It is generally supposed that a suit at law is commenced by the plaintiff's attorney lodging with the clerk a præcipe directing as to the form of the writ. I have not found, nor have counsel shown, where the ministerial officer, called the clerk, is invested with judicial powers; nor how a plea in abatement for want of jurisdiction, or a motion to quash the writ could be determined before the clerk should sign the summons.

The sole question is whether the provision is mandatory or directory, and the case of *Sidwell* v. *Schumacher*, 99 Ill., 433, seems sufficient on this point.

If we assume the writ to be good, the next question is, did the court acquire jurisdiction of Noble?

The form of the return has been sufficiently discussed; but Judge Tuley, who may without disrespect be called the leading counsel for appellees, his opinion being admirable as an argument, admits that the return does not show service of the writ (Mr. Fuller's brief, 53), but seeks to avoid this fatal fact by divers presumptions.

The first presumption he evokes is that the return is amendable, and therefore the judgment is erroneous, but

not void. Any return, I understand, may be amended to conform to the true state of facts; but until it is amended the jurisdiction must be determined by the return as it is, and not as it might be, if a different state of facts is shown.

Suppose a sheriff goes out to serve a summons on A and another on B, and finds and serves the latter but not the former, and that on going back to his office, by mistake he returns the writ against B, "not found," and service on A; that a judgment is rendered, by default, against B. There is no doubt that the return could be amended so as to show the truth—due service on B, which would make a valid judgment. And because of this possibility that the true facts are other than the record shows, and the possibility that the return may be amended, something with which every writ is pregnant, Judge Tuley would rule, and counsel argue, that a judgment based upon a writ with a return of "not found," was not void but only erroneous, and that a purchaser at an execution sale under such judgment would be protected; arriving at this conclusion by the aid of a whole litter of presumptions.

Certainly it must be true that there is no presumption that something that has a manifest existence is controlled or rendered nugatory by that which does not appear, and may not exist, or that silence preponderates over a positive statement.

Then as an officer is presumed to state the truth in his return, and the facts he states do not constitute service, what voice has silence to declare another state of facts? Where do counsel and Judge Tuley get their presumption of facts, on which it is presumed the return was

amended in contemplation of law? They don't find them in the record; and it is not worth while to guess what they might be; since, while in the presumption business, they will fit themselves out as suits their fancy.

In addition to what was said in *Clark* v. *Thompson*, *Botsford* v. *O'Connor*, and *Harris* v. *Lester*, this Court has said in *Barnett* v. *Wolf*, 70 Ill., 78:

"The question whether the solemn finding of the court, "as to its jurisdiction, can be contradicted by evidence "outside of the record, is presented in this case, and upon "its determination depend the rights of the parties. In "cases of summons and personal service, and where the "proof of service can only be shown by the return of the "officer, it has been held that, if the return contradicted "the finding of the court, it would overcome the finding "and prove the want of jurisdiction, even in a collateral "proceeding."

It is then claimed that although the return does not show jurisdiction of Noble, from the fact that a judgment was entered, it must be presumed that the court acquired jurisdiction in some other way, as appearance or otherwise.

As our experience teaches us that defendants only get into court by being served with summons (*Hicks* v. *Silliman*, 93 Ills., 262), and as it appears Noble would not come into court without an officer being sent for him, there is no presumption that he afterward filed a voluntary appearance. The probative force of the evidential facts renders it more likely that the court fell into the error, which Messrs. Sleeper & Whiton, and Messrs. Bisbee, Ahrens & Decker would have fallen into, of considering this a good return, than that Noble filed an appearance

without filing a plea. The court will not presume a paper was filed unless there is some proof tending to show the fact. Indeed in *Ins. Co.*, v. *Stayart*, 79 Ill., 259, the record in this court showing everything requisite to a judgment, except a declaration, afterwards a supplemental record was filed containing a declaration in the case without any file marks, and it was held that it would be presumed that the declaration was not filed.

Then again the presumption is claimed that another summons may have issued. But here again they are building without a foundation. There is nothing to indicate a second summons. Certainly one would not have been issued if the first or the service of it had been good or amendable—and counsel can't "bunch" these inconsistent presumptions to establish the same fact. And they are again seeking to overcome something by nothing.

And the mathematics of the case show the falsity of such a baseless presumption.

The præcipe is dated June 15.

The summons is dated June 16, to the July term, on the first Monday in July.

The pretended service was June 16, but the summons was not returned till June 28. Another writ could not then have been issued and served to the July term, at which judgment was rendered, as from June 28 to the first Monday in July could at most be only eight days. Judge Tuley says no one swears there was not another summons. Is there any presumption that there was another—there is no legal presumption, nor any facts proven which have probative force in that direction. We have a summons and a return, which counsel say shows

good service. There is no proof of another summons and "no presumptions can be indulged except such as arise "from the proof."

R. R. Co. v. *Van Patton*, 74 Ill., 94.

My adversaries must get some fact of record, instead of fancy, on which to base a presumption of another summons before being entitled to a presumption of due service of it.

Finally, so far as I shall notice the presumptions claimed for this judgment, it is urged, that the judgment may have recited that there had been due service of process.

It is admitted by all that there was some form of judgment entry; what it was is not shown, and appellees are doubtless entitled to some presumption as to its form.

But no form of judgment with any unusual recitals of appearance or of default for want of plea after appearance can be indulged, since there is no "proof from which they "can arise." They are entitled, in the absence of any proof on which to base a different one, only to a presumption of the ordinary form of judgment by default, which recites that it appearing to the court that defendant has been duly served with process more than ten days before the first day of this term, and being now three times solemnly called, comes not, but makes default.

Suppose that to be so, the recital must be consistent with the rest of the record, and therefore must rest upon the return on the summons, service of which can be proved in no other way; and the return under consideration would contradict and overcome such finding in the judgment and prove the want of jurisdiction, *Barnett* v.

Wolf, 70 Ill., 78; and no presumption can be indulged upon any speculative return when an actual one is proven; *R. R. Co.* v. *Van Patten*, 74 Ill., 94.

Judge Tuley evidently was of opinion that if the judgment recited due service of process that would control the return—which is not the law where there is personal service; nor can another summons be presumed, one being shown, because then a recital in the judgment could never be contradicted and overcome by the return, as this Court says in *Barnett* v. *Wolf*, may be done, for the reason that as fast as one writ was shown to be void a valid one would be presumed, and as the position taken is that the matter must be determined solely by the record itself, these presumptions controlling facts would never end; a logical result of presuming something from a fact which itself is only presumptive in order to defeat a fact which, is concrete and proven.

The refined speculations as to what constitute a record are immaterial since in this State a summons has always formed part of it, and is always found in a return to a writ of error.

If I have been correct in my apprehension of the law in regard to jurisdiction not having been obtained of Mark Noble, that would seem to be the end of the case; since, although a purchaser at judicial sale is only bound to see that there is a judgment, etc., he is bound to see that there is a judgment which is not void on the face of the record, for want of jurisdiction of the person.

Passing on to the next point, and assuming, while considering the various executions, that the judgment was valid, I have not much to add to what has been said in regard to the non-perpetuation of the lien, by the failure

to issue a proper execution within a year and a day. The only argument that Judge Tuley makes against this is that of inconvenience, and he says that the construction claimed would require two executions within the year, in order to give the judgment the same force as a Circuit court judgment, which the statute provided it should have. (Mr. Fuller's brief, 57.) Notwithstanding the law provided, in general terms, in all matters, that the Municipal court should be substantially a Circuit court, it must still be considered as different in some things, else it would be a Circuit court and not a Municipal court; and all that these provisions of the statute erecting the court mean, is that so far as is not inconsistent with its individuality and the special provisions in regard to it, it should be like a Circuit court. Now, property in different counties may be sold upon an execution issuing from a Circuit court, and in order to make the judgment of the Circuit court of Cook county a lien on the property outside the county, it is necessary to issue an execution to a different officer than the one to whom it would run if it were merely sought to perpetuate the lien in Cook county; and it seems it is only following the analogy provided for by the statute to say that although an execution, issuing to one officer, might perpetuate the lien as to property in one municipality, yet, to accomplish the same result in another, an execution must be issued to a different officer.

If, on a judgment in the Circuit court of Cook county, two executions could be out at the same time, one to the sheriff of Cook county, and one to the sheriff of Will county, there is no reason why two executions could not be out at the same time on a Municipal court judgment; one to the high constable and the other to the sheriff of Cook county; and if the position taken by Judge Tuley

is correct, that in case an execution should issue to the high constable just ninety days before the year expired, none other could issue to the sheriff until its return, whereby the right to perpetuate the lien on lands outside the city, but within the county, would be lost, then it must be also true that in case of a judgment in the Circuit court of Cook county, execution issued to the sheriff of Cook county, just ninety days before the expiration of the year, another execution could not be issued to Will county within that ninety days, and, therefore, the construction contended for, even on the hypothesis of Judge Tuley, would render the status of the two judgments the same.

The next point made by appellants is that by the failure of the plaintiff in execution to bid two-thirds of the appraised value of the property levied upon, under the execution of June 4, 1838, the lien of the judgment was thenceforth discharged as to all of Noble's lands. Even Judge Tuley has made no reply to this position. Messrs. Bisbee, Ahrens & Decker, page 22 of their brief, say, merely, that the law is not as claimed by us, because, they say, the provisos of the act are not properly applied by Mr. Woodbridge. Mr. Fuller, page 109, claims that the statute is ambiguous, and that because later laws leave the judgment creditor in the same position as other purchasers, the doubt in construction must be solved in favor of a like construction. But the fact that the legislature subsequently passed an act putting the judgment creditor on the same plane with other bidders, shows the intent of the act of 1825 to put him on a different one. Mr. Woodbridge calls attention to the act of 1825, which contains the provisos in question. It may add to a proper understanding of

them to consider the state of the law when that act was passed. By the twenty-second section of an act of March 22, 1819, entitled "An Act, subjecting real estate to exe- "cution for debt, and for other purposes," it was provided that all real estate that should be ordered to be sold under the provisions of that act should be valued by free-holders, etc., and that the sheriff should then proceed to sell the same, provided that the property should bring at least two-thirds of its appraised value; in case it should not bring two-thirds, the sale should be continued until the property should have been offered on three different days, with intervening periods of twenty days between consecutive offerings, unless the person in whose favor the execution issued should agree to take the same at its valuation. This act was amended February 15, 1821, by an act in which this court has said, in *Curtis* v. *Doe*, Breese, 140, that "the legislature assume the fact that real "estate cannot be sold on execution, unless it will bring "two-thirds of its valuation. The third section is intended "to authorize lands that have been already valued, and "not sold, for want of bidders, at two-thirds of that val- "uation, to be sold for one-half the valuation."

They then proceed as follows:

"The fourth section of the amended act is: 'That "when any real estate shall hereafter be levied upon, by "virtue of any execution hereafter to be issued, and shall "have been twice offered for sale under the provisions of "the act to which this is an amendment, and has not "brought the amount of its valuation, or two-thirds "thereof, upon the third or any subsequent offering, the "sheriff, or other officer, shall proceed to sell to the "highest bidder for what it will bring in ready money, "having first given fifteen days' notice as aforesaid.' My

"conclusion is, that the sheriff was bound to proceed, on "the execution mentioned in this case, according to the "directions of the 22d section of the original act, as mod- "ified by the fourth section of the amending act. From "which it will result that the sheriff's duty was to have "had the premises valued by three disinterested free- "holders on oath, and advertised for twenty days, when, "if two-thirds was not bid, he should again have adver- "tised for twenty days, and then if two-thirds was not "bid, he could, according to the above recited fourth "section, sell the premises for what they would bring in "ready money, having first given fifteen days notice of "the sale. Can the court presume that the sheriff com- "plied with these express provisions of the law? I think "not. Would not every lawyer be startled at the propo- "sition, whether the court would not presume in favor of "the sheriff's deed, that the sheriff had an execution? "And that the execution was based on a judgment? Yet "these presumptions appear as reasonable as the pre- "sumption that the sheriff has obeyed the mandates of "the statute, without showing the fact. Every agent, "whether public or private, must act within the powers "delegated to him, and must show that in all essential "particulars he has not varied from them. If a party is "to be deprived of his property without his consent, the "law that authorizes him to be dispossessed must be "obeyed, and he has a right to call for proof that he has "not been illegally divested of his estate. The argument "that good policy requires that public sales should be "supported, whether the provisions of the statute have "been substantially complied with or not, does not appear "to be entitled to much weight."

From all this it appears that the requirements of the act

of 1819, that the plaintiff must bid the whole valuation, or any other party two-thirds of the valuation, made a discrimination against the judgment creditor, and operated to prevent a satisfaction of judgments; the scale was too high, so by the third section of the act of 1821 it was provided that lands which had been theretofore appraised might be struck off at one-half, instead of two-thirds, of the appraisement which had been put upon them, and that lands thereafter to be appraised should, after having been twice offered, without bringing two-thirds of its valuation, be sold for the highest and best bid, without regard to the valuation, upon the third sale. Then when the act of 1825 was adopted, which did not contemplate these repeated adjournments of sale, the first proviso was made, so as to avoid a retrospective effect to the act, and the second proviso, and the body of the section, are then to be considered together, without regard to the first proviso, or the prior statutes. This then gives a plain and unambiguous reading of the act, that when any real estate should be levied upon it should be appraised, and should be struck off and sold the first day offered to the highest bidder for cash, but that if the plaintiff would not bid two-thirds of the appraisement, or take enough of the property at that rate to satisfy the judgment, the judgment should cease to be a lien as against all other judgments, or subsequent *bona fide* purchasers. It seems to me that this clears up all the ambiguity found by Mr. Fuller, and that there can be no doubt as to the meaning of the statute, as contended for by Mr. Woodbridge, and that when the property was sold under the execution of June 4, 1838, to third parties, for less than two-thirds of its appraised value, the judgment ceased to be a lien upon the premises in controversy, and Benjamin Harris' title of record then be-

came paramount to anything that might be claimed under this judgment.

The comments of Judge Breese, upon the presumptions that must be indulged to overcome the statute, are to be commended to counsel for appellees.

The next point in the case is the execution of February 5, 1840, of which I spoke in my original argument; but the claims of appellees in regard to the testimony as to the character of that document, and the witnesses who testified to it, are so extraordinary, so unjust, both to witnesses and the record of their testimony, and in some instances so absurd, as to make it proper to call attention to some of the things they have said.

The character of the witnesses has perhaps been sufficiently discussed. It is scarcely probable that a man like Judge Evans, who has been chosen by the community in which he has resided for many years, to administer, as probate judge, upon the property descending to widows and minors, is a man who is to be led, even by his interests in this case, which he has not attempted to conceal, to falsify, or commit perjury. Judge Tuley himself says that these witnesses are unimpeached, except as they are interested in the result of the suit, (Mr. Fuller's brief, page 58), which is no impeachment at all, nor a fitting remark for a judge to make when the statute allows interested parties to testify; or, if it is an impeachment, Mr. Cornell, Mr. Mulvey, Mr. Jameson, Mr. Shortall, Mr. Brown and Mr. Greenleaf, are all impeached, because they have all an interest in maintaining the case of the appellees. Not a direct money interest, it is true, but an interest in that which the law regards as property; reputation on the part of some, liability on covenants of war-

ranty as to others, and as to the abstract makers the fact that if they could be shown to have been negligent in making up their abstracts, they might be pecuniarily liable, and in any event would undoubtedly suffer a loss of business.

In order to discredit the testimony of complainants' witnesses, and to disregard their testimony, it is absolutely necessary to conclude that two lawyers, and the uncle of one of them, all reputable men, conspired, in the outset, to perpetrate a fraud, by the filing of the original bill in this case. The Chicago fire had not then occurred. They knew that the proceedings in Gardner against Noble had been examined by others, parties in the Noble dower suits. They could have no assurance, nor even the probability of an assurance, that the other parties in interest did not have copies of all those proceedings. They knew that the property had been subject to many transfers, and that in the ordinary course of business all those transfers would, if prudently made, be based upon examination of the records, which would show the truth in regard to those papers. So that the presumption was against the success of such a conspiracy, undertaken at the time it was. And if it had been a conspiracy—that is, if they were making the case out of whole cloth—is it conceivable that they would not, on their copies, have had a transcript of the device of the seal upon the execution of 1840, showing it to be the seal of the Municipal court? They being unimpeached, as Judge Tuley says, we have the testimony of four witnesses as to the language of the body of the writ, and the attestation clause, and the testimony of three witnesses as to the character of the seal, from positive recollection, and that of Judge Holbrook,

merely to the effect that it exists in his mind as corresponding with the statement of that execution.

In accordance with the case from the 90th Ill., already cited, the positive testimony of these witnesses overcomes the force of the presumptions, first, I will say, as to the language of the writ itself, for we have an exact and full copy; and the presumption claimed that the writ duly issued from the Circuit court then loses its legal force, and has nothing left but its probative force, if any proof can be found on which to base it. Not one of defendants' witnesses pretends to give the language, or the substance of the language of the attestation clause of this execution. Some of them swear to the legal effect of the whole instrument, but that is of no weight whatever. Three men produce sworn copies of this writ. A fourth, without having seen a copy of the language of the writ for years, gives it from memory, word for word, in accord with the copies of the other witnesses, and correctly gives the substance of the body of the writ. Here again it is not admissible to presume something from nothing; and the only presumptions which can be indulged are those which arise from the facts put in proof, and it must be taken as undeniably true, that the language of the writ is correctly shown by the appellants' proof.

This being so, how about the seal? I have already shown your Honors how mistaken Mr. Sleeper was in his quotation of Judge Evans' testimony, while indulging in his attack upon him. Judge Evans did not say he thought at first it was a Circuit court seal. He said he thought it was a figure of justice, with a pair of scales, but in the morning, by the better light, saw that it was a human figure, holding a sword, or something, downward in her hand. The

witnesses swear that the seal on that execution bore the same device as that upon the second execution, which is here in evidence, and is unquestionably the seal of the Municipal court. There is not a single witness offered by the defendants, who pretend to give a description of the device, or who can state, even in general terms, as a positive, instead of a negative, fact that it was the Circuit court seal. Mr. Brown swears it was a Circuit court seal, because he would have noticed it if not, but that is merely negative testimony. Now what is the presumption from the language of the writ? Counsel for appellees ask the court to presume that the clerk of the Circuit court lied when he stated that he affixed the seal of the Municipal court. That is, they seek by a presumption to control and negate a fact, which affirmatively appears of record by competent proof. There is no room for doubt, in the mind of any reasonable man that the attestation clause upon that writ was as shown in the copies of Evans and the two Swans, and as stated by Judge Holbrook. Then, on the authority of the case cited as to presumptions, the law will not indulge a presumption which will contradict the established fact, or, in the language of the Van Patten case, when "there is clear and incontestable "proof of a fact, no presumptions can be indulged, except "such as arise from the proof."

Your Honors will not presume that Richard J. Hamilton, clerk of the Circuit court, lied, when he said that he attached the seal of the Municipal court, and the presumption arising from that statement alone, in the absence of any proof at all, as to the seal, would be sufficient to establish it as the seal of the Municipal court, until some evidence should be adduced to show another seal.

When Judge Tuley says that all the presumptions of the law are against the fact that the seal of the Municipal court was attached, and that he who attacks the execution must overcome the presumption of the law "by proof "*which fully satisfies the mind*," that the execution was not such as the law required to be issued, he is taking a position inconsistent with the authority already cited as to presumptions; for, if we take the language of that writ, which is incontestably established, the presumption that any seal but that of the Municipal court was affixed at once disappears, by virtue of the statement in the writ; and whether or not that be so, it is sufficient to put the matter in doubt, as to whether or not the Municipal court seal was attached, and it is not necessary to fully satisfy the mind that the execution did not have the Circuit court seal, because when once the matter has been put in doubt, the presumptive force or the arbitrary force of the presumption disappears, and we are left to determine the question upon the testimony, and all that is then required is that there shall be a *preponderance* of evidence, which need not "fully satisfy the mind"; and in the weighing the arbitrary or legal force of the first presumption counts for nothing.

We also have the testimony of Mr. Cornell, as tending to support the claim that this was an execution of the Municipal court. On the direct examination (Abst., Vol. 2, page 221), he was asked this question by Mr. Fuller, which, by the way, like most of the questions asked this witness on direct examination, is leading:

"Q. And do you remember about the sheriff's deed, "whether the sheriff had given a deed to Gardner; that is "what I want to call your attention to?

"A. Well, Collins said that by the filing of the bill it "would correct the discrepancies in regard to the writs, "etc., pertaining to the title. I remember that, and the "description, as well."

Mr. Fuller saw the point, and at once steered the witness away, the next question being:

"Q. Would you remember the name of Jefferson "Gardner in connection with the title?

"A. Yes, sir. Oh, I remember the name of Jefferson "Gardner, of course.

"Q. Do you recollect about getting a sheriff's deed? "Do you remember that?" and so on.

Now what were the writs in which there were discrepancies which were to be fixed up by the filing of the Cornell and Fellows bill? The writs are all here, save two executions, one of which is unimportant, and the only discrepancies which anywhere appear are, first, the defective service of the summons, and second, the discrepancies in the execution of February 5, 1840.

Now, if Mr. Cornell was not then a good enough lawyer to know, Mr. Collins was, that a want of service of process could not be fixed up in that way. Therefore, there must have been some discrepancy in this only other writ in which it could be found, viz: the execution of February 5, 1840, "to be fixed up." Defendants' witness and we therefore agree that there were discrepancies in that writ. We point them out; defendants do not. Therefore the proof made by us must control as to the nature of the discrepancies, since there is no conflict.

Messrs. Sleeper & Whiton, page 38, say that the seal im-

pressed on the execution of February 5, 1840, was that of the Circuit court, because the writ bore teste in the name of the clerk of that court, whence it will be taken and deemed to have been sealed with its seal, until the contrary affirmatively appears by the writ itself; to which I reply, that the evidence of three sworn copies, each one of which is just as much entitled to credence as a certified copy, and the independent testimony of another witness, establishes that the contrary does affirmatively appear by the writ itself, and the statement of the clerk of the court to that effect. Counsel's second reason is that there is no sufficient proof of the loss of that writ to admit of secondary evidence of its contents, or its seal, which is an argument which reflects great credit upon the erudition and fairness of counsel. The only testimony on the point is that of Mr. Swan, that he took it back to the court, and when he went again to get it, it was not to be found. This was after brother Sleeper had been employed to defend in this suit. This being so, according to brother Sleeper, the presumption would be that the clerk had possession of it, and the court will take judicial notice that the records and files, and everything of that sort, were burned October 9, 1871. The third reason of counsel is because the evidence on the question of the seal is overwhelming in the proof of what the law presumes, which, although rather discouraging, we do not think a sufficient argument to convince " Us and the court " of what counsel claim.

Some of the counsel say that either Swan or Evans willfully suppressed or destroyed the original, or mislaid it among their papers while they had the files in their office, and made no search for it, and hence no foundation is made for the admission of copies. This statement is incorrect, and attributable either to a want of recollection

or examination of the testimony of the witness Swan, which is distinct and unequivocal, that he returned it to the clerk's office, and upon again going for it could not find it. The record shows that when Judge Evans found out that Swan had carried back the files and left them in court, he at once demanded whether he had obtained a certified copy, and on being told no, that he went at once with Swan to court to get a certified copy, and on finding that this execution was missing then took away the files, to preserve them from the predatory habits of some unknown party who was interested in the case, but who was neither Mr. Whiton, Mr. Evans, nor either of the Swans.

In Mr. Fuller's brief it is suggested, as bearing upon this point, that Mr. Swan's partner, Griffin, who had access to the files, and this execution, was not called. Mr. Swan's testimony is explicit that he took the execution back to the court, with all the files, and left it there, and when he went again it was gone. It did not disappear in his office, and by the same rule we observe that Mr. Whiton's partner, Mr. Sleeper, who had access to the clerk's office, and who knew about these files, was not called. I am not charging Mr. Fuller with any fraud in not calling Mr. Sleeper, whose connection with the case is shown, but I simply say that the thing is as broad as it is long. Mr. Fuller suggests that no search by the circuit clerk was requested, or made, and that none of the witnesses searched the clerk's office, which is a mistake, for the testimony shows that Swan did go there to get it, and could not find it. He says the proper foundation for secondary evidence is lacking, to which I say that the presumption is it was destroyed by the fire.

Considerable stress is laid by Mr. Fuller, and some of the other counsel, upon the fact that no copy of the seal—

that is, of the device of the seal—appears upon the copies made of the execution. I will venture to say that if your Honors will cause the clerk of your court to examine the transcripts of record on file, he will not find upon the transcript of any writ issued under the seal of the lower courts, a delineation of the device which the seal bore, or anything more than either the words "Seal" or "L. S.," or "Seal of the court." It is simply in accord with the ordinary practice in copying papers, as your Honors will know from your knowledge and experience in the practical affairs in life, which you have a right to avail yourselves of, as is stated in *Hicks* v. *Silliman*, 93 Ill., 262. The witnesses expected that the original document itself would be forthcoming. It was like another seal on another writ, which is produced. It bore out the language of the attestation clause, which stated that it was the seal of the Municipal court, and it has never been the practice in making copies of court papers to copy the device, or legend of a seal. They examined it with great care, and determined what it was. They could not make out on that one writ every particle of the device, but there were some portions which were unmistakable, and which identified the impression beyond a doubt with that of an execution which was saved, and is produced in this case, and which is the seal of the Municipal court. If these witnesses had formed a conspiracy, we would not have found the variance in their testimony, as to whether or not there were any interlineations in that writ of February 5, 1840. E. D. Swan, who had most to do with the paper, states that his recollection of the instrument is, it had interlineations at the bottom, although what they were he could not state. If he had been manufacturing a case, with intent to suppress the writ, he would have

known precisely what those interlineations were, and so would the other witnesses. This fact merely tends to strengthen, rather than weaken the evidence.

Mr. Fuller calls attention to Greenleaf's testimony, who was in the circuit clerk's office in 1852 or 1853, that the clerk kept the Municipal court execution docket straight along for executions issued from the Circuit court, on Municipal court judgments. This was more than ten years after the fact, and we know that many Municipal court executions were issued after that court was abolished, from the case of *Newkirk* v. *Chapron*, 17th Ill., 344, where it is stated that "the defendant further offered "in evidence a number of papers purporting to be process "of the Municipal court of the city of Chicago, dated after "the 15th day of February, A. D. 1839, and in no way "connected with, or having relation to, the title set up by "said defendant," which shows that the custom of issuing Municipal court process under the seal of that court, was kept up for a good while; and the process must have been execution, for certainly no summons, nor subpœnas, were being issued after the court had ceased to sit.

Mr. Fuller then catalogues the presumptions and proofs in favor of the South Park Commissioners, that this execution bore the Circuit court seal.

(*a.*) Is the presumption.

This I have already, I think, disposed of.

(*b.*) The judgment of the Circuit court, in January, 1848, ordering the sheriff's deed to issue to Gardner.

This is exceedingly unsatisfactory, for the reason that it is not an adjudication where any contest was made, or

anybody claiming under Harris could have been heard, and because the application was based, not on the execution, but upon the sheriff's certificate of sale. So that the execution was not before the court to be passed upon; and again, at that time, and up to the decision of the Supreme court in the case of *Newkirk* v. *Chapron*, it seems to have been the opinion in Cook county that process should continue to issue as the process of the Municipal court, upon judgments rendered in that forum. As already shown, a bundle of such documents was produced in *Newkirk* v. *Chapron*, and the decision in that case, in the Cook county court of Common Pleas, was in favor of that position. So that court would, without doubt, order the deed to issue, the execution having been that of the Municipal court. It would more likely have refused it, if it had been a Circuit court execution, in the light of history.

(*c.*) The bill of *Cornell and Fellows* v. *Harris*, taken pro confesso, as against Harris, and the decree thereon.

That might do as a matter of argument against the Harris heirs, but has not even that dignity as against me; and as against the Harris heirs, it is to be remarked, that neither the master nor the court had that execution before them, nor indeed the original certificate of sale, but merely a copy of it. This is shown by the statement in the master's report of what proofs were before him, and the fact that the report was confirmed upon motion.

(*d.*) The abstract by Shortall & Hoard, of September 14, 1868, which declares that the execution in question, dated February 5, 1840, issued out of the Circuit court of Cook county, which is in the same condition it was when it left the office to be delivered to Morton and Cle-

ment, as has been made clear by the testimony of Mr. Shortall.

This abstract was objected to, because of this erasure in a material part, to wit: the very part which Mr. Fuller now invokes as proof of this execution, and under the statute it was not admissible in evidence. The statute provides: "That any writings, &c., shall be rejected, and "not be admitted in evidence, unless the same appear "upon its face without erasure, blemish, alteration, inter- "lineation or interpolation, in any material part, unless the "same be explained to the satisfaction of the court, and "to have been fairly and honestly made in the ordinary "course of business." Now, what I say is, not that the evidence shows that that erasure was dishonestly made, after the abstract left the office of Shortall & Hoard, or dishonestly made prior to that time. There is no evidence of that; but there is likewise no evidence to explain why it was made, or who made it. Mr. Shortall don't know. He looks simply at his letterpress copy-book, and then at the abstract, and merely testifies that the copy-book shows the erasure was made before the document left their office. It don't appear that that abstract was an original abstract. It does appear by the testimony of Shortall and Brown and Greenleaf,'that when an examamination or an abstract has once been made, and a copy kept of it, whenever there is subsequently occasion to go over the same ground, they merely copy the former abstract; and here we find, under this same head, Mr. Fuller's brief, page 125, "as additional proof in regard to the "seal, the Shortall & Hoard abstract, dated April 5, 1871, "to the same effect;" this by Mr. Shortall's own admission is merely a copy of the one of 1868.

(*e.*) The Gardner abstract, showing the deed issuing to him for property in Bickerdike's Addition, on his application to the Circuit court, which abstract declares the execution issued from the Circuit court.

I have already shown your Honors that that application to the court for the issuing of that deed was based upon the sheriff's certificate or a copy of it, and not on the execution itself. And the entry in that abstract as to the Gardner judgment does not state that the execution issued out of the Circuit court. That is only found in the memorandum of the recitals of the sheriff's deed. (Abst., Vol. 2, page 35.)

(*f.*) The certificate of the sheriff.

This is merely a subdivision or restatement in different form of the same thing.

That is the Gardner abstract, and the order of the court in 1848, directing the sheriff's deed to Gardner, for the property in Bickerdike's Addition, all rest upon the certificate of the sheriff; yet here the thing is sought to be transformed into a chimera, whose three heads will work destruction to their adversary.

(*g.*) Rees, Chase & Co. abstract, which has no note that the execution was otherwise than regular.

This scarcely amounts to the expression of a conclusion of law even on the part of the one who made it. We are not informed who made it, or what his notions would be of a regular and what an irregular execution, or by what rule he would determine the character of an execution.

(*h.*) The evidence of Brown.

He says that he examined the last execution, and while he has no recollection of it, as a matter of fact, testifies from his recollection that if there had been an erroneous seal he would have noticed and noted it. Your Honors will recollect, as I pointed out in my previous argument, his notion of regularity was that on a judgment in the Municipal court, the execution would necessarily run to the high constable, and that they always did so. (Abst., 191.)

(*i.*) The opinion (says Mr. Fuller) of Judge Beckwith, Mr. Whiton and others upon the title, without any suspicion of such a defect as is claimed.

We are not shown Judge Beckwith's opinion, and it is patent even from the statement of Mr. Fuller, that that matter was not discussed; and Mr. Whiton disclaims any recollection whatever of having seen that execution, though he thinks he may have done so.

(*j.*) The fact that a number of gentlemen, mentioned by name, all had something to do with this title, and yet knew of no defect of this kind, although thoroughly familiar with the case of *Newkirk* v. *Chapron*, which was commenced June 4, 1854, and decided at the June term, 1855.

If my recollection serves me right, none of these gentlemen had anything to do with this property after the decision in *Newkirk* against *Chapron*, that is, in regard to investigating the title, because Mr. Cornell and Mr. Fellows had got their scheme through before that case was decided.

After that and the making of the deed which followed the decree, resting upon a copy of the sheriff's certificate of sale as its only evidential basis, it would be quite natural for a clerk in an abstract office to act upon these recitals; the first thing such an examiner would find in running down the chain in the recorder's office would be the sheriff's deed, which would refer him to the Cornell-Fellows case; but all this evidence runs back only to the recital in the certificate of sale which the sheriff most likely put there because he saw the execution was signed by the clerk of the Circuit court, and which at its best is merely a statement of a conclusion of law.

We do not know by whom a single one of these later examinations was made nor, consequently, that the recitals in them were based upon an examination of the execution itself. The memoranda of date and number of execution were in the abstract office as shown by the exhibits of witness Greenleaf.

Here is the entry made by him in the abstract makers' judgment docket of Municipal court judgments, the matter above the line being on one page, that below on the opposite page.

No.	Names of Parties.	Judgment, etc.		Amount.
6852	Jefferson Gardner,	July 7, 1837.	A 51	
(77)	*vs.*	Defendant.	Dam. and	$251 56
	Mark Noble, Jr.		costs.	18 06

Execution.	Date.	Return.	Remarks.
67	July 31, 1837	Returned by order of plff's atty.	Satisfied.
493	June 4, 1838	Made seventy-four and 72-100 dollars and costs by sale of real estate. *See Sales 274.*	
1407	Feb. 5, 1840	Satisfied in full by sale of real estate. *See Sales 336.*	

This shows that when Mr. Greenleaf wrote up this matter he did not consider it a Circuit court execution; it will be remembered he had no independent recollection whatever of the writ.

As to Limitations.

I am surprised to find in some of the briefs of appellees the claim that my title is barred by other statutes of limitation than that found in the bankrupt act, in view of the fact that Judge Tuley finds that these limitations were not made out. Mr. Fuller says (page 83) that the evidence of Mr. Cornell is not as clear as might be desired in reference to one of the years between 1848 and 1857. He had better have said so as to all of them, down to that date. Probably Mr. Fuller referred to 1852, as to which Cornell testified that he did not know any thing about it. There was not, until after 1852, at all events, a *possessio pedis* of any precise portion of the tract, which the court could ascertain and define from the evidence, if it were seeking to render a decree upholding the limitation as to such portion.

It is claimed for Stevens that he makes out seven years' payment of taxes. The trouble with this is that there is no proof that the taxes were paid by the person who claimed the color of title, and he must make it. *Chickering* v. *Failes*, 26 Ill., 508. Messrs. Bisbee, Ahrens & Decker say that payment by another enures. It is true, payment by a grantor enures to a grantee, upon conveyance, but a payment by a grantor, after conveyance, will not enure to the grantee, nor if the grantee has paid them before the conveyance will they enure to the grantor, and follow the title.

Jayne v. *Gregg*, 42 Ill., 413.

Mr. Fuller states (page 83) that a *pedis possessio* is necessary if the description is bad, but proceeds to argue that the description was good in the first instance, and that in any event it was made correct in June, 1855, by the decree in the Cornell and Fellows case. To this I answer that it was not good up to 1855, unless Messrs. Cornell and Fellows lied, or made the allegation found in their bill for a fraudulent purpose (either to obtain a footing in a court of chancery, or for something else), for the allegation of their bill is in substance that the description in the deeds from Draper to Noble, from Gardner to Watson, from Watson to Phillips, from Phillips to Electa Watson, were all erroneous, and insufficient to convey a good legal title. This description includes all the conveyances from Draper down to August 10, 1852, when Mr. Cornell bought from his clients an undivided one-half of the tract, in which conveyance it was correctly described. That is, they are estopped by their averments of record, and by the decree in the case under which all the defendants claim, from saying that they had a good and sufficient legal title, so that a possession of a part would draw to it the possession of the whole or which, the land being entirely vacant and unoccupied, would draw to it the possession of the tract. Nor, as against me, can it be said that the description was correct in 1855, because the parties then holding the title, under which I claim, were not made parties to that proceeding, and the whole of it is a nullity as to them and to me. And your Honors will please bear in mind, also, in relation to the color of title under which a limitation might be claimed, that it was averred in the Cornell and Fellows bill, and found by the decree of the court, that Nathan W. Watson, who appears to have had some sort of a tax deed, had no other

title to the premises than that derived by his deed from Gardner, at which date Gardner's only interest was a sheriff's certificate of sale, the deed not being made until 1856.

Appellees seem to rest their case largely upon what they suggest as the general equities of the case, and the fact that the complainants in the original bill, as is stated, do not come into court with clean hands. None of these matters, however, are or can be urged against me. I was pursuing my remedy in a court of law when brought into this suit, and not only had the right but am perhaps compelled to litigate it here. Nothing effective has been urged against my title that I can see. The South Park Commissioners are precluded, from their answer, from denying that I have a valid legal title of whatever estate was vested in Benjamin Harris. Their claim of divestiture is based upon a judgment, wherein, I think, it clearly appears the court had not jurisdiction of the person, wherein the lien, if perpetuated beyond the expiration of one year from the date of the judgment, was lost by the sale under the execution of June 4, 1838, and upon an execution which issued out of the Municipal court after it had been abolished.

Much is said about inattention to the title and the premises. There may have been considerable attention paid to the premises by those who sought to acquire the title otherwise than by deed from the lawful owners, but there was no legal title acquired in good faith down to the date of the sheriff's deed in 1856, for the reason that all the parties have said, and had it adjudicated by a decree, which is good as to them, though not to me, that Watson had no other title than that derived by the conveyance

from Gardner. That amounted merely to an assignment of the certificate of sale, which Gardner then held, and was not taken by Watson under the impression, or in honest faith, that he thereby acquired a legal title. Cornell and Fellows bought, the former in 1852, and the latter in 1853, from the widow and heirs of Watson, who held merely as volunteers, the deed from Watson to Phillips, and from him to Mrs. Watson, being made merely to avoid administration proceedings. When Mr. Cornell, the lawyer, purchased the property from his client he must certainly be presumed to have examined the records, or, at least, to have had an abstract. It seems that he was not in the habit of examining the records himself. An abstract made in 1850 is produced, with his handwriting upon it, with the memoranda of Judge Jameson upon it, which shows that it was in Mr. Cornell's possession, and with his writing upon it, as early as 1853, Judge Jameson swearing that he had not seen it since that time; and the two phrases, or pencil memoranda, made by Judge Jameson are supplementary to, and explanatory of, the memoranda which are in the handwriting of Mr. Cornell. In one Mr. Cornell had written "Jef-"ferson Gardner and wife, to N. W. Watson. Spcl. "W. Deed, &c."; under the words "Jefferson Gardner "and wife," are in Judge Jameson's handwriting, the name of the wife, "Mary A. Gardner," and after the word "deed" an inerlineation, written above the line, of the words "No date."

It is conclusively shown that this abstract was in his possession in 1853. Judge Jameson made the draft of that bill in the fall of 1853, but it was only filed to the June term, 1854. It raises a query why the bill was held so long, and as to what alterations were made in it before

it was filed. Very likely Judge Jameson drew it, according to the abstract which he had in his possession, and very likely that did not suit Mr. Cornell, and another draft was made during the six months in which it was withheld from the files. Certainly if Mr. Cornell purchased the title, without examining the records, or having an abstract, he cannot lay claim to such diligence and ordinary care as to entitle him to claim the position of a *bona fide* purchaser. He does not claim to have examined the records himself, and he shows no other abstract than the one which is identified as having been in his possession in 1853, and which he says may have come to him with the papers of Watson, which shows Harris' title and bears the pencil memorandum "Ex. No. 1,407 Municipal."

And how did the parties who made the examination of the record, and found the mortgage from Harris to Kercheval, come to be looking under the letter "H" in the grantor's and grantee's index? One of the counsel has stated that there were no such indexes, but in this he is directly disputed by Mr. Shortall, and, I think, by other witnesses. Certainly the law required them to be kept, and perhaps the defendants and I can agree here that the presumption is that the officer did his duty. If the examiner did look under "H," why did he do so, if not because that is where he found the memorandum of the conveyance from Harris to Kercheval? It must have been because he had already found the conveyance from Noble to Harris, and was trying to see what Harris had done with it.

None of the counsel have suggested any reason why they are not chargeable with notice of the bankruptcy of Benjamin Harris. The fact is suggested only as an ex-

cuse—a personal excuse, and not a legal one—for not making Cyrus F. Miller a party, that the records of the bankrupt court were at that time in Springfield; but none the less the adjudication in bankruptcy transferred the title to the assignee, and none the less the proceedings there showed that Miller had sold the property to Anson S. Miller. Counsel say they are not bound to examine all the files in the bankruptcy proceedings, to see what was done with the assets. However that might be in an ejectment suit, when they seek to avail themselves of equitable excuses, such as the distance from the record, they cannot deny the equitable effect of such notice. It must be remembered that all this time, up to the date of filing the Cornell and Fellows bill, the certificate of sale was nothing more than a secret lien. That was not filed in the place required by the statute, in order to charge anybody with notice of the fact of sale. Hence the deed from Gardner to Watson, being unconnected with the record title, was no notice to anybody, and, as claimed in the Cornell and Fellows bill, was ineffectual to convey a legal title.

In Mr. Kales' notes, which I suppose is what Mr. Fuller refers to as being perhaps the opinion on which the South Park Commissioners bought, if not on Judge Beckwith's, but which were found among Mr. Kales' papers, it is suggested that the parties under whom I claim have acquiesced in the execution sale, as regular and valid, and that the execution was issued out of the office of the clerk of the Circuit court, for the reason, first, that Early failed from 1839 to 1871 to assert any right or title to this property; to which there is an offset that Gardner, and those claiming under him, failed to assert any right or title to this property for a long period of years, and that

as Gardner did nothing, and the title of the assignee was notice, and equivalent to an affirmative assertion of his title by the assignee, especially when he made a sale, it would seem that there was little of acquiescence by him. Mr. Kales gives as another reason the omission of Harris to specify this property in his inventory in bankruptcy, in 1843. Harris did specify it, by stating he had conveyed all his assets to Early. The third reason is the omission of the assignee in bankruptcy to lay claim to this property, as part of the assets, or to record deeds. The fact is that Miller, assignee, had no deed to record. The decree in bankruptcy transferred the title, and the moment it was entered was recorded as to this property. The fourth specifies the omission of Harris and King, as grantees, to lay claim to this property. King, on the theory of Mr. Kales, could not lay claim to this property, or take possession of it, until the statute of limitation had run as against the debts, for the payment of which the conveyance had been made to Early. Fifth, the omission of King to lay claim to this property, he dying in 1860; but King had no notice that it was claimed by any one that this execution had issued out of the office of the clerk of the Circuit court. It is true he lived within reach of the summons which might have been issued on the Cornell and Fellows bill, but he was not notified. Sixth, the omission of all these parties to controvert the facts publicly of record.

Inasmuch as it was not a fact, it is difficult to see how they were bound to controvert it. Under the same head, Mr. Kales says that the execution is shown to have issued out of the Circuit court, as stated in the official and recorded certificate of the sheriff (which was not recorded where the law required it to be, and which was only a statement of the sheriff's legal conclusions), and as stated

in the bill and proceedings in the Cornell and Fellows suit (which was a nullity as to King or Miller, and which is nothing more than any bald assertion which may be incorporated into a bill), and finally as the records of that court itself, of which it could then presumptively take notice, prove; but the evidence shows that those records and files were not submitted to the court in the Cornell and Fellows case. Seventh, acquiescence. This cannot be predicated upon a proceeding which is a nullity as to those of whom it is sought to be said that they have acquiesced in it.

Judge Tuley has spoken in his opinion of an equitable estoppel, as to the Harris heirs, arising from the fact that in 1870, and probably in 1869, the alleged void execution, and the void summons, were off the files of the court at various times. That it devolved on the Harris heirs to show when they were on, and when they were off, and that if the park commissioners, or their grantors, purchased when the execution 1407 was off the files, then it was a lost execution as to them, and cites the provision of the statute, which makes the sheriff's deed *prima facie* evidence of the existence of a judgment, where the execution is lost. The statute don't seem to say anything about the deed being presumptive evidence of a summons having been duly served; but even if it did, this estoppel cannot be invoked against me, nor is it an estoppel which is set up in the pleadings, and on which the appellees have, therefore, a right to rely. Moreover it appears, or at least is claimed by the appellees, that they bought on the faith of an abstract. Clement and Morton, and the South Park Commissioners, on the abstract of Shortall and Hoard, which contains the erasure, and it is not shown by any one that they sought these files, and could

not find them; and it is not only adjudicated, but axiomatic law, that a person cannot claim an estoppel *in pais*, arising from the act of another party, unless the act of that other party has influenced his own action, and that is not shown, or claimed, or suggested here. Judge Tuley's enthusiasm as an attorney just there rather got the better of his calmness as a judge.

Judge Tuley also says, near the close of the opinion, that the grantees through the two assignments, having failed to record their deeds in Cook county, until after the present holders of the execution title had purchased, cannot set up their title as against those who purchased in good faith, upon a record title, apparently good. I should like to know, how, if one adverse conveyance appears of record, the case is varied by a string of a great gross of conveyances, deduced from that which does appear? There certainly was all the time from the date of Harris' adjudication as a bankrupt, record notice to everybody of the transfer of the title to Cyrus F. Miller, and it would have added nothing to the notice made by the adjudication if all the subsequent deeds, which only derived their validity from the first, were put upon record.

The defendants are seeking to claim on color of title, which I submit, was not acquired in good faith, and which though perhaps available at law in some cases, could never be in equity.

The defense of *laches* may be easily disposed of. I have shown to the court, I believe, that there is no legal limitation which could prevent a recovery of the premises by me in the pending suit, in ejectment, or indeed, in this cause, and I understand the rule to be that *laches* will not be enforced short of a statutory bar, except where *bona*

fide rights will be prejudiced. Certainly, from the adjudication of Harris, the bankrupt, to the present time, there has been notice to all the world that the Harris title had passed from him. The defendants themselves lay by so long before taking out their sheriff's deed, and that too, after having once taken out a sheriff's deed as to other property, sold under the same execution, that, under the authority of *Rucker* v. *Dooley*, they are not entitled to it, as against any one claiming under Harris' assignee. They all knew that Harris' assignee was not made a party. The two years' statute of limitations does not work against me, but in my favor, as I have shown in my original brief. The execution, and the judgment, one or both, being void, as shown, the defendants could not maintain their title at law, and it is shown incontestably, that Mr. Cornell, one of the South Park Commissioners, and a member of the land committee, must have known of Harris' title in 1855, or earlier when the abstract of 1850 first came into his possession, which was doubtless prior to his purchase in 1852. The abstract upon which the South Park Commissioners bought, in its most material part, as to the character of the execution, betrays an erasure, which no one has explained.

It is true the South Park Commissioners have spent a considerable sum of money in the purchase of the rights of certain parties to this suit. While I believe that my title is paramount to all the others, as disclosed in the record, that I could recover in an action of ejectment, I wish to steal no man's money—no man's land; and I offered upon the hearing below, if the court should deem it a proper condition to the granting of the relief prayed for in my cross-bill, to refund to the park commisioners whatever they have paid for said premises, or to perform

any other act which the court might deem to be a reasonable and just requirement. I stand here, offering to do that, or anything else which this court may consider proper conditions, or terms, to the granting of the relief sought, in case it shall seem to your Honors that the defendants hold a title acquired in good faith, with due diligence, and not with a persistent blindness to the facts as they exist.

In conclusion, I owe my acknowledgments to the other counsel in the case for their courteous treatment of me, being altogether mindful of the old adage concerning him who tries his own case. I had not expected to do this. The names of two other counsel are found in the record as appearing for me, one of whom has sat upon the bench occupied by your Honors, and either of whom would have made a fitting presentation of the case. Both of them have been removed from the cause, one by the sacrament of a sudden death, and the other after weary years of struggling with disease. Believing, however, that a court of equity whose office it is to aid all those who labor under any disability will embrace me within the rule, and trusting rather to the inherent merits of the case, and the calm and courageous consideration which I look for it to receive at the hands of your Honors, I confidently and respectfully submit the case to your Honors' care.

CHARLES H. LAWRENCE,
pro se.