No. 8868

Supreme Court of Illinois

Frederick Dehler

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vs.

Charles Held, et al

TRANSCRIPT OF PROCEEDINGS IN SUIT.—Culver, Page & Hoyne, Stationers, Chicago.

UNITED STATES OF AMERICA,
State of Illinois,
Saint Clair COUNTY. } ss. In Circuit Court, March Term A.D. 1869

PLEAS, before the Honorable Joseph Gillespie Judge of the twenty fourth Judicial Circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Saint Clair County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Belleville in said County, on the third Monday (being the Fifteenth day) of March in the year of our Lord one thousand eight hundred and Sixty Nine, and of the Independence of the said United States the ~~eighty~~ Ninety second,

Present, Honorable Joseph Gillespie Judge of the 24th Judicial Circuit of the State of Illinois.

Robert A. Halbert States Attorney.

James M Stookey Sheriff.

Attest, Geo. H. Roeder. Clerk.

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Be it Remembered that on the 29th day of February A. D 1868 the following Summons was issued to wit:

State of Illinois } Sct. The People of the State of Illinois
County of St Clair } To the Sheriff of St Clair County, Greeting:

We Command you to summon Charles Held and Jacob Meister if they can be found in your County, to be and appear in the St Clair Circuit Court, on the first day of the next term thereof, to be holden at the Court house in the City of Belleville, in said County, on the third Monday of March next, then and there to answer unto Frederick Dehler of a plea that they render unto him the sum of $350.00 which they owe him and unjustly detain from him to his damages as he says of the sum of $200.00 and not to fail under penalty of what the law directs. And this writ you shall have at our said Court, with your return endorsed thereon.

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Witness, Henry A. Kircher, Clerk of the Circuit Court, and the seal thereof pereunto affixed at office this 29th day of February A.D. one thousand Eight hundred and sixty eight.

Henry A. Kircher Clk

Upon which Summons appears the following indorsement to wit:

Fred Dehler
Charles Held et al } Debt summons

Returnable March Term

I hereby deputize R.B. Patterson to execute the within writ Feby 29. 1868.
Kaze & Hinchcliff Charles Becker Shff.

Served by reading to the within named defendants Charles Held and Jacob Meister March 2d 1868.

Fees serve & Pet 1.10
mile 10
$1.20

Charles Becker Sheriff
by R. B. Patterson Spec Dty.

Filed March 10 - 1868.

Henry A. Kircher
Clerk Circuit Court St Clair Co Ills.

Be it Remembered that on the 4th day of March A.D. 1868. the following declaration and copy of bond was filed, to wit:

State of Illinois } ss. In the Circuit Court of St Clair
St Clair County } County at the March Term thereof.
A.D. 1868.

Frederick Dehler the plaintiff in this suit by S.M. Kaze his attorney complains of Charles Held and Jacob Meister the defendants of a plea that they render to the said plaintiff the sum of Three Hundred and fifty dollars, which they owe to and unjustly detain from him. For that Whereas the defendants Charles Held and Jacob Meister on the 21st day of November

A.D 1867 at the County of St Clair aforesaid made their certain writing obligatory Sealed with their seals, and here in Court to be produced, and then and there delivered the same to the plaintiff the said Charles Held and Jacob Meister acknowledged themselves to be held and firmly bound unto the said plaintiff under the name style and description of Fritz Dehler a Constable of said County in the sum of Three hundred and fifty dollars for the payment of which well and truly to be made they bound themselves their heirs Executors and administrators jointly and severally & firmly to be paid to the plaintiff, which said writing obligatory was subject to a condition thereunder written whereby it was provided That whereas three Executions was on the twenty first day of November A.D 1867 ipued Martin Medart Esq a Justice of the peace of said County to the said plaintiff under the name, style and description afore said in and for said County, against the goods and chattels of the said Charles Held for the sum of One hundred & sixty two dollars and Ninety nine cents debt and sixteen & 80/100 dollars Costs, which said Executions had been levied by the said plaintiff as a Constable on the following goods and Chattels, property of the said Charles Held, six single bedsteads and bedding, one round stove and pipe 5 whiskey Kegs, one Pigeon hole, one counter and shelf one ice box, one round table, four square tables one dozen chairs in bar room, eight decanters, three dozen beer glasses, one clock, six double bed steads and bedding, two dining tables, one and one half dozen common Chairs seven pictures and frames, three brass faucets, & one dinning bell, and whereas it was further provided that the said plaintiff under the style and description of said Constable having appointed a sale of said property to be held at the

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Lincoln House near the rail road in Belleville said County and State, on the 21st day of January A.D 1868, and the said Charles Held being desirous of retaining posession of said property until the day of sale thereof, it was further conditioned that if the said Charles Held should deliver the said property so levied on as aforesaid in its then present good condition, on the day and at the time and place so appointed for the sale thereof as aforesaid then said writing obligatory was to be void otherwise to remain in full force and vertue, as by the writing obligatory here shown to the Court will appear, and although afterwards to wit, on the 21st day of January A.D 1868 at the Lincoln House near the rail road in Belleville St. Clair County aforesaid the day upon which the sale of said property had been appointed, the day upon which, and at the place where the said Charles Held was to deliver the said property so levied on as aforesaid in good condition to said plaintiff, yet the plaintiff in fact says that the said Charles Held did not deliver the said property nor any part thereof at the time nor place aforesaid according to the writing obligatory aforesaid, and as well the said writing obligatory, as the delivery of said property therein specified remains in full force and vertue, in no wise satisfied, vacated or discharged, whereby and according to the form and effect of said writing obligatory, an action hath accrued to the plaintiff to demand and have of the defendants the sum of $ yet said defendants although often requested so to do, have not as yet paid the said sum of Three Hundred and fifty dollars nor any part thereof nor delivered said property nor any part thereof to the damage of the plaintiff of $200.00 and therefore he brings suit.

by S. H. Kase his atty

5 Be it Remembered that on the 4th day of March 1868 the following Forthcoming bond was filed to wit:

Know all men by these Presents that We Charles Held & Jacob Meister of the County of St Clair in the State of Illinois are held and firmly bound unto Fritz Dehler a Constable of said County, in the sum of Three Hundred and fifty dollars for the payment whereof well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally firmly by these presents. Witness our hands and seals this 21st day of November A.D. 1867.

The condition of the above obligations is such, That Whereas three executions was on the twenty first day of November 1867 issued by Martin Medart Esq a Justice of the Peace of said County, to the said Fritz Dehler a Constable in and for said County against the goods and chattels of the said Charles Held for the sum of One Hundred sixty two 99/100 dollars debt; and sixteen & 80/100 dollars costs, which said executions has been levied by the said Constable on the following property of the said Ch Held. I have levied the following descr property 6 single bed steads and bedding, one round stove and pipe, 5 whiskey Kegs 1-one Pigion hole 1 one counter and shelf, 1 One ice box, one round table, four (4) square tables, one dozen chairs in barroom, eight decanters, three dozen beer glasses, one clock, six double bed steads and bedding, two dining tables, One and one half dozen common chairs, seven pictures and frames, three brass faucets one dining bell. And the said Constable having appointed a sale of said property to be held at Lincoln House in Belleville near the rail road on the 21st January January day of 1868. and the said Charles Held being desirous of retaining possession of said property until the day of sale thereof. Now if the said Charles Held shall deliver the said property so levied on as aforesaid, unto

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present good condition, on the day, and at the time and place so
appointed for the sale thereof as aforesaid then this obligation to be void,
otherwise to remain in full force and virtue.

Signed, sealed and delivered } Chr Held (Seal)
in presence of. } Jakob Meister (Seal)

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Be it Remembered that on the 19th day of March A.D 1868 the following plea was filed to wit:

State of Illinois } March Term 1868 of the
St Clair County } St Clair Circuit Court.

Charles Held and Jacob Meister ats Frederick Dehler } In Debt.

And the defendant Jacob Meister by Underwood & Noetling his attorneys comes and defends the wrong and injury, when &c and says that the said supposed writing obligatory is not his deed, and of this the said defendant puts himself upon the Country etc.

Jacob Meister
Underwood & Noetling attys for deft.

State of Illinois } ss.
St Clair County } In Circuit Court March Term 1868

Charles Held & Jacob Meister ats Frederick Dehler

And the said Jacob Meister on oath, states that the above plea by him pleaded is true in substance and in fact.

Subscribed and sworn to before me this 18 day of March 1868
Henry A. Kircher Clk
by Fred. A. Scheel Dy } Jacob Meister.

Be it Remembered that on the 16th day of December A.D 1868. the following additional pleas were filed by leave of Court, to wit:

Frederick Dehler vs. Charles Held & Jacob Meister } Debt.

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And the said Jacob Meister for further plea by leave of Court as to the following property mentioned in said declaration and said forthcoming bond to wit: One Counter, and shelves, one ice box, one round table, four square tables, one dozen chairs (in bed room) six decanters, three dozen beer glasses, one clock, six double bed steads and bedding, two dining tables, one and a half dozen of common chairs, seven pictures and frames, three brass faucets, one dinner bell, and all the furniture in the bar room of said Charles Held on the 15th August A.D. 1867 at the County aforesaid, the said Jacob Meister says actio non because he says that before the issuing of the said three Executions or any of them in said forthcoming bond mentioned to wit on the 15th day of August A.D. 1867 the said Charles Held then being the owner of said personal property and a resident of the City of Belleville in said County and being indebted to Yeo & Gintz in the sum of $400 then and there and in good faith and to secure the payment of said four hundred dollars to said Yeo & Gintz in six months from that date with interest at ten per cent as per his promissory note to them of that date, then and there made and delivered to them his Chattel Mortgage on said personal property, which said Chattel Mortgage was then and there in due form of law on the 15th of August A.D. 1867, at the County aforesaid duly acknowledged before a Justice of the peace in the district where said Charles Held then resided to wit in said City of Belleville, and a memorandum was then and there entered by the said Justice of the peace on his docket of said Chattel mortgage and of the description of said property according to the Statute in such cases made and provided, and which said Chattel Mortgage

was on the day and year aforesaid at the County aforesaid duly recorded in the Recorder's office of said County in Book No of Chattel Mortgages page 247 by which said Chattel Mortgage it was provided among other things, that until default should be made by the said Charles Held in the payment of said money as aforesaid it should and might be lawful for him to retain the possession of said personal property and use and enjoy the same for the space of two years unless said Stein & Gintz elected to take possession sooner, but if the same or any part thereof should be attached or levied upon by virtue of any execution or Executions &c it should & might be lawful for the said Stein & Gintz to take full and immediate possession of the whole of said personal property and sell and dispose of them for the best price they could obtain, and out of the moneys arising therefrom to retain and pay said $400 & interest and all charges touching the same, rendering the overplus if any to said Charles Held, his heirs and assigns. And the said deft in fact says that afterward & before said six months after the date of said mortgage expired and after the levy of said three Executions in said forthcoming bond mentioned and after the making of said forthcoming Bond and before the time for delivery of the property therein mentioned to wit on the 15th day of December A.D 1867 at the County aforesaid, the said Chattel Mortgage being wholly unpaid and unsatisfied, the said Stein & Gintz under said Chattel Mortgage took possession of said personal property mortgaged as aforesaid, and afterwards and before the time for the delivery of said personal property under said forthcoming bond, to wit on the 27th day of December AD 1867 at the County aforesaid, after due notice, sold

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and disposed of all of said personal property at public sale in good faith to one Louis Roes for the large sum, to wit: $372.00 and applied the proceeds of said sale towards satisfying said mortgage unpaid and unsatisfied as aforesaid as they lawfully might by the provisions of said Chattel Mortgage, and then & there delivered possession to said purchaser, wherefore and whereby this deft was unable to deliver said personal property under said forthcoming bond & said pltff has sustained no damage for a failure to deliver said personal propaty under said forthcoming bond, and this said deft is ready to verify wherefore he prays Judgment &c.

And for further plea in this behalf as to all of the personal property mentioned in said forthcoming bond and not covered by the Cattel Mortgage in the foregoing plea referred to the said Jacob Meister says action non because he says that he did deliver to said pltff Constable as aforesaid said personal property in the same condition it was at the making of said forthcoming bond on the day and at the time and place appointed in said forthcoming bond for the sale thereof according to the true intent and meaning of said writing obligatory and delivery bond & this said deft is ready to verify wherefore he prays Judgment &c.

Underwood & Koelling
Attys for Meister

Be it Remembered that on the 20th day of March AD 1869. the following demurrer to second plea was filed to wit:

Dehler
Held & wo. Meister } Demurrer to second Plea

11 And the plaintiff says that the said plea by the defendant secondly pleaded by leave &c in manner and form as the same are therein set forth are not sufficient in law.

Kase & Wilderman
Attys for Pltff

Be it Remembered that on the 20th day of March A.D 1869 the following demurrer to third plea was filed to wit:

Dehler
vs.
Held & Meister

} Demurrer to third plea.

And the plaintiff says that the said plea by the defendant Meister thirdly above pleaded by leave &c in manner & form as the same are therein set forth are not sufficient in law.
And the plaintiff shows the Court here the following special causes of demurrer to the said plea that is to say.
1st That the said plea sets forth the performance generally without stating the manner of the performance.
2. That the said defendant does not pray oyer of the said writing obligatory.

And also that the said plea is in other respects uncertain informal and insufficient etc.

by Kase & Wildermann
Attys for Pltff.

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Be it Remembered that at the March Term A D 1869 of the Saint Clair county Circuit Court, among other things the following proceedings were had, to-wit:

Frederick Dehler
vs.
Charles Held & Jacob Meister
} Debt $350 Dam $200

On the first Monday of the term comes the plaintiff by Kane & Wilderman his attornies and moves the court to strike the defendants additional pleas from the files. And on the first Wednesday of the term this cause is set for the third Wednesday. Reset for second Thursday. On the first Saturday the defendants by Underwood and Snelling their attorneys and withdraw their notice under general issue. And on the second Wednesday of the term comes again the plaintiff by his said attorneys and demurs to defendants second and third special pleas, which demurrer is argued by Counsel, and by the Court overruled. And now the plaintiff standing by his demurrer, the Court renders Judgment upon the demurrer in favor of the defendant.

It is therefore considered and adjudged by the Court that the said defendant recover of and from the said plaintiff their proper costs of suit to be taxed, and Execution is awarded for the Collection thereof.

State of Illinois } ss.
St Clair County }

I George W. Roeder Clerk of the Circuit Court of Saint Clair County, in the State aforesaid, do hereby Certify the above and foregoing to be a true, perfect

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and Complete Copy of 1/ Summons 2/ declaration 3d/ bond 4/pleas, 5/ demurrer to pleas, 6/ Judgment of the Court at the March Term 1869. in a certain Cause of Debt pending in said Court on the Law side thereof, wherein Frederick Kohler is plaintiff and Charles Held and Jacob Meister are defendants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Belleville this twenty eighth day of April AD 1869.

Geo. M. Roeder, Clerk.

I, _____ Clerk of the Circuit Court of _____ County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of _____ in a certain cause _____ pending in said Court, on the _____ side thereof, wherein _____ and _____ Defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at _____ this _____ day of _____ A. D. 186

_____ *Clerk.*

1868-D

Transcript of Proceedings
IN SUIT.

CIRCUIT COURT.

Saint Clair County.

March Term, 1869

In the matter of

Frederick Dehler

vs.

Charles Held &

Jacob Meister

Culver, Page & Hoyne, Stationers, Chicago.

Fees on Transcript $5.00.

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State of Illinois
First Grand Division } ss. In Supreme Court
Of the June Term A.D. 1869

Frederick Dehler - Plaintiff in Error
vs
Charles Held &
Jacob Meister - Defendant in Error

Assignment of Errors

And now comes Frederick Dehler the plaintiff in error by Kase & Hilderman his attorneys and says that in the record and proceeding aforesaid, there is manifest error in this to wit:

I The Circuit Court erred in overruling plaintiffs demurrer to defendant, Meisters, second (special) plea.-

II The Circuit Court erred in overruling plaintiffs demurrer to defendant, Meisters, third (special) plea -

III The Circuit Court erred in rendering judgment upon said demurrers for defendant, Meister.

IV The Circuit Court erred in rendering judgment, upon said demurrers to defendant, Meisters, second and third (special) pleas, against the plaintiff -

By reason whereof the plaintiff prays that said judgment may be revised, etc..

By Kase & Hilderman
Attys. for Plff. in Error

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State of Illinois
First Grand Division } ss. In Supreme Court
To the June Term A.D. 1869

Frederick Dehler
vs
Charles Held &
Jacob Meister | Error to Saint Clair County

Judgment at the March
Term A.D. 1869 for costs dollars
Issue a writ of error to the Circuit Court
of Saint Clair county, against Jacob
Meister at suit of Frederick Dehler
returnable on the first day of the June
term next – A.D. 1869.

Kase & Wilderman
Attys. for Plff. in Error

Dated at Belleville Ills.
May 6th A.D. 1869.

To the Clerk of the
Supreme Court of the State of Illinois for
the First Grand Division

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Supreme Court June Term 1869

Fredrick Dehler

vs

Charles Freedhoff

Record

Filed 8th May 1869

W.H. Wilbanks

Clk

Case 107

Walker J. This was an action of debt, upon a forthcoming bond executed by Charles Heht the execution debtor and Jacob Meister as his surety, to Frederick Dehler. The breach assigned is that the obligors failed to deliver the property to plaintiff in error at the time and place named in the condition of the bond. To this declaration defendants in error ~~Meister~~ Mister pleaded first non est factum; and secondly that a portion of the levied property ~~that the property levied upon~~ was levied upon by plaintiff in error under three different executions in his hands as a constable from a justice of the peace of the county and against Heht. ~~The plea avers that~~ at the time the levy was made that the property there levied, was subject to a chattel mortgage given by Heht to Nix & Gintz to secure a debt of $400. which he owed to them and which was to mature at six months from the date of the mortgage. That it was duly executed and properly acknowledged before a justice of the peace in the proper district, and that he had entered the memorandum required by the statute in his docket, and that it was regularly recorded in the

* and plea that a portion of the property ~~levied upon~~

58868-107

proper office.

That the mortgage provided that
upon the mortgagor might retain possession of the property for two years
but that in case it should be attached
or levied upon under execution, then
the mortgagee might enforce it to
possession and after given notice as
specified sell it and apply the proceeds
to the payment of their debt. That the
property being thus held under this
chattle mortgage at the time the levy
was made, and the debt not being
due and unpaid, after the levy
was made by plaintiff in error, Rents
claims by virtue of the power con-
tained in the mortgage sized and
retained the property into their possession
and after giving the required notice
sold the same for a sum less than
their debt, and applied it towards pay-
ing the same. Whereby defendant in
error was prevented from delivering the
property to plaintiff in error according
to the terms and conditions of the bond
sued upon.

The third plea avers that all of
the property named in the petition coming

[8868-11]

bond and not embraced in the mortga-
ge was duly delivered by Mesten to
plaintiff in error in the same con-
dition it was in when the bond was
given, and at the time and place and
in the manner required by the bond-
To the ~~the~~ second ~~plea~~ plea plaintiff in error
filed a ~~general~~ demurrer ~~and to the~~
and ~~to the special demurrer to the third plea~~
~~and a special demurrer,~~ and assigned
special causes that the plea avers per-
formance generally without stating the man-
ner, and that the plea does not aver
copy of the writing obligatory and is alto-
gether uncertain, informal and insuffi-
cient. The court below overruled these de-
murrers, and plaintiff ~~abiding by his de-~~
~~murrer and~~ failing to answer further
the court rendered judgment on the de-
murrer in bar of the action, and to re-
verse that judgment plaintiff brings
the case to this court on error.

The only question arising on this
record is whether these pleas present a
defense to the action against Mesten.
As a general rule where a party binds himself
to perform an act he is held to its performan-
ce except where it is rendered impossible by
the act of God or the public enemy. The mere

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~~Hello at~~

fact that it may be inconvenient or attended with loss is no excuse. And that is all that can be said of this obligation. Its performance was in no wise rendered impossible. ~~Appellee~~ Master could have redeemed the property by paying the mortgage debt and thus have retained it to answer the condition of the bond, as the mortgagee would have been compelled to receive the money and discharge the property from the mortgage lien he had on the debt. It was therefore within his power to perform the condition of this bond, upon ~~which suit is brought~~ Having failed to deliver the property as his and his principal had agreed in law there was a breach and an action thereby accrued to the plaintiff against the obligors.

~~But~~ Concerning the ~~2d~~ second plea to her true and it is admitted by the demurrer, it does not constitute a bar to the action. If the facts exist as stated in the plea what would be the measure of the damages? Evidently the amount of the loss sustained by the execution creditors by the failure of defendants ~~in~~ to redeem the property at the

(Folio 12)

time and place fixed by the board. Had the property been obtained, what would have been the rights of the judgment creditors? Surely to have sold it under the executions subject to the prior mortgage, and thus have realized the surplus over and above the amount of the mortgage debt, subject to their executions. If as the pleas allege that the property levied upon was not worth as much as the mortgage debt, then a sale would have realized nothing and they have sustained no loss by a failure to obtain the property to the constable.

Suppose the constable had been sued by the plaintiffs in these executions for refusing to levy this property under the executions, and he had shown that the property was worth no more than the liens of the mortgage, would any one contend that the measure of damages against him should be the full value of the property? Assuredly not. And why? Because plaintiffs in execution had sustained no damage by the officers refusing to make the levy. But had it appeared that the property was worth more than he would be liable for the amount of the surplus. And why

Should not the same rule apply to
Masters? No reason is presented.
In an action of covenant
on debt on a bond with a condition
the true measure of damages is the loss
sustained by the covenantee on the ob-
ligee. This case was simply a question
of the measure of the damages. By
failing to perform the condition of the
bond there was a breach of the bond
and a right of action accrued. And
the effect of the bond being that Mas-
ters would relieve the property as he
held he was himself to pay such
damages as the plaintiffs in execution
sustained by his failure. Now
we have seen that the property being
written to have been worth 15s. more
than amount of the liens of the writ
of exp, there could be no damages be-
yond a nominal sum which the law
implies. If however it should turn out
that the property was worth more than
the 15s. Whatever it might be would
be the measure of the damages as
that would be the extent of the injury
sustained by plaintiffs in execution.
That was all that their executions could
have reached by the levy and a sale.

[8848-1]

The plea was bad because it was pleaded as a bar to the action and in bar when seen it was not an answer to the whole cause, and the demurrer should have been sustained. ~~to it.~~

The third plea although informal in substance presented a defence to a part of the recovery. So far as it alleged that Thurston had no property levied on under these executions had been delivered ~~to the~~ and which was not held by the mortgage, it was an answer of the performance of the condition to that extent. It can never be held that a part performance of an obligation accepted by the obligee will be held for nothing. It is good and must be held to discharge the obligor so far as it goes, but no further. If the property admitted by the demurrer to have been delivered to the Constable was sufficient to pay a portion of the ~~debts to collect~~ judgments to collect which the executions, ^ were issued, then it would leave on the sum to be recovered, to that extent. The extent of the recovery would in no case be more than ^ with the ^ these executions interest and costs. ~~after deducting~~ ^ but the proceeds of the property

should be dismissed.

Texas delinquent, Although informal the plea in substance pursuited a defense to a part of the recovery. Being informal the demurrer should have been sustained for that reason. As the court erred in failing to sustain the demurrer the judgment of the court below is reversed and the cause remanded with leave to amend the plea.

Judgment reversed.

F Dobbs

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Hilt + Minter

Opinion courtesy
Walker J.

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Recorded

June 3 69.

Illinois Supreme Court.---First Grand Division.

JUNE TERM, 1869.

ELISABETH WALSH, pltff. in error,
vs.
JACOB REIS, defendant in error. } Error to Monroe.

BRIEF OF DEFENDANT IN ERROR.

I am not aware that the Supreme Court (so far as its decisions have been published) has ever had occasion to examine the question raised in this record. It presents a conflict between the right of dower and a right of homestead, and out of it arises the question how far the doctrine of merger may be applied, if at all.

To say that the dower is the greater estate and cannot merge in the homestead, as is asserted in the brief of the pltff. in error, is hardly correct as a universal principle. Whether it is a greater estate or not, depends upon the value of the premises. If, for instance, the deceased husband has left only a homestead worth not more than one thousand dollars, the homestead right is beyond question the greater estate. The widow, claiming under her right of dower, would only be entitled to the use and occupation during life, of one-third of such homestead, while under the homestead law she has a life estate in the whole of it, with survivorship to her children, until the youngest becomes of age. No widow, so situated, would ever claim a dower estate in such premises, as an assignment to her would be a useless act. In this instance her dower interest is closely merged in her homestead right. Should the husband have left other estate, or should he have sold it without her having joined in the deed, of course she would be endowable in such other estate.

Now in this case the house and lot were worth more than a thousand dollars. Upon foreclosure, the mortgagee Horine paid to Walsh, the husband of pltff., one thousand dollars. Walsh had a right to dispose in this wise of the homestead. "While," as the Supreme Court says, in Cassell vs. Ross, et. al., 23 Ill., 244, "the homestead act was designed more for the protection of the wife and children than of the husband, yet as the title is usually vested in the latter, he must be treated as acting, at least to some extent, as their trustee."

Indeed by the clear letter of the law, the mortgagee had a right to extinguish the homestead right of the whole family, by the payment of the one thousand dollars to the head of the family. There can be no question of that.

Had there been no homestead exemption, the widow would have been entitled, after death of husband, to the life estate in one third of the premises. It so happens that in this case the property was worth at the time Horine obtained it by foreclosure and sale, about $3000. Surely her dower right in the whole premises could not have been worth more than her homestead right. Can she now in equity still claim her dower, her homestead right in this instance being greater than her dower right. Her dower right would have been a life estate in one-third of the premises, or the rent and profits thereof, while instead of the rents and profits her husband, being also trustee for her, got the full value of one-third of the entire property at once paid down, which at ten per cent would net him, or after his death, his wife and children, $100.00 per year, while the value of the rent of the entirety, deducting for repairs, insurance and charges, only amounted to $112.50, (according to the testimony,) and the widow's part thereof would only amount to $37.50. It is therefore contended on behalf of the defendants in error, that in this case the widow had no right in equity to have any dower assigned at all in the premises.

But suppose that her dower, in the whole, is not merged, yet can she claim dower in more than two-thirds of the rents and profits. One-third of the property was absolutely paid for, under the homestead exemption law, and by its operation her homestead right, which as to the one-third part of the premises was surely a larger estate than her dower right, was fully extinguished. Now, can she claim dower in the same premises? Suppose the house and lot had been divisible, and a thousand dollars worth of the lot and house had been set apart as a homestead, and was now occupied by her for life, could she have had dower assigned therein? Of course not as it would have had to be assigned on her own estate. The land having been changed into money by due course of law, her rights are not changed, and she cannot have rent and profits out of land, which was once before converted into money for her benefit. The money paid under the homestead law in this case, was precisely one third of the whole value of the land, so she could only be endowed in the rent and profits in the other two thirds. By what calculation the Court came to the sum of $20,00, it is not material to enquire into, suffice it to say, that it is just about the rents and profits of two-thirds of the real estate, according to the testimony, deducting insurance, taxes and repairs. Under this view of the case, the result of the Judge's computation is correct, although he may have come to it in the wrong way.

The defendant has assigned cross errors.

1st. That the Court should have dismissed the bill on final hearing, because the bill does not allege that the said mortgage was made during coverture. If Walsh had made the mortgagee, before he married complainant, she could not have dower in it, against the mortgage or those claiming under him. Chap. 34, Dower, 1 sec. Gross' Stat., P. 231. It would be perceived that there was no testimony taken in the case as to time of marriage of complainant with her deceased husband.

2d. That the Court found her entitled to any dower at all. The reasons for this assignment of error are already stated above, and need therefore no repetition.

GUSTAVUS KOERNER, for Defendant in Error.

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Walsh

vs

Reis

Error to Monroe

Brief of dis.

G Kaercher

Filed 25th June 1809

W A Whitaker

Clerk

State of Illinois,
SUPREME COURT,
First Grand Division, } ss.

The People of the State of Illinois.

To the Sheriff of ..Saint Clair..... *County:*

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of..Saint Clair.....County, before the Judge thereof, between.....

Fredrick Dreher

Plaintiff, and.....

Charles Held and
Jacob Meister

Defendant s, it is said manifest error hath intervened to the injury of the aforesaid.....

Fredrick Dreher

as we are informed by.....his.....complaint, the record and proceedings of which said judgment, we have caused to be brought into our Supreme Court of the State of Illinois, at MOUNT VERNON, before the Justices thereof, to correct the errors in the same, in due form and manner, according to law; therefore we command you that by good and lawful men of your county, you give notice to the said.....

Charles x Held and
Jacob x Meister

that they.....be and appear before the Justices of our said Supreme Court; at the next term of said Court, to be holden at MOUNT VERNON, in said State, on the first Tuesday in June next, to hear the records and proceedings aforesaid, and the errors assigned, if.....they..... shall think fit; and further to do and receive what the said Court shall order in this behalf: and have you then there the names of those by whom you shall give the said Charles Held and Jacob Meister notice together with this writ.

WITNESS, SIDNEY BREESE, Chief Justice of the Supreme Court, and the seal of said Court at Mt. Vernon, this.....8th..... day of.....May.....in the year of our Lord, one thousand eight hundred and sixty-nine.

.....W. H. Wilbanks.....

Clerk of the Supreme Court.

[8848-19]

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June Term 1869

SUPREME COURT

FIRST GRAND DIVISION.

Fredrick Dekler

PLANTIFF IN ERROR

VS.

Charles Hedstead

DEFENDANT IN ERROR.

SCIRE FACIAS

FILED. 18th May '69

B. H. Wilcox Clerk

Served May 12th 1869 by C. C.

126

Returned Served on the within named Chas Hedstead
Marshall County. the 12th day of May 1869
Jas Fee
Sheriff
Fee $1.25
Paid

Returned Served on the within named Chas Hedstead
Marshall County. the 12th day of May 1869
James M Hartley Sheriff
Fee $1.25
Paid

State of Illinois,
SUPREME COURT,
First Grand Division, } ss.

The People of the State of Illinois.

To the Clerk of the Circuit Court for the County of Saint Clair ..... *Greeting:*

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which was in the Circuit Court of Saint Clair ..... County, before the Judge thereof, between .....

Fredrick Dehler,

Plaintiff, and .....

Charles Held and
Jacob Muster

Defendant S, it is said manifest error hath intervened to the injury of the aforesaid .....

Fredrick Dehler

as we are informed by this ..... complaint, and we being willing that error, if any there be, should be corrected in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to the Justices of our Supreme Court the record and proceedings of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid, at Mt. Vernon, in the County of Jefferson, on the first Tuesday in June next, that the record and proceedings, being inspected, we may cause to be done therein, to correct the error, what of right ought to be done according to law.

WITNESS, SIDNEY BREESE, Chief Justice of the Supreme Court, and the seal of said Court at Mt. Vernon, this ..... 8th ..... day of ..... May ..... in the year of our Lord, one thousand eight hundred and ..... sixty nine .....

..... S. D. Whitnuke .....

Clerk of the Supreme Court.

[8 9 L 8-20]

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2nd Term 1869

SUPREME COURT

FIRST GRAND DIVISION.

Adler

PLANTIFF IN ERROR

VS.

Hall et al

DEFENDANT IN ERROR.

WRIT OF ERROR

Issued Ord

FILED. 8th May 1869

W. D. Witmarker
Clerk

Case 98

Rhea Ch. J. This was a petition for dower under the statute in lot fifty two in the town of Watrous in Mora County, brought by the plaintiff in error as the widow of David M. Valle against Jacob Reis.

A motion to dismiss the petition having been overruled the defendant answered, denying the petitioners right to dower, "because her husband thereof from the claims had mortgaged the lot to M. J. Haines who foreclosed it, and the said husband having claimed a right of homestead in the lot it being worth more than one thousand dollars that sum was paid to him, and for that reason the petitioner is not entitled to dower in the widow of the property after deducting that sum from its value." The defendant also set up a claim to be allowed for improvements made on the lot by Haines and by himself.

Exceptions to the answer were sustained and the cause submitted on bill and answer application and proofs.

The court decreed that the complainant was entitled to dower in the premises after deducting out of the same the sum of one thousand dollars received by the husband of the petitioner under the Homestead laws and also the value of the improvements made upon the lot by the defendant and the former owner.

To reverse this decree the petitioner brings the record here by writ of error.

[3818-21]

The assignment of error questions the propriety of this decree, and the power on which it is based. It certainly cannot be denied that the homestead right and the right to dower are distinct and independent right, the former being a mere right of occupancy of the premises under certain circumstances, the latter though an inchoate right does not depend upon occupancy but upon the marriage, the seizin of the husband during coverture and his death. [illegible] Until the death of the husband it is merely an interest which attaches to the land by reason of marriage and seizin, it not in action only and can not be conveyed by deed. [illegible] upon which the lien can enter and which becomes an estate, [illegible] may be conveyed by deed and is liable to be sold on Execution for the debts. It is a settled maxim of the law, that of this right a widow cannot be deprived, except by operation of the statute of limitations in certain cases Moon vs Peacock 38 Ill. 33 without her consent expressed in the mode pointed out in the statute. Nicoll vs Ogden 29 Ib. 386.

Here then from the [illegible] property which [illegible] vested in the plaintiff in this bill the fruit of which had been extinguished by the act of her husband in his life time he having received the value of the homestead or the [illegible] foreclosure sale, [illegible] her dower interest remaining untouched by these proceedings. The remedy out of which the dower was to be assigned was swept away by the purchase of the homestead right, [illegible] and this value as a whole, was the

true and only basis on which to estimate the value of the dower interest.

The widow therefore was dowable of one third of the premises to be set off to her by metes and bounds, but if that should not be practicable then of one third the yearly rents and profits of the same, after deducting the value of the improvements since Horine's title accrued, the annual insurance if there be any, and the annual taxes and reasonable annual repairs, the net amount after these deductions to be ascertained by a jury. Lee Peyton et al. vs Jeffries decided Jan. Term 1869

The defendant in Error has assigned Cross-Errors making the point that the plaintiff in error had no right in equity to have any dower at all assigned in the premises.

This point is made on the hypothesis that the right of dower merged in the homestead. This proposition is clearly inadmissible inasmuch as the law, as we have already said, has different distinct and independent incidents in the premises - the one, possible merely, which was extinguished by the husband in his life time - the other fixed and certain, arising upon his death, and of this latter the widow could not be deprived by any act of the husband. Counsel are mistaken when they say, that the payment of one thousand dollars to extinguish the homestead right was a payment for one third of the property. That payment purchased no portion of the property, it only released it

from an incumbrance. The courts are equally at fault in the position that these premises or any portion of them have been converted into money, since the argument that the Canada have sold and disposed of land which has been converted into money for her benefit has no force. It seems clear to us, that had not the Mohawks received payment for the lands - had she been in possession of it, his widow would have been entitled not only to the rights of a tenant but to her dower also in the same premises, and to which the doctrine of merger can have no application there being no "estate to be dowered in the quarter". See on

As to the objection that the bill is defective in not alleging the mortgage was executed during the coverture, it is unnecessary to dispose that point, as on amending the cause the complainant can amend her bill in that particular and make a specific allegation in that particular.

In the decree given the cause is remanded and the cause remanded.

[illegible]

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Walker
vs
Reis

Opinion

Nunn Ch. J.

Recorded

ILLS. SUPREME COURT.

First Grand Division.

JUNE TERM, A. D. 1869.

DEHLER,

VS.

HELD & MEISTER.

Appeal from St. Clair.

DEFENDANTS' BRIEF.

The 2d and 3d pleas of Meister's security referred to in appellant's abstract, are as follows: (Record page 8,) 2d Plea as to part of the property mentioned in the declaration and forthcoming bond, to-wit, &c., *a tio non* because he says before the ~~opening~~ issuing of the three executions in said forthcoming bond or any of them to-wit, &c., the said Charles Held, then being the owner of said personal property, and a resident of said city of Belleville, in said county, and being indebted to Neu & Gintz in the sum of $400, then and there in good faith, and to secure the payment of said $400 to said Neu & Gintz in six months from that date, with interest, &c., as per promissory note of that date to them, then and there delivered to them his chattel mortgage on said property, which chattel mortgage was then and there duly acknowledged before a Justice of the Peace in the district where said Held then resided, &c., and a memorandum was then and there made thereof on his docket, &c, which said mortgage was then and there duly recorded, &c. By which said chattel mortgage, it was provided, that until default should be made by said Held in the payment of said money, as aforesaid, &c., it should and might be lawful for him to retain the possession of said personal property and enjoy the same for the space of two years, unless said Neu & Gintz elected to take possession sooner; but if the same or any part thereof should be attacked or levied upon by virtue of any execution or executions, &c., it should and might be lawful for the said Neu & Gintz to take full and immediate possession of the whole of said personal property and sell and dispose of it for the best price they could obtain, and out of the money arising therefrom to retain and pay said $400 and interest and all charges touching the same, rendering the overplus if any to said Held, his heirs and assigns. Plea then avers that afterwards and before said six months after the date of said mortgage expired, and after the levy of said three executions in said forthcoming bond mentioned, and after the making of said forthcoming bond and before the time for the delivery of the property therein mentioned, to-wit, on the 15th of December, 1867, at the county aforesaid, the mortgage being wholly unpaid and unsatisfied, the said Neu & Gintz under said chattel mortgage took possession of said personal property mortgaged as aforesaid, and afterwards and before the time for the delivery thereof, undersaid forthcoming bond, to-wit, on the 27th of December, 1867, at, &c., aforesaid after due notice sold and

disposed of the same at public sale, in good faith, to one Louis Kloes for $372 17, and applied the proceeds of said sale towards satisfying said mortgage, unpaid and unsatisfied as aforesaid, as they lawfully might by the provisions of said mortgage; and then and there delivered possession to said purchaser, wherefore and whereby this defendant was unable to deliver said personal property under said forthcoming bond, and said plaintiff has sustained no damage for a failure to deliver said personal property under said forthcoming bond, and this defendant is ready to verify where he prays judgment, &c.

3d Plea is as to all the property mentioned in said forthcoming bond and not covered by the chattel mortgage in the foregoing plea referred to, said Meister says *actio non*, because he says that he did deliver to said plaintiff, constable as aforesaid, said personal property in the same condition it was at the making of said forthcoming bond, on the day and at the time and place appointed in said forthcoming bond, according to the true intent and meaning thereof, and this he is ready to verify wherefore he prays judgment, &c.

To the 2d Plea plaintiff demurred generally, and to the 3d Plea specially, assigning for causes of demurrer, that the plea sets forth performance generally without stating the manner of performance. 2d Plea does not crave oyer of said writing obligatory and is in other respects uncertain, informal and insufficient. (Record page 11.)

As to 3d Plea. To avoid prolixity one plea may refer to matters stated in a prior plea. 1 Chitty's Pleading, 563. Plea must not traverse a negative allegation, Id. 613. Every breach in the declaration must be answered specifically. People vs. McHatton, 2 Gil. R. 732. A plea of part performance must necessarily state time, place and extent, and is good so far as it goes. 1 Chitty's P. 487 note 7; Sherman vs. Gassett, 4 Gil. R. 521, 532. It was only by such a plea of part performance that defendant could show that defense *pro tanto*. No oyer is necessary under our statute requiring breaches to be assigned.

2d. The case however turns on the 2d plea. It is insisted that the security was estopped by the forthcoming bond from making this defense. The doctrine of estoppel is strictly construed, for it excludes proof of the truth. A tenant may show that after the commencement of his tenantcy the title of his landlord expired. West vs. Little, 13 Ill. R. 239. The most that can be said of this bond is that it admits that the property was subject to a levy under these executions, but there is no admission as to the extent of title in defendant in execution. At the time these executions were levied the interest of the mortgagee was subject to execution, and had not the mortgagee elected to take possession, a purchaser would have acquired title subject to the mortgage. Prior vs. White, 12 Ill. R. 262; Beach vs. Derby, 19 Id. 622; Merrit vs. Niles, 25 Id. 283; Scott vs. Whitmore, 7 Foster's R. 321.

b. The 2d Plea does not deny that the property was subject to levy, and that there was a naked unclaimed title in a third person, as in Gray vs. McLean, 17 Ill. R. 404. In that case this court says: "Had the plea shown that the property attached had been actually taken from them by the third person, while they were endeavoring to retain it in good faith to answer the judgment of the court, a very different question would have arisen." In Learned, Adm'r, vs. Bryant, 13 Mass. R. 224, it was held in a suit by the sheriff's administrator against a receiptor that he could show in defence that the title to the property attached was in a third person who claimed it before the return,

and took possession thereof. The court says the receiptor was certainly not bound to hold it against the one who had the right and who might by replevin have taken it out of his hands; and he was not bound to resist a rightful claim at the expense of a law suit. The sheriff is not liable to an action for levying on the goods, and the receiptor is not liable to the sheriff upon the receipt. This principle is approved in Fisher vs. Bartlett, 8 Maine, R. 124; and ably argued by the court. See also Burt vs. Perkins, 9 Gray's R. 320; Webster vs. Harper, 7 New H. R. 597; Edson vs. Weston, 7 Cowen R. 280; Scott vs. Whitmore, 7 Foster R. 321.

c. The ground assumed by Drake on Attachments, Sec. 311, is not sustained by the authority to which he refers, Sartin vs. Weir, 3 Porter R. 423. That was a suit on a Replevin bond, conditioned that the property should be returned, &c., or in failure thereof that the defendant should pay the judgment that might be rendered. Of course he was liable for the amount of the judgment on failure, &c. The case of Dorr vs. Clark, 7 Mich. R. 312 was a suit upon replevy bond in attachment where the form of the bond and the extent of liability was fixed by statute, and it did not appear that the owner of the property claimed it, or took possession. Where the bond has been held an estoppel, it recited that the property levied on, or attached, was "the property" of the principal obligor. Lynn vs. Montague, 4 Heming & Mumf. 182. But even in such a case, it was held there was no estoppel, Decherd vs. Blanton, 3 Sneed R. 373. The point did not arise in 19 Ark. R. 319. The other authorities and points made have so little to do with the case, or are so palpably wrong, that it is not deemed necessary to discuss them.

WM. H. UNDERWOOD,

Attorney for Appellee.

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Dehler

Held and Meister

Defts Brief.

Filed 11th June 1869

W. A. D. Wilmarth

Clerk

Illinois Supreme Court.

FIRST GRAND DIVISION.

JUNE TERM, A. D. 1869.

FREDERICK DEHLER, Plaintiff in Error,

vs.

CHARLES HELD and JACOB MEISTER, Def'ts in Error.

ERROR TO ST. CLAIR.

ABSTRACT.

This suit grows out of a levy made by the plaintiff in error, who was a Constable, upon the property of Charles Held, by virtue of three executions from the docket of Martin Medart, a justice of the peace within and for the county of St. Clair, in favor of Linn & Westermann, and against Charles Held, who being desirous of retaining possession of the property levied on, together with Meister executed a delivery bond for the safe keeping and forthcoming of the same; thereby agreeing to deliver it in its then present good condition to the plaintiff at the Lincoln House near the railroad in the city of Belleville on the 21st day of January A. D. 1868. Held did not deliver the property at the place and time mentioned in the obligation. The plaintiff then brought suit on said bond in action of debt.

At the time of the levy there was a chattel mortgage on nearly all of the property included in the delivery bond, this chattel mortgage was executed by Charles Held and in favor of Neu & Gintz, had been duly acknowledged, the proper memorandum entered on the Justice's Docket, and duly recorded in the Recorder's office.

After the making of the bond, and before the return day of the writ, Neu & Gintz took possession of the property under the chattel mortgage, and sold it with the knowledge and consent of the defendant Meister.

The defendant Meister now seeks to excuse himself from liability on the bond by pleading—

1. Non Est Factum.

2. The taking of property mentioned in the plea by Neu & Gintz under the chattel mortgage by reason of which defendant was prevented from delivering it.

3. The delivery of the remainder of the property included in the bond and not in the chattel mortgage.

General demurrer to second plea, and general and special demurrer to third plea. Both overruled. Judgment upon demurrers against the plaintiff for costs.

ERRORS ASSIGNED.

1. The court erred in overruling plaintiff's demurrer to defendant, Meister's, second plea.

2. The court erred in overruling plaintiff's demurrer to defendant, Meister's, third plea.

3. The court erred in rendering judgment for defendant, Meister, upon said demurrers.

4. The court erred in rendering judgment against the plaintiff upon said demurrers.

BRIEF.

I. Because the facts set forth in defendant Meister's second plea are no excuse in law for the failure of the defendant Held, to perform the condition of the bond, and are no discharge of Meister's liability on the bond.

a. It is perhaps, necessary, as a preliminary, to ascertain the effect of a forthcoming or delivery bond. Such a bond does not withdraw the property from the custody of the law, or divest the lien of the attachment, or execution. Hagan vs. Lucas, 10 Peters, 400 ; People ex rel., vs. Cameron, 2 Gil. 468. But the obligation is that the defendant in execution shall keep and retain *possession* of the property levied on until the day of sale, and that he shall deliver the *possession* of the property to the officer at the time and place appointed in the obligation; hence the defendant's possession under the obligation being the possession of the officer under the writ, the defendant in execution cannot be heard to deny his possession under the officer and for the officer; he accepts possession from the officer, under the lien of the execution by giving the bond, and is thereby estopped to question validity of the lien created by the writ; by giving the bond he has agreed to hold the property of the officer, and for the officer. Dewey vs. Field et al. 4 Met's Mass. 383. Gray vs. MacLean, 17 Ills. 404 ; Gross' Stat. ch. 59, sec. 86 ; Crisman vs. Matthews, 1 Scam. 148 ; Morgan vs. Furst, 4 Mass. N. S. 141.

b. The bond given in such cases as this is a very different contract from the contract of the receiptor under the New York and New England system of bailment of attached property. Drake on Attachments, secs. 330 and 344, and cases there cited. First, in deriving its existence from statute and not from practice. Second, in being a specialty and not a simple contract. Third, the officer being under legal obligation to accept it and release the (possession of the) property from *actual* custody, upon sufficient security being given.

c. In this State, and in several other of the Western and Southern states, are statutes authorizing such bonds, and wherever the statute authorizes this bond to be given, it is not like the *practice* in New York and New England. There it is a matter in the discretion of the officer, whether he will accept the offer of the defendant or his friend or not ; he is under no legal obligation to accept it. Not so here—upon sufficient security being given by the *defendant* in execution or attachment, the officer must accept it *nolens volens*. Drake on Attachments, Secs. 330 and 344. There it is a matter of *grace*, here where the matter is regulated by statute, it is a *right given to the defendant in execution or attachment*, by positive law. Drake on Attachments Secs. 330 and 344, to which the officer *must yield* upon the tender to him by the defendant, in execution of the bond with good and sufficient security. Hence it results that the New York and New England cases are of very little governing force as a rule of decision here, under our particular system. The principal New York cases are Lockwood vs. Bull, et al, 1 Cowen, 322 ; Edson vs. Weston, 7 Cowen, 278. The principal New England cases are those of Massachusetts, Johns vs. Church, 12 Pick. 557 ; Robinson vs. Mansfield, 14 Pick. 40 ; Wentworth vs. Leonard, 4 Cushing, 416 ; Dewey vs Field, et al, 4 Metcalf, 383.

II. The question arises, how may the obligors in such bond, discharge themselves from liability on its conditions ? Are the facts set forth in Meister's second plea sufficient to discharge him from liability on the condition of this bond ?

a. The answer is given by this court in the case of Gray vs McLean, 17 Ill. 404; by the Supreme Court of Alabama in Sartin vs. Weir, 3 Stew & Porter, 421; and by the Supreme Court of Michigan in Dorr vs. Clark, 7 Mich. 310. In the case of Gray vs. McLean, 17 Ill. 404, the defendants pleaded: 1st, Non Est factum. 2d, One of the defendants, as in this case, pleaded that the property mentioned in the bond did not belong to the defendant in the original proceeding; held, that this did not constitute any defence to the action on the bond, that he was estopped by his obligation; Duchess of Kingston's case; 2 Smith's Leading cases, 6th, American Edition, 710. Norris vs. Norton, 19 Ark. 319; Decherd vs. Blanton, 2 Sneed, 373.

We are unable to perceive any distinction in point of fact, between that plea and the second one pleaded by the defendant, Meister, in this case. Where is the distinction between averring that the goods and chattels mentioned in the bond were not the goods and chattels of Held, but the goods and chattels of Neu & Gintz, and averring that Neu & Gintz had a better right to them than Held, and therefore Neu & Gintz took them as they lawfully might, &c. If the one is no defence—Gray vs. McLean, 17 Ill. 404—the other certainly is not.

b. In this plea the defendant Meister shows that he had notice of the chattel mortgage; he was bound to know of its existence and contents—the law makes the record of this mortgage notice to all the world of its existence and contents, at least when any person acts with reference to the mortgage; and the memorandum on the Justice's docket creates a still stronger presumption of notice, against him. The facts set forth in this plea show that he entered into this obligation with full knowledge of the existence of this mortgage, and we contend that he must be presumed to have contracted with reference to it—at any rate he had sufficient knowledge to put him on inquiry which was notice to him. Epley vs. Witherow, 7 Watts, 163.

c. Here is a contract which was possible to be performed at the time it was entered into, by the obligors. It was entered into by the obligors without any provision therein contained guarding against a case of hardships which might arise, or limiting their liability in any respect. The obligors undertake to do the thing absolutely. They charge themselves by their own act and agreement, and are not charged by any duty which the *law* creates. It was not *rendered impossible* by the act of God, nor the law, nor the other party—the plaintiff in this suit—but rather by the previous act of Held, Meister's co-defendant. Unforeseen difficulties, however great, will not discharge or excuse him, Meister. 2 Smith's leading cases, (6 American Edition) 52 in notes to Cutter vs. Powell—Beal vs. Thompson, 3 Bos. & Pul. 420—Beebe vs. Johnson, 19 Wend 500—Cornyn's Dig. 93—Angle vs. Hanna, 22 Ill. 429—Louber vs. Bangs, 2 Wallace 278; and especially do we wish to call the attention of the court to the cases of Parradine vs. Jayne, Alleyn's Rep, 27—Jones vs. Dermott, 2 Wallace 1—Tompkins vs. Dudley, 25 New York 272—School Trustees vs. Bennett, 3 Dutcher 515.

d. The defendants, we hold, by the bond undertook to have the property forthcoming and it was their duty to comply with their obligations, and leave it to the plaintiffs in execution to litigate their rights with regard to the property, with the claiment whoever he might be; and not to take it out of the *possession* of the officer, by the bond, which the officer was bound to accept, if the security was sufficient: and in effect put it into the hands of an adverse claimant, and afterwards when the plaintiff, obligee, demands the property or claims compensation, from the defendant, obligor, plead this in excuse or discharge of the breach of the condition of their bond. Drake on Attachments, Sec. 339—Sartin vs. Weir, 3 Stew. & Port. 421—Gray vs. McLean, 17 Ill. 404—Dorr vs. Clark, 7 Mich. 310—Saddler vs. Glover, 5 Dana, 552—Laughlin vs. Ferguson, 6 Dana, 122. Bacon's Abr. title Condition IV. and particularly Mouncey vs. Drake, 10 Johns 27. The Iowa cases do not apply here because the defence here sought to be interposed it seems is *given* by statute. Blatchley vs. Adair, 5 Iowa 545, which is a strong indication that unless it be *given* by statute it does not exist.

e. It seems to us that the facts set forth in this plea do not constitute any defence to this action, either in bar, or in mitigation of damages, because in violation of a well known maxim of law, that "No man shall take advantage of his own wrong." Here the defendants by giving the bond accomplished the object sought, the retaining of the property by Held, and it would be inequitable for the defend-

ant Held with the privity and by the assistance of Meister to take the possession of the property from the officer by means of the bond, and after doing so Meister the surety on the bond to allow it to be taken away by a third person, and then seek to discharge himself from liability on the bond by pleading in effect that which he had undertaken should not be done. It does not lie in the mouth of Meister to plead this state of facts, in view of the circumstances as shown in the record in this case, there being no allegation of fraud in the plea in the procuring of the bond. Mounsey vs. Drake, 10 John, 27—Broom's Legal Maxims (Marg. page 66, 5 American Edition and cases there cited).

f. Meister, by his plea, sets up the *bona fides* of the Chattel Mortgage and asks us to litigate that point with him; although not a party thereto—asks us to question in this proceeding the good faith of the parties in executing that instrument—presenting thereby an immaterial issue, after giving the bond and inducing in the mind of the plaintiff a belief which prevented him, plaintiff, from contesting that point with the proper parties and in a proceeding for that purpose.

g. This case is strongly analogous in principle to the cases of Brown vs. The People, 26 Ill. 28—Mix vs. The People, 36 Ill. 22—Gingrich vs. The People, 34 Ill. 448, and Shook et al vs. The People, 39 Ill. 443. These are cases Scire Facias on Recognizance. In Brown vs. People and Mix vs. People the defendants pleaded in discharge of their liability on the recognizance that at the time the bail was required to surrender the principal, he, the principal, was confined and restrained of his liberty by the Sheriff of another county—held no defense. In Gingrich vs. People, 34 Ill. 448, the bail pleaded that the principal after the making of the recognizance without their knowledge or consent enlisted in the military service of the United States, and at the time was in the State of Virginia, and that it was impossible to produce him in discharge, and that they could not obtain or procure his custody or control by *habeas corpus* or otherwise; the court was "inclined to think this constituted no defense." See also Shook vs. People, 39 Ill. 443—Hurd on *Habeas Corpus*, 67.

h. We observe too, the analogy in principle between the present case and cases of proceedings against special bail. It is no cause for exonerating bail that the principal has become insane—which is by the act of God. Ibbotson vs. Lord Galway, 6 T. R. 133—Bowerbank vs. Payne, 2 Wash. 6. Ct. 464, cited in Bacon's Abr. tit. "Bail in Civil Actions" "D". Nor is it cause for discharging bail that the principal is imprisoned on conviction for crime, unless it be for life, or a long time in another state. See Phœnix Fire Ins. Co. vs. Moffatt, 6 Cow. 599, where as in North Carolina, Granberry vs. Pool 3 Dev. 157, it seems to be a matter resting in the discretion of the court, at least in the State of North Carolina. Granberry vs. Pool 3 Dev. 157.

Bail cannot plead that the principal, at the return day, when judgment was rendered against him, was so sick that it was manifestly dangerous to his life to remove him after the return day died. Goodwin vs. Smith, 4 New Hampshire 30. Tymperly vs. Coleman, 3 Croke 165—Hutton's R. 47—5 Penn. R. 363—6 do. 284. In all these cases which we have been able to examine, bail was prevented by agencies which he could not control from surrendering the principal in discharge of his undertaking, and no provision having been made in the writing evidencing the undertaking, limiting his (the bail's) liability thereon—Parradine vs Jayne, Alleyn 27—Jones vs Dermott, 2 Wall. 1—Tompkins vs Dudley, 25 N. Y. 272—School Trustees vs Bennet, 3 Dutcher 515. The courts held such a state of facts in the absence of a statute allowing the same to be pleaded, could not avail. In this State such a state of facts as above mentioned is by statute. Gross. Stat. ch. 14, sec. 12, made to constitute a defence—a very strong indication that in the absence of a statute such a defence could not avail. It is true, many of these cases are proceedings by scire facias, and against bail, yet we do not perceive that the principle involved in those cases is in any respect different from that involved in the case under consideration.

i. This plea presents matter of defence in Equity only—therefore, cannot avail int his suit. 1 Ch. Pl. 469, and cases there cited—Nichols vs Nichols, 9 Wend. 264—Spriggs vs Mt. Pleasant Bank, 10 Peters S C 257—17 Wendell 62.

III. The demurrer to the third plea, pleaded by Meister should have been sustained.

a. Because this is a plea of performance, and does not crave oyer of the condition of the bond upon which this action is founded. The defendant cannot plead performance of the condition of the bond without craving oyer and setting out the condition *haec verba*—2 Saunders Pl & Ev. 409 n. 2, sec 86 n. *a*; See Brady vs Spurck, 27 Ills. 481, bottom of page, court per Breese, J.

b. Because the plea does not state with sufficient certainty what personal property was delivered by defendant, but states that "defendant did deliver all the personal property mentioned in said forthcoming bond and not covered by the chattel mortgage in the foregoing plea referred to." If the demurrer to the "foregoing plea" should be sustained, or if it were stricken from the files, this plea must necessarily fail, it would be impossible to tell from this plea what "personal property" was intended—was delivered—this plea would, in that event, be perfectly insensible.

Pleas pleaded by leave of the court must contain *in each of them*, matter sufficient to bar the plaintiff's action—they cannot be made to depend upon facts stated in other pleas, and with equal reason we contend they cannot be made to depend upon each other. Currie vs Henry, 2 Johns. 431—Sevey vs Blacklin, 2 Mass. 543—1 Ch. Pl. 563.

This plea is made to depend upon another, the "foregoing plea," for its certainty.

c. The allegation in the declaration is that "Held did not deliver the said property, nor any part thereof at the time," &c. This plea avers that defendant did deliver all the personal property in, &c. not, &c. This plea is bad, because it traverses the allegation in the declaration and concludes with a verification. It should conclude to the contrary. Upon a traverse issue must be tendered—Stephen on Pl. 230. It is impossible to take issue upon this plea, for there can be no traverse upon a traverse—Stephen on Pl. 186. The matter of fact stated in this plea is not *new*, but as above stated, is a simple denial of the allegation in the declaration laying the breach that "Held did not deliver," &c. The burden of proof, notwithstanding this plea concludes with a verification, is on the plaintiff to prove the issue thus presented, for this plea introduces no new matter into the record. The declaration assigns breaches in the first instance, consequently this plea is bad. Under the practice in England it was necessary for the defendant to conclude his plea of performance with a verification, because the declaration did not assign breaches—hence the plea of performance introduced new matter into the record. Not so in our practice. Here breaches must be assigned in the first instance, and not upon the record. Gross. Statute ch. 83, section 24—Rev. Statute chapter 83, section 18—Hibbard et al., vs. McKindley et al., 28 Ill. 253—Commissioners, &c. vs. Smith et al., 3 Scam. 228. Hence a plea of performance under our practice act becomes a *traverse.*

d. This plea is pleaded in bar of the action—"the foregoing plea" admits the breach as laid in the declaration. This plea admits *all of the* breach, which it does not deny—hence as a plea in bar it is bad, because *taken by itself* it admits that a breach of the condition of the bond exists—a plea of part performance admits a breach. Lindsay vs Blood, 2 Mass. 518—Sevey vs Blacklin, 2 Mass. 541.

In conclusion, we say that demurrers to both pleas should have been sustained, not only for the foregoing reasons, but upon every true principle of law and correct practice. It would, in our minds be monstrous to permit Meister, the defendant in this case, (a default having been taken against Held, the principal) to come into court and ask the court to make a contract entirely different from that which

be made for himself—"against the hardship of which he now complains he might have guarded by a provision in his contract. Not having done so it is not in the power of the court to relieve him. If unexpected impediments lie in the way, and a loss must ensue, it, the law, leaves the loss where the contract places it."

"Our conclusion is, that these principles rest upon a solid foundation of reason and justice. They regard the sanctity of contracts; compel men to do what they have deliberately agreed to do—a principle commendable both in law and morals." Tompkins vs Dudley, 25 N. Y. 272—Paradine vs Jayne, Alleyn, 27—Jones vs Dermott, 2 Wallace, 1—School trustees vs Bennet, 3 Dutcher 515.—Smith's Lead. Cas. (6th Am. Ed.) pages 52, 53 and 54 in notes to Cutter vs Powell, reported in 6 T. R. 320.

KASE & WILDERMAN,

Attornies for Plaintiff in Error.

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Fredk Dehler

vs

Held & Meister

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Abstract

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Filed 12th June 1869

W. D. Wilbracht

Clk

ILLS. SUPREME COURT.

First Grand Division.

JUNE TERM, A. D. 1869.

DEHLER,

vs.

HELD & MEISTER.

Appeal from St. Clair.

DEFENDANTS' BRIEF.

The 2d and 3d pleas of Meister's security referred to in appellant's abstract, are as follows: (Record page 8,) 2d Plea as to part of the property mentioned in the declaration and forthcoming bond, to-wit, &c., *actio non* because he says before the ~~opening~~ of the three executions in said forthcoming bond or any of them to-wit, &c., the said Charles Held, then being the owner of said personal property, and a resident of said city of Belleville, in said county, and being indebted to Neu & Gintz in the sum of $400, then and there in good faith, and to secure the payment of said $400 to said Neu & Gintz in six months from that date, with interest, &c., as per promissory note of that date to them, then and there delivered to them his chattel mortgage on said property, which chattel mortgage was then and there duly acknowledged before a Justice of the Peace in the district where said Held then resided, &c., and a memorandum was then and there made thereof on his docket, &c., which said mortgage was then and there duly recorded, &c. By which said chattel mortgage, it was provided, that until default should be made by said Held in the payment of said money, as aforesaid, &c., it should and might be lawful for him to retain the possession of said personal property and enjoy the same for the space of two years, unless said Neu & Gintz elected to take possession sooner; but if the same or any part thereof should be attacked or levied upon by virtue of any execution or executions, &c., it should and might be lawful for the said Neu & Gintz to take full and immediate possession of the whole of said personal property and sell and dispose of it for the best price they could obtain, and out of the money arising therefrom to retain and pay said $400 and interest and all charges touching the same, rendering the overplus if any to said Held, his heirs and assigns. Plea then avers that afterwards and before said six months after the date of said mortgage expired, and after the levy of said three executions in said forthcoming bond mentioned, and after the making of said forthcoming bond and before the time for the delivery of the property therein mentioned, to-wit, on the 15th of December, 1867, at the county aforesaid, the mortgage being wholly unpaid and unsatisfied, the said Neu & Gintz under said chattel mortgage took possession of said personal property mortgaged as aforesaid, and afterwards and before the time for the delivery thereof, undersaid forthcoming bond, to-wit, on the 27th of December, 1867, at, &c., aforesaid after due notice sold and

disposed of the same at public sale, in good faith, to one Louis Kloes for $372 17, and applied the proceeds of said sale towards satisfying said mortgage, unpaid and unsatisfied as aforesaid, as they lawfully might by the provisions of said mortgage; and then and there delivered possession to said purchaser, wherefore and whereby this defendant was unable to deliver said personal property under said forthcoming bond, and said plaintiff has sustained no damage for a failure to deliver said personal property under said forthcoming bond, and this defendant is ready to verify where he prays judgment, &c.

3d Plea is as to all the property mentioned in said forthcoming bond and not covered by the chattel mortgage in the foregoing plea referred to, said Meister says *actio non*, because he says that he did deliver to said plaintiff, constable as aforesaid, said personal property in the same condition it was at the making of said forthcoming bond, on the day and at the time and place appointed in said forthcoming bond, according to the true intent and meaning thereof, and this he is ready to verify wherefore he prays judgment, &c.

To the 2d Plea plaintiff demurred generally, and to the 3d Plea specially, assigning for causes of demurrer, that the plea sets forth performance generally without stating the manner of performance. 2d Plea does not crave oyer of said writing obligatory and is in other respects uncertain, informal and insufficient. (Record page 11.)

As to 3d Plea. To avoid prolixity one plea may refer to matters stated in a prior plea. 1 Chitty's Pleading, 563. Plea must not traverse a negative allegation, Id. 613. Every breach in the declaration must be answered specifically. People vs. McHatton, 2 Gil. R. 732. A plea of part performance must necessarily state time, place and extent, and is good so far as it goes. 1 Chitty's P. 487 note 7; Sherman vs. Gassett, 4 Gil. R. 521, 532. It was only by such a plea of part performance that defendant could show that defense *pro tanto*. No oyer is necessary under our statute requiring breaches to be assigned.

2d. The case however turns on the 2d plea. It is insisted that the security was estopped by the forthcoming bond from making this defense. The doctrine of estoppel is strictly construed, for it excludes proof of the truth. A tenant may show that after the commencement of his tenantcy the title of his landlord expired. West vs. Little, 13 Ill. R. 239. The most that can be said of this bond is that it admits that the property was subject to a levy under these executions, but there is no admission as to the extent of title in defendant in execution. At the time these executions were levied the interest of the mortgage was subject to execution, and had not the mortgagee elected to take possession, a purchaser would have acquired title subject to the mortgage. Prior vs. White, 12 Ill. R. 262; Beach vs. Derby, 19 Id. 622; Merrit vs. Niles, 25 Id. 283; Scott vs. Whitmore, 7 Foster's R. 321.

b. The 2d Plea does not deny that the property was subject to levy, and that there was a naked unclaimed title in a third person, as in Gray vs. McLean, 17 Ill. R. 404. In that case this court says: "Had the plea shown that the property attached had been actually taken from them by the third person, while they were endeavoring to retain it in good faith to answer the judgment of the court, a very different question would have arisen." In Learned, Adm'r, vs. Bryant, 13 Mass. R. 224, it was held in a suit by the sheriff's administrator against a receiptor that he could show in defence that the title to the property attached was in a third person who claimed it before the return,

and took possession thereof. The court says the receiptor was certainly not bound to hold it against the one who had the right and who might by replevin have taken it out of his hands; and he was not bound to resist a rightful claim at the expense of a law suit. The sheriff is not liable to an action for levying on the goods, and the receiptor is not liable to the sheriff upon the receipt. This principle is approved in Fisher vs. Bartlett, 8 Maine, R. 124; and ably argued by the court. See also Burt vs. Perkins, 9 Gray's R. 320; Webster vs. Harper, 7 New H. R. 597; Edson vs. Weston, 7 Cowen R. 280; Scott vs. Whitmore, 7 Foster R. 321.

c. The ground assumed by Drake on Attachments, Sec. 311, is not sustained by the authority to which he refers, Sartin vs. Weir, 3 Porter R. 423. That was a suit on a Replevin bond, conditioned that the property should be returned, &c., or in failure thereof that the defendant should pay the judgment that might be rendered. Of course he was liable for the amount of the judgment on failure, &c. The case of Dorr vs. Clark, 7 Mich. R. 312 was a suit upon replevy bond in attachment where the form of the bond and the extent of liability was fixed by statute, and it did not appear that the owner of the property claimed it, or took possession. Where the bond has been held an estoppel, it recited that the property levied on, or attached, was "the property" of the principal obligor. Lynn vs. Montague, 4 Heming & Mumf. 182. But even in such a case, it was held there was no estoppel, Decherd vs. Blanton, 3 Sneed R. 373. The point did not arise in 19 Ark. R. 319. The other authorities and points made have so little to do with the case, or are so palpably wrong, that it is not deemed necessary to discuss them.

WM. H. UNDERWOOD,

Attorney for Appellee.

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Dehler
vs
Held and Meister

Defts Brief

Filed 11th June 1869
P. D. Wiecmke
Clerk

Illinois Supreme Court.

FIRST GRAND DIVISION.

JUNE TERM, A. D. 1869.

FREDERICK DEHLER, Plaintiff in Error,

vs.

CHARLES HELD and JACOB MEISTER, Def'ts in Error.

ERROR TO ST. CLAIR.

ABSTRACT.

This suit grows out of a levy made by the plaintiff in error, who was a Constable, upon the property of Charles Held, by virtue of three executions from the docket of Martin Medart, a justice of the peace within and for the county of St. Clair, in favor of Linn & Westermann, and against Charles Held, who being desirous of retaining possession of the property levied on, together with Meister executed a delivery bond for the safe keeping and forthcoming of the same; thereby agreeing to deliver it in its then present good condition to the plaintiff at the Lincoln House near the railroad in the city of Belleville on the 21st day of January A. D. 1868. Held did not deliver the property at the place and time mentioned in the obligation. The plaintiff then brought suit on said bond in action of debt.

At the time of the levy there was a chattel mortgage on nearly all of the property included in the delivery bond, this chattel mortgage was executed by Charles Held and in favor of Neu & Gintz, had been duly acknowledged, the proper memorandum entered on the Justice's Docket, and duly recorded in the Recorder's office.

After the making of the bond, and before the return day of the writ, Neu & Gintz took possession of the property under the chattel mortgage, and sold it with the knowledge and consent of the defendant Meister.

The defendant Meister now seeks to excuse himself from liability on the bond by pleading—

1. Non Est Factum.

2. The taking of property mentioned in the plea by Neu & Gintz under the chattel mortgage by reason of which defendant was prevented from delivering it.

3. The delivery of the remainder of the property included in the bond and not in the chattel mortgage.

General demurrer to second plea, and general and special demurrer to third plea. Both overruled. Judgment upon demurrers against the plaintiff for costs.

ERRORS ASSIGNED.

1. The court erred in overruling plaintiff's demurrer to defendant, Meister's, second plea.

2. The court erred in overruling plaintiff's demurrer to defendant, Meister's, third plea.

3. The court erred in rendering judgment for defendant, Meister, upon said demurrers.

4. The court erred in rendering judgment against the plaintiff upon said demurrers.

BRIEF.

I. Because the facts set forth in defendant Meister's second plea are no excuse in law for the failure of the defendant Held, to perform the condition of the bond, and are no discharge of Meister's liability on the bond.

a. It is perhaps, necessary, as a preliminary, to ascertain the effect of a forthcoming or delivery bond. Such a bond does not withdraw the property from the custody of the law, or divest the lien of the attachment, or execution. Hagan vs. Lucas, 10 Peters, 400 ; People ex rel., vs. Cameron, 2 Gil. 468. But the obligation is that the defendant in execution shall keep and retain *possession* of the property levied on until the day of sale, and that he shall deliver the *possession* of the property to the officer at the time and place appointed in the obligation; hence the defendant's possession under the obligation being the possession of the officer under the writ, the defendant in execution cannot be heard to deny his possession under the officer and for the officer; he accepts possession from the officer, under the lien of the execution by giving the bond, and is thereby estopped to question validity of the lien created by the writ; by giving the bond he has agreed to hold the property of the officer, and for the officer. Dewey vs. Field et al. 4 Met's Mass. 383. Gray vs. MacLean, 17 Ills. 404; Gross' Stat. ch. 59, sec. 86; Crisman vs. Matthews, 1 Scam. 148; Morgan vs. Furst, 4 Mass. N. S. 141.

b. The bond given in such cases as this is a very different contract from the contract of the receiptor under the New York and New England system of bailment of attached property. Drake on Attachments, secs. 330 and 344, and cases there cited. First, in deriving its existence from statute and not from practice. Second, in being a specialty and not a simple contract. Third, the officer being under legal obligation to accept it and release the (possession of the) property from *actual* custody, upon sufficient security being given.

c. In this State, and in several other of the Western and Southern states, are statutes authorizing such bonds, and wherever the statute authorizes this bond to be given, it is not like the *practice* in New York and New England. There it is a matter in the discretion of the officer, whether he will accept the offer of the defendant or his friend or not ; he is under no legal obligation to accept it. Not so here—upon sufficient security being given by the *defendant* in execution or attachment, the officer must accept it *nolens volens*. Drake on Attachments, Secs. 330 and 344. There it is a matter of *grace*, here where the matter is regulated by statute, it is a *right given to the defendant in execution or attachment*, by positive law. Drake on Attachments Secs. 330 and 344, to which the officer *must yield* upon the tender to him by the defendant, in execution of the bond with good and sufficient security. Hence it results that the New York and New England cases are of very little governing force as a rule of decision here, under our particular system. The principal New York cases are Lockwood vs. Bull, et al, 1 Cowen, 322 ; Edson vs. Weston, 7 Cowen, 278. The principal New England cases are those of Massachusetts, Johns vs. Church, 12 Pick. 557 ; Robinson vs. Mansfield, 14 Pick. 40 ; Wentworth vs. Leonard, 4 Cushing, 416 ; Dewey vs Field, et al, 4 Metcalf, 383.

II. The question arises, how may the obligors in such bond, discharge themselves from liability on its conditions ? Are the facts set forth in Meister's second plea sufficient to discharge him from liability on the condition of this bond ?

a. The answer is given by this court in the case of Gray vs McLean, 17 Ill. 404 ; by the Supreme Court of Alabama in Sartin vs. Weir, 3 Stew & Porter, 421 ; and by the Supreme Court of Michigan in Dorr vs. Clark, 7 Mich. 310. In the case of Gray vs. McLean, 17 Ill. 404, the defendants pleaded : 1st, Non Est factum. 2d, One of the defendants, as in this case, pleaded that the property mentioned in the bond did not belong to the defendant in the original proceeding ; held, that this did not constitute any defence to the action on the bond, that he was estopped by his obligation ; Duchess of Kingston's case ; 2 Smith's Leading cases, 6th, American Edition, 710. Norris vs. Norton, 19 Ark. 319 ; Decherd vs. Blanton, 2 Sneed, 373.

We are unable to perceive any distinction in point of fact, between that plea and the second one pleaded by the defendant, Meister, in this case. Where is the distinction between averring that the goods and chattels mentioned in the bond were not the goods and chattels of Held, but the goods and chattels of Neu & Gintz, and averring that Neu & Gintz had a better right to them than Held, and therefore Neu & Gintz took them as they lawfully might, &c. If the one is no defence—Gray vs. McLean, 17 Ill. 404—the other certainly is not.

b. In this plea the defendant Meister shows that he had notice of the chattel mortgage; he was bound to know of its existence and contents—the law makes the record of this mortgage notice to all the world of its existence and contents, at least when any person acts with reference to the mortgage ; and the memorandum on the Justice's docket creates a still stronger presumption of notice, against him. The facts set forth in this plea show that he entered into this obligation with full knowledge of the existence of this mortgage, and we contend that he must be presumed to have contracted with reference to it—at any rate he had sufficient knowledge to put him on inquiry which was notice to him. Epley vs. Witherow, 7 Watts, 163.

c. Here is a contract which was possible to be performed at the time it was entered into, by the obligors. It was entered into by the obligors without any provision therein contained guarding against a case of hardships which might arise, or limiting their liability in any respect. The obligors undertake to do the thing absolutely. They charge themselves by their own act and agreement, and are not charged by any duty which the *law* creates. It was not *rendered impossible* by the act of God, nor the law, nor the other party—the plaintiff in this suit—but rather by the previous act of Held, Meister's co-defendant. Unforeseen difficulties, however great, will not discharge or excuse him, Meister. 2 Smith's leading cases, (6 American Edition) 52 in notes to Cutter vs. Powell—Beal vs. Thompson, 3 Bos. & Pul. 420—Beebe vs. Johnson, 19 Wend 500—Cornyn's Dig. 93—Angle vs. Hanna, 22 Ill. 429—Louber vs. Bangs, 2 Wallace 278; and especially do we wish to call the attention of the court to the cases of Parradine vs. Jayne, Alleyn's Rep, 27—Jones vs. Dermott, 2 Wallace 1—Tompkins vs. Dudley, 25 New York 272—School Trustees vs. Bennett, 3 Dutcher 515.

d. The defendants, we hold, by the bond undertook to have the property forthcoming and it was their duty to comply with their obligations, and leave it to the plaintiffs in execution to litigate their rights with regard to the property, with the claiment whoever he might be; and not to take it out of the *possession* of the officer, by the bond, which the officer was bound to accept, if the security was sufficient: and in effect put it into the hands of an adverse claimant, and afterwards when the plaintiff, obligee, demands the property or claims compensation, from the defendant, obligor, plead this in excuse or discharge of the breach of the condition of their bond. Drake on Attachments, Sec. 339—Sartin vs. Weir, 3 Stew. & Port. 421—Gray vs. McLean, 17 Ill. 404— Dorr vs. Clark, 7 Mich. 310—Saddler vs. Glover, 5 Dana, 552—Laughlin vs. Ferguson, 6 Dana, 122. Bacon's Abr. title Condition IV. and particularly Mouncey vs. Drake, 10 Johns 27. The Iowa cases do not apply here because the defence here sought to be interposed it seems is *given* by statute. Blatchley vs. Adair, 5 Iowa 545, which is a strong indication that unless it be *given* by statute it does not exist.

e. It seems to us that the facts set forth in this plea do not constitute any defence to this action, either in bar, or in mitigation of damages, because in violation of a well known maxim of law, that "No man shall take advantage of his own wrong." Here the defendants by giving the bond accomplished the object sought, the retaining of the property by Held, and it would be inequitable for the defend-

ant Held with the privity and by the assistance of Meister to take the possession of the property from the officer by means of the bond, and after doing so Meister the surety on the bond to allow it to be taken away by a third person, and then seek to discharge himself from liability on the bond by pleading in effect that which he had undertaken should not be done. It does not lie in the mouth of Meister to plead this state of facts, in view of the circumstances as shown in the record in this case, there being no allegation of fraud in the plea in the procuring of the bond. Mounsey vs. Drake, 10 John. 27—Broom's Legal Maxims (Marg. page 66, 5 American Edition and cases there cited).

f. Meister, by his plea, sets up the *bona fides* of the Chattel Mortgage and asks us to litigate that point with him; although not a party thereto—asks us to question in this proceeding the good faith of the parties in executing that instrument—presenting thereby an immaterial issue, after giving the bond and inducing in the mind of the plaintiff a belief which prevented him, plaintiff, from contesting that point with the proper parties and in a proceeding for that purpose.

g. This case is strongly analogous in principle to the cases of Brown vs. The People, 26 Ill. 28—Mix vs. The People, 36 Ill. 22—Gingrich vs. The People, 34 Ill. 448, and Shook et al vs. The People, 39 Ill. 443 These are cases Scire Facias on Recognizance. In Brown vs. People and Mix vs. People the defendants pleaded in discharge of their liability on the recognizance that at the time the bail was required to surrender the principal, he, the principal, was confined and restrained of his liberty by the Sheriff of another county—held no defense. In Gingrich vs. People, 34 Ill. 448, the bail pleaded that the principal after the making of the recognizance without their knowledge or consent enlisted in the military service of the United States, and at the time was in the State of Virginia, and that it was impossible to produce him in discharge, and that they could not obtain or procure his custody or control by *habeas corpus* or otherwise; the court was "inclined to think this constituted no defense." See also Shook vs. People, 39 Ill. 443—Hurd on *Habeas Corpus*, 67.

h. We observe too, the analogy in principle between the present case and cases of proceedings against special bail. It is no cause for exonerating bail that the principal has become insane—which is by the act of God. Ibbotson vs. Lord Galway, 6 T. R. 133—Bowerbank vs. Payne, 2 Wash. 6. Ct. 464, cited in Bacon's Abr. tit. "Bail in Civil Actions" "D". Nor is it cause for discharging bail that the principal is imprisoned on conviction for crime, unless it be for life, or a long time in another state. See Phœnix Fire Ins. Co. vs. Moffatt, 6 Cow. 599, where as in North Carolina, Granberry vs. Pool 3 Dev. 157, it seems to be a matter resting in the discretion of the court, at least in the State of North Carolina. Granberry vs. Pool 3 Dev. 157.

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i. This plea presents matter of defence in Equity only—therefore, cannot avail int his suit. 1 Ch. Pl. 469, and cases there cited—Nichols vs Nichols, 9 Wend. 264—Spriggs vs Mt. Pleasant Bank, 10 Peters S C 257—17 Wendell 62.

III. The demurrer to the third plea, pleaded by Meister should have been sustained.

a. Because this is a plea of performance, and does not crave oyer of the condition of the bond upon which this action is founded. The defendant cannot plead performance of the condition of the bond without craving oyer and setting out the condition *haec verba*—2 Saunders Pl & Ev. 409 n. 2, sec 86 n. *a*; See Brady vs Spurck, 27 Ills. 481, bottom of page, court per Breese, J.

b. Because the plea does not state with sufficient certainty what personal property was delivered by defendant, but states that "defendant did deliver all the personal property mentioned in said forthcoming bond and not covered by the chattel mortgage in the foregoing plea referred to." If the demurrer to the "foregoing plea" should be sustained, or if it were stricken from the files, this plea must necessarily fail, it would be impossible to tell from this plea what "personal property" was intended—was delivered—this plea would, in that event, be perfectly insensible.

Pleas pleaded by leave of the court must contain *in each of them*, matter sufficient to bar the plaintiff's action—they cannot be made to depend upon facts stated in other pleas, and with equal reason we contend they cannot be made to depend upon each other. Currie vs Henry, 2 Johns. 431—Sevey vs Blacklin, 2 Mass. 543—1 Ch. Pl. 563.

This plea is made to depend upon another, the "foregoing plea," for its certainty.

c. The allegation in the declaration is that "Held did not deliver the said property, nor any part thereof at the time," &c. This plea avers that defendant did deliver all the personal property in, &c. not, &c. This plea is bad, because it traverses the allegation in the declaration and concludes with a verification. It should conclude to the country. Upon a traverse issue must be tendered—Stephen on Pl. 230. It is impossible to take issue upon this plea, for there can be no traverse upon a traverse—Stephen on Pl. 186. The matter of fact stated in this plea is not *new*, but as above stated, is a simple denial of the allegation in the declaration laying the breach that "Held did not deliver," &c. The burden of proof, notwithstanding this plea concludes with a verification, is on the plaintiff to prove the issue thus presented, for this plea introduces no new matter into the record. The declaration assigns breaches in the first instance, consequently this plea is bad. Under the practice in England it was necessary for the defendant to conclude his plea of performance with a verification, because the declaration did not assign breaches—hence the plea of performance introduced new matter into the record. Not so in our practice. Here breaches must be assigned in the first instance, and not upon the record. Gross. Statute ch. 83, section 24—Rev. Statute chapter 83, section 18—Hibbard et al., vs. McKindley et al., 28 Ill. 253—Commissioners, &c. vs. Smith et al., 3 Scam. 228. Hence a plea of performance under our practice act becomes a *traverse.*

d. This plea is pleaded in bar of the action—"the foregoing plea" admits the breach as laid in the declaration. This plea admits *all of the* breach, which it does not deny—hence as a plea in bar it is bad, because *taken by itself* it admits that a breach of the condition of the bond exists—a plea of part performance admits a breach. Lindsay vs Blood, 2 Mass. 518—Sevey vs Blacklin, 2 Mass. 541.

In conclusion, we say that demurrers to both pleas should have been sustained, not only for the foregoing reasons, but upon every true principle of law and correct practice. It would, in our minds be monstrous to permit Meister, the defendant in this case, (a default having been taken against Held, the principal) to come into court and ask the court to make a contract entirely different from that which

he made for himself—"against the hardship of which he now complains he might have guarded by a provision in his contract. Not having done so it is not in the power of the court to relieve him. If unexpected impediments lie in the way, and a loss must ensue, it, the law, leaves the loss where the contract places it."

"Our conclusion is, that these principles rest upon a solid foundation of reason and justice. They regard the sanctity of contracts; compel men to do what they have deliberately agreed to do—a principle commendable both in law and morals." Tompkins vs Dudley, 25 N. Y. 272—Paradine vs Jayne, Alleyn, 27—Jones vs Dermott, 2 Wallace, 1—School trustees vs Bennet, 3 Dutcher 515.—Smith's Lead. Cas. (6th Am. Ed.) pages 52, 53 and 54 in notes to Cutter vs Powell, reported in 6 T. R. 320.

KASE & WILDERMAN,

Attornies for Plaintiff in Error.

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Fredk. Dehler
vs
Held & Meister

Abstract

Filed 12th June 1869
R. L. Melvaine
Clk