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Syllabus. Statement of the case.

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the decree on her motion. Her remedy is complete by a petition for partition, and to assign her dower in the premises. But, inasmuch as Mary J. Hall has shown error in fact in the decree, requiring its reversal, and that it should be set aside, no reason is perceived why the widow should not then be allowed to come in and file her cross-bill, and assert her rights and have them determined on the new hearing of the case. If it is true that one of the children died after the father, and before the partition was made, then the interests of the several parties was not properly presented to or found by the court, and these parties, on a new hearing, should be allowed to assert them.

In other respects this proceeding was exceedingly loose, and it may be erroneous; but, plaintiff in error having shown *prima facie* that she has the right to have the decree opened and to make defense, we deem it unnecessary to discuss other questions. The order of the court below, refusing to set aside the decree for partition, is reversed and the cause remanded.

*Decree reversed.*

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THE GOVERNOR OF ILLINOIS, for the use of WILLIAM  
THOMAS, Trustee,  
*v.*  
JOSEPH G. BOWMAN.

FORMER DECISIONS. The case of *The Governor of Illinois, for the use of Thomas, v. Lagow*, 43 Ill. 134, must be considered decisive of this, the same points arising in each case.

APPEAL from the Circuit Court of Richland county; the Hon. AARON SHAW, Judge, presiding.

This was an action of debt, instituted in the court below, by the appellant, against the appellee, Joseph G. Bowman, to recover the amount of a certain decree, rendered against one Ebenezer Z. Ryan, in the Circuit Court of the United States for the northern district of Illinois, for the sum of \$45,467.27, and in favor of the bank of the State of Missouri. Ryan and

## Opinion of the Court.

certain other persons had been appointed assignees of the Bank of Illinois; and the decree above required him to pay over that amount to William Thomas, as trustee; which sum had been found to be due from said Ryan, as such assignee, on account of assets which had come into his hands. The suit is brought against Bowman, upon the decree against Ryan, as one of his sureties on the bond given for a faithful discharge of his duties as such assignee.

Mr. WILLIAM THOMAS, for the appellant.

Mr. W. H. UNDERWOOD, for the appellee.

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

Most of the questions presented by this record were considered and decided in the case of *The Governor, for the use of Thomas, v. Lagow*, 43 Ill. 134, which was an action against one of the sureties on this same bond. No points are made here that were not made in that case.

As we held in that case, so we hold in this, that the sureties in this bond are responsible for all defalcations of Ryan which occurred prior to the act of 1849, and that act did not suspend the right of action on the bond. Suit might have been brought upon it at any time, notwithstanding the extension of time after Ryan failed to burn and cancel the notes in his hands and report to the governor. For this breach the liability of the sureties had attached, and it was in no degree enlarged by that act. For breaches occurring after the extension of time the sureties are not liable.

The defendant had judgment on demurrer in bar of the action, while it appears the first breach in the declaration was not answered. The fifth and sixth pleas only purported to answer the second and third breaches. The first breach that the notes and certificates were not burned and canceled, and a report thereof made to the Governor, and of the moneys in Ryan's hands, not having been answered by plea, the plaintiff was entitled to a judgment on that breach, and to

## Syllabus.

have his damages assessed, for that breach is alleged to have occurred prior to the act of 1849. Those damages would be the value of those notes and certificates, and such damage as was occasioned by the neglect to report, and the failure to pay over the moneys in Ryan's possession.

Without going over the ground traversed in the case referred to, the judgment in this case must be reversed and the cause remanded, with leave to either party to amend their pleadings, and for further proceedings consistent with this opinion.

*Judgment reversed.*

GEORGE S. PIDGEON

v.

THE TRUSTEES OF SCHOOLS.

44	501
191	1166

1. ESTOPPEL. M. and wife executed a mortgage upon their homestead without the statutory waiver, and afterward conveyed it to P. subject to the mortgage lien, and which lien formed a part of the purchase price. *Held*, in a suit to foreclose by the mortgagee, that, P. having obtained the premises by admitting the lien and assuming its payment, he was estopped from setting up as a defense the omission of M. and wife to release their homestead right in the mortgage.

2. PRACTICE — *decree too large* — *this court will not fix amount*. Where in a case it is admitted that the decree rendered by the court below is too large, this court will not fix the amount, but will reverse the case, that the inferior court may enter the proper decree.

WRIT OF ERROR to the Circuit Court of Pulaski county; the Hon. WESLEY SLOAN, Judge, presiding.

This was a bill in chancery, filed by the defendants in error in the court below, against the plaintiff in error, to foreclose a certain mortgage executed to them by one Thomas J. Mansfield and wife, upon certain premises described in the bill as the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of sec. 16, T. 15, S. R. 1, east, containing forty acres, and situated in the county of Pulaski,