JOHN ANKENY, Plaintiff in Error, *v.* JAMES PIERCE, Defendant in Error.

ERROR TO JACKSON.

A tenant is estopped from denying the title of his landlord.
If a tenant enters upon and enjoys leased premises, though his landlord may have no title, the tenant has no right to complain of his landlord until after an eviction.

Opinion of the Court by Chief Justice WILSON. This is an action of covenant from the Jackson circuit court, founded upon an article of agreement for the leasing of the big Muddy Saline, by Pierce, the plaintiff below, to the defendant, Ankeny. To the plaintiff's declaration, the defendant filed five pleas, all of which were withdrawn except the third and fifth. The third plea avers a want of consideration, to which plea the plaintiff replies, and the defendant files a demurrer to his replication. The court overruled the demurrer. This opinion is assigned for error, but I am clearly of opinion that the court decided correctly. The replication shows a good and valuable consideration; it sets forth a lease from the said Pierce to the said Ankeny, of the premises therein described, and the tenant, Ankeny, is estopped from denying the title of the landlord, Pierce, under whom he had enjoyed the premises, as is alleged in plaintiff's declaration. The demurrer to the fifth plea was well sustained; the plea does not allege that Pierce had not obtained a lease from the governor, and for aught that appears, he may have had good title and authority to lease the premises. Another objection to the plea is, that it does not appear but that defendant entered upon and enjoyed the demised premises; if so, he has no ground of complaint until after eviction, which is not alleged. The judgment of the court below is affirmed, with all costs here and below, and execution is directed to issue from this court. (1)

Judgment affirmed

Baker, for plaintiff in error.

Cowles, for defendant in error.

(1) While a tenancy exists, the tenant can not dispute the title of his landlord, either by setting up a title in himself, or a third person. *Dunbar* v. *Bonesteel*, 3 Scam., 34. *Wells* v. *Mason et al.*, 4 Scam., 90. *Furgeson* v. *Miles*, 3 Gilm., 358. *Rigg* v. *Cook*, 4 Gilm., 351. *Tilghman* v. *Little*, 13 Ill., 241.

The tenant must surrender up the possession before he can assail or question the title of his landlord. He must put the landlord in the same position he occupied, when he parted with the possession. *Tilghman* v. *Little*, *supra*, and cases there cited.

But the tenant may show that the title of his landlord has terminated, either by

MORELAND AND WILLIS, Appellants, *v.* THE STATE BANK OF ILLINOIS, Appellee.

APPEAL FROM GALLATIN.

The 22d section of the act establishing the state bank, is merely directory to the board of directors, and an omission by them to comply with it does not release the securities to a note executed to the bank for an accommodation. (1)

Rules of decision are the same in a court of equity as in a court of law.

Opinion of the Court by Justice LOCKWOOD. This action was originally commenced before a justice of the peace, and judgment rendered in favor of plaintiff below, against defendants below, as securities to a note given to said plaintiff. The defendants appealed to the circuit court of Gallatin county, where the following facts were agreed to by the parties: "That the note was discounted upon the application of one Garner Moreland, and the accommodation was made to him upon his check, that neither the directors of the bank,

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its original limitation or by a conveyance to himself or a third person, or by the judgment and operation of law. Id.

If the landlord transfers the estate, the allegiance of the tenant is due to the grantee. Id.

If the estate is vested in a third person by operation of law, the tenant holds the possession subject to the title of such third person. Id.

The tenant may purchase in the premises under a judgment against the landlord, and set up the title thus acquired, in bar of an action brought against him by the landlord. Id.

A tenant has a right to attorn to one who has acquired his landlord's title, but not to one who has acquired a title hostile to the landlord, although it may be a better title. *Bailey* v. *Moore et al.*, 21 Ill., 165.

An eviction in fact or in effect, which renders the premises useless, may prevent a recovery of rent. *Halligan* v. *Wade*, 21 Ill., 470.

A tenant, upon a proceeding by distress, may show that he was evicted from a part of the premises, or that he was disturbed in his possession. *Wade* v. *Halligan*, 16 Ill., 507.

(1) The present statute is nearly the same as that cited in the opinion of the court. Purple's statutes, 1083, sec. 1. Scates' Comp., 835. And under this statute the court holds that "To sustain a plea under the statute, it must appear on the face of the note that the party signed it *as security.*" *McAllister* v. *Ely*, 18 Ill., 249. *Payne* v. *Webster*, 19 Ill., 103.

This statute applies only to such obligations as are transferable by indorsement, so as to vest the legal interest in the assignee. *Taylor* v. *Beck*, 13 Ill., 384.

The rule is well settled that mere passiveness or delay in proceeding against the principal, except when required by statute to sue, will not discharge a surety. *The People* v. *White et al.*, 11 Ill., 341. *Pearl et al.* v. *Wellmans*, id., 352. *Taylor* v. *Beck*, 13 Ill., 376.

If a creditor, by a valid and binding agreement, without the assent of the surety, give further time for payment to the principal, the surety is discharged both at law and in equity; and it makes no difference, whether the surety be actually damnified or not. *Davis et al.* v. *The People*, 1 Gilm., 410. *Waters* v. *Simpson*, 2 Gilm., 574. *Warner* v. *Crane*, 20 Ill., 148.

A promise to delay for an uncertain period, will not discharge a surety. The time of extension must be definitely fixed. *Gardner et al.* v. *Watson*, 13 Ill., 352. *Waters* v. *Simpson*, 2 Gilm., 574.