Opinion of the court.

sent down to the circuit from this court it had not been filed there, nor had the rule been entered in pursuance of its directions reversing the judgment. The court had not, therefore, obtained possession of the cause, and this was, doubtless, the reason for refusing the motion for restitution. The plaintiffs in error were entitled to restitution both of the premises and costs on the reversal of the judgment, and the modern practice is to apply to the court on the coming down of the mandate from the appellate tribunal and the entry of the judgment of reversal for a writ of restitution, setting forth the facts entitling the party to the remedy and giving notice of the motion to the adverse party. The earlier and more formal remedy was by *scire facias.**

It seems that the writ of restitution may be granted though a new venire has been directed. In *Smith's Lessee* v. *Trabue's Heirs*,† this court held, that a writ of error would not lie to an order of the Circuit Court awarding a writ of restitution on motion, and dismissed the case for want of jurisdiction. The writ in the present case must be dismissed for the same reason. The order is not considered a final judgment within the meaning of the Judiciary Act.

DISMISSAL ACCORDINGLY.

BANKS *v.* OGDEN.

1. A plat of an addition to a town, not executed, acknowledged, and recorded in conformity with the laws of Illinois, operates in that State as a dedication of the streets to public use, but not as a conveyance of the fee of the streets to the municipal corporation.
2. A conveyance, by the proprietor of such an addition, of a block or lot bounded by a street, conveys the fee of the street to its centre, subject to the public use.

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* Rex *v.* Leaven, 2 Salkeld, 558; Sympson *v.* Juxon, Cro. Jac. 699; 2 Sellon's Prac. 387; 2 Tidd's do. 1033, 1188; Safford *v.* Stevens, 2 Wendell, 164; Close *v.* Stuart, 4 Id. 95; Smith's Lessee *v.* Trabue's Heirs, 9 Peters, 4; Jackson *v.* Hasbrouk, 5 Johnson, 366; Cassel *v.* Duncan, 2 Sergeant & Rawle, 57; Russel *v.* Gray, 6 Id. 208; Ranck *v.* Backer, 13 Id. 41.

† 9 Peters, 4.

Statement of the case.

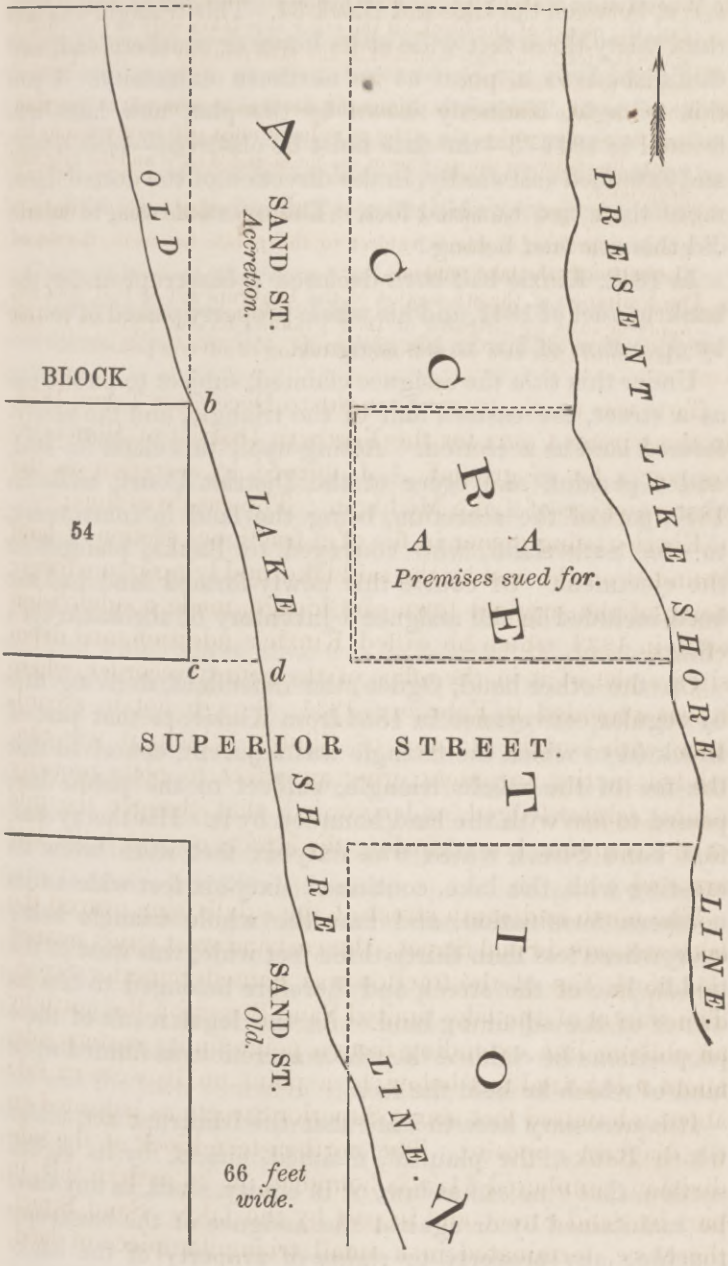
3. When a street of such an addition is bounded on one side by Lake Michigan, the owner of the block on the other side takes only to the centre; while the fee of the half bounded by the lake remains in the proprietor, subject to the easement.
4. When the lake boundary so limits the street as to reduce it to less than half its regular width, the street so reduced must still be divided by its centre line between the grantee of the lot bounded by it and the original proprietor.
5. Accretion by alluvion upon a street thus bounded will belong to the original proprietor, in whom, subject to the public easement, the fee of the half next the lake remains.
6. The limitation of the 8th section of the bankrupt act of 1841 does not apply to suits by assignees or their grantees for the recovery of real estate until after two years from the taking of adverse possession.

THIS was an ejectment brought to December Term, 1859, in the Circuit Court for the Northern District of Illinois, to recover a lot of ground, *A A*, formed by accretion on the western shore of Lake Michigan. The case was thus:

Kinzie, being owner in fee of a fractional section of land bounded on the east by the said lake, and lying immediately north of the original town of Chicago, made a subdivision of it in 1833, which he called Kinzie's addition, and deposited a plat of it in the office of the county recorder, where it was recorded in February, 1834: though not in accordance with certain statutes of Illinois, which, it was contended in the argument, give an effect to plats properly made, acknowledged, and recorded, that changes the rule of the common law regarding the streets on which the lots are sold.

The north and south street of the subdivision nearest the lake was called Sand Street; the east and west street nearest the north line of the fraction was named Superior Street. The waters of the lake limited Sand Street on the north by an oblique line extending from a point on its eastern side, about a hundred feet below, to a point on its western side about a hundred feet above Superior Street; as indicated on the diagram opposite. The northeastern block of the subdivision, numbered 54, was bounded, on its eastern side, in part by Sand Street and in part by the lake. Sand Street, therefore, terminated in a small triangular piece of land,

Diagram.


OLD
SAND ST.
Accretion.
BLOCK
54
b
c
d
LAKE SHORE
SUPERIOR STREET.
SAND ST.
Old.
66 feet wide.
CROCKER'S
ADDITION
A A
Premises sued for.
PRESENT LAKE SHORE LINE.
OLD LINE.

b, *c*, *d*, between the lake and Block 54. This triangle was less than thirty-three feet wide at its lower or southern end, and diminished to a point at its northern extremity. Upon this triangle, distinctly shown by the plat, new land was formed in 1844–'5—the date must be observed—*by accretion;* and extended eastwardly, in the direction of the dotted lines, more than two hundred feet. The question was, to whom did this *new land* belong?

In 1842, Kinzie had been declared a bankrupt under the bankrupt act of 1841, and his whole property passed of course by operation of law to his assignee.

Under this title the assignee claimed, subject to public use as a street, the eastern half of the triangle, and the newly-formed land as accretion. Acting upon this claim he sold, under petition and order of the District Court, made in 1857, part of the accretion, being the land in controversy, to one Sutherland, who conveyed to Banks, plaintiff in the ejectment. Of course this newly-formed land had not been included in the assignee's inventory of the bankrupt's effects.

On the other hand, Ogden, the defendant, deriving title by regular conveyance in 1833 from Kinzie, to that part of Block 54 to which the triangle was adjacent, conceived that the fee of the whole triangle, subject to the public use, passed to *him* with the land bounded by it. His theory was, that Sand Street, which was sixty-six feet wide below its meeting with the lake, continued sixty-six feet wide to its northern termination, and that the whole triangle being everywhere less than thirty-three feet wide, was west of the middle line of the street, and therefore belonged to him as owner of the adjoining land. As the legal result of these propositions he claimed the whole accretion, as formed upon land of which he held the fee.

It is necessary here to state that the bankrupt act, under which Banks, the plaintiff, claimed, enacts, by its eighth section, that "no *suit* at law, or in equity, shall, in any case, be maintained by or against the assignee of the bankrupt, touching any property or rights of property of the bank-

rupt, transferable to or vested *in him*, in any court whatever, unless the same be brought within two years of the declaration of bankruptcy, or after the cause of suit shall have first accrued." At what date Ogden, the defendant, *went into possession, did not appear.* The bankrupt act (§ 10) also enacts that all proceedings in bankruptcy shall, if practicable, be brought to a close by the court within two years after a decree.

Upon this case the court below instructed the jury that the law was for the defendant; and, judgment having been so entered after verdict, the case was now before the court on error.

Mr. Fuller, for Ogden, defendant below and in error.

1. The first question is, whether or not Kinzie had any title remaining in him to any land east of Block 54, after making and recording the plat of Kinzie's addition, and the conveyance of 1833?

By making and recording the plat, Kinzie dedicated all the land which there then was in front of the block; and, so far as it sufficed to make a street, to public use, and as the land increased, by accretion or otherwise, the public was entitled to extend the street in a line with that part of it south of this block. "Where a city is laid out with streets running to the water," says a California case,* "such streets should be held to continue on to the high water, if the city front is afterwards filled in, or the space enlarged by accretion or otherwise. Any other doctrine would be destructive of the interests of commercial communities." The curved line on Kinzie's plat, showing the course of the lake opposite to the block, was not meant to declare its boundary in all time on that side. It meant simply to show that along that line was the then course of the water; that *there* was where the lake came, and to prevent purchasers from supposing that the street held good for its original width of sixty-six feet below or southward. If it was washed away after that,

* Wood *v.* San Francisco, 4 California, 194.

it was the purchaser's loss. If it was extended by accretion, his gain. Had a street of full width been there, it would have carried the grant to the middle; but, before the middle was reached, the granted premises touched the waters of the lake; and the purchaser, like Kinzie himself had been, became riparian owner, and entitled to the privileges of such ownership,—one of which is that above stated, of having the *whole* road.

Independently of this he may rely on the common law principle of *ad medium filum*, or to the dividing line. The land in front of Block 54, at its widest part, did not suffice to make *one-half* the width of the street when the grant of the lot was made; and the conveyance of the block invested the purchaser with the fee, not only of the block itself, but of all the land to the water's edge. "As between grantor and grantee," says a recent and leading case in New York,* "the conveyance of a lot bounded upon a street in a city, carries the land to the centre of the street. There is no difference in this respect between the streets of a city and country highways." This case overrules all the preceding ones in New York which had been supposed to establish a different rule. There is, indeed, no doubt—notwithstanding several dicta and some decisions to the contrary—that the rule, in the broad and imperative way in which it is above asserted—is now rapidly becoming—has in fact become the rule of our courts. They are disposed to regard the matter not as one of intention or of construction at all, but as one of policy; and as in *Paul* v. *Carver*,† to carry the grant to the middle line, in spite of words limiting it in the clearest way to the edge.‡ And this is reason; for, whether the new ground arise from the abandonment of a former street, or from the creation of new soil by accretion, there is no reason for giving it to the old owner. In neither case did *he* ever expect to have it. In the first he has been

* Bissell *v.* The New York Railroad Co., 23 New York, 61.

† 26 Pennsylvania State, 223.

‡ See Dovaston *v.* Payne, 2 Smith's Leading Cases, 199*, 6th edition, and the English and American notes to that case.

paid for it in the price of the adjoining lots made of higher price by being on the street; in the latter he has parted, as he supposed, with every vestige of soil, and should not be allowed to block up and intercept light and view—in this case a view upon a noble lake, itself a matter of value to any residence—by building upon soil so accidentally and unexpectedly obtained, and so to injure persons who supposed, as *he* did, that they had acquired ownership to the water's edge. The purchaser is therefore a riparian owner, and is entitled, as such proprietor, to the accretions which have been formed in front of the block. "The question," says this court, in one case,* "is well settled at common law, that the person whose land is bounded by a stream of water, which changes its course gradually, by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss, by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain." This rule was also tacitly recognized in *Jones et al.* v. *Johnston*;† *Johnston* v. *Jones et al.*,‡ here as applicable to accretions formed on Lake Michigan, and at almost the precise place where the accretions in question have been formed. The same rule has elsewhere been held applicable to the Detroit River.§ To the same effect is *Seaman* v. *Smith.*‖

That this right to the accretion is not divested by the intervention of a public highway between the riparian estate and the water-course, was decided by the Supreme Court of Louisiana; a region where, from the nature of their soil, this whole subject of accretion and diminution is specially studied and most wisely settled in the well-considered case of *Morgan* v. *Livingston.*¶ "If there be a public road between a field and the river," says that case, "still that which is

* New Orleans *v.* United States, 10 Peters, 717.
† 18 Howard, 150.
‡ 1 Black, 209.
§ Lorman *v.* Benson, 8 Michigan, 18.
‖ 24 Illinois, 523.
¶ 1 Louisiana Condensed Reports, 451.

made by alluvion accrues to the field." This case was decided in 1819. In 1841 the same question came before the same court in the case of *Municipality* v. *The Orleans Cotton Press;** and the court cited the language used in the former case, with approval, as a correct statement of the law on this subject. It added further, "that the intervention of a public road between the front tract and the river does not prevent accretion by alluvion, because the road and the levee themselves belong to the front proprietors, subject to the public use;" and the court, in summing up the points intended to be decided, say:

"We are of opinion that urban property fronting on a watercourse is entitled to alluvion, as well as rural estates; and that cities can acquire *jure alluvionis* only in virtue of a title which would constitute them front proprietors. That the defendants must be considered as owning down to the road last laid out, and that the intervention of the road does not in law prevent their being regarded as front proprietors, and entitled to any alluvion which now exists or may hereafter be formed between the levee and the water, subject to the public use under the administration of the municipal authorities."

The language first quoted is descriptive of the present case, and that cited last states the rule which should be applied. The principles established by these cases have been affirmed in the later ones.†

The right to accretion is one that belongs to the principal estate, not to the person of the owner, nor to the proprietor of the easement. It does not belong to the latter, because he enjoys a benefit in another man's property or estate, and the loss or gain of that estate is not his, but the owner's. "The right to future alluvion," says one of the cases cited by us, "is inherent in the property itself, and forms an essential attribute of it, resulting from natural law in consequence of the local situation of the land, just as much as the natural

* 18 Louisiana, 122.

† Mrs. Kennedy *v.* Municipality No. 2, 10 Louisiana Annual, 54, A.D. 1855; Remy *v.* The Second Municipality, 11 Id. 161, A.D. 1856; Barrett *v.* New Orleans, 13 Id. 105, A.D. 1858.

fruits of a tree belong to the owner of the land; and that such an attempt to transfer from the owner of the land to the city the future increase by alluvion, would be as legally absurd as if the legislature had declared, that after the incorporation of the city, the fruits of all the orange trees within its limits should belong thereafter to the city, and not to the owners of the orchards and gardens."*

It cannot be contended, we think, that the *medium filum* was to the middle of the triangle only. Such a view would be unreasonable. It would be a view first of all extremely technical. It would decide, moreover, that *because* the purchaser of Block 54 had less than anybody else, less than he needed for the proper enjoyment of his lot, less than was usual and natural, he should have but *half* of that. Is it possible to suppose that Kinzie meant to reserve one-half the triangle? Of what use could such a piece of ground be to him? Of what necessity was it not sure to prove to the purchaser? A *full street* is supposed to be equally divided, because the owner on each side needs half; but here there was no owner on the east or lake side. The broad and fathomless Michigan was there. Ownership was not predicable of that side at all, and was predicable of the other side only. Had the road been full sixty-six feet wide, yet we might say that at common law, even then coming to the water's edge, it was a case where the owner would take it all. In grants on tidal waters the grant is almost universally to low water mark; and this for the obvious reason that, if this mark change, the purchaser may still have as near as possible what was sold and what was bought. By analogy we may fairly contend that here the purchase is to the water's edge, even had the street been full, there being nothing to be sold beyond it. That seems to be the doctrine of the Louisiana case; specially, as we have said, worthy of respect in this branch of law.

The case does not show that Kinzie ever asserted or supposed he had any interest left after his deed of 1833. Years

* Municipality No. 2 *v.* Orleans Cotton Press, 18 Louisiana Annual, 240.

after he had parted with his interest there, the accretion began to form. It was not inventoried among the assets of his bankrupt estate, because it did not then exist. Fifteen years after that, a "prowling assignee" asks for, and obtains, an order to sell the demanded premises, which had no existence, either in fact or law, until after Kinzie had been declared a bankrupt, and when he was no longer the owner of the principal estate, or any part of it, to which the right to accretions could attach. The assignee takes no greater interest than the bankrupt had in the estate assigned to him, and we cannot well see how a right to accretions, which is an incident to the principal estate, can arise or exist in favor of one who had no such estate.

2. Kinzie was declared a bankrupt in 1842, under the act of August 19, 1841. The petition and order for a sale of the demanded premises were made in 1857. If any interest or estate was left in Kinzie, after his conveyance of 1833, his assignee, and those claiming under him, are barred from maintaining this suit by the 8th section of the bankrupt act. This, like all limitation laws, was intended as a "statute of repose," and to insure a prompt settlement of the bankrupt estate; and the public good requires that full effect be given to it by the courts.

It is a practice too common all over the country for assignees to make sales of real and pretended interests in the bankrupt estate down to the present time, and for the purchasers to bring suits upon the titles thus acquired. It cannot be pretended that this is done for the benefit of the creditors. It is now more than twenty years since that law was enacted and repealed, and the interests of the creditors of the bankrupts have, in most cases, passed away, and these proceedings are instituted obviously for speculating and litigious purposes. They belong to the class of suits described by Lord Bacon as "contentious suits," which that great judge declares "ought to be spewed out as the surfeit of courts."* The act, in express terms, limits the right of the

* Essay of Judicature.

assignee to bring any suit, at law or in equity, against any person claiming an adverse interest touching the property, and rights of property, assigned to him, to two years after the declaration and decree of bankruptcy, or after the cause of suit shall first have accrued. The present cause of action (if there is any) arose fifteen years before the petition for the sale of the demanded premises was filed. The assignee acquired title to them at the date of the assignment, or he never did; and if his right was barred, so was that of his grantee, for it was a limitation against the right to recover these premises, and he could transfer no greater right than he had. This point has been decided in New York.*

Mr. Wills, contra.

The CHIEF JUSTICE delivered the opinion of the court, and, after stating facts, proceeded as follows:

The rule governing additions made to land, bounded by a river, lake, or sea, has been much discussed and variously settled by usage and by positive law. Almost all jurists and legislators, however, both ancient and modern, have agreed that the owner of the land, thus bounded, is entitled to these additions. By some, the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion; by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself.

There is no question in this case that the accretion from Lake Michigan belongs to the proprietor of land bounded by the lake. The controversy turns on ownership.

In deciding this controversy, we derive no important aid from the statutes of Illinois, referred to in the argument.

* Cleveland *v.* Boerem et al., 24 New York, 613, S. C., 27 Barbour, 252.

The plat of Kinzie does not appear to have been executed, acknowledged, and recorded, in conformity with either of them.* It operated, therefore, only as a dedication; and the law applicable to dedications must control our judgment.

It is a familiar principle of that law, that a grant of land bordering on a road or river, carries the title to the centre of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent by the exterior lines. There is indeed a passage in one of the judgments of the Supreme Court of Illinois which, if taken literally, would exclude grantees of lots in towns and cities from any interest whatever in the streets beyond the common use. The court said: "In the case of a valid plat," that is, a plat duly executed, acknowledged, and recorded, "the title to the ground set apart for public purposes is held by the corporation for the use and benefit of the public; in the case of a dedication by a different mode the fee continues in the proprietor, burdened with the public easement."† This rule would limit the grantee of Block 54 to the lines of the block, and he would take nothing in Sand Street; but the propositions quoted were not essential to the decision of the question before the court, and there are other cases‡ which seem to warrant a belief that when the operation of an ordinary dedication shall come directly before that tribunal, it will not apply any other principle to its construction than that generally recognized.

We shall assume, therefore, that the owner of the southeast part of Block 54 was the owner of the adjacent part of Sand Street to its centre. But adjacent to that part of the block, Sand Street had been reduced, as the plat clearly shows, to the small triangle already described; and it must follow that it was to the centre line of the street thus reduced that the defendant acquired title. He took, subject to the public use, the westerly half of the triangle and no more.

But Kinzie was the original owner of the whole fractional

* Jones *v.* Johnson, 18 Howard, 153. † Manly *v.* Gibson, 13 Illinois, 312.

‡ Canal Trustees *v.* Havens, 11 Illinois, 557; Waugh *v.* Leech, 28 Id. 488.

section. He retained every part of which he did not divest himself by deed or dedication. By the dedication of Sand Street, he gave to the public the use and only the use of the land within the artificial and natural lines marked on the plat. By the conveyance of Block 54 west of the street, he conveyed the fee of Sand Street within those lines to its centre. On the east side of the street, opposite that block, he conveyed nothing, for he had nothing to convey. The fee, therefore, of the eastern half of the triangle which there formed the street, remained in him. In the words of the Supreme Court of Illinois, clearly just when applied to the land in question, "the fee continued in the proprietor, subject to the easement."

Upon Kinzie's bankruptcy the fee of this strip of land passed to the assignee. It was about this time, or shortly afterwards, that the alluvion began to form upon it, and continued to increase until the commencement of the suit below. The title to the accretion, thus made, followed the title to the land and vested in the assignee.

It is unnecessary to consider the effect of the accretion, under the dedication, upon the width of the street; for, whatever that effect may have been, the fee of the east half and of the accretion beyond the true width, whatever that width was, remained constantly in Kinzie or the assignee. A part, therefore, of the bankrupt's estate remained unsold when the order of sale, under which the plaintiff in error claims, was made by the District Court; and the only remaining inquiry is, whether that order was lawfully made.

The eighth section of the bankrupt act of 1841 limited suits concerning the estate of the bankrupt by assignees against persons claiming adversely, and by such persons against assignees, to two years after decree of bankruptcy or first accrual of cause of suit. There is no express limitation upon sales, nor any limitation upon any action other than suits, by the assignee, except a general requirement in the tenth section, that all proceedings shall, if practicable, be brought to a close by the court within two years after decree. We are not satisfied that the limitation in the eighth

section can be applied to sales of real estate made by assignees under orders of district courts having general jurisdiction of proceedings in bankruptcy. But it is not necessary now to pass upon this point. The limitation certainly could not affect any suit, the cause of which accrued from an adverse possession taken after the bankruptcy, until the expiration of two years from the taking of such possession; and there is nothing in the record which shows when the adverse possession relied on by the defendant in error commenced, and therefore nothing which warrants the application of the limitation to the petition for the order of sale.

We think the court below erred in instructing the jury that the defendant in error, upon the case made, was entitled to their verdict. Its judgment must therefore be reversed, and the cause remanded with directions to issue a

NEW VENIRE.

BROOKS *v.* MARTIN.

1. After a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms,—*the results* of the contemplated operation completed,—a partner, in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract.
2. Where one partner, who is in sound health, is made sole agent of the partnership by another, who is not, and who relies on him wholly for true accounts, and the party thus made agent manages the business at a distance from the other, communicating to him no information, the relation of partners, whatever it may be in general, becomes fiduciary, and the law governing such relations applies.

MARTIN filed a bill in equity in the Federal Court of Wisconsin to set aside a contract of sale which he had made to Brooks of his interest in a partnership venture, and for an account and division of the profits; the ground of the prayer being his own alleged embarrassed condition at the time of the sale; his ignorance of the partnership business; fraud on the part of the defendant, Brooks; concealment by Brooks of what he knew; misrepresentation in what he