LINCOLN *v.* CLAFLIN.

1. A bill of exceptions should only present the rulings of the court upon some matter of law, and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issue involved.
2. In an action against two defendants for fraudulently obtaining the property of the plaintiff, the declaration alleged that the fraud was a matter of pre-arrangement between them. The fraud of one of the defendants was not contested; and as to the other defendant, *Held*, that his subsequent participation in the fraud and its fruits was as effective to charge him as preconcert and combination for its execution.
3. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character, committed by the same parties, at or near the same time, is admissible.
4. Where two persons are engaged together in the furtherance of a common design to defraud others, the declarations of each relating to the enterprise are evidence against the other, though made in the latter's absence.
5. Interest is not allowable as a matter of law, in cases of tort. Its allowance as damages rests in the discretion of the jury.
6. Where a charge to the jury embraces several distinct propositions, a general exception to it will not avail the party if any one of the propositions is correct.

ERROR to the Circuit Court of the Northern District of Illinois.

Claflin and others brought an action on the case against two defendants, Lincoln and Mileham, for fraudulently obtaining the property of the plaintiffs, alleging a combination and *prearrangement* between them, by which Mileham purchased goods to a large amount of different parties in New York, and among others of the plaintiffs, upon false and fraudulent representations of his means and business, and Lincoln sold them at St. Louis, within a few days afterwards, at auction, for less than their cost price, and appropriated the proceeds to his own use; the whole thing being alleged to have been done with intent to defraud the vendors of their property.

That *Mileham* was guilty of the fraud was not seriously controverted in the court below.

The principal defence turned upon the connection of the

Statement of the case.

defendant Lincoln with the fraudulent acts of Mileham. Lincoln had been, it was alleged, a large creditor of Mileham, and, as he and Mileham asserted, had obtained the goods from Mileham only by his own superior vigilance, and to pay his own just debt. On the subject of the fraudulent connection of the parties, the court charged that the jury must be satisfied either that Lincoln was a party to the original fraud, or that he became a party to it by his own conduct and acts subsequently, with knowledge of the fraud; and that this last, if true, "*would be the same as though he had been a party to it originally.*" The court also admitted evidence of other similar fraudulent transactions of the same parties, with others, made about the same time. The court also allowed declarations of each party, made in the absence of the other, relating to the transaction in question, to go to the jury; but it charged that whether these declarations would be evidence as against both, would depend on the view the jury should take in relation to the completion and consummation of the fraudulent enterprise; that is to say, if they believed there was a fraudulent concert between the two defendants, and that these declarations were made during the progress and continuation of the enterprise, what each said would be evidence against the other; but that if the enterprise was ended and completed before the declarations were made, then that what one said would not be evidence against the other. As to damages, it charged that if the jury should find for the plaintiffs, that the amount should be "the value of the goods at the time they were purchased, *with interest* from that time."

The plaintiff excepted to the admission of the evidence above mentioned, and to the charge of the court *generally*, but did not except to it on the ground of a wrong instruction as to interest. The bill of exceptions set out the whole evidence given on the trial, with a long charge *in extenso*, and occupied ninety-six pages out of a hundred and twenty-six which composed the record.

The plaintiff recovered judgment, and the defendant, Lincoln, brought the case by a writ of error to this court.

Argument for the plaintiff in error.

Mr. Goudy, for the plaintiff in error:

1. *The allegata and probata do not agree.* The *gist* of the declaration was the purchase of the plaintiff's goods in pursuance of a fraudulent *prearrangement* between Mileham and Lincoln. Under the allegations the purchase was made as much by Lincoln as Mileham; and Lincoln was an original party to the fraud; not an accessory after the fact, but a principal. Of these allegations there was no proof. There was, therefore, a variance.

The court might have properly charged that the acts of Lincoln subsequent to the purchase were sufficient evidence that he was an original conspirator. But it charged instead that it was unimportant whether he entered into a conspiracy and was a party by preconcert or not; that it was sufficient to convict him, if, knowing of the fraud by Mileham, he became a party to it subsequently. There was no *such* cause of action set forth, and no such issue.

If such cause of action had been set forth it would not have been a good one. A conspiracy subsequently to the purchase of goods, although fraudulent and injurious, is no cause of action. *Adler* v. *Fenton** decides this. Indeed, in that case, there was a conspiracy and fraud for the express purpose of defeating the creditor. Here there was a mere effort of one creditor to gain priority over another; an act which the law commends; for it helps the vigilant, not the sleeping.

2. *The admissions were wrongly received.* It is true that the court below charged that they would not be evidence as against both of the defendants unless the conspiracy was proved and the common purpose had not been accomplished and completed. But this did not cure the error. There was no evidence of conspiracy, and the reception of the evidence caused a prejudice in the jury against the defendant.

3. That interest is not allowed *eo nomine* in an action to recover damages for the wrongful conversion or tortious

* 24 Howard, 408.

Argument for the defendant in error.

taking of property, but is a matter of discretion with the jury, is settled.*

Mr. Farnsworth, contra:

1. Opposing counsel argue the case as if it were in the court below. They contend that Lincoln was a creditor of Mileham, but that question was passed on by the jury, who have obviously found in the negative.

The charge as to Lincoln's connection with the fraud was right. The doctrine laid down in it is held even in criminal cases. Thus, in *The People* v. *Mather*,† the court say:

"Whenever a new party concurs in the plans originally formed, and comes in to aid in the execution of them, he is from that moment a fellow-conspirator. He commits the offence whenever he agrees to become a party to the transaction, or does any act in furtherance of the original design."

Adler v. *Fenton*, relied on to show no cause of action, was an action brought by creditors of Adler & Schiff, upon the complaint that they had fraudulently conspired with their co-defendants to dispose of their property, so as to defeat creditors: the decision was based on the ground that courts would not prevent an insolvent debtor from alienating his property, and that as Adler & Schiff were the legal owners of the property at the time the suit was commenced, no one had any right to interfere with their use. Our case is different. We do not allege that we have suffered damage, by reason of a conspiracy between Lincoln and Mileham, fraudulently to dispose of the property of the latter, *but seek to recover damages against them for obtaining, by a fraudulent conspiracy, the possession of our property.* The theory of our case is, that no title for the goods he got from us ever passed to Mileham; but that through a prearrangement and conspiracy with Lincoln, they two fraudulently obtained possession of our property, which resulted in damage to us to its value.

* Gilpins *v.* Consequa, Peters's Circuit Court, 95; Willings *v.* Same, Ib. 174; Beals *v.* Guernsey, 8 Johnson, 453.

† 4 Wendell, 261.

2. The admissions were rightly received,* even if in an action like the present one a recovery might not be had against any *one* of the defendants against whom a case was made; which it may be.†

Mr. Justice FIELD delivered the opinion of the court.

The bill of exceptions in this case is made up without any regard to the rules in accordance with which such bills should be framed. It is little else than a transcript of the evidence, oral and documentary, given at the trial, and covers ninety-six printed pages of the record, when the exceptions could have been presented with greater clearness and precision in any five of them. In its preparation counsel seem to have forgotten that this court does not pass, in actions at law, upon the credibility or sufficiency of testimony; that these are matters which are left to the jury, and for any errors in its action the remedy must be sought in the court below by a motion for a new trial. A bill of exceptions should only present the rulings of the court upon some matter of law—as upon the admission or exclusion of evidence—and should contain only so much of the testimony, or such a statement of the proofs made or offered, as may be necessary to explain the bearing of the rulings upon the issues involved. If the facts upon which the rulings were made are admitted, the bill should state them briefly, as the result of the testimony; if the facts are disputed, it will be sufficient if the bill allege that testimony was produced tending to prove them. If a defect in the proofs is the ground of the exception, such defect should be mentioned without a detail of the testimony. Indeed, it can seldom be necessary for the just determination of any question raised at the trial to set forth the entire evidence given; and the practice in some

* Whittier *v.* Varney, 10 New Hampshire, 294; Bridge *v.* Eggleston, 14 Massachusetts, 250; Foster *v.* Hall, 12 Pickering, 89; Howe *v.* Reed, 3 Fairfield, 515; Blake *v.* Howard, 2 Id. 202; Lovell *v.* Briggs, 2 New Hampshire, 223; Wiggin *v.* Day, 9 Gray, 97; Scott *v.* Williams, 14 Abbot's Practice Reports, 70; Cary *v.* Hotailing, 1 Hill, 316.

† Jones *v.* Baker, 7 Cowen, 447.

districts—quite common of late—of sending up to this court bills made up in this way—filled with superfluous and irrelevant matter—must be condemned. It only serves to throw increased labor upon us, and unnecessary expense upon parties. If counsel will not heed the admonitions upon this subject, so frequently expressed by us, the judges of the courts below, to whom the bills are presented, should withhold their signatures until the bills are prepared in proper form, freed from all matter not essential to explain and point the exceptions.

The action in this case is brought to recover damages against the defendants for fraudulently obtaining the property of the plaintiffs. It differs materially from that of *Adler* v. *Fenton*, reported in 24th Howard, which is cited to show that the declaration discloses no cause of action. In that case certain creditors, whose demand was not due at the time, brought an action against their debtors and others for an alleged conspiracy to dispose of the property of the debtors, so as to hinder and defeat the creditors in the collection of their demand; and this court held that the action would not lie. The decision proceeded upon the ground that creditors at large have no such legal interest in the property of their debtors as to enable them to interfere with any disposition of it before the maturity of their demands. The creditors in that case possessed no lien upon or interest in the property of their debtors to impair or clog in any respect the right of the latter to make any use or disposition of it they saw proper. The exercise of that right, whatever the motive, violated no existing right of the creditors, and consequently furnished them no ground of action.

The case at bar is not brought upon the allegation that the defendants have fraudulently disposed of their own property, but that they have fraudulently obtained possession of the property of the plaintiffs. It proceeds upon the theory that the title to the goods never passed to the defendants, but remained in the plaintiffs, from whom they were obtained by false and fraudulent representations.

That such representations were made by the defendant,

Mileham, and that by means of them the goods were obtained, was not seriously disputed at the trial. The principal controversy turned upon the connection of the defendant, Lincoln, with the fraudulent acts of Mileham. The declaration alleges that the fraud was a matter of prearrangement between them, and their counsel insisted that proof of such prearrangement was essential to a recovery against Lincoln, but the court held that it was sufficient to show that he subsequently, with knowledge of the fraud, became a party to it; that subsequent participation in the fraud and its fruits was as effective to charge him, as preconcert and combination for its execution. In thus holding we perceive no error. The character of the transaction was not changed, whether Lincoln was an original party in its inception, or became a party subsequently; nor was the damage resulting to the plaintiffs affected by the precise day at which he became a co-conspirator with Mileham. If, knowing the fraud contrived, he aided in its execution, and shared its proceeds, he was chargeable with all its consequences, and could be treated and pursued as an original party. Every act of each in furtherance of the common design was in contemplation of law the act of both.

On the trial declarations of the defendants were received, which related not merely to the transaction which is subject of inquiry in this action, but to similar contemporaneous transactions with other parties. The evidence was not incompetent or irrelevant, as contended by counsel. Where fraud in the purchase or sale of property is in issue, evidence of other frauds of like character committed by the same parties, at or near the same time, is admissible. Its admissibility is placed on the ground that where transactions of a similar character, executed by the same parties, are closely connected in time, the inference is reasonable that they proceed from the same motive. The principle is asserted in *Cary* v. *Hotailing*,* and is sustained by numerous authorities. The case of fraud, as there stated, is among the few exceptions

* 1 Hill, 317.

to the general rule that other offences of the accused are not relevant to establish the main charge.*

The declarations of each defendant, relating to the transaction under consideration, were evidence against the other, though made in the latter's absence, if the two were engaged at the time in the furtherance of a common design to defraud the plaintiffs. The court placed their admissibility on that ground, and instructed the jury that if they were made after the consummation of the enterprise they should not be regarded.

It is possible that the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury. But the error, if it be one, cannot be taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill, contrary to the proper practice, as repeatedly stated in our decisions, and contrary to an express rule of this court. It embraces several distinct propositions, and a general exception in such case cannot avail the party if any one of them is correct.

JUDGMENT AFFIRMED.

GREEN v. VAN BUSKIRK.

1. A., B., and C. were residents and citizens of New York. A. being indebted to both B. and C., and having certain chattels personal in Illinois, mortgaged them to B. Two days afterwards, and before the mortgage could be recorded in Illinois, or the property delivered there, both record and delivery being necessary by the laws of Illinois, though *not* by those of New York, to the validity of the mortgage as against third parties, C. issued an attachment, a proceeding *in rem*, out of one of the courts of Illinois, and, under its laws, in due form, levied on and sold the property. B. did not make himself a party to this suit in attachment, though

* See also Hall *v.* Naylor, 18 New York, 588, and Castle *v.* Bullard, 23 Howard, 172.