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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

By JAMES M. WOOLWORTH,
COUNSELLOR-AT-LAW.

CHICAGO:
CALLAGHAN & COCKCROFT.
1871.

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JUDGES

OF THE

SUPREME COURT.

Chief Justice.

OLIVER P. MASON.

Associate Justices.

GEORGE B. LAKE.

LORENZO CROUNSE.

CASES REPORTED.

A.

PAGE.

Adams v. Boulware..... 470
Anderson v. Colson..... 172
Aumock v. Jamison..... 432

B.

Baker, Nebraska City v..... 180
Baptist Church, Redgrave v..... 345
Bender, Eaton v..... 426
Bennet Administrator v. Hargus, 419
Bennet v. Fooks & Moffit..... 465
Bennett v. Townsend..... 460
Boulware, Adams v..... 470
Boulware, Newcomb v..... 428
Boydston, Holmes v..... 346
Bradford, Neligh v..... 451
Bradshaw v. The City of Omaha.. 16
Brewer v. Otoe County..... 373
Bridge v. Pomeroy..... 462
Brown v. Homan..... 448
Burley v. Shinn..... 433
Burley v. The State..... 385
Butler, Jameson v..... 115

C.

Chicago and Northwestern Railroad Company, Porter v..... 14
Clark v. Hotailing..... 436
Colson, Anderson v..... 172
Cook v. Kuhn..... 472

D.

Dawley, Phillips v..... 320
Day, The M. P. R. R. Company v. 407
Duncan, Filley & Hopkins v..... 134

E.

Eaton v. Bender..... 426

PAGE

Eaton v. Lambert..... 339
Eaton v. Redick..... 305
Edwards, Jones v..... 170
Elbert. Monroe v..... 174

F.

Filley & Hopkins v. Duncan 134
Finn, Miller v..... 254
Fooks & Moffit, Bennet v..... 465
Fremont, Kittle v..... 329

G.

Griswold, Moffat v..... 415

H.

Harding, The Platte Val. Bank v.. 461
Hargus, Bennet Administrator v. 419
Holmes v. Boydston..... 346
Homan, Brown v..... 448
Homan v. Laboo..... 204
Hotailing, Clark v..... 436
Hurford. The Columbus Co. v.... 146

I.

Ide, Zoller v..... 439

J.

Jamison, Aumock v..... 432
Jameson v. Butler..... 115
Johnson, Towsley v..... 95
Jones v. Edwards..... 170
Jones v. Nebraska City..... 176
Jones, Rogers v..... 417

K.

Kennard, Meredith v..... 312
Kittle v. Fremont..... 329
Kruger v. The State..... 365
Kuhn, Cook v..... 472

L.

PAGE.

Laboo, Homan v. 204
Laughlin v. Schuyler..... 409
Lambert, Eaton v..... 339
Larsh, Morgan v..... 361
Loughridge, The People v..... 11

M.

Mattis v. Robinson..... 8
McAusland v. Pundt..... 211
McCallum, The People v..... 182
McCartney, The M. P. R. R. Co. v. 398
McCartney v. The Territory..... 121
McCartney, Watson v..... 131
McDonald v. Penniston..... 324
McReady v. Rogers..... 124
Meredith v. Kennard..... 312
Middleton, The City of Brownville v..... 10
Miller v. Finn..... 254
Mills v. Redick 437
Mills v. Murry..... 327
Mills, Murry v..... 456
Mills v. Paynter..... 440
Moffat v. Griswold..... 415
Monroe v. Elbert..... 174
Morgan v. Larsh..... 361
Murry, Mills v..... 327
Murry v. Mills..... 456

N.

Nebraska City v. Baker..... 180
Nebraska City, Jones v..... 176
Neligh v. Bradford..... 451
Newcomb v. Boulware..... 428
Newman, The M. P. R R. Co. v. 408

O.

O'Connor, Poland v..... 50
Orr v. Orr 359
Orr v. Seaton 105
Otoe County, Brewer v..... 373

P.

Paynter, Mills v..... 440
Penniston, McDonald v..... 324
Phillips v Dawley..... 320

PAGE

Poland v. O'Connor..... 50
Pomeroy v. Bridge..... 462
Porter v. Chicago and Northwestern Railroad Co..... 14
Pundt, McAusland v..... 211

R.

Redgrave v. Baptist Church..... 345
Redick, Eaton v..... 305
Redick, Mills v..... 437
Richards, Wilson v..... 342
Robinson, Mattis v..... 3
Rogers v. Jones..... 417
Rogers, McReady v..... 124
Roush, Verges v..... 113

S.

Sahler, Smith v..... 310
Sampson, Smiley v..... 56
Sands v. Smith..... 108
Schuyler, Laughlin v..... 409
Seaton, Orr v..... 105
Shinn, Burley v..... 433
Shoff v. Wells..... 168
Shields, Wood v..... 453
Smiley v. Sampson..... 56
Smith v. Sahler..... 310
Smith v. Sands..... 108

T.

The City of Brownville v. Middleton..... 10
The City of Omaha, Bradshaw v. 16
The Columbus Co. v. Hurford... 146
The Midland Pacific R. R. Co. v. Day..... 407
The Same v. McCartney..... 398
The Same v. Newman..... 408
The Same v. Williamson..... 406
The Platte Val. Bank v. Harding.. 461
The People v. Loughridge 11
The People v. McCallum..... 182
The State, Burley v..... 385
The State, Kruger v..... 365
The Territory, McCartney v..... 121
Townsend, Bennett v..... 460
Towsley v. Johnson..... 95

V.

PAGE.

Verges v. Roush..... 113

W.

Watson v. McCartney..... 131

Wells. Shoff v..... 168

PAGE.

Williamson, The M. P. R. R. Co. v. 406

Wilson v. Richards..... 342

Wood v. Shields..... 453

Z.

Zeller v. Ide..... 439

INDEX TO CASES CITED.

A.

PAGE.

Adams, Pratt v..... 110
Adams v. The People..... 388
Albany N. Railway v. Lansing... 399
Alexander, Parkhurst v.... 147, 160
Allen v. Blunt..... 70
Allen, St. Louis v..... 21
Alley v. Deschamps 251
American Ins. Co. v. Oakley.... 158
Andrews v. Pond..... 109, 110
Applegate, Langdon v.. 192, 193, 195
Archer, Canal Co. v..... 399
Arkansas, Lytle v..... 88, 69
Armstrong, Toler v..... 110
Arrendends. United States v.... 70
Ashley, Cunningham v..... 67, 79
Ashton, Jackson v..... 293
Aspinwall v. Commissioners..... 21
Astor, Gardner v..... 300
Atkins, Hunter v..... 147
Atwood v. Weston..... 352
Avery, Kiersted v..... 138
A. and S. Railway v. Carpenter.. 399

B.

Bacon, Denniston v..... 239
Bacon v. School District..... 19
Baldwin, Dame v..... 206
Baltimore v. The State..... 23
Banbury, Collins v..... 352
Bank of U. S., Voorhees v..... 273
Bank of Cincinnati, State v..... 317
Bank of the U. S. v. Peter..... 302
Bank of Niagara, Roswell v..... 274
Banks, Findley v..... 288
Barclay v. Howard..... 331

PAGE.

Barker, Lawrence v..... 352
Barnes v. Currier..... 290
Barr, Fosdick v..... 468
Barret v. Warner..... 207
Bartels v. Rochester Bank..... 306
Bartlett, McDuffie v..... 290
Bartlett, People v..... 351
Batte, Lures v..... 404
Beach, Haines v..... 274, 301
Beamand, Raymond v..... 309
Beard, Zebnor v..... 404
Beatty v. Knowler..... 20
Beatty v. Fitzpatrick..... 225
Beaver, Bishop of Winchester v.. 275
Beckman, Bemus v..... 313
Bell v. Bruen..... 109
Bemus v. Beckman..... 313
Benedict v. Gilman..... 274
Bennet v. Denniston..... 301
Bennet, McMurtie v..... 52
Bennet, Woodcock v..... 227, 240
Berger, Phillips v..... 52
Berrian v. The State..... 367
Berry v. The Mutual Ins. Co.... 466
Bigby, McCoy v..... 307
Bigelow, Rowly v..... 207
Billingsley v. State Bank..... 350
Bishop of Winchester v. Beaver.. 275
Bishop, Livingston v..... 127
Blaac's Exc., Cousin v..... 72
Blake, Caldwell v..... 351
Blougher, Lessees of Brewer v.. 64, 90
Bloodgood v. Mohawk & H. Railway 18, 400
Blunt, Allen v..... 70
Board of Public Works, Walker v. 19

PAGE.
Bond, Owen v. ... 460
Bondereau v. Montgomery. ... 350
Boon v. Chiles. ... 227
Boston and Maine Railway, Whitman v. ... 399
Boyd v. McLean. ... 147
Boyd, Morgan v. ... 174
Boyd, Taylor v. ... 240
Bradley, Harris v. ... 309
Brady, Smith v. ... 306
Brainard v. Cooper. ... 281
Braughn, Nebbe v. ... 351
Bridgham, Gloucester v. ... 353
Brighton v. Wilkinson. ... 21
Brignardello, Gray v. ... 243
Brewer v. Crosby. ... 352
Broadwell, Hubbel v. ... 227, 240, 244, 245
Bronson v. Kinzie. ... 378
Bronson v. Newberry. ... 378
Brouner v. Goldsmith ... 389
Brown v. Cannon. ... 351
Brown, Champion v. ... 225
Brown v. Cincinnati ... 399
Brown, Doe v. ... 174
Brown v. Jackson ... 70
Brown v. Manning. ... 331
Brown, Pierce v. ... 3, 7
Brown, The State v. ... 12
Brown v. Wooton. ... 128
Browder, McGrew v. ... 206
Browning v. Magill. ... 206
Browser v. Browser. ... 7
Bruce v. Skuyler ... 378
Bruen, Bell v. ... 109
Buckingham, Young v. ... 326
Buckley, Ingalls v. ... 207
Budlong, Rochester and Syracuse Railway v. ... 399, 400
Buffman v. New York and Boston Railway. ... 400
Bull, Calder v. ... 19
Burd, Semple v. ... 468
Burghardt v. Turner. ... 378
Burnam, Hopping v. ... 468
Burnet v. Dennison ... 277
PAGE.
Burnet, Lessees of Morgan v. ... 289
Butler v. Haskell. ... 147
B. and Mt. Pl. Railway, Sater v. ... 399

C.

Calder v. Bull. ... 19
Caldwell v. Blake. ... 357
Call v. Hagger. ... 378
Callan v. Statham. ... 65, 278, 286, 287
Cameron v. Montgomery. ... 352
Canal Co. v. Archer. ... 399
Canandaigua and N. Railway v. Payne ... 399
Cannon, Brown v. ... 351
Carney, Tate v. ... 77
Carpenter, A. & S. Railway Co. v. 399
Carpenter v. Graff. ... 350
Carpenter, White v. ... 138
Carroll, Olcott v. ... 204
Carter, Simmons v. ... 128
Cassady v. Clarke. ... 351
Chadwell, Godfrey v. ... 301
Chamberlain, Jackson v. ... 467
Chambers v. The People ... 367
Champion v. Brown ... 225
Chandler, Thompson v. ... 301
Chapin v. Norton. ... 351
Chapman, Commonwealth v. ... 395
Chapman v. Robertson. ... 109, 110, 112
Chappell, Stillwell v. ... 404
Charlotte and S. C. Railroad, White v. ... 399
Cheaney v. Hooser ... 20, 38, 44
Cheeseborough v. Millard ... 141
Cheney, Resinger v. ... 351
Chester v. Willis. ... 299
Chesterman v. Gardner ... 138
Childs v. Childs. ... 270, 275, 276
Chiles, Boon v. ... 227
Chrisman v. Miller. ... 307
Church v. Sterling. ... 147, 160
Cincinnati, Brown v. ... 399
Cincinnati, Mays v. ... 19
Cincinnati, Symonds v. ... 399
Cincin., Wil. & Zanesville R. R. v. Com. of Clinton Co. ... 191

PAGE.

City of Boston, Parks v..... 399
City of Boston, Smith v..... 337
City of Dubuque v. Maloney..... 331
City of Cincinnati v. White..... 331
City of Georgetown v. The Alexandria Canal Co..... 337
City of Weston, Wells v..... 19, 38
Clapp, Conn. River Railway v.... 400
Clapp, Glenn v..... 292
Clark, Cassady v..... 351
Clark, Jones v..... 6
Clark v. People..... 191
Clemens, Gillett v..... 309
Clements v. Warner..... 331
Cleveland Railway v. Vanhorn... 400
Clinton Co., Com of Cincin., Wil. & Zanesville R. R. v..... 191
Clynan v. Cooke..... 52, 53
Coates v. Roberts..... 354
Codman, Hascall v..... 280
Coles v. Madison County..... 21
Collins v. Banbury..... 352
Collins, Jackson v..... 64, 87
Colson v. Thompson..... 52
Columbus P. & J. Railway v. Simpson..... 399
Commercial Bank, Creed v..... 319
Commissioners, Aspinwall v..... 21
Commissioners, The Town of Lebanon v..... 330
Commissioners of Clermont Co. v. Little..... 401
Commonwealth v. Chapman..... 395
Commonwealth, McCreary v..... 370
Commonwealth v. Morse..... 366
Commonwealth v. Newell..... 367
Commonwealth v. Roby..... 367
Compton v. Oxender..... 299
Comstock, Mills v..... 277, 300
Concord Railway Co. v. Greely... 400
Conklin, Vincent v..... 354
Conn. River Railway v. Clapp.... 400
Conrad v. Griffey..... 351
Consequa, Fanning v..... 109
Cooke, Clynan v..... 52, 53
Cook Seaman v..... 147

PAGE.

Cooper, Brainard v..... 281
Cooper v. Earl of Waldegrave.... 109
Corden & Bagg, The Trustees of Watertown v..... 332
Cottrell, Sears v..... 24
Cousin v. Blaac's Exc..... 72
County Judges, State v..... 194
County of Macoupin, Hosey v.... 460
Covington v. Southgate.. 20, 23, 41
Covering, Sill v..... 24
Cowan, Davison v..... 468
Cowan, Lance v..... 206
Cowan, State v..... 21
Cowles v. Raquet..... 273
Cox, Davis v..... 468
Creed v. Commercial Bank..... 319
Crehore, Gibson v..... 309
Crockett v. Lee..... 296
Cromartie, Donahue v..... 206
Crosby, Brewer v..... 352
Crowninshield, Sturges v..... 378
Cullings, The Commonwealth v... 12
Cummings v. The State..... 12
Cunningmam v. Ashley..... 67, 79
Currie, Rothschild v..... 109
Currier, Barnes v..... 290
Curtis v. Leavitt..... 109, 110
Cushman, Hale v..... 337
Cushman v. Smith..... 400
Cutler v. Wright..... 109
Cutright, Jackson v..... 52

D.

Dale v. Kennedy..... 313
Dalton, State v..... 378
Dame v. Baldwin..... 206
Dartmouth College v. Woodward, 178
Davenport, Fulton v..... 20, 45
Davison v. Cowan..... 468
Davis v. Cox..... 468
Dawson, Rouge v..... 313
Dawson, Welch v..... 352
Deckins, State v..... 367
Dedham, King v..... 378
Defrees, Wright v..... 23
Denman, White v..... 468

PAGE.
Denman, Winona and St. Paul Railway v. 399
Dennison v. Burnet 277
Denniston v. Bacon 239
Denniston, Bennet v. 301
Denniston v. Wertz 352
Depeau v. Humphreys 110, 112
Depeyster, Wheelwright v. 206
Dequindse v. Williams 289
Deschamps, Alley v. 251
De Witt v. Greenfield 317
De Witt, Van Benthuysen v. 313
De Wolf v. Johnson 109
Dickerson, Nashville Railway v. .. 399
Dickerson v. Tillinghast 467
Digby, State v. 399
Ditmas, Vroom v. 281, 303
Doe v. Brown 174
Doe v. Eslava 76, 77
Donahue v. Cromartie 206
Donnelly, People v. 191
Doolittle v. Supervisors 337
Dorlan v. E. Br. & Wav. R. R. Co. 400
Doughty, Somerville Railway v. .. 399
Douglas v. Huston 273
Draper v. Earl of Clarendon 301
Draper, The People v. 21, 22
Dubuque, Langworthy v. 20, 45
Dufrene, Haydell v. 71
Duke of Marlborough, Neate v. .. 274
Dunham, Macomber v. 111
Durrawsean v. United States 90
Dyce v. Ford 251

E.

Earl of Clarendon, Draper v. 301
Earl of Waldegrave, Cooper v. 109
Earl, Huff v. 353
Earle v. Willsmore 206
Earls v. Pittsburg Railroad Co. 404
East Penn. Railway Co. v. Hottenstein 400
East Penn. Railway Co. v. Heister, 400
Eaton v. The Commonwealth 391
E. Br. & Wav. R. R. Co., Dorlan v. 400

PAGE
Edilen, Hampsen v. 143
Edwards, Ladd v 460
Edwards v. Meyrick 147
Edwards v. Varrick 137
Eldred v. Hazlett 353
Eldridge v. Howell 114
Ellis v. Haskins 306
Ellis, Stanton v 275
Ellis, The State v 12
Ellis v. Tousley 138
Erwine v. Parham 273
Eslava, Doe v 76, 77
Evans, Watts v 52
Evansville R. R. Co. v. Fitzpatrick, 405
Evertson, Ketchum v. 306, 309
Ex rel. Goodrich v. Guthrie 173

F.

Fanning v. Consequa 109
Faucett v. Whitehouse 147, 160
Faw v. Marsteller 64
Ferry v. Pfieffer 225
Finch v. The State 367
Findley v. Banks 288
Finley, Galloway v. 227
Finney, Holbrook v. 378
First Presbyterian Church, Williams v. 331
Fisher, United States v. 64
Fitchburg Railway, Meacham v. ... 399
Fitzpatrick v. Beatty 225
Fitzpatrick, Evansville R. R. Co. v. 405
Flagg v. Mann 160
Foley v. Harrison 70
Forbes v. Moffat 299, 301
Ford, Dyce v 257
Fosdick v. Barr 468
Foster v. Morris 6
Fraley, Stump v. 404
Franklin, McArthur v. 276
Freeman v. Paul 300
Frees, Morgan v 353
Fricho v. Kramer's Lessee 275
Friendly v. Hamilton 468
Fulks, Spurlock v 181
Fulton v. Davenport 20, 45

G.

PAGE.

Galloway v. Finley..... 227
Gana v. State of Ohio..... 191
Gardner v. Astor..... 300
Gardner, Chesterman v..... 138
Gardner v. Newberg..... 18, 19, 37
Gardner, The People v..... 12
Garland v. Wynn..... 68
Gates, Wambaugh v..... 227, 241
Geiger v. Welsh..... 354
Georgia v. Stanton..... 30
Gibson v. Crehore..... 300
Gilchrist v. Moore..... 207
Gillett v. Clemens..... 309
Gillespie, Neville v..... 52
Gilman, Benedict v..... 274
Glancy, Johnston v..... 52
Glenn v. Clapp..... 292
Gloucester v. Bridgham..... 353
Godfrey v. Chadwell..... 301
Goelet, Lansing v..... 453
Goldsmith, Brouner v..... 389
Goodnow, Hyde v..... 109
Gore, State v..... 366
Gouverneur v. Lynch..... 138, 139
Graff, Carpenter v..... 350
Gray v. Brignardello..... 243
Gray v. Stiver..... 404
Griffey, Conrad v..... 351
Greely, Concord Railway v..... 400
Green v. Green..... 306, 309
Greencastle v. The State..... 195
Greene v. Munson..... 8
Greenfield, De Witt v..... 317
Greenleaf's Estate..... 147
Greenville & C. Railway v. Partlow, 399
Grundy, Roland v..... 206
Guest v. Hornfray..... 252
Gugerty, Smith v..... 351
Guthrie, Ex rel. Goodrich v..... 173
Guthrie, O'Connor v..... 206

H.

Hagger, Call v..... 878
Haines v. Beach..... 274, 301
Hale v. Cushman..... 337
Hall, Stuyvesant v..... 141
Hallock, Jackman v..... 280
Hallum v. Jacks..... 174
Hamer, Tarpley v..... 378
Hamilton v. The State..... 12
Hamilton, Friendly v..... 468
Hammond v. Hopping..... 109
Hampsen v. Edilen..... 143
Harper, Powell v..... 317
Harper, Wilkes v..... 467
Harris v. Bradley..... 309
Harris, Newton v..... 352
Harrison Justices v. Holland..... 21
Harrison, Foley v..... 70
Hart, Hays v..... 307
Harvey v. Lackawanna Railway... 399
Hascall v. Codman..... 280
Hasford v. Nichols..... 11
Haskins, Ellis v..... 306
Haskell, Butler v..... 147
Hausbrough v. Peck..... 306
Hawes, Lindsey v..... 56, 66, 78
Hawes v. Smith..... 352
Haydell v. Dufrene..... 71
Hays v. Hart..... 307
Haywood, McCracken v..... 378
Hazlett, Eldred v..... 353
Heister, East Penn R. R. Co. v... 400
Helm, Warren v..... 467
Henderson v. Swift..... 306
Henry v. The Dubuque & Pacific Railway Co..... 339, 401
Herf v. Shultze..... 311
Hewitt, Leaf v..... 311
Hewson v. Saffin..... 313, 316
Hildreth v. Sands..... 273, 278
Hill v. Kliny..... 322
Hinman, Mayer v..... 138, 139
Hoare, King v..... 128
Hoban, Webster v..... 225
Hodgeden v. Hubbard..... 206
Hogan, Russell v..... 460
Holbrook v. Finney..... 378
Holden v. James..... 20
Holland, Harrison Justices v..... 21

PAGE.
Holliday, Howes v. 404
Hornfray, Guest v. 252
Hooser, Cheany v. 20, 88, 44
Hopkins v. Lee. 349
Hopping v. Burnam. 468
Hopping, Hammond v. 109
Hosack v. Weaver 206
Hosey v. County of Macoupin. 460
Hottenstein, East Penn R. R. Co. v. 400
Howard, Barclay v. 33
Howell, Eldridge v. 114
Howell, Ransom v. 147
Howes v. Holliday. 404
Hoyt, Schmidt v. 467
Hubbard, Hodgeden v. 206
Hubbel v. Broadwell. 227, 240 244, 245
Hubbel, Rockwell v. 378
Huff v. Earl. 353
Huff, Vincent v. 350
Humphreys, Depeau v. 110, 112
Hunt v. Hunt. 300
Hunter v. Atkins. 147
Hunter, Kelly v. 311
Hunter, Indiana Central v. 399
Hussy v. Thornton. 206
Huston, Douglas v. 273
Hyde v. Goodnow. 109

I.

Indiana Central v. Hunter. 399
Ingalls v. Buckley. 207
Ingersoll v. Sawyer. 297
In re Albany Street 19, 31
In re John Street 19, 33
In re Selby 63
In the matter of Howe. 138
Irvine v. Marshall. 147, 160
Irwin, The People v. 280

J.

Jackman v. Hallock. 280
Jacks, Hallum v. 174
Jackson v. Ashton. 296
Jackson, Brown v. 70
Jackson v. Chamberlain. 467
PAGE
Jackson v. Collins. 64, 87
Jackson v. Cutright. 52
Jackson v. Luce. 468
Jackson v. Packard. 109
Jackson, Parkhurst v. .....
Jackson, Parks v. 138, 142
Jackson, Wilcox v. 75
Jackson, Wood v. 240
Jacocks, Sweet v. 147, 160
Jamaica, Livermore v. 399
James, Holden v. 20
James v. McKernon. 296
James v. Morley. 298
Jennings, Orth v. 468
Jewett v. Wright. 109, 110
Johnson, De Wolf v. 109
Johnson, Monell v. 270
Johnston v. Glancy. 52
Jones v. Clark. 6
Judd, Seymour v. 114

K.

Keeler, Ruggles v. 378
Kelly v. Hunter. 311
Kelly v. Stanbury. 311
Kennedy, Dale v. 313
Kent v. Lawson. 404
Ketchum v. Evertson 306, 309
Kiersted v. Avery. 138
Killer, Sites v. 52
Kimball v. Lockwood. 6
King v. Dedham. 378
King v. Hoare. 128
Kinzie, Bronson v. 378
Kline v. Wyne. 174, 175
Kliny, Hill v. 322
Kneeland, Rogers v. 352
Knowler, Beatty v. 20
Knowlton v. Supervisors. 23
Kramer's Lessee, Fricho v. 275
Kugler v. Wiseman. 175

L.

Lackawanna Railway, Harvey v... 399
Ladd v. Edwards. 460
Lake Front Case. 330

PAGE.

Lance v. Cowan..... 206
Lane, State v..... 366
Lane, Smith v..... 350
Langdon v. Applegate.. 192, 193, 195
Langley v. Warner..... 242
Langworthy v. Dubuque..... 20, 45
Lansing, Albany N. Railway v... 399
Lansing v. Goelet..... 453
Laverty v. Moore..... 225
Law, Merrills v..... 111
Law, Pratt v..... 252
Lawrence v. Barker..... 352
Lawrence v. Miller..... 7
Lawrence County, Richland Co. v. 21
Lawrence, The People v..... 23
Lawson, Kent v..... 404
Leaf v. Hewitt..... 311
Leavitt, Curtis v..... 109, 110
Le Clercq v. Town of Gallopolis.. 330, 332
Lee, Crocket v..... 296
Lee, Hopkins v..... 349
Lee, Troy & Boston Railway v... 399
Lees v. Nuthall..... 146, 158
Lehman v. McBride..... 192
Leland, Wilkinson v..... 19
Leonard v. Morgan..... 306
Lessee of Morgan v. Burnet..... 289
Lessees of Brewer v. Blougher, 64, 90
Lincoln v. Saratoga Railway..... 400
Lindsey v. Hawes..... 56, 66, 78
Little, Comm's of Clermont Co. v. 401
Littler v. Smiley..... 193, 195
Livermore v. Jamaica..... 399
Livingston v. Bishop..... 127
Livingston, Storm v..... 207
Lockwood, Kimball v..... 6
Longworth v. Sturges..... 311
Longworth, Taylor v..... 225
Lord, Mayor v..... 64, 88
Louisville & Nashville R. R. v. Thompson..... 400
Lovett v. The Ger. Ref. Church... 242
Luce, Jackson v..... 463
Lures v. Batte..... 404
Lynch, Gouverneur v..... 138, 139

PAGE.

Lyon v. Yates..... 129
Lytle v. Arkansas..... 69, 88

M.

Macomber v. Dunham..... 111
Madison County, Coles v..... 21
Magill, Browning v..... 206
Main v. Melbourne..... 52
Maloney, City of Dubuque v..... 331
Mann, Flagg v..... 160
Manning, Brown v..... 332
Marshall, Irvine v..... 147, 160
Marsteller, Faw v..... 64
Marvin v. Stone..... 348
Mason v. Rowe..... 352
Massie v. Watts..... 147, 160
Matter of F Street..... 399
Mattis v. Robinson..... 227, 249
Mayer v. Hinman..... 138, 139
Mayo, Pecks v..... 112
Mayor, Stuyvesant v..... 52
Mayor of Brooklyn, The People v..... 19, 37
Mayor v. Lord..... 64, 88
Mays v. Cincinnati..... 19
Mayworm, People v..... 189, 191
McArthur v. Franklin..... 276
McBlain v. McBlain..... 227, 241
McBride, Lehman v..... 192
McBride, Millspaugh v..... 300
McCarty, State v..... 394
McCollough v. Moss..... 147, 161
McCoy v. Bigby..... 307
McCracken v. Haywood..... 378
McCreary v. Commonwealth..... 370
McCulloch v. The State..... 28
McDuffie v. Bartlett..... 290
McGrew v. Browder..... 206
McGuire v. The People..... 391
McIntire v. The State..... 399
McKernon, James v..... 296
McKinney v. McKinney..... 378
McLean, Boyd v..... 147
McMeehan v. Nichols..... 453
McMurtrie v. Bennett..... 52
Meacham v. Fitchburg Railway... 399

PAGE.
Melbourne, Main v. 52
Mercer v. Whall 400
Meredith, Wright v. 460
Merrills v. Law 111
Meyrick, Edwards v. 147
Millard, Cheeseborough v. 141
Miller, Chrisman v. 306
Miller, Lawrence v. 7
Miller v. Miller 378
Miller, Moore v. 352
Miller v. Ohio 192
Miller v. Tiffany 110
Mills v. Comstock 277, 300
Mills v. Williams 21
Millspaugh v. McBride 300
Millspaugh v. Mitchell 207
Milwaukie Railway, Robbins v. ... 399
Milwaukie, Weeks v. 21
Mitchell, Millspaugh v 207
Mockridge, The State v. 12
Moffat, Forbes v. 299, 301
Mohawk & H. Railway, Bloodgood v. 18, 400
Monell v. Johnson 270
Monson, Powell v. 147
Montgomery, Bondereau v. 350
Montgomery, Cameron v. 352
Montgomery v. Varner 400
Moore, Gilchrist v. 207
Moore, Laverty v. 225
Moore v. Miller 352
Moran v. Palmer 279
Morford v. Unger 45
Morford v. Weger 20, 23, 43, 46
Morgan v. Boyd 174
Morgan v. Frees 353
Morgan, Leonard v. 306
Morley, James v. 298
Morris, Foster v. 6
Morse, Commonwealth v. 366
Morse v. Stocker 19
Moss, McCollough v. 147, 161
Mowrey v. Walsh 207
Munson, Greene v. 8
Mutual Insurance Co., Berry v... 466

N.

PAGE.
Nashville Railway v. Dickerson.. 399
Neate v. Duke of Marlborough.. 274
Nebbe v. Braughn 351
Neville v. Gillespie 52
Newberg, Gardner v. 18, 19, 37
Newberry, Bronson v. 378
Newell, Commonwealth v. 367
Newton v. Harris 352
New York and Boston Railway, Buffman v. 400
New York Central, The People v. 23
Nichols, Hasford v. 111
Nichols, McMeehan v. 453
Nicholson, Pim v 192
Noonnan, Wesley v. 349
Northern Turnpike Co., Troy and Boston Railway v. 400
Norton, Chapin v. 351
Nuthall, Lees v. 146, 148

O.

Oakey, Wood v. 281
Oakley, American Ins. Co. v. 158
O'Connor v. Guthrie 206
Ogden v. Saunders 378
Ohio, Miller v. 192
Olcott v. Carroll 203
Oliver v. Piatt 147
Orth v. Jennings 468
Owen v. Bond 460
Owings v. Thompson 292
Oxender, Compton v. 299

P.

Packard, Jackson v. 109
Paget, Wade v 299
Painter, Smith v 292
Palmer, Moran v. 279
Palmer, Stanchfield v. 207
Pardee v. Van Alleu 302
Parham, Erwine v. 273
Parks v. City of Boston 399
Parks v. Jackson 138, 142
Parkhurst v. Alexander 147, 160
Parkhurst v. Jackson .....

PAGE.
Partlow, Greenville and C. Railway v. 399
Paul, Freeman v. 301
Payne, Canandaigua and N. Railway v. 399
Pearson, Pickett v. 158
Peck, Hausbrough v. 306
Pecks v. Mayo. 112
People v. Bartlett. 351
People, Clark v. 191
People v. Donnelly. 191
People v. Irwine. 280
People v. Mayworm. 189, 191
People v. Ridgley. 191
People, Starks v. 352
Perchman, United States v. 77
Perkins v. Washington Ins. Co. 158
Peter, United States v. 302
Pfieffer, Ferry v. 225
Phillips v. Berger. 52
Philips v. Philips. 299
Piatt, Oliver v. 147
Pickett v. Pearson. 158
Pierce v. Brown. 3, 7
Plype v. Wardell. 52
Pim v. Nicholson. 192
Pintard v. Tredgal. 227
Pitts, State of Iowa v. 206
Pittsburg Railroad, Earls v. 404
Polly v. S. W. Railroad Co. 400
Pomeroy, Slocum v. 109
Pond, Andrews v. 109, 110
Powell v. Harper. 317
Powell v. Monson. 147
Powell v. Swan. 298
Power, The People v. 21
Powles, Thompson v. 109
Porter, Taylor v. 18, 20
Pratt v. Adams. 110
Pratt v. Law. 252
Prescott, Wright v. 298
Prine v. The Commonwealth. 392

R.

Ransom, Howell v. 147
Raquet, Cowles v. 273
PAGE.
Ray, Respublica v. 189, 191
Raymond v. Beamand. 309
Reed v. Warner. 147, 160
Reid, Webster v. 446
Resinger v. Cheney. 351
Respublica v. Ray. 189, 191
Rice v. State. 290
Richland County v. Lawrence Co. 21
Ridgley, People v. 191
Ritchie, United States v. 70
Roads v. Symes. 137
Robbins v. Milwaukie Railway. 399
Roberts, Coates v. 354
Robertson, Chapman v. 109, 110, 112
Robertson v. Rochford. 21
Robertson v. Smith. 460
Robinson, Mattis v. 227, 249
Roby, Commonwealth v. 367
Rochester Bank, Bartels v. 306
Rochester and Syracuse Railway, Budlong v. 399, 400
Rochford, Robertson v. 21
Rockwell v. Hubbel. 378
Rogers v. Kneeland. 352
Roland v. Grundy. 206
Root v. Shields. 26
Ross v. State. 367
Ross, Swain v. 313
Roswell v. Bank of Niagara. 274
Roswell v. Sharp. 289
Rothschild v. Currie. 109
Rouge v. Dawson. 313
Rowe, Mason v. 352
Rowley v. Bigelow. 207
Ruggles v. Keeler. 378
Russell v. Hogan. 460

S.

Saffin, Hewson v. 313, 316
Salmon, Taylor v. 147, 160
Sampson, Smiley v. 102, 103
Sands, Hildreth v. 273, 278
Saratoga Railway, Lincoln v. 400
Sater v. B. & Mt. Pl. Railway. 399
Saunders, Ogden v. 378
Sawyer, Ingersoll v. 297

	PAGE.
Schenk, The People v	12
Schmidt v. Hoyt	467
School District, Bacon v	19
Seaman v. Cook	147
Seamons, State v	367
Sears v. Cottrell	24
Semple v. Burd	468
Seymour v. Judd	114
Sharp, Roswell v	289
Sharp, Spier v	20
Shields, Root v	25
Shultze, Hurf v	311
Sill v. Covering	24
Simmon v. The Commonwealth	12
Simmons v. Carter	128
Simon v. Stuart	270
Simpson v. The State	12
Simpson, Columbus P. & J. Railway v	399
Sites v. Killer	52
Skuyler, Bruce v	378
Sloan v. The State	21
Slocum v. Pomeroy	109
Smiley, Littler v	193, 195
Smiley v. Sampson	102, 103
Smith v. Brady	306
Smith v. City of Boston	337
Smith, Cushman v	400
Smith v. Gugerty	351
Smith, Hawes v	352
Smith v. Lane	350
Smith v. Painter	292
Smith, Robertson v	460
Smith, The People v	20
Smith, Ventress v	206
Somerville Railway v. Dougherty	399
Southgate, Covington v	20, 23, 41
South Reading Railway, Upton v.	399
Spence, Watson v	275
Spier v. Sharp	20
Spurlock v. Fulks	181
Stanbury, Kelly v	311
Stanchfield v. Palmer	207
Stanley v. States	331
Stanton v. Ellis	275
Stanton, Georgia v	30
Starks v. People	352
Statham, Callan v	65, 278, 286, 287
State, Baltimore v	23
State, Rice v	290
State v. Bank of Cincinnati	317
State v. County Judges	194
State v. Cowan	21
State v. Dalton	378
State v. Deckins	367
State v. Digby	399
State, Finch v	366
State v. Gore	366
State v. Lane	366
State v. McCarty	394
State, Ross v	367
State v. Seamons	367
State v. Swarts	404
State v. Voshall	367
State Bank, Billingsly v	350
State of Iowa v. Pitts	206
State of Ohio, Gana v	191
States v. Stanley	331
Sterling, Church v	147, 160
Stewart v. The State	368
Stillwell v. Chappell	404
Stiver, Gray v	404
St. Louis v. Allen	21
Stocker, Morse v	19
Stone, Marvin v	348
Storm v. Livingston	207
Stuart, Simon v	270
Stump v. Fraley	404
Sturges v. Crowninshield	378
Sturges, Longworth v	311
Stuyvesant v. Hall	141
Stuyvesant v. Mayor	52
Supervisors, Doolittle v	337
Supervisors, Knowlton v	23
Swain v. Ross	313
Swan, Powell v	298
Swarts, State v	404
Sweet v. Jacocks	147, 160
Swift, Henderson v	306
S. W. Railroad Co., Polly v	400
Symmes, Roads v	137
Symonds v. Cincinnati	399

T.

	PAGE.
Tahann Trustees v.	21
Tarpley v. Hamer	378
Tate v. Carney	77
Tate v. Williamson	164
Taylor v. Boyd	240
Taylor v. Longworth	225
Taylor v. Porter	18, 20
Taylor v. Salmon	147, 160
Taylor, Terret v.	19
Taylor v. Williams	351, 353
Terret v. Taylor	19
The Alexandria Canal Co., City of Georgetown v.	337
The City of New York, The Sun Mutual Ins. Co. v.	195
The Commonwealth v. Cullings	12
The Commonwealth, Eaton v.	391
The Commonwealth, Prine v.	392
The Commonwealth, Simmon v.	12
The Commonwealth v. Uprichard,	12
The Dubuque & Pacific Railway, Henry v.	399, 401
The Ger. Ref. Church, Lovett v.	242
The People, Adams v.	388
The People, Chambers v.	367
The People v. Draper	21, 22
The People v. Gardner	12
The People v. Lawrence	23
The People v. Mayor of Brooklyn	19, 37
The People, McGuire v.	391
The People v. N. Y. Central R. R.	23
The People v. Power	21
The People v. Schenk	12
The People v. Smith	20
The People, Wenehamer v.	20
The People v. White	368, 369
The State v. Brown	12
The State, Berrian v.	367
The State, Cummings v.	12
The State v. Ellis	12
The State, Greencastle v.	195
The State, Hamilton v.	12
The State, McCulloch v.	23
The State, McIntyre v.	399
The State v. Mockridge	12
The State, Simpson v.	12
The State, Sloan v.	21
The State, Stewart v.	368
The Sun Mutual Ins. Co. v. The City of New York	195
The Trustees of Watertown v. Corden and Bagg	332
Thompson v. Chandler	301
Thompson, Colson v.	52
Thompson, Louisville and Nashville R. R. Co. v.	400
Thompson, Owings v.	292
Thompson v. Powles	109
Thornton, Hussey v.	206
Tiffany, Miller v.	110
Tillinghast, Dickerson v	467
Toler, Armstrong v.	110
Tousley, Ellis v.	138
Town of Gallopolis, Le Clercq v.	330, 332
Town of Lebanon v. Commissioners	330
Tredgal, Pintard v.	227
Troy & Boston Railway v. Lee	399
Troy & Boston Railway v. Northern Turnpike Co.	400
Trustees v. Tahann	21
Turner, Burghardt v.	378

U.

Unger, Morford v.	45
United States v. Arredends	70
United States, Durransean v.	90
United States v. Fisher	64
United States v. Perchman	77
United States v. Ritchie	70
Uprichard, The Commonwealth v.	12
Upton v. South Reading Railway,	399

V.

Van Allen, Pardee v.	302
Van Benthuysen v. De Witt	313
Vanhorn, Cleveland Railway v.	400
Varner, Montgomery v.	400
Varrick, Edwards v.	137

PAGE.

Ventress v. Smith 206
Vincent v. Conklin..... 354
Vincent v. Huff..... 350
Voorhees v. Bank of the U. S.... 273
Voshall, State v..... 367
Vroom v. Ditmas..... 281, 303

W.

Wade v. Paget 299
Walker v. Board of Public Works, 19
Walsh, Mowrey v..... 207
Wardell, Plype v..... 52
Warner, Barret v..... 206
Warner, Clements v..... 331
Warner, Langley v..... 242
Warner, Reed v..... 147, 160
Warner v. Webster..... 273
Warren v. Helm..... 467
Washington Ins. Co., Perkins v.. 158
Watson v. Spence..... 275
Watts v. Evans..... 52
Watts, Massie v..... 147, 160
Waumbaugh v. Gates..... 227, 241
Weaver, Hosack v..... 206
Webster v. Hoban..... 225
Webster v. Reid..... 446
Webster, Warner v..... 273
Weeks v. Milwaukie..... 21
Wells v. City of Weston..... 19, 38
Welsh, Geiger v..... 354
Welch v. Dawson..... 352
Wenehamer v. The People..... 20
Weger, Morford v.... 20, 23, 43, 46
Wertz, Denniston v..... 352
Wesley v. Noonan..... 349
Weston, Atwood v..... 352
Whall, Mercer v..... 400
Whelan v. Whelan..... 147
Wheelwright v. Depeyster..... 206
White v. Carpenter..... 138
White v. Charlotte & S. C. Railroad..... 399

PAGE

White, City of Cincinnati v..... 331
White v. Denman..... 468
White, The People v..... 368, 369
Whitehouse. Faucett v.... 147, 160
Whitman v. Boston & Maine Railway..... 399
Wilcox v. Jackson..... 75
Wilkes v. Harper..... 467
Wilkinson, Brighton v..... 21
Wilkinson v. Leland..... 19
Williams, Dequindse v..... 289
Williams v. First Presbyterian Church..... 331
Williams, Mills v..... 21
Williams. Taylor v..... 351, 353
Williamson, Tate v 164
Willis, Chester v..... 299
Willsmore, Earle v..... 206
Winona & St. Paul Railway v. Denman 399
Wiseman, Kugler v..... 175
Wood v. Jackson 240
Wood v. Oakey..... 281
Woodcock v. Bennet..... 227, 240
Woods v. Young..... 119
Woodward, Dartmouth College v. 178
Wooton, Brown v..... 128
Wright, Cutler v..... 109
Wright v. Defrees..... 23
Wright, Jewett v..... 109, 110
Wright v. Meredith..... 460
Wright v. Prescott..... 298
Wyne, Kline v..... 174, 175
Wynn, Garland v..... 68

Y.

Yates, Lyon v..... 128
Young v. Buckingham..... 326
Young, Woods v..... 119

Z.

Zebnor v. Beard..... 404

CASES

IN THE

SUPREME COURT OF NEBRASKA.

Mattis v. Robinson.

1. LANDLORD AND TENANT: *Tenant holding over.* A tenant for one year, holding over after the expiration of his term, cannot disclaim his relation, nor question his landlord's title.

2. ——: *Assailing his landlord's title.* Before he can be permitted to assail his landlord's title, he must surrender his possession, acquired under the lease.

3. ——: *Eviction or its equivalent necessary.* Wherever there is a paramount title in a third person, who has a right thereby to the possession, and it can be done without any collusion or bad faith to the lessor, the tenant, in order to prevent being expelled by the holder of that title, to whom otherwise he would be rendering himself liable as a trespasser, may yield the possession and attorn to or take from such holder of the title, a new lease, or he may abandon the possession. In neither case will he be liable to the first lessor for rent. In the former case, he may resist his first lessor's claim to the possession, by the new right thereby acquired.

4. ——: *Notice to his landlord.* In all cases, he should notify his landlord of his action.

5. ——: *Pierce* v. *Brown*, 24 *Vt.* 165, examined and overruled.

6. ——: *Buying in outstanding title.* A tenant buying in an outstanding title for the purpose of protecting his possession, shall have what he has paid and legal interest, and no more.

On the 24th of August, 1858, Russel Miller made to one Easly the note and mortgage to foreclose which this suit

was brought. Afterwards Miller died, leaving four daughters, all of whom were married — one to Robinson and one to Dowling. In 1863, Robinson made a verbal lease of the premises to Mattis, who was to pay to the four sons-in-law, in equal proportions, one-fourth of all the crops he raised on the land. This he did. The year having expired, he continued in possession. Dowling testified that he did so under an agreement made with him, for a lease for another year on the same terms as he had held the premises. But Mattis denied this. On the 16th day of September, 1864, Easly assigned the note and mortgage to Mattis for $300: the amount then due for principal and interest being some $600. Thereupon, Mattis filed his bill for foreclosure, in the District Court of the then Territory of Nebraska. The defendants, who were the four daughters and their husbands, answered alleging Mattis' tenancy, and the purchase by him, while in possession, of the mortgage, at a large discount, and that he was, under the agreement for the lease, indebted to them for a large part of the sum paid by him for the mortgage. They also filed a cross bill for an account of the products of the premises, and to have the value of their portion thereof set off, against what he had paid for the note and mortgage.

The cause was heard upon pleadings and proofs before the Honorable WILLIAM F. LOCKWOOD, then one of the judges of the Territory, who rendered a decree of foreclosure for the full amount due on the mortgage. The defendants appealed to the Supreme Court of the Territory. On the admission of the State into the Union, the cause was removed into this court.

J. M. Woolworth, for the appellants.

A. J. Poppleton, contra.

CROUNSE, J.

At the time of the purchase of the mortgage by Mattis, he was in possession of the premises as tenant of the heirs of the mortgagor, Miller. He entered as such in March, 1863, under an express parol lease made with Robinson, a husband of one of Miller's daughters, paying rent to Robinson and the other sons-in-law; and whether a new lease was made with Dowling, another of the sons-in-law, for the year 1864, or not, his relation is established in law as tenant by his holding over after the expiration of his first year, and he cannot be permitted now to disclaim it. How far then does this relation impair the right of Mattis to take an assignment of the mortgage and assert it against his lessors while the tenancy exists? It is an old and familiar rule of law that the tenant shall not be allowed to question the title of his landlord. At common law this estoppel did not exist unless the lease were by deed indented, when it arose from the indenture and not from the tenancy.—*Lit. Sect.* 58; *Co. Lit.*, 47 *b.* But in this country the rule prevails as a part of the law of landlord and tenant, whether the tenancy be created by indentures or otherwise, being founded on equitable rather than on legal grounds. The policy of the law will not allow a tenant to be guilty of a breach of good faith, in denying a title, by acknowledging and acting under which he originally obtained, and has been permitted to hold possession of the premises. The lessee obtaining possession under a lease is estopped from keeping the land in violation of the agreement under which it was acquired. The result of allowing a tenant to deny the title of his landlord is well illustrated in 2 *Smith's Leading Cases, p.* 657: "It is well known that a recovery cannot be had in ejectment, without proof of title, and that it may be defeated, by proving an outstanding title in a third person. For a tenant, therefore, to be permitted to question or contest his landlord's title in an action of ejectment for the land,

would be to take the estate from the latter, and confer it on the former, whenever there was a defect, either in the title itself or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property, even when they were unable to use it themselves." Good faith requires that the tenant shall not avail himself of the advantage given by his possession as against his landlord.

Before assailing his landlord's title, he must put him in as good position as he was before the tenancy, by delivering up to him the possession.

There are numerous instances, however, where the tenant has been allowed to question his landlord's title, but an examination of the cases will show that they are reconcilable with the reason and policy of the rule, laid down above. Thus if the tenant has been evicted in an action of ejectment, or yields to such a judgment without actual eviction, he may take a new lease from the plaintiff in ejectment, and thereupon resist the claim of the first lessor, provided he had notice of the pendency of such ejectment suit.—*Foster* v. *Morris*, 3 *A. K. Marshall*, 609. Or if a tenant of a mortgagor, he may show that the mortgagee has gained possession, and given the lessee notice to pay him the rent.—*Jones* v. *Clark*, 20 *Johns.* 51. Or that he yielded to a mortgagee claiming under a mortgage prior to his lease, and paid him rent.—*Kimball* v. *Lockwood*, 6 *R. I.* 138. By these cases it will be seen that where the tenant has been evicted, or to protect his possession as against him who has a paramount title, he will be permitted to dispute his lessor's title. Without reviewing more of the numerous authorities on this point, I may cite *Washburn*, who, in his work on *Real Property*, states the law, in my opinion correctly. The result of the numerous cases may, perhaps be summed up in the proposition, that whenever there is a paramount

title in a third person, who has a right thereby to the possession of the premises, and it can be done *without any collusion*, or bad faith to the lessor the tenant, in order to *prevent being expelled* by the holder of that title, to whom otherwise he would be rendering himself liable as a trespasser, the tenant may yield the possession and attorn to or take from such holder of the title a new lease, or he may abandon possession. In either case, he will not thereafter be liable to pay rent to the original lessor, and may resist the first lessor's claim to recover possession, by virtue of the new right thereby acquired. But it seems that he ought, in all these cases, to give notice to the lessor of his abandoning or holding adverse possession, that he may not take advantage of the confidence reposed in him by the lessor in putting him into possession of the estate, to deprive him of any rights which the lessor had thereby yielded to his keeping. If, therefore, he were to purchase a better title than that of his landlord, he ought, nevertheless, to surrender possession to his lessor before he seeks to avail himself of his new title against his landlord.—1 *Wash. Real Prop.* 361; *Browser* v. *Browser*, 10 *Humph.* 49; *Lawrence* v. *Miller*, 1 *Sandf.* 516.

Mattis having by notice advised his lessors of the purchase of the mortgage by him, and disclaimed holding any longer as their tenant, it is claimed by his counsel that the tenancy thereby ceased, and he was at liberty to assert his mortgage against them without delivering up possession of the premises. In support of this the case of *Pierce* v. *Brown*, 24 *Vt.* 165 is relied upon. It is true that that case goes to the full extent claimed. The court there says in a case where the facts are quite similar to those in the case under consideration here, "We have no doubt that if the plaintiff first entered into possession of these premises under the mortgagor, as his tenant, still, he may repudiate the tenancy by purchasing the mortgage as being an older

and better title, and protect himself in his possession of the premises, from any claims of his former landlord. And whenever by purchasing such title he is entitled to the right of possession, it would be an idle ceremony to require the tenant to surrender up his property, and then resort to his action of ejectment, when its only effect can be, to put the plaintiff in the same situation he now occupies."

I concede that when in good faith the purchase is made to protect the lessee in his possession as against the mortgagee, he may purchase the mortgage and allege it against his lessors; but to the extent that a tenant should be warranted like any third person in buying in titles, without surrendering possession of the lands, asserting them against his landlord, I must dissent from that case. It is in violation of the policy of the law and not sustained by the authorities. In support of its conclusion the Court in that case cite that of *Greene* v. *Munson*, 9 *Vt. R.* 37, where it is laid down that "where the tenant notifies his landlord that he shall no longer hold under him, the relation ceases. The possession has become adverse, and the statute of limitations begins to run." This may be true, but still not warrant the conclusion announced above. The tenant by such notice has committed such dissension as to warrant the lessor to treat him as a trespasser, if he so elect.—3 *Peters*, 49. For the purpose of fixing the period from which the statute of limitations would run, such holding has been regarded as adverse. But for other purposes the principle of repudiating a tenancy without first surrendering possession, does not apply. One party cannot of his own volition terminate a contract while he continues in the use and occupation of that for which he promised to make compensation. Mattis having purchased the mortgage while he was in as a tenant, it must be presumed he did it for the only purpose permitted by the law to protect his possession.

What he may have paid for the mortgage (when the

amount does not exceed what was justly due thereon) with lawful interest thereon should only be allowed him. The court below erred, therefore, in allowing Mattis to allege the mortgage against his lessors for its face and the exhorbitant rate of sixty per cent. interest while he purchased it at the legal rate, ten per cent.

An account should have been taken and the rents allowed down to the time of the sale of the mortgaged premises.

For these reasons the decree should be reversed and the case remitted to the court below, and a new decree entered in accordance with the views expressed above.

The City of Brownville v. Middleton.

PRACTICE: *A petition in error* must be filed with the transcript of the record of the District Court, and before the summons in error is issued, in order to give the Supreme Court jurisdiction.

The District Court for Nemaha county had rendered judgment against the plaintiff. It caused to be filed with the clerk of the Supreme Court a transcript of the record of the District Court, and also caused a summons in error to be issued and served. But it did not file any petition in error.

Section 584 of the Code provides that "The proceedings to obtain such reversal, vacation or modification, (of a judgment,) shall be by petition, to be entitled petition-in-error, filed in a court having power to make such reversal, vacation or modification; setting forth the errors complained of, and thereupon a summons shall issue and be served," &c.

Section 586 provides, "that the plaintiff shall file with his petition a transcript of the proceedings," &c.

J. M. Woolworth, for the city, moved for leave to file a petition, now, as of the date of the filing of the transcript.

Redick & Briggs, for Middleton, moved to dismiss the summons in error.

The Court, by LAKE, J., held that the Supreme Court obtained jurisdiction to review a judgment at law rendered by the District Court, only by the petition in error. That must be filed with the transcript, and before the summons issued. Until it was filed, there was no authority for issuing the summons, and the writ was void. It could not be filed afterwards, so as to retain the summons in error which had already been issued and served. The motion to file the petition now as of the date of filing the transcript is denied, and the motion to dismiss the summons is sustained.

Cause dismissed.

The People v. Loughridge.

LARCENY. The bringing into this State, by the thief, of goods stolen in another State, is not larceny.

This was a writ of error to the District Court for Douglas county. The facts are fully stated in the opinion.

J. W. Savage, for Loughridge.

G. W. Doan, District Attorney, contra.

CROUNSE, J.

The plaintiff in error, Charles Loughridge was tried at the October term of the District Court for Douglas county, upon an indictment charging that, on the 30th day of August, 1867, in the county of Douglas, State of Nebraska, he did steal, &c., a pocketbook and other property to the amount of about five hundred dollars. The evidence shows that the property in question was taken from one Hanson, at St. Johns, in the State of Iowa, and found in the possession of Loughridge a few days subsequently at Omaha, in Douglas county, in this State. The judge, in effect charged the jury that if they found that the prisoner feloniously took the property in the State of Iowa, and escaped into this State, and was found in possession of it, in Douglas county, they might find him guilty under the indictment. The jury returned a verdict of guilty. Motions were made for a new trial and in arrest of judgment, which were overruled; and the case is brought here on alleged error lying chiefly in the charge to the jury. Whether an indictment for larceny can be supported, where property is originally stolen in one of the United States, and carried into another State, where the thief is arrested and prosecuted, is a question upon which the cases are in

conflict. In Massachusetts, *The Commonwealth* v. *Cullings*, 1 *Mass.* 116; Connecticut, *The State* v. *Ellis*, 3 *Conn.* 185; Vermont, *The State* v. *Mockridge*; Ohio, *Hamilton* v. *The State*, 11 *Ohio*, 435; and Maryland, *Cummings* v. *The State*, 1 *Har. & John.* 140, such indictments have been sustained. In New York, *The People* v. *Gardner*, 2 *John.* 477, *The People* v. *Schenk*, 2 *John.* 479; Pennsylvania, *Simmon* v. *The Commonwealth*, 5 *Binney*, 617; Tennessee, *Simpson* v. *The State*, 4 *Humph.* 456, and North Carolina, *The State* v. *Brown*, 1 *Harvy*, 100, the contrary doctrine has prevailed. The force of the Massachusetts cases however holding as above, is very much shaken by the opinion of Ch. J. SHAW in the much more recent case of *The Commonwealth* v. *Uprichard*, 3 *Gray's R.* 434, where he holds that stealing goods in one of the British Provinces and bringing them into Massachusetts, will not support an indictment in that State. I can discover no reason applying in that case which does not obtain in case of an indictment found in one State where the goods are brought from one into another. The different States are altogether as independent of each other in point of jurisdiction as any two nations.

No case sustaining an indictment under such circumstances asserts the rights of courts of one State to entertain jurisdiction of cases where crimes were committed in other States; but they all proceed upon the assumption that the possession in the thief amounts to a larceny in every county into which he carries the goods, because the legal possession remains in the true owner, and therefore every moment's continuance of the felony amounts to a new caption and asportation. There is considerable subtlety in this principle, and it was, no doubt, suggested for the convenience of trying felons in the county where they might be taken with the goods, and to avoid their escaping punishment by fleeing from one State or locality into another.

No legislator in defining larceny, and affixing a penalty to the offence, ever contemplated such an interpretation. To allow this interpretation to hold in the case of different counties of the same State may with safety be permitted. Here the accused may have compulsory process for his witnesses, and a conviction in one county will be a bar to that in another. To extend its application to States, is to attach to the crime of larceny, penalties uncertain in their character, possibly greatly incommensurate with the offence committed, and such as do not attend any other crime. Conviction in one State is no bar to a conviction in another. For larceny committed in the State of Missouri, the thief bringing the goods here by way of Iowa, may be first tried here, under this doctrine, and sentenced for ten years; the same in Iowa, and lastly convicted and sentenced in Missouri. So from the fear that the thief might escape justice altogether, we find a warrant to inflict upon him a triple penalty. I should prefer the ultimate escape of now and then a culprit, than assume jurisdiction upon a theory which to me seems based on a fiction rather than on a clear and positive principle of law. The Constitution of the United States has provided for cases where offenders fly from the State where the offence is committed. Wherever he is found he may be secured, and sent to that State for trial from which he has fled, on demand of the executive thereof. Under this provision escape out of a State, while it may involve some inconvenience, need not defeat justice. If the legislature of this State like that of some of the States, chooses to make the possession of stolen goods an offence, it would be proper for it to do so. I am of the opinion, therefore, that the judgment of the court below, should be reversed and the prisoner discharged.

Judgment reversed.

Porter v. The Chicago and Northwestern Railway Company.

1. *Service of summons on agent of a corporation.* An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the 75th section of the Code, upon whom a summons may be served. It is immaterial where he resides.

2. *Appearance.* A defendant may appear specially to object to the jurisdiction of the court, either over his person or the subject matter of the suit, without waiving his right to be heard on these questions in bank. *Per* MASON, Ch. J.

3. ——. But if he seek to call into action any power of the court except on the question of its jurisdiction, his appearance is general.

Porter sued the Chicago and Northwestern Railway Company in the District Court for Douglas county. The summons was returned served by leaving a certified copy thereof with "W. B. Strong, the general managing agent of the defendant, at their usual place of doing business in the county of Douglas, State of Nebraska." The defendant appeared specially, and by motion objected to the service alleging that Strong was not a managing agent within the meaning of the statute. The motion was supported by an affidavit made by Strong, in which he says that he is superintendent of the offices of the defendant at Council Bluffs, in Iowa, and at Omaha; that its railroad terminates at Council Bluffs, and does not extend into this State; that it runs passenger and freight trains from Council Bluffs to Omaha over the track and bridge of the Union Pacific Railroad Company, and has a ticket and freight office at Omaha, and has no other office or place of business within this State. The principal office of the defendant for transacting and keeping a record of the business done at its office in Omaha was kept at Council Bluffs. The local agent at Omaha reports to the Council Bluffs' office. His only duties in connection with the Omaha

office is occasionally, and for a few hours, to visit it, and confer when necessary, with its agent. He has no agency for the defendant except at the two places named. He resides at Council Bluffs, and never resided in Nebraska. The defendant is a foreign corporation.

The court overruled the motion, and gave judgment for the plaintiff.

E. Wakely, for plaintiff in error.

J. I. Redick, for defendant in error.

Mason, Ch. J.

The defendant transacts all its business in this State, at its office in Omaha. The person served with this summons is superintendent of this office, as well as of that at Council Bluffs. He has the general direction and management of its business at the former office. An agent who is invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent, within the meaning of the 75th section of the Code, which authorizes service of summons on a managing agent of a foreign corporation, and it is immaterial where he resides.

It is not necessary to decide here whether the appearance entered by the defendant was such as to give the court jurisdiction, if the service was insufficient. I think a defendant may appear specially to object to the jurisdiction of the court, either over his person or the subject matter of the suit, without waiving his right to be heard on the question in bank. But if, by motion or by any other form of application to the court, he seek to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally. Such application concedes a cause over which the court has power to act. The judgment must be affirmed.

Judgment affirmed.

Bradshaw v. The City of Omaha.

1. JURISDICTION OVER CONSTITUTIONAL QUESTIONS. The courts have no jurisdiction of matters which are committed to the discretion of the legislature.

2. ——. Nor may they declare an act unconstitutional, because the legislature in passing it, was influenced by unworthy motives.

3. ——: *Municipal corporations.* The legislature may increase or restrict the powers, extend or contract the limits, of cities, and the courts cannot interfere.

4. ——: *Municipal taxes.* The courts have jurisdiction to inquire and determine whether lands brought by the legislature within the limits of a city, are justly subjected to taxes levied by it for its support; because that is a question of property and private right.

5. TAXATION: *Constitutional provisions.* There is in the constitution of Nebraska no express provision, limiting the legislative power of imposing, or distributing, or enforcing taxes.

6. ——: ——. By the general provisions thereof the exercise of that power when unjustly exercised, may be restrained.

7. ——: *City and State.* Whether a city can be authorized to tax property not justly subject thereto, is a question very different from that of the validity of State taxes:

   1. The relations of the citizen to the State and to a particular city, are different.

   2. All citizens are compensated for what, in the form of taxes, they pay to support the State. This may not be true of taxes levied and exacted by a city.

   3. State taxes are levied for political, city taxes for administrative purposes.

8 ——: *Compensation.* The constitutional provision that private property shall not be taken for public use without just compensation, implies that it shall not be taken for private use at all; either with, or without compensation. This is the same as the axiom of natural justice, that the State shall not take A's property, and give it to B.

9 ——: *City.* The nature of the act of taking one man's property and giving it to another, is not modified by the circumstance, that the party to whom it is given is a city.

10. ——: *Public object.* When a city seeks to take private property for its use, whether under the form of taxes or otherwise, the object for which it is taken must be a matter of public advantage.

11. ——: *Tests.* If lands have been divided into town lots, and purchasers of small parcels have been invited to settle thereon, if the owner has done any affirmative act inducing the corporate authorities to treat them as town property, or if town settlements have approached near to them, so that their enjoyment in peace and good order demands the police regulations of a city, they are justly liable to municipal taxation.

12. ——: ——. If the owner has done no act, such as laying his lands off into lots, or asking for city grades, or to have streets opened to his lands, if he retains them in a large body, if they are half a mile from the settled part of the town, and no streets are or need to be opened for the use of owners of adjoining lots, occupied as town property, and their quiet enjoyment does not require a city police, then legislation subjecting them to city taxation, is unconstitutional and void.

The appellant filed his petition in the District Court for Douglas county, against the City of Omaha and Hahn, county treasurer, and alleged therein the following facts:

That he was, and for three years had been, seized of a quarter section of land; that part of the land included within the limits of the city was used for agricultural purposes merely, and that the town site laid off into lots was much larger than was now, or was likely to be, required for city purposes; that the plaintiff's land was two miles from the settled part of the town, and was one mile from any lands settled, improved, or occupied as town lots; that it is vacant and has never been divided, and he does not intend to divide it, into lots for town purposes; that such an enterprise would be impracticable, because it is distant from the city, and surrounded by lands which are vacant or only used for agricultural purposes; that by an act of the Legislature of the late Territory it had been included within the limits of said city; that he did not know of the passage nor of the application for said act, until three months before filing his petition; that the act

was passed for the sole purpose of subjecting the lands to the burdens of city taxation, and to reduce the city taxation on property previously within its limits, by compelling the plaintiff and others similarly situated to share the same, and that the peace or good order or prosperity of the city did not require that the lands should be brought under its municipal control; that the city assessor has assessed the said plaintiff's said quarter section of land, as city property, and for the expenses of its government, at the rate of forty dollars per acre; and the same are included in the levy of taxes, by said city, for said purposes; that the said defendant Hahn, as treasurer of the county, has advertised the same for sale, for the purpose of raising the sum so assessed and levied thereon, and unless restrained by the injunction of the court, will, in his official capacity, sell the same for said purpose.

The prayer of the petition is for an injunction, and that it be, by the judgment of the court, declared that said lands are not liable for the said taxes.

To this petition the defendants demurred generally. The demurrer was sustained, and the petition dismissed. To reverse this judgment this cause is brought to this court.

J. M. Woolworth, for the appellant.

I. The act is obnoxious to the objection of taking A's property and conferring it upon B; which is violative of the principles of natural justice.

1. This objection, if well founded in fact, is fatal, although it has not the sanction of constitutional provisions.—*Vattel, C.* 4, *sec.* 45–6; *C.* 1, *ch.* 4, *sec.* 51; 1 *Kent's Comm.* 600*; 1 *Black. Comm.* 41* *and* 91*; *Sen. Tracey, in Bloodgood* v. *Mohawk R.*, 18 *Wend.* 56; *Taylor* v. *Porter*, 4 *Hill*, 146; *Gardner* v. *Newberg*, 2

John. Ch. 162; *Mr. Justice* CHASE, *in Calder* v. *Bull* 3 *Dall.* 386; *Wilkinson* v. *Leland*, 2 *Peters*, 654; *Terrett* v. *Taylor*, 9 *Cranch*, 43.

2. Unless the rule be changed, either by the character of the parties, or by the nature of the proceeding, the objection is well founded in fact; for the allegation in the petition is, that the sole object of the statute and of the proceeding, is to compel the owners of lands not within the benefit of the municipal government, to divide the expenses of supporting it with those who have need of it.

3. The fact that the party for whose benefit the property is taken is a city, does not affect the case.—*In re Albany Street*, 11 *Wend.* 149; *In re John Street*, 19 *Wend.* 659; *Morse* v. *Stocker*, 1 *Allen*, 150; *Bacon* v. *School District*, 97 *Mass.* 421.

4. Nor is the case affected by the fact that the oppression is exercised under the name of taxation.

a. Taxation is a taking of private property for public use, and is justified only by returning for the money thereby taken, the compensation of the benefits of government.—*The People* v. *The Mayor of Brooklyn*, 4 *Coms.* 419; *Morse* v. *Stocker*, 1 *Allen*, 159.

b. The nature of the act is not changed by giving it a name which sounds as if it were lawful.—*Walker* v. *Board of Public Works*, 16 *Ohio*, 540; *Mays* v. *Cincinnati*, 1 *Ohio St.* 268; *Wells* v. *City of Weston*, 22 *Mis.* 384.

II. The act is obnoxious to the further objection that it takes the plaintiff's property, without due process of law.

1. This principle of individual liberty, although not expressly saved to the people by a special provision in our constitution, must be taken as one of those rights which are retained by the general terms of section twenty of the declaration of rights; for it has always been a fundamental doctrine of English liberty.—2 *Sullivan's Lec.* 243, *et pass*; *Gardner* v. *Newbergh*, 2 *John. Ch.* 162.

2. The act confiscates the property of the plaintiff, for the benefit of the citizens and owners of property, within the just limits of the city.—*The People* v. *Smith*, 21 N. Y. 595; *Wenehamer* v. *The People*, 3 *Kern.* 390; *Taylor* v. *Porter*, 4 *Hill*, 140; *Holden* v. *James*, 11 *Mass.* 396.

III. The act infringes the provision of the constitution, which forbids the taking of private property for public use, without just compensation.—*Cheany* v. *Hooser*, 9 *B. Mon.* 330; *Covington* v. *Southgate*, 15 *Id.* 491; *Morford* v. *Weger*, 8 *Iowa*, 82; *Langworthy* v. *Dubuque*, 13 *Id.* 86; *S. C.* 16 *Id.* 271; *Fulton* v. *Davenport*, 17 *Id.* 404.

IV. The act, when taken by itself, does not authorize the taxation of the plaintiff's lands. That power is claimed from the other provisions of the charter, which, as is assumed, are extended over them. The mischiefs complained of are, therefore, collateral consequences of the act, which it is reasonable to suppose were not in the view of the legislature. The statute should be construed so as to avoid these mischiefs.—1 *Blackstone's Comm.* 91*; *Co. Litt.* 360; *Beatty* v. *Knowler*, 4 *Peters*, 152; *Sharp* v. *Spier*, 4 *Hill*, 76.

G. W. Ambrose, contra.

I. The first thing that strikes one on the examination of this petition, is the manifest impropriety in the court entertaining the question it presents.

No principle is better settled than that the legislature of a State has complete authority to amend charters of municipal incorporations, enlarge or diminish their powers, extend or limit their boundaries, consolidate two or more into one, over-rule their action whenever it is deemed unwise, impolitic, or unjust, and even to abolish them altogether in the legislative discretion. The authorities on this subject are so numerous, and the cases in which this doctrine has been

declared are so various in character and so familiar, that it seems almost unnecessary to refer to the following, which are some of them :—*Coles* v. *Madison County*, *Breese's R.* 115 ; *Richland County* v. *Lawrence County*, 12 *Ill.* 1 ; *Trustees of Schools* v. *Tahann*, 13 *Ill.* 27 ; *Robertson* v. *Rochford*, 21 *Ill.* 451 ; *People* v. *Power*, 25 *Ill.* 187 ; *Harrison Justices* v. *Holland*, 3 *Grattan*, 247 ; *Brighton* v. *Wilkinson*, 2 *Allen*, 27 ; *Sloan* v. *State*, 8 *Blackford*, 361 ; *Mills* v. *Williams*, 11 *Iredell*, 558 ; *Weeks* v. *Milwaukee*, 10 *Wis.* 242 ; *People* v. *Draper*, 15 *N. Y.* 532 ; *Aspinwall* v. *Commissioners*, 22 *How.* 364 ; *St. Louis* v. *Allen*, 13 *Mis.* 400 ; *State* v. *Cowan*, 29 *Mis.* 330.

If this principle is correct, then clearly the question of extending the boundaries of a city is a question of legislative discretion, to be determined upon a view of all such considerations of policy as have a bearing upon it, and with reference to the probable growth of the city, as well as of its present needs. The city bounds can never be confined to the precise limits occupied for urban purposes on the day its charter is passed; but the legislature looking to the future with wise foresight will be expected in our rapidly growing country to provide to-day for the wants of to-morrow, and to so frame their charters of incorporation as to bring within their influence all that territory that feels the benefit of city government in enhanced prices, and that, in the opinion of the legislature, is so distinctly pointed out for speedy occupation for city purposes, as to justify its being included.

And if the question is one of legislative discretion, no argument can be required to prove that the courts can have no jurisdiction over it. A court might with the same propriety review and set aside the legislative action in levying or refusing to levy a particular State tax; in paying or refusing to pay a State debt; in providing or refusing to provide bounties to soldiers ; in passing or refusing to pass

a militia law, or on any other subject involving questions of policy, and where the legislature is to act upon its own judgment of what is proper, just and expedient. It is easy in any of these cases for an individual to charge the legislature with having acted improperly and from wrong motives; and if the courts can enter upon a consideration of such questions, they may easily draw within their jurisdiction the whole legislative power of the State, and set aside the laws from their own views of the facts, when they find themselves differing with the legislature as to what is proper, just and politic. One coördinate department of the government would thus be made subordinate to another, which would exercise a supervisory power, limited only by its own discretion.

II. If the act extending the bounds of the city was passed by the legislature from proper and correct motives, and from proper regard to the growth and wants of the city, then it is plain that the courts cannot disregard or limit it. The petitioner seems to concede this by his petition, but he attacks the law on the ground that it "was passed for the sole purpose, by bringing said lands within said city, to subject the same to the burdens of the taxation of said city." In other words, the law is assailed by assailing the motives of those who passed it.

We deny the authority of any court to enter upon such a question. No court has a right to assume that the legislative motives have been other than proper and patriotic. "The courts cannot impute to the legislature any other than public motives for their acts."—*People* v. *Draper*, 15 *N. Y.* 545, *per* DENIO *Ch. J.*

"We are not made judges of the motives of the legislature, and the court will not usurp the inquisitorial office of inquiring into the *bona fides* of that body in discharging its duties."—*S. C. page* 555, *per* SHANKLAND, J.

"If this may be done, we may also inquire by what

motives the Executive is induced to approve a bill or withhold his approval, and in case of withholding it corruptly, by our mandate compel its approval. To institute the proposed inquiry would be a direct attack upon the independence of the legislature, and a usurpation of power subversive of the constitution."—*Wright* v. *Defrees*, 8 *Ind.* 302.

The following cases are to the same effect: *Baltimore* v. *State*, 15 *Md.* 376; *People* v. *Lawrence*, 36 *Barb.* 193; *People* v. *N. Y. Central R. R. Co.*, 34 *Barb.* 137; *McCulloch.* v. *State*, 11 *Ind.* 431.

III. No judicial decisions which have ever been made will sanction the granting of relief to the petitioner, except certain cases in Kentucky and Iowa.—*Covington* v. *Southgate*, 15 *B. Monroe*, 491; *Morford* v. *Weger*, 8 *Iowa*, 82.

These cases are unquestionably in point, and in them the courts have assumed to enter upon inquiries of fact, in order to determine whether the bounds of a city ought to have been extended so as to include certain lands, and if their judgment decided the question in the negative, they have restrained the collection of city taxes from such lands on the ground that the legislature must have included them from improper motives. Of these cases we say:

1. They have no basis in principle, but they lead necessarily to a usurpation by the courts of discretionary legislative power.

2. Inasmuch as they undertake to declare that a part of the lands in a city shall not be subject to city taxes, they prevent that uniformity of apportionment which is absolutely essential in every taxing district, and they are directly opposed to those cases in which it has been held that even the legislature cannot establish different rules of liability for the taxation of property within the same municipal corporation.—*See Knowlton* v. *Supervisors, &c.*, 9 *Wisconsin*, 419.

3. The courts, in those cases, have departed from well settled landmarks, and have gone into inquiries where all is necessarily vague, conjectural, and uncertain, and in substance have exercised an appellate supervisory power over the legislature, upon a view, not of the law, but of the facts. They have assumed to say that the facts did not warrant the legislative action upon a subject clearly within its discretion; and in effect they have decided that the courts, and not the legislature, may determine when the public needs demand the extension of city limits. With great respect for those courts, we are forced to conclude, that either they have mistaken the true boundary between legislative and judicial power, or, if they have not, then that the power to grant and amend city charters should rest exclusively with the courts, and petitions for that purpose should be addressed to them rather than to the legislature.

IV. When the legislature clearly oversteps the bounds of their constitutional authority, and the conflict between their act and the constitution is beyond reasonable doubt, a court may declare the act unconstitutional and void. Here is safe ground for the courts to stand upon, and in such a case their duty is plain. But unless the conflict is clear, the duty is equally plain to enforce the law.—*Sill* v. *Covering*, 15 *N. Y.* 531; *Sears* v. *Cottrell*, 5 *Mich.* 251,

The courts are the guardians of the constitution, but they are not the guardians of the legislative conscience, discretion or judgment. They annul unconstitutional laws by enforcing the higher and paramount law which the Legislature has disregarded. But except so far as the will of the people is declared in that higher and paramount law, the complete law-making power of the State is vested in the legislature, and its will, when expressed in due form, is as much binding upon the courts as upon private citizens. The people have not attempted by their consti-

tution to limit the legislative authority in respect to the bounds which shall circumscribe their municipal incorporations. If the people have set no limit the courts can set none. And it is respectfully submitted that in undertaking to do so the courts venture upon ground which is doubly dangerous:

1. Because it is setting the courts over the legislature in a matter of mere legislative discretion.

2. Because in doing so they are compelled to charge the legislature with improper and discreditable motives. And thus they necessarily invite collision and unseemly conflict with a coördinate department of the government.

I have given to this case this somewhat extended examination, from the fact that it was a test case, involving questions the decision of which will be the governing rule in all future legislative action in the State. And with the submission of these views, I would ask that the judgment of the court below be affirmed.

MASON, Ch. J.

The city of Omaha was incorporated in 1857. By the act of incorporation more than three thousand acres were included within its limits. The charter has been amended at almost every session of the legislature since; some times the boundaries of the city have been extended, and sometimes contracted.

At the last session of the territorial legislature, the last amendment was made. Before that amendatory act was passed, the city limits on the north were, a mile beyond lands laid off into lots. On the other side, the distance was not so great, but it was very considerable.

This legislation has been very mischievous; lands included within the limits of an incorporated city are not subject to entry under the preëmption law of 1841.—*Root* v.

Shields, Mr. Justice Miller's Decisions, 334. Until 1859, title in fee could be acquired to any portion of the public land in Nebraska, except under that law. A great many shifts were resorted to, to avoid its stringent provisions. The exclusion of lands within a city from its privileges was disregarded by parties and by the land department of the government. Consequently numerous and most serious litigations have sprung up. Besides that, a speculative character has been given to these lands, because, within the city limits they have been held at very high prices. They have not generally been cultivated as farms — the only purpose to which they could be applied, for many years. These remarks are true of many other cities in Nebraska.

The last legislative act amends the charter of the city only in its first section, which defines the boundaries of the corporation. By it, the boundaries are extended beyond the former lines, on the north, half a mile, on the west, a mile, and on the south, from a half a mile to a mile. An area of over twenty-five hundred acres is thus added to the former very extended city jurisdiction.

An explanation of this very extraordinary measure may be found in the fact perhaps, that at the same session of the legislature, the city was authorized to aid the building of the bridge over the Missouri by the Union Pacific railroad, to the extent of $100,000, and has contracted other large debts, in securing the valuable railroad connections, which have lately stimulated its growth to a city of the first class.

It is charged in the petition in this cause, that the amendment was made in order to lighten from the shoulders of people living within the city proper, the burden of the taxation which will be necessary to pay these debts and the interest on them, by dividing it with those who live or own land beyond the former corporate limits. And the charge seems to be justified, because admitted by the demurrer.

This action was brought to restrain by injunction, the

authorities from selling the plaintiff's lands for non-payment of taxes levied by the city, and to have it declared by the judgment of the court, that these lands are not liable to be taxed by the city. To the bill a general demurrer is filed. The land thus sought to be protected, lies two miles from the settled part of the town, and one mile from any lands improved or occupied as, or laid off into town lots. The lands adjoining it are either vacant, or are used for agricultural purposes only. Between it and the city, lies a whole quarter section undivided and cultivated as a farm. A cemetery adjoins a part of it on the south, and also the large farm of Jesse Lowe. On the east is a tract of many hundred acres almost entirely unoccupied, and whatever improvements there are, are agricultural in their character If any land can be protected from city taxation, it would seem as if this should be. The plaintiff is entitled to the relief he seeks if the court can grant it. It is insisted that we have not the power to grant it, because, it is said, the taxing power is in our government, committed exclusively to the discretion of the legislature, and this defense is put forward as a question of the jurisdiction of the court.

Questions of this nature always require the first attention.

It is to be observed, at the outset, that there is no provision in our constitution which in terms limits the legislative power of imposing, or distributing or enforcing taxes. I speak of provisions aimed directly at this power. In the constitutions of most of the States, express provisions on this subject will be found; as, for instance, that the levy of taxes shall be uniform, that the property of non-residents shall not be taxed higher than the property of residents, &c. We have no such clauses in our constitution. But, as we shall see hereafter, we have some general provisions, under the protection of which, the taxing as well as any other power of the legislative or executive branches of the government, may be restrained.

Another observation: the case before us presents the question of the power of the legislature, to authorize a municipality to tax for its purposes any and all property, whether justly within its territorial limits or not; which is very different from the question of such power, when exerted by the State for State or general purposes. The relation of the citizen to the State and to a particular city are very different.

Of the former he is a member both rightfully and legally. He owes to it certain high and sacred duties, not the least of which is contributing to its support. Of the latter he may not be a member, he may owe to it no duties, he may derive from it no benefits.

To illustrate: suppose the city of Omaha were by its proper authorities to determine to build a sewer on one of its streets; its citizens would be interested in and benefited by this work and would be justly required to pay for it. But would it be right to require a farmer, living ten or five, or even two miles from the city, to share the burden of this expense with those who justly should pay for it? Obviously not. On the other hand, suppose the State should determine to build a road through some section, remote from some other, and attempt to raise the money for defraying the expense by taxing all parts alike. This would not be unjust. By opening up, improving, developing one district of country, drawing in settlers, planting farms, building schools, churches, homes, nursing commerce, and fostering, rearing, extending communities, the State and every district of the State is benefited, and every citizen is benefited. It is by the aiding of one section at a time, by developing it, by building it up, that the State grows to that great majestic, glorious stature, which sheds its lustre on every citizen, and fills his breast with pride, no matter how humble he may be.

In a word, a city's taxes are for local, a State's for general

purposes. Of the one, a man may or may not be, of the other, he must be a member. The improvements of one may or may not, those of the other must measurably benefit him.

Extreme cases may be stated on the one hand and on the other. The supposed instances may come so near together that the distinction may be without a difference. But it is not the duty of the courts to lay down exact rules to which every case must be brought. It never attempts to lay down more than general rules, which are flexible in their just application to particular cases.

The distinction which is pointed out above, applies to the power or propriety of the court interfering with what the counsel call "legislative discretion," when conferring taxing power for the benefit of the State, and when conferring them for the benefit of a city. In the former case, in almost every instance, the exercise of the taxing power is political, but in the latter it is purely administrative in almost every instance. I can only point out these obvious distinctions, without following them out or illustrating them at length. The fallacy of the argument of the learned counsel for the city, consists in laying down what he deems just considerations as to the jurisdiction of the court, and then applying them to an entirely different subject of municipal taxation.

The question is then narrowed down to this: Can a legislature authorize a city to tax for its support, lands not reasonably to be considered city property?

We are able to go along with the counsel for the city in many of his positions. We think with him that the legislature has exclusive authority to amend the charter of municipal corporations, enlarge or diminish their power, extend or limit their boundaries or even to abolish them altogether. And this may be done with a view to the future, as well as to the present wants of the city. So too,

we agree with him if the question is purely one of legislative discretion, the court has no jurisdiction over it and that we cannot declare a law unconstitutional from any regard to the motives which influenced the legislature in passing it. But this does carry us one step towards the point he must reach, to maintain his proposition. The legislature may very well be vested with exclusive power to determine whether a municipal goverment is needed, to aid in maintaining the public order, over lands which are not justly taxable for the maintenance of such a goverment. And as that question is not one of property or private right, with which alone the court can deal, it will not meddle with it.—*Georgia* v. *Stanton*, 6 *Wallace*, 50.

But it is a question of property and private rights, whether such lands should bear a burden or a share of a burden, for another's benefit. And therefore it may be a question for the determination of the court.

But we may, and we are bound in determining the constitutionality of a law, to examine all enactments bearing on the question; and if in so doing we discover that their effect, all taken together, is unjust, and oppressive, and violative of some principle of the constitution, we are bound to raise the shield of that fundamental charter over the otherwise prostrate and powerless citizen. While we shall always thus interfere with hesitation, and only with any act which the legislature may pass when our way is clear before us, we shall not consciously fail in this our highest and most sacred duty.

Of course it is admitted that if the legislature pass an act which takes private property for public use, without just compensation, it is unconstitutional, and must be so declared by the court.

The counsel for the city assumes that that constitutional provision does not apply here, because for some reason the subject is committed exclusively to legislative discretion.

He did not point out any reason why it should not apply here as well as elsewhere. Nor does any other reason occur to me but these two: that the property is taken for a city, and that there is something in the nature of taxation which distinguishes that mode of taking a man's property from all others.

Is the nature of the act complained of changed because the money raised by the tax goes to a city? We think not. We shall content ourselves by presenting on this point the views of learned courts which seem to us decisive.

The case *In re Albany Street*, 11 *Wend.* 149, was a motion on behalf of the city of New York to confirm an assessment of the damages arising from the proposed extension of Albany street. It was resisted by Trinity Church, on the ground that more of its church-yard was taken than the proposed extension of the street required.

This was justified by the act of the legislature, which provided that where part only of any lot or parcel of land shall be required, if the commissioners deem it expedient to include the whole lot in the assessment, they shall have power so to do, and the part not wanted for the particular street or improvent, shall upon confirmation of the report, become vested in the corporation, which may appropriate the same to public uses, or sell the same in case of no such appropriation.

Chief Justice SAVAGE delivered the opinion of the court, and said on this point: "If this provision was intended merely to give the corporation capacity to take property under such circumstances, with the consent of the owner, and then to dispose of the same, there can be no objection to it: but if it is to be taken literally, that the commissioners may, against the consent of the owner, take the whole lot, when only a part is required for public use, and the residue to be applied to private use, it assumes a power, which with all respect, it did not possess.

"The constitution authorizing the taking of private property for public use, impliedly declares that for any other use, private property shall not be taken from one and applied to the private use of another. It is in violation of a natural right; and if it is not in violation of the letter of the constitution, it is of its spirit, and cannot be supported. This power has been supposed to be convenient; when the greater part of a lot is taken and only a small part left not required for public use, and that small part is of but little value in the hands of the owner. In such case, the corporation has been supposed best qualified to take and dispose of such parcels, or gores as they have sometimes been called, and probably this assumption has been acquiesced in by the proprietors. I know of no case where the power has been questioned, and where it has received the deliberate sanction of this court. Suppose a case where only a few feet or even a few inches were wanted from one end of a lot to widen a street, and a valuable building stands upon the other end of the lot; would the power be conceded to exist to take the whole lot whether the owner consented or not? Or suppose the commissioners had deemed it expedient or proper in the case, in the language of the statute, to take the whole of the church-yard, the act would equally have been within the letter of the statute, with their act in the present case, and yet no one would suppose that the legislature ever intended to confer such a power. The quantity of the residuum of any lot cannot vary the principle. The owner may be very unwilling to part with only a few feet; and I hold it equally incompetent for the legislature thus to dispose of private property whether of feet or acres are the subject of this assumed power.

"I am clearly of the opinion that the commissioners had no right to take the strip of land in question, against the consent of the corporation of Trinity Church."

The case *In re John and Cherry streets*, 19 *Wend.* 659, was also a motion to confirm a like report of commissioners in reference to the two streets named in the title. The commissioners were appointed for the purpose of straightening and closing up a part of the streets. This was done in such a manner that between the lots of owners and the straightened streets were narrow strips of land, which by the law under which the proceedings were had, became the property of the city. The streets were ancient ways, and upon discontinuance reverted to the owners, as *residuum filum viae;* and the question presented was, whether the act conflicted with the constitutional provision quoted above, by taking these strips from the lot owners, and conferring them on the city. That great Judge, COWAN, delivering the opinion of the court says, on this subject: "Under the provisions of our constitution, property cannot thus be transferred, unless it be taken for public use, and not then except on payment of, or a provision for a just compensation. Accordingly in *Albany street*, 11 *Wend*, 149, it was held that a statute making provisions for transferring to the corporation of New York, a title to the fragments of lots which had been broken, in laying out streets, though the same statute required compensation to be made, was void, on the ground that the land was not taken for public use. The late Chief Justice then said, that the clause withholding private property from public use, unless with compensation, in itself, implies that it shall not be taken for individual use, and such I think is still more clearly the meaning, when that clause is considered in connection with the preceding one, exhibiting a deprivation of property, without due process of law. This clause is an enlargement and extension of the words in *Magna Charta, ch.* 29. 'No free man shall be disseized of his freehold, &c., but by the law of the land.' These words 'by the law of the land' as said by *Coke*, 2 *Inst.* 50, are properly rendered 'due

process of law,' among which he mentions the writ original at the common law, the ordinary mode of commencing a suit to try a title and see 3 *Story Comm. on the U. S. Const.* 661, § 1783. Our constitution adopts the very words of Coke, and means undoubtedly that to work a change of property from one person to another, some proceeding must be had in court of justice or before magistrates; at least, that the legislature should have no power to deprive one of his property and transfer it to another, by enacting a bargain between them, unless it be in the hands of the latter a trust for public use. The Chief Justice in the case of Albany street adds what is very obvious, that the quantity of land intended to be taken by the statute cannot vary the principle, and that the legislature are incompetent to dispose of private property in this manner, whether in feet or inches. I cannot bring myself to doubt that the case was decided upon correct grounds judiciously applied, nor have I been able to distinguish the present from that case.

"It is said that the city of New York is a public corporation, and that therefore all its property is for public use. The argument is equally applicable to all other municipal corporations by which the State is covered. If it be good for a city, it is equally so for a county, town or village, all of which may become legislative purchasers upon summary appraisal and then sell out to individuals, using the avails for the benefit of the corporation. Such a construction would make the constitutional clause a dead letter."

Other cases to the same effect might be quoted, but from the two above cited, the law appears plain, that when a city seeks to appropriate to its use, whether with or without compensation, the object for which it does so, must be for the use of the public and not merely for some matter of advantage to it, as an entity distinct from the individual

or from the aggregation of individuals for whose government it is organized.

If it does take property for its own aggrandizement instead of the public use, it offends against the constitution just as much as if it were to take A's property, without his consent and confer it upon B.

The other question mentioned, is whether or not doing this by means of the taxing power, changes the principle. I never heard it suggested before, that that power was above the jurisdiction of the court and above the constitution. It has been restrained by ordinances of French parliaments, by charters of English parliaments, and by provisions in American constitutions.

Burke says that "the great contests for freedom in England were from the earliest times chiefly upon the question of taxing. On this point of taxes, the ablest pens and the most eloquent tongues have been exercised, the greatest spirits have suffered. They proved not only that the right of granting money had been acknowledged to reside in the House of Commons, but that in theory it ought to be so, whether the old records had delivered this oracle or not."

And in this country, where the danger to liberty is not from the one against the many, but from the many against the few, and where written constitutions have been framed mainly to protect minorities from majorities, the power of taxing has been granted by the sovereign people, to the legislature, with many guards and strict limitations. And as the contest for freedom in England has been chiefly upon this question of taxing, claiming it for parliament and denying it to the king, if the theory put forth now is to obtain, that conquest in America must be renewed upon the same point, restraining the legislature by fundamental laws, made by the people, for the control of every depart-

ment of government, as well as of the citizen. But there will never be any need of such an effort.

The taxing power, even when exercised by the legislature, has recognized the restraints of the constitution. As, witness the great number of cases in the courts reported in all the volumes of the law on this very subject. But I do not think it necessary to follow the counsel for the appellant into the discussion of some theories on this subject which he has presented.

He lays down the proposition, that the property of A cannot be taken away from him and given to B. He says that while this principle of natural justice has not the sanction of constitutional provisions, the conrts will yet enforce it. And he cites a number of the highest authorities in support of this line of argument and of this position. With all respect for the great writers and judges whose opinions he cites, I think that line of argument is opening a field of discursive theorizing altogether too wide ; for what is needed in constitutional discussions, is plain, obvious, strong reasoning, carrying conviction to the mind. If we are to theorize about abstract principles of natural justice outside of the fundamental law, we are introduced into a vague, hazy, uncertain region, where we cannot tell whether we are walking the solid earth, or floating among the clouds. It is not necessary to consider this matter on any abstract principles. The property of A can not be taken from him and given to B, in this country, not because it is contrary to natural justice, but because it is in violation of the constitution. To that effect is the case last before cited, and there are many others in which the same view has been held.

When the constitution says that private property shall not be taken for public use without just compensation, it implies very clearly that it cannot be taken for private use, either with or without compensation.

That is the same in effect as the axiom quoted as a rule of natural justice.

The other principle evoked, that a citizen can not be deprived of his property without due process of law, is obnoxious in its application here to the same objection, although not to the same extent. I have no doubt that the benefit of that clause from *magna charta* is retained to us under our constitution, if not by a special provision, at least by the general terms of section twenty of the bill of rights; for unquestionably it is a fundamental doctrine of liberty as held in modern times.—2 *Sullivan's Lectures*, 243 *et pas.*; *Chancellor* KENT *in Gardner* v. *Newbergh*, 2 *John. Ch.*, 162.

Confining ourselves to the single provision of the constitution which inhibits the taking of property for public use without just compensation, is there anything in the nature of the taxing power which should prevent the court from inquiring whether a particular legislative act authorizing a city to levy and enforce taxes for its purposes, violates that provision?

In *The People* v. *The Mayor, &c., of Brooklyn*, 4 *Coms.* 419, RUGGLES, J., delivering a most elaborate and well considered opinion, says on this subject: "Private property may be constitutionally taken for public use in two modes: that is to say, by taxation and by right of eminent domain. These are rights which the people collectively retain over the property of individuals, to resume such portions of it as may be necessary for public use. The right of taxation and the right of eminent domain, rest substantially on the same foundation. Compensation is made when private property is taken either way. Money is property, taxation takes it for public use, and the tax payer receives or is supposed to receive his just compensation in the protection which the government affords to his life, liberty and property, and in the increase of the

value of his possessions by the use of which the government applies his money raised by the tax. When private property is taken by right of eminent domain, special compensation is made for the reason heretofore stated." The same language is held by other eminent judges.

It is clear then, that no particular tax can be justified under the restraint of this provision of the constitution, unless some benefit accrue to the tax-payers from the purposes to which it is applied. In case of a general tax as we have seen above, this is always presumed. In the case of a city tax, that may not be the case. Hence it follows that when it is not the case, the court will intervene. It was on this principle that *Wells* v. *The City of Weston*, 22 *Mis.* 385, was ruled. There the legislature authorized the city to tax lands beyond and adjoining its limits. The Court held that this was taking one man's property under the form and name of taxation and giving to another, which we have seen is prohibited by the constitutional provision which we are considering. On this ground the tax was held illegal.

I have now shown upon principle that the legislature does not possess unlimited power over this subject, and that the case at the bar is not in its nature beyond our jurisdiction.

We now approach the peculiar features of this case. We have now to inquire whether lands situated as the lands here in question are above stated to be situated, and of the character above described, are liable to taxation by the city for city purposes. Several cases were cited at the bar upon this very question which relieve us of the labor of an independent consideration of this question.

Cheeny v. *Hooser*, 9 *B. Mon.* 330, was an action of trespass, brought by Cheeny to recover damages for the taking and conversion of his horse by Hooser, who justified as Marshall of Hopkinsville, by virtue of an assessment of

taxes by the trustees of the town of which the plaintiff was alleged to be a citizen. The plaintiff denied the citizenship, and thus was raised, or sought to be raised, the question whether the property of the plaintiff who resided without the limits of the town prior to the act of February, 1846, but who by its provisions was brought within its limits, was subject to taxation levied by the proprietors, of and for the benefit of the town. The act like the one we are here considering, made no express grant of power, but simply amended the act by extending the limits of the town.

Chief Justice MARSHALL delivered the opinion of the court. In his very carefully considered judgment, he concedes to the legislative branch of the government all that can possibly be claimed for it, in respect of the power to incorporate towns, to extend their limits, to confer upon their authorities power to impose taxes for local purposes, and to designate the subjects of property and the class of persons to be taxed. He says: "It is palpable that persons or their property are not subject to a burthen for the benefit of others, or for purposes in which they have no interest and to which therefore they are not bound justly to contribute, no matter under what form the power is professedly exercised; whether it be in the form of laying or authorizing a tax, or in the regulations of local divisions or boundaries, and which results in a subjection to a local tax, and whether the operation be to appropriate the property of one or more individuals without their consent, to the use of the local or general public, or the use of other private individuals, or of a single individual, the case must be regarded as coming within the prohibition contained in this clause of the constitution. That we are impotent for the protection of individual rights or property from any aggressions however flagrant, which may be made upon them, provided it be done under color of some recognized power, we are not prepared to concede."

He again says "this is not the case of vacant land or of a well improved farm occupied by the owner and his family alone, for agricultural purposes, and which without being required for either streets or houses, or for any other purposes of the town but that of increasing its revenues, is brought within its taxing power by extending its limits. Such an act, though on its face simply extending the limits of a town, and therefore presumptively a legitimate exercise of power for that purpose, would in reality, when applied to the facts, be nothing more or less than an authority to the town, to tax the land to a certain distance outside of its limits, and in effect to take the money of the proprietor for its own use, without compensation to him. But suppose a proprietor of a farm adjoining an established and flourshing town, should lay out his land upon the town limits in small lots, and by selling or leasing them, should invite the building or occupation of houses, and in fact raise up a town, could he or his alienees or lessees, or the residents in his town, complain if the legislature should take jurisdiction over it? And then either enact a separate municipal goverment for them, or incorporate them with the adjoining town from which they had taken their growth?

"We do not admit that persons who have thus concurred and assisted in making a town in fact, could say they had not consented, or that their actual consent was necessary to its being made a town in law; and although, if the two towns were incorporated into one, some inequalities might exist in the appropriation of the taxes between the two towns considered separately, and to the advantage of the larger one, this would not necessarily nor probably follow to an extent greater than is found to exist between the closely and thinly settled portions of any town; and it certainly would not be assumed, from the incorporation of the new with the old town, and its consequent subjec-

tion to a common taxation with all the citizens, that there was any flagrant abuse of the power of taxation, or of local regulations amounting to the tax being of private property for public use without compensation.

"The essential difference between the case supposed, is that when the limits of a town are not filled up, and it has not in fact extended itself beyond them on either side, and upon the petition of the town the adjacent vacant land or cultivated farm not necessary or wanted for streets or houses, is brought within it by an extension of its boundary, the whole force and effect as well as the obvious intent of the act is, to subject those exterior lands to the taxation of the town, without even a pretext for extending the protection or control of the town over them; and the power of local regulation and government would furnish no legitimate or real basis for the act; while with other cases, the actual growth of the town beyond its legal limits or any of its borders, furnishes a basis and motive for legislative interposition not merely for the purpose of subjecting the exterior part to the taxing power of the town, but also for extending over it the government and care of the municipal authorities, with the equal right of participating not only in their elections, but also in the benefits to result from the appropriation of the common revenue of the town, to the convenience and security of the new portion in common with the rest."

The case of *Covington* v. *Southgate*, 15 *B. Mon.* 491, was an action brought by Southgate to recover against the city $625, which he had been compelled to pay as city taxes, upon one hundred and sixty acres of land of which he was owner, and which without his consent had been included within the city limits by act of the legislature. The land was used exclusively for agricultural purposes. The former boundary of the city adjoined it. On the east boundary of Southgate's land, was a tract of several hun-

dred acres, on which, to a considerable distance from the former city limits, lots had been laid off, and on which lots were inhabitants, and which could be conveniently reached only by a passage over Southgate's land; but on the part of the former townsite, near and adjoining Southgate's land, there were but few houses and many vacant lots. Chief Justice MARSHALL also delivered the opinion of the court in this case. He says he concurs with the opinion of the Circuit Court, "that there was no legitimate necessity of the city which required that this portion of Southgate's land should, at the date of the act which the city procured without or against his consent, or should even at this time, be included within its boundaries. There is little reason to apprehend that when the city actually grows up to the land now in question, the proprietor, whoever he may be, will withhold it from the necessities of a growing population.

"Even if the land of Southgate be lawfully within the city, it cannot be coerceively appropriated for streets without that compensation which the constitution secures for private property taken for public use. And there is certainly no power to take any part of it for buildings or other private use, but by contract with him. Then the only apparent purpose to be effected by including his land within the city without his consent, is that of subjecting it to taxation for the benefit of the city, and without any advantage to him. As Southgate has made no town and desires none, as there appears to have been no legitimate necessity which might justify the extension of the boundary so as to include it within the city against his consent, and as the obvious effect and probable purpose on the part of the city was to subject it to taxation, for the exclusive benefit of the town, it would seem that if there ever was a case of taking private property for public use in the form of taxation, under color of the extension of the boundaries

of a town or city, and without making compensation therefor, this must be regarded as one."

The next case is that of *Morford* v. *Weger*, 8 *Iowa*, 82. The facts are briefly stated in the opinion of the court by STOCKTON, J.: "The only question to be considered in this case, is whether the act of the legislature of Iowa, approved July 14, 1856, entitled 'An act to amend the act to incorporate the city of Muscatine,' is constitutional. By this act it is conceded the limits of the city of Muscatine were extended about one mile on the east, and about two miles on the north and west, beyond its former boundary. The plaintiff lived upon the territory brought into the city by the act aforesaid, upon land used exclusively for farming purposes, about one mile from the old city limits, and about the same distance from any land laid out into city or town lots, or used as city property. His land so used, was taxed by the city at the sum of one dollar per acre. This tax he refused to pay, and his property being distrained for the payment thereof, he brought this action of replevin to test the contitutionality of this act, extending the limits of the city."

On the subject we are here considering, he holds this language:

"The municipal corporation is the mere creature of the law. The town itself in its material constituents, is the result of the voluntary act of the inhabitants. When there is a town or city *de facto*, there can be no question of the power of the legislature to provide for it a local government, and to authorize local taxation for its support. The greater burden of taxation is compensated for, in the greater advantages conferred by the municipal government. The consent of every individual to the authority of the local government is not deemed requisite, in order to subject him or his property to its jurisdiction, or is it

implied, in the fact of his placing himself in a condition to require such local government.

"If the legislature, independent of the question of taxation, may rightfully impose the authority of a local government on persons, who, by building in close proximity, have made a town *de facto*, it would seem hardly reasonable that the expense of such government should be borne by the county and State; and as little reason, we think, can exist, why the legislature may not require the local population to support by local taxation, the government provided for it. * * * * * * *

"Legitimate taxation, whether under the State or the municipal authority, is not the taking of private property for public use without compensation, within the meaning of the constitution. The protection afforded by the government to the citizen is usually conceded the just compensation referred to by the constitution for all private property he is required to surrender to the public use in the shape of taxes. And it is only where an undue proportion of the burden of taxation is laid upon him, or when the power of local taxation is made to operate upon those who, being out of the reach of the local benefit, ought not to be subject to the local tax, that there can be any plausible ground for alleging that property taken for taxes authorized by law is taken without compensation."

The learned judge then states at length the case of *Cheeny* v. *Hoover*, cited above. He then proceeds:

"If there be such a flagrant and palpable departure from equity in the burden imposed, if it be imposed for the benefit of others, or for purposes in which those objecting have no interest, and are therefore not bound to contribute, it is no matter in what form the power is exercised; whether in the unequal levy of the tax, or in the regulation of the boundaries of the local goverment, which results in

subjecting the party unjustly to local taxes, it must be regarded as coming within the prohibition of the constitution, designed to protect private rights against aggression however made, and whether under color of recognized power, or not."

"But if the case is that of vacant land, or a cultivated farm occupied by the owner for agricultural purposes, and not required for either streets or houses or other purposes of a town, and solely for the purpose of increasing its revenue, it is brought within the taxing power by the enlargement of the city limits, such an act though on its face, providing only for such extension of the city limits, is nothing more than authority to the city to tax the land to a certain distance outside of its limits and is in effect the taking of private property without compensation."

The opinion proceeds further to support the views above expressed in a most exhaustive manner. Enough has been quoted, not only to show what was the judgment of the court upon the subject, but also to indicate pretty clearly the sound and conclusive reasoning upon which it is based.

The next case was that of *Langworthy* v. *The City of Dubuque*, 13 *Iowa*, 86. WRIGHT, J. says in the opinion, that it appears "that the lands were not necessary for city purposes; that they were not lots nor out-lots, but lands used for mining, horticulture, grazing, farming and other similar purposes; that the sole object of bringing them within the city limits was to increase the city revenue; that the complainants did not, nor did they propose to lay them off into lots, or invite purchasers to settle upon and occupy them." He cites the case of *Morford* v. *Unger*, *supra*, as conclusive of the question contenting himself with that judgment and a few general words of his own in support of it.

The next case is that of *Fulton* v. *The City of Davenport*, 17 *Iowa*, 404, in which the situation of the lands is

thus defined. "Said land is a tract of about eighty rods long, north and south, by about thirty rods wide east and west, and contains about sixteen acres, and is situated about one mile from the present western boundary of the city, and from the eastern boundary of the city, two miles lacking thirty rods; from the northern boundary of said city it is half a mile, and eight hundred feet; from the southern boundary of said land to the city, it is seven-eighths of a mile. It has for eleven years or more, been used for farming and agricultural purposes, and no other, has never been laid off into city or town lots, and has not a road or street open to or touching it, either from said city or elsewhere. The nearest house on the south is ninety rods distant. On the west are three frame buildings, the nearest of which is quarter of a mile distant. On the north there are no buildings in sight of the city. On the east are six buildings twenty-six rods from the land. On the north-west the city is pretty well built up. South of the land the city is thickly settled. An east and west line drawn through the geographical centre of the city would come about one rod south of the southern line of this land. A very large portion of the built-up portion of the city, lies south and east of this line. The city is built up at some distance from the land both east and west of it, further north than the land, but in its vicinity is not built up or improved, by way of streets, &c., and never has been."

LOWE, J. delivered an extended opinion approving and applying *Morford* v. *Weger*, and laying down a rule for determining what lands are, and what are not justly liable to taxation by the city, thus: "When the proprietor of undedicated property being locally within corporate limits holds such close proximity to the settled and improved parts of the town, that the corporate authorities can not open and improve its streets and alleys, and extend to the inhabitants thereof its usual police regulations and advan-

tages without incidentally benefiting such proprietors in their personal privileges and accommodations or in the enhancement of their property, then the power to tax the same arises, but in its exercise great care and circumspection should be exercised lest perchance an injustice and oppression may ensue.

"Now, applying this rule to the property involved in this case in the light of the facts and circumstances above reported to us by the referee, we can not be at a loss where to place this property, and to hold at once that locally it occupies no such attitude towards the improved parts of the town, that it can be legally taxed for municipal objects."

After these extended citations, it will bring out the strength of the case at the bar, to rehearse the situation of the lands successively protected by these numerous adjudications, and compare them with those now in question. In the two Kentucky cases, the cities had, in their actual growth, reached to and in one case beyond the lands.

In the first Iowa case, the lands were about a mile from any lands laid out as town lots, or used as town property, and were used for farming purposes.

In the secondly cited Iowa case, all that is said of the lands is that they were not needed for, or used as city property.

In the last case cited, the lands were within twenty-six rods on one side and ninety on the other of improvements, and the city had been built up on each side and beyond it. But no streets had been opened to it, and it had been used exclusively for farming purposes. It contained only sixteen acres.

In all these five cases the legislation subjecting them to city taxation was held unconstitutional.

In this case the land is alleged to be two miles from the settled part of the city, and one mile from any lands improved or occupied as town lots; the adjoining lands

are either vacant or used for agricultural purposes only; between these lands and the city, is a whole quarter section used as a farm. A cemetery and a large farm bounds this tract on the south. On the east are several hundred acres entirely vacant, and on the west and north are no improvements whatever. No streets approach nearer than a mile, and no house is nearer than a mile. If the cases cited are law, this in every circumstance is much stronger. These cases are cited with approval by Sedgwick in his great work on Construction, page 675 in the notes, and are quoted by Mr. Justice COOLEY of the Supreme Court of Michigan, in his late most interesting and able treatise on Constitutional Limitations. They seem to meet his approval, as the result of them is stated without qualification in the text.

From these cases, and from the abundant reasons by which they are sustained, may be deduced the following tests of the liability of lands to taxation by a city, within which they have without the owner's consent been included.

1. If the lands have been divided into town lots, if purchasers of small parcels have been invited to settle thereon and occupy them, if the owner has done any affirmative act leading the city to treat the property as town property, or if town settlements have approached near to them, so that the enjoyment of them in peace and good order, demands the police regulations of a municipal corporation, then the lands are liable to taxation. 2. On the other hand, if the owner has done no act, as by laying the lands off into lots, or asking for city grades, or applying for opening streets, if he retains them in a large body of such size as is manifestly inadmissible in a city, and if they are situated at a distance of a mile or half a mile from the settled part of the town, and no streets are or need to be opened for the use of owners of adjoining lots, and their quiet enjoyment does not require a city

police, then the legislation is obnoxious to the objection, that it infringes the constitution, and must be so declared by the court.

We do not attempt to draw the line between such lands as are taxable and such as are not. Each case must be determined by its own circumstances. But the tests above mentioned will furnish an easy solution to any case which may arise. Tried by them, the legislation here complained of, cannot be sustained. It is unconstitutional and void.

The demurrer should have been sustained, with leave to the defendants to answer if they desired to do so. The judgment of the District Court must be reversed, and the cause remanded, for such further proceedings, in pursuance of the principles of this opinion, as to the court may seem just to be had or permitted. The defendant must pay the costs of this appeal.

Judgment reversed and cause remanded.

Poland v. O'Connor.

SPECIFIC PERFORMANCE of a parol contract for the sale of lands—

1. *Must be clearly established.* A parol agreement for the sale and conveyance of land must be established by clear and most satisfactory proof, or the court will not specifically enforce it.

2. PART PERFORMANCE. *Payment* of a small portion of the purchase price is not such part performance as takes the contract out of the statute of frauds.

3. ——: *Possession.* To take such a case out of the statute, the possession of the vendee must be by acts clear, certain and definite in their object, and having reference to the contract.

4. ——: ——. Possession taken by the vendee after the vendor has disavowed the contract, which has been made by a person pretending to be his agent, will not support the claim.

5. ——. ——. Using a lot otherwise vacant, and adjoining the vendee's warehouse, for storing lumber, wagons and like articles, of himself, his firm and others who have placed the same in his hands for sale on commission. is not such possession as will take the case out of the statute.

6. ——: *Building.* Not every possible act of the vendee done with reference to the contract, but those only to which he has been induced by positive action or permission of the vendor, or at most by those results which naturally flow from the agreement, operate to take the case out of the statute.

7. ——: *An instance.* A vendee under such contract, who has purchased a house with the view of placing it on the premises, but who has not done so, has not thereby taken his case out of the statute.

This was a bill in chancery for a specific performance of a parol contract, for the sale of certain real estate.

The plaintiff claimed to have made the purchase through one Clarke, who, as he insisted, was the defendant's agent. Whether O'Connor had ever appointed Clarke his agent, or in any way authorized him to sell the lot, was a question of fact in the cause, much discussed. Clarke testified very positively that O'Connor had employed him to sell the lot, had assented to the sale and the terms of it, and

detailed a number of circumstances to show that he was correct.

On the other hand, O'Connor contradicted Clarke as positively, gave a different version to their conversations, and testified to a continued and persistent refusal on his part to sell, at and about the time Clarke claimed to have received his authority to sell.

The purchase price of the lot as alleged by the plaintiff, was one thousand dollars. When informed that Clarke had made the sale to him, the plaintiff immediately sent him $25 to apply on the purchase, and received from Clarke a receipt, saying that the deed was to be made in ten days. Shortly afterwards, and as the defendant alleged, as soon as he heard that the plaintiff claimed to have made the purchase through Clarke, he disavowed the sale, and informed the defendant that he should claim rent for the premises, if he occupied them.

The premises were a business lot in Omaha, vacant at the time, adjoining a warehouse which belonged to the plaintiff, in which with a partner, he carried on the business of selling articles of merchandize, particularly wagons, on commission. He had on the lot, shingles, timber, lumber, machinery and wagons. He had also purchased a house with the view of placing it on the premises, and designed to carry on therein a mercantile business. This house had been taken in pieces, brought from a considerable distance, and in consequence of the defendant's refusal to convey, had been left at the wharf, and never been placed on the premises.

The cause was heard upon pleadings and proofs, and a decree was rendered dismissing the bill.

The plaintiff appealed to this court.

A. J. Poppleton, for the appellant, contended that the agency of Clarke was proven, notwithstanding the defend-

ant's denials, and that the acts of part performance took the case out of the statute. He cited *Willard's Eq. Juris.* 283, 285, 287; 2 *Story's Eq. Juris.* §§ 759–764; *Fry on Spec. Perf.* 47; *Phillips* v. *Berger*, 2 *Barb. S. C.* 608; *Plype* v. *Wardell*, 3 *Edward's Ch.* 47; *Stuyvesant* v. *The Mayor of New York*, 11 *Paige*, 414; *Neville* v. *Gillespie*, 1 *How.* (*Miss.*) 108.

J. M. Woolworth and *E. Wakely* for the appellee.

I. The contract is not proven. On the preliminary question of Clarke's agency, on which depends the contract, the proof is contradictory, while many circumstances tend to disprove the claim of the plaintiff, on that point.—*Fry on Spec. Perf.* 266–8; 2 *Story's Eq. Juris.* §§ 764–766–769; *Willard's Eq. Juris.* 286; *Colson* v. *Thompson*, 2 *Whea.* 336.

II. Neither the payment to Clarke of the $25, nor the plaintiff's possession such as it was, were sufficient to take the case out of the statute.—*Fry on Spec. Perf.* 260, 251; 2 *Story's Eq. Juris.* § 759; *Clynan* v. *Cooke*, 1 *Sch. & L.* 22; *Watt* v. *Evans*, 4 *Young, &c. Ex.* 579; *Main* v. *Melbourn*, 4 *Vesey*, 720; *Jackson* v. *Cutright*, 5 *Munf.* 308; *McMurtrie* v. *Bennett*, *Harring. Ch.* (*Mich.*) 124; *Johnston* v. *Glancy*, 4 *Blackf.* 94; *Sites* v. *Killer*, 6 *Ham.* (*Ohio*) 483.

CROUNSE, J.

The bill was rightly dismissed.

The statute has said, that no person shall be charged with the execution of an agreement relating to the sale of land who has not personally, or by his agent signed a written agreement.—§ 62, *page* 292, *R. S.* And when done by an agent, that the authority of such agent must

also be in writing.—§ 84, *page* 297. The record shows no such case as should relieve the complainant from the operation of the statute.

1. The existence of a contract clear, definite and unequivocal in its terms should have been admitted by the answer, or satisfactorily established by competent proof.—*Story's Eq. Jus.* § 764. Here, however, the very authority of the agent, who assumed to sell the property, is explicitly denied by the answer. To establish it we have but the unsupported testimony of the real estate agent himself, whose interest, next to that of securing his fee, seems to have been to serve the purchaser rather than the vendor; to combine with the former in tying up and hurrying the transfer of the property from one to the other. Opposed to this is the testimony of the respondent in direct contradiction — affording a striking exhibition of the evils against which the statute was designed to provide. One of the most important objects of the statute was, to prevent the introduction of loose and indeterminate proofs of what ought to be established by solemn written contracts.—*Storey's Eq. Jus.* 764.

2. Not regarding the contract as established, has there been such a part performance of it as entitles the complainant to the relief sought? The payment of the twenty-five dollars does not effect it.—*Clynan* v. *Cooke*, 1 *Sch. & Lefr.* 40; *Story's Eq. Jus.* 760; 2 *Pars. on Con.* 552. Neither is there such unequivocal and satisfactory evidence of possession given and entered upon, or of any acts clear, certain and definite in their object, and having reference to the contract made, as is required. Under the contract relied on, a deed was to be given in ten days. At the expiration of this time, Poland was advised that O'Connor disavowed the agreement of Clarke, and of his refusal to make a deed. What Poland may have done subsequently to that time therefore, was without warrant, and defiantly.

The proofs leave it quite uncertain as to what acts of possession, if any, transpired under the agreement during that time. From the testimony of Poland it appears that the vacant lot in question, adjoining the warehouse of himself and partner, Patrick, was used subsequently to the time of agreement for storing lumber, wagons and like articles of himself, the firm and others held on commission. It is quite probable that not only during the ten days, but both prior and subsequent thereto, such use would be made of an unoccupied lot adjoining a warehouse. This is far short, however, of that improvement, that open, visible and unequivocal possession under the contract, necsssary to take the case out of the statute.—*Fry. Sp. Per.* § 403, *p.* 237.

As to the purchase of the house to put upon the lot: it may be remarked that the defendant is not to be bound by every possible act of the complaining party done with reference to the contract. He should be affected by those only to which he has been induced by positive action or permission, of the vendor; or, at most, by those results which naturally flow from the agreement. He certainly should not be concluded by the folly of the vendee.

Here, possession was not an expressed part of the agreement. It does not appear that the purchase of this lot was for the purpose of erecting or building thereon; much less with the design of moving one already constructed thereon. The building, in fact, never was moved on the premises. It is not shown to be lost or depreciated in value. No damage of any character appears to have resulted from its purchase. Still, had the investment proved an entire loss, the complainant's conduct has not been such as to challenge the consideration of a court of equity. To purchase a valuable lot through a real estate agent who can show no authority, with the owner of the property living on the next block; to pay

but the amount of the agent's fee as earnest; and in the next hour to purchase a building ready constructed to place thereon, without consent of or conference with the vendor, is an attempt at sharpness or an exhibition of folly which courts do not favor.

The decree of the court below is affirmed.

Decree affirmed.

Smiley v. Sampson.

1. JURISDICTION. The power to hear and determine a matter in controversy, is jurisdiction. It is *coram judice*, whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally.

2. ——: *Of land officers.* The register and receivers of the local land office and their superiors in the land department, form a special tribunal for some purposes and to a certain extent.

3. ——: ——. They have jurisdiction to determine questions of settlement and improvement, between different preëmption claimants, which are questions of fact; and their decision thereon is conclusive upon the parties and the courts.

4. —— : ——. They have not jurisdiction to determine conclusively questions arising between one settler and the government, which are generally questions of law. On these questions the courts are not concluded by their decisions.

5. ——: ——. Their decision on an application to preëmpt, when made *exparte* without the presence of the party interested adversely to the applicant, is not conclusive.—*Lindsey* v. *Hawes*, 2 *Black*. 554, *examined and distinguished.*

6. FILING TWO DECLARATORY STATEMENTS. The act of Sept. 4, 1841, requires the filing of a declaratory statement of intention to preëmpt a tract of land, only when the tract claimed is subject to private entry.

7. ——. The act of March 3d, 1843, prohibits a second filing, only under the act of '41 ; *i. e.*, only on lands subject to private entry.

8. STATUTORY CONSTRUCTION. General words of a statute will be restrained when they clearly were not intended to include a particular act or thing.

9. ——: *The mischief.* Where a matter is clearly out of the mischief intended to be guarded against, and thus is out of the spirit, although it be within the letter of the act, it is the duty of the court in construing the act, to limit the effect of the terms employed.

10. LAND IS NOT WITHDRAWN, from preëmption by the circumstance that a company has endeavored to build a town thereon, after the enterprise has been abandoned.

11. Neglect of officer. The law will protect an individual who, in the prosecution of a right, has done all that the law requires him to do, but fails to attain his right, by reason of the neglect or misconduct of a public officer.

12 Fraud in pre-emptions. If an indigent party give for a house standing on a tract of the public land, his note for $3,000, and thereupon asserts a preëmption claim to the tract, without making any other improvement thereon, and as soon as he effects his entry, conveys a large tract to the payee of the note, in discharge thereof, and also conveys most of the remainder to parties, who as witnesses and attorneys have aided him in securing it, and who have previously endeavored to secure it by fraudulent practices, these circumstances unexplained, justify the opinion that there was at the time of his first asserting his preëmption claim, an agreement to do what was afterwards done.

In the summer of 1857, Smiley possessing such personal qualifications, as under the provisions of the act of September 4, 1841, entitled him to preëmpt a tract of the public land, erected on the west half of the south-east quarter of section three, and the west half of the north-east quarter of section two, in township fifteen north, range thirteen east of the sixth principal meridian, a substantial dwelling and another house, and fenced an enclosure around the same, and made some other improvements, all of the value, and at a cost of about $1,500.

At this time an association of persons who assumed the name of the Sulphur Springs Land Company, "claimed" —in the parlance of the frontier—these lands, together with several thousand acres adjoining. That is, without any right or title derived from the United States land laws, they assumed the proprietorship of these lands, and pretended to have, although they had not in reality, possession and occupancy thereof. The object of this company was to build a town on these lands. They laid them off into town lots with streets, and induced many persons to build houses on the lots and live on them. They also issued certificates of shares as in a joint stock company, which were held by large numbers of persons.

Smiley's father owned one or more of these certificates. The Smiley family consisted of the plaintiff, the father and four maiden sisters. Immediately on their arrival in the Territory, with the lumber for the houses above mentioned and their household goods, they proceeded, (the plaintiff claims that he, and the defendants claim that the father proceeded) to the premises in question and built the said houses, and afterwards lived there for some time. The only other improvements upon the tract was a house built by one Gant. The tract was, like the other lands "claimed" by the Land Company, laid off into lots; but Smiley's house and enclosure was not built with any reference to the lines thereof.

Shortly after Smiley built the houses, the company caused John A. Mowrey to preëmpt under the act of September 4, 1841, the quarter section here in question, and immediately convey the same to it. In March, 1858, Mowrey's entry was returned to the local from the general land office, with directions to the register and receiver to reinvestigate his right to preëmpt; and on the 4th of June following, those officers decided against the validity of his entry. In the same month, Smiley asserted his right to preëmpt the land, by tendering to the register his declaratory statement of intention to claim the same, under the act of 4th September, 1841. The officer refused to receive the paper, on account of Mowrey's previous entry. Smiley then took steps in his own name, and on his own behalf against Mowrey's entry, and upon his caveat filed before the commissioner, it was by that officer again returned to the local office for reëxamination. The investigation commenced on the 13th of December, 1858, and was protracted till the 3d day of March, 1859. This matter was entitled "*John A. Smiley* v. *James A. Mowrey.*" The result was a decision by the register and receiver adverse to the claims urged in Mowrey's name, which they communicated to the

commissioner by their letter, dated May 19, 1859. This decision was approved by the last mentioned officer, and no subsequent efforts were afterwards made to reverse or modify it.

The ground of the decision was, that Mowrey had made the entry for the Land Company and not for himself.

At this point, the appellant Sampson first appears as a claimant of these lands. He had come to Nebraska the preceding spring, in very straightened circumstances, and rented the house on the tract built by Gant, and also a farm three miles distant, which he worked that season. In August, he filed his declaration of intention to preëmpt, adversely to Smiley, by whose persistent efforts the tract had been discharged of the fraudulent entry in Mowrey's name. On the 16th of November, 1860, the investigation ordered by the commissioner was had; and the matter was entitled "*John A. Smiley* v. *James A. Mowrey and others.*" Smiley stood on the proofs of his right taken in the former examination, and Sampson introduced proof, in support of his claims. The record thus presented was unsatisfactory to the commissioner; and on the 24th of January, 1862, he ordered a new and full examination on four points, namely: "First, the date of settlement; second, the nature and purposes of the same; third, the nature and extent of the improvements; and fourth, the date and duration of the residence of each claimant." On the 9th of June, 1862, this examination commenced before the register and receiver, and was very full and greatly protracted; and resulted in a decision by those officers in Smiley's favor. Sampson appealed to the commissioner, who on the 9th of October, affirmed the report of the local officer. Sampson appealed again to the Secretary of the Interior, who on the 11th of July, 1863, revised these decisions, and awarded the land to Sampson. The sole ground of the Secretary's decision is the fact that Smiley

had in 1857, filed his declaratoy statement of intention to preëmpt another tract of land; and had thereby exhausted his preëmption right.

Immediately after this, Gant entered up a judgment in the District Court against Sampson for $3,000, on a note made in 1860, the consideration of which is alleged to be the house above mentioned rented by him to Sampson. In a few days afterwards, and as is said, in satisfaction of this judgment, Sampson conveyed a part of the land to Gant, and also conveyed to others other parts of the land; Gant, and the other grantees being Sampson's attorney's and witnesses in the proceedings above mentioned. Tuttle who secured a part of the land was treasurer, and Patrick who secured another part was the executive committee of the Land Company.

The circumstances of Smiley's first filing, which in the Secretary's opinion exhausted his rights, under the preëmption law, were these: He came here in the spring of 1857 to find a home. He found a piece of land which appeared to be unclaimed, and filed on it. A day or two afterwards, one Creighton told him he was the claimant of it, under the regulations of the "Omaha Claim Club." This was an organization which assumed to authorize its members to "claim" three hundred and twenty acres of land, and to prevent all others, by adverse claims or preëmption rights, interfering therewith. Persons not members of it, who asserted such rights, were called "jumpers." "The Club" was composed of large numbers, and had in some cases enforced its rules by extreme violence. Smiley did not wish to come in conflict with this organization; and when he made his filing, did not know the land was so "claimed." On being informed of it, by Creighton, he immediately withdrew his filing, and never afterwards claimed the land or any interest in it.

It was claimed in the answers, and on the proofs, and

in argument, that it appeared that Smiley, the plaintiff, did not make, but that his father made, the improvements in virtue of which he claimed his preëmption right. The plaintiff testified that he purchased the lumber and other material with which the houses were built, at Wheeling, Va., and brought them with him to Nebraska, and mostly with his own hands put up the houses; that he earned the money with which to buy the material, teaching school at Charlestown, in Virginia; that his father lived with him, and he had general care of the family, until his father died, who was buried on the tract; that his sisters lived on the tract with him, until he removed them to Omaha, where he provided for them, until they were married; that the house was always his home, although he went to Iowa to teach school, and also was engaged freighting on the plains. The defendants produced the depositions of three witnesses residing at Charlestown, to the effect that no such man ever taught school there; but in his own support, Smiley produced the depositions of four witnesses, who swear he taught school at the time claimed by him, at , which was quite near to Charlestown.

A patent having been issued to Sampson for the lands in question, Smiley, on the 24th of September, 1864, filed his bill to recover the legal title from him and his grantees. The cause was heard on pleadings and proofs in the District Court, where on the 6th of August, 1867, a decree was rendered in favor of Smiley, according to the prayer of his bill. The defendants appealed to this court.

J. I. Redick for the appellants, argued the following propositions:

I. The land officers are a special tribunal, to whose decision the several questions involving the right of a claimant to preëmpt a tract of land, are, by law, finally submitted.

II. The courts cannot reëxamine these questions, when, after a full and fair trial, the parties have submitted them to the land department for adjudication.

III. Smiley did not, but his father did, make the improvements on the tract.

IV. Nor did he actually inhabit and cultivate the land.

V. The land had been selected as a town site, and was, therefore, not subject to preëmption.

J. M. Woolworth for appellee, argued the case upon a brief filed by himself and *A. J. Poppleton.*

I. The first question which naturally presents itself is, whether these lands were subject to preëmption. The only reason urged why they were not, is, that as is alleged, they had been selected as a site for a city or town. The allegation of the answer is, "that on the 13th day of May, 1857, the said premises were selected for the site of a city or town, and were so used and occupied at the time, and were known as the city of Saratoga." We submit that this allegation, even if true, is insufficient to take these lands out of the law, and is unsustained by proof.

1. Smiley alleges a preëmption claim dating from June, 1858, at which time the enterprise of building a town on these lands, if ever *bona fide* entertained, was completely abandoned, and the lands no longer used or occupied for that purpose.

a. The Sulphur Springs Land Company was the only party which ever had this enterprise in view.

b. This company, in June, 1858, had failed, and given up this enterprise.

c. There is no proof of any improvement on the land, except the house of Gant and the houses built by the complainant.

2. These houses having been built early in 1857, and no

other town improvements having ever been made, they are insufficient to withdraw this tract of one hundred and sixty acres, from the operation of the preëmption act; especially as against the repeated agricultural entries, allowed by the land department.

3. Gant himself did not claim that his house brought the tract within the exemption of the law, so as to exclude Smiley's preëmption right.

4. The Sulphur Springs Land Company never pretended that these lands were withdrawn from the operation of the law.

a. They never, so far as is shown, recorded any map of their survey, nor otherwise complied with the law.—2 *Session Laws*, 43.

b. They procured them to be preëmpted and took title under that entry.

5. All that can possibly be claimed from what that company did, that is, the plating and staking the land into lots, was insufficient to indicate that the tract was severed from the body of the public land, and not subject to preëmption.—*In re Selby et al.* 6 *Mich.* 193.

II. The next question naturally presented for consideration, is whether Smiley had the necessary qualifications to make a valid preëmption. He is shown without dispute to have all the personal qualifications. But it is insisted that his previous filing on another tract, brings him within the exception of the act, which excludes from its privileges those who have once enjoyed its benefits. We insist that it is not true.

1. The act of 1843, 5 *U. S. Statutes at large*, 620, forbids a second filing to those only who have filed once under the act of 1841. The act of 1841, 5 *U. S. Statutes*, 457, provides for filings only on lands subject to private entry. These lands were not subject to private entry; and, there-

fore, Smiley's filings were not under the act of 1841, and his second filing was not forbidden by the act of 1843.

2. The distinction between lands subject to private entry, and those which were not, is made because one man filing on several tracts of the first class withdraws them from sale, and thereby injures the government; but no such injury is sustained when the filings are on the second class, because they are not offered for sale.

3. The act of 1843 was passed to suppress frauds. Smiley did not intend any fraud, nor was the government injured by his withdrawal from the land he first took, and claiming this tract. His case is not, then, within the mischief at which the act aimed.—*Faw* v. *Marsteller*, 2 *Cranch*, 10; *Jackson* v. *Collins*, 3 *Cowen*, 85; *United States* v. *Fisher*, 2 *Cranch*, 399; 19 *Vin. ab.* 519; *Lessees of Brewer* v. *Blougher*, 14 *Peters*, 178; *Mayor, &c.*, v. *Lord*, 18 *Wend.* 131.

III. As regards Smiley's rights, it only remains to inquire if he has complied with the law in building a dwelling on, and inhabiting the tract. That abundant improvements were made, and that he lived there, is admitted; but it is contended that these improvements were made by his father and not by him; and that he lived in his father's family as his son. We claim that the proof shows that Smiley built the houses and was the real head of the family.

1. His deposition is minute, full, accurate and candid. It is incredible that his account is a fiction. He tells us: 1st, when, where and how, he earned the means of buying the material for the houses; 2d, when and how he brought it here; 3d, how he built the houses; on which point he is corroborated by Gise, a carpenter, who worked for him.

2. The attempt to show that he did not earn these means by teaching, is triumphantly met by the testimony of persons who knew him, when so engaged.

3. The testimony of the witnesses for the appellant, is

not satisfactory, because: 1st, it is merely negative in its character; 2d, the facts testified to, are all reconcilable with our views and Smiley's testimony; 3d, those facts are not conclusive.

IV. The *bona fides* of Sampson's entry is successfully assailed, and is not vindicated by proofs on his part.

1. He comes here without means, rents Mr. Gant's house, and a farm at a distance.

2. By the sole and persistent efforts of Smiley for three years, the fraudulent entry of Mowrey is vacated; and thereupon Sampson, being quite without means, buys this house, giving his note therefor, for $3,000, and in virtue thereof claims his preëmption right.

3. Immediately after the matter is determined in the land department, Sampson confesses judgment on the note, and a few days afterwards deeds a large part of the land to Gant, who satisfied this judgment, and, excepting a small parcel, the tract is distributed between the counsel and witnesses of Sampson in this very extraordinary proceeding.

4. Sapp, one of these attorneys, and a defendant here, boasted that he had an agreement with Sampson, prior to his entry, for a part of the tract, and afterwards received from Sampson a deed for exactly the same land.

5. These facts, unexplained, show that there was an agreement prior to the entry, by which the title to be acquired by Sampson should enure to the benefit of others, and called on the defendants for rebutting evidence. They did not furnish it, because they could not.—*Callan* v. *Statham*, 23 *How.* 477.

MASON, Ch. J.

The defendants insist that the decision of the secretary of the interior adversely to Smiley's right of preëmption,

is conclusive between the parties, and that *Lindsey* v. *Hawes*, 2 *Black.* 554, does not apply; because, they say, that that case was determined by land officers *ex parte*, while this was determined after a full and fair contest. The distinction seems to be well taken. In the case cited, the facts as stated by Mr. Justice MILLER, who delivered the opinion of the court, were these: In April, 1859, Lindsay applied to enter, and in June of that year he did enter, the tract in question under the preëmption law of 1838, with the register of the land office in Illinois. Shortly afterwards he removed to Iowa, and in September of the same year, he died. On the 9th day of August, 1845, James Shields, commissioner of the land office, set aside the entry of Lindsey, ordered his certificate to be cancelled, and directed the register and receiver to hear proof of the right of David Hawes, and to adjudicate his claim. They accordingly heard his proof, and gave him the certificate on which he afterwards obtained his patent. The difficulty in Lindsey's entry was, that by a survey made in 1833, by Bennet, the government surveyor, the south line of the quarter section impinged upon the river, at a point near the center of the line, and thus divided that part of the quarter which was south of the river into two separate fractions, the east of which contained one and eighty-seven hundredths acres, and the west five and seventeen hundredths acres, the latter of which was the subject of the suit; while by a survey made in 1844, the west fraction was found to contain thirteen and twenty-three hundredths acres, and the south line was located so far north as to leave Lindsey's house entirely south of the quarter.

On this point, the learned judge says: "The order for this new survey, emanated from the commissioner of the land office June 1st, 1844, and the survey was actually made in the autumn of that year, five years after Lindsey's entry and five years also after his death; and there is no proof

whatever that any of his heirs had notice of this survey, or of any intention on the part of the commissioner, to set aside Lindsey's entry, but the whole proceeding was *ex parte.*"

Two proceedings were had by the commissioner; one setting aside Lindsey's entry, which was done summarily and without any notice to, or appearance by the parties in interest, and the other ordering and causing to be made the new survey, which was also without notice. I think that we are particularly concerned here only with the first; but that is a distinction which does not seem to have been observed in the opinion, and is not material to our present purpose. So that it appears that as to the facts of the case cited, the distinction taken between it and the one here, is sustained. The cases upon which the learned judge placed his decision, are distinguishable from this in the same respect.

The first of these cases is *Cunningham* v. *Ashley*, 14 *Howard*, 377. In 1824, Cunningham applied to locate a Cherokee warrant on land previously taken by a New Madrid certificate. The application seems to have been instantly rejected, because of this prior location. In 1831, Cunningham claimed a right of preëmption in the land. He made proof to the officers of the local land office, of his improvements, and tendered the required price. This application was also rejected for the same reason. Appeals were taken to the commissioner of the general land office, to the secretary of the treasury, and the attorney general, all of which resulted in a denial of the claim. After all this, preëmption entries were allowed to Plummer and Beaubean, upon the land in question, and they conveyed to the persons holding under the New Madrid location. These two entries were allowed to carry out some agreement between these parties and others; so that Cunningham could not have been a party to the agreement, nor to

the act of the officers in allowing these entries. His own two several applications appear also to have been rejected summarily, and without the intervention before the land office, of the claimants under the New Madrid location. Of course the preëmption claims of Plummer and Beaubean were not presented, for they had no inception until afterwards. This brief statement shows that the proceedings in the land department from first to last were *ex parte*.

In *Garland* v. *Wynn*, 20 *Howard*, 6, Mr. Justice CATRON, delivering the opinion of the court, says: "In November, 1842, William Wynn, the complainant below, proved that he had a preference of entry to the quarter section of land in dispute, according to the act of 1838, and his entry was allowed. In February, 1843, Samuel Hemphill made proof that he had a right of preëmption to the same land under the act of May 26, 1830. The two claims coming in conflict, it was decided by the register and receiver at the local land office, that Hemphill had the earlier and better right to enter the land, and in this decision the commissioners of the general land office concurred. The learned judge states the matter thus: "The question is, have the courts of justice power to examine a contested claim to a right of entry under the preëmption laws, and to overrule the decision of the register and receiver confirmed by the commissioner, in a case where they have been imposed upon by *ex parte* affidavits, and the patents had been obtained by one having no interest secured to him in virtue of the preëmption laws, to the destruction of another's right, who had a preference of entry which he preferred and exerted in due form, but which right was defeated by false swearing and fraudulent contrivance, brought about by him to whom the patent was awarded." He then answered this question in the affirmative, laying great stress upon the *ex parte* character of the proceedings.

From the statement in the first part of the opinion, it

would appear that there was a contest before the land office between the two claimants there present. But the manner in which the question is put and answered shows that this could not have been the case, or at least not to the extent of subjecting witnesses to an oral examination, in presence of the adverse parties, and to a cross-examination, which is of the essence of a judicial inquiry.

The next case cited is that of *Lytle* v. *Arkansas*, which was twice before the court: the first opinion being reported in 9 *Howard*, 154, and the second in 22 *Howard*, 193. In this case the entry by Cloyes under consideration was made before the grant by congress to Gov. Pope, against which it was alleged, and therefore must have been *ex parte*. So in fact it is expressly stated to have been "that Cloyes in his lifetime, by his own affidavit and the affidavit of others made proof of his settlement on and improvement of the above fractional quarter section, &c." The entry was finally decided against, because these *ex parte* affidavits were false.

This review shows that the cases relied upon to support our jurisdiction, involved the examination of the record findings and decisions of the land office, in proceedings which were there simply *ex parte*. In the case which we are here considering, such is not the fact. The examination of the right of preëmption as claimed both by Smiley and by Sampson, was had, upon notice to the parties, who appeared personally, and by counsel produced each his witnesses in support of his own and in opposition to his adversary's rights, which witnesses were, in presence of the officers and the parties, subjected to oral examination and cross-examination, and arguments very voluminous and exhaustive were filed by counsel for the instruction of officers.

The register and receiver of the local office, and their superiors in the land department, form a special tribunal for some purposes and to a certain extent. The eleventh

section of the act of 1841 (5 *U. S. Stat. at Large*, 456), provides "that when two or more persons shall have settled on the same quarter section of land, the right of preëmption shall be in him or her who made the first settlement; provided that such persons shall conform to the other provisions of this act: and all questions as to the right of preëmption arising between different settlers, shall be settled by the register and receiver of the district, within which the land is situated, subject to an appeal to and revision by the secretary of the Interior of the United States." This act seems to me to be very clear.

This statute vests a power in the officers named to settle, that is, to finally determine certain questions. Over these questions, they have jurisdiction; and their judgment thereon is conclusive.—*Allen* v. *Blunt*, 3 *Story C. C.* 742. The power to hear and determine a question is jurisdiction. It is *coram judice*, whenever a case is presented which brings this power into action.—*United States* v. *Arredends*, 6 *Peters*, 709. This power may be exercised according to the rules of the common law, or by special direction, or informally.—*United States* v. *Ritchie*, 17 *Howard*, 525. The cases upon this class of officers are all to the same effect.

The first I have noticed is *Brown* v. *Jackson*, 7 *Wheaton*, 218. The board of commissioners composed originally of the secretary of state, secretary of the treasury and attorney general, and afterwards of three persons appointed by the president, by and with the advice and consent of the senate, was authorized and required "to adjudge and finally determine upon all controversies arising from such claims as aforesaid, which may be found to conflict with and to be adverse to each other."—3 *U. S. Statutes at large*, 117, § 2. The court, Chief Justice MARSHALL delivering the opinion, held that the award of the commissioners upon questions submitted to them, under the act, is final and conclusive. In *Foley* v. *Harrison*, 15 *Howard*,

443, the entry which was subject to examination was made under the preëmption law, and had been suspended for reasons not necessary here to notice. An act of congress was passed, providing, "that the commissioner of the general land office be and is hereby authorized and empowered, to determine upon principles of equity and justice as recognized in courts of equity, and in accordance with general equitable rules and regulations, to be settled by the secretary of the treasury, the attorney general, and commissioner conjointly, consistently with such principles, all cases of suspended entries, now existing in said land offices, and to adjudge in what cases patents shall issue for the same." Under this act, the commissioner reported to the secretary among others the entry in question as adjudicated by him favorably to the claimant, and as entitled to be patented; and this report was agreed to by the secretary and attorney general. Mr. Justice MCLEAN delivered the opinion of the court, and dismissed the matter which we are now considering, with these brief words, "as this decision was made by a special tribunal with full power to examine and decide, and as there is no provision for an appeal to any other jurisdiction, the decision is final within the law."

Haydell v. *Dufrene*, 17 *Howard*, 23, turned upon the question of the conclusiveness of a division of lands made under an act of Congress, 2 *Statutes at large*, 619–663, which provided, "that every person who, &c., shall be entitled to a preference in becoming a purchaser of any vacant tract of land, adjacent to and back of his own land, &c., and the principal deputy surveyor, &c., is hereby authorized, &c., to cause to be surveyed the tract claimed by virtue of this section. And in all cases where, by reason of bends in the river, &c., and of claims of a similar character, each claimant cannot obtain a tract equal in quantity to the adjacent tract already owned by him, to divide the vacant land applicable to that object between the several claim-

ants, in such a manner as to him may appear most equitable."

Mr. Justice CATRON delivered the opinion of the court, and said: "Congress contemplated that these lands should be divided among front proprietors by a surveyor on the grounds, aided by his principal; these officers were bound to act according to their best judgment, and decide as judges on the equities of these claimants; nor could the courts of justice interfere to control their acts, if they were honestly performed."

In *Cousin* v. *Blaac's Exc.*, 19 *Howard*, 202, the statute, (3 *U. S. Statutes at large*, 708, § 4,) which was the subject of consideration, provided, "that the registers and receivers of the public moneys of the said respective districts, &c., shall have power to direct the manner in which all lands, &c., shall be located and surveyed, and also to direct the location and manner of surveying all the claims to lands recognized, &c., having regard to the laws, usages and customs of the Spanish government on that subject, &c.; and that in relation to all such claims which may conflict, or in any manner interfere, the said registers and receivers of the public moneys of the respective districts shall have power to decide between the parties, &c."

Mr. Justice CATRON delivering the opinion of the court, says: "It rested with the register and receiver to ascertain the location of the land confirmed to Cousin from the evidences of claim recorded and filed with the register, and having decided where and how the land should be located and surveyed, the courts of justice cannot reverse that decision."

Many other cases might be cited to the same effect; but these are enough to show that the Supreme Court of the United States holds land officers to be special tribunals, whose decisions are conclusive between the parties, upon certain questions and matters. What are these questions

and matters? Obviously, such as are by the statute submitted to them for their decision. The statute says that "all questions as to the right of preëmption arising between different settlers shall be settled by these officers." Not every question, but such only as arise between different settlers, and such only as relate to the right as between themselves, to purchase the one before the other. It is evident that there are questions which are not of this character, which may arise between one of the settlers and the government, as for instance: whether the land is subject to entry under the preëmption laws; whether the claimant is entitled to the benefit of the act, &c., &c. These questions do not arise between the two adverse claimants, and are not to be settled by the land officers. And this is made yet more clear, from a consideration of the first clause in the section; "when two or more persons shall have settled on the same quarter section of land, the right of preëmption shall be in him or her who made the first settlement." After this provision, vesting the right in one of the claimants, and in immediate connection with it, it is said that all questions arising between these two claimants, as to this right thus vested, shall be settled by the land officers. Evidently the questions involve their relative and respective rights as compared the one with the other. And then again, the proviso, that the person in whom the right is vested by the first clause, shall conform to the other provisions of the act, that is, that he shall do such things as are required of all preëmptors, shows that such questions only are submitted to the decision of the officers.

There are provisions of the act, which if a party does not answer to, exclude him from its benefits, and yet to which you would not say he must conform. For instance, land excepted from the act by special limitations cannot be preëmpted by any one, and yet you would not say of it, that a claimant did not conform to the act in that particular.

It is thus apparent that the proviso relates to a class of inquiries, which may arise between the claimants, but not to a class of inquiries which can arise between only one of the claimants and the government. It is the former class of questions and not the latter, which are submitted to these officers for their determination.

We have now shown that questions arising between the settlers, in determining which one of them shall have the preference in the purchase of a tract claimed by both, are submitted to the judgment of the land officers, to the exclusion of a re-examination by the courts, but that other questions are not so submitted. An examination of the act will show that the first class of questions are confined to these subjects; namely, the settlement and the priority of settlement upon the tract, and the improvements and their character, extent and value, as indicative of the *bona fides* of the alleged settlement made by each of the claimants. For the act says that the right shall be in the first settler, and the officers shall settle the questions arising between the settlers, the most important of which must be the priority of the one or the other on the tract. So too, the act says the first settler must conform to the provisions of the act. These provisions are, that the claimant shall have "made a settlement in person upon the tract," and inhabit and improve the same, "and erect a dwelling thereon."

In determining the questions of settlement, inhabitancy and improvements, it is evident that an inquiry into and determination of their *bona fides* is necessary, in order to adjudge upon the claims of the parties respectively. These are all questions of fact, of precisely the nature of such as in a common law trial are submitted to a jury. The questions arising between the settler and the government are of a different nature. One of the limitations specified in the act is, that lands included within the limits of an incorporate town shall not be preëmpted. Here is no question

of fact as such, to be determined. The act of incorporation, or such other proceedings as may have been had to create an incorporation, is presented, and the judge and not the jury determines its validity, and the extent of territory brought within the municipal jurisdiction. Or, to take another instance. The act excludes from its operation, lands included in a reservation for military, or Indian, or other purposes. Here the law, or proclamation or treaty making such reservation is presented, and on it the question of reserve or no reserve is submitted. This obviously is a question of law. If we go through the whole statute, we will find that aside from questions of settlement, inhabitancy, cultivation and improvement, all the questions arising upon a claimant's right under the act, partake of the nature of questions of law, or of law and of fact together, and in a common law trial, would be reserved by the judge for his own rulings.

The intention of congress and its great wisdom in these beneficent provisions is brought out clearly to view by these considerations. Nothing could be so proper as to submit to the land officers the questions of fact, touching settlement and improvement; but nothing could be so ill-advised as to entrust to them the determination of questions of law, such as we have instanced. They are generally men of intelligence in the ordinary business of life, but not trained by study or experience to the habits of investigation required of judicial officers. They are good material for juries. They are not fit for judges. This view is confirmed by the adjudged cases.

The case of *Wilcox* v. *Jackson ex dem. M'Connell*, 13 *Peters*, 498, arose out of a preëmption entry, allowed by the register and receiver, of a tract of land on which was a military post, called Fort Dearborn, and which tract had, as was claimed, been reserved for military purposes. Mr. Justice BARBOUR, delivering the opinion of the court, says :

"Before we proceed to inquire whether the land in question falls within the scope of any one of these prohibitions, it is necessary to examine a preliminary objection, which was argued at the bar; which, if sustainable, would render that inquiry wholly unavailable. It is this, that the acts of congress have given to the registers and receivers of the land offices, the power of deciding upon claims to the right of preëmption, that upon these questions they act judicially. Now, assuming that the decision of the register and receiver, in the absence of frauds, would be conclusive as to the facts of the applicant being then in possession, and his cultivation during the preceding year, because these questions are directly submitted to them, yet if they undertake to grant preëmption in lands in which the law declares they shall not be granted, then they are acting upon a subject matter clearly not within their jurisdiction; as much so as if a court whose jurisdiction was declared not to extend beyond a given sum, should attempt to take cognizance beyond that sum."

In *Doe ex dem. Barbarie* v. *Eslava*, 9 *Howard*, 421, this question was presented upon a decision made by the register and receiver, under an act which provided that "in all such claims which may conflict or in any manner interfere, the said registers and receivers of public moneys of the respective districts shall have power to decide between the parties," &c. In a preceding clause of the same section of the same act it is provided that "they shall have power to direct the manner in which all lands claimed shall be located and surveyed." Mr. Justice WOODBURY delivered the opinion, and on this point said: "We do not consider that the act" * * "meant to confer the adjudication of titles of lands on registers and receivers.—7 *Peters*, 94. Those officers are not usually lawyers, and their functions are in general ministerial rather than judicial. Sometimes, as in the case of preëmptioners, they are authorized

to decide on the fact of cultivation or not; and here from the words used no less than their character they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title, involving also the whole interests of the parties, and yet allowing no appeal or revision elsewhere.

"The power given them as before quoted, is to decide only how the lands confirmed shall be located and surveyed. The further power to decide on interfering or conflicting claims should apply only to the location and survey of such claims."

In *Tate* v. *Carney*, 24 *Howard*, 357, the same statute came up for consideration upon the same question, and the ruling was as in the last above cited case.

I shall not refer to other cases, although they are very numerous. I do not think anything need be added to the decisive and well considered opinions of the eminent judges who pronounced these judgments. However they state the proposition, whether as a question of jurisdiction of the land officers, or of construction of the statutes, it rests ultimately upon the distinction stated above. These cases hold the findings of the land office upon the question of fact touching settlement and improvement to be conclusive; but to decisions upon questions of law as whether the land is subject to preëmption, they do not award the same credit or effect.

I wish to make one observation here. In construing the 11th section of the act of '41, I limited the questions submitted by the officers in the last clause by the preceding clause, which gave the right to the settler first in time.

This is precisely what was done by the court in construing the 4th section of the act of '22, in the case of *Doe* v. *Eslava*, and was also done by the same court in the case of the *United States* v. *Perchman*, 7 *Peters*, 51. I no-

tice this because the cases are in this particular, on all fours.

What were the questions decided by the land officers in this case? On the 24th of January, 1862, the commissioner of the general land office addressed a letter to the register and receiver of public moneys of the Omaha land district, ordering them to make a new and full examination into the respective claims of Smiley and of Sampson, on four points, namely: "first, the date of settlement; second, the nature and purposes of the same; third, the nature and extent of the improvements; and fourth, the date and duration of the residence" of each settler.

On the 9th of June, 1862, this examination commenced before the register and receiver, and was very full and greatly protracted; and resulted in an unqualified decision by these officers in Smiley's favor, upon each one of those questions. Sampson appealed to the commissioner, who, on the 9th day of October, affirmed the report of the local officer. Sampson appealed again to the Secretary of the Interior, who, on the 11th day of July, 1863, reversed these decisions, and awarded the land to Sampson. The sole ground of the secretary's decision, is the fact that Smiley had, in 1857, filed on another tract of land and was by the act of March 3d, 1843, 5 *U. S. Statutes at large*, 619, forbidden to file on another tract. He did not question the decision of his subordinates, upon either of the four points to which their investigation was directed. Now upon this state of the record, it is proper to observe in the first place, that the matter on which the case was determined by the Secretary, was not referred to the local officers at all; it was not an issue to be tried, and it was not tried before them; the Secretary's decision on it was therefore *ex parte*, and comes within the case of *Lindsey* v. *Hawes*, cited above, and the other cases of the same class. But, furthermore, all the questions of settlement and cultivation arising

between Smiley and Sampson were determined by the local officers and the commissioner in favor of the former, and those decisions stand unreversed. In fact, as the Secretary in his decision did not advert to the findings on these findings of settlement and improvement, and placed his ruling on another and disconnected ground, we are to presume that on those questions, he concurred with his subordinates. —*Cunningham* v. *Ashley*, 14 *Howard*, 383. Upon the principles established above, we are constrained to adopt the same view, and the whole case is narrowed down to the proper construction to be placed upon the act of '43.

This is a question of law, upon which we are bound by no opinion of the officers. Our inquiries are to be entirely independent of such opinion, except as the reasons assigned by the Secretary, and his high official position, entitle it to respect.

When we say we are constrained to adopt the judgment of the land officers upon the four questions enumerated by the commissioner in his letter of the 24th of January, 1862, we do not mean to intimate that we doubt its correctness. We do not. Smiley's account of earning the means and of the purchase of the materials with which, and the manner in which, he made the improvements on the tract, is too specific, clear and decisive to be questioned. The alleged discrepancy about the place in Virginia where he taught, is of no consequence, as he is shown to have taught near there. The material question is, did he earn the money by teaching? and disinterested witnesses show that he did. His statement, too, showing that he was the head of the family, and that the large family, consisting of an aged father and four sisters, who were dependent to a large extent upon him, is unquestionably true. Patrick, who swears to the contrary, does not commend himself by his candor, and evidently is trying to sustain his own, or, as he prefers to put it, his wife's interests. His statements can-

not over-ride Smiley's, whose account of the matter we believe throughout. His testimony as to the continuance of his residence on the tract, we think, is quite sufficient. The house remained occupied by him or his tenant continuously. Here was his home when teaching in Iowa, when freighting in the Platte Valley, when his sisters after his father's death were removed to Omaha, and here his father's grave is to this day. His absences were doubtless occasioned by the efforts he had to make to support those who, for a long time, were dependent upon him. They cannot deprive him of the rights which would not have been strengthened under the law, by unintermitted residence. We are satisfied with the findings of the land officers, and adopt them as ours, not only by virtue of a rule of law, but as our own convictions.

We are now brought to the consideration of the one question of law which was decided by the Secretary of the Interior, against Smiley.

The facts as shown by Smiley and undisputed, are these: Smiley came to Nebraska in 1857, and settled upon the lands now in question. Being desirous of securing lands under the preëmption law of September 4, 1841, he made search for a proper tract, but experienced difficulty in finding one, because all the lands in the vicinity were claimed under the protection of the claim club. This club was an organization composed of some hundreds of leading citizens, which, by force in certain cases — by the use of most violent force — prevented new comers into the territory, taking under the act of congress, lands which its members claimed, not by virtue of any actual possession, but simply by joining it and entering on its records a minute of their claim. These claims were 320 acres in extent, in opposition to the law which permitted a settler to take only 160 acres. The organization in its objects, measures and operations was flagrantly illegal and vicious. Smiley,

however, did find a tract of land, which was unoccupied, and unimproved, and accordingly filed with the register of the land office his written declaration of intention to preëmpt it. Before he had made any improvements or done any other act, one Creighton who seems to have held considerable bodies of land in the same way, came to him and told him he held the land under the claim club, and required him to withdraw his filing and claim thereto at once, under pain of being taken in hand by that violent and illegal association. Smiley being unacquainted with these usages of the frontier, and with his rights under the law, and desirous of avoiding any such trouble as he was thus threatened with, readily withdrew his filing, did not again assert any claim to the tract, and it was afterwards preëmpted by another party. Such in brief are the facts. The statutes bearing on this question are these:

The 15th section of the act of 1841, is as follows: "Whenever any person has settled, or shall settle and improve a tract of land subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case within three months after the passage of the same, and in the last within thirty days from the date of such settlement, file with the register of the proper district, a written statement describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made within the same period after the date of such settlement, make the proof, affidavit and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof and payment within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry

of any other purchaser." This is the only provision in that act requiring a declaratory statement to be filed.

It will be at once observed that the lands upon which the filing is to be made under this act, are only such lands as are subject to private entry. The provision is, "Whenever any person has settled, or shall settle and improve a tract of land subject at the time to private entry." The requirement was limited to lands of that single class intentionally, for some reason which seemed good to congress; for the preceding section relates to lands not subject to private entry, providing that the proof and payment shall be made before the public sale. Congress had before its attention the two classes of lands, and when it required the filing of the statement, did so only in respect of one class, and designedly did not do so in respect to the other.

The lands here in question were not at the time of Smiley's filing subject to private entry. The facts about that filing are these: In June, 1858, he offered his filing to the register of the land office, but that officer refused to receive it, because the land had been previously entered under the act of '41, by one Mowrey, although the register had previously decided against the validity of that entry. On the 24th of July following, Smiley filed a *caveat* against Mowrey's entry, whereupon the commissioner ordered a second investigation of its validity, which examination commenced on the 13th day of December, 1858, and was protracted till the 3d day of May, 1859. These proceedings were entitled "*John A. Smiley* v. *James A. Mowrey*;" the result was a decision of the register and receiver adverse to Mowrey's claims, which they communicated to the commissioner by letter under date of May 19th, 1859. A third and fourth trial before the local officers was had, and then came on the investigation upon the four points enumerated above, as directed by the Commissioner in his letter of the 24th of January, 1862. At this last trial,

Smiley offered and caused to be inserted in the record, a declaratory statement dated back to his previous offer in 1858, and as a copy of the one then offered and rejected. The declaratory statement offered by Smiley in June, 1858, should have been received and filed by the register. His excuse for his refusal was insufficient. Mowrey's entry was palpably fraudulent and clearly void. He had himself so decided. That entry did not take the tracts out from the body of the public lands. It was subject to the claim of any other person.

It is a well established principle, that where an individual in the prosecution of a right, does every thing which the law requires him to do, and he fails to attain his right, by the misconduct or neglect of a public officer, the law will protect him.—*Lytle* v. *Arkansas*, 9 *Howard*, 333.

Smiley did all that was required of him in June, 1858, when he prepared and offered to the register to be filed his declaratory statement claiming these lands, under the preëmption law. The officer was guilty of misconduct in refusing to receive the paper. Smiley must be protected by law. But this is not all. From this time forth, he pursued this land, immediately filing a *caveat* against Mowrey's entry, which, by pretense of the land officer was made to stand in his way, and then by successive investigations, avoiding that entry, proving clearly his own right, and following, to this hour, what must at times have seemed to him an *ignis fatuus*. He could not have done more, if his filing had been accepted. The want of it under the circumstances did not seem in all these successive proceedings in the land office, to have prejudiced his rights. We are therefore to regard him as filing on the land in June, 1858.

Lands do not become subject to private entry until they have offered at public sale, under the proclamation of the president. Of these public sales the courts take judicial notice. The first public sale of any lands in Nebraska, did

not take place until July 5, 1859. At the time of Smiley's filing, these lands were not subject to private entry. The 11th section of the act of '41, therefore did not apply to them.

On the 3d day of March, 1843, congress passed an act entitled "An act to authorize the investigation of alleged frauds under the preëmption laws, and for other purposes;" the 4th and 5th sections of which are as follows:

"§ 4. And be it further enacted, that where an individual has filed under the late preëmption law, his declaration of intention to claim the benefits of said law for one tract of land, it shall not be lawful for the same individual at any future time to file a second declaration for another tract.

"§ 5. And be it further enacted, that claimants under the late preëmption law, for land not yet proclaimed for sale, are required to make known their claims in writing to the register of the proper land office, within three months from the date of this act, when the settlement has been already made, and within three months from the time of settlement, when such settlement shall hereafter be made, giving the designation of the tract, and time of settlement; otherwise his claims to be forfeited, and the tract awarded to the next settler in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law."

This 5th section is the first and only provision of law requiring the filing of a statement in writing of a claim to the land, on the part of the preëmptor of unoffered land. It was under this section, that Smiley filed on these lands.

The 4th section relates to lands upon which by the act of '41, a preëmptor was required to file. which lands, as we have seen, were only such as were subject to private entry. The prohibition of the law in a second filing is therefore confined to those lands. The lands here in question not

belonging to that class, the prohibition did not relate to them. Smiley did not infringe the law, by making a second filing. The reason for the distinction between offered and unoffered lands, for prohibiting a second filing upon lands subject to private sale, and not doing so upon lands not subject to private sale, is obvious upon a moment's consideration. Parties purchasing government lands at private entry, do not generally go to the land and personally examine them. They go to the land office for information, where an examination of the plats shows the general character and locality of the lands; almost always they select the lands which they desire from information thus derived. If they were to find a tract, which, from such information, seemed desirable, but which had been already claimed by a party under the preëmption laws, they would naturally decline to take it. If a person could file on several pieces, he would prevent purchasers from entering them, and sales would be greatly retarded and interrupted. As the government by placing the lands in market, indicates thereby its desire to sell, the filing by one person on several tracts, operates to thwart the desires and obstruct the interests of the government. Here is a palpable mischief, which the 4th section of the act of '43 was designed to prevent.

On the other hand, unoffered land can only be purchased by preëmption, and can only be preëmpted by a settlement and residence on the tract, which must, or at least should precede the filing; for it is required to state the day of settlement. Of course this necessitates a personal knowledge of the tract; and whether or not it has been previously settled upon by another. On going to the land office the claimant finding a prior filing, knows whether it will stand in his way; for, unless supported by a settlement, it will be of no consequence. The prior filing unsupported by settlement will not prevent his proceeding to secure the

tract, by compliance with the law, and so he is not injured. Nor is the government injured. It has not placed these unoffered lands in market, but reserves them for actual settlers. No injury is therefore sustained by one man's filing on more than one tract of such land. I think this is the reason for congress making the distinction between the two classes of lands, which has been pointed out above, in well considered and carefully framed statutes. It seems clear to me that there is no prohibition in them or either of them of a second filing on unoffered lands; and therefore the fact of Smiley's filing in 1857, did not affect his right or capacity to secure to himself the benefits of the act of '41, when he filed on the lands here in question in 1858.

There is another view of the matter which may be taken, and which conducts to the same result. The act of '43 was passed to suppress certain frauds and mischiefs which had grown up under the preëmption laws. Its title, the most of its provisions and its whole frame indicates this. One of the frauds doubtless was the very one which is aimed at in the 4th section noticed above; that is, of persons filing declaratory statements upon several parcels of offered lands, whereby the government sales were retarded, and these persons were enabled to extort from others, desiring to purchase, sums of money, in order to remove the obstruction thus interposed. The facts of Smiley's first filing and his withdrawal of all claim to the land, so at that time claimed by him, as they appear in the record and as they are stated above, show, very clearly, that he did not do what he did for any fraudulent purpose, nor to speculate in the public lands; nor did any injury result to the government. On the other hand, he did what he was justified in doing; what any prudent man would have done under the circumstances. The government could not protect him in his rights against this violent and illegal claim club;

and it cannot now turn around and say, because it failed of its duty in furnishing the protection to which he as a citizen was entitled, he shall suffer.

The act of '43 was passed to suppress frauds, and Smiley's case is not within the mischief aimed at.

It is a just, reasonable and necessary rule of statutory construction, that the general words of a law are to be restrained where it is clear that they were not intended to extend to a particular act or thing.—*Grotius de Equitatu, C.* 1, *sec.* 3, 2 *Just.* 43, 83. In fact statutes are to receive at times a construction which may seem contrary to the letter. The reason assigned is, that the lawgiver could not set down everything in express terms, so as to meet all the various exigencies of human affairs, and is by the necessity of the case, compelled to use general terms, which include in their natural significance many cases which were not in the intention of the law-maker. So when such a case arises, when it is clearly out of the mischief intended to be guarded against, being out of the spirit of the law, although within its letter, it is the duty of the judge to limit the terms employed. The case of *Jackson* v. *Collins*, 3 *Cowen*, 89, furnishes an apt example. The statute prohibited any sheriff or other officer, to whom any execution should be directed, or any of their deputies, or any one for them or either of them, to purchase any goods or chattels, lands or tenements at any sale by virtue of any execution, and declared all purchases made by them, or any of them, void. The premises in question in that case, which was an action of ejectment, had been sold by one deputy sheriff, on an execution issued under a judgment owned by another deputy of the same sheriff, and was bid off by a third person, in his own name, but in fact, as it was claimed, for the deputy who owned the judgment, and was subsequently conveyed to him by the purchaser. It was contended that the purchaser was trustee of the deputy, and purchased the land

for his benefit, and that for that reason the purchase was void. SAVAGE, Ch. J., held that although the purchase came within the letter of the act, it could never have been the intention of the legislature to have prevented a deputy sheriff, when he was plaintiff in an execution from bidding in order to secure his money. "The object was to prevent abuse — that the sheriff or his deputy should not be allowed to become purchasers at their own sales, and thereby be induced to conduct corruptly in relation to them. But surely it was never intended to place those persons in a worse situation than others as to the collection of their own demand. 'Whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such may seem contrary to the letter.'—*Bac. ab. til. Statute* (*I*) 15 *John.* 386, *per Ch. J.* THOMPSON. A thing which is within the letter of the statute, is not within the statute, unless it be within the intention of the makers."

The same rule was applied in the case of *The Mayor, &c. of New York* v. *Lord*, 18 *Wendell*, 131. The statute provided that when any building or buildings in the city of New York, should be on fire, the mayor might direct or order the same to be pulled down or destroyed, and that upon the application of any person interested in any such building, a jury should be called to inquire and assess the damages which the owner of such building, or any person having any estate or interest therein, had sustained by the pulling down or destroying thereof. During the great fire in December, 1835, a building owned by Rufus L. Lord, and occupied by David N. Lord as tenant for a year, from May 1, 1835, had been destroyed by being blowed up by the order of the mayor, to prevent the spreading of the conflagration. The tenant, D. N. Lord, had a large amount of goods in the building which were destroyed with it. He applied under the act for a jury, who assessed the

damages of the owner at $7,168.50, and of the tenant as lessee and for his goods, at $156,274.50. The question was, whether the tenant was entitled to the indemnity under the act. Chancellor WALWORTH in delivering the opinion of the court, said: "In the language therefore, of an eminent Scotch civilian, 'when the strict letter of the law seems contrary to its spirit or to equity, judges ought not so much to regard the proper or received signification of the words, as that meaning which appears most consonant to the design of the law.'—*Ersk. Inst.* 81, *tit.* 1, § 52. And he bids fairest for a just interpretation, who keeps constantly in view the mischiefs, or defects which existed in the former laws, on the same subject, the remedies which the statute has provided to cure them, how far those remedies are proper, and what sense appears most congruous to its subject matter and most agreeable to equity. —*Idem.* § 58.

"In relation to the subject under consideration in this case, the defects which existed in the common law were, that where it might become necessary for the officers of the corporation to destroy property of an individual to prevent the ravages of a fire, no provision was made for compensating the individual for his private property, which was taken for the benefit of others, notwithstanding the officers were protected from personal liability, when they could show that the destruction of the property was neces sary to produce the effect. They were, at the common law, bound at their peril to decide correctly as to such necessity, to protect themselves from liability to make good the loss. Although the legislature seem to have supposed that it was only necessary to give to the officers of the corporation a discretionary power to pull down or destroy buildings, to arrest the progress of the fire, it can hardly be presumed that they did not intend to extend this protection to the officers, as well as the compensation to the indi-

vidual, whose property was thus taken or destroyed, to all cases of destruction which were the necessary consequences of a correct and judicial exercise of the power expressly given by the statute. * * *

"The terms of the act appear sufficiently broad to give to the owner or lessee of the building an assessment of all the damages he has sustained by the pulling down and destroying of such building, without giving him an opportunity to remove his goods therefrom. In such a case the loss of the goods may be as legitimately considered a damage sustained by the destruction of the building, as the loss of the building itself. Both are equally within the spirit and equity of the statute, and no reason can be assigned why the individual whose property is thus taken and destroyed for the preservation of the city, should not be compensated as well for one part of the injury as for the other.—*Durraussean* v. *U. S.*, *Cranch*, 307 ; *U. Fisher*, 2 *Cranch*, 358 ; *Lessees of Brown* v. *Plougher*, 14 *Peters*, 178.

Many other cases both in England and America might be cited in support of this view. And so it is at the civil law. Dornet says (*C. I. til. I.* § 2.), "where the hardship or rigor of the law be not the necessary consequence of and inseparable from it, but the law itself may have effect by an interpretation which mitigates its rigor, courts may, as the spirit of the law requires, depart from the rigor which the letter of the law seems to demand, and follow rather its spirit and true intendment, rather than adhere to a strict and rigid interpretation."

St. Germain is thus quoted in Doctor and Student, 16 : "In some cases it is necessary to leave the words of the law and follow that which reason and justice requireth ; and to that intent, equity is ordained, that is to say, to temper and mitigate the rigor of the law ; and so it appeareth that equity taketh not away the very right, but only that which seemeth to be right by the general words of the law."

Puffendorf thus expresses it: "A true equitable construction consists in showing by principles of natural good sense, that a particular case is not comprehended in the meaning of a law, because if it were so comprehended, some absurdity would necessarily follow." Applying this rule of statutory construction to this case and our view above expressed is fully supported. If the two acts of '41 and '43 taken together do in words forbid one person to file twice a declaratory statement, as well on unoffered as on offered lands, because by doing so the United States or third party are in some way injured, yet these words would be restrained so as to except from their otherwise harsh and rigorous effect, the case of a person, who was, by some power which he could not resist, compelled to abandon all the advantages of his first filing. Unless the case be taken out of the operation of the words of the act, the absurdity occurs of passing a beneficent statute for the benefit of a meritorious person, and then, for no fault of his, depriving him of that benefit. A law passed to suppress frauds is made to operate oppressively upon a party, who has not voluntarily infringed it, and whose conduct has injured no one.

There is another consideration which I will simply advert to. Throughout this Territory in 1857, and 1858, and 1859, persons did file a second and even a third declaratory statement, upon unoffered lands. They were encouraged to do so, by the land officers, who received one dollar for every filing; and these officers were directed by the commissioner of the general land office, to permit this practice, and to permit parties making a second filing, to withdraw the former one. I do not think the officer of the goverment can by such a course, put a certain construction on the law, and then when a party has been misled by it, ignore the rule he has made. That savors too much of a fraudulent

device, to be accepted as the practice of an enlightened and free goverment.

The honorable Secretary was clearly wrong in holding that Smiley exhausted his right under the preëmption law, when in 1857, he filed on one piece of land, and that having withdrawn that statement under compulsion and completely abandoned the tract, he could not file on the lands here in question, and thus enjoy the privileges he had not willingly forfeited.

Another objection not much insisted upon at the bar to Smiley's entry, is made in the record, and demands a brief notice. It is that these lands had been selected as the site of a city, and so were within the exceptions mentioned in the act of 1841. The facts on this branch of the case are these: There was a company known as the Sulphur Spring Land Company, which, under the protection of this Omaha Claim Club, "claimed" some four thousand acres of land, and laid it out in town lots. By one means and another, they induced many persons to build houses on these lots. The only houses on this tract of one hundred and sixty acres, was one built by Gant, a member and at one time the president of the company, and those built by Smiley. The company could not obtain title to the lands in any way, except by hiring parties to preëmpt under the act of '41, and deed to them. This tract was in 1857 preëmpted by one Mowrey under a contract previously made with this company, to convey to it after his entry was made, for the consideration of $150. This was in violation of the law and of the oath he was required to take, when he made his entry. It was perjury on his part, and subornation of perjury on the part of the officers of this company. This was the entry which first stood in the way of Smiley's preëmption. In 1858, this company failed, and the forced enterprise of building the town was abandoned. The bubble burst.

This tract never was selected as the site of a town, so as to exclude preëmptors from it. At the time Smiley claimed it, no one objected to his claim, because it had been selected as a town site.

From the case as thus made by Smiley in support of his right of preëmption of the lands in question, we must turn for a moment to the consideration of the facts shown in support of Sampson's right. Smiley claimed and instituted proceedings to secure these lands in the summer of 1858. In the following winter a trial was had in a matter entitled "*John A. Smiley* v. *James A. Mowrey*," which resulted in a decision of the local officers in Smiley's favor. The commissioner affirmed this decision. On the 21st day of August, the commissioner directed another investigation in Smiley's behalf, and at this time Sampson first appears on the scenes. He came into the case, therefore, not until after Smiley, by persistent efforts, had avoided the fraudulent entry of Mowrey. On his arrival in the Territory, without means, he rented a farm from the Creighton above mentioned, some miles distant from this tract, and rented the house thereon built by Gant. This house, it is claimed, he bought from Gant, giving him his note for $3,000. He never built any other house. Immediately after, he, under the Secretary's decision, obtained this land, he conveyed nearly the whole of it to Tuttle, the treasurer, and indirectly to Gant the president, and Patrick, the donating committee of the extinct Sulphur Springs Company, and to others, his witnesses and attorneys. We cannot doubt that this was all, as it had been agreed, when this man first asserted a claim to the tract. It was unquestionably one of those speculations, like that previously entered into with Mowrey, into which all those parties entered, or into which they were from time to time admitted, as their services seemed to be required, in the progress of these most extraordinary proceedings. They

all evidently entered into the venture with their eyes open. Not one of them is shown to have put a dollar in, not one of them comes before us with a case having a single equitable feature. On the other hand the record shows to our apprehension as fraudulent a case as Mowrey's, except that he was shame-faced enough to leave the country as soon as these parties had paid him "his price." If it is not proven, so that parties unacquainted with the manner of doing such things in new countries can see it, to us it is perfectly clear. No injustice, no legal injury is done to these parties by taking this title from them, and conferring it upon an early settler, a *bona fide* preëmptor, and a meritorious claimant.

The decree of the District Court was right, and must be

Affirmed.

Towsley v. Johnson.

1. PRE-EMPTIONS: *Object of restrictions.* The several provisions of the pre-ëmption act of September 4, 1841, as to settlement, cultivation, inhabitancy, &c., were designed to secure permanent, actual settlers on the public lands.

2. ——: ——. Such a settler will not be deprived of the benefits of the act, by giving to some provision of law a harsh and inequitable construction, when applied to his case, unless the terms of the statute clearly and imperatively require it.

3. ——: *Priority.* The first settler who has complied with all the provisions of the law in good faith, is entitled to the land settled upon, whatever any subsequent settler may do in respect thereof.

4. ——: *Conveyances in fraud of the law.* A person occupying a portion of the public land under a supposed right, may, after such right fails, assert a preëmption claim thereto; and the fact of his having mortgaged his supposed interest under the invalid claim, will not vitiate his preëmption right.

5. ——: ——. Nor will conveyances of the lands after he has preëmpted them, invalidate his entry.

6. ——: *Town improvements.* Surveying a tract of public land and dividing it into town lots, making a plat of it as a town, and building one house on one lot, are acts insufficient to impress upon it the character of a town, so as to withdraw it from the operation of the preëmption law. And especially so, after the design of building the town has been abandoned.

7. *Smiley* v. *Sampson, ante,* followed.

8. ESTOPPELS must be reciprocal.

This is an appeal from a decree, rendered by Mr. Justice CROUNSE, sitting in the District Court for Douglass county.

It was a bill in chancery, filed by John W. Towsley, against these appellants, to recover the legal title to the premises in question. The record shows the following facts:

Towsley, being the head of a family and a citizen of the United States, and never having enjoyed the privilege of

preëmpting any part of the public land, unless he did so under the circumstances hereafter stated, and not being the proprietor of three hundred and twenty acres of land, and not having quit or abandoned his own land to reside on the public land, on the 15th of June, 1858, settled upon the west half of south-west quarter of section 3, in township 15, north range 13, east of the 6th principal meridian, and has ever since inhabited the same. These lands, and also those adjoining, that is to say, the west half of north-west quarter of section 10, in the same township and range, were not, in any manner, nor for any purpose, reserved by the government, nor included within the limits of an incorporated town, nor, save as is hereafter stated, selected as the site for a city or town; nor were they occupied for the purposes of trade; nor were any known salines or mines situated thereon. Prior to the day aforesaid, he built a dwelling house and out-houses on said lands, at a cost and of the value of over $1,500; and during that year he broke, and has ever since cultivated them, and being entirely unimproved and vacant when he entered upon them, he, by his improvements and cultivation, has converted them into a good, substantial, husband-like farm.

On the 15th of August, in said year, he tendered to the register of the United States land office at Omaha, his statement of intention to preëmpt the said premises, under the act of 4th September, 1841; and requested that officer to file the same; but this was refused; because, as was alleged, the lands had been previously entered by one Bennett, as a mail contractor. Bennett's entry was illegal and void; and was shortly afterwards so declared by the Secretary of the Interior, and was accordingly set aside and canceled.

On the 4th of February, 1859, Towsley filed with said register the statement previously tendered by him.

One Kountze claimed the second above described lands under said act, and a settlement thereon prior to Towsley.

The question of their respective claims was, after protracted proceedings in the land department, determined in favor of Kountze, on the ground that he was the first settler; and it was then, that is, on the 22d day of August, 1862, decided by the said department, that Towsley was entitled to the lands first above described.

On the 5th of October, 1860, the appellant, Johnson, removed from a place about a mile distant, on to the lands so adjudged to Towsley, a small house worth about $200, and fenced a small enclosure. The house was easily removable; and it is charged that it was intended to be only temporary. This house he and his family have, at different times, lived in; but, as is alleged, only for brief periods, when the varying decisions of the land department seemed to render it necessary, in order to enable him to secure the land under the preëmption law. During most of the time, he has actually lived in Omaha; where he has carried on business as a photographer.

On the day of his said alleged settlement, Johnson filed with the register, his declaratory statement of intention to preëmpt these lands. In that year, also, the respective claims thereto of Towsley and Johnson were investigated by the local office, and the matter determined in favor of the former, and this decision was affirmed by the commissioner of the general land office.

On the 20th day of September, 1862, he took the prescribed oath, and entered the land, and received the patent certificate therefor.

Thereafter, he proceeded to make further improvements at the cost and of the value of $3,000.

The dispute between Towsley and Johnson having been by the latter carried by appeal to the Secretary of the Interior, that officer on the 11th of July, 1863, decided that Towsley's entry was illegal, for the sole reason that on the 2d of April, 1858, he had filed on another tract in the

Brownville district. The facts connected with this matter were these: Immediately after making this filing, he returned to Douglas county for his family, with the purpose of removing them to the lands so filed upon. But, soon afterwards, he broke his arm, by which accident he was disabled from going to Nemaha county. On his recovery, he went there and found that one McArthur had settled upon and preëmpted them. Towsley went to the land office at Brownville, and asked the officers there, what course to pursue. He was advised by them to abandon his claim, because he could not recover the land, and his rights under the law to preëmpt another tract were not compromised by what he had done. Accepting this advice, he abandoned the land and his claim thereto, and so told the officers; and has never since alleged any interest therein.

Repeated efforts to obtain from the Secretary a reconsideration of his decision, and also a reference of the matter to the Attorney General, were unsuccessful, and resulted only in the statement by the land department, that if the decision was erroneous the remedy would be granted in the local courts.

Afterwards Johnson effected his entry, upon which a patent was issued to him. Parts of the premises he afterwards conveyed to the other appellants, who were impleaded to the amended bill.

In 1856, the Sulphur Springs Land Company, claiming the land in dispute, together with several thousand acres adjoining, surveyed them into lots and streets, with the view of building thereon a town, to be known as Saratoga. It built a hotel near the lands in question, and also laid the foundation of another hotel. It also gave to parties building houses on these lands, parcels of ground proportionate to the value of the improvements made by them; and Towsley himself first went upon the tract, under some agreement of this character with the company. It is alleged

that when Towsley built his house, the lands here claimed by him, were occupied as the town site of Saratoga.

J. I. Redick, for the the appellant Johnson.

J. M. Woolworth, for the appellee Towsley.

Mason, Ch. J.

If we reverse this decree, we shall drive from these premises, a citizen who has, with his family, lived and made his home upon them for more than ten years; who entered upon them when they were raw prairie, and opened upon them a farm; who has gone on year by year adding to his improvements, until now his farm-house, his barns, his fences, his implements of husbandry, his cultivated fields, his crops, attest not only his industry and thrift, but his honest intention, at the first, and thence down to this day, to make here, for himself and his family, his home.

If we reverse this decree, we shall take from this citizen this home of his, and these improvements of his hands, and give them to a man who never permanently made a home here, and who from first to last, has not expended in money or labor but the merest trifle.

Towsley's original claim of preëmption to these lands was, *bona fide*, to secure them under the beneficent provisions of the law, solely for himself. Johnson's claim was with the view from the first of getting them, not for himself alone, but for himself and others; and not for his permanent home, but to speculate in them. The improvements of the former have cost at least $5,000; those of the latter have not cost as many hundreds. The former has put one half of the premises in the highest state of cultivation. The latter never cultivated but one acre, and that but for a single season, in a melon patch. Tows-

ley has amply, honestly, in spirit, if not in the letter, complied with and entitled himself to all the benefits of the law. Johnson, if he has met its easy requirements in the letter, has not even tried to comply with the spirit of the act.

And we are urged to lend ourselves and the processes of this court of justice and equity to this measure on a ground merely technical. For the objections urged to Towsley's rights are not matters arising between him and Johnson, by reason of which the latter has any personal complaint against the former. They are not objections, which, if well founded in fact, would work any injury to the government. The object, and the sole object of the guards thrown around the privilege of preëmption by the law, is to secure on the public lands, actual permanent setters. Such was Towsley. So that the object of the law was in his case fully subserved.

If there be some express positive provision of the law which he has not complied with, or which he has violated, of course it must be applied, and he must bear the consequences of his neglect or disobedience of it, even though those consequences be so unhappy and so unequal as to give his home to one who did not build it, and who has done nothing to deserve it.

But a provision of law to have that effect, must be clear in its terms, and imperative in its demands.

Towsley settled on these lands in 1857, and asserted his preëmption right thereto, in 1858. Johnson did not settle on them, nor assert any right to them until 1860. Towsley being thus the first settler, if he has in all respects complied with the law, is entitled to the lands, without regard to anything which Johnson may have done. We have then to consider his rights first. And inasmuch as the record shows too clearly to admit of question, that his settlement on the premises was very early in the history

of this Territory, and his claim under the preëmption law ante-dated his adversary's two years, and inasmuch as his continued inhabitancy and extended and valuable improvements are in no particular assailed, I shall content myself with a brief consideration of objections urged against his claims to the lands.

The first objection urged against him is, that in consequence of the manner in which he went into possession of the premises, Towsley is estopped to allege any preëmption—right to the premises. The circumstances of this branch of the case are these :

In 1856, the Sulphur Springs Land Company was formed for the purpose of building a town on these and the adjoining lands. For this purpose, they laid claim to some 4,000 acres ; that is, they asserted that they had possession of, and were able and ought to keep others out of the possession thereof. For this, there was no law ; indeed the laws of congress forbade this. A part of this immense body they laid out into lots as a town. The lands here in question were so laid out and divided. The means by which they sought to populate this paper town, was to agree to give to any party who would build on one or more of these lots the title thereto, when the company should acquire it.

The lands here in question were thus laid off, and an agreement of this character was made by the company with Towsley. That is, the company agreed to make to him the title to two lots, when he should build a house of certain dimensions thereon. Towsley built the house, it being the farm-house, in which he has ever since lived. The company acquired a title to the lands by virtue of a preëmption entry thereof, made by one Bennett as a mail contractor. But it does not appear that it ever conveyed to Towsley the two lots according to its agreement. This may not be material, for shortly afterwards this preëmption entry of Bennett's was set aside by the Secretary of the Interior, as illegal and

void. The company was thus disabled to perform the agreement on its part. Besides, the title, which by means of fraudulent preëmptions, it had acquired to other lands, was also vacated, and it was left without means. It became insolvent and went out of existence.

It was at this period that Towsley asserted his preëmption—right to these lands. There is no pretence for saying that his previous dealings with this company stood in the way of his doing so successfully. So far as the technical doctrine of estoppel is concerned it cannot avail Johnson, for he is a stranger. Coke says (*Co. Litt.* 352, *a*): "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel." Nor had the land been selected as the site of a city or town, and thereby taken out of the preëmption act. The only improvement on the tract was made by Towsley. The building of a hotel on an adjoining tract did not and could not affect the character of these lands. With the company, the project of building a town failed, and he was left the sole occupant of the land. The previous survey into lots by an exploded company, and a single dwelling house, are quite insufficient to impress upon an otherwise vacant tract of eighty acres, the character of a city, or to withdraw it from the operation of the preëmption law; especially after the town enterprise was abandoned. Left by this company without any title to the lands, it would be unjust in the extreme, to deny to Towsley the only means of acquiring a title, and saving the $1,500 which he had expended in building thereon.

Another objection urged against this preëmption right is, that by a previous filing on another tract, the claimant exhausted the privilege conferred upon him by the law. In the case of *Smiley* v. *Sampson*, *ante* 56, this question was fully considered and decided. It is, however, right

to refer here briefly to the circumstances of this previous filing.

When he saw that the enterprise of the town was about to fail, Towsley went to the southern part of the Territory to find land which he could preëmpt. Having found a tract answering his purposes, he filed in the proper land office his declaratory statement of intention to preëmpt the tract; and, without making any improvements, returned to his home for his family, and to effect his removal. While at home, he broke his arm, and was thus laid up some weeks. As soon as he recovered he returned in company with his hired man to the tract, when he found it occupied and already preëmpted by another. He applied to the land officers for advice as to the course which he should pursue. They told him that he could not secure the land, were he to contest the entry already made, and that he had better abandon his claims thereto, and that his filing would not invalidate any subsequent entry under the preëmption law which he might seek to make. Acting under this advice, he did abandon his claims to the land, and has never since in any way asserted them. He returned home, and then laid claim to this tract. His whole conduct was open, ingenuous and fair. It commends him to our good opinion in every point of view. To say that such conduct shall be held to operate to deprive him of his right to these lands, is unreasonable.

On the question of our jurisdiction in this case, we refer to our opinion in *Smiley* v. *Sampson*.

Another objection to his claims here, is that Towsley contracted to convey the tract to McConihe, and in fact did convey a part of it to him; and in so doing, disqualified himself from preëmpting it. The facts do not support the position. Before asserting any preëmption claim to the tract, while he expected to get two town lots from the Sulphur Springs Land Company, he mortgaged them to Mc-

Conihe. But this evidently did not qualify his preëmption right. Between the date of his filing and the time he proved up, he made no conveyances. Conveyances made afterwards, whatever they were, if standing alone, do not show a previous contract. And the circumstances of his several mortgages and deeds clearly exclude the idea of any such contract. This objection is not well taken.

I have now considered each one of the objections urged against Towsley's preëmption right. They are none of them of any force. They do not either singly or all together displace the strong equity of his claim. It gives me satisfaction to find that he holds his home by sanctions of the law of the highest obligation, as well when regarded technically, as when regarded equitably. The flimsy claim of Johnson cannot prevail against his solid rights.

The decree of the District Court is affirmed with costs.

Decree affirmed.

Orr v. Seaton.

1. PREPARING RECORDS. The attention of counsel is called to the necessity of seeing to it, that proper orders are entered in the records of the District Court, and that full transcripts thereof are brought to the Supreme Court.

2. PRACTICE: *Time to answer.* When, to a defendant in default for want of answer, the time is given which is fixed by statute, he has to the third Monday following, to answer, and no longer.

3. ——: *Objecting to service.* A defendant who has answered, although his answer has been stricken from the files, and who has applied to the court for leave to answer over, has appeared to the action, and cannot object to the form of the process.

4. ——: *Opening a default.* Whether a default shall be opened, is a question addressed to the discretion of the court. The Supreme Court will not interfere with its exercise, unless it is oppressive.

W. H. James, for plaintiff.

J. M. Woolworth, for defendants.

CROUNSE, J.

This is a suit in equity in which an appeal was taken to the Supreme Court of the Territory, from a decree rendered by his honor WILLIAM F. LOCKWOOD, formerly one of the district judges, at the June term of 1866, for Dakota county.

The bill was filed to foreclose a mortgage given by the defendant Seaton, to secure the payment of certain promissory notes, and to have its lien declared prior to that of certain mortgages and judgments of the other defendants, given by and obtained against said Seaton, subsequent to the making and recording of the plaintiff's mortgage.

The defendants were all non-residents, and service was made by publication. The time specified in the published notice for the defendants to answer was the 9th day of October, 1865. The proof of the publication was not filed until the 7th day of November, of the same year.

The defendants by answer filed the 5th day of January, 1866, recite their liens and allege such informal and improper recording and indexing of plaintiff's mortgage, as should postpone his lien to those of the defendants.

The record transmitted to this court contains much that is unnecessary to enable the court to pass upon that which only can be reviewed properly here, and fails to show other important orders made, evidently by the court, leaving them to be inferred by us by reference to the record presented.

The record shows an answer filed long after the time for answering had expired, a motion made to strike such answer from the files, and a subsequent default and judgment or decree, without an order striking the answer out as asked for; leaving this court to infer that it was so stricken out, by reference to certain affidavits filed and applications made by the defendants, at the June term following, for leave to answer. Allusion is made to this here, to suggest to attorneys the importance of attending to the entry of every material order made at the trial, and of seeing that the record presented to this court contains them.

It appears, however, that on the 9th day of June, 1866, on motion by the defendants, an order was made "that the defendants be allowed the time fixed by statute within which to file their answer from this date." The statute in cases of personal service fixes the third Monday after the date of the return of the subpœna, and where publication is made the same time is given after completion of service. This would make the 25th of June the last day given in which to file an answer. The defendants gave the order another interpretation, claiming that the full time of the publication of the notice and the time thereafter given should be allowed them, being some weeks more than by the other computation.

The Court took the former view of the order, and on the

28th of June permitted a default to be entered, and on the 29th rendered its decree.

On the same day the defendants move to set aside the default for the reason that it was taken before the time for answering had expired, and further that no internal revenue stamp was placed upon the published notice.

As to this second point, it appears that a revenue stamp was placed on the proof of publication and allowed tc remain. The defendant had, as early as January 5th, answered generally without any objection as to regularity in any regard; and although this answer was struck out, still the defendants by their own application had asked and received permission to file an answer in a given time, and it is now too late to interpose any objection of this character, even though the point were tenable had it been taken in time.

As to the other point, the parties defendant had made an appearance, and were before the court at the time of making the order. It was but reasonable to treat them for all purposes thereafter as resident defendants, and the most natural construction to be put upon the order made, and that most likely to be in contemplation of the parties, was that given by the court. The granting of the order, then, to open the default, was a favor to the defendants resting in the discretion of the courts, and where this is not abused, this court will not interfere.

The defendants had been in default once before; and we can see nothing unwarranted in the court on this second application, refusing to allow the defendants to interpose an answer, which, if it obtained, must prejudice a just claim of plaintiff by reason of some neglect or mistake of the recording officer.

The decree, in our opinion, is right, and must be affirmed

Decree affirmed.

Sands v. Smith.

1. LEX LOCI CONTRACTUS. An agreement for a loan of money was made in New York, and the money advanced there: a note dated in Nebraska, payable in New York, and a mortgage on lands in Nebraska were given to secure the debt: *held*, that the circumstance that the note was made and dated in Nebraska, was immaterial; the note was but an incident to the agreement. The contract is to be governed by the laws of New York.

Sands sued Smith and others upon a promissory note, dated at Omaha in Nebraska, payable in New York city, for $5,000 and interest, at 21 per cent per annum.

In his answer, Smith set out *in hæc verba* the usury laws of New York, which make void securities given for a loan of money, by which interest at a higher rate of interest than 7 per cent per annum, is received. He then alleged that before the making of the note, it was "in the said State of New York, corruptly and against the said law of the said State, agreed by and between the said plaintiff and the said makers of the said note and mortgage, that the said plaintiff should lend and advance to the said makers $5,000, and that he, the said plaintiff, should forbear and give day and days of payment of said sum, as in said note is provided, from said day, and that the said makers of said note and mortgage, should for the forbearing and giving of day of payment as aforesaid, give and pay to the said plaintiff, 21 per cent per annum upon said sum of $5,000 so lent and advanced as aforesaid; and to secure the re-payment of said sum and interest at the rate of 21 per cent per annum, the said makers of said note should make and give to said plaintiff, and he should receive the note and mortgage in the petition mentioned; and that in pursuance and part performance of said corrupt agreement, the said makers of said note and mortgage did make, execute and deliver the same to said plaintiff, and in further pursuance and part performance of said corrupt

agreement the said plaintiff in said State did lend and advance to said parties, said sum of $5,000; that said agreement was entered into as aforesaid, and said sum paid over and advanced as aforesaid in said State of New York, contrary to the above recited law thereof, whereby, and by force whereof, the said note and mortgage are wholly void."

No reply was filed. The cause was tried on the pleadings. A judgment was rendered for the plaintiff, interest being allowed at 7 per cent per annum. Smith brought this petition in error to reverse the judgment.

J. M. Woolworth, for plaintiff in error.

I. In the State of New York this note is usurious and absolutely void, and will not sustain an action. See the statute of that State, in the answer.—*Jackson* v. *Packard*, 6 *Wend.* 415; *Hammond* v. *Hopping*, 13 *Wend.* 505, 511.

II. Being thus void where the contract of loan was made and the money advanced, and where it is payable, the note is void here, and will not sustain this action; and this, upon the principle that the *lex loci contractus* controls the validity of the contract, wherever the contract is sought to be enforced.—2 *Kent's Comm.* 455; *Story on Conf. of Laws*, §§ 272, 317–340; *Curtis* v. *Leavitt*, 15 *N. Y.* 9, 227, 296; *Cutler* v. *Wright*, 22 *N. Y.* 472, 480–9; *Fanning* v. *Consequa*, 17 *John.* 511, 518–9; *Andrews* v. *Pond*, 13 *Peters*, 65, 78; *Slocum* v. *Pomeroy*, 6 *Cranch*, 221; *Bell* v. *Bruen*, 1 *How.* 169, 182; *Cooper* v. *Earl of Waldegrave*, 2 *Bea.* 282; *Rothschild* v. *Currie*, 1 *Q. B.* 43; *Thompson* v. *Powles*, 2 *Simons*, 194; *Hyde* v. *Goodnow*, 3 *N. Y.* 266; *Jewett* v. *Wright*, 30 *N. Y.* 259.

III. The case is not taken out of the rule, by the circumstance that a mortgage upon lands in Nebraska was taken as collateral security.—*Story on Conf. of Laws*, § 287; *Chapman* v. *Robertson*, 6 *Paige*, 627; *De Wolf* v.

Johnson, 10 *Whea.* 367, 383; *Andrews* v. *Pond*, 3 *Peters*, 65, 78–9.

IV. The fact that the note is dated at Omaha does not change the case, because, the contract of loan having been made in New York, and that State having also been made the place of performance, the presumption arising from the date, as to the place of making the contract, is rebutted; and the fact is proved to be a mere device to cover the usury.—*Pratt* v. *Adams*, 7 *Paige*, 615, 636–7; *Armstrong* v. *Toler*, 11 *Whea.* 258, 271; *Curtis* v. *Leavitt*, 15 *N. Y.* 9, 53, 178; *Jewett* v. *Wright*, 30 *N. Y.* 258.

Redick and *Briggs*, for the defendant in error.

I. It was competent for the parties to contract for the highest rate of interest, allowed by the laws of either Nebraska or New York, because the note was dated in one State, and was to be paid in another.—*Andrews* v. *Pond*, 13 *Peters*, 65; *Miller* v. *Tiffany*, 1 *Wallace*, 298; *Curtis* v. *Leavitt*, 15 *N. Y.* 9.

II. The loan having been secured by a mortgage upon lands in Nebraska, the contract will be governed by the laws of that State.—*Depeau* v. *Humphreys*, 20 *Martin*, 1; *Chapman* v. *Robertson*, 6 *Paige*, 627.

CROUNSE, J.

From the pleadings as presented by the record, there is no question but that the agreement for the loan of money expressed in the note in suit, with its terms as to rate of interest, time and place of re-payment, was made in the State of New York, and the money there advanced. The circumstance that the note was made in Omaha, Nebraska, where, at the time, there was no limit to the amount of interest that might be agreed upon by the parties, is relied

on to save the note from being declared void under the laws of New York relating to usury, as set out in the answer of the defendant in the court below. This, it is contended, makes it a case where the contract is entered into at one place to be performed in another, giving the parties liberty to contract for the highest rate of interest allowed by the laws of either.

The fallacy of this argument consists in compounding the contract with the note. It is distinctly charged that the note was executed in pursuance of the agreement made in New York. When that agreement was made, and the money there paid over, the rights and obligations of the respective parties attached; the note was but evidence of the agreement. Had the note expressed but lawful interest of New York, with the understanding between the parties that the remaining fourteen per cent interest was to be paid as fixed upon when the law was made, the note would be so related to the contract that because of the illegality of the original agreement, no action could be maintained in New York, upon it.—*Merrills* v. *Law*, 9 *Cow.* 65; *Macomber* v. *Dunham*, 8 *Wend*, 550; 13 *Wend*, 505. So, on the other hand, had the agreement in New York, been for lawful interest, a note given subsequently, expressing a greater interest, would be declared void, while the original agreement would stand.—2 *Pars. on Con. 4th ed.* 392.

These illustrations are given to show that the original agreement is to be considered in the solution of questions of this character. The note is but an incident. In *Hasford* v. *Nichols*, 1 *Paige*, 220, where a contract for the sale of land in New York was made between two citizens of New York, one of whom removed to Pennsylvania, where the contract was afterwards executed, by giving a deed, and taking a mortgage of the premises to secure the payment of the purchase money, in which mortgage the New York rate of interest was reserved, which was greater than that

of Pennsylvania, it was held that the giving the deed and taking the mortgage was only a consummation of the original contract made in New York, and that the mortgage was not void for usury.

Here, then, we have a contract both made, and to be performed in the State of New York, and being void by the laws of that State, must be so here.

The cases urged upon the attention of the court by the counsel for defendant in error, have no application.—*Depeau* v. *Humphreys*, 20 *Mart. La.* 1, is a case where a note was given in New Orleans, payable in New York, with the legal interest of Louisiana, being ten per cent, while that of New York is but seven. There it was held by the Supreme Court of Louisiana, that the contract being made in Louisiana, and to be performed in New York, the parties might stipulate for the interest of either State. This case is sustained by *Pecks* v. *Mayo*, 14 *Vt.* 33; and *Chapman* v. *Robertson*, 6 *Paige*, 627, while it has the disapproval of Justice STORY.—*Conf. of Laws*, § 298.

Having concluded, that in the case under consideration, the contract was not made in Nebraska, it is unnecessary to consider the case just cited.

The contract of the parties being void by the laws of New York, no action will lie here on the note given under it.

The judgment of the court below must be reversed.

Verges v. Roush.

1. *Power of court to enlarge the time within which an appeal shall be perfected.* Courts do not possess any power to enlarge the time within which the transcript of the record of the District Court shall be filed in the Supreme Court, in order to perfect an appeal from the decree of the former court, when the legislature has limited the time within which it shall be filed, and provided as a consequence of failure to do so, that the decree shall stand and be proceeded on, as if no appeal had been taken.

This was a suit in chancery for the foreclosure of a mortgage. A decree of foreclosure was entered on the 1st day of November, 1866. Notice of appeal was filed the next day. The transcript of the record in the District Court was filed in the Supreme Court, on the 7th day of September, 1867.

A motion was made to dismiss the appeal, because the transcript was not filed in this court, within six months from the filing of the notice of appeal in the District Court.

Section 774 of the Revised Statutes requires the appealing party to file a written notice of appeal with the clerk of the District Court, within thirty days from the rendition of the decree of that court.

Section 777 requires the appellant to file in the Supreme Court a certified transcript of the proceedings in the District Court, within six months from the filing of his notice of appeal; and provides that on failure to do so, the decree of the District Court shall stand and be proceeded in as if no appeal had been taken.

Redick and *Briggs*, for the motion.

C. H. Brown, contra.

MASON, Ch. J.

The statute required this transcript to be filed within six months from November 2d, 1866, and provides as a

consequence of default in this particular, that the appeal should be entirely disregarded. The rule in respect to matters of practice is, that the court possesses no dispensing power, when the legislature has spoken. Thus where a statute declares that a judge at chambers may direct a new trial, if application is made within ten days after judgment, it has been held, that he could no more enlarge the time, than he can legislate on any other matter.—*Seymour* v. *Judd*, 2 *Comst.* 464; *Eldridge* v. *Howell*, 4 *Paige*, 457.

In this case, the legislature not only limited the time within which the appeal should be perfected, by the filing of the transcript, but also fixed the consequences of the neglect to do so, within the time limited. We cannot enlarge the time, nor prevent the consequences.

The motion is sustained and the appeal dismissed.

Appeal dismissed.

Jameson v. Butler.

1. CONTINUANCE. The affidavit for the continuance of a cause, to procure the evidence of a co-defendant, is fatally defective, if it does not state the testimony which the affiant expects will be given by the absent party.

2. ——: *Overruling motion for.* Whether the refusal to grant a continuance can be assigned for error: quere?

3. CERTIFICATE TO DEPOSITIONS. A certificate to depositions, showing that the witnesses were sworn to testify the truth, the whole truth, and nothing but the truth, without naming the cause or matter in or about which they were sworn, and showing the other facts prescribed by the statutes, is sufficient.

4. COUNSEL'S OPINION. A written request to counsel for his deliberate legal opinion, justifies him in preparing and forwarding such opinion in writing.

5. INSTRUCTION TO JURY. It is not error for the court to decline to give a request for instructions to the jury, in the words of the request, if the substance thereof is given in terms as favorable to the party.

6. AGENCY. There is no relation or agency between a party forwarding a written request to counsel for his opinion, and another party by whom the writing is transmitted.

This action was commenced in the District Court for Douglas county, by John A. Jameson against David Butler, Thomas P. Kennard, H. G. Worthington and St. A. D. Balcomb, to recover $1,500 for a written opinion given by the plaintiff to the defendants, upon a legal and constitutional question, submitted to him by them. The request was given in a writtten communication addressed by the defendants to the plaintiff, in these words;

"As the power of the governor in his proclamation, convening an extra session of the legislature of Nebraska, under section twelve of article two (2) of the constitution, in the designation of the objects for which they are so convened, is an important question, we beg leave to submit the following proposition, and earnestly request your deliberate opinion on the same:

"First: Has the legislature to be convened the power, under section five (5) article two (2) to re-district the State, or in any manner interfere with the districts as they now are, and as they were under the Territorial organization, until there first be an enumeration as required in section three of the same article?

"It is to be remembered that, the first election referred to in section five of article two, has been held.

"As it is a matter of pressing interest, permit us to hope for an immediate examination of the subject, and a reply at your earliest convenience," (signed) "David Butler, Gov.," "Thomas P. Kennard, Sec. of State," "H. G. Worthington," "St. A. D. Balcomb."

This communication was given to John H. Sahler, at Omaha, to be by him carried to Chicago, and delivered to the plaintiff. Sahler discharged his mission, and the plaintiff prepared and gave to him a written opinion, in answer to the question propounded, with which he returned to Omaha, and delivered to the defendants. For this professional service, the plaintiff charged $1,500, to recover which he brought this action.

The defendants filed separate answers to the petition. Butler and Kennard, put in the general denial. Balcomb, admitted signing the paper set out above, but denied that he either alone or along with the others, or any of the other defendants, requested of the plaintiff the legal opinion referred to, or even employed him to give the same. Worthington's answer was to the same effect.

At the January term, 1868, Balcomb filed a motion for continuance of the cause, supported by his affidavit. In it he states that he expected to prove by Worthington — who is shown to be absent — "that the services for which the plaintiff sues were rendered at the instance and request of John H. Sahler, and not this defendant, nor any of the defendants; and that plaintiff's charges or compensation, if

any, were to be paid by Sahler alone; and that this defendant is not, nor are any of the defendants liable therefor." The motion was overruled, and Balcomb excepted.

The plaintiff caused depositions of witnesses to be taken in Chicago. The officer before whom the same were taken certified as follows: "I, Alex. L. Stevens, a notary public, &c., do certify that the above named (witnesses) were by me first duly sworn to testify the truth, the whole truth, and and nothing but the truth, that the foregoing depositions by them respectively subscribed were reduced to writing by me, and were written and by said witnesses respectively subscribed in my presence, and were taken at the time and place specified in the notice hereto attached; and the taking of said depositions was commenced on the 10th day of October, 1867, and was continued from day to day as provided in the notice hereto attached, until the 11th day of October, 1867, when the taking of said depositions was closed." "Witness my hand," &c.

A motion was made to suppress the depositions on the ground that the certificate was defective; which motion was overruled.

The cause came on to be tried before the court and a jury. Upon the plaintiff's request the judge instructed the jury, "that if they find that John H. Sahler had authority from the defendants, to procure from Judge JAMESON his deliberate legal opinion upon the question submitted, such authority was complete and sufficient to authorize him to procure the written opinion of the plaintiff, upon the questions submitted." To which instruction, the defendants excepted.

The defendants requested the judge to instruct the jury, "that they must find that there was either an express or an implied contract by the defendants, to pay the plaintiff for his services; and if they find that there was no express contract, and if from all the evidence, they find that the

plaintiff had no reasonable expectation that he was to be paid, but was to give an opinion gratuitously, if at all, he cannot recover." The court refused the request as made, but did charge the jury that they "must find from the evidence that there was either an express or an implied contract by defendants to pay plaintiff; otherwise he cannot recover; and if they find that there was such express or implied contract, and if from all the evidence, and from the facts and circumstances as proved, they are satisfied that the plaintiff had no reasonable expectation he was to be paid, but was to give an opinion gratuitously, if at all, he cannot recover." To which refusal of their request, and to the charge as given, the defendants excepted.

The jury rendered a verdict for the plaintiff for $500, upon which, after motion for a new trial overruled, judgment was entered. The defendants bring this petition in error to reverse the judgment.

C. S. Chase and *E. Wakeley*, for plaintiffs in error.

A. J. Poppleton, for defendant in error.

MASON, Ch. J.

This petition alleges several errors on account of which it claims a reversal of the judgment of the District Court.

I. The affidavit for the continuance of a cause to procure the evidence of a co-defendant, should state the testimony which the affiant expects to be given by the absent party. If it does not do so, it is fatally defective. It is not enough to set forth, in terms however positive, the legal conclusion which the party may draw from the testimony to be given; this is for the court, and not for him to do.

This affidavit does not state any fact which Worthington is expected to swear to, but only the conclusions of law

which the party himself draws from facts to be proved. It is not uncommon for parties to mistake the conclusions which should be drawn from facts proved. The motion to continue was rightly overruled.

II. It has been decided by many courts that the refusal of the court to continue a cause, could not be assigned for error, because it is a matter of discretion.—*Woods* v. *Young*, 4 *Cranch*, 237. It is not necessary to decide that question here.

III. The statute is very explicit as to the contents of the certificate of the officer taking depositions.—*R. S.*, *p.* 458, § 585. When it is complied with, the certifficate is sufficient. We cannot add to its requirements. If the statute is not a good one, the remedy is elsewhere. It might be well, as urged by the counsel for the plaintiffs in error, for the certificate to show in terms that the oath was administered in or with reference to the cause. But the statute does not so require. Besides, a long course of decisions in our District Courts has established the sufficiency of certificates, like the one here objected to.

IV. The request in writing, signed by the defendants, addressed to Judge JAMESON, was in itself, sufficient to justify him in preparing and forwarding his opinion in writing. The defendants requested the plaintiff's "deliberate" opinion upon the question, which they state with circumstance and with exactness. It was a grave constitutional question. It was deemed by the plaintiffs one of "pressing interest," and demanding "an immediate examition," and "a reply, at" the plaintiff's "earliest convenience." The form and the terms of the request justified the plaintiff in supposing that he was expected, not only to examine with care the matter in hand, but to reduce his views to writing. A verbal answer, given without reflection, would not have answered the request.

V. The attempt is made to establish the relation of

agency between Sahler and the defendants, and by showing that the agent transcended his authority, to relieve the principals of their liability. There is no such relation shown. Sahler's connection with the matter was simply that of messenger by whom the defendants sent their communication from Omaha to Chicago. When he delivered the writing containing the request to the plaintiff his business was done. It was the writing, and not he, that asked for the "deliberate opinion." It was the request contained in it, and not any words of his, which implied a promise to pay.

VI. The difference between the request, which the defendants made to the judge for an instruction to the jury, and the instruction as given is very slight. It is a difference in words merely. The instruction as requested was evidently intended to contain the legal proposition which the court charged. As given, it was quite as favorable to the defendants as the one requested. It is not error to decline to give an instruction in the very words in which it is requested, if the substance thereof is given in terms as favorable to the party, as those of his request.

The record discloses no error in the court below. The judgment must be affirmed.

Judgment affirmed

McCartny, plaintiff in error v. The Territory of Nebraska.

1. EVIDENCE: *Rebutting incompetent evidence.* Competent evidence may be received on behalf of one party, to rebut incompetent evidence introduced by the other party without objection.

2. ——. But incompetent testimony cannot be admitted to rebut incompetent testimony.

The plaintiff in error was indicted for stealing, in the District Court for Nemaha county, while Nebraska was a Territory. On her admission into the Union, under the provisions of the constitution, the prosecution was transferred to the State Court. Upon the trial, certain testimony was, on the part of the Territory offered, and under the defendant's objection received; and this is the subject of his complaint here. The facts are fully stated in the opinion.

CROUNSE, J.

The affidavit of the defendant in the court below, upon which was based his application for a continuance is certainly a strong one, but as the judgment must be reversed upon other grounds, this court will not undertake to fix the limit to the discretion of inferior courts in refusing continuances. The second and third assignments of error relate to the admission of testimony of witness Brown, concerning declarations of one Meadows. The property stolen was taken from a blacksmith shop in Nebraska City, in Otoe county of this State, and subsequently found on the premises occupied wholly or in part by the defendant. A. S. McCartney, a brother and witness for the defendant, testified that on the morning subsequent to the evening when the property was missed, Meadows, who was at

defendant's, brought the tools which were the property stolen, from the stable to the house. Witness asked him where he got them, to which Meadows replied, "that they were his own, and that he brought them from town" (Nebraska City).

At the close of the testimony for defendant, the prosecution called as a witness, one Brown, to testify what Meadows said to him when he (Meadows) brought the tools to defendant's house, in the presence of the tools, and relative to the ownership of the same. Under defendant's objection, witness stated, "that in the morning Meadows brought the tools to defendant's house, he (Meadows) told witness that defendant broke into a blacksmith shop in Nebraska City and took the tools." This does not appear to have been said in the presence of the defendant or his brother, A. S. McCartney. The record contains a note that the court at the time of the admission of this evidence, remarked that it was permitted for the purpose of offsetting the evidence of A. S. McCartney, relative to the statement of Meadows, as to the ownership of the tools.

The evidence of A. S. McCartney as to declarations of Meadows, is of very questionable competency; but having been admitted without objection, its effect could not be destroyed or assailed by other competent testimony, introduced under the established rules of evidence, if demanded by the opposing party. The admission of improper evidence on the one side furnishes no warrant to the other to meet it by that which is equally bad.

For the purpose of contradicting the statements of A. S. McCartney, the witness Brown might have been allowed to testify whether Meadows at the time, place, and in the conversation spoken of by McCartney, did say, as McCartney related. His testimony, however, was not so limited or directed, but the witness was allowed to testify gene-

rally as to what Meadows said to him, resulting in Brown testifying that Meadows told him that defendant did steal the tools.

This is clearly obnoxious to the rule, that hearsay evidence is inadmissible. Jurors, incapable of discriminating between proper and improper testimony, may have received this testimony of Brown as going far to establish the guilt of the defendant, and the attempt of the learned judge below, to direct or restrict such testimony to a specific point, was, most likely futile. Pernicious evidence when once passed to the jury, is beyond the control of the court.

The judgment of the court below must be reversed, and a new trial granted.

McReady v. Rogers.

1. EVIDENCE: *Verdict.* A verdict of a jury in one case, in order to operate an abatement of another, must have been recovered for the identical cause of action and between the same parties.

2. ——: *Res adjudicata.* A verdict of a jury is not admissible, to show that the matter has been determined, even if it be between the same parties for the same cause of action; because it is not conclusive of the matter.

3. SEVERAL JUDGMENTS AGAINST WRONG-DOERS. Several actions may be brought, and several judgments recovered against several wrong-doers although but one satisfaction can be had.

4. ——: *against sureties on several attachment bonds.* A surety on one attachment bond incurs an obligation, several as respects a surety on another attachment bond, when the two are given respectively in several suits, against the same defendant, and the same property is taken upon the two writs.

5. LIABILITY OF SURETY *on an attachment bond.* A surety on an attachment bond is liable for all damages which the defendant in the writ may sustain, up to the re-delivery of the property to him, if the attachment be dissolved because wrongfully issued.

6. SURRENDER OF ATTACHED PROPERTY: *Charges.* A defendant in an attachment which has been dissolved, is entitled to the possession of the property taken under the writ, without reimbursing the sheriff what he, in order to obtain the property on the writ, paid to a carrier who had lien on it, nor what he has paid for the safe keeping of it.

7. PRACTICE: *Exceptions to charge.* If the charge of the court to the jury contain more than one proposition, and any portion of it be correct, each specific point deemed erroneous must be pointed out, and separately excepted to. A general exception will be unavailing.

Austin sued McReady in attachment. In his affidavit, as ground for the writ, he swore that the defendant had disposed of his property with intent to defraud his creditors. Rogers was the surety on the attachment bond, given by the plaintiff. The attachment was levied on certain personal property, and one Phelps was garnished. The attachment was dissolved, the court finding that McReady had not disposed of his property with fraudulent intent. There-

upon, McReady brought this action against Rogers for his damages. The cause was tried to a jury.

On the trial, the defendant offered in evidence a verdict of a jury recovered by McReady against one Kennard, and to prove that Kennard had sued McReady in attachment and levied his writ on the same property as that taken under Austin's writ, and had garnished Phelps, prior to the suing out of the latter; that this attachment had been dissolved; and that the verdict was for damages sustained by McReady by reason of wrongful suing out of the same. The testimony was excluded by the court.

At the time of the levy of the attachment, the property was in the possession of the Chicago and North-Western Railway Company, which was holding it for its charges for unpaid freight. In order to obtain possession of it, the sheriff paid these charges. He also incurred other expenses in storing it. The court charged the jury that upon the dissolution of the attachment, McReady was entitled to have the property surrendered to him, without reimbursing the sheriff these expenses, and that Rogers was liable for all the damages which McReady sustained by reason of the wrongful detention of the property by the sheriff, upon this pretext, as well after as before the dissolution of the attachment.

The charge of the court to the jury, consisted of several propositions bearing upon distinct questions arising in the case, the correctness of some of which was not questioned. The only exception to the charge was shown by the bill of exceptions to be in these words: "To all of which charge, and each and every part thereof, the defendant by his counsel then and there excepted."

The jury found for the plaintiff, and judgment was entered accordingly.

The defendant brought this petition to reverse the judgment on the grounds indicated above.

C. S. Chase, for the plaintiff in error, argued the following propositions:

I. A judgment in one suit for interest on money, will bar the recovery of interest on the same money for the same period of time, and to the same amount in a separate suit, although the party defendant in such suit, may have been a subsequent attaching creditor of the money, interest on which is sought to be recovered.—*Drake on Attachment*, § 178.

II. The first attaching creditor is alone liable for damages for loss of the use of money attached, if judgment go against him in favor of the attachment defendant.—*Drake*, § 251.

III. The officer, not the plaintiff nor his surety, is liable if the former retain possession of the property after the dissolution of the attachment.—*Drake*, §§ 306, 307.

E. Wakely, for defendant in error, contended:

I. The verdict was rightly rejected, because

1. It was not recovered between the same parties, and was not conclusive of any controversy between the parties to it.

2. Kennard's liability and Rogers' liability were several and not joint. Several actions could be brought and prosecuted to judgment, even though but one satisfaction could be had.—2 *Kent's Comm.* 389*, 508. *and notes to* 10*th ed.*

II. The charges, re-payment of which the sheriff required as condition of delivery after dissolution of the attachment could not be exacted of McReady.

1. When the attachment was dissolved, it was as if it had never issued. The payments by the sheriff were accordingly voluntary.

2. The return to the attachment showed that the sheriff

had taken and held the property subject to the order of the court. The order in effect was, that he should return it to McReady. That was conclusive that the writ should never have issued.—*Drake*, 173.

III. The exception to the charge was unavailing.

IV. Upon the question of interest and the damage sustained by reason of the detention of the money, he cited *Drake*, § 175, *et. seq.*, 664 *et. seq.*

CROUNSE, J.

Among the errors assigned and chiefly relied on by the counsel for the plaintiff in error are:

I. The rejection of testimony offered by him in the court below, showing a verdict obtained at the same term of court, against other parties and in favor of the defendant in error, in which was included the same interest sought to be recovered in this action, and

II. Permitting the jury to consider damages arising from detention of the attached property by the sheriff, subsequent to the dissolution of the attachment.

As to the first, I cannot understand upon what principle such proof would have been material.

Certainly not to effect an abatement of this action; for this purpose the offer must have been to show a suit for the identical cause of action, and between the same parties.

Not as *res judicata*, for the like reason, that neither the parties nor subject matter are identical; and the further reason that not until judgment, has a matter become *res judicata*.

Regarding Rogers as one of several wrong-doers, in attaching the property of McReady, the rule is, that each may be proceeded against, separately, although but one satisfaction can be had.—*Livingston* v. *Bishop*, 1 *Johns.* 290.

But treating Rogers as a debtor under his bond, as was so pertinaciously insisted upon by the counsel (and the concession is here made for the argument), rather than as a wrong-doer, his obligation is several as respects Kennard. His attachment is a distinct proceeding subject to settlement, continuance, and other incidents independent of that of Kennard or others. Still, as one of a number severally liable for the same debt, he, like each of the others, may be proceeded against to judgment, although but one satisfaction could be had. Even where the obligation is joint and several, judgment (without satisfaction) is no bar to a recovery against another.—*Brown* v. *Wooton*, *Cro. J.* 74; *King* v. *Hoare*, 13 *M. & W.* 504; *Simmons* v. *Carter*, 6 *Mass.* 18.

The difficulty is, that the counsel, at the time of his offer, was anticipating a condition of the several cases which had not then transpired—the perfection and satisfaction of judgment against Kennard upon the verdict which was then standing upon the records of the court. McReady in this action was entitled to but his actual damages arising from the interference with his property and credits. If, as to any parts of those sued for in this action he had been satisfied, he would have been allowed to show it. The introduction of a verdict, simply, is not sufficient. Too many contingencies intervene between that and the realization of the amount it expresses. It may be set aside, the judgment on it may be reversed, or the defendant may be worthless. Nothing short of its satisfaction could avail the defendant below, and this he might show on proper application, even after judgment against him.

As to the second point relied on by the plaintiff in error, it would be sufficient to remark that he is not in a condition to take advantage of the supposed error. The bill of exceptions shows so much of the charge of the judge on the trial below as involves several propositions of law, some

of which are conceded to be correct. The exception taken by the counsel at the trial is, "to all and each and every part thereof." This firing at the flock will not do.

It is a well established point of practice, that when the charge of the court involves more than one single proposition, a general exception to it will be unavailing, and, if any portion of it be correct, the whole will stand. Each specific portion of it which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to.—See 2 *Whit. Prac. 3d ed. p.* 364, *citing scores of cases.* Nevertheless, let us briefly notice the point contended for by the counsel.

It is claimed by him that on the dissolution of the attachment, it was the duty of the sheriff to return the property to McReady, and that for his neglect or refusal so to do, Rogers is not responsible; that the sheriff alone is liable from that time. That Rogers, as surety in the attachment suit is responsible for all damage up to the discharge of the attachment, is conceded. Upon what principle he is then to be relieved, I cannot discover. The plaintiff in that suit, representing that McReady had assigned and disposed of his property with intent to defraud his creditors, procured an attachment. Subsequent proceeding showed these representations to be false, and the attachment was discharged. Thereupon, they stand as though no process against McReady's property had ever issued, and become trespassers *ab initio.*—*Lyon* v. *Yates, et al.* 52 *Barb.* They, through their instrument or agent, the sheriff, took McReady's property without his consent, and against his will, and it was their duty to return it, and place him in as good condition as before the taking. It is true that McReady might, as he did, demand the property of the sheriff after the dissolution of the attachment, and have his action against him, not officially, but as against any trespasser wrongfully detaining it, upon his refusal to

deliver it up; still, the liability of the plaintiff in the attachment, or that of Rogers, as his surety, is none the less. The contrary rule might prove very damaging. Property of great value, far in excess of the ability of the sheriff, or the amount of his official bond, might, upon a proper and sufficient undertaking being given, be attached and passed into the hands of the sheriff. The condition of the defendant would be quite unfortunate if the sheriff should wilfully dispose of or refuse to return the property — the plaintiff, by the sheriff's conduct, being relieved from any liability under his bond.

It remains to notice whether the reason assigned for not re-delivering the property be sufficient. The property having been wrongfully taken, it follows that any charges paid to get possession of it, or in its keeping, were voluntary and without warrant, and therefore, re-payment could not be made a condition upon which a return of the property depends.

The judgment must be affirmed.

Judgment affirmed.

Watson v. McCartney.

1. PRACTICE: *Endorsement of summons.* No other judgment can be rendered than that, notice of which is endorsed on the summons.

2. ——: If a summons, issued in an action of such a character as does not require an endorsement, be actually endorsed, the notice so given must fully and truthfully inform the defendant, of the extent and nature of the claim alleged against him.

3. ——: *Amendment of endorsement.* The endorsement of the summons giving the defendant notice of the nature and extent of the plaintiff's claim, cannot be amended unless the defendant appear in the action.

The plaintiff, Watson, sued McCartney in the District Court for Otoe county, to enforce in equity a vendor's lien upon certain lands sold by him to the defendants. The summons issued was endorsed with the notice required in cases where a judgment for money only is sought. The defendants not appearing, the endorsement was, by leave of the court amended, so as to conform to the nature of the action; and judgment was rendered accordingly.

I. N. Shambaugh, for McCartney.

T. H. Stevenson, for Watson.

LAKE, J.

Henry Watson, plaintiff in the court below, on the 24th day of August, 1867, filed in the office of the clerk of the District Court for Otoe county, his petition, in which he claimed to recover of the defendants, Henry M. and A. S. McCartney, the sum of $1,600, being balance due on premises theretofore sold to them, with interest on that sum from April 1st, 1866, and praying also "that in case the defendants should fail to pay said judgment by a short day to be named, the premises (described in the petition) may be sold, and the proceeds of such sale be applied in

payment of said judgment, so to be obtained; that the plaintiff may have his vendor's lien on said premises fully satisfied, and that any and all equity of redemption of the defendants in and to said premises be foreclosed; that plaintiff may have such other and further relief as may be agreeable to equity and good conscience."

The precipe is simply, "To the clerk of court: amount of claim, $1,600, with interest from April 1, '66." Signed by the solicitor for plaintiff. On the same day a summons in the usual form was issued, with the following endorsement: "The plaintiff in this action claims judgment for the sum of $1,600, together with interest thereon from the 1st day of April, A. D., 1867, at the rate of ten per cent per annum."

The defendants failing to appear, the plaintiff was allowed to have the endorsement on the summons changed from 1867 to 1866, and to take judgment for the sum of $1,600, with interest on that sum from April 1st, 1866, and the further decree that the plaintiff have a prior vendor's lien, and that the premises be sold, &c., as prayed in the petition.

So well am I satisfied that this amendment was irregular and unwarranted, that I have not undertaken to look into the cases relating to amendments cited by the counsel for the defendant in error. Although cases might be found to support such a proceeding, I should deem it unwise, in the settlement of the practice which is to govern in the courts of this State. to conform to precedents of that character.

Section 64 of the Code directs that "where the action is for the recovery of money only, there shall be endorsed on the writ the amount to be furnished in the precipe, for which, with interest, judgment will be taken, if the defendant fail to answer. If the defendant fail to appear, judgment shall not be rendered for a larger amount and the costs."

Here, the action is not "for the recovery of money only," but asks the sale of real estate, and such further relief as the court may deem proper. No endorsement in this case was was necessary; but inasmuch as one was made, it should have been sufficiently complete to have advised the defendants of all the relief prayed for. This notice is deceptive, and was calculated to mislead the defendants. No other judgment could regularly be given under it, the defendants not appearing, than for money simply, and that for no greater amount than that claimed in the notice. Had the defendants appeared, the amendment might have been made by order of the court. The office of the notice endorsed on the summons, is to advise the defendant of the amount claimed. He then is at liberty to consent or resist. In consenting to allow judgment, by not appearing for the sum of one hundred dollars, the amount claimed in the notice, he is not to be at the hazard of having the notice amended in his absence, and without his knowledge, by the addition of another cypher, making a judgment against him for a thousand instead of a hundred dollars.

The plaintiff's course was to take judgment for the amount indicated in the notice, with interest from April 1st, 1867. If he desired a further or greater recovery, he should have obtained leave and issued another summons, such as was proper in the case.

The judgment of the court below must be reversed.

Judgment reversed.

Filley and Hopkins v. Duncan.

1. POSSESSION EVIDENCE OF TITLE. A party in possession and cultivating a tract of land, will be presumed to have some interest therein; especially if he afterwards acquire the legal title.

2. SPECIFIC PERFORMANCE. He will, after acquiring the title, be compelled to specifically perform a contract to convey, made prior thereto.

3. LIEN OF JUDGMENT: *After acquired lands.* Until levy of execution, the lien of a judgment does not attach to lands, acquired after its rendition, so as to affect *bona fide* purchasers.

4. ——: *As against equities.* Equity will control judgments, so as to protect equities of third parties existing at its recovery.

5. ——: *As against vendee.* A judgment against a vendor of lands, recovered after his agreement to convey, is not a lien against a vendee in possession, beyond the unpaid purchase money.

6. ——: *Constructive notice.* The entry of the judgment will not of itself compel the vendee in possession, under contract, to make subsequent payments to the creditor.

7. ——: *Actual notice,* of the mere fact of the entry of the judgment, will not compel him to do so.—CROUNSE, J.

8. CREDITORS' BILL. The judgment creditor may reach the unpaid purchase money by creditors' bill.

9. POSSESSION IS NOTICE. A vendor of lands by contract, retains the fee, and may convey a good title to a *bona fide* purchaser without notice; but such notice may be as effectually communicated, by the open and notorious possession of the vendee, as by information personally communicated to the purchaser.

On the 20th of July 1859, Francis Bell was in possession of the south-west quarter of section thirty in township eight north, range fourteen east of the sixth principal meridian, situated in Otoe county, holding the legal title to an undivided half thereof, and, in some way not explained, being entitled to have the legal title to the other undivided half, from certain heirs in whom the same vested. On that

day he entered into a contract with Mrs. America Duncan, for the sale to her of the entire tract; and gave her a bond to convey the same to her, as soon as he should be able to make the deed. By the terms of the agreement, he was to take towards the purchase money, certain personal property, and was to be paid the balance of the agreed price, which was eighteen hundred dollars, whenever he should execute the conveyance. Mrs. Duncan entered at once under this contract, and that season gathered the crop, which, at the time of the sale, Bell was raising. The succeeding year she rented the premises to some person who lived upon and cultivated them. In October Mrs. Duncan paid all of the purchase money but $512.

On the 28th of May, 1860, Bell, having possessed himself of the legal title to the whole tract, made his deed therefor to Mrs. Duncan, and received the balance of the purchase money.

On the 20th of October, 1860, Mrs. Duncan died, leaving a husband and three children, who are the plaintiffs in this suit.

From his wife's death until 1863, Mr. Duncan continued in the occupancy of the premises, either personally or by tenants. At that time, he left the territory, entrusting the premises to the care of a friend. Shortly after he left, the defendants, Hopkins and Filley, entered into, and thence to the bringing of this suit occupied the premises.

At the December term, 1859, in the District Court for Otoe county, Hills recovered a judgment against Bell, which soon afterwards, he assigned to Filley. Execution issued thereon on the 21st of August, 1861, which was levied upon the south half of the premises above described. Filley was the purchaser at the sale; and after confirmation, he had a sheriff's deed of the premises, which bears date on the 20th of March, 1862.

At the same term of the court, Hopkins also recovered

a judgment against Bell, and sued out execution thereon, on the 2d of October, 1860, which was levied on the north half of the premises. At the sale, he was the purchaser, and after confirmation, he had a sheriff's deed, which bears date April 4th, 1862.

It appears that both Hills and Hopkins had, at the time they recovered their judgments, actual notice of Mrs. Duncan's purchase, and that Filley, who did not live in Nebraska, had an agent, who made the purchase for him of the judgment from Hills, and who also knew of Mrs. Duncan's interest. It does not appear that she knew of the judgments, until after she had paid the whole of the purchase money, and received the conveyance.

The action was brought in equity, to have the sheriff's deeds declared void, and the possession of the premises decreed to the plaintiffs. The cause was heard upon pleadings and proofs in the District Court, by Mr. Chief Justice MASON, who rendered a decree according to the prayer of the petition. The defendants appealed to this court.

Mr. Shambaugh, for the appellant.

Mr. Croxton, contra.

CROUNSE, J.

At the time of making the contract of sale of the lands in question with Mrs. Duncan, Bell, it is conceded, was the owner of the undivided one half thereof. He was in possession of the premises, and agreed to convey the entire fee when he should receive deeds from certain heirs. What his interest was to this remaining one half does not appear. The circumstance that he was in possession — cultivating the premises being of itself *prima facie* evidence of title — and the further fact that he did receive quit-claim deeds

from the heirs, make it quite certain that he had some right to this remaining one half. The conveyances received by him were simple releases, and of themselves do not indicate the interest conveyed by them. If there was an entire want of interest in Bell to this part, it devolved upon those who claim an advantage by reason of it, to show the fact affirmatively. It is safe to presume, that Bell had such an interest as he could sell or assign, and which a court of equity would recognize and protect in the hands of his vendee or assignee. "It is extremely clear," says Story, 2 *Eq. Jur.* 1050, "that an equitable interest, under a contract of purchase of real estate, may be the subject of sale. A purchaser claiming under such original contract, in case he afterwards sells his purchase to sub-purchasers, becomes in equity, a trustee for the persons to whom he contracts to sell."

Where there is a contract to convey an estate, which the vendor has not at the time, if he afterwards become the owner, a court of equity will compel a specific performance.—*Edwards* v. *Varrick*, 5 *Denio*, 664; *per* PORTER, *Senator*, 695. So, when Bell completed his title by securing the deeds from the heirs, it was in fact for the benefit of Mrs. Duncan, and the transaction is so related to the contract with her, that in my opinion, her rights to this after-acquired title are the same as to that about which there is no dispute. However this may be, the lands in question were not levied upon, under these judgments until Bell had conveyed by deed to Mrs. Duncan; and as to after acquired lands, no lien attaches so as to effect *bona fide* purchasers, until levied upon.—*Code*, 477; *Roads* v. *Symmes*, 1 *Ohio*, 281, 313. For the purposes of this case, therefore, it may be assumed that, at the time of making his contract with Mrs. Duncan, Bell was the absolute owner of the land bargained to her.

The position of Mrs. Duncan in July, 1859 when she

had made her contract with Bell, was this: She was the purchaser from the owner in fee of the land in question; she was in possession of, and cultivating the same, and on making payment, according to the terms of her contract, was to receive a good and sufficient deed. The transaction was a lawful and a usual one, and entered into in good faith.

The judgments under which Hopkins and Filley, the appellants, claim, were entered in December following, and before the execution of the deed from Bell to Mrs. Duncan, which was on the 28th day of May, 1860.

The lands and tenements of the debtor are bound for the satisfaction of a judgment against him, from the first day of the term at which it is rendered.—*Code*, 477. But it is well settled, that in equity, the lien of a judgment is subject to all equities that existed at the time it was recovered.—*Mayer* v. *Hinman*, 3 *Kernan*, 180, 190; *in the matter of Howe*, 1 *Paige*, 125; *Ellis* v. *Tousley*, *id.* 280; *White* v. *Carpenter*, 2 *id.* 217; *Keirsted* v. *Avery*, 4 *id.* 9; *Parks* v. *Jackson*, 11 *Wend.* 442. It is true, an agreement for the sale of lands is a personal contract; it does not attach to the lands sold, nor divest the vendor of his estate. The legal title still remains in him, and he can convey to a *bona fide* purchaser, without notice, a title to the premises, freed from the equity of the vendee. But while this is so, a purchaser with notice, would take the premises, subject to the equitable rights of a vendee. This notice may be actual personal notice, or it may arise from open, notorious possession of the lands, by the vendee, which is constructive notice to all the world.—*Gouverneur* v. *Lynch*, 2 *Paige, Ch.*, 300; *Chesterman* v. *Gardner*, 5 *Johns, Ch.*, 29. The lien of these judgments went no farther. They attached to the interest of the vendor, Bell, as they found it. Had the vendee abandoned the contract, the entire fee in the vendor would have become subject to the lien of the judgments; and the purchaser at sheriff's sale

under them, would have received a clear title to the lands so sold. With the contract subsisting, the lien extended only to the unpaid balance of the purchase money. To the extent of the five hundred and twelve dollars remaining unpaid upon Mrs. Duncan's contract, these judgments were a lien, which could have been made available to these judgment creditors, in a proper proceeding.

Subsequent to the entry of these judgments and before sale of the premises under them, Mrs. Duncan paid this balance of the purchase money to Bell and took a deed from him. No actual notice to her of the entry of these judgments nor claim upon her for the balance of the purchase money is shown. But it is claimed that the record of these judgments was constructive notice to her, and that any payment by her to Bell after this entry, was in her own wrong, and not to the prejudice of these judgment creditors. In support to this position, counsel refer to *Gouverneur* v. *Lynch*, 2 *Paige*, 300. All that is there said by the chancellor on this point is: "If a vendee is in possession of land, under a contract to purchase, a subsequent purchaser or mortgagee has constructive notice of his equitable rights, and takes the land subject to his prior equity. If the purchase money has been paid before notice of or prior to the recording of a subsequent mortgage, the mortgagee will have no claim upon the land. Where a part remains unpaid, he will have an equitable lien thereon to the extent of the unpaid purchase money." This case and the others cited by counsel under this head, while they assert the principle assumed in this case that these liens, in equity extend no farther than to the unpaid purchase money, do not declare the doctrine contended for here. In my examination, I have met with but one case supporting the view taken by the counsel for the appellants.—*Mayer* v. *Hinman*, 17 *Barb.*, 137. In 1835, one Schroeppel, being the owner of certain lands, contracted to sell them to Mayer. In 1838,

a judgment was recovered against Schroeppel which became a lien upon the premises and upon which they were sold in 1844. In January, 1846, a sheriff's deed was given to Hinman as assignee of the sheriff's certificate. Payments were made to Schroeppel by Mayer, after the recovery of the judgment, and before the sheriff's sale. After the sale and before the deed was given, viz. in October, 1845, Mayer made a further payment to Schroeppel. It was held that the judgment against the vendor was a charge upon the land binding the legal title — the lien being restricted in equity to the amount of the unpaid purchase money. It was further held that no notice to Mayer of the judgment, or sheriff's sale, was necessary to protect the legal title and claim of Hinman: and that Mayer had no right to make payments to Schroeppel in October, 1845, and was not entitled to have the same credited upon his contract, as against the title and claim of Hinman under the judgment. The judge delivering the opinion of the court says, as to the vendee, "his real equity consists in having parted with his money upon the faith of his contract and before an adverse legal title had accrued, or legal lien attached; and not in having parted with his money subsequently, without making an effort to discover the then state of the legal title, and the rights of parties."

This case was taken to the Court of Appeals (*vide* 13 *N. Y.*, 3 *Kernan*, 180), and there reversed, as to so much as holds that the record of a judgment is sufficient to insure the payment of the balance of the purchase money from vendee to judgment creditors. Judge DENIO delivering the opinion of the court, after assuming the law as fully established, that one in possession under contract of purchase is to be protected in equity as to his rights which existed at the time of docketing a judgment, says: "I consider it equally well settled, that the docketing of a judgment against the vendor affords no notice of its existence,

either actual or constructive, to the prior vendee of the judgment debtor. Parties who deal with the debtor respecting his lands, subsequently to the docketing of the judgment, are affected with notice. Such persons may make themselves perfectly safe in that particular, by searching the docket book of judgments in the proper office; and they will of course abstain from purchasing, if they find the land which they are proposing to buy, encumbered by a judgment. So, it may be said, a party holding a contract upon which payments remain to be made, may, before making such payments, examine for jndgments against the vendor; but it would be an intolerable inconvenience to require this, where the payments, as is usually the case, are to be made annually or oftener; and should such examinations be ever so strict, the vendee would have to run the risk of an incumbrance intervening, while he was going from the office where the search was made to the residence of the vendor, to make the payment. It has been repeatedly decided that the docketing of a judgment, or the recording of a mortgage, is no notice to a prior purchaser or mortgagee of the premises, whose conveyance is on record, or of which notice was had; the object of the recording acts, and of the law requiring judgments to be docketed, being, it is said, to protect subsequent purchasers and incumbrancers against previous deeds, mortgages &c., which are not recorded, and of which they had no notice, and to deprive the holder of the prior unregistered conveyance or mortgage, of the right which his priority would have given him at common law.—*Cheeseborough* v. *Millard*, 1 *Johns Ch.* 409; *Stuyvesant* v. *Hall*, 2 *Barb. Ch* .151.

"The plaintiff (Mayer), in this case being in possession under his contract, that circumstance was notice to all persons who might subsequently become interested in any way in the premises, not only of such possession, but of the terms of the contract and of all his existing rights under it.

"In the view of a court of equity, his condition was like that of a party having a prior conveyance or lien which was duly recorded. * * The vendee having no notice of the judgment creditor's lien, and the creditor having full notice of the vendee's situation, it would seem to be reasonable, that in order to intercept those payments and divert them from the vendor's hands to his own, the creditors ought at least to inform the vendee of the existence of his lien, and his right to the unpaid purchase money."

The case of *Parks* v. *Jackson*, (11 *Wend.* 442,) cited with approval in the last mentioned opinion, is a strong authority in point. Parks, the plaintiff in error, was in possession of a tract of land which had been purchased by one of these executory contracts, and possession had been taken by the vendee upon the contract being executed, which was continued down to the time the controversy arose. Judgments were recovered against the devisee of the vendor, and afterwards the party holding under the vendee, without actual notice of the judgments, paid the whole purchase money, took a conveyance, and conveyed to Parks. Then the judgment creditors sold the land on the judgment, obtained a sheriff's deed, and brought ejectment against Parks. The Court of Errors held that the plaintiff could not recover. The purchase money for the land was paid to, and the deed under which Parks held was executed by one Henry Franklin, to whom the devisees of the original vendor had conveyed the premises, and the judgments under which the plaintiff in the ejectment suit claimed, were against the devisees. The judgment creditors claimed that the conveyance to Henry Franklin was void as against the creditors of the grantors, and commenced a suit in chancery against the parties to that conveyance, and obtained a decree setting it aside for the alleged fraud, having at the time of filing the bill, filed a notice of *lis pendens* in the County Clerk's office. The payments were made and the deed under which Parks

held, was given pending the suit. It was scarcely contended that the docketing the judgment against the grantors of Henry Franklin, would alone enable the creditors to question the payments subsequently made; but it was insisted that the *lis pendens* affected the parties holding under the vendee in the executory contract, and that the payments were consequently made in their own wrong. The court, however, held that neither the judgments, nor the *lis pendens*, nor both of them, affected the vendees, or impaired the effect of the payments made, or the deeds under which Parks held.

In Maryland, in the case of *Hampsen* v. *Edilen*, 2 *Har. & Johns.*, 64, it was held, that where a vendee, subsequently to the recovery of a judgment against the vendor, but without actual notice thereof, had paid over the balance of the purchase money and taken a conveyance from the judgment creditors, such vendee was, in equity, entitled to be protected against the claim of the judgment creditors.

These latter cases, besides challenging the consideration due to so high authority, are based on the better reasoning. The conclusions reached are deduced from doctrines so fully established by authority, as to entitle them to be regarded as among the elementary principles of the law; and when applied here afford an easy solution of this case. At the time of the entry of the judgments under which Hopkins and Filley claim, Mrs. Duncan had made a contract with Bell for the premises in question, and had parted with a part of the purchase price. At the time of her purchase there was no suggestion of right or interest to the same in these parties, either actual or constructive. She took the hazard of the vendor's title, and relied upon his responsibility to make her a deed in due time. She also ran the risk of prior judgments against the vendor, and at her peril was bound to search the records for incumbrances prior to the date of her contract. Her possession was notice to all

the world of her interest. She was the equitable owner of so much at least, as had been paid for and was entitled to a conveyance of the whole of the lands, when the balance of the money should be paid. She had obligated herself to pay Bell the balance, and to assume to pay any one else, might embarrass her or lead to litigation with Bell, or those to whom he might assign his contract with her. These judgment creditors, came into this arrangement rather as intruders. They are given a right to the unpaid purchase money, which, in a proper proceeding, may be secured by them. To this extent, they are to be benefited and it is but right that as to this, they should become the actors.

They should at least have given Mrs. Duncan, or her representatives, actual notice of the entry of their judgments and their claim under them. Whether a simple notice to the vendee of the existence of judgment liens, acquired since her contract, would be sufficient to make any further payments to the vendor, the judgment debtor, at her own peril, it is unnecessary to decide. In my opinion, however, it is not. In a proceeding in the nature of a creditor's bill, payment could be enjoined until the rights of the parties are determined. The party who seeks to interfere with and override a lawful transaction, and intercept payments due under legal obligations, and have the same applied in satisfaction of his claims, should, it seems to me, provide himself with authority from some competent power.

Here, Mrs. Duncan, pursuant to her agreement, has paid all of the purchase money, and taken a deed; and her heirs now ask that the title so taken be cleared from the cloud raised by the sale of these premises, under the judgments mentioned. To this relief they are entitled. When the sheriff's sale was made, no title remained in Bell, and of course no title passed. Bell had already conveyed to Mrs. Duncan. The rule that the purchaser at sheriff's sale

becomes possessed of the title and interest held by the judgment debtor at the time of the entry of judgment, is subject in equity to this qualification—that he takes such title, subject to the equities that then existed against him, or which have since arisen, through want of knowledge of such judgments.

Judgment of the court below affirmed.

The Columbus Company v. Hurford.

1. AGENCY: *Continuance of the relation.* When the relation of principal and agent has once been established, it will be presumed to continue until shown to have been dissolved.

2. ——: *How established.* The relation of principal and agent may be inferred by implication from the acts of the parties, as well as shown by deeds, or informal writings, or verbal delegation.

3. ——: —— *as to corporations.* This is equally true of the agents of corporations.

4. ——: *Dealings of agent with principal.* It is the duty of persons holding confidential relations, of whatever nature, with others, to put themselves on terms of perfect equality, by furnishing full, exact and truthful information of all matters which enter into a negotiation between them.

5. ——: ——. If they fail to do so, they are liable to lose the entire advantage of the transaction.

6. ——: ——. General allegations of having done so, made by the agent, are insufficient. It is his duty to inform the court precisely of the information which he did impart to his principal, so that the court may judge whether he has made a full and fair disclosure.

7. CORPORATIONS: *Act of members.* A corporation whose governing power is vested in a board of directors, is not bound by the act of its stockholders.

This was an appeal from a decree rendered by Mr. Justice CROUNSE, sitting in the District Court for Douglas county. The facts are fully stated in the opinion of the court.

The arguments consisted mainly of the examination of questions of fact, raised upon the record. It is not deemed worth while to set out the points thus argued.

J. M. Woolworth, for the Columbus Company, contended,

I. That Hurford being shown by the record to have acted as the plaintiff's agent, made the purchase for its benefit, and cited, *Lees* v. *Nuthall*, 1 *Russ. & My.*, 53, *affd.*; 2 *My.*

& *Keen*, 819; *Faucett* v. *Whitehouse*, 1 *Russ. & My.* 132; *Taylor* v. *Salmon*, 2 *Cromp. & Mees.* 136; *Church* v. *Sterling*, 16 *Conn.* 387; *Parkhurst* v. *Alexander*, 1 *John. Ch.* 394; *Reed* v. *Warner*, 5 *Paige*, 650; *Sweet* v. *Jacocks*, 6 *Paige*, 364; *Massie* v. *Watts*, 6 *Cranch*, 143; *Irvine* v. *Marshall*, 20 *How.* 558.

II. The plaintiff is entitled to so much of the property purchased as its note against Mitchell, paid for.—4 *Kent's Comm.* 305; 2 *Story's Eq. Jr.* §§ 1201–1210; *Boyd* v. *Mc Lean*, 1 *John. Ch.* 582; *Powell* v. *Monson*, 3 *Mason*, 362; *Seaman* v. *Cook*, 14 *Ill.* 501; *Oliver* v. *Piatt*, 3 *How.* 333.

III. The release alleged in avoidance of the liability of Hurford and Redick, for the retention of the ferry interests, purchased for the plaintiff, and partly with its means, is invalid and void, for several reasons.

1. It was made by individual stockholders, and not by the governing body of the corporation.—*Angell & Ames on Corpo.* §§ 151–164; *McCollough* v. *Moss*, 5 *Denio*, 567.

2. It was obtained by fraud, which fraud consisted in several circumstances.

3. Hurford and Redick being at this time in confidential relations with the plaintiff, it was incumbent on them to establish the perfect fairness of this transaction, and that the release was supported by an adequate consideration. Having failed to do that, the defence fails.—4 *Kent's Comm.*, 6 30, *n.* (*b*). *Story on Agency*, §§ 211 *and* 212; 1 *Story's Eq. Jr.* § 307, 312; *Butler* v. *Haskell*, 4 *Dessau*, 651; *Hunter* v. *Atkins*, 4 *My. & K.*, 113; *Edwards* v. *Meyrick*, 2 *How.* 61; *Howell* v. *Ransom*, 11 *Paige*, 538; *Whelan* v. *Whelan*, 3 *Cowen*, 537; *Greenleaf's Estate*, 14 *Pa. State*, 489.

J. I. Redick, for the defendants, argued the case upon the facts alone.

MASON, Ch. J.

THE COLUMBUS COMPANY *v.* HURFORD.

This action was commenced on the chancery side of the District Court by the Columbus Company against O. Perry Hurford and others, who claimed to be the owners of the franchise and privileges secured to the Elkhorn and Loupe Fork Bridge and Ferry Company, to establish and enforce a claim set up by the complainant to an interest in said bridge and ferry company, and to be admitted to membership therein, and to share in its earnings and profits.

The complainant sets forth and alleges in its bill, that one James C. Mitchell, about the first of January, 1860, was the principal stockholder in said bridge and ferry company; that the complainant being desirous of purchasing said Mitchell's stock in said company, employed the defendant, O. Perry Hurford, to purchase the same for it, and that said Hurford undertook to make such purchase; that said Hurford having sometime thereafter associated with him one John I. Redick, with the intent to defraud the complainant, represented to the complainant that said Mitchell peremptorily declined to sell said stock to the complainant, on the ground of a bitter hostility existing between said Mitchell and the complainant; that beleiving these representations to be true, the complainant directed the said Hurford and Redick to purchase said stock ostensibly in their own names, but in fact, on behalf and for the benefit of the complainant, furnishing to said Hurford and Redick a certain note held by the complainant against said Mitchell, for the sum of $1,767.41, to be used as part consideration for the purchase of said stock, and assigned said note to said Hurford and Redick for that purpose, they paying and the complainant receiving no consideration therefor; that said Mitchell having demanded a further consideration in money for said stock, one John Rickley consented to advance it to the complainant, and directed said Hurford and Redick to apply certain moneys in the hands of said Redick, and certain indebtedness due from said Mitchell to

said Rickley and in said Redick's hands for collection, towards such purchase in behalf of the complainant, and that said complainant relying upon such application of said moneys and indebtedness, did not procure by other means the funds necessary for such purchase; that on or about the 14th day of February, A. D., 1860, said Hurford and Redick having associated with them one John Hughes and one John H. Green, they, the said Hurford, Redick, Hughes and Green, purchased from said Mitchell, all the stock and franchise in said Bridge and Ferry Company, and that the only consideration paid therefor, except some small matters the amount of which was unknown to the complainant, was the said note of the complainant, and the said moneys and debts of said Rickley advanced for that purpose; and, that in violation of the said undertaking of the said Hurford and Redick, the said Hurford, Redick, Hughes and Green, refused to transfer said stock to the complainant, and excluded the complainant from membership in said company.

The complainant further alleges, that said Hurford and Redick, by some means unknown to the complainant, settled with said Rickley for said moneys and debts of said Rickley, used in the purchase of said stock, but that the same was done without its knowledge and consent; that by divers assignments and transfers all the stock and property of said Ferry Company, has become vested in said O. Perry Hurford, Thomas J. Hurford, and Noble R. Hays, but that said Thomas J. Hurford and said Hays had full knowledge of the complainants' rights in the premises; that said Ferry Company since the 14th day of February 1860, has been in continual and successful operation, and has accumulated large profits exceeding to a considerable extent all sums expended in carrying on its business: that as soon as complainant learned of the purchase of said stock from said Mitchell by said Hurford and Redick, and at divers times

since that day, it applied to them and to the successive members of said Bridge and Ferry Company to assign said stock to the complainant and for an accounting etc., and has offered to reimburse said defendants for any and all sums paid to said Mitchell and Rickley, or either of them, for said stock, etc; that by reason of the premises, the purchase made by said Hurford and Redick of said stock and franchise of said Ferry Company from said Mitchell, was made for the benefit, and is now held by said defendants in trust for the complainant, and that the complainant is entitled to the said stock and franchise of said Ferry Company, upon the repayment to said defendants of whatever sum or sums were paid to said Mitchell and Rickley in the purchase of said stock and franchise, out of the profits and net income from the business of said Ferry Company, and asks that an accounting may be had of the amounts so paid for said stock and franchise, by said Hurford and Redick, and of the business of said Ferry Company since said purchase, and that the said defendants may be required by the decree of the court, to transfer said stock and franchise to said complainant, and to pay over to the complainant any balance that may be found in their hands, after re-imbursing them for such sums and amounts as have been paid or sustained by them, by the purchase of said stock and franchise, and in the management of the business of said Ferry Company, and for general relief.

To said bill, the defendant, O. Perry Hurford, answers in substance, that the complainant is not a corporation and doing business in Platte county, Nebraska, as alleged in said bill, that said Mitchell never acted as treasurer of the present Columbus Company, but that the company for which said Mitchell did act as treasurer and received said sum of $1,767.41, dissolved by its own act about the spring of 1859; that he never undertook or agreed to buy said ferry franchise for the complainant and that he never agreed

to purchase said property ostensibly in his and said Redick's names, but in trust for said complainant, or for the use and benefit of said complainant, and that he never agreed as the agent or otherwise of the complainant, to purchase said Mitchell's interest in the stock and property of said ferry company, and turn in part payment therefor, the said note of said Mitchell, but that said note was left with said defendant by one John Wolful, who asked said defendant to use his personal influence with said Mitchell, to see if he would not turn out something in discharge of said note; that Mitchell was insolvent, and the company considered it of no value; that he never had any conversation with the complainant about the purchase of said stock before the purchase thereof by said Hurford and others, but that he did ask said Mitchell to sell said franchise and ferry property to said complainant, and that said Mitchell peremptorily refused, claiming that one John Hall owned or claimed to own it; that the said Hurford, in connection with John I. Redick and John Hughes, bought said franchise and ferry property for fifteen hundred dollars, and paid that sum therefor, and that the note referred to was given to said Mitchell partly in consideration of said transaction; and that said Mitchell at the same time gave to said Columbus Company, several lots in the town of Columbus in further consideration of giving up said note, but that in fact, said note formed but little part of the consideration of said purchase; that in said transaction about $79 or $80 of the claims in said Redick's hands for collection against Mitchell and in favor of Rickley was used, and that sometime thereafter said Hurford paid or caused to be paid said amount to said Rickley; admits that said Thomas J. Hurford and Noble R. Hays, are joint owners in said property; that said ferry has been kept up by the defendant at great expense, but denies that they have accumulated large profits; that a full and complete settlement was made between said Com-

pany and said Hurford and Redick in regard to said purchase and the giving up of said note to said Mitchell, and that said Hurford and Redick offered to assign to said complainant said stock and franchise, if said complainant would refund to them the amount so paid by said Redick, Hurford and Hughes, to said Mitchell, but that the complainant refused the same; that said Hurford, Hughes, Redick and John Green, expended about eight hundred dollars in repairs, etc., necessary to run said ferry, and that since then said defendants have been compelled to make additions and permanent improvements to said property amounting to over $2,000, and denies that they hold said property in trust for the complainant.

The answer of said defendant Hays, admits that he owns one fourth interest in said ferry company, that he bought the same from O. Perry Hurford, that at the time of his purchase he had no knowledge or notice whatever of any right of the complainant, and that he paid for his said interest the sum of one thousand dollars; that some profits have accrued from the business of said ferry company, the amount of which he cannot state, and claims to be a *bona fide* purchaser.

The answer of Thomas J. Hurford denies all the allegations of the bill, for want of information, etc., excepting that he heard of the purchase of Hurford, Redick and Hughes, of said franchise, but knows nothing of the manner or consideration of said purchase; that he did not know of the settlement between complainant and Hurford and others; that he bought one-fourth interest in the ferry in 1860, in good faith of one John H. Green and paid about $700 therefor, and had no notice or knowledge of any rights of complainant.

To these several answers the complainant replies generally. The evidence taken in this case shows that the defendant, O. Perry Hurford, was employed by the com-

plainant, the Columbus Company, as its agent to settle in some manner the Mitchell note of $1,776.41, and that it was used by said Hurford, or Hurford, Redick, and Hughes, in the purchase of the ferry interest from said Mitchell, as a part consideration. The witnesses Redick and Hurford testify, that it formed a small part of the consideration of said purchase, but the letter of Hurford to John Rickley, dated February 14, 1860, the day on which said purchase was made, shows that in said purchase, $1,500, was applied on the Mitchell note. Exhibits B and C, dated February 23, 1860, show that at that time, the parties understood the amount to which the note was used in said purchase was $1,531.75, and the balance of the note might have been and very likely was satisfied by the conveyance of the lots in Columbus from Mitchell to the complainant.

The evidence shows that after said purchase, the parties met at Columbus to adjust the matter of the purchase; that a meeting of the members of the Columbus Company (the complainant) was called; that said Hurford and Redick offered to transfer to said complainant their said purchase upon being reimbursed the amount of money paid by Hurford, Redick and Hughes to Mitchell, in addition to the amount applied upon the Mitchell note; that the members of the company present declined to reimburse them; that upon talking over the matter of Mitchell's note, it was contended by Hurford and Redick, that Mitchell was insolvent, and that the note was worthless or of very little value, and that unless the complainant would reimburse them for the money they had paid, etc., they desired a full discharge from the complainant of all liability to it on account of said note; that some dissatisfaction was expressed on the part of some of the members of the said Columbus Company to this proposition, but that finally it was settled upon, that in consideration that the said purchasers of said ferry should maintain and keep a ferry at or opposite the town of Colum-

bus, and cross the members of said Columbus Company, on said ferry, free of charge, certain members of the complainant, released and discharged the said Hurford, Redick, Hughes and Green from all liability on account of said note; that this arrangement or settlement of the matter was reduced to writing and signed by the President and Treasurer of said Columbus Company, a copy of which appears in the record as exhibit "B"; that a committee of the members of said Columbus Company, was also appointed at said meeting at the suggestion of Hurford and Redick, who investigated the matter and recommended, by their written report, such arrangement, a copy of which was also attached to the record as exhibit "C;" that said Ferry Company did, in pursuance of such adjustment, establish and maintain a ferry at or opposite the town of Columbus, but that the members of said Columbus Company were not at all times passed over said ferry free of charge. The evidence shows that said ferry was kept in successful operation by said Ferry Company, but it does not show satisfactorily the amount of the receipts and expenditures during its operation by the defendants.

The cause was heard in the court below upon the pleadings, proofs, exhibits, and master's report, and a decree rendered against O. Perry Hurford for the sum of sixteen hundred dollars and costs, and that the bill be dismissed as to the other defendants with costs, from which decree the defendant Hurford appealed. The complainant also filed notice of appeal, and the cause now comes up and is heard by this court on the appeal of Hurford.

The history of the note which the Columbus Company held against Mitchell, appears from the record and proofs to be about as follows: In 1858, Mitchell was Treasurer of the Company, and as such received a considerable sum of its money, the exact amount does not distinctly appear from the record or proofs. Some disagreement between the

Company and Mitchell having sprung up, and he being unable or unwilling to account for this money, Hurford and Redick, on behalf of the Company, undertook, either voluntarily or at its request, to secure this demand, and they succeeded; but afterwards, for some reason not explained, the Company cancelled the securities thus obtained from Mitchell, and in place thereof took the note in question. It further appears that in August, 1859, the Company being indebted to one Kasserman in the sum of $1,500, sent the note to Hurford with a view of having Mitchell assume the debt to Kasserman and credit the amount upon the note. He did not succeed in effecting this, but returned the note to the Company. In June, 1860, the note was again placed in Hurford's hands, and it is at this point, that this controversy begins.

The first question presented is, in what capacity and for what purpose the note was then placed in Hurford's hands, whether as an agent or in a fiduciary capacity, or simply to do with it as he pleased.

The person who gave the note to Hurford was John C. Wolful, the president of the Company; so Hurford says. Wolful testifies that when he gave the note to Hurford, he told him that he did so, for the purpose of having him exchange it with Mitchell for the ferry owned by Mitchell. Weaver and Kummer also testify that the Company authorized Wolful to place the note in Hurford's hands for that purpose. Rickley, the secretary of the Company, swears that he had repeated conversations with Hurford on the subject of the contemplated transaction with Mitchell, and it was distinctly understood that Hurford was acting for the Company. It also appears, from the testimony of these four witnesses, that Hurford represented to the Company, or its officers, that Mitchell would not give the ferry interest for the note "even up" (as it was expressed), and they told him to make the exchange, he contributing what money

was necessary as his part of the purchase money, and he to be interested with them in the property thus to be secured. I regard the circumstance of his receiving the note and afterwards reporting progress to the Company, as clearly indicating that he then understood that he was acting for them in purchasing the ferry to the extent at least of the value of the note. But now a new difficulty seemed to intervene. Mitchell refused to sell to the Columbus Company on any terms, because he had quarreled with its members, and was willing to injure himself that he might injure them. This is what Hurford reported to the Company. In the bill it is charged that this was false. I do not deem it very material whether this representation was true or false. It is not shown to be false. It is enough that it was acted upon both by Hurford and the Company as true; by Hurford's drawing up of a formal resolution to be passed by the Company's directors, authorizing Wolful to transfer the note to Hurford and Redick, and have Wolful assign it formally to them. It is not pretended that any consideration whatever was paid by him or them to the Company for its assignment. These facts are testified to by the four witnesses mentioned above, so clearly and emphatically, that we cannot doubt their truth. This resolution was uncalled for by the circumstances. The reason assigned for this action was to deceive Mitchell as to whom he was dealing with, he being unwilling to sell to the company, but quite willing to sell to Hurford. Even if it was thought necessary or best or proper to do so, the formality employed was not required. The resolution would not be likely to be made known to Mitchell. Why, then, was such formality employed? It certainly appears to have been in order by so decisive and conclusive an act, to connect the company with the transfer irrevocably. This transfer of the note to Hurford without consideration, when considered with the surrounding circumstances, shows clearly that Hurford had as-

umed, for the Company, to act in a fiduciary capacity in this matter. If this is not so, then the transfer was made to enable Hurford to use the note for the Company's benefit, which is the very point contended for by the complainant; so that it makes but very little difference which position is true.

The testimony and attending circumstances show very clearly that the note was placed in Hurford's hands for the purpose for which he used it. Hurford testifies that if the purchase of the ferry, as at first proposed with the note, "even up," had been effected, he would have acted for the Company as its agent. When or how that agency was dissolved he does not pretend to say. It was not shown to have been dissolved; and the established presumption of law is that it is continued (1 *Greenleaf's Evidence, Sec.* 41–2). But we are not left to resort to presumption in this case. Hurford used the note in making the purchase. What right had he to do this, if he was making it for himself and not for the owners of the note? He did it, as a matter of course, under the very authority with which he first received the note from Wolful, and when he himself admits he took the note to use, as he did use it, this is decisive of the matter. Again, on the 19th of January, 1860, he wrote a letter to Rickley, the Company's secretary, in which he says "the chances are for success" in effecting the purchase; and he also says that he and Redick made Mitchell believe that it was for themselves *alone* they wanted to buy. This letter shows they had been, or pretended they had been, deceiving Mitchell, whereas the fact was they were buying, partly at least, for some one else. Who was this some one else? We think it was the Columbus Company.

I do not think any one reading this record can doubt for an instant that Hurford was the agent of the complainant

in this transaction, or acted in a fiduciary capacity for the complainant in negotiating and effecting the purchase.

Leaving out of view the question of good morals and fair dealing which might be raised in this case, the law is perfectly plain that such a course of conduct, as this record shows was pursued between the parties, will constitute the relation of principal and agent. An agency may be inferred by implication, from the acts of the parties, as well as by deeds or verbal delegation or informal writings. This was the rule of the civil law.—*Pothier Lib.* 3, *Tit.* 3, *No.* 3; 1 *Domat. B.* 1, *Tit.* 15, *Sec.* 1, *Art.* 5. And the wisdom of the common law follows the civil law by adopting it.

It is true, that by the ancient common law, corporations aggregate were considered incapable of making a contract, or of appointing agents or attorneys to do any binding act, except by deed or power in writing, under the corporate seal. But the existing law on the subject is, that a corporation may be bound by the acts of its agents, although not under its corporate seal, and even when they are not reduced to writing, except in those cases where the statute of frauds otherwise expressly provides.

The agency may be inferred from facts and circumstances, without the violation of any known rule of evidenc. *American Insurance Co.* v. *Oakley*, 9 *Page*, 497; *Perkins* v. *Washington Insurance Co.*, 4 *Cowan*, 645; *Pickett* v. *Pearson.* 17 *Vermont*, 470. Almost all the cases in which the question of the agency arose, were between the alleged principal and a third party, or where the effect was in some way to bind the principal by the act of the agent. But the question is not so presented here. Here the agent has done an act, employing the property of the principal in the doing of it, and it is the principal who insists on the agency against the agent.

Lees v. *Nuthall*, 1 *Russ. & My.* 53, was this: The wife

of the plaintiff and her sister, as administratrixes of their father, were entitled to a mortgage debt charged on the premises in question. The plaintiff desired to become the owner of the equity of redemption which was in one Walker, and he employed Nuthall to negotiate the purchase. Various attempts were made to accomplish this object, but without success. Some years afterwards, fresh negotiations took place, and Walker proposed to sell to the plaintiff for £1,200. This letter was dated March 25. The following day the plaintiff sent his son to Walker to inform him that he accepted his offer, and on the 27th he also sent his son to Nuthall and informed him of what had transpired, and requested him to draw the necessary agreement of purchase. Nuthall did not express any unwillingness to act as agent of the plaintiff, or intimate that he was in treaty for the purchase of the property on his own account, but within a day or two afterwards entered into an agreement in his own name, dated the 29th day of March, for the purchase of the premises for £1,000. Nuthall, by his answer, claimed the benefit of the purchase, stating that for two months before the 29th of March, he had been in treaty with Walker on his own account, and that he did not, in the transaction, consider himself the attorney of Lees.

Sir John Leach, the Master of the Rolls, held that Nutball having been originally employed by the plaintiff as his agent for the purchase of the estate, was held to the duties of that relation, and that the purchase in his own name was to be held for the benefit of his principal, and rendered a decree according to the prayer of the bill with costs.

The case was carried by appeal, before Lord BROUGHAM, who affirmed the decree of the Master of Rolls, 2 *My. & Keen* 819.

I have selected this case for mention here, out of a great number to the same effect, because in its facts, it is apposite

and simple, and has been repeatedly cited and approved by the most learned judges both in England and in this country. In that case, and in the one at bar, an agency was admitted to have existed at one time between the parties. The negotiations in both, as at first conducted, failed, and were not renewed for some time, and when they were renewed and consummated, it was by the agent in his own name, and as he intended for his own benefit.

When, now, we consider these facts which are either admitted or proved beyond a question, that on a previous occasion Hurford had acted as the agent of the company, in dealing with Mitchell in reference to its claim, out of which the note grew; that again he endeavored on its behalf to effect a settlement of it, by a novation with Kasserman; that he recieved the note again to exchange it for the ferry, and acted on the Company's behalf; that he was requested to join in the purchase by the Company, by contributing what money Mitchell required; that he constantly reported progress to its officers; that at the time his efforts were likely to be successful, he admitted impliedly, but most distinctly, that he was acting for some third party, which must have been the Company; that he used the note in the purchase, and effected the wishes of the Company as he had been requested; when we consider these facts, it is impossible to resist the conviction, that he was the agent of the complainant, and that as such he is bound to give it the benefit of the purchase.—*Faucett* v. *Whitehouse*, 1 *Russ & My.* 132; *Taylor* v. *Salmon*, 2 *Cromp & Meeson*, 136; *Church* v. *Sterling*, 16 *Com.* 387; *Parkhurst* v. *Alexander*, 1 *Johns. Chancery*, 394; *Reed* v. *Warner*, 5 *Paige*, 650; *Sweet* v. *Jacocks*, 6 *Paige*, 364; *Massie* v. *Watts*, 6 *Cranch*, 143; *Irvine* v. *Marshall*, 20 *How.* 558; *Flagg* v. *Mann*, 2 *Sumn.* 286.

It now becomes material to inquire, how much of the purchase price of the ferry, the complainant's note formed. And here too Hurford has himself supplied the proof. In his

letter, dated the 14th of February, 1860, addressed to Rickley the Secretary, he announces the purchase, of which in his previous letter of the 18th of January, he says, "the chances are for success," and he then says that the purchase price was $3,000, and that the note paid $1,500, of that sum. Wolful, Kummer and Rickley, also swear that he so informed them.

But the defendants allege that after the purchase from Mitchell had been made by them in their own names, the complainant ratified it, and released them from any claim such as is here alleged. Several objections are urged against this release.

The complainant is a corporation. By its articles of incorporation, it is provided that its business shall be conducted by a board of directors consisting of five members, one of whom is to be the President of the Company, and a Secretary and a Treasurer. This alleged release was made by a committee of five, appointed at a meeting of the members and from the body of the members of the Company. It was not the act of the directors, nor did they ever ratify it. On the other hand, when it came to the knowledge of the secretary, he wrote Hurford, protesting against it.

McCollough v. *Moss*, 6 *Denio*, 567, was an action of debt brought against one of the stockholders of the Rossie Lead Mining Company, by virtue of its act of incorporation, rendering them personally liable for the payment of its debts. The action was founded on a promissory note made in the name of the company and signed by the president, who was the general managing agent, and by the secretary. The note was one of four, given to secure $15,000, and interest, for certain property sold to and received by the Company. The charter provided that the affairs of the Company should be conducted by five directors, a majority of whom formed a board for the transaction of business. It was not shown in evidence that the board of directors

authorized the president and secretary to give the note, but it appeared that at a meeting of the stockholders a resolution was passed purporting to confer the authority.

LOTT Senator, delivering the opinion of the court on this subject, says: "Where a charter vests a board with the power to manage the concerns of a corporation the power is exclusive in its character. The corporations have no right to interfere with it, and courts will not, even on a petition of a majority, compel the board to do an act contrary to its judgment (*Angel and Ames on Corpo.* p. 121, 151 to 164.) The stockholders as such, in their collective capacity, could do no corporate act. It is one of the fundamental conditions of the contract into which the corporators have entered, by becoming members of the corporation, that its concerns shall be managed in the manner prescribed by the act of incorporation, and from this no essential departure can be made."

But it is said that this is a technical objection to the form of the release, and in a Court of Equity, should not be permitted to prevail. I do not think it is such an objection as a Court of Equity could overrule. But even if it were, it must, in the circumstances of the case, have its full force, because the release was obtained fraudulently.

The meeting at which the committee was appointed, was called by or at the instance of Redick and Hurford, and its members were named by them. With a single exception, it was composed of persons who knew but little of the matter, or of the company's affairs. That exception was one Green. The bill charges that at that time he was interested with Redick and Hurford in the purchase. This they both positively deny in their depositions, and swear that he did not become interested with them until afterwards. But the release is produced by them. It was drawn by Redick at the time and is signed by the committee, and among its numerous recitals it is stated, that

Redick, Hurford, Hughes, and this very man, Green, had purchased this ferry. Their next step was to meet this committee of their own selection and make certain representations about the purchase from Mitchell. Hurford and Redick, as well as the complainant's witnesses swear, that they stated that the note formed a very small part of the consideration, and was worthless. We have already seen to what extent this representation was true. In fact Hurford's own account of the negotiations with Mitchell, shows that the note formed at least one quarter of the consideration. It is true Hurford swears that he made a full and truthful statement of precisely what was paid to Mitchell, and that the company could have investigated the matter fully for themselves, and could not have been misled. I do not attach very great value to such general statements. He should have informed us what he did say, and left us to judge whether it was a full, fair account of the matter. What he is shown to have disclosed, demonstrates that his statement was not a full and fair disclosure of all the facts. Besides, he might have told this committee exactly what was paid, and not concealed the real proportion which the note formed of the whole consideration.

And as to any opportunity of the committee to investigate the matter, they could do nothing but inquire of these parties as to the facts. They could not come down from Columbus, where the investigation, such as it was, was being made, and learn the facts from Mitchell, for Redick, Hurford, Hughes and Green, were then pressing the matter to an immediate conclusion. They did not propose to remain but one or two days. They were detained by a storm longer than they intended, but this gave the Company no opportunity to inquire elsewhere after the facts. Their own account shows that they gave the Company, only the alternative either to lose all it had in the matter, or pay at once all that had been advanced. One of the committee swears

that they were left to their choice between these two courses only. I am satisfied no sufficient opportunity was given to inquire elsewhere for the facts. But it is not material whether there was or not, considering the relations of the parties. Hurford and Redick both occupied confidential relations to this company. As early as 1858, they had undertaken a settlement with Mitchell for it, and had continued in one way and another to act in its behalf. Hurford was a director, and, as the complainant's witnesses say, a confidential adviser and friend, and Redick was counsel to the Company—at least had been and was then so considered by the Company. It was their duty to explain their transaction with Mitchell so fully that when the Company came to deal with them they would be on equal footing, or in other words, to communicate to the company every fact relating to the transaction within their knowledge. This duty grew out of the relation they sustained to the Company. For not doing so, they are liable to lose the entire advantage of the alleged settlement, and on this subject the cases are numerous. A case very recently decided in the English Chancery, is that of *Tate* v. *Williamson*, *Law Reports*, 1 *Equity Cases*, 528, 2 *Ch. Ap.* 58. It was first heard and decided by the then Vice-Chancellor Woods, now Lord High Chancellor, and his decree was affirmed by Chelmsford, L. C. It is especially interesting here because the fiduciary relation, out of which the liability grew, was rather indecisive, and there was not proper advice given to seek information in a quarter where it could be had. The facts of the case were briefly these. Tate, a young man, aged twenty-three, was entitled to a moiety of a freehold, the entirety of which brought in about £440 per annum. He had been dissipated at college, and had contracted debts with tradesmen and money lenders, amounting to £1,000, which were pressing him. His father was estranged from him, and he had formerly applied to and received from his

great uncle advice and assistance. He now made application to him again for aid. The uncle deputed his nephew, one of the defendants, to meet young Tate at an appointed time and place, to discuss his embarrassments. At this interview the young man refused to allow any attempt to compromise his debts, and said he would sell his moiety of the estate. Upon which the defendant offered him £7,000, payable in installments. The next day Tate accepted the offer. Before the agreement had been signed, the defendant obtained a valuation by a surveyor, estimating the value of the mines under the entirety, at £20,000. The sale was completed without this valuation being communicated to Tate. He having died, his heir filed this bill, impeaching the sale. In his judgment, Sir W. Page Wood, V. C., says: "The broad principle upon which the court acts in cases of this description is, that whenever there exists such a confidence, of whatever character that confidence may be, as enables the person in whom confidence or trust is reposed, to exert influence over the person trusting him, the court will not allow any transaction between the parties to stand, unless there has been the fullest and fairest communication of every particular, resting in the breast of the one who seeks to establish a contract with the person so trusting him. This unfortunate young man being in difficulties of a serious character, or rather which were in his opinion serious, the defendant, Robert Williamson, as representing his uncle, H. H. Williamson, Tate's great uncle and trustee, took upon himself to advise the young man in reference to the arrangement of his difficulties. The young man, having then said that he was determined to dispose of his property, it was then absolutely impossible for Robert Williamson, filling as he did that position of confidential adviser, to enter into any treaty for the purchase of that estate, without communicating to him every particle of information that he himself possessed with respect to

its value. One most important piece of information, Cope's report as to the value of the minerals, which he put for the whole estate, at £20,000, being in respect of a moiety £3,000 more than the defendants gave for it, minerals, surface and all included, was during the negotiations obtained by the defendant and kept back from the person with whom he was dealing. This circumstance renders it at once impossible that the contract can be maintained. It has been said: 'What could Robert Williamson have done?' To which I answer, 'Why did he not tell this young man to consult some mining surveyor, or Mr. Cope, whom he had himself consulted.' * * * It is a fallacy to contend that Robert Williamson's mission was limited to seeing if Tate's debts could be compromised, and that his agency ceased with the refusal of Tate to allow his debts to be compounded for." The Lord Chancellor, in his judgment, reviews the whole case, and states the principle in even more decisive and exact terms.

Nor do we think there was any ratification of the release in making of the deed by the mayor of Columbus to the purchasers, for that was the deed of a public officer who was bound to convey to a party occupying the premises, who appeared to have a right to the deed. It was not in any sense nor in any view the deed of the complainant.

The claim interposed for services rendered by the defendant Hurford to the complainant in securing the claim against Mitchell, and negotiating for the ferry, should be allowed the complainant to the extent of what the same was reasonably worth.

The defendant Hurford should be allowed the expense of the management and control of the ferry, the same to be deducted from the gross profits or income of said ferry. He should not be allowed for crossing the members of the Columbus Company free. The defendant Hurford, should

be allowed the item of seventy-five or eighty dollars paid to Gutschalk.

The complainant should be charged with the actual value of all property and money received by them from the defendants, in consideration of the pretended release and settlement.

The defendants must be charged with the value of one-half the ferry and franchise, together with the profits and proceeds thereof. It only remains to be determined how this shall be apportioned among the defendants.

There is no evidence showing that Thomas J. Hurford purchased his interest with notice as to the complainant's claims. As to him the bill must be dismissed with costs. Hays did have notice when he bought, and as he purchased from the principal defendant, O. Perry Hurford, he would have a remedy over against him.

The bill prays, among other things, that the right of the parties may be declared by the court in the decree. It will cause further litigation to settle the relations of the defendants as between themselves in the decree, and it will therefore provide that the amount to be paid be first made out of O. Perry Hurford, and then in event of his being unable to answer for the whole judgment, execution for due proportion should go against Hays. In order to determine the amount for which Hays may be liable, we must know the date of his purchase, which does not appear in the master's report. And in order to render a final decree, the account between the complainant and defendants must be stated upon the basis of this decree.

A reference must therefore be had touching these matters, and also the rents, profits, proceeds, business and expenses of the concern.

Cause remanded.

Shoff v. Wells.

1. NEW TRIAL: *Assault and battery.* In an action for assault and battery, a new trial will not be granted on account of the smallness of damages awarded by the verdict.

2 ——: *Error.* If it be granted and another trial take place, at which larger damages are awarded by the jury, all proceedings after the first verdict will be set aside, and judgment be ordered on that verdict.

This was a petition in error to bring up a judgment rendered by the District Court for Otoe county, for review. It was an action for damage for an assault and battery, committed by the defendant upon the plaintiff. The cause was tried at the December term, 1868, before the court and a jury. The testimony showed that the plaintiff paid a physician fifteen dollars for medical attendance, rendered necessary by the injuries inflicted upon him, and tended to show that for ten days he was unable to work, and that four dollars per day was what he could have earned. The jury rendered a verdict for seventeen dollars and fifty cents. The plaintiff moved for a new trial on the ground that the damages awarded were inadequate. The court granted the motion. The pleadings were amended and reformed by the parties, and another trial was had at the March term, 1869, before the court and jury, which resulted in a verdict for the plaintiff for thirty-seven dollars and ten cents. The defendant moved to arrest the judgment, which the court refused to do, and entered judgment for the amount of the verdict and costs.

I. N. Shambaugh, for plaintiff in error.

C. W. Seymour, for defendant in error.

CROUNSE, J.

SHOFF v. WELLS.

In article six of the Code relating to new trials it is provided:

"SEC. 315. A new trial shall not be granted, on account of the smallness of damages, in an action for an injury to the person or reputation, nor any other action where the damages shall equal the actual pecuniary injury sustained."

The reading and interpretation contended for by the counsel for the defendant in error, is that in an action for damages for an injury to the person or reputation, as well as in all other actions, the damages must equal the actual pecuniary injury sustained.

This claim is opposed not only to the letter but to the obvious spirit of the section.

In cases of assault and battery, libel and slander, so many matters in aggravation or justification are disclosed upon the trial, that it is left for the jury to determine, in view of all the circumstances, what should be given as damages. With their findings, courts rarely interfere. Scarcely a case can be found where a new trial has been granted, because of the smallness of the damages assessed. This section, we think, is but declaratory of the practice which has so long obtained.

The case must be remanded with directions to reinstate the first verdict, and to set aside all proceedings subsequent thereto.

Cause remanded with directions.

Jones v. Edwards.

1. VERDICT: It is not usual for courts to disturb the verdict of a jury, because it is against the weight of evidence, when there is any evidence to support it.

2. FRAUD IN SALE: It is fraud in a vendor of a horse not to acquaint a vendee, when negotiating for the purchase, of facts affecting the value of the ani mal, which, if known to him, would prevent the vendee from buying.

This was a petition in error to review a judgment rendered, upon a verdict, by the District Court for Otoe county. The facts sufficiently appear in the opinion of the court.

I. N. Shambaugh, for plaintiff in error.

Calhoun and *Croxton*, for defendant in error.

CROUNSE, J.

It is not usual for courts to disturb the verdict of a jury because it is against the weight of evidence, where there is any evidence to support it. We see no occasion to do so in this case.

The action was brought in the District Court by Jones against Edwards, to recover damages, because of fraud practiced in the sale of a horse. The defendant, with the cunning not unfrequently introdued into this class of transactions, seems to have provided against much evidence being brought against him. Still, enough appears to warrant the verdict.

In the November previous to the sale, Edwards traded for the horse. He was then afflicted with sweany, stiffness of the neck, and other ailments. Edwards cut some cords about the nose and neck, and turned the horse out in the yard, relieved from work. In March, Jones came along

wishing to purchase a team suitable for farm purposes. His business being known to Edwards, the latter represented that he had just the team. He hitched up the pair, the doctored horse being one, and in driving Jones about was careful not to trot them. He assured Jones that they were "sound as far as he knew;" "he would not warrant them sound—he never warranted the soundness of a horse, because he could not always know whether a horse was sound or not." Not a word appears to have been said, to acquaint Jones of the former ailment and treatment of the horse. Relying on Edwards' representations, Jones took the team. Upon trotting and working him, this horse disclosed a difficulty in breathing, and after working some three weeks to plough ten acres, he ceased breathing entirely. The jury on the trial below said there was fraud, and I think they were quite right. Fair dealing would have called upon Edwards to acquaint Jones of those facts which were calculated to affect the value of the horse, a knowledge of which would very likely have determined him not to purchase.

The judgment, although somewhat informal, is good, and must stand.

Judgment affirmed.

Anderson v. Colson.

1. MANDAMUS: A mandamus will not be allowed upon the hearing of the application for which the applicant's title to an office, in virtue whereof he claims the writ, is drawn in question.

This was an original application to this court for the writ of mandamus, to be directed to the defendant Colson, as treasurer of Dodge county. The applicant in his petition for the writ, states that a meeting of the electors of school district number one of Dodge county, was, on the 4th day of April, 1870, duly convened for the purpose, among other things, of electing members of the school board for the ensuing year: In the course of the proceedings, which are minutely detailed, a motion to adjourn to the eleventh of April was made, and having been put by the moderator and voted upon by those present, was by that officer declared, in his opinion, carried. A division was called for, which being had, the presiding officer declared the meeting adjourned. An appeal from the moderator's decision to the meeting was claimed; but he refused to entertain it, and immediately left the chair and the room, the clerk going with him. Thereupon, Mr. E. H. Crosby was, by those remaining, elected president, and Mr. Robert Kettle, secretary of the meeting; they at once took the places of the officers who had left. Mr. Crosby entertained the appeal from the decision of the chair on the question of the adjournment, and put the question to the meeting, which did not sustain the decision; thereafter the business was proceeded with as if there had been no interruption; an election was held for members of the school board, which resulted in the election of five gentlemen. The applicant here was elected by this board as treasurer of the district, and claims to be such treasurer under this board. In the county treasury there are $2,750,

to which the school board is entitled. The object of the writ is to compel the county treasurer to pay this money to the applicant, as treasurer of the school board.

The answer does not deny the facts alleged in the petition, as above stated, except as it claims that the meeting of the 4th was actually and fairly adjourned to the 11th of April, and that all the proceedings had on the day of the first meeting after the adjournment, were unauthorized and void. On the 11th, pursuant to the adjournment, the electors of said district again met, when they re-elected for the ensuing year the members of the old board. This board reorganized and elected its officers, and retained all the books, records, papers and funds of the district.

To this answer there was no replication. The hearing was upon these pleadings.

R. Kittle, for the application.

E. F. Gray, contra.

MASON, Ch. J.

The pleadings show that there is a dispute who is treasurer of the school district. We cannot try that question upon an application for a mandamus. The applicant must first establish, by the proper process, his right to the office by which he claims the writ. Having done that, this application will be in order. Mr. Justice CURTIS in *ex rel. Goodrich* v. *Guthrie*, secretary of the treasury, 17 Howard, 305. The petition is dismissed.

Monroe v. Elburt.

1. PRACTICE: *Exceptions to charge.* To make exceptions to the charge of the court to the jury available to the party excepting, the exception must be reduced to writing, together with so much of the charge as is necessary to explain it.

2. ——: *Bill must be signed in term.* If the bill of exceptions be not reduced to writing and tendered during the term at which the trial is had, it will be disregarded.

The facts are fully stated in the opinion.

A. J. Poppleton, for plaintiff in error.

Redick & Briggs, for defendant in error.

In representing the defence in this case, we would state:

1st. That in order for the court to take or consider the motion for a new trial in this case, the record must show that the plaintiff excepted to the overruling of the new trial by the court below at the time that it was done, which does not appear. *Morgan* v. *Boyd*, 13 *Ohio State Reports*, 281.

2d. That in order that the court consider any of the supposed errors that took place during the proceeding of this cause in the court below, it must appear that the said plaintiff, at the time each supposed error was made or each question was passed on, excepted to the ruling, and that a bill or bills of exceptions were made out and signed before the adjournment of that term of the court. *Doe* v. *Brown*, 6 *Ohio State Reports*, 12; *Kline et al.* v. *Wyne, Haynes & Co.*, 10 *Ohio State Reports*, 221.

No memorandum of the judge purporting to be the charge to the jury, can be considered in this case unless the plaintiff has embodied the same in his bill of exceptions which is not done in this case. *Hallum* v. *Jacks*, 11 *Ohio State Reports*, 692.

LAKE, J.

This case was tried in the District Court while we were yet a territory.

The supposed errors consist in the refusal of the court below to give certain instructions asked by the defendant, as well as those actually given to the jury upon the trial.

It is objected on the part of the defendants in error, that this court cannot consider the alleged errors for the reason that the record discloses the fact, that the bill of exceptions was not reduced to writing and signed by the presiding judge during the term at which the trial took place.

To make exceptions to the charge of the court to the jury available to the party excepting, it is necessary that the exceptions be reduced to writing, together with so much of the evidence as is necessary to explain it. *Vide Code, sec.* 309.

The record before us contains none of the testimony adduced upon the trial. The instructions asked may have been entirely irrelevant. If so, then, even though abstractly considered, they may have been correct legal propositions; it was not error to refuse to give them to the jury. *Kugler* v. *Wiseman*, 20 *Ohio Reports*, 361.

But we cannot consider here the exceptions taken. The case was tried by a jury on the 14th day of April, 1866, and the court closed its term on the 18th day of the same month. The bill of exceptions was settled and signed by the judge on the 6th of September following. This was in direct violation of section 308 of the Code, which provides, that "time may be given to reduce the exceptions to writing, but not beyond the term. If not reduced to writing during the term, it must be regarded as no exception." *Kline and Berry* v. *Wynne, Haynes & Co.*, 10 *Ohio State*, 223.

There being no exceptions in the record which we can consider, the judgment of the court below must be affirmed.

Judgment affirmed.

Jones v. Nebraska City.

1. POWER OF SCHOOL BOARD: *To remove teachers.* A statute empowering a school board to employ teachers and remove them at pleasure, enters into and forms part of a contract made by the board with a teacher for his services for one year; and he may be discharged within that time notwithstanding the terms of his employment.

2. JURISDICTION: *To inquire the cause of removal.* The court has not jurisdiction to inquire the cause of the removal, nor whether the cause alleged be sufficient.

This was a petition in error filed to review a judgment of the District Court for Otoe county. The facts are sufficiently stated in the opinion.

I. N. Shambaugh for Jones, plaintiff in error, among others not considered by the court, argued the following points:

II. The contract was for one year's service for a fixed price for the term. It was an entire contract, and the defendants could not without some fault or misconduct of the plaintiff discharge him and terminate the contract before the end of the school year, and having dismissed the plaintiff before the end of the term and prevented him from rendering the service stipulated for the defendants, are liable to him for the balance of his year's wages which remains unpaid.—2 *Parsons on Contr.* 41 *and note*; 22 *Ill.* 63; 28 *Ill.* 257; 2 *Parsons on Contr.* 34, *note I and cases cited*; 9 *Mo.* 218; 3 *Mo.* 230, 233; 4 *Mo.* 41; 2 *Denio* 619; The case in Denio is directly in point, 20 *Vt.* 487; 9 *U. S. Digest* 393 *Sec.* 10; 3 *Greenleaf* (*Maine*) 450; 1 *McAll* (*Cal.*) 505; 18 *U. S. Digest* 54.

III. In such cases the measure of damages is the contract price, unless the defendants show that during the time he was prevented from fulfilling his contract he was otherwise employed, or was offered employment of a similar kind in the same place. The burden is on the defendants to show

this, and when shown it goes in reduction of the plaintiff's demand to the extent of the wages he has otherwise earned or might have earned. *Sedgwick on the Measures of Damages* 221; 2 *Denio* 609.

IV. The 14th section of the act concerning the schools in Nebraska city, did not authorize the Board of Education to dismiss the plaintiff before the end of the term for which he was hired. Standing by itself it confers no such power; but taken in connection with section 6, of the general law concerning schools, and it is clear that the dismissal could only be made for some fault or misconduct of the teacher. Section 19 of the school law of Nebraska city, makes the general school law applicable to the city — statutes in *pari materia* are to be taken together.—*Sedgwick on Statutory and Con. Law* 247.

The construction contended for by the defendants would destroy the school system.

V. But if the statute conferred the power of dismissal at pleasure, the Board of Education waived the right to exercise the same by employing the plaintiff for a stated term. *Sedgwick on Statutory and Con. Law* 109 *and* 110; 2 *Comstock* 464; 3 *Comstock* 197.

VI. The right to dismiss at pleasure is claimed under a private act, of which the plaintiff had no notice, and by which he is not bound or concluded.—*Sedgwick on Statutory and Con. Law* 35.

VII. Corporations incur the same liability for their acts as private individuals.—21 *Vt.* 102; 1 *Smith, Wis.* 98; 17 *Penn. S. R.* 406; 13 *U. S. Digest*, 134, *Sec.* 9.

Mr. *Archbold*, upon a brief filed by himself and Mr. *McLellan*, maintained for the defendant in error, that the law of the land enters into and forms part of every contract, whether made by natural persons or by corporations. But individuals may contract at their discretion about anything innocent or not forbidden by law. And the law sc

far enters into the contract as to compel its fulfillment. But corporations, such as these defendants, can make no contracts, unless authorized by direct enactment or necessary implication. See *Dartmouth College* v. *Woodward*, 4 *Peters' Cond. Rep.*, 543.

This distinction is of less consequence in this case, because the contract on which the plaintiff relies is in the very teeth of the statutes, not merely unauthorized. See 11th sec. of act of Feb. 12th, 1866, Statutes of Nebraska, p. 694. Also, the first clause of the 14th sec. of same act, p. 694. Also, the fourth clause of the last mentioned section of same act, p. 695, Also, the 6th sec. of the act concerning Schools, Statutes of Nebraska, p. 353.

This last mentioned section of our Statutes is identical with the 6th section of the Statutes of Ohio, on the same subject, passed March 14th, 1853. See Swan's Statutes of Ohio, edition of 1854, p. 837.

CROUNSE, J.

The plaintiff alleges that he was duly employed by the Board of Education of Nebraska City, as principal, to teach the High School in said City for a period of ten months for a salary of fifteen hundred dollars, and that after teaching six months, said Board, without reasonable or sufficient cause, stopped the schools and dismissed the plaintiff, paying him for the six months at the rate of one hundred and fifty dollars per month. This action was brought to recover damages for such dismissal. To the petition a demurrer was interposed, which was sustained.

Were this an action between private individuals no question could arise; but can it be maintained in this case? We think not. The right of the defendants to employ teachers is given by an act of the Legislature, passed at a session thereof had in 1866, which is referred to in plaintiff's peti-

tion. That act, among other things, empowers the Board of Education "to contract with and employ all the teachers in the several schools therein" (in the City), "and at their pleasure to remove them." What was the occasion or reason for closing the schools and dismissing the teachers employed, we are not to inquire. It is enough that the discretion and power is vested with the Board of Education. Contracting with public officers, the plaintiff is presumed to know the extent of their authority and the special powers given to them. This law authorizing the employment of teachers, entered into and formed part of the contract. To say that the plaintiff could only be discharged for good cause, is to declare this provision of the act unimportant; that it confers no greater or other right than that which exists outside of it. It is scarcely necessary to refer to the propriety and importance of the provision under consideration. With a Board of Education rests a high responsibility. The qualifications for a successful teacher are various. The considerations which might move a Board of Education, who are presumed to act for the best interests of the community they represent, in the exchange of teachers, may be good and proper, and still not sufficient in law. To act in such cases upon the hazard of being endorsed by the verdict of a jury would be very embarrassing.

The judgment of the District Court must be affirmed.

Judgment affirmed

Nebraska City v. Baker.

1. PRACTICE: *Paper not rightly in record.* A deposition used upon a hearing in the District Court, but not included nor referred to in the bill of exceptions, will, on motion in this court, be stricken out of the transcript.

Nebraska City sued Baker and Wolfolk for certain damages. Baker having been personally served with process, judgment was rendered against him. Execution issued and was returned unsatisfied. An affidavit alleging these proceedings and other matters usual to effect a garnishment, was filed and an order of attachment issued, upon which a notice of garnishment was served on Bradley and Payne, alleged debtors of Baker. Bradley and Payne moved the court to discharge the garnishment as unauthorized by law. This motion was overruled by the court. Bradley and Payne then answered, denying any indebtedness to Baker. To establish such indebtedness, the City took the deposition of Conrad Jones. The garnishees then moved to be discharged and this motion was sustained by the court; and to the order made in that behalf the City excepted on the journal, and also took a bill of exceptions, which merely recited that the motion to be discharged had been made and sustained, and that an exception was duly taken; but without showing on what papers the hearing of the motion was had nor referring to the deposition of Jones. That deposition was included in the transcript filed in this court, and Bradley and Payne now moved to strike it out of the record.

I. N. Shambaugh, for the motion.

G. B. Scofield, contra.

CROUNSE, J.

Included in the record transmitted to this court is a deposition of Conrad Jones. The bill of exceptions which is made a part of the record (omitting its formal parts), recites that "this cause came on for hearing upon the motion of the garnishees to be discharged from their garnishment herein, and the court being fully advised doth discharge the said garnishees, and order that the said garnishees recover their costs herein, to all of which the plaintiff excepts." The deposition was, no doubt, used upon the hearing in the court below, but it was not included nor referred to in the bill of exceptions, and is therefore not properly with the record here. The motion to strike it from the transcript must prevail.—*Hilliard on New Trials*, 503; *Spurlock* v. *Fulks*, 1 *Swan*, 289. Upon the record standing no error appears, and the judgment of the court below must be affirmed.

Judgment affirmed.

The People v. McCallum.

1. CONSTITUTION: *Title of bills.* Section 19 of article 2 of the constitution, does not require that the title of a bill shall contain an abstract of the bill, nor set out the particulars of the amendment. The Legislature may select its own title, although it may not be the most suitable or comprehensive.

2. ——: *Recital of the provision amended.* An act amendatory of a former statute need not recite the provision changed.

3. ——: *Mistake in such recital.* If the former provision which is amended, be recited in the new enactment, and a mistake in such recital be made, it does not render the new act void as in contravention of this clause of the constitution.

4. BONDS OF COUNTY CLERKS: *Assuming duties of clerks of District Courts.* The statute making county clerks, *ex officio* clerks of the District Court in their respective counties, does not require of them bonds in their character of court clerks, separate or additional to such as they give as county clerks.

5. QUO WARRANTO: *Demand.* If such additional bond were required, a county clerk would not be excluded from performance of his duties as clerk of the court, because he had neglected to give the additional bond, unless demand that he do so were first made upon him in that behalf.

6. ——: *Answer.* An allegation in an answer to an information in the nature of a *quo warranto*, that the defendant had given a bond "for the faithful performance of all the duties required by law of him in consequence of his said election to the office" in question, is a sufficient allegation that he has given the bond required by law.

7. ——: *Pleading.* A pleading which is ambiguous is not for that reason liable to demurrer. The proper remedy is motion to make it more certain.

This was an information filed in the District Court of Otoe county, to try the right of the defendant to exercise the duties of clerk of the said court. The information was as follows:

"And now comes O. B. Hewett, prosecuting attorney for the First Judicial District of the State of Nebraska, comprising the county of Otoe, and at the relation of Guy

THE PEOPLE *v.* MCCALLUM.

A. Brown, exhibited to this honorable court an information in the nature of a *quo warranto*, and states that one George R. McCallum, the defendant, has usurped, invaded, and intruded into, and unlawfully holds and exercises the office of clerk of the District Court in and for the county of Otoe and State of Nebraska, and that the said George R. McCallum, the defendant, has no right or authority to hold said office.

And your petitioner further states, that the said George R. McCallum is the county clerk of said county of Otoe, and by virtue thereof claims that he is *ex officio* clerk of the District Court of said county, and entitled to the custody and control of the books, papers, records and seal belonging and appertaining to said District Court, and to exercise all the functions and to perform and execute all the duties devolving upon the clerk of said District Court. But your petitioner states that the said George R. McCallum, as such county clerk, is not *ex officio* clerk of said District Court, and is not entitled to the care, custody and control of the books, papers, records and seal thereof, and is not entitled to exercise the functions, and to perform and exercise the duties of clerk of said District Court, and that the acts of the said George R. McCallum in usurping, invading, holding, exercising and taking possession of the office of clerk of the District Court of said county, and of the books, papers, records and seal thereof, and in exercising the functions, and in performing and exercising the duties of clerk of said District Court, is contrary to and in violation of the constitution and laws of the State of Nebraska.

And your petitioner further states that the said George R. McCallum, although he now holds possession of the office of clerk of said District Court, and exercises the functions, and performs and exercises the duties of said office, yet he, the said George R. McCallum, has failed and

neglected to give bond as clerk of said District Court, as required by law.

And your petitioner further states, that on the tenth day of November, A. D. 1869, the said Guy A. Brown was duly appointed the clerk of the said District Court by the Hon. O. P. MASON, Chief Justice of the State of Nebraska, and Judge of the First Judicial District, comprising the county of Otoe, and that therefore the said Guy A. Brown afterwards, to wit, on the twelfth day of November, A. D. 1869, entered into a bond to the People of the State of Nebraska, in the sum of three thousand dollars, with good and sufficient security, conditioned for the faithful performance of the duties of said office, which said bond was on the day and year last aforesaid, duly approved by the Honorable O. P. MASON, Chief Justice and District Judge as aforesaid, and has duly qualified as such clerk; and that therefore the said Guy A. Brown became, and was and now is, entitled to the care, custody and control, of all the books, papers, records and seal of said District Court, and to exercise the functions, and to perform and execute all the duties of clerk of said District Court.

And your petitioner states that afterward, to wit: on the twelfth day of November, A. D. 1869, the said Guy A. Brown, at Nebraska City, in the said county of Otoe, demanded of the said George R. McCallum, the possession, custody and control of all the books, papers, records and seal belonging and pertaining to said District Court, and to allow and to permit him, the said Guy A. Brown, to exercise the functions, and to perform and execute all the duties of clerk of said District Court, all of which the said George R. McCallum refused to do, and still holds possession of said office, and all the books. papers. records and seal thereof. and still claims to be such district clerk, and to exercise all the functions, powers

and duties incident thereto, and to the prejudice and against the lawful rights of said Guy A. Brown.

Wherefore, your petitioner prays for a judgment of ouster against the said George R. McCallum, and that he be altogether excluded from the office of clerk of said District Court, and for such other and for further judgments and orders as to this court shall seem proper to prevent said defendant from usurping, intruding or invading into, or unlawfully holding, or exercising, or executing said office."

To this information there was filed an answer as follows:

"And now comes the said George R. McCallum, defendant as aforesaid, and denies that the said defendant usurps, invades or intrudes into, or unlawfully holds or exercises the office of clerk of the District Court in and for the county of Otoe aforesaid. But, on the contrary thereof, this defendant alleges that by virtue of his office he, this defendant, has good right and lawful authority to have, hold and exercise the office of clerk of said District Court, and that no other person whatsoever has any right or title to said office. And said defendant further alleges and says, that on the second Tuesday in October, A. D. 1867, he, this defendant, was duly elected county clerk by the qualified voters of Otoe county aforesaid, and gave bond, and in all respects qualified himself for holding said office and for the discharge of the duties thereof. And being county clerk as aforesaid, this defendant on the fourth day of July, 1869, by the law of the land, became *ex-officio* clerk of the District Court in and for the county of Otoe aforesaid, and bound to perform all and singular the duties of the clerk of said District Court, and entitled to receive all and singular the emoluments of said office. And said defendant, George R. McCallum, being by operation of law, *ex-officio* clerk of said District Court, the said Guy A. Brown made application to this

defendant to become, and did become, by appointment of this defendant, deputy clerk of said District Court under this defendant, and on the 24th day of July, A. D., 1869, gave bond in the penal sum of five thousand dollars, with good and sufficient security, conditioned for the faithful performance of his duties as deputy of this defendant. And afterwards, to wit: On the twenty-seventh of July, 1869, the said Guy A. Brown made solemn oath that he would faithfully and impartially perform the duties of deputy district clerk in and for said county of Otoe, and had the same endorsed on said bond, as by reference thereto will more fully and at large appear. Wherefore, said Guy A. Brown ought not to be permitted or allowed in a court of law to dispute the title of this defendant to be clerk of said District Court, but ought to be estopped from so doing.

And this defendant, George R. McCallum, further alleges and says, that on the second Tuesday in October, 1869, the said George R. McCallum, by the qualified voters of said Otoe county, was duly elected county clerk of said county; and within the time prescribed by law, the said George R. McCallum took the oath prescribed by law, and gave bond in the penal sum of six thousand dollars, with Jacob Blum, James Smith, and W. H. H. Waters, as his sureties, the date of which is the eighteenth day of October, 1869; which said bond was conditioned for the faithful performance of all the duties required by law of said George R. McCallum, in consequence of his said election and the same, and the sureties therein were approved by the Probate Judge of said Otoe county, and lodged in his office, as by reference thereto will more fully and at large appear.

And by virtue of said election, the said George R. McCallum became, and was and is, *ex officio* clerk of the District Court, in and for said Otoe county, in said information mentioned, and is fully entitled to the care, custody

and control of the books, papers, records and seal belonging and appertaining to said District Court, and to exercise all the functions, and to perform and execute all the duties devolving upon the clerk of said District Court, according to the statute in such case made and provided, and the tenor and effect of said bond so executed, approved and filed as aforesaid, and this the said defendant is ready to verify.

Wherefore, he prays judgment that this information in the nature of *quo warranto* be dismissed, and that he, this defendant, recover of said Guy A. Brown his costs in this behalf expended, and go hence without day."

The plaintiff demurred as follows:

"And now comes the said petitioner and plaintiff in the above entitled cause and demurs to the answer filed by the said defendant herein, and states the following causes of demurrer thereto, to wit:

1. The several matters set up in said answer are not sufficient in law to bar the information and action of the said plaintiff.

2. The several matters set up in said answer constitute no defence to the information and action of the plaintiff.

3. Said answer does not state facts sufficient to constitute a defence to the information and action of the plaintiff.

4. Said answer admits that the said relator, Guy A. Brown, was duly and legally appointed clerk of the District Court of Otoe county, in the State of Nebraska, and gave bond and qualified as such, as required by law, and that the said defendant holds and keeps possession of said office, and of the books, papers, record and seal thereof, and exercises the functions and performs the duties and receives the profits and emoluments of said office without any legal authority so to do.

5. Said answer fails to show that the defendant has

taken the oath and given the bond required of the clerk of said District Court.

6. Said answer fails to show that the defendant is entitled to hold said office or to exercise the functions or perform the duties or receive the profits or emoluments thereof.

7. The law under which the defendant claims the right to hold the office of clerk of the District Court aforesaid, and to exercise the functions and perform the duties thereof, is unconstitutional, null and void."

The demurrer was argued before Mr. Justice LAKE, sitting in the District Court for Otoe county. He overruled the demurrer and gave judgment for the defendant, dismissing the information. The cause was removed here by petition in error.

I. N. Shambaugh and *E. R. Richardson*, for plaintiff in error.

The plaintiff in error relies upon the following points and authorities to reverse the judgment of the court below:

I. The demurrer to the defendant's answer ought to have been sustained. The answer admits that the relator was duly appointed clerk of the District Court of Otoe county by the judge thereof, and that he gave bond and qualified as required by law, and also admits that the defendant has failed to give bond and qualify as clerk of the District Court.

II. The law under which the defendant claims the office is unconstitutional. The subject of the act is not expressed in its title, and the section amended is not contained in the amendatory act. Section 19, article 2, Constitution of Nebraska.—5 *Ind.* 327; 6 *Ind.* 31. Similar decisions have been made in Louisiana. The Legislature of Nebraska, by

its general course of legislation, has given to the Constitution a legislative interpretation similar to that contained in the cases referred to.

III. But if the act in question is constitutional it does not make the county clerk of Otoe county, clerk of the District Court. It does not apply to Otoe county. It only applies to the organized counties in which the terms of the District Court were to be called, and not to those in which the time for holding court was fixed by law.—*Act of* 1869, *sec.* 1, *page* 62.

IV. The act of June 22, 1867, sec. 1, page 92, authorized the judges of the District Court to appoint the clerks of said court. This law is still in force, and the clerk of the District Court is to be appointed by the judge of that court. The act of February 9, 1869, did not repeal the act of June 22, 1867. There is no repealing clause, and the two acts are consistent with each other. Repeals by implication are not presumed or favored, and never allowed unless there is an irreconcilable antagonism or inconsistency between the two acts. If the last act is susceptible of a construction consistent with the first act, that construction must prevail. The impropriety of changing the first law may well be considered in giving a construction to the last act.—*Sedgwick on Statutory and Constitutional Law*, 50, 54, 123, 127, *and* 238.

V. But if the act of February 9, 1869, made the county clerk the clerk of the District Court, he could not act as such without giving bond and taking the oath prescribed by law.—*People* v. *Mayworm*, 5 *Mich.* 146; *Respublica* v. *Ray*, 2 *Yates* (*Penn.*) 429. The law requires the clerk of the District Court to give bond.—*Revised Statutes*, 52, *sec.* 38; and to take an official oath, *page* 30, *sec.* 17—neither of which was done by defendant. These sections are not repealed.

The bond of the county clerk is conditioned for the dis-

charge of his duties as county clerk only, and does not extend to or embrace the duties of the clerk of the District Court.—*Revised Statutes*, 29, *sec.* 10 *and* 30, *sec.* 18.

VI. But if the bond given by the county clerk was held to extend to and embrace the duties of the clerk of the District Court, it would be inoperative until approved by the judge of the District Court.—*Revised Statutes.* 52, *sec.* 38. If such bond extends to and covers both offices, then it must be approved by the Probate Judge before he can act as county clerk, and by the District Judge before he can act as clerk of the District Court. The defendant's bond, as county clerk, has not been approved by the Judge of the District Court. The approval of the Probate Judge is not binding on the District Court. It is the right and duty of the Judge of the District Court to determine the sufficiency of the bond and sureties of the clerk of his court.

VII. To hold that the county clerk is clerk of the District Court, and that but one bond is required, involves an inconsistency and gross absurdity. The law requires the county clerk's bond to be filed with and kept by the Probate Judge—*Revised Statutes* 29, *sec.* 15; and the District clerk's bond to be filed in the District Court—*Revised Statutes* 52, *sec.* 58; both cannot be done.

VIII. The defendant, as county clerk, having failed to give bond and qualify as clerk of the District Court, it was the duty of the Judge of the District Court to appoint a clerk of that court, under the act of June 22, 1867, and the District Judge had such power without that statute. The power of every court, or Judge of a Court of Record, to appoint a clerk to make up and keep the records of the court, is a power inherent in the court, and may be exercised without any express statutory provision.

IX. Even if it should be held that the relator has no title to the office, still the defendant cannot hold it without

showing good title to the same. The proceeding by *quo warranto* is in the nature of a public or criminal prosecution in which the people have an interest, and unless the defendant shows good title to the office, judgment of ouster must go against him.—*People* v. *Mayworm*, 5 *Mich.* 146; *Respublica* v. *Ray*, 2 *Yates* (*Penn.*) 429; *People* v. *Donnelly*, 11 *Ill.* 552; *People* v. *Ridgley*, 21 *Ill.* 66; *Clark* v. *People ex rel.* 15 *Ill.* 217; *Gana* v. *State of Ohio ex rel.* 10 *O. S.* 237

E. Archibold, for defendant in error.

The plaintiff in error contends that the act of the 9th of February, 1869, under which defendant in error occupies the office of clerk of the District Court by election, is unconstitutional and void, because in attempting to recite the act of June 22, 1867, a few words are omitted, we suppose, by mistake and inadvertence.

For defendant in error, we contend that counsel on the opposite side mistake the meaning of the 16th section of the second article of our State Constitution: It only requires the new act or section to contain the old one, nothing more. It does not require re-publication at full length of the old repealed statute. If it does, the inadvertent omission of a few words will not vitiate; and if it does not, then the attempt to recite at all is mere surplusage, and surplusage does not vitiate.

We have to consider the old law, the mischief, and the remedy. Our construction affords us as good a remedy as that of the gentlemen on the opposite side. Is this doubtful? Doubt acquits an acccused statute as effectually as it does an accused individual. *Cincinnati, Wilmington and Zanesville Railroad Company* v. *The Commissioners of Clinton County*; 1 *Ohio State Rep.*, 84, and the authorities there cited.

The 19th section of the 2d article of our constitution is a mere transcript of the 16th section of the 2d article of the constitution of Ohio.

When a provision is adopted from another State, the courts of this State will give it the same construction which it may have received from the highest courts in the State of its origin. *Langdon* v. *Applegate*, 5 *Indiana Reports*, 328.

The compliance with this section of the constitution is secured by the sense of duty and official oaths of the members of the Legislature, and not by any supervisory power of the courts. *Miller & Gibson* v. *Ohio*, 3 *Ohio State Reports*, 481, and subsequent pages.

This section is merely intended to furnish permanent rules for the proceedings of the two houses. *Pim* v. *Nicholson*, 6 *Ohio State Reports*, 179.

The true construction of this provision of the constitution does not require the act or section revised or amended to be recited in full in the reviving or amending act or recited at all, but only that the new act or section shall contain the old act or section, as it purports to amend it. *Lehman* v. *McBride*, 15 *Ohio Reports*, 601, and subsequent pages.

As this provision was first reported to the Ohio Constitutional Convention, it required the old amended act or section to be engrafted into the new act, and published at length. 1*st vol. Debates, Ohio Convention, page* 163. But it was committed and recommitted until it assumed its present shape, not requiring such a ceremony. We know of no attempt to recite the old amended act or section in the statutes of Ohio, although amendatory acts are numerous. In the District Court we laid fifteen volumes of Ohio session acts on the counsel table, subject to public inspection, but no instance of the kind was brought to our notice. The one formula is uniformly adopted:

"Be it enacted, &c., &c., that section of the act for be so amended as to read as follows."

The practice in the Nebraska Legislature has not been uniform, but the above formula has been adopted in *numerous* instances.

The provisions of the Indiana constitution are essentially different. *Langdon* v. *Applegate*, 5 *Indiana Reports*, 328.

The Indiana constitution requires that the "act revised or section amended shall be set forth and published at full length." *Langdon* v. *Applegate*, *page* 328 of the above-mentioned volume. The Supreme Court, in that case, decided that the amendatory or revising act must be accompanied by a full and extended republication of the act or section revised or amended. Judge STUART dissented.

In *Littler* v. *Smiley*, 9 *Indiana*, 118, Judge GOODKIN adhered to the decision in *Langdon* v. *Applegate*, but added, "Were this an original question I would not so decide."

An examination of the Indiana reports will make manifest that this minute provision of constitutional law has done but little honor either to the legislative or judicial wisdom of that State. Their reports set up a beacon to warn, not a light-house to allure.

CROUNSE, J.

The grounds, mainly upon which the denial of McCallum's right to exercise the duties and receive the emoluments of clerk of the District Court of Otoe county, is placed, are:

1. The alleged unconstitutionality of the act of February 9, 1869, which takes from the judges of the District Court the authority to appoint clerks of that county, and which makes the county clerks of the several counties, *ex-officio*, such clerks; and,

2. The failure of McCallum to give a bond for the faith

ful performance of his duties of clerk of the District Court, other than that given as county clerk.

The unconstitutionality complained of is that the act referred to, was enacted in violation of so much of section nineteen, article two of the State constitution, as declares that, "No bill shall contain more than one subject, which shall be clearly expressed in its title; and no law shall be revived or amended, unless the new act contain the entire act revived and the sections amended."

With respect to its title: The act contains but one subject, which is, to provide clerks for the District Court. By section one of the act which is amended, such clerks were appointed by the judges of the respective districts. The amendment makes county clerks *ex-officio* clerks of the District Court. This is quite well expressed in the title, "An act to amend section 1 of an act entitled, An act to provide for the appointment of clerks of the District Court, approved June 22, 1867." It is not required that the title should contain an abstract of the bill, nor set out the particulars of the amendment. Whether this requirement of the constitution is designed as a rule for the government of the legislature, an observance of which is enjoined by a sense of duty and the official oath of each member, and not subject to any supervisory power of the courts (3 *Ohio State*, 481; 6 *Ib.* 179), it is unnecessary to stop to inquire. The constitution not having fixed the degree of particularity with which a title is to express the subject, it is enough that the legislature, with this provision before them, have selected their own title; and although we might not agree upon it as the most suitable or comprehensive, the act for that reason is not to be declared void.

The purpose of this provision is to prevent surprise in legislation, by leaving matter of one nature embraced in a bill whose title expresses another.—*State* v. *County Judges of Davis Co.* 2 *Iowa*, 282. There can be no suggestion

of any such deception in the title of the act before us. It is only in cases clearly involving the mischief provided against, that this court should be called upon to declare void the acts of the legislature. Chief Justice OAKLEY of the New York Superior Court, well remarked: "It is not a light thing to set aside an act of the legislature, even when its objections are grave and weighty; but when they touch not the substance of the law, or the authority of the legislature to pass it, but are merely criticisms upon its form or phraseology, the exercise of such a power by the judiciary of the State would be prolific of evil, and would soon be universally condemned."—*The Sun Mutual Insurance Co.* v. *The City of New York*, 5 *Sand.* 10.

The further question is presented under this section of the constitution, whether the new act shall contain the section as it stood before amendment, or simply set out the section *as* amended? The able counsel for the relator contends that the new act must recite the old section and that literally. This construction is rested chiefly upon the case of *Langdon* v. *Applegate*, 5 *Ind.* 328, which, upon a clause of the constitution of Indiana, similar to this, adopt the interpretation insisted upon. The decision of that case was by a divided court, and the opinion published quite meagre and unsatisfactory. It seems never to have challenged respect, but having been announced by the highest court of that State was, for a time, adhered to, not without protest however.

Judge GOODKIN, in a case where he felt constrained to follow, remarked, "Were this an original question I would not so decide."—*Littler* v. *Smiley*, 9 *Ind.* 118. At last, however, the Supreme Court boldly met and overturned *Langdon* v. *Applegate*, in the well considered case of *Greencastle Southern Turnpike Co.* v. *The State ex rel. Malat*, 28 *Ind.* 382. This was a somewhat recent case, and was not cited upon the argument before us.

If the case under consideration were, in my mind, a doubtful one, this action of the Supreme Court of Indiana would go far in resolving it against the plaintiff in error. The inconvenience must be great and the error quite obvious, which would induce the same court to overturn one of its own decisions. "When a rule has once been deliberately adopted and declared," says *Chancellor Kent*, 1 *Com.* 476, "it ought never to be disturbed by the same court, except for very cogent reasons and upon a clear manifestation of error."

The only State, I believe, having a like constitutional provision, which has given it the interpretation here claimed, is Louisiana. Some early cases of that State are referred to, but I have been unable to possess myself of them, to see the reasoning upon which they proceeded. Neither have I been able to advise myself whether, like Indiana, the courts of that State have not reversed these early cases, and relieved themselves from the annoyance and embarrassment attending them.

Judge COOLEY, *Constitutional Limitations*, 152, after referring to the rule expressed in these early cases in Indiana and Louisiana, says: "It is believed, however, that the general understanding of the provision in question is different, and that it is fully complied with in letter and spirit, if the act or section revised or amended is set forth and published, as revised or amended, and that anything more only tends to render the statute unnecessarily cumbrous." The construction insisted on, in my judgment, is wanting in reason as well as authority to support it.

As the best light in which to discover the true meaning of this provision of the constitution, let us briefly inquire into the purpose of its institution, and perhaps the mischief it was designed to correct may be as well illustrated by reference to the course of past legislation. Taking up a volume of Territorial Laws nearest me, I open at page 20,

Laws of the Territory of Nebraska, 1867, upon "An Act to amend Section 34, Chapter 46, of the Revenue Law," which does it in the following rather stenographic manner:

"SECTION 1. *Be it enacted by the Council and House of Representatives of the Territory of Nebraska*, that line four, section thirty-four, be amended as follows: Strike out the word "two," and insert the word "five:" that after the word "precinct" in tenth line, insert the word "voting." Several serious objections to this character of legislation are obvious. With terms as blind as this, a bill may be read three different times, as required by the constitution, or a hundred times, and no one, from its reading alone, except he who drafted the bill, or those immediately interested in it, would comprehend its object. Inexperienced and inattentive members would consent to the passage of any bill concerning the object of which they know nothing, when to inform themselves would involve an examination of other laws not readily accessible. Designing men could effect material changes in the most important laws, by deceiving members into the belief, that they were acting upon other and less important subjects. These objections are obviated, besides presenting the law when published in a complete and intelligent form, without necessitating recourse to other volumes as a key, by requiring the new act to contain the section amended, *i. e.*, the section *as* amended. The act above cited, brought into conformity with this constitutonal requirement, would read, (the enacting clause being omitted), that section 34 of chapter 46, of the Revised Statutes be and hereby is amended so as to read: "Section 34. No special, precinct or district school taxes hereafter levied pursuant to any existing law, for the purpose of building or repairing school houses, or for any other purpose, shall exceed in any one year the rate of *five* mills on the dollar," &c. Here, it will be seen, that under the system allowed prior to the

adoption of the constitution, an important act, which of itself is senseless, and liable to confound and deceive, is made by a compliance with the constitution, at once intelligible to the legislator, and complete and convenient for him who has occasion to use it. With the purpose of this provision so fully satisfied by the publication of the law as amended, I can see no good object to be attained by the publication of the old law, while I can discover much embarrassment and mischief likely to arise from it. The act under consideration is one of the few of the amendatory acts in which it is undertaken to set out the old sections amended. By the mistake or oversight of him who drafted the bill, or through the carelessness or design of an enrolling clerk, some few words are omitted from what purports to be the old section. A mis-recital, it is claimed, is equivalent to no recital. Therefore, under the construction contended for, the act must be declared void, and the will of the legislature defeated, not because they have transcended any authority affecting person or property, or because of any substantial defect in the act, but because of a simple clerical error which is of no importance to the law itself, nor which had the least influence upon its passage. With legislators intent upon what the law is to be when passed, and naturally indifferent as to what it may have been, such errors must occur frequently, and, under the rule urged here, would prove very damaging to legislation.

Add to this, the appearance of these amendatory acts upon the pages of our statute book; particularly that of a section, which should unfortunately have undergone repeated amendments, and where old obsolete acts must be brought forward and spread out at length, making our laws unnecessarily cumbrous and confused, and imposing additional expense in their publication, and there remains little to

induce a belief that such was ever designed to be the interpretation of this constitutional provision.

I am clearly of the opinion, therefore, for the reasons I have mentioned, and for others that occur to me, that this section of the constituion does not require the recital of the old section in the amendatory act, but that it is satisfied by setting forth the section as amended.

McCallum having been duly elected county clerk of Otoe county, taken the oath of office and given the bond required of him as such, it remains to be considered whether, under a law making county clerks *ex officio* clerks of the District Court, it was required of him to give another and additional bond for the discharge of his duties as clerk of the District Court. Before this act of 1869, the office of clerk of the District Court was a separate and distinct office, the judges of the several judicial districts appointing their own clerks. By section 38, page 52, Revised Statutes, such clerks were required, before entering upon their duties, to give a bond in the sum of three thousand dollars, conditioned for their faithful performance. But under the amended law I do not understand that this bond must be given in addition to that already given as county clerk. It has not been so understood in either of the other judicial districts. In fact, I believe no doubt upon this point ever was suggested until this case arose. Even the relator must, in the first instance, have believed no bond was required, by acting as clerk of the District Court, under a deputyship given him by McCallum. Similar laws have never been so understood. By laws of First General Assembly of the Territory, page 162, the office of register of deeds was created. His bond was fixed at five thousand dollars, page 178. By an act of January 11, 1861, county clerks were made *ex officio* registers of deeds, and empowered to keep the books and perform the duties heretofore belonging to that office, and I will venture to say there is not an instance

where two distinct bonds were ever required, one for the office of county clerk and another for register of deeds. We are pointed to no authority or principle of law supporting the position assumed by the relator's counsel; and in the absence of it, this general understanding had of this law, and of laws similar, by judges, officers and others interested, should go far in settling the interpretation to be given by this court. It is reasonable to suppose the Legislature, in enacting this law, did it in the light of the general construction given to like laws, and that they designed here that the bond of county clerk should extend to his acts as clerk of the District Court. Upon examination, this presumption is not affected by the case of the State Librarian referred to by counsel. Prior to June 22, 1867, the office of State Librarian was a separate office, filled by election at the time of choosing State officers. By act of the Legislature of that date, the Secretary of State was constituted *ex officio* State Librarian. By an act approved two days later, amending the law relating to the amount of bonds for certain State officers, the bond of State Librarian is fixed at five thousand dollars. This, it is urged, is evidence of the fact that the Legislature designed to exact this bond in addition to that required for the discharge of duties as Secretary of State. It is certain that the bill to fix the amount of bond of State Librarian was introduced before the Secretary of State was made *ex officio* Librarian, and by those who know something of the wanderings of a bill through the two houses before its final passage, it will be easily believed that one bill may have been passed in ignorance of and without reference to the other. This is more evident when we see that the act of June 24, makes the Secretary of State the custodian of the bond of Librarian. It is hardly supposable that the Legislature would, knowingly, give the Secretary of State the custody of the bond which was designed as an indemnity against his acts

as State Librarian, when by another act passed at the same session, page 129, they fix his bond as Secretary at ten thousand dollars, to be approved by and delivered to the Treasurer of the State. Then again, amid something of a confusion of laws relating to Librarian, beside the act of June 22, page 86, Laws of Special Session 1867, making the Secretary of State Librarian and defining his duties as such, we have by section 5 of another act, page 129, same volume, another law declaring that the Secretary of State shall be State Librarian *ex officio*, and by next section the amount of bond for Secretary of State is fixed. There is no doubt in my mind whatever but the Legislature designed but one bond to be given to cover his acts as Secretary of State proper, and also his duties as Librarian.

But I confess I mistake the purport of the term *ex officio* f McCallum, by virtue of his office, by his election, taking the oath of office, and giving the bond required as county clerk, is not entirely competent and entitled to discharge the duties as clerk of the District Court for Otoe county. Those duties are added to and imposed upon those who hold the office of county clerk. There is no loss of security arising from it. The bond required of county clerks is not to be less than three thousand dollars, and may extend to ten thousand. In this case it was placed at six thousand, and the presumption is that it will be always fixed with reference to all the duties to be discharged. The bond heretofore required was but three thousand of the District Court clerk. It cannot be, as contended, that the bond given for the faithful performance of his duties as county clerk, will not extend to acts done as clerk of the District Court. That he may sign himself in one case as county clerk, and in another as clerk of the District Court, is an immaterial circumstance. His acts are all done under his election and qualification as county clerk, and his bond is given to cover any of them. As well might it be contended

that the official bond of any officer is no security for the want of faithful discharge of any additional duty which may from time to time be imposed upon such officer by law.

To settle any point which might again arise under this law, I have considered the broad question whether county clerks can be required to give any other bond than that given as county clerks before they can demand the right to exercise the duties of clerk of the District Court. This question is not fairly presented by the record in this case, and this point might have been dismissed, in my opinion, with that suggestion. It is alleged simply that McCallum, "failed and neglected," to give the bond contended for; not that he refused so to do. For reasons, some of which I have already alluded to, it may have never occurred to McCallum, that any other bond than that given was required. The very conduct of the relator in accepting and acting for a time under a deputyship given him by the defendant, was calculated to induce that ignorance of such requirement; and before the court undertook to exercise the inherent right of supplying itself with a clerk when none is provided, or before the relator can ask that McCallum be dismissed and himself be instated, it should appear, that by order of court or otherwise, McCallum was required to present his bond for approval, and that he refused so to do. I could not consent to see one driven from an office, in which the partiality of his fellow citizens had placed him, for innocently neglecting to meet a requirement of the law which, perhaps upon the sligthest intimation, would have been cheerfully complied with.

Some further point, if I understood counsel, was sought to be made, that the defendant has not alleged in his answer the making of a proper bond, as county clerk even. After setting out his election in October, 1869, as County Clerk of Otoe county, the defendants answer recites, the making of

a bond signed by several persons named, "conditioned for the faithful performance, of all the duties required by law of said George R. McCallum, in consequence of his said election." This condition, I understand, is complained of as not being for the faithful performance of his duties as County Clerk, &c. As is the usual phraseology, I can hardly believe this point was urged with any confidence. If it were necessary to recite the giving of a bond at all, there can be no mistaking what is there set forth for any other effort to aver that fact. It would seem that none, but the wilfully blind, could fail to discover, that "the duties required by law in consequence of his said election" immediately following the averment of his election as county clerk, means the duties of county clerk. If it is susceptible of any other interpretation, it may be said to be ambiguous. That is not a cause for demurrer. The court may, in such cases, be asked to order the pleadings to be made more certain.—*Olcott* v. *Carroll*, 39 *N. Y.* 436.

The judgment of the court below overruling the demurrer, must be sustained.

Judgment affirmed.

Mason, Ch. J. dissented to that part of the above opinion in regard to the bond of McCallum.

Homan v. Laboo.

1. INSTRUCTION TO JURY *after they have retired.* It is perfectly proper when a jury returns into court and requests further instructions, for the judge, in the presence of the parties or their counsel, to repeat what he has already said, or add whatever is proper in the case, which will aid them in reaching a conclusion.

2. ——: *Presumptions of correctness.* If the record does not show that it contains all the testimony, it will be presumed that there was evidence which would justify a charge of the court, although it does not appear at large.

3. REPLEVIN: *Demand.* Under the Code, in Nebraska, in an action of replevin, in which ownership in the plaintiff is established, proof of demand by him of the defendant of the property before suit, is not necessary to maintain his action.

4. ——: ——. If, at the service of the order, the defendant is not the owner of, or has not a special interest in the property but holds the same innocently, only nominal damages can, without demand, be recovered by him.

5. ——: ——. If such be the fact he should so plead, and then he will have nominal damages and costs.

6. ——: ——. If such be the fact, but he alleges property in himself, demand need not be proved in order to maintain the action against him.

This was an action of replevin of a pair of mules, brought by Homan against Laboo and Ward, in the District Court for Otoe county.

Laboo answered separately, alleging that he was the owner of the property.

The cause was tried to a jury. The plaintiff was sworn on his own behalf, and testified that he was surety for Ward in a replevin suit pending before a justice of the peace, in Douglas county, and that Ward placed the mules in his possession as security. While they were there, Ward came to him and told him he had gotten one Jennings to take his place on the bond, and would get him, Homan, released from his liability thereon, with which the latter

expressed satisfaction. The following morning, Ward went to the plaintiff's stable before he was there, and told the man in charge that he had arranged with Mr. Homan that he should have the mules, and then took them away. Homan had been compelled to pay the bond which he was on for Ward. He found the animals in Laboo's possession and brought this action.

Laboo showed that he purchased them of Ward just after they were taken from Homan's stable. The bill of exceptions did not show whether it contained all of the testimony or not.

After the jury had been charged by the court, and had retired and had deliberated sometime, they returned into court saying, that they could not agree because of differences of law and of fact. The court then instructed them as follows: "Although you may believe from the evidence that the defendant, Ward, left the mules in controversy with the plaintiff Homan, and that he obtained possession of them from Homan by false and fraudulent representation, yet if Homan, after having parted with them, let them remain in Ward's possession two or three months, and permitted Ward to hold them out to the world as his own property, and Ward sold them to Laboo, an innocent purchaser, then you should find for the defendant, Laboo. If, in this particular case you find no demand, you should find for the defendant.

The jury returned a verdict for Laboo for three hundred and thirty-eight dollars and seventy-three cents, upon which judgment was entered.

The plaintiff brings the cause here by petition in error.

Calhoun and *Croxton*, for plaintiff in error.

No one can give what he has not himself; and, therefore, no one can give a good title who has no good title.—1*st*

Parsons on Contracts, book 3, *Ch.* 4, *p.* 520; *McGrew* v. *Browder*, 14 *Mart* (*La.*) 17; *Roland* v. *Grundy*, 5 *Ohio*, 202; *Browning* v. *Magill*, 2 *Har. & J.* 308; *Dame* v. *Baldwin*, 8 *Mass.* 518; *Wheelwright* v. *Depeyster*, 1 *Johns.* 479; *Hosack* v. *Weaver*, 1 *Yates*, 478; *Lance* v. *Cowan*, 1 *Dana*, 195; *Ventress* v. *Smith*, 10 *Peters*, 161.

Where a person has acquired property by fraudulent representations, he acquires no right in the property, and the owner may retake the same, in the same manner as he would be permitted to retake stolen property.—2*nd Parsons, part* 2 *ch.* 3, *p.* 786; *Hodgeden* v. *Hubbard*, 18 *Vt.* 504.

If a vendee (or person) obtains possession of goods or chattels by fraud he can derive no rights, and the vendor (owner) can lose none by such delivery.—*Earle of Bristol* v. *Willsmore*, 1 *B. & C.* 514; *Hussey* v. *Thornton*, 4 *Mass.* 405; *Donahue* v. *Cromartie*, 21 *Cal.* 80; 1*st Parsons on Contracts, book* 3, *ch.* 4, *p.* 527.

We claim that no demand was necessary in this case. And, if necessary, we refer to the decision of this court, recently made in a case to us unknown.

T. B. Stevenson, for defendant in error.

It is not error to instruct the jury in open court even after they have retired to consider of their verdict.—*Code, Title* 9, *Sec.* 287; *O'Connor* v. *Guthrie & Jordan*, 9 *Iowa*, 80; *State of Iowa* v. *Pitts*, 9 *Iowa*, 343.

All the instructions taken together, especially in a civil case, must be erroneous to sustain error. One single paragraph of the instructions, though, if alone erroneous, is not sufficient.

There is no error in the instructions in this case, as the case was replevin in *detinet*, and there is no proof that Peter Laboo wrongfully took, or obtained the property by

fraud, but the proof shows Laboo to have been a *bona fide* innocent purchaser, for a valuable consideration, actually paid.

Therefore, a demand for the property should have been made before suit brought.—*Barrett* v. *Warner*, 3 *Hill*, 348 *and cited cases*; *Stanchfield* v. *Palmer*, 4 *Green, Iowa*, 23, *and cases cited*; *Ingalls* v. *Buckley*, 13 *Illinois*, 315; *Storm* v. *Livingston*, 6 *John.* 44; *Millspaugh* v. *Mitchell*, 8 *Barb. Supreme Court*; *Mowrey* v. *Walsh*, 8 *Cowan*, 238; *Rowley* v. *Bigelow*, 12 *Pick.* 307; 3 *Phillips' Evidence, p.* 412; *Gilchrist* v. *Moore*, 7 *Iowa*, 9.

Crounse, J.

Upon the trial of this cause in the court below, the jury having been out awhile, returned into court and announced that they were unable to agree, because of differences among them upon questions of law as well as upon questions of fact. The judge, thereupon, gave them additional instructions, after which they returned a verdict. We see no error in this. The practice is quite usual. Jurors not unfrequently disagree in their recollections of testimony, or misapprehend the language and meaning of the judge's charge, and there can be no impropriety, with the parties present, in having the court repeat what has already been said, or add that which may be proper in the case for the enlightenment of the jury. It is better than that the jury should be driven into finding a verdict, in ignorance, or under misapprehension, or that the parties should be subjected to the expense and annoyance attending a disagreement. We think, however, that the exception was well taken, to so much of the charge so given, as directs the jury that, "if in this particular case you find no demand, you should find for the defendant."

The action was replevin brought by Homan against

Laboo and Ward to recover possession of a span of mules. Ward, it is claimed, wrongfully took the mules from Homan's stable. Some time after the taking, as plaintiff swears, he found them in possession of defendant Laboo, from whom he demanded them, but who refused to deliver them up. The record, although containing the testimony of the defendant Laboo, with that of other witnesses sworn on the trial, shows nothing contradictory nor calling in question the truthfulness of plaintiff's testimony on this point. Neither does it contain a statement that all the testimony taken on the trial appears therein, and we must assume that evidence was given that made the question of demand an open one; otherwise it would have been error for the court to mislead the jury by treating that as doubtful, which was clearly settled by the testimony.

Regarding the question of demand then, as one of fact, liable to be determined against the plaintiff, the instruction of the court in respect to it became quite material. Particularly is this so in view of the circumstances under which it was given. This charge was upon one of two points for advice upon which it appears the jury had returned. They could not have found Lahoo to be the owner of the property: else, why concern themselves about a demand. So, while it is probable that, in the opinion of the jury, Homan was the owner of the property, this instruction of the court, directing them to find unqualifiedly for the defendant, in case of no demand, may have been the inducement to the verdict given. This cannot be the law. Where a defendant has come rightfully into possession of property in an action of trover and conversion, we can readily see the importance of evidence of demand. There the action proceeds upon the tortious act of converting plaintiff's property. To show him guilty of this, evidence of a demand and a refusal while he was possessed of the property, is introduced. So in the case of dependant covenants, to

subject one of the parties to an action at law, there must be a tender of performance, and demand made by the other. But, whatever may be the law under the statutes of those States where the action is made to rest upon the wrong involved; where before trial the defendant may have a return of the property; where the judgment is in the alternative, for the property or its value; and where, as in New York (*vide* 2 *R. S.* 523), the declaration must contain an averment of demand and refusal, in replevin under the statute of Nebraska, and under the issue here formed, I can see no necessity for a demand. As in this case, upon filing the required affidavit and bond, the plaintiff possesses himself of the property, and there is no way either before, or by force of the judgment, that the defendant can have a return of it. It is then for the jury to find, upon issue joined, to whom, at the commencement of the action, belonged the right of property, or the right of possession. —*Sections* 191, 192, *Code.*

Section 191 directs that: "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of the property, or the possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant."

In the case before us, Homan claimed the property as pledgee. Laboo answering, does not disclaim ownership, nor put in the plea of *non detinet*, under which, with the right of Homan established as pledgee, he might have claimed protection from costs, as an innocent party upon whom no demand had been made; but beside denying Homan's claim, and charging conspiracy between Homan and Ward, he avers, "that he is the owner of said mules,

and entitled to the possession of the same. Ownership was a proper plea, and the one he chose to tender. Homan's right as pledgee, did not depend upon a demand; nor could his omission to make it, establish a right of property in Laboo. The property, under the writ of replevin, had passed irrecoverably into the hands of Homan. If the property, at the time it was so taken under that process, was not that of Laboo, (and he claimed no special ownership) the only damage to which he was subjected, was that of being sued while he was innocently in possession of the mules, and before a demand was made for them. Had he chosen this attitude, he would have been entitled to a charge from the court, that if no demand was made he must recover nominal damages. This would have given him his costs. But having pleaded property in himself, the issue required no proof of demand and refusal. *Morris on Replevin*, 78. It would be unjust to impose upon the plaintiff the costs of trying an issue forced upon him by the defendant, when he is successful, because he fails to establish matters not presented by the pleadings, nor relied on by the defendant. The judgment must be reversed, and a trial *de novo* awarded.

Reversed and remanded.

McAusland v. Pundt.

1. DERIVATIVE TITLES. Although it may be true as an abstract proposition that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of the rule.

2. JUDICIAL TITLE: *Not defeasible.* A party who has recovered a judgment or decree, under which his adversary's property has been sold to him, holds an estate which is not merely defeasible upon a reversal of the judgment or decree by an appellate court.

3. ——: *Why restored on reversal.* The principle upon which the property so sold, remaining in the hands of such party at the time of reversal, is returned to the former owner, is that of convenience in doing justice between the parties.

4. ——: *Not restored when held by grantee.* If a party who has recovered a judgment or decree becomes the purchaser of property thereunder, and conveys the same to a third party, and afterwards, the judgment and decree not having been superseded by bond, is reversed in the appellate court, such grantee will retain the property notwithstanding the reversal.

5. ——: *When party thereto retains property.* And so will the party if he retain the property at the time of the reversal. Per CROUNSE, J.

6. WHEN VENDEE CAN DISPUTE HIS VENDOR'S TITLE. The rule, that a tenant or a vendee in possession under a contract, cannot deny the title under which he entered, is confined to the title of the landlord, or of the vendor, at the time possession was given.

7. ——. If the law avoid that title, the tenant or vendee may disclaim it and take under him to whom it is adjudged.

8. SPECIFIC PERFORMANCE: *Gross negligence.* Specific performance of a contract for the sale of real estate will not be decreed when the vendee has been guilty of gross negligence in the performance of his stipulations.

9. ——: *Excuses.* Such neglect is not excusable, on the ground that the title was involved in dispute, if the dispute existed when the contract was made, and an unfavorable determination was provided against by security taken and stipulations made at the time for the vendee's protection.

This was an appeal from a decree rendered by Mr. Justice CROUNSE, sitting in the District Court, for Douglass county.

The case will appear, from the allegations of the bill, as follows: "That on and before the twenty-eighth day of May, A. D. 1859, William M. Jones was seized to himself and his heirs of a certain piece or parcel of land, situate in the city of Omaha, and known and described as follows: the west two-thirds of lot number five (5), in block number one hundred and twenty-one (121).

And your orator further shows that the said Jones, being desirous to dispose of the said real estate, entered into an agreement with John Hughes, then of said city, now of the kingdom of England, for the sale thereof to him, which agreement was reduced to writing, and signed by the said Jones and the said Hughes, to the purport and effect that the said Jones should, by good and sufficient deed of conveyance, containing a covenant of warranty by him duly made, executed and acknowledged, convey the said estate to said Hughes, in fee; and that thereupon the said Hughes should pay therefor to him, the said Jones, the sum of two thousand dollars, and that in the meanwhile, and until the making of said deed, the said Hughes should pay to said Jones, for the use and occupation of the said premises, the sum of three hundred dollars per annum; and that the said Hughes, on the said day, and under the said agreement, entered into the said premises, and thence until the day in that behalf hereinafter mentioned, continued in the possession thereof.

And your orator further shows unto your honor, that on and after the thirtieth day of May, in the year aforesaid, Henry R. A. Pundt and Charles W. Koenig, were seized in common to themselves and their heirs, of a certain piece or parcel of land, situate in the said city of Omaha, and known and described as follows: the west one-third of lot number five, in block number one hundred and four, and were desirous to exchange the same for a certain portion of the premises first above described, that is to say: so much

thereof as is twenty-two feet front on Farnham street, and eighty-eight feet deep on Thirteenth street; that, accordingly on said day, the said Pundt and Koenig entered into an agreement with the said John Hughes for the said exchange, which agreement was reduced to writing, and signed by the said Hughes, and Pundt, and Koenig, to the purport and effect that the said Hughes should, at such time as he should obtain the title thereto, by a good and sufficient deed of conveyance, convey to said Pundt and Koenig in fee, with covenants of warranty, the above described part of lot five, in block one hundred and twenty-one; and the said Pundt and Koenig, beside certain other considerations by them to be paid thereof, should convey to said Hughes in fee, the said west third of lot five, in block one hundred and four; and thereupon and under, and in virtue of the said agreement, the said Pundt and Koenig entered into and have ever since occupied the said part of said lot five, in block one hundred and twenty-one.

And your orator further shows unto your honor, that on the ninth day of July in the said year, the said Hughes entered into an agreement with your orator for the sale to him of the said lot secondly above described, which agreement was reduced to writing and signed by said Hughes, and your orator, to the purport and effect, that the said Hughes had sold, and when your orator should pay the notes hereinafter mentioned, would execute a good and sufficient deed of warranty of said premises, free and discharged of all incumbrances, to your orator, and that your orator gave to said Hughes his three several promissory notes, each for the sum of one hundred and sixty-six dollars and sixty-seven cents, with interest at the rate of ten per cent per annum, and payable respectively in one, two and three years from the date thereof; and your orator in and by the said articles agreed to pay all taxes on said

premises as long as he held possession of said premises, or any other person held possession thereof under him; and that in case he failed to pay any one of said notes, then that the said Hughes, or his assigns, might declare all thereof due, and foreclose the said article as a mortgage, and that the said article should, by all the courts of this Territory be, in case of foreclosure, construed as a mortgage. And the said Pundt and Koenig delivered the possession of said premises to your orator, as thereunto entitled under the said agreement, and your orator has ever since so held possession of and occupied the said premises, and has erected thereon a building at an expense and of the value of one thousand dollars, which your orator has occupied and does occupy for mechanical and mercantile purposes. And your orator further shows unto your honor, that on the tenth day of July, A. D. 1862, the said Hughes, for the consideration to him therefor duly paid, of eight hundred dollars, sold to John I. Redick and Clinton Briggs, both of the city of Omaha, the lands first above described, and also among others, the aforesaid contract between him, the said Hughes and your orator; and the said notes, so as aforesaid by your orator to said Hughes made, and on said day by their certain deed of conveyance bearing date on said day, he, the said Hughes, and Eliza, his wife, conveyed to said Redick and Briggs the same premises, and also sold and assigned to them "all the money, rights and credits of every description, belonging to them or either of them, or due to them or either of them, from any person or persons, or company of persons, in said Territory," including said agreement and said notes. And your orator further shows unto your honor, that on the 14th day of March last past, the said John I. Redick and Clinton Briggs, purchased the first above described premises from the aforesaid William M. Jones, and that on the said day, by a deed by him duly made, executed and acknowledged,

the said Jones conveyed the same to the said Redick and Briggs, in fee forever. And your orator further shows unto your honor, that on or about the eleventh day of October, A. D. 1863, the aforesaid Charles W. Koenig departed this life intestate, leaving Gustavus H. W. Koenig, his son, and Eleonora, his wife, his sole heirs at law him surviving. And your orator further shows unto your honor, that recently — but at what day your orator is not informed and cannot state — the said Redick and Briggs of the one part, and the said Pundt and Eleonora Koenig, and Gustavus H. W. Koenig, of the other part, executed between themselves the afore-mentioned agreement between the said Hughes and the said Pundt and Koenig; and the said Redick and Briggs, by their deed of conveyance by them duly made, executed and acknowledged, conveyed to the said Pundt, all the undivided one-half of that certain piece or parcel of land, being the part of the said lot five in block one hundred and twenty-one, which is twenty-two feet on Farnham street and eighty-eight feet on Thirteenth street, and in like manner conveyed to the said Eleonora Koenig all the other undivided half of said premises, and thereupon by same conveyance or conveyances, writing or writings, the nature whereof is to your orator unknown, the said Redick and Briggs acquired and now hold, or are entitled to have from said Pundt, and the heirs of said Koenig, the legal title to the west one-third of said lot five in block one hundred and four.

And your orator further shows unto your honor, that on the 14th day of February, 1859, Charles W. Green, Jonas W. Green, George H. Gill and Charles J. Gill exhibited in this honorable court their certain bill of complaint, impleading therein the aforesaid William M. Jones and one Franklin W. Brown, and alleging divers judgments by them recovered at law against the said Brown; and that the said Brown had caused the title to the lands first afore-

said described to be conveyed to the said Jones, notwithstanding he, the said Brown, was the real owner thereof, in order to place the same beyond the reach of his creditors; and praying that it be declared by the decree of this honorable court that said Jones held said premises in trust for the creditors of said Brown, and that it be ordered and decreed that the same be sold and the proceeds applied to pay the said judgments; that such proceedings were had in said court on said bill; that on the twenty-fifth day of January, A. D. 1861, a decree was by said court rendered according to the prayer of said bill; that afterwards such further proceedings were had on said decree; that on the eleventh day of June, in the year last aforesaid, a decree was, by the honorable Supreme Court of this Territory made, affirming the decree of this honorable court; and afterwards and at the term of December, A. D. 1863, a decree was, by the honorable Supreme Court of the United States made, reversing the two decrees aforesaid, and dismissing the aforesaid bill of complaint.

And your orator further shows unto your honor, that on the 13th day of May, A. D. 1861, under and in pursuance of the decree first aforesaid made, John C. Hileman, Esq., sheriff of the said county of Douglass, did duly sell at public auction to the aforesaid Charles W. Green, so much of the said premises as is twenty-two feet front on Farnham street, and eighty-eight feet on Thirteenth street; and at the same time and under and by virtue of the same authority, did sell the remainder of said premises to one James M. Woolworth; that having reported his proceedings on said sale to this honorable court, a decree was, by said court, at its term of April in said year, duly made confirming said sale, and directing said sheriff to convey, by his deed in due form of law, the two several parts aforesaid of said premises to the purchasers thereof respectively,

which was by said sheriff, on the 14th day of August in said year, accordingly done.

And your orator further shows unto your honor, that such further proceedings were, by said Supreme Court of this Territory had, on the last aforesaid order and decree; that at the term of December last past, the said order and decree were, by its decree in that behalf, affirmed; that throughout all the above recited proceedings the said Redick was, and from the rendition of the first aforesaid decree, the said Redick and Briggs were the solicitors therein, as well of said Hughes, as of said Jones, and were the general counsellors and agents of said Hughes in respect of all his affairs, business and interests in this Territory.

And your orator further shows unto your honor, that on the 11th day of March, A. D. 1862, the aforesaid Charles W. Green, by his deed of conveyance of that date, by him duly made, conveyed to the aforesaid H. R. A. Pundt and Charles W. Koenig, since deceased, the part of said premises said Green had purchased as aforesaid; and that recently, but at what date your orator is not informed and is unable to state, the aforesaid Redick and Briggs, by divers conveyances, acquired the title to the part of the said premises so as aforesaid purchased by said Woolworth.

And your orator further shows unto your honor, that he has been ready and willing to pay the notes, and each thereof, by him to said Hughes made, in payment for the said premises known as the west one-third of lot five, in block one hundred and four, when the same became due, and at all times since that time; and has during said period had and retained in his possession, ready to be applied thereto, the amount of said notes; that shortly after making said notes the said Hughes left, and has ever since been absent from this country; that until within ten days last past your orator has not known to whom the said Hughes entrusted said notes, or in whose hands the same at any time were.

and for that reason has not offered to pay the same, but now and hereby tenders to the aforesaid Redick and Briggs, whom he charges to be the owners and holders of said notes; or if it shall appear that they are not the owners and holders of said notes, then he tenders to the holder and owner thereof, whoever he shall appear to be, the sum both for principal and interest which is due on said notes. And your orator says that he has at all times since he so as aforesaid entered into said lots, well and truly paid all taxes levied or assessed on said premises."

The contracts on which the rights of the parties depend are as follows:

I. Article of agreement made and entered into this 28th day of May, in the year of our Lord one thousand eight hundred and fifty-nine, between William M. Jones, of the State of Indiana, of the first part, and John Hughes, of the city of Omaha, of the second part, witnesseth: that the said party of the first part for himself, heirs, executors and administrators, doth hereby covenant and agree to and with the said party of the second part, his heirs, executors and administrators, that he will sell and convey, as hereinafter mentioned, to the said party of the second part, all that certain piece or parcel of land situate and being in the county of Douglass and city of Omaha, known and described as the west forty-four (44) feet of lot number five (5), in block number one hundred and twenty-one (121). The said party of the second part for himself, heirs, executors and administrators, does hereby covenant and agree, that he will well and truly pay, or cause to be paid to the said party of the first part, his heirs, executors, administrators or assigns, without fraud or delay, the just sum of two thousand dollars to be paid to the said William M. Jones at any time he, said Jones, shall execute and tender to the said party of the second part, at the office of Sahler & Co., in the city of Omaha, a good and sufficient warranty deed of said

premises. It is further agreed between the parties that the party of the second part agrees to pay the said Jones rent for said premises therein described, at the rate of three hundred dollars per annum, quarterly in advance, until such time as said deed is executed and tendered to the said party of the second part as aforesaid, and the said sum of two thousand dollars paid therefor as herein agreed; and it is further covenanted by and between the parties aforesaid, that on the performance of all the conditions to be done and performed at the time and manner above mentioned and specified on the part and behalf of the said party of the second part that the said party of the first part shall execute a good and sufficient deed of warranty of the above described premises, free and discharged from all incumbrances to the said party of the second part, his heirs, executors and administrators, subject to all taxes assessed on said premises from and after this date; and the failure or neglect of the said party of the second part to do and perform anything herein specified to be done or performed on his part, the said party of the first part may elect to consider himself released or discharged of and from all liability in any of the covenants to be done and performed on his part; and all payments and improvements made by said party of the second part shall be deemed forfeited; and the said party of the second part does hereby release and discharge the said party of the first part from all claims and demands for said payments and improvements, any law or statute to the contrary notwithstanding.

In witness whereof, the said parties hereunto have set their hands and seals the day and year first above written.

WILLIAM M. JONES,
By JOHN I. REDICK,
his attorney in fact.

In presence of
JOHN H. SAHLER.

JOHN HUGHES.

II. "Articles of agreement made and entered into this 30th day of May, in the year of our Lord 1859, between John Hughes, of Omaha City, county of Douglass and Territory of Nebraska, of the first part, and Henry R. A. Pundt and Charles W. Koenig, of the same place and Territory aforesaid, parties of the second part, witnesseth: that the said party of the first part, for himself, his heirs, executors and administrators, does hereby covenant and agree to and with the said party of the second part, their heirs, executors and administrators, that he will sell and convey, as hereinafter mentioned, to the said parties of the second part, the following described lot or piece of land, situate in the county of Douglass, in the city of Omaha, and as known on the lithographed plate thereof, being twenty-two feet (22) on Farnham street by eighty-eight feet (88) on Thirteenth street, off the west side of lot five (5) in block one hundred and twenty-one.

The said party of the first part, further agrees that he will execute a good and sufficient deed of warranty of the above described premises, free and discharged from all incumbrances, as soon as he shall obtain the same, to the said parties of the second part, their heirs, executors and administrators; and the said party of the first part hereby binds himself, and his heirs and executors, in ten thousand dollars as his damages by reason of his not strictly complying with this contract. In consideration of the above, the said parties of the second part agree to pay the said party of the first part the sum of two thousand dollars, in Omaha city scrip, the receipt whereof is hereby acknowledged; and further do hereby covenant and agree to and with the said party of the first part, his heirs, executors and administrators, that they will sell and convey to the said party of the first part the following described lot or piece of land situated in the city of Omaha and Territory aforesaid, and known and described in the lithographed plat thereof,

being the west twenty-two (22) feet of lot five (5) in block one hundred and four (104). The said parties of the second part further agree that they will execute a good and sufficient deed of warranty of the last herein described premises, free from all incumbrances, as soon as the said party of the first part fulfills his agreement hereinbefore mentioned; and the said parties of the second part hereby bind themselves and their heirs in ten thousand dollars as damages by reason of their not complying strictly with this contract.

In witness whereof, the said parties have hereunto set their hands the day and year, first above written.

JOHN HUGHES,
HENRY R. A. PUNDT,
CHARLES W. KOENIG.

In the presence of
CYRUS H. DEFOREST, JR.,
D. D. BELDEN.

In consideration of one dollar, to us in hand paid, the receipt whereof is hereby acknowledged, we the undersigned Sahler & Co., and Mrs. Eliza Hughes, hereby guarantee the fulfillment of the above contract on the part of the party of the first part.

In witness whereof, we have hereunto set our hands, the day and year above written.

Attest
D. D. BELDEN.

SAHLER & CO.,
ELIZA HUGHES.

III. Articles of agreement made and entered into this 19th day of July A. D., 1859, between John Hughes, of Omaha City, in the county of Douglass, Territory of Nebraska, of the first part, and Alexander McAusland of the same county, place and Territory, of the second part, witnesseth: that the said party of the first part for himself, his heirs,

executors, adminstrators and assigns, doth hereby covenant and agree to and with the said party of the second part, his heirs, executors, administrators and assigns, that he does sell and will convey, as hereinafter named, to the said party of the second part, that certain piece or parcel of land situated in the county of Douglass, in the city of Omaha, and Territory of Nebraska, known and described as follows, to wit: the west twenty-two feet (22) of lot five (5) in block one hundred (104), as surveyed by A. D. Jones, and lithographed by the Council Bluffs and Nebraska Ferry Company. In consideration of the above agreement, the said party of the second part, does give to the said party of the first part his three (3) several promissory notes, each for the sum of one hundred and sixty-six dollars and sixty-seven cents, bearing interest at the rate of 10 per cent per annum, said interest payable annually; said promissory notes being Nos. 1, 2 and 3. Number one running one year, number two running two years, and number three, three years from date. And it is further convenanted and agreed, by and between the parties aforesaid, that on the payment of the three several promissory notes before named, at the time and manner above mentioned and specified, on the part of the said party of the second part, that the said party of the first part, shall execute a good and sufficient, deed of warranty of the within described premises, free and discharged from all incumbrances, to the said party of the second part, his heirs or asigns. And it is further agreed, that in case of failure of the said party of the first part, to make the deed as herein named, the said party of the second part, shall collect of the said party of the first part, his heirs, executors or administrators, the sum of two thousand dollars as damages; and the said party of the second part agrees to pay all taxes assessed upon said premises, as long as he shall hold posession, or any other person holding under or through him.

And the said party of the second part, hereby further

agrees, that in case he shall fail to perform any of his agreements herein mentioned, then the said party of the first part or his asigns, may declare all the remaining payments due; and the said party of the first part, his heirs, executors, administrators, or assigns, may then foreclose this article as a mortgage, and this article shall be construed as a mortgage by all courts in this Territory in case of foreclosure, as witness our hands the day and year, first above written.

JOHN HUGHES,
ALEXANDER McAUSLAND.

In the presence of
CYRUS H. DEFOREST, JR.

The undersigned, Sahler & Co., a firm composed of John H. Sahler and John Hughes, of Omaha city, Douglass county, Nebraska Territory, for and in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, do hereby guarantee all the agreements of the said party of the first part named in the annexed contract. Witness our hands this 19th day of July, A. D., 1859.

SAHLER & CO.

In presence of
C. H. DEFOREST, JR.

The following deed was also considered material to the rights of the parties:

Know all men by these presents, that we, John Hughes and Eliza Hughes, of Lime Grove, near Manchester, England, in consideration of the sum of eight hundred dollars, in hand paid by John I. Redick and Clinton Briggs, Omaha, Nebraska, do hereby sell and convey and quit claim unto said John I. Redick and Clinton Briggs, all our right, title and interest in and to the following *real* and *personal* property, situated and being in the Territory of Nebraska, to wit: The east twenty-two (22) feet of lot three (3) in blocks

one hundred and thirty-six, the west forty-four (44) feet of lot five (5) in block one hundred and twenty-one (121), the south half of lot eight (8) in block one hundred and fifteen (115), lot six (6) in block seventy-four (74), lot six (6) in block one hundred and fifty (150), lot seven (7) in block twenty-two (22), lot six in block one hundred and seventy-one (171), lot seven (7) in block eighty-three (83), lots six (6) and seven (7) in block seven (7), all of which lots are situated in the city of Omaha, in Douglas county, Nebraska, and also the west fractional part of the southeast quarter, the southeast fractional part of the northeast quarter, and an east fractional part of the northwest quarter of section five (5) in township thirteen (13) north, range ten (10) east of the sixth principal meridian, and also all other real or personal property which we, or either of us, may have any legal or equitable interest in, in the Territory of Nebraska, and we do also sell and assign to said Redick and Briggs, all the moneys, rights and credits of every description belonging to us or either of us, or due to us or either of us, from any person or persons or company in said Territory, to have and to hold the same unto the said Redick and Briggs, and to their heirs and assigns forever.

Witness our hands and seals the 10th day of July, 1862.

JOHN HUGHES. [L. S.]
ELIZA HUGHES. [L. S.]

In presence of
HENRY W. LORD,
CATHARINE BEADLE.

From the decree dismissing the bill, the complainants, in whose behalf the cause had, after the death of their father, the original complainant, been revived, appealed to this court.

J. M. Woolworth, for appellant.

I. Performance of the agreement between Hughes and McAusland would be decreed by the court, if they were the only parties to the controversy.

1. The fact that Hughes did not hold the title to the lot, which he agreed to convey with warranty, and whether he ever could get it being contingent upon the suit between Green and Jones, excused McAusland from paying his notes at their maturity.—*Taylor* v. *Longworth*, 14 *Peters*, 172, 176.

2. The taking from Hughes of the guarantee of Sahler & Co., is not a circumstance indicative of the purposes of the parties, for it was not peculiar to that, but appears also in the other contracts.

3. The contract fixed the rights of McAusland and Hughes, as those of mortgagor and mortgagee, which required a suit of foreclosure, to cut off the rights of the former. The maxim is, *Modus et conventio vincunt legem.*—*Webster* v. *Hoban*, 7 *Cranch*, 399; 3 *Parsons on Contr.* 377, *n.* (7.)

II. Redick and Briggs being the grantees and assignees of Hughes, are as much bound by his obligation to convey as he himself is.—2 *Story's Eq. Jr. Sec.* 782–3; *Champion* v. *Brown*, 6 *John. ch.* 405–6.

1. They took with notice, and are therefore bound.—*Fitzpatrick* v. *Beatty*, 1 *Gilman*, 454, 468; *Ferry* v. *Pfieffer*, 18 *Wis.* 510, 19.

2. They took by assignment from Hughes, instead of by absolute conveyance.

3. And it is not necessary to show any privity between them and us.—2 *Story's Eq. Jr. Sec.* 784, 90, 1212, 13; *Laverty* v. *Moore*, 33 *N. Y.* 658, 664.

III. From the point of their first connection with either lot, to the bringing of this suit, Redick and Briggs proceeded as if executing the three several contracts.

1. This appears, if regard be had to the order of the transactions to which they were parties.

(1). They first became connected with the property, by the conveyance and assignment to them by Hughes, in 1862, which was pending the suit between Jones and Green.

(2). They took no farther step during the pendency of that suit, because until able to make a good title, Jones could not, by the terms of this contract, be compelled to convey.

(3). When the difficulty in his title was, by the reversal of the decree, avoided, they executed the contract between Hughes and him. This was the next step which they were, by the circumstances, compelled to take. Until then, they could not call on Pundt and Koenig for performance of the contract, with those vendees made by Hughes and by him assigned to them.

(4). Having taken all the necessary steps preliminary thereto, they now execute the contract between Hughes, and Pundt, and Koenig.

(5). And thereby acquiring the premises in question, they call on the original complainant in this suit, to surrender them.

2. The same still farther appears, from the fact that they took from Hughes the instrument proper in such cases, did precisely what he was bound to do, and thereby acquired precisely the advantages to which he, under the several contracts, was entitled.

3. They admit in their answer, and it is clearly in proof, that they settled their conflicting claims between themselves and Pundt and Koenig, with a view to these several contracts, and the reciprocal obligations of the parties thereto.

IV. The sale under the decree of the lot in block 121 to Green, and by him to Pundt and Koenig, is not an element

intervening here, which disturbs the rights and duties of the parties, as above demonstrated.

1. The title which Pundt and Koenig took, was divested by the reversal of the decree.

(1). Had Green retained it until the reversal, Jones would have been in, as of his former estate.—*Hubbel* v. *Broadwell*, 8 *Ohio*, 120; *McBlain* v. *McBlain*, 15 *Ohio St.* 337; *Waumbaugh* v. *Gates*, 4 *Seld.* 138.

(2). The title being defeasable in Green, was defeasable in Pundt and Koenig.

a. And this upon the maxim, that no man can transfer a greater right or interest than he himself possesses.—*Broom's Maxims*, 416.

b. The reason for protecting purchasers at judicial sales does not apply.—*Woodcock* v. *Bennett*, 1 *Cow.* 711, 734.

c. Nor does the reason for the exception to the maxim, protecting *bona fide* purchasers, apply.—*Boon* v. *Chiles*, 10 *Peters*, 177, 210.

(3). Pundt and Koenig not appearing to have paid any consideration for their purchase, are, as volunteers, entitled to no consideration, to which their grantor would be not entitled.

2. As vendees in possession, under contract with Hughes, and through him under Jones, they could not allege their purchase of the outstanding title, against him or his grantees.—*Galloway* v. *Finley*, 12 *Peters*, 260; *Pintard* v. *Tredgal*, 12 *How.* 26.

(1). The circumstances of the case do not take it out of this rule, for their possession was not threatened, and might not have been, until the outstanding title was avoided by reversal, on the then pending appeal.—1 *Washburn on Real Pr.* 367.

(2). If dissatisfied with Hughes' title, and desirous of taking an adversary title, they were bound to surrender the possession.—*Mattis* v. *Robinson*, 1 *Nebr.* 20.

(3). Jones and Hughes' estate was not determined by the judicial sale, except contingently; and until the contingency were removed, the exception invoked by the appellee, to the rule above referred to, was not applicable.

E. Wakely, contra.

I. McAusland cannot compel either Pundt and Koenig, or their assigns, to convey the lot in controversy to him. The agreement of Pundt and Koenig was to convey it, on certain conditions, to Hughes, "his heirs, executors or administrators." (See contract). McAusland is neither the legal representative, nor the assignee of Hughes. Hughes neither conveyed to McAusland his interest in the lot, nor assigned to him his interest in the contract for the conveyance. McAusland claims, under a separate and independent agreement of Hughes to convey, its performance guaranteed by Sahler & Co. To this, Pundt and Koenig were not parties, and should not be involved in controversies growing out of it.

If A. agrees to convey to B. 160 acres of land, and B. agrees to convey different parcels of it to different persons, these persons do not thereby become assignees of B., and cannot maintain action against A. for specific performance. In such case, as in this, the court must determine, not only whether B. has performed his agreement with A., so that A. is bound to convey, but also whether the complainant, as the vendee of B., has performed his agreement with B., and is entitled to a conveyance from him. Such controversies are foreign and not legitimate.

II. If our first position is not sustainable, still it is certain that McAusland cannot compel a conveyance to himself, except on the same terms and conditions as Hughes could have done had he remained the owner of the lot.

It must also be conceded that Redick or Redick and

Briggs, as the present holders of the title, cannot be compelled to convey it in pursuance of the contract between Pundt and Koenig and Hughes, unless Pundt and Koenig could be so compelled, had they not conveyed the lot.

In other words, conceding that McAusland acquired all the rights of Hughes under his contract with Pundt and Koenig, and that Redick and Briggs became subjected to all the liabilities of Pundt and Koenig, under the same contract, then a conveyance cannot be decreed in this suit, unless it would be decreed if Hughes, having never transferred his interest, had brought the suit against Pundt and Koenig, they never having parted with their title to the lot. Suppose this to be such an action between those parties. Hughes, of course, would have to prove that he had performed on his part, the condition on which Pundt and Koenig were to convey to him the lot in controversy. That is, he would be obliged to show that he had conveyed or caused or procured to be conveyed to them, the 22 by 88 feet of lot five, in block one hundred and twenty-one. Is this fact shown?

The complainant says yes. Before this suit was commenced, Jones, who held the title to the forty-four feet when Hughes made the contract to convey a part of it to Pundt and Koenig, did convey it to John I. Redick, and Redick conveyed the proper part of it to Pundt and Koenig, or to Pundt and the legal representatives of Koenig. They have therefore received the consideration for which they were to deed the lot in controversy to Hughes.

The proofs do show that Pundt and Koenig obtained a title to that part of lot 5, block 121, which Hughes agreed to convey to them; but the vital and controlling question remains, how, from whom, and on what consideration did they obtain the title?

The record answers this question beyond controversy or

doubt. Hughes did not convey it to them. He did not procure, or cause, or induce the conveyance. Jones did not convey it to them, although he went through the form of conveying the 44 feet to Redick, and Redick afterwards went through the form of conveying to Pundt and Koenig, the 22 by 88 feet, yet all this was years after Jones had ceased to have any title to or interest in the premises. It was years after Pundt and Koenig had obtained from another source, or in another way, and for a large money consideration paid by themselves, a complete title to the premises. Let us demonstrate this from the record.

On the 14th of February, 1859, Jones held the legal title to the 44 feet of lot 5, in block 121. On that day a creditor's bill was filed against him, and other proper parties, charging that the lot was bought with the money of one Brown, and that Jones held the title in trust for Brown's creditors. On the 15th day of January, 1861, the court decreed that he did so hold it in trust, and that it be sold to pay Brown's creditors. On the 11th day of June, 1861, the Supreme Court of Nebraska affirmed this decree. Meantime, on the 13th day of May, 1861, the sheriff sold the premises. Green, the judgment creditor, bought the 22 by 88 feet, which Hughes had contracted to convey to Pundt and Koenig. James M. Woolworth bought the balance. Subsequently, at the April term, 1861, this sale was confirmed by the District Court, and the sheriff was ordered to deed to the purchasers, and on the 14th of August 1861, did so deed. In December, 1865, the order of confirmation was affirmed by the Supreme Court of Nebraska, so testified to by Woolworth. On the 11th day of March, 1862, as alleged in the bill, Green conveyed the 22 by 88 feet to Pundt and Koenig. If these proceedings operated to vest in Pundt and Koenig a valid title to the premises, it follows undeniably:

1. That they obtained title not from or through or under Hughes, or by his procurement, or aid, or inducement, but by and through a judicial sale which conveyed the title as of a date prior to, and wholly unaffected by, the contract between Jones and Hughes, or any of the subsequent contracts.

2. That when Jones conveyed to Redick, in form, he had no remaining title, and had nothing to convey.

3. That Redick's conveyance to Pundt and Keonig was nugatory and valueless, adding nothing to their existing title.

4. That the nominal conveyance from Jones to Redick, and that from Redick to Pundt and Koenig, were not a performance of the condition, and did not constitute the consideration upon and for which Pundt and Koenig were to deed the lot in controversy to Hughes.

III. The decree of the district court being in force and unreversed when the sale was made, and when it was confirmed, and when Green deeded to Pundt and Koenig, the latter acquired a title unaffected by the subsequent reversal of the decree in the Supreme Court of the United States. 13 *John*, 97; 8 *Wend.* 9; 1 *Cow.* 734; 2 *Hill*, 630; 5 *Black*, 328; (*Supreme, U. S. Dig.* 2, 728; 1 *Smith*, 617; 6 *Black*, 466; *Eq. Dig. U. S.* 1, 304, 731.

Pundt and Koenig, therefore, on their purchase from Green, were in the same situation, as if the property, when Jones entered into the agreement to convey, had been subject to a mortgage, or to a judgment lien on which it had been afterwards sold; and by which sale Jones' title had been terminated and absolutely divested, and they had then bought it of the purchaser at the judicial sale. Could Hughes then have compelled them to accept a conveyance from Jones, or from Hughes, and to convey the lot in controversy, in consideration thereof? At the time of all the contracts and before any of them were executed,

the suit was pending, in which it was determined that Jones' title was subject to the trust, to satisfy which it was sold. This was constructive notice to all concerned, and they all dealt in view of it, as the contract shows.

IV. The rule that lessee cannot purchase an outstanding or paramount title to defeat his landlord to this case.

1. It does not apply to vendor and vendee.

2. It does not prevent the lessee nor the vendee, if applicable to him, from purchasing the title of the landlord himself or the vendor.

3. The lessee may purchase this title directly from the lessor, or at any judicial sale, as on foreclosure or execution. If, when he leases or afterwards, the premises are subject to mortgage, or to a judgment lien, or a mechanic's lien, or a trust created by the act of the lessor, or by operation of law, and the premises are sold under and by virtue of said mortgage or lien or trust, the lessee may purchase. This is not buying in or setting up an adverse or paramount title. It is a purchase of the very title under which he goes in as lessee or vendee. He gets, by judicial sale, just the title which the deed of the lessor or vendor would have conveyed at the time to which such sale relates. And in this case it relates back to a date prior to all the contracts.—*Taylor's Land and Tenant*, 529; 1 *Wash. Real Prop.* 369, *marg.* 359.

V. If it is demonstrated that Pundt and Koenig, at the time of their conveyance to Redick and Briggs, and after receiving from Redick the nominal conveyance of the 22 by 88 feet in lot five, in block 121, could not have been compelled to convey the lot in suit to McAusland, it seems undeniable that their conveyance to Redick and Briggs could not and did not subject them to the liability to convey. Pundt and Koenig having a title to the lot free from all equities, under the Hughes and McAusland contract, they could convey such title unaffected thereby, They

could sell it or convey it without consideration, or to compromise threatened litigation, or even under a mistaken belief that they could be compelled to convey it. The consideration, the inducement, the motive for the conveyance, are utterly immaterial in this controversy.

But, as a matter of fact, the proofs show that Redick did not claim a conveyance from Pundt and Koenig, under their contract with Hughes. This contract had been abandoned by Hughes (Briggs' testimony). Nobody claimed anything under it. Before the transfer from Hughes to Redick and Briggs, all Hughes' rights and interest in the store lot had been extinguished by the judicial proceedings. Redick's whole and only claim, or supposed claim, was that the reversal of the decree by the United States Supreme Court might give Jones and his assigns a title. The claim was baseless in law, but to avoid litigation Pundt and Koenig conveyed to him the premises in controversy. This cannot, by any possibility, be held to confer on McAusland any new rights and equities. Woolworth testifies, "that he claimed Pundt and Koenig had a good [illegible] under the execution sale."

VI. McAusland came too late to enjoin the agreement. For years he utterly refused to pay the notes (see Gautt's testimony), for years he refused to pay the taxes, and once or more the land was sold for non-payment. He filed his bill after the value of the lot had increased from $500 to $4,000 or $5,000. Meantime he has had possession for nearly ten years. The rental, at ten per cent on the average value, would be about $3,000, and he took the personal guaranty of Sahler & Co., that Hughes should convey, *and on failure to do so should pay* $2,000 *damages.*

He bought in view of the litigation knowing that the title was doubtful, and secured himself accordingly. The title was adjudged adversely to Hughes and his grantor, Jones. The property was sold at judicial sale, passed to

bona fide purchasers, and before and aftewards McAusland refused to perform his part of the agreement. He has no equities.—*Wil. Eq. Jur.* 291; 2 *Wheat.* 326; 6 *Wheat.* 518; 6 *Pet.* 389; 4 *Pet.* 311; 14 *Pet.* 173; 26 *Wend.* 247; 1 *John. Ch.* 375; 5 *McLean*, 253; 4 *John. Ch.* 559; 5 *Ib.* 193; 3 *Mason*, 244; 7 *Paige* 22; 11 *Ib.* 264; 2 *Story's Eq.* 759.

The contract between Hughes and McAusland provided, that if Hughes failed to convey, McAusland "shall collect * * the sum of $2,000 as damages." This remedy is thus made exclusive. A suit for specific performance cannot be sustained.

VII. As to the effect of not avering in an answer that Pundt and Koenig were purchasers for value, we say,

1. The complainant himself states a conveyance which, if valid, and for a valuable consideration, shows that he cannot maintain his action, he must, therefore, in order to avoid the effect of it, charge that it was not for value.

2. The fact of a valuable consideration not being denied, and the conveyance being alleged and admitted, if the proofs show *prima facie*, and by fair and reasonable presumption that it was for value, defendants are entitled to the benefit of it. The proofs do show conveyance and possession under it for several years, and that it is extremely improbable, if not almost impossible, that the conveyance was voluntary.

3. The fact of valuable consideration not being denied, it was not necessary to prove it.—*Story's Eq. Pl.* 677, *note.*

VIII. As to the effect of the mortgage provision in the Hughes and McAusland contract, we say:

1. Unless the court should first arrive at the conclusion that Pundt and Koenig could have been compelled to convey to Hughes, it is immaterial what McAusland's rights were as

between him and Hughes. He cannot compel them or their assigns to convey.

2. The most that McAusland can possibly claim in his own favor is that Hughes had an option to consider McAusland possessed of the equitable title, and to foreclose this by strict foreclosure, or by sale of the equity. This might be for Hughes' interest. But he is not precluded in a suit for specific performance, from objecting to McAusland's non-performance and laches. His remedy by foreclosure was merely cumulative.

3. If the parties did agree to establish the relation of mortgagor and mortgagee between themselves, in relation to the title, it is certain that McAusland cannot maintain a suit for specific performance, either as mortgagor or mortgagee.

CROUNSE, J.

This is an appeal from a decree rendered by myself, sitting in the District Court for Douglas county, dismissing complainant's bill. This court being unanimous in sustaining the decision there made, I will briefly state some of the reasons inducing it.

The suit was brought in the name of Alexander McAusland, and revived in the name of his children, the present complainants, to enforce the specific performance of a written contract entered into between one Hughes and himself, for the sale of a certain building lot in the city of Omaha.

The facts involved may be best understood when stated in the order of their occurrence chronologically.

February 14, 1859, William M. Jones held the legal title to a certain lot in Omaha, which may be designated as the Farnham street lot. On that day a suit was instituted in the District Court for Douglas county, by Charles W.

Green, and others, creditors of one Franklin W. Brown, against said Brown and Jones, alleging that Brown was the real owner of said lot, and asking a decree declaring that Jones held the same in trust for the benefit of the creditors of Brown, and that it be sold to satisfy their judgments. May 28, 1859, Jones, in writing, agreed to sell to John Hughes, aforesaid, the Farnham street lot, Hughes to pay him $2,000 at any time Jones should execute and deliver to him a good and sufficient warranty deed of said premises, and until such time Hughes to pay Jones $300 annual rent for the use of the same. May, 30, 1859, Pundt and Koenig being seized in common of the lot in question, and which may be distinguished as the "Douglas street lot," entered into a written agreement with Hughes, by which the latter agreed to convey by warranty deed the Farnham street lot to them, when he should obtain title to the same, when Pundt and Koenig were, besides other considerations, to convey to Hughes the Douglas street lot.

July 9, 1859, Hughes and Alexander McAusland enter into the agreement in writing, the specific performance of which is sought in this suit, by which Hughes sells to McAusland the Douglas street lot, and is to execute a good and sufficient deed for the same when McAusland shall have paid three several promissory notes given to Hughes, each for $116.67, payable in one, two and three years, respectively, with ten per cent interest annually. McAusland is to pay all taxes assessed on the premises. Upon McAusland's failure to perform any of his agreements, Hughes may declare all the remaining payments due, and may foreclose the agreement as a mortgage. Hughes agrees that if he shall fail to make the deed as therein named, McAusland shall collect the sum of $1,000 damages. The agreements of Hughes are guaranteed by Sahler and Company. Under this agreement, McAusland

went into possession, put on the lot a building worth from $1,000 to $1,500; has occupied the premises ever since, paid the taxes thereon but rarely, and has paid nothing upon the notes. January 15th, 1861, the District Court, in the suit of Green and other creditors against Jones, decreed that Jones held the Farnham street lot in trust, and that it be sold to pay Brown's creditors. From this decree an appeal was taken to the Supreme Court of the Territory, but no bond was given to stay the execution of the decree. May 13, 1861, the Farnham street lot was sold by the sheriff under the decree last mentioned, Green, one of the plaintiffs, becoming the purchaser. The sale was confirmed, and Green received a deed for the premises. June 11, 1861, the Supreme Court of the Territory affirmed the decree of the District Court. From the judgment of that court an appeal was taken to the Supreme Court of the United States. March 11, 1861, Green sold and conveyed the Farnham street lot, so bought by him at sheriff's sale, to Pundt and Koenig aforesaid. July 10, 1862, Hughes, then residing in England, "sold and conveyed and quit-claimed to John I. Redick and Clinton Briggs, certain real and personal property in Nebraska, describing among others the Farnham street lot, but not the Douglas street lot, "and all other real or personal property which have any legal or equitable interest in;" also "sold and assigned to them all the moneys, rights and credits of every description belonging to him from any one, &c." In December, 1865, the Supreme Court of the United States reversed the decree of the District and Supreme Courts of Nebraska, in the case of Green and others, against Jones and Brown. March 24, 1866, Jones conveyed to Redick and Briggs all of his interest in the Farnham street lot. Shortly thereafter, Redick and Briggs released to Pundt and Koenig their interest in the Farnham street lot, and received in return a deed for themselves of the Douglas street lot.

The complainant's claim to succeed, proceeds upon the assumption that Redick and Briggs, as the assignees, and under the conveyance from Hughes, first executed the contract between Jones and Hughes, thereby possessing themselves of the Farnham street lot, then exchanged that with Pundt and Koenig for the Douglas street lot, in pursuance of the contract between Hughes and Pundt and Koenig; and that now having the lot in question as the assignees of Hughes, and having notice of Hughes' contract with McAusland, they are as much bound as he would have been to convey to McAusland or his representatives. This theory gives no importance to the circumstance, that long prior to the conveyance from Jones to Redick and Briggs, of the Farnham street lot, the same had been sold to Green under judicial sale, who had sold to Pundt and Koenig. This, to my mind, is a very important circumstance; for, if Pundt and Koenig had already possessed themselves of a good title to the Farnham street lot, from another source than from Hughes, the consideration for which they were to give Hughes the Douglas street lot, was gone, and neither Hughes nor his assignees could claim the Douglas street lot because of the contract between Hughes and Pundt and Koenig. This circumstance appellant's counsel wipes out in a very summary manner with a syllogism: "No man can transfer a greater right or interest than he himself possesses." Green's title, Green being a party to the suit in which the decree was given, upon the reversal of the decree by the United States Supreme Court, must have reverted to Jones. Green conveyed to Pundt and Koenig; therefore Pundt and Koenig's title passed back to Jones. But the maxim here invoked, like many others, is subject to its qualifications and exceptions. The books are full of illustrations, showing that the rights which fall under the protection of commercial law, the respect paid to judicial proceedings, the regard given to claims of innocent

parties, and the like, are considerations before which the rule must give way. By sale in market overt, one wrongfully in possession of a chattel may convey a good title to a *bona fide* purchaser; so, the holder of a negotiable note, who could not himself recover upon it as against the rightful owner, may frequently, by transferring it for value, vest a perfectly valid and unimpeachable title in the assignee. So, under the law of stoppage *in transitu*, the title of the consignee may be such that the consignor may revest himself of the goods; but possessed of a bill of lading, the consignee may transfer a title to an innocent third party, which is beyond the power of the consignor to disturb. "The law," says Chancellor KENT, in *Denniston* v. *Bacon*, 10 *Johns.* 197, "has always had a regard for derivative titles, when fairly procured; and though it may be true as an abstract principle that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of this principle." In that case, a sale under the power of attorney contained in a mortgage, being equivalent to a foreclosure under a decree of a court of equity, was held to give good title, notwithstanding the contract upon which the mortgage was given as security, was usurious, and the statute declared the contract and the security given under it, void.

Let it be conceded that, had Green retained the Farnham street property under the reversal by the United States Supreme Court of the decree of the courts of Nebraska, Jones would have been in as of his former estate, is it because Green was seized of what counsel chooses to term a "defeasible title," or because of considerations of convenience, the relation of particular persons to the property at the time, and like matters not growing out of the character or quantity of the estate held by Green? For it must be admitted, that if the owner of a determinable fee conveys in fee, the determinable quality of the estate

follows the transfer. 4 *Kent Com.* 10. The District Court of Nebraska, with authority unquestioned, had decreed that Brown was the owner of the lot, and ordered that it be sold. No supersedeas bond being filed to stay the execution of this decree, the sheriff was compelled to sell it. *Revised Statutes, Code, title* 24, *section* 775. The title he conveyed was the same quantity that Brown might have conveyed. That, by the District Court, was declared to be the fee simple in a decree which was in full force. It is not disputed but that had a third party purchased at the sheriff's sale, instead of a plaintiff in the suit, his title would have been absolute and unaffected by this reversal. *Wood* v. *Jackson*, 8 *Wend.* 9; *Woodcock* v. *Bennett*, 1 *Cow.* 711; *Taylor* v. *Boyd*, 3 *Ham.* 337. This is so by statute, which makes no distinction in favor of third parties. *Code*, 508. The deeds given to the party purchaser, and to third parties, are similar. No defeasance is expressed, and a deed cannot be defeated by one not in writing. Therefore, with the same grantor, a given estate, conveyances identical, and under a law discriminating in favor of neither, it necessarily follows, that the estate passed in either case must be the same. If there be any good reason why the property reverts from the hands of the purchaser plaintiff, it must be for some other than that he takes, what can legally be denominated, a defeasible title. Judge LANE, in *Hubbel* v. *Broadwell*, 8 *Ohio*, 120, (one of three cases cited in support of the position that had Green retained the property until the reversal of the decree, it must have reverted to Jones), says: "It is the settled policy of the court to protect judicial sales. Where lands have passed by sale under execution, to a stranger to a judgment, the statute compels the owner of the land, on reversal, to pursue the fruits of the sale in the hands of his antagonist. But when a party to a judgment purchases and continues to hold, this rule does not apply with the same force.

The purchaser is a party to the errors, and it seems most consonant with justice, to restore the land itself to its original owner, where it remains between the original parties, and within reach of the court, no new rights intervening." The statute here referred to, is that of which I believe ours is a transcript. What warrant there may be for a court to override the express language of it, when it declares that "such reversal shall not defeat or affect the title of the purchaser," to the prejudice of a party to a judgment, because in his opinion, "it seems most consonant with justice," I shall not here stop to inquire. But from the peculiarly guarded manner of expressing himself, it is very certain that the rule here announced was not designed to extend to a case like the present one, where the property has passed from the hands of the judgment creditor to those of third parties. The language used is "*where a party to a judgment purchases and continues to hold*," and "where it *remains between the original parties and within reach of the court, no new rights intervening.*"

The next case, *McBlain* v. *McBlain*, 15 *Ohio St.* 337, is not one of reversal of a judgment, but of an order confirming a sale; a distinction to which some importance is given in the opinion. Even in this case, caution is shown not to extend the effect of a reversal to third parties. WELCH, J., who delivered the opinion, says, "It is enough here, however, to say that the purchaser was not only a party to the sale, but also a party to the suit, and that no legal rights had been acquired by third parties before the reversal." In the remaining case, *Wambaugh* v. *Gates*, 4 *Seld.* 138, the doctrine contended for, that title obtained at a sale under a decree authorizing it, which is subsequently reversed by an appellate court, is subverted by the reversal, is simply assumed, with no argument or authority to support it.

Whatever may be thought of the correctness of the

main position asserted in these cases, it does not follow that grantees from purchasing parties stand in the same position, but the contrary is plainly inferable from them. And this is consonant with authority and good reason.

In *Lovett* v. *The Ger. Ref. Church*, 12 *Barb.* 67, the contest was as to who were the rightful officers of a certain church corporation. The first party having, by a decree of the Chancellor, been declared the rightful officers, under authority given them, executed a mortgage and confessed a judgment. After this, the second party appealed from the Chancellor's decree and it was reversed, and they were restored. In a suit brought to foreclose the mortgage given, while the first set of officers were acting, it was held that such mortgage was a valid lien. The court says: "Indeed, unless the decree of a court of competent jurisdiction protects third persons not parties to the suit, dealing with the successful party on the faith of the decree, no judgment can be of any avail until it shall have received the sanction of the highest tribunal of the land, or until the time for appealing shall have expired."

The rights of third parties are well expressed by BRONSON, Ch. J. in *Langley* v. *Warner*, 3 *Com.* 327. In that case Walsh recovered a judgment against Langley, upon which execution issued and money collected. By agreement between Walsh and his attorney, Warner, the money was paid by the officer to the latter to apply on account for services. On review by the Appellate Court, the judgment was reversed and restitution ordered. Langley being unable to collect the money from Walsh, on the order of restitution, brings an action against Warner. Having succeeded in the court below, the case was reversed in the Court of Appeals. The learned judge, in delivering the opinion of the court, among other things, remarks: "I see no principle on which the action can be maintained. The defendant has got none of the plaintiff's money; he has

got nothing but his own. Walsh had a perfect title to the money when it was collected; just as perfect as it would have been if no *certiorari* had been issued. He had a right to do what he pleased with the money, and he made a very proper use of it by paying his debts. The plaintiff has taken up the strange notion that because he was trying to get the judgment reversed, Walsh could not give a good title to the money, especially if he paid it to one who knew what he was trying to do. I am not aware of any foundation for such a doctrine. As Walsh had a good title to the money he could, of course, give a good title to the defendant, or any one else. No one was bound to presume that the judgment of a court of competent jurisdiction was erroneous, and would be reversed. The legal presumption was the other way, that the judgment was right and would be affirmed. But if the judgment had been known to be erroneous, the pendency of the proceedings in error could not affect, in the least degree, the title of Walsh to the money. Nothing short of a reversal of the judgment could destroy or impair his right."

In *Gray* v. *Brignardello*, in the Supreme Court of the United States, 1 *Wallace*, 627, it is laid down: "It is a well settled principle of law that the decree of a court which has jurisdiction of the person and the subject matter is binding until reversed, and cannot be collaterally attacked. The court may have mistaken the law or misjudged the facts, but its adjudication, when made, concludes all the world until set aside by the proper appellate tribunal; and, although the judgment or decree may be reversed, yet all right acquired at a judicial sale, while the decree or judgment was in full force, and which it authorized, will be protected. It is sufficient for the buyer to know that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and author-

ized the sale. With the errors of the court he has no concern."

Numerous other cases might be added, some declaring the doctrine generally and without exception; while all agree that as to third parties, rights acquired under a judgment of a court of competent jurisdiction, are not affected by the reversal of such judgment. Third parties include as well those who may acquire their rights through a party to the suit, while the judgment is in force, as those who purchase immediately at the sale. The grantee of such party to the suit buys from one who obtained title through one of the best known sources. At the time of his purchase no appeal may have been taken, and he has no right to expect there will be. If an appeal has been taken, he is not to suppose that the judgment will be reversed, but the contrary rather. Notwithstanding, as in the case of *Hubbel* v. *Broadwell*, referred to by counsel, courts may, on reversal of a judgment or decree, regard it as most consonant with justice to hand back the identical land, if yet in possession of a party; still, until reversal, it cannot be denied that the party purchasing under the decree or judgment has as good a title as a third person, and, if he conveys, transfers as complete a title as would be taken by a third party directly at the sale. Both parties take under the same judgment or decree, and while it is in full force, the law protects both equally.

In this view of the point raised, Pundt and Koenig took from Green a title to the Farnham street lot, unaffected by the reversal of the decree in the case against Brown and Jones.

The discussion under this head, has thus far proceeded upon the assumption, that had Green retained the title to the Farnham street lot until the reversal of the decree under which he bought, Jones would have been in as of his former estate. This was conceded by counsel for appellee,

and, as I understand, agreed to by a majority of the court. As for myself, I prefer to go one step further, and hold that Green, as plaintiff in the suit, under the decree on which he purchased, took a title no more affected by a reversal of the decree than though he had been a stranger. This I regard the better ground, and in harmony with well established principles of law. With the concession, that a stranger to the suit would take a title unaffected by the reversal of the decree, as a legal conclusion, it follows with mathematical certainty, that the party to the suit who might buy at the same time, taking under the same decree and same proceedings and instrument, must take a like title, unless there be some controlling consideration opposed. After some examination, I have been unable to find any such reasons or considerations. Those assigned in the opinion in the case of *Hubbel* v. *Broadwell*, *supra*, seem unwarranted and are far from being satisfactory. There, it is seen, the positive terms of a statute which declares that "such reversal shall not defeat the title of the purchaser," are disregarded, and a party to the suit is excepted from its protection because he is "a party to the errors, and it seems most consonant with justice to restore the land to its owner." To say nothing of a want of authority to summarily override a plain statute, is the reason well founded in fact? Is the rule following it a safe one to adopt and apply with the uniformity which should characterize all legal rules? There is no law prohibiting the party to a decree to bid at a sale under it. He becomes a purchaser, when he bids more than a stranger. If he is not to have the same protection for his title, his bidding is discouraged, and to this extent the defendant, in a decree or judgment, is liable to have his property sold at a diminished price. If the property, as in the case before us, is a building lot, the value of which consists in affording a place to erect a building, should the party purchaser be required to hold the property at great expense

for years perhaps, to await the final result of an appeal before he can make any use of it? If he is to build, is he to receive any consideration for his improvements? On the other hand, and it is said to be a poor rule that does not "work both ways," suppose the property purchased by him to consist of valuable buildings, which, by accident, have been distroyed, is justice satisfied by returning to the original owner the lots and ashes? Or should the property be timbered or mining lands, will it do for the party purchaser to strip them of the timber or minerals, and return the worthless soil? I know of no power in a court of equity to stop him who is possessed of a sheriff's title, under a judgment in full force, from cutting timber or extracting minerals from lands purchased, even though he be a party to a judgment or decree. This must be because in law, he has the valid title. The law has provided against all this by allowing execution to be stayed by a proper bond.

These are but few of many queries which naturally suggest themselves, and which must show the working of such a rule very complicated, and anything but in consonance with justice. No force is given to the rule to say that he is a "party to the errors." If it be the errors which invalidate, they must operate against strangers as well.

The real ground assumed is, that as a party in possession it is the easier and simpler way to "square up," by handing back the identical land. This we have seen is a very uncertain and inequitable rule. To pursue the fruits of the sale, to have a return of the money for which the property sold, affords at once a fixed and invariable rule, and against which I can perceive no good objection. In presumption of law, the property being sold at public sale, brought its value. The sale was permitted by the defendant by not filing his *super sedeas* bond. The plaintiff, under the law, is at liberty alike with strangers, to bid and pur-

chase under the authority of the decree, and should have equal protection. Any errors which may have intervened, are the errors of the court with which he has no concern. In case of no reversal, the defendant is benefited by the plaintiff being a purchaser to the extent that he may have raised the price of the property sold. The only other objection I have heard or have been able to discover, is the loose expression thrown out in some cases where the right of third parties or strangers to the suit are referred to, that such rights are upheld: because such rule is calculated to encourage bidding, from which the inference is drawn, that parties to the judgment are not within the policy. This is fallacious. We acknowledge a sad weakness in solemn decrees and judgments of courts of unlimited jurisdiction, standing in full force, if they are subject to considerations of policy and convenience. No encouragement to bidding is an incident or result following the reliance or confidence which is always given to the face of judgments and decrees pronounced by courts of competent jurisdiction, while such judgments and decrees stand in force and are unreversed. Such expressions, no doubt, take their origin from *Manning's case*, 8 *Coke*, where it is said: "If upon his judgment the plaintiff takes out a *fieri facias*, and thereupon the sheriff sells a term for years to a stranger, and the judgment is afterwards reversed, the defendant shall only be restored to the money for which the term was sold, and not the term itself; for by the writ the sheriff had authority to sell, and if the sale might be avoided afterwards, few would be willing to purchase under execution, which would render writs of execution of no effect."—*Bac. Abr. Tit. Ex.* 2, *Ro.* 778; *Cro. Eliz.* 278; *Moore* 573; *Leon* 89; 1 *Mand S.* 425. It will be remarked that the principal asserted here is, that the stranger's title to the term for years, rests upon the fact that "by the writ the sheriff had authority to sell," and what is said about purchasers being unwil-

ling to buy if the rule were otherwise, is simply in commendation of the rule, and not the rule itself or the ground on which the rule rests.

This case, it will also be remarked, speaks of the sheriff "selling to a stranger" and seemingly makes a distinction in his favor. This is cited in many of the cases which maintain the rights of third parties, or strangers purchasing at judicial sales, and the inference has been drawn from the language used, that parties to the suit fall without the protection given by the law to strangers. Such use has been unwarranted and indulged in without examination. The sale of lands under execution, was unknown to the common law. Such sale would have been an invasion of the foedal principle then existing, which prohibited the sale or alienation of lands. Under the statute of *Westm.* 2, 13, *Edwd. I. C.* 18, the writ of *elegit* was given by which the defendant's goods were appraised and delivered to the plaintiff. If this were not sufficient to satisfy the judgment then a moiety of his lands were passed to the plaintiff, to hold until out of rents and profits thereof the debt was levied.—3 *Blackstone's Com.* 418. We can readily see that where no title passes but the lands are held to satisfy a judgment given, upon a reversal of such judgment, the lands should be returned to the defendant. This is illustrated in *Tidd's Practice, vol.* 2, *page* 1138. "But if a man recovers damages in a writ against B. and have an *elegit* of his chattels and a moiety of his lands, and the sheriff upon this writ deliver a lease for years, of the value of £50 to him, that recovered *per rationable pretiurn et extentum, habendum* as his own term, in full satisfaction of £50, part of the sum recovered; and after B. reverse the judgment, he shall be restored to the same term, and not to the value; for though the sheriff might have sold the term upon this writ, yet here it is no sale to a stranger, but a delivery of the term to the party that recovered, by way of extent, without any sale, and therefore the owner

shall be restored.—*Bac. Abr. Lit. Ex.* 2 *Cro. Jac.* 246. That it would be otherwise if sold to a stranger who, of course, parts with his money, is true.—*Selw.* 108; *Bac. supra.*

Without pursuing this discussion further, to me, the rule contended for by counsel, seems without reason to sustain it, and no doubt, to a great extent, was induced by a misapprehension of the authority cited in its support. The true rule, and the one I believe will be established generally, is that the title acquired under judicial sale is equally good, whether taken by a party to the suit or a stranger, and not affected by a reversal of the decree or judgment in the hands of one any more than in those of the other.

Counsel makes the further objection, that as vendees in possession under contract with Hughes, and through him under Jones, Pundt and Koenig could not allege their purchase of the outstanding title against him or his grantors. For the purpose of answering this objection, we may regard the duties and obligations of a tenant paying rent, and a vendee in possession under a contract for the purchase of the premises the same, resting upon that principle of equitable estoppel which forbids a person denying a title, by recognizing which he was permitted to take possession.—*Mattis* v. *Robinson, ante.*

This rule, however, must be confined to the title of the landlord or person contracting to sell, had at the time such possession is given. Subsequently to making the lease or contract of sale, the lessor or vendor might sell the premises. In that case I see nothing to forbid the tenant or vendee in possession from recognizing or treating with him, to whom the vendor or landlord had sold. What the vendor could himself voluntarily do, the law can as effectually accomplish in cases falling within its authority. In this case Pundt and Koenig did not question the title of Jones. Other parties did and the court adjudged that he

had no title, and ordered the premises sold as being, in fact, those of Brown. After Green had obtained the complete legal title, there was nothing in the way of Pundt and Koenig bargaining with him. It is well settled, that a tenant is not estopped from showing that the interest of the lessor has passed from him by his own conveyance, or by sale under judgment against him.—*Bingham on Real Estate.* 210. The tenant himself may become purchaser at such judicial sale.—*Idem.* 15 *N. Y.* 377. It follows, then, that Pundt and Koenig, after the reversal of the decree made in the case of Green and others against Jones and Brown, were possessed of a good title to the Farnham street lot from a source other than from or through Hughes, and that the consideration for which they were to convey to him the Douglas street lot was gone, and they accordingly relieved from their obligation to convey. It was then that Redick and Briggs obtained a release from Jones of his interest in the Farnham street lot. It has been shown that Jones, in fact, had no remaining interest in it. Whether Redick and Briggs knew this, or whether they supposed that by the reversal by the United States Supreme Court of the decree, Jones was invested with his original title, it matters not. They bought evidently on their own behalf, and not as the representatives or assignees of Hughes. Hughes had years before abandoned his contract. With this pretence of title from Jones, Redick and Briggs approach Pundt and Koenig and obtain the Douglas street lot in consideration of their release to them of this assumed interest in the Farnham street lot. Whether Redick and Briggs believed that, through the reversal aforesaid, they were seized of a good title to the Farnham street lot, or whether, thinking it a question of some doubt, the parties compromised upon an arrangement which gave Redick and Briggs the Douglas street lot, or whether knowing they took nothing under the Jones release, but

using the release as a pretext, exercised sharp practice upon Pundt and Koenig, I deem it unnecessary to inquire; and, although in getting this property in question they followed in the order of the several contracts enumerated, it is clear Redick and Briggs did not, in fact, act as the assignees of Hughes, following those contracts. They acted independently of them, and while they undoubtedly used a knowledge of them to their own advantage, it is their own good fortune, and cannot avail the appellants.

I have thus briefly reviewed the more important points, presented and very ably argued by counsel. There are other grounds still upon which the dismissal of the bill might properly have rested. At the very threshold of his application to a Court of Chancery, the complainant stood confronted by several rules which have controlled Courts of Equity in denying relief of the kind sought here. Beyond what would have seemed profitable to him, McAusland performed none of the obligations of his contract with Hughes. The notes expressing the price to be paid for the Douglas street lot, were never paid, not a cent of principal or interest. The taxes which he undertook to keep down were left unpaid, and the place was allowed to be sold and had to be redeemed by Pundt and Koenig. More than this, McAusland is shown to have been insolvent, and had Hughes sought to collect the notes he would have been unsucessful. Again, the property which at the time of making the contract was worth but $500, and which remained so, or of even less value for several years, afterwards grew rapidly in value till worth several thousand dollars. A Court of Equity will not lend its aid in case of gross negligence.—*Dyce* v. *Ford*, 4 *Bro. C. C.* 497. Nor will it allow parties to lie by, with a view to see whether a contract will prove a gaining or losing bargain, and, according to the event, either abandon it, or considering the lapse of time as nothing, claim a specific performance, *Alley* v. *Deschamps*, 13 *Vesey* 228, unless the

complainant has taken all the pains he could to be ready to carry into execution the agreement, *Guest* v. *Hornfray*, 5 *Vesey*, 822, nor, unless he has shown himself ready, prompt and eager, *Note* 2, 5 *Vesey* 720, *Sum. Ed.*, nor, must there have been a change in circumstances affecting the character and justice of the contract.—*Pratt* v. *Law*, 9 *Cranch* 456 493. The rules as announced in these cases, the record shows the complainant to have violated, unless he stands relieved by the excuse offered by his counsel. That is, because Hughes did not hold the title to the lot which he agreed to convey with warranty, and whether he ever could get it, being contingent upon the suit between Green and Jones, McAusland was excused from paying his notes at their maturity. This hardly satisfies. The suit involving Jones' title was pending when the several contracts were made. McAusland was constructively advised of it, as there is no doubt he was in fact. He seems to have provided against an adverse determination of that suit by taking the guaranty of Sahler & Co., for some $2,000. The notes were negotiable, which were given on the making of the contract, and had McAusland been of sufficient responsibility they could have been transferred and collected. The prospect of a good title or the guaranty of Sahler & Co., seems to have been a sufficient warrant for him to erect a cheap building on the premises. To my mind all these circumstances are evidence that McAusland well knew the fact that Jones' title was in litigation, and that he bargained and acted with reference to it. But after putting on a cheap building, and the property not appreciating for a time in value, he no doubt found it profitable and convenient to pay nothing on the purchase price, and to occupy the place for a term of years without the payment of rent and taxes. At last he asks that he be allowed to pay the five hundred dollars, which should have been paid years ago, and take a place worth as many thousand. This

would be a good enterprise, and if it could have the favor of this tribunal, the courts would swarm with applicants eager to engage in like speculations. The decree rendered in the court below must be affirmed.

Judgment affirmed.

MILLER v. FINN.

Miller v. Finn.

1. REMOVAL OF CAUSES TO FEDERAL COURT. The acts of congress do not authorize the removal of causes from State to federal courts, on the ground of prejudice or local influence, unless

1st. The application for removal be made before the trial or final hearing in the State court of original jurisdiction; and

2d. The affidavit of prejudice or local influence be made by the party in person.

3d. The application, when made by one of several defendants, must be made in a cause which may be effectually proceeded in against one defendant separately from the other.

2. EQUITY OF REDEMPTION: *Interest of execution purchaser.* A purchaser at execution sale of an equity of redemption against whom a decree of foreclosure and sale has been entered, for a sum greatly in excess of what the premises afterwards bring on the sale, who has consented to the decree and withdrawn his appeal therefrom, has no interest in the premises and can convey none.

3. FRAUD IN MORTGAGE AND IN FORECLOSURE THEREOF. A mortgage to secure a sum certain, and future advances duly recorded, and by regular proceedings foreclosed, is not fraudulent as to creditors.

4. ——. Strong positive proof of fraud is required to avoid the recitals and findings in a decree of a court of general jurisdiction.

5. PARTIES: *Bringing them in by notice.* An affidavit for publication of notice of pendency of suit alleged that the action was brought for the foreclosure of a mortgage, and that the defendants were non-residents of the State, without alleging that they could not be served with process in the State; the notice was published four weeks next after June 16, 1860, and required the answer on the 30th of July, 1860; *held*, the notice was sufficient, and a decree rendered thereon concluded the defendant.

6. ——: *Appearance.* A party whose agent, not an attorney of the court, has entered his appearance, and who has answered a cross-bill filed in the cause against him and the plaintiff in the original bill, affirms the appearance and becomes a party in the principal suit.

7. ——: *Partners.* The omission of one partner as a co-defendant in an action in respect of partnership property, can, at the common law, only be taken advantage of by plea in abatement duly verified.

8. ——: Impleading parties in a bill as "Pomeroy & Benton," and publishing notice of pendency of the suit addressed in that form, is sufficient to

bring before the court the members of a firm doing business under the style of Pomeroy, Benton and Company, composed of Pomeroy, Benton and Chase.

9. ——: Incumbrancers not made parties to foreclosure bill, are not affected by decree.

10. EXECUTION TITLE: *Caveat emptor* applies with all its force to a purchaser of real estate on execution.

11. ——: D. had judgment against B. in 1858, took out execution under which real estate was sold on the 24th of October, 1859. The sheriff's deed to the purchaser expressed the conveyance of B.'s interest on the 24th day of October. P. had a judgment against B. which, on the 16th day of October, 1859, became a lien on the premises. Afterward he took out execution and sold the same premises, *held*, that the purchaser took no title.

12. ——: A creditor had judgment in 1859, took out execution, but at what time did not appear; took out an alias in 1862, *held*, that his lien was postponed to those of intermediate judgments.

13. ALLEGATA ET PROBATA: The plaintiff in a bill in chancery cannot go to the answer for facts which, by his bill, he did not put in issue.

14. MERGER: There can be no merger unless a greater and a less estate meet in the same person holding in the same right.

15. ——: Nor where intervening rights or estates interfere nor where the interests of the party in whom the estates meet so require.

16. ——: Nor where the intention to keep the estates distinct may be inferred or has been expressed.

17. REDEMPTION: *A subsequent incumbrancer* has a right to redeem the senior lien, on paying the amount thereof, by an assignment thereof, but not to take the possession.

18. ——: *A judgment creditor* not a party to a foreclosure suit, is entitled to pay the mortgage debt, and have an assignment of a mortgage senior to his lien until the decree.

19. ——: *After a decree of foreclosure*, such a party may be permitted to redeem the mortgage, or may be compelled to receive the amount of his judgment, as the court in its discretion shall think just between the parties.

This is an appeal from a decree, rendered by Mr. Justice Crounse, sitting in the District Court for Douglas county.

MILLER *v.* FINN.

The bill was filed on the 21st day of August, 1865, in the District Court of the late Territory of Nebraska. It seeks to set aside as fraudulent and void as to creditors, a mortgage upon the premises in question, made by George Bridge to Charles Bridge, on the 17th day of October, 1857, or to redeem the said mortgage, if upon the hearing, it should appear to have been made *bona fide*.

The allegations in the bill are as follows:

1. At a term of the District Court of Douglas county, prior to the term of October, 1859, George Pomeroy, William H. Benton and George H. Chase, who were partners under the firm name of Pomeroy, Benton and Company, commenced their certain civil action in said court, against George Bridge; and at the said October term (the first day of which was October 16th), recovered a judgment therein, against him, for $685.60. On the 18th of September, 1863, the said plaintiffs sued out an execution, directed to the sheriff of Douglas county, which that officer levied on the west forty-four feet of lot five in block one hundred and twenty in Omaha; and accordingly, on the 24th of October, in said year, sold the same to the plaintiff for $250. The sale having been duly confirmed by the court, and the sheriff directed to make a deed thereof to the purchaser, he, on the 10th of November, 1863, made the conveyance in due form to the complainant below and appellant here.

2. Other judgments against the said George Bridge, impleaded with George L. Miller and others, were recovered by divers parties and were assigned for value, to the complainant. The plaintiffs in said judgments, and the dates and amounts thereof, are as follows:

February 2, 1859, John Davis	$2,147 41
October term, 1859, William Dean & Co	354 94
March term, 1859, James Murray	214 19

October term, 1859, Milton Rogers	$1,310 07
June term, 1860, Hadley D. Johnson	1,805 92
October term, 1859, Charles Turner	1,422 10
July term, 1861, Henry H. Vischer	126 40
Amount of judgments held and alleged by the complainant	$7,383 03

3. On the 22d of October, 1857, and thence till the 24th day of October, 1859, the said George Bridge was seized of the premises in question in this suit, and the above mentioned judgments were and still are valid liens thereon.

4. At the October term, 1858, in said court, Dowdall, Markham and Company recovered against the said George Bridge and others, a judgment for $1,400; on the 12th of September, 1859, execution issued thereon which was levied on the said west forty-four feet of lot five in block one hundred and twenty, and in virtue thereof, the said premises were on the 24th day of October, 1859, sold to William H. Markham. A deed was duly made to him, conveying all right, title and interest which the said George Bridge had in said premises, at the said day of sale.

5. Other judgments were recovered against the same parties, who are made defendants to this bill, as follows:

October, 1858, William, Patrick & Co	$800 80
" " " "	800 50
March, 1859, Charless, Blow & Co	658 45
June, 1860, Pundt & Koenig	575 21
June, 1860, Leas & Harsh	635 37
June, 1860, Eaton & Chambers	1,058 99
June, 1860, William Y. Brown	6,370 36
June, 1860, William E. Osman	214 55

6. On the 22d day of October, 1857, George Bridge mortgaged the said premises to Charles Bridge, to secure

two drafts of $2,500 each, and any other drafts which the said George should draw, and the said Charles should pay; and on the 19th day of May, 1860, the said Charles Bridge brought his suit in said court, to foreclose said mortgage. Of the incumbrancers above mentioned, John Davis, George Pomeroy, William H. Benton and George H. Chase, William Dean & Co., James Murray and Charless, Blow & Co., and George Bridge were not served with process in the action. Davis was not named as a defendant. Among the defendants named in the bill were parties who were styled "Pomeroy & Benton." As to William Dean & Co., the bill was dismissed. James Murray and Charless, Blow & Co., voluntarily appeared and answered. A paper was filed running thus: "I appear in this action and waive the issue and service of subpœna on me.

Charles H. Hamilton, for George Bridge."

Markham, the purchaser, on execution filed his cross-bill against George and Charles, alleging that the mortgage was made to hinder, delay and defraud the creditors of George, and he and Charles answered the same jointly.

An affidavit to procure publication of notice of pendency of the suit, addressed, among others, to "Pomeroy & Benton," ran thus: A. J. P., "being duly sworn, deposes and says, that this action is brought for the sale of real property under a mortgage executed by the defendant, George Bridge, to the complainant, and that the following named defendants are non-residents of this Territory, to wit: George Bridge, Dowdall, Markham & Co., George W. Thatcher, Judd & Leeds, William Dean, William, Patrick & Co., Charless, Blow & Co., and Pomeroy & Benton." Thereupon a notice was published, the first insertion being on the 16th of June, 1860, and continued thence four weeks; and by it the defendants were required to answer on the 30th day of July, following.

There was a firm doing business under the style of

"Pomeroy & Benton," and also another doing business under the style of "Pomeroy, Benton & Co.," which latter was composed of Pomeroy, Benton and Chase, and who were the plaintiffs in the judgment above named. On the 26th day of November, 1861, a decree of foreclosure, with the usual directions, was rendered in and by the said court.

7. A proceeding having been instituted touching the rents of the said premises, to which the said Markham, Charles Bridge and George Bridge were parties, the same were, by the Supreme Court, awarded to George Bridge, who applied them to the payment of the costs and expenses of the said Charles Bridge, in foreclosing the said mortgage.

8. At the sale under the decree, the property was bid off in the name of Archibold T. Finn, by Charles W. Hamilton, acting as his agent, who also receipted to the master for the amount of his bid, as the agent of the said Charles Bridge; and in the course of the said proceedings, Hamilton acted at once as the agent of the said George Bridge, of the said Charles Bridge, and of the said Finn; and, since the sale, has collected the rents in the same manner as before the same. He also, acting as such agent, effected a compromise with Markham, who accordingly conveyed to Charles Bridge the premises which he had purchased at the execution sale. But no consideration for said premises was ever paid by or on behalf of said Finn, on account of said sale.

9. Considerable sums of money, belonging to the said George Bridge, came to the hands of the said Charles, out of which the drafts mentioned in the said mortgage were paid; yet the said Charles pretends that he paid them out of his private funds. George Bridge engaged in divers large and hazardous enterprises in Nebraska, in which he became insolvent; and on or about the 1st of July, 1864, he died intestate, leaving his brothers, Edward and Charles,

his heirs at law, him surviving. The said mortgage was made to defraud the creditors of the said George Bridge.

10. The defendant Finn has conveyed the west thirty-four feet of lot 7, in block 120, to Michael Murphy; and the west forty-four feet of lot 5 in said block, to Myer Hellman.

On the 27th day of July, 1866, the defendant Finn filed his answer thereto.

He says he has no personal knowledge of the recovery of the several judgments alleged in the bill, nor of the issue of executions, nor of the other proceedings thereon; and therefore denies the same. Of the execution sale upon the judgment recovered by George Pomeroy and others, he says it was secretly and clandestinely advertised and conducted; that, at the time it took place, the judgment had been paid, satisfied and discharged by George L. Miller, one of the defendants therein, and was held by the complainant, who is the father of the said George L., in trust for him; that the complainant never paid anything for the judgment, but the said George L. caused it to be assigned to him in order to keep it on foot against his co-defendants; that the bid at the sale has never been paid, and that, at the time of the sale, the said Bridge had no interest in the property, but the same was the said Finn's property, free from all claims whatever; and were worth $15,000; the order of confirmation was *ex parte*, and without notice to any person intrusted therein.

Of the assignments to the complainant of the several judgments alleged by him, the said Finn also says that the consideration for which the same were made was furnished by the said George L. Miller, and they are held in trust for him, in order that they may be asserted against the said Bridge, for his benefit; whereas they have in fact been paid and discharged.

Of the sale upon the judgment recovered by Dowdall,

Markham & Company, he says that it was void, because not conducted according to law; said Markham did not, nor did any person authorized by him bid in the premises; no moneys were paid on said bid, and said sale was made without the knowledge or consent of said Markham, or said Dowdall, Markham & Co.; and the confirmation thereof was made without notice and *ex parte*, and in a secret and clandestine manner.

He admits the making of the mortgage by George Bridge to Charles Bridge, the filing of the bill for the foreclosure thereof, the recovery of the decree, the sale to himself of the mortgage premises, and the making of the deeds accordingly; and alleges that all persons interested in the equity of redemption, were made parties to the bill; and especially that the said Markham filed a cross-bill against the said George and Charles, which the said defendants therein duly answered, and which was determined along with the original bill. He also alleges that he, by his agent Hamilton, paid to Charles Bridge the amount of his bid at said sale at the time it was made. He also denies that Charles W. Hamilton has managed the property under the direction of the said George Bridge.

He says the interest of Markham was acquired by Charles Bridge upon the negotiation in that behalf of his exclusive agent, in order to relieve the title acquired by the mortgage foreclosure, of all shadow of claim, and that the consideration paid to said Markham, was his money. He admits that in a suit brought by George Pomeroy and others against George Bridge, James G. Megeath was appointed receiver of the rents of the west forty-four feet of lot five in block one hundred and twenty, and that a considerable sum came to his hands; but avers that his accounts in that behalf were duly settled by the court, and he discharged. He denies all knowledge of the proceedings between said Markham, George and Charles Bridge, touching the rents;

and denies that any moneys adjudged therein to George, came directly to the hands of said Charles, and were applied to his use without accounting therefor to the said George; and avers that the said George remained largely indebted to the said Charles, after all money belonging to him, which came to the hands of the latter, had been applied towards the payment of the debts of the former.

He also denies all the facts alleged in the bill going to show fraud in the mortgage; but he says that the said George Bridge, George L. Miller and Lyman Richardson, as partners, embarked in the enterprise of building the Herndon Hotel in Omaha; that they were overtaken by the revulsion of 1857, 8, and became indebted in the sum of $60,000, for which the judgments mentioned in the bill were recovered; that they were insolvent, and neither the said George Bridge, nor the said Lyman Richardson had been able to discharge any part of the said debts; but said Miller had acquired large funds, in the course of the late civil war, which he had used in buying in these debts, and was, in the name of the complainant, asserting them against his co-defendants in fraud of their rights.

He also admits the conveyances, alleged in the bill by him, to Hileman and Murphy.

On the 15th of November, 1867, the defendant Hileman filed his answer to the bill, to the same effect as the answer of the defendant Finn.

To these answers replications were filed.

Proofs were taken by the parties, which consisted mainly of records of the several judicial proceedings alleged in the pleadings. Upon the hearing a decree was rendered in favor of the complainant, letting him in to redeem. It was also referred to a special master to inquire and report the amount due on the mortgage, and also the amount of the rents and profits which had come to the hands of the defendant, or any of them, and what expenditures they had

made on account of the premises. The defendants were required to produce before the master all books, papers or documents in their possession, touching the matters of the said account. The master issued his usual master's summons, requiring the defendants to produce the mortgage and evidences of debt secured thereby. But on the hearing before him no documents were produced. Oral testimony as to the receipts from and expenditures on account of the property was taken. He reported that no showing was made of the amount due upon the mortgage, and that the sum of $4,960 had come to the defendant Finn, and the sum of $8,625.16 had come to the defendant Hileman, from the rents and profits. The complainant filed exceptions to the report. The matter was re-referred to the master, who reported further a sum due on the mortgage, and also expenditures on account of the property, by the defendants. To this report the complainant also filed exceptions. The accounts having been adjusted by his Honor Judge CROUNSE, in the final order, the complainant appealed therefrom to this court.

The defendant Hileman moved this court to transfer the cause to the United States Circuit Court, for the District of Nebraska, filing the petition and affidavit of prejudice prescribed by the acts of Congress in that behalf, and also tendering a bond.

This motion was argued by

Redick and *Briggs*, in support thereof.

J. M. Woolworth, contra.

Upon this motion the opinion of the court was delivered by MASON, Ch. J.

The counsel who made this motion stated on the argument, that if this application was refused they did not pro-

pose to appear further in this court. Their purpose may be to place the record of this cause in the United States Circuit Court and proceed to trial therein, notwithstanding the order of this court in the premises.

Should we retain the cause and determine it against these applicants it is plain to see that a conflict between the State and Federal Courts may occur, and possibly between State and Federal authority. In view of the possibility of such an unhappy and mischievous event occurring, we have deemed it proper to reduce our views to writing. We do this in order, if possible, to prevent such a result, by setting before the judge of the Federal Court, the counsel and all parties concerned, our view of the law. We have looked into the record in this case, not to determine the rights of parties, but to see what has been the course of this litigation, and the nature of it, and it will be well to here state it.

This action was commenced by a bill in chancery, filed by the assignee of certain judgments, against a mortgagee, to have the mortgage declared by the court void as to creditors; or, if it shall appear to be valid, to redeem the mortgage. It appears that as against all the parties but those represented here by the complainant, the mortgage was foreclosed in equity, and that the defendant Finn, was the purchaser at the sale of the premises. He sold a part of the premises to the defendant Hileman, and a part to the other defendants. The complainant, claiming that the parties who assigned their judgment to him were not brought before the court in the foreclosure case, has impleaded here the said Finn and Hileman, as well as all others who are in any way interested in the subject-matter of the suit.

This bill was filed in the District Court of the Territory of Nebraska, on the 21st day of August, 1865. On the 27th day of July, A. D. 1866, Finn filed his answer. On

the 25th of November, A. D. 1867, Hileman answered; no other defendants answered, and the bill was taken as confessed against them. In July, 1868, a decree was rendered in the District Court of the State in favor of the complainant. In this decree he was adjudged entitled to redeem the mortgage, and a reference was ordered to take an account of the rents and profits. From this decree, the defendants, Finn and Hileman, appealed to this court and filed their transcript in December last. The account ordered, having been taken and an order of the District Court made thereon, the complainant appealed to this court and filed his transcript last January. At the last term of this court, Hileman and Finn filed several motions to strike certain papers from the record, and suggesting a diminution of the record; and, upon an affidavit alleging sickness of counsel and other reasons, moved the court to continue the case until this term. This is a brief history of the cause up to the filing of this motion.

Upon the argument, counsel who made this motion, frankly admitted that Hileman was a citizen of Nebraska until a week ago, when he removed to Iowa for the purpose of being able to effect a removal of this cause from before us into the United States Circuit Court.

We are, then, presented with this proposition: that a party may come into the court of his own State, and invoke and submit to its jurisdiction, litigate the cause through years, and through every stage of it until he is defeated and a decree rendered against him, and appeal to a higher court and invoke its aid, and then, by a temporary removal, made by him for the very purpose, oust the court of all power over him for the enforcing of its decree, and go into another forum to there lead his adversary a like chase after his rights. It is a startling proposition; it leads to consequences most momentous. It effectually abolishes the courts of last resort in the States; the Supreme Courts of

Pennsylvania, Massachusetts, New York and Ohio, as well as of Nebraska. In place of these great tribunals which the people reverence, it substitutes a United States District Judge, who, in his own court, has no jurisdiction, except of certain crimes against the United States, and of bankruptcy and admiralty cases. It reduces the courts of general, original jurisdiction, concurrent with the Federal Circuit Courts into mere examining tribunals; into mere clerical machines for preparing causes for trial and hearing, but incapable of deciding any question upon which their judgment has been invoked. If either party object and acts upon his objection by temporarily removing to another State, it completely annihilates the State judiciary; and the position taken ousts the State Court of all power; completes the work of empire and consolidation begun in Congressional action, and makes it effective. These are the consequences of the proposition insisted upon by counsel for the motion.

Let us now turn and look at the act itself, and see if Congress has attempted to do this, which, until now, has never been conceived or attempted. And, in considering the legislation referred to as supporting this proposition, we shall endeavor to carry out the intent and purpose of Congress upon that subject. We will resort to no refinement of construction, but take the acts as they stand and give them a reasonable and obvious construction without leaning to one side or the other, or favoring one view more than another, uninfluenced by the consequences to which we have adverted.

The act of 1867, is an amendment of the act of 1866. It purports to cover the whole ground of the former statute, and appears to be intended as a substitute for the preceding enactment. It may be questionable whether it must not be taken as repealing and standing in the place of the former law, and being the only one applicable to the case at the bar. I shall, therefore, turn my attention to its pro-

visions first. The ground for the removal of a cause from a State to a Federal Court, specified in the act, is the existence of local prejudice or influence which prevents the due administration of justice. Such a prejudice may exist in a locality of limited boundary, in a neighborhood, town or county. But it certainly cannot, in any conceivable case, extend to a great State. It may perhaps be charged against a local court, but how can it be predicated of a Supreme Court of a State, a court of appellate and final jurisdiction? The former, from a limited extent of territory from which its jurors are drawn, all of whose inhabitants may be known to the judge, is liable to local influence; but the latter, whose members come from distant parts of a whole State, and are accustomed to rise above prejudice to administer the law, is not reached by local influences. If Congress intended to say that which is contended for, it offered a gross indignity to the State Courts, many of which have been and now are the peers in learning, wisdom and popular respect of the National Supreme Court. I cannot believe that Congress meant any such thing. The reason, then, prescribed in the law for awarding a removal from the State to the Federal Court being confined to the State Court of original jurisdiction, it follows that the act does not apply to the appellate court. The terms used in the two acts cited are, in one respect, substantially the same. The first act says, "In any case already commenced, or hereafter to be commenced, in any State Court," of a certain character may, by certain proceedings, be removed from that to the Federal Court. And the second says, "That when a suit may be brought in any State Court," it may, if of a similar character, be, by like proceedings, removed from that court. From what court, then, is the cause to be removed? That in which it is commenced or brought. This is the court of original and not appellate jurisdiction. These acts both require the application to be made before

trial or final hearing. It is insisted that when a cause is appealed, it is tried or finally heard in the appellate court. The words "trial" and "final hearing" are two distinctive terms. In a common law cause we never apply the term "hearing," but "trial." On the other hand, we never speak of the argument upon pleadings and proofs, before the judge in a chancery cause, as a "trial." To that we apply the term "final hearing." These two words are used in the acts of Congress, so as to include both chancery and law cases within its provisions. And the use of them is corroborative evidence of the intention of Congress to require the application to be made in the court of original jurisdiction. But aside from this, take the terms of the statute just as we find them, without reference to any other words. Has there been a final hearing of this cause in the State Court? So the order and decree state. The time is past, then, for making this motion, for the law only authorizes it to be made before, *not* at any time after the hearing.

Again: These statutes providing for the removal of causes, may all be laid side by side and read together as one single enactment. This is often done in considering statutes. In 1863, in the Habeas Corpus Act, Congress provided, that a certain limited class of cases might be removed from the State to the Federal Court after judgment, by appeal or writ of error. It was thought necessary to provide for this most extraordinary proceeding by express terms. Lay that and the act here cited together, and the two may be read thus: Causes brought in State Courts against persons acting under executive orders to suppress the rebellion, may be removed from the State Courts to the Federal Courts after judgment, by appeal or writ of error; but causes in State Courts, between citizens of different States, may be removed before trial or final hearing. The expression in the one act of the right of removal after judgment in express and apt terms, leads to the irresistibl-

conclusion in the case where like terms are not used, that the right of removal must be availed of before trial or final hearing in the court of original jurisdiction. Nothing can be more consistent with reason and propriety. I have now shown that Congress never intended to enact the enormity which is here contended for, and have not, in fact, done so. Now let us look at this case particularly. The act of 1867 provides that a non-resident citizen, if he will make and file in such State Court an affidavit, may have the cause removed. Who makes the affidavit? He, the non-resident citizen, not his agent or attorney, but himself. Have we Finn's affidavit here? No, it is only his attorney who makes the affidavit. The necessary showing as to him has not been made. If it is true that the act of 1866 is repealed by the act of 1867, this is the end of this application; for until the act of 1866 was passed the Supreme Court of the United States always held, that all parties must apply to remove and be of such citizenship as to come within the jurisdiction of the Federal Court. As we have no proper showing as to Finn, and as the cause cannot be removed as to him, then it cannot be removed as to Hileman. But suppose the act of 1866 be still in force, and a cause can be divided between the two courts, how stands the case? Can there be a final determination of the cause as to Hileman without the presence of Finn? Let us return to the nature of the cause. It is, in one aspect of it, a bill to redeem a mortgage. Finn owns one part, and Hileman another part of the mortgaged premises. Each is entitled to a part of the money the plaintiff must pay in order to be let in to redeem. Each has received a part of the rents and profits which must be credited on the mortgage debt. The complainant must pay the whole debt, less the rents and profits, and therefore each person interested in the determination of the amount of the debt, and of the rents and profits, must be before the court.

Being required to pay the whole debt, the complainant is entitled to the whole mortgaged property; and each person holding any part of the property must be before the court in order to surrender it. *Childs* v. *Childs*, 10 *Ohio State*, 339; 4 *Kent's Com.* 163; *Simon & Stuart*, 425. It follows then, even admitting the act of 1866 to be in force, that this case is not within its provisions.

There is no such bond as is required by the statute. The bond tendered does not, in its conditions, comply with the requirements of the act in providing for the appearance of the parties on the first day of the next session of the Circuit Court, and is otherwise defective. Besides, the sureties have not justified, and we cannot know that they are sufficient. The penal sum of one thousand dollars is quite inadequate if we are permitted to consider the effect of this proceeding. This property rents for a large sum as the record shows, and the defendants are receiving the rents. If this motion should be allowed and the defendant failed to remove the cause, it would work a delay of more than six months. The penal sum of $1,000 is altogether insufficient to indemnify the complainant for the delay, if the issue should finally be found in his favor. I have treated those acts of Congress which bear upon the question as constitutional. That is a great question on which it has not been necessary to enter.

But I will say, it is extraordinary, after a party has invoked and voluntarily submitted to the jurisdiction of a State Court, if he can withdraw into another jurisdiction against the judgment and consent of that judicial power he has called into action. The opinion of Mr. Justice MILLER, in *Monell* v. *Johnson* (*Woolworth's Reports*, 397), is not altogether satisfactory to my mind, although I have the greatest respect for him as a jurist. It does not however touch this case.

I wish further to say, that, while in determining this

motion the court has looked into the record to learn its history and character, we have made no examination which affects the merits. We will approach the argument and determination of this cause with an honest effort to do impartial justice between these parties, regardless of imputations and reflections.

The motion is overruled and the cause set down for argument.

Motion overruled.

The cause then came on to be argued by

J. M. Woolworth, for the complainant.

FIRST POINT.

By virtue of the judgment recovered against George Bridge, by George Pomeroy, William H. Benton and George H. Chase, the execution issued thereon, the sale under the same, the order confirming the sale, and directing the making by the sheriff of a deed to the purchaser, and his deed made accordingly, the complainant acquired a title to the premises so sold and conveyed to him, which dated from the 16th day of October, 1859, and which will support this action.

I. Those proceedings are regular on their face; and unless tainted by some infirmity, not so appearing, were effectual for the purposes for which they are alleged.

1. The record shows an indebtedness in favor of the plaintiffs in these proceedings, against George Bridge individually; and a civil action instituted by them as individuals, against him, to collect the same; that on the 20th day of March he, by his attorney, appeared thereto; that at the March term, 1859, to which the action was brought, it was continued to the October term of that year, which term commenced on the 16th day of that month; that at that

time a judgment was rendered in favor of the plaintiffs and against the defendant; that on the 18th day of September, 1863, an execution issued, and was levied on the premises, and in virtue thereof, they were, on the 24th day of October following, sold to the complainant; which sale, by the proper order, was confirmed; and in pursuance of the directions thereof a deed made to the complainant.

2. The estate thus vested in the complainant, dated from the 16th day of October, 1859, because the judgment, having been rendered at the October term in that year, and that term having commenced on that day, the premises became "bound for the satisfaction" of the judgment, from that day.—*Code of* 1858, *Sec.* 435.

3. And the deed thus made, vested in the complainant, a title to the premises, which will support this action. *Code of* 1858, *Sec.* 452.

II. These proceedings are not tainted by any infirmity which does not appear on their face.

1. The previous sale and conveyance to Markham, does not intervene.

(1). That sale, and all the proceedings upon it, were, as alleged by the defendants themselves, utterly void. See the answers.

(2). The deed to Markham did not purport to pass to him any other title than such as George Bridge had, on the 24th of October, 1859; at which time, the premises were "bound for the satisfaction" of the judgment of Pomeroy and others.

2. The validity of the execution sale, is not affected by any consideration arising out of the amount bid and paid at the same.

(1). It is not shown that the amount bid and paid was not equal to the full value of the title so purchased.

(*a*). There is no proof whatever of the value of the property.

(*b*). If the allegation in that behalf in the answer had been established by evidence, that is, that the premises sold were worth $15,000, inadequacy would not have appeared, for the property stood charged with liens to the extent of its alleged value.—*Erwine* v. *Parham*, 12 How. 197.

(2) But had the inadequacy been made to appear, it could not avail the defendants in this suit.

(*a*). Bridge was the only person injured thereby, and, therefore, the only person who could complain.

(*b*). The order of confirmation cured the defect. While that stands, the sale must stand; and that must stand until avoided by a direct proceeding for the purpose.—*Voorhees* v. *Bank of United States*, 10 *Pet.* 449; *Warner* v. *Webster*, 13 *Ohio*, 505.

(*c*). Under the circumstances of the case, this sale must stand, the debtor himself having, by mortgaging and otherwise incumbering the premises, caused the evils complained of.—*Hildreth* v. *Sands*, 2 *John. ch.* 35, 50; *Affirmed pr. r.* 14 *John.* 493; *Douglas* v. *Huston*, 6 *Ohio*, 154.

(*d*). If the case, instead of being considered one of a fraudulent conveyance, be considered one to redeem the mortgage, the consideration paid is not material.—1 *Powell on Mort.* 97; *Anon.* 3 *Aik.* 313; *Cowles* v. *Raquet*, 14 *Ohio*, 33.

3. The validity of the sale is not affected by any fraudulent acts connected therewith, charged against either the complainant or George L. Miller.

(1). The sweeping allegations in the answer are unsustained by proof; but on the other hand are disproved so far as they were inquired into.

(*a*). Allegations of fraud, made to impeach and avoid a judicial record, should not be allowed unless supported by clear proof.

(*b*). As affirmative matter, alleged in the answer and

denied by the replication, it was incumbent on the defendants to sustain these allegations by proof.—3 *Greenleaf's Evi. Sec.* 287.

(2). If there was any fraud, it was against Bridge alone, and he alone can complain.

(3). An exclusive remedy has been provided for the alleged fraud; and a day fixed within which it must be sought; which day has long since elapsed. It cannot be sought in this collateral way. R. S. Code, sec. 606 and 9.

SECOND POINT.

The complainant is the assignee of several judgments against George Bridge, George L. Miller and Lyman Richardson, which are valid and subsisting liens upon the premises.

1. On the 2d of February, 1859, John Davis recovered a judgment against those parties, which on that day became a lien upon the premises, and has, by several successive assignments, come to the complainant.

2. The other judgments alleged in the bill were also duly recovered and assigned to, and are held by the complainant.

THIRD POINT.

The complainant's rights are not affected by the decree of foreclosure in the case of Charles Bridge against George Bridge and others.

1. Davis was not named as a defendant in the bill nor the decree, and the lien of the judgment recovered by him was not affected by the foreclosure suit. See pages 241, 2, 335; *Haines* v. *Beach*, 3 John. ch. 459; 2 Story's Eq. Jr., sec. 1023; *Neate* v. *Duke of Marlborough*, 3 Myl. & C., 416; *Roswell* v. *Bank of Niagara*, Hokpins, 582; S. C., 9 Cow., 409; *Benedict* v. *Gilman*, 4 Paige, 580.

2. Nor were George Pomeroy, William H. Benton and George H. Chase, named as defendants therein; and the

lien of the judgment recovered by them was not affected by the foreclosure suit.

(1). The naming of "Pomeroy and Benton" in the record as defendants, and the notice advertised in that way is of no avail; because, while the foreclosure suit was pending, no statute authorized an action against a partnership as such.

(2). And even had the statute authorized a suit in that form, as this was not the name of the partnership, it could not be taken as a party to the proceedings.

(3). And the individual members of the firm could not be thus made parties so as to affect their individual rights.

(4). And not being affected by the proceedings in the foreclosure suit, they could enforce their lien by execution and sale. *Watson* v. *Spence*, 20 Wend., 260; *Fricho* v. *Kramer's Lessee*, 16 Ohio, 125; *Childs* v. *Childs*, 10 Ohio St., 339.

3. George Bridge was not a party to the foreclosure suit, and the judgments held by the complainant were, for that reason, unaffected by it.

(1). He was not made a party by the proceedings for publication, because the affidavit did not state that he could not be served with process.—*Stanton* v. *Ellis*, 2 Kern., 576.

(2). The appearance entered by Hamilton was not effectual to bring him before the court, because Hamilton was not an attorney.

(3). The appearance of George Bridge to the cross-bill filed by Markham did not make him a party to the original suit.

(4). No suit pending against him, creditors recovering judgments, did not acquire their liens, *pendente lite*. *Bishop of Winchester* v. *Beaver*, 3 Ves., 314; 316 note.

FOURTH POINT.

If the mortgage was valid, the complainant is entitled to

be let in to redeem the same, and to be subrogated to the rights of the defendants.

1. Finn, as the purchaser at the foreclosure sale, and Hileman as the purchaser from him, stand in the position of Charles Bridge ; that is, of the mortgagee in possession. R. S., p. 543, sec. 853 ; 4 Kent's Comm. 185*, and note *b* ; *McArthur* v. *Franklin*, 16 Ohio St., 193 ; *Childs* v. *Childs*, 10 Ohio St., 339.

2. As the owner of the equity of redemption, by virtue of the execution sale under the judgment of Pomeroy and others, and as the owner of judgments subsequent to the mortgage, the complainant is entitled to redeem the mortgage, and be subrogated to the rights and position of the defendants. 2 Story's Eq. Jr., sec. 1023.

3. Nor can the defendants prevent this by now paying off the liens held by the complainant.

(1). Never having tendered payment, they are now too late to ask leave to do so.

(2). The complainant, as absolute owner of the equity of redemption, cannot be deprived of it by any sale to be forced upon him by the court.

(3). It is subsequent lien-holders only, who have a right to redeem incumbrances and be subrogated.—*Story's Eq. Jr. sec.* 493, 502, 567, 589, 635–8 ; *See* 4 *Kent*, 185, *note a.*

FIFTH POINT.

But in this case, there is no mortgage.

1. The defendants were specially called upon to produce evidence of the mortgage, and of the mortgage-debt, and deliberately refused to do so. The decree in the foreclosure suit was not evidence of a mortgage.

2. When Charles Bridge, the mortgagee, took the execution-title from Markham, the mortgage was merged in the equity of redemption.

(1). The allegations against the validity of the sale to Markham are not sustained by the proof.

(2). It cannot be true that the estate acquired by Markham at the sale was fraudulent as well against him as Bridge, when it appears that it was alleged in his answer and cross bill in the foreclosure suit.

(3). It was not so esteemed by Bridge, who paid $1,200 for this alleged void title.

(4). It passed such estate as George Bridge had, and that was sufficient to effect the merger of the mortgage.—*Mills* v. *Comstock*, 5 *John. Ch.* 214; *Burnet* v. *Dennison*, *Id.* 35.

3. The alleged mortgage, and all the proceedings under it, were, as to creditors, fraudulent and void.

(1). The expenses of the litigation, and most of the expenses of procuring Markham's title, were defrayed out of funds which belonged to George Bridge.

(2). The alleged mortgagor and mortgagee had, in the suit between them, the same attorney and the same agent.

(3). Hamilton having been the agent of George Bridge at the commencement of suit, and also of Charles Bridge, and also of Finn, when he, by his purchase at the foreclosure sale, became a party to the proceedings, and it not appearing that the rents collected by him, were so collected in any other capacity at one time than another, no change of possession from George Bridge is shown, or can be presumed.

(4). The account by Finn of the payment of his bid is most unsatisfactory and contradicts his answer.

(5). Finn, at the time of his purchase, was the receiver of Charles Bridge, and he took his title from the master, as such receiver.

(6). The equivocal circumstances of the case, Hamilton's agency for parties appearing to have adverse interests, the possession of the property remaining apparently unchanged, the mortgage-debt not appearing on the face of the mort-

gage, and evidences of it being specially called for by the court, and not produced, the secresy of the payment of the bid, the silence of Finn, when called upon to testify how the payment was made by him, the relations of the parties, the insolvency of George Bridge, have been suffered to remain unexplained by parties who alone held in their hands proofs which would vindicate their dealings and the transaction from the charges made in this bill against them. It is impossible to resist the conviction, that they kept silence because the truth was fatal to their defense.—*Callan* v. *Statham*, 23 *How.* 577; *Hildreth* v. *Sands*, 2 *John. Ch.* 35.

SIXTH POINT.

The final order upon the master's reports, should have awarded to the complainant the whole amount of rents and profits, shown to have been received by the defendants, with interest; and should not have allowed to the defendants the mortgage debt.

1. The decree of the court and the master's summons, required the defendants to show what they had received from the rents and profits, and what the mortgage debt was. They refused to do so, and have thus put themselves in contempt and are entitled to no favors at the hands of the court.

2. The rents and profits should be allowed in full, and with interest; for being largely in excess of the interest, they are to apply on the principal of the debt.

3. No mortgage debt has been shown, and therefore the rents and profits were wrongly received by the defendants, and are to be accounted for to the complainant as money had and received to his use.

Redick & Briggs, for defendants.

I. The bill alleges that Dowdall, Markam & Co., recovered

a judgment against George Bridge for $1,400, in October, 1858, prior to all other judgments; that in September, 1859, execution was issued on the judgment, and the premises in question sold to Markam; sale confirmed and deed made to Markam; that, February 12th, 1862, Markam conveyed to Charles Bridge, the mortgagee, but that the sale was really made to George Bridge, the mortgagor, and that the latter paid the consideration.

It is a rule of law, without exception, that the complainant must make his case upon the allegations of his bill, and must stand by what he has therein alleged. The allegations of the answer cannot help him any. Story's Eq. Pl., secs. 257, 264; *Moran* v. *Palmer*, 13 Mich., 312.

Now the bill alleges this sale and conveyance to Markam; and although it is denied by the answer, still the complainant cannot say that his own pleading is false.

We then have all of George Bridge's interest in this property in the hands of Markam, no equity of redemption left in Bridge.

The sale from Markam to Charles Bridge is admitted by the answer, and the allegations that George Bridge's money paid for the title is denied.

II. The equity of redemption of George Bridge, the mortgagor, was disposed of in the foreclosure suit, if the court had jurisdiction over him.

The bill makes him a party defendant. Record 249.

1. There was notice to him by publication. Record 288.

2. His appearance was entered in the case by his agent, Hamilton. 318.

3. He appears in the cause and files answer to cross-bill of Markam. Record 322. This cross-bill not only asks a discovery, but prays that the mortgage be cancelled because it is fraudulent.

George Bridge is made a party to this bill, and he answers to the merits of the controversy. The case was

finally heard upon the cross-bill as well as the original bill; by the decree, the equity of redemption is foreclosed, and all the estate of the mortgagor passed to Finn, and Hileman has succeeded to Finn's rights, and he is vested with all the estate which the mortgagor had in the premises, subject only to such judgments, if any, as may be liens on the same.

What then did Miller get at the sheriff's sale in 1863? He simply got nothing, for the equity of redemption had ceased to exist, as such, but was merged in the legal title which Finn acquired at the mortgage sale. Miller is in no better situation than the judgment creditor, and the most he can ask is to have his $250 refunded with interest.

We conclude, therefore, that Miller cannot be permitted to redeem on the theory that he is the owner of the equity of redemption. If entitled to redeem at all, it is because he is a judgment creditor.

But a judgment is not a lien upon an equitable title, only upon the legal title.—*People* v. *Irwin*, 14 Cal. 428; 21 U. S. Dig. 359, sec. 134; *Jackman* v. *Hallock*, 1 Ham., 318, 144.

III. It does not appear what amount, if any thing, was paid for the judgment by the complainant. Can he come into a court of equity and enforce this judgment against a purchaser at the mortgage sale, or his grantee, Hileman, now in possession, without showing that he has paid something for the judgment?—*Hascall* v. *Codman*, 8 Met., 336.

IV. Hileman is a *bona fide* purchaser of the premises, for a valuable consideration, without notice of Miller's claim.

The bill does not charge that Hileman had any notice of Miller's equities. It would seem that the most that Hileman can be called on to do is to pay Miller back the amount he has paid for the Davis judgment, with interest, if the court can find from the record what amount that is; and if Miller has declined to show the court the amount, if

any thing he has paid, he cannot expect relief in this case. But Hileman is not bound by the testimony of the complainant, as the record does not show that he had any notice of the taking of the same, nor did he appear.

V. But in no event can Miller be permitted to take the property unless the appellants refuse to pay the judgment. The decree in this case should be, that the appellants pay the amount, at most, of the judgment, with interest, in a short time to be fixed, and on failure to do so, the complainant have a right to redeem the property.—*Brainard* v. *Cooper*, 10 N. Y. 356; *Vroom* v. *Ditmas*, 4 Paige, 525, 535; *Wood* v. *Oakey*, 11 Id., 400, 404; Story's Eq. Pl., sec. 84; 2 Leading Cases in Eq., 238.

VI. If a judgment creditor has a right to redeem, it is by virtue of some law, either statute or common law. There is no statute law in this State on the subject. We have the common law then, but at common law lands were not subject to sale on execution. 4 Kent, 428.

In all States where redemption is allowed, it is by virtue of the statute law of the State.

Equity will of course afford relief to the creditor, as under our law the judgment is a lien on the lands of the debtor. But what relief?—not redemption, but it will give him a lien on the *surplus* after the mortgage is satisfied. If the property was sold for an inadequate price, on a proper case made by the bill, the court will order a re-sale, that a surplus, or a greater surplus, may be realized for the benefit of the creditor. This, however, is not the case here made by the bill or proofs.

MASON, Ch. J.

This is an appeal from the District Court of Douglas county, in a suit in equity originally brought by the appellee against the defendants to declare void a certain

mortgage and the decree and proceedings had thereon, or if said mortgage should be found valid, then to redeem certain premises described in the mortgage from under the same and the decree of foreclosure. It appears by the pleadings and record that on the 22d day of February, 1857, George Bridge, then the owner of the premises in question, mortgaged the same to Charles Bridge, his brother, to secure a large sum of money due from George to Charles, and to secure further advances; and, that on the 19th day of May, 1860, Charles Bridge commenced his proceedings to foreclose said mortgage. Charles Turner filed his answer in that action July 26, 1860. O. D. Richardson filed his answer July 26, 1860. Dowdall, Markham & Co., answered September 28, 1860. William Patrick, James Patrick and Griswold E. Warner, composing the firm of Wm. Patrick and Company; Taylor Blow and William T. Blow, surviving members of the late firm of Charless, Blow and Company, and administrators of Joseph Charless, deceased; George W. Thatcher, Frederick Gridley and John H. Killom, composing the firm of F. Gridley & Co., filed their joint and several answers October 11, 1860. On the 12th of the same month, Judd and Leeds filed their answer. The record of the suit to foreclose the mortgage shows that Samuel B. Woolworth, jr., Aaron H. Blair, George R. Smith, Mrs. George B. Bronson, John C. Hileman, John A. Parker, A. Sahler & Co., and James Murry, were each personally served with process, and that on the 30th of October, 1860, an order was made that the bill be taken as confessed as to each of them. On the 14th of January, 1861, William H. Markham filed his answer; and on the 17th of the same month filed his cross-bill, and on the third day of April, 1861, Charles Bridge and George Bridge filed their answer to this cross-bill; and on the seventh of May he filed his replication to the answer. Replications were filed to the answers of the several defend-

ants in the foreclosure suit. On the 26th of November, 1861, after a protracted litigation in which the defense of fraud was set up and urged against the validity of the mortgage, and that the same was made to hinder, delay and defraud creditors, a decree establishing its validity and for a sale of the mortgaged premises, was entered. Upon this decree the premises now in controversy in this bill were sold to A. T. Finn, which sale was confirmed on the 19th of May, 1862. It is shown by the record that sometime in July, 1865, Finn sold and conveyed the west forty-four feet of lot five, in block one hundred and twenty, to Myer Hileman, the same being a part of the premises sold upon the decree of foreclosure, and in the same year Finn sold the west part of lot seven, in the same block, to Michael Murphy. At the October term, 1859, of said court, Pomeroy, Benton & Co., recovered a judgment against George Bridge, and in 1863 issued an execution thereon which was levied on the west forty-four feet of lot five, in block one hundred and twenty. At the sale, the complainant in this action was the purchaser, and the sale was confirmed at the October term, 1863. At the March term of the District Court, 1858, John Davis obtained a judgment against George Bridge and others, and in 1865, this judgment was assigned to the complainant. At the October term, 1859, of the same court, William Dean & Co. recovered a judgment against George Bridge and others; and it is alleged in the bill and denied in the answer that the judgment was assigned to the complainant in this suit. There is no evidence offered to show that this last judgment was assigned to the complainant in this suit, or that he is the owner thereof. At the October term, 1858, Dowdall, Markham & Co., obtained their judgment against George Bridge and others, had execution issued thereon, sold the west forty-four feet of lot five, in block one hundred and twenty, to William H. Markham, on the 24th of October,

1859, which sale was soon thereafter confirmed, and the sheriff made a deed to Markham in pursuance of such sale. On the 12th of February, 1862, Markham sold and conveyed the same premises to Charles Bridge. The present bill alleges a large number of judgments obtained against George Bridge by various persons, which judgments, it is alleged, have been assigned to the complainant. These judgment creditors of George Bridge were all made parties and served with subpœna, and most of them answered the bill. Wm. Dean & Co. were made parties to the foreclosure suit, but for some reason the complainant in the foreclosure suit dismissed his bill as to them. The complainant prays that the deed from William H. Markham to Charles Bridge, may be declared to be in trust for George Bridge, and that the premises so conveyed be liable for the debts of George Bridge; that the mortgage by George to Charles Bridge was made to hinder, delay and defraud the creditors of George, and that it and the proceedings to foreclose the same be decreed void; or if it shall be found that the mortgage is valid, that the usual accounts be taken and that the plaintiff be at liberty to redeem the premises upon payment of the amount found due, etc., and that thereupon the parties in possession of the premises deliver up the possession thereof to the complainant. In the record of the proceedings in the foreclosure suit of Charles Bridge against George Bridge and others, upon bill, answers, replications, and cross-bill of William H. Markham, and the answer of George and Charles thereto, and replication of Markham; and after decree of sale of the mortgaged premises upon bill, cross-bill, answers and replications, there is the following entry: "*William H. Markham* v. *George Bridge and Charles Bridge.*

To the Register of said Court:

William H. Markham directs that his prayer for appeal to the Supreme Court in the above entitled cause, and also

his request for a stay of sale of the mortgaged premises, be withdrawn, hereby consenting to the decree of the District Court thereon, and to a sale of said premises at such time as Charles Bridge or his solicitor may direct.

James M. Woolworth,
Solicitor for MARKHAM.

Dated, OMAHA, *February* 12, 1862."

This entry, it will be observed, is made on the very day that Markham conveys his interest in the west forty-four feet of lot five in block one hundred and twenty, to Charles Bridge, which conveyance is charged in the bill to have been in trust for George Bridge. That decree found the amount of the mortgage debt then due to be eleven thousand nine hundred and sixty-six dollars and twenty-nine cents, and directed a sale of the mortgaged premises to pay said amount and costs ; all the mortgaged premises, except the forty-four feet aforesaid, to be first sold, and if the amount thus realized was insufficient to pay the mortgage debt, then the said forty-four feet to be sold, and the proceeds to be applied to the satisfaction of the mortgage debt. The master sold the premises, William H. Markham assenting thereto, and to the decree. The amount realized from the sale of the premises was seven thousand seven hundred and seven dollars, which was largely inadequate to satisfy the mortgage debt. What interest then had William H. Markham in the west forty-four feet of lot five in block one hundred and twenty, consenting to the sale and decree and the appropriation of the funds as directed in the decree? It is plain that he had none at all. What interest did Charles Bridge acquire in the premises by virtue of the conveyance of Markham ? Sim ply none at all. He could convey no greater interest than was vested in him, and that was only a contingent interest depending upon the fact whether the premises included in

the mortgage, exclusive of the forty-four feet aforesaid, should sell for enough to satisfy the mortgage debt; if not, the forty-four feet was to be sold under the decree of foreclosure. This fact was known to all the parties to the record in the foreclosure suit, for the decree therein was made and enrolled on the twenty-sixth of November, 1861. Then it is clear that Charles Bridge derived no interest whatever in the forty-four feet aforesaid from William H. Markham. This disposes of the question of trust as to the west forty-four feet of lot five in block one hundred and twenty. This also disposes of the question of merger, but that will be alluded to again.

Are the mortgage from George Bridge to Charles, and the proceedings to foreclose the same, void? The present case is widely different from that of *Callan* v. *Stratham*, 23 How. 477, cited in the argument. That case was a creditor's bill to set aside a deed made by J. F. Callan to M. R. Callan, his brother, while J. F. was largely in debt, and several suits were impending over him and maturing to judgments to which the property conveyed would have been subjected. The conveyance was made for a consideration, stated in the deed to be $4,900, which, according to the estimate of witnesses who were well acquainted with the premises, was worth $15,000, assuming the title to be good, and the vendor continued in possession of the property conveyed, leasing the buildings and collecting the rents in his own name, and not accounting to the vendee for them. It did not appear that the vendee took any part in the management of the property, or exercised any acts of ownership over it, after the absolute deed of conveyance to him. The creditor's bill was brought to set aside that conveyance, and certainly it was a case surrounded with evidences of fraud sufficient to justify the court in setting the conveyance aside. From the decree setting aside the conveyance an appeal was taken, and the decree was

affirmed. In the present case instead of an absolute deed and secret conveyance to defraud creditors, we have a mortgage given to secure a debt of a certain amount, named in the mortgage, and future advances. Nor does it appear that George Bridge had any debts whatever hanging over him, except the one secured by the mortgage. It was not necessary that the mortgagee should take possession of and exercise acts of ownership over the property mortgaged. The first act on the part of the mortgagee, after the execution and delivery of the mortgage to him, was to file in the District Court his bill to foreclose the same, and as respects the subsequent creditors of the mortgagor, the mortgagee was not bound to pursue any other course. Upon this suit to foreclose, a decree was rendered in favor of the complainant, and afterwards upon that decree the mortgaged premises were sold to A. T. Finn, a third person. This was a judicial sale, duly advertised, and it was not until this sale that the whole title passed from George Bridge, the mortgagor, and those holding under him, who were made parties to that proceeding. It is clear, then, that there is no similarity between this case and that of *Callan* v. *Stratham.*

In the foreclosure suit, the District Court, in the recital of the decree, states that the case was heard upon the bill confessed as to part of the defendants therein, upon the answers of the others, the replications thereto of the complainant, the proofs and exhibits, and upon the proceedings in the cross suit, and then finds in favor of the complainant a large amount due to him from George Briggs. The decree and sale was assented to by Markham, and completely executed, the foreclosure money paid, and the sale to A. T. Finn confirmed. Considering the findings of the court as recited in the decree, the fact that the decree has been fully executed, together with the fact that there is no proof which tends to establish the allegation of fraud

in the execution of the mortgage, I can discover nothing which would justify the court in rendering the decree prayed in the bill here before us. Fraud is never to be presumed but must be proven. There is nothing in the record which raises a presumption of fraud in the execu tion of the mortgage, or the proceedings to foreclose the same. When the decree is executed by sale of the property and payment of the purchase money, followed by a confirmation of the sale, it will not be set aside for the purpose of introducing a party who ought to have been an original defendant.—*Findley* v. *Banks*, 11 *Wheat.* 307. And it is an imperative rule of law that the recitals and findings of a court of general jurisdiction contained in its decrees are not to be set aside and vacated, or in any manner to be disturbed upon the charge of fraud, except upon clear and strong proofs. The presumption of law is that the findings of the court, as stated in the decree, are based upon sufficient proof of the facts, and that the court was fully justified in the rendition of the decree.

The bill charges that neither George Bridge, Milton Rogers, John Davis nor Pomeroy, Benton and Company, was served with subpœna to answer the bill of foreclosure, nor did either of them appear to the same, not did the court acquire jurisdiction of them, or either of them. In respect to Pomeroy, Benton and Chase, who were partners under the name of Pomeroy, Benton & Co., it is only necessary to observe that Pomeroy and Benton, as shown by the record, were served with notice by publication, for the length of time and in the mode and manner provided by the statute. Our statute had then, as it has always since had, a provision for making non-resident parties defendants, and subjecting them to the operation of a decree without personal service of subpœna or otherwise. It is indispensable that some practice should be established by which non-residents owning lands here, or some interest

in them, should be made parties to suits in respect to such lands without the service of process, for officers could not serve process without the limits of the State. There seems to me to be no sufficient reason for denying that the court acquired jurisdiction by the usual service in strict accordance with the statute, more especially when the bill is for the foreclosure of a mortgage upon the lands situated within the jurisdiction of the court. I think the rule is settled that when the subject-matter of the suit or controversy is within the jurisdiction of the court, the defendants may be made parties by publication, if non-residents, and if notice is thus given, and the court pass upon the sufficiency of the notice and affidavit which the statute requires to be made as to the fact of the non-residence of those who are notified by publication, neither the sufficiency of the notice or affidavit can be questioned or reviewed collaterally.—*Roswell* v. *Sharp*, 15 *Ohio*, 447. The court, in the foreclosure suit, found the affidavit and service by publication, to be regular and sufficient, and we cannot review that finding in this proceeding. When a proceeding in a court of superior jurisdiction is of such a character that upon final action the court should, from the nature of the case, ascertain and determine whether the action is such in fact that it has jurisdiction, its decree cannot be questioned collaterally.—*Dequindse* v. *Williams*, 31 *Ind.* 444. We think the court acquired jurisdiction over Pomeroy and Benton, and over their rights and interests in the mortgaged premises, by the publication of notice under the statute, and perhaps of their persons also.—*Lessee of Franklin Morgan* v. *Burnet*, 18 *Ohio*, 535. And although it is a general rule in an action brought against partners on partnership contracts, that all who were partners at the time of the contract ought to be joined, yet it is a principle of law well settled that in such cases the omission of a party as such co-defendant is not ground for a non-suit,

and can only be taken advantage of by plea in abatement verified by affidavit.—*Collyer on Part.* 712. This has been held to be the law ever since the case of *Rice* v. *Shate*, 5 *Burr*, 2615; 8 *S. and R.* 55. And the failure to plead in abatement is considered as an absolute waiver of the objection.—6 *Taunt.* 29; 2 *Johns. Ch.* 382; 1 *Sand.* 2916.

In some instances the courts have gone much further, for it is said that in an action commenced against partners, one may enter an appearance for all; that when several are connected together in partnership, notice to one is equivalent to notice to all in *bona fide* transactions; that in an action on a promissory note, if the defendants suffer judgment by default, service of rule *nisi*, to compute principal and interest, on one of them is service on all, for *quoad hoc*, they are partners, *Collyer on Part.* 441, 443, and that a notice to one of several partners of a prior unrecorded deed, is notice to all the partners, and will defeat a deed to the same lands subsequently made to all the partners.—*Barnes* v. *Currier*, 1 *D. Chip.* 315.

In *McDuffie* v. *Bartlett*, 3 *Barr. Pa.* 319, it is held that a judgment against Clark & Co., when the nature of the claim of the plaintiff does not appear, the presumption is that it was a partnership claim, and the partnership property might be attached under such a judgment, though the names of the co-partners did not appear in the judgment, and they were not served. Though the above cases and the principle referred to seem to indicate strongly that in proceedings *in rem* and *a fortiori*, in the foreclosure of a mortgage, a notice to part of the members of a former partnership might, and probably would, be notice to all the members of the firm, yet it does not seem to be necessary to give any definite opinion on that question in determining this case. The fact appears in the record that Pomeroy and Benton were made parties to the foreclosure suit, and were served with notice sufficient to determine

this case. By permitting their default, the bill stands as effectually confessed by them as if they had made such confession in open court, or by their answer; and hence they are concluded and barred under the decree of and from all right of redemption as judgment creditors or incumbrancers. And in respect to their partner, Chase, as indicated before, it is not necessary to give an opinion as to whether he is or is not concluded by the confession of Pomeroy and Benton, his co-partners, and whether he has or has not any individual rights which he might enforce on the ground that he was not named as a party and served with process, for the reason that the bill presents no such case for determination. I may add that I am quite clear, that both upon principle and authority, Chase, as well as Pomeroy and Benton, is concluded by the decree.

In respect to George Bridge, it need only be stated that his agent entered an appearance for him, that he recognized the right of such agent to appear for him, and does not now question that right, and that he filed his answer to the cross-bill in the original suit. This made his appearance to the suit complete, for by filing this answer he recognized and ratified the act of his agent, and made himself a party to the original suit. Nor is there anything in the parol evidence to show any inconsistency or fraudulent acts on the part of his agent which would justify the conclusion that there was any fraud or collusion between George Bridge, Charles Bridge, and their agent, Hamilton.

The complainant insists, that by virtue of the execution sale to him under the judgment of Pomeroy, Benton and Company against George Bridge and others, he acquired a title to a part of the premises in question, which will support his action. The rendition of the judgment, the issuance of the execution, the sale to complainant, were proceedings at law, and therefore it is upon principles of law

that we must examine this claim of right made by the com plainant.

It is true, the judgment creditor may issue his execution and direct the sheriff to levy on property, still the sheriff is only the instrument which the law uses to sell and turn the debtor's estate into money; of the nature of the estate he is necessarily ignorant, and being only an instrument the law uses to sell the estate for what it will bring in the market, he has no power to make conditions in respect of the title or the price of it. Such sale by the sheriff excludes all idea of warranty, and the purchaser takes all risks, and buys on his own knowledge and judgment. *Caveat emptor* applies in all its force to him. If this were not so, an execution, which is the end of the law, would only be the commencement of a new controversy. The creditor would be kept at bay during a series of suits before he could reap the fruits of his judgment.—*Smith* v. *Painter*, 5 *S. and R.*, 225; *Glenn* v. *Clapp*, 1 *Gill and John.*, 1; *Owings* v. *Thompson*, 3 *Scam.*, 502. We have already seen that, before the judgment on which his title rests was recovered, the mortgage was made and recorded, and before the sale to him Finn had purchased under the foreclosure. And besides, the property had, before the sale to him, been sold to Markham on the Dowdall, Markham & Co. judgment, which was recovered before the Pomeroy, Benton & Co. judgment. From these facts, it is very plain that at the date of issuance of the execution and sale on the Pomeroy, Benton & Co. judgment, George Bridge had no interest in the premises. Both his legal and equitable interest was wholly divested by the sale of his equity of redemption to Markham on the judgment of Dowdall, Markham & Co. against him, on the 24th of October, 1869, and the sale of his legal title, under the mortgage decree, in the early part of 1862, to A. T. Finn. George Bridge had no possible interest vested in him in or

to the premises at the date of the levy and sale under the Pomeroy, Benton & Co. judgment, and the attempt to levy and sell was a mere useless ceremony which did not affect the interest of any person. It did no good to the judgment creditor. The mortgage and the Dowdall, Markham & Co. judgment, were each liens upon the premises, superior to the Pomeroy, Benton & Co. judgment, and so held in the decree of foreclosure, to which Pomeroy and Benton were parties. There is another light in which the question now under consideration may be viewed. Execution is a common law process for obtaining actual possession of the thing recovered by the judgment, and is called the life of the law. Upon it only could the personal estate of the debtor be seized at common law, for the reason, it was said, that it was only a chattel that was lent, and therefore chattels only were liable to pay it.—*Co. Litt.*, 154; 2 *Rol. Abr.*, 472; 2 *Bac. Abr.*, 695, 714. And if a plaintiff, after obtaining his judgment in a personal action, failed to procure process of execution within a year after judgment, he was put to his original on his judgment, because it was presumed to be executed, and therefore the law allowed him no *scire facias* to show cause why there should not be execution. Hence, if the plaintiff had slipped his time, he was put to his action on the judgment, and the defendant was obliged to show how the debt, of which the judgment was simply an evidence, was discharged.—2 *Inst.*, 469; 2 *Salk.*, 600. Very nearly four years elapsed from the time the Pomeroy, Benton & Co. judgment was obtained before process of execution was issued. It is clear that at common law the plaintiffs in this judgment had slipped their time, and they could not have either execution or *scire facias* on their judgment, but would be put to their original action upon the judgment. Consequently, no rights could be acquired under an execution so issued. But, since the statute of Westminster, 2 chap. 13, the rights of parties

and the process of writs are defined and regulated by statutory provisions. The question here is, will the correct construction and proper application of our statute relating to executions put the complainant in any better position than the common law? The Code passed in 1858, sec. 435, provides that the lands and tenements of the debtor within the county where the judgment is entered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment was recovered. The words, "shall be bound for the satisfaction, etc.," in this section, can receive no other construction, according to their legal effect and the intent of the legislature, than to mean and intend that the judgment shall be a lien on such premises from the first day of the term; and this construction is not only rational, but is rendered conclusive by section 426, which provides that, "if execution shall not be sued out within five years from the date of the judgment, it shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor." Section 461 provides, that "no judgment heretofore rendered, or which may hereafter be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor to the prejudice of any other *bona fide* judgment creditor," and then provides for the relief of judgment creditors in case of appeal, error, injunction, or vacancy in office of sheriff and coroner. This section of the Code is explicit in itself, and as regards a judgment on which execution has not been taken out and levied within one year next after its rendition, it is conclusive upon the creditor that his judgment shall not operate as a lien on the estate of the debtor to the prejudice of any other *bona fide* judgment creditor. The lien is effectually dead and gone, so far as respects the rights and interests of such other *bona fide* judgment creditor, and a levy and sale of the debtor's

lands upon the judgment of such other *bona fide* judgment creditor passes the lands absolved and wholly discharged from the first lien. Section 452 provides, that "when sale is made upon execution, the deed shall be sufficient evidence of the legality of such sale, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned as was vested in the party at or after the time when such lands and tenements became liable to the satisfaction of the judgment." Under this section, the purchaser takes an estate in the premises as good and as perfect and complete as was vested in the debtor at the time of the rendition of the judgment when the lien attached. Now, the Pomeroy, Benton & Co. judgment was obtained at the October term, 1859, and the execution was not issued until September 18, 1863, nearly four years thereafter. The Dowdall, Markham & Co. judgment was obtained at the October term, 1858, and execution issued thereon September 12, 1859, and levied on the premises in lot five, block one hundred and twenty, which were sold on the 24th of October following. This execution and levy were had within one year after the rendition of the judgment. From these facts, it is plain that Pomeroy, Benton & Co. were negligent, and let their time slip away without issuing execution, while Dowdall, Markham & Co. were diligent, and took out their execution and levied within the time required by the statute. And it is a plain conclusion of law, under this construction and application of the statute, that the purchaser, under the execution sale on the Dowdall, Markham & Co. judgment, not only took an estate in the premises absolved and discharged from the lien of the Pomeroy, Benton & Co. judgment, but that he also took such an estate in the premises as was vested in George Bridge, the debtor at the time the judgment was rendered and the lien attached. In any view which may be taken of this question, I can arrive at but the one conclusion,

that, at the time of the Pomeroy, Benton & Co. execution was issued and levied in 1863, George Bridge had no interest in the premises levied upon and sold; that both his legal and equitable interest, and all his rights and title in and to the premises had been wholly exhausted, and in the attempt to levy and sell under the Pomeroy, Benton & Co. judgment, the purchaser acquired no interest whatever in the property.

The defendant, Finn, alleges in his answer that the sale to Markham on the execution issued on the Dowdall, Markham & Co. judgment, was fraudulent and void, both as to the plaintiffs and George Bridge, and passed no title from George Bridge to William H. Markham. Mr. Hileman, in substance, makes the same allegations in his answer. The complainant in his prayer asks that it be decreed that the deed from Markham to Charles Bridge, executed February 12, 1862, was in trust for George Bridge. In his argument he insists that when Charles Bridge purchased and took from Markham the title acquired by him, the mortgage was merged in the equity of redemption. This is urged mainly upon the ground that it cannot be true that the estate acquired by Markham at the execution sale was fraudulent; that it was not so esteemed by Charles Bridge, who paid for it, and that therefore it passed such an estate as George Bridge had, and that was sufficient to effect a merger of the mortgage. There is no evidence in the record which impeaches the validity of the Dowdall, Markham & Co. judgment on the sale and confirmation thereof. The complainant cannot go to the answer for facts which by his bill he did not put in issue. The court pronounces its decree *secundum allegata et probata. Crocket* v. *Lee*, 7 *Wheat.* 522; *Jackson* v. *Ashton*, 11 *Peters*, 229; *James* v. *McKernon*, 6 *John.* 564. I can discover nothing in the record which invalidates the execution sale to Markham, and it divested George Bridge from all interest in the

premises as effectually as if he had, by his own deed, conveyed to Markham for a valuable consideration.—*Ingersoll* v. *Sawyer*, 2 *Pick.* 279. But the complainant insists that Charles Bridge purchased the title of Markham in trust for George Bridge, the mortgagor. If this position should be sustained, the complainant would destroy his theory of merger of the mortgage in the equity of redemption. A conclusive answer to this is, that if Charles purchased in trust for George, then Charles took no beneficial interest in the premises. He was simply a holder of the title to the land for George. In this event the interest under the mortgage and purchase would be distinct and owned by two different persons; and under this state of facts, a greater estate and a less, the interest of the mortgagee and the equity of redemption, could not meet and coincide in Charles, and without this there could be no merger. We have heretofore disposed of the question which drew in controversy the title derived from William H. Markham, but let us now inquire, did Charles Bridge purchase the Markham title in trust for George Bridge.. Mr. Woolworth was the only witness called and examined in respect of this matter, and he states that at the final settlement in the negotiations between Charles Bridge and Markham in regard to the purchase by Bridge from Markham, there were present Poppleton, Hamilton, Forbes and Megeath, and that Megeath, who had been the receiver of the rents and profits which had been adjudged by the court to belong to George Bridge, gave a statement of the rents, etc., received by him, and, according to witness' recollection, produced the money, that the whole amount was first paid to him, then by him paid to Forbes who deposited the same in the bank until his fees were agreed upon. The testimony of Finn shows that George Bridge was largely indebted to Charles Bridge, and there was then a large and unsatisfied balance remaining due by George to Charles on various transactions. The

fact is admitted that the money which Charles paid Markham for his title was the money arising from the rents and profits of the premises. That alone is hardly sufficient to establish the allegation that Charles bought in trust for George, especially when we consider the situation of the parties and of the litigation at that time and the fact that George was then largely indebted to Charles.

In equity, when the fraudulent intent is denied, the allegation of it cannot be helped by a presumption of fraud, unless the fact in evidence is conclusive; and the testimony of a witness who does not or cannot give the facts and circumstances which establish the allegation of fraud, in a clear and satisfactory manner, but states what may fairly be inferred from his testimony to be in substance, his understandings and inferences derived from conversations cannot aid the case.—*Wright* v. *Prescott*, 2 *Barb.* 196; *Powell* v. *Swan*, 5 *Dana*, 1. The evidence is wholly insufficient to establish the allegation of trust in Charles in favor of George Bridge. Suppose we admit that William H. Markham, up to the twelfth day of February, 1862, held and owned the equity of redemption to the east forty-four feet of lot five in block one hundred and twenty, and that by virtue of the purchase made on that day Charles Bridge then became the owner of the equity of redemption, the question then occurs, did the mortgage merge in the equity of redemption thus purchased by Charles Bridge? When does merger take place? It is said the general rule is that whenever a greater estate and a less coincide and meet in one and the same person without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be merged, that is, sank or drowned in the greater.—*James* v. *Morley*, 2 *Cow.* 284; 2 *Blackstone Com.* 177. The doctrine of merger has been discussed by the courts from an early period down to the present time; and if any principle of law seems to be well settled it may now be said that in

all cases when intervening rights interfere, or when the two estates meet and it is necessary that the charge be kept on foot to protect those interests, the courts will not enforce a merger. In *Co. Litt.* 388, it is said "mergers were not favored in courts of law, and still less in courts of equity." They are never allowed unless for special reasons and then only to preserve the intention of the parties.—*Philips* v. *Philips*, 1 *P. Wm.* 41. When there is a union of rights equity will preserve them distinct if the intention so to do is either express or implied.

The distinction stated by Lord Hardwicke is, that when the owner of the fee in which the charge would otherwise merge, manifests his intent that the charge shall subsist, his intent, if clear, shall prevail.—*Chester* v. *Willis*, *Amber*, 246. In *Compton* v. *Oxender*, 2 *Ves. Jr.* 264, Lord Thurlow observed: "It is a clear principle, both at law and in equity, that where there is no confusion of rights, when debtor and creditor become the same person, there is an immediate merger, but that equity will preserve the rights distinct according to the intent, express or implied." Whenever it is more beneficial for the person entitled to the charge to let the estate stand with the incumbrance upon it than to take it discharged of the incumbrance, that circumstance will have a controlling influence in deciding on the implied intent.—*Wade* v. *Paget*, 1 *Brown Ch.* 368. In *Forbes* v. *Moffat*, 18 *Ves.* 364, Sir William Grant says: "It is very clear that a person becoming entitled to an estate subject to charge for his own benefit may, if he choose, at once take the estate and keep the charge. Upon this subject a court of equity is not controlled by the rules of law. It will sometimes hold a charge extinguished when it would subsist at law, and sometimes preserve it when at law it would be merged." The question turns upon the actual intention of the person in whom the interests are united. In most instances it is of no use or

benefit to the party himself to have the charge on his own estate, and when that is the case it will be held to sink unless something shall have been done by him to keep it on foot. In *Hunt* v. *Hunt*, 14 *Pick.* 382, the court says it "can see no reason why a purchaser of the equity of redemption, whether of a part or the whole of the mortgaged premises, is in any respect disabled from becoming such assignee." He may consider his equity of redemption of small value, or of no value, or the title to it invalid or doubtful, and can there be any reason in law why he, who has the most urgent occasion for making such purchase to protect his own interests, should be disabled from doing so, and be placed, in this respect, in a worse condition than a stranger? In order to effect a merger at law, the right subsisting in an individual, and the right subsequently acquired in order to coalesce and merge, must be precisely co-extensive, must be acquired and held in the same right, and there must be no right outstanding in a third person to intervene the right held and the right acquired. If any of these requisites are wanting, the two rights do not merge, but both may stand together.—*Gibson* v. *Crehore*, 3 *Pick.* 382; *Gardner* v. *Astor*, 3 *Johns. Ch.* 53; *Millspaugh* v. *McBride*, 7 *Paige*, 509. The case of *Mills* v. *Comstock*, 5 *Johns. Ch.* 214, was decided on its own peculiar circumstances. The decree was made upon the ground that the assignment of the mortgage to Comstock was a deed of conveyance, and within the registry act of 1794, and not having been registered was fraudulent and void as to Mills, the subsequent purchaser, for a valuable consideration. By reason of the assignment being void, the mortgage was considered still in the hands of Herrick, and the deed from him to Mills being his first act legally affecting the transaction, or manifesting his intent, must necessarily be considered as conclusive evidence of his election or intent that the two estates should unite.

The deed itself purported to convey an estate which could not have passed unless a merger had taken place, but the chancellor put his decree on the ground of fraud. The facts show that Charles Bridge cannot be affected by the lapse of time in making his election or manifesting his intent. His execution of the mortgage decree by sale under the direction of the court within less than two months after he acquired the Markham title, is conclusive evidence of his intent that the charge should remain distinct. In the case of *Forbes* v. *Moffat*, the acts of the party were considered and examined for a series of ten years for some evidence of his intent, and none being found as decisive upon the point, the legal presumption of his intent was that the charge should not merge because it was his intent that it should not.—*Thompson* v. *Chandler*, 7 *Greenl.* 377; *Freeman* v. *Paul*, 3 *Greenl.* 260.

The rights of those incumbrancers, who were not made parties to the suit, cannot be affected by the decree. *Draper* v. *Earl of Clarendon*, 2 *Vernon*, 517; *Godfrey* v. *Chadwell*, 2 *Vernon*, 601; *Haines* v. *Beach*, 3 *John. Ch.* 464. This rule seems to be founded on the reason that it is indispensable to justice in case of a decree of sale, for otherwise the mortgagor would take the surplus money or the cash value of the equity of redemption, and thereby entirely defeat the rights of subsequent creditors. It seems to me clear, that the absolute right of such incumbrancers to redeem is, strictly speaking, the right to redeem a senior incumbrancer and not the premises, and thereby secure a conveyance of the land. This absolute right would be a subsisting one, up to the rendition of the decree and the actual sale of the premises thereunder, and as in the case of *Bennett* v. *Denniston*, 5 *Johns. Ch.* 35, if the tender of the money should be made to redeem such senior incumbrance, and there should be a refusal on the part of the mortgagee, and after such tender a sale should be had, it

would be illegal and void, for it would be a fraud upon judgment creditors and junior incumbrancers. In the case of *Pardee* v. *Van Allen*, 3 *Barb.* 537, it is said the owner of the junior incumbrance redeems not the premises, strictly speaking, but the senior incumbrance, and then he is entitled, not to a conveyance of the premises, but to an assignment of the security. And in the case of the *Bank of the United States* v. *Peter*, 13 *Peters*, 125, it is said, "It is a well settled principle in equity that a judgment creditor who is compelled to pay off a prior incumbrance on land to obtain the benefit of his judgment, may, by assignment, secure to himself the right of the incumbrance; and the same rule applies when a junior mortgagee, to save his lien, is obliged to satisfy a prior mortgage on the same estate. He stands as the assignee of such mortgagee, and may claim all the benefits under the lien that could have been claimed under the assignor." But when a foreclosure is had, and the decree completely executed, and the purchase money paid, and then an incumbrancer who was not made a party to the bill to foreclose, brings his action, the right of such incumbrancer to a decree to redeem the premises and receive a conveyance of the land mortgaged is not absolute. Under such circumstances, I apprehend the case presents to the court a question of equity which must be determined in such manner as to do justice to the parties; and if there is no fraud in obtaining the decree of foreclosure and sale, the owner of the land, under such sale, may be and should be protected in his title subject only to the payment of the creditor's just claim. I deem this rule to be well founded on the principle of justice and equity between man and man. No principle is more firmly and justly established than that he who comes into a court of equity must do equity.

The complainant brings this action as the owner of judgments which were incumbrances at the time of the suit to

foreclose the Charles Bridge mortgage. The three judgment creditors who were not parties in the mortgage suit, were William Dean & Co., John Davis and Milton Rogers. The several other judgment creditors named in this bill were made parties and served with process. The complainant asks that he may be at liberty to redeem the premises and obtain the possession of the same. Suppose the premises are now worth in cash many times the mortgage security and these judgment liens, is it true that a court of equity is compelled to permit him to redeem and to sweep all this property, together with the improvements thereon, from the owner, and appropriate the same to himself, merely upon the payment of the mortgage debt, when the payment of the entire amount of his judgments may be secured and paid to him within a reasonable time? Would this be doing equity? Would it be justice between man and man? The complainant comes into a court of equity seeking equity, and would it be right for the court by its decree to make itself the instrument to secure to him property in value so largely in excess of what is justly coming to him; to turn over to him a large and valuable estate for one twentieth of what he could purchase the same estate for in open market, and by so doing deprive the respondents, in like proportion, of their property acquired by them without fraud or dishonesty? I cannot believe that any such rule has been established and settled as a principle of law, and if it had, I should regret to be compelled to follow it. In the case of *Vroom* v. *Ditmas*, 4 *Paige*, 531, it appears that Arnold and May, at the time the owners of the fee, mortgaged the premises to Watson; that Ditmas, by sundry conveyances, held the title of Arnold and May; that Vroom, the plaintiff, had two mortgages against Ditmas. The Watson mortgage was foreclosed against Ditmas and wife by statutory foreclosure, the premises bought by Bacon, who sold to Vanhorn, and

Vanhorn sold to Smith. Vroom brought his action, and the court held that the two mortgages of the plaintiff were a lien upon the equity of redemption, notwithstanding the statutory foreclosure and the plaintiff entitled to redeem, unless the present owner of the premises should elect to pay off the amount due on those two mortgages. This case fully recognizes the rule adopted in this opinion, and leaves it with the court to do equity between the parties. Believing that such practice is founded on reason and the principle of equity, and the only one that can fully protect and secure the legal and equitable rights of all parties, I have no hesitation in giving it my hearty indorsement.

It follows then that the complainant being the owner of the judgments recovered by Davis and by Rogers, is, in respect of them, entitled to relief. That relief will be awarded to the full extent of what he is equitably entitled to by affording to the defendants an opportunity to pay those judgments. Should they fail to do so then the right of redemption will be absolute in the complainant.

A decree will be entered reversing that of the District Court, directing a reference to ascertain the amount due on the judgment named, requiring the defendants to pay that amount within thirty days from the confirmation of the master's report of the amount due; and in default of their so doing, requiring them to release their security to the complainant upon the usual terms of decrees for redemption of mortgages.

Decree of the District Court reversed, and a decree entered according to the directions of this opinion.

NOTE.—Mr. Justice LAKE having been of counsel in this cause did not sit therein, and Mr. Justice CROUNSE having made the decree appealed from, did not participate in the determination of the appeal, so that the Chief Justice sat alone upon the appeal.

Eaton v. Redick.

1. CONTRACT. The failure of a vendee of lands to perform the stipulations of the contract on his part does not terminate the contract, but leaves it optional with the vendor to adhere to or rescind it.

2. ——: *Rescission.* The vendor, by selling the property to another, exercises his option and rescinds the contract, and thereafter the parties stand as if no contract subsisted between them.

3. ——: *Recovery of amount paid.* When the vendor, availing himself of the vendee's default, elects to put an end to the contract, the vendee may recover back the money he has paid in part performance, with interest from the date of the rescission.

This was an action brought in the District Court for Douglas County, by Emerson H. Eaton and Sarah M., his wife, to recover from the defendant, Redick, a sum of money paid by the plaintiff, Sarah M., to the defendant, on account of a contract for the sale of a lot in Omaha, which, by reason of their failure in their payments as agreed, Redick had rescinded. The plaintiff had judgment, to reverse which the defendant brought this petition in error.

C. Briggs, for plaintiff in error.

Has Eaton a right of action against Redick? If he has, it is because he violated his agreement. He first broke the contract by not paying the notes at maturity. He thereby abandoned, and, in effect, rescinded the contract, so far as he was concerned, and though urged to perform, persistently refused. Can he found a right of action upon his own default?—*Chitty on Contracts*, 308; 1 *Id. Pleadings*, 321, 328; *Nash Pl.*, 298. It is claimed that Redick, some time after two of the notes were past due, sold the lot to More, and for an increased price, and that he thereby rescinded the contract. It is admitted that he sold the lot, and for an increased price. But does that help Eaton? The con-

tract was put an end to by the sole act of Eaton; Redick all the while insisting on a performance. Eaton says, I will not perform this contract. Redick says, perform, but finally sells the lot. Did this sale of the lot give a right of action to Eaton which he did not possess the day before? How long was Redick bound to hold the lot for him? If he was bound to hold the lot for one year, he was twenty. In order to recover in this class of action, the plaintiff must allege and prove one of three things; either, 1. That he has performed; or, 2. That he has offered to perform; or, 3. That he has a good and valid reason for not performing, such as unavoidable accident, mistake or fraud.

But nothing of this appears anywhere in the case.

The case of *Ketchum* v. *Evertson*, 13 *John.* 358–364, is precisely in point. In this case the court says: "It would be an alarming doctrine to hold that the plaintiffs might violate the contract, and, because they chose to do so, make their own infraction of the agreement the basis for an action for money had and received. Every man who makes a bad bargain and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case. The plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would in effect be saying that the defendant could never sell it."

This case has been recently approved by the Supreme Court of the United States, in *Hausbrough* v. *Peck*, 5 *Wal.* 497–506. See also *Ellis* v. *Haskins*, 14 *John.* 363; *Henderson* v. *Swift*, 20 *John.* 24, 27; *Green* v. *Green*, 9 *Cow.* 46; *Bartels* v. *Rochester Bank*, 3 *Comst.* 89; *Smith* v. *Brady*, 17 *N. Y.* 173; *Leonard* v. *Morgan*, 6 *Gray*, 412;

Hays v. *Hart*, 42 *Barb.* 58 ; *Chrisman* v. *Miller*, 21 *Ill.* 236 ; *McCoy* v. *Bigby*, 6 *Ohio*, 134.

No counsel appeared on the other side.

MASON, Ch. J.

The errors assigned in this cause are, that upon the evidence and pleadings in the case the court erred in rendering judgment for the defendant in error ; that the judgment is contrary to law ; that the judgment should have been for the plaintiff, and that the court erred in overruling the plaintiff's motion for a new trial. The facts of the case are as follows : On the 19th of April, 1865, John I. Redick sold a lot situated in Omaha city, to Sarah Eaton, wife of Emerson H. Eaton, for the consideration of sixteen hundred and fifty dollars. Eaton paid on said purchase four hundred dollars, and the balance was to be paid in four equal payments in three, six, nine and twelve months. At the same time Redick executed a deed for the lot to Mrs. Eaton. By mistake or design, on the part of Emerson H. Eaton, only three notes for the deferred payments were delivered to Redick. He deposited the notes which were delivered to him and the deed for the lot with Kountze & Brothers, of Omaha, to be delivered to Eaton when all the purchase money was paid. No payments were made on the lot after the first, although the same were often requested. On the 13th of January, 1866, Redick sold the lot to Mrs. More for the sum of twenty-two hundred dollars. This action was brought by Eaton and wife to recover the amount paid on the lot and interest. The case was tried before the court below, and Eaton and wife recovered a judgment for the sum claimed by them.

The amount which Eaton and wife were to pay for the lot was sixteen hundred and fifty dollars ; the amount

which Redick received on the re-sale was twenty-two hundred dollars. The sale to Eaton and wife was made April 19, 1865, and the re-sale to Mrs. More on the 13th of January, 1866. The failure of Eaton and wife to comply with their contract, and make the payments at the time agreed, did not terminate the special contract, but left it optional with the other party to do so. He exercised this option by the sale to Mrs. More, putting it beyond his power to fulfill his contract with Eaton, and this, too, before the last payment had fallen due. Then, on the failure of Eaton to pay, Redick chose to rescind the contract and put an end to the same, so that when this action was brought there was no subsisting contract between the parties on which the money sought to be recovered was paid. It may be admitted that if the special contract on which the money was paid was a subsisting contract between the parties, and the defendant Redick had at all times performed his part of the contract, or stood ready to do so, and at the present time insisted on performance, and the failure to perform was exclusively the fault or neglect of Eaton and his wife, they could not recover. But that is not the case. The plaintiffs failed to fulfill their contract, and the defendant chose to rescind the same, and the plaintiffs acquiesced in the choice of the defendant. Then there was no subsisting contract between the parties upon which the money sought to be recovered was paid. Redick admits, in his answer, "that when the first note became due, he called upon Kountze & Brothers, with whom he had left the notes for collection, and directed them to deliver back to said Eaton his notes, leaving them for that purpose." He is bound by this admission in his answer, and it is decisive of this case. When there is no contract subsisting between the parties, but the same has been put an end to by the election or refusal of the defendant to perform, the other party may recover back any money paid in part perform-

ance, with interest from the date of the rescission of the contract.—*Raymond* v. *Beamand*, 12 *Johns.* 274; *Gillet* v. *Clemens*, 5 *Ib.* 85; *Green* v. *Green*, 9 *Cow.* 46; *Chitty on Contracts*, 741; *Harris* v. *Bradley*, 9 *Ind.* 168.

It may be stated, as a principle of the common law, that when money has been paid on a special contract, an action for money had and received to recover back the same, could not be maintained if it has been in part performed, and the plaintiff derived benefit from the same. *Chitty on Contracts*, 5*th ed.* 627, and cases there cited; 1 *Chitty Pleadings*, 9*th ed.* 355.

The case referred to in 13 *Johns.*, *Ketchum* v. *Everston*, relied upon by the plaintiff in error, is not applicable to this case; neither is it at variance with the principles here laid down. This determines the case. The judgment must be affirmed with costs.

Judgment affirmed.

Smith v. Sahler.

1. APPEAL OR PETITION IN ERROR *to final order*. An order to be final and subject to review in an appellate court upon appeal or petition in error, must dispose of the whole merits of the case, and leave nothing for the further determination of the court. It must affect a substantial right and determine the action.

2. An order or decree which leaves the law or equity of the case, or some material question connected with the merits of the controversy, for future determination, is interlocutory, and is not subject to review in any appellate court on appeal or petition in error.

3. An order dissolving an injunction, when the same is an incident of the action, and the substantial rights of the parties remain undetermined, is interlocutory and not appealable.

This was a motion to dismiss an appeal. The facts sufficiently appear in the opinion of the court.

John H. Sahler, the defendant, in person for the motion.

T. M. Marquette, contra.

MASON, Ch. J.

The error complained of in this cause is the order of the court below, dissolving an injunction which had been allowed in the cause by William D. Gage, Probate Judge of Cass County.

The defendants in error now move to dismiss the proceeding on the ground that the order dissolving the injunction was not a final order within the meaning of section five hundred and eighty-two of the Civil Code. The prayer of the bill in this case is that a certain judgment at law obtained against John Hughes and John H. Sahler, and assigned to the plaintiff, be set off against a judgment obtained by defendant Sahler against the plaintiff aforesaid; and that the defendant Sahler, and Joseph W. Johnson, sheriff of the county of Cass, be enjoined

from collecting the judgment obtained by Sahler against the plaintiff, and for such other and further relief as equity and good conscience may require.

A writ of error or an appeal lies only to a final order or decree; and by section five hundred and eighty-one a final order is thus defined: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed as provided in this title."

A decree to be final must dispose of the whole merits of the case, and leave nothing for the further consideration of the court. An order is final when it affects a substantial right and determines the action. An order is interlocutory which dissolves an injunction when the same is an incident of the action, and the substantial rights of the parties involved in the action remain undetermined. When no further action of the court is required to dispose of the cause pending, it is final; when the cause is retained for further action, as in this case, it is interlocutory.—*Kelly* v. *Stanbury*, 13 *Ohio*, 408. A writ of error lies only to a final judgment or order of the District Court, or board, or tribunal.—*Kelly* v. *Hunter*, 12 *Ohio*, 216; *Herf* v. *Shultze*, 10 *Ohio*, 263.

An order or decree of a court which leaves the law or equity of the case, or some material question connected with the merits of the litigation or controversy, for future determination, is interlocutory, and not a final order or decree.—*Leaf* v. *Hewitt*, 1 *Ohio St.* 54; *Longworth* v. *Sturges*, 6 *Ohio St.* 143.

The motion to dismiss the proceeding in error in this cause must be sustained.

Motion sustained.

Meredith v. Kennard.

1. VERDICT. A verdict which finds two inconsistent facts, is void, and cannot be the foundation of a legal judgment.

2. ——. The verdict must respond to all the material issues between the parties.

3. ——. Cases may occur, when a general verdict alone will be a substantial response, to the issues taken by special matters set up in the pleadings.

4. CHARGE. When the court gives to the jury instructions not required nor called for by any evidence adduced in the cause, and it appears that such unnecessary instruction mislead the jury in its consideration of the facts of the case, the judgment will be reversed.

5. ——. If an erroneous charge be given on an abstract proposition, or on a point not in the case, and the verdict is supported by proof in the cause, the judgment will not be disturbed.

McCready, being insolvent, made a deed of assignment of all his property to Meredith, in trust for his creditors. He was largely indebted to Kennard shortly before he made the assignment. Thomas P. Kennard, a brother and attorney of the creditor, applied to McCready to secure his debt. After considerable negotiations, McCready gave to the attorney three notes for $1,000 each, made by McMurphy to McCready's order, and by him indorsed. The attorney having delivered these notes to his principals, they retained the same, and at the same time proceeded to enforce their debt by judicial process. Thereupon, the assignment was made, and Meredith, as assignee, brought this action. It was brought as an action of replevin for the possession of the notes. But the sheriff, not having obtained possession of the property on the writ, the action was prosecuted for damages. It was tried to a jury which returned a verdict for the defendants, upon which judgment was accordingly entered. This petition in error was brought to review the proceedings.

G. W. Doane and *E. Wakely*, for plaintiff in error.

I. The verdict was unwarranted by the evidence.

II. The instructions excepted to, ought not to have been given, because there was no evidence to predicate them on.

III. The verdict did not find upon the issue of property. *Swain* v. *Ross*, 4 *Wis.* 150; *Rouge* v. *Dawson*, 9 *Id.* 246; *Bemus* v. *Beckman*, 3 *Wen.* 673; *Van Benthuysen* v. *De-Wit*, 4 *John.* 213; *Dale* v. *Kennedy*, 38 *Ill.* 282; *Hewson* v. *Saffin*, 7 *Ohio*, 587.

IV. The value of the property was proven, but there was no opposing evidence. Even if no value had been shown, there should have been a verdict for nominal damages.

The demand was clearly proven. Hence, the verdict was unsupported by the evidence, unless the jury were justified in finding that the notes were the property of the defendants. We rest upon the oral argument, and the perusal of the record of the court, that this was most clearly not shown; but, on the contrary, that the notes passed to the assignee as McCready's property.

Redick and *Briggs*, for defendant in error.

I. All the allegations of the answer are admitted by the failure of the plaintiff to file a replication.

II. The record shows that the defendants sold to McCready a large stock of goods with which he opened a store at Decatur, Nebraska, and that he was indebted for the goods. Some time afterward McCready concluded to sell the store to one John McMurphy, and consulted the Kennards in relation to the sale, and it was agreed and understood between the Kennards, McMurphy and McCready, that if the store was sold to McMurphy, the proceeds of the sale were to be turned over to the Kennards, to discharge so much of their claim against McCready. The sale was made, and these three notes were taken in

payment therefor, and were indorsed by McCready and delivered to the Kennards, together with his own note of $1,000, leaving a small balance due the Kennards on the books, which McCready promised to pay in a few days. McCready failing to come up and settle the balance, as he had promised, Kennard tried to abandon the settlement and tendered back the notes, and brought suit on the original account against McCready. McCready refused to accept the notes, and at that time was in failing circumstances, and immediately thereafter made an assignment of all his effects to said Meredith. When that had been done, he demanded of the Kennards the three notes in question, which they refused to give. We say we had a right to the possession of the notes.

1. It was originally agreed that the proceeds of the sale of said store were to go towards the liquidation of the claim of the Kennards against McCready.

2. We tendered the notes back, and he refused to accept them.

3. McCready did not demand of them the notes until he had become bankrupt, and all his property had passed to the assignee, Meredith.

4. If we were not the owners of the notes, we certainly had the right of possession in them as security for our claim.

III. We think the cause ought not to be reversed.

1. There have been two jury trials already, and the question was one of fact and fairly passed upon.

2. The plaintiff failed entirely to prove the value of the property sought to be taken in the action, nor do we think that the court erred in its instruction to the jury. If there had been a settlement between McCready and the Kennards in regard to the notes, we were certainly entitled to a verdict; or if we only held to the notes as security for the claim, we were entitled to a verdict. But the record

does not disclose which view the jury took in passing upon the question.

4. It is a well settled principle of law that a court will never disturb or interfere with the verdict of a jury, if there is any evidence before them which would authorize the verdict, it being the province of the jury to determine the weight and sufficiency of the evidence.—*Hilliard on New Trials*, 340.

5. The verdict is in form and in every way regular, there being no statute requiring a special verdict in an action of replevin when it proceeds as one in damages.—*Hilliard on New Trials*, 107, 108.

6. While the jury might have found, by their verdict, that the defendant was the owner of the notes, or entitled to the possession, still it was wholly immaterial if the defendants were not liable to the plaintiff in damages.—*Hilliard on New Trials*, 107, 108, *and authorities cited.*

Mason, Ch. J.

This action was instituted by Meredith, as assignee of McCready, to recover possession of three promissory notes of one thousand dollars each, made by John A. McMurphy, payable to the plaintiff's assignor or his order, and by him indorsed. The defendants answered denying the special property of Meredith in the notes, denying that the assignment included them, and charged that the same were made for the purpose of hindering and delaying creditors, and plead property in themselves. The cause was tried to a jury, who returned a verdict as follows: "We, the jury in the above entitled cause, find for the defendant. B. A. Hall, Foreman." A motion was made by the plaintiff to set aside the verdict and for a new trial for alleged errors of law in giving and refusing instructions to the jury, to which exceptions were taken, and be-

cause the verdict was not warranted by the evidence, and because the verdict did not respond to nor determine the issues of fact joined in the pleadings, and was insufficient in law. Other errors and irregularities were also complained of. This motion was denied by the court and judgment rendered upon the verdict. All the evidence given at the trial is set out in the record. The notes in controversy were not taken on the writ of replevin and therefore not delivered to the plaintiff. This proceeding in error is brought to reverse the judgment of the court below. Let us first consider the question made upon the sufficiency of the verdict. Section one hundred and ninety-three of the Code, reads as follows: "When the property claimed (in replevin) has not been taken or has been returned to the defendant by the sheriff, for the want of the undertaking required by section one hundred and eighty-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for the want of the undertaking required by section one hundred and eighty-six, the plaintiff shall pay all costs made by taking the same." When the property claimed in the petition, affidavit and writ has not been taken, the action shall proceed as one for damages. If this action had been brought for the wrongful taking by the defendants, and converting to their own use the property mentioned in the writ and the answer filed, and trial had, and verdict rendered the same as in this case, it would not be pretended that the verdict was not responsive to the issues and entirely sufficient.

We are referred to *Hawson* v. *Saffin*, 7 *Ohio*, 587, which was replevin upon issue joined on pleas of *non detinet*, with notice of special matters and property in both defendants, and property in a third person. The verdict was for the defendants, as follows: "We, the jury, find for the defendants, and assess the damages at eleven hundred and

forty-one dollars and twenty cents. Here were two special issues each inconsistent with the other. The jury found the right of property in both defendants and in a stranger, and the repugnancy in the verdict was held fatal. A verdict which finds two inconsistent facts is void and cannot be the foundation of a legal judgment. The law, we think, is clear that the verdict must respond to all the material issues between the parties, *Dewitt* v. *Greenfield*, 5 *Ohio*, 227; *Powell* v. *Harper*, *Idem*, 259; *State* v. *Bank of Cincinnati*, 7 *Ohio*, 131. Cases may occur when a general verdict alone will be a substantial response to the issues taken by special matters set up in the answer, when all the facts set up in the answer are negatived by the general verdict. Is not this the precise case at bar? The defendants deny the property of Meredith in the notes and plead property in themselves. This general verdict responds to and finds all the issues made between the parties in favor of the defendants, and is such a finding as the statute contemplates when the property has not been taken on the writ of replevin. We think the verdict in form sufficient and responsive to the issues.

It is insisted by the plaintiff in error that there was no evidence upon which to predicate the instructions given. The court, at the request of defendant's counsel, instructed the jury as follows:

1. "If the jury find, from the evidence, that before the making of said assignment, there was a settlement made between Alexander McCready and Thomas P. Kennard, as the agent of the defendants, and that said Thomas P. Kennard had authority to make such settlement; and if the jury further find from the evidence, that as part of said settlement the notes in controversy in this suit were to be endorsed and delivered by McCready to said Kennard, with the agreement that they should be applied upon an indebtedness existing in favor of the Kennards, then the

ownership of the notes passed to the defendants, and became their lawful property.

2. The title and ownership of the said notes being once vested in the defendants, a mere tender back of said notes, not accepted by the said McCready, did not pass the title to the said notes to said McCready, and no acceptance or declaration of willingness to receive said notes back, made after the execution of said assignment, would have any effect to pass the title to John R. Meredith, assignee, without the assent of the defendants.

3. In this action it is incumbent upon the plaintiff to make out his title to the property claimed, before he is entitled to a judgment therefor; and before the plaintiff can recover in this action damages for said property (the same not having been taken by the sheriff), he is bound to show its value in proof; and in absence of proof of the value of the property, even if the jury find them entitled there to, they can render a verdict for only nominal damages.'

To the giving of each of these instructions, the plaintiff excepted, and the jury then retired to consider of their verdict, and afterwards returned into court without agreeing, and asking further instructions upon questions of law as to settlement with Thomas P. Kennard, when the court further instructed the jury as follows:

"If the jury believe from the evidence, that Thomas P Kennard had authority to make an absolute settlement of this debt, and he made such settlement, and as a part thereof took these notes in payment, the defendants would be bound by such settlement; and in ascertaining whether a settlement was made, the jury may inquire why was the individual note of McCready given? and may consider that fact as a circumstance to prove a settlement. If the jury shall find that the notes were placed in the hands of defendants as security for the debt from McCready to defend-

ants, and that they hold them for that purpose, the defendants have a right to the notes in this action."

The jury retired, and afterwards returned the verdict which is before set out. We fail to find any evidence in this record tending in the least degree to prove a settlement between McCready and the Kennards, or that Thomas P. Kennard ever effected any settlement, or settled the accounts between them, or was the agent for that purpose. There was then no evidence upon which to predicate the first instruction requested by the defendants. The second and third instructions were justified by the evidence, and we see no error in either of them. The same objection lies to the instructions given to the jury by the court, after the jury had returned and requested further instructions on the question of settlement, that lies to the first requested by the defendant. The charge of the court to the jury should always be founded on and applicable to the testimony; but if an erroneous charge be given to the jury on an abstract proposition or on a point entirely out of any case made by the evidence and the verdict can be supported by the proof made, the judgment will not be reversed.—*Creed* v. *Commercial Bank of Cincinnati*, 11 *Ohio*, 489; 1 *Indiana*, 406; 6 *Blackford*, 258; 7 *Blackford*, 272; 15 *Indiana*, 190; 8 *Blackford*, 240.

But when, as in this case, it plainly appears the court, in charging the jury, gave instructions not required nor called for by any evidence, and it appears that such unnecessary charge was calculated to, and we think did, mislead the jury in considering the facts of the case, the judgment ought to be reversed. The judgment is reversed and trial *de novo* awarded.

Reversed and remanded.

Phillips v. Dawley.

1. ORDERS CONFIRMING SALES. Until a sale of real estate, on execution or order, is confirmed, either party to the same, and also the purchaser may object thereto.

2. RIGHTS OF PURCHASER. A person by becoming a purchaser at a judicial sale, becomes a party thereto, and may both be compelled to complete his purchase, and is entitled of right to an order directing the sheriff to make the deed.

3. ATTACKING ORDER. The order confirming the sale cannot be collaterally attacked. It can only be questioned by a party in interest, and in a proper proceeding to review it.

4. SHERIFF MAKING DEED. If the term of office of the sheriff who made the sale, expire before he make the deed, his successor, and not his immediate successor only, but any other, may make the same.

This was a petition in error to an order made by the District Court for Burt county. The facts fully appear in the opinion.

MASON, Ch. J.

The record in this case shows the following facts: On the eleventh day of September, A. D. 1863, the plaintiff, Phillips, commenced a suit by attachment against Dawley, in the District Court of the then Territory of Nebraska. Certain lands were taken on the writ so issued, on the fourteenth day of September, A. D. 1863. On the seventh day of April, A. D. 1864, the plaintiff recovered a judgment against the defendant for the sum of six hundred and twelve dollars and twenty-four cents, and took an order of sale of the attached property. This order was regularly issued, attested the eighteenth day of April, A. D. 1864, and was executed by a sale of the attached premises on the sixth day of January, A. D. 1865, and the plaintiff became the purchaser. At the June term, 1865, of the District Court

of that county, the sale was confirmed by the court. The sheriff failed to make a deed of the premises to the purchaser.

On the fourteenth day of January, 1869, the plaintiff in the action and purchaser at the sale, filed his motion setting forth in substance the foregoing facts, with a description of the real estate purchased at the sale, and moved the court for an order upon the then sheriff directing the execution of the deed.

Upon this motion a rule was entered, that the sheriff, Elisha Crowell, show cause why the motion should not be allowed and be ordered to execute the deed. In return to said rule, he assigned twenty causes why he should not make the deed, and among others that he has purchased the land of the defendant in the action, Dawley, since the confirmation of said sale. Issues of fact were joined by the plaintiff on the assigned reasons of the sheriff in answer to the rule, except upon the allegation that he had purchased the land of Dawley since the confirmation of said sale. Upon the hearing, the court below discharged the rule on the sheriff and denied the motion. This ruling is assigned for error.

In sales upon orders of attachment and execution under our statute, the whole business is transacted by a public officer under the direction of the law and the guidance and superintendence of the court. Even after the sale is made, it is not final until a report is made to the court and it is approved and confirmed. Up to that time, either party may object to the report of sale, and the purchaser himself, who became a party to the sale, may appear before the court, and if any mistake has occurred may have it corrected. The purchaser, therefore, becomes a party in interest and may represent and defend his interest, and if he acquiesces in the report he is deemed to adopt it and is bound by a decree of court confirming the sale. He may

be compelled by the process of the court to comply with the terms of his purchase, and on the other hand the sheriff who makes the sale is by law required and in duty bound to make a deed to the purchaser after the confirmation and order to that effect. Our statute requires the court on the return of an execution showing a sale of land, if satisfied after carefully examining the proceedings of the officer, that it has been made in all respects in conformity with the provisions of the title of the statute relating to executions against the property of the judgment debtor, to make an entry on the court journal to that effect, and order that the officer make to the purchaser a deed of the lands and tenements sold.—*Revised Statute, page* 478, *sec.* 498 *Code.* The court in this case found the sale regular and confirmed the same. The purchaser was, therefore, entitled of right to an order directing the sheriff to make the deed.

The order confirming the sale could not be attacked collaterally. Elisha Crowell was a stranger to this sale; he could not be heard to question its regularity in this collateral manner. The order confirming the sale entitled the purchaser to a deed, and its regularity could only be questioned by a party in interest in a proper proceeding for the review of final orders and judgments.

In the case of *Hill* v. *Kliny*, 4 *Ohio*, 135, when a return was made on a *venditioni exponas* by the sheriff, in December, 1810, that he had sold certain lands previously levied upon and the sheriff who made the return having died, this return at the December term, 1812, was, on motion of his administrator, ordered to be so amended as to state that the property was unsold for want of bidders; and at the February term, 1828, this order of amendment was rescinded, on motion of the purchaser, at the sheriff's sale in 1810, and an order made upon the sheriff to execute a deed. It was held that these proceedings were regular. When land is sold by a former sheriff, who makes no deed and his term

of office expires, the deed may be made by his successor, and it is unnecessary that it be his immediate successor.

We think, therefore, that the court erred in discharging the rule and denying the motion of the plaintiff, and an order should be issued that the judgment discharging the rule and denying the motion be set aside, and remanding this cause, with directions to the sheriff to make a deed to the purchaser of the land in respect of which the sale was confirmed at the June term, 1865.

Judgment reversed and cause remanded.

McDonald v. Penniston.

1. PRACTICE: *Appearance to summons in error.* An attorney of record in a cause in the District Court, may, when the cause is removed into the Supreme Court, enter therein the voluntary appearance of his clients, without the issue or service of summons in error.

2. ——: *Records in Supreme Court.* Transcripts of records of proceedings had in the District Court, when filed in the Supreme Court for the purpose of reviewing the action appearing thereby, must show when and where the court was held, its term, and the names of the judge and other officers present, and be duly authenticated by its clerk.

This was a motion to dismiss the petition in error. The facts fully appear in the opinion.

J. M. Woolworth, for the motion.

No counsel appeared to oppose.

MASON, Ch. J.

This action is brought into this court by filing a petition in error and the defendant entering a voluntary appearance to the action. The petition in error was filed May 28, A. D. 1870, and is indorsed as follows:

"We hereby waive the issuance and service of summons herein, and we hereby enter our appearance to this proceeding in error in the Supreme Court. Dated April 20, 1870.

Penniston & Miller, by *B. J. Hinman*, attorney for defendant in error."

The defendant in error now moves to dismiss this proceeding for the following reasons:

1. That no transcript of the record of the District Court is filed in this case.

2. No service of summons in error has been made.

3. The said transcript is not in form prescribed by the rules of court.

It was not necessary to issue or serve a summons, the defendants, by their attorney of record in the court below, having entered a voluntary appearance. Section 584 of the Code provides, that service of summons on the attorney of record in the original case, shall be sufficient in cases of error. If the service might be legally made upon him, we think he might waive the issuance and service of summons for his clients, which he did in this case.

Section 486 requires that the plaintiff in error shall file with his petition a transcript of the proceedings containing the final judgment or order sought to be reversed, vacated, or modified.

There is no such transcript filed with this petition in error. Copies of what seem to be the original files in the case below are attached to the petition in error. And there is no authenticated transcript of the record containing the final order or judgment sought to be reversed. There is a paper attached to the petition in error which, after reciting the title of the cause, etc., reads as follows:

"And now comes the plaintiff, by B. J. Hinman, his attorney, and makes proof that defendant was personally and duly served with a summons in said action, in which defendant was required to answer on the eleventh day of April, 1870, and the defendant having failed to appear and answer or demur to the petition of plaintiff in said action, wherein is claimed four hundred and sixty-eight dollars and twenty cents, the court finds that the plaintiff ought to recover of the said defendant the sum of four hundred and forty-eight dollars; it is therefore considered by the court that the said plaintiff recover of the defendant the said sum of four hundred and forty-eight dollars, and also his costs expended, taxed at seventeen dollars."

This is all that purports to be a record of any judgment, and it cannot be determined from this paper or any others attached to this petition in error, in what State or what

court, or when or where any of the things set out therein were had or done. The record should state facts sufficient to show when and where the court was held, the term, the name of the judge or judges and officers present, so the court above may know, from the facts set out, that the proceeding was had before a proper court. This is not done.

A record is the history of a cause from its commencement, the issuing of the original writ or filing the precipe, until final judgment is entered. Section 446 of the Civil Code defines how the record shall be made up in the following words: "The records shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court." Section 444 requires the clerk to make a complete record of every cause as soon as it is finally determined, unless such record, or some part thereof, be duly waived, and section 443 reads as follows: "All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted." The journal is one book and the record book is another. The statute requires the journal of the court to be kept, and an entry there is all that is indispensable to make an act of the court effectual. The entries in the journal are not any part of the complete record of the case.—1 *Ohio*, 268. The book is one of the records of the court containing a part of the necessary materials to make the complete record; when all is done to authorize the recording officer to record it, it is in law considered as recorded, although the labor of writing it in a book kept for that purpose has not been performed.—4 *Ohio*, 79; *Young* v. *Buckingham*, 485, 488; 18 *Ohio*, 535, 545.

There is no transcript attached to the petition in error, as by law required, and for this reason the motion to dismiss should be sustained.

Motion sustained.

Mills v. Murry.

1. PARTIES *to suits brought on choses in action.* The assignee of a chose in action is the proper and the only party who can maintain a suit thereon.

This was a petition in error to reverse a judgment rendered by the District Court for Douglas county, when Nebraska was a Territory. The facts fully appear in the opinion.

J. M. Woolworth and *C. H. Brown*, for plaintiff in error.

A. J. Poppleton, for defendant in error.

LAKE, J.

This cause was tried originally in the late Territorial District Court for Douglas county, and is brought here by proceedings in error to review the judgment of that court.

The plaintiff in error was the assignee of certain rents alleged to have accrued to one Ira Cook from the defendant, for the use and occupation of a lot in the city of Omaha. He brought this suit to recover a judgment therefor.

Upon the trial testimony was introduced showing the occupation of the premises by the defendant, the rental value thereof during his occupancy, and the assignment of the rents so accrued by Cook to the plaintiff.

The plaintiff also offered further testimony tending to prove a written assignment of said rents to himself by Cook. This was objected to by the defendant, who at the same time moved the court to exclude from the jury all testimony which had been given relative to the occupation of said lot by the defendant under Cook, the value of the use of the same, and the assignment of his claim for rent by Cook to the plaintiff, on the ground that by the law,

the plaintiff could not maintain an action therefor in his own name. The court sustained the objection and excluded the testimony for the reason stated, and the jury returned a verdict for the defendant. A motion for a new trial was subsequently made by the plaintiff because of the alleged errors of law in excluding said testimony, which was overruled and judgment entered on the verdict, to reverse which the case is brought here.

There is but one question presented in the record for this court to decide. Is a chose in action assignable under our law so as to vest in the assignee a right to maintain an action therefor in his own name?

We had supposed that since the adoption of our present Code of Civil Procedure this was not an open question, and that the action could *only* be brought by and in the name of the assignee, the person beneficially interested therein, save in certain excepted cases. Section 29 of the Code of Civil Procedure provides that, "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section thirty-two." But section thirty-two has no application to the case at bar. Similar provisions were incorporated in the Codes of Civil Practice of 1855 and 1857, and ever since the first organization of our courts it has been the uniform practice to bring suits on choses in action in the name of the assignee. Mills being the assignee of this claim for rent and the real party in interest, was entitled to bring the action for its recovery in his own name. It could not have been maintained in the name of Cook after the transfer of his interest therein by the assignment. The learned judge was evidently mistaken in his view of the law, and improperly excluded the plaintiff's testimony from the jury.

The judgment of the District Court is reversed and a trial *de novo* awarded.

Reversed and remanded.

Kittle v. Fremont.

1. PARTIES *to actions of public concern.* A common or public nuisance, if committed without lawful authority, can be remedied by a public prosecution instituted by the proper public officer, on behalf of the people.

2. ——: An individual who is specially injured by a common or public nuisance may maintain a suit to have the same abated.

3. ——: But a private person cannot maintain an action to abate a public nuisance unless he can aver and prove some special injury to himself.

4. LEGISLATIVE ACT APPROVING THE *alleged nuisance.* It is competent and proper for the legislature to validate the action of town authorities, in modifying the location of public parks, and such provisions operate to waive the ground of complaint of the public.

This was an appeal from a decree of the District Court for Dodge county. The facts appear in the opinion of the court.

E. F. Gray, for appellant.

The vacation of parks and closing of streets and alleys are not within the delegated powers of the trustees of towns in this State, as see *Nebraska Statutes of* 1855 *and* '56, *page* 41, *sec.* 4.

The trustees being ministerial officers created by statute, they can exercise no other or greater authority than is vested in them by the statute.—*Sedgwick on Statutes, etc., page* 466.

The legalizing act pleaded (see *Statutes of* 1861, *page* 117) is of that class of statutes called *Retroactive*, and is sometimes allowed to cure an irregularity in the election of officers and the like, but not to make valid what was in itself a nullity.—*Sedgwick on Statutes, etc., page* 198.

Besides this statute is scarcely definite enough to effect anything of itself, as to close this park, etc.

But were it sufficiently comprehensive for the purpose,

still if there ever was a dedication of this park, etc., either statutory, at common law or resulting from the entry and trust imposed by the United States upon the trustees of the town, neither the legislature or municipal authority of the town have any power to interfere with the use of the park, streets and alleys as intended by such dedication.—*LeClercq* v. *Town of Gallopolis*, 7 *Ohio Reports* (*part first*) 218–222. *Lake Front case, reported in Chicago Times, August 29th*, 1869.

Filing the plat was equivalent to recording.—*Nebraska Statutes of* 1855 (*first session*), *page* 162, *sec.* 4.

The recording of the acknowledgment after filing the plat, completes the dedication. *Nebraska Statutes of* 1855, 6, *page* 43, *sec.* 2, and it matters not though the land be government land.—*Nebraska Statutes of* 1855, 6, *page* 44, *sec.* 9. The certificate may be defective. *Sec.* 8, *page* 44, *of Nebraska Statutes of* 1855, 6, is only directory, and the certificate is not essential to a dedication.—*Sedgwick on Statutes, etc., page* 368.

The recording of the acknowledged plat was the act of dedication.—*Town of Lebanon* v. *The Commissioners of Warren county*, 9 *Ohio Reports, page* 80.

The act of Congress of May 23, 1844, provides that town sites may be entered in trust, and the sale of lots to be regulated by legislature of territory, and a further provision that any act of trustees, not in conformity with such rules, void.—*Brightly's Digest, page* 475, *sec.* 98 ; *same* 5 *vol. U. S. Statutes at large, page* 657 ; see *Nebraska Statutes of* 1857, *page* 133, *sec.* 2, as to sale of lots to pay expense of park, etc.

The town company went upon the land, under the presumed license and protection of the laws of the United States, (see *U. S. Statutes, act of* 22*d July*, 1854, *Brightly's Digest, page* 576, *sec.* 646 ; *U. S. Statutes, act May* 23*d*, 1844, *Brightly's Digest, page* 475, *sec.* 98, *and note*

A; same, page 473, *sec.* 83. Also, see *Clements* v. *Warner*, 24 *Howard*, (*U. S. Reports*) 394; *States* v. *Stanly*, 6 *McQuean*, 409, 5 *vol.*, *Opinions of Attorney General, page* 7; *Opinion of E. M. Huntington, made Sept.* 15*th*, 1841, *found in Estabrook's Forms, page* 234), with these guarantees that their possession would be reserved and title perfected. Such possession as the town company acquired, constituted an equitable title, which enabled the town company to make a valid dedication of the park, etc.—*Williams* v. *First Presbyterian Church in Cincinnati*, 1 *Ohio State Reports*, 478; *Barclay* v. *Howard*, 6 *Peters*, (*U. S. Reports*) 506; *City of Cincinnati* v. *White*, 6 *Peters*, 431, 433, 440.

And it will be seen too that in these Cincinnati cases the dedication depended upon statute; the mere act of platting and selling lots being the only acts of dedication.

Supposing the acts of the town company were so irregular that there was no statutory dedication, still there would be a common law dedication. See the Lake Front case above referred to.

Rogers, as chairman of the trustees of the town, received the patent of the town site in trust, as it was laid out on the plat; from the plat he received his authority, and is estopped from conveying the park represented upon it to individual uses.—See 3*d* v*ol. Washburn on Real Property, page* 70, *sec.* 7, *and page* 71.

The delegation of the trust to Rogers, and his sale of lots in pursuance of the trust by the plat, of itself works a dedication and brings this case within the rules laid down in the case of the *City of Dubuque* v. *Maloney*, 9 *Iowa*, 451.

The conveyance to the school and church corporations, defendants, being without authority no title passes.—*Angle and Ames on Corporations, sec.* 188.

The plaintiffs being owners of lots in and residents of the town have an interest in the park and other public grounds, which the courts may protect by injunction or enforce by

mandamus.—*The Trustees of Watertown* v. *Corden and Bagg*, 4 *Paige*, 510; *Brown* v. *Manning*, 6 *Ohio*, 305; *LeClercq* v. *Town of Gallopolis*, 7 *Ohio*, 221.

E. Wakely, for appellee.

I. The alleged "proprietors" who laid out the town, had no title to the land, and therefore could not make a statutory dedication of it.

At the time of the pretended "dedication" they were mere naked possessors. Having no title they could not convey or give one to the public.

The language of the statute that the plat and acknowledgement being recorded "shall be equivalent to a deed in fee simple from the proprietor," is inapplicable to the mere naked possession which the assumed proprietors had. They could not convey a fee, having none to convey.

They were *occupants* only. And the plat merely evinced a permission to the public to occupy the public places streets, alleys, etc. The occupancy by the public must be manifested by some actual and visible evidence thereof.

2. The attempted dedication was entirely insufficient as a statutory dedication.

The map or plat of the town was not recorded.

There was no proper certificate of the surveyor appended to the plat. The certificate did not show that the streets, alleys, public places, &c., had been staked off and marked.

The proof shows, beyond all denial, that the streets, lots, etc., *had not been* staked off at the time of filing the plat for record and for a long time thereafter.

3. There was a dedication of the old park, or acceptance of it by the public, by acts *in pais*.

The acts which show or tend to show a dedication to or acceptance by the public, are all referable to the park as it now is.

Prior to the change in its boundaries, by the resolution of the Board of Trustees, the original park existed only on paper. It was not used as a park. It was not separated by any visible boundaries or marks from the surrounding prairie, and was not distinguished from it. It was not even staked off. There was a prominent and main thoroughfare of travel from Fremont to the northern country running directly through it, and which was substantially a continuation of Broad street, now sought to be shut up. There was scarcely a building erected with any reference to it.

But soon after the change of boundaries, the present park was fenced, planted to shade and ornamental trees, and has ever since been used exclusively as a park.

The whole town has been built with reference to it. Fremont, then an insignificant hamlet of 200 or 300 inhabitants, has grown to be a flourishing town of 2,000 people. Its dwellings, its public buildings and business structures, have nearly all been located with direct reference to the park as now defined, and the streets as they now run.

All this has taken place not only with the assent but with the active sanction and public acts of the town authorities, and been acquiesced in by the public for eight years with no dissent or protest so far as appears until now.

Have not the inhabitants of Fremont a hundred fold more ground to insist on all these things as constituting a dedication to and occupancy by the public of the park with its present boundaries, than one or two individuals can prefer for going back to the old one?

4. The plaintiffs have no right to sue. They show no special damage to themselves. They sue only as a part of the public, and in the public right. This is the duty of the public authorities, not of individuals. This proceeding is analogous to one for abating a nuisance, which must be instituted by public officers. An individual sustaining

special damage may sue therefor; but he cannot sue in behalf of the public.

The plaintiffs own no property on the park, or on the streets affected by the change of its limits. This is necessary as the authorities show, to entitle them to sue.

5. So far as the public is concerned the legislative act ratifying the proceedings of the board is valid. The public is represented by the trustees of the town and the legislature, and may unquestionably release its right to a public ground. This power must reside somewhere. If it is not in the local authorities and legislative sovereignty combined, where is it? And by what acts or formalities can the public right be extinguished?

6. The public and the plaintiffs are estopped from proceeding against the church and the school district. The former, especially, was suffered to proceed with valuable and costly improvements upon the ground held by a title not controverted. Those who stand by quietly and suffer this to be done cannot afterwards object.

LAKE, J.

In the month of January, 1857, the plaintiff, Robert Kittle, together with several associates, known and acting as the Town Company, entered upon that portion of the public lands of the United States now included within the limits of the town site of Fremont, and surveyed and laid out a town with blocks, lots, streets, alleys, and a public square or park. By this survey and plat, the park, which is the subject of dispute in this proceeding, was located between Eighth and Ninth streets, running east and west, and F and H, running north and south through the town. Broad street, a wide and principal avenue, between F and H streets, was intersected by the park, which covered ground equal in area to two blocks, together with that

portion of Broad street upon which it was located. This was the condition of things until November, 1861, when the Board of Trustees of the town of Fremont conceived the idea of re-locating the park, by vacating all that portion thereof lying west of the east line of Broad street, and extending its boundaries east across F street, so far as to include block ninety-six. Up to the time of this change no improvements had been made upon the park. It was merely unimproved, vacant prairie ground. But very soon thereafter it was fenced, set out with shade and ornamental trees, and, in its appearance, began to indicate the use to which it was devoted. By this change Broad street was extended and opened through what was, until then, a portion of the old park ground. A new block of lots was carved out of that portion of the park lying west of Broad street. Portions of this new block have since been conveyed to the defendants, the Methodist Episcopal Church and School District Number One of the town of Fremont, for the purpose of erecting thereon a church building and school house. It further appears that since the re-location of the park, which act has been generally acquiesced in by the inhabitants of the town, the population of Fremont has increased from not more than two or three hundred to nearly, if not quite, two thousand souls; that the permanent settlement, building and business of the town have progressed and become established with direct reference to the park as it is now defined; that no objection has been interposed to this change by any person whose property fronts or borders upon the park, as originally or now established; that neither of these plaintiffs own any grounds adjoining the park, nor upon the streets affected by this change, nor are they shown to be affected to any greater extent, or in any other manner, than are all the rest of the inhabitants of Fremont. It further appears that subsequently to this action by the Board of Trustees, the legis-

lature of this State, in January, 1862, confirmed all and singular their acts in this behalf, and declared them to be valid in law.

The object of this suit is to enjoin the church and school district from erecting their proposed buildings upon the grounds so conveyed to them, and also to prohibit the town authorities from further incumbering the park grounds, as originally laid out, and to compel them to re-locate and establish said park and streets as they are designated upon the original plat of the town.

The magnitude of the interests involved in this controversy, and the disastrous results which would necessarily follow to a large number of the inhabitants of Fremont, should the prayer of the petitioners be granted, are sufficient reasons why the court should hesitate to grant it, and most certainly not until their right to such relief be very clearly established.

Several very interesting questions are presented by this record, which have been ably argued by counsel, but the views we take of the case relieve us of the necessity of noticing but one of them.

The plaintiffs sue on behalf of themselves and all others, the property holders of the town of Fremont. They do not pretend to have any interest in the subject matter of the suit, which is not common to all the other residents of the town, whether they be freeholders or not. The pretended grievance is one of general interest, and the question which we meet at the threshold, to be first determined, is, have they shown such an interest as will enable them to maintain this suit?

The pretended wrong of which the plaintiffs complain is the closing up of certain of the public streets and alleys, and the vacation of a portion of the public park. This is in the nature of a common or public nuisance, and if done without lawful authority, can be remedied by a public

prosecution, instituted by the proper public officer, on behalf of the people. So, too, could a suit be maintained by any individual of the town in his own right who is specially injured thereby. The rule in such cases seems to be well established that in the case of a public nuisance, where a bill is filed by a private person, he cannot maintain his standing in court unless he aver and prove some special injury to himself.—*City of Georgetown* v. *The Alexandria Canal Company*, 12 *Pet.* 91; *Smith* v. *City of Boston*, 7 *Cush.* 254; *Hale* v. *Cushman*, 6 *Metcalf*, 425; *Doolittle* v. *The Supervisors of Broome County*, 18 *N. Y.* 155.

The plaintiffs are simply resident freeholders of the town of Fremont. They have no real estate bordering upon the park, or upon either of the streets affected by this change. They have sustained no special damage by reason thereof, and a very large majority of the inhabitants are benefited thereby. They present themselves before the court in the character of volunteer champions of the public interests, and in its behalf challenge the officers of the town to meet them in the courts of justice to defend their official acts, which appear not only to have been in harmony with the expressed wishes of a large majority of the people, but acquiesced in by all the inhabitants for several years without objection. Under these circumstances we are most clearly of the opinion that the plaintiffs show no such interest in the subject of this suit, nor are they in such position, as to enable them to maintain this action.

We might safely stop here, but there is one other question of interest to the people of Fremont, to which it is not improper to give a passing notice.

It is, as has been urged, that the action of the town board in making this change was entirely without authority of law, and therefore void, and being void, the act of the legislature ratifying and confirming their acts, can have no

binding force or effect whatever. Now, without any reference to the effect, if any, of this confirmatory statute upon private rights and interests, we are quite clear that so far as the public are concerned, it was entirely competent and proper for the legislature to enact it, and that to this extent full effect must be given to its provision.

The judgment of the District Court is in all things affirmed.

Judgment affirmed.

Eaton v. Lambert.

1. SURETY. A surety paying a judgment recovered against himself and his principal, may, in an action brought by him thereon against his principal, recover what he has actually paid to satisfy the same, with legal interest and no more.

2. PARTIES. In an action brought upon a judgment against a principal debtor, in behalf of a surety who has paid off and satisfied the same, and taken an assignment thereof, the original plaintiffs are not proper parties.

The facts fully appear in the opinion of the court.

LAKE, J.

This cause comes into this court from the late Territorial District Court for Cass county.

The action was originally brought by one of the defendants in error, Charles Hasty, against the plaintiff in error, upon a transcript of a judgment rendered by the Court of Common Pleas of Lucas county, Ohio, on the 28th of June, 1847, in favor of Lambert and Edmonds, against said plaintiff in error and said Hasty, which judgment having become dormant, was revived by Lambert and Edmonds in said court, on the 12th day of December, A. D. 1864, in which judgment of revivor said Eaton was declared to be the principal debtor, and Hasty merely his surety for its payment.

In the original petition filed by Hasty, he alleges that on the 13th day of December, 1864, he paid to Lambert and Edmonds the sum of $1,146.24, in full satisfaction of the amount due on said judgment, and took from them an assignment of all their interest therein. To this petition Eaton filed a demurrer, on the ground that there was a defect of parties plaintiff, which was sustained, and thereupon an amended petition was filed, bringing in Lambert and Edmonds as parties plaintiff with Hasty. We fail to

see any good reason for sustaining this demurrer, but the judgment of the court was acquiesced in and the amend ment made. Although Lambert and Edmonds are made parties plaintiff in the amended petition, there is nothing to show that they have the least interest in the subject of the action. Nevertheless, an answer was filed by Eaton and trial had, with verdict in favor of Hasty alone against Eaton, for the full amount claimed. A motion for a new trial was made by Eaton, which was overruled, and a judgment rendered on the verdict in favor of all the plaintiffs, to reverse which the case is brought here.

The first error, in the order of their assignment, is that the court erred in the instructions given to the jury, which were as follows:

"That if the jury, from the evidence, either find that the judgment set up in plaintiff's petition * * has been assigned to said Charles Hasty by the said plaintiffs, George G. Lambert and William O. Edmonds, or that the said Charles Hasty has paid the amount due on the same to said Lambert and Edmonds, or their duly authorized agents, they will find for plaintiffs. In the former case he would be entitled to recover the full amount of the judgment. In the latter case he would be entitled to recover the amount he had paid, with interest," etc.

The record before us contains none of the evidence, consequently we are entirely uninformed as to what proportion of the entire judgment Hasty actually paid to satisfy it. It is, however, but reasonable to infer that it was something less than the whole amount due thereon, or this instruction would be absolutely meaningless. By his own showing Hasty was the surety of Eaton in this transaction, and, as such surety, he paid a certain amount to Lambert and Edmonds, "in full satisfaction" of this judgment, and thereupon took to himself an assignment in writing of all their interest therein. Under this state of facts the court

instructed the jury that Hasty was entitled to recover from Eaton the whole amount called for by the judgment, regardless of the sum paid to Lambert and Edmonds in satisfaction thereof. This instruction was erroneous and calculated to prejudice the rights of Eaton. The jury should have been told, under this state of facts, that Hasty was entitled to recover only so much as he actually paid, not exceeding the whole amount due on the judgment, with interest.

It is evident, from this record, that Lambert and Edmonds have no interest in this controversy and ought not to have been made parties plaintiff. The pleadings should be so reformed as to bring before the court those only who are necessary parties, to the end that the issues to be tried may be made just as simple and distinct as possible.

The judgment of the court below is reversed, and the cause remanded to the court below for a new trial, with leave to both parties to amend their pleadings.

Judgment reversed.

Wilson v. Richards.

1. ABSOLUTE CONVEYANCES *to be construed as mortgages.* A deed of real estate, absolute on its face, given to secure the payment of a sum of money, as between the parties, and all persons having knowledge of the purpose for which it is given, must be construed as a mortgage.

2. STATUTE OF LIMITATION: *Suits to redeem.* As against the right to redeem a conveyance absolute in its terms, but in fact a mortgage upon unoccupied land, the statute of limitations does not begin to run until tender of the money secured by the mortgage, and refusal to reconvey.

This was an appeal from a decree of the District Court for Otoe county. The facts fully appear in the opinion.

LAKE, J.

The testimony in this case proves that, on the 4th day of January, A. D. 1858, the defendant Hills, acting as the agent of Seth Richards, loaned to one Thomas L. Golden a bounty land warrant with which to enter the land, which is the subject of this controversy. Golden agreed to pay Hills for said warrant the sum of two hundred and eighty dollars, twelve months thereafter, and gave his note therefor. To secure the payment of the note, he conveyed said land to Hills, by a deed absolute on its face, and took back a bond for a reconveyance when the note should be paid. In June of the same year, Golden, by warranty deed, conveyed his equity of redemption to the plaintiff. In this deed there is a stipulation that she took the land subject to Hills' lien which she was to pay. Hills had actual notice of the plaintiff's purchase, and agreed to surrender the title to her upon being paid the amount of his claim. Seth Richards, being Hills' principal, and the real party in interest, was affected by this notice, and bound by whatever his agent had lawfully done in the premises. In November, 1859, Hills, for some purpose, executed to his principal, Seth Richards, a deed in fee. The latter, in October, 1868,

the land having become quite valuable, conveyed it by quit-claim deed to his nephew, John W. Richards, who, in his answer, claims to be an innocent purchaser without notice of the plaintiff's rights.

The testimony also shows that, before the bringing of this action and prior to the recording of the deed from Seth to John W. Richards, the plaintiff offered to pay to the former the whole amount due him and redeem the land, but this offer was refused.

Authorities need not be adduced to show that a deed of real estate, although absolute on its face, when given to secure the payment of a sum of money, as between the parties and all other persons having knowledge of the purpose for which it was given, must be construed as a mortgage merely. Section 29, chapter 43, of the Revised Statutes declares, "every deed conveying real estate which, by any other instrument in writing, shall appear intended only as a security in the nature of the mortgage, though it be an absolute conveyance in terms, shall be considered as a mortgage.

There can be no doubt, then, that the deed from Golden to Hills must be considered as a mortgage, and that Seth Richards, being the principal of Hills in the transaction, he can take no advantage of the plaintiff by obtaining a conveyance of the legal title from his agent.

As before stated, John W. Richards claims protection as an innocent purchaser, but there is nothing in the case to justify that claim. He occupies a very questionable attitude before the court. It is not shown that he ever paid a single dollar for the land, nor that he even knows of the existence of the deed which Seth Richards made to him. The deed is not shown to have been out of Seth Richards' possession, except during the time he left it with the county clerk for record. He has observed a studied silence in this controversy, and the meagre showing that is made

falls far short of clothing him in the garb of an innocent purchaser, and he must be regarded as the mere tool of Seth Richards in his unjustifiable attempt to cheat the plaintiff out of this land.

But one other point needs be noticed. It is insisted, with much earnestness, that this action cannot be maintained by reason of the statute of limitations, approved February 12, 1869. By this act "an action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of action shall have accrued." This act is amendatory of section six of Title II. of the Code of Civil Procedure, which was in force when the note given to Hills by Golden fell due; in which the bringing of such an action was limited to twenty-one years, and it is insisted by the plaintiff that this and not the act of 1869, governs this case. There is certainly quite a conflict of authorities on this point, but it is wholly unnecessary to enter into an examination of them.

We think there was a misapprehension in the court below, as well as by counsel, as to the time the right of action accrued.

It must be borne in mind that this land during most, if not all the time since its entry, has been wholly unoccupied, and that until about the month of June, 1869, no tender of the money for which it was mortgaged had been made, nor had there been any refusal to reconvey.

Under this state of facts we are of the opinion that the statute did not commence to run until the tender of the money and the refusal to reconvey took place.

The judgment of the court below is in all things affirmed.

Judgment affirmed.

Redgrave v. The Baptist Church.

1. PRACTICE: *If notice of appeal* from a judgment be served upon the successful party and the clerk not until thirty days have expired from the rendition of the judgment, they are ineffectual to give the Supreme Court jurisdiction.

This is a motion to dismiss an appeal.

D. Gantt for the motion.

LAKE, J.

A motion is made by the plaintiffs to dismiss this case on the ground that the notice of the appeal was not served within the time limited by the law regulating appeals to this court.

It appears that final judgment was rendered in the District Court on the 20th day of January last. The notices of the appeal were served upon the clerk and plaintiff respectively, on the 20th and 21st of the following May.

These notices were clearly insufficient to give this court jurisdiction. They ought to have been served within one month from the rendition of the judgment appealed from. *Sec.* 675 *Code R. S. Nebraska.*

The appeal must be dismissed.

Motion sustained.

Holmes v. Boydston.

1. PRACTICE: *Depositions* taken in a cause instituted by one plaintiff with whom others are afterwards joined, may be read in evidence, if applicable to the case, after the amendment as to parties.

2. EVIDENCE: The owners of a mill, in their contract for the erection therein of the machinery, agreed to have their building ready for setting the same up by a certain day, and the parties furnishing the machinery agreed to have it up by a day also limited. The owners not being ready when they were required to be, and thereby greatly delaying the work of putting the machinery in, were not permitted to show what their mill would have earned from the time the machinery was to be in, had it then been ready to run.

3. ——: *The value of services* cannot be shown by proof of what was paid therefor, but only by proof of what they are worth.

4. DAMAGES *for breach of a contract* or machinery, sustained by reason of furnishing imperfect articles, cannot be shown by proof of what the party to whom the same were furnished actually paid for replacing them with such as the contract required.

5. ——: ——. The true rule is, the difference between the value of the machinery furnished and what it would cost to replace the same with such as was demanded by the contract.

6. CHARGE TO JURY: *Unsupported by evidence.* It is error for the judge to instruct the jury that they will not find for a party a certain sum claimed by him, unless the claim therefor has been assigned to him, when there is no evidence whatever of any assignment.

This action was originally brought in the District Court for Otoe county, by Arba Holmes, against Boydston and Heth, defendants, upon a contract entered into by the parties, whereby Holmes, Gould & Co., agreed to furnish the material and put up the machinery in a mill for defendants, for the sum of five thousand five hundred dollars. To the petition of the plaintiffs the defendants filed an answer. While the cause was in this situation depositions of witnesses were taken.

On the 23d of September, 1869, the defendants moved the court for an "order requiring Delos N. Gould and Ed.

ward Powell, who were members of the late firm of Holmes, Gould & Co., to be brought into court and made parties to the suit, for the reason that a complete determination of the controversy of the questions involved and at issue in this cause could not be had without the presence of said Gould and Powell as parties to the suit." The motion was sustained by the court; and at the December term, 1869, on motion to the court, leave was granted plaintiff to amend the petition and to make Gould and Powell also parties plaintiff with Holmes. December 27th, 1869, the new petition was filed, making Holmes, Gould & Powell parties plaintiff. This petition set forth the substance of the contract, alleged performance on the part of plaintiffs therein, claimed for extra work, and showed that the delay in the time of performance was occasioned by reason of the failure of performance on the part of the defendants of conditions precedent to be performed on their part and alleged non-performance on part of defendants, and asked judgment for the balance, to wit: For $1,887.31 balance on contract, and $436.45 for extras, making in the aggregate $2,323.76 claimed to be unpaid and due to plaintiffs. January 5th, 1870, defendants filed their answer to this petition, to which answer a replication was filed. The issues being thus joined at the same December term, the cause was tried before a jury who rendered a verdict in favor of plaintiffs for $1,747, upon which judgment was rendered.

On the trial the depositions taken in the cause when Holmes stood on the record as the sole plaintiff, were read under the defendan'ts objection.

A motion for new trial was made by defendants and overruled by the court. They thereupon brought this petition in error.

I. N. Shambaugh and *John H. Croxton*, for plaintiffs in error, among other points argued the following:

III. The evidence offered by defendants as to the extra hauling and boarding of plaintiff's hands by the defendants, should have been admitted. The contract entitled defendants to pay for the same. The court erred in its construction of the contract. Construction of contract is in favor of covenantee.—*Marvin* v. *Stone*, 5 *Cow.* 781; *Waterman on New Trials*, 824.

IV. The evidence offered by defendants as to the value of the use of the mill from the time it ought to have been completed until it was turned over to them, ought to have been admitted; also the evidence as to the damage of defendants by reason of the mill not being completed according to contract.

These were not speculative profits, but direct damages sustained by the plaintiff's failure to complete the mill according to the contract.—*Sedgwick on Damages*, 225 *d. note* 2, 233, *note* 1, 14 *Barbour, N. Y.*, 611; 2 *Md.* 597; 8 *Exch.* 401; 1 *Smed.* 622.

V. The defendant's objection to the question asked by plaintiffs of the witness Boydston, on cross-examination, as to his conversation with Hayward, should have been sustained. Such evidence was collateral, immaterial and irrelevant to the issues and could not be made the ground of contradiction.—*See* 1 *Greenleaf on Evi. sec.* 449, *and note* 6, 1. *Starkie on Evi.* 189 *and notes.*

VI. The court erred in admitting the evidence of the witness Hayward, to contradict the answers of Boydston, on cross-examination. The plaintiffs having interrogated Boydston upon a matter which was collateral, immaterial and irrelevant to the issues, they were bound by his answers and could not bring witnesses to contradict him.—*See* 1 *Greenleaf on Evi. sec.* 449, *and note* 6. 1 *Starkie on Evi.* 189 *and notes.*

VII. The evidence of Pinney was improperly admitted. It does not appear when he saw the mill.

VIII. The first and second instructions given by the court on motion of the plaintiffs, were manifestly erroneous. The first instruction assumes a fact which was denied by all the witnesses on both sides. The measure of damages laid down in the second instruction, was erroneous.—*Sedgwick on Damages*, 225, *note* 2, 233, *note* 1; 14 *Barbour*, (*N. Y.*) 611; 8 *Exch.* 401; 1 *Smed.* 622; *Hopkins* v. *Lee*, 6 *Wheaton*, 109.

IX. The fourth and fifth instructions asked by defendants should have been given. They laid down the law correctly. The instructions substituted by the court were erroneous. The contract required the plaintiffs to furnish all machinery and complete the mill without extra charge.

The seventh instruction asked by defendants was correct and should have been given as asked. The qualification added by the court assumes a fact which was not proved and which was denied by all the witnesses.

The eighth instruction asked by defendants should have been given. The qualification added by the court was not supported by any evidence.

There was no evidence that the item of $40, claimed to be due, Powell had assigned to the plaintiffs.

D. Gantt and *C. W. Seymour*, for the defendant in error.

The first and second errors assigned, relating to the admission in evidence of the depositions of Stewart, Bradford & Gould, are based alone on the objection that "because the same were not taken in this cause." As the filing of the amended petition is not the commencement of another action, but is a continuance of the same cause, relating to the same subject matter, the fact is clear that these depositions were taken in this cause. And no objection to their admission, except the one made in the court below, can now be interposed.—*Wesley* v. *Noonnan*, 31 *Miss.* (2 *Geo.*), 599.

It seems that a deposition in a former cause, relative to the same question between the same plaintiffs and a co-administrator of the defendant, is evidence.—*Bondereau* v. *Montgomery*, 4 *W. C. C. R.*, 186; See also *Carpenter* v. *Graff*, 5 *S. & R.*, 162; *Vincent* v. *Huff*, 8 *Id.*, 381; *Smith* v. *Lane*, 12 *Id.*, 80.

And again, if the evidence is sufficient without the deposition, it is immaterial whether it should have been suppressed or not.—*Billingsley* v. *State Bank*, 3 *Ind.*, 375.

II. The third error assigned for sustaining the objection to the question asked Shatzer as to when plaintiffs were ready to go out to work; the fourth and eighth to rejecting evidence as to board of hands and hauling; the fifth for rejecting evidence of profits of the mill, and the sixth rejecting evidence of damages sustained by defendants; all involve a proper construction of the written contract, and the proper application of principles relating to performance and non-performance of contracts, and therefore the questions raised by these errors will be considered together. By the terms of the contract, Boydston & Heth agreed "*to have the mill in which the machinery is to be erected complete with floors and stairs ready for the machinery by the first day of July*, 1868,"—"*to do, or have done,* ALL THE HAULING *of said machinery*, and such lumber as is necessary for the completion of the work,"—and "*to board the hands that Holmes, Gould & Co. furnish to put up said machinery while at work at the mill.*" The defendants did not have the mill ready with floors and stairs complete by the first of July, 1868, for the machinery, and did not have the same complete until some three months thereafter, and therefore utterly failed to perform the conditions precedent on their part to be performed, before the erection of the machinery by the plaintiffs.

Powell testifies that he "went out to the mill to put up the machinery for the first time on the 22d of August, 1868

The roof of the mill was not then on. The defendants said, after I should have been at the mill, that it wasn't ready at that time; they were disappointed about getting their stone work done. Before they had the floors and stairs all in, I think I must have been there a month or more; they didn't have the work all done at the time of the election in October, 1868."

Holmes testifies that "about the middle of July, 1868, Boydston was in the office, in Nebraska city, to get hands to put up the building of the mill."

Douglas testifies that at the time, to wit, the 22d of August, 1868, "the lower floor was partly laid, the upper was not," and Shatzer says "the first floor was then half laid."

A party cannot take advantage of the non-performance of a condition in a building contract where such non-performance has been caused by himself, and he cannot complain of the other until he has put him in default by a substantial performance on his own part, and then a failure or refusal to perform on the part of the other. The defendants having so utterly failed to have the mill ready for the machinery until a long time after the time stipulated, they cannot take advantage of their failure, and therefore the court properly rejected evidence of damages by reason of delay in the completion of the work.—*Smith* v. *Gugerty*, 4 *Barb.*, 614–21; *Brown* v. *Cannon*, 5 *Gilm.*, 174; *Resinger* v. *Cheney*, 2 *Id.*, 84; *Chapin* v. *Norton*, 6 *McLean*, 500; *Caldwell* v. *Blake*, 6 *Gray*, 402–9; *People* v. *Bartlett*, 3 *Hill*, 571.

Where a piece of work is to be done within a certain time, if the contractor fail to do it within the time, but is permitted to go on and finish it afterward, and the work is accepted, he may recover the price.—*Cassady* v. *Clarke*, 2 *Eng.*, 123; *Conrad* v. *Griffey*, 11 *How.* 479; *Taylor* v. *Williams*, 6 *Wis.*, 363; *Nebbe* v. *Braughn*, 24 *Ill.*, 268.

The construction of a written agreement is the province of the court, and it is of the utmost importance that this province should not be invaded by the jury.—*Welch* v. *Dawson*, 3 *Binn.* 337; *Denison* v. *Wertz*, 7 *S. & R.* 372; *Moore* v. *Miller*, 4 *Id.* 279; *Collins* v. *Banbury*, 5 *Iredell*, 118.

The defendants agreed to do all the hauling and board the hands of plaintiffs. This is the contract, and the defendants are bound by it. Hence, the court properly rejected evidence of cost of hauling and boarding of hands. "Parties making a written memorial of their contract have implicitly agreed that in the event of any misunderstanding, that the writing shall be referred to as the proof of their act and intention."—2 *Phil. Ev. top p.* 558, *margin* 665, *note* 494.

In the construction of agreements, the plain, ordinary and popular sense of the terms used should prevail.—*Hawes* v. *Smith*, 3 *Fairf.* 429; see *Rogers* v. *Kneeland*, 13 *Wend.* 120; *Mason* v. *Rowe*, 16 *Verm.* 525.

3. The seventh, ninth, eleventh and twelfth errors assigned, all relate to the admission of evidence to discredit the witneesses, Hincks and Boydston, and therefore the questions raised by these errors will be considered together. Great latitude of examination may be permitted, arising from the disposition, temper and conduct of the witness, which can only be regulated by the discretion of the court.—*Lawrence* v. *Barker*, 5 *Wend.* 305; see *Atwood* v. *Weston*, 7 *Conn.* 66–70; *Cameron* v. *Montgomery*, 13 *S. & R.* 132; *Starks* v. *People*, 5 *Denio*, 108; *Newton* v. *Harris*, 2 *Seld.* 346; *Brewer* v. *Crosby*, 11 *Gray*, 29, 30; 2 *Phil. Ev. top page* 812, *margin* 971.

The judge, in the exercise of a sound discretion, may rightly permit an inquiry of a witness for reasons why he did certain acts, to test his accuracy of recollection, or affect his credibility, although it may have no direct tendency to

support or disprove the issue.—*Gloucester* v. *Bridgham*, 28 *Maine* (5 *Shep.*) 60.

May discredit a witness on the ground that he has corrupted, or endeavored to corrupt, another person to give false testimony, or done acts to procure persons corruptly to give evidence, etc.—2 *Phil. Ev. top page* 804, 5, *margin p.* 962.

"On the trial of Lord Stafford (7 *How. St. Tr.* 1400), proof was admitted on part of the prisoner, that Dugdall, one of the witnesses for the prosecution, had endeavored to suborn one of the witnesses to give false evidence.—2 *Phil. Ev. top page* 811, *margin* 971 ; *Morgan* v. *Frees*, 15 *Bark.* 352.

4. The thirteenth assignment is an alleged error of the court in giving the instructions to the jury asked by plaintiff; and the fourteenth is for refusing to give the fourth, fifth, seventh and eighth instructions in the form asked by defendants.

The first instruction asked by plaintiffs, submit wholly to the jury the finding of a certain state of facts, and that if the jury believe from the evidence such state of facts exist, then they may find the defendants accepted the mill and machinery and discharged the plaintiffs from all claims of damages.—*Taylor* v. *Williams*, 6 *Wis.* 363.

The substance of the second instruction, asked by plaintiff, is embodied in the first instruction asked by defendants, and the court answered both correctly.

The fourth, fifth and eighth instructions asked by defendants refer exclusively to extra work for which plaintiffs claimed pay. Although the slight modifications of these three instructions were correctly made by the court, yet, if it were otherwise, the defendants have no ground of complaint, for the verdict clearly shows that the jury gave plaintiffs no allowance for extra work.—*Huff.* v. *Earl*, 3 *Ind.* 306 ; *Eldred* v. *Hazlett*, 38 *Penn.* 16.

And it is not necessary that a proposition put by counsel should be answered in the words; nor is it error that several points were answered collectively, relating to the same matter.—*Geiger* v. *Welsh*, 1 *R.* 349; *Coates* v. *Roberts*, 4 *Id.* 100.

The modification made by the court to the seventh instruction, asked by defendants, was proper, and submitted wholly to the jury to find whether or not, upon the evidence, the defendants accepted the machinery and workmanship thereon, in fulfillment of the contract; and that if the jury were satisfied from the evidence such was the fact, it would bar any claim by plaintiffs for damages, for defects, or inferiority in the machinery or workmanship. This was a fair submission of facts to the jury.

CROUNSE, J.

On the trial of this cause in the District Court several exceptions were taken to the allowance and rejection of testimony, as well as to the charge of the judge, the more important of which will be noticed.

The action was originally begun by Arba Holmes as sole plaintiff. Subsequently, by an order of the court, Gould and Powell, his former partners, were joined with him. Exception was taken to the reading of certain depositions taken in the cause prior to this amendment as to parties. The testimony taken in the depositions related to the value, in Chicago, of certain burr millstones, and was alike applicable to the case after, as well as before the amendment, and there is no substantial reason for excluding the deposition.—*Vincent* v. *Conklin*, 1 *E. D. Smith*, 203.

By the terms of the written contracts under which the plaintiffs below were to furnish the machinery and place the same in the mill building of the defendants, the defendants were to have the building completed, with floors and

stairs ready for the machinery, by the first day of July, 1868. When the plaintiff closed his testimony, it clearly appeared that the building was not completed till long after the first of July, and that the defendants told Powell, one of the plaintiffs, that they were disappointed in getting the stone work done; that the plaintiffs had been there a month or more before the stairs and floors were all in; that not until the election in October was the mill building completed, and that the plaintiffs got the mill running by the last of November, or the early part of December. With a view, no doubt, to establish a claim for damages for not having the machinery put up by the first day of September, as required by the contract, among the first questions asked by defendant's counsel was: "When were Holmes, Gould and Powell first ready to go to Boydston and Heth's mill with the machinery, and to put it up?" The question was excluded, the court remarking that under the contract and the case as then made, the defendants were not entitled to show what the mill might have earned if running by September first. This is correct. As the case then stood, the defendants appeared as having failed to complete the building till a month or more after the time even when the machinery was to be in. They could not lay a foundation for damages upon their own wrong. Until this showing of the plaintiffs was questioned and a foundation laid, the court was right in excluding this testimony as immaterial.

Further along in the course of the trial the defendant's counsel asked of a witness: "What would have been the average profit of that mill, fully completed according to contract, from the first day of September to the time when the plaintiffs turned the same over to the defendants?" This was objected to "as incompetent on the ground that it was immaterial under the written contract offered in evidence." With the written contract requiring Holmes,

Gould & Co. to have the machinery in running order by September first, I cannot understand the force of this peculiar objection. But as being wholly immaterial in the case as then made, the court correctly rejected it, as it might have done on his own motion in accordance with the prior holding, the case remaining unchanged with respect to the defendant's failure to have the mill in readiness for the machinery.

Again, a witness is asked by the defendant's counsel, "How much did the defendants pay for hauling machinery from the mill back to the foundry to be finished and completed, and for hauling the same from the foundry to the mill the second time?" The question was asked for the purpose of establishing a claim for extra hauling done by the defendants in taking a shaft back to the foundry to be refitted. Without stopping to inquire whether, under the plain terms of the contract, wherein they obligate themselves "to do or have done all the hauling of said machinery as is necessary for the completion of the works," they could make any charge for extra hauling, it is enough that proof of what they may have paid for such hauling is not evidence of its value. They could, in any event, claim only what such labor was worth. What was paid might be more or less. The court was right in sustaining the objection.

The same may be remarked in reference to the ruling upon the question as to "what was paid" for extra board of hands employed in replacing imperfect machinery.

I come next to consider the exceptions taken to the charge of the court. The first is to that which instructs the jury: "That the rule of law in the assessment of damages in such cases as the present one, is the difference between the value of the machinery actually put in by the contractors, and the actual cost of the new machinery put in place of it." Here the court erred. No question was

made by the defendants upon the trial below against the right of the plaintiffs to recover anything because of a failure to comply with the contract, but it was contended that such recovery must be subject to any claim for damages arising from the failure of the plaintiffs to put the quality of machinery and work in, and do it in the time required by the contract. It was the duty of the jury first to determine whether the machinery and work put in the mill was such as was called for by the contract. Finding that it was not, as seems clearly to appear from the evidence, it is wholly immaterial what character or grade of machinery the defendants' fancy or circumstances, may have led them to substitute in the place of it. The court improperly assumed that the machinery put up by the defendants was such as the plaintiffs were obligated to put in in the first instance. This was a matter for the jury to determine, and even had they concluded that it was such as the plaintiffs were to put up under their contract, they were improperly directed to consider its "actual cost" in reaching their estimate of damages. The use of the words "actual cost," in this particular connection, would imply what was paid for the new machinery. That, as I took occasion to remark in another connection, is not conclusive evidence of its value. It may have been more or less than its true value. The defendants were entitled to have such machinery and work as was specified in the contract. If that which was put in was inferior in respect to that, the defendants were entitled, as damages, to the difference between its value and what it would cost to replace it with such as was demanded by the contract. The court was asked by the defendant's counsel to charge that "if the jury believe from the evidence that the item of forty dollars, charged in plaintiff's bill of extra work for elevator, &c., was a private matter between Powell and these defendants, then these plaintiffs cannot, in this action, be

allowed said item." The court refused to charge as requested simply, but added thereto, "unless the same has been assigned to these plaintiffs." Powell, one of the plaintiffs testifying in behalf of plaintiffs, enumerated this among other items for extra work. Subsequently he testified that "the forty dollar item in our bill of extras for pulleys, &c., for elevator, was a private bill between defendants and me alone." This is all the testimony relating to this item, one of the plaintiffs testifying that the bill for this item was due to him individually, with no word of evidence showing that he had ever assigned or transferred this claim to the plaintiffs. Under this proof it was the duty of the court to give the instruction as asked, and without qualification. To qualify it as was done, was calculated to raise an inference in the minds of the jury that the account had been assigned. It is error for the judge to leave the jury to infer a fact not warranted by the evidence.—12 *Barb.* 84; 1 *Wend.* 50; 1 *Denio*, 583; 15 *N. Y.* 524.

Without noticing other points raised, the judgment must be reversed and a new trial had.

Reversed and remanded.

ORR v. ORR.

ORR v. ORR.

1. PRACTICE: *Time to answer supplemental bill.* Under the practice in Chancery, before the equity and common law jurisdiction were blended by the amendments of the Code of Civil Procedure, a defendant had until the fifth Monday after notice of the filing thereof, to answer a supplemental bill.

2. ——: *A decree,* entered before that time had elapsed, without the defendant's consent, and before he had plead to the supplemental bill, reversed.

This was an action for a divorce, brought in the District Court for Dacotah county, under the Chancery Code, prior to the late repeal of that Code and the amendments of the Code of Civil Procedure, conforming the common law and equity practice the one to the other. The bill was filed on the 18th of October, 1866; and proceedings were had thereon not material to be farther stated, than that the defendant appeared thereto and defended the same. On the 31st of October, 1867, the complainant filed her supplemental bill, alleging new matter and praying additional relief, and gave notice thereof to the defendant. By section 741 of the Chancery Code, he had until the fifth Monday following the service of the notice, to take proceedings against the supplemental bill. But on the 2d day of December following, the cause was brought on to be heard, as the decree expressed it, upon "the pleadings and proofs," and "was submitted to the summary decision of the court." The decree awarded a divorce with $15,000 alimony. The defendant appealed to this court.

A. J. Poppleton and O. C. Tredway, for the appellant.

J. M. Woolworth, contra.

LAKE, J.

It is unnecessary here to notice but one of the several questions argued at the bar.

The original petition was filed on the 18th of October, 1866, but issue had not been joined thereon, when on the 31st day of October, 1867, the complainant filed her supplemental petition, alleging new and material facts, and in addition to her former prayer, praying alimony in the sum of fifty thousand dollars.

On the 22d of November following, without the assent of the defendant, and before he had plead to the supplemental bill, the case was tried and a decree entered in favor of the complainant.

By the law regulating the practice in such cases, the defendant had until the fifth Monday after the service of notice upon him of the filing of the supplemental petition, to plead thereto. This right he was denied. Sec. 741, Code.

The record shows that on the 2d of December following, and within the time fixed by the statute therefor, the defendant did file exceptions to the supplemental petition, but they could not be heard, nor could they be of the least avail, were they ever so well taken, for the case had already passed to final judgment. The decree of the court below must be vacated and the cause remanded for further proceedings.

Reversed and remanded.

Morgan v. Larsh.

1. PRACTICE: *Records for Supreme Court.* The court reflects upon the habit of inserting in the transcripts of the proceedings in the District Court, papers filed therein upon which no question is made, because the same unnecessarily incumber and burden the records of the Supreme Court.

2. ——: *Objections to testimony* must be stated at the time the same is offered, or they will be disregarded in this court.

3. LIABILITY OF OFFICERS: A Probate Judge issuing an attachment and a sheriff executing it, are not liable for the taking and conversion of property thereon if they have acted in good faith.

On the 19th day of May, 1868, Morgan sued Larsh, Hail who was sheriff, and Dickey, who was probate judge of Otoe county, together with their sureties on their official bonds, in the District Court of that county.

The action, as stated in the petition, was for damages for the taking by Larsh, Hail and Dickey, of the plaintiff's horse, and converting it to their own use. The transcript filed here contains the precipe, and the summons with its endorsement. On the 15th day of June, 1868, Larsh, Dickey and Hail answered, and their sureties demurred to the petition.

The demurrer was sustained by the court, and the plaintiff had leave to file an amended petition. This he did on the 23d of July, 1868. In this pleading the plaintiff, besides the usual allegations in such cases, stated that Hail took the horse under color of a pretended writ of attachment, issued by Dickey, which he had no authority to issue, and which was void on its face. The defendants, who were the official sureties, moved to strike this amended petition, but the record does not clearly show what action the court took on the motion.

On the 10th day of August, 1868, the sureties demurred to the amended petition, and on the 14th day of August

the other defendants filed their separate answers. On the 25th of September the court sustained the demurrer, and the sureties of both the sheriff and the judge were dismissed out of court with their costs. On the 25th of October, 1868, the plaintiff filed his reply to the answers. On the 9th day of January, 1869, a trial was had which resulted in a verdict for the plaintiff, and on the same day a motion for a new trial was filed. This motion was sustained by the court and a new trial ordered, which took place at the March term, 1869, and resulted in a verdict and judgment for the plaintiff. A bill of exceptions was filed. The errors complained of, consist mostly of rulings of the court upon the the admission and rejection of evidence, but the grounds of objection are not stated.

It appears, from the bill, that the plaintiff in this suit was indebted to Larsh, and resided in Seward county, nearly one hundred miles from Nebraska city. That he came to this place with his horses and wagon to purchase provisions, when Larsh sued him in attachment before Dickey as probate judge of Otoe county. Dickey issued the writ and Hail, who was sheriff of the county, served it by taking the horse. In his affidavit for the attachment, Larsh swore that Morgan lived in Seward county, and had a horse in Otoe county which he was about to remove therefrom in order to place it beyond Larsh's reach as his creditor, and to hinder delay and defraud his creditors. The affidavit, writ and other proceedings were regular in form, and there was no evidence showing that the officers did not act fairly in the usual discharge of their duty. The charge of the court is stated in the opinion.

The defendant brought this petition in error to reverse the judgment.

MORGAN v. LARSH.

I. N. Shambaugh and *C. W. Seymour*, for plaintiff in error.

T. B. Stevenson, for defendant in error.

LAKE, J.

The record in this case is unnecessarily cumbrous. At least three-fourths of it is of no possible use, and should have been left out. The issues tried in the District Court were formed by an amended petition, answer and reply. No errors are alleged before issue joined; consequently the original petition, motion, demurrers and answer thereto, are useless for any conceivable purpose, and yet we find them all copied at full length here. So, too, of the record of the first trial. We have here the motion for a new trial which was granted, covering five or six pages, but no question is presented for the consideration of this court upon which it can have the least bearing. It is not only entirely useless, but does positive injury, and makes the examination of the case exceedingly tedious. I would suggest greater care in this respect, that the records of this court may not be burdened unreasonably.

A great many errors are alleged in the admissions and rejection of testimony. But we cannot regard them, for the reason that no ground of objection is stated. Where an objection is made to the admission or rejection of testimony the reason should be given.

But there was no evidence in the case to support a judgment against the defendants, Dickey and Hail. The record shows that Dickey, as probate judge, issued an order of attachment in a case brought before him by the defendant Larsh, of which he had jurisdiction. Hail, as sheriff, executed the order by taking the plaintiff's horse, which is the subject of this action. Both Dickey and Hail acted in good

faith, and if there was any fault anywhere it was on the part of Larsh alone, in sueing out the order.

The instruction given by the court to the jury was erroneous. The jury were told that "if the evidence satisfied them that the defendants took the plaintiff's horse, they should find for the plaintiff the value of the horse as shown by the evidence." Now this implied that there was evidence before the jury, from which they might find that the defendants, Dickey and Hail, had wrongfully taken and converted the plaintiff's horse. But there was no testimony which even tended to prove this fact. Again, the defendants, Dickey and Hail, requested the court to instruct the jury in substance that there was no evidence which would warrant a verdict against them. This was refused, and in this refusal there was error prejudicial to the defendants, Dickey and Hail. The instruction should have been given as prayed. For these reasons the judgment of the District Court must be reversed, and a trial *de novo* awarded.

Reversed and remanded.

Kruget v. The State.

1. PLEADING IN CRIMINAL CASES: *The caption.* It is not necessary to follow, literally, the form for the caption to an indictment given in section 166 of the Criminal Code, and the omission of the word "chosen" is not fatal.

1st. The word "selected," coupled with the word "chosen," in the form, signifies the same.

2d. The omission of the word "chosen" is of no practical importance, and therefore section 170 requires it to be disregarded.

2. ——: *Assault with intent to kill.* An indictment for an assault with intent to kill, should charge that the assault was made with a weapon, which *ex vi termi ni* imports a deadly weapon, or charge specifically that the weapon was deadly.

3. ——: *Assault and battery.* An indictment alleging an assault of such a character as would support a charge of assault with intent to kill with a wooden club, if it described the club as a deadly weapon, will, when those terms are omitted, support a conviction for assault and battery.

4. PRACTICE IN CRIMINAL CASES: *Arraignment.* In misdemeanors it is sufficient if the counsel of the prisoner waives the reading of the indictment. and enters the plea of not guilty without a formal arraignment.

5. ——: *Jury separating.* It is not error in a case of misdemeanor for the court, having instructed the jury, as is usual, not to hold conversation with any person, to permit the jurors to separate for their meals.

This was a writ of error to the District Court for Washington county. It was an indictment under which the plaintiffs in error were convicted. The facts sufficiently appear in the opinion.

Geo. W. Doane, for plaintiff in error.

I. On overruling motion to quash.

1. That the caption is not such as is prescribed by law, in this—that the description of the court is not that of any court created or recognized by law.—*R. S. of Nebraska*, *p.* 630; 1 *Chitty's Crim. Law*, 327.

2. That the commencement of said indictment is not in

the terms prescribed by the statute in this—that it is not stated that the grand jurors were "*chosen*, selected and sworn," as required by law.—*R. S., p.* 630.

3. That the weapons with which the assault is charged to have been committed, are not of themselves deadly weapons, and are not described in the indictment as such.

4. That the indictment is indefinite and uncertain, in the description of the manner of the commission of the offense as given in said indictment. The holding and using of the weapon is a necessary averment in the indictment, and being such must be technically exact. The charge here is that each of the defendants held a club, either in the hands of the other defendant or of both the defendants. The indictment does not set forth the facts and circumstances which constitute the offense, but only the conclusion of law from the facts to be proved, as that the assault was made "with no considerable provocation and an abandoned and malignant heart."—1. *Whar. Crim. Law*, 372; 1. *Arch. Crim. Prac.* 85, 283, 285, 291.

5. That the indictment does not charge that the assault was committed "feloniously." It is admitted that this indictment is framed under the last clause of section 49 of the Criminal Code, which declares the offence to be a felony.

6. That the word "feloniously" is essential to all indictments for felony.—*Whar. Crim. Law, sec.* 364, 366, 375, 399, 402, 1285; 1. *Arch. Crim. Prac.*, 85, *note*; 1. *Chitty's Crim. Law*, 282, 283; *Bacon's Abr.* 68, 70, 90; 2. *Hawkins' Pleas of the Crown*, 25, *sec.* 10; *State* v. *Gore*, 34, *N. H.* 514; *Commonwealth* v. *Morse*, 2 *Mass.* 130.

7. That there is no averment of the time and place when and where the weapons were held and used, and it is only by inference that the charge is made that the assault was made with weapons. "Time and place must be attached

to every material fact averred."—1 *Whar. Crim. Law, sec.* 261; 1 *Arch. Crim. Prac. p.* 85, *and note.*

8. That figures in the statement of the date of the offence vitiate.—*State* v. *Deckins*, 1 *Hayw.* 406; *State* v. *Lane*, 4 *Iredell*, 114; *Finch* v. *State*, 6 *Blackf.* 533; *State* v. *Seamons*, 1 *Greene's Iowa*, 418; *Chambers* v. *The People*, 4 *Scam.* 351; *Berrian* v. *State*, 2 *Zabriskei*, 9; 1 *Leading Crim. Cases*, *p.* 500; *State* v. *Voshall*, 4 *Ind.* 590.

II. That the defendants were put upon their trial without first having been arraigned.—1 *Chitty's Crim. Law*, *marg. p.* 414.

That an arraignment is necessary, and its omission a sufficient ground for reversing the judgment.—1 *Chitty's Crim. Law*, 419; 4 *Black. Com.* 375. Our statute has only so far changed this as to provide in section 188 of the Criminal Code, that a plea may be entered either in person or by counsel; but that this was not intended to dispense with the arraignment, is shown by the last clause of the same section, providing the manner in which the omission of the record of the "arraignment and plea" may be supplied; showing that both were essential, and that only the plea was provided to be made by counsel.

III. That a verdict and judgment for a misdemeanor, cannot be sustained under an indictment for felony.—*Whar. Crim. Law*, 388, 400; *Commonwealth* v. *Roby*, 12 *Pick.* 496; *Same* v. *Newell*, 7 *Mass.* 244; *Ross* v. *State*, 1 *Blackf.* 391.

That our courts are governed by the common law in that respect.—*Rev. Stat. sec.* 195, *p.* 637.

There should be something like legal precision and accuracy required in criminal pleading; and when an indictment is so defective in every *material* respect, as well as in its formal parts, as that not even the nature of the offence charged or the manner of its commission are technically, clearly, or even *grammatically* stated, it would

seem that the liberality of construction so often extended to criminal pleadings and pleaders, could hardly, in justice to the proper legal rules of construction, reach so far as to cover the defects of this indictment and the judgment rendered under the finding of the jury under it.

E. F. Gray, for the State.

The indictment charges the assault with intent to commit a felonious bodily injury, while the assault itself is not charged to have been committed feloniously. At common law this assault was only a misdemeanor. Our statute makes it a felony, but gives it no penalty or characteristic of a felony to make it differ from what the offence was at common law. There is no disability or exclusion from any privilege incident to this offence, either in the trial or resulting from the judgment and conviction, different from what there would be if called a misdemeanor by the statute.

The word felony is then meaningless within the act, and would be meaningless in charging the assault.

Besides, section 166 of the Criminal Code provides that every indictment shall be deemed sufficiently technical which states the offence in the terms and language of the statute. This offence is stated in the language of the statute creating it. The refusal of the court to quash an indictment cannot be assigned as error.—1 *Archbold*, 723.

But were the indictment had for the assault with intent to commit a bodily injury, assault and battery is well charged within the indictment, and the same is good for the assault and battery, if not for the other.—*The People* v. *White*, 22 *Wendell*, 176; *Stewart* v. *The State*, 5 *Ohio*, 241; 1 *Archbold Prac.* 606, *note* 1.

As to the conviction for an offence less than that charged. The assault and battery being charged in the indictment, and being one of the constituents of the full offence and

of the same generic character, the conviction is good.—*The People* v. *White*, 22 *Wend.* 177; 24 *Vermont*, 129; 9 *Iredell*, *N. C.* 415; 2 *Arch. Prac.* 74.

LAKE, J.

William and Christopher Kruger were convicted in the court below, of assault and battery, and each sentenced to pay a fine of one hundred dollars and costs. The case is brought here by proceedings in error to reverse this judgment.

It is objected that the court erred in overruling the motion to quash the indictment, and herein it is claimed that the commencement or caption is defective because of the omission of the word "chosen," which we find in the form given in section 166 of the Criminal Code. But it must be borne in mind that the statute does not require a literal copying of this form into the indictment, but that it shall be substantially followed. We think there has been a substantial compliance with the requirements of this section, which is all that is necessary. The caption states that the grand jurors were "selected." The words, "chosen" and "selected," have, in common parlance, the same meaning. They are used synonymously by the best writers and speakers. The use of both words in this connection would be mere tautology, a needless repetition of the same thing. Section 170 of the Criminal Code, provides that "no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offence charged in the indictment." Now I am quite certain that if the commencement to this indictment be tested by the sensible rule here laid down, it will bear the closest scrutiny. The omission of this word is of no importance, and I can but regard the objection urged as merely technical.

It is further objected, as ground of error, that the defendants were put upon trial without being first personally arraigned and required to plead to the indictment. It is admitted that they were in court when their counsel, as is usual in cases of mere misdemeanor, on their behalf, waived the reading of the indictment and interposed the plea of not guilty. This the law permits.—*Sec.* 188 *of the Criminal Code.*

The record shows, that during the progress of the trial, the jury were permitted to separate for the purpose of getting their meals and during the adjournments for the night. In this it is insisted there is error. There is no force in this objection. There is no law requiring the jury to be kept together at such times, nor has it been the practice in this State to do so, on the trial of any but capital cases. It is left entirely to the discretion of the judge presiding at the trial of cases not capital, to determine whether the circumstances surrounding it, are such as require the jury to be kept together until the termination of the trial; and where there is no abuse of this discretion shown, it will not be interfered with. It is usual in case of separation, however, for the court to instruct the jury to hold no conversation with any person respecting the case, which admonition was given by the court below, and this caution is usually considered a sufficient protection against any outside influence.—*McCreary* v. *Commonwealth*, 5 *Casey*, 323; 1 *Bishop Crim. Prac.* 824.

It is true, doubtless, that the indictment in this case was based upon the second clause of section 49 of the Criminal Code, that by it the pleader intended to charge the defendants with a felonious assault, which would subject them to a fine, if guilty, not exceeding a thousand dollars and imprisonment in the county jail for a term not longer than one year. This was undoubtedly the theory of the case, as understood by both parties. This indictment is mani-

festly inadequate to sustain a conviction for a felony under the clause of the section last referred to. It fails to charge that the weapons, with which the defendants made the assault, were "deadly." Neither does the name given to them import that they were such. They are simply described as being "weapons, to wit, wooden clubs."

To warrant a conviction under this section, it is necessary that the assault be made with a deadly weapon, or with some other instrument or thing, fitted to occasion death, in the use to which it is put. If it be a weapon, the ordinary name of which, *ex vi termini*, imports its deadly character, *e. g.*, a sword, gun or pistol, it would be sufficient to describe it by such name; but in other cases the instrument or thing used, should be described and charged to be deadly. But while this indictment is defective for the purpose intended, it is good as one for an assault and battery merely. It charges an unlawful and outrageous beating of the prosecuting witness by the defendants, with much greater minuteness than is necessary in an indictment for an assault and battery. Whatever is charged that is unnecessary may be disregarded. Mere surplusage in an indictment will not vitiate it. And therefore where it alleges facts which constitute a misdemeanor it is good for that offence, although it state other additional facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony. Although an attempt was thus made to charge the defendants with a felonious assault, we have before remarked that by omission of the word "deadly" in the description of the weapons used, it falls short of charging that offence, but does charge an assault and battery of which the jury found the defendants guilty. The indictment is ample to sustain the verdict rendered.

There is no complaint urged here that the evidence given upon the trial did not fully warrant the conclusion

at which the jury arrived. It is true that one of the grounds of the motion in arrest of judgment is that the verdict was against the weight of the evidence, but none of the testimony is preserved and this point cannot be considered at this time. I infer, however, that the evidence fully sustained the verdict and that no injustice was done to the defendants.

Several other errors are assigned, predicated however upon the insufficiency of the indictment to charge a felonious assault. Holding the indictment good for assault and battery disposes of these objections, and renders a further consideration of them unnecessary.

No substantial error appearing in this record, the judgment of the District Court must be affirmed.

Judgment affirmed.

Brewer v. Otoe County.

1 CONSTITUTION: *Act impairing the obligation of a contract.* An act requiring the holder of a county warrant, which is over due and which draws ten per cent per annum interest, to present the same at the treasury, and surrender it and take in its place bonds drawing interest at seven per cent per annum, payable at a distant day, is unconstitutional.

2. STATUTE OF LIMITATIONS: *County warrants.* The Statute of Limitations does not limit the time within which proceedings to enforce the payment of county warrants shall be instituted.

1st arg. The whole course of legislation shows that county warrants are not within the statute.

2d arg. The cause of action upon a county warrant does not accrue when the warrant is issued, but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed.

3. ACTIONS ON COUNTY WARRANTS. A petition alleging the issue and non-payment of a county warrant, without alleging that there is money in the treasury for its payment, or that time has elapsed for the collection of the money by taxation, will be dismissed without prejudice.

This was a petition in error to the District Court for Otoe county.

Brewer filed in that court his petition as follows:

I. The said Francis B. Brewer, plaintiff, complains of the said Otoe county, defendant, for that the said defendant, on the fifth day of February, 1863, at Nebraska city, in said county, by and through the then Board of County Commissioners of said county, made and drew her certain warrant in writing of that date, on the treasurer of said county, signed by one George T. Lee, the then president of said board, and countersigned by one E. W. Botsford, clerk of said county, and attested by the seal of said county being thereto affixed, and then and there delivered the same to the said plaintiff, and thereby and therein ordered and directed the said treasurer to pay to the said plaintiff, by the name and description of Francis Brewer, or order, the sum of eighty-one dollars and forty-eight cents, out of

any money in the treasury of said county not otherwise appropriated. That afterwards, and on the 7th day of January, 1863, the said plaintiff presented said warrant to the treasurer of said county, and demanded payment of the same, which was refused by said treasurer, who thereupon, on the day and year last aforesaid, endorsed on said warrant, "presented and not paid for want of funds," That said defendant has not paid said sum of money nor any part thereof to the said plaintiff, although often requested so to do, and that there is now due to the said plaintiff from the said defendant, on the said warrant, the said sum of eighty-one dollars and forty-eight cents, which he claims with interest thereon from the 7th day of January, A. D. 1863, at the rate of ten per cent per annum, a copy of which warrant is hereto attached as follows:

$81.48. Fiscal year, A. D. 1862. No. 471.

Treasurer of Otoe county, pay to the order of Francis Brewer the sum of eighty-one dollars and forty-eight cents, out of any money in the treasury not otherwise appropriated.

GEORGE T. LEE,
President Board County Com.

Given under my hand and the seal of said county, this 5th day of January, 1863.

E. W. BOTSFORD,
County Clerk Otoe County, N. T.

Endorsed on back as follows:

"Presented and not paid for want of funds."

J. W. PEARMAN.

JANUARY 7, 1863.

The petition contained fourteen counts of the same character. To the petition a general demurrer was filed as follows:

"The said defendant demurs to said petition of said plaintiff, because it does not state facts sufficient to constitute a cause of action."

This demurrer was overruled by the court, and defendant required to answer. The defence set up by the defendant appears in the opinion of the court. To the answer a demurrer was filed, which was sustained, and judgment given for the plaintiff for the amount claimed, to which defendant excepted. It then brought the case here by petition in error.

S. H. Calhoun and *John H. Croxton*, for plaintiff in error.

This action is founded on seventeen Otoe county warrants, of different denominations, issued by the commissioners of Otoe county, drawn on the treasurer of said county and ordering him to pay the amounts therein specified, to the payees, out of any money in the county treasury not otherwise appropriated, without naming any time at which the same should be paid, and without naming any rate of interest.

They were, however, presented to the treasurer, and by him indorsed, "presented and not paid for want of funds," By statute, from this indorsement, the warrants would draw ten per cent per annum interest.

These warrants bear date, and were presented as follows.

No. 471, January	5, 1863.	Presented January	7, 1863.
No. 291, January	7, 1861.	Presented Sept.	16, 1861.
No. 289, January	7, 1861.	Presented Sept.	16, 1861.
No. 1105, Feb'y	6, 1860.	Presented March	5, 1860.
No. 289, Sept.	24, 1858.	Presented Feb'y	28, 1859.
No. 1043, Feb'y	6, 1860.	Presented April	5, 1860.
No. 1045, Feb'y	6, 1860.	Presented March	5, 1860.
No. 1037, Feb'y	6, 1860.	Presented April	5, 1860

No. 1061, Feb'y	6, 1860.	Presented March	5, 1860.
No. 437, January	5, 1863.	Presented January	7, 1863.
No. 453, June	3, 1861.	Presented Sept.	16, 1861.
No. 955, Dec.	23, 1859.	Presented Dec.	28, 1859.
No. 157, March	6, 1858.	Presented Dec.	3, 1858.
No. 1059, Feb'y	6, 1860.	Presented April	5; 1860.
No. 1044, Feb'y	6, 1860.	Presented April	5, 1860.
No. 1047, Feb'y	6, 1860.	Presented March	5, 1860.
No. 1048, Feb'y	6, 1860.	Presented March	5, 1860.

On the 10th of February, A. D. 1865, an act to provide for the funding of the warrants of Otoe county was approved, by which it was enacted that all Otoe county warrants bearing date prior to January 1, 1864, and outstanding, should be presented and bonded before the first day of December, 1865, or be forever barred, and that such warrants should thereafter be null and void. Said bonds to be payable on or before January 1st, A. D. 1873.

These warrants amounting, as alleged in defendant's petition to $411.40, were not presented and bonded under said funding act. Nor were said warrants ever presented for bonding under said act, and consequently no refusal was ever given by said county to bond them. Therefore, by the terms of said act, said warrants are barred, and defendant had no cause of action.

But plaintiff claims that the legislature of Nebraska did not possess the power and authority to enact such an act, that such act impairs the obligation of the contract made by the county with the payees of said warrants, and, therefore, said act is unconstitutional and void under section 10 article 1 of the Constitution of the United States.

In considering this objection the question naturally occurs, What is the nature and scope of this law?

Is it a limitation law, which affects only the remedy?

Or does it go further; and while it authorizes and directs

the county to take up the orders or warrants outstanding against it, and to give in the stead thereof its bonds, does it, in any way, affect the essence of the contract, existing between the county and the warrant holder, to the injury of the latter?

We claim that this act is a limitation law, because in section 5 it provides that payment of all Otoe county warrants or orders which were issued prior to January 1, 1864, and which were not presented and funded, or bonded, in accordance with its provisions prior to the first day of December, 1865, should be forever barred.

This section does just what all limitation acts do. It fixes the time in which payment of the debts in question may be enforced, and beyond which the same shall not be enforced by the courts. In other words it fixes the time in which parties interested may seek and obtain a remedy, and beyond which the remedy will be denied.

But it is claimed that the words "and such warrants shall, after the said first day of December, A. D. 1865, be null and void," in said section 6, render the entire act void. If the section had read that "all the warrants, &c., issued prior to January 1, 1864, and which was not presented, funded or bonded prior to the first day of December, 1865, shall, after the first day of December, A. D. 1865, be null and void," there might be some force in the objection. But such is not the section under consideration.

As has already been shown, this section, down to the word "barred," is simply a limitation of the time in which the warrant holder could have enforced payment of his warrants, and then it proceeds with the words "and such warrants shall, after the said first day of December, A. D. 1865, be null and void," which words, if they mean anything in the construing of this statute, means that after said first day of December, 1865, the remedy of the warrant holder shall be denied, if he seek to enforce payment. To

give these words the meaning, force and effect claimed for them by plaintiff, would be to destroy the whole object and purpose of the act, which manifestly was to provide for the payment of the outstanding warrants of the county, by a given time named therein with interest on them.

Indeed, we think no violence would be done to the intention of the legislature if these words were considered to be surplusage.

The legislature may and can regulate and modify the remedy on contracts, may shorten or change the statute of limitation, without impairing the obligation of the contract.—*Sturges* v. *Crowningshield*, 4 *Wheat.* 122; *Bronson* v. *Kinzie*, 1 *How.* 311; *McCracken* v. *Haywood*, 2 *How.* 608; *State of Alabama* v. *Dalton*, 9 *How.* 522; *Bronson* v. *Newberry*, 2 *Doug.* (*Mich.*) 38; *Rockwell* v. *Hubbell*, 2 *Doug.* (*Mich.*) 197; *Tarpley* v. *Hamer*, 9 *Smedes & Marsh*, 310; *Bruce* v. *Skuyler*, 4 *Gilman*, 221; *Ruggles* v. *Keeler*, 3 *Johns.* 263; *King* v. *Dedham*, 15 *Mass.* 447; *Holbrook* v. *Finney*, 4 *Mass.* 566; *Call* v. *Hagger*, 8 *Mass.* 430. To the same point see Smith's Commentaries on Constitutional Law, sec. 254, 265 and authorities cited in ref. "A."—*Story on the Constitution*, *sec.* 1383.

Municipal corporations are subject to the operation of statutes of limitation in the same manner and to the same extent as natural persons.—*McKinney* v. *McKinney*, 8 *Ohio*, 594.

The legislature may change (the character of) the security by the substitution of one more beneficial.—*Holbrook* v. *Finney*, 4 *Mass.* 566; *Miller* v. *Miller*, 16 *Mass.* 59; *Burghardt* v. *Turner*, 12 *Pick.* 534.

The State legislature may impair a contract itself, but cannot impair the obligations of the contract.—*Ogden* v. *Saunders*, 12 *Wheat.* 213.

If to this it is objected that the act bars the warrants,

we reply that it bars them only as a statute of limitations bars them. And of this above.

I. N. Shambaugh, for defendant in error.

The defendant in error insists that no errors were committed by the court below in this cause, and relies upon the following points and authorities:

I. The plaintiff's amended demurrer to the defendant's answer was properly sustained by the court below. The answer sets up no legal or equitable defence.

II. The act of the legislature of the Territory of Nebraska relied on by the defendant below, was passed in violation of the 10th section of the 1st article of the Constitution of the United States, and is null and void.—1 *Kent's Com.* 449, 456 *and note* 1, 457, 461,.462 *and note B*, 463, 464; 6 *Cranch*, 87; 7 *Cranch*, 164; 9 *Cranch*, 43; 4 *Wheat.* 518; 8 *Wheat.* 1; 4 *Wheat.* 122. Smith on Constitutional Law, 248-259.—18 *Curtis*, 358; 10 *How.* 190.

III. The act of the legislature of Nebraska impairs the obligation of the contract. The county warrants were made, by a prior act of the legislature, a legal tender in payment of taxes. The act of February 10, 1865, was passed after the warrants were issued and required the holder to surrender his warrants and receive bonds, payable in eight years, and such bonds are not receivable in payment of taxes.—18 *Curtis*, 358.

IV. The statute of limitations does not apply to this case. County warrants are not embraced in the provisions of that statute. A county warrant is in the nature of a domestic judgment, and is not barred by the statute. The statute does not run in favor of a county against a judgment rendered by the board of county commissioners, and a warrant issued by the county in its corporate capacity.

LAKE, J.

BREWER v. OTOE COUNTY.

The defendant in error brought his action in the court below, to recover a judgment upon several warrants drawn by the county commissioners of Otoe county upon its treasurer, at various times between the 24th day of September, 1858, and the 5th day of January, 1863. To the petition the county filed a general demurrer which was overruled, but no exception taken thereto. Thereupon an answer was filed admitting the drawing of the warrants, but denying the liability of the county, for the reason that they were all rendered null and void by the provisions of the act of the late Territorial legislature, entitled "An act to provide for the funding of the warrants of Otoe county, approved February 10, 1865."

To all except the first three causes of action there was interposed the further defence of the statute of limitations, viz: that they did not accrue to the plaintiff within five years next before the commencement of the suit.

To the answer, Brewer filed a general demurrer which was sustained, and judgment thereupon rendered in his favor for the amount due on the several warrants sued on, to which ruling and judgment the defendant excepted.

Two errors are relied on to reverse this judgment.

1. That the court erred in sustaining the demurrer to the answer, and

2. In rendering judgment for the plaintiff when it should have been in favor of the defendant.

The questions presented are very important, involving as they do the constitutionality of the act of the legislature before referred to.

It is unnecessary here to decide whether the legislature, in an act authorizing a county to fund its indebtedness, can require the holders of its warrants, which are due, to surrender them and receive in lieu thereof its bonds payable several years thereafter. That the legislature is invested with any such power may well be doubted. But the act

before us does not stop here. It, in direct terms, provides that these warrants, which by the law of the land in force when they were drawn, bore interest at the rate of ten per cent per annum shall be exchanged, without the consent of the owner, for bonds payable on the first day of January, 1873, with interest at the rate of seven per cent per annum.

The effect of this would be to set aside and wholly annul a solemn contract which the county had made with one who had given it credit, and without his knowledge or assent to substitute another not only radically different in its terms but greatly to his prejudice.

Section 2 of the act provides that no bond shall be issued for a less sum than twenty-five dollars, so that the holder of a warrant for less than that amount would not have been entitled to a bond therefor, and yet by the sixth section of the act it is provided that "all warrants issued prior to January 1, 1864, which are not presented and bonded prior to December 1, 1865, shall be forever barred."

I must confess that if all this may be done, I can see no limit to the exercise of arbitrary, despotic power by the legislature over personal contracts. I cannot give my assent to so dangerous a proposition, and must deny its authority. I do not feel at liberty to concede to the legislature any such power, and am forced to the conclusion that the act in question violates one of the provisions of the tenth section of the first article of the Constitution of the United States, as well as the twelfth section of the first article of the Constitution of Nebraska, and therefore must be declared and held to be wholly inoperative as to these warrants and to furnish no defence to a recovery thereon.

The plaintiff, then, was under no legal obligations to present his warrants for bonding, nor is the county, by reason of his failure to do so, released from its obligation to receive them in payment of county taxes, or whenever the necessary funds are in the treasury to pay them on presentation, just

the same as if this act had never been passed. It in no wise releases the county from the obligation it assumed when the commissioners issued these warrants.

This view of the case would enable the court to dispose of it without considering the question raised by the plea of the statute of limitations, but as this is fairly presented in the record and is relied on by counsel, I will give it a brief notice.

Section 10 of title 2 of the Code provides that "an action upon a specialty or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years after the cause of action shall have accrued." This provision applies as well to actions where counties or other municipal corporations are parties as between private persons. The law recognizes no distinction in suitors, but is the same rule unto all.

But these warrants do not, nor was it the intention of the legislature that they should, fall within the operation of this act. When a demand or claim against a county is presented to the commissioners for settlement, they hear the proofs and determine whether it is one which the county is bound to pay, and the amount due thereon. In this they act judicially, and, within the scope of the authority conferred upon them, their decision is a judgment binding upon the county. If they decide in favor of the claimant an order is drawn upon the treasurer for the amount, designating the fund out of which it is to be paid. If there be money in the treasury belonging to the fund against which it is drawn, not otherwise appropriated, it is the duty of the treasurer to pay the warrant; but if there be none he must indorse upon it the fact of its presentation, and non-payment for want of funds, and the holder must wait for his money until such time as it can be raised through the means which the legislature provides for the collection of revenue. Nor can any action rightfully be brought on such

warrant until the fund is raised, or at least sufficient time has elapsed to enable the county to levy and collect it in the mode provided in the revenue laws.

That the legislature never intended that county warrants should be affected by the limitation act before referred to is evident, I think, from the whole course of legislation respecting them. As late as the 12th of February, 1866, it was enacted that "all debts heretofore incurred by the county commissioners of any county acting in good faith, and duly recorded at the time on their books, shall be deemed valid, and the county shall be held liable for the same." Chap. V, sec. 1, Rev. Stat.

Chapter IX, Section 1 provides that "all county orders *heretofore* drawn, or that may hereafter be drawn, by the proper authorities of any county, shall, after having been presented to the county treasurer and by him endorsed not paid for want of funds in the treasury, draw interest from said date at the rate of ten per cent per annum."

From these, as well as numerous other enactments of the legislature that might be cited, I have reached the conclusion that the plea of the statute of limitations cannot be successfully made against these warrants, and that whenever it can be shown that the funds have been collected out of which they can be paid, or sufficient time has been given to do so in the mode pointed out in the statutes, their payment may be demanded, and, if refused, legally coerced.

It only remains now to determine whether the judgment of the court can be sustained, whether the facts set forth in the petition constitute a cause of action. It states that the several warrants were drawn upon the treasurer, payable out of any money in the treasury not otherwise appropriated. This must be considered as a provision for their payment out of any money belonging to the general fund then in the treasury or which should be afterwards collected. The treasurer had no authority to pay them out of the road,

bridge or school funds, because they are drawn against neither.

It has been the constant practice, from the first settlement of our State, to anticipate both the general and special funds by drawing orders against them in advance of their collection. This practice has been repeatedly recognized by the legislature, especially in section two, chapter five of the Revised Statutes, which provides that "it shall not be lawful for any board of county commissioners to issue any warrant or order, on the county treasurer, for any sum or sums of money exceeding in the aggregate the amount said board have levied by tax for the current year."

Whoever deals with a county and takes in payment of his demand a warrant of the character of these, no time of payment being fixed, does so under an implied agreement that if there be no funds in the treasury out of which it can be satisfied, he will wait until the money can be raised in the ordinary mode of collecting such revenues. He is presumed to act with reference to the actual condition and the laws regulating and controlling the business of the county. He cannot be permitted, immediately upon the receipt of such warrant, to resort to the courts to enforce payment by judgment and execution, without regard to the condition of the treasury at the time, or the laws by which the revenues are raised and disbursed.

This leads us to the conclusion that there is no right of action shown by the petition, and that the demurrer interposed by the defendant should have been sustained and the action dismissed. For these reasons the judgment of the District Court is reversed, and the case remanded with instructions to dismiss the action without prejudice.

Judgment reversed and cause remanded.

Burley v. The State.

Per MASON, Ch. J.

1. PRACTICE: *Called terms: Records in criminal cases.* In a criminal case for felony, in which the indictment or other proceedings are had at a called term of the court, the record should show the request made by the county commissioners to the judge for the term, the order of the judge thereon, and the due publication of notice of the holding of the court.

2. ——: *Record in criminal cases* for felony should show that a venire for summoning the juries has been issued to the sheriff and been by him executed, or that the court, by its order, directed the summoning of the juries.

3. ——: ——. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict.

4. ——: *Waiving a right.* Nor can the prisoner waive his right thus to be present when on trial for a capital felony.

Per LAKE, J.

1. PRACTICE IN CRIMINAL CASES: Section 166 of the Criminal Code, as enacted while Nebraska was a Territory, providing that the indictment shall run in the name of "The Territory of Nebraska," is modified by the clause of the constitution which provides that it shall run in the name of "The People of the State of Nebraska."

2. ——: *Called terms.* It is not necessary that the record should show affirmatively that every step was taken to convene the court at a called term, in order to support the proceedings had thereat, providing enough appears to establish the facts.

3. ——: *Pleading.* A plea to the jurisdiction which only alleges conclusions of law, and not facts adverse to the jurisdiction, is not good.

4. ——: ——.—It is error to put a prisoner upon his trial before he has plead to the indictment.

5. ——: ——. But if the defendant plead "not guilty," and afterwards file his motion to quash and plea in abatement and they are determined, and the trial proceeds without a renewal of the plea of "not guilty," the presumption is that it, as first interposed, was not withdrawn.

6. ——: *Evidence.* It is error to refuse to permit, on cross-examination, a question as to his being intoxicated being put to a witness, who, on his direct examination, has testified to acts and declarations of the accused

and the deceased before the homicide, which tend to fasten guilt on the former.

7. ——: *Filling vacancies in juries.* It is error to fill vacancies in the grand jury from the list of persons summoned as petit jurors, and it is not material whether any injustice was thereby suffered by the prisoner.

This was an indictment for murder. Its caption was thus:

"THE STATE OF NEBRASKA, } ss.
Lincoln County, }

Of the November term of the District Court of the Third Judicial District, held in and for the county of Lincoln pursuant to appointment and notice of his honor L. CROUNSE, judge of said district, in the year of our Lord, 1868."

Attached to the record, but apparently not a part of the transcript certified by the clerk of the District Court, are the following papers: A copy of an affidavit made by Charles L. Jenkins, of the publication, for forty days prior to November 2d, 1868, in the Omaha Republican, a newspaper published at Omaha, of a notice given by "L. CROUNSE, judge Third Judicial District," that a term of court would be held at North Platte, in and for Lincoln county, commencing on the 25th day of November, 1868; a copy of the proceedings of the county commissioners of said county, ordering that Judge CROUNSE be requested to hold such term of court; an order made by Judge CROUNSE thereon that such term be held.

The record did not show that any venires for the grand or petit jurors had been issued or that the court had made any order that they be summoned, but recited that "thereupon O. O. Austin, sheriff of said county, made return of the following grand jurors as having been regularly summoned." It also showed that the persons thus summoned appeared, when seven were excused, and "a like number

from the list of petit jurors transferred to complete the panel of grand jurors." This indictment was returned on the 26th of November, 1868. On the 30th of the same month the defendant was arraigned and plead "not guilty," without prejudice to his right of interposing any other plea. He, on that day, filed his motion to quash the indictment which, after argument, was overruled. Thereupon he filed his plea to the jurisdiction, which was also overruled. The venue was then changed by the court to Dodge county.

The trial was had at a special term of the District Court for Dodge county, commencing on the 28th day of December, 1868. No plea of "not guilty" was interposed, except that mentioned above. The trial commenced on that day and the taking of testimony was continued through that and the two following days, and on the 31st the jury returned a verdict of guilty. The record did not show that the prisoner was present at any time during the trial, or at the rendition of the verdict.

On the trial three witnesses severally testified that they were at dinner at the shanty where the killing took place; that the deceased then said that he was going to try to buy eight mules for $800. He drew from his pocket book a fifty dollar bill to make a bet with the prisoner, who took and returned it to him, and, with a sinister look, asked him if he had more, to which he replied that he had. After dinner the witnesses left the shanty, the deceased and the prisoner remaining alone, and went to work chopping wood about four hundred yards distant, when they heard a pistol shot. They then went to the cabin and found the deceased shot dead. They afterwards found his pocket book lying open on the ground two hundred yards distant.

On cross-examination by the prisoner's counsel, they were asked if they drank intoxicating liquors at dinner. Objection was made to the question which the court sustained, and the prisoner excepted.

The cause was brought here by writ of error.

C. H. Brown, for the plaintiff in error

I. There was error on the part of the court below in overruling the motion of the accused to quash the indictment.

1. The presentation of the accused in the indictment is in the name of The People. It should have been in the name of the State of Nebraska.—*Sec.* 10, *Constitution of Nebraska, title "Judiciary;" Sec.* 1, *Id. "Schedule;" Sec.* 166, *Criminal Code.*

2. The indictment purports to have been found at a November term of the District Court for Lincoln county. Such a court is not known to the laws of our State.—3 *Session Laws of State, page* 50, *sec.* 5, 6, 7, 8; *Wharton's Precedents of Indictments and Pleas, page* 1.

3. All the allegations necessary to confer full authority and jurisdiction upon the court should be apparent, and fully set forth in the indictment.—*Wharton's Crim. Law, sec.* 223; 1 *Bish. Crim. Pro. sec.* 152.

II. It was error on the part of the court below, overruling and dismissing the plea to the jurisdiction of the court.

1. It was a sworn plea and tendered to the court facts raising an issue, and should have been answered by the State by demurrer or replication. The issue thus raised should have been tried and judgment rendered thereon, if against the accused, with right to plead over.—*Wharton's Crim. Pro.* 657; *Adams* v. *The People*, 1 *Com.* 173; *Adams* v. *The People*, 3 *Denio*, 190; 1 *Bish. Crim. Pro. sec.* 479; 1 *Arch. Crim. Pro.* 370; 1 *Chitty Pleadings*, 480; 1 *Chitty on Crim. Law*, 437.

III. The record shows error in this, that the defendant in the court below was tried without having plead to the

indictment. This made no issue to the jury.—*Wharton's Crim. Law*, 430; 1 *Arch. Crim. Plead.* 666, 351, *n.*; *Nebraska Crim. Code, sec.* 188.

IV. The court below erred in excluding from the jury competent and legal evidence.—1 *Greenleaf Evi.* 201, 215, 218; 2 *Rus. on Crimes*, 867; 1 *Phil. on Evi.* 406, 407; *Roscoe's Crim. Evi.* 55.

E. F. Gray, for the People.

I. It is in the discretion of the court to hear the motion to quash, while the plea of not guilty remains on the record.—1 *Bish. Crim. Pro.* 447 *and note a.* As to objection to jurisdiction after plea.

II. Evidence of drunkenness only admissible when some provocation is shown, and then only in those States where there is "murder in the second degree." Such evidence "may only be admitted when there is passion excited by inadequate provocation."—1 *Whar. Crim. Law, note p. to sec.* 41.

III. "Where an admission of a party to the action is proved against him, he may prove, on his part, the whole of the conversation at the time so far as it qualifies the admission, but no farther. His declaration at the time, upon the general merits of the case, cannot be proved in his favor."—2 *Abbott's N. Y. Digest*, 694, *sec.* 1140, 1141; *Brouner* v. *Goldsmith*, 1 *Am. Law Reg.* 47; 1 *Phil. Evi.* 407; *Cowen & Hill's note*, 118.

MASON, Ch. J.

The defendant, in the court below, was indicted at a called term of the District Court sitting in and for Lincoln county, commencing on the 25th of November, 1868, for the murder of Charles Colliton. The term of the court was called

at the request of the county commissioners, and notice of the term so called published in the Omaha Republican. The affidavit of the printer attached to the order of the judge calling the term was sworn to, as shown by this record, at Omaha city, on the second day of January, 1868. The affidavit itself says, the printed notice attached was published in the Omaha Republican for forty consecutive days next prior to the 25th day of November 1868. Neither the request of the commissioners of Lincoln county nor the note of the judge appointing the term, is set out in the record; neither do either of said papers appear to have been filed in the Lincoln county District Court. I do not think they could have been so filed, as the affidavit of the printer was, doubtless, made on the second day of January, 1869, instead of 1868, and a copy of the notice or order of the judge calling the term, then and there attached.

The term of the court at which the defendant was indicted being a called term under the statutes, does the record show that the necessary steps were taken to constitute a legal term of the court? The fact may be, and doubtless is, that the necessary request and order was made and notice given, but does this record show that fact? The statute under which this term of the court at Lincoln was called, *Laws of* 1867, *page* 50, requires certain things to be done. Can we presume they were so done unless the record discloses the fact?

It does not show that a precept for summoning the petit jury was returned into court, or that said jury were summoned by the sheriff under the order of the court. Our statute requires the clerk to issue an order to the sheriff, deputy sheriff or coroner, as the case may be, commanding him to summon the persons whose names have been drawn as jurors. The manner of selecting and drawing the jury is clearly pointed out in sections 658, 659, 660, Code. Section 664 provides for the emergency which may, and

and often does, happen when the proper officers fails to summon a grand or petit jury. One of the modes referred to in that section should have been pursued, and it may have been, but the record does not disclose that fact. There is no mention of a venire or order of the court commanding any one to summon a jury, but the record, after reciting the fact of the commencement of the court and that the cause came on to be heard, proceeds as follows: "Then and there came a jury of twelve good and lawful men of the body of the county of Dodge, and were duly impannelled and sworn to well and truly try and true deliverance make between The People of the State of Nebraska and John Burley, the prisoner at the bar, whom they shall have in charge, and a true verdict give according to the evidence."

In New York it was deemed good cause for reversal of a capital judgment against the defendant, rendered at the court of Oyer and Terminer, that no precept summoning a petit jury was returned and filed.—*McGuire* v. *The People*, 2 *Parker*, *C. C.* In another case, when the county commissioners are to draw the jury, and process is issued to the sheriff to summon them for the court of Oyer and Terminer, it is error if the record does not show, either expressly or by necessary inference, that the jury have been legally drawn.—*Eaton* v. *The Commonwealth*, 6 *Penn.* 73.

Another startling defect in the record before us is, that it does not show, nor can it be rightfully inferred therefrom, that the prisoner was present at the rendition of the verdict. In a capital felony it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be present at the rendition of the verdict or during the trial. Such is the rule laid down by that eminent jurist, Chief Justice GIBSON, in a case when the prisoner was indicted for burglary and larceny, and expressly waived, by his counsel, the right to be present at the rendition of

the verdict, and a verdict was given against him in his absence. The judgment thereon was reversed. It would be contrary to the dictates of humanity to let a prisoner waive that advantage, which a view of his sad plight might give him, by inclining the hearts of the jurors to listen to his defence with indulgence.—*Prine* v. *The Commonwealth*, 6 *Harris' Penn.* 103. The record shows that the prisoner was in court on the 28th of December, 1868, and no mention is again made of him until he is brought up for sentence, on the first day of January, 1869. The verdict was returned by the jury on the 31st day of December, 1868, and it does not show he was present in court at that time. He may have been, but it is not here a question of fact whether he was or not, but only a question whether the record shows his presence. For these reasons, I think, the sentence and judgment of the court below should be reversed.

LAKE, J.

At a called term of the District Court for Lincoln county, held at North Platte on the 25th day of November, 1868, the plaintiff in error was indicted for the crime of murder. At the same time a motion was made by the prisoner for a change of venue which was allowed, and the cause removed to Dodge county for trial. A special term of the court was called by the judge of that district for the trial of the case. Upon the trial to a jury the prisoner was convicted, and the sentence of death pronounced against him.

The case is brought here by writ of error to reverse that judgment. It is claimed that several errors intervened, as well during the trial to the jury as in the determination of numerous questions of law by the court, before the case was transferred to Dodge county. We will consider them in the order of their assignment.

It is claimed that the court erred in overruling the motion to quash the indictment.

It is objected to the indictment that it runs in the name of "The People of the State of Nebraska," whereas it should run in the name of "The State of Nebraska," and it is insisted that in this it is repugnant to section one hundred and sixty-six of the Criminal Code, which gives the form of the commencement of an indictment to be substantially followed. It should be borne in mind that this provision comes to us as a portion of the late territorial statutes, continued in force by section one of the schedule of the constitution, and is subject to all the necessary modifications imposed by that instrument, one of which is that "all process, writs and other proceedings shall run in the name of "The People of the State of Nebraska." This indictment conforms to this command of the constitution, as it most certainly should do, and there is no force in this objection.

It is further objected that this indictment purports to have been found at the November term of the District Court for Lincoln county, whereas, in fact, no such term of said court is known to the law. It is true that no term of said court for Lincoln county has been actually fixed by the legislature, but there was at that time a public law in force under which this court appears to have been called and held. Section 7, act approved June 12, 1867, entitled "an act to define the boundaries of the judicial district, and to assign justices to the same."

Now, a term called and held under the provisions of this act is as well entitled to be designated a regular term, as if the time for holding it had been actually fixed by the legislature. The record before us shows that the court in Lincoln county, at which this indictment was found, was duly called and held under the authority of this act. It is true that the record is somewhat irregular, but enough

appears to clearly establish these facts; that the county commissioners of Lincoln county, at an adjourned meeting held on the 5th of October, 1868, in an official manner, made application to the judge of that district for a term to be held in that county, and thereupon, in compliance with this request, he fixed upon the time, gave the necessary notice, and held the court accordingly. The indictment itself alleges that the term was held pursuant to application and notice by the judge of that district, and the record elsewhere shows that he had been duly requested to do so. But it is insisted by counsel for the prisoner that the indictment itself should contain all the necessary averments, to show, affirmatively, that the term was called in the exact manner required by law; in other words, that it show that the county commissioners and judge have taken every step which the statute requires of them. To this proposition we cannot assent. The District Court possesses general jurisdiction, and all that the caption need contain is found in section 166 of the Criminal Code, as modified by the constitution. The record showing, as it does, that the county commissioners requested a term to be held, and that in pursuance of such request this term was appointed, notice given, and the court actually convened in pursuance thereof, it is sufficient for the caption to show, in general terms, as this does, that the court was held pursuant to appointment and notice. We will presume in favor of the regularity of all the steps taken, until the contrary is made to appear.—*State* v. *McCarty*, 2 *Chand.* 199. It is unnecessary to notice the rest of the objections urged to this indictment in the motion to quash, as they are sufficiently answered by what has already been said.

Another objection is that the court erred in overruling the defendant's plea to the jurisdiction. This plea appears to have been resorted to for the purpose of presenting, in another form, the same question which the court had deter-

mined in overruling the motion to quash. The jurisdiction of the court is challenged by stating legal conclusions merely. No fact is stated which can be considered as entitled to any weight whatever, and the plea was properly disposed of.

Another error assigned is, that the prisoner was put upon his trial without having plead to the indictment. If this were true, it would be error. But does the record show this was done? It discloses the fact that the plea of "not guilty" was interposed by the defendant on his arraignment. But it is urged, with much force, that inasmuch as a motion to quash, and a plea in abatement were afterwards filed and acted upon by the court, the presumption arises that the plea of "not guilty" must have been withdrawn before they were filed. If the subsequent pleas were inconsistent with the plea of not guilty, this might be true. But they were not, and the record being silent on this point we must presume that the motion to quash and the plea in abatement were filed and determined, with the plea of not guilty upon the record.—1 *Bishop's Crim. Pro.* 437, 447; *Commonwealth* v. *Chapman*, 11 *Cush.* 422.

The next error assigned is, that the court refused to permit certain questions to be put to three of the witnesses, called by the prosecution, on their cross-examination.

Of these witnesses, John Rice and John Fritchie, who, together with the prisoner, the deceased and several other persons, took dinner at a shanty near which, and a short time before, the deceased was killed, on their direct examination, had testified to certain acts and declarations of the prisoner and deceased, tending to establish defendant's guilt, and on cross-examination they were asked certain questions tending to show that they were intoxicated at that time, but objection being made by the attorney for the State, the testimony was excluded from the jury. In this we think there is error. It is always of vital import-

ance to ascertain the exact condition of the mind of a witness at the time of a transaction or conversation about which he is testifying. The jury should be informed of all the influences affecting his mind, so as to enable them to determine whether it was in such a condition as rendered him capable of understanding, recollecting and narrating correctly what actually took place. And if for any reason, such as imbecility or excessive intoxication, the witness was in such a state of mind as rendered him incapable of exercising a correct discrimination, the court and jury should know it. In rejecting this testimony, we are of the opinion the court was in error.—2 *Phil. Evi. Cown and Hill and Edwards' notes*, 950, *note* 596, *and cases there cited.*

There is one other point deserving notice. The record discloses the fact that several persons summoned as grand jurors having been excused from serving, their places were filled by the court by transferring from the list of petit jurors enough to make up the requisite number. This was unauthorized by the law, and rendered the grand jury, when thus organized, an illegal body. Section 664 of the Code of Procedure, regulates the filling of vacancies in both grand and petit juries. It provides that in such case "the court may order the sheriff, deputy sheriff or coroner, to summon, without delay, good and lawful men having the qualifications of jurors, and each person so summoned shall forthwith appear before the court and, if competent, shall serve on the grand and petit jury, as the case may be, unless such person shall be excused from serving or lawfully challenged." Although in this case it is not claimed or even suggested that any injustice was done the prisoner by this irregularly selected jury, still we cannot shut our eyes to the fact that it would be a most dangerous precedent, if permitted to stand. If so wide a departure from the statutory mode of selecting grand jurors were adjudged to be an unimportant informality, to be disregarded, where could

we stop? Could not every provision of the law be disregarded with just as much reason, and the judge select the jury in his own way, and of the material best suited to the accomplishment of his own purposes? The grand jury must be selected in the manner prescribed by the law. There is no security to the citizen but in a rigid adherence to the legislative will, as expressed in the statutes made for our guidance.

The judgment is reversed and cause remanded to the District Court for Lincoln county, for further proceedings.

The Midland Pacific Railroad Co. v. McCartney.

1. PRACTICE: *Verdict.* The appellate court will presume the verdict of the jury sustained by the evidence, unless the contrary fully appear.

2. ——: ——. All the evidence adduced on the trial should be preserved in the bill of exceptions, and the fact be accordingly stated, in order to justify a claim that the court below erred in refusing a new trial, asked for on the ground that the verdict was not sustained by sufficient evidence.

3. ——: *Motion for new trial.* Errors in the admission or refusal of testimony on the trial and in giving or refusing instructions to the jury will be considered as waived, unless complaint thereof be made in the motion for a new trial.

This was a petition in error filed in this court by the Midland Pacific Railroad Company. The facts are fully stated in the opinion except the single one that a motion for a new trial was filed in the court below, and that errors assigned in the petition in error are not included in the motion.

S. H. Calhoun and *John H. Croxton*, for plaintiff in error.

The line of plaintiff's railway crosses the defendant's land. Defendant refused to give the right of way across the same. Appraisers, appointed as required by the laws of Nebraska, on actual view appraised the same. From this appraisement defendant appealed to the District Court of the First Judicial District, in and for the county. On a trial in said court, before a jury, the damage was reassessed. In this trial plaintiff claims that there was error, as set forth in their petition in error filed in this court.

The plaintiff holds the true rule of the assessment of damages in cases of this kind to be: That the jury shall confine themselves to estimating real value of the land taken, without going into any conjectural and speculative

estimations of consequential damages. And this can only be truly and fairly done by determining the value of the whole land without the railway, and the portion remaining after the railway is built. The difference is the true assessment of the damages—the true compensation to which the owner is entitled, except when there is some special benefit resulting or accruing to the remainder of the land by reason of the location and operation of the railway through or over the same; in which case the amount of such special benefit is to be deducted from the amount of the damage so ascertained. The remainder, if anything, will be the amount of damage which the owner of the land would be entitled to receive.—*Henry* v. *The Dubuque & Pacific Railway Co.*, 2 *Iowa*, 288; *Meacham* v. *Fitchburg Railway*, 4 *Cush.* 291; *Upton* v. *South Reading Railway*, 8 *Cush.* 600; *Albany N. Railway* v. *Lansing*, 16 *Barb.* 68; *Canandaigua & N. Railway* v. *Payne*, 16 *Barb.* 273; *Greenville & C. Railway* v. *Partlow*, 5 *Rich.* 428; *White* v. *Charlotte & S. C. Railroad Co.*, 6 *Rich.* 47; *A. & S. Railway Co.* v. *Carpenter*, 14 *Ill.* 190; *Symonds* v. *Cincinnati*, 14 *Ohio*, 147; *Brown* v. *Cincinnati*, 14 *Ohio*, 541; *McIntire* v. *State*, 5 *Blackf.* 384; *State* v. *Digby*, 5 *Blackf.* 543; *Troy & Boston Railway* v. *Lee*, 13 *Barb.* 169–71; *Matter of F Street*, 17 *Wend.* 649; *Canal Co.* v. *Archer*, 9 *Gill & J.* 480; *Parks* v. *City of Boston*, 15 *Pick.* 198; *Somerville Railway* v. *Doughty*, 2 *Zab.* 495; *Columbus P. & J. Railway* v. *Simpson*, 5 *Ohio St.* 251; *Rochester & Syracuse Railway* v. *Budlong*, 6 *How. Pr.* 467; *Sater* v. *B. & Mt. Pl. Railway*, 1 *Clarke*, 386; *Harvey* v. *Lackawana & Bloomsburg Railway*, 47 *Penn. St.* 428; *Win. & St. Peter's Railway* v. *Denman*, 10 *Minn.* 267; *Whitman* v. *Boston & Maine Railway*, 3 *Allen*, 133; *Livermore* v. *Jamaica*, 23 *Vt.* 362; *Indiana Central Railway* v. *Hunter*, 8 *Ind.* 74; *Robbins* v. *Milw. & Hor. Railway Co.*, 6 *Wis.* 636; *Nashville Railway* v.

Dickerson, 17 *B. Mon.* 173–180; *Louisville & Nashville Railway* v. *Thompson*, 18 *B. Mon.* 735.

The rule governing the admission of evidence seems to be—to allow only strictly legal evidence to be received, such as would be admissable in the trial of similar questions before a jury in ordinary cases.—1 *Redfield on Railw. sec.* 72; *Troy & Boston Railway* v. *Northern Turnpike Co.*, 16 *Barb.* 100; *Rochester & Syracuse Railway* v. *Budlong*, 6 *How. Pr.* 467; *Lincoln* v. *Saratoga & Schenectady Railway*, 23 *Wend.* 425, 32.

And the witnesses cannot be allowed to give their *opinion* of the value of the land or material taken.—*Montgomery & West Point Railway* v. *Varner*, 19 *Alab.* 485; *Concord Railway* v. *Greely*, 3 *Foster*, 237; *Buffman* v. *New York & Boston Railway*, 4 *Rh. I.* 221; *Cleveland & Pittsburgh Railway* v. *Vanhorn*, 18 *Ill.* 257; *Dorlan* v. *E. Br. & Wav. Railway Co.*, 46 *Penn. St.* 520; *East Pa. Railway Co.* v. *Heister*, 40 *Penn. St.* 53; *East Penn. Railway Co.* v. *Hottensteine*, 47 *Penn. St.* 28.

Preliminary surveys may be made without compensation.—1 *Redfield Railway, sec.* 66, *p.* 241; *Cushman* v. *Smith*, 34 *Maine*, 247; *Polly* v. *S. W. Railway Co.*, 9 *Barb.* 449; *Bloodgood* v. *Mohawk & H. Railway*, 14 *Wend.* 51; *S. C.* 18 *Wend.* 9; *Statutes revised, of Nebraska, sec.* 81, *p.* 217.

Who shall go forward in the pleadings, proof and argument, on the trial.—1 *Greenleaf Evi. scc.* 76, 77; *Connecticut River Railway* v. *Clapp*, 1 *Cush.* 559; 1 *American Railway cases*, 450; *Mercer* v. *Whall*, 52 *Q. B.* 447; 1 *Redfield Railway, sec.* 71, *p.* 268.

The fact that a juror is a citizen of a town, city or county, and tax payer therein, against which suit is brought to recover judgment, does not render him incompetent to sit as a juror in that suit; nor does the fact that a man is a tax payer and citizen of a town, city, or county which may

be liable, or may become liable to pay the judgment in a given case, if rendered, render him incompetent to sit as a juror in the trial of that case. He has no such interest in the event of the suit as will incapacitate him to sit as a juror.—*Comms. of Clermont Co.* v. *Little*, 3 *Ohio*, 289.

Party claiming damages must show title.—*Henry* v. *The Dubuque & Pacific Railway Co.*, 2 *Iowa*, 288.

I. N. Shambaugh, for defendant in error.

The defendant in error insists that no errors were committed by the court below, and relies upon the following points and authorities:

I. But two points are made in the motion for a new trial, and none others will be considered by this court. All the errors complained of must be assigned and relied on in the motion for a new trial, and if the attention of the court below is not called to the same by such motion, will be considered waived.—4 *Mo.* 544; 6 *Mo.* 162; 9 *Mo.* 493; 10 *Mo.* 515; 11 *Mo.* 623; 13 *Mo.* 444, 453; *Hilliard on New Trials*, 12 *and* 16.

The motion for a new trial was properly overruled. The damages are not excessive.—20 *Mo.* 272, 567; 21 *Mo.* 354.

The evidence fully sustains the verdict, and this court will not set aside a verdict if there is any evidence to support it.—1 *Mo.* 13; 3 *Mo.* 464; 7 *Mo.* 292, 220, 445; 4 *Mo.* 295; 5 *Mo.* 489; 6 *Mo.* 489, 61, 211; 8 *Mo.* 642; 9 *Mo.* 268; *Mo.* 380; 19 *Mo.* 241; 11 *Mo.* 264; *Hilliard on New Trials*, 340; 6 *Ohio*, 456; 12 *Ohio*, 151; 4 *Ohio*, 566; 2 *Ohio*, 44, 53; 12 *O. S.* 146.

But if the rulings of the court below upon the other points made in the plaintiff's petition were properly before this court for consideration and review, the defendant insists that no errors were committed by the court below, and relies upon the following points and authorities:

THE MIDLAND PACIFIC RAILROAD CO. *v.* MCCARTNEY.

I. The court committed no error in excluding tax paying citizens of Nebraska city from serving as jurors in this cause.—11 *Mass.* 468; 2 *Mass.* 543; 13 *Mass.* 339; 4 *Gray*, 427; 11 *Mo.* 247.

II. There was no error in requiring the parties to plead *de novo* in the District Court, and no exception was taken to the ruling of the court.

III. The defendant would have failed if no evidence had been given, and he was entitled to the opening and conclusion. Section 283, Code. Section 97, act concerning corporations.

IV. There was no error in permitting defendant to testify to the ownership of the land. The title was not in issue. The plaintiff asserted and affirmed defendant's title by proceeding against him to have the damages assessed. Section 97, act concerning corporations.

V. There was no error in admitting the evidence as to the damages done to the land and improvements. The evidence of defendant and his witnesses was rightly admitted. The evidence offered by plaintiff, relative to the price of land at public sales, was properly excluded.

VI. The rule or measure of damages laid down by the court and the instructions given by the court were correct, indeed more favorable to the plaintiff than to the defendant, and it has no cause of complaint.—5 *Pick.* 182; 15 *Pick.* 564, 198; 17 *Pick.* 58; 4 *Cush.* 291, 292; 5 *Black.* 386; 25 *Mo.* 258, 535, 544; 7 *Allen* 322 *directly in point; Redfield on Railways*, 133–138, 148–155; 692–697 *App.*

In estimating the damages the jury were properly instructed to consider the value of the land at the time the road was located over it, and to give interest from that time.—7 *Allen*, 326.

VII. The instructions asked by plaintiff were properly refused.

VIII. Judgment was properly rendered against the plain-

tiff. When the damages were assessed the plaintiff became entitled to the use of the land taken, and the defendant to the damages assessed, and the plaintiff could not be compelled to pay the damages and costs, except by judgment and execution.—12 *Mo.* 328; 22 *Pick.* 363; 2 *Metcalf*, 559. Section 97, act concerning corporations.—*Redfield on Railways*, 129, *sec.* 17–684, *sec.* 98.

IX. The verdict is for the right party, and this court will not disturb it.—*Graham & Waterman on New Trials, vol.* 2, 48 *and* 49; 1 *Ohio*, 330, 357; 5 *Ohio*, 375, 385, 109; 4 *Ohio*, 5; 5 *Ohio*, 89.

LAKE, J.

In the District Court this case was tried to a jury on an appeal from an assessment of damages for the right of way for a railroad track through the defendant's lands.

A verdict was rendered by the jury assessing the damages at the sum of $599.50. The plaintiff filed a motion for a new trial on the ground that the damages were excessive and not sustained by sufficient evidence. The court overruled the motion for a new trial and entered judgment on the verdict against the railroad company, to which exceptions were duly taken.

Of the alleged errors this court can only consider that which relates to the rendition of judgment on the verdict of the jury. As to the sufficiency of the evidence to sustain the verdict it is well settled that the appellate court will presume the verdict right, and the evidence ample to sustain it until the contrary is made to appear. This should be done by embodying all of the testimony that is produced on the trial bearing upon the point of dispute, in a bill of exceptions, so that it shall become a part of the record of the case. Considerable testimony was thus preserved and is before us, but looking into the record we are

unable to say that this is all. There may have been very much more presented to the jury which had a direct bearing upon the question of damages, and contributed materially to produce the result to which the jury arrived. Where all the evidence is not in the record the ruling of the court in refusing a new trial on the ground that the verdict is not sustained by sufficient evidence is presumed to be correct.

It is also objected that the court below erred in the admission of illegal testimony and also in the instructions given to the jury. These points were not made, however, in the motion for a new trial. If the court had committed the errors suggested, they would have been good grounds for a new trial, but no complaint of such errors having been made, nor the attention of the court directed thereto in the motion for a new trial, we must consider them as waived.—*Stump* v. *Fraley*, 7 *Ind.* 679; *Zebnor* v. *Beard*, 8 *Id.* 96; *State* v. *Swarts*, 9 *Id.* 221; *Howes* v. *Holliday*, 10 *Id.* 339; *Kent* v. *Lawson*, 12 *Id.* 675; *Gray* v. *Stiver*, 24 *Id.* 174; *Lures* v. *Batte*, 26 *Id.* 343; *Stillwell* v. *Chappell*, 30 *Id.* 72.

A reference to the cases here cited shows an unbroken current of decisions in support of the position which we are constrained to take.

The Code of Indiana, in its provisions relating to new trials, is substantially the same as our own. The language used is nearly identical, and makes errors of law occuring at the trial, and excepted to by the party making the application, a ground of a motion for a new trial.

In the case of the *State* v. *Swarts*, above cited, Judge STEWART, in his opinion, says: "It is due to the lower court that its errors, if any, be pointed out there, so that it may retrace its steps while the record is yet under its control." I am aware that in *Earls* v. *Pittsburgh R. R. Co.*, 12 *Ohio State*, 621, a different construction is given to the same statutory provision. But with the utmost respect for

the court making that decision, I must say that the construction given by the courts of Indiana seems to be more in harmony, both with the letter and the spirit of the Code.

The same principle will require a motion for a new trial to be made for every cause specified in section 314 of the Code, as a ground therefor, before this court can review the judgment of the District Court thereon.

As to the rendition of a judgment upon the finding of the jury, I am satisfied that there is no error. Such is the practice in Indiana and Ohio, under statutes similar to our own, and the language of the act under which the case was appealed to the District Court will justify it.—*Evansville R. R. Co.* v. *Fitzpatrick*, 10 *Ind.* 20.

For these reasons the judgment of the District Court must be, in all things, affirmed.

Judgment affirmed.

The Midland Pacific Railroad Co. v. Williamson.

1. The decision in the preceding case of The Midland Pacific Railroad Company, affirmed.

This, like the preceding case, was brought up by petition in error from the District Court of Otoe county. It was argued in connection with that case.

S. H. Calhoun and *J. H. Croxton*, for plaintiffs in error.

I. N. Shambaugh, for defendant in error.

LAKE, J.

Having fully considered all the questions presented in this record in the case of this Railroad v. McCartney, decided at this term, upon the principles therein declared, the judgment of the District Court in this case is affirmed.

Judgment affirmed.

The Midland Pacific Railroad Co. v. Day.

1. The decision in the preceding case of The Midland Pacific Railroad Company v. McCartney, affirmed.

This, like the preceding case, was brought up by petition in error from the District Court for Otoe county. It was argued in connection with the preceding case.

S. H. Calhoun and *J. H. Croxton*, for plaintiffs in error.

G. B. Scofield, for defendant in error.

LAKE, J.

Upon the principles laid down in the case of this Railroad v. McCartney, decided at this term, the judgment of the District Court in this case must be affirmed.

Judgment affirmed.

The Midland Pacific Railroad Co. v. Newman.

1. The decision in the preceding case of The Midland Pacific Railroad Company v. McCartney, affirmed.

This, like the preceding case, was brought up by petition in error from the District Court of Otoe county. It was argued in connection with that cause.

S. H. Calhoun and *J. H. Croxton*, for plaintiffs in error.

I. N. Shambaugh, for defendant in error.

LAKE, J.

The record in this case presents precisely the same questions as have already been passed upon in the case of The Midland Pacific Railroad v. McCartney, decided at this term of the court.

For the reasons stated in the opinion in that case, the judgment of the District Court in this must be affirmed.

Judgment affirmed.

Laughlin v. Schuyler.

1. JUDICIAL SALE: *Confirmation.* The return of the sheriff or master of a judicial sale must show that the appraisers were residents of the county in which the premises are situated.

2. ——: *In parcels.* Each lot or parcel of ground must be appraised and sold separately, or the sale will be set aside.

LAKE, J.

This is an appeal from an order confirming a sale of mortgaged premises under a decree of foreclosure.

The sale was not legally made, and there are, at least, two fatal objections to it. 1st. The return of the master does not show that the persons selected by him to appraise the premises, were residents of the county where the lands were situated, nor is there anything in the record from which this fact can be legitimately inferred. 2d. The return shows that the premises sold consisted of two city lots. They were appraised and sold together as one piece of property. Each lot or parcel of ground should have been appraised and sold separately. The sale should have been set aside. For these reasons the order of the District Court confirming the sale is set aside and the cause remanded for further proceedings.

Reversed and remanded.

Redick & Briggs, for appellants.

CASES

IN THE

SUPREME COURT

OF THE

TERRITORY OF NEBRASKA.

JUDGES OF THE SUPREME COURT

OF THE

TERRITORY OF NEBRASKA.

Chief Justices.

FENNER FURGERSON.
AUGUSTUS HALL.
WILLIAM PITT KELLOGG.
WILLIAM KELLOGG.

Associate Justices.

JAMES BRADLEY.
EDWARD R. HARDIN.
SAMUEL W. BLACK.
ELEAZER WAKELY.
JOSEPH MILLER.
WILLIAM F. LOCKWOOD.
JOSEPH E. STOUTER.
ELMER S. DUNDY

Moffat v. Griswold.

1. PROMISSORY NOTE. An endorser of a promissory note who waives notice of protest will be relieved from liability thereon, if the holder does not notify him within a reasonable time of its non-payment nor use due diligence to collect it of the maker.

This was an action brought in the District Court for Otoe county upon a promissory note of which the following is a copy:

"KEARNEY CITY, *August* 3, 1857.

"Thirty days after date we, or either of us, promise to "pay Joseph Moffat, or order, one hundred and fifty dollars "in gold, with five per cent per month interest from date, 'for value received.

"C. W. PIERCE,
"JOHN CAMPBELL.

Endorsed as follows:

"For value received, I assign the within note to H. C. 'Blackman. Protest waived July 2, 1859.

"JOSEPH MOFFAT,"
"H. H. HARDING."

"H. C. BLACKMAN."

The defendants, Harding and Moffat, answered, alleging that the plaintiff had not used due diligence in presenting the note to the makers for payment and notifying them of non-payment, that when it became due, and for a long time afterwards, the makers were possessed of property out of which the amount could have been made, but at the time the endorsers were informed that the note had not been paid, the makers were insolvent. These facts appeared in evidence. Judgment was rendered for the amount due on the note, and Moffat brought the case here by petition in error.

S. E. McCracken, for plaintiff in error.

J. M. Woolworth, contra.

The court, by DUNDY, J., held that Moffat was relieved of liability on the note by reason of the neglect of the holder to notify him of its non-payment and to enforce it against the makers.

Judgment reversed.

Rogers v. Jones.

1. FRAUD AS TO CREDITORS. If an insolvent convert his property into notes, payable to a third party as his assignee, and the transaction is concealed from his creditors, a creditor's bill will lie to reach the fund, and the plaintiff therein will be entitled to it.

This was a creditor's bill filed in the District Court for Douglas county, on the seventh of August, 1858. At the March term, 1858, of said court, Rogers recovered a judgment against Jones and Wood for $1,181.79, on which execution was issued and returned unsatisfied. At the time of the recovery of the judgment the defendants were druggists in Omaha, and shortly thereafter dissolved the partnership, Jones continuing the business and Wood leaving the Territory. Soon after this, Jones being insolvent, sold the stock to Ford at the agreed price of $4,100, taking his notes therefor, payable in six, twelve, eighteen and twenty-four months. These notes ran to the order of "Samuel Pease, assignee of James A. Jones," and were delivered to him. This fact was not communicated to any of the creditors, and did not become known until disclosed by the answer filed in the cause. The question was whether a trust was created here which would defeat the bill. A decree was rendered for the plaintiff, and defendant appealed.

R. A. Howard, for appellant.

J. M. Woolworth, contra.

The court, by HALL, Ch. J., held that the transaction was fraudulent as to creditors. It was unnecessary to decide, as contended for by the appellant, whether a trust in personalty could be created by parol under our statutes. The case must be determined on its own facts. It would

open a wide door to fraud to suffer an insolvent to convert his property into notes payable to a friend, and for the parties to conceal the transaction from all interested. It would give them the best opportunity to apply the money collected on the notes to the benefit of the assignor, without the possibility of the creditors being able to follow the fund.

Decree affirmed.

Bennet, administrator, v. Hargus.

1. REPEALS. A right of action or remedy, founded solely upon a statute or a suit to enforce such remedy, not prosecuted to judgment, is determined by the repeal of the statute.

O. P. Mason, for plaintiff.

J. F. Kinney, contra.

WAKELY, J.

The administrator of Lacy commenced this suit against Hargus on the 14th day of March, 1858. The petition alleges that, on the 23d day of April, 1856, the defendant "wrongfully, maliciously, feloniously and unlawfully," assaulted Lacy, in consequence of which he died on the 25th of the same month.

The answer set up, among other things, that the statute which authorized a suit by an administrator for damages in such a case had been repealed. To this part of the answer the plaintiff demurred. The parties stipulated that the demurrer should be sustained, and the case should then be taken to this court for a decision upon the question raised by the demurrer. The district court accordingly sustained the demurrer, *pro forma*, without argument. The effect of the ruling was that the repeal of the statute in question did not prevent a recovery.

It is not claimed that this suit could be sustained without the aid of the statute. At common law, the remedy for injury to life was merged in the public offense. An action, *ex delicto*, abated by the death of the sole plaintiff. The right to bring it died with the person. *Actio personalis moritur cum persona*, was the established rule of the common law. We are to see then what has been the effect of the legislation upon this subject.

The statutes of 1855, page 145, contained these provisions: "The right of a civil remedy is not merged in a public offense." "When a wrongful act produces death the perpetrator is civilly liable for the injury. The parties to the action shall be the same as though brought for a claim founded on a contract against the wrongdoer." While these provisions remained in force an administrator might doubtless have prosecuted a suit effectually upon such a cause of action as the petition in this case sets forth. They were in force when the act is alleged to have been committed, but, in February, 1857, before this suit was commenced, the civil code, of which these provisions were a part, was directly and in terms repealed, without any attempt to save pending suits or rights of action which had accrued under the statute repealed. The repealing act took effect from its passage. The date of its enactment does not appear in the printed volume of laws, nor is the precise day material. It was a special and separate act repealing absolutely and unconditionally, by a single section, both the civil and the criminal codes of the Territory. On the 13th day of February, 1857, the date of the repealing act, as was stated in the argument, a new code was adopted in place of the one repealed, containing the identical provisions above quoted; but this did not take effect until the first day of June then next. This code was in force when this suit was commenced, but it, in turn, was repealed by the present civil code of the Territory, which took effect February 1, 1859, with a provision "saving rights which shall have attached by virtue of any of the provisions contained in any of the chapters above repealed."

Such has been the legislation upon the subject. Has it put an end to the right of the administrator to maintain this suit?

By a long course of judicial decisions it has become a settled principle that a right of action, or a remedy founded

solely on a statute, or a pending suit to enforce such remedy, not prosecuted to judgment, is terminated by the repeal of such statute, without a provision for saving rights accrued under it, or suits already commenced to enforce them. The reason is apparent. If there be no such remedy at common law, then, after the unconditional repeal of the statute which created it, there is neither common law nor statute to uphold it. I need not cite authorities to sustain this position, which, as a general principle, I understand to be conceded. I will refer to a few cases which seem to establish the power of the legislature to take away the remedy in such a case as that before us, by repealing the statute which creates it.

In 1 *Hill*, 325, the question was whether the time allowed for the redemption of mortgaged premises sold upon decree could be abridged by an act passed subsequent to the sale, it was held that "inchoate rights, generally derived under a statute, are lost by its repeal, unless saved by express words in the repealing statute, otherwise as to those which have ceased to be executory and have become executed." The statute was held to be valid, and to apply to sales already made.

In 6 *Wendell*, 526, SAVAGE, Ch. J., says: "It will not be denied, I presume, that it is competent for the legislature to repeal an act upon which a suit has been brought, and, if the repeal is absolute, such suit is at an end. For instance, the present statutes prohibit gaming, and allow an action to be brought to recover back money won at play; an action is brought and ready for trial; the day before the circuit the legislature repeals the act; the suit dies because the court has no jurisdiction to proceed; the party has no right to recover his money. Such right did exist subject to the contingency of obtaining a judgment, and such jurisdiction, too, existed; but both have been taken away, because the means of enforcing the right no

longer exist. * * * But it cannot be denied that the legislature possess the power to take away by statute, what was given by statute, except vested rights."

In 7 *Johnson*, 477, the court decided that the legislature might, after a right of action had accrued against a sheriff for the negligent escape of a debtor, take away the remedy which existed at the time. YATES, J., said: "There is nothing in the State constitution to prevent legislative interference, and being in the nature of a tort, and not a contract, this question cannot be affected by the constitution of the United States, which declares that no State shall pass an *ex post facto* law or law impairing the obligation of contracts." SPENCER, J., said: "It cannot admit of argument that the act impairs the obligation of contracts. It is an action for a tort, for a wrongful escape of a debtor in the sheriff's custody, and it would be a waste of time to cite authorities, which are numberless, that the escape being a tort, the remedy is lost if the sheriff should die, and there would be no relief against his representatives."

In 11 *Maine*, 234, we find the following in the opinion of the court: "The act of January 31, 1854, providing 'that no action should thereafter be maintained to recover damages for the escape of any debtor committed on execution, except a special action on the case,' operated upon actions pending. Such an act is not unconstitutional on the ground of operating retrospectively or disturbing vested rights."

In 36 *Maine*, 365, was a suit by the assessors of Macknawhoe plantations for trespass on lands reserved for public use. The court, by TENNEY, J., says: "This action was commenced in the name of the proper party plaintiffs, by authority of statute, 1850. But when the action was tried that section had been repealed, without any exception in reference to actions pending at the time of the repeal. No statute giving power to the inhabitants of plantations to

commence and maintain suits for trespasses committed upon lots in such plantations reserved for public uses, was then in existence, and the non-suit was properly ordered."

I need not multiply citations in support of the power of the legislature to take away the remedy it has given for a tort, before such remedy has been followed to judgment. The books abound in cases sustaining the general principle that rights and remedies given only by statute are lost by its unconditional repeal, save only vested rights. And it is sufficient to say that no respectable authority will be found to the effect that a mere right to sue for a tort is, previous to the commencement of a suit, a vested right which the legislature cannot disturb. In Smith on Statutes, which is not now accessible to me, the questions involved in this case are treated at large.

We were referred to 7 *Ohio*, 257, as an authority that a remedy is not lost by a repeal of the statute creating it. That was a peculiar case. Property was attached and held at the time of the revision of the statutes in 1810, when the attachment law, with numerous others, was formally repealed, and a new one, precisely similar, was enacted as a part of the Revised Statutes. In 1835, twenty-five years after the revision, the court was asked to hold the proceedings in attachment invalid by reason of such repeal, and placed its refusal so to do on this ground: "No question was raised at the time as to their effect upon such pending suits. The bar and the bench seem to have concurred in the interpretation of the legislature of that day, that, in remedial proceedings, such saving clause was unnecessary. It would be very unsafe for us now to disturb this then universally admitted proposition upon the authority of the jurists or of the adjudged cases of other states or countries."

That case differed from this widely. A lien upon property had been acquired in a suit pending on a contract at

the time of the repeal. It partook somewhat of the character of a vested right. Whether the case was rightly decided or not, it ought not to outweigh the numerous authorities applicable to the particular case before us, especially in view of the reasons which the court assigns for its conclusion, and of the implied admission that the "jurists and the adjudged cases of other States and countries" were against the position to which the court was forced by special circumstances surrounding the case before it.

It was urged on the argument that the provisions in question were not really repealed, because they were continued in the code which took the place of the repealed one. There is no force in this suggestion. The old code, containing those provisions, was totally, unqualifiedly and in terms, repealed. No language could have been employed which was more effectual. Also, that the act of 1857, when it took effect, operated as a repeal of the repealing act, and revived the repealing statute, thus saving the right of action which accrued under it. *Smith on Statutes*, 791. There is a wide and palpable distinction between the enactment of a statute precisely like a former one and an express repeal of the act which repealed such former one. It is too evident to require argument.

A question is made as to the regularity of the pleadings. It is claimed that the defendant should have demurred to the petition, instead of setting up by answer that there was no cause of action on the ground of the repeal of the statute, that being a question of law presented by the petition on its face. This might have been done; but the plaintiff demurred to the answer, and the judgment upon demurrer must be against the party whose pleading was first defective in substance. *Ch. Pl.* 1, 668. Besides, no question was made in the district court on this point of formality, and we understand the stipulation to have been

made for the purpose of having a determination in this court of the real question involved — the right of the administrator to maintain this action. We are all of the opinion that it cannot be maintained, and that the judgment of the district court must be reversed.

The stipulation provides that, in such event, the suit shall be dismissed; but we do not understand that it is to be dismissed by this court, and we order it to be remanded to the district court for further proceedings, in conformity with this opinion and with the stipulation. We have not considered how the repeal of the code of 1857 affected this suit, which was then pending. The point was not argued, and the case is disposed of without the necessity of our deciding the question.

Judgment reversed and cause remanded.

Eaton v. Bender.

1. A party who furnishes material for the building of a house, but does not follow the directions of the mechanics' lien law, has no lien on the premises entitling him to redeem a mortgage made thereon, nor does he acquire any interest in the premises by reason of his recovery of judgment against the mortgagor after foreclosure and sale.

This was a bill in chancery, filed in the district court for Douglas county. The complainants were four judgment creditors of Henry, who claimed to have furnished to him the materials with which a brick block was built by him on the premises in question. The judgments were recovered upon the indebtedness so incurred. About the time the building was being erected, Henry borrowed from Bender $3,000, to secure which he gave a mortgage on the premises; Henry having made default in the payment of the mortgage, Bender commenced his suit of foreclosure, in which he had a decree of sale. Upon the sale by the master, Bender purchased the premises. This sale being confirmed, a deed was made to Bender, and he went into possession. After all this, the judgments sued on were recovered. The validity of the mortgage and of the proceedings for its foreclosure were charged in the bill to have been fraudulent as to Henry's creditors; but the question thus raised was determined on the evidence, which is too voluminous to set forth. The question most insisted upon was whether, by reason of the fact that the debts for which the judgments were recovered were for materials used in erecting the building on the premises, the plaintiffs had not liens which required them to be made parties to the foreclosure suit in order to cut off their right to redeem even after the sale. A decree was rendered dismissing the bill, and the plaintiff appealed to this court.

Redick & Briggs, for appellant.

G. B. Lake, contra.

The court, by Lockwood, J., held that, inasmuch as the plaintiffs did not assert their liens as the same were given under the mechanics' lien law, they had no interest in the premises at any time before the foreclosure sale, by which they were entitled to be made defendants to that suit; that by virtue of judgments recovered afterward, they acquired no interest in the premises; that the proofs showed that the mortgage and the proceedings for its foreclosure were not made or had to defraud creditors, but were valid and effectual to vest a good title in Bender.

Decree affirmed.

Newcomb v. Boulware.

1. APPEALS UNDER TOWN SITE ACT are not governed by the act subsequently passed regulating appeals in justices' courts. They are sufficient if taken orally on the date of the mayor's decision and note in his docket.

WAKELY, J.

An act "regulating the disposal of lands purchased in trust for town sites" was approved February 10, 1857, and took effect at the date of its passage. It authorizes the mayor of an incorporated town to hear and determine all questions of title to lots therein, and give deeds to the successful claimants. It provides for appeals from his judgments in the following terms: "Sec. 6. Should any person feel aggrieved by the judgment of said mayor or commissioners, an appeal may be taken to the District Court of the county in the same manner as when taken up from justices of the peace. In case of appeal, no deed shall be made or pass until the title shall be settled by the proper courts. Notice of the appeal must be given on the day when the judgment is rendered." When this act was approved there was no statute requiring notice to be given of an appeal from a judgment of a justice of the peace. Three days afterward an act was approved, which, under a general provision applying to the laws passed at that session, took effect on the first day of the next June, and which requires written notice of such appeal to be served on the justice and on the adverse party, his agent or attorney, and allows twenty days from the rendition of the judgment to perfect the appeal

Proceedings to determine the title to certain lots in Nebraska city were commenced before the mayor prior to June 1, 1857, which, being continued, trial was had and judgment rendered after that date. An appeal from their judgment to the District Court was then dismissed upon

the ground that due notice of the appeal had not been given.

The only notice shown, or claimed to have been given, is mentioned thus in the mayor's transcript sent up to the District Court. After stating the submission of the case without evidence and the determination of the title, the the record concludes: "A. R. Newcomb gave notice that he would appeal to the District Court on the same day, and he signed a bond in the sum of five hundred dollars, signed by W. B. Hail as security; and the appeal was allowed." The mayor then certifies that the foregoing is a true transcript from his docket of the proceedings in the cause had before him. Is the transcript evidence that notice of the appeal was given? And was such notice sufficient? The transcript is evidence of the highest character as to all the proceedings before the mayor, in hearing and determining the question of title upon which he rendered judgment. If the notice required by section 6 was to be given in open court as a part of the proceedings before the mayor, after his judgment should be rendered, the mayor's record is the proper, if not the only admissible evidence thereof. I think this kind of notice is contemplated — to say the least, is allowed — by that statute, although it is not explicit as to manner of giving notice. A fair construction of this record shows, I think, that the notice was publicly given upon the rendition of the judgment as a part of the proceedings, and was recorded as such by the mayor. A similar practice was at that time prescribed in taking appeals from the District to the Supreme Court.—*Laws* 1855, *p.* 194. The appeal was to be "prayed for at the time of the rendition" of the judgment. The party in open court was to pray for his appeal, which the clerk would enter in his minutes, and the record will be the only evidence of it. A notice so given in the mayor's court must have been held sufficient so long as

the act of February 10 continued to govern the method of taking appeals. Was that method changed by force of the act above mentioned, which took effect June 1, 1857? If so, the new method would have applied to the appeal in this case, as the trial took place after June 1, although the proceedings were commenced before that date.

The act of February 10 says, in general terms, that an appeal from the judgment of the mayor may be taken "in the same manner as when taken from justices of the peace." If this had been the only provision in that act, as to the manner of taking an appeal, there would be no doubt that, when the legislature subsequently provided a new method of appealing from justice's judgments, appeals under that act must have thereafter conformed in all particulars to the change. But this general language was very materially qualified by the concluding words of section 6, "Notice of the appeal must be given on the day when judgment was rendered." Effect must be given to both these provisions, which are parts of the same section. Therefore, according to the very terms of the act, the manner of taking the appeals was not to be the same, in all respects, as the manner of appealing from justice's judgments. The provision as to notice was to be observed, without reference as to whether it was required or not, on appeals from justices of the peace. It so modified the general provision requiring appeals in the two cases to be taken in the same manner, that, previous to June 1, 1857, notice was required in the one case but not in the other. Since that date notice has been requisite in either case, but in the one it must be given on the day when judgment was rendered, in the other it may be served within twenty days thereafter.

The last act is not a statute on the same subject, as the former intended to take its place, or in any respect to change its provisions. The former is a special act regulating special proceedings before the mayor, and the other

is a general act regulating appeals from justices of the peace, and providing a particular time and manner of serving notice of such appeals. The former act provides expressly for a different time, and, by a fair implication, for a different manner of giving notice of appeals from the judgment of the mayor. I regard the last clause of section 6 as a complete provision on the subject of notice, requiring it to be given forthwith, in order to prevent the mayor from making a deed to the party successful before him, and contemplating a notice which could be instantly given on the rendition of judgment; a notice publicly given in court, according to the practice observed in the District Court at the time the act was passed. The language is, "notice of the appeal must be given on the day," not "served," which could apply only to a notice in writing, but "given," the term which aptly and fitly applies to a notice in a court given orally. A notice so given certainly answers every purpose of a notice in writing served within twenty days after judgment. The oral notice given in court in the one case is equivalent, in its object and effect, to the written notice served in the other. Instances can easily be supposed, and would doubtless occur, where it would be found impracticable to serve written notice of appeal on the adverse party on the "same day" when the mayor's judgment is rendered.

The whole provision in section 6, above quoted on the subject of notice, is excepted from the requirement in a former part of the section as to the manner in which the appeal is to be taken. Otherwise, it would have been nugatory when inserted. If it was to be then considered as excepted, it must be so considered still. I think the appeal should not have been dismissed.

Judgment reversed.

Aumock v. Jamison.

1. SERVICE OF SUMMONS ON RETURN DAY. A service of summons made on the return day thereof is sufficient to require the defendant to appear to the action, and is effectual to support a judgment by default if he fail to appear.

This was a bill in chancery, filed in the District Court for Douglas county. It alleged that, on the 27th of July, 1862, Jamison sued Aumock, in the said court, for the recovery of a debt, and that the summons issued in said action was returnable on the 4th day of August, 1862, and that the summons was served on Aumock on that day and was also returned on that day. The defendant failed to appear to the suit and judgment was entered against him. Execution was thereupon issued to the sheriff, who levied the same on certain lands of Aumock. He filed the bill for an injunction restraining the sheriff from selling the property on the ground that the court was without jurisdiction to render the judgment. A decree was rendered for the plaintiff, and Jamison appealed. The question was whether the service of the summons was good under the 69th section of the Code, which is as follows: "The service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual place of residence at any time before the return day."

Redick & Briggs, for appellant.

A. J. Poppleton, contra.

The court, by DUNDY, J., held that a service of summons made upon the return day named therein was sufficient to require the defendant to appear thereto, and, if he did not do so, that it was effectual to support a judgment by default.

KELLOGG, Ch. J., dissented.

Decree reversed.

Burley v. Shinn.

1. A vendor of an undivided interest in a claim on the public lands, of which he remains in the sole possession, who afterward acquires title from the government, and immediately conveys the same to a third party, held to repay his vendee the amount paid to him.

Burley sued Shinn in the District Court for Douglas county upon the following instrument: "Articles of agreement made and entered into between Moses F. Shinn of the first part, and J. H. Lockwood of the second part, this 5th day of November, A. D., 1856. The party of the first part has this day sold unto the party of the second part the one undivided fourth part of the following described premises, situated in Douglas county, Nebraska Territory, described as follows: Being a claim upon the public lands which I purchased of L. Miller, and he of Samuel Bayless, he of A. J. Hanscom, and bounded on the south by the claim of T. B. Cuming and by Omaha city; west by an eighty-acre tract of land conveyed by A. J. Hanscom to R. G. Pierce; north by the Sterling claim and Omaha city, together with lots 7, 8, 9 and 10 of said Sterling claim, as surveyed by L. Miller and described by Sterling Claim Company, and east by Omaha city, containing two hundred and forty acres, more or less. Also stone quarry and timber claim about one mile south of Omaha city, bounded north by claim of Smith and Kline, west by Folsom and Patrick, south by Berry's claim, east by A. D. Jones, containing forty acres, more or less. Said party of the second part is to have one-fourth of all the improvements upon said claim, and to draw one-fourth of the rents and profits therefrom. For which he agrees to pay the party of the first part four thousand and five hundred dollars ($4,500), as follows: $500 in hand, $1,500 the first day of April next, and $2,500 in three yearly installments, commencing

the first day of April, bearing ten per cent. interest per annum, for which the party of the second part has executed his notes. Also, it is understood, that a contract made by the party of the first part with the trustees of the Simpson University, granting fifty acres of the above described tract of land in consideration that the said trustees erect a building thereon the party of the second part relinquishes one-fourth of said fifty acres out of the two hundred and forty acre tract, to said trustees.

"In testimony whereof we have hereunto set our hands and seals this fifth day of November, 1856.

"MOSES F. SHINN.
"J. H. LOCKWOOD.

"Received first payment on the within.

"M. F. SHINN.

"I do hereby assign all my right, title and interest in the within article of agreement between M. F. Shinn and myself, dated the 5th day of November, 1856, to James Burley, for value received.

"Witness my hand and seal this ninth day of February, 1857.

"J. H. LOCKWOOD. [SEAL.]"

He alleged that Lockwood paid Shinn the $4,500 stipulated for, and that Shinn, having acquired title to the claim from the United States, conveyed the same to a third party, disabling himself from conveying to Lockwood the undivided fourth of the premises, and that Lockwood had assigned to the plaintiff his interest in the contract and to his claim for damages. He prayed for judgment for $4,500 and interest.

Shinn demurred generally. The court sustained the demurrer and rendered judgment dismissing the petition.

The plaintiff files this petition in error to review this judgment.

Redick & Briggs, for plaintiff in error.

W. F. Sapp, contra.

The court, by STREETER, J., held that the petition stated a good cause of action, and that the demurrer should have been overruled.

Judgment reversed and cause remanded.

Clark v. Hotailing

1. PRACTICE: A petition is not the proper remedy to avoid a decree of foreclosure after it has been enforced by sale and deed made by the master, although it may have been void for want of effectual service of process.

Clark held a mortgage against Hotailing, and, in 1858, filed his bill to foreclose the same. Having filed his affidavit showing such facts as are required to be shown in order to authorize a publication of notice of the pendency of suit to a non-resident defendant, he proceeded in the cause, according to the usual course in such cases, had his decree by default, a sale, a confirmation and a deed, all the proceedings being regular in point of form. After all these proceedings had been had, Hotailing filed his petition in the same cause, alleging that he was, during all the time these proceedings were being had, a resident of Nebraska, and did not know of them, and praying to have the orders and decrees set aside. The court made an order according to the prayer of the petition. Clark appealed to this court.

Redick & Briggs, for appellant.

J. M. Woolworth, contra.

The court, by KELLOGG, Ch. J., held that it was inadmissible to assail and avoid all these proceedings, which have been consummated by a conveyance, by a simple petition filed in the cause. This can only be done by an original bill.

Order reversed.

Mills v. Redick.

1. REPLEVIN: *Replevin* will lie to recover the possession of buildings erected on a lot of ground by a party claiming title thereto, who, by judicial determination, has been evicted therefrom, if the buildings were by him set upon blocks, and were not, at the time of eviction, affixed to the soil, notwithstanding another being afterward in possession did affix them to the soil, and they were so affixed when the replevin was brought.

This was an action of replevin brought in the District Court of Douglas county. It was brought to recover the possession of certain houses which had been erected by Mrs. Mills upon the lot, the title to which was the subject of inquiry in *Mills* v. *Paynter*, *infra* 432. Under the judgment in that case she and her husband, who had charge of the property, were evicted, leaving the houses on the lot. It appeared in evidence that the houses were set up on blocks as long as Mrs. Mills held possession of the lots. Paynter, the defendant in that case, leased the lots to Shelden, who moved the houses, two in number, together, and made one house of them. He also raised them and built a stone foundation under them, and built a chimney which rested on the soil. After making this lease, Paynter conveyed the premises to Redick, subject to the estate of Shelden. No defense was interposed on behalf of Shelden, who was impleaded in the cause.

As between Redick and the plaintiffs, the cause was tried before Honorable William F. Lockwood and a jury, and resulted in a verdict for the defendant for $500 damages, on which judgment was entered. The error complained of was, that the court charged the jury that the property was not subject to the action of replevin, because it was, at the time of bringing the action, affixed to the soil, and was a part of the realty, and that it was immaterial

what its character was previous thereto. Mills brought this petition to correct this error.

W. T. Sapp, for plaintiff in error.

Redick & Briggs, contra.

The court, by STREETER, J., held that the instruction was erroneous, that the houses were properly subject to replevin when the possession of them was taken from the plaintiff, and that the defendants could not be deprived of this remedy by any thing they had done with it.

Judgment reversed and cause remanded.

Zoller v. Ide.

1. CORPORATION: *Deed.* A deed executed in the name of the president of a corporation, purporting to convey its lands, is inoperative.

This was a bill in chancery, filed to recover the legal title to lands. Zoller sought to make his title through a corporation called "The Sulphur Springs Land Company," by a deed which ran, "I, Thomas H. Benton, jr., President of the Sulphur Springs Land Company, do hereby convey," etc., and was signed by Benton in the same way.

The court, by LOCKWOOD, J., held that this conveyance did not pass the title of the company, and, therefore, Zoller did not show title in himself.

J. M. Woolworth, for Zoller.

G. B. Lake, for Ide.

Mills v. Paynter.

1. RES ADJUDICATA: The decision of a tribunal acting within its jurisdiction, whether it be a court or merely a board, or an officer having special enumerated powers, can be reviewed or set aside only by a direct proceeding for that purpose.

2. TOWN-SITE ACT: The mayor of a city under the town-site act, in determining a controversy between adverse claimants to the same lot, acts judicially, and his decision can be reviewed only by appeal.

This was an action for the recovery of the possession of real property, brought in the District Court for Douglas county. The answer was as follows:

"And now comes George M. Mills, the defendant, and for answer to the matters contained in the petition of the plaintiff, says that he denies all the statements and allegations in said petition contained.

"And this defendant, further answering, denies that the said plaintiff now is, or was, on the first day of May, 1857, seized of the lands and premises in said petition described, to wit: lot number eight, in block one hundred and thirty-five, in the city of Omaha, county of Douglas, Nebraska Territory, for an estate of inheritance in fee simple absolute. And this defendant, further answering, denies that the said plaintiff has the lawful title thereto, or that he is entitled to the possession thereof. And this defendant, further answering, denies that he unlawfully keeps the said plaintiff out of the possession of the land and premises in said petition described. And this defendant, further answering, says that he is now and was in possession of said land and premises ever since the seventh day of February, A. D. 1856, and that he now, and ever since the said seventh day of February, 1856, held possession of said property and premises, by consent and authority of one Anna Mills, a resident of said city of Omaha, Douglas

county, Nebraska Territory, who became and was, on the said seventh day of February, 1856, and still continues to be, legally, lawfully and equitably seized and possessed of the said land and premises, to wit: lot number eight, in block one hundred and thirty-five, in said city of Omaha, by virtue of a deed executed to her by one William D. Brown, who was also a resident and occupant of said city of Omaha.

"*And this defendant, further answering, says that the said William D. Brown, on or about the 1st day of March, A. D.* 1854, *settled upon and occupied that portion of the public lands upon which said city of Omaha is now situated, and that afterwards to wit, some time in the month of June or July, A. D.* 1854, *he, together with others, caused the same to be surveyed into blocks, streets and alleys, and occupied the same as a town site, and had a plat thereof recorded as by law required, that they called the same Omaha city. And this defendant, further answering, says that afterwards, to wit, on the second day of February, A. D.* 1857, *the said city became and was incorporated with power to elect a mayor, and that, on the 1st Monday in March,* 1857, *one Jesse Lowe claimed to be duly elected mayor of said city of Omaha, and entered upon the duties of his office of mayor, and, in accordance with the act of Congress, approved May* 23, 1844, *entitled 'An act for the relief of citizens of towns upon the lands of the United States, under certain circumstances,' he, the said Jesse Lowe, mayor, as aforesaid, did enter at the United States Land office, in the city of Omaha, Douglas county, Nebraska Territory, the northeast quarter and the north half of the northwest quarter of section number twenty-two and lot number two in fractional section number twenty-three, township number fifteen, north of range number thirteen, east of the sixth principal meridian in the Territory of Nebraska, in trust for the several use and benefit of the occupants*

thereof, according to their respective interests; and that the land and premises described in said plaintiff's petition is a part and parcel of the land so entered in trust, as aforesaid, by Jesse Lowe, mayor as aforesaid. And this defendant further says that the said Anna Mills was, on the seventh day of February, A. D. 1856, *an actual occupant of said lands and premises, and that she has continued in the occupancy thereof down to the present time, and that she has made large and valuable improvements on said land and premises, to wit, improvements of the value of two thousand dollars; that the said improvements were all made previous to the* 20*th day of April, A. D.* 1857, *and the said Jesse Lowe, mayor as aforesaid, well knowing of the actual occupancy and improvements of the said Anna Mills, and at the same time well knowing that the said John I. Paynter never was in possession or occupancy of said land and premises, and further, well knowing that said John I. Paynter had no legal right or equitable right thereto, on the* 21*st day of April, A. D.* 1857, *in direct violation of said trust, fraudulently made and executed a deed for said lands and premises described in the plaintiff's petition to said John I. Payuter, plaintiff in this suit, and that the so making of the said deed by the said Jesse Lowe, as mayor and trustee, to the said John I. Payuter, was in direct violation of said trust, and of the act of Congress aforesaid. And this defendant further says that said deed should have been made to Anna Mills, and not to John I. Paynter; defendant, therefore prays that he be hence dismissed with his costs."*

The parts of this answer printed in italics was demurred to and stricken out under the plaintiff's exception. The cause was tried to a jury, when an offer was made to prove the same facts as were alleged in and stricken from the the answer, which offer was, under exception of plaintiff, rejected by the court. A verdict and judgment was ren-

dered for the defendant, and the plaintiff appealed to this court.

R. A. Howard, for appellant.

J. M. Woolworth, contra.

WAKELY, J.

An "action for the recovery of real property," the simplified name substituted by the Code for the action of ejectment, was brought by Paynter against Mills.

Before the petition was answered the plaintiff obtained leave to amend it. The amended petition was demurred to, the demurrer was overruled, and the defendant answered. On motion of the plaintiff certain parts of the answer were stricken out, whereupon an amended answer was filed. To a part of the amended answer plaintiff demurred; the demurrer was sustained, and to the other part of the amended answer a replication was filed. A trial was had, which resulted in a judgment for the plaintiff, and the defendant appealed.

It is assigned as error, first, that defendant's demurrer to the plaintiff's amended petition was overruled. I do not find this demurrer in the record, and we could not therefore determine whether it was well taken. Besides, the defendant, after his demurrer was overruled, filed an answer to the same pleading to which he had demurred. It has been often held that by such a step the party waives the error, if any, in the overruling of his demurrer. It is not necessary here to decide whether this principle is affected by anything in our Code.

It is alleged, secondly, that the court erred in sustaining the plaintiff's demurrer to a part of the amended answer, and, thirdly, that there was error in excluding certain evidence offered by the defendant on the trial.

The facts proposed to be proven were set forth in that part of the answer covered by the demurrer, and not elsewhere. They were not relevant, except to sustain the pleadings founded upon them, and the demurrer to the pleading having been sustained, the evidence could not be received. The third point, therefore, is merged in the second, which goes to the correctness of the ruling upon the demurrer. It is proper here to observe that the third assignment of error assumes the offer of evidence to have been broader than it appears by the bill of exceptions to have been. The offer there stated was merely to prove that the mayor's deed to Paynter was obtained in fraud of defendant's rights, and in violation of the trust created in the mayor as trustee for the occupants and owners of lots. No specific act of fraud was pointed out in the offer of proof, and it was evidently intended to suggest the same matter alleged in the answer and involved in the determination of the demurrer.

The answer having, among other things, set up possession of the premises by defendant, under authority of one Anna Mills, who was seized thereof by virtue of a deed from one William D. Brown, proceeds to state the ground of defense which is demurred to. Without recapitulating the facts stated in this part of the answer, it is sufficient to say that they were intended to show, and let it be granted here that they do show, *prima facie*, that Anna Mills, instead of Paynter, was entitled to the deed from the mayor. Then follows this averment: "And the said Jesse Lowe, mayor, as aforesaid, well knowing of the actual occupancy and improvements of said Anna Mills, and at the same time well knowing that said John I. Paynter never was in the possession or occupancy of said lands and premises, and further knowing that said John I. Paynter had no legal or equitable right thereto, * * in direct violation of said trust, fraudulently made and executed a

deed for said lands and premises * * to said John I. Paynter." It is averred further, that this "was in direct violation of said trust and of the act of Congress aforesaid, and that said deed should have been made to Anna Mills, and not to John I. Paynter."

Is there any thing alleged in this answer sufficient to impair the validity of the deed from the mayor to Paynter?

The act "regulating the disposal of lands purchased in trust for town sites" requires the mayor to execute a deed of each lot to the person entitled to it, and when the same lot is claimed by two or more persons, to hear and determine all questions of title according to law and evidence, and give a deed to the person adjudged to have the best title. It also allows appeals, by persons aggrieved, to the district court. By virtue of his power, under this act, the mayor executed the deed. The power so conferred is, in its nature, judicial. He is to hear and determine questions of title according to law and evidence, and adjudge which of the claimants is entitled to a deed. The power of the legislature to confer this jurisdiction upon the mayor, the efficacy of his deed to the successful claimant, or to the person entitled to a deed when there is no contest, are questions not raised by the pleadings or made in this case. The answer does not question the jurisdiction of the mayor, nor the validity of his deed, except for the reasons specially given. We are to determine whether these are sufficient.

The rule is general that the decision of a tribunal acting within its jurisdiction, whether it be a court or merely a board, or an officer having special enumerated powers, can be reviewed or set aside only by a direct proceeding for that purpose. As to the merits of the controversy, it is conclusive between parties and privies in all collateral proceedings. This doctrine has been long and undeviatingly sanctioned. It disposes of all that part of the answer

designed to show that Anna Mills was entitled to a deed. However clearly that may appear from the facts as stated, or may have been proven before the mayor, his determination of the question could not be reviewed in the district court in a collateral proceeding between the same parties or their privies.

Want of jurisdiction is, of course, fatal to any judgment or determination. There are authorities, also, that fraud may be given in evidence to impeach a judgment in a collateral proceeding, where title derived through such judgment is relied upon. Among the cases in which it is so held is that of *Webster* v. *Reid*, 11 *Howard*, 437, and a stranger to the judgment may show that it was rendered by fraud and collusion between the parties to it. This is well settled; but I think no instance will be found where that which is alleged to have been fraudulent in this case has been held to vitiate a judgment. The allegation is, in substance, that the mayor, well knowing that Anna Mills was entitled to the deed, fraudulently made and delivered it to Paynter. The fraud charged is that the mayor purposely gave a wrong judgment. Grant that the judgment was erroneous, it can make no difference as to its validity whether the mayor intended to decide correctly or wrongfully — whether there was a mere error of judgment or a willful perversion of law. The judgment in either case would be conclusive in a collateral proceeding. If there be any authority to the contrary I have not met with it. There is no averment of any fraudulent practice or device in the course of the proceedings, of a want of notice, of surprise, of a false record, of deception practiced upon the unsuccessful claimant. In short, there is nothing averred to negative a full, fair and regular trial before the mayor of the disputed title to the premises, except that the final decision was fraudulent, because it was contrary to what the mayor well knew it ought to have been. As the conduct imputed to

the mayor would be reprehensible, if not corrupt, in an officer exercising the delicate power intrusted to him in this class of cases, it is well to see whether the answer states facts to justify the severe term "fraudulent" which it applies to his decision. Section 3 of the act in question, requires the mayor to "hear and determine all questions of title according to law and evidence, and give to the person adjudged to have the best title a deed in fee simple." What is the mayor's duty? Is it to adjudge according to what he may know of the facts, or according to what is proven? No elementary principle is better known than that, in all judicial investigations, the facts must be found according to the proofs, unaffected by the private knowledge of the officer or the jury who try the issue. The express language of the act is that the mayor shall determine according to "law and evidence." The answer does not deny that the mayor so determined in this case. It does not show that any evidence was offered before him of Anna Mills' right to the deed, nor deny that evidence was given conclusively establishing the right of Paynter. It is silent as to all the proceedings before the mayor. These are presumed to have been regular, and the answer should have at least asserted that they were not, and have not shown wherein they were not, regular before it pronounced the judgment fraudulent. I have confined myself to the sufficiency of what is set forth in the answer as a defense against the plaintiff's title, without intending to touch the general question of the effect or conclusiveness of a mayor's deed, or any question not involved in the demurrer. The judgment should be affirmed.

Judgment affirmed.

Brown v. Homan.

1. One tenant in common before partition cannot purchase in an outstanding title or incumbrance, on the joint estate, for his exclusive benefit, and use it against his co-tenant. The purchase enures to the common benefit, and the purchaser is entitled to contribution.

This was a bill in chancery, filed in the District Court for Douglas county, to recover the title to an undivided half of a lot in the city of Omaha. It appeared that a controversy sprang up, at an early day in the history of the city, between Brown and General Samuel R. Curtis, in respect of a large number of lots therein; the lot in controversy in this said suit being one of them. Brown being in possession of this lot, made to Allen a deed, of which the following is a copy:

"In consideration of the sum of two hundred dollars to me paid, the receipt whereof is hereby acknowledged, I, William D. Brown, do hereby quit claim to J. B. Allen the following described property, situated in the county of Douglas, and Territory of Nebraska, being the undivided half part of lot number five (5), in block number one hundred and thirty-seven (137), in Omaha city, as surveyed by A. D. Jones, and lithographed by the Council Bluffs and Nebraska Ferry Company.

"Witness my hand, the second day of April, 1856.

(Signed) "WM. D. BROWN."

At the same time they made an agreement between them as follows:

"Articles of agreement made and entered into this third day of April, in the year of our Lord one thousand eight hundred fifty-six, between William D. Brown and J. B. Allen, both of Omaha city, Douglas county, Nebraska Territory, witnesseth as follows: Whereas, the said William D. Brown did, on the second day of April A. D. 1856, sell

and convey, by quit-claim deed, the undivided one-half part of lot number five, in block one hundred and thirty-seven, in Omaha, Douglas county, Nebraska Territory, to the said J. B. Allen. Now, therefore, in consideration of such sale and conveyance of the undivided one-half of the lot aforesaid, the said J. B. Allen has and by these presents does hereby agree to erect upon said lot a good and substantial blacksmith shop, of the value of one thousand dollars, or less; and that the said Allen will occupy said lot and the said shop thereon to be erected, free of rent, until such time as the said Brown shall see fit to pay for one-half of the actual cost of said shop; upon the payment of which the said Allen hereby agrees to pay to the said Brown a reasonable rent for the undivided one-half of the said shop; and in case either of the said parties desires to sell his interest in the said lot and shop thereon to be erected, he shall give the other party the preference over all other persons, to become the purchaser thereof. And in case the said Allen is ousted of the possession of said lot by Samuel R. Curtis, then the said Brown is to refund to the said Allen the sum of two hundred dollars, with ten per cent interest from the time of the said sale of the lot aforesaid, until such time as such ouster shall be had. And it is further agreed by and between the said Brown and the said Allen, that in case a suit is commenced by said Curtis to obtain possession of said lot, they will bear equally between them the costs and expenses of such suit; and in case the said Allen shall be so ousted, said Brown is to be liable to said Allen for one-half of the costs of the shop thereon to be erected."

In March, 1857, Jesse Lowe, as mayor of the city, entered the town-site at the United States Land office, under the act of Congress of May 24, 1844.

Allen and Curtis came to an agreement between them in respect of this lot, to the effect that Allen should have a

deed from the mayor for the lot without opposition from Curtis, and should pay Curtis $300. This was accordingly done. Afterwards Allen sold to Homan.

A decree was rendered for the plaintiff, and Homan appealed to this court.

G. B. Lake, for appellant.

J. M. Woolworth, contra.

The court, by LOCKWOOD, J., held that the relation of tenants in common existed between Brown and Allen, under the agreement and the deed of the former to the latter; that it was not material what the nature of the controversy between Brown and Curtis was, as Allen was estopped to deny Brown's right, and that he took the mayor's deed, to the extent of one-half of the lot, in trust for Brown. This was upon the principle that one tenant in common before partition cannot purchase in an outstanding title, or incumbrance, on the joint estate, for his exclusive benefit and use it against his co-tenant. The purchase enures to the common benefit, and the purchaser is entitled to contribution. Homan has not shown himself to be a *bona fide* purchaser, and therefore is in no better situation than Allen.

Decree affirmed.

Neligh v. Bradford.

1. The release of one of several joint obligors operates a release of all.

This was an action brought in the District Court for Otoe county, upon an instrument in the following words:

"Whereas, William Neleigh has this day sold to us the following described property, to wit: The one-half of the southwest quarter, and the one-half of the northwest quarter of section number six, and the one-half of the northwest quarter, and the one-half of the southwest quarter of section seven, and his interest in the fractional parts of said section, all in township number nine, north of range number fourteen east, and the one-half of the southeast quarter of section twelve, and the one-half of the southeast quarter of section number one, in township number nine, range thirteen east of the sixth principal meridian, Nebraska Territory, for which we agree to pay him sixteen thousand dollars, in manner following, to wit: One-fourth in twelve months from this date, and one-fourth in eighteen months from this date, and one-fourth in thirty months from this date, all of the payments to be upon interest at the rate of ten per cent after the first six months, in the following proportion amongst ourselves, to wit: Allen A. Bradford, two thousand dollars; S. F. Nicholls, four thousand dollars; Jacob Dawson, four thousand dollars; William E. Pardee, two thousand dollars; Jacob Safford, four thousand dollars.

Given this 22d day of April, A. D. 1857.

(Signed) ALLEN A. BRADFORD.
S. F. NICHOLLS.
By H. Nicholls.
W. E. PARDEE.
JACOB SAFFORD.
JACOB DAWSON.

Upon delivery to me, William Neleigh, of a good title in

fee from Jacob Safford, for the interest and title of the said Jacob and John Safford, to their share of the lots in and by virtue of their purchase of the foregoing property, a credit of four thousand dollars in full, as said Safford's interest, is hereby entered on this contract, releasing the said Jacob Safford from all further liability on this contract.

(Signed) WM. NELEIGH."

The defendant's demurred as follows:

1. "That the petition shows that there is no cause of action against said defendants.

2. That petition shows that there is no cause of action against either one of said defendants.

3. That petition on its face shows that whatever cause of action may have at any time have existed against said defendants, the same is shown to be released by the plaintiff.

4. The release mentioned in said petition to the said Jacob Safford is a release of all said defendants.

5. That there is a defect of parties defendant, for the reason that Jacob Safford is a necessary party to this suit, and said petition shows that there is no cause of action against him."

Judgment was given in favor of the defendants on the demurrer and the petition dismissed. The plaintiff brought the cause here by petition in error.

W. H. Taylor, for plaintiff in error.

O. P. Mason, contra.

The court, by LOCKWOOD, J., held that the release of Safford released all the other defendants, and that notwithstanding the apportionment between them of the amount each was to pay, they were joint obligors.

Judgment affirmed.

Woods v. Shields.

1 THE REMEDY OF STRICT FORECLOSURE is not taken away by the statute of this territory providing a remedy by sale of the mortgaged premises.

The question presented in this action was whether this court could decree a foreclosure of a mortgage without a sale of the premises.

J. M. Woolworth, for appellant.

I. 1. The courts of this territory, when sitting as courts of chancery, have all the powers of the English courts of chancery.—*Organic Act, Section* 9, *McMeehan* v. *Nicholls, decided in this court in June*, 1857; 1 *Sess. Laws*, 328; 1 *Sess. Laws*, 190; 3 *Sess.* 41.

2. It was and still is the practice in England, a few cases alone excepted, to decree a strict foreclosure.—4 *Kent Com.* 181; 2 *Story's Equity*, 24; *Lansing* v. *Goelet*, 9 *Cow.* 346.

3. The power to decree a foreclosure of mortgage is inherent. But it has been the almost universal practice in this country to provide for a foreclosure by sale, as if such a practice required a statute.—4 *Kent Com.* 181, *and notes.*

4. Such statutes are merely cumulative remedies. They do not, unless the terms of them are express, take away the former right of strict foreclosure. With such cumulative remedies provided by statute in many States, strict foreclosure has been allowed.—4 *Paige*, 58; 2 *New York R. S.* 191; *Lansing* v. *Goelet*, 9 *Cow.* 346; 8 *Post*, 288; 1 *Ohio*, 335; 5 *Ham. Ohio*, 554; 1 *Mon. Kentucky*, 66; 14 *Conn.* 45; 15 *Illinois*, 97.

II. Unless our statutes providing for the foreclosure by sale, expressly repeal the common law or the English practice, it will be construed to be a cumulative remedy.

III. But so far from providing a substitute for the English

chancery remedy, and thereby repealing that remedy indirectly, the statute does in terms save it. It only confers upon the court power to exercise its discretion, when a strict foreclosure is prayed by the complainant, to decree a sale.

1. The statute throughout uses two terms to indicate two distinct remedies, and uses them in contradistinction one to the other; foreclosure or satisfaction. See sec. 1, 2. 6 and 12.

These terms are used according to their exact and technical meaning, which is as follows:

By foreclosure is meant the foreclosure of the equity of redemption. By satisfaction is meant the payment, discharge or satisfaction of the debt secured by the mortgage, which is done,

(1). By a sale of the property;

(2). By an execution on the other property of the defendant, for deficiency of the proceeds arising on the sale, to pay the debt.

The terms are so used in the cases cited above. In section 9 the term foreclosure is used alone in its exact technical sense.

2. The provisions of the statute regulate, and therefore recognize, the strict foreclosure.

3. The statute does not take away, by any express provision, the former remedy.

4. Both remedies stand to be administered in the discretion of the court, as the interest of the parties seem to require.

No counsel for the appellee.

The court, by MILLER, J., held that the statute of the Territory, regulating the foreclosure of mortgages by s

sale of the mortgaged premises, did not take away the remedy of strict foreclosure which had existed in the English Chancery. It did not assume to do so. Nor under the provisions of the organic act could it do so.

Order reversed.

Murry v. Mills.

1. ARBITRATIONS: *Form of award.* An award of arbitrators must state the facts found by them, and their conclusions of law separately.

On the 28th of January, 1863, the parties hereto entered into "articles of submission" to arbitrators, in which were recited divers matters of difference between them, after which was the following:

"Now, therefore, we, the undersigned, George M. Mills and Thomas Murry aforesaid, do hereby submit the said controversy and the matters above stated, to the arbitrament of S. J. Goodrich, Oscar F. Davis and S. M. Parmelee, all of said city of Omaha; and we do mutually covenant and agree, to and with each other, that the award which is to be made by said arbitrators, or any two of them, shall, in all things, by us, and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing under the hands of the said J. O. Goodrich, Oscar F. Davis and S. N. Parmelee, or any two of them, and so made and signed on or before the 28th day of February, 1863.

"And it is hereby further agreed between the said parties that judgment in the district court, first judicial district, sitting within and for the county of Douglas, in the Territory of Nebraska, may be entered upon the award to be made, pursuant to this submission, to the end that the matters hereinbefore stated shall be finally concluded."

The persons named as arbitrators made their awards as follows: "To all whom these presents shall come or may concern, send greeting: S. J. Goodrich, Oscar F. Davis and S. N. Parmelee, to whom, as arbitrators, certain matters in controversy between George M. Mills, of the city of Omaha, in the county of Douglas and Territory of Nebraska, and Thomas Murry, of the same place, as by their

submission in writing, and bearing date the 28th day of January, A. D. 1863, more fully appears. Now, therefore, know ye, that we, the arbitrators mentioned in the said submission, having been first duly sworn according to law, and having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make this award in writing, that is to say: the said George M. Mills is indebted to the said Thomas Murry in the sum of two hundred dollars, and we do find, award, adjudge and decree that the said George M. Mills pay to the said Thomas Murry the said sum of two hundred dollars as the balance due said Thomas Murry from the said George M. Mills upon the several matters submitted to us in and by the said submission in writing, and signed by the said George M. Mills and Thomas Murry.

"In witness whereof we have hereunto subscribed these presents this fourth day of February, 1863.

"S. J. GOODRICH.
"OSCAR F. DAVIS.
"S. N. PARMELEE."

These papers being filed in the District Court for Douglas county, Murry filed his motion as follows:

"And now comes the said Murry, and moves the court for judgment upon the award heretofore made in this cause, in accordance with the statute in such case made and provided, and the stipulation in the articles of submission, and for the amount found due said Murry by said arbitrators, as shown by their award now on file in this cause, &c."

And Mills at the same time filed his exceptions as follows:

"1. The said arbitrators have not, in the said award, stated the facts found by them on the evidence, and the matters submitted to them on said arbitration.

"2. The said arbitrators have not, in the said award,

stated the facts found by them and their conclusions of law on said arbitration separately.

"3. The said arbitrators have not, in the said award, stated the facts proved and submitted to them.

"4. The said arbitrators have not, in the said award, given their decisions on the facts proved and submitted to them and their conclusions of law separately."

The motion for judgment was overruled and the exceptions were sustained, and the award set aside by the judgment of the court. Thereupon Murry brought the cause to this court by petition in error.

The provisions of law construed in this cause were the following: Sec. 866 of title XXVIII of the Revised Statutes, page 545, is as follows: "All the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed, or except as otherwise agreed upon by the parties."

Section 300 of the Code of Civil Procedure is as follows "The trial before referees is conducted in the same manner as a trial by the court. They have the same power to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trials of the case, and to grant adjournments, as the court upon such trial. They must state the facts found and the conclusions of law separately, and their decision must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court." When the referees is to report the facts, the report has the effect of a special verdict."

W. A. Little, for plaintiff in error.

J. M. Woolworth contra.

The court, by KELLOGG, Ch. J., held that the provision of the Code above quoted was, by the section in the chapter on arbitrations above quoted, made applicable to the report of the arbitrators, and that such report must, to have any validity to support a judgment, state the facts found by the arbitrators and their conclusions of law thereon separately. As this report does not conform to this requirement of the statute it must be set aside. The motion for judgment was rightly overruled, and the exceptions filed by Mills to the report were rightly sustained. The judgment must be affirmed.

Judgment affirmed.

Bennett v. Townsend.

1 PRACTICE: If a suit be brought against three parties jointly and severally liable, two of whom only are served, it is not error to enter judgment against those served and omit therefrom the other.

Townsend filed his petition in the District Court for Otoe county, against John P. Bennett, H. P. Bennett and Elisha Bennett, upon a joint and several promissory note made by them to him. John P. Bennett and Elisha Bennett, were duly served with summons, but H. P. Bennett was not served. Judgment by default was entered against the defendants who were served only. The defendants brought the case here by petition in error.

O. P. Mason, for plaintiff in error, contended that it was necessary to enter judgment against all or none of the defendants in the writ, and cited *Russell* v. *Hogan*, 1 *Scam.* 552; *Owen* v. *Bond*, *Breese* 91; *Ladd* v. *Edwards*, *Breese* 139; *Robertson* v. *Smith*, 18 *Johnson*; *Hosey* v. *County of Macoupin*, 2 *Scam.* 36; *Wright* v. *Meredith*, 4 *Scam.* 361; *Freeman's Illinois*, *Dig.* 2, 975.

H. H. Harding, contra.

The court, by STREETER, J. The judgment was rightly entered against the defendants served. It was not error not to make it in form against the defendant who was not served.

Judgment affirmed.

The Platte Valley Bank v. Harding.

1. NIEL TIEL CORPORATION. The maker of a note which is in terms payable to a bank, cannot, in an action brought by it thereon, raise the question of its incorporation. He is estopped to deny it.

The Platte Valley Bank sued Harding in the District Court for Otoe county, upon a promissory note made by him, whereby he promised to pay to "The Platte Valley Bank or order, $400, etc." The plaintiff claimed to be incorporated by an act of the legislature of the Territory of Nebraska. The defendant denied that it was incorporated, because, he insisted, that the alleged act of incorporation conflicted with an act of Congress entitled "An act to disapprove and annul certain acts of the Territorial Legislature of Florida, and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

That no act of the Territorial Legislature of any of the Territories of the United States incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever until approved and confirmed by Congress.

Judgment was given for the plaintiff, and the defendants brought the case here by petition in error.

J. M. Woolworth, for plaintiff in error.

J. F. Kinney, contra.

The Court, by HALL Ch. J., held that the question of the incorporation of the bank could not be raised in this cause, because the defendants were estopped to deny the same.

Judgment affirmed.

Pomeroy v. Bridge.

1. A judgment was recovered in 1858 when the debtor had, a year from the sale, to redeem his estate. In February, 1859, another law was passed by which the right to redeem was abolished, and its provisions made applicable to proceedings to enforce judgments already recovered. In October, 1859, an execution sale on the judgment was had. Held, that the debtor had a year from the sale to redeem, notwithstanding the act of 1859.

Pomeroy filed his creditor's bill against George Bridge, in the District Court for Douglas county, and James G. Megeath was therein appointed receiver of the rents and profits of certain premises. A considerable sum having accumulated in his hands, several parties applied to have the same paid to them. One of these parties was Charles Bridge. He had a mortgage upon the premises made to him by George Bridge before any of the judicial proceedings were had, to secure a sum greatly in excess of the value of the mortgaged premises. He had served the tenants with a notice, as follows:

"I claim the amount of rent now due, or to become due, from you for the rent of the premises now occupied by you in this city, and hereby notify you not to pay to any other person but myself or my agent."

He took no other steps toward obtaining possession.

Markham claimed the rent in the receiver's hands as purchaser of the premises at sheriff's sale. It appeared that, at the October term, 1858, Dowdall, Markham & Co. had judgment against George Bridge in the District Court for Douglas county. In September, 1859, execution was issued thereon and levied on these premises, which were sold by the sheriff on the twenty-fourth day of October following, to Markham. This sale was confirmed by the

court, and on the 5th day of November, 1859, the sheriff duly conveyed the property to him. He claimed to be entitled to all the rents which had accrued from that time.

George Bridge resisted this claim, because, as he insisted, he was entitled to the possession of the property for a year after the sale. He based his claim upon the following statutory provisions of the 3 Session Laws, 78 :

"Sec. 40. When real property has been levied upon, if the estate is less than a leasehold having two years of unexpired term, the sale is absolute. When the estate is of a larger amount the property is redeemable as hereinafter prescribed.

"Sec. 41. At the time of the sale the sheriff shall give to the purchaser a certificate containing a description of the property and the amount of money paid by such purchaser, and stating that unless redemption is made within one year thereafter according to law, he or his heirs or assigns will be entitled to a deed for the same.

"Sec. 42. The defendant may redeem such property at any time within one year from the day of sale, as hereinafter provided, and will, in the meantime, be entitled to the possession of the property.

"Sec. 49. If the defendant or his assignee fail to redeem, the sheriff must, at the end of the year, execute a deed to the person who is entitled to the certificate, as hereinbefore provided, or to his assignee. If the person so entitled be dead, the deed shall be made to his heirs, but the property will be subject to the payment of the debts of the deceased in the same manner as if required during his lifetime." And Code of 1858, proviso to section 622, as follows: "Provided, that any and all rights which shall have attached, by virtue of the provisions contained in any of the chapters above repealed, under any cause of action accruing before the taking effect of this act, shall not be affected by said repeal."

Markham sought to avoid these provisions by citing section 618 of the Code of 1858, which took effect on the first of February, 1859.

"The provisions of this Code do not apply to proceedings in actions, or suits pending when it takes effect. They shall be conducted to final judgment or decree in all respects as if it had not been adopted; but the provisions of this Code shall apply after a judgment or order heretofore or hereafter rendered to the proceedings to enforce, vacate, modify, or reverse it."

The question was whether Markham's title was to be governed by the one or the other of these provisions.

A decree was rendered awarding all the rents to Markham. George Bridge and Charles Bridge appealed to this court.

A. J. Poppleton, for appellants.

J. M. Woolworth, contra.

The court, by MILLER, J., held, that George Bridge was entitled to the rents and profits, down to the 24th of October, 1860, and that after that time the rents should remain in the receiver's hands to await the result of a foreclosure suit instituted by Charles Bridge. The statute which governs this case is that passed at the third session. By it, George Bridge had a right of redemption for one year from the time of the execution sale. This statute is not affected so far as these parties are concerned, by the subsequent one known as the Code of 1858.

Decree reversed.

Bennet v. Fooks and Moffit.

1. SHERIFF'S SALE: *Bona fide purchaser.* A purchaser at execution sale of lands, who, under the act of 1857, had the sheriff's certificate but had not yet received his deed, was protected against an unrecorded prior mortgage upon a bill of foreclosure, filed before the expiration of the time allowed a defendant to redeem his lands sold on execution.

This was a bill in chancery filed in the District Court for Cass county, for the foreclosure of a mortgage. The mortgage was made by Fooks on the 2d of October, 1857, but for reasons not material to be stated here, was not filed for record in Cass county in which the premises were situated, until the sixth of April, 1858.

Moffit obtained judgment against Fooks in the District Court for Otoe county, at the December term, 1857, on which execution issued to the sheriff of Cass county, who levied the same on the mortgaged premises, and on the 30th of January, 1858, he, under his said levy, sold the premises to Moffit who had no notice of the mortgage. He had a certificate from the sheriff of his purchase, but had not received a deed.

A decree was made in the District Court dismissing the bill, and the complainant appealed to this court.

The question to be determined was, which of the parties had the better equity; and this depended upon the following statutory provisions.—2 *Session Laws, page* 82, *sec.* 16.

"All deeds, mortgages, and other instruments of writing, which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the register for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments, shall be adjudged void, as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages, and other instruments, shall be first recorded. *Provided*, That

such deeds, mortgages, or instruments shall be valid between the parties."

3 Session Laws, 96.

"§ 3. If the lands lie in any other county, the lien does not attach until an attested copy of the judgment is filed in the office of the clerk of the District Court of the county in which the land lies.

§ 4. Such clerk shall, on the filing of a transcript of the judgment in his office, immediately proceed to docket and index the same in the same manner as though rendered in the court of his own county."

3 Session Laws, 75.

"§ 4. Execution from the District Court may issue in the first instance into any county which the party ordering them may direct."

3 Session Laws, 79.

"§ 50. The purchaser of real estate at a sale on execution need not place any evidence of his purchase upon record until twenty days after the expiration of the full time of redemption. Up to that time the publicity of the proceedings is constructive notice of the rights of the purchaser, but no longer."

3 Session Laws, 78.

"§ 42. The defendant may redeem such property at any time within one year from the day of sale, as hereinafter provided, and will, in the meantime, be entitled to the possession of the property."

W. H. Taylor, for appellant.

1. The equities of complainants are older and paramount to those of the defendant, Moffit. The older equity and the legal title which is in complainants, must prevail over the equities of Moffit.—*Willard's Eq.* 46; *Berry* v. *Mutual*

Insurance Co., 2 *John's Ch.* 608; *Wilkes* v. *Harper*, 2 *Barb. Ch.* 338.

2. An unrecorded mortgage, under our statute, will hold over a docketed judgment.—*Registry Act*, 1856, *p.* 82, 16; *Willard's Eq.* 254; *Warren* v. *Helm*, 1 Gil. Ill. 231; *Schmidt* v. *Hoyt*, 1 *Eastb. Ch.* 652; *Jackson* v. *Chamberlain*, 8 *Wend.* 620.

3. The defendant, Moffit, never acquired a judgment lien on the land in dispute.—*Statute of* 1857, *p.* 96.

4. If the defendant could acquire a lien upon real estate in any other way than by the judgment act of 1857, he certainly could do so only by the statute regulating the registry of instruments of writing affecting real estate. Priority is only given to those who have their deeds and mortgages first recorded. There is no pretence that defendant, Moffit, ever obtained a sheriff's deed.—*Statute of* 1856, *p.* 82, and authorities cited, *supra.*

5. Defendant, Moffit, is in no sense a *bona fide* purchaser without notice, and cannot claim as such.—*Dickerson* v. *Tillinghast*, 4 *Paige* 220.

6. The levy of an execution upon real estate, and sale where the law gives the right of redemption to the defendant and creditors, does not vest in the purchaser any interest in the real estate, but only gives him a lien or inchoate right which may become absolute, and the defendant, Moffit, could acquire no other or greater interest in the premises by virtue of the sale under execution that defendant Fooks had at the time, for it was Fooks' interest the sheriff levied upon and sold.

S. E. McCracken, for appellee.

I. The decree in the court below was right because of defects in the bill and proceedings prior to the decree.

1. The suit abated on the death of William Bennett, and

has never been revived in any manner known to chancery practice. The only way of making new parties is by supplemental bill.—*Story's Eq. p.* 329, 354, 885 ; 1 *Ind.* 262.

2. There never was any service on Fooks, and the court did right in dismissing the bill.

3. The bill alleges that there is a mistake in the description of the premises. The mortgage describes the premises as in Otoe county, and the bill alleges the land to be in Cass county, and there is no proper averment in the bill or prayer to have the mortgage reformed, and without these averments the court did right in dismissing the bill.—*Davis* v. *Cox*, 6 *Ind.* 481.

2. The court did right in rendering a decree for the defendants.

1. The mortgage attached to the bill and made an exhibit has never been properly acknowledged and recorded. The certificate of the acknowledging officer has no evidence that the grantor was known to the person taking the acknowledgement, and without such evidence was not entitled to be recorded and is void as to creditors.—*Session Laws* 1856, *p.* 82, sec. 16, 17 ; *White and Tudor's leading cases in Eq., vol.* 2, 1, 112 ; *Friendly* v. *Hamilton*, 17 ; *Serg and Rawle*, 70 ; *Fosdick* v. *Barr*, 3 *Ohio*, 471.

2. Moffit is a *bona fide* purchaser for a valuable consideration with no notice of the equities of the plaintiff and as such will be protected by a court of chancery.—2 *White and Tudor's leading cases*, 1, 50, 85, *and authorities there cited* ; *Hopping* v. *Burnain*, 2 *Green*, 39 ; *Orth* v. *Jennings*, 8 *Black*, 420 ; *Davison* v. *Cowan*, 1 *Devereux*, 474 ; *Semple* v. *Burd*, 7 *S. & R.* 286 ; *Jackson* v. *Luce*, 14 *Ohio*, 514 ; *White* v. *Denman*, 16 *Ohio*, 59.

The court, by LOCKWOOD, J., held that Moffit was a *bona fide* purchaser of the premises without notice of the unrecorded mortgage, and entitled to hold the same divested

of the lien thereof; and that the proceedings by which he acquired his interest were regular, and were of themselves notice to all the world of his rights thereunder.

Decree affirmed.

Adams v. Boulware.

1. ATTACHMENT: Under the attachment law enacted in 1857, a *bona fide* purchaser of lands for value will take the same, free of the lien of an attachment, which has been levied thereon, unless an abstract of such attachment be entered in the Register's office of the county.

On the 17th day of June, 1859, Charles F. Holly sold and conveyed to Adams certain lands in Nebraska city, and the deed was duly recorded on the 30th of June of the same year.

On the 5th of May, 1858, Boulware sued Holly in attachment in the District Court for Otoe county, and caused the writ of attachment to be levied on the same lands.

At the June term, 1860, Boulware had judgment in his action against Holly, and on the 11th of August following sued out execution thereon, which was, by the sheriff, in pursuance of the attachment and judgment, levied on the same lands. The sale under this execution was advertised and about to take place, when Adams filed his bill in chancery to restrain the sale. The ground of equity alleged by him was that when he purchased the premises, he caused the records in the office of the register of deeds to be searched, and that thereby it appeared that the title thereto stood unincumbered in Holly, and especially that no abstract of the attachment above mentioned was ever entered in that office, and that he was a *bona fide* purchaser without notice of the attachment.

Boulware demurred to the bill for want of equity. This demurrer was sustained by the court and the bill dismissed. The complainant appealed to this court.

J. M. Woolworth, for the appellant, cited 3 *Session Laws, Chap. XXIX., Sec.* 5, *page* 96, as follows:

"The liens above authorized continue in force for ten years only from the date of the judgment. Provided,

abstracts of judgments, mechanic liens, and all securities provided for in this statute shall be recorded as provided for in section thirty-five of chapter."

2 *Session Laws, Chap. XXXI.*, *sec.* 35, *page* 86, as follows:

"The register, when presented with an abstract of

"1. Any judgment;

"2. A mechanic's lien;

"3. The service of an attachment;

"4. The levy of an execution, any of which establishes a lien upon real estate; or with

"5. A notice of *lis pendens* in chancery, shall enter in a proper book, to be kept for that purpose, the substantial part of such abstract, so as to show the manner of the parties to such liens and notices, the amount of the judgment or indebtedness, by what court the judgment was rendered, or the attachment or execution was issued, and in what court the suit in chancery is pending, together with a general description of the estate to be affected by the lien or notice."

W. H. Taylor, for the appellee, cited 3 *Session Laws, Chap. XXXI.*, *sec.* 29, *page* 101, as follows:

"Property attached otherwise than by garnishment, is bound thereby from the service of the attachment only."

The court, by MILLER, J., held that unless an abstract of an attachment is entered in the register's office, a *bona fide* purchaser for value of lands which have been taken under it, will hold them free of the lien.

Decree reversed.

Cook v. Kuhn.

1. CORPORATION: *Power of Attorney.* A resolution recorded at length on the journal of the proceedings of a corporation, authorizing a party to negotiate a loan for it, and execute a mortgage to secure the same, is sufficient authority in that behalf.

2. ———: *Avoiding Conveyance.* A corporation which has enjoyed the fruits of a loan, which it has authorized to be made, cannot avoid the security which its officer has given, until it has done equity by repaying the money loaned.

This was a bill to foreclose a mortgage, filed in the District Court for Douglas county, by Cook and others, against the Florence Land Company and Kuhn. The mortgage was made on the 13th of June, 1859, by the company to the plaintiff, to secure $1,800. It was executed by Parker, as attorney, in fact, of the company. His authority to execute such an instrument was conferred by a resolution of the company, passed on the 31st day of August, 1858, which was in these words:

"On motion of Mr. Officer, the following resolution was passed: *Resolved*, That James M. Parker, Esq., be authorized to sell the eighty-six shares of stock now held by the company, or such portion of them as he can dispose of at a price not less than one hundred dollars per share, and that he be authorized to borrow at as low a rate as possible, not to exceed twenty per cent. at and for a period not to exceed one or more than two years, an additional amount which, with the proceeds of the sale of said shares of stocks, shall not exceed eighteen thousand dollars; that to aid him in affecting this loan he be fully empowered to pledge or mortgage all the real estate and other property of this company, and that to facilitate the general objects of this trust he be authorized to visit the principal eastern cities of our country."

Parker went east on this business, but was unsuccess-

ful in raising funds, and returned in December. On the 9th of June, he settled his account for the expenses of his trip. Two witnesses testified that they understood that his authority under the resolution ceased at this time.

Kuhn held a judgment against the company, and was impleaded with it as a defendant, and he alone defended. A decree was rendered according to the prayer of the bill, and Kuhn appealed to this court.

Redick & Briggs, for appellant.

G. B. Lake, contra.

The court, by KELLOGG, Ch. J., held that the resolution recorded on the journal was sufficient to authorize Parker to execute the mortgage. The statute of frauds does not require the authority of the agent to be signed by the principal. Besides, the proof shows that the company had the benefit of the loan, and until it repays it, it cannot avoid the security. He who seeks equity must do equity.

Decree affirmed.

INDEX.

Actions.

PAGE.

1. ON COUNTY WARRANTS. A petition alleging the issue and non-payment of a county warrant, without alleging that there is money in the treasury for its payment, or that time is elapsed for the collection of the money by taxation, will be dismissed without prejudice. *Brewer* v. *Otoe County* 378

See CONSTITUTION 4.

Agency.

1. There is no relation or agency between a party forwarding a written request to counsel for his opinion, and another party by whom the writing is transmitted. *Jameson* v. *Butler* 115

2. ——: *Continuance of the relation.* When the relation of principal and agent has once been established, it will be presumed to continue until shown to have been dissolved. *The Columbus Co.* v. *Hurford*.. 146

3. ——: *How established.* The relation of principal and agent may be inferred by implication from the acts of the parties, as well as shown by deeds, or informal writings, or verbal delegation..... *id*

4. ——: —— *as to corporations.* This is equally true of the agents of corporations..... *id*

5. ——: *Dealings of agent with principal.* It is the duty of persons holding confidential relations, of whatever nature, with others, to put themselves on terms of perfect equality, by furnishing full, exact and truthful information of all matters which enter into a negotiation between them..... *id*

6. ——: ——. If they fail to do so, they are liable to lose the entire advantage of the transaction..... *id*

7. ——: ——. General allegations of having done so, made by the agent, are insufficient It is his duty to inform the court precisely of the information which he did impart to his principal, so that the court may judge whether he has made a full and fair disclosure... *id*

See COUNSEL'S OPINION 1. CORPORATIONS 3.

Arbitrations.

1 FORM OF AWARD. An award of arbitrators must state the facts found by them, and their conclusions of law separately. *Murry* v. *Mills*.. 456

Attachment.

1. Under the attachment law enacted in 1857, a *bona fide* purchaser of lands for value will take the same, free of the lien of an attachment, which has been levied thereon, unless an abstract of such attachment be entered in the Register's office of the county. *Adams* v. *Boulware*..... 170

2. SURRENDER OF ATTACHED PROPERTY: *Charges.* A defendant in an attachment which has been dissolved, is entitled to the possession of the property taken under the writ, without reimbursing the sheriff what he, in order to obtain the property on the writ, paid to a carrier who had lien on it, nor what he has paid for the safe keeping of it. *McReady* v. *Rogers*..... 124

See SURETY 2, 3.

Attorney.

See AGENCY 1. CORPORATION 1.

Bonds.

1. BONDS OF COUNTY CLERKS: *Assuming duties of clerks of district courts* The statute making county clerks, *ex officio* clerks of the District Court in their respective counties, does not require of them bonds in their character of court clerks, separate or additional to such as they give as county clerks. *The People* v. *McCallum*..... 182

2. *Demand.* If such additional bond were required, a county clerk would not be excluded from performance of his duties as clerk of the court, because he had neglected to give the additional bond, unless demand that he do so were first made upon him in that behalf..... *id*

See QUO WARRANTO 1, 2.

Caveat Emptor.

See EXECUTION TITLE.

Constitution.

TITLE OF BILLS. Section 19 of article 2 of the constitution, does not require that the title of a bill shall contain an abstract of the bill, nor set out the particulars of the amendment. The Legislature may select its own title, although it may not be the most suitable or comprehensive. *The People* v. *McCallum*..... 182

2. *Recital of the provision amended.* An act amendatory of a former statute need not recite the provision changed..... 182

3. *Mistake in such recital.* If the former provision which is amended be recited in the new enactment, and a mistake in such recital be made, it does not render the new act void as in contravention of this clause of the constitution..... *id*

4. ACT IMPAIRING THE OBLIGATION OF A CONTRACT. An act requiring the holder of a county warrant, which is over due and which draws ten per cent per annum interest, to present the same at the treasury, and surrender it and take in its place bonds drawing interest at seven per cent per annum, payable at a distant day, is unconstitutional. *Brewer* v. *Otoe County* 878

See ACTIONS 1. JURISDICTION 1, 2. TAXATION 1, 4.

Contract.

1. The failure of a vendee of lands to perform the stipulations of the contract on his part does not terminate the contract, but leaves it optional with the vendor to adhere to or rescind it. *Eaton* v. *Redick*. 305

2. *Rescission.* The vendor, by selling the property to another, exercises his option and rescinds the contract, and thereafter the parties stand as if no contract subsisted between them ..... *id*

3. *Recovery of amount paid.* When the vendor, availing himself of the vendee's default, elects to put an end to the contract, the vendee may recover back the money he has paid in part performance, with interest from the date of the rescission..... *id*

See CONSTITUTION 4. DAMAGES 1, 2.
EVIDENCE 2. LEX LOCI CONTRACTUS 1.
SPECIFIC PERFORMANCE 1, 2, 9, 10, 11.
VENDOR 2, 4.

Conveyances.

1. ABSOLUTE CONVEYANCES *to be construed as mortgages.* A deed of real estate, absolute on its face, given to secure the payment of a sum of money, as between the parties, and all persons having knowledge of the purpose for which it is given, must be construed as a mortgage. *Wilson* v. *Richards*..... 342

See CORPORATIONS 2. PRE-EMPTIONS 14.
STATUTE OF LIMITATIONS 2.

Corporations.

1. POWER OF ATTORNEY. A resolution recorded at length on the journal of the proceedings of a corporation, authorizing a party to negotiate

a loan for it, and execute a mortgage to secure the same, is sufficient authority in that behalf. *Cook* v. *Kuhn*..... 472

2. AVOIDING CONVEYANCE. A corporation which has enjoyed the fruits of a loan, which it has authorized to be made, cannot avoid the security which its officer has given, until it has done equity by repaying the money loaned..... *id*

3. ACT OF MEMBERS. A corporation whose governing power is vested in a board of directors, is not bound by the act of its stockholders. *The Columbus Company* v. *Hurford*..... 146

4 DEED. A deed executed in the name of the president of a corporation purporting to convey its lands, is inoperative. *Zoller* v. *Ide*.. 489

See AGENCY 2, 3, 4, 5, 6, 7. JURISDICTION 4.

Counsel's Opinion.

1. A written request to counsel for his deliberate legal opinion, justifies him in preparing and forwarding such opinion in writing. *Jameson* v. *Butler*..... 115

See AGENCY 1.

County.

See ACTIONS 1. CONSTITUTION 4.

County Clerk.

See BONDS 1, 2.

Creditor's Bill.

1. The judgment creditor may reach the unpaid purchase money by creditor's bill. *Filley* v. *Duncan*..... 134

See FRAUD 1.

Criminal Law.

See LARCENY 1. PRACTICE 12.
PRACTICE IN CRIMINAL CASES 13, 14, 15

Damages.

1. DAMAGES *for breach of a contract* for machinery, sustained by reason of furnishing imperfect articles, cannot be shown by proof of what the party to whom the same were furnished actually paid for replacing them with such as the contract required. *Holmes* v. *Boydston*..... 846

2. ——: ——. The true rule is, the difference between the value of

the machinery furnished and what it would cost to replace the same with such as was demanded by the contract 346

See CONTRACT 3. EVIDENCE 2, 3. OFFICER 2. REPLEVIN 2, 3. SURETY 3.

Deed.

See CONVEYANCES 1. CORPORATION 4.

Derivative Titles.

1. Although it may be true as an abstract proposition that a derivative title cannot be better than that from which it is derived, yet there are many necessary exceptions to the operation of the rule. *McAusland* v. *Pundt*..... 211

Estoppel.

1. ESTOPPELS must be reciprocal. *Towsley* v. *Johnson* 95

See NIEL TIEL CORPORATION 1.

Evidence.

1. VERDICT. A verdict of a jury in one case, in order to operate an abatement of another, must have been recovered for the identical cause of action and between the same parties. *McReady* v. *Rogers*. 124

2. The owners of a mill, in their contract for the erection therein of the machinery, agreed to have their building ready for setting the same up by a certain day, and the parties furnishing the machinery agreed to have it up by a day also limited. The owners not being ready when they were required to be, and thereby greatly delaying the work of putting the machinery in, were not permitted to show what their mill would have earned from the time the machinery was to be in, had it then been ready to run. *Holmes* v. *Boydston*..... 346

3. ——: *The value of services* cannot be shown by proof of what was paid therefor, but only by proof of what they are worth..... *id*

4. REBUTTING INCOMPETENT EVIDENCE. Competent evidence may be received on behalf of one party, to rebut incompetent evidence introduced by the other party without objection. *McCartney* v. *The Territory*..... 121

5. ——. But incompetent testimony cannot be admitted to rebut incompetent testimony..... *id*

See AGENCY 3. DAMAGES 1, 2. PRACTICE 8, *a*, *c*, 13, *g*. PRACTICE IN CRIMINAL CASES 6. RES ADJUDICATA 3 SPECIFIC PERFORMANCE 1.

Execution Title.

1. CAVEAT EMPTOR applies with all its force to a purchaser of real estate on execution. *Miller* v. *Finn* 255

2. ——: D. had judgment against B. in 1858, took out execution under which real estate was sold on the 24th of October, 1859. The sheriff's deed to the purchaser expressed the conveyance of B.'s interest on the 24th day of October. P. had a judgment against B. which, on the 16th day of October, 1859, became a lien on the premises. Afterward he took out execution and sold the same premises, *held*, that the purchaser took no title ..... *id*

3. ——: A creditor had judgment in 1859, took out execution, but at what time did not appear; took out an alias in 1862, *held*, that his lien was postponed to those of intermediate judgments .... *id*

See REDEMPTION 4.

Foreclosure of Mortgage.

1. THE REMEDY OF STRICT FORECLOSURE is not taken away by the statute of this territory providing a remedy by sale of the mortgaged premises. *Woods* v. *Shields* 458

See FRAUD 2. MECHANICS' LIEN 1. PARTIES 2, 6. REDEMPTION 2, 3. SHERIFF'S SALE 1.

Fraud.

1. AS TO CREDITORS. If an insolvent convert his property into notes, payable to a third party as his assignee, and the transaction is concealed from his creditors, a creditor's bill will lie to reach the fund, and the plaintiff therein will be entitled to it. *Rogers* v. *Jones* 417

2. IN MORTGAGE AND IN FORECLOSURE THEREOF. A mortgage to secure a sum certain, and future advances duly recorded, and by regular proceedings foreclosed, is not fraudulent as to creditors. *Miller* v. *Finn*, 254

3. ——. Strong positive proof of fraud is required to avoid the recitals and findings in a decree of a court of general jurisdiction ..... *id*

4. IN SALE. It is fraud in a vendor of a horse not to acquaint a vendee, when negotiating for the purchase, of facts affecting the value of the animal, which, if known to him, would prevent the vendee from buying. *Jones* v. *Edwards* 170

See PRE-EMPTIONS 10, 14.

Judgment.

1. LIEN OF JUDGMENT: *After acquired lands.* Until levy of execution, the lien of a judgment does not attach to lands, acquired after its rendition, so as to affect *bona fide* purchasers. *Filley* v. *Duncan* 134

2. ——: *As against equities.* Equity will control judgments, so as to protect equities of third parties existing at its recovery..... 184

3. ——: *As against vendee.* A judgment against a vendor of lands, recovered after his agreement to convey, is not a lien against a vendee in possession, beyond the unpaid purchase money..... *id*

4. ——: *Constructive notice.* The entry of the judgment will not of itself compel the vendee in possession, under contract, to make subsequent payments to the creditor..... *id*

5 ——: *Actual notice,* of the mere fact of the entry of the judgment, will not compel him to do so.—CROUNSE, J..... *id*

6. SEVERAL JUDGMENTS AGAINST WRONG-DOERS. Several actions may be brought, and several judgments recovered against several wrong-doers, although but one satisfaction can be had. *McReady* v. *Rogers* 124

See EXECUTION TITLE 2, 3. PARTIES 11. SURETY 1.

Judicial Sale.

1. CONFIRMATION. The return of the sheriff or master of a judicial sale must show that the appraisers were residents of the county in which the premises are situated. *Laughlin* v. *Schuyler* 409

2. ——: *In parcels.* Each lot or parcel of ground must be appraised and sold separately, or the sale will be set aside..... *id*

3. ——: *Not defeasible.* A party who has recovered a judgment or decree, under which his adversary's property has been sold to him, holds an estate which is not merely defeasible upon a reversal of the judgment or decree by an appellate court. *McAusland* v. *Pundt* 211

4. ——: *Why restored on reversal.* The principle upon which the property so sold, remaining in the hands of such party at the time of reversal, is returned to the former owner, is that of convenience in doing justice between the parties..... *id*

5. ——: *Not restored when held by grantee.* If a party who has recovered a judgment or decree becomes the purchaser of property thereunder, and conveys the same to a third party, and afterwards, the judgment and decree not having been superseded by bond, is reversed in the appellate court, such grantee will retain the property notwithstanding the reversal ..... *id*

6. ——: *When party thereto retains property.* And so will the party if he retain the property at the time of the reversal. Per CROUNSE, J.... *id*

See SHERIFF'S SALE 1, 2, 3, 4, 5.

Jurisdiction.

1. The power to hear and determine a matter in controversy, is jurisdiction. It is *coram judice*, whenever a case is presented which brings the power into action. It may be exercised according to the rules of the common law, or by special direction, or informally. *Smiley* v. *Sampson* 56

2. ——: OVER CONSTITUTIONAL QUESTIONS. The courts have no jurisdiction of matters which are committed to the discretion of the legislature. *Bradshaw* v. *The City of Omaha*..... 16

3. ——. Nor may they declare an act unconstitutional, because the legislature in passing it, was influenced by unworthy motives..... *id*

4. ——: *Municipal corporations.* The legislature may increase or restrict the powers, extend or contract the limits, of cities, and the courts cannot interfere..... *id*

5. ——: *Municipal taxes.* The courts have jurisdiction to inquire and determine whether lands brought by the legislature within the limits of a city, are justly subjected to taxes levied by it for its support; because that is a question of property and private right ..... *id*

See PRACTICE 3, 6, *b*.
PRACTICE IN CRIMINAL CASES 8.
PRE-EMPTIONS 2, 3. SCHOOL BOARD 2.

Landlord and Tenant.

1. ——: TENANT HOLDING OVER. A tenant for one year, holding over after the expiration of his term, cannot disclaim his relation, nor question his landlord's title. *Mattis* v. *Robinson* 3

2. ——: *Assailing his landlord's title.* Before he can be permitted to assail his landlord's title, he must surrender his possession, acquired under the lease ..... *id*

3. ——: *Eviction or its equivalent necessary.* Wherever there is a paramount title in a third person, who has a right thereby to the possession, and it can be done without any collusion or bad faith to the lessor, the tenant, in order to prevent being expelled by the holder of that title, to whom otherwise he would be rendering himself liable as a trespasser, may yield the possession and attorn to or take from such holder of the title, a new lease, or he may abandon the possession. In neither case will he be liable to the first lessor for rent. In the former case, he may resist his first lessor's claim to the possession, by the new right thereby acquired ..... *id*

4. ——: *Notice to his landlord.* In all cases, he should notify his landlord of his action ..... *id*

5. ——: *Pierce* v. *Brown*, 24 *Vt.*, 165, examined and overruled..... 8

6. ——: *Buying in outstanding title.* A tenant buying in an outstanding title for the purpose of protecting his possession, shall have what he has paid and legal interest, and no more ..... *id*

Larceny.

1. The bringing into this State, by the thief, of goods stolen in another State, is not larceny. *The People* v. *Loughridge* 11

Lex Loci Contractus.

1. An agreement for a loan of money was made in New York, and the money advanced there: a note dated in Nebraska, payable in New York, and a mortgage on lands in Nebraska, were given to secure the debt: *held*, that the circumstance that the note was made and dated in Nebraska, was immaterial; the note was but and incident to the agreement. The contract is to be governed by the laws of New York. *Sands* v. *Smith*..... 108

Mandamus.

1. A mandamus will not be allowed upon the hearing of the application for which the applicant's title to an office, in virtue whereof he claims the writ, is drawn in question. *Anderson* v. *Colson*..... 172

Mechanics' Lien.

1. A party who furnishes material for the building of a house, but does not follow the directions of the mechanics' lien law, has no lien on the premises entitling him to redeem a mortgage made thereon, nor does he acquire any interest in the premises by reason of his recovery of judgment against the mortgagor after foreclosure and sale. *Eaton* v. *Bender* 426

Merger.

1. There can be no merger unless a greater and a less estate meet in the same person holding in the same right. *Miller* v. *Finn*..... 255

2. Nor where intervening rights or estates interfere, nor where the interests of the party in whom the estates meet so require..... *id*

3. Nor where the intention to keep the estates distinct may be inferred or has been expressed..... *id*

Mortgages.

See CONVEYANCES 1. CORPORATIONS 1, 2.
FORECLOSURE 1. FRAUD 2.

Niel Tiel Corporation.

1. The maker of a note which is in terms payable to a bank, cannot, in an action brought by it thereon, raise the question of its incorporation. He is estopped to deny it. *The Platte Valley Bank* v. *Harding*..... 461

Officer.

1. NEGLECT. The law will protect an individual who, in the prosecution of a right, has done all that the law requires him to do, but fails to attain his right, by reason of the neglect or misconduct of a public officer. *Smiley* v. *Sampson*..... 57

2. LIABILITY. A Probate Judge issuing an attachment and a sheriff executing it, are not liable for the taking and conversion of property thereon if they have acted in good faith. *Morgan* v. *Larsh*..... 361

See ATTACHMENT 2. BONDS 1, 2. MANDAMUS 1.

Parties.

1. TO SUITS BROUGHT ON CHOSES IN ACTION. The assignee of a chose in action is the proper and the only party who can maintain a suit thereon. *Mills* v. *Murry*..... 327

2. ——: *Bringing them in by notice.* An affidavit for publication of notice of pendency of suit alleged that the action was brought for the foreclosure of a mortgage, and that the defendants were non-residents of the State, without alleging that they could not be served with process in the State; the notice was published four weeks next after June 16, 1860, and required the answer on the 30th July, 1860; *held*, the notice was sufficient, and a decree rendered thereon concluded the defendant. *Miller* v. *Finn*..... 254

3. ——: *Appearance.* A party whose agent, not an attorney of the court, has entered his appearance, and who has answered a cross-bill filed in the cause against him and the plaintiff in the original bill, affirms the appearance and becomes a party in the principal suit..... *id*

4. ——: *Partners.* The omission of one partner as a co-defendant in an action in respect of partnership property, can, at the common law, only be taken advantage of by plea in abatement duly verified..... *id*

5. ——: Impleading parties in a bill as "Pomeroy & Benton," and publishing notice of pendency of the suit addressed in that form, is sufficient to bring before the court the members of a firm doing dusiness under the style of Pomeroy, Benton & Co., composed of Pomeroy, Benton & Chase..... *id*

3 ——: Incumbrancers not made parties to foreclosure bill are not affected by decree..... 255

7. ——: To ACTIONS OF PUBLIC CONCERN. A common or public nuisance, if committed without lawful authority, can be remedied by a public prosecution instituted by the proper public officer, on behalf of the people. *Kittle* v. *Fremont*.... 329

8. ——: An individual who is specially injured by a common or public nuisance may maintain a suit to have the same abated..... *id*

9. ——: But a private person cannot maintain an action to abate a public nuisance unless he can aver and prove some special injury to himself..... *id*

10. LEGISLATIVE ACT APPROVING THE *alleged nuisance*. It is competent and proper for the legislature to validate the action of town authorities, in modifying the location of public parks, and such provisions operate to waive the ground of complaint of the public..... *id*

11. ——: In an action brought upon a judgment against a principal debtor, in behalf of a surety who has paid off and satisfied the same, and taken an assignment thereof, the original plaintiffs are not proper parties. *Eaton* v. *Lambert*..... 339

Pleading.

See PRACTICE.

Power of Attorney.

See CORPORATIONS 1.

Practice.

1. ALLEGATA ET PROBATA. The plaintiff in a bill in chancery cannot go to the answer for facts which by his bill, he did not put in issue. *Miller* v. *Finn*..... 255

2. ——: A petition is not the proper remedy to avoid a decree of foreclosure after it has been enforced by sale and deed made by the master, although it may have been void for want of effectual service of process. *Clark* v. *Hotailing*..... 436

3. ——: *A petition in error* must be filed with the transcript of the record of the District Court, and before the summons in error is issued, in order to give the Supreme Court jurisdiction. *City* v. *Middleton*.... 10

4. ——: *Time to answer supplemental bill.* Under the practice in Chancery, before the equity and common law jurisdiction were blended by the amendments of the Code of Civil Procedure, a defendant had until the fifth Monday after notice of the filing thereof, to answer a supplemental bill. *Orr* v. *Orr*..... 359

5. ——: *A decree*, entered before that time had elapsed, without the defendant's consent, and before he had plead to the supplemental bill, reversed..... 359

6. APPEALS *a*. UNDER TOWN SITE ACT are not governed by the act subsequently passed regulating appeals in justices' courts. They are sufficient if taken orally on the date of the mayor's decision and note in his docket. *Newcomb* v. *Boulware*..... 428

b. APPEAL OR PETITION IN ERROR *to final order*. An order to be final and subject to review in an appellate court upon appeal or petition in error, must dispose of the whole merits of the case, and leave nothing for the further determination of the court. It must affect a substantial right and determine the action. *Smith* v. *Sahler*..... 310

c. An order or decree which leaves the law or equity of the case, or some material question connected with the merits of the controversy, for future determination, is interlocutory, and is not subject to review in any appellate court on appeal or petition in error..... *id*

d. An order dissolving an injunction, when the same is an incident of the action, and the substantial rights of the parties remain undetermined, is interlocutory and not appealable..... *id*

e. *Power of court to enlarge the time within which an appeal shall be perfected.* Courts do not possess any power to enlarge the time within which the transcript of the record of the District Court shall be filed in the Supreme Court, in order to perfect an appeal from a decree of the former court, when the legislature has limited the time within which it shall be filed, and provided as a consequence of failure to do so, that the decree shall stand and be proceeded on, as if no appeal had been taken. *Verges* v. *Roush*..... 113

f. ——: *If notice of appeal* from a judgment be served upon the successful party and the clerk not until thirty days have expired from the rendition of the judgment, they are ineffectual to give the Supreme Court jurisdiction. *Redgrave* v. *Baptist Church*..... 345

7 ——: If a suit be brought against three parties jointly and severally liable, two of whom only are served, it is not error to enter judgment against those served and omit therefrom the other. *Bennett* v. *Townsend*..... 460

8 CHARGE *a*. When the court gives to the jury instructions not required nor called for by any evidence adduced in the cause, and it appears

that such unnecessary instruction mislead the jury in its consideration of the facts of the case, the judgment will be reversed. *Meredith v. Kennard* 312

b. ——: If an erroneous charge be given on an abstract proposition, or on a point not in the case, and the verdict is supported by proof in the cause, the judgment will not be disturbed..... *id*

c —— TO JURY: *Unsupported by evidence.* It is error for the judge to instruct the jury that they will not find for a party a certain sum claimed by him, unless the claim therefor has been assigned to him, when there is no evidence whatever of any assignment. *Holmes* v. *Boydston* 346

d ——: *Exceptions to charge.* If the charge of the court to the jury contain more than one proposition, and any portion of it be correct, each specific point deemed erroneous must be pointed out, and separately excepted to. A general exception will be unavailing. *McReady* v. *Rogers* 124

e. ——: ——. To make exceptions to the charge of the court to the jury available to the party excepting, the exception must be reduced to writing, together with so much of the charge as is necessary to explain it. *Monroe* v. *Elburt* 174

f. ——: *Bill must be signed in term.* If the bill of exceptions be not reduced to writing and tendered during the term at which the trial is had, it will be disregarded..... *id*

CONTINUANCE *a.* The affidavit for the continuance of a cause, to procure the evidence of a co-defendant, is fatally defective, if it does not state the testimony which the affiant expects will be given by the absent party. *Jameson* v. *Butler* 115

b. ——: *Overruling motion for.* Whether the refusal to grant a continuance can be assigned for error: quere? ..... *id*

0. DEPOSITION *a.* CERTIFICATE. A certificate to depositions, showing that the witnesses were sworn to testify the truth, the whole truth, and nothing but the truth, without naming the cause or matter in or about which they were sworn, and showing the other facts prescribed by the statutes, is sufficient ..... *id*

b. ——: *Depositions* taken in a cause instituted by one plaintiff with whom others are afterwards joined, may be read in evidence, if applicable to the case, after the amendment as to parties. *Holmes* v. *Boydston* 346

11. INSTRUCTION TO JURY *a.* It is perfectly proper when a jury returns

into court and requests further instructions, for the judge, in the presence of the parties or their counsel, to repeat what he has already said, or add whatever is proper in the case, which will aid them in reaching a conclusion. *Homan* v *Laboo* 204

b. ——: *Presumptions of correctness.* If the record does not show that it contains all the testimony, it will be presumed that there was evidence which would justify a charge of the court, although it does not appear at large ..... *id*

c. ——: It is not error for the court to decline to give a request for instructions to the jury, in the words of the request, if the substance thereof is given in terms as favorable to the party. *Jameson* v. *Butler* 115

12. NEW TRIAL *a*: *Assault and battery.* In an action for assault and battery, a new trial will not be granted on account of the smallness of damages awarded by the verdict. *Shoff* v. *Wells* 168

b. ——: *Error.* If it be granted and another trial takes place, at which larger damages are awarded by the jury, all proceedings after the first verdict will be set aside, and judgment be ordered on that verdict ..... *id*

c. ——: *Motion for new trial.* Errors in the admission or refusal of testimony on the trial, and in giving or refusing instructions to the jury, will be considered as waived, unless complaint thereof be made in the motion for a new trial. *M. P. Railway Co.* v. *McCartney* 398

13. RECORDS *a.* The attention of counsel is called to the necessity of seeing to it that proper orders are entered in the records of the District Court, and that full transcripts thereof are brought to the Supreme Court. *Orr* v. *Seaton* 105

b. ——: *Time to answer.* When, to a defendant in default for want of answer, the time is given which is fixed by statute, he has to the third Monday following, to answer, and no longer *id*

c. ——: *Objecting to service.* A defendant who has answered, although his answer has been stricken from the files, and who has applied to the court for leave to answer over, has appeared to the action, and cannot object to the form of the process .. *id*

d. ——: *Opening a default.* Whether a default shall be opened, is a question addressed to the discretion of the court. The Supreme Court will not interfere with its exercise, unless it is oppressive ..... *id*

e. ——: *Paper not rightly in record.* A deposition used upon a hearing in the District Court, but not included nor referred to in the bill of exceptions, will, on motion in this court, be stricken out of the transcript. *Nebraska City* v. *Baker* 180

f. ——: *Records for Supreme Court.* The court reflects upon the habit of inserting in the transcripts of the proceedings in the District Court, papers filed therein upon which no question is made, because the same unnecessarily incumber and burden the records of the Supreme Court. *Morgan* v. *Larsh* 361

g. ——: *Objections to testimony* must be stated at the time the same is offered, or they will be disregarded in this court .... *id*

14. SUMMONS *a.* *Appearance to summons in error.* An attorney of record in a cause in the District Court, may, when the cause is removed into the Supreme Court, enter therein the voluntary appearance of his clients, without the issue or service of summons in error. *McDonald* v. *Penniston* 324

b. ——: *Records in Supreme Court.* Transcripts of records of proceedings had in the District Court, when filed in the Supreme Court for the purpose of reviewing the action appearing thereby, must show when and where the court was held, its term, and the names of the judge and other officers present, and be duly authenticated by its clerk ..... *id*

c. ——: *Endorsement of Summons.* No other judgment can be rendered than that, notice of which is endorsed on the summons. *Watson* v. *McCartney* 131

d. ——: If a summons, issued in an action of such a character as does not require an endorsement, be actually endorsed, the notice so given must fully and truthfully inform the defendant of the extent and nature of the claim alleged against him *id*

e. ——: *Amendment of endorsement.* The endorsement of the summons giving the defendant notice of the nature and extent of the plaintiff's claim, cannot be amended unless the defendant appear in the action ..... *id*

f. ——: *Service of summons on return day.* A service of summons made on the return day thereof is sufficient to require the defendant to appear to the action, and is effectual to support a judgment by default if he fail to appear. *Aumock* v. *Jamison* 432

g. ——: *Service of summons on agent of a corporation.* An agent invested with the general conduct and control, at a particular place, of the business of a corporation, is a managing agent,

within the 75th section of the Code, upon whom a summons may be served. It is immaterial where he resides. *Porter* v. *The Chicago & N. W. R. R. Co*..... 14

——: *Appearance.* A defendant may appear specially to object to the jurisdiction of the court, either over his person or the subject matter of the suit, without waiving his right to be heard on these questions in bank. *Per* MASON, Ch. J..... *id*

i. ——: But if he seeks to call into action any power of the court except on the question of its jurisdiction, his appearance is general..... *id*

5. VERDICT *a.* The appellate court will presume the verdict of the jury sustained by the evidence, unless the contrary fully appear. *The Midland Pacific Railway Co.* v. *McCartney*..... 398

b. ——: ——. All the evidence adduced on the trial should be preserved in the bill of exceptions, and the fact be accordingly stated. in order to justify a claim that the court below erred in refusing a new trial, asked for on the ground that the verdict was not sustained by sufficient evidence..... *id*

c. ——: It is not usual for courts to disturb the verdict of a jury, because it is against the weight of evidence, when there is any evidence to support it. *Jones* v. *Edwards*..... 170

d. ——: A verdict which finds two inconsistent facts, is void, and cannot be the foundation of a legal judgment. *Meredith* v. *Kennard*..... 312

e. ——: The verdict must respond to all the material issues between the parties..... *id*

f. ——: Cases may occur, when a general verdict alone will be a substantial response, to the issues taken by special matters set up in the pleadings..... *id*

See ACTIONS 1. ARBITRATIONS 1. ATTACHMENT 1, 2. CREDITOR'S BILL 1. DAMAGES 1, 2. EVIDENCE 1, 2, 3, 4, 5. JUDGMENT 1, 3, 4, 5, 6. JUDICIAL SALE 1, 2. LEX LOCI CONTRACTUS. MANDAMUS 1. MECHANICS' LIEN 1. OFFICER 2. PARTIES. QUO WARRANTO 1, 2. RES ADJUDICATA 3.

Practice in Criminal Cases.

1. ——: Section 166 of the Criminal Code, as enacted while Nebraska was a Territory, providing that the indictment shall run in the name of "The Territory of Nebraska," is modified by the clause of the constitution which provides that it shall run in the name of "The People of the State of Nebraska." *Burley* v. *The State*..... 885

2. ——: *Called terms.* It is not necessary that the record should show affirmatively that every step was taken to convene the court at a called term, in order to support the proceedings had thereat, providing enough appears to establish the facts 885

3. ——: *Pleading.* A plea to the jurisdiction which only alleges conclusions of law, and not facts adverse to the jurisdiction, is not good ..... *id*

4. ——: ——. It is error to put a prisoner upon his trial before he has plead to the indictment..... *id*

5. ——: ——. But if the defendant plead "not guilty," and afterwards file his motion to quash and plea in abatement and they are determined, and the trial proceeds without a renewal of the plea of "not guilty," the presumption is that it, as first interposed, was not withdrawn ..... *id*

6. ——: *Evidence.* It is error to refuse to permit, on cross-examination, a question as to his being intoxicated being put to a witness, who, on his direct examination, has testified to acts and declarations of the accused and the deceased before the homicide, which tend to fasten guilt on the former ..... *id*

7. ——: *Filling vacancies in juries.* It is error to fill vacancies in the grand jury from the list of persons summoned as petit jurors, and it is not material whether any injustice was thereby suffered by the prisoner 886

8. ——: *Called terms: Records in criminal cases.* In a criminal case for felony, in which the indictment or other proceedings are had at a called term of the court, the record should show the request made by the county commissioners to the judge for the term, the order of the judge thereon, and the due publication of notice of the holding of the court 885

9. ——: *Record in criminal cases* for felony should show that a venire for summoning the juries has been issued to the sheriff and been by him executed, or that the court, by its order, directed the summoning of the juries ..... *id*

10. ——: ——. The record should also show that the prisoner was present at and during the trial, and at the rendition of the verdict.. *id*

11. ——: *Waiving a right:* Nor can the prisoner waive his right thus to be present when on trial for a capital felony ..... *id*

12. ——: *Pleading: The caption.* It is not necessary to follow, literally, the form for the caption to an indictment given in section 166 of the

Criminal Code, and the omission of the word "chosen" is not fatal. *Kruger* v. *The State* 865

1st. The word "selected," coupled with the word "chosen," in the form, signifies the same ..... *id*

2d. The omission of the word "chosen" is of no practical importance, and therefore section 170 requires it to be disregarded *id*

13. ——: *Assault with intent to kill.* An indictment for an assault with intent to kill, should charge that the assault was made with a weapon, which *ex vi termini* imports a deadly weapon, or charge specifically that the weapon was deadly ..... *id*

14. ——: *Assault and battery.* An indictment alleging an assault of such a character as would support a charge of assault with intent to kill with a wooden club, if it described the club as a deadly weapon, will, when those terms are omitted, support a conviction for assault and battery ..... *id*

15 ——: *Arraignment.* In misdemeanors it is sufficient if the counsel of the prisoner waives the reading of the indictment, and enters the plea of not guilty without a formal arraignment ..... *id*

16. ——: *Jury separating.* It is not error in a case of misdemeanor for the court, having instructed the jury, as is usual, not to hold conversation with any person, to permit the jurors to separate for their meals ..... *id*

See LARCENY 1.

Pre-emptions.

1. ——: OF LAND OFFICERS. The register and receivers of the local land office and their superiors in the land department, form a special tribunal for some purposes and to a certain extent. *Smiley* v. *Sampson*... 56

2. ——: ——. They have jurisdiction to determine questions of settlement and improvement, between different pre-emption claimants, which are questions of fact; and their decision thereon is conclusive upon the parties and the court ..... *id*

3. ——: ——. They have not jurisdiction to determine conclusively questions arising between one settler and the government, which are generally questions of law. On these questions the courts are not concluded by their decisions ..... *id*

4 ——: ——. Their decision on an application to pre-empt, when made *ex parte* without the presence of the party interested adversely to the applicant, is not conclusive. *Lindsey* v. *Hawes*, 2 *Black*, 554, *examined and distinguished*..... *id*

5. FILING TWO DECLARATORY STATEMENTS. The act of Sept. 4, 1841 requires the filing of a declaratory statement of intention to pre-empt a tract of land, only when the tract claimed is subject to private entry, 56

6. ——. The act of March 3, 1843, prohibits a second filing, only under the act of '41; *i. e.*, only on lands subject to private entry..... *id*

7. STATUTORY CONSTRUCTION. General words of a statute will be restrained, when they clearly were not intended to include a particular act or thing..... *id*

8. ——: *The mischief.* Where a matter is clearly out of the mischief intended to be guarded against, and thus is out of the spirit, although it be within the letter of the act, it is the duty of the court in construing the act, to limit the effect of the terms employed..... *id*

9. LAND IS NOT WITHDRAWN, from pre-emption, by the circumstance that a company has endeavored to build a town thereon, after the enterprise has been abandoned..... *id*

10. FRAUD. If an indigent party give for a house standing on a tract of the public land, his note for $3,000, and thereupon asserts a pre-emption claim to the tract, without making any other improvement thereon, and as soon as he effects his entry, conveys a large tract to the payee of the note, in discharge thereof, and also conveys most of the remainder to parties, who as witnesses and attorneys have aided him in securing it, and who have previously endeavored to secure it by fraudulent practices, these circumstances unexplained, justify the opinion that there was at the time of his first asserting his pre-emption claim, an agreement to do what was afterwards done..... 57

11. ——: OBJECT OF RESTRICTIONS. The several provisions of the pre-emption act of September 4, 1841, as to settlement, cultivation, inhabitancy, &c., were designed to secure permanent, actual settlers on the public lands. *Tousley* v. *Johnson*..... 95

12. ——: ——. Such a settler will not be deprived of the benefits of the act, by giving to some provision of law a harsh and inequitable construction, when applied to his case, unless the terms of the statute clearly and imperatively require it..... *id*

13. ——: *Priority.* The first settler who has complied with all the provisions of the law in good faith, is entitled to the land settled upon, whatever any subsequent settler may do in respect thereof..... *id*

14. ——: *Conveyances in fraud of the law.* A person occupying a portion of the public land under a supposed right, may, after such right fails, assert a pre-emption claim thereto; and the fact of his having mortgaged his supposed interest under the invalid claim, will not vitiate his pre-emption right..... *id*

15. ——: ——. Nor will conveyances of the lands after he has pre-empted them, invalidate his entry..... 95

16. ——: *Town improvements.* Surveying a tract of public land and dividing it into town lots, making a plat of it as a town, and building one house on one lot, are acts insufficient to impress upon it the character of a town, so as to withdraw it from the operation of the pre-emption law. And especially so, after the design of building the town has been abandoned..... *id*

17. *Smiley* v. *Sampson, ante,* followed..... *id*

Promissory Notes.

1. An endorser of a promissory note who waives notice of protest will be relieved from liability thereon, if the holder does not notify him within a reasonable time of its non-payment nor use due diligence to collect it of the maker. *Moffat* v. *Griswold*..... 415

See NIEL TIEL CORPORATION 1

Quo Warranto.

1. ——: *Answer.* An allegation in an answer to an information in the nature of a *quo warranto,* that the defendant had given a bond "for the faithful performance of all the duties required by law of him in consequence of his said election to the office" in question, is a sufficient allegation that he has given the bond required by law. *The People* v. *McCallum*..... 182

2. ——: *Pleading.* A pleading which is ambiguous is not for that reason liable to demurrer. The proper remedy is motion to make it more certain..... *id*

See BONDS 1, 2.

Redemption.

1. ——: *A subsequent incumbrancer* has a right to redeem the senior lien, on paying the amount thereof, by an assignment thereof, but not to take the possession. *Miller* v. *Finn*..... 255

2. ——: *A judgment creditor* not a party to a foreclosure suit, is entitled to pay the mortgage debt, and have an assignment of a mortgage senior to his lien until the decree..... *id*

3. ——: *After a decree of foreclosure,* such a party may be permitted to redeem the mortgage, or may be compelled to receive the amount of his judgment, as the court in its discretion shall think just between the parties..... *id*

4. EQUITY OF REDEMPTION: *Interest of execution purchaser.* A purchaser

at execution sale of an equity of redemption against whom a decree of foreclosure and sale has been entered, for a sum greatly in excess of what the premises afterwards bring on the sale, who has consented to the decree and withdrawn his appeal therefrom, has no interest in the premises and can convey none..... 254

Release

1. THE RELEASE of one of several joint obligors operates a release of all. *Neligh* v. *Bradford*..... 451

Removal of Causes to Federal Court.

1. The acts of congress do not authorize the removal of causes from State to Federal Courts, on the ground of prejudice or local influence, unless

1st. The application for removal be made before the trial or final hearing in the State Court of original jurisdiction; and

2d. The affidavit of prejudice or local influence be made by the party in person.

3d. The application, when made by one of several defendants, must be made in a cause which may be effectually proceeded in against one defendant separately from the other. *Miller* v. *Finn*..... 254

Replevin.

1. ——: *Demand.* Under the Code, in Nebraska, in an action of replevin, in which ownership in the plaintiff is established, proof of demand by him of the defendant of the property before suit, is not necessary to maintain his action. *Homan* v. *Laboo*..... 204

2. ——: ——. If, at the service of the order, the defendant is not the owner of, or has not a special interest in the property, but holds the same innocently, only nominal damages can, without demand, be recovered by him..... *id*

3. ——: ——. If such be the fact he should so plead, and then he will have nominal damages and costs..... *id*

4. ——: ——. If such be the fact, but he alleges property in himself, demand need not be proved in order to maintain the action against him..... *id*

5. ——: *Replevin* will lie to recover the possession of buildings erected on a lot of ground by a party claiming title thereto, who, by judicial determination, has been evicted therefrom, if the buildings were by him set upon blocks, and were not, at the time of eviction, affixed to the soil, notwithstanding another being afterward in possession did

affix them to the soil, and they were so affixed when the replevin was brought. *Mills* v. *Redick* 437

Res Adjudicata.

1. ——: The decision of a tribunal acting within its jurisdiction, whether it be a court or merely a board, or an officer having special enumerated powers, can be reviewed or set aside only by a direct proceeding for that purpose. *Mills* v. *Paynter*..... 440

2. ——: The mayor of a city under the town site act, in determining a controversy between adverse claimants to the same lot, acts judicially, and his decision can be reviewed only by appeal..... *id*

3. ——· A verdict of a jury is not admissible, to show that the matter has been determined, even if it be between the same parties for the same cause of action; because it is not conclusive of the matter. *McReady* v. *Rogers*..... 124

School Board.

1. POWER TO REMOVE TEACHERS. A statute empowering a school board to employ teachers and remove them at pleasure, enters into and forms part of a contract made by the board with a teacher for his services for one year; and he may be discharged within that time notwithstanding the terms of his employment. *Jones* v. *Nebraska City*, 176

2. JURISDICTION: *To inquire the cause of removal.* The court has not jurisdiction to inquire the cause of the removal, nor whether the cause alleged be sufficient..... *id*

Sheriff.

See ATTACHMENT 2.

Sheriff's Sale.

1. BONA FIDE PURCHASER. A purchaser at execution sale of lands, who, under the act of 1857, had the sheriff's certificate, but had not yet received his deed, was protected against an unrecorded prior mortgage upon a bill of foreclosure, filed before the expiration of the time allowed a defendant to redeem his lands sold on execution. *Bennett* v. *Fooks & Moffit* 465

2 ORDERS CONFIRMING SALES. Until a sale of real estate, on execution or order, is confirmed, either party to the same, and also the purchaser may object thereto. *Phillips* v. *Dawley*..... 320

3 RIGHTS OF PURCHASER. A person by becoming a purchaser at a judicial sale, becomes a party thereto, and may be compelled to complete his

purchase, and is entitled of right to an order directing the sheriff to make the deed..... 320

4. ATTACKING ORDER. The order confirming the sale cannot be collaterally attacked. It can only be questioned by a party in interest, and in a proper proceeding to review it..... *id*

5. SHERIFF MAKING DEED. If the term of office of the sheriff who made the sale expire before he make the deed, his successor, and not his immediate successor only, but any other, may make the same..... *id*

Specific Performance.

SPECIFIC PERFORMANCE of a parol contract for the sale of lands—

1. *Must be clearly established.* A parol agreement for the sale and conveyance of land must be established by clear and most satisfactory proof, or the court will not specifically enforce it. *Poland* v. *O'Connor*..... 50

2. PART PERFORMANCE. *Payment* of a small portion of the purchase price is not such part performance as takes the contract out of the statute of frauds..... *id*

3. ——: *Possession.* To take such a case out of the statute, the possession of the vendee must be by acts clear, certain and definite in their object, and having reference to the contract..... *id*

4. ——: ——. Possession taken by the vendee after the vendor has disavowed the contract, which has been made by a person pretending to be his agent, will not support the claim..... *id*

5. ——: ——. Using a lot otherwise vacant, and adjoining the vendee's warehouse, for storing lumber, wagons and like articles, of himself, his firm and others who have placed the same in his hands for sale on commission, is not such possession as will take the case out of the statute..... *id*

6. ——: *Building.* Not every possible act of the vendee done with reference to the contract, but those only to which he has been induced by positive action or permission of the vendor, or at most by those results which naturally flow from the agreement, operate to take the case out of the statute..... *id*

7. ——: *An instance.* A vendee under such contract, who has purchased a house with the view of placing it on the premises, but who has not done so, has not thereby taken his case out of the statute..... *id*

8. POSSESSION EVIDENCE OF TITLE. A party in possession and cultivating a tract of land, will be presumed to have some interest therein; especially if he afterwards acquire the legal title. *Filley* v. *Duncan*..... 134

9. ——: ——. He will, after acquiring the title, be compelled to specifically perform a contract to convey made prior thereto..... 134

10. GROSS NEGLIGENCE. Specific performance of a contract for the sale of real estate will not be decreed when the vendee has been guilty of gross negligence in the performance of his stipulations. *McAusland* v. *Pundt*..... 211

11. ——: *Excuses.* Such neglect is not excusable, on the ground that the title was involved in dispute, if the dispute existed when the contract was made, and an unfavorable determination was provided against by security taken and stipulations made at the time for the vendee's protection..... *id*

Statute of Limitations.

1. ——: *County warrants.* The Statute of Limitations does not limit the time within which proceedings to enforce the payment of county warrants shall be instituted. *Brewer* v. *Otoe County.*

1st arg. The whole course of legislation shows that county warrants are not within the statute.

2d. arg. The cause of action upon a county warrant does not accrue when the warrant is issued, but only when the money for its payment is collected, or time sufficient for the collection of the money has elapsed..... 373

2. ——: *Suits to redeem.* As against the right to redeem a conveyance absolute in its terms, but in fact a mortgage upon unoccupied land, the statute of limitations does not begin to run until tender of the money secured by the mortgage, and refusal to reconvey. *Wilson* v. *Richards*..... 342

See ACTIONS 1.

Surety.

1. ——: A surety paying a judgment recovered against himself and his principal, may, in an action brought by him thereon against his principal, recover what he has actually paid to satisfy the same, with legal interest and no more. *Eaton* v. *Lambert*..... 339

2. ——: A surety on one attachment bond incurs an obligation, several as respects a surety on another attachment bond, when the two are given respectively in several suits, against the same defendant, and the same property is taken upon the two writs. *McReady* v. *Rogers* 124

3. LIABILITY *on an attachment bond.* A surety on an attachment bond is liable for all damages which the defendant in the writ may sustain,

up to the re-delivery of the property to him, if the attachment be dissolved because wrongfully issued 124

See PARTIES 11.

Taxation.

1. ——: CONSTITUTIONAL PROVISIONS. There is in the constitution of Nebraska no express provision, limiting the legislative power of imposing, or distributing, or enforcing taxes. *Bradshaw* v. *The City of Omaha* 16

2. ——: ——. By the general provisions thereof the exercise of that power, when unjustly exercised, may be restrained ..... *id*

3. CITY AND STATE. Whether a city can be authorized to tax property not justly subject thereto, is a question very different from that of the validity of State taxes.

1. The relations of the citizen to the State and to a particular city, are different.

2. All citizens are compensated for what, in the form of taxes, they pay to support the State. This may not be true of taxes levied and exacted by a city.

3. State taxes are levied for political, city taxes for administrative purposes ..... *id*

4. COMPENSATION. The constitutional provision that private property shall not be taken for public use without just compensation, implies that it shall not be taken for private use at all; either with, or without compensation. This is the same as the axiom of natural justice, that the State shall not take A's property, and give it to B ..... *id*

5. CITY. The nature of the act of taking one man's property and giving it to another, is not modified by the circumstance, that the party to whom it is given is a city ..... *id*

6. PUBLIC OBJECT. When a city seeks to take private property for its use, whether under the form of taxes or otherwise, the object for which it is taken must be a matter of public advantage 17

7. TESTS. If lands have been divided into town lots, and purchasers of small parcels have been invited to settle thereon, if the owner has done any affirmative act inducing the corporate authorities to treat them as town property, or if town settlements have approached near to them, so that their enjoyment in peace and good order demands the police regulations of a city, they are justly liable to municipal taxation ..... *id*

8. ——: ——. If the owner has done no act, such as laying his lands off into lots, or asking for city grades, or to have streets opened to his lands, if he retains them in a large body, if they are half a mile from the settled part of the town, and no streets are or need to be opened for the use of owners of adjoining lots, occupied as town property, and their quiet enjoyment does not require a city police, then legislation subjecting them to city taxation, is unconstitutional and void..... 17

See ACTIONS 1. JURISDICTION 5.

Tenants in Common.

1. One tenant in common before partition cannot purchase in an outstanding title or incumbrance, on the joint estate, for his exclusive benefit, and use it against his co-tenant. The purchase enures to the common benefit, and the purchaser is entitled to contribution. *Brown* v. *Homan* 448

Vendor

1. A vendor of an undivided interest in a claim on the public lands, of which he remains in the sole possession, who afterward acquires title from the government, and immediately conveys the same to a third party, held to repay his vendee the amount paid to him. *Burley* v. *Shinn*..... 433

2. WHEN VENDEE CAN DISPUTE HIS VENDOR'S TITLE. The rule, that a tenant or a vendee in possession under a contract, cannot deny the title under which he entered, is confined to the title of the landlord, or of the vendor, at the time possession was given. *McAusland* v. *Pundt*.. 211

3. ——. If the law avoid that title, the tenant or vendee may disclaim it and take under him to whom it is adjudged..... *id*

4. ——. A vendor of lands by contract retains the fee, and may convey a good title to a *bona fide* purchaser without notice; but such notice may be as effectually communicated, by the open and notorious possession of the vendee, as by information personally communicated to the purchaser *Filley* v. *Duncan*..... 134

See CONTRACT 1, 2, 3. FRAUD 4. JUDGMENT 3.

Verdict.

See EVIDENCE 1. PRACTICE 15. RES ADJUDICATA 3. SPECIFIC PERFORMANCE.