REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

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

CHICAGO:
CALLAGHAN & COMPANY,
1873.

JUDGES

OF THE

SUPREME COURT.

Chief Justice.

OLIVER P. MASON.

Associate Justices.

GEORGE B. LAKE.

LORENZO CROUNSE.

CASES REPORTED.

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CASES

IN THE

SUPREME COURT OF NEBRASKA.

Sweet v. McConnel.

PARTNERSHIP: *Indebtedness of one partner to firm.* The defendant sold to the plaintiffs his interest in a partnership existing between the parties, being at the time charged upon the books of the firm with moneys previously drawn by him therefrom: *held*, that he was not afterwards liable to his late partners for those moneys.

This was an action to recover $4,221.06. The petition alleges that the plaintiffs are partners in the banking business, and have been since the thirteenth day of July, 1868; and that they do business under the firm name of James Sweet & Brock. The balance of the petition is in the usual form for money paid, laid out, and expended for the defendant at his request.

The defendant in his answer admits that the plaintiffs are partners in the banking business, and have been since the twenty-third day of May, 1870, and that they do business under the firm name of James Sweet & Brock. Then the defendant alleges that he did, in company with the plaintiffs, as co-partners, carry on the business of banking at the city of Lincoln,

in the firm name of James Sweet & Brock, from the ninth day of June, 1868, until the twenty-third day of May, 1870; that on the twenty-third day of May, 1870, he sold all of his interest in the firm of James Sweet & Brock, and all of his interest in the demands due the firm, to the plaintiffs, for the sum of $10,600.00.

The defendant's answer also alleges, that while he was a partner in the firm of James Sweet & Brock, and before he sold his interest in the co-partnership, he drew out of said firm, between the thirteenth day of June, 1868, and the twenty-third day of May, 1870, divers sums of money, amounting in all to the sum of $4,221.06; and that the moneys so drawn out by him are the same moneys claimed by the plaintiffs in their petition.

The answer then denies each and every allegation in the petition not before admitted or denied.

The cause was submitted to the District Court upon the pleadings, and a judgment rendered for the defendant: whereupon the plaintiff filed this petition in error.

J. M. Woolworth argued the cause for the plaintiff in error upon a brief filed by *G. B. Schofield*, and endeavored to distinguish this case from *Lesure* v. *Norris*, 11 *Cushing*, 328; and cited *Tomlinson* v. *Hammond*, 8 *Iowa*, 40; *James* v. *Woodruff*, 10 *Paige*, 541; *Sykes* v. *Work*, 6 *Gray*, 433; *Foster* v. *Allison*, 2 *Fost.*, 479; *Worral* v. *Grayson*, 1 *M. & W.*, 166; *Howard* v. *France*, 43 *N. Y.*, 596; *Roberts* v. *Ripley*, 14 *Conn.*, 543; *Brislow* v. *Taylor* 2 *Starkey*, 50.

S. Robinson, upon a brief filed by himself and *E. E. Brown*, insisted for the defendant in error, —

The interest of a partner in the rights, credits, and effects of a partnership is that share or proportion of them to which he would be entitled upon a final adjustment and liquidation of its concerns. Whatever stands properly charged to him on the company's books, whether it be regarded as a debt due, or, perhaps more correctly, as evidence that he has withdrawn already a certain amount of the capital invested or the profits earned, is first to be deducted, and will to that extent diminish the share he is to receive. His interest in the partnership is only the balance remaining after such deduction has been made. *Lesure* v. *Norris*, 11 *Cushing*, 328; *Murdock* v. *Melhop*, 26 *Iowa*, 213; *Stoddard* v. *Wood*, 9 *Gray*, 90.

If these decisions are to be regarded as a correct exposition of the law, clearly the facts set up in the answer constitute a defence.

There is another reason why these plaintiffs cannot recover in this action. The fact that all of these parties, plaintiffs and defendant, were partners at the time the pretended cause of action occurred, is admitted; and that the pretended cause of action grew out of the partnership concerns is also admitted.

Partners cannot sue each other at law for any thing relating to their partnership concerns, unless there has been a settlement, a balance struck, and an express promise to pay. *Murray* v. *Bogert*, 14 *John.*, 318; *Halsted* v. *Schmelzel*, 17 *John.*, 80; *Westerlo* v. *Evertson*, 1 *Wend.*, 532.

It will not be claimed in this case that there has been a settlement, balance struck, and an express promise to pay: therefore the plaintiffs cannot recover in an action at law.

The judgment of the Court below was unquestionably correct, and should be affirmed.

MASON, Ch. J.

The law is clearly and correctly stated by Merrick J. in *Lesure* v. *Norris*, 11 *Cushing*, 328; which was a case in its material circumstances on all-fours with the one at the bar. "The sale," says the learned judge, "was a dissolution of the partnership. *Taft* v. *Buffum*, 14 *Pick.*, 322. It was also in effect an adjustment by the partners as between themselves of all its concerns, and a division and appropriation of every thing belonging to it. Nothing further remained to be done to effect a complete settlement between themselves. By the bill of sale, the plaintiff transferred all his interest in the company property, including debts which were due, to the defendant; and the latter thereby became sole owner of the whole. The interest which any partner has in the effects, rights, and credits of a solvent partnership is the share or proportion of them which he will be entitled to receive upon a final adjustment and liquidation of its concerns. Whatever stands properly charged to him on the company books, whether it be regarded as a debt due, or, perhaps more correctly, as evidence that he has withdrawn already a certain amount of the capital invested or of the profits earned, is first to be deducted, and will to that extent diminish the share he is to receive. His interest in the concern is only the balance remaining after such deduction has been made."

When McConnel sold out to the plaintiffs, he conveyed to them all of his interests in the firm's assets, which were the assets less the sum he had received. This was not a debt, nor did he convey it. *Stoddard* v. *Wood*, 9 *Gray*, 90, and *Murdock* v. *Melhop*, 26 *Iowa*, are to the same effect.

The judgment below must be

Affirmed.

The People *ex rel* Hudson v. Butler.

Mandamus: *Mechanic's lien against state buildings.* Where commissioners of public buildings contract with A for the erection of a building for the State, — e.g., a State lunatic asylum, — a sub-contractor who has done work or furnished material is not entitled to mandamus upon the commissioners to compel them to draw their warrant upon the fund appropriated for the erection of the building.

Argument 1. The mechanic's lien law does not apply to buildings erected by the State for public uses, because the State cannot be sued.

2. The commissioners are not bound to recognize any one but the party with whom they contract.

3. The inconveniences of any other rule would be very great.

Lake, J.

This is an original application to this Court for a writ of mandamus to compel the defendants to draw their warrant through the auditor upon the State Treasurer for the sum of eight hundred dollars, which the petition alleges is due to the relator from one Joseph Ward, who was the contractor for the erection of the State Lunatic Asylum.

The defendants are the commissioners acting for the State in the erection of this building, and, in that capacity, let the contract for the erection of it to Ward.

The relator is a sub-contractor under Ward, and, as such, furnished the rock necessary to complete the work. But there was no contract therefor between the relator and the defendants: they knew Ward only in the transaction, and kept their accounts respecting the building with him.

Under this state of facts, it is insisted by counsel for the relator that he has a lien upon the fund set apart by the legislature for the construction of this building, and that the agents of the State, the defendants, are obliged to recognize his claim, and draw a warrant upon the State Treasurer therefor.

This raises the question, whether the act familiarly known as the mechanic's lien law has any application to contracts for the erection of public buildings by the State. It is a familiar principle of law, that a State cannot be brought into court without its consent. *Briscoe* v. *the Bank of the Commonwealth of Kentucky*, 11 *Pet.*, 259; *Beers* v. *the State of Arkansas*, 20 *Howard*, 527. We have no statute in this State authorizing such suit to be brought. The lien law, therefore, cannot be invoked to aid the relator here: he must rely upon his remedy against the contractor. The commissioners are not bound to recognize the demands of any person other than the one with whom the contract was made.

To adopt any other rule would be productive of infinite mischief, and lead to inextricable confusion, in the prosecution of work upon our public buildings.

The Court are unanimous in the opinion that the writ must be denied.

Writ denied.

M. M. Sessions, for relator.

The People *ex rel* Dobson v. McClay.

MANDAMUS: Mandamus is the proper remedy to compel a sheriff to appoint appraisers, under the exemption-execution law, upon the proper application to him by the judgment-debtor.

EXEMPTION: *Aliens.* A resident alien, whose family is not in this State, is as much entitled to the benefit of the law giving exemption from sale of his property taken upon execution against him as is a citizen, if he came here with a settled purpose of abandoning his foreign residence, and, on his arrival here, fixed upon this State as his home, and intends to remove his family here.

On the twelfth day of November, 1870, Lathrop obtained a judgment against Dobson before a justice of the peace, on which execution issued to the sheriff of Lancaster County. The sheriff levied upon all of the property of the defendant, consisting of household furniture and carpenter's tools, of less value than five hundred dollars. Dobson thereupon filed with the justice who rendered the judgment an inventory of his property, verified by him, claiming the benefit of the exemption law; and the same was duly appraised and released by the sheriff. Another execution was afterwards issued by the justice upon the same judgment, which was levied upon the same property. Dobson then filed a second inventory, claiming the benefit of the exemption law; but the sheriff refused to appoint appraisers so as to permit Dobson to avail himself of the privileges of the law.

Dobson applied to this Court for a writ of mandamus to compel the respondent to do his duty in that behalf, and an alternative writ was allowed.

The sheriff answered the writ, alleging that Dobson was not, at the time of the recovery of the judgment, a citizen of the United States, and that his family was not in this country; but that, coming himself from

Europe, he left his family there, consisting of a wife and five children, who, he alleged, were dependent upon him for support.

S. M. Boyd and *G. W. Lowley*, for petitioner.

Lamb and *Billingsbly*, contra.

LAKE, J.

We have no doubt that mandamus is the proper remedy in this case. There is no other adequate remedy for the wrong of which the relator complains. By no other means can he compel the respondent to do that which the law specially enjoins upon him, as a duty resulting from the official position that he occupies. The relator filed an inventory of all his personal property, as required by sect. 522 of the Code of Civil Procedure, which embraced that which the respondent had levied upon, and claimed it as being exempt from forced sale or execution.

This done, the respondent had but one course to pursue: this was to call three disinterested freeholders of the county, and have them appraise the property, and if its value, as shown by the appraisement, did not exceed five hundred dollars, release it from the execution, and return it at once to the owner. If the value exceeded that amount, the owner or his agent, or, in case of their absence, the sheriff himself, must select property therefrom to the amount of five hundred dollars in value, and return the same to the owner. The residue, if any, he could lawfully hold and sell under his execution.

But it is urged on the part of the respondent, that the relator, although the head of a family, is not enti-

tled to the benefits of our exemption act, for the reason that he is an alien, whose wife and children still remain in England, from whence he came to our State.

Our statutes on this subject make no distinction between resident aliens and citizens: they are alike entitled to its protection and benefits. In this they are in harmony with sect. 14 of Art. I. of the Constitution, which declares that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment, or descent of property."

The relator is a resident of our State, and the head of a family consisting of a wife and several children. He has neither lands, town-lots, nor houses subject to exemption under the laws of Nebraska. He is therefore entitled to the benefits secured by sect. 521 of the Code of Civil Procedure; viz., to "have exempt from forced sale on execution the sum of five hundred dollars in personal property."

These benefits are secured to him, not because of the residence of his family, but his own. They attach to him in his own right as the head of a family actually residing here. That his family did not accompany him in his removal to our State is of no consequence so long as he came with the settled purpose of abandoning his residence in England, and on his arrival fixed upon this State as his home, to which he intends to bring them, and from which he has now no intention to remove.

The Court being of the opinion that the answer of the respondent to the alternative writ is entirely insufficient, a peremptory mandamus is awarded against him.

Judgment accordingly.

Smith v. Fife.

PRACTICE: *Record for Supreme Court.* The Court again animadverts upon the practice of inserting in the transcript, filed here, of the record of the District Court, papers and entries upon which no question is raised.

COUNTERCLAIM: *Waste by mortgagee in possession.* In an action by a mortgagee, after sale on foreclosure, to recover deficiency of the proceeds of the sale to pay the mortgage debt, the mortgagor may allege, by way of counterclaim, damages sustained by him on account of waste committed by the mortgagee in possession between the decree and sale.

This is a petition in error to review a judgment of the District Court for Cass County. The facts are sufficiently stated in the opinion of the Court.

T. M. Marquette, for plaintiff in error.

1. The facts set forth in the answer do not constitute a defence to the plaintiff's cause of action. *Cleveland & Pittsburgh Railroad Co.* v. *Stackhouse*, 10 *Ohio St.*, 327; *Van Sanvoord's Pleadings*, 565, 566, 569.

2. Where no cause of defence is stated, the objection can be taken for the first time on error. *Edgerton* v. *Page*, 20 *N. Y.*, 281; *Powers* v. *Reed*, 19 *Ohio St.*, 159; 26 *Ind.*, 48.

3. The verdict is against the weight of evidence.

W. Pottenger, for defendant in error.

1. In order that this Court should consider the motion for a new trial, the record must show an exception to the order overruling the same. *Morgan* v. *Boyd*, 13 *Ohio St.*, 281; *Monroe* v. *Elburt*, 1 *Neb.*, 174.

2. And so also of all other errors here complained of, exceptions duly taken and saved by bill. *Doe* v. *Brown*, 6 *Ohio St.*, 12; *Kline* v. *Wyne*, 10 *Iowa*, 225.

3. No memorandum of the judge who tried the cause not embodied in the bill of exceptions is any part of the record. *Hallum* v. *Jacks*, 11 *Ohio St.*, 692.

LAKE, J.

We have taken occasion heretofore to condemn the too common practice of including in the record of the case a large amount of materials which can have no possible bearing upon the question to be considered, and which compels the Court to spend a great deal of time in culling from a mass of rubbish that which alone ought to be brought here.

And here we again have an example of this objectionable mode of making up a record. We have a complete transcript of every paper filed in the case in the District Court, from the petition down. The original petition and answer were superseded by an amended petition and answer, upon which the case was tried. There is no question raised in the Court below as to any ruling, until we reach the demurrer to the answer to the amended petition. This renders wholly useless more than two-thirds of this entire record, including the original petition, affidavit for an attachment, præcipe, summons, order of attachment, list of property attached *alias* summons, original answer, motion for leave to file answer, motion to strike answer from the files, demurrer to answer, and the several rulings of the Court up to the time of filing the amended petition. A little care in directing the clerk as to what should be included in the transcript would benefit both the court and counsel, and result in a great saving of expense.

SMITH *v.* FIFE.

This case was brought in the Court below to recover a balance alleged to be due to the plaintiff on a decree of foreclosure, after exhausting the security by sale of the mortgage premises.

The answer admits all the allegations of the petition as to the foreclosure and sale of the premises, and the balance that remained unsatisfied of the sum found due by the decree.

But the defendant answers, by way of counterclaim, that after the decree of foreclosure was entered, but before the sale, the plaintiff entered upon the mortgage premises, and sold and removed therefrom a great portion of the improvements, whereby he was damaged in a sum much larger than what remained unsatisfied of the mortgage debt.

This demand was set forth in two counts, to both of which the plaintiff demurred. The Court sustained the demurrer to the second count, but overruled it as to the first; to which ruling the plaintiff duly excepted. No reply was filed to the answer; at least, none is found in the record.

Upon the trial to a jury, a verdict was returned for the defendant, which the plaintiff moved to set aside. This motion was overruled, and judgment entered on the verdict, against the plaintiff for costs.

The sole question presented is this: Can a defendant, in an action brought to recover the amount remaining unsatisfied of the mortgage debt, set up as a counterclaim the damages he has sustained by reason of waste committed by the mortgagee in possession between the entry of the decree and sale of the mortgage premises?

We do not think that waste committed by a mortgagee before the decree, that the right of the mortgagor to be credited with the amount of the damages

done him, in a suit brought to foreclose the mortgage, would be questioned.

In *Allen* v. *Shackelton*, 15 *Ohio State*, 145, it was held, that, in an action by a mortgagee against a mortgagor for the sale of the mortgage premises, the mortgage being given to secure the purchase money, the mortgagor was entitled to set up as a counterclaim the damages which he had sustained by reason of fraud practised upon him, in the sale of the same premises, by the mortgagee.

We are unable to see any substantial distinction between that case and the one before us; nor do we see that any injustice could result to the plaintiff by calling on him to respond in this action for the damages he had done to the premises while thus in possession.

Our statute relating to and defining a counterclaim was borrowed from the code of Ohio; and the construction given to it by the courts of that State should have great weight with us.

One of the chief objects of this statute was to prevent multiplicity of suits, and to enable parties, when before the courts, to have a complete determination of all claims of the defendant, "arising out of the contract *or transaction* set forth in the petition, as the foundation of the plaintiff's claim, *or connected with the subject of the action.*"

We are of opinion that there is no substantial error in the record, and the judgment of the District Court must be affirmed.

Judgment accordingly.

Ellison v. Tallon.

ATTACHMENT: *Affidavit.* An affidavit for an attachment is sufficient if it be in the words of the statute, and does not set forth the facts on which the allegations thereof are based.

——: *Preponderance of proof* must be in favor of the party suing out the attachment, when affidavits are filed to disprove the charge made in that on which the order issued.

MASON, Ch. J.

This is a petition in error to reverse the judgment of the District Court of Douglas County. The allegations of error extend to the action of the Court in discharging an order of attachment obtained by the plaintiff. The affidavit for the attachment was alleged to be insufficient; and at the same time the truth of the charge was denied, and counter-affidavits of the defendant and others were read in evidence. The plaintiff also offered and read additional affidavits. The causes assigned in the affidavit filed for attachment were: *First*, That the defendant fraudulently contracted the debt upon which the suit was brought. *Second*, That he had fraudulently disposed of his property, or a part thereof, with the intent to defraud his creditors. These are two of the grounds mentioned in the statute, and in its exact language. The objection, that the facts and circumstances are not set forth in the affidavit upon which the affiant bases his claim for an attachment, was fully considered in the case of *Harrison & Wiley* v. *King & Hurd*, 9 *Ohio State*, 388: and it was there held, that an affidavit in the language of the statute was sufficient;

although the ground stated involved a charge of intent to defraud, and no facts or circumstances were set forth. It appears from an examination of title 8, chap. i., Arrest and Bail of the Code, that very similar grounds are stated for the arrest of a defendant, and for an attachment. But, to obtain an order for arrest of a defendant, it is added, that the affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of the causes assigned for the arrest. One would naturally conclude that what was so expressly required in the one case would not be necessary in the other. If it were necessary, it might be asked why the legislature, in title 8, chap. i., Arrest and Bail, was so careful to require it, and in chap. iii., same title, was so careful to omit it. And we believe the uniform practice since the Code, in ordinary actions, has been to state the grounds for an attachment in the language of the statute. With this practice we are not disposed to interfere. See *Hoekspringer* v. *Ballenberry*, 16 *Ohio*, 304; *Harrison & Wiley* v. *King & Hurd*, 9 *Ohio State*, 388.

We have examined the affidavits as to the truth of the charges as grounds for the attachment. If the statutory cause for attachment be charged in the affidavit, and denied by the affidavit of defendant, and nothing appear to authorize greater credit to be given to the statements of the plaintiff than to those of the defendant, the attachment ought to be discharged. When the charge is made and denied, the burden of proof is thrown on the plaintiff; and he ought to satisfy the Court that the charge he has made is well founded. In this case we think the preponderance of proof is clearly with the defendant, and against the truth of the charge made for obtaining the attachment.

The Court below was right in discharging order of

attachment, and its judgment must be affirmed, with costs.

Judgment affirmed.

T. W. T. Richards, for plaintiff in error.

W. Doane, for defendant in error.

Robertson v. Hall.

PRACTICE: *Appeals.* A judgment rendered in an action at law, during the prosecution of which in the District Court no exception was taken to any ruling, cannot be brought to the Supreme Court by appeal, and there tried *de novo*.

MASON, Ch. J.

This is a motion to dismiss an appeal claimed under title 21 of the Revised Statutes.

The action was an ordinary one in replevin to recover the possession of one twenty-five horse-power stationary steam-engine, including driving-wheel and main shaft, and one cast-iron boiler-front. The defendants answered, denying that they wrongfully detained, or that they ever did wrongfully detain, from plaintiff's possession, the property in the petition described. The issue joined was tried before the Douglas-County District Court and a jury, at the September term, 1870; and a verdict found for the defendants, and their damages assessed at a hundred and sixty-seven dollars. The plaintiff filed a motion in the Court below to set aside the verdict, and for a new trial; which motion was overruled; and, at the same term, judgment was entered upon the verdict. This action is strictly one at law. No exceptions were taken by the plaintiff to any ruling of the Court below, and no error of that Court is assigned in the record in this Court.

The defendants move to dismiss the appeal, and assign the following grounds for the motion: —

No exceptions were taken in the Court below. No such proceeding as an appeal for trial *de novo*, in an action at law, from the District to the Supreme Court, is known to our law.

ROBERTSON v. HALL.

Unless the law gives plaintiffs a legal right to demand a jury and a trial *de novo*, the defendant's motion should prevail. When we became a State, it was enacted, as a part of the fundamental law, that all laws in force should remain in force until altered, amended, or repealed by the legislature; and that, wherever in the statute the word "Territory" occurred, it should be construed to mean "State." See Constitution of Nebraska, Schedule, art. 1. What is now, and then was, chap. xiii. of the Revised Statutes, was enacted at the third session of the territorial legislature in 1857, and has been the statute law of the Territory and State ever since. The provisions of our State Constitution in respect to the organization and jurisdiction of courts does not differ from the organic act. Chap. xiii. of the Revised Statutes, enacted in 1857, relates to courts and their jurisdiction, and is adapted to our Constitution now as well as when we were a Territory. Sect. 1 of said chapter reads as follows: "The Supreme Court of the (Territory) State shall have and exercise appellate and final jurisdiction of all matters of appeal, or writs of error, that may be taken from the judgments or decrees of the District Courts in all matters of law, facts, and equity, when the rules of law, or principles of equity, appear, from the files, exhibits, or records of said courts, to have been erroneously determined." This section is too plain for misconstruction. The rules of law and the principles of equity, as well as the facts over which the Supreme Court exercise appellate jurisdiction, must appear from the files, exhibits, or records of the District Courts, and from no other source. It is important to bear in mind, in passing upon this question, that regard must be paid, not only to the language of the particular section now under consideration, but to our entire system of practice as regulated by

statutory law. Since the enactment of chap. xiii., our statutes have provided for appeals in chancery, and for writs of error in proceedings strictly on the law side of the Court; and it has been the uniform practice in this Court to consider no questions except those which were presented in the transcript of the record filed in this Court. If the legislature had intended that issues of fact should be tried in this Court by a jury, they would have provided some mode for obtaining jurors. This they have not done. Who shall summon the jury? From what district of country shall they be drawn? We think the judicial power of this Court is limited to the questions presented by the transcript of the record from the Court below. The motion to dismiss the appeal in this case must be sustained.

Ordered accordingly.

J. I. Redick, for motion.

Savage and *Manderson*, contra.

Kyger v. Ryley.

I. PAYMENT: K, holding R's note and mortgage, lodges, in company with another person, at R's house one night, and in the morning produces the note, and demands payment, which R is unable to pay: whereupon K says he will credit R's charge for the lodging, amounting to one dollar, upon the note; to which R does not assent: *held* no payment to take the case out of the Statute of Limitations.

II. MORTGAGE: In this State, if a recovery upon a note secured by a mortgage be barred by the Statute of Limitations, an action for foreclosure is also barred.

Argument 1. The note is the principal, and the mortgage an incident thereto.

2. The mortgage is, upon the mortgagee's decease, personal assets.

3. It is a mere pledge for the payment of the debt, or performance of an obligation.

4. The mortgagor retains the right of possession up to the confirmation of sale had upon the decree of the Court.

This was an action brought on the twenty-second day of September, 1865, in the District Court for Washington County, for the foreclosure of a mortgage made by Ryley, the defendant, to Kyger, the plaintiff, on the 23d of September, 1857, to secure a note of that date, made by the former to the latter, payable one year after its date.

The petition alleged the payment of one dollar, made by the defendant on the 4th of September, 1865.

The answer denied the payment, and pleaded the statute limiting actions on notes, specialties, &c., to five years.

The proofs showed, that on the night of Sept. 4, 1865, the plaintiff and another person, both of whom were unknown to the defendant personally, went to his house, and, applying for a lodging for the night, were taken in and provided for. Nothing was said about the note until morning, when the plaintiff produced it, and asked the defendant for payment; to which the defendant answered, that he had not the money to pay it. The plaintiff then said he would credit it on the note. The defendant swears that he did not consent to the plaintiff paying his bill in that way; and, in fact, no indorsement of the payment was at the time, or ever, made upon the note.

The Court rendered a decree of foreclosure, and the defendant appeals.

A. J. Poppleton, for the appellant.

The only question before the Court is, whether, under the law in force in this State, the mortgage in question was barred by the same lapse of time as the note, — to wit, five years, — or whether a longer time is required to effect that result. It is accordingly respectfully submitted that said mortgage was barred by the express terms of the statute. Revised Statutes, page 295, sects. 7, 10, 16; page 297, sect. 85.

The entire current of decisions which hold that the note may be barred, and the mortgage made to secure the same still survive, are based upon the idea, that the one being a simple contract, and the other a specialty, they are amenable to different statutes, and are each controlled by statutes applicable by their express terms to the respective instruments. *Belknap* v. *Gleason*, 11 *Conn.*, 160; *Thayer* v. *Munn*, 19 *Pickering*, 535; *Craig* v. *Payne*, 4 *Cushing*, 486; *Joy* v. *Adams*, 26 *Maine*, 330.

All distinctions between said contracts being unknown to our law, the reasoning in those cases has no application. The better rule is clearly that laid down in the following cases; viz., that when the note, the principal debt, is barred, the mortgage collateral thereto is also barred. *Jackson* v. *Sackett*, 7 *Wend.*, 94; *Mills* v. ——, 28 *Illinois*.

The policy of the statute would be wholly thwarted and subverted upon any other construction than that the mortgage falls with the note.

G. W. Doane, for the appellee.

MASON, Ch. J.

The first question presented to us is, whether a payment was made by the defendant upon these securities which will take the case out of the Statute of Limitations. The circumstances are not very creditable to the plaintiff. He sought and obtained the night's lodging with the view of overreaching the defendant, and, without his consent, gaining an advantage; and, when he disclosed the object of his visit, the defendant did not consent to his paying for his lodging by a credit on the debt. The case wants the very first element of a valid payment to take the case out of the statute, which is an intelligent, or at least conscious, consent on the defendant's part, that what was due to him should be applied on his debt.

The next, and a very important, question is, Was the mortgage barred when the statute ran against the note? In all proceedings to foreclose mortgages in this State, the decree is, that the mortgage be foreclosed, and the mortgaged premises be sold to pay the amount due upon the mortgage debt. A strict foreclosure is

unknown in our State. The nature and character of a mortgage, as well as the method of proceeding to foreclose the same, is regulated by statute. A mortgage in this State differs essentially from a mortgage at common law, both in the remedy and the quantity and character of the estate which was vested in the mortgagee.

A mortgage at common law may be defined to be an estate created by a conveyance absolute in its form, but intended to secure the performance of some act, such as the payment of money and the like, by the grantor, to some other person, and to become void if the act is performed agreeably to the terms prescribed at the time of making such conveyance.

The estate becomes effectually vested in the grantee by the mortgage if the grantor or mortgagor fail to perform the condition of the mortgage. *Fray* v. *Cheney*, 14 *Pick.*, 399; *Brigham* v. *Winchester*, 1 *Metcalf*, 390; *Thrall* v. *Trask*, 7 *Wisconsin*, 566.

The possession of the mortgaged premises may be in the grantor or grantee, according to the terms of the deed; though ordinarily it is retained by the grantor. If there is no provision in the deed as to possession, the mortgagee may lawfully enter and hold possession of the premises until condition performed; and, if the mortgagor failed to perform the condition of the mortgage, his estate was, by the common law, wholly defeated and gone. Mortgages had become common in the time of Henry VI. and Edward IV. Mr. Donell ascribes their origin to the Jews: others derive them from estates upon condition at the common law. And at common law, if the payment was not made at the time fixed, the estate, by the breach of the condition, became forfeited; and the mortgagee thereupon held the same as absolute and irredeemable. 1 *Spence, Eq. Jur.*, 602; *Story's Eq. Jur.*, sect. 1004.

The idea of extending the time, in which the debtor might redeem his estate, beyond that fixed by the contract of the parties, was doubtless borrowed from the Roman law of hypothecation: the estate did not pass out of the debtor until a sale made by authority of the prætor, and might be redeemed at any time before sale actually made by the payment of the money for which it was a security. *Story's Eq. Jur.*, sect. 1005; 1 *Spence, Eq. Jur.*, 600; *Cooke, Mortgages*, 40.

The right to redeem after condition broken made its way slowly against the notions of the common law; though a strict forfeiture in case of a mortgage was condemned by the Council of Lateran, A.D. 1178, during the reign of Henry II. It is said, Parliament, in 1391, refused to admit a redemption after forfeiture; and such estate continued irredeemable during the reign of Edward IV., who died in 1783.

In *Goodall's case*, 39 *and* 40 *Elizabeth*, the Court of King's Bench held that an estate was lost to a mortgagor, he having failed to perform the condition truly and effectually. 5 Rep., 96.

The disposition to save the debtor from loss if he was willing to indemnify his creditor on account of his debt, which had grown up under the influence of the Courts of Chancery, continued to gain strength until the time of James I., when the Court of Equity decreed a redemption after forfeiture; and finally, in the reign of Charles I., it became settled that the payment, or tender, after the day, should have the same effect in saving the estate of the mortgagor from forfeiture as if done before the day of payment. A case of this kind is decided in 1 Rep. in Chancery, 32, *Howe* v. *Virgores*. The right to redeem mortgaged premises after they had, in the view of the common law, been forfeited by a failure to perform the condition of the mortgage, gave

to mortgages a double aspect and a double nature,—the one created by and known to the common law, and the other created by and known only to a court of equity; the right of redeeming after breach of condition being what is called in equity the right of redemption, or, in other words, an equity of redemption.

This may reconcile some seeming discrepancies which occur in defining the right of the mortgagors and mortgagees. In law, the mortgagee held the freehold, and might bring an action of ejectment, and recover the possession of the land mortgaged, against the mortgagor. He might devise his interest by will as real estate, or it would descend by common law to his heir. On the contrary, in equity, the land, or mortgaged estate, is a pledge. The mortgagee holds the mortgaged estate only as a security for a debt; and, like a debt, it was treated only as an interest of a personal nature; and, if the mortgagee died, the mortgage debt and security went to his executor, who might receive the same, and compel the heir to release to the mortgagor without being paid a cent. *Williams on Real Property*, 353, 354. The legislature of this State have, by enactment, declared that mortgages in this State shall be viewed only in the aspect created by and known to equity, simply as a pledge or security of a debt. The true question to be determined is, Is there a debt subsisting between the parties capable of being enforced in any way *in rem* or *personam?* For it would seem clear that the want of liability of the grantor to pay the debt secured by the mortgage would necessarily release all right of recovery or liability upon the mortgage. The debt secured by the mortgage is the principal thing: the mortgage is simply an incident to the principal thing. The right to recover on the principal thing having ceased to exist,

and being determined by statute, the right of action upon all the incidents must be deemed also to have ceased. No recovery can be had upon the collateral security against the principal debtor when the debt for which such security was given has ceased to exist from any cause whatever. So, in the present case, the debt, which is the principal thing, being barred by the Statute of Limitations, and the mortgage on the land being held as a mere pledge to secure the debt, and held only as security for it, the right of recovery upon the mortgage was gone when liability upon the principal debt ceased. The authorities which held the other way came from those States where the common law is in practical force in respect to the nature and character of mortgages, where the mortgage is treated as conveying the fee to the land, and vesting the same in the mortgagee. Revised Statutes, page 100, sect. 207, says, "When any mortgagee of real estate, or any assignee of such mortgage, shall die, without having foreclosed the right of redemption, all the interest in the mortgaged premises conveyed by such mortgage, and the debt secured thereby, shall be considered as personal assets in the hands of the executor or administrator; and he may foreclose the same, and have any other remedy for the collection of such debt which the deceased would have had if living, or may continue any proceeding commenced by the deceased for that purpose." It will be seen, from the foregoing section, that the interest of the mortgagee in the estate mortgaged, as well as the mortgage debt, is located as assets in the hands of the personal representative of the mortgagee in case of his death. Sect. 288 provides, in case of the redemption of any such mortgage, or sale of the mortgaged premises by virtue of a power of sale contained therein, or otherwise, the money paid thereon

shall be received by the executor or administrator, and he shall thereupon give all necessary releases and receipts; and if, upon sale of the mortgaged premises, the same shall be bid in by the executor or administrator for such debt, he shall be seized of the same for the same persons, whether creditors or next of kin or others, who would have been entitled to the money if the premises had been redeemed, or purchased at such sale by some other person. It appears, from the foregoing sections of the statute, that it was the intention of the legislature to adopt the same view as taken by the courts of equity in respect to mortgages; and it has gone to the full length, treating the estate or pledge vested in the mortgagee as personal assets, and in no case subject to descent to the heir as an interest in real property. See also sects. 31–34, chap. xliii., title Real Estate, pages 286, 287, Revised Statutes, which fully corroborate this view of the nature and character of a mortgage under our statutes. Title 27, Revised Statutes, page 542, Foreclosure of Mortgage, requires that all proceedings for the foreclosure or satisfaction of mortgages shall be in the District Court in Chancery in the county where the mortgaged premises are situate; and requires the petitioner to state whether any proceedings have been had at law for the recovery of the debt secured thereby, or any part thereof has been collected or paid. A common-law foreclosure of a mortgage is unknown to our statutes, and a mortgage is quite a different thing from what it was at common law. Our statute treats it as assets in the hands of the administrator, or personal representatives of the mortgagee. A mortgage in this State is a mere pledge, or collateral security, for the payment of money, or the doing of some other thing. At common law, a mortgage was a conveyance with a defeasance, and gave the mortgagee a right of posses-

sion. He might peaceably enter into possession of the mortgaged premises before condition broken, or have ejectment. The mortgagor at common law conveyed the legal title to the mortgagee; and, upon condition broken, his legal right to the mortgaged premises became absolute. If the money due upon the mortgage was paid at the time appointed, the estate, or the mortgaged premises, reverted to the mortgagor: if not so paid, the estate of the mortgagor was gone forever. This was the common law relating to mortgages prior to the Council of Lateran, in 1187. In our State the mortgagor has the right of possession of the mortgaged premises before and after the money is due upon the mortgage, and after decree of foreclosure and sale, and up to the confirmation of the sale by the Court. The remedy of the mortgagee is confined to an action for the sale of the pledged or mortgaged premises to pay the debt secured by the mortgage, or to an ordinary suit at law to recover the debt itself. The mortgage is a mere pledge, or collateral security, creating a lien upon the mortgaged property, by conveying no title or vesting no estate either before or after condition broken. The mortgage gives no right of possession, and does not limit the mortgagee's right to control the mortgaged property in any manner he may choose, so that the security remains unimpaired. He may sell the mortgaged property, and the title will pass by his conveyance. The Statute of Limitations was made to apply to the substance of the action, and not the mere form. The substance of the mortgage is the debt secured thereby. The debt being barred by the Statute of Limitations, no recovery can be had thereon, and no remedy upon the mortgage exists. The judgment of the Court below is reversed, and cause remanded.

Judgment reversed.

Rogers v. Ware.

BILL OF EXCHANGE. A holder of a bill must show a genuine indorsement by the payee before he can recover thereon.

——: *Fictitious payee.* But, if the bill run to a fictitious payee, it is as if drawn payable to bearer; and indorsement is not necessary.

——: ——. And, if it be payable to some person who had no interest in it, and not intended to become a party to it, whether such person is or is not known to exist, the payee may be deemed fictitious. Minet *v.* Robinson, 1 H. B., 561; Foster *v.* Shattuck, 2 N. H., 446; Pease *v.* Dwight, 6 How., 190, distinguished.

——: ——. But if it be payable to some person known at the time to exist, and present to the mind of the drawer when he made it, as the party to whose order it was to be paid, the genuine indorsement of such payee is necessary, in order to a recovery thereon by an indorsee, even though he have no interest in it, and the drawer knew that fact.

——: ——. Nor is the case changed by the circumstance, that the party who induced the drawer to make such bill defrauded him in so doing.

——: ——. A deposited with B, a banker, a forged draft, and had credit for its contents; and, upon his check against the same, obtained B's draft payable to the order of C, a person known to the parties, and mentioned by A at the time as the person who was to indorse the draft. A negotiated the draft to the plaintiff for value, and *bona fide* indorsing thereon the name of C. B, discovering the forgery of the draft taken by him from A, stopped payment of the one he gave. *Held* that C was not a fictitious payee; but his genuine indorsement must be shown to support the plaintiff's title.

This was a petition in error to a judgment rendered by the District Court for Douglas County, in favor of the plaintiffs, for $3,299.40.

ROGERS *v.* WARE.

It was an action upon a bill of exchange, of which the following is a copy: —

"BANKING-HOUSE OF J. A. WARE,
NEBRASKA CITY, NEBRASKA,
Aug. 2d, 1869.

"Pay to the order of Wm. T. Allen three thousand dollars.

(Signed) J. A. WARE,
By H. N. SHEWELL.

"To Imp. & Tra. Nat. Bank, New York."
(Indorsed) "Wm. T. Allen," "S. H. Fowler."

The action was brought by Eliphas H. Rogers and Lucius H. Rogers, bankers at Fremont, in this State, to whom, in the usual course of business, the draft was for value duly indorsed, on the fourth day of August, 1869, against Ware, the drawer, and Fowler, one of the indorsers. Besides the usual allegations in a petition upon such an instrument, and also of the due presentation thereof for payment, and its refusal and protest, it was averred by the plaintiffs that the said William T. Allen in the said draft named was a fictitious person, and had no interest in or connection with the same, of which the said Ware was well advised; that the said Ware delivered the same to a person whose name is to the plaintiffs unknown, who indorsed the same by the name William T. Allen, and delivered it to the defendant Fowler, who indorsed the same to the plaintiffs, and the said Fowler then and there representing that the person presenting the bill was William T. Allen, and the identical person named in the said bill as the payee thereof; that the said plaintiffs indorsed the said bill to the First National Bank of Omaha, which, on the tenth day of August, 1869, caused the same to be duly presented for payment,

which was refused, the defendant Ware having directed the drawee not to pay the same.

The defendant Ware answered, admitting the drawing of the draft by him, but denying that Allen, the payee therein, was a fictitious person; and alleging, that, on the day the bill bears date, a man who represented that his name was C. G. Whiteman called at his bank, and deposited with him a draft for three thousand five hundred dollars, purporting to be drawn by the National Bank of Bloomington, on Gilman, Dunlap, & Co., of Cincinnati, Ohio, payable to the order of C. G. Whiteman, who indorsed the same to Ware; that he immediately sent the draft to the drawees for collection; that it was not paid, but pronounced a forgery, and that the same was a forgery, as he afterwards learned from the Bloomington Bank; that, consequently, he never received any consideration for the draft in question; that, at the time he drew the draft, Whiteman represented that he was about to purchase a stock of goods of Day, Allen, & Co., of Chicago, and wanted the draft made payable to the order of William T. Allen of that firm; that the defendant, believing that the draft would go into the hands of said Allen, of said firm, delivered the same to Whiteman, to be by him delivered to Allen; that the indorsement of the name of William T. Allen on said draft was a forgery, and that the plaintiffs are not innocent holders of said draft.

To this answer there was a reply, denying these allegations.

The cause was tried to a jury.

Upon the trial, it was shown that a man, who gave his name as C. G. Whiteman, came to Nebraska City, the place where the defendant Ware did business, and represented that he was from Chicago, where he had

been in the employment of Day, Allen, & Co., one member of which was named William T. Allen. This firm was engaged in selling goods, and was known to Ware when he made the draft. Mr. Allen, of this firm, testified that neither he nor his firm ever had any connection with this draft, and knew nothing of it, nor have any interest in it; that the first he knew of it was by a letter from Mr. Ware, inquiring if he had indorsed it, or authorized Whiteman to draw it; and that Whiteman had never in any way been connected with him or his firm. It further appeared that this man came to Ware's banking-house, and asked for a draft for three thousand dollars, payable to the order of William T. Allen, stating at the time that he wanted it to buy goods with of Day, Allen, & Co., of Chicago, and that Mr. Allen was a member of that concern: whereupon the draft was accordingly made and delivered to him.

This was on the 2d of August; and on the next day he appeared at Fremont, giving out his name as William T. Allen. On the 4th he presented the draft to the plaintiffs, and asked them to cash it. They required him to identify himself, which he did by producing at the bank the defendant Fowler, who stated to the plaintiffs that he was William T. Allen. But, in fact, Fowler knew nothing of it, except from this man's previous representations during the time he was in Fremont. Without knowing more, the plaintiffs cashed the draft, indorsed it to the First National Bank of Omaha, by which it was duly presented for payment when it was dishonored.

On the trial, the defendant Ware offered himself as a witness on his own behalf, and the following question was asked: —

"State whether or not you ever received any consideration for making this draft."

The plaintiffs objected; and the Court sustained the objection, and the defendant excepted.

The question was then asked, —

"State to the jury how much is in your bank to the credit of this man Whiteman."

The plaintiffs objected; and the Court sustained the objection, and the defendant excepted.

The defendant offered in evidence a deposition of E. Throp, in which he testified that he was cashier of the National Bank of Bloomington; that the draft in the answer mentioned, drawn by that bank on Gilmore, Dunlap, & Co., of Cincinnati, Ohio, to the order of C. G. Whiteman, for three thousand five hundred dollars, was a forgery.

The plaintiffs objected to the reading of this deposition to the jury; and the Court sustained the objection, and the defendant excepted.

The Court, under the defendant's exception, charged the jury, that "it is shown, by the pleadings and evidence, that the draft was made and delivered by the defendant; and that W. T. Allen, named as payee, was, in contemplation of law, a fictitious person, having no interest or concern in the draft; and therefore his indorsement of it was not necessary to give title to the plaintiffs."

"It is also shown sufficiently, by the evidence, that the plaintiffs received the draft soon after its issue from the holder and bearer thereof, and paid value for it; and were, at the time of the commencement of this suit, *bona-fide* holders and bearers thereof. They are, therefore, entitled to recover upon it."

The defendant Ware requested the Court to instruct the jury, that "if they believe, from the evidence, that the name William T. Allen, the payee in the bill in controversy, was forged on the back of the same as

indorser at the time or before the plaintiffs purchased the same, then they must find for the defendant."

The Court refused to give the said direction; and the defendant excepted.

He further requested the Court to instruct the jury, "that, in order to entitle the plaintiffs to recover, it must be shown to their satisfaction, by the evidence, that the payee in the bill, William T. Allen, indorsed the same, and that his signature is genuine." The Court declined to give the said request; and the defendant excepted.

He further requested the Court to direct the jury, that "it is incumbent upon the plaintiffs to prove that they became legally possessed of the draft, immediately or mediately, through the person to whom it was originally delivered by Ware." The Court gave the direction, adding, "I am compelled to say, that this fact is sufficiently shown by the testimony. The person whom the defendant says the draft was drawn in favor of disclaims all interest therein by his testimony, and has repudiated it." The defendant excepted to the matter so added to his request.

The jury rendered a verdict for the plaintiffs. The defendant moved for a new trial; which was denied

E. E. Brown, for plaintiffs.

I. It was necessary for William T. Allen, the payee of the draft, to indorse it, in order to pass the legal title to the defendants in error; and the Court erred in directing the jury to find for them without proof of his indorsement.

It will be admitted that the legal rule is, that, in an action by an indorsee of a bill or note payable to order against the maker, he must not only prove the signature

of the maker, but also that of the payee as indorser, to be genuine. *Canal Bank* v. *Bank of Albany*, 1 *Hill*, 287; *Blakely* v. *Grant*, 6 *Mass.*, 385.

Bacon, in laying down this rule, speaking of the bill, says, "The money is to be paid to him in whose favor the bill is drawn, or to the indorser in case it be indorsed over; of which indorsement, it seems, the drawer, acceptor, and drawee must take notice at their peril." 6 *Bacon's Abrigt.*, 788.

Again he says, "A transfer by indorsement can only be made by him who has a right to make it; and *that is strictly only the payee*, or the person to whom he or his indorsees have transferred it, or some one claiming in the right of some of the parties." 6 *Bacon's Abrigt.*, 792.

The Court below, however, seems to have recognized this as the general rule, but claims, that because the evidence in this case showed that William T. Allen, the payee, had no interest in the bill, he was for that reason, in contemplation of law, a fictitious person; and therefore his indorsement was unnecessary to pass the legal title. An important question, and perhaps the most important one, presented for the consideration of this Court, is, "Does the payee named in a bill of exchange, if a real person, and known by the maker or drawer to be such, and to whom he expects and intends that it shall be delivered become, in contemplation of law, a fictitious person simply because he has no interest in the bill? and is his indorsement, therefore, unnecessary to pass the legal title?"

All of the authorities I have been able to find agree in answering this question in the negative. *Morgan* v. *Bank of the State of New York*, 1 *Duer*, 434, *affirmed in N. Y. Court of Appeals*, 1 *Kernan*, 404; *Balles* v. *Stearns*, 11 *Cush.*, 320; *Dana* v. *Underwood*, 19 *Pick.*,

90; *Mainort* v. *Roberts*, 4 *E. D. Smith*, 84; *Foster* v. *Shattuck*, 2 *N. H.*, 446.

II. In an action brought by an indorsee on a draft payable to order against the maker, in order to dispense with the necessity of proving the indorsement of the payee to be genuine, on the ground that the payee is a fictitious person, the plaintiff must show, —

1st, That the maker knew the payee was a fictitious person at the time he made the draft; and,

2d, That he indorsed the name of the fictitious payee upon it, and then transferred it to a *bona-fide* holder for value.

Or, if the payee be a real person, the plaintiff must show, —

1st, That the indorsement of the payee was forged by the maker, or at least with his knowledge and consent; and,

2d, That the maker negotiated the draft with such forged indorsement upon it to a *bona-fide* holder for value.

The reason of this rule is obvious. The law in such case estops the maker of the draft, who has himself made it payable to a fictitious person, and indorsed the name of his fiction upon it, or who has made it payable to a real person, and forged the name of the payee upon it, and then transferred it, from denying his liability; and such a draft may be declared upon by a *bona-fide* holder for value as payable to bearer. 1 *Edwards on Bills and Notes* (*marginal pages*), 125, 126, 683; 1 *Parsons on Bills and Notes*, 32 (*note*); *Chitty on Bills*, 157, 158, 167, 172, 566, 643; 2 *Parsons on Bills and Notes*, 50, *and note*, *and* 591, 592; *Hortsman* v. *Henshaw*, 11 *Howard U. S.*, 177; *Plets* v. *Johnson*, 3 *Hill*, 112; *Minet* v. *Gibson*, 3 *Term*, 482; *Mainort* v. *Roberts*,

4 *E. D. Smith*, 82; *Tatlock* v. *Harris*, 3 *Term*, 174; *Vere* v. *Lewis*, 3 *Term*, 182; *Coggill* v. *American Exchange Bank*, 1 *N. Y.*, 113; *Foster* v. *Shattuck*, 2 *N. H.*, 446.

A second reason for the above rule is, that any person disposing of a negotiable instrument guarantees, by implication of law, that all the signatures then on the instrument are genuine. *Edwards on Bills and Notes* (*marginal page*), 685, 686; *Heinrich* v. *Whitney*, 15 *Johns.*, 240; *Erwins* v. *Downs*, 15 *N. Y.*, 575.

The above is the only exception that permits any departure from the otherwise inflexible rule, that, in an action on a draft by the indorsee, the indorsement of the payee must be proved; and the policy of allowing even this departure has been seriously questioned by some very eminent jurists. 1 *Parsons on Bills and Notes*, 33 (*note*); *Bennett* v. *Farwell*, 1 *Camp.*, 130 *and* 180; *Dissenting Opinions of Justices Eyre and Heath in Minet* v. *Gibson*, 1 *Hen. B.*, 569.

The name of the payee, William T. Allen, being forged on the draft in question after it had left the possession and control of the maker, the defendants in error could take no title through such forged indorsement; and they occupy no better position than they would if no indorsement whatever had been made. *Edwards on Bills and Notes* (*marginal page*), 190; 2 *Parsons on Bills and Notes*, 234; *Canal Bank* v. *Bank of Albany*, 1 *Hill*, 287; *Graves* v. *American Exchange Bank*, 17 *N. Y.*, 205; *Mead* v. *Young*, 4 *Term*, 28.

III. The interest which the defendants in error took in this draft, if any, was the equitable interest which their assignor had, *and no other nor greater.*

A draft payable to order may be transferred without indorsement so as to vest the property in the purchaser; but such a transfer does not clothe the assignee with all

the rights of an indorsee of negotiable paper transferred to him in the usual manner and course of business. It gives him title to the draft, but subject to every equitable defence which the maker had against it at the time of the transfer. *Edwards on Bills and Notes* (*marginal page*), 286, 287; *Hedges* v. *Seeley*, 9 *Barb.*, 214; *Franklin Bank* v. *Raymond*, 3 *Wend.*, 69; *Jones* v. *Whittier*, 13 *Mass.*, 304.

The above is unquestionably the true legal rule in cases of this character, and the only one that can do equal and exact justice to all the parties. For the reasons above stated, we say the Court below erred in excluding the evidence offered in regard to the consideration for which the draft was given, and also in its instructions given the jury in regard to the payee being a fictitious person; and therefore the judgment should be set aside, and a new trial ordered.

E. Wakeley and *A. J. Poppleton*, for the defendants in error.

I. If a draft be payable to a fictitious person, especially if the drawer knows the fact, it is, in contemplation of law, payable to bearer. 1 *Parsons on Bills*, 32, 560, 591, 592, *and notes;* 2 *Parsons on Bills*, 48–50; 3 *Kent's Comm.*, 77, 78; *Edwards on Bills*, 125–130 (*marginal paging*); *Story on Bills*, sect. 50, 200.

II. It is claimed, however, that because there was in fact such a person as William T. Allen, and because the attention of the maker was directed to him as a person who might perhaps become the holder of it, he was not a fictitious person, but a person whose indorsement was necessary to transfer and give title to it.

We insist, that upon the facts stated in the answer,

and shown by the proofs, Allen was, for all purposes connected with the draft, a fictitious person, and that Ware knew it.

1. Allen never had any interest in the draft. He did not furnish the consideration for it: it was not delivered to him. There was no agreement that he was to have an interest in it. He did not know of its issue. He did not know Whiteman, or whoever the person was to whom it was issued. It was not intended by Whiteman that Allen should know of it. In short, he was an absolute stranger to the whole matter and proceeding. The answer and the proofs show conclusively that Ware knew that Allen had no interest in it, and never would have, except in the wholly uncertain and contingent event that Whiteman should purchase of him a bill of goods, and give the draft in payment.

2. Allen not only had no interest in the draft, but he could not be compelled to indorse it, and had no interest, motive, or inducement, to indorse it.

3. The position of plaintiff in error, therefore, is, that Ware issued a draft which could not be transferred to any one, so as to give title, except by the indorsement of a person who had no reason or motive to indorse it, and could not be compelled to do so. Also that Ware could not be required to pay it without such indorsement, for the manifest reason that he had promised to pay it only to that person's order. Therefore, although Ware had received full consideration for making the draft, he could never be compelled to pay it unless Allen should volunteer to indorse it.

Upon the whole reason of the case, when Ware issued and delivered the draft to a person whom he knew was not the payee named in it, and further knew that such payee had no interest in or concern with it, and might never see or know of it, should he not be

held to the same liability as if he had known that the payee was in every particular a pure fiction; namely, the liability to pay the draft to bearer?

A person having no interest in, or concern with, the note or draft, is regarded as a fictitious person. 2 *Parsons on Bills*, 591, 592, *and notes; Coggill* v. *American Exchange Bank*, 1 *N. Y.*, 113; *Pease* v. *Dwight*, 6 *Howard*, 190; *Moore* v. *Anderson*, 8 *Indiana*, 18; *Farnsworth* v. *Drake*, 11 *Indiana*, 101; *Foster* v. *Shattuck*, 2 *N. H.*, 446; *Blodget* v. *Jackson*, 40 *N. H.*, 41; *Meacher* v. *Fort*, 3 *Hill* (*So. Ca.*), 227; *Grant* v. *Vaughn*, 3 *Burr.*, 1516; *Plets* v. *Johnson*, 3 *Hill*, 112.

III. This is not a case where the transfer to Rogers & Co. can be held to be only an equitable assignment of a non-negotiable instrument, and therefore subject to equities between the holder transferring it and the drawer.

Upon all the authorities the draft was negotiable. If the payee was a real person for the purposes of the draft, it was negotiable by his indorsement. If the payee was a fictitious person, it was payable to bearer, and negotiable by delivery, or by the indorsement of the name of the fictitious person by the owner and holder. There is no middle ground. No authority holds such an instrument to be payable *only* to the person to whom it was issued.

IV. If the payee be a pure fiction, the acceptor must of course pay without requiring the legal impossibility of the holder showing title through the indorsement of such fiction. Is not the impossibility just the same of showing title through indorsement of a person having a real existence, where he was not a party to the instrument, and cannot be *identified* by the drawer?

If a draft be payable or indorsed to John Smith, and

be delivered by the maker or by an indorser to some John Smith, this fixes and identifies the John Smith intended. The acceptor then has the means of ascertaining whether the John Smith who is a party to the draft holds it, or has indorsed it to some holder. How is this possible in such a case as this, where the particular William T. Allen intended as the payee by the maker is distinguished from all others of that name *only* by the mental operation of the maker? Suppose Whiteman had obtained the genuine indorsement of some man *whose real name was* William T. Allen, but was not the man *intended* by Ware, and the drawer had accepted and paid it: upon the reasoning of the plaintiff in error, the draft would not have been indorsed by the real payee. How was it possible for Rogers & Co., purchasing the draft, to know whether or not the William T. Allen named in it had indorsed it?

V. For the purposes of this draft, the person to whom it was sold and delivered, and whom Ware knew to be the only person interested in it, may be regarded and presumed to be William T. Allen, whatever his real name was. The proof shows satisfactorily that his real name is unknown. He called himself Whiteman at Nebraska City, and Allen at Fremont. Either or neither may have been his real name.

All authorities agree that the *real payee*, by whatever name designated, may transfer the instrument, and, if necessary, may assume such name, and indorse it. Cases cited under point II.; *Chaffee* v. *Taylor*, 3 *Allen* (*Mass.*), 598.

CROUNSE, Justice.

"When one has done a mercantile act," says Lord Ch.

Baron Gilbert, "he subjects himself to mercantile law." *Gilbert's Lex Prætoria*, 288; 3 *Kent's Comm.*, 79. This law declares, that when Ware signed and delivered to the person representing himself as Whiteman the bill of exchange drawn on the Importers' and Traders' National Bank of New York for three thousand dollars, payable to William T. Allen or order, he undertook, in the event of its dishonor, to pay that sum to Allen or his indorsees. *Jac. Law Dic., title Bill of Ex., IV.* By an equally familiar rule of mercantile law, any holder of that bill must show such indorsements as establish his title before he can recover of Ware: the indorsement of the payee must, at all events, be shown; because, without that, it cannot appear that he made an order upon the existence of which depends the title of the indorsee. *Id. V.* 2.

Rogers & Co., as bankers, well understood this, and demanded the indorsement of William T. Allen, but were deceived by a forgery. Unable to show the indorsement of Allen, and comprehending the futility of proceeding against Ware as the equitable assignees of Whiteman *alias* Allen, — when it must appear that he who forged the indorsement of the payee on the bill of exchange had likewise imposed a forged and worthless draft upon Ware in the purchase of it, — Rogers & Co. declare on the bill in question as payable to a fictitious payee, and therefore payable to bearer, relying on the circumstance that Allen had no interest in the bill to establish his character as fictitious payee. That Allen never had any interest in the bill of exchange is undeniable. That there was such a person as William T. Allen, of the firm of Day, Allen, & Co., of Chicago; that such firm was understood by Ware to exist, and that he had made drafts in their favor; that he was requested to make this draft to the order of William T. Allen; and that he had in his mind the Allen who was

a member of the firm when he signed and delivered the draft; and that he had no reason to believe but that the same would be paid to the said Allen or his order, — is equally clear from the record. We then have the question presented, whether, under such a state of facts, Allen may be regarded as a fictitious payee, and his indorsement be dispensed with.

Among the first cases reported where this class of indorsement was considered is that of *Tatlock* v. *Harris*, 3 *D. & E.*, 162. Harris drew a bill payable to Grigson & Co., and accepted the same, and gave it to Lewis & Potter, who indorsed it, in the name of Grigson & Co., to the plaintiffs. Harris defended on the ground that Grigson & Co. had not indorsed it. Lord Kenyon, Chief Justice, among other things, says, "The necessary inference which the jury would have made was, that, at the time the bill was drawn, there were no such persons in existence as a Grigson & Co.; and that the fact was notorious to all the parties in the transaction, and particularly to the defendants in this cause. On these facts, what the conscience of the case is, no man can doubt; for it is extremely clear, that the defendant, who is now called upon to pay this bill, has received the value of it, and therefore ought, in conscience, to account for it. . . . This decision proceeds on the special circumstances of the case; namely, that the defendant, at the time of entering into his engagement, knew that there were no such persons as Grigson & Co., and that therefore, in point of formal derivation of title, that which is usually done could not be done in this case. . . . The counts on which the judgment of this Court is given are those for money paid, and money had and received."

The question of interest in the payee did not arise here; but it will be remarked, that the decision of the

Court proceeds upon the circumstance that the payees named had no existence in fact, and that this was known to all the parties, especially the drawee.

Several other cases arose about the same time (1786–1788). That most fully considered, and reported at great length, is *Minet* v. *Gibson*, 1 *Henry Blackstone*, 561. The effect of the determination in the House of Lords is given in *Jacob's Law Dic.*, *Bills of Ex.*, 5, 3, as follows: "If a bill of exchange be drawn in the name of a fictitious payee, with the knowledge as well of the acceptor as the drawee, and the name of such drawee be indorsed upon it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself, or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person, such innocent indorsee for a valuable consideration may recover against the acceptor as upon a bill payable to bearer. Perhaps also, in such case, the innocent indorsee might recover against the acceptor as on a bill payable to the order of the drawer, or on account stating the special circumstances."

This is a leading case; but it affords little or no support to the position of the defendant in error. Several elements are wanting in the case under consideration which existed in that of Minet *v.* Gibson. It is sufficient to call attention to the fact, that the drawer there indorsed the name of the fictitious payee on the bill himself, — a circumstance, as we shall have occasion to notice hereafter, which went to fix his liability. *Coggill* v. *American Ex. Bank*, 1 *N. Y.*, 113; *Herrick* v. *Whitney*, 15 *Johns.*, 240.

Among the cases pressed upon the attention of this

Court, as sustaining the position that Allen is to be regarded as a fictitious payee, is that of *Foster* v. *Shattuck*, 2 *N. H.*, 446. This was assumpsit on a promissory note, made by the defendants, for $1,666.67, payable to Moses Foster or order, and was declared on as having been indorsed to the plaintiff by the payee. The signature was admitted; but the indorsement appeared to have been made by a person in Milford in the name of Moses Foster. The defendant contended that one Moses Foster of Andover was intended to be the payee; and, the case being submitted to the jury, they found that the plaintiff alone had always possessed the note, and loaned the money to two of the defendants for which it was given, and that no person of the name of Moses Foster had ever possessed any interest in it, or been particularly interested as payee.

Woodbury, J., says, "It appears, that though the whole interest of this note has ever been in the plaintiff, yet it was made payable to Moses Foster or order. Hence he must claim through some person of that name who was intended as payee, if any particular person was so intended. But, the jury having found that no person in particular was intended as payee, no person was authorized to indorse it; because every negotiable note must be negotiated by the person (or his representative) to whom the note was made payable, and not by a person of the same name. 1 *Hen. Bl.*, 607; *Mead* v. *Young*, 4 *D. & E.*, 28. When a note, however, is made payable to the name of some person not having any interest, and not intended to become a party in the transaction, whether a person of such a name is or is not known to exist, the payee may be deemed fictitious. The name is assumed merely to give form to the instrument. In such case it has been ad-

judged that a recovery can be had on the money counts by the actual creditor when money passed between the parties in the action. 3 *D. & E.*, 174; *Bennett* v. *Farnell*, 1 *Camp. N. P.*, 130. But here one of the defendants was merely a surety, and had received no money of the plaintiff. The only remaining mode to warrant a recovery is on a count on the note as payable to bearer, after alleging that the nominal payee is fictitious. This construction of such an instrument has been opposed by some eminent jurists; and in the Napoleon Code such a note is declared void: but still it has received the sanction of the Courts of Common Pleas, King's Bench, and Parliament. 1 *Hen. Bl.*, 321, *Collis* v. *Emmet; Id.*, 607, *Gibson et al.* v. *Minet;* 3 *D. & E.*, 162, *Vere et al.* v. *Lewis et al.; Chit. Bills*, 58; *Sed.*, 1 *Camp. N. P.*, 130.

"We are inclined to adopt this construction, in order to prevent the note from becoming a nullity when founded on a full and fair consideration. Such construction injures nobody, and is no more forced than to hold, that, when the name of the payee is left blank, it is the same thing as if the defendant had made the bill payable to bearer. *Cruchly* v. *Clarence*, 2 *Maul & Selew*, 91. But, to enable the plaintiff to recover under this view of the case, a new count must be filed, and, for that purpose, the verdict be set aside, and the cause stand open for a new trial. On that trial, the facts can be more fully investigated as to the person actually intended as payee in the note."

This is, perhaps, as strong a case as can be found: still a careful reading of it will discover a marked difference between it and the one under consideration. In the one, the payee not only never had any interest in the bill, but *was not particularly intended as payee:* in the other, a particular payee was designated. That the

want of interest in the payee does not vary the principle, is quite clearly expressed by the learned judge who wrote the opinion. He says, "Though the whole interest in the note has ever been in the plaintiff yet it was made payable to Moses Foster or order. Hence he must claim through some person of that name who was interested as payee, if any particular person was so intended." Again: the plaintiff in that case loaned to two of the defendants the money expressed in the note, the other defendant becoming surety. The finding of the jury — that the "plaintiff alone had always possessed the note" — shows that he did not hold it as indorsee, but that the note was evidence of a money transaction between the parties. How the name of Moses Foster, rather than the name of Samuel Foster the plaintiff, came to be inserted as payee, the case as reported does not disclose. It would seem to have been the result of accident, or to have been put in to complete the form of the bill. In view of all this, and that the note might not become a nullity when founded on a full and fair consideration, the Court allowed the action to proceed as on a note payable to bearer, *no one being injured by such construction*. Another case strongly urged as in point is that of *Walter F. Pease* (impleaded with John Chester and Tarleton Jones), plaintiff in error, v. *William Dwight*, 6 *How. U. S.*, 190. The count on which judgment was given in the U. S. Circuit Court for Michigan against Pease is as follows: "For that whereas one John Chester, heretofore, to wit, on the first day of January, 1837, at Detroit in said district, made his certain promissory note in writing, bearing date the same day and year aforesaid, and thereby and then and there promised, two years from the date thereof, to pay to the order of Walter Chester and the said defendants, under the copartnership name

and style of these defendants, Pease, Chester, & Co., one thousand five hundred dollars for value received at the Farmers' and Mechanics' Bank of Michigan, with interest; and then and there delivered the said promissory note to the defendants, who then and there, using the copartnership name and style of Pease, Chester, & Co., indorsed said note, and delivered the same to the plaintiff; and the said plaintiff avers, that the said John Chester was one of the said persons using the name and style of Pease, Chester, & Co., and that the name of the said Walter Chester was inserted in the said promissory note as one of the persons to whose order the said sum of money should be payable by the said John Chester, for the purpose, and with the intention on the part of said John Chester, of procuring the said Walter to indorse the said note for the accommodation and benefit of the said John Chester, and for no other purpose; that the said note was never delivered to said Walter Chester, and that the said Walter Chester never had at any time any interest or property or rights therein, or the money specified and mentioned therein; that the said note was by the said John Chester delivered to the said Pease, Chester, & Co. alone, who received the same and indorsed it solely, who waived the indorsement of the said Walter Chester, and, having solely indorsed the same, delivered the said note, so indorsed as aforesaid, to the plaintiff; and the said plaintiff avers, that, when the said promissory note became due," &c.

Pease demurred, "because it is not averred in said count that Walter Chester, *one of the joint* payees of the said promissory note described in said count, ever indorsed or delivered the same to the said plaintiff or any other person whatever."

Mr. Justice Wayne says, ". . . The point is, whether

a promissory note, payable to the order of several persons, one of whom inceptively refused to be a payee of it, and who was treated by the drawer and other payees, both in the delivery of the note and its negotiation, as no party, and having no interest in it, can be transferred by the indorsement of the real payees, so as to give the ownership of it to the indorsee, and a right of action upon it, *ex directo*, under the statute of 3 & 4 *Ann. C.*, 9. . . . The statute requires the transfer to be made by the indorsement of the person to whom the note is payable; and the interpretation of it is, that, when a note is payable to the order of several persons not in partnership, all must separately sign their names as indorsees; the object being, that, before an indorsee shall recover the contents of the note, he shall show he had acquired a property in it by a transfer by those who were the original payees, or from others who were their indorsees. The statute is not merely a form requiring all the payees to indorse, but a substantial requisition, upon the presumption that all the payees upon the face of the paper have an interest in it, and that they have indorsed it. We have, then, the rule, and the reason of the rule; and it seems to me, that to permit it to comprehend a case of an understanding between the real parties, because a name had been mistakenly inserted, or had been inadvertently left upon the face of the paper, when the note was delivered to the real payees by the drawee, would be to wrest the statute out of its meaning, and to sacrifice the substantial intention of it merely to form. The statute meant to deal with the real parties. The omission to erase the name in such a case does not lessen the drawer's obligation to pay his note to the real payees, or their right of action upon it against the drawer of a note of hand. If, then, the real payees shall indorse the note to

a third person, they are within the words of the statute as indorsees; and the indorsee, in an action against them or the drawer, may be permitted to prove the real character of the undertaking by showing that the name of a person had been inadvertently left upon the paper as a payee who had refused to be such, and who had been waived as a party to the note, both by the drawee and the real payees, when the contract had been completed between them by the delivery of the note. . . .

"It would be really going very far to say that the statute giving the indorsee a right of action *for such a sum of money, either against the person signing such note or against any of the persons who indorsed the same*, did not mean to be exercised, because a person's name was upon the face of the paper who never had been a party to it. No such a decision has been made. It may be because no case of this kind has ever occurred before. We can find none like it. In the absence of all authority against our conclusion, we must take upon ourselves the responsibility of announcing it as an original application of the statute to that case, and for any case of like kind which may occur, without intending to go further."

This case also differs widely from the one at bar. When John Chester drew the note payable "to the order of Walter Chester, and Pease, Chester, & Co.," his intention, no doubt, was to secure the indorsement of Walter Chester. But the note did not become operative till it was negotiated or put into use. *Catlin* v. *Gunter* 11 *N. Y.*, 368. When that transpired, all design of having Walter Chester become a party to the note had been dismissed, and it was so understood by all the parties to the transaction. His name was occupying but a space on the paper, when, to conform to the un-

derstanding of the parties, it should have been erased. Of the justness of the decision there can be no doubt. John Chester, a member of the firm of Pease, Chester, & Co., wishing to obtain money, first proposed to have his note indorsed by Walter Chester and his own firm. Dwight, it seems, consented to loan the money upon the indorsement of the firm alone. In an action to recover the money so lent, it illy becomes the firm, or any member of it, to set up the want of Walter Chester's indorsement, when it had been expressly waived by them. This opinion proceeds upon the assumption that Walter Chester was no payee at all, rather than that he was either a real or fictitious one. There is no suggestion that this was a note payable to bearer. On the contrary, it is treated as payable to Pease, Chester, & Co., the true and sole payees; and, upon their indorsement being shown, a recovery was sustained.

The case of *Hortsman* v. *Henshaw et al.*, 11 *How. U. S.*, 177, cited on the same side, will be found to proceed upon reasoning which has no place in the case before us. There Fiske and Bradford, a mercantile firm in Boston, drew their bill of exchange upon Hortsman of London, to the order of Fiske and Bridge. The drawers, or one of them, placed the bill in the hands of a broker, with the names of the payees indorsed upon it, to be negotiated; and it was sold to the defendants in error, *bona fide*, and for full value. It was accepted, and paid at maturity. It turned out that the indorsement was forged; by whom it does not appear. Shortly afterwards the drawers became insolvent, and the drawee brought this action against the defendants to recover back the money paid: it was held that he could not recover. It is unnecessary to repeat the opinion given by Chief Justice Taney. The point made is, that the drawers, having put the bill in circula-

tion, with the names of the payees indorsed thereon, must be understood as affirming the genuineness of such indorsements. The acceptor being presumed to accept upon the strength of the funds of the drawee, and having paid to the rightful holder of the bill, — to him who could have recovered from the drawee should the bill have been dishonored, — he can look only to the drawee for a return of the money used in the payment of the bill.

With the case of *Coggill* v. *The American Exchange Bank*, *supra*, I will have noticed the principal cases relied on by the defendant in error. This case is very much like the last. Shapley & Billings (through the wrong of one of them) drew a bill, in the name of the firm, on the plaintiff, for fifteen hundred dollars, payable to the order of Truman Billings. The name of Truman Billings, as well as that of Truman Billings, jun., was forged on the back of the bill; and it was passed by one of the firm to the Bank of Central New York for discount, and was cashed without any suspicion of the forgery. This bank indorsed the draft, and sent it to the defendant for collection. The American Exchange Bank collected it of the plaintiff, who, learning of the forgery, and the absconding of one of the firm of Shapley & Billings, brought his action to recover the amount paid the defendant, upon the ground that the defendant got no title to the bill through the forgery. As in the case of *Hortsman* v. *Henshaw*, *supra*, the Court holds, that, inasmuch as Shapley & Billings negotiated the bill with the names of the payees indorsed, they affirmed the genuineness of the signatures; and, upon the plainest principles for maintaining honesty and fair dealing, they would have been estopped from controverting it. Coggill, the acceptor, deriving his title through those who could maintain an action against Shapley & Billings, must look to

them. Judge Bronson, who delivers the opinion in this case, in remarking upon the rights and remedies these banks had, in case of the drawee refusing to accept the bill, says, "There is also another form of declaring, in which the bank might have recovered on this bill. As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled, that when a man draws, and puts into circulation, a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer." . . . (Citing the leading English cases, to which reference has been made.)

"The point had been adjudged, that, when the maker of a promissory note puts it into circulation with a forged indorsement of the name of the payee upon it, a *bona-fide* holder may sue, and recover against the maker, as upon a note payable to bearer (*Fort* v. *Meacher*, 3 *Hill's S. Car.*, 227, and *Riley's Law Case*, 248); and the same rule has been applied where the payee had no interest in the note, and it was not intended that he should become a party to the transaction. *Foster* v. *Shattuck*, 2 *N. H. Rep.*, 446. Notwithstanding what was said in *Dana* v. *Underwood*, 19 *Pick.*, 99, I think this sound doctrine; and it is applicable to the case of a bill put into circulation by the drawer with a forged indorsement upon it, — a *bonâ-fide* holder may treat it as a bill payable to bearer." This case is wholly unlike the one we are considering, going more particularly on the ground that the drawers negotiated the bill with the payee's name, or what was taken to be the indorsement of the payee, upon it. But what is here said by this learned jurist concerning the want of interest in a payee, that will authorize a recovery as upon a bill payable to bearer, is qualified, in common with all cases of the kind, with the further con-

sideration, that "it was not intended the payee should ever become a party to the transaction," as was well illustrated in that case. There undoubtedly was not the remotest intention in the mind of the drawer of the bill that Truman Billings should ever possess or indorse it.

Passing from authority to what is urged as the reason of the case, it is submitted, whether it is reasonable to insist upon the indorsement of him who has no interest or motive to indorse the draft, and who could not ever be compelled so to do; and whether, having issued a draft in proper form, but to the order of a payee who had no interest in it, as he well knew, Ware should not be held to the same liability as though he had known the payee to be purely a fiction; and that he designed to pay some one the amount of the draft, and as Allen is shown to possess no interest in it whatever, Ware should not object to paying it to him who has paid full value for it. This is somewhat plausible, but, as a matter of conscience, would be greatly enforced if it could be truthfully added, that Ware had received a consideration for the draft. Were this the fact, I apprehend the law is not wanting in ways in which Rogers & Co. might obtain a return of the money they have advanced. In order to exclude proof that the fact is otherwise, they were forced to rest their rights, if any, upon the rules of commercial law governing negotiable paper. These rules may not always work complete justice; but a regard for the confidence and security which should obtain in mercantile transactions of this kind demands their rigid application when a proper case arises. Ware's engagement, when he executed and delivered the bill in question, was to pay to the order of William T. Allen, unless Allen was a fictitious person. Whether he might not as well pay to Rogers & Co. is not the question. He can rely upon the letter of his obligation; and, if this is kind to him,

it is his fortune. To hold Allen, under the circumstances of this case, a fictitious payee, is to go beyond any authority I have been able to discover, or any which I believe to exist; and the evident caution which has marked every departure from the rule — that the indorsement of the payee named in the bill of exchange must be shown to establish title in the holder — admonishes us against any extension of the exception. The early cases show that the payee had no existence really, — a fact which was understood by the parties. Later cases include the names of payees who do exist, but who never had any interest in the bill, *and who it was intended never should become parties to the transaction.* Here Allen did exist; was designated by the applicant for the draft as the person to whose order he would have it payable. Ware knew of such a person, his business, and place of business; and, whatever may have been the reserved intention of the applicant as to Allen ever becoming interested in the draft, there can be no doubt that Ware had no other idea than that the bill would be paid to Allen or his order. If Allen, although possessing at the time of delivering the draft no present interest in it, was not intended by the drawer as a party to it, I certainly cannot conceive of a case where one might be so intended. To hold Allen a fictitious payee in this case is to declare the doctrine broadly, that, when a bill or note is made payable to the order of a payee who at the time has no actual interest in it, it may be negotiated and recovered upon as a note or bill payable to bearer. This would be a most dangerous rule indeed, — one destroying the chief value of bills of exchange. As an example, suppose the person representing himself to Ware as Whiteman to be an honest man, applying in good faith for a draft payable to the order of William T. Allen, of the firm of Day, Allen, & Co., of Chicago, wholesale grocers,

with a view of purchasing of them that amount of groceries; suppose further, that, instead of going personally, he had intrusted the draft to an agent, who should forge the name of Allen, and pass it to an innocent holder for value: under the rule contended for, because Allen had no actual interest in the bill, and it being the same as a bill payable to bearer, of course the holder could recover. Illustrations without number might be added. Bills are daily made payable to persons who have no interest in them in fact, or whose interest, like Allen's, is but potential. It is not enough to answer, that, inasmuch as Ware knew Allen had no interest in the bill, he must have known that the real interest in it resided in Whiteman, the purchaser. Such interest in Whiteman rested, not on any principle of commercial law, but upon the special circumstances of the case. Had Whiteman returned immediately, and expressed a change of purpose, and returned the bill, there would have been no impropriety in Ware returning him what had been paid, if any thing, as he might have compelled a return of what he may have paid, had Ware refused, in an action as for money paid and received. Rogers & Co.'s rights are but the rights of equitable assignees of Whiteman. In such case they might recover what Whiteman paid, be the same more or less; but their rights under the law merchant are entirely different. Whiteman, or he who represented himself such, applied for no draft payable to a fictitious payee, but chose to have one made payable to the order of a person known to, and in contemplation of, the parties when it was executed and delivered. To give title to the holder of such a bill, the indorsement of the payee must be shown. The defendants in error having failed to show the indorsement of Allen, the jury should have been instructed to return a verdict against them. If authority were needed to support this

view, the case of *Morgan* v. *Bank of the State of New York*, 1 *Duer*, 434, is one very nearly in point. This was an action brought by Morgan to recover some seven hundred and sixteen dollars, deposited by the plaintiff with the defendants. It was admitted that the plaintiff was entitled to a judgment for that amount, unless he could be charged with the amount of two checks, drawn by him upon the defendants, payable to the order of George Corlies & Co., the indorsements on which were alleged to be forgeries. On the trial the checks were produced, and the signature of the plaintiff admitted. G. W. Corlies, one of the firm of G. W. Corlies & Co., testified that the indorsement of G. W. Corlies on the back of the checks was not in the handwriting of any member or any clerk of the firm, and that the firm had no dealing with Morgan, and that he owed them nothing, and that the checks were never delivered to, nor in the possession of, the firm. Morgan recovered in the Court below, and the judgment was sustained on appeal. Justice Paine, delivering the opinion of the Court, says, "Although no explanation was given, upon the trial, of the purposes for which the checks were drawn, nor of the circumstances under which they passed from the possession of the plaintiff, it seems to us there is no reasonable ground upon which the right to recover in this action can be doubted. When a bill or check is payable to order, to justify the application to its payment of the funds of the drawer, it must be proved that the required order was in fact given: in other words, it must be proved that the indorsement was genuine; and the burden of this proof rests upon the person or bank upon whom the bill or check is drawn. Where the indorsement of the payee is shown to be forged, the payment of a check by the bank is in its own wrong, and can never be set up as a defence against the person

whose rights it violated, or whose funds are misapplied. In all such cases, the bank must be liable to some person to the extent of such wrongful payment. If the check at the time was the property of the payee, it is to him that the bank is liable; but if it had never passed into his hands, and he had no interest in it whatever, — and such are the facts in the case before us, — they are the funds of the drawer that have been misapplied, and which the bank is bound to replace. It is the plaintiff, therefore, who is entitled to maintain this action.

"It is impossible for us to treat these checks as payable to bearer or to a fictitious person. As the payees are real persons, the presumption of law is that the checks were drawn with the intent of vesting the title in them, and them alone. Consequently it was only from them that a title could be derived, and only be a title given by them, and evidenced by their indorsement that a valid payment could be made. As the checks were never delivered to them, and they were not the holders of them at any time for value or otherwise, it seems to us a necessary inference that it was by the fraud of some third person that the checks were obtained and put into circulation. The loss resulting from this fraud the defendants must sustain, and, against its perpetrator, must seek their remedy.

"The supposition that the plaintiff delivered the checks to some third person, to whom he gave authority to put them into circulation by indorsing the names of the payees, is something worse than gratuitous. We reject it wholly: there is no proof of such delivery, and the plaintiff could give no such authority; and assuredly we will not impute to him, in order to protect the defendant, the design of enabling a third person, by means of a forgery, to effect a fraud."

ROGERS *v.* WARE.

This case was taken from the general term to the Court of Appeals, and there affirmed. 1 *Keyes*, 404.

In the rulings upon the trial, there was error; and the judgment must be reversed, and a new trial ordered.

Judgment reversed, and a new trial ordered.

Nuckolls v. Irwin.

JUDGMENTS: *Their entry and effect.* When a judgment is once entered of record, it must stand as the judgment of the Court until vacated, modified, or disposed of by the process prescribed by law. Entering another judgment is not one of them.

TRANSCRIPTS: *Notes of clerk.* A clerk of a District Court should not insert in his transcript of proceedings therein a note of his own explanatory thereof. If he does, such note will be disregarded.

——: *The form* of transcripts to be filed in this Court prescribed.

——: *Decisions.* If an entry in the journal recite a trial and a finding by the judge, and run in the usual form of a judgment, it will not, simply because signed by a judge other than the one holding the term, be treated as a finding and decision merely; and a judgment in form at a subsequent term cannot be entered thereon. If it is a decision, it is a judgment.

This was a motion to dismiss an appeal from a judgment of the District Court for Otoe County. The action was for the specific performance of a contract. At the term of the Court being held on the seventeenth day of August, 1868, Mr. Justice Lake, who was assigned to hold the District Courts in the second district, presided. Otoe County is in the first district, to which Mr. Chief Justice Mason was assigned. The statute authorizes one judge to hold courts for another. On that day the cause was tried before Judge Lake, and by him taken under advisement. A note of this circumstance was entered in the journal, as follows: —

"*S. F. Nuckolls et al.*
v.
John Irwin et al.

"And now, on this day, this cause came on to be heard

by the Court, and is submitted and taken under advisement by Justice Lake."

The March term, 1869, was held by Chief Justice Mason; and the transcript filed in this Court showed the following: —

"And afterwards — to wit, at the March term, to wit, March 27, 1869 — the following proceedings were had and done, Hon. O. P. Mason presiding: —

"*Stephen F. Nuckolls et al.*
v.
John Irwin et al.

"Be it remembered, that heretofore — to wit, at the adjourned term of this Court, held on the seventeenth day of August, 1868 — this cause came on to be heard before the Hon. George B. Lake, Judge, who was then present, holding said Court, upon the pleadings and proofs of the respective parties, and was argued by counsel; and, for the purpose of more fully considering the questions involved, the case was, by consent of counsel, taken under advisement by the Court.

"And now, here at this term of the Court, on consideration of the premises, and the Court finding all the equities of the case with the defendants, it is considered and adjudged that the petition of the said plaintiffs be dismissed at the costs of the said plaintiffs; and that said defendants go hence without day, and recover of the said plaintiffs their costs to be taxed, and that execution issue therefor. — By the Court: George B. Lake, Judge."

At the October term, 1870, Chief Justice Mason presiding, another entry was made in the journal, as follows: —

"*Stephen F. Nuckolls et al.*
v.
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"And now, at this day, the fact that no judgment has

been entered by the Court in this cause having been duly called to the attention of the Court, in open Court, by the above-named plaintiffs, and the Court, having examined the records herein, did, at the request of the said defendants, temporarily pass said cause; and afterwards the Court, being fully advised in the premises, and having listened to said defendants, doth, in accordance with the finding heretofore entered of record in said cause, consider and adjudge that the said petition of the said plaintiffs be, and the same is hereby, dismissed at the costs of said plaintiffs; and, further, that the above-named defendants go hence without day, and that they recover of said plaintiffs their costs herein to be taxed, and that execution issue therefor: to which plaintiffs excepted, and from which judgment said plaintiffs prayed an appeal, which is accordingly allowed; and to all which orders of the Court, the said defendants, by their attorney in open Court, duly except."

The plaintiffs brought the case here by appeal.

C. W. Seymour and *W. W. Wardell*, for the defendants, moved the Court to dismiss the appeal; insisting, --

1. That the journal entry of October, 1870, was not a judgment, because judgment was entered at the March term, 1869, and could not be displaced by a subsequent entry.

2. That the statute required notice of appeal to be served within one month from the entry of the judgment; and more than two years had elapsed from the entry of the judgment in the case.

3. That the entry of October, 1870, was a device to avoid the limitation upon the right of appeal imposed by the statute.

J. H. Croxton and *John F. Kinney*, contra, insisted that the entry of March 27, 1869, was not a judgment of the Court, because Judge Lake was not present, and the same was not passed by Judge Mason.

CROUNSE, J.

A glance at this record raised no doubt in my mind that this appeal must be dismissed. The Court, however, not being unanimous in this view, and the motion being given the additional importance of a full day's argument by able counsel in support of the appeal, it is proper that the views of the majority be briefly stated. No question is made but that the District Court had jurisdiction of the persons and subject-matter involved in this action. The issues being complete, the trial of the cause came regularly on at the August term of that Court in the year 1868, and was submitted and taken under advisement by Justice Lake. Otoe County is one of the counties of the first judicial district, to which Chief Justice Mason is assigned to hold terms of the District Court. What brought Justice Lake from his district (the second) into Otoe County, we will not stop to inquire. The statute permits district judges to interchange and hold each other's courts (*sect.* 16, *page* 50, *R. S.*); and we will presume he was rightfully there. The record showing Justice Lake in possession of the case, we find, that at the March term, 1869, an entry was made on the journal of the same Court, reciting the trial, submission of the cause, and the taking of the same under advisement by the Court by consent of counsel, the finding or decision of the Court, and its judgment thereon in favor of the defendant. With so complete a record, showing a cause over which the Court had full jurisdiction,—its trial, submission, finding,

and judgment, — we would suppose the case concluded in that Court; and are not a little surprised to find the further entry appearing on the record, made more than a year and a half subsequently, several terms of the same Court having intervened. That entry itself is a little singular. It was made against the protest of the defendants. The decision was favorable to them; and they were satisfied with one judgment in the case, or at least with the one they supposed they had. This entry itself betrays a suspicion at least, on the part of the plaintiffs' counsel, that what already appeared on the records might be mistaken for a judgment; or why this unnecessary recital, that "now, on this day, the fact that no judgment had been entered by the Court in this cause having been duly called to the attention of the Court, in open Court, by the above-named plaintiffs"? The entry shows, further, that the Court, treating the previous entry as a "finding," pronounces its judgment accordingly. And, in point of form, I must confess it is no improvement as a judgment upon that which is denominated a "finding." A judgment is the determination or sentence of the law. The apt language is, "it is considered by the Court," — "*consideratum est per curiam.*" 3 *Black. Com.*, 396. This appears in both. We look in vain for any explanation for this peculiar proceeding, unless we receive the suggestion that was made at the argument, that an attempt was made to take an appeal from the judgment of March, 1869, which was attended with some fatal irregularity; and the idea of having a judgment entered anew was conceived. A reference to the Supreme-Court calendar for the last July term shows a cause of the same title of this here, but which was withdrawn. Taking into consideration this circumstance, with the fact that an appeal was taken from this last entry within a few days after its

appearance on the journal of the District Court, it is difficult to resist the conclusion that this is an attempt to do that by indirection which could not be done directly. There is no power in either the District or Supreme Court to enlarge the time for taking appeals; and any effort to attain the same end by an evasion of the provisions of the statute is equally unlawful. *Humphreys* v. *Chamberlin*, 11 *N. Y.*, 274. But that is not a question legitimately arising on the record: so I will pass to a brief notice of the ingenious arguments advanced by counsel in support of this appeal; and I may say of them, that while very ably advanced, resting largely on ingenuity, they lead to as many different conclusions as there are advocates urging them. If I fully comprehend counsel, one contends that judgments may be multiplied at pleasure; and that the last entered may be appealed from, especially when the Court assumes to declare there is no judgment, as is done here: while the other insists that there was no authority in the Court of March, 1869, to render judgment; that, if there was no authority to render judgment, there was none to give a decision; and that, therefore, the judgment sought to be based upon it in October, 1870, is equally worthless; and that the case must be returned to the Court below for judgment: while the Court at the October term, 1870, seems to have concluded that there was just enough authority in the Court of March, 1869, to render a decision, but not a judgment, in the case.

As to the first of these positions, it was unnecessary to argue at length, or cite authority in support of the general proposition, that a judgment of a court of competent authority must be recognized till set aside or reversed. But the counsel for the other side invoke this same principle, and claim that the judgment of March, 1869, has never been set aside, or disturbed in any way:

so we are not to settle the force of the judgments. But, as there can be but one final judgment in a cause, we have the entirely different question, Which is *the* judgment in the case? That seems to be not a very difficult question. When a judgment is once entered of record, it must stand as the judgment until it is vacated, modified, or disposed of by some means provided by law: entering additional judgment entries is not one of them. A case regularly brought into Court is presumed to be attended at regular terms of Court by the attorneys having it in charge; and all proceedings of the Court in reference to them, in the absence of fraud, will be binding on the parties, whether present or not. But, when judgment is entered, they may cease their attention. The further proceedings in the case, by petitions to vacate or modify judgment, or on error to this Court, must be on proper notice provided by statute. *Chaps.* 1 *&* 2, *Tit.* 16, *Code.* If to enter additional judgments in the same cause is a regular proceeding, I see no necessity for notice; and, when a party once obtains judgment, he must ever after stand guard over it, lest some enterprising attorney should, in after-years, enter another judgment, so as to bring the party into an appellate court. This position will not stand. We will go to the next, — that there was no authority in the Court of March, 1869, to render judgment in the case. This is declared on the strength of the note of the clerk, introducing into the record sent here the words, "Hon. O. P. Mason presiding," just before the entry of March, 1869. This is made the text upon which are based many interesting speculations, — as to the appearance of a court with two district judges; what business Justice Lake had out of his own district, rendering judgments in Otoe County, where Hon. O. P. Mason was presiding; and the like. Had the record

sent here been made up in the usual way, and in accordance with the directions of the statute, and after approved precedents, such discussions, which are not calculated to add to the dignity of courts and the credit which should attach to their proceedings, could not have arisen; nor should this Court entertain questions arising by insinuation, which it is evident could not have been supported if made directly, and brought properly into the record, with all the facts attending them. A proper record, in its caption, as introduction, should show a competent court to render the judgment sought to be reviewed or used; the constitution of the Court at the time of its rendition, as "Pleas before his Honor," &c., showing a term of the Court regularly held, convened at the proper place, and presided over by a judge having authority. This is followed by a minute of each step taken, as the filing of the respective pleadings, the journal entries made in the cause, and concluding with the judgment. There is no more propriety in interjecting into the note of the clerk, introducing the journal entries into the complete record, the remark that this or that judge presided, than there would be to show that he presided in Otoe County, rather than in Iowa, where he would have had no jurisdiction. *Vide sect.* 677, *Code*, also form for complete record. *Nash. Prac.* 724; *Rules of Sup. Ct. Iowa*, 1870, *sect.* 100. In this regard, this record, differing from those usually sent here, and being unlike those which come from the same county, I can but presume this addition was made in that case by direction, in order to form the basis upon which to raise some question as to the competency of the Court. If, in good faith, counsel thought that the entry was a nullity, why not, in the year and a half, have moved to expunge it? Then the Court could have passed upon it, and all the facts show-

ing jurisdiction been brought up in a bill of exceptions. The record, eliminating that which has no business here, shows a case regularly brought into a court of competent jurisdiction, presided over by a judge fully qualified to sit, a trial had before him as the Court and the judgment, and the judgment of the Court given; and it would be unbecoming us to tolerate any attack upon its jurisdiction, or the regularity of its proceedings, by any gratuitous comments of the clerk. *Omnia præsumuntur solenniter esse acta.* What authority there is for making the second judgment entry based on the record of the first, I cannot discover. The Court, prefacing its judgment with the remark that no record of judgment appears, does not destroy the fact, if one did appear. We will suppose the Court to have overlooked it, or have been misled by counsel. To call a judgment a finding makes it none the less a judgment. A summons is not an execution, nor an almanac a pleading, even if called so on authority of a court. So I am at a loss to know how the Court of March, with either Justice Mason or Justice Lake, or both, if you please, had enough authority to pronounce a decision, and still fail in its vitality to direct a judgment upon it. The record shows that here at this (March) term of Court, "on consideration of the premises, and the Court finding all the equities of the case with the defendants, it is considered," &c., — the finding and judgment of the Court coming at the same breath. Unlike the provisions of the New-York Code, where judgments are not necessarily entered in term time, and where, the trial being had to the Court without a jury, its decision is given in writing, and filed with the clerk within twenty days, here the decision is the act of the Court done in term. If Justice Lake was present at the March term to announce his decision, he was equally there for the pur-

pose of directing judgment of the Court upon it. If his actual presence at the term was waived, and by consent, as is frequently the case, his decision was entered as though present, there is equal authority for entering the judgment. If Hon. O. P. Mason presided exclusively at the March term, the records were completely under his control. The clerk makes entries of orders and judgments only under direction of the Court. 887 & 889 *sects.*, *Code*. These entries are to be read over from time to time in open Court, and, when correct, shall be signed by the judge. *Sect.* 17, *chap.* 13, *R. S.* Evident mistakes in the record can subsequently be corrected. *Sect.* 21, *Id.*

So there can be no suggestion that this record found its way improperly on the record. If Judge Lake was not present, Judge Mason permitted the judgment to be entered, followed by the addition, "By the Court, — George B. Lake, Judge;" showing by that, that, for that case, Judge Lake, and not Hon. O. P. Mason, presided. The statute allowing judges to interchange does not compel them to do so an entire term; but it may be for a week, a day, or for the few minutes necessary to announce a decision and direct a judgment. Hon. O. P. Mason may have presided generally at that term; but, whatever the fact may be as to Judge Lake's actual presence, the record shows well enough that the judgment entered at the March term was one entered by a competent court, George B. Lake being the judge thereof, leaving this attempt to confound the records to stand. We will not indulge any presumptions against the regularity of proceedings in courts of record. The appeal must be dismissed.

LAKE, J., concurred.

MASON, Ch. J., dissenting.

I dissent from the opinion of the Court. I do not think the reasoning of the majority of the Court sound, nor the result reached law. I shall state my reasons briefly.

Conceding, for the purpose of the argument, that the entry of Aug. 17, 1868, did not show upon its face that it was not a judgment of the Court, it is still clear, from this record, that it was effectually displaced by the entry of Oct. 10, 1870. The last entry shows that the first entry, purporting to be a judgment, was brought to the attention of the Court; that an inquiry into the circumstances under which the clerk recorded it was had; and that the result of that inquiry was, that the clerk recorded it by mistake, and that the counsel of both parties was fully heard in the matter. It would have been more regular for the defendants to file a motion to correct the mistake, and take an order to that effect upon the hearing of the motion. Instead of that, a motion *ore tenus* was made, to which the defendants appeared, without objection to the form of the proceeding; and the matter was heard as fully and fairly, and with all the means of arriving at the truth and doing justice, as if a more formal procedure had been had. I think the criticism of the majority upon the record very trifling. It puts the form before the substance, the mode of procedure before right and justice.

The case stands, then, in the attitude of one in which a party moves the Court to correct a mistake of the clerk in entering a judgment; upon the hearing of which motion, the Court finds that such mistake has been made, and proceeds to correct it. This the Court was authorized to do by sections 602 and 604 of the Code, which are as follows: "Sect. 602. — A District Court shall have power to vacate or modify its own judgments or orders after the term at which such judgment or order was

made. . . . Third, for mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order."

"Sect. 604. — The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion, upon reasonable notice to the adverse party or his attorney in the action."

Acting under this authority, the District Court heard this motion. And this record shows that an entry of judgment was made upon the journal by the clerk, without the intervention of the Court; and the District Court so found. And the record shows that this was a correct finding, as I shall explain hereafter. But whether it was or not is not now the question. The Court had the authority to inquire into the matter: it did so, and it found the fact. Its finding and its order thereon is final and conclusive until reversed. We are not here asked to review or reverse it, but to ignore it. To state the case is to determine it.

Much has been said about the mischief which would result from permitting a District Court to set aside a judgment, and enter another, thereby extending the time for appealing; and especially of setting aside a judgment in the absence of the parties, and without their knowledge. A great deal of this is very true; but it does not apply to this case. The record in this case shows that the parties had notice, did appear, were heard, the Court duly considered the case, found a certain state of facts, and adjudged accordingly. If objection be made to this course of proceeding, then let the legislature repeal the two sections above quoted. As long as they are the law, we ought to administer them.

A lengthy discourse on the mischief resulting from a

certain view of the law leads to no very satisfactory result. There are mischiefs in refusing to vacate a judgment entered by mistake, as well as those mentioned in the opinion of the Court. And this case furnishes a good illustration. A cause is heard by the Court: the judge, in the pressure of the business of the term, has not time to consider it so as to reach a conclusion satisfactory to his own mind: he takes the case under advisement; he writes out the result which he has reached; he sends it to some party, — perhaps to another judge holding a succeeding term, perhaps to the clerk, and possibly, as in this case, to the successful party; and then, without the action of the Court, this is recorded in the journal as a judgment, in the absence and without the knowledge of or consent of the unsuccessful party; and the time fixed by law within which an appeal is to be taken passes away. It is said that the parties attend the term at which their cause is determined. Three terms elapsed after this cause was submitted before the decision was made. Were the parties to be supposed to attend all these terms to see that nothing escaped them? or might they reasonably expect to have some notice of a judgment against them? And, if entered without notice, are they to lose their appeal from it? By this means the substantial right of every citizen to be heard in this Court is annihilated, not by any fault or neglect of his, but by a mistake of the clerk. What shall be said of the mischief of such a case?

I have said enough to show that the entry of October was effectual to avoid that of August, and might stop content with this; but I am willing to look farther, and determine from the whole record whether the earlier in date was a judgment final and conclusive, or only a finding of a judge upon which a judgment might, under proper circumstances, be entered. The Constitu-

tion vests the judicial authority of the State in certain courts and in justices of the peace. A judge of a District Court possesses no judicial authority to render a judgment. An attempt on his part to do so would be futile. He is clothed with authority only as a constituent part of the Court, established and authorized by law He is not the Court: he is but the presiding officer of the Court. A judgment, when entered, is not his judgment, but that of the Court. It may be entered on his decision; but his decision is not final: it does not conclude the parties any more than the verdict of a jury. A District Court duly organized must have a judge, a clerk, and a sheriff; and one is quite as essential as the other. One judge only can sit in the District Court at the same time. The Constitution provides that the judges of the Supreme Court shall be assigned to hold District Courts in their respective districts. Accordingly the legislature assigned Mr. Justice Crounse to the third district, Mr. Justice Lake to the second district, and myself to the first district. It required each to live in the district to which he was assigned. It provided that we might hold courts one in the district of another. Mr. Justice Lake must preside alone in the District Court of his district. When he exchanged with one of his brethren, still he must preside alone but one judge can sit in the District Court. The whole structure of our judicial system contemplates this arrangement. Were it useful or necessary, I might collect the several provisions of the statute, clearly indicating the same view on the part of the legislature. These are familiar principles: they are known to the whole profession, and are almost maxims in the law. I mention them here, not as new, but to recall them to mind; for, in the light of them, we are able to see very clearly what is the right of the case.

This record shows that Judge Lake was holding the District Court for Otoe County when he heard this case. The parties agreeing, he took the papers to his home to consider them; and the term was adjourned. Several terms intervened without a decision. In August, 1868, the Court was in session, Judge Mason presiding. Judge Lake was not present. He could not sit in the Court, for reasons I have already recounted, at the same time Judge Mason was presiding. A paper is then presented to the clerk in the form of a decree, signed by Judge Lake. As his decision, it had no force or value whatever. He was not present, and was not a judge in that Court then sitting, any more than one of the counsel. He had no authority, even, to render a decision; but the Court, as constituted at the time, might adopt his views, and render a decree accordingly. The paper was given to the clerk, who, mistaking its character, placed it upon the journal without the action of the Court. This gave it no force or effect as a judgment. The clerk cannot render a judgment: a record of judgment made by him, without the order of the Court, would be void. Judge Lake not being present, and not sitting in the Court, the clerk could not render a valid judgment: the attempt to do so would be a nullity. The judgment, to be valid, should have been the judgment of the Court then sitting. But such was not the fact; and the record shows it: it was the finding and the judgment of Judge Lake, an individual.

It is true, if the entry were not signed by Judge Lake, we should infer from it that the decree was the act of the Court: but even then it would be competent for the District Court to inquire what the fact was; and, if it discovered on its journal an entry of a decree which it did not render, it would only do what was its plain duty in setting it aside. And this is what was done in

October. As I have already said, inquiry was made into the fact, and the plaintiffs and defendants appeared and were heard; and it was found that the decree was not the act of the Court, and for that reason it was disregarded, and treated as a nullity. I am unable to see how any other course could have been pursued.

The majority in their opinion have criticised the action of the clerk in inserting in the transcript, before the entry of March, 1869, a statement that "Hon. O. P. Mason" was "presiding." At the same time, they say that the transcript should, in its introduction, show before what judge the proceedings were had. I am unable to see that it is very material whether the name of the judge appears at the beginning or in the middle of the transcript. It is more regular and formal to place it in the introduction; but it is not necessary. It is enough if it duly appear; and why find fault with the clerk, and impute to him and to parties and counsel some ill-flavored design in making it appear? If causes are to be adjudged in this Court on the mere formality of transcripts filed therein, few cases will ever be determined on their merits. Justice is not administered on any such frivolities. It was the duty of the clerk to make this transcript as he did, unless he followed the more usual form. And he only disclosed what the facts were; namely, that a paper signed by Judge Lake, in the form of a judgment, in some way found its way upon the journal of the Court while Judge Mason was presiding therein, and while, necessarily, Judge Lake was not present. And it is these facts being made to appear by the clerk that the majority object to. I think the judgment of October, 1870, the one rightly before us for review, and that the motion to dismiss the appeal should be overruled.

Appeal dismissed.

Geere v. Sweet.

A plaintiff cannot have costs of his action, if he bring it in the District Court, when it is within the jurisdiction of a justice of the peace, even though the District Court have concurrent jurisdiction.

MASON, Ch. J.

This was an action commenced in the District Court of Lancaster County, by the defendant in error against the plaintiff in error, as the indorser of a promissory note, to recover a less sum than a hundred dollars. At the November term of said Court, 1870, the plaintiff recovered a judgment against the defendant for the sum of eighty-four and fifty-eight one-hundredths dollars, their damages, and their costs taxed at twenty-two and fifty-five one-hundredths dollars; and it was ordered that execution be awarded therefor: to which ruling and judgment of the Court as to costs the defendant at the time excepted, and now brings the case to this Court on writ of error to reverse the judgment of the Court below as to costs. The plaintiff in error insists, that as the defendant in error, who was plaintiff in the Court below, recovered less than a hundred dollars, it appears that a justice of the peace had jurisdiction of the action; and the plaintiff below cannot recover costs. Costs are unknown to the common law. They are given only by statute, which may be changed at the will of the legislature. The recovery of costs

must depend upon the statute law in force at the time the judgment was rendered. Bacon's Abridgment, vol. ii. page 484. *John Farrier* v. *Esther Cairnes*, 5 *Ohio*, 47. What was the statute respecting costs when this judgment was rendered? Sect. 621 of the Code of Civil Procedure reads as follows: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other Court, the plaintiff shall not recover costs; and in all actions for libel, slander, malicious prosecution, assault and battery, false imprisonment, criminal conversation, seduction, actions for nuisance, or against justices of the peace for misconduct in office, if the damages assessed be under five dollars, the plaintiff shall not recover any costs." The last clause of the section relates to costs in particular actions; and it is not necessary to consider the same. It did appear that a justice of the peace had jurisdiction of the action at the filing of the petition, and again at the rendition of the judgment; and the fact that the District Court has concurrent jurisdiction with justices of the peace when the demand or cause of action exceeds fifty dollars, in no way affects the question of costs. The right to costs is a statutory right, and cannot be enlarged by judicial authority. If the intention of the legislature was to limit the application of the first clause of this section to cases when the recovery did not exceed fifty dollars, why was the word *exclusive* omitted before the word "jurisdiction"? It seems to me plain, that where it appears that at the commencement of the action a justice of the peace has jurisdiction of the action, whether concurrent or exclusive, and the plaintiff brings his action in any other Court, he cannot recover his costs. This was so held in *Brunaugh* v. *Wooley*, 6 *Ohio St.*, 597, under a similar statute. The judgment of the Court below for the

recovery of the plaintiff's costs against the defendant below is reversed with costs; and each party must pay his own costs in the Court below.

Judgment and order in accordance with this opinion.

S. Robinson, for plaintiff in error.

Lamb and *Billingsby*, for defendant in error.

Franklin v. Kelley.

COUNTY CLERKS: *Power to take acknowledgments.* County clerks are authorized to take the acknowledgment of deeds conveying real estate.

FEDERAL AND STATE COURTS: *Their relative authority.* The United-States Supreme Court and the Supreme Court of this State are peers. The decisions of the former upon the Federal constitution and laws are binding on the latter: the decisions of the latter upon the constitution and laws of Nebraska are binding on the former. The decisions of neither upon questions of general jurisprudence are binding upon the other.

THE FEDERAL CIRCUIT AND STATE SUPREME COURTS: *Their relative authority.* The construction placed by the United-States Circuit Court upon a Federal statute is not binding upon the State Supreme Court. Its decision will be respectfully considered, but will not preclude an examination of its soundness.

PRE-EMPTIONS: *Conveyance before patent.* A conveyance by a party who has entered land under the United-States Pre-emption Law of Sept. 4, 1841, before the patent therefor has been issued to him, is not void.

Argument 1. In the construction of a statute, a universal practice by the people of long continuance under the act may be resorted to.

2. The terms of the act — "assignment and transfer" and "right" — are inapt to describe a deed of conveyance of the fee-simple.

3. Before his entry, the pre-emptor has only a "right" to the privilege which the statute confers; but after his entry, having paid for it, he has not a right, but ownership of it; so that his widow is endowable of it, and it is liable to taxation.

4. The mischief aimed at in the statute was the conveyance by the pre-emptor intermediate his entry and patent, whereby, if his

entry were erroneous, a *bona-fide* purchaser would be protected, and the government effectually injured. The clause means, that if, before the patent issues, the land department finds the entry erroneous, it may treat the assignment as void, and, notwithstanding it, set the entry aside.

5. The words "null and void," as in many statutes, so here, are used in the sense of "voidable."

6. Other congressional legislation supports the construction which we have placed on the act.

7. This construction of the statute is correct, because otherwise another clause would prohibit the same thing.

8. Congress could not impose such a restriction; for the United States holds the proprietorship of the public lands in States only as private persons do; and, the State having by statute provided that a grantor of land will be estopped to deny the title which his deed purports to convey, the United States cannot make a different rule. Per Mason, Ch. J.

EJECTMENT. FRAUD may be shown in an action of ejectment to avoid a deed.

——. Weakness of understanding alone is not sufficient to avoid a deed; but it is a material circumstance in establishing an inference of unfair practices and imposition.

——. *Only the party* defrauded can complain.

——. *Pleading.* The fraud need not be specially pleaded in order to admit proof of it.

Warren B. Franklin brought his action in the District Court for Washington County, under the provisions of the first chapter of title 13 of the Code of Civil Procedure, to recover from Timothy Kelley and Michael Kelley the possession of the west half of the north-west quarter and the south-east quarter of the north-west

quarter of section twenty, and the west half of the south-west quarter of section twenty-nine, in township seventeen, north of range thirteen, east of the sixth principal meridian.

By sect. 626 of that chapter it is provided, that, "in an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal estate therein, and is entitled to the possession thereof, describing the same as required by sect. 133; and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived." And by sect. 627 it is provided, that "it shall be sufficient in such action if the defendant deny generally in his answer the title alleged in the petition, or that he withholds possession, as the case may be."

The pleadings were framed according to these provisions.

The action was tried before Crounse, J., and a jury; and the plaintiff introduced in evidence a deed to himself from Margaret Kelley, conveying the premises; which deed was, as his certificate thereto attached showed, acknowledged before "A. Castetter, county clerk of Washington County;" the defendants objecting, because, as he insisted, said county clerk was not competent to take acknowledgment of deeds. The plaintiff also introduced in evidence a deed from the defendant, Timothy, to the said Margaret, conveying to her the premises in question; also a deed to said Timothy, from Michael Williams, of the west half of the south-west quarter of section twenty-nine; also the record of a certificate of the Register of the United-States Land Office, showing the entry by said Williams under the provisions of the Act of Congress of Sept. 4, 1841, granting pre-emption rights of the premises so by him

conveyed to said Kelley; also a like certificate of entry by said Kelley of the remaining portion of the disputed lands. Thereupon the plaintiff rested.

The defendants then called A. Castetter, who testified as follows: "I know of the making of a deed from Margaret Kelley to Warren B. Franklin. I was living at De Soto at the time. I was county clerk of Washington County. I took the acknowledgment of this deed at my house. The plaintiff and his wife, and Margaret Kelley and my wife, were present. I think I had seen Mrs. Franklin once or twice before. I had never seen Margaret Kelley. The plaintiff and his wife brought Margaret there in a wagon. Franklin was living in a small house beside the road, below Calhoun, at the time. It was a blustering day: it was sharp, but not extremely cold. They all came in together. Franklin opened to me the business there." The witness was then interrogated as follows: "State all the circumstances attending the signing, acknowledging, and delivery of the deed from Margaret Kelley to Warren B. Franklin, dated Jan. 6, 1866." And thereupon the counsel for said defendants stated to the Court, that the object of the question, and the evidence to be thereby elicited, was to show that the said deed was obtained by undue influence, duress, and fraud; and that at the time said Margaret Kelley had very feeble mental capacity, and that the said plaintiff, in obtaining said deed, fraudulently took advantage thereof; and also offered in evidence a deed from said Margaret to said Timothy, reconveying said premises to him, dated Jan. 13, 1866. The plaintiff objecting, the Court refused to permit the witness to answer the question, or to admit the last-mentioned deed in evidence; and the defendants excepted.

The defendants also offered to show that the patents from the United States were not issued until after the

making of the said deeds: but, the plaintiff objecting, the Court refused to hear the proof; and the defendant excepted. The jury found for the plaintiff. The defendants moved for a new trial, which was refused, and judgment was entered on the verdict. The defendants brought the case to this Court by petition in error.

A. J. Poppleton and *J. M. Woolworth*, for plaintiff in error.

I. The deed from Margaret Kelley to the plaintiff Franklin was not acknowledged before an officer authorized to take acknowledgment of deeds. The county clerk is not clerk of such a Court as is referred to in the Recording Act.

II. The evidence which the defendant offered of undue influence exerted by the plaintiff in obtaining the deed from Margaret Kelley, amounting to fraud, would have overthrown the deed, and should have been admitted. Evidence of a like character has been admitted in the following cases: *Lessee of Torrey* v. *Beardsley*, 4 *Wash. C. C.*, 242; *Den* v. *Moore*, 2 *Southard*, 470; *Marcy* v. *Kinney*, 9 *Conn.*, 394; *Giddings* v. *Canfield*, 4 *Id.*, 482; *Jackson* v. *Myers*, 11 *Wend.*, 533; *Lessee of McCall* v. *Carpenter*, 18 *How.*, 297; *Bruce* v. *Lee*, 4 *Johns.*, 410; *Parker* v. *Barker*, 2 *Met.*, 423; *Fay* v. *Winchester*, 4 *Id.*, 513; *Stow* v. *Russell*, 36 *Ill.*, 18; *Small* v. *Jones*, 6 *Watts & S.*, 122; *McCaskey* v. *Graff*, 23 *Penn. St.* (11 *Harris*), 321.

III. The deed from Timothy to Margaret Kelley was void, because made by a pre-emptor, under the Act of 1841, before the issuing of the patent. *Kellom* v. *Easley*, *Dillon's C. C.*, 281.

E. Wakeley, for defendant in error.

FRANKLIN v. KELLEY.

MASON, Ch. J.

On the trial in the Court below, the defendants objected to the deed offered by the plaintiff, made by Margaret Kelley to the plaintiff, on the ground that it was not acknowledged before an officer competent to take acknowledgments of deeds. The instrument had attached thereto a certificate of acknowledgment, made by "A. Castetter, county clerk of Washington County;" and the question is, whether that officer is competent to take acknowledgments. That power is conferred upon him by sect. 43, on page 44 of the Revised Statutes. The Court was right in overruling the objection.

The defendants, in order to avoid the several deeds by which the plaintiff had made out his title, offered to show that the patents for the land were not issued until after the deeds were made. The theory upon which this position rests is, that as the lands were originally secured from the government by pre-emption, under the Act of 1841 (which fact the plaintiff showed in the course of his direct proofs), the deeds of the pre-emptors, made before the issue of the patent, were, by virtue of a provision of said act, void. The counsel for the defendants have been content to cite, in support of this position, the recent decision of Judge Dillon in the United-States Circuit Court for the District of Nebraska, in the case of *Easley et al.* v. *Kellom et al.*, *Dillon's Circuit-Court Reports*, 281; and they insist that we in this Court are bound to accept that decision as an authoritative exposition of the law.

In these days of Federal absorption and State subserviency, this idea is likely to receive a too ready assent. But a moment's reflection will expose its error. The United-States Circuit Courts are, with the exception of a limited appellate jurisdiction, vested with original ju-

risdiction; and appeals lie from their judgments to the Supreme Court. Consequently their decisions, even upon the construction of Federal statutes, are not final or conclusive. Different statutory constructions have in many cases been given by different circuit judges to the same statute. In the case cited, an illustration is furnished. The cause was first heard and determined by Judge Love, and a decree rendered by him for the plaintiffs. It was afterwards heard upon a bill of review by Judge Dillon, who reversed Judge Love's decree, and dismissed the plaintiffs' bill. The judgments of courts which vacillate in this way are not entitled to very much consideration from other tribunals. And, further than this, it is to be observed, that the Circuit Courts are, in respect of causes between citizens, co-ordinate with our District Courts, and not with this Court. The peer of this Court is the Supreme Court of the United States. Its decisions upon questions arising out of the Federal constitution and Federal statutes are binding on us; but so, on the other hand, our decisions upon questions arising out of our State constitution and our State statutes are binding upon it. At the same time, upon that wide domain which is presented by general jurisprudence the Federal Supreme Court and the State Supreme Court hold an equal and divided jurisdiction. Our opinions are not binding upon it, nor its opinions upon us. Subordinate to it is the Circuit Court of the United States; subordinate to us is the District Court of this State. It is manifestly absurd to claim for its subordinate tribunals any binding authority on us.

At the same time, we shall always yield to the judges who sit in the United-States Circuit Court the respect to which, by their learning and their talents, they have proved themselves entitled. Especially shall we give to their opinions upon Federal statutes the utmost attention:

we shall accept them whenever we do not feel constrained to reject them. But, reserving to ourselves the full right to consider the grounds upon which they are based, and governing ourselves by the duty which devolves upon us of exercising our own judgments, we shall decline to follow them when they appear to us manifestly unsound; and, as we cannot accept the construction of this Federal statute which the Circuit Court in the case cited adopted, we deem it right to set forth our reasons with considerable fulness and detail. Our duty in every point of view renders this course imperative.

We are met at the outset by the consideration, that the construction of this statute contended for by the defendants, and given by the Federal Court, is novel. The statute was passed in 1841, — thirty years ago. The pioneers in all the States settled during that long period have acquired titles to their lands under it; and a very large proportion of all the lands in the new States to-day is held by pre-emption entries. The practice during all this period has been for the pre-emptor to sell and convey the land after making his entry, and before receiving his patent. Always and everywhere, his deed intermediate his entry and his patent has been held and treated and deemed to be as valid and perfect as that of a person who has received his patent; and almost all the land that, since the enactment of the law, has been entered under it, is held by deeds made before the issue of the patent. The mischief which will be done by upsetting a universally-received opinion upon such a subject is too obvious to need to be pointed out.

But we do not place our opinion upon the ground of such mischief. There is no evil greater than judicial legislation; and no other apprehended evil will justify it. We wish here distinctly to direct attention, not to the mischief likely to follow the construction for which

the defendant contends, but to the fact that that construction is novel, and conflicts with a universal practice which has prevailed among the people ever since the law was passed. We are authorized to resort to this common practice to ascertain the meaning of this provision.

Chief Justice Vaughn, in *Sheppard* v. *Gosnold*, *Vaughn's Reports*, 165, cited in 1 Kent's Commentaries, says, that, when the penning of a statute is dubious, long usage is a just medium to expound it by; for *jus ad norma loquendi* are governed by usage. The meaning of things spoken or written must be, as it hath been constantly received to be, taken from common acceptation." This principle has been applied in several cases. In *Stuart* v. *Laird*, 1 *Cranch*, 299, a trial was had in the Circuit Court of the United States, at which Chief Justice Marshall of the Supreme Court presided. Objection was made, that the judges of the Supreme Court were not judges of the Circuit Courts, without a special appointment thereto, and a distinct commission as such. The Court says on the objection, "To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has, indeed, fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong to be shaken or controlled. Of course the question is at rest, and ought not to be disturbed."

In *McKean* v. *Delancy's Lessees*, 5 *Cranch*, 22, the question arose under an act of Pennsylvania, passed in 1715, which required deeds to be acknowledged before a justice of the peace of the county where the land lay; and it had been the long-established practice, before 1775, to acknowledge deeds before a judge of the Su-

preme Court. The Court says, that a judge of the Supreme Court could not be considered as a justice of the peace of the county; and, were the act to be for the first time construed, the decision would be, that the deed was not properly acknowledged: yet, as the practice had long prevailed, it was held that it must be a correct exposition of the statutes; that long and uninterrupted practice under a statute was good evidence of such construction. See also *Martin* v. *Hunter*, 1 *Wheaton*, 304; *Cohens* v. *Virginia*, 6 *Wheaton*, 264; *Myrick* v. *Hasey*, 27 *Maine*, 9; *Whitcomb* v. *Reed*, 20 *Vermont*, 49.

Upon the principle of construing statutes by a long-continued and generally-received practice, we are justified in holding, that the deeds in question, made by pre-emptors before they had received their patents, were valid; but we do not place our decision solely on this ground. An examination of the statute and its terms will show that this construction is commended to us, not only by its general reception extending through so many years, but also by its own soundness. The clause which is supposed to support the opposite construction is as follows: —

"All assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." 5 *United-States Statutes at Large*, page 456, sect. 12.

There is a manifest inaptness in this language to describe a conveyance with covenants for title and with warranty, purporting to pass the fee-simple of lands and tenements. I know no other place, in law-books or law-writings, where such a conveyance is spoken of as an assignment or a transfer. Those words may have the large meaning here sought to be placed upon them; but it is very unusual. These terms are used more usually — indeed always, so far as I remember — when applied

technically to describe a transfer of an estate for years, or an equitable interest, or a chattel; and this seems to be the use of it here when taken in connection with the word "right," — a word never employed when speaking of a fee in lands, or even an estate less than a fee in lands. It is evident that these pre-emptors did not profess to convey by their deeds a mere "right:" the instruments purport on their face to pass the absolute ownership of the lands, — the fee-simple. And the rule of statutory construction is, that, when technical words occur in a statute, they are to be taken in a technical sense. 1 *Kent's Com.*, 462; *Clarke* v. *The City of Utica*, 18 *Barb.*, 451; *Merchants' Bank* v. *Cook*, 4 *Pick.*, 405; *Regina* v. *Commissioners of Poor Laws Holborn Union*, 6 *Adol. & Ellis*, 68, 69; *Vattel*, book ii., chap. xvii., page 285.

This conducts us to a consideration of the interest which the pre-emptor has in the lands after he has entered them, and before the patent therefor has issued to him. Has he, during that period, a mere right thereto? or is he the absolute owner thereof by virtue of an indefeasible title? It is evident, that, if he have but a "right" thereto, the language of the provision is apt; but if he has an indefeasible estate, then it is not apt, and hence a strong argument may be drawn against the effect claimed by the defendant.

The tenth section of the act provides, that a person having certain qualifications, who has settled upon and improved a quarter-section of land, may enter the same with the register, paying the minimum price therefor fixed by Congress. Sect. 14 provides in substance that this privilege shall continue until the public sales, and no longer. The benefit which the act confers is simply this: it authorizes an actual settler to enter at a certain price the land on which he resides until the government

offers the tract for sale to the public. This privilege is secured to the claimant by settlement and improvement. When he does what is required by law to secure to himself the privilege of entering the tract, he becomes entitled to make the entry in preference to any other party. His right consists in just that: his right is to purchase before others at a stipulated sum. His relation to the government is precisely the same as that of a vendee to a vendor in a contract. His agreement is to improve the land, and reside on it, and pay for it within a certain time: that of the government is to convey the land to him when he has performed his undertakings. Until he does make payment for the land, he has a "right" merely to execute on his part, and to have the government execute on its part, this mutual agreement. All he has is a mere "right." But when he does make payment for the land, and receives a patent certificate evidencing the fact, he has more than a right: he has the land itself. He exercises his pre-emption right when he makes the purchase.

The phrase "pre-emption right" of itself pretty clearly expresses this idea, and nothing more; and, wherever it is used in the statute, that seems to be its signification. In that sense it is used in all the cases. It is unnecessary to refer to the several passages in the opinions to point this out minutely. See *Wilcox* v. *McConnel*, 13 *Peters*, 498; *Barnard* v. *Ashley*, 18 *Howard*, 43; *Lytle* v. *Arkansas*, 9 *Howard*, 314; *Clements* v. *Warner*, 24 *Howard*, 394; *Opinions Attorneys-General*, 493, 494; *id.*, 23.

After the entry is made, the pre-emptor becomes seized of the lands. Before the entry, the widow has no dower (*Davenport* v. *Farrar*, 1 *Scammon*, 314): after it, there is an estate of which she is endowed.

Before the entry, the lands are not subject to taxation:

thereafter they are subject to taxation. *Carroll* v. *Safford*, 3 *Howard*, 441. In this case language pertinent to our present inquiry is used. Mr. Justice McLean, delivering the opinion of the Court, says, at page 460, —

"When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate-holder and the patentee.

"It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so technically at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators. In every legal and equitable aspect, it is considered as belonging to the realty. Now, why cannot such property be taxed by its proper denomination as real estate? — in the words of the statute, 'as lands owned by non-residents'? And, if the name of the owner could not be ascertained, the tract was required to be described by its boundaries or any particular name. We can entertain no doubt that the construction given to this act by the authorities of Michigan, in regard to the taxation of land sold by the United States, whether patented or not, carried out the intention of the law-making power.

"But it is insisted that the lands in question were not, before the date and execution of the patents for them, subject to taxation at all by the State of Michigan.

"It is supposed that taxation of such lands is an

interference with the primary disposition of the soil by Congress, in violation of the Ordinance of 1787; and that it is a tax on the lands of the United States, which is inhibited by the ordinance. Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. Suppose the officers of the government had sold a tract of land, received the purchase-money, and issued a patent certificate: can it be contended that they could sell it again, and convey a good title? They could no more do this than they could sell land a second time which had been previously patented. When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and any second purchaser would take the land charged with the trust."

And, until the entry is actually made, no interest is vested in the pre-emptor. It is competent for Congress to deprive a party, who has settled upon the land, of the benefit granted by the act. This precise question was presented in *Frisbie* v. *Whitney*, 9 *Wallace*, 187. Mr. Justice Miller, delivering the opinion of the Court in that case, discusses it as a case in which a party went upon lands subject to pre-emption, and had done what the act required, but from whom thereafter Congress withdrew the benefit. The learned judge says, "What had he (the pre-emption claimant) done? He had gone upon the land, built a house and barn, and perhaps enclosed some of the ground. He also applied to the register of the land office, and offered to make a declaration that he had done these things with

the intention of making a permanent settlement, and claiming the land under the right of pre-emption. This is all. He had paid no money, nor had he then tendered any. The land officers refused to receive his declaration, and denied his right to pre-empt the land. He never has paid any money, has never received any certificate of pre-emption, and the register and receiver have never in any manner acknowledged or admitted his right to make pre-emption of that land. So far as any thing done by him is to be considered, his claim rests solely upon his going upon the land, and building and residing on it. There is nothing in the essential nature of these acts to confer a vested right, or indeed any kind of claim to land; and it is necessary to resort to the pre-emption law to make out any shadow of such right.

"The act of Congress on this subject, to which all the subsequent acts refer, and which prescribes the terms and the manner of securing title in such cases, is the Act of Sept. 4, 1841. That was an act full of generosity; for it gave the proceeds of the sales of all the public lands to the States. The tenth section of the act provides, that any of the class therein described who shall make a settlement upon public lands of a defined character, and who shall inhabit and improve the same, and who shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office, by legal subdivisions, one quarter-section of said land, to include the residence of the claimant, upon paying the minimum price of such land. Sect. 11 provides that conflicting claims for pre-emption shall be settled by the register and receiver; sect. 12, that, prior to such entry, proof of the settlement and improvement required shall be made to the satisfaction of the register and receiver; and sect.

13 requires an oath to be made by the claimant before entry. Sect. 15 requires a person settling on land with a view to pre-emption to file, within a limited time, a statement of this intention, and a description of the land.

"When all these prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time to enable the land officer to ascertain if there are superior claims, and if, in other respects, the claimant has made out his case, he is entitled to receive a patent, which, for the first time, invests him with the legal title to the land.

"The construction of this act, and others passed since, *in pari materiâ*, in regard to the nature of the rights conferred on occupants of the public lands, has, of course, received the consideration of that department of the government to which the administration of these land laws has been confided. The construction of that department, and of the Attorneys-General to whom the Secretaries of the Interior have applied for advice, cannot be better expressed than in the language of some of those opinions.

"Attorney-General Cushing, in an opinion given in 1856, says, 'Persons who go upon the public land with a view to cultivate now, and to purchase hereafter, possess no right against the United States, except such as the acts of Congress confer; and these acts do not confer on the pre-emptor *in posse* any right or claim to be treated as the present proprietor of the land in relation to the government.'

"In the matter of the Hot-Springs tract of Arkansas, Attorney-General Bates says, 'A mere entry upon land, with continued occupancy and improvement thereof, gives no vested interest in it. It may, how-

ever, give, under our national land system, a privilege of pre-emption; but this is only a privilege conferred on the settler to purchase land in preference to others. His settlement protects him from intrusion or purchase by others, but confers no right against the government.'

"In the matter of this same Soscol Ranch, Attorney-General Speed asserts the same principle: he says, 'It is not to be doubted that settlement on the public lands of the United States, no matter how long continued, confers no right against the government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the requisite purchase-money.'"

These opinions, written for the guidance of the land department, have been received and acquiesced in by the Secretaries of the Interior, and have come to be the recognized rule of action in that department.

This construction of the law has also been asserted by the courts of last resort in Missouri, Mississippi, Illinois, and California, — States in which the population is largely interested in the liberal operation of the pre-emption laws.

We are satisfied that this is a sound construction of the pre-emption laws on the question now under consideration.

And it is only upon this view — that, prior to the entry by the pre-emptor of lands claimed by him, no interest is vested in him, but that thereafter he holds a title indefeasible, either by the government or any third party — that a great multitude of cases can be supported.

There is the large class of cases in which it has been held, that, after the pre-emptor has made his entry, the

government cannot grant the land to another; and, if its officers attempt to do so, the act is void. *Stoddard* v. *Chambers*, 2 *Howard*, 284; *Bissell* v. *Penrose*, 8 *id.*, 317; *Cunningham* v. *Ashley*, 14 *id.*, 377.

Then, again, there is the very large and severely-contested class of cases, in which the courts, refusing to be concluded by the action of the land department in issuing a patent to one of two contesting pre-emptors, has inquired who had the prior right, and awarded the lands to him, and directed the patentee to convey accordingly. The cases of *Smiley* v. *Sampson*, and *Towsley* v. *Johnson*, 1 *Nebraska*, 56, recently affirmed in the United-States Supreme Court, are instances.

Both of these classes of cases proceed solely upon the idea, that an interest in the land, not subsisting in mere right, but absolute and indefeasible in its nature, and needing nothing to perfect, establish, or confirm it, is possessed by the pre-emptor after his entry.

So far the question is simple, and easy of solution. But the clause under consideration contains other words which demand our notice. It provides that the right secured by the act shall not be assigned "before the patent issues." It is these words which present the difficulty: for it is said that it is a matter of indifference by what form of instrument the interest secured by the act is transferred; that the prohibition is general and absolute until the patent actually issues.

The position is plausible; but its unsoundness becomes apparent as soon as the whole case is fairly considered.

It is a familiar canon of statutory construction, that every word, phrase, and clause shall have its full and legitimate force in determining the meaning of the lawgiver. In fact, it is by virtue of this rule that our attention to the limiting words here — "before the issuing of the patent" — is challenged. Now, we have seen what

is meant by the words "right hereby secured." To that meaning we must adhere; and the question then is. What is meant by the provision, that the right to enter at the minimum price, in preference to all others, a certain tract, shall not be assigned before the patent is issued? We are bound to adopt such a construction as avoids the apparent contradiction, if a reasonable one can be discovered. We think that one is at hand.

The Act of 1841 provides that the entry shall be made with the register of the land office. The acts organizing the land department of the government provide that the action of the register shall be subject to revision and supervision by the commissioner of the general land office; and entry with the register is dependent upon the approval of his superior, so far as the course and order of the business goes; and, without the affirmative action of the commissioner, the patent issues. It would be a great evil if a party, claiming a pre-emption right, could, as soon as his entry was made, convey the land to a third party, and thereby prevent the commissioner from re-examining and disapproving the entry if it was erroneously allowed. Such a course would expose the government to serious loss, and pervert a statute conceived in a wise policy and a generous spirit into a means of perpetrating the greatest frauds. This is the mischief aimed at. The object was to protect the government; and in this view the language — that the right secured by the act should not be assigned — is apt. As between the claimant and the government, his interest is a right merely until the patent issues. It is subject to re-investigation, and, on inquiry, to be disregarded by the department. Until the patent issues, it is treated by the government, not as a title, but as a right, or a claim of right.

I admit, that if an entry under the act is made with

the register, and the commissioner finds that it was illegally allowed, — as, for instance, if the entry is upon lands not subject to pre-emption, — and he sets it aside, a conveyance intermediate the entry and the official act of vacating it would be void. Such a conveyance would be within the mischief. But if a valid entry be made, and a patent issued upon it, a conveyance intermediate those two acts would not be within the mischief. The issue of the patent is a confirmation of the entry: it relates back to it, and takes effect from it. *Astrom* v. *Hammond*, 3 *McLean*, 107.

In such a case, the government is not defrauded in supporting the conveyance.

Nor is it any objection to this construction that the assignment is declared to be null and void. Viner, title Void and Voidable, A., pl. 18, says that a thing may be void in several degrees: 1. Void, so as if never done, to all purposes, so as all persons may take advantage thereof. 2. Void to some purposes only. 3. So void by operation of law, that he that will have the benefit of it may make it good: of which last class manifestly is this case; for, beyond all doubt, these pre-emptors could confirm the deeds here in question. Those words are in many statutes used in the sense of voidable.

In *Prigg* v. *Adams*, 2 *Salkeld*, 674, the defendant justified as an officer under a *ca. sa.*, on a judgment in the Common Pleas, upon a verdict of five shillings for a cause of action arising in Bristol. The plaintiff replied the private act of Parliament for erecting the Court of Conscience in Bristol, wherein was a clause, that if any person bring such action in any of the courts at Westminster, and it appeared upon trial to be under forty shillings, no judgment should be entered for the plaintiff; and, if it be entered, that it should be *void*. Upon demurrer, the question was, whether it was so

far void that the party could take advantage of it in a collateral action; and the Court held that it was not, but that it was only voidable by plea or error.

In *Anderson* v. *Roberts*, 18 *Johnson*, 515, where the question was, whether a deed to defraud creditors was void or voidable, Judge Spencer, delivering the opinion of the Court, says, "In my judgment, the error of those who assert that a fraudulent grantee under the 13th Elizabeth takes no estate, because the deed is declared to be *utterly void*, consists in not correctly discriminating between a deed which is an absolute nullity and one which is voidable only. No deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided at the election of others. In 2 Lilly's Abr. 807, and Bac. Abr., title Void and Voidable, we have the true distinction. A thing is void which is done against law at the very time of doing it, and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself after it is done. *Bacon* classes under the head of acts which are absolutely void to all purposes the bond of a *feme covert*, an *infant*, and a person *non compos mentis*, after an office found, and bonds given for the performance of illegal acts. He considers a fraudulent gift void as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and therefore, in a legal sense, is not utterly void, but merely voidable."

I concede that this case does not dispose of the question before us, except as we assume as proved what has been laid down above, — that the mischief aimed at was the defrauding of the government by an effectual con-

veyance to a third party of lands entered with the register, but found to be erroneously entered by the commissioner; and that the instrument is void as to the government only. But the last citation shows very clearly the consequence of deeming the provision applicable only to the government. I think that it is clear that the provision should be thus limited.

Hone v. *Woolsey*, 2 *Edwards's Ch. R.*, 287, was a bill by judgment creditors to avoid an assignment for the benefit of creditors. An instrument of that character had been made; but the Court, having in another case decided that a provision therein made it void, the trustees reconveyed the property, and the debtors executed the instrument in question, again assigning upon like trusts the same property to the same trustees. The Vice-Chancellor says, —

"Again, a void deed is incapable of confirmation or of being made good by any subsequent act of the party; while one which is merely voidable may be made good by matter *ex post facto*. It may be confirmed, and will then be effectual for all purposes, unless the rights of third persons intervene and prevent it. Nothing, I consider, is more clearly settled than that an assignment constructively fraudulent under the statute, or at common law in regard to creditors, is voidable only, and not absolutely void. I had occasion to examine this doctrine in the recent case of *Henriques* v. *Hone*, *ante*, page 120; and the principles there stated, adduced from former decisions, I must adhere to until I shall be better instructed by the final decision to be had on the appeal in that cause.

"In the case I am now considering, the first assignment, of the third day of July, one thousand eight hundred and thirty-two, was not a nullity. It was voidable only as between the assignors and assignees: the title

passed, and a trust was created for creditors upon the trusts and conditions contained in it. None of the creditors came forward to accept the property upon those terms; and it appears to me, that before the rights of any of the creditors had actually attached as *cestuis que trust* under the assignment, and before any of them were in a situation to acquire liens by virtue of judgments and executions returned and the filing of bills, the parties were at liberty to do any further acts by which the assigned property might be held by the assignees upon similar trusts, but divested of the objectionable features of the first instrument. If the assignment were capable of confirmation, then no matter in what form it may have been done, — whether by a conveyance back to the assignors and a re-assignment by them, or by an instrument reiterating the trusts, and dispensing with the conditions upon which they were to take effect. This Court will look to the object and intent of the parties, and give effect to their acts so as to carry such into effect wherever it is fair and honest."

Young v. *Billiter*, 9 *House of Lords Cases*, 682, was an action of trover for goods brought by Billiter as assignee of Flint. The defendant, among other pleas, pleaded, that, before Flint became insolvent, the defendant recovered judgment against him, and took his goods in execution; and that such taking, and the sale thereof, were the conversion complained of. The replication alleged, that Flint, being in insolvent circumstances, did, with intent of petitioning the Court for the relief of insolvent debtors, voluntarily and fraudulently, and contrary to the statute, charge his estate in favor of Young, then being a creditor, by means of a warrant of attorney fraudulent and void within the statute, whereby Young obtained the judgment and execution by him pleaded.

The provision of the statute was as follows: —

"If any prisoner shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over, any estate, real or personal, security for money, bond, bill, note, property, goods, or effects whatsoever, to any creditor, or to any person in trust for, or to or for the use, &c., of any creditor, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed, and is hereby declared to be, fraudulent and void as against the provisional or other assignee or assignees of such prisoner appointed under this act; *provided* that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be so deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention, by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the said Court for his discharge from custody under this act."

The lords took the opinion of the judges upon the question; and Mr. Justice Blackburn states his views thus: "I think that the better construction of the statute is, that the transaction is valid till the assignees indicate an intention to treat it as void; and that, consequently, the act of seizing or selling the goods under the authority of the transfer whilst yet valid cannot be treated as being a wrongful conversion." And this is the view taken by the lords, who severally delivered their judgments.

Bryan v. *Childs*, 5 *Exch.*, 368, brought up for construction the words "null and void to all intents and purposes whatever," contained in 12 and 13 Victoria, chap. cvi., sect. 137, as follows: —

"Every judge's order made by consent by a trader

defendant in a personal action, and whereby the plaintiff is authorized forthwith, after the making of the order or at any future time, to sign or enter up judgment, or to issue or take out execution, and whether the order is made subject to a defeasance or condition or not, — in case the action in which the order is made is in the Court of Queen's Bench, or in any other court, a true copy of the order shall, together with an affidavit of the time of consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the dockets and judgments in the Queen's Bench within twenty-one days after the making of the order, in like manner as warrants of attorney, and cognovits or copies thereof, and affidavits of the execution thereof, may be filed; otherwise the judge's order and judgment signed or entered up thereon, and execution issued and taken out on the judgment, shall be null and void to all intents and purposes whatever." And it was held that these words were, by force of the general intent of the statute, applicable only to the trader afterwards becoming bankrupt, and not to his assignee.

Nash v. *Birch*, 1 *M. & W.*, 402, was an action upon an agreement of demise, containing a proviso, that, if the tenant did not within a time limited erect a shop-front, the lease should be null and void; and it was held to be voidable at the option of the lessor. The same was held of like terms, in a lease stipulating for non-payment of rent, in *Rede* v. *Farr*, 9 *M. & S.*, 121. See also *Hughes* v. *Palmer*, 19 *C. B.* (*N. S.*), 393.

It is clear from these cases, which might be greatly multiplied, that the use of the words "null and void" does not preclude the construction which we have put upon the provision.

I think Congress has placed a construction on this

clause which the courts are bound to observe. The Act of May 30, 1830, chap. ccviii., contains a provision precisely like that here under consideration. On the 23d of January, 1830, Congress passed a law providing that all persons who had purchased under the first-mentioned act might "assign and transfer their certificates of purchase or final receipts, and patents might issue in the name of such assignee."

I think this clause indicates pretty clearly that Congress understood the inhibition as relating to transfers by which the government would be bound, so as to compel it to issue patents to the assignee; and also that the assignment prohibited was not a conveyance of the land, but a transfer of the right as heretofore defined.

The rule is well settled, that, when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed. *Henry* v. *Tilson*, 17 *C. & M.*, 479, and *Rex* v. *Loxdale*, 1 *Burr.*, 44; *Theriat* v. *Hart*, 2 *Hill*, 380; *Goodell* v. *Jackson*, 20 *Johnson*, 772; *Young* v. *Dake*, 1 *Seld.*, 463.

We have thus far considered the case with reference to the single clause above mentioned; but there is another provision of the statute which demands our attention. I refer to the latter part of the thirteenth section, which is as follows: "And, if any person taking such oath shall swear falsely in the premises, he or she shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he or she may have paid for said land, and all right and title to the same; and any grant or conveyance which he or she may have made, except in the hands of *bona-fide* purchasers for a valuable consideration, shall be null and void. And it shall be the duty of the officer administering such oath to file a certificate thereof in the public land office of such district, and to transmit a duplicate copy to the

general land office, either of which shall be good and sufficient evidence that such oath was administered according to law."

It will be observed that the terms here used are apt to describe such an instrument as is here presented. If the clause in sect. 12 has the construction contended for, it presents the very case covered by the clause in the thirteenth section. This will be easily illustrated. The construction contended for would make the first clause read thus: "A conveyance of the land by a pre-emptor, after he has purchased and paid for it, and before he has received his patent, shall be void." The second reads thus: "If a party, when he makes his entry, swears falsely in taking the oath prescribed, a deed made by him shall be void." The deed avoided in the latter case may be made at any time after the entry, and is avoided except as to a *bona-fide* purchaser whose rights are saved. The construction sought to be placed on the former clause avoids a deed made during the same period, and does not even save the rights of purchasers. It is much more reasonable to hold, that the prohibition, if to be held to extend to third parties, relates to assignments of the right to pre-empt, which obviously should extend to all persons, and make each clause apply to a separate and distinct subject. This is required by the familiar rule, that such a construction is to be placed upon an act as will give effect to each and every part, clause, and phrase thereof. *Commonwealth* v. *Duane*, 1 *Binney*, 601; *Commonwealth* v. *Alger*, 7 *Cushing*, 53; *Attorney-General* v. *Detroit, &c., Co.*, 2 *Michigan*, 138.

The views here expressed are supported in many cases adjudged in the State courts. I shall content myself here with mentioning two in which very satisfactory opinions were delivered. The first is *Dilling-*

ham v. *Fisher*, 5 *Wisconsin*, 475. This was ejectment. It appeared by stipulation that Crane pre-empted the premises under the Act of 1838, which contained the same provision as the Act of 1841, making his entry, and paying for the land, and receiving his certificate on the sixteenth day of November, 1838; and the patent did not issue until the ninth day of May, 1842. On the 22d of January, 1855, Crane conveyed to Cooper, under whom the plaintiff derived title.

The defendant showed title to the premises by divers deeds from one Kearney, to whom Crane conveyed after his entry, and before the issuance of the patent; and the case is made to turn upon the validity of that deed.

Whiton, Ch. J., delivering the opinion of the Court, says, —

"The authorities being thus at variance, we shall be compelled to view the question somewhat as an original one. What, then, is the proper construction to be put upon this provision? It was stated at the argument that although the terms 'right of pre-emption,' or 'pre-emption right,' as used in the Act of Congress, are somewhat ambiguous, the words 'before the issuance of the patent' show clearly that it was the intention of Congress to prohibit sales of the land after pre-emption has been obtained, as well as the right which the pre-emptor has before the payment of his money and the issuing of the certificate. It was insisted that these words made the meaning of the statute plain, which, without them, would be ambiguous.

"But we think that these words create the only ambiguity which this part of the statute presents. If the term 'right of pre-emption' only had been used, we should not have had any difficulty in giving the statute a construction, as these words have acquired, in that

part of the United States where the public lands are situated, a clear and definite signification. They mean the exclusive right which a person has to purchase a quantity of land belonging to the United States, in consequence of having complied with the laws of Congress upon the subject of pre-emption. These laws have invariably required, that, in order to acquire this right, a person must have settled upon the land, or cultivated a portion of it, or have done both: so that a pre-emptor is one, who, by settlement upon the public land, or by cultivation of a portion of it, has obtained the right to purchase a portion of the land thus settled upon or cultivated, to the exclusion of all other persons; and, but for the words now under consideration, we should think that the sale or assignment of this right was alone prohibited. It was contended by the counsel for the plaintiff in error that this right was a mere personal privilege, and not in its nature assignable; and that it would be absurd to suppose Congress intended to prohibit the transfer of that which is not capable of transfer. But it is to be observed that such rights may be made assignable by the legislatures of the States and Territories in which the public lands are situated; and it may have been the intention of Congress to declare such assignment void, notwithstanding they were allowed by State or Territorial legislatures, and thus prevent the public domain from being occupied by persons who did not intend to purchase it and become permanent occupiers of the soil.

"But, whatever may have been the intention of Congress, we cannot give to the words 'right of pre-emption' alone such signification as would apply them to a subject-matter wholly foreign to their true meaning and intent.

"Do the words 'before the issuance of the patent,'

used in the statute, so enlarge and extend their meaning as to compel us to give them this interpretation? We are compelled to answer this question in the negative. We have given full effect to the principle, always applied to the interpretation of a statute, which compels courts so to construe it as to give to all parts of it some force and effect; and also to the principle of interpretation, by force of which courts look at all the various parts of the statute, and endeavor to make them all harmonize. But we have been unable to give the clause of the Act of Congress in question such a construction as to allow it to extend the meaning of the words 'right of pre-emption,' so as to prohibit a sale of the land after all the rights of pre-emption have been merged in the actual purchase of the land.

"It is to be observed that our statute (Revised Statutes, chap. xcviii. sect. 95) provides that the receiver's receipt (such as Crane received at the time he paid for the land) shall be evidence of title in the person who pays the money, and to whom the receipt is given.

"But it was contended by the counsel for the plaintiff in error that the legal title to the public lands remains in the United States until the patent issues, notwithstanding the payment of the purchase-money and the issuing of the certificate to the purchaser.

"It is not necessary to controvert this doctrine in order to uphold the law of this State so far as it relates to suitors in our own courts. We suppose the legislature of this State can prescribe what shall be deemed evidence of title to land as between the citizens of this State and all who seek the aid of its judicial tribunals.

"But, whether this is so or not, it is plain that the rights of a person as a pre-emptor cease when he has paid the purchase-money and obtained his certificate. He no longer has a right to purchase, because he has already

purchased and paid the purchase-money: it is therefore immaterial to inquire whether the legal title is in the United States till the patent issues or not, because the purchaser has an interest in the land entirely different from that of a pre-emptor, — one which can be sold, and which will pass by the ordinary forms of conveyance.

"We cannot suppose that Congress intended by the words 'previous to the issuance of the patent' to prevent the sale of the land, or of the interest in land which the pre-emptor acquires by the payment of the purchase-money. Had this been intended, the prohibition would have been contained in language clear, plain, and adapted to the object to be accomplished."

The other case to which we refer is that of *Camp* v. *Smith*, 2 *Minn.*, 230; which is an elaborate and full discussion of all the principles involved. I do not think it necessary to set forth the opinion in that case at length. It is very strong and well reasoned in favor of the position taken by us. Many cases are referred to in support of the defendant's position; but an examination of them will show, in almost every instance, that the deeds in question in them were made by the pre-emptor before his entry. Deeds so made are, upon the construction which we have placed upon the statute, void. The following are of this class: *Arbone* v. *Nettles*, 12 *La. An.*, 217; *Craig* v. *Tappan*, 2 *Sandf.*; *Stanbourgh* v. *Wilson*, 13 *La. An.*, 494; *Winn* v. *Morris*, 16 *Ark.*, 414; *Randall* v. *Edhart*, 7 *Minn.*, 450; *Doe* v. *Hays*.

And the case here relied on by the defendant, of *Kellom* v. *Easley*, cited above, does not conflict with our view. In that case, Johnson, the pre-emptor, mortgaged the land to Easley, after his entry, but before his patent issued: his entry was set aside by the commissioner of the land department, and the lands sold at auction. Kellom was the purchaser at that sale; and the attempt

was to enforce Easley's mortgage against Kellom's title. To support the pre-emptor's deed when his entry was vacated would be against the act as we have construed it. It is true, Judge Dillon in his decision goes beyond the case as presented; but all he says is *obiter* when applied to the circumstances of the one before us.

There are other considerations which support our views on this subject. The practical operation of the other construction shows that it could not have been within the purpose of Congress. We all know that the time when a patent will issue on any particular pre-emption-entry is very uncertain. On one entry it may issue in two months; on another, not for as many years; and this without any special merit or fault of either party. It is hardly conceivable that Congress meant to subject the rights of parties to such accidents.

There is another consideration. It is not competent for Congress to impose such a rule as the construction contended for would imply. This will appear from a very brief consideration of the nature of the proprietorship which the United States has in the public lands. It does not hold them as the sovereign, but merely in the same way that the citizen does. The eminent domain does not rest in the Federal Government, but in the States. Indeed, the States may take the public domain, as they may take private property, for roads and other internal improvements. The States could tax the public lands, if they had not, each one of them as it came into the Union, entered into a compact with the United States not to do so. These points have all of them been decided, and are settled law. *United States* v. *The Railroad Co.*, 6 *McLean*, 515; *The West River Bridge Co.* v. *Dix*, 6 *Howard*, 507. They prove that the public lands are subject to the State legislation, except that the State cannot interfere with the primary disposal of the soil,

having stipulated not to do so. Being thus subject to State legislation, it is competent for the legislature to say that a pre-emptor shall be estopped to deny the title which, acquired by his entry, he conveys before his entry; and it is incompetent for Congress to deny that such shall be the effect of his deed. I state this as my own opinion, and do not mean to state it as the judgment of the Court.

We have a statute which makes even a quitclaim deed operate as an estoppel. The deed which we are here considering is with covenants of warranty and for title. If the provision of the Federal statute were to be construed as is claimed, I am of the opinion that it was not within the competency of Congress to enact it. I have already occupied so much time in explaining and justifying the views of the Court, that none remains for a full exposition of this point; and I have felt compelled to set forth our opinions at great length, because they are in conflict with those held by all three of the learned judges of the United-States Circuit Court, — Mr. Justice Miller of the Supreme Court, Judge Dillon of the Circuit, and Judge Dundy of the District Courts. The vast importance to the whole Western country, and to our own State in particular, of this question, is a sufficient justification for our course.*

The ruling of the District Court was correct, and the evidence as to the issue of the patents rightly excluded.

The defendants offered on the trial to show that the deed to the plaintiff made by Margaret Kelley was obtained by fraud. Castetter, the officer before whom the acknowledgment was taken, was called by the defendants, and asked this question, — "State all the cir-

* The question determined in this judgment has, since its delivery, been finally decided by the Supreme Court of the United States. The opinion of that Court will be found in the Appendix to this volume.

cumstances attending the signing and acknowledging of the deed from Margaret Kelley to Warren B. Franklin, dated Jan. 6, 1866:" and counsel stated, that, in order to prove the fraud charged against Franklin in procuring the deed, they would show that Margaret Kelley had very feeble mental capacity; and, in obtaining the deed, the plaintiff took advantage thereof, and in this connection offered a deed from her to Timothy Kelley, one of the defendants, dated Jan. 13, 1866. The plaintiff objected; and the Court declined to admit the testimony, or receive the deed; and this ruling is assigned for error.

It will be observed that the offer of the defendants was very broad. It was not merely to show a case of a hard bargain made between two persons dealing at arm's-length, nor a case of two persons dealing together, — the one not so astute in making bargains as the other; but it was the case of one party being of very feeble mental capacity, and of the other party taking advantage thereof to such an extent as to constitute fraud.

Again: it will be observed that the defence proposed to be shown was not made by a stranger to the fraud. It may well be, that if one party has been defrauded by another ever so grievously, and yet does not object, but submits to the injury, a third party cannot allege it; but the case here is where such defrauded person has transferred the property of which he has been defrauded to another. These are matters which will be adverted to hereafter: they are mentioned here in order that all the facts of the case may be before us in the examination.

The principle that a claimant in a real action must recover on the strength of his own title is so firmly established, that little can be found in the reported cases respecting the evidence necessary on the part of the

defendant to avoid a deed produced by the plaintiff. On the trial of such action, the plaintiff must of course, in the first instance, show a clear and substantial title in himself. This being done, the defendant need do no more than falsify the proof thus made. He need not show that he has a valid claim to the premises, or give evidence of a title in a third person. It is sufficient if he make it appear to the satisfaction of the jury that a legal title does not subsist in the plaintiff by any course of testimony to that end. Thus, if the plaintiff claim as heir-at-law, the defendant may show a devise by the ancestor to a stranger, or that another, and not the claimant, is heir, or any other circumstance or state of facts which will invalidate his title. If he claims as devisee, the defendant may show that the will was obtained by fraud, or that it was not duly executed, or that the testator was a lunatic. On the same principle, the defendant may show that the plaintiff's title was void, whatever evidence of title had been shown. 2 Espinasse's Nisi Prius, 455.

The authorities in support of these positions are abundant.

Crisp v. *Barber*, 2 *Term*, 360, was where the lessor of the plaintiff claimed under a demise of the rectory-house, and from the rector for twenty-one years; and the defendant had entered upon him without any color of title whatever. At the trial, the defendant relied on the lease being void under the statute of 13 Elizabeth, chap. xx., by reason of the non-residence of the rector, he having been absent more than eighty days within the year. This fact was proved. It was decided, that, as the words of the statute declared the lease void, the lessor of the plaintiff could not recover even from a defendant who was not in under color of title, and was a stranger and wrong-doer.

Torrey v. *Beardsly*, 4 *Wash. C. C.*, 242, was an ejectment tried before Mr. Justice Washington and a jury. In his charge the learned judge stated "that the plaintiff's title was founded on two warrants for four hundred acres each, dated in 1793, granted in the names of Walter Kemble and Eliza Kemble. The surveys bear date in July, 1794, and are of different tracts of land from those described in the warrants, to which they were removed on account of the prior appropriation of the tracts for which they called. The surveys were returned into the office, and accepted in January, 1797.

"On the 13th of August, 1796, deeds were executed by Walter and Eliza Kemble to Jason Torrey, by which they conveyed to him all their right and title to the above warrants, and the lands surveyed or to be surveyed under them, for the consideration of twenty pounds; being the amount of the original purchase-money paid to the State for the warrants. In March, 1802, an order of resurvey was granted on the application of Jason Torrey; and the whole quantity not comprehended in prior surveys was found to amount to three hundred and seventy-two acres, for which a patent was granted to Jason Torrey on the 1st of January, 1810, who, in September, 1818, conveyed the same to the lessor of the plaintiff.

"The defendant claims the possession as tenant under Walter Kemble, and disputes the plaintiff's title on the ground of fraud in obtaining from him and Eliza Kemble the conveyances stated. Jason Torrey acted as deputy-surveyor in the district where these surveys were made; and he is charged with having fraudulently concealed from Walter Kemble the fact that the survey of the land in dispute had been made at the time he purchased the warrants from him, and with having deceived him by the representation that there was no vacant land on which to lay them.

"The Court has permitted the defendant to go into proof to establish the alleged fraud; and, if he has done so to your satisfaction, he is entitled to your verdict."

The learned judge then entered into a full and elaborate exposition of the proofs, and thereupon submitted the question of fraud to the jury. Although the verdict was for the plaintiff, that fact does not impair the authority of the case upon the point for which it is here cited; namely, that fraud may be shown in ejectment to defeat the plaintiff's title.

Doe ex dem. The State Bank v. *Moore*, 2 *Southard*, 470, was an ejectment upon a mortgage from the defendant to the bank. The defendant showed, in defence, that his son had seven notes discounted by the bank, on which were the names of the defendant and one Ryder; and the bond and mortgage were collateral thereto. Ryder denied his signature; and the son was arrested for forgery. A director of the bank, and the son, in the custody of the officer, went at midnight to the defendant's house, he being at the time very sick, and of infirm mind. The son requested to go in, in advance, and prepare his father for the business. This liberty was granted; and he went in, and, after some considerable time, returned, and told the others that he believed it would do now, — that his father would acknowledge the notes. They went in; and, being asked if he would acknowledge his signature, he said, "Yes;" and shortly afterwards the bond and mortgage were made. The fraud or imposition practised upon the defendant was the concealing from him the fact that the signature of Ryder was not genuine. In the course of his opinion, Southard, J., says, "In an action of ejectment, where the plaintiff claims title under a mortgage, is it proper for the defendant to prove that the bond and mortgage

were fraudulently obtained by deception and concealment, or were given to suppress a prosecution for forgery already commenced? I think both these questions may be very safely answered in the affirmative. Whatever will avoid the bond and mortgage is a competent defence in such a case; and that which shows a fraudulent or illegal consideration will avoid them. A bond fraudulently obtained, or given to suppress a prosecution for a felony, never can be supported in a court of justice. 2 *Wils.*, 341–47; 1 *P. Wm.*, 156, 220."

Jackson v. *Myers*, 11 *Wend.*, 533, was ejectment brought by the purchasers at an execution-sale, upon a judgment against A. Parsons, docketed May 11, 1827. Parsons was seized of the premises, but conveyed the same to Miller Feb. 23, 1829, the deed being recorded March 3 in the same year. The plaintiff, on the trial, showed his title by judgment, execution-sale, and sheriff's deed; and the defendant showed his prior deed. The plaintiff then assailed this deed by proof that it was made to defraud creditors, and was therefore void. The validity of the defence was not questioned, the controversy arising on the competency of the testimony.

Doe ex dem. McCall v. *Carpenter*, 18 *Howard*, 297, was also an ejectment, on the trial of which the plaintiffs, in order to avoid a deed from their father to one Stewart, offered to prove that it was obtained by fraud on the part of Stewart; and also, that, at the time of its execution, their father was of unsound mind, and incapable of making a valid contract; that said unsoundness was well known to Stewart, and that he took advantage of it in obtaining the deed; that the consideration of eleven thousand five hundred dollars mentioned was never paid; that six thousand dollars in depreciated State scrip was paid, or agreed to be paid; and that the

defendants purchased of Stewart with full knowledge of all the facts; that the real estate purported to be conveyed at the time was worth twenty thousand dollars. To all which evidence the defendant objected; and the Court excluded the same. The Supreme Court held that this was error, and awarded a new trial.

These cases are sufficient to show that fraud may be shown in an ejectment to avoid a deed. And the offer made here was of matter which would, if proven to the satisfaction of the jury, have sustained the defence. The offer was not only of evidence showing mere imbecility of mind. When this alone exists, it will not avoid a deed, a contract, or any legal act. The law does not undertake to measure the validity of contracts by the greater or less strength of the understanding. Mere weakness of mental powers does not incapacitate a party from acting or contracting. But weakness of understanding may be a material circumstance in establishing an inference of unfair practice or of imposition. *Osmond* v. *Fitzroy*, 3 *P. Wm.*, 129; *Bennet* v. *Vade*, 2 *Atkins*, 324; *Blackford* v. *Christian*, 1 *Knapp's Appeals*, 73. Here the offer to show mental weakness in Margaret Kelley was only one element: it was accompanied by the offer to show that Franklin took advantage of it, and that he did so in such way, and to such extent, as constituted it fraud. It was proposed to show to the jury all the circumstances of the making of the deed, whereby they would be able to pass a fair and well-informed judgment upon the whole case.

And it is undoubtedly true that it is not every person who can avoid a deed for fraud. A stranger to the fraud cannot do so. It matters not how corruptly, as between A and B, the former secures an estate: if the latter does not object, no one else can or should. A fraudulently-acquired title is voidable only, and not

void; and it is voidable only by the injured party. He may affirm it, and it will be effectual. Of course this is not true of titles which are illegal: they are void absolutely, and not merely voidable; they cannot be affirmed. But all this was completely covered by the offer. The proposition was to show that Margaret had conveyed to these defendants. By so doing, she disaffirmed her deed to Franklin; and the defendants stood in her shoes as to that deed: they were not strangers to the fraud.

In whatever aspect the offer of the defendants is regarded, it is within the rule that fraud may be shown in ejectment to avoid a deed; and the refusal of the Court to hear the evidence was error. One other matter only remains to be noticed. It is insisted that this matter should have been specially pleaded. It is undoubtedly true, that the theory of the system of pleading under the Code generally is, that the facts necessary to constitute a cause of action or defence shall be stated. But, in respect of actions for the recovery of real property, another rule has been adopted. Why this is so is not very clear. It may be because, as two trials, of course, are given in that class of actions, the parties are supposed to learn, from what is shown on the first, what will be in issue on the final trial. But, whatever the reason, it is apparent that in this class of actions, as also in cases of replevin, the facts need not be stated. That being the rule of pleading contained in the Code, we have only to enforce it here.

The judgment of the District Court must be reversed, and a new trial awarded.

Reversed, and new trial awarded.

Dawson v. Merrille.

UNITED-STATES HOMESTEAD LAW: *Specific Performance.* The policy of the Act of Congress granting homesteads on the public lands, as disclosed by its requirement of affidavit and other provisions, is adverse to the right of a party availing himself of it to convey, or agree to convey, the land, before he receives the patent therefor.

PUBLIC POLICY. The Court will not lend its aid to the enforcement of a contract which is against public policy.

This was a petition in equity, filed in the District Court for Lancaster County, to compel the specific performance of a contract for the sale of lands; which contract was in the following words: —

"Articles of agreement made and entered into by and between the undersigned parties hereto, witnesseth: that for and in consideration of the mutual agreements and covenants hereinafter expressed, we, the undersigned, do hereby agree and bind ourselves, and each of our heirs, executors, and administrators and assigns, to convey to such one of the parties hereto as may be agreed upon by a majority of the undersigned the several pieces or parcels of land set opposite our respective names; said conveyance being upon the express condition that the capitol of the State of Nebraska, and other public buildings, be located at or adjoining Lancaster in said State; the conveyance to be made immediately upon the location being announced by the commissioners: and we also agree to convey any portion of the land hereinafter specified, as may be agreed upon, to the State of Nebraska."

This paper was signed by a number of persons, and among them by the defendant Merrille; against his name being set the land here in question. The capitol was locat-

ed as required by the paper, and the plaintiff's testator was designated by the parties as the person to whom the conveyance should be made. It was alleged in the petition, and admitted in the answer, that, at the time of making the agreement, Merrille had the legal title to the premises under the United-States Homestead Law, and had since acquired the legal title thereto.

The Act of Congress referred to is chap. lxxv., *Laws of* 1862 (12 *United-States Statutes at Large*, 392), entitled "An Act to secure Homesteads to Actual Settlers on the Public Domain," and is to the effect following: —

Sect. 1 gives to settlers of certain classes a right to "enter one quarter-section or a less quantity of unappropriated public land," of certain descriptions, at the minimum rates.

Sect. 2 provides that the person applying for the benefit of this act shall, upon application to the register of the land office in which he or she is about to make such entry, make affidavit before said register or receiver that such application is made for his or her exclusive use and benefit, and that such entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whomsoever; and, on payment of ten dollars, he or she shall thereupon be permitted to enter the quantity of land specified. *Provided, however*, that no certificate shall be given, or patent issued therefor, for the space of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry . . . shall prove, by two credible witnesses, that he, she, or they, have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit aforesaid, and shall make affidavit that no part of said land has been alienated, . . . then he or she . . . shall be entitled to a patent.

Sect. 4 provides that the land shall not become liable for any debts contracted prior to the issuing of the patent.

Sect. 5 provides for a reversion of the land to the United States, if, during the five years, the party shall have actually changed his residence, or abandoned the land for six months.

Sect. 7 provides that all false oaths, affirmations, and affidavits taken under these provisions shall be considered perjury, and be punished as such.

The cause was tried upon pleadings and proofs, and the petition dismissed: whereupon the plaintiff appealed to this Court.

S. Robinson, *E. E. Brown*, and *S. E. Gailey*, for the appellant.

Is there any prohibition, expressed or implied, contained in, or rule of policy growing out of, the provisions of this act, which disables the occupier of land under the same from making a valid contract to convey his homestead when he shall have acquired the legal title thereto?

The act to secure homesteads to actual settlers, &c., commonly called the Homestead Law, requires that the applicant for its benefits shall make oath, 1st, That he is the head of a family, or twenty-one years or more of age, or that he has performed service in the army or navy of the United States; 2d, That he has never borne arms against the government of the United States, or given aid and comfort to its enemies; 3d, That such application is made for his exclusive use and benefit; 4th, That such entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person or persons whatsoever.

To make final proof, these things are required of the settler: 1st, That he shall have resided upon or cultivated the land for the term of five years immediately succeeding his entry; 2d, That no part of the land shall have been alienated; 3d, That he shall have borne true allegiance to the government of the United States.

And it is perfectly consistent with all these requirements for the settler, after his entry and before final proof, to make a contract to convey all or any portion of his homestead when he shall have acquired the legal title.

An agreement to convey is not an alienation. To alienate a thing is to transfer it; to make it another's.

As to the policy which the government had in view in enacting this law, it is to be noted that the Pre-emption Law ("An Act to appropriate the Proceeds of the Sales of Public Lands and to grant Pre-emption Rights," approved 4th September, 1841), which afforded great temptations and many opportunities for frauds, is very stringent in its provisions; while the Homestead Law, which requires actual residence and cultivation for five years, insures good faith, and hence these stringent restrictions are dispensed with.

Under the eighth section of the Homestead Law, the settler is only required to prove actual settlement and cultivation, and is not obliged to show that he has not alienated his claim; and such is the practice established by the department, and the practical construction which they have given to the law. See *Land Laws, Regulations, and Decisions*, page 264.

The consideration of the contract has been received and enjoyed by H. W. Merrille; and he is estopped in the courts from denying the validity of the contract, or asserting to the contrary. 34 *N. Y.*, 100; 25 *Wend.*, 628; 18 *N. Y.*, 394; 8 *Wend.*, 483; 1 *Seld.*, 395

But, if the contract set up be in violation of the law, the defendant, H. W. Merrille, was the party who committed the wrong: the government was the only party wronged, and the only party that could take advantage of the wrong; and, in this proceeding, that question cannot be tried. *Stow* v. *Flannery*, 10 *Iowa*, 318.

An entry under the Homestead Law confers an inchoate equitable title good against the world, and which, after settlement and cultivation, ripens into a perfect title.

M. H. Sessions and *D. G. Hull*, for the appellees, argued several propositions which were not considered by the Court, as its judgment turned upon the single point of the validity of the contract under the Homestead Law. Upon this point the learned counsel insisted that this contract, which the plaintiff seeks to enforce, was for the sale of land then occupied by defendant Merrille under a "homestead entry," — "the settling upon land for the purpose of selling on speculation," or any contract or agreement made by him, whereby he "directly or indirectly, in any way or manner, with any person whatever, contracted or agreed that the title to the same should inure, in whole or in part, to the benefit of any person except himself, when obtained, would forfeit all interest or claim that he had in or to said land by virtue of said homestead entry;" and any title that he might receive to the same from the government would be void. Sects. 1, 2, and 8 of Homestead Act, May 20, 1862, on page 140 of Zab. Land Laws; also sect. 13 of Pre-emp. Laws of 1841, on page 35; also see *Instructions of Commmissioner under same* on pages 88, 112, 148, 149, and 150.

A contract made in consideration of an act which is forbidden by statute is void; and a party may avoid the same, though in so doing he is obliged to allege and

show his own illegal conduct. *Bailey* v. *Tabor*, 5 *Mass.*, 296; *Wheeler* v. *Russel*, 17 *Mass.*, 258; *Farrar* v. *Burton*, 17 *Mass.*, 395; *Roby* v. *West*, 4 *N. H.*, 285; *Bancroft* v. *Dumas*, 21 *Vermont*, 456; *Boutwell* v. *Foster*, 24 *Vermont*, 485; *Buck* v. *Alba*, 26 *Vermont*, 184; *Brackett* v. *Hoyt*, 9 *Foster*, *N. H.*, 267; *In. Co.* v. *Harvey*, 11 *Wis.*, 394.

MASON, Ch. J., after stating the contract and the act of Congress, proceeded: —

It is by virtue of his affidavit, in which he swears that the entry is for his exclusive use and benefit, and not directly for the use or benefit of another, that the homesteader is permitted to enter the land in the first instance. If he abandon the land, or be absent from it six months during the five years, it reverts to the government. This provision is designed to secure a continuance of the state of things to which, in his first affidavit, the homesteader swears; and then, to prevent any evasion, by mortgaging the land, or by contracting debts, and letting it be charged by judgment and sold on execution, it is explicitly provided that the tract shall not be liable to debts contracted before the issue of the patent; and then, when the patent is to be issued, he must swear that no part of the land has been aliened.

These provisions, if they do not directly prohibit the making of this contract, do yet most clearly indicate a policy adverse to such contracts. The cases are numerous in which it has been held that such contracts are void. *Marshall* v. *The Baltimore and Ohio Railroad*, 16 *How.*, 314; *Coppell* v. *Hall*, 7 *Wallace*, 542. The Court will not lend its aid to the enforcement of such con-

tracts by decreeing their specific performance or otherwise.

The judgment of the District Court was right, and must be affirmed.

Judgment affirmed.

Johnson v. Jones.

SUMMONS: *Service.* A summons, directing the sheriff to serve the same on Harrison Johnson, was returned served on "the within-named H. Johnson." *Held* good to require the defendant to appear.

——: *Attacking return.* A petition in equity to avoid a judgment, on the ground that the return to the summons showing due service is false, draws the return in question collaterally, and cannot be sustained.

PRACTICE: *Verification; amendment.* A verification of a petition is not necessary in order to vest jurisdiction; but, if defective, may be amended; or, if wanting, may be supplied.

This was a petition in equity, filed in the District Court for Douglas County, to have a judgment declared void, and execution upon it enjoined. The record shows, that on the 6th of October, 1859, Jones commenced an action against Johnson in the District Court upon a promissory note for $943.40. The petition which he filed was not verified; but summons was issued to the sheriff, commanding him to summon Harrison Johnson. The officer returned it duly served on "the within-named H. Johnson." The record of the judgment recites that Johnson did not appear, and that his default was taken. The judge's minutes show a demurrer filed and withdrawn. In his petition, Johnson denies that any service was made upon him, or that he appeared to the action, or that he had any knowledge of the pendency of the action or the recovery of the judgment. The answer insists that Johnson was duly served, and that the judgment was regular and valid.

On the trial, Johnson testified that he was not served with the summons; and, in order to show that he could not have been, says, that, during the whole of the month,

— namely, October, 1859, — he was absent in Indiana; and his wife confirmed this statement. But he also says, that at that time he was county commissioner of Douglas County; and the records of the commissioners, being produced, show that he was present at meetings held by them in three successive weeks in the same month. When this proof was made, Johnson admitted that he was mistaken as to the year in which he was in Indiana.

A judgment was rendered according to the prayer of the petition; and Jones appealed to this Court.

The statutory provisions on which the case turns are as follows: —

The Code, "Sect. 62. — A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

"Sect. 113. — Every pleading of fact must be verified by the affidavit of the party, his agent or attorney."

"Sect. 19. — An action shall be deemed commenced within the meaning of this title, as to the defendant, at the date of the summons which is served on him. Where service by publication is proper, the action shall be deemed commenced at the date of the first publication; which publication shall be regularly made."

Revised Statutes, chap. xiii., page 49, vests in the District Courts "original and exclusive jurisdiction over all matters and suits at law and in chancery arising in each county in their respective districts," except certain cases within the jurisdiction of justices.

E. Wakeley, for the appellant.

I. The officer's return to the summons showing personal service cannot be contradicted. The attempt to contradict it was a humiliating failure.

II. The want of a verification to the petition was not a jurisdictional fact: it could be supplied. The plaintiff must show that the petition was a nullity. If it be a petition, no matter how faulty, the suit is commenced by filing it, and causing a summons to be issued thereon. This and other like requirements are mere statutory rules of pleading, the non-observance of which may be taken advantage of in the proper way, but does not render them a nullity.

III. The whole record, taken together, shows an appearance by the defendant. The recital in the judgment that he failed to appear is not conclusive.

Redick & Briggs, for the appellee.

I. It is just as essential, in order to give a court jurisdiction in a cause, that the form of the proceeding be substantially such as the law directs, as that the subject-matter or the person be within the jurisdiction. *Wicks* v. *Ludwig*, 9 *Cala.*, 173, 213. Sect. 62 of the Code requires that a petition be filed in order to the commencement of an action; and sect. 113 requires that it be verified. These imperative provisions of the Code cannot be ignored at the pleasure of the party.

Verification of the petition is necessary in order to constitute the paper a petition.

II. The record does not show that Johnson was served with summons. The recital in the judgment that he was "duly served" is not conclusive; and the sheriff's return is not of service upon Harrison Johnson. If the summons and return could not be found in the case, then the presumptions which attach to the proceedings of courts of general jurisdiction would, according to some authorities, be sufficient to sustain the judgment. But here the record purports to show

just what has been done; and it is from the whole record that we are to determine the question of jurisdiction. *McMinns* v. *Whelan*, 27 *Cal.*, 300. In this case the Court holds, that "if it appears by the record, *or otherwise*, that the Court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question, and whether the Court be of inferior or superior jurisdiction. *Coit* v. *Haven*, 30 *Conn.*, 190; *Trimble* v. *Longworth*, 13 *O. N. S.*, 431; *Ely* v. *Tallman*, 14 *Wis.*, 28; *Woodward* v. *Whitescarver*, 6 *Clark*, 1; *Bayland* v. *Bayland*, 18 *Ill.*, 551; *Gamble* v. *Warner*, 16 *Ohio*, 370; 1 *Smith's Lead. Cases*, 835.

But we are not attacking this judgment collaterally in the sense of the term used in the authorities: we attack it *directly* in the same court that undertook to render it, and really between the same parties. Were we trying title to lands, where one of the parties claimed under a judicial sale based upon this judgment, then the judgment would come collaterally in question. And so in many other instances; but not so here.

It is hardly necessary to consider the question, whether in any case a sheriff's return can be impeached, as this point does not of necessity arise in the case. We think the record impeaches itself. But Johnson testifies that he was never served with summons. Is this competent evidence? The recent cases in Wisconsin and other States hold, that, when the officer returns that he served the writ on the agent or other officer of a corporation, it is competent to show that the return is false as to the official character of the agent or officer. So, too, when the return of summons shows it was served on John Smith, is it competent to show that the John Smith whose property is sought to be taken in execution, on the judgment is not the John

Smith who was really served in the action. And is it not competent to show in this case that the appellee is not the "H. Johnson" who was served with the summons? Suppose an execution against the property of John Doe for ten thousand dollars, issued on a judgment rendered against him years ago; and admit the fact to be that the defendant never heard of the judgment, never owed a dollar or incurred an obligation to the alleged plaintiff, and never heard of him or the Court or the proceedings: will it be claimed that he cannot attack the return of the sheriff? Must he pay the judgment, and then sue an irresponsible sheriff and his sureties for indemnity? Justice Marcy, in the case of *Starbuck* v. *Murray*, 5 *Wend.*, 148, throws some light on this subject. 2 *American Leading Cases*, 730; *Pollard* v. *Wegener*, 13 *Wis.*, 569; *Gray* v. *Harris*, 8 *Cal.*, 592.

III. It is claimed that Johnson appeared in the case by filing a demurrer. The docket of the clerk shows this entry: "Demurrer filed. (Withdrawn.)" And the judge's docket shows in pencil this: "Dem. withdrawn. Ans. by Monday." The judgment entry shows that the defendant failed to "plead, answer, or *demur*," and that his default was entered for want of *appearance*, and not for want of answer. The judgment of the Court recites the fact that there was *no appearance;* that *no demurrer* was filed. The clerk's entry shows that there was; but it does not show *who* filed it: and we only have the judgment of the clerk that the paper filed *was* a demurrer. It might have been something else, and especially as his judgment and the judgment of the Court differ so widely. Johnson says he did not file it; that he did not appear either in person or by attorney. A judgment entry is higher evidence than a clerk's entry. *Hopkins* v. *Donaho*, 4 *Texas*, 336. If an attorney assumed to ap-

pear for him, who was he? The record does not show, nor has Johnson any means of finding him out. Should the Court hold Johnson to the consequences of an appearance by attorney, when, in the nature of things, it is impossible for him to reach the attorney, and hold him responsible for his acts? *Simons* v. *De Bar*, 4 *Bosw.*, 547; *Kimbal* v. *Merrick*, 20 *Ark.*, 12.

MASON, Ch. J.

The plaintiff insists that he was not served with summons in the action brought against him by Jones; and that, for that reason, he is not bound by the judgment rendered therein. The return to the writ shows a service thereof upon "the within-named H. Johnson." It is conceded that the Johnson named in the writ was the plaintiff here. Had the return shown a service on "the defendant named" in the writ, or on the "within-named Johnson," there can be no doubt that it would have been good. *Grovenor* v. *Henry*, 27 *Iowa*, 269. No uncertainty is caused by the addition of the letter "H." There may have been, as the plaintiff claims, three persons named Johnson living in the same town, the initial of whose first name was H; yet, when the sheriff returns that he served that one who was named in the body of the writ, there is no possible room to doubt upon whom he made the service.

The attempt to contradict the return was a signal failure. Johnson testified on the trial that he was not served with the summons; and, as a reason for being certain of the fact, says he was not in the State at the time: but when he was confronted with the records of the county commissioners, of whom he was one, by which it appears that he was present at their meetings on three successive weeks in the month in which the sheriff re-

turns that the service was made, Johnson confesses his mistake. The reason which he assigns for asserting that he was not served having failed, the allegation in proof of which the reason is given remains unestablished. The case then stands without proof to contradict the return.

This might be sufficient upon this branch of the case. but, as other and important questions were raised on the argument, they will be noticed. It is insisted, that inasmuch as this petition is filed in the same Court which rendered the judgment impeached by it, and the parties to the petition and the judgment are the same, the judgment is drawn in question directly, and not collaterally: and the rule is invoked, that, where a record is assailed by a direct proceeding, jurisdiction must appear, and will not be assumed from the fact of its exercise; while, if it be questioned collaterally, jurisdiction will be presumed, unless the record disproves it. Such undoubtedly is the rule. A party to a finding, judgment, or decree, concerning himself, prejudiced thereby, must resort to some one of the various modes provided by the law for appeal, review, rehearing, or impeachment by writ of error. *Lessee of Boswell* v. *Sharp*, 15 *Ohio*, 466; *Lessee of Irvin* v. *Smith*, 17 *Ohio*, 226; *Lessee of Newman* v. *The City of Cincinnati*, 18 *Ohio*, 323; *Lessee of Morgan* v. *Burnett*, 18 *Ohio*, 546; *Lessee of Fowler* v. *Whiteman*, 2 *Ohio State*, 270; *Spaulding and Others* v. *Baldwin*, 31 *Indiana*, 376; *Hessner* v. *Doe*, 1 *Carter*, 130; *Doe* v. *Smith*, *ib.*, 451; *Parks* v. *Moor*, 13 *Vermont*, 183; *Grise* v. *M. Landen*, 7 *Georgia*, 362; *Silsin* v. *Snyder*, 7 *S. & R.*, 171; *Cole* v. *Connelly*, 16 *Alabama*, 271; *Morris* v. *Galbrath*, 8 *Watts*, 166. So that, when judgment is obtained by fraud, the only remedy opened to the injured party is a resort to bill in equity. *French* v. *Shotwell*, 5 *Johnson*, Ch. 555, 6 *id.*, 235; *Smith* v. *Lowry*, 1 *id.*, 332; *Demerit*

v. *Lyford*, 7 *Foster*, 441; *Slocum* v. *Slocum*, 3 *Cranch*, 300; *Smith* v. *Lewis*, 3 *Johnson*, 157; *Rick* v. *Woodbridge*, 3 *Bay.*, 30; *Benton* v. *Burget*, 10 *G. & R.*, 240; *Granger* v. *Clark*, 22 *Maine*, 128. Or upon application to the Court upon which it was rendered. 8 *Watts*, 166.

The question remains to be determined, whether the return of the sheriff may be assailed by extrinsic evidence. Whatever the rule may be when the record is silent, it would seem clearly and conclusively established, by weight of authority too great for opposition, unless on the ground of local and peculiar statutes, that no one can contradict what the record actually avers; and that a recital of notice or appearance, *or of a return of service* by the sheriff in the record of a domestic court of general jurisdiction, is absolutely conclusive. *Cooper* v. *Sunderland*, 3 *Clark*, 114; *Trimble* v. *Longworth*, 3 *Ohio State*, 431, 439; *Granger* v. *Clark*, 22 *Maine*, 128; *Cook* v. *Darling*, 18 *Pick.*, 293; *Light* v. *Harris*, 20 *Alabama*, 411.

In these cases last named, a similar doctrine was applied to courts of inferior jurisdiction. I am aware that it was held in the case of *Bodurtha* v. *Goodrich*, 3 *Gray*, 508, that, in the absence of personal service, a mere recital that the defendant appeared by attorney was not absolutely binding, and did not preclude the defendant from showing that the attorney was not authorized to appear; Shaw, Ch. J., who delivered the opinion of the Court, remarking, that to hold that recital of the appearance was conclusive because the Court had jurisdiction, and the Court had jurisdiction because the record recited that the defendant had appeared, would be to reason inconclusively, and in a circle. But, in that case, it was not the record which was assailed, but the authority of the attorney to appear for the defendant: the validity of the record was admitted; and this

case is not in conflict with the position before laid down. The soundness of the decisions cannot be doubted, when we consider that the law clothes the Court with full power to issue process and summon parties, and the sheriff with authority to serve process. The question, whether due notice was given to the defendant, and a day assigned him to appear and make defence, does not in this case depend upon the fact, whether requisite authority existed in the case, but on whether it was properly exercised; and consequently falls within the general rule, that every thing must be presumed in favor of the proceeding of a superior court, unless there is a plain excess or want of authority. The presumption that the powers committed to judicial tribunals have been properly exercised is essential to the repose of society; and the evils which must result from allowing it to be overcome by parol evidence would seem greater than the benefit that can be derived from the correction of injustice in particular instances. The case now under examination furnishes a striking example of the dangers to which the administration of public justice would be exposed by permitting a defendant to contradict and overthrow the return of the sheriff by parol evidence. Mr. Johnson and his wife no doubt honestly believed, until the mistake was made manifest by the records of the commissioners' court and of the recorder's office, that they were in Indiana at the time the sheriff returns that he served the summons on the within-named H. Johnson. The means of correcting such mistakes would seldom exist, as in this case. The requisitions of natural justice are satisfied by establishing tribunals whose duty it is to ascertain that notice has been given, and not to proceed against any one without giving him an opportunity of being heard. *Callen* v. *Ellison*, 13 *Ohio State*, 455. And public policy demands,

that, when such a tribunal has pronounced judgment, its adjudication should be conclusive on the question whether the defendant was duly notified, as on any other point essential to the determination of the case. *Trimble* v. *Longworth*, 13 *Ohio State*, 431, 439. When the law invested the sheriff with the authority to serve process and make return thereof, and he returns that he has served the process, his return cannot be collaterally assailed.

It remains to consider whether the failure to swear to the petition was a jurisdictional defect. Jurisdiction is a power constitutionally conferred upon a judge or magistrate to take cognizance of and determine causes according to law, and to carry his sentence into execution. 6 *Pet.*, 591; 9 *Johnson*, 239. It is the law which gives jurisdiction: and consent of parties cannot, therefore, confer it in a matter which the law excludes. 1 *N. & M.*, 192; 3 *McCord*, 263, 280; *Cooke*, 27; *Miner*, 65; 3 *Litt.*, 332; 2 *Yerger*, 441; 1 *Comstock*, 478. But when the Court has jurisdiction of the subject-matter of the suit and the person of the defendant, and the defendant has some privilege which exempts him from jurisdiction, he may waive the privilege. See *Jurisdiction*, *Bouvier's Law Dictionary*. Chap. xiii., page 49, Revised Statutes, vests jurisdiction in the District Court as follows: "The District Court shall have original and exclusive jurisdiction over all matters and suits at law and in chancery arising in each county in their respective districts, except when justices of the peace have jurisdiction; and concurrent jurisdiction with said justices of the peace in cases when the demand or cause of action of the plaintiff shall exceed fifty dollars, and not exceed a hundred dollars; and shall have jurisdiction of all cases of appeal from a justice of the peace, or judge of probate: and the said judges of the District Court shall be conservators of the peace throughout the State."

Sect. 62 of the Code provides, "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon." Sect. 63 reads, "The plaintiff shall also file with the clerk of the court a præcipe, stating the names of the parties to the action, and demanding that a summons issue thereon." Title II. of the same act, sect. 19, provides that "an action shall be deemed commenced, within the meaning of this title as to the defendant, at the date of the summons which is served upon him. When service by publication is proper, the action shall be deemed commenced at the date of the first publication; which publication shall be regularly made." It is true that this section defines when the action shall be deemed commenced under Title II., which is the Statute of Limitation. But the above sections, when construed with reference to each other and sect. 113, clearly indicate that the jurisdiction of the Court attaches to the defendant when he is legally served with summons, without regard to the defects contained in the petition. Sect. 113 provides that every pleading of fact must be verified by the affidavit of the party, his agent or attorney. It was decided in the case of *George* v. *McAvoy*, 6 *How., Pr.*, that the verification is no part of the pleading. The petition in the case of *Henry O. Jones* v. *Harrison Johnson* was defective. No jurat was attached to the petition. But this defect was amendable under sect. 144 of the Civil Code, which is exceedingly broad. It provides that mistakes in any respect, in any proceeding, may be amended. This provision is as follows: "The Court may before judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mis-

take in any other respect, or by inserting other allegations material to the case, or when the amendment does not change substantially the claim or defence, by conforming the pleadings or proceedings to the facts proved; and, when any proceeding taken by any party fails to conform in any respect to the provisions of this Code, the Court may permit the same to be made conformable thereto by amendment." The Code requires its provisions to be liberally construed with a view to promote its object, and assist parties in obtaining justice. *Code*, sect. 1. One of the primary objects of the Code was to prevent the rights of a suitor, or the merits of his cause, from being sacrificed to technical rules, or to omissions or mistakes: hence this section of the Code in regard to mistakes before judgment.

Is the act of attaching the jurat to the affidavit of the petition, or the swearing of the petition, a proceeding? The word "proceeding" is applicable to every step taken by a suitor to obtain the interposition or action of a court. The swearing to the petition is a proceeding; and so is attaching the jurat to the affidavit. It is clearly a proceeding by which the suitor takes steps to prosecute his action. So also is the suing out of process at the commencement of the action a proceeding, or a filing a petition in error, with process served. The term "proceeding" is used, in the section of the Code now under consideration, to distinguish all other steps taken in an action from those embraced in the term "pleading." See *Irwin and Others* v. *The Bank of Bellefontaine*, 6 *Ohio State*, pages 81, 90. If, then, the omission in the petition was amendable, it could not be a jurisdictional omission; for if the Court had acquired no jurisdiction over the defendant, or subject-matter of the action, there would be nothing upon which the amendment could operate. But we have shown, from

the statute and authority, that it was within the power of the Court to permit the amendment upon such terms as it should deem proper, if the defendant had appeared and called the attention of the Court to the omission. The affidavit to the petition was not an element of jurisdiction, without which the Court could not act. It was, at most, merely a formal part of the petition, — a preliminary form in commencing a suit; and its omission amounts to one of those irregularities which cannot be collaterally called in question, even if the proceedings had taken place before an inferior tribunal. See *Wright* v. *Marsh Lee and Delevan*, 2 *Iowa*, 108, *Green*, *J.*

Judgment reversed.

Smith v. Pinney.

PRACTICE: *Reinstating cause; unavoidable accident.* A petition to reinstate a cause dismissed at a term prior to filing the same for want of prosecution, alleging as excuse a change by general statute of the time of holding the Court, of which the petitioner had not knowledge, does not show unavoidable casualty or misfortune entitling him to relief.

——: ——. An order on such petition to reinstate a cause is not an exercise of discretion merely, but is subject to review in the Supreme Court.

——: ——. In an appeal from a justice's judgment to the District Court, the defendant's death was suggested, and his administrator substituted, and the cause continued. At next term, the plaintiff neither filed his petition, nor appeared; and, on defendant's motion, the cause was dismissed for want of prosecution. At the following term, the plaintiff filed his petition to reinstate, alleging that he was ignorant of the time at which the preceding term was held, the same having been changed by recent statute not published, although grand and petit jurors were summoned from the body of the county, and all the machinery of a court put in operation. *Held*, that a case was not alleged.

This was a petition in error filed to obtain a reversal of an order reinstating a cause, dismissed out of the District Court for Nemaha County for want of prosecution. The facts fully appear in the opinion of the Court.

Thomas & Broady, for plaintiff in error.

1st, An order of the District Court vacating a judgment rendered at a previous term, and reinstating the original case on its docket for trial, is an order affecting a substantial right, in a special proceeding, in an action after judgment, within the meaning of sect. 581 of the *Code of Civil Procedure*. *Taylor* v. *Fitch*, 12 *Ohio State*, 169; *Huntington* v. *McIntyre*, 3 *Ohio State*, 444; *Watson* v. *Sullivan*, 5 *Ohio State*, 42.

2d. A petition in error to reverse such an order may be filed while the original action is pending. See the cases above referred to; also *Miller* v. *Albaugh*, 24 *Iowa*, 130; *Schaeffer et al.* v. *Marienthal, Lehman, & Co.*, 17 *Ohio State*, 183.

3d, Any inconvenience that may arise from this practice may be obviated by a continuance of the case below until the proceeding in error is terminated, and then dismissing it, or proceeding in it, according to the final result in the reviewing court. *Schaeffer et al.* v. *Marienthal, Lehman, & Co.*, above cited.

4th, The petition to reverse the judgment does not state facts sufficient to constitute a cause of action. Under such circumstances, no judgment can be legally rendered against the defendant, whether he demurs, or answers without demurring, or allows judgment to be taken by default. The objection is fatal on error. *Swan's Pleading and Prec.*, 240, and authorities there referred to; *Montg. Co. Bk.* v. *Albany City Bk.*, 3 *Seld.*, 464.

5th, The discretionary control of the Court over its own orders and judgments during the term at which they are entered ends with term; and the power of the Court to set aside or vacate the judgment subsequent to the judgment term is governed by settled principles, to which the action of the Court must conform, and for a departure from which a judgment or order of the Court may be subject to reversal on proceeding in error. *Huntington & McIntyre* v. *Finch & Co.*, 3 *Ohio State*, 445.

6th, If the proceeding to vacate the judgment can be sustained at all, it must be under the seventh subdivision of sect. 602 of the Code.

7th, The petition does not allege in the words of the subdivision that there was any "unavoidable casualty

or misfortune preventing the party from prosecuting or defending;" nor does it allege any facts to bring the case within the meaning of that subdivision. Unavoidable casualty or misfortune means the act of God, — as sickness, death, storm, &c., — and does not mean ignorance of any kind, much less of law; and it is necessary that the party applying should show the exercise of due diligence. *Howard* v. *Ambery*, 1 *West, Law Ma.*, 278; *Miller* v. *Albaugh*, 24 *Iowa*, 128; *Seney's Ohio Code*, 408, 409.

8th, Sect. 606 of the Code requires that a judgment shall not be vacated until it is adjudged that there is a valid cause of action in the proceeding in which the judgment was rendered. This was not done by the District Court; and therein there was error.

Hewett & Newman, for defendant in error.

1st, That error cannot be assigned on the decisions of the Court below of a motion founded upon affidavit to vacate a judgment, such motion being addressed to the sound discretion of the Court; and the following authorities are referred to: *The City of Detroit* v. *Jackson*. 1 *Douglas, Mich. R.*, 106; *Van Rensellaer* v. *Whiting*. 12 *Mich. R.*, 449; cited in *Cooley's Michigan Digest*, title *Error*, sect. 1539.

2d, The affidavit sets forth a sufficient showing of facts to bring the case clearly within the seventh subdivision of sect. 602 of the *Code of Civil Procedure*: to wit, that the plaintiff below was "prevented from prosecuting by unavoidable misfortune." Upon this point it is claimed, —

1st, That under sect. 1, *Code of Civil Procedure*, *Revised Statutes*, page 394, the statute must be liberally construed.

2d, That the said seventh subdivision of sect. 602 is intended as a substitute for, and is substantially the same remedy as is allowed in, equity for relief against accident, surprise, &c. *Nash's Pleadings and Practice*, page 700.

3d, That there is a legal definition applicable to the words "casualty and misfortune," which requires the cause of failure of plaintiff below to prosecute in this instance to be considered both a casualty and a misfortune.

Bouvier's *Law Dictionary* defines the word "casual" to be accidental; and, for the legal definition of "accident," see *Story's Equity Jurisprudence*, sects. 78, 79, 90, 91, 92.

LAKE, J.

This case was brought by *Smith* against *Fraker* before a justice of the peace; from whose judgment it was appealed to the District Court. At the March term, 1870, on the suggestion of the death of Fraker, the action was duly revived, and continued against Pinney as the administrator of his estate.

Nothing further was done until the September term of the same year, when Pinney, the defendant, filed his motion to dismiss the case for want of prosecution. This motion was sustained, and judgment rendered against Smith for costs.

After the final adjournment of the Court at this term, Smith filed his petition for the vacation of the judgment of dismissal, which was heard at the following term, and granted; to which exception was duly taken by the defendant.

The facts set forth in the petition are admitted, which presents to us the single question, whether they author-

ized the Court to vacate the judgment which it had rendered at a former term.

Our statute, sect. 602, of the *Code of Civil Procedure*, provides that the District Court shall have the power to vacate or modify its judgments, after the term at which they are made, for certain specified causes. One of these causes, and the one relied upon by the defendant in error, is "for *unavoidable* casualty or misfortune, preventing the party from prosecuting or defending."

But do the allegations of the petition, when given their utmost force, bring the case within the operation of this statute? They are set forth in these words: "That the said plaintiff was fully expecting and preparing to be present at the said term of Court, and prosecute the said suit; and that he was informed, and firmly believed, that the said term of the Court was to be held on the second Monday in September, 1870, and was making his preparations to have his testimony before the Court at that time; yet that the term of the said Court was held on the first Monday of September, and that he did not learn this fact until the Court had finally adjourned; and that he was living at the time in Richardson County, and had no opportunity of learning the time of holding courts in Nemaha County; that the law fixing the time of holding courts in Nemaha County had been changed, and that the same had not been generally published and known; that the said plaintiff came on the week after Court had adjourned with his testimony, and found that the case had been called up, and dismissed for want of prosecution, and that he had been adjudged to pay the costs."

The only legitimate inference to be drawn from this statement is, that the plaintiff was ignorant of the law fixing the terms of Court for the county of Nemaha. In this he may have been unfortunate; but it cannot be

said to have been such unavoidable casualty or misfortune as is contemplated by the section of the statute above referred to. The statute in question was a general law of the State, under which grand and petit jurors had been summoned from the body of the county, the whole machinery of the Court put in motion, and the business of the term duly transacted.

It is a very familiar rule, quite applicable to this case, that ignorance of the law will furnish no excuse. Were this otherwise, there would be no end to litigation, nor any stability to the judgments of courts.

It is the duty of the courts to require a reasonable degree of diligence on the part of a suitor in the prosecution of his case. He has no right to require the attendance of the defendant term after term, while he is doing nothing to bring the case to issue and trial. When no greater attention is manifested by a plaintiff than this record discloses, he has no just cause for complaint if he is sent out of court with costs taxed against him.

From an examination of the record in this case, we find that the action was pending in the District Court at the March term, when the administrator was substituted for the original defendant. It was then continued to the September term; up to which time no petition had been filed, nor any attention whatever given to the case by the plaintiff. He might well have been considered as having abandoned his suit.

It is the duty of a plaintiff to give prompt attention to and prosecute his case with vigor; and, if he do so, it will not drag through two terms of court and a six-months' vacation without a petition being filed, or any other step taken to hasten it to final judgment. It is not a case of unavoidable casualty or misfortune, but rather of extreme indifference and neglect on the part of the plaintiff. *Miller* v. *Albaugh*, 24 *Iowa*, 128.

But it is said that the power of the District Court over its own judgment is entirely discretionary, and not subject to review by this Court. This is true of its orders made during the term at which the judgment is rendered; but this discretion ends with the rising of the Court. Thereafter this power must be exercised within the limits prescribed by the statute, and governed by fixed principles of law. To these the courts must confine their action; and any substantial departure therefrom, resulting in an injury to a suitor, may subject their judgment to review and reversal by proceedings in error. *Huntington & McIntyre* v. *Finch & Co.*, 3 *Ohio State*, 445; *Taylor* v. *Fitch*, 12 *Ohio State*, 169.

It may be unfortunate to the defendant in error not to have a trial of his case upon the merits: if so, it is the result of his own inaction, and not any fault of the plaintiff in error, or of any hard rule of the law.

When a case is taken into the District Court by appeal, a reasonable degree of care and prudence requires the parties to take counsel of persons learned in the law at once, that they may be duly advised of what is necessary to be done to protect their respective interests. If they fail to do so, and loss is thereby occasioned, they have only themselves to find fault with or blame.

It is a right which a defendant may insist upon, that his case shall go forward to final judgment with all reasonable speed; and it is the duty of the Court to protect him in this right, and to guard him against all unnecessary delays.

We are of opinion that the facts set forth in the petition did not authorize the Court below to vacate its former judgment; and that its order in that behalf should be vacated, and the said judgment of dismissal reinstated.

Judgment accordingly.

Crowell v. Johnson.

ATTACHMENT: *Affidavit.* In a collateral action, in which the title acquired through a sale based on an order of sale and an order of attachment is drawn in question, the objection, that the affidavit upon which the attachment issued had no venue, will not be entertained.

——: *The order.* In such action, a writ duly issued by the clerk, under the seal of the Court, directed to the sheriff, running in the name of the Territory of Nebraska, commanding the officer to attach the goods and chattels, lands and tenements, of the defendant, sufficient to satisfy a sum named, — being the sum mentioned in the affidavit, and costs of seizure, — and also commanding him to safely keep the same to abide the order of the Court, and summon all proper parties as garnishees, and also the defendant, to answer the plaintiff's petition, cannot be disregarded, but will be held sufficient to support the jurisdiction of the Court and its judgment thereon.

——: *Affidavit for publication.* And the same rule will be applied in respect of the affidavit for publication of notice of the pendency of the suit. The Court obtains jurisdiction by the levy of the attachment; and subsequent irregularities render the judgment in a proper proceeding voidable, but not void.

——: *Judgment.* In a collateral action, a judgment in attachment which recites a finding of a certain sum due the plaintiff, and runs against the property attached on the provisional order, and directs its sale, and does not run against the defendant personally, is not void.

——: *Confirmation.* All questions which may be raised upon the proceedings of the sheriff in executing the order of sale are concluded by the confirmation, and cannot be opened in a collateral action.

This was an action of ejectment, in which both parties derived title from one Dawley, — the plaintiff by deed from him, and the defendant by virtue of a judicial title acquired in proceedings against him. These proceedings were in an action, brought in 1863, while Nebraska was

a Territory, in attachment, by one Phillips against Dawley. The affidavit for the attachment was without a venue, and the writ was in these words: —

TERRITORY OF NEBRASKA, COUNTY OF BURT, *ss.*

To the sheriff of said county, greeting: —

In the name of the Territory of Nebraska, you are hereby commanded to attach the goods and chattels, lands and tenements, of J. E. Dawley, in your county, of value sufficient to pay to W. L. Dawley the sum of five hundred and ninety dollars, which the said W. L. Phillips claims as due him from the said J. E. Dawley, together with all costs accrued and to accrue on the seizure; and the property so attached in your hands to retain possession of the same, to abide the order of the Court in the premises, or until it be otherwise legally discharged; and, if property sufficient cannot be found, that you summon all such persons in your county as the plaintiff, his agent or attorney, shall direct as garnishees, to appear on the first day of the next term of the District Court to answer such interrogatories as may be propounded to them; and that you also summon the said J. E. Dawley, if to be found in your county, to be and appear before the District Court in and for said county on the second day of April term thereof, to be held in Tekama on the first Monday in April, A.D. 1863, to answer to the petition of the said W. L. Phillips; and have you then and there this writ, and the manner in which you execute the same.

[L.S.] Witness my hand, &c.

The contents of an order of attachment are prescribed in sect. 201 of the Code as follows: —

"Sect. 201. — The order of attachment shall be directed and delivered to the sheriff. It shall require him

to attach the lands, tenements, goods, chattels, stocks, or interests in stocks, rights, credits, moneys, and effects, of the defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim, to be stated in the order as in the affidavit, and the probable costs of the action not exceeding fifty dollars."

Sect. 203 provides that "the return-day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons: when issued afterwards, it shall be twenty days after it issued."

By sect. 66 the return-day of a summons is the second Monday after its date.

The judgment being for the defendant, the plaintiff filed this petition in error.

E. F. Gray, for plaintiff in error.

I. In the case of *Phillips* v. *Dawley*, the affidavit for attachment is without a venue, or any thing to show it was taken within the jurisdiction of the officer.

The officer's jurisdiction being local, the affidavit for attachment must show where the same is taken, else the affidavit will be a nullity. *Lane* v. *Morse*, 6 *Howard's Prac. Reports*, 394; *Cook* v. *Staats*, 18 *Barbour* (*N. Y.*), 407; *Towsley* v. *McDonald*, 32 *Barbour* (*N. Y.*), 604; *Whitney* v. *Brunette*, 15 *Wisconsin*, 61; *Ladow* v. *Grooms*, 1 *Denio*, 429; *Drake on Attachments*, sect. 88; 1 *Vansanford's Equity Prac.*, page 419.

The writ under which the attachment was made is a mongrel order of attachment and summons, combining some of the requisites of both, but not all of the essential requisites of either.

It is made returnable, and defendant is required to answer, on the second day of the April term, 1863; and

was issued the eleventh day of September, 1863. It should have been made returnable on the second Monday after its issue (*Statutes of* 1858, page 138, sect. 195; *Statutes of* 1859, page 92, sect. 5), and have required the defendant to answer on the third Monday after the return-day. *Statutes of* 1859, page 92, sect. 6. Besides, the return and answer day of this writ is a date anterior to the issue of the same. The writ is a nullity. *Rattan et al.* v. *Stone et al.*, 3 *Scammon's Illinois Reports*, 540; *Hildreth* v. *Hough et al.*, 20 *Illinois*, 332; *Whitney* v. *Brunette*, 15 *Wisconsin*, 68.

II. The affidavit for publication was not sworn to, there being no signature to the jurat: therefore the affidavit is a nullity. *Ladow* v. *Grooms*, 1 *Denio*, 429; 3 *Cain*, 128; *Jackson* v. *Vanbuskirk:* this case is referred to in 8 *Georgia*, 521. The notice is of no effect, unless based upon a proper affidavit. *Cook* v. *Farren*, 34 *Barbour* (*N. Y.*), 95; *Towsley* v. *McDonald*, 32 *Barbour* (*N. Y.*), 604; 1 *Vansan. Equ. Prac.*, page 421; *Berdsong* v. *McLaren*, 8 *Georgia*, 521. Defendant's assumption, that the clerk wrote and signed an order on the same paper with the affidavit, is not supported by the transcript or any other evidence.

III. The notice requires an answer on the second Monday after the last publication: it should have been fixed for the third Monday after the last publication. *Statutes of* 1859, page 92, sect. 6. Judgment could not be rendered without compliance with the statute. *Howard* v. *McCrary*, 33 *Illinois*, 464; *Hodson* v. *Tibbets*, 16 *Iowa*, 97.

IV. The judgment is rendered against the property attached, instead of being rendered against the defendant, and then ordering the property sold to satisfy it.

The form of judgment is the same in an attachment suit as in any other, and that, too, whether there be a

personal service or not. *Young* v. *Campbell et al.*, 5 *Gilman's Rep.* (*Ill.*), page 83; *Nash's Pleadings and Practice; Form of Judgment in Attachment of Real Property*, page 435; 2 *Abbott's Pleadings and Practice*, (*N. Y.*), page 520.

Judgment must be distinctly rendered and formally entered, or it will not support an order of sale. *Lincoln* v. *Cross*, 11 *Wisconsin*, 91; 32 *Barbour* (*N. Y.*), 271.

V. The order of sale refers to a judgment rendered against the defendant Dawley: there being no such judgment, the order of sale is itself a nullity. 32 *Barbour* (*N. Y.*), 271.

The notice of sale was published in a paper published in Douglas County for four weeks only, instead of thirty days; and only four notices were posted, instead of six; and none posted at the court-house door. The confirmation does not cure these fatal defects. *Minnesota Co.* v. *St. Paul Co.*, 2 *Wallace*, 609; *Shreves, Lessee*, v. *Lyons*, 640; *Gray* v. *Brig Wardello*, 2 *Howard* (*U. S.*), 43; 1 *Wallace*, 627; *Shelton* v. *Tiffin*, 6 *Howard* (*U. S.*), 163; *Wellington* v. *Gale*, 13 *Massachusetts*, 482; *Russel* v. *Dyer*, 40 *New Hampshire*, 173; *Olcott* v. *Robinson*, 21 *New York*, 150; *Statutes of* 1858, page 182, sect. 450.

I. S. Monk, for defendant in error.

If the jurisdiction of the Court once attached, subsequent irregularities would not render the judgment void: it would remain valid until reversed, and cannot be impeached collaterally.

The filing of the proper affidavit, issuing the writ and attaching the property, gives the Court jurisdiction in attachment cases; and notice to the defendant by publication is not essential to the jurisdiction. *Drake*

on Attachment, sects. 447 and 448, and cases there cited; *Paine* v. *Moorland*, 15 *Ohio*, 435; *Beech* v. *Abbott*, 6 *Vermont*, 586; 3 *Denio*, 167; 3 *Wisconsin*, 773; 38 *N. H.*, 171.

The law presumes that the clerk administered the oath in the proper county. *Snell* v. *Echerson*, 8 *Iowa*, 284. The authority of the clerk is supplied by implication from the balance of the record. *Drake on Attachment*, sect. 91, and cases there cited; 3 *Scammon*, 576; 7 *Porter*, 483; 3 *Ala.*, 709.

This affidavit, though not essential, is, however, sufficiently authenticated. The clerk, by writing an order for publication which was signed by him, immediately under it, and on the same paper, by the strongest implication certified that he acted upon the affidavit as one sworn to before himself. *Drake*, sect. 91; 12 *La.*, 132.

In attachment proceedings, the writ of attachment is the process, the service of which confers jurisdiction over the property (15 *Ohio*, 435); and its sufficiency cannot be questioned in this collateral manner. A judgment rendered on defective service of process, or on the service of defective process, is not void. It is only where no service is made, or attempted to be made, that the judgment is void. In one case there is nothing to call the jurisdiction of the Court into exercise: in the other it is authorized and required to decide upon the existence of the facts which confer jurisdiction; and its ruling in favor of its own jurisdiction cannot be collaterally assailed. 3 *Clarke* (*Iowa*), 114; 4 *id.*, 77; 12 *Iowa*, 204; 14 *id.*, 309; 17 *id.*, 107; 37 *Missouri*, 307; 2 *Howard* (*U. S.*), 342; 13 *Mass.*, 162.

The form of the judgment is substantially correct; and it cannot be attacked for informality in this action. 11 *Iowa*, 166.

CROWELL *v.* JOHNSON.

In an action of right, the purchaser at sheriff's sale need not show any other title than the judgment, execution, and sheriff's deed; and such title cannot be controverted by the execution debtor, or any one claiming under him; and such purchaser is not effected by any error or irregularity in the judgment or execution, nor by any irregularity or omission of the sheriff in advertising and conducting the sale. *Cooper* v. *Galbraith*, 3 *Wash. C. C.*, 546; *Wheaton* v. *Sexton*, 4 *Wheat.*, 503; 4 *Scammon*, 364; 3 *id.*, 107; 1 *Clarke* (*Iowa*), 307; 1 *Cowen*, 711; 8 *Cowen*, 192; 8 *Johnson*, 361; 12 *id.*, 213; 20 *id.*, 338; 13 *id.*, 97; 9 *Ohio*, 19; 3 *id.*, 188 and 553; 19 *Ala.*, 188. Irregularities are cured by confirmation of sale.

A *bona-fide* purchaser, even though he be the execution plaintiff, is not effected by any irregularity or omission of the sheriff in advertising or conducting the sale. *Saunders's Heirs* v. *Norton*, 4 *Monroe*, 465; *Correll* v. *Ham*, 4 *Greene* (*Iowa*), 455; 1 *Clarke* (*Iowa*), 307.

LAKE, J.

This is a proceeding in error to reverse the judgment of the District Court for Burt County, rendered in favor of the defendant in error upon the facts found by the Court, a jury having been waived by the parties.

The action in the Court below was brought to recover the possession of certain real estate to which both parties claimed the legal title, and both derived their pretended ownership from a common source.

The plaintiff's claim is based upon several conveyances from James E. Dawley, and Helen S. Dawley his wife, to himself, bearing date the 27th of April, 1869. The defendant rests his claim to title upon the sale of the premises by the sheriff of Burt County, in pursu-

ance of an order of the District Court, made in a case wherein one William L. Phillips was plaintiff, and said James E. Dawley was defendant, in which action said premises had been taken by attachment. This suit of attachment was commenced in December, 1863: final judgment, and order of sale, were entered April 17, 1864, and the sale actually made by the sheriff on the sixth day of June following, the plaintiff Phillips being the purchaser. On the sixth day of June, 1865, the sale was confirmed; but the sheriff's deed was not made to the purchaser until the 9th of November, 1869. The defendant is a purchaser from Phillips, by deed bearing date of Aug. 12, 1868; and is in possession.

On the trial of the cause, very many questions were raised by the plaintiff, by objections to defendant's testimony. The several objections and exceptions are, however, so imperfectly preserved, that but for the fact that the respective counsel have seen fit to treat them as explicit, and have in their briefs very clearly presented the real points in dispute, we should be inclined to affirm the judgment without any examination of the alleged errors.

It is objected to the title under which the defendant holds the lands, that the Court never acquired jurisdiction of the property; that the proceedings are merely void, and therefore the sheriff's deed to Phillips conveyed nothing.

The first point urged in support of this position is, that the affidavit for the order of attachment has no venue; that it does not appear that the officer taking it acted within his territorial jurisdiction.

This objection cannot be sustained. The affidavit was sworn to before the clerk of the Court in which the action was pending; and it will be presumed that the clerk administered the oath in the proper county. *Snell*

v. *Echerson*, 8 *Iowa*, 284. This objection, and also that taken to the form of the order of attachment, only show at most that the proceedings in these respects were erroneous, which can avail nothing to the plaintiff in this collateral action. They are only errors committed by a court which had jurisdiction of the subject of the suit, and was fully authorized to render the judgment, and make all necessary orders for its enforcement. These proceedings can be assailed, — not, as here attempted, collaterally, but only by a proceeding brought directly for the purpose of setting them aside. *Lessee of Paine* v. *Moreland*, 15 *Ohio*, 435; *Martin et al.* v. *Barrow*, 37 *Mo.*, 301; *Shawhan et al.* v. *Leffer*, 24 *Iowa*, 217.

The same may be said of the objection that the record fails to show that a proper affidavit for service by publication was made.

In the case of the *Lessee of Paine* v. *Moreland*, above cited, Judge Reed, delivering the opinion of the Court, said, "Are the proceedings in attachment void? It is contended that they are void, because no notice of the pendency of the attachment was given as required by the statute. If the jurisdiction of the Court once attached, subsequent irregularities would render the judgment voidable only; and it would remain valid until reversed, and cannot be impeached collaterally."

So here we find that the Court had acquired jurisdiction of the property *by the levy of the order of attachment thereon.* The necessary affidavit for the attachment had been filed, and order duly issued and levied, whereby the property of the debtor was taken from him, and placed in the custody of the law.

Now, all this may be done on the very day the action is commenced, and before any notice is given to the defendant. Thus far, it is strictly a proceeding *in rem;* and the want of notice to the debtor can have no effect

whatever. But the law regards it but just to the defendant that he be notified of the proceeding against his property, and provides that notice shall be given to him. If he be within the jurisdiction of the Court, the notice must be personal; but if, as here, he be a non-resident, beyond the jurisdiction of the Court, such notice may be given by publication. In either case, to be valid, it must conform substantially to the requirements of the statute. But, should it fail to do so, the proceeding is of course voidable, but not void. It may be reversed in a proceeding instituted for that purpose; but it cannot be assailed collaterally. The rule is the same, whether the notice be personal by the service of a summons, or constructive by publishing the same in a newspaper.

But it is urged, with considerable earnestness, that the final judgment will not support the order of sale, it being in form rendered against the property instead of the defendant. After reciting the facts found by the Court, among which is, "that the said defendant is indebted to the said plaintiff in the sum of $612\frac{25}{100}$, and it appearing that an attachment has been issued against the property of the defendant, &c., it is therefore ordered and adjudged that the plaintiff have and recover a judgment against the said attached property for the sum of $612\frac{25}{100}$ damages, and the further sum of $15\frac{10}{100}$ costs of suit. And it is further ordered and adjudged that an order of sale be issued by the clerk of this court, directed to the sheriff of said county, commanding him to sell so much of said property, land, and tenements, heretofore attached herein, as shall be necessary to satisfy the said claim of the said plaintiff, and the money arising therefrom be applied to satisfy said judgment and costs; and that any surplus that may remain be returned to the said defendant."

The judgment would certainly have been more formal had it run directly against the defendant by name. It is customary so to render it; and this unquestionably is the better course. But, taking the whole entry together, I think the judgment is made sufficiently certain. It first finds the amount due from the defendant to the plaintiff, and adjudges the same in his favor, to be paid from the proceeds of the attached property which was then in custody of the law. It may be considered as quite informal; but I do not consider it erroneous, much less void.

In *Vangeazel* v. *Hillyard*, 1 *Harrington* (*Del.*), 515, it is held that a judgment in this form is valid: "It being found that John Vangeazel, the defendant, is indebted to Robert Hillyard, the plaintiff, $\$78\frac{7}{100}$. Wherefore judgment is rendered against John Vangeazel, the defendant, for $78.07 debt and $1.90 costs of suit." It was objected that there was a want of certainty as to whom the judgment was in favor of; but the Court held it to be sufficiently certain by an inspection of the whole record, and refused, therefore, to disturb it.

It is wholly unnecessary to go further, inasmuch as the only remaining objections relate solely to the proceedings of the sheriff in making the sale under the order of the Court. These questions were all fully considered, and finally disposed of, by the Court in the order of confirmation, and cannot here be reviewed. *Phillips* v. *Dawley*, 1 *Neb.*, 320.

We find no substantial error in the record; and the judgment of the District Court is in all things affirmed.

Judgment affirmed.

Rakes v. The People.

CRIMINAL LAW: *Pleading.* An indictment for murder should contain a certain description of the crime which the defendant is accused of committing, and the facts constituting it.

——: *Dying declarations.* It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the party offering them, that they were made under a sense of impending death; but it is not necessary that it should be stated at the time that they were so made.

——: ——. The state of the deceased's mind may be judged from the circumstances; but the length of time which elapses between the declaration and death furnishes no rule for the admission or rejection of the testimony.

——: *Exceptions to evidence.* The rule, that in a capital case the accused does not waive a right by not insisting upon it, entitles him to have proof which is prejudicial to his case, and is not legally admissible, withdrawn from the jury, although he does not object to it when offered. Mason, Ch. J.

This was an indictment for murder, found in the District Court for Cass County. It was in the following words: —

STATE OF NEBRASKA, COUNTY OF CASS, *ss.*

Of the November term of the District Court, within the second judicial district in and for Cass County, State of Nebraska, in the year of our Lord one thousand eight hundred and seventy, the grand jurors, chosen, selected, and sworn in and for the County of Cass, in the name and by the authority of the people of the State of Nebraska, upon their oaths present: That Tallant Rakes, late of the county aforesaid, on the twenty-eighth day of June, in the year of our Lord one thousand eight hundred and seventy, in the County of Cass, and

State of Nebraska, aforesaid, in and upon one Sarah J. Powers, then and there being, unlawfully, wilfully, feloniously, and of his malice aforethought, did make an assault; and that the said Tallant Rakes a certain pistol, then and there charged with gunshot and one leaden bullet, which said pistol he, the said Tallant Rakes, in his right hand then and there had and held, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did discharge and shoot off, to, against, and upon the said Sarah J. Powers; and that he, the said Tallant Rakes, with the leaden bullet aforesaid, out of the pistol aforesaid, then and there by force of the gunpowder aforesaid, by the said Tallant Rakes discharged and shot off as aforesaid, then and there unlawfully, wilfully, feloniously, and of his malice aforethought, did strike, penetrate, and wound her, the said Sarah J. Powers, in and upon and through the body of her, the said Sarah J. Powers, thereby then and there giving to her, the said Sarah J. Powers, with the leaden bullet aforesaid, so as aforesaid discharged and shot out of the pistol aforesaid, by the said Tallant Rakes, in and upon and through the body of her, the said Sarah J. Powers, one mortal wound of the depth of eight inches, and of the breadth of one inch; of which said mortal wound she, the said Sarah J. Powers, then and there languished, and, languishing, did live for and during the period of ten hours, and of which said mortal wound she, the said Sarah J. Powers, on the day and year aforesaid, at the county aforesaid, died. So the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the people of the State of Nebraska aforesaid, do say that the said Tallant Rakes, her, the said Sarah J. Powers, in the manner and by the means aforesaid, unlawfully, wilfully, feloniously, and of his malice aforethought, did kill and murder, contrary to the form of the statutes in such

case made and provided, against the peace and dignity of the people of the State of Nebraska.

J. C. COWIN, *District Attorney.*

It appeared in evidence that the deceased lived a short distance — some forty or fifty steps — from the residence of the prisoner, who was living with his father; that on the 28th of June, 1870, between nine and ten o'clock in the forenoon, the deceased was shot, and went to her house.

On the trial of the cause, Elizabeth Hardwick was sworn as a witness, and testified as follows: "It was about four years since I first knew the prisoner. Mrs. Sarah J. Powers was my mother. On the 28th of June last, I was at Mr. Bell's, visiting; when prisoner came there, and said to me, 'Your mother is dying.' I said, 'What in the name of God is the matter?' He said, 'I don't know: I believe she has been shot.' I went immediately to my mother's, and found her lying on the bed, on the floor, in a bad condition. I think Mrs. Rakes is all the one that was there when I got to the house. I examined her, and found the wound. It had been dressed: a wet rag had been applied to the wound. Her clothes were on her yet. She knew where she had been shot. She talked as if she could not get well. I did not express to her that I thought she could not get well. As near as I can recollect, she said, in these exact words, 'O Lizzie! I can't stand it, I suffer so.' I did state before a justice of the peace on preliminary examination, repeatedly, that my mother said she would recover; but she did not say so immediately before she said, 'O Lizzie! I can't stand it, I suffer so.' I got to the house between ten and eleven o'clock. My brother-in-law raised her up before noon; but she could not sit up. I believe it was about eleven or twelve she used the words she

could not 'stand it.' In a short time she appeared more lively: and then, after that, in a short time, she could scarcely talk; and her tongue became stiff, so she could not talk. Again, about sundown, she said, 'O Lizzie! I can't stand it, I suffer so.' She told me where she was wounded shortly after I went there. She said who she thought shot her, about two o'clock; and very late in the evening she said so again. When defendant was after the doctor, mother said he would bring none: he did not want any." The defendant's counsel objected to the foregoing evidence, on the ground that no sufficient foundation had been laid to admit the same as dying declarations; which objection was overruled, and this ruling is now assigned for error. This witness further testified that it was not much past the middle of the afternoon when her mother expressed the belief she would recover; that prisoner returned from Plattsmouth, where he had been after a doctor, about three o'clock. No other evidence had at this time been offered tending to show what the deceased thought touching her recovery.

The jury rendered a verdict of guilty; and the defendant sued out this writ.

T. M. Marquette and *Maxwell & Chapman*, for plaintiff in error.

The Court erred in admitting the dying declaration of Sarah J. Powers.

Dying declarations are not admissible, unless it appear to the Court that they were made *under a sense of impending death.* 1 *Greenleaf Ev.* (*Redfield's Ed.*), sect. 158; *R.* v. *Woodcock*, 1 *Leach*, 652; *R.* v. *Welbourn*, 1 *East P. C.*, 358; *Hill's Case*, 2 *Grattan*, 494; *Nelson* v. *State*, 7 *Humph.*, 542; *Moore* v. *State*, 12 *Ala.*, 764; *Brakefield* v.

State, 1 *Sneed*, 215; *Starkie* v. *People*, 17 *Ill.*, 17; *Robbins* v. *State*, 8 *O. S.*, *Rep.* 131; 3 *Geo.*, 433; *Kilpatrick* v. *Com.*, 7 *Casey*, 198.

2d, That the Court erred in overruling the motion for a new trial, the verdict being contrary to and against the weight of evidence.

A conviction clearly against the weight of evidence will be set aside. *Bedford* v. *State*, 5 *Humph.*, 553; *State* v. *Lyon*, 12 *Conn.*, 487; *State* v. *Bird*, 1 *Mo.*, 417, 585; *Bell's Case*, 8 *Leigh*; *Com.* v. *Madden*, 5 *Eick*, 429; *Copeland* v. *State*, 7 *Humph.*, 479; *State* v. *Tomlinson*, 11 *Iowa*, 402; *Hoagland* v. *Moore*, 2 *Blackf.*, 167; *People* v. *San Martin*, 2 *Cal.*, 484; *State* v. *Miner*, 10 *Minn.*, 313.

3d, The Court erred in overruling the motion for a new trial, there not being sufficient evidence to sustain the verdict.

When the evidence is not sufficient to warrant the verdict, a new trial will be granted in criminal cases, although it may not be such a case of rashness as would induce a like decision in civil cases. *Bedford* v. *State*, 5 *Humph.*, 532; *State* v. *Tomlinson*, 11 *Iowa*, 404; *Bayley* v. *Eaton*, 8 *Cal.*, 159; *Guilford* v. *State*, 24 *Geo.*, 315; 2 *Humph.*, 442.

To warrant a conviction in a criminal case, the evidence must exclude every other hypothesis but that of the defendant's guilt. 1 *Greenleaf Ev.* (*Redfield's Ed.*), sect. 34; *Tweedy* v. *State*, 5 *Clark*, 433; *Horn* v. *State*, 1 *Kansas*, 42; *People* v. *Strong*, 30 *Cal.*, 151; *Orr* v. *State*, 34 *Geo.*, 342; *State* v. *Collins*, 20 *Iowa*, 85; 3 *Greenleaf Ev.* (*Redfield's Ed.*), sect. 29; 5 *Clark* (*Iowa*), 436; *Sumner* v. *The State*, 5 *Blackf.*, 579; 2 *Hale*, *P. C.*, 29 *O.*

The evidence to prove an *alibi* need not outweigh the evidence which tends to disprove it. It is sufficient on this, as on other points in a criminal case, that it raises a reasonable doubt of the truth of the charge; and, if it

does, the prisoner must be acquitted. *French* v. *The State*, 12 *Ind.*, 670; *State* v. *Waterman*, 1 *Nev.*, 543.

G. A. Roberts, Attorney-General, for the people.

MASON, Ch. J., after reading the indictment and the evidence above recited, delivered the opinion of the Court as follows: —

1. It was urged, upon the motion to quash, that the place where the offence was committed was not clearly stated. The offence is charged to have been committed in the County of Cass, and State of Nebraska; and the facts which constitute the offence are clearly and distinctly stated. The indictment charges Tallant Rakes with the murder of Sarah J. Powers, in the County of Cass, and State of Nebraska, on the twenty-eighth day of June, 1870. It states facts, which, if true, constitute the crime of murder. The county where the offence is charged to have been committed is clearly averred in the body of the indictment, and the allegation of time and place then and there is reported to every material fact which is issuable and triable. This is sufficient. See *The State* v. *Williams*, 21 *Indiana*, 234.

The indictment should contain a certain description of the crime which the defendant is accused of committing, and a statement of the facts by which it is constituted. This indictment states the facts of the crime charged with as much certainty and precision as the nature of the case will allow; and this is all that is required. 5 *T. R.*, 586; 1 *Leach*, 249; 5 *T. R.*, 611, 623.

II. When it appears that the deceased, at the time of the declaration which is offered in evidence, had any expectation or hope of recovery, however slight it may have been, and though death actually ensued in an

hour afterwards, the declaration is inadmissible. Says *Greenleaf*, vol. i., sect. 158, "It is essential to the admissibility of these declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made *under a sense of impending death*; but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears, in any mode, that they were made under that *sanction*, whether it be expressly proved by the express language of the declarant, or be inferred from his evident danger, or the opinion of the medical or other attendants stated to him, or from his conduct or other circumstances of the case; all of which are resorted to to ascertain the state of the declarant's mind. The length of time that elapses between the declaration and the death of the declarant furnishes no rule for the admission or rejection of the evidence; though, in the absence of other evidence, it may serve as one of the exponents of the belief of the deceased that dissolution was or was not impending." It was incumbent on the State to lay a sufficient foundation for the admission of the declaration of the deceased, by showing that the deceased believed, at the time of the declarations which are offered in evidence, that her death was impending. This was not done.

In the middle of the afternoon she expressed a belief — not a hope, but a belief — that she would recover. Before this time, and while the prisoner was absent after a doctor, she said he, the prisoner, would bring none: he did not want any. It was clearly error to admit this declaration while she, the deceased, had strong hopes of recovery.

III. But it has been suggested that the objection to the admission of this evidence was not made in time.

The accused has a right to a legal and impartial trial;

and to insist that evidence, the tendency of which is to prejudice his case, and which is not legally admissible, shall be submitted to the jury for their consideration, because the objection was not made in time, is in violation of that principle of law, that the mere neglect to insist on a right, in a capital criminal case, is not a waiver of that right. But, in this case, there was not even a neglect to insist on the right; but the bill of exceptions recites the evidence which is objectionable,—the declarations of deceased,—and then proceeds: "The defendant's counsel objected to the testimony of witness as to deceased's dying declarations, upon the ground that no foundation had been laid for such testimony; which objection was overruled by the Court, and to which ruling defendant's counsel excepted." The bill of exception is very inartistically prepared. But the reasonable construction is, that the evidence was objected to at the time it was offered. I think, from the manner in which the facts are recited, that such was the case; but, whether it was or not, the result must be the same. In a capital case, the prisoner may, on motion for a new trial, bring before the Court, for review, any ruling which denies him a substantial legal right. See *The People* v. *Ah Fong*, 12 *California*, 348; *The People* v. *Beebe*, 6 *California*, 246; *The People* v. *Demmit*, 8 *California*, 423.

It is not necessary to examine the record further: this disposes of the case. The judgment is reversed, and a new trial granted.

CROUNSE, J.

The evidence introduced by the prosecution as dying declarations was brought in without a proper foundation having been laid: whether objection to its introduc-

tion was made in time strictly, is not clear. However, in a case of this kind, we will resolve any doubt in favor of the accused. The conviction of the defendant in the Court below resting wholly on circumstantial evidence, and the evidence thus improperly allowed being very important in the case, a new trial should be allowed.

Judgment reversed, and new trial ordered.

The People ex rel. Spaun v. The Mayor of Omaha.

MANDAMUS: *Municipal corporations.* The city of Omaha is not liable to process of garnishment.

The city of Omaha was indebted to one Lampiere in the sum of $320; and he assigned his demand to the relator, who duly presented it to the city council; by which body the demand was audited, and an order passed directing the mayor to draw his warrant upon the treasury for the same. But, prior thereto, certain creditors of Lampiere, in actions brought by them against him, sued out attachments, and caused notices of garnishment to be served upon the city. To these notices the city answered, that it was indebted to him in the sum above named. The mayor, therefore, refused to draw the warrant. Upon the relator's application, an alternative writ of mandamus was issued to, and duly served upon, the mayor, who showed these facts in answer to the writ. The relator thereupon moved the Court for a peremptory writ, which was refused. Thereupon he filed this petition in error.

Spaun & Pritchett, for plaintiff in error.

I. A municipal corporation is not liable to garnishee process. *Code of Nebraska*, sect. 208; *Burnham* v. *The City of Fond du Lac*, 15 *Wis.*, 193; 11 *Missouri R.*, 59; 2 *Mass. R.*, 37; 26 *Alabama*, 498; 29 *Tenn.*, 173; 8 *Maryland*, 95.

II. The money in question was not due, and was to become due *only* on completion of an executory contract, and performance of certain other conditions precedent; and hence cannot be held by garnishment. *Code of Nebraska*, sects. 244 and 246; *Drake on Attachment*, sect.

223; *Thomas* v. *Hillhouse*, 17 *Iowa*, 66; *The City of Newark* v. *Funk & Bro.*, 15 *Ohio State*, 462.

III. The defendant's answer to the application for the peremptory writ is insufficient: it does not state how the city was garnisheed, upon what officer process was served, what answer was made thereto, or whether any judgment was rendered thereupon. The whole current of authorities hold this answer to be insufficient. *Herman on the Law of Estoppel*, sect. 120; *Lowry* v. *Lumberman's Bank*, 2 *Watts & Sarg.*, 210; *Brown* v. *Somerville*, 8 *Maryland*, 444; *Merriam* v. *Rundlett*, 13 *Pickering*, 411.

IV. The duty of signing warrants on the treasury is especially enjoined upon the mayor by law. Sect. 43 of Act of Legislature of Nebraska, passed 1871, and which took effect March 1, 1871.

V. The plaintiff has no other remedy: the demand is conceded by the answer to be $320; and if sued, and judgment obtained against the city, it could only be enforced by mandamus, as no execution could issue thereon. Sect. 87 of Act of Legislature of Nebraska, passed 1871, entitled "An Act to incorporate Cities of the First Class."

Upon these authorities it is submitted that the order denying the writ should be reversed, and a peremptory writ awarded out of this Court.

No counsel appeared for the mayor.

MASON, Ch. J.

The question presented in this case — whether a municipal corporation in this State, established for the purpose of government, is subject to garnishee process — was, in the Court below, decided in the affirmative; and this writ of error is prosecuted to reverse that judgment.

Sect. 207 of the Code provides, that "when the plaintiff, his agent or attorney, shall make oath in writing that he has good reason to and does believe that any person or corporation, to be named, and within the county when the action is brought, has property of the defendant (describing the same) in his possession, if the officer cannot come at such property, he shall leave with the garnishee a copy of the order of attachment, with a written notice that he appear in court at the return of the order of attachment, and answer," as provided in sect. 221. This section reads as follows: "The garnishee shall appear as follows: If the order of attachment be returned during a term of court, he shall appear at that term; if the order be returned during vacation, he shall appear at the term next after its return."

He shall appear and answer under oath all the questions put to him touching the property of every description and credits of the defendant in his possession or under his control; and he shall disclose truly the amount owing by him to the defendant, whether due or not.

Sect. 208 provides for the service of the garnishee process, and reads as follows: "The copy of the order and notice shall be served upon the garnishee as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other officer of the same, or managing agent thereof." Our statutes provide for no such officer of a municipal corporation as a president; and a managing agent is to them unknown. It would not be contended that the city would be bound by service upon a policeman. The legislature did not contemplate the service of garnishee process upon municipal corporations created exclusively for the purpose of government; and hence no provision was made for service upon them.

We think from an examination of the statute relating to garnishment, and the service of process, that it is clear that the legislature did not intend to subject municipal corporations, erected for the purpose of government, to attachment and garnishee process. The city of Omaha is a public municipal corporation, created for the public benefit, and not subject to the same rules which govern private corporations. The legislature did not contemplate compelling this class of corporations to stand at the bar of the various courts of the State, and participate in controversies between debtors and creditors. The public interest might suffer, while the municipal authorities would be compelled to occupy their time over contests in which the public had no interest.

Public policy forbids the imposition of such a liability upon a corporation of a public and municipal character. The Court says, in *Hamilton* v. *The City of St. Louis*, 11 *Missouri*, 61, "To appreciate the consequences which would inevitably follow in the train of such proceedings, it is only necessary to refer to the large amount of revenue collected and disbursed by the city. If this disbursement is to be made through garnishment, which may be instituted in any county in the State against any creditor of the corporation, it must result injuriously to the prosperity of the city and of the public interest." *Hawthorne* v. *The City of St. Louis*, 23 *Missouri;* 26 *Alabama*, 498; 8 *Maryland*, 951.

It is not necessary to consider the other questions raised in this case.

It follows that the motion for the peremptory writ of mandamus should have been granted.

The judgment of the District Court is reversed with costs, and cause remanded for further proceedings, in accordance with this opinion.

Judgment reversed, and cause remanded.

Orr v. Orr.

PRACTICE: *Transcript.* A transcript of the record of the proceedings of the District Court filed in this Court must show upon its face when, where, and before what court, the proceedings were had, so as to make it appear that they were before a court known to the law, held at a time and place authorized by law, and were *coram judice.*

MASON, Ch. J.

This cause is submitted on the motion of Lotta A. Orr to strike the papers filed herein from the files, for the reason that no transcript of the record of the District Court has been filed in this Court.

Sect. 777 of the Code, under which this appeal was taken, reads as follows: "The appellant or appellants shall, within six months from and after the date of the filing in the register's office a notice of his appeal, procure from said register, and file in the office of the clerk of the Supreme Court of this State (Territory), a certified transcript of the proceedings had in the cause in the District Court, containing the pleadings and decree rendered, or final order made therein, and all the dispositions of record offered in evidence, and all other evidence of record offered on the hearing of the cause, and have the cause properly docketed in the said Supreme Court; and, on failure thereof, the decree rendered or final order made in the District Court shall stand, and be proceeded in as if no appeal had been taken." The voluminous papers filed in this Court do not purport to be a certified transcript of the proceedings had in this cause in the District Court. No reference is made to any court, nor does it appear that the proceedings were had before any court begun and held at any place by any judge

or other officers. It cannot be told, from the papers and what purports to be a transcript, that any proceedings have been had before any court or tribunal known to the laws of this State. The statute directs what shall compose the transcript brought to the Supreme Court on appeal. The parties may bring less if they agree, but cannot require the Court to act upon it; nor will it do so upon less than is necessary to enable it to determine whether there was available error in the proceedings of the Court below. It is incumbent on the appellant to bring to the Supreme Court a perfect record of the judgment and proceedings of the Court below on which errors are assigned. This is not done in this case. These papers do not purport to be the proceeding of any court: it is not pretended that the transcript of the record of the proceedings in any court is set forth in what purports to be the record in this cause. The record should show when and where, and before what court, the proceedings set out in the record took place, in order that it may be seen that they were before a court known to the law, and at a time and place authorized by law, so that it may appear from the record that the proceedings are *coram judice*. For the reason here expressed, the motion to strike the papers filed herein from the files of this Court should be sustained; and it is so ordered. See *Watt.* v. *Alvord*, 27 *Ind.*, 498; *Collin et al.* v. *United-States Express Company et al.*, 27 *Indiana*, 11.

Motion sustained.

J. M. Woolworth, for motion.

A. J. Poppleton, contra.

Barrett v. Turner.

SALE OF PERSONALTY: *Delivery.* Delivery may be actual or symbolical; but it must be some act indicating a purpose to pass possession of the property absolutely to another.

REPLEVIN: *Right to recover.* The defendant agreed to deliver to the plaintiff certain personal property in consideration of the deeding to him of certain land. Before performance, he learned of a defect in the title to the land, and placed the personal property in an agent's hands, with directions to deliver the same to the plaintiff upon payment by him of a certain sum. *Held*, that replevin would not lie.

This was replevin brought in the District Court for Otoe County, in which a judgment upon the verdict of a jury was rendered in favor of the plaintiff. The defendant brought petition in error to reverse the judgment.

CROUNSE, J.

On the twenty-first day of April, 1869, the defendant in error filed his petition in the Court below, complaining that he was the owner and entitled to the possession of the property claimed; and that the plaintiff in error, with Hawley, Burks, & Co., unlawfully detained the same. An order of delivery was issued, under which the property was taken, and passed to the plaintiff in the action. The claim of ownership is based on the following writing, introduced by him in evidence; to wit: —

"In consideration of the deeding to me of the north-east quarter and the north-west quarter of section No. 35, in township 6, north in range 7, east of sixth principal meridian, three hundred and twenty acres more or less, by Richard F. Barrett and wife of Brownville,

Neb., I hereby agree to deliver to the said Barrett five hundred thousand good merchantable Osage orange-plants, in good order, in bulk, on the cars at Phelps Station, on the St. Joe and Council-Bluffs Railroad, in season for setting the ensuing spring; said plants to be of the kind and size ordered by the said Barrett of me, at two dollars and twenty-five cents per thousand.

"Witness my hand and seal this ninth day of March, 1869.

(Signed) "J. B. TURNER."

By correspondence between the parties subsequent to this time, the place of delivery was changed from Phelps Station to Nebraska City. From some advices received by Turner, doubts arose in his mind as to the validity of the title to the land mentioned in the agreement. So, instead of sending any plants to Barrett, he sent five hundred thousand plants to Nebraska City, directed to his own name, accompanied with the following instructions to the railroad or express agent at that place; to wit: —

"JACKSONVILLE, April 9, 1869.

"I propose to deliver five hundred thousand good merchantable plants for a certain tract of land, — three hundred and twenty acres in Gage County, — sent to Richard F. Barrett of Brownsville, Neb., in place of receiving two dollars and twenty-five cents cash for them per thousand, according to the original order from Mr. Barrett, made last fall. But the land proved embarrassed by fault of a third party, as alleged before the plants were shipped. To give time to defend myself, and prevent needless delay and embarrassment to Mr. Barrett, I have ordered the plants shipped to my own name, so as to have them seasonably on the ground. This is to order that the express agent or the railroad agent in whose care these plants are is hereby author-

ized to deliver the whole or any part of said plants, according to the marking on the boxes or packages, to any person authorized to receive them by the said Barrett, on receiving two dollars and twenty-five cents per thousand ($2.25 per M), in deposit to my order for said plants, or for so many of them as may be delivered. This is done to prevent embarrassment in Mr. Barrett's work till I can send up an agent to fully adjust the matter. The plants were put on the cars to-day, tied in bunches, four bunches to the thousand plants, count guaranteed. I am to pay the freight.

"J. B. TURNER.

"P.S.—I will not order the money withdrawn till the matter can be adjusted, if within one month."

At the time of shipping, Turner sent a letter to Barrett, advising him what he had done. Barrett declining to receive the plants sent on the conditions above, he offered to Hawley, Burks, & Co. the freight and charges on the same; and, upon their refusal to deliver them, instituted this action. From this statement it will be seen that Turner's contract was executory. No specific plants were bargained for, or in contemplation of the parties. In a given time, and at a place agreed upon, he was to deliver to Barrett five hundred thousand plants of a certain quality. Whether he has ever performed his contract or not, is not known. If he has failed, he may be liable to an action for damages. But, until such delivery is made, I am at a loss to understand when or how any right of property arose which would enable the plaintiff to maintain this action. Delivery may be either real, by putting the thing sold into the possession or under the control of the purchaser; or it may be symbolical, where the thing does not admit of actual delivery, as by the key of a warehouse, or the delivery of

other *indicia*. But there must be a delivery one way or the other, or the property is not absolutely divested from the vendor. *Hunn* v. *Bowrie*, 2 *Caines*, 44. Delivery is not the result of trick or accident: it must have the purpose of the vendor. This may be evinced by marking or putting them apart for the use of the vendor, or in various ways. Whether the title to the land deeded to Turner was perfect or not, is immaterial. Turner chose to act upon the safe side, and refused a delivery under the contract. He subjected himself to an action for a failure to perform if the title was perfect; but, until he did perform, Barrett had no right to the plants in question.

Because there is justly owing me ten dollars, I am not warranted in seizing the first ten dollars I may see in my debtor's possession. Nor, should he deposit that sum with a third person, with instructions to deliver it to me only on my signing a receipt in full of all demands, could I rightfully take it from such third party under an order of delivery. It is not the office of an action of replevin to enforce specific performance in the sale of chattels, where the vendor fails to deliver the property as he may have agreed.

In *Updike* v. *Henry*, 14 *Ill.*, 378, the defendant agreed to make and deliver three lumber-wagons to the plaintiff within a given time. When the defendant had made that number, upon his refusal to deliver them to the plaintiff, the latter brought an action of replevin. The Court held that no title passed, and that replevin would not lie; that plaintiff's remedy was a suit on the contract. 1 *Hil. on Torts*, 618.

Among the instructions given by the Court, and to which the defendant excepted, was one charging the jury thus: "If Turner, after being paid for the plants, sent the same in pursuance of his contract to an express

agent in Nebraska City to be delivered to the plaintiff, and undertook to impose additional terms upon the plaintiff, or to exact an additional price for the same, the plaintiff became entitled to the plants as soon as they arrived at Nebraska, without complying with such additional terms." Such instructions should not have been given. I have given all the evidence relating to any delivery, from which it is clear there was no delivery under the contract. On the contrary, the defendant positively refused to so deliver the plants, and was particular to avoid doing any thing from which any such intention could be drawn. The circumstance that they were sent to Nebraska City does not affect his relation to the property. They were sent to himself, and put under the control of his own agents, who offered them to plaintiff on the terms specified in the instructions given them by Turner. These conditions seem fair under the circumstances; but whether so or not is immaterial. It was only by a compliance with them that the plaintiff could obtain possession of them. Choosing not to do this, his remedy would be one on the contract for damages.

The judgment of the Court below must be reversed, and a new trial ordered.

Stewart v. Otoe County.

COUNTY COMMISSIONERS: *Powers.* County commissioners have power to buy a poor-farm for the county, but not to give promissory notes or a mortgage in payment for the same.

Argument 1. The statute (*R. S.*, chap. xl. sects. 17–23) authorizes the establishment of a county poorhouse, and the taking of a grant of land therefor, whether the same be donated or purchased, and appropriating not to exceed twenty-five hundred dollars to the purchase. The expression of these powers excludes the authority to give notes and mortgages for deferred payments.

2. A mortgage is but a conditional sale, and may result in divesting the owner of all interest; and yet the statute has authorized the commissioners to sue the property of the county, only upon a vote of a majority of the electors of the county.

This was a petition in error filed to reverse a judgment of the District Court of Otoe County. The facts fully appear in the opinion.

Hall & Porter, and *Shambaugh & Richardson*, for plaintiffs in error, insisted, upon the statutes which are set forth in the opinion of the Court, that the commissioners had authority to purchase lands for a poor-farm on time, and secure the deferred payments by note and mortgage; and cited to the point, that municipal corporations, such as counties, cities, &c., created by legislative enactment, and acting within the scope of their authority, are liable on their contracts in the same manner and to the same extent that an individual would be. *Touchard* v. *Touchard*, 5 *Cal.*, 306; *Abbott's Dig. Law of Corps.*, 489, sect. 62; 9 *Exch.*, 55 *and* 84; 4 *Ellis & B.*, 397; 30 *Eng. L. and Eq.*, 120; 22 *N. Y.*, 258; *Abbott's Dig. Law of Corps.*, 870, sects. 2 and 5; *Akin* v. *Blanchard*, 32 *Barbour*, 527; *Abbott's Law of Corps.*, 256, sect. 399.

Counties, and boards of county commissioners, are

quasi corporations by reason of their creation by the legislative power of the State. 2 *Bour. Law Dic.*, 413; *Wright's O. Reps.*, 417, 494; 2 *Wallace*, 501; *Angel & Ames on Corps.*, 15.

The power conferred on the commissioners of a county to purchase property for the use of the county carries with it the power to use all means necessary to make the purchase available, and to carry out the intention of the legislature. 5 *O. S.*, 59; 6 *Cal.*, 1; 25 *Ind.*, 536; 1 *Barbour*, 584; 5 *Wis.*, 173; 11 *Wis.*, 306, 334; 10 *Wend.*, 342; *Angel & Ames on Corps.*, 16 and 17, sect. 111.

A power to purchase carries with it a power to purchase on credit, and give acknowledgments therefor. 14 *N. Y.* 356; 10 *N. Y.* (6 *Selden*), 449.

A contract made by a corporation must be enforced as against it, unless it is made out that the act conferring certain powers on such corporation clearly prohibits such contract. *Angel & Ames on Corps.*, 237, sect. 256–357.

D. Gantt, for the defendant, insisted that the county commissioners had no authority in law to make such contract as that alleged in plaintiff's petition; and that, even if made with all the necessary formalities of a contract for the sale of real estate, yet it is a nullity; that the county is a *quasi* corporation, and the commissioners can exercise no powers except such as are delegated to them, and can make no contract binding on the county except such as they are expressly authorized to make by statutory law.

I. Statutes *in pari materia* are to be construed together. The statutory provisions, the construction of which are involved in the determination of this case, are found in the seventeenth, eighteenth, nineteenth

and twenty-third sections of chap. xl., sect. 2 of chap. v., and the ninth chapter of the *Revised Code of Nebraska*, approved Feb. 12, 1866. All of these sections and chapters constitute only parts of one entire act; and to obtain a correct interpretation of the powers, duties, and limitations of the board of county commissioners, in respect to the purchase of a poor-farm, all these several parts of this act must be taken together as one law: although they form several parts of the same act, yet they are *in pari materia*, and must be construed together. *Wakefield* v. *Phillips*, 3 *N. H.* 295; *Ryegate* v. *Woodsboro*, 30 *Verm.*, 746; *Green* v. *Weller*, 32 *Miss*, 650; *Pennington* v. *Cox*, 2 *Cranch*, 52; *Ogden* v. *Strong*, 2 *Paine C. C.*, 584; *U. S.* v. *Fisher*, 2 *Cranch*, 386; *Merrill* v. *Gorham*, 6 *Cala.*, 41.

And it is said to be a settled rule of interpretation that the application of words of an act may be enlarged or restrained to bring the operation of the act within the intention of the legislature, when violence will not be done, by such interpretation, to the language of the act. *Maxwell* v. *Collins*, 8 *Ind.*, 38.

II. Counties are only *quasi* corporations, and have such powers only as are expressly granted by statute.

At common law, a county cannot sue or be sued; and statutes authorizing suits by or against them must be strictly complied with. *Schuyler* v. *Mercer & Co.*, 4 *Gilm.*, 20; *Lyell* v. *St. Clair*, 3 *McLean*, 580.

The people of a county have no capacity to take by grant; and it is a settled rule of the common law, that communities not incorporated cannot purchase and take loans by succession, gift, grant, devise, or purchase. *Jackson* v. *Cory*, 8 *John.*, 588. See also *Co. Litt.*, 3, *a;* 10 *Co.*, 26, *b; Com. Dig.*, title *Capacity*, *B*, 1.

But, under statutory provisions by which counties are made municipal organizations, they are only considered

quasi corporations. *Vankirk* v. *Clark*, 16 *S. & R.*, 239; *Irwin* v. *Commissioners*, 1 *S. & R.*, 505; *Lyon* v. *Adams*, 4 *S. & R.*, 443; *Price* v. *Sacramento*, 6 *Cal.*, 254; *Treadwell* v. *Commissioners*, 10 *Ohio* (*N. S.*), 181; *Hunter* v. *Commissioners*, 10 *Ohio St.*, 520.

And a grant of powers to such a corporation must be *strictly* construed. When acting under a special power, it must act strictly on the conditions under which it is given. *Treadwell* v. *Commissioners*, 10 *Ohio* (*N. S.*), 183; *Manuel* v. *Manuel*, 13 *do.*, 458.

III. The Board of County Commissioners can exercise no powers except such as are especially granted; and the grant must be strictly construed. On these points the authorities are numerous.

1. If a county authorized by law to appoint a commissioner to build a bridge according to a plan, and with materials directed by the County Court, appoint one with authority to build one according to such plan as he shall deem proper, the appointment is illegal, and his acts are not binding on the county. *County of St. Louis* v. *Cleland*, 4 *Mis.*, 84.

Under an act authorizing the relocation of the seat of justice of a county, the Board of Commissioners appointed A, with two other persons, to superintend the erection of public buildings. *Held*, that the county was not liable to A for any services rendered by him under said appointment. *Hoover* v. *Hoover*, 5 *Blackf.*, 182.

Commissioners were authorized to establish roads of a width not exceeding forty feet. An order by them establishing a road of undefined width is void. *White* v. *Conover*, 5 *Blackf.*, 462.

The hire of carriages by the sheriff, under the direction of the circuit judge, to convey the grand jurors to the county jail to inspect it, is no charge against the county, although the commissioners for many years past

have allowed such items. *Van Epes* v. *Commissioners, Court of Mobile*, 25 *Ala.*, 460.

Work was done in repairing a bridge under a contract with a board of supervisors, not in compliance with the regulations laid down in the act concerning roads and highways. *Held*, that the contract was not binding on the county, and that the contractor could not recover on it, and was properly nonsuited. *Murphy* v. *Napa Co.*, 20 *Cal.*, 497.

Boards of county commissioners are courts of limited and special jurisdiction; and the records must show, to make them evidence of the validity of the acts of the courts, that the requisitions of the statutes under which they acted were complied with so far as necessary to give them jurisdiction. *Rhode* v. *Davis*, 2 *Cart.* (*Ind.*), 53.

Again: county courts being courts of limited jurisdiction, it must appear of record, in all cases, that they had jurisdiction of the case decided by them. *Frees* v. *Ford*, 2 *Selden* (*N. Y.*), 176.

2. The county cannot create a debt, except by an express power granted.

The supervisors cannot create a debt or liability on the part of the county for any purpose, except as provided by law. *Foster* v. *Coleman*, 10 *Cal.*, 278.

The county auditor has no power to issue a bill of exchange, nor to give his warrant in the form and qualities of such instrument. *Dana* v. *San Francisco*, 19 *Cal.*, 486.

3. Their contracts must be made at their regular meetings.

An agreement of county commissioners, not made at a regular session of the board, but in vacation, is not binding on the county. *Campbell* v. *Breckenridge*, 8 *Blackf.*, 471.

STEWART v. OTOE COUNTY.

A contract made by county commissioners, to be binding on the county, must be made by the board at a regular session of their court. *Rhodes* v. *Davis*, 2 *Carter* (*Ind.*), 53.

IV. The statutes of this State do not authorize the purchase of a poor-farm on credit, and giving of notes and a mortgage to secure deferred payments.

LAKE, J.

The plaintiff brought his action in the Court below to recover damages claimed by him by reason of the breach of an alleged contract between him and the county commissioners, whereby they agreed to purchase of him certain premises to be used as a poor-farm.

The petition shows that the commissioners advertised for bids for a poor-farm, in which persons offering the same were requested to state the number of acres, the location, state of improvements, timber and water if any, conditions of sale, and price per acre.

In pursuance of this notice, the plaintiff offered his farm, consisting of three hundred and twenty acres, for the price of twelve thousand dollars, of which two thousand dollars were to be paid down, and the remainder in annual payments of two thousand dollars, with interest, until the whole amount should be paid,—the payments to be secured by mortgage upon the premises.

The bid was accepted by the county commissioners on the fifth day of January; at which time it was also agreed that the annual payments of principal and interest should be made on the first day of March in each year, and that the plaintiff should make his deed, and give possession of the premises, on the first day of March, 1870.

On the first day of March, 1870, the plaintiff exe-

cuted his deed, and tendered it, together with the possession of the premises, to the commissioners, and demanded a performance of the contract on their part, which was refused; in consequence of which he was damaged to the amount of several hundred dollars.

To the petition the defendant filed a general demurrer, which was sustained by the District Court; and the only question now presented for our consideration is. Does the petition allege facts sufficient to constitute a course of action?

First, then, had the county commissioners authority to bind the county of Otoe in a contract of the character of the one set forth? If they had, the ruling of the District Court upon the demurrer cannot be sustained.

That the county commissioners may purchase a poor-farm for the county is clear; but can they execute notes and mortgage in the name of the county in payment of the purchase money? This the contract stipulated should be done; and, because it was not done, this suit was brought.

There is no authority of law for the county commissioners to bind the county in the manner contemplated. They cannot give a promissory note, nor can they mortgage the property of the county. Should they formally do so, their action would be a nullity. In the purchase of land for a poor-farm, the authority of the commissioners of a county is very clearly set forth. The mode of raising the money, and paying it over, are all definitely stated. These statutes set a limit, beyond which they cannot go. They are a guide, not only to the commissioners, but equally so to all persons dealing with them, who must see to it that their contracts are within the boundaries thus described. To maintain an action against a county upon a contract, it must be

shown, that, in respect to both its subject-matter and terms, it is within the statute.

Sect. 17, chap. xl., provides "that the county commissioners in each county are authorized, whenever they see fit to do so, to establish a poorhouse;" and the next section provides that "they may take to the county, by grant, devise, or purchase, any tract of land not exceeding six hundred and forty acres for the purposes of said poorhouse."

Now, having authorized the purchase of the land for the purposes of a poorhouse, how may they pay for it? Sect. 19 of said chapter declares that said commissioners are hereby empowered to receive donations to aid in the establishment of such poorhouse; and also empowered from time to time, as they shall see fit, to levy and collect a tax, not exceeding one per cent, on the taxable property in the county, and to appropriate the same to the purchase of land, not exceeding the aforesaid six hundred and forty acres; and to erect and furnish buildings suitable for a poorhouse, and to put into operation and to defray the actual expenses of said poorhouse should the labor of the inmates be inadequate thereto. By sect. 23 of the same chapter, the commissioners are authorized, if they deem it to be for the interest of the county, to appropriate out of any other money belonging to the county any sum not exceeding two thousand five hundred dollars, for the purpose of purchasing a farm, and erecting thereon suitable buildings, as contemplated in the sections before referred to.

Here we find the authority, and indeed the only authority, for the purchase, and payment of money for, a "poor-farm" by the county commissioners; and here, too, are specially designated the money that may be used for that purpose, together with the mode of raising it. But there is not one word about mortgaging the

property of the county to secure the payment of the purchase-money at a given time. The statutes provide the only security that can be given. The public faith is pledged; and a tax, not exceeding one per cent, may be levied upon all the taxable property of the county annually, and, when collected, paid to the person entitled thereto by an order upon the treasurer of the county, payable out of that special fund. If the commissioners could pledge the property of the county by mortgage, it would follow, that, if the debt secured were not paid at its maturity, an action could be at once instituted to foreclose the equity of redemption, subjecting the county necessarily to expensive litigation. This result was never intended by the legislature; and therefore the authority to pledge the property of the county as security for the payment of its indebtedness has been most wisely withheld from its agents.

A mortgage of property is but a conditional sale, and may result in a complete divestment of all the owner's interest therein: and not only is there no express authority given in our statutes to the county commissioners to mortgage the real property of the county, but their right to sell or transfer it in any manner is most carefully guarded; for in no case can they do so unless first authorized by a majority vote of the electors of the county, as provided in sect. 16, chap. ix., of the Revised Statutes.

We conclude, therefore, that the contract upon which the breach is assigned was not within the statute; that the county of Otoe was not bound by its terms; and that the refusal of the county commissioners to abide by its provisions furnishes no cause of action to the plaintiff.

The ruling of the District Court upon the demurrer was correct; and its judgment must be affirmed.

Judgment affirmed.

Sutro v. Hoilo.

REPLEVIN: *Possession.* A party from whose possession personal property is taken in replevin may challenge the plaintiff's title, and defeat it by showing property in a third person.

——:——. In a case of contract of sale of personal property, possession may be recovered from the vendees in certain events while the right of property remains in the vendors; but, when the right of property has passed to the vendees, possession, being once complete in them, cannot be resumed.

DELIVERY OF PERSONAL PROPERTY *on sale.* If personal property be contracted to be sold, the vendee agreeing to some act upon delivery, possession obtained by him without performance does not vest the title in him.

——: *Waiver.* When goods are sold on condition of being paid for on delivery in cash or commercial paper, an absolute and unconditional delivery by the vendor, without exacting performance, is a waiver of the condition; and complete title passes to the vendee if there be no fraudulent contrivance to obtain possession.

——:——. Although usual, it is not necessary that the vendor should declare that he does not waive the condition, when the delivery is made without its performance.

STOPPAGE IN TRANSITU: *Definition.* The term *transit*, as used in the law relative to the right of the creditor to retake goods sold before delivery, is not confined in its meaning to the passage of the goods through the country, but includes their situation in every stage, from the time of passing out of the control and possession of the vendor into that of the vendee.

——:——. The accident of place is not a material circumstance; but the immediate relation of the parties to the goods is rather to be considered.

——: B and A, merchants in Omaha, ordered, through plaintiff's agent, goods of him, agreeing to give their notes at four months; and the defendant, as marshal, was in possession of their store on

delivery of the goods. B and A had filed petition in bankruptcy at arrival of goods, which were delivered to him by an expressman, without the presence or direction of the plaintiffs, or knowledge of B and A, and without delivery of the notes of B and A. *Held*, that the right of stoppage remained in plaintiffs, notwithstanding delivery to the defendant.

This was a petition in error, filed to review a judgment of the District Court for Douglas County. The facts are fully stated in the opinion.

Redick & Howe, for plaintiffs in error.

I. There was such a delivery of the goods as defeated the right of stoppage *in transitu* of Sutro & Newmark. *Biggs et al.* v. *Barry et al.*, 2 *Curtis*, 259.

The stoppage must be while *in transitu*, and before goods delivered at destination. *Congers* v. *Emis*, 2 *Mason, C. C. R.*, 236; *Opinion by Judge Story*, 2 *Kent*, pp. 539 and 544, 545; *Dixon* v. *Baldwin*, 5 *East's R.*, 175; 4 *Esp. R.*, 82; *Barret & Goddard*, 3 *Mason C. C.*, 107, where goods even remained in hands of vendor, being marked and set off, &c.

If consignments are landed at wharf, or put in warehouse, the *transitu* is at an end. 2 *Kent*, 243, and cases cited.

Buckley v. *Farness*, 15 *Wend.*, 137: "The goods must come to the actual possession, or to the end of their journey," says the Court.

Covell v. *Hitchcock*, 23 *Wend.*, 611: "The law appears to be well settled, that the right of stoppage terminates whenever the goods are or have been either actually or constructively delivered to the vendee. A delivery to a general agent is, of course, tantamount to a delivery to himself."

The idea that goods must come to corporal touch of

vendee is exploded. 2 *Kent*, 544; *Hoson* v. *Tibbets*, 13 *Wis.*, 79.

In the case at bar, the goods had been taken away by an expressman. Was he the agent of consignor? When he took possession of goods in his usual way, the delivery was complete, if indeed not before. Does it not show, that, at the place where he obtained them (warehouse), they were "*subject to the order*" of Bemis & Abbott?

Sawyer v. *Joslyn*, 20 *Vt.*, 172: "The right of stoppage *in transitu* ceases whenever the goods, in pursuance of the original destination, have come into either the *actual* or *constructive* possession of consignee." "When goods are landed at wharf, the *transitu* is ended." *Ibid.*

"The deposit of goods in a warehouse, 'subject to order' of consignee, is an executed delivery, *as effectual to defeat the right of stoppage* in transitu *as though actually deposited in warehouse of buyer*" (*Frazier* v. *Hilliard*, 2 *Strobh*, 309). *Hinkey* v. *Earle*, 8 *Ellis & B.*, 410; *Lane* v. *Robinson*, 18 *B. Mon.* (*Ky.*), 623.

"If goods are consigned to a certain place, and are there subject to order of consignee as to their future destination, the *transitu* is ended." *Hays* v. *Mourill*, 2 *Harris*, 48.

II. The failure to give the promissory notes was no reason for rescinding or avoiding the sale. *Biggs* v. *Barry*, 2 *Curtis*, 259; *Lord* v. *Goddard*, 13 *How.*, 198; *Commonwealth* v. *Eastman*, 1 *Cush.*, 221; *Chaplin* v. *Hoops*, 1 *Gray*, 172; *Ives* v. *Howland*, 8 *Metc.*, 377.

A. M. Henry, for defendant in error.

I. There was no such delivery of the goods to Bemis & Abbott as to deprive the plaintiff of their right of stoppage *in transitu*.

The delivery must be made directly to Bemis & Abbott, or constructively by delivery to their agents. Hoile was not in possession of the store as agent of Bemis & Abbott: therefore a delivery to him was not a delivery to Bemis & Abbott. *Williams on Pers. Prop.*, p. 98, *note; Edwards on Bailment*, p. 537; *Parsons on Merc. Law*, p. 62; *James on Bankruptcy*, p. 56; *Story on Sales*, p. 273; *Mottram* v. *Heyer*, 5 *Denio*, p. 629; *O'Neil* v. *Garrett*, 6 *Iowa*, p. 484; *Buckley* v. *Furness*, 15 *Wend.*, p. 137; *Covell* v. *Hitchcock*, 23 *Wend.*, p. 611; *Naylor* v. *Dennie*, 8 *Pick.*, p. 198; *Stubbs* v. *Lund*, 7 *Mass.*, p. 453; *Cox* v. *Burns et al.*, 1 *Iowa*, p. 64; *Aguirre* v. *Parmalee*, 22 *Conn.*, p. 473; *Druath* v. *Broomhead*, 7 *Barr.*, 301.

II. Said goods were not, at the time this suit was brought, assets of Bemis & Abbott.

1. They were the property of Bemis & Abbott, only as subject to the right of stoppage *in transitu* in Sutro & Newmark, the vendors.

2. The right of property, as well as the right of possession, in said goods, vested at once in Sutro & Newmark, when demand was made upon Hoile; and,—

3. As demand was made before suit was brought, the said goods were not assets of said bankrupt.

III. 1. When one of two contracting parties fails to fulfil his part of the contract, the other party may consider the contract at an end, and act accordingly. When Bemis & Abbott failed to give their note as agreed, the other party, Sutro & Newmark, were released from their contract; to wit, the delivery of the goods.

2. When one of two contracting parties puts himself in a position to be incapable of fulfilling his part of the contract, the other party may rescind the contract. When Bemis & Abbott filed their petition in

bankruptcy, they put themselves in a position to be incapable of fulfilling their part of the contract; and therefore it was left optional with the other party, Sutro & Newmark, to complete sale by delivery or not. *Parsons on Contracts*, vol. ii. p. 191, *N.; James on Bankruptcy*, pp. 36, 37, 40, and 56; *Story on Sales*, pp. 371, 389.

CROUNSE, J.

This is a case of replevin tried in the District Court for Douglas County. The trial was had before the court without a jury; and judgment given for the plaintiffs there, Sutro & Newmark. These facts appear: On the 18th of February, 1870, Bemis & Abbott of Omaha, through a travelling agent of Sutro & Newmark doing business in New York, ordered from the latter a quantity of cigars at a price agreed upon, and for which they were to give their note payable in four months. Before the arrival of the cigars, and on the 14th of March, Bemis & Abbott filed with the register in bankruptcy their petition asking to be declared bankrupts; and the 6th of April was the time fixed for the meeting of creditors and the election of an assignee. On or about the 21st of March, an expressman brought the cigars to the store lately occupied by Bemis & Abbott, which, together with the goods of Bemis & Abbott, was in possession of Hoile, who was claiming to hold as United-States marshal under a warrant issued by the register. Bemis & Abbott never gave, or offered to give, their note in payment for the cigars: they never received them personally, or ever assumed to exercise any control over them. A short time after the arrival of the cigars, they were demanded of Hoile, who refused to give them up. Beyond that of naked possession, I believe it is not claimed that Hoile had any interest in the cigars in question;

nor do I see how he could have. He was neither agent of Bemis & Abbott, nor assignee in charge of their assets. What authority there was for issuing the warrant by the register is not shown. But, with mere possession in himself, he could challenge the plaintiffs below to show a better title, and could fortify himself by establishing property in third persons. This he did by attempting to show that the cigars were among the assets of Bemis & Abbott. In other words, while having no individual right to the property himself, he sought to protect his possession, and defeat Sutro & Newmark from recovering the cigars they had lately owned in New York, by asserting property through those who had never paid nor offered to pay anything, and who were able to pay nothing for them. The technical rule of law which can sustain a claim so opposed to equity and common justice should be made very clearly to apply. One of the express conditions upon which this sale was made was, that the vendees were to give their note payable in four months. Another condition, attaching as strongly as though expressed in the most explicit language, was, that the note should be that of Bemis & Abbott solvent, and not bankrupts; and, although we may naturally surmise that the failure of Bemis & Abbott was the immediate occasion or inducement for the proceedings of Sutro & Newmark to recover the cigars, their right to insist on the former condition is not to be prejudiced by such consideration. Two points are thus presented,—one going to the right of property, and the other to the right of its possession,—both involving a consideration of the questions of delivery to the vendees. In the one case, with the right of property still vested in the vendors, possession may in certain events be recovered from the vendees; while, when the right of property has passed to the

vendees, its possession cannot be resumed when once complete in them. In whom was the right of property, then, when the demand was made of Hoile?

No time appears to have been fixed for the giving of the note. This must be referred to the law, then, which says payment and delivery are concurrent acts. 2 *Kent*, 496. None was given, and none offered, when the goods came to Hoile's hands. Counsel seek an apology for this in the testimony of Abbott, one of the vendees, who says he expected the note to be sent with the invoice of goods. He swears, however, that the giving the note was an express agreement; and in this he concurs with the other witness: and, although he may have "expected" the note to be drawn and sent, that circumstance is too small and unsubstantial to weigh here. The signing and returning of the note is the important circumstance. That has never been done or proposed since the receipt of the goods. But, it is said, permitting the goods to come into the store without insisting on this condition was a waiver of it. I am not unmindful of the rule, that, when goods are sold on condition of being paid for on delivery in cash or commercial paper, an absolute and unconditional delivery of the goods by the vendor, without exacting at the time of delivery a performance of the condition, is a waiver of the condition of the sale; and a complete title passes to the purchaser, if there be no fraudulent contrivance on the part of the latter to obtain possession. 2 *Kent*, 296; *Chapman* v. *Lathrop*, 6 *Cow.*, 110; *Smith* v. *Dennie*, 6 *Pick.*, 262; *Smith* v. *Lynes*, 1 *Seld.*, 41; *Lupin* v. *Marie*, 6 *Wend.*, 77. Whether the delivery is absolute or conditional must depend on the intent of the parties at the time the goods are delivered. *Furniss* v. *Hone*, 8 *Wend.*, 256. It is usually signified by refusing to deliver the goods without an immediate compliance with the con-

dition. *Lupin* v. *Marie*, *supra*. Yet, though important, it is not absolutely imperative that the vendor declares that he does not waive any condition of the sale at the time of delivery to the vendee. *Smith* v. *Dennie*, 6 *Pick.*, 262; *Smith* v. *Lynes*, 1 *Seld.*, 45. The situation of the parties, the nature of the transaction, the presumption in favor of honest dealing, and like considerations, may be entertained in determining whether any of the conditions of the sale have been waived. When the contracting parties are present, the vendor may cling to his goods till the payment is made. Here it was not practicable for the vendors to give open and positive expression to their determination to insist upon the giving of the note before allowing possession of the property to go to Hoile. They were warranted in presuming, on the honesty of Bemis & Abbott, that their note would be returned according to agreement. To presume otherwise would be to impute fraud to Bemis & Abbott: for where payment is expected simultaneously with delivery, and is omitted, evaded, or refused by the vendee on getting the goods under his control, such delivery is but conditional; and the non-payment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have a right instantly to reclaim the goods. 2 *Kent*, 497. There is nothing in the case to raise a suggestion that Sutro & Newmark ever designed to waive the giving of the note. In *Smith* v. *Dennie*, *supra*, goods were sold on the express condition that the vendee should give an indorsed note for the price. The clerk of the vendor delivered the goods to the vendee without any reference to the condition; and they remained with him eight days, during which time no demand was made for the note or goods. It was there held that there was a waiver of the condition.

Chief Justice Parker, in giving the opinion of the Court, says, "There is nothing in the case from which an intention to hold on, upon the condition, can be inferred; no declaration at the time, which, though not necessary, is important; and no call for security until it was forgotten or abandoned; and perhaps never would have been recurred to if the goods had not been attached." In that case the parties were present at the time of delivery; and though, in the language of the judge, "not necessary," yet it was "important" to insist upon the condition of sale. Here the parties were hundreds of miles apart, and the goods and note to be exchanged by public carriers and the post. There the property passed immediately into the hands of the vendee, who was allowed to retain it, till other parties, acting on the belief that it was his, proceeded to attach it. Thus the cigars never came into the hands, or under the personal control, of the vendees: the rights of no third parties had attached, nor was any one induced to act because of such possession, before the vendors sought to recover the property. A demand was made upon Hoile as promptly as could be expected under the circumstances, and should have been complied with. For these reasons, the judgment of the Court below is right.

But viewing the sale as for credit simply, and the case one where the right of stoppage *in transitu* is sought to be exercised by the vendors, — and this was the theory upon which the discussion mostly proceeded in this Court, — I am far from the opinion that they should not recover on this ground. In view of the conclusion I have expressed upon the other branch of the case, I deem it unnecessary to discuss this at any length; much less to examine the numerous cases cited, and attempt to reconcile them or apply them to this.

The cases are so numerous, and so various in their facts, that it is not surprising that some apparent or real confusion should exist among them. It will be found simpler to keep in view the rule, and the reason of it, than to wander off into the field of cases.

Strong, J., in *Harris* v. *Pratt* (17 *N. Y.*, 263), says, "The right of stoppage *in transitu* on a sale of goods on credit arises when the vendee becomes insolvent after the sale, and before the goods have been actually delivered to him, or to his agent for him, having some authority in respect to the goods unconnected with their transit, as to keep or dispose of them. The basis of this right is, that the insolvency of the vendee was not contemplated by the vendor in the sale; and that it is plainly just that he should, on account of that unforeseen event, endangering the loss of the price to be paid, be permitted to reclaim the goods, and keep them as security for payment at any time before a delivery terminating their transit. The right is limited to that period, and ends with such a delivery. It is a right, which, from its equitable nature, is regarded with favor; and the rules relating to it are applied with great liberality to the vendor, in furtherance of justice." Transit, as here used, and as is understood by its use in the books, is not confined in its meaning to the passage of the goods through the country, as from New York to Omaha, but includes their situations in every stage, from the time of passing out of the control and possession of the vendor into that of the vendee. The accident of place is not a material circumstance; but the immediate relation of the parties to the goods is rather to be considered. Had Bemis & Abbott intercepted the goods at Chicago instead of Omaha, the right of stoppage *in transitu* would have ended there. 2 *Kent*, 547. So, if, before the goods had reached Omaha, Bemis & Abbott had removed

to Cheyenne, the right of stoppage would not have terminated with Omaha, even though the goods had been received and forwarded at Omaha by some person acting under the direction of Bemis & Abbott. *Harris* v. *Pratt*, 17 *N. Y.*, 249. So, while in the same warehouse, the delivery of the vendor's key to the vendee, paying the vendor rent for the goods left there, lodging with the warehouseman the order of the vendor, marking the goods by the vendee, are all circumstances to show that it is not the particular place, but that it is the possession or control given or taken by the parties, which determines the point where the transit may be considered complete. Again: suppose Bemis & Abbott to have been removed to some other part of the town when the goods arrived: can it be contended that the mistake of some ignorant expressman in leaving them at their old store, but which was then in possession of a stranger to both parties, is a delivery to Bemis & Abbott? If I am right in these several propositions, it is but one step to the case before us. Here the goods never reached the vendees; in fact, they never knew of their arrival even, from what I can gather from the record. No one acting for them ever received them. But Hoile, who seems to have intruded upon the premises to the exclusion of Bemis & Abbott and all others, uses them as a trap or net to catch all that comes that way. Had he been out of there, Bemis & Abbott would not have received the goods, in all probability; and Sutro & Newmark might have repossessed themselves of them before their right to do so was gone; Hoile being in no sense the agent of Bemis & Abbott, and the cigars never having been actually delivered to the vendees, or to their agent for them, having some authority in respect to them unconnected with their transit, or to keep or dispose of them." This case falls within the rule I have

cited, permitting the vendors to resume possession of the goods.

The judgment of the Court below should be affirmed.

Judgment affirmed.

Brittle v. The People.

THE CONSTITUTION. *The history* of the formation and adoption of the constitution of the State of Nebraska stated.

——: *Jurisdiction to determine its adoption.* The question, whether a State constitution was regularly and legally adopted after the same has been acted upon, and the State government is, in fact, being administered under it, is a political rather than a judicial question. A court organized under a constitution would be *felo de se* if it should declare such constitution null for irregularity and illegality in its adoption.

——: *Amendments by Congress.* When a constitution has been adopted by the people of a Territory preparatory to admission as a State, and Congress prescribes certain changes and additions to be adopted by the legislature as part of the constitution, and such changes and additions are declared to be fundamental conditions of the admission of the State, and the legislature accept such changes, additions, and conditions, and the State is thus admitted, they become thereby a part of the constitution, and binding as such, although not submitted to the people for their approval.

ADMISSION INTO THE UNION. *Congress* is vested with the sole power of admitting new States into the Union.

A COLORED MAN *has the right to sit on a jury* under the constitution of the State of Nebraska.

This was a writ of error to the District Court of Douglas County. The plaintiff in error was indicted in that Court for burglary; and the plea of not guilty was put in by him. The cause having been moved for trial, the names of persons summoned on the regular panel were called, and among them that of Howard W. Crossley, who was a colored man; for which sole reason the defendant challenged him as not competent to sit on a jury. The Court overruled the objection.

BRITTLE v. THE PEOPLE.

The trial resulted in a verdict of guilty. Motions for a new trial and in arrest of judgment were overruled; and judgment was entered, and sentence pronounced. The ruling upon the challenge of the colored juror is assigned for error.

R. Townsend, for plaintiff in error.

I. All free *white* males otherwise qualified, and none others, are competent jurors in this State. *Revised Statutes of Nebraska*, p. 509, sects. 657, 658.

The above statute is not in conflict with the National Constitution. The Thirteenth Amendment to that instrument simply abolished slavery; the Fourteenth Amendment defined citizenship, and secured civil rights to *all* citizens; the Fifteenth Amendment prohibits any distinction on account of color in the matter of the *elective franchise.*

Negroes are not competent jurors on the mere ground of citizenship. The Fourteenth Amendment makes *all persons* born or naturalized in the United States citizens thereof, and of the State wherein they reside. (See first section of Fourteenth Amendment.) All infants and all women, black as well as white, born or naturalized in the United States, are citizens thereof, and of the State wherein they reside; but it is not pretended that *their* citizenship gives *them* the right to vote or hold office, or makes *them* competent jurors. See *Webster's Dictionary* for definition of word "person."

And the second section of the Fourteenth Amendment clearly implies that the rights guaranteed by said first section are only such rights as are in their nature fundamental, — the natural rights of persons as defined by Blackstone, — the right of personal liberty, the right of personal security, the right of private property. For

said second section admits the power of States to deny or abridge the elective franchise; and, if not potent enough to invest with *that* coveted boon, how can it be said that this Fourteenth Amendment had the mystic power to regulate the less important matter of the competency of jurors?

Sect. 2, article 4, United-States Constitution: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." Under this provision, it has been decided that the *privileges* and *immunities* secured "are only such as are in their nature fundamental." 4 *Washington Circuit Court Reports*, 371; 18 *How. U. S.*, 591.

Fundamental rights belong to the black boy or girl, the white boy or girl, the black woman and the white woman, as well as to the black male adult. That it was the object of sect. 1, Amendment XIV., simply to secure *such* rights to all these persons, is evident from contemporaneous history. Although Amendment XIII. had abolished slavery, yet, under the Dred-Scott decision, many States denied to free persons of color the right to sue or be sued, to make contracts, or to hold property. And this section of Amendment XIV. was passed to avoid the Dred-Scott decision, and secure these natural rights to the negro, male and female, infant and adult. *Dred Scott* v. *Sanford*, 19 *How. U. S. R.*, 393; and see pp. 4, 6, 13, and 22, of the *Report of the Joint Committee on Reconstruction made to Congress in the Year* 1866.

II. Service as a juror is not a personal right. It is a duty, service, or liability, for the non-performance of which a *penalty* is imposed. *Revised Statutes of Nebraska*, p. 511, sect. 667. No penalty is ever imposed for the failure to exercise an absolute personal right; as, for instance, fining a citizen for not suing out a writ

of *habeas corpus*, or for not bringing any ordinary private action.

III. The elective franchise, as guaranteed by the Fifteenth Amendment, is not the test as to qualifications of jurors. All the States have, from their origin, applied other tests; such as property qualifications, age, sound mind, and discretion, &c. As the jury law of Nebraska now stands, the county commissioners have a large discretion as to whom they shall place on the jury lists. But *query:* If the legislature can confer such discretion on the county commissioners, can it not exercise such discretion itself, and exclude any person, or class of persons, whom it may deem not of sufficient discretion? And *query:* If the exercise of such discretion by the legislature be unconstitutional, is not the exercise of the like discretion by the county commissioners equally obnoxious? And *query:* If the elective franchise invests with the "right" to serve as a juror, what power has the legislature to affix other qualifications? Strict personal rights are enjoyed without qualifications as to *age*, *sex*, *bodily disability*, or *sound discretion.*

And again: every *right* admits of a *remedy* for its denial. But where is the remedy to compel the county commissioners to place A B's name on their jury-list? The remedy is not in the courts: it can be had only at the ballot-box, the sole medium (aside from special statute relief) for correcting evils not amounting to the violation of strict personal rights.

IV. The Fifteenth Amendment conferred nothing of its own force but the elective franchise. It was at first proposed to include therein the right to hold office; which is certainly more in the nature of a right than is service as a juror. But that proposition was voted down.

The condition annexed to the admission of Nebraska

into the Union is to the same effect as sect. 1 of Amendment XIV. and Amendment XV. It confers the same rights, and no more.

S. Robinson, Attorney-General, for the People.

I. That there shall be no denial of the elective franchise, or of any other right to any person (excepting Indians not taxed), by reason of race or color, is a part of the fundamental, organic law of the land. *Act of Feb.* 21, 1867; *Session Laws of* 1867, 30, 31.

Granted, that the right to vote, the right to hold office, the right to serve as a juror, are not in their nature fundamental.

They belong to a man, not by virtue of his relation to the rest of mankind as a fellow-man, but by virtue of his relation to the government under which he lives as a citizen thereof; and are, in their nature, wholly fictitious. And herein, I think, lies the true ground of the distinction between such rights as are in their nature fundamental and such as are not so.

But the act above cited is not limited by express words to fundamental rights; nor am I able to see where lies the presumption that the clause "or of any other right" refers to fundamental rights only. The elective franchise, a right confessedly not fundamental, is not to be denied, *nor any other right.* There is no reason to regard the term "right" as meaning fundamental right; but since it is used along with the right of franchise, a right not fundamental, the strong presumption is the other way; and that no person shall be deprived of any right, privilege, or franchise whatsoever, which is justly his by virtue of the relation which he sustains to the society or government of which he is a member or citizen, by reason of race or color: for these rights are far

more numerous, including the right to sue, the right to serve as a soldier, &c., and scarcely less important, than those natural rights which we call fundamental.

II. I have not seen the case, cited by counsel for the plaintiff in error, which passes upon that section of the Federal Constitution which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" but I clearly see that the rights there secured ought to be held to be such only as are fundamental.

For it would be *unequal*, *unjust*, and *unreasonable* to hold that one who is not a citizen of a State, and performs none of the duties devolving on a citizen, is entitled to vote, or to hold office, or to any of the rights which I have denominated fictitious, by virtue of any except the most express and unequivocal enactment; though the language of that section might, without violence, when taken by itself, cover all rights whatsoever.

But it is *equal*, *just*, and *reasonable* that the section of our organic law which I have quoted, viewed in any and every light, should be construed to include all rights, whether fundamental or otherwise.

III. To serve as a juror is a right, as much as to hold office, though not always so desirable. That a penalty is imposed is merely accidental; since it would be competent, if necessary, to impose a penalty for a failure to perform the functions of an office to which one might be chosen, as sometimes is done.

Mr. Townsend, for plaintiff in error, in reply.

I. The class of rights termed by the learned attorney-general "fictitious" always have been and are subject to amendment or repeal. To adopt the construction of the Act of Feb. 21, 1867, for which he contends, would

be to determine that the legislature has no power to abolish any mere statutory or conventional right existing at the time of the adoption of the above-mentioned organic provision. And again: it is apparent, from the fact that the elective franchise is the only right *specially* named in said organic provision, that it was necessary to name it *specially*, as the general class of rights therein secured did not include it. nor any other right not fundamental.

II. So far as the Act of Feb. 21, 1867, is in conflict with the Fourteenth Amendment to the United-States Constitution, the latter repeals the former. The Amendment is the later law. If the former prohibited Nebraska from regulating the elective franchise and other conventional rights, the latter permitted her to resume such power of regulation. See sect. 2, Amendment XIV. And if the former allowed discrimination in the matter of rights and privileges, as between males and females, the latter clearly does not. See sect. 1, Amendment XIV. Nor can the legislature be permitted to deny any thing to a female simply by designating the thing denied a "right," instead of a "privilege" or "immunity;" for, if there be any variance in the definition of these several terms, that of the word "right" is the more strict and narrowed. A right may be *demanded* as something which the State is bound to concede to the individual; while "privilege" or "immunity" presupposes a grant from motives of favor or policy.

III. The term "electors" in the jury law of Nebraska means now what it meant when enacted, — electors for all purposes, National as well as State.

CROUNSE, J.

On the trial of this cause in the Court below, Howard

Crossley, a colored man, was allowed to sit as one of the jury that returned a verdict of guilty against the plaintiff in error. Exception was taken to the holding of the Court permitting him to sit. This exception presents the principal question for our decision.

Prior to the admission of Nebraska as a State into the Union, none but *white* males were allowed by the laws of the Territory to sit upon juries. As part of the Act of Congress, passed Feb. 9, 1867, admitting the State, it is declared, "That this act shall not take effect, except upon the fundamental condition, that, within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed."

Two questions have arisen under this act, — the first presented by counsel for the plaintiff in error, who insists that the words "any other right" do not include service on a jury: the second is raised by a member of the Court in the counsel-room for the first time, who contends, as I understand it, that this clause, denominated the "fundamental condition," recited above, is not a part of the organic law of the State.

As a rule, objections not raised upon the trial of causes in the Court below should receive no attention here; but, inasmuch as the one suggested is of great importance, it is well to state briefly the position of the majority, and fix, as far as a decision of this Court can, the right of the colored man in this State.

Nebraska, as a part of that vast tract of country ceded to the United States by France under the treaty concluded at Paris April 30, 1803, was organized as a Territory by Congress, in the year 1854, by what is familiarly known as the Kansas-Nebraska Act. The appointment of a governor, secretary of state, judges, and marshal, and the election from time to time of a legislature,

were provided for in this organic act, and a territorial government established and conducted under it.

In April, 1864, Congress passed an enabling act, providing for the election, in June of that year, of delegates, who should meet in convention in July following, for the purpose of framing a constitution, with a view to the admission of Nebraska as a State into the Union. The sentiment of the people at that time being opposed, evidently, to becoming a State, the delegates chosen in the manner provided, upon meeting, refused to make a constitution, and adjourned *sine die*.

Without any further act of Congress, the territorial legislature of 1866 submitted a proposed constitution to the electors, to be voted on in June of that year, with directions to choose, at the same time, legislative, executive, and judicial officers for the proposed State. The governor, secretary of state, and auditor of the Territory, were, by the act submitting the instrument, constituted a board of canvassers; and they declared the constitution adopted by a majority of a hundred.

The legislature thus chosen assembled in July, the time prescribed, and chose two senators to represent the State, who, together with the representative in Congress, took the proposed constitution to Washington, and prayed Nebraska's admission. This constitution, in prescribing the qualifications of electors, limited the right to vote to white males. To this restriction Congress took exception, and, after much debate, on Feb. 9, 1867, passed an act as follows:—

"An Act for the Admission of the State of Nebraska into the Union.

"Whereas, on the twenty-first day of March, A.D. 1864, Congress passed an act to enable the people of Nebraska to form a constitution and State government, and offered to admit said State, when so formed, into

the Union, upon compliance with certain conditions therein specified; and whereas it appears that the said people have adopted a constitution, which, upon due examination, is found to conform to the provisions and comply with the conditions of said act, and to be republican in its form of government, and that they now ask for admission into the Union: therefore

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the constitution and State government which the people of Nebraska have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed; and that the said State of Nebraska shall be, and the same is hereby, declared to be one of the United States of America, and is hereby admitted into the Union upon an equal footing with the original States in all respects whatsoever.

"Sect. 2.—*And be it further enacted*, That the said State of Nebraska shall be, and is declared to be, entitled to all the rights, privileges, grants, and immunities, and to be subject to all the conditions and restrictions, of an act entitled 'An Act to enable the People of Nebraska to form a Constitution and State Government, and for the Admission of such State into the Union on an Equal Footing with the Original States,' approved April 19, 1864.

"Sect. 3.—*And be it further enacted*, That this act shall not take effect except upon the fundamental condition, that, within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed; and upon the further fundamental condition, that the legislature of said State, by a solemn public act, shall declare the assent of said State to the said fundamental condition, and shall transmit to the President of

the United States an authentic copy of said act; upon receipt whereof, the President, by proclamation, shall forthwith announce the fact: whereupon said fundamental condition shall be held as a part of the organic law of the State; and thereupon, and without any further proceeding on the part of the State, its admission into the Union shall be considered as complete. Said State legislature shall be convened by the Territorial governor within thirty days after the passage of this act, to act upon the condition submitted herein."

The State legislature was convened by the governor accordingly; and on the twentieth day of February, 1867, after reciting the act of Congress, and their convention under it, declared: —

"*Be it enacted by the legislature of the State of Nebraska*, That the act of Congress of the United States, entitled 'An Act for the Admission of the State of Nebraska into the Union,' passed Feb. 9, 1867, be, and the same is hereby, ratified and accepted; and it is hereby declared that the provisions of the third section of the said act of Congress shall be a part of the organic law of the State of Nebraska."

This action was certified to the President, who, on the second day of March, 1867, made proclamation as required.

Thereupon our senators and representatives were admitted to seats in Congress; the Territorial officers retired; those elected for the State nearly a year before entered upon the discharge of the duties appertaining to their respective offices; and a State government went into operation. State officers have repeatedly been elected, and senators and representatives have been chosen to represent us in Congress. Many and important laws, made necessary because of the transition from Territorial to State government, have been enacted

by the legislature. The lands, to the value of millions of dollars, given by this act, as well as under general laws of Congress, to new States on their admission, have been accepted and appropriated. Colored men, without objection, as far as my knowledge extends, have voted at each election; and one of the first acts of the State, through its legislature, was to inscribe upon its great seal the motto, "Equality before the law:" and, in fine, every thing has been done in recognition of a State government, and of the extent of the organic law as it passed from the hands of Congress, until this case arose. As our very right to sit here as a Supreme Court depends on the existence of a State organization, based on a constitution creating our existence and defining our powers, the fact that such government and such constitution exists must at once be conceded by us.

But, as I understand the objection, it is contended that the constitution by which we are bound is the one submitted to Congress when admission was asked, and does not include the fundamental condition forming part of the act of admission; that Congress was not competent to impose such condition, and that the legislature of the State, having no inherent power so to do, and not being elected with reference to such action, or instructed to that end, could not accept the condition so as to bind the people of the State; that, to be binding on the State, it must have been submitted to a vote the same as was the constitution proper. In short, the argument amounts to this, — that the constitution, saving the fundamental condition, is a valid and legal instrument, because it was submitted to, and voted upon by, the people; while the fundamental condition is not valid or binding, because it was not so submitted.

Were we able to refer to any known law, or to any uniform precedent, governing the introduction of new

States into the Union, and were this a tribunal to which appeal might be made to enforce an observance of that law or custom, our duty in the premises would be comparatively simple. But the matter of admitting States is purely a political question, committed to another forum altogether, whose action, as will be seen by a reference to the history of the formation of State governments, has been as various, almost, as the occasions in which States have been admitted. When, however, a State government has been formed, and the State admitted into the Union with a given constitution, courts must recognize, and are as fully bound by, the fact as the merest citizen; and I submit, with all respect, that we can as well dispute the validity of the United-States Constitution, because the convention framing it, disregarding all instructions limiting its members to making amendments to the old articles of confederation, assumed to make an entirely new frame of government, as we can inquire into any supposed irregularities or illegalities which may have entered into the construction of our own. Lest there should be any doubt upon this position, we have only to pause and see to what alarming or absurd conclusions the contrary doctrine would lead us.

As we shall see more fully hereafter, the people of the Territory cannot frame a State government, and force themselves into the Union. Congress, under the Constitution, is charged with the duty of making all needful rules and regulations respecting the territory of the United States. It has given to Nebraska a Territorial form of government. A State and Territorial government could not possibly exist at one and the same time. This is seen by the fact, that, until our admission, the Territorial government continued in full force, notwithstanding the vote of June, 1866. What we chose to style a State constitution was at most a proposed instru-

ment, and of no more force until admission than blank parchment. Those who had been chosen as State officers had no offices to fill, and were mere private citizens, governed by the laws and officers of the Territory. It was Congress alone that could admit the State. But Congress refused to admit us with a constitution including the word "white," and proposed to accept us with a constitution in all respects like the one we sent up, except that the word "white," by a fundamental condition attached, was stricken out.

Now, if we inquire into the manner in which this fundamental condition was imposed, and say that it would be binding if it had the vote of the people, and not binding if it lacks it, we can make the same inquiry with reference to the remainder of the instrument.

As is well known, the constitution was originally drafted in a lawyer's office by a few self-appointed individuals. These importuned the legislature then sitting to submit it to a vote of the people. At the start, then, we must reject the instrument, or admit that any one may draft the organic law of a proposed State who chooses to volunteer.

The legislature of the Territory owes its existence to the organic act of Congress, passed in 1854, which empowers it to legislate on all "rightful subjects of legislation." To undertake to subvert the very government under which it assembles and acts is not a "rightful subject of legislation:" on the contrary, it is revolutionary. These "rightful subjects" must be such as are usual, and as are for the benefit of the governed, and must be acted upon in recognition of the existence of the Territorial government. The legislature of the Territory have not inherent or original power to make or submit constitutions. Whatever they may do in that direction is without authority, and is done only by indul-

gence of Congress. Authority is scarcely needed on this point; but I extract from a long opinion of the Attorney-General of the United States the following: —

"The Territorial legislature cannot, without permission from Congress, pass laws authorizing the formation of constitutions and State governments. All measures commenced and prosecuted with a design to subvert the Territorial government, without the consent of Congress, are unlawful." Vol. ii., *Opinions of Attorneys-General*, p. 726. *Vide* also *Webster's Works*, vol. vi. p. 485; *Jam. Con. Convention*, 200.

This is conceded to be so by Reverdy Johnson, one of the ablest opponents to Nebraska's admission in the United-States Senate. *Cong. Globe*, i., 2d session 39th Cong., p. 356.

So, in point of legality, there was no more authority in the Territorial legislature to direct the people to vote upon the constitution than might be possessed by a religious conference, a teachers' institute, or a woman's-rights convention. If, then, we are satisfied with the legality of the proceedings thus far, and are prepared to say that a constitution can regularly be drafted by any one, and submitted under the decision of any body, we have reached another very important inquiry: To whom shall the instrument be submitted, so as not to impair its validity? Where shall we look for any direction in the matter? The organic act is silent. We have not the aid even of an enabling act: if we had, and it should undertake to prescribe to whom the instrument should be submitted, I fear our objectors would take offence at the unwarrantable interference of Congress in presuming to direct on so important a matter. We must bear in mind that we are establishing a government for the people, male and female, black and white, young and old. All are to be governed alike by the organic law to be

made; and all should, in theory, be consulted in the establishment of such a law. We might not experience much difficulty in excluding all below twenty-one years of age. Should an attempt be made to exclude females, we should be opposed by all the woman's-rights advocates, who would insist upon equal right and ability to vote upon the question, and who would point to republican forms of government where women are allowed equal rights with men. So any offer to limit the vote to the white male would be opposed by the claim, that the black man was equally invited on the public domain, and had helped to build up the Territory, and that he was as much concerned in the form of government about to be established as the whitest. We look in vain over the whole field of law to find any legal definition of a voter; but, because this legislature has assumed to submit the instrument to the vote of white males of a certain age who have established a prescribed residence, we must declare judicially that this submission is legal. Let us follow one step farther.

Where the existence of an office, or the right of an officer to fill it, depends on an election, such office or officer must have a majority vote. If we are in a position to say that a constitution, to be binding, must have the vote of the people who are to be governed by it, it would be idle to say that the requirement is answered by a mere formal vote, irrespective of which way a majority may have voted. When the question is submitted to us, if we can inquire at all in the matter, we must see that the State government had the support of a clear majority of those voting upon it. If this were not so, the fate of the people would rest with precinct, county, and territorial board of canvassers, who, acting under no law for violations of which they could be punished, as here, might, however great the majority opposed might

be, still declare the constitution adopted. Suppose, then, a member of this Court is sitting as judge in his district. A criminal is put upon his trial; and, as a defence, he offers to show, that, at the June election in 1866, a clear majority voted against the adoption of the constitution, notwithstanding the board of canvassers have declared otherwise: therefore there is no State government, and no right in the judge, whose powers rest upon the constitution, to try him. I am satisfied that he could make a fair showing in that direction. It is said that a whole precinct in one county was thrown out, where the majority was largely against the constitution; that, in another place, a large number of soldiers voted in its favor, with no pretext of right so to do; and, in other respects, irregularities intervened which might easily overcome the declared majority of a hundred. This might well be where a vote was had under no competent authority, and where no one, for ballot-box stuffing or for false returns, could be punished. Would the Court allow the evidence? If so, and the jury should find that the constitution was in fact defeated, what follows? The criminal must be discharged, the judge vacate the bench, other officers subside, and the State fall into a condition of anarchy, — both State and Territorial governments being gone.

This, then, is the legitimate conclusion, fairly stated as I believe, that must or may follow from any attempt on our part to treat as judicial those questions which are solely political. We are not only liable to destroy an entire State government, but, at the same time, present the singular spectacle of a court sitting as a court to declare that we are not a court.

However, the Court are all agreed that the constitution proper is valid. Yet we have seen that it was born in a law-office, instead of a convention; that it was

made by no one under any authority whatever; and that it might as well have been made by any one else as by those who did draft it.

Again: we have noted that it was submitted by nobody lawfully empowered to do so; that no one was obliged to vote, and no one could be punished for voting a thousand ballots at the pretended election. And we have further seen, that, whether carried by a majority vote in fact or not, we are nevertheless a State working under the constitution so voted for. Why is this? The answer is not a difficult one when the question is viewed in its proper light.

It may be innocent vanity to arrogate to ourselves great importance as "the people," and talk of the unwarranted interference by Congress in attempting to thrust upon this "people" institutions and laws against their wishes: but we should not forget that the very territory we are on was purchased and owned by the people of the United States; that they have directed Congress, under the Constitution, to make all needful rules and regulations respecting the territory; that, as long as we were on this territory, we were subject to, and had to abide by, such laws as they chose to make; and that not until we were strong enough to defeat the United States by arms could we hope for any change from such Territorial rule without the permission of Congress. How is such change to be effected? Some one or some body, assuming to act for the people, may make a constitution, and may elect officers for the proposed State. Congress may refuse to recognize such State government. It therefore amounts to nought. The people may assemble as often as they see proper, and may make, from time to time, a score of proposed constitutions, and elect as many sets of officers. Each is as good as the other; and all are good for nothing un-

less indorsed by Congress. It is an act of Congress that gives vitality to the action of the people. By article iv., sect. 3, of the United-States Constitution, it is declared, "New States may be admitted by the Congress into this Union." No other authority exists anywhere for the admission of new States. This is all that is said. The manner in which such States shall be formed, or how they shall be introduced, is nowhere prescribed. It is a political question, to be settled by the people of the Territory on the one side, and Congress on the other. When the fact of admission is established, the Court are bound by it, and cannot go behind it. To say that the people of a Territory must frame — that is, write out — their constitution in the first instance themselves, is not correct. The document might be imported from Japan, or fall from the clouds; and if, by any subsequent action, it becomes the constitution of the State, we are bound by it, and cannot question where it came from. It is equally erroneous to say, as a conclusion of law, that, to be valid, it must be submitted to a vote of the people. Who will point us to any law requiring it? To which of the people shall the Court say it must be submitted? To the electors over twenty-one years of age? But to which? — white or black, literate or illiterate, poor or rich, male or female?

Suppose a constitution were draughted, and to it were appended the subscription of nine-tenths of the names of all the males — white, if you please — residing in the Territory, praying admission as a State into the Union under the constitution submitted, and Congress should admit the State accordingly. Will objectors contend that the constitution is invalid because not having been submitted to a vote? Will any be ready enough to contend that a vote without authority, where any one may vote as often as he pleases, or may refuse to vote

at all, is a better expression of the wishes of the people than the subscription I have instanced?

Again: suppose the electors should, upon the call of any influential man, assemble pretty generally in mass meeting, by almost unanimous agreement adopt a constitution for a proposed State, and Congress should admit the State accordingly. Will the Court again insist that the instrument is invalid because wanting the formal vote of the people?

If these questions are answered in the negative, — as they must certainly be, — we then have established a very important point in this discussion; viz., that while, by a vote of the people themselves, a constitution may not become operative, it may become so without a formal vote. This vote, then, which is insisted upon as a legal requirement for a valid instrument, is nothing more nor less than a means of signifying the wishes of the people to become a State, and of their acceptance of a given constitution. Congress, deferring to the wishes of the people who are to be organized into a State government with a given constitution, as a political rule of action, generally acts upon the assumption, that it is the wish of the people to have such a government, and that they are satisfied with the proposed constitution. Any thing which expresses that wish and satisfaction will answer, whether it be by vote, caucus, petition, or by simple acquiescence in receiving a constitution, and organizing a State government under it. That Congress may mistake the sentiment of the people at times, innocently, is not surprising; neither does it make any difference if the State government is nevertheless established. In our case, not near a full vote of the electors was had. How those staying at home would have voted is not known. Of those who did vote, it is very uncertain whether a clear majority voted for the adoption of the constitution.

Whether they did or not in fact was a question for Congress alone; and its decision is final.

The same is true were Congress to act wilfully wrong, and to assume to recognize one political faction of the Territory as the representatives of the people as against the other. Take the case of the troubles in Kansas between the advocates for a free State and those advocating a slave State. Had Congress chosen to admit the State with either a free or slave constitution, in violation of the wishes of a clear majority of the people, however much its action might be condemned as unwise political conduct, if a State government had been organized under either, as long as such government existed, and the constitution remained unchanged, such organic law would have been binding on the people. Their remedy must be in changing the organic act, or refusing to continue or conduct a State government under it. While it exists, the courts, in common with the people, are subject to its control. In my opinion, we may safely go still farther. I think it has been clearly shown, that whatever the people of a Territory may do by way of a vote, petition, or otherwise, with a view to admission into the Union, is designed to signify to Congress our desire to become a State, and our satisfaction with a certain proposed constitution. Now, suppose Congress, acting upon a supposed wish on our part to become a State, should draught a constitution, and append to it an act declaring that the people might form a State government under it, and, when the fact of the election and installation of officers was certified to the President, he should declare it to be, and the State thereupon should be, one of the Union. We might reject the offer, and refuse to organize. But, should we organize and conduct a State government, can it be maintained that we would not be a properly-organized State? and would it become a court,

whose existence rested solely upon the constitution so adopted, to declare the constitution, or any part of it, illegal?

We have now established several propositions, in the light of which we can understandingly look at the action of Congress and of our own people in establishing the fundamental condition under consideration. In 1864, Congress proposed that we might then frame a constitution, giving political right to white males alone, if we desired, and we could be admitted. We refused to do so. In 1867, when we desired admission with such a constitution, we were told, in effect, that the proposition of 1864 was not a standing offer; that, in the march of events, the black man had risen in the consideration of the nation represented by Congress; and that in all the dominion under the jurisdiction of Congress, including Nebraska Territory, the right of franchise had been granted to black and white alike, and that no steps would be taken backward. We were rejected with our proposed constitution. Congress, in turn, by the fundamental condition attached, amended our proposed constitution by erasing the word "white," and returned it to the State legislature to approve for the people of the Territory. And here, I may remark in passing, is the first of all the proceedings had up to this time which had the semblance of regularity. What had gone before, we have seen, was transacted by any one who chose to act, and was done in the most irregular manner. Up to this time, Congress, which could legally give any direction in the matter, had taken no notice of our proceedings, and given no warrant for our action. But it is said the State legislature had no authority to accept the amended constitution. Grant it. Congress, however, assumed to recognize it as the representative of the people, and the legislature assumed to act for them.

Agents not unfrequently transcend the limits of their authority. Congress might well say, that, by a recent act, equal rights in Nebraska had already been given to the colored man, and that it could make no difference with our people whether the same rights were continued under a State or a Territorial government. The legislature would be quite likely to look at the matter in the same way, and count upon its action receiving the indorsement of the people. In this they were not mistaken. Instead of refusing to be bound by the action of the legislature, the people ratified it most heartily. Representatives and senators at once took their seats in Congress. All the State officers qualified and engaged immediately in the discharge of their several duties. Legislature after legislature have been returned by the people; and I have yet to learn of the first instance of refusal to recognize the government. It is a familiar maxim in the law, "that a subsequent ratification is equivalent to a previous command." It may be said, that the fact that senators took their seats in Congress, that the State officers entered their offices, and that the legislature met, is not a ratification by the people, but by those several officers. This may be so; but it is very strong evidence to conclude the people. It is charging extreme recklessness upon them, and a terrible greed for office, to say that they all, with one accord, would accept office, and thereby organize a State government against the sentiment of the majority of the people. That this is not true, however, is known by the fact, that, at the very first election, the people themselves engaged with unanimity in the election of State officers; and, to show that they recognized the binding force of the organic law, blacks were permitted to vote the same as whites.

But it may be further contended (and I must anticipate or surmise the several objections which may be

entertained by my dissenting brother, because none of these objections were suggested on the argument, and I am not advised of the grounds upon which the minority rejects the fundamental condition), that although the legislature ratified the fundamental condition, and we have accepted a State government under the act of admission, inasmuch as we asked admission in the first instance with the original constitution, and we have been declared admitted, now that we are in we can repudiate the action of Congress and the legislature, and fall back on the constitution that Congress rejected. That is pretty good. I send my servant to my neighbor to buy his ox, saying I will give but fifty dollars. My neighbor says flatly that he will not sell for fifty, but will let the ox go for sixty dollars. My servant agrees, and drives the ox home, telling me what he has done. I eat up the ox; and, when my neighbor comes for his sixty dollars, I put him off with fifty, on the ground that my agent exceeded his authority. Or to state a case more nearly in point: A half-dozen gentlemen apply to the legislature, asking to be incorporated under a proposed charter which they submit, in which, among other things, it is proposed to carry all white persons at a sum named per head. The legislature makes the grant in all respects the same as asked, except that they append the condition that black persons are to be carried alike with white ones. Can they accept the charter, and then kick the first black person off their cars who comes aboard and offers to pay the same as the others? Clearly not. The same is the case here, unless there is one law, one rule of honesty and fair dealing, when it relates to transactions between individuals, or between a State and its citizens, and another rule when the transaction is between a State and the United States. This bench was among the

first to qualify and enter upon their duties. When we took the oath, and accepted the office, of judges, we swore we would support the constitution of the State. We know that Congress refused to admit us with the original constitution, and that Congress had said, in the act of admission, that our constitution could be operative only upon "the fundamental condition," that, within Nebraska, there should be no denial of the elective franchise, or of any other right, to any person. Did we inject into the oath the mental reservation, that, while Congress meant and insisted on one thing, we would interpret it another way? Answering for this fraction of the Court, I must say I did not. I cannot regard the organization of State governments, and their introduction into the Union, as the result of cheat or fraud. If the rights of the black man are to be assailed, let it be done boldly, and not by what seems to me a breach of faith. If the terms proposed by Congress were not acceptable, we had the high privilege of remaining a Territory, and staying out of the Union. But when, on its part, Congress raised us to the dignity of Statehood; gave us representation in Congress, and a voice in the affairs of the nation; donated to us munificent grants of land and money, — all for the small consideration that we would do justice to a few theretofore proscribed people, — it behooves us to keep faith, and abide by the terms of admission.

I pass to notice the objection raised by counsel, — that the fundamental condition does not include the right to sit upon juries. It is true that the right to sit upon juries is not a natural right; neither do I believe that the words "any other right" were used with the purpose of extending only to these. Introduced in connection with the grant of the elective franchise, an artificial right, it is evident to my mind that these other

rights referred to mean rights of the same class,—rights attaching to a citizen because of his relation to the government. That this interpretation is in accord with the sentiment of the ruling majority of the body from whom the act proceeded, we need only to glance at the debates of, and to the character of legislation enacted by, Congress about the time the act before it was passed. Emancipation had been accomplished. Black men were enlisted into the United-States armies; and they had proved their loyalty to the government in suppression of the rebellion. In the re-organization of government in the rebellious States, they were allowed equal rights with the whites; and the doctrine that intelligence, or fitness to participate in the affairs of government, was influenced by the circumstance of color, had become exploded. It is in the light of this history we are to interpret this act of Congress, rather than with the technical refinement put forth by the ingenuity of counsel.

That jury service is a duty, I admit. That it is a right also, I maintain. To be of the "good and lawful men" from whom juries are to be formed is an honor and distinction as well as the subject of duty. To say to the black man possessing equal intelligence and fitness with his white neighbor, that he cannot be allowed on a jury because of the misfortune of his color, is an insult from which he has a right to be saved. To permit a jury of white men to sit in determination of his right to property when assailed by a white man, or his right to life or liberty, when he is regarded as but little better than a brute under the law, is rank injustice. When the white man acts under the consciousness that the black man may some day sit in judgment upon his rights, and that he in return may measure with the same measure that is applied to him, an important right is accorded him.

The right to sit on the jury is not a natural right that can be demanded at the hands of the Court. What I contend for is, that there is no right to discriminate because of color. A white man may be called as a juror; and because of interest, prejudice, deafness, a want of understanding, he may be rejected; and he could not claim the right to insist upon sitting. So a German citizen may be called with no knowledge of the English language, when the trial is conducted in English. He may be rejected; and no protest of right on his part to sit would avail him or any party who should claim his right to sit. In such case, however, he is excluded, not because he is a German, but because of his lack of knowledge of the English language.

Disguise it as we will, when we say that black men shall not sit upon juries, it is because they are black, and is an insult to the race. This is a clear violation of a political right which Congress secured to the colored man when we were admitted. Until you put him on an equality in the race for honor, distinction, and preferment, we have infringed his rights. If intelligence is wanted on the jury, exclude the unintelligent alike of all classes, race, or color.

We cannot cloak such injustice under the guise of saving the black from the burden of jury service. If it can be done in the case of black citizens, we can as well do it in the case of the Irishman, the German, or the citizens of any other nationality. Our perceptions of the great principles of right may not be so clear when applied to a few of that class of citizens, who, since the birth of the nation, have been the subjects of oppression and insult. But let us amend our jury law so as to confine the service to native-born citizens. The result would be that such a war of races would be inaugurated as would soon awaken us to the injustice being

done to a great body of our fellow-men. To protest that such proscription was but an act of kindness, prompted by a disposition to save our foreign brethren from the burden of jury service, I fear would not be satisfactory.

Without pursuing the discussion further, I conclude, then, that not only does the fundamental condition attached to the act of admission form a part of our organic law, but that the condition extends to the right to sit upon juries.

The judgment of the Court below must be affirmed.

JUSTICE LAKE concurs in the foregoing opinion.

MASON, Ch. J., dissenting.

On the trial below, one Crossley was called into the box as a juror; and the defendant challenged him on the ground that he was "a colored man, and not a free white male;" which fact was made duly to appear. The challenge was not sustained; and he was sworn as a juror. Upon this very simple state of facts two questions arise, — whether, under the laws of this State and the amendment of the Constitution of the United States, Crossley was a competent juror; and whether, under the laws of this State and the third section of the act of Congress admitting Nebraska into the Union, he was a competent juror. In the opinion of the majority, it is insinuated that I raised the latter question for the first time in the counsel-room; that it receives attention at their hands, contrary to the correct practice, but out of deference to the importance of the question.

But any person conversant with criminal procedure can readily see that the very question was involved in the objection taken on the trial by the defendant; and it was discussed by the learned attorney-general in his

argument, although the counsel for the defendant placed his case on the other question. I understood him to do so, because, in his view, one point really involved the other. So that the point was not first raised by me.

But it is a very familiar principle of criminal law, that it is the imperative duty of a judge to see that a defendant, on trial for felony, loses no right by reason of his own silence, or his counsel's ignorance or neglect. Had any point fatal to the judgment not been made on the trial, or on the argument here, and any one of us had observed it, how could we justify ourselves to our own consciences if we failed to bring it forward, and decide upon it? Certainly not by saying that it would be unpopular or unjust to some third party.

I have noted this point in the opinion of the majority, because all through it seems to run an anxious spirit to turn this judicial judgment into a partisan discussion; and I cannot turn aside to give it any words hereafter.

The history of the admission of Nebraska into the Union, given at length by my brother Crounse, may be briefly stated thus: A small number of men, without authority of law, drew up the constitution; and the legislature provided for its submission to a vote of the people. This instrument provided, that "every male person of the age of twenty-one years and upwards," . . . who is a "white citizen of the United States," should be an elector. At an election held for the purpose, a majority voted for the constitution. This majority was small; and my brother seems anxious to concede that there was no majority at all, but that it was only made to appear by divers transparent frauds. Nevertheless, the canvassers appointed by the legislature for the purpose, consisting of the Territorial governor, secretary, and auditor, declared the vote

favorable to the constitution. But Congress passed a law for our admission, which should not take effect except upon "the fundamental condition, that, within the State of Nebraska, there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, except Indians not taxed; and upon the further fundamental condition, that the legislature of said State, by a solemn public act, shall declare the assent of said State to the said fundamental condition." The body of men elected as a legislature of the proposed State, at the same time that the popular vote was taken, was convened, and passed an act declaring that the above clauses should be part of the organic law of the State. Thereupon the State was admitted into the Union.

There is much discussion as to each of these circumstances. The proceedings were throughout very irregular. But no just argument can be drawn from that fact. There are but two circumstances in the whole course of this history which deserve a moment's attention, — one, the vote of the people upon the constitution, without which all that had gone before was of no avail; the other, the action of Congress. Each, in its turn, cured all irregularities which preceded it, and relieves us of the necessity of any inquiry in respect of every thing else.

So, too, the introduction into the discussion of the question, who ought to vote upon a constitution, is a mere diversion. While, abstractly, everybody, without regard to age, sex, color, race, intelligence, or other quality, might claim a right to vote upon the fundamental law to which he is to be subjected, practically some limit must be and always has been imposed; and that limit has been the qualification of electors under the previous government.

One point further in this connection. But for the act of Congress, the "solemn public act" of the so-called State legislature would have been of no force. The reason is obvious: it conflicted with a provision of the State constitution, every clause of which was as binding on the first legislature as on any subsequent one.

The matter is thus reduced to a single point. All that "self-appointed men" and the Territorial legislature did, and all discussion of who are the people and who ought to vote on the constitution, and also all cavil as to the mode of conducting the election and canvassing the votes, and the act of the legislature pretending to amend the constitution, being laid out of view, the simple question is, Could Congress change the constitution which the people had adopted, and admit the State into the Union with its fundamental law so changed, without the consent of the people? The change made by Congress was only one word. It was a change right to be made. But that is not the question. If Congress can change one word, it can change the whole instrument; and we are confronted with the grave, the novel question, whether Congress can make a constitution for a community, and force them into the Union under it, without their consent. Whether the principles of the proposed government are right or wrong, is not the question, but whether the people of the new State or Congress is the body to determine those principles.

I am disappointed to find that this question, the fundamental one in the case, has received almost no attention from the majority of the Court. Their sight has been so distracted by the many circumstances which are detailed in the opinion with a mild humor, that they have been almost blind to the real issue. When Judge Crounse comes the nearest to the consideration

of the true point, he says, that, although the State legislature could not amend the constitution, yet Congress assumed to recognize it as the representative of the people. But the trouble here is, that, being elected by the people to legislate under the restrictions of the constitution, the legislature was not, nor could Congress by recognition or otherwise constitute it, the representative of the people, to overturn the law which the people had established for it as well as for the citizen. (And then it is said that the people are concluded by electing officers under it.) To apply the doctrine of estoppel to the people, acting in their primary and sovereign capacity, is the merest pedantry.

And then the morality of getting into the Union under the pretence of amending our constitution, and deceiving Congress, and afterwards repudiating the amendment, is urged and illustrated by what is presented, I suppose, as a parallel case of an ox trade. I must confess that this style of arguing the very gravest constitutional question ever presented to a judge, so far from carrying conviction to my mind, seems to me most frivolous and absurd. But let us see whether we are guilty of any bad faith in repudiating this so-called "solemn public act." Was the Congress of the United States deceived at all by what we did? Did not the very best constitutional lawyers of the land, who were members of that body, know very well what was the full force and effect of that act? The question carries its own answer. But, furthermore, did this State perpetrate a fraud in getting into the Union by means of that act? The people of this State never voluntarily entered the Union with a constitution amended by the erasure of the word "white." Congress admitted representatives from the State, and the Territorial government was withdrawn; and nothing remained for the

people but to go on under the State government. Coerced in this way, their action now is said to conclude them; and an attempt to reclaim their independence is called dishonest, fraudulent, and bad every way. No words of mine can make more clear the transparent fallacy of this position.

And this is all that this learned Court has to say upon this question. But we cannot leave it here. It is too serious to be answered by a sneer. It is too profound to be solved by an appeal to partisanship.

The Declaration of Independence declared, that "governments derive their just powers from the consent of the governed;" and this fundamental and just maxim is the governing and dominating rule of American polity. The idea has been expressed in different terms by different statesmen and bodies, — as that "this is a government of the people by the people for the people," or that "constitutions and laws can be rightfully formed and established only by the people over whom they are put in force." Our constitutions all commence, "We the people;" and, throughout their structure, the people as the source of authority, the power to which every officer must give account, is the one dominant sovereign. It is too late in the day to question or to vindicate this maxim of the American civil polity.

Another principle equally fundamental, equally well settled, and universally received, is this, — that the Federal Government is, in the sphere of its constitutional authority, sovereign, but, out of that sphere, is subordinate. The mutual relations of the States and the United States are so perspicuously and forcibly stated by Chief Justice Taney in *Ableman* v. *Booth*, 21 *Howard*, 506, that I shall content myself by simply referring to what is there said. It has always been conceded that Congress could not prescribe a form of government to a

people, save that it should be republican in form. To go beyond this is without its jurisdiction.

Now, apply these two familiar principles of American government to the case in hand; and we shall be conducted directly to the position that Congress cannot frame a constitution for a community, and, without their consent, force the same upon it. The people of the proposed State are to be "the governed." The government which is set over them should have their consent and approval, or it does not possess just authority; and the fundamental maxim is violated.

Again: it is not within the constitutional power of Congress to frame a constitution for a people, and, *nolens volens*, force it on them. The Federal Constitution authorizes it to guarantee a government republican in form to every State. The expression of this one power over the State excludes the exercise of all other powers. It was competent to open the constitution with which Nebraska presented herself asking admission, and see whether it provided a government republican in form. If that constitution did not provide such a government, Congress could refuse admission, or enter into negotiations with the people of the proposed State to secure the necessary amendment. But it could not say to the applicant, "This instrument requires your judges of the Supreme Court to hold the District Courts: I will change that, and then force you into the Union with the constitution so modified." That would have been beyond the competency of Congress, because it would have been exacting more than the constitution authorized it to exact. Besides, the provision that "new States may be admitted by the Congress into this Union" clearly indicates, by the frame of the clause, the authority to admit them upon their application, and not to force them in upon arbitrary terms prescribed by Congress.

These views are confirmed by the uniform practice of Congress in admitting new States. The requirement has always been of the distinct approval by the people, in their primary or representative capacity, of their fundamental law. Whenever a State has applied for admission, with a constitution containing some provision which Congress did not approve, it has been returned with some proposed change to be submitted to the people. Until the case of our State arose, no single instance ever occurred of Congress admitting a State without the popular approval of the constitution. This practice, obtaining in the days of the framers of the Federal Constitution, and continued in without exception, is an authoritative construction of it; at least, it is a strong confirmation of our view.

And a consideration of the consequences of the opposite view affords further confirmation. Concede to Congress the power to frame a constitution for a people, force them into the Union under it without their approval, and see how it would work in a particular case. There is the Territory of Colorado. Let Congress provide a constitution for it. One provision may be, that it shall not be changed without the approval of Congress. Then, according to the rule in *Luther* v. *Borden*, 7 *Howard*, 1, an attempt to amend it in any other way is treason, and may be punished with death. Then suppose it is provided in this congressional constitution that no person shall be eligible to a seat in the legislature who is not a postmaster, nor to an executive office who is not an Indian agent; so that the entire State government may be dictated from Washington. There you have all the powers of the States absorbed by the government at Washington, and the whole theory of the relations of the local and central authorities subverted. That is an extreme case. But, if Congress can dictate

to a people one word of their State constitution, it may dictate the whole. Concede the power in one point, and you concede it in all. And a principle which is logically capable of such consequences is utterly unsound and dangerous.

I am aware that it will be said that Congress would never do such a tyrannical thing as our supposition implies. In these days of centralization, it is hard to tell what Congress may not do. When we reflect that at the time of the discussions over the Lecompton Constitution in Kansas, by which the whole country was convulsed, it was universally supposed that the doctrine was once and forever settled, that no Territory could be forced into the Union until its people had had a full, fair, free opportunity to express their approval or disapproval of its constitution, and that this principle was ignored in the case of her twin-sister, our confidence that Congress will adhere to any policy is not strong. It is the first insidious approaches of power which are to be guarded by a people jealous of its liberties.

I am content to leave this subject here. So little has been said in the long opinion of the majority upon the principle involved in this case, that no good can come of surmising objections which might be urged to our view. I think it clear that the act of Congress imposing the fundamental condition upon us was void.

But it is insisted that the Fourteenth Amendment of the Federal Constitution secures to each citizen the *right* to serve on the jury. If the word "right," as used in that clause, includes jury service, then Crossley was competent, and the exception is not well taken. Let us consider this question.

If we refer to the origin of the institution of trial by jury, we shall find no indication that it was an honor or a right thus to serve litigious parties. In the Saxon and

early Norman times, causes were tried in the County Court; and this tribunal was composed of all the hundredors assembled in a tumultuous and popular body. As the population increased, and the subjects of contention became more intricate and complicated, the practice was resorted to of referring them to twelve, or some multiple of twelve, *liberos et legates homines juratores*, — free and lawful men, sworn to speak the truth. This body was selected from those resident in the vicinity of the matter in dispute, and those best acquainted with the parties and the controversy. They were taken for their personal knowledge of the parties and the dispute. They were taken for the very opposite reason jurors are now selected. They were the witnesses, not simply the judges of the evidence. They were, as witnesses, sworn to speak the truth of the matter before them. They were called because conversant with the circumstances.

This interesting fact explains many circumstances otherwise obscure. There is the expression as to a trial by jury, until recently used in a civil case, and still retained in criminal cases, that a party puts himself upon the country; that is, the county, or men of the county. This is a relic of the ancient jurisdiction of the County Court, where at first the whole body of freeholders were the judges and the jurors, *juratores* were the witnesses, and in which Court the party put himself upon the judges as men of the county. Then, too, there is the expression still retained in our judicial proceedings, "good and lawful men, sworn," &c., which, we have seen, is from the ancient formula. This explains also the fact, very strange to us, that at one time it was a very frequent occurrence to arrest and indict for perjury persons, who, sitting on jurors, rendered a verdict which was disapproved by the court or the king. This was upon the old theory, that the jury found the verdict

according to their own knowledge, and were sworn to speak the truth in finding it; so that, if they did not find a true one, they were guilty of perjury. It also explains the position so powerfully contended for by Erskine, and now adopted into our criminal code, that the jury is the judge of the law and the fact.

That the jury was composed of the witnesses is laid down by many learned historians. Thus Mackintosh, in his "History of England," vol. i. p. 273, says, "There are scarcely any authentic materials for its early history. It seems most probably to have arisen from the confluence of several causes. Perhaps the first conception of it may have been suggested by the very simple expedient of referring a cause by the County Court to a select committee of their number, who were required to be twelve, for no reason or even cause that has been discovered. In civil cases, the obvious analogy of arbitration might have contributed to the adopting of juries. Judges unacquainted with and incapable of a patient inquiry into facts might find it safer, as it was easier, to trust to a sort of general testimony, given by twelve unexceptionable neighbors, on the litigated question. There are many features in this institution which indicate that jurors must, in some manner, have been regarded in the same light with witnesses. Neighborhood, for instance, which might be dangerous to the impartiality of a judge, is advantageous to the knowledge of a witness; and it is still a sort of legal theory, that jurors have the dangerous power of finding a verdict from their own knowledge."

Palgrave, in his "History of the English Commonwealth," vol. i. p. 243, says, "Trial by jury, according to the old English law, was a proceeding essentially different from the modern tribunal, still bearing the same name by which it has been replaced; and, whatever merits be-

longed to the original mode of judicial investigation, — and they were great and unquestionable, though accompanied by many imperfections, — such benefits are not to be exactly identified with the advantages now resulting from the great bulwark of English liberty. Jurymen in the present day are triers of the issue; they are individuals who found their opinion upon the evidence, whether oral or written, adduced before them; and the verdict delivered by them is their declaration of the judgment which they have formed. But the ancient jurymen were not impanelled to examine into the credibility of the evidence. The question was not discussed and argued before them: they, the jurymen, were the witnesses themselves; and the verdict was substantially the examination of these witnesses, who of their own knowledge, and without the aid of other testimony, afforded their evidence respecting the facts in question to the best of their belief. In its primitive form, a trial by jury was therefore only a trial by witnesses; and jurymen were distinguished from any other witnesses only by customs which imposed upon them the obligation of an oath, and regulated their number, and which prescribed their rank, and defined the territorial qualifications, from whence they obtained their degree and influence in society."

Finalon's note (*a*) to Reeve's "History of English Law," ii. p. 541, states the same fact in a few words: "The law had attached great importance to the trial of causes by jurors who came from the locality where the matter arose: for originally they gave their verdicts of their own knowledge; and even now (in the time of Henry VI.), when they had tried causes on the evidence of witnesses of which they were to judge, it was important that they should come from the place where the witnesses lived, which would be where the matter arose."

It was, then, the accident of neighborhood and knowledge that constituted a party a qualified juror. It was not the quality of a citizen or a freeman. It neither gave nor detracted from the honor due to a person called to the service. It was not a right.

If we come down to a later date, when the juror and the witness were separated, and their relations established much as they are now, we shall still see in the position and function of the former that which renders his office, not a right, but a burden, and his duty a service attended by heavy personal risks. The only one of the circumstances which I enumerate is that mentioned above; namely, the liability, in case of reaching a false verdict, or one assumed to be false, to imprisonment and punishment. The situation of affairs out of which this grew is aptly described by Hallam, in his "History of the Middle Ages," vol. ii. p. 404: "Perjury," he says, "was the dominant crime of the middle ages, encouraged by the preposterous rules of compurgation, and by the multiplicity of oaths in the ecclesiastical law. It was the frequency of their offence, and the impunity which the established procedure gave to that of jurors, that produced the remedy by writ of attaint, but one which was liable to the same danger; since a jury on an attaint must, in the early period of that process, have judged on common fame, or on their own testimony, like those whose verdict they were called to revise." Being thus liable to so violent a process in the event of being found to have rendered a false verdict, a juror could hardly have claimed as a right the office, if such it may be called, of adjudging his neighbor's cause. And although this remedy was no longer in use, yet jurors were for a long time subjected to imprisonment when they found a verdict obnoxious to the court or the king. I will not stop to mention

particular instances of such oppressions, but content myself with a quotation from Hallam's "Constitutional History of England," vol. iii. p. 7: "It is said to have been the practice in early times, as I have mentioned from Sir Thomas Smith in another place, to fine juries for returning verdicts against the direction of the Court, even as to matter of evidence, or to summon them before the Star-Chamber. It seems that instances of this kind were not very numerous after the accession of Elizabeth; yet a small number occur in our books of reports. They were probably sufficient to keep juries in much awe. But, after the Restoration, two judges, Hyde and Keeling, successively chief justices of the King's Bench, took upon themselves to exercise a pretended power which had at least been intermitted during the time of the Commonwealth." The last instance on record of fining a jury for rendering a verdict obnoxious to the Court was in 1670, before the recorder of London, where a fine of forty marks was imposed on each juror. 6 *State Trial*, 967. One of the jury, being committed for non-payment of this fine, sued out *habeas corpus;* upon which Chief Justice Vaughn held the imprisonment illegal. *Vaughn Reports*, 135; 6 *State Trial*, 999. It is a curious circumstance, that special verdicts, and bills of exception, so common in our day, when the prerogative of juries are so well understood and perfectly guarded, were devised by those bodies in those turbulent days to embody the facts as they found them, or the rulings of the Court, so as to relieve them of the necessity of finding a general verdict for which they could be called in question in so violent and summary a manner. Such was the burden and the hazard of a juror down to a comparatively recent day. And history shows that they were so grievous, that to render such service could never be deemed a right. It was a

duty which the freeman owed society. It was discharged in the midst of violence and under intimidation, and at great risks.

Our statutes, and those of other States, have uniformly recognized this as the correct view of the subject. Acts are numerous to exempt certain persons from serving on juries. All of those acts recognize the service as a burden, not a right. See an act entitled "An Act to exempt Firemen from Jury, Military, and Road Duty," 1 *State Session Laws*, p. 16. Numerous other acts might be cited to the same effect. The legislature of our own State and of the other States, and the Parliament of Great Britain, have all recognized the service of a juror as a burden which a freeman might be called upon to perform, or be exempt therefrom, as the wisdom of the legislature should determine. The legislature may impose this duty upon one class, and not another. If there was a great number of Chinamen or Asiatics amongst us who were citizens and entitled to the franchise, but ignorant of our language, our laws, our customs, usages, and habits, the legislature might deem it wise to exclude that class from jury service. If they were rejected from such service under the general term "Chinamen" and "Asiatics" by statute, would such statute be obnoxious to the fundamental condition on which Nebraska was admitted into the Union? I think not. If it be a right, it belongs to every elector; and he may claim his right, and it cannot be denied. The Federal Constitution provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The words "privileges and immunities" have been treated as synonymous with "right."

In *Corfield* v. *Coryell*, 4 *Washington, C. C.*, 371, Mr. Justice Washington, speaking of these words, says, "We

feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union."

And in *Conner* v. *Elliott*, 18 *Howard*, 591, Mr. Justice Curtis, delivering the unanimous opinion of the Court, says that these words relate only to the privileges of citizenship.

Webster, in the sixth volume of his works, p. 112, says that these words do not confer political rights. The word "right" in the amendment to the Constitution of the United States refers to those natural rights guaranteed in the Bill of Rights, and not such privileges as may be intrusted to a part of the citizens. This construction is sustained in *Amy* v. *Smith*, 1 *Littel*, 333; *Campbell* v. *Morris*, 3 *Har. & McH.*, 554; *Murry* v. *McCarthy*, 2 *Munf.*, 393; *Austin* v. *The State*, 592; and by Mr. Justice Curtis in *Scott* v. *Sanford*, 19 *Howard*, 580–584. See also *Debates in New-York Constitutional Convention of* 1821, participated in by Mr. Justice Spencer, Col. Young, Mr. Radcliff, and others, p. 183.

That being the meaning of the word in the amendment, there can be no question that it has no relation to this case.

For these reasons, I think that there was error in admitting Crossley as a juror, and that the judgment should be reversed.

Pyle v. Warren.

PRACTICE. *Objections to evidence* tendered at a trial not supported by reasons therefor are not usually considered; but, if the testimony be directed to a point already indisputably established, refusing to receive it is not ground for awarding a new trial.

STATUTE OF FRAUDS: *Chattel mortgages.* Creditors of the person making a chattel mortgage, and subsequent purchasers in good faith, can alone assail a chattel mortgage under which the mortgagor retains possession.

——: ——. As to such parties, if the mortgage be not recorded, and there is no charge of possession, it is to be considered as absolutely void: if it be recorded, the presumption is only *prima facie* that it is void; and evidence may be received and must be given to rebut it in order to support the mortgage.

——: ——. In determining the *bona fides* of the mortgage, it is immaterial what the assignee of the mortgagee may have paid for it.

CONVERSION: *Demand.* Possession of chattels with claim of title adverse to the owner is evidence of conversion; and no demand need be shown to support replevin.

Error to Otoe District Court.

In his petition, the plaintiff alleged that one Wilson mortgaged to John W. Pyle an undivided two-thirds of certain books of abstracts of title, enumerated, to secure his note for two hundred dollars; that, after the note matured, the said John W. assigned the note and mortgage to the plaintiff, his brother; and also that the property came to the possession of the defendants, who converted the same to their use to the plaintiff's damage seven hundred dollars.

The defendants answered, that they purchased the property of Wilson for a valuable consideration, with-

out knowledge of the mortgage. The cause was tried to a jury, who rendered a verdict for the plaintiff for $223.40. The matters complained of appear in the opinion of the Court.

E. F. Warren, for plaintiff in error.

I. — FRAUD.

1. The Court below erred in not submitting the question of fraudulent intent, in suffering the mortgaged property to remain in the possession of the mortgagor, to the jury *as a question of fact.*

It is not a question of law for the decision of the Court: and when the objection to the sale or mortgage of chattels is, that the vendor or mortgagor continues in possession, the transfer, although *prima facie* fraudulent, is susceptible of explanation by proof that it was intrinsically honest; and such proof is to be submitted to a jury in all cases where it arises upon the trial of an issue of fact. *Smith* v. *Acker*, 23 *Wend.*, 653; *Cole* v. *White*, 26 *id.*, 511; *Hanford* v. *Artcher*, 4 *Hill*, 271; *Thompson* v. *Blanchard*, 4 *N. Y.*, 303; *Stewart* v. *Slater*, 6 *Duer*, 83; *Ford* v. *Williams*, 24 *N. Y.*, 359; *Rogers* v. *Daro*, *Wright*, 136; *id.*, 359; 16 *O.*, 547, 552.

2. The continued possession of the mortgagor rendered the mortgage *presumptively* fraudulent. See *Revised Statutes*, chap. xliii. sect. 70; also *Sturtevart* v. *Ballard*, 9 *Johns.*, 337; *Bissell* v. *Hopkins*, 3 *Cow.*, 166.

3. When possession is permitted to remain with the mortgagor or alienor, it is well established that such mortgages are fraudulent *per se*, and void as to creditors and purchasers, unless retaining possession be consistent with the deed, because possession not remaining with

the person shown by the deed to be entitled to it works deception and injury. *Thornton* v. *Davenport*, 1 *Scan.*, 298.

Also if, by terms of mortgage, the mortgagor could retain possession until default, if he retained it longer the mortgage would be deemed fraudulent and void. *Rhines* v. *Phelps*, 3 *Gilm.*, 465.

4. The general rule is, that the contract must be made in good faith for a valuable consideration, and accompanied with and followed by possession. *Cases above cited; Kitchel* v. *Bratton*, 1 *Scan.*, 302; 1 *Smith's Lead. Cases*, 1–14; 18 *Law Lib.*, 33; *Powers* v. *Greene*, 14 *Ill.*, 389.

Guilt, and not innocence, is presumed: continuance of possession by mortgagor is highest presumptive evidence of fraud. 23 *Wend.*, 653; 17 *id.*, 53.

5. The filing of the chattel mortgage is no substitute for change of possession of the things mortgaged, and does not rebut the presumption of fraud arising from the continued possession of the mortgagor. *Otis* v. *Sill*, 8 *Barb.*, 102.

The object of the statute requiring chattel mortgages to be recorded is the same with that of the registry acts respecting mortgages of real estate; namely, to prevent imposition upon subsequent purchasers and mortgagees. *Gregory* v. *Thomas*, 20 *Wend.*, 17; *Much* v. *Patchin*, 14 *N. Y.*, 71.

6. Failure to file adds one more ground for avoidance. *Wood* v. *Lowrey*, 17 *Wend.*, 492; *Smith* v. *Acker*, 23 *id.*, 653.

7. The filing and recording of a chattel mortgage is not a substitute for taking possession, and does not enable or authorize the mortgagor to continue in possession. *Thompson* v. *Van Vetchen*, 5 *Abb. Pr.*, 458.

But, if the mortgage *is* duly filed, the mortgagee is

placed in a position to excuse his omission to take possession. *Id.*

8. Possession of mortgagor is *prima-facie* evidence of fraud. 5 *Dutcher* (*N. J.*), 250. And conclusive evidence in absence of proof of *bona fides*. 15 *Mo.*, 416; 40 *Penn. St. R.*, 352; 31 *Miss.*, 566; 15 *Mo.*, 459.

When, on sale of personalty, the possession does not follow, it is *fraud in law*, without regard to the interest of parties. 40 *Penn. St. R.*, 352. And, when mortgagor sells to *bona-fide* purchaser, sale is valid. 2 *Hall*, 63.

II. — CONSIDERATION.

The evidence shows conclusively that the defendant herein neither paid nor parted with any new or present consideration upon the assignment of the mortgage and note by the said John W. Pyle to him, but that the consideration of such assignment was a previous indebtedness owing the defendant by said John W. Pyle, for which said Pyle had given him, the defendant, his note. There is no evidence that the defendant ever agreed to receive, or *did accept*, such assignment in satisfaction and payment of his claim against his brother, or that the defendant ever surrendered up the note given by the said John W. to him, or released any security therefor; and, for aught that was elicited on the trial, — and there have been two of them, — the defendant is to-day in the same situation as before the mortgage was assigned to him.

The rule of law is clear, that receiving a note or security merely as payment or security for a precedent debt, no new credit being given, and no security being relinquished or discharged, nor any new responsibility incurred, is *not* parting with value, such as to enable the holder to enforce his right, or to hold it free of the equities against his transferrer; and therefore it would seem

that the defendant is not such a *bona-fide* holder for value as that the Court will protect his rights against the equities of the plaintiffs herein.

III. 1. In no event can a recovery be had against the defendant Warren. The action was brought against these plaintiffs as *individuals:* there is no evidence tending to show a partnership between them, or any pretence that they are partners. And, in case of joint bailees, demand upon and a refusal by one is not in itself a conversion. *Mitchell* v. *Williams*, 4 *Hill.*, 13; *Lockwood* v. *Bull*, 1 *Cow.*, 322.

2. Two cannot be jointly liable unless there is joint conversion; and a demand of and refusal by one is no evidence of joint conversion. 2 *N. H.*, 546.

3. In *torts* there can be no partnership; and a tortious act by one of several partners will not render the others liable, unless they ratify and receive the benefits of the tortious act: still less would another person be bound when no partnership existed. It is only in *contracts* that the principle, that one partner is the agent for his co-partners, obtains.

4. No act done or omitted by the defendant Warren *after* suit brought would render him liable in this action. Conversion must be proved to have happened before the commencement of the action. Demand after suit brought will not suffice. Nor will a *sale* even by defendant, after suit brought, avail as evidence of a conversion. 3 *Johns.*, 433; *id.*, 54; *Storm* v. *Livingston*, 6 *Johns.*, 44.

D. Gantt, for defendant in error.

I. 1. The defendant in error had the legal right of action, because, after condition forfeited, the title to the property became absolute in the mortgagee's assignee:

he need not reduce the property to actual possession in order to maintain a suit against one taking it. *Brown* v. *Bement*, 8 *Johns.*, 466; *Burdick* v. *McVauner*, 2 *Denio*, 170; *Champlin* v. *Johnson*, 39 *Barb.*, 606; *Langdon* v. *Buel*, 9 *Wend.*, 80; *Patchen* v. *Pierce*, 12 *Wend.*, 62; *Robinson* v. *Campbell*, 8 *Mis.*, 365; *Thornbill* v. *Gilmer*, 4 *Smed & Marsh*, 153.

2. The mortgage alone is *prima-facie* evidence of property in the mortgagee as against a subsequent vendee of the mortgagor. *Brooks* v. *Briggs*, 32 *Maine*, 447.

3. The recording of the mortgage is legally equivalent to an actual delivery. *Forbes* v. *Parker*, 16 *Pick.*, 466.

4. The assignee of a chattel mortgage becomes vested with the legal title, and may bring trover or trespass after condition broken, whether the assignment was made before or after forfeiture. The action must be in the assignee's name. *McKee* v. *Judd*, 2 *Kern*, 622; *Langdon* v. *Buel*, 9 *Wend.*, 80; *Montgomery* v. *Kerr*, 1 *Hill, S. C.*, 291; 2 *Hill, S. C.*, 587; 12 *Johns.*, 484.

5. In trover, the rule of damages is the value of the property converted, with interest from the time of conversion. *Clark* v. *Whitaker*, 19 *Conn.*, 319.

6. Transfer made in payment of a past debt, or for the purpose of securing a contemporaneous advance, is as much a sale for value as if the consideration were payable in cash. 2 *Am. Lead. Cases*, 216, fourth edition; 1 *Smith's Lead. Cases*, part ii. 1080.

II. 1. If a party refuse to deliver goods to the owner, on the ground that they belong to himself or to a third person, such refusal amounts to a conversion. *Coffin* v. *Anderson*, 4 *Blackf.*, 406. To exercise dominion over personal property, in exclusion of the owner's right, is a conversion. *Reynolds* v. *Shuler*, 5 *Cow.*, 323. Possession of property, with a claim of title adverse to that of the owner, is evidence of conversion. *Maxwell*

v. *Harrison*, 8 *Geo.*, 61. Assuming to one's self the property, and the right to dispose of it, is a conversion. *Gillman* v. *Hill*, 36 *N. H.*, 311; *Bristol* v. *Burt*, 7 *John.*, 254. If an actual conversion is shown, demand need not be proved. *State* v. *Patten*, 49 *Maine*, 383; *Thompson* v. *Haile*, 3 *Wend.*, 406; *Wheeler* v. *Wheeler*, 33 *Maine*, 347; *Chamberlain* v. *Shaw*, 18 *Pick.*, 275.

2. Where two persons are in joint possession of personal property owned by a third, demand of one is sufficient to constitute the foundation for an action against both. *Ball* v. *Larkin*, 3 *E. D. Smith*, 555; and in *Loyd* v. *Bellis*, 37 *Eng. L. & E.*, 545; 18 *Pick.*, 287. *Held*, that a refusal by one partner is evidence of conversion by all the parties.

3. Demand made by an agent of the party interested is sufficient to support the action. *Harmon* v. *Barstow*, 23 *Mis.* (1 *Cush.*), 276.

III. "The judgment must be presumed to be right until shown to be wrong." The Court will not reverse because an instruction or charge may be erroneous, unless it be shown to have operated an actual or possible injury to the appellant; and this can only be done by showing on the facts as proven that he was entitled to a judgment in his favor: nor will the Court reverse for an erroneous instruction where the evidence plainly sustains the finding of the jury, nor where substantial justice has been done by the verdict, nor for errors in abstract propositions of law. *Armstrong* v. *Lipscomb*, 11 *Texas*, 654; *Lee* v. *Merrick*, 8 *Wis.*, 234; *White* v. *Jackson*, 15 *Ind.*, 156; *Lewis* v. *Bank Kent*, 12 *Ohio*, 151; *State* v. *Caster*, 10 *Iowa*, 456; *Clayton* v. *West*, 2 *Cal.*, 381; 15 *Ind.*, 190, 207, 325.

LAKE, J.

The errors assigned in the petition in this case may

all be included under two general heads: first, in excluding from the jury certain testimony; and, secondly, in refusing to give to the jury several instructions as requested by the defendant. These alleged errors will be considered in the order of their assignment.

To maintain the issues on their part, the defendants called as a witness one John H. Croxton, who testified (the case being tried to a jury) that he was an attorney-at-law and a dealer in real estate; that he kept in his office a set of abstracts of titles, and knew the value of such property. He was then asked this question: "Upon what do books of abstracts of titles depend for their value?" An objection was interposed on behalf of the plaintiff, without, however, assigning any ground therefor. The Court sustained the objection, and excluded the proposed testimony; to which the defendants duly excepted. It is not customary to consider an objection when no reason is given, unless the proposed testimony is entirely irrelevant or incompetent. Upon what gronnd this objection was sustained, we are at a loss to determine: indeed, the record discloses the fact that the defendant Warren had just before testified without objection upon the very subject of this inquiry, — "that the value of books of abstracts of titles depends upon and consists in their accuracy, and that incorrect books would be worthless." Testimony had also been given to the jury that these books were very inaccurate and unreliable.

It is but a reasonable inference from the import of this question, that the witness Croxton would have given a similar answer had he been permitted to testify. Had he done so, it would, perhaps, have had a tendency to give increased weight to the testimony of the defendant Warren, — "that the books were not worth a hundred dollars." The question was certainly perti-

nent; and we see no good reason sustaining the objection.

But, while the question was proper, the fact should not be overlooked, that, in addition to the testimony of Warren, we have that of Simeon H. Calhoun to the same effect. That the value of these books depends upon their accuracy was not disputed: there was no conflict in the testimony on this point. The fact having been sworn to by two credible witnesses, and being uncontroverted, I cannot see how a repetition of the testimony by Croxton could have produced any different result.

The interest of the plaintiff in the books was but little over two hundred dollars. This was certainly much less than their fair value. On the part of the defendants, Warren swears in one place that they were not worth a hundred dollars; at another, that they were worth about three hundred dollars, and that he would sell them for that. On behalf of the plaintiff, four or five witnesses (real-estate dealers) testify that they are worth from twelve hundred to fifteen hundred dollars: so that it would not have been possible for the jury to have valued the property at less than the interest of the plaintiff, even if Croxton had been permitted to answer the question put to him by the defendants.

The defendants requested the Court to give to the jury two instructions as to the legal presumptions arising from the retention of the mortgaged property by the mortgagor. Although differing slightly in form, they present substantially the same question for our consideration.

The request was as follows: "That, if the jury find from the evidence that the chattels mortgaged were left under the control and in the possession of the mort-

gagor, such mortgage was presumptively fraudulent and void; and that, in the absence of evidence on the part of the plaintiff showing the *bona fides* of such mortgage, such sale by mortgage was conclusively fraudulent and void, and that the plaintiff could not recover.

"That the retention of the mortgaged chattels by the mortgagor is *prima-facie* evidence of fraud; and that, in the absence of evidence showing the *bona fides* of the transaction, the sale was fraudulent and void, and that the plaintiff could not recover."

The Court refused to give the instructions, on the ground that they were inapplicable to the case; at the same time, admitting their correctness as abstract legal propositions.

The question presented for our determination calls for a construction of sect. 70, chap. xliii., of the *Revised Statutes*, which provides that "every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels by way of mortgage or security, or upon any condition whatever, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold, mortgaged, or assigned, shall be presumed to be fraudulent and void as against the creditors of the vendor, or the creditors of the person making such assignment, *or subsequent purchasers in good faith*, and shall be conclusive evidence of fraud, unless it shall be made to appear on the part of the persons claiming under such sale or assignment that the same was made in good faith, and without any intent to defraud such creditors or purchasers."

In the case at bar, it is undoubtedly true that the property described in the mortgage, and which is the subject of the action, was left in the possession of

the mortgagor; and that, under the section of the statute just quoted as to certain persons, the transaction would be declared fraudulent. But who is entitled to invoke the aid of this provision? Not every person, most certainly. It is expressly limited by unequivocal language to creditors of the person making the sale or assignment, *and subsequent purchasers in good faith.* Before a *purchaser* can invoke the aid of this statute, he must establish his own *bona fides.* If, at the time of his purchase, he knew of the existence of the mortgage, he will take the property charged with the just claims of the mortgagee, or in case of an assignment of the assignee of the mortgagee under the mortgage.

Looking to the record, we fail to discover any evidence of good faith on their part in making the purchase. They paid only about a hundred and fifty dollars for property, which, from a due consideration of all the testimony, could not have been worth less than eight hundred dollars at that time. This would seem to indicate that they must have known that the property was encumbered. It is true that both of the defendants swear that they had no personal knowledge of the mortgage at the time of making the purchase; but the mortgage was duly recorded, which gave them at least constructive notice of its existence. Taking all the testimony together, — the fact that one of the defendants is an attorney, and the other a business-man dealing in real estate, both knowing the importance of referring to the records of the county in ascertaining the condition of the property they were about to purchase, — my mind cannot resist the conclusion that the existence of the mortgage was well known to them at the time of the purchase. Had testimony been offered to the jury tending to establish the good faith of the defendants, still I would hold the proposed instructions to be

erroneous. They, in effect, take from the jury one of the principal issues which they were sworn to try; viz., the want of notice on the part of the defendants. Unless this fact were first found in their favor by the jury, it was quite useless for them to inquire into the good faith of the mortgage sale. For these reasons, I am of the opinion that there was no error in refusing these two instructions.

The defendants further requested the Court to instruct the jury, "that the filing of the chattel mortgage in the office of the county clerk did not rebut the presumption of fraud arising from the continued possession of the mortgaged property by the mortgagor, and that such filing of the chattel mortgage is not a substitute for change of possession." This instruction is substantially correct: the failure to record the mortgage where there is no change of possession of the things mortgaged renders it "*absolutely void*" as to the creditors of the mortgagor and subsequent purchasers in good faith. In such case this legal presumption of fraud cannot be overcome by any amount of evidence of good faith in the execution of the mortgage: it is made by the statute an indisputable presumption. If, however, the mortgage be duly recorded, and the mortgagor retain possession of the property, the presumption of fraud is merely *prima facie*, and may be overcome by competent testimony; but, if no evidence of good faith be produced, this presumption becomes conclusive as to creditors and *bona-fide* purchasers.

But there was no error in the refusal to give this instruction, for the reason that the defendants were not in an attitude to defend it. It was not an admitted fact that they were purchasers in good faith, nor had they given testimony that such was the fact. Until they established their own good faith in making the pur-

chase, they were in no situation to complain either because of the property remaining with the mortgagor, or the failure to record the mortgage.

We discover no error in the refusal to give the remaining instructions as requested. The plaintiff was not claiming the property as an innocent purchaser: he was the assignee of the mortgagee, and took by the assignment whatever interest his brother, John W. Pyle, had in the property. It is quite immaterial what he paid for that interest, — whether much or little.

There can be no question raised as to the conversion under the pleadings. The defendants allege that they purchased the books from Wilson, the mortgagor, and that they have a good title as against the plaintiff. Possession of property, with a claim of title adverse to the owner, is evidence of a conversion. *Maxwell* v. *Harrison*, 8 *Geo.*, 61. In such case no demand need be shown.

After a very careful examination of the whole record, we fail to discover any error which calls for a reversal of the case. We believe that substantial justice has been done, and that no different result could possibly be attained by awarding a new trial.

The judgment of the District Court is affirmed with costs.

Judgment affirmed.

French v. Ramge.

MEASURE OF DAMAGES. An allowance of damages sustained by reason of failure to ship goods, according to contract, upon the basis of calculation of profits to arise from trade in the goods, is inadmissible.

Error to the Douglas District Court.

This was an action brought by French to foreclose two mortgages executed by Ramge to the plaintiff. Ramge was a merchant-tailor, doing business in Omaha, Nebraska. The defence interposed to the second cause of action was, that French agreed, that if defendant would secure by mortgage the indebtedness then existing on open account from Ramge to him, and pay interest thereon at the rate of twelve per cent per annum, he would postpone payment thereof for five months, and sell and ship Ramge, on a credit of four months, such goods — not exceeding eighteen hundred dollars in value — as he should require for his spring trade, then about to open; that, relying on such agreement, Ramge executed the mortgage set up in the second cause of action in the petition; and French, in pursuance of said agreement, took his order, and, after holding it for more than twenty days (Ramge meanwhile expecting the arrival of the goods daily), for the first time informed Ramge (by letter) that he would not then or ever fill such order; and before Ramge could procure the goods embraced in said order, and necessary for him to carry on his spring trade, from other sources, the season was well-nigh over; he lost the sale of the goods, and his

customers were compelled to purchase elsewhere; in consequence of which he suffered great damage and loss, which he seeks to set up as a counter-claim to the amount due upon such mortgage.

To this defence a general demurrer was interposed, which was sustained by the Court. In this ruling, as well as in the refusal to grant a new trial, it is claimed the Court erred; and this petition is filed by Ramge to correct the alleged error.

Spaun & Pritchett, for plaintiff in error.

J. Neville and *T. W. T. Richards*, for defendant in error.

I. The damages alleged by way of counter-claim are remote and consequential, and cannot be allowed. *Sed. on Meas. of Dams.*, pp. 57, 65, 66, 68, 72; 3 *Pars. on Conts.*, 181, *et seq.*; 2 *Gr'lf on Ev.*, sect. 256; *Cincinnati* v. *Evans*, 5 *Ohio S.*, 594; *Fleming* v. *Beck*, 48 *Penn., S.* 309; *Berry* v. *Dwinel*, 44 *Maine*, 255; *Olmstead* v. *Burke*, 25 *Ill.*, 86.

II. The only damages recoverable by plaintiff in error would be the difference between the value of the goods at the time they were to be delivered and the date of the refusal to perform. *Sed. on Meas. of Dams.*, p. 291; 3 *Pars. on Conts.*, 204, *et seq.*; *Dana* v. *Eiedler*, 12 *N. Y.*, 40; *Griffin* v. *Colver*, 16 *N. Y.*, 489; 2 *Gr'lf on Ev.*, sect. 261; *Humphreysville, &c., Co.*, v. *Vermont, &c., Co.*, 33 *Vt.* (4 *Shaw*), 92.

III. Special damages of this kind must be pleaded, or no recovery can be had. There are no allegations covering such damages in the answer of the plaintiff in error. *Sed. on Meas. of Dams.*, p. 65; *Armstrong* v.

Percy, 5 *Wend.*, 538; *Furlong* v. *Polleys*, 30 *Maine*, 17 *Shep.*, 491.

CROUNSE, J.

It may be conceded, that securing an open account by mortgage upon the homestead of the debtor, signed by the debtor and his wife, is a good consideration for a promise made by the creditor. The promise set up by Ramge, in his answer to the petition filed by French to foreclose the mortgage so given, is, that French was to sell and ship him further goods, as he might require for his spring trade as a merchant-tailor, to an amount not exceeding eighteen hundred dollars. French failing to send the goods ordered by Ramge, the latter sets up a counter-claim for alleged damages arising from such failure. No price was agreed upon for the goods ordered; and of course no damage results from any difference between any agreed price and the value of the goods at the time and place of delivery. But it is averred, and it is made the *gravamen* of the defence, that, waiting some twenty days for the arrival of the goods before he was advised that French refused to send any, Ramge lost the sale of a large amount of cloth and the profits thereon, as well as the profit on the manufacturing the same into garments; that many of his permanent customers had to go elsewhere to be supplied, and thereby lost as customers altogether: for all of which he asserts a claim for damage of some eight hundred dollars.

That one party to a contract is entitled to recover such damages as he may have sustained by reason of its breach by the other is a general legal proposition; subject, however, to such restriction as to what may be regarded as properly falling under the head of damages

as policy and justice have attached. This claim overleaps all limits, and is opposed to the rule as found in the authorities.

Sedgwick, in his work on the "Measure of Damage," p. 18, says, "Both the English and American courts have generally adhered to the denial of profits as any part of the damages to be compensated, and that whether in cases of contract or tort."

Farther on the same writer says, "Independent, however, of all authority, I am satisfied, upon principle, that an allowance of damages upon the basis of a calculation of profits is inadmissible. The rule would be in the highest degree unfavorable to the interests of the community."

Mayne, a writer on the same subject, says (p. 6, "Measure of Damage"), "It is obviously unfair that either party should be paid for carrying out his bargain on one estimate of its value, and be forced to pay for failing in it on quite a different estimate. This would be to make him an insurer of the other party's profits without any premium for undertaking the risk."

Parsons, in his work on "Contracts," vol. iii. p. 182 (fifth edition), says, "Profits are excluded, not because they are in themselves remote, but because they depend upon contingencies which are so many, so various, and so uncertain, — as the arrival of goods; the time, place, and condition of arrival; the state of the market at the moment; and the like, — that it would be impossible to arrive at any definite determination of the actual loss by any trustworthy method."

Fleming v. *Beck*, 48 *Penn.*, 309, was a case brought to recover damages for loss of custom and profits by alleged defective performance of a contract to dress millstones. No recovery was allowed, because of the

remoteness of the damages. Judge Agnew, delivering the opinion of the Court, remarks, "In strict logic it may be said, that he who is the cause of loss should be answerable for all the losses which flow from his causation. But, in the practical workings of society, the law finds in this, as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and reflections of mankind are not founded on nice casuistry. Things are thought and acted upon rather in a general way than upon long, laborious, extended, trained investigation. Among the masses of mankind, conclusions are generally the result of hasty and partial reflection. Their undertakings, therefore, must be construed in view of these facts: otherwise they would often be run into a chain of consequences wholly foreign to their intentions. In the ordinary callings and business of life, failures are frequent. Few, indeed, always come up to a proper standard of performance, whether in relation to time, quality, degree, or kind. To visit upon them *all* the consequences of failure would set society upon edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses; and the law, therefore, aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of his acts and the attending circumstances would dictate."

Copper Company v. *Copper Mining Company*, 33 *Vermont Reports*, p. 92, is a case quite like this. It was an action brought to recover special damages for a failure to meet a contract to furnish copper for manufacturing purposes. Chief Justice Redfield says, "There is nothing in this case to show that the parties were aware that this article was important to the plaintiff in carry-

ing forward his business, beyond the mere fact of being supplied with ore to manufacture, or how much ore the defendant knew the plaintiff would require for the supply of his works, or what proportion he expected from this source, or how difficult it might be to supply the place of this ore in the market, or whether this ore could be profitably worked alone. Under these circumstances, we are not prepared to say that the special damages claimed in this action were the natural or ordinary, and therefore the known and necessary, result of the failure to perform the contract, or that they were in any sense fairly within the contemplation of both parties at the time of entering into the contract, and so the natural result of the breach of the contract as understood by the parties; and, unless the damages resulting from a breach of a contract are of this character, it will be settled they are too remote to be recovered. The general damages which the vendee of personal property is entitled to recover for its non-delivery, whether the price be paid or not, is the difference between the contract-price and the market-value of the article at the time and place of delivery when the price has advanced, together with the money paid on the contract."

Berry v. *Dwinel*, 44 *Maine Reports*, 255, is also quite similar. It was an action brought to recover damages for breach of contract in not cutting and hauling a large quantity of logs to be cut into lumber. Proof was offered to show damage resulting from not having a sufficient quantity of logs to stock the mill. The Court says, "The measure of damage for the non-delivery of an article is its value at the time and place of delivery. Remote and consequential damages — possible gains and contingent profits — are not allowed. The damages

recoverable are limited to such as are the immediate and necessary result of the breach. The purpose of the purchaser, the anticipated disposition of the thing purchased, and the probable profits in case the anticipated disposition had been made, are not, ordinarily, the proper subject of damage. The actual loss at the *time and place* of delivery seems to be the true rule to be gathered from all the cases." See *Hadley* v. *Baxendale*, 26 *Eng. L. & E.*, 398; *Hamlin* v. *The Great N. W. R. R. Co.*, 38 *id.*, 335; *Watson* v. *The Ambergate, Nottingham, & Boston R. R. Co.*, 3 *id.*, 497; *Taylor* v. *McGuire*, 13 *Missouri*, 517; *Olmstead* v. *Burke*, 25 *Ill.*, 86; *Griffin* v. *Colver*, 16 *N. Y.*, 489.

The case before us is one where there is a simple breach of contract, and for which at least most nominal damages could be allowed. No price was agreed upon for the goods ordered, and no damage results from any increased price that Ramge might have had to pay. Had the goods been sent, the presumption is that he must have paid for them what they were worth. The fact that he was to have a credit, he paying interest, no extraordinary circumstances being averred, lays no foundation for damage. By paying cash, he saves the same amount of money he must have paid as interest. No importance is given this circumstance by counsel, however; but the loss of profit which might have been realized from the sale of the goods manufactured, and the loss of customers, are relied on. These, as we have seen, involve too many contingencies to be admitted. An investigation of this kind would lead into a wilderness of uncertainties. At best, the Court could but approximate to the extent of the manufacture and sale of cloths by Ramge. Equally uncertain would be the question of how much would be the

probable profit on each garment sold, which must be qualified by the amount of competition, the value of labor, the rise or fall in the price of ready-made or custom-made clothing, the fact whether the customers buy for cash or on time, the responsibility of some of the patrons, and like considerations. All these, we repeat, are too uncertain and confused to be tolerated; and any attempt to ascertain damages of this character would more likely result in doing injustice than justice. It is not averred, neither is it to be supposed, that French understood his agreement as any thing more than that he was to forward the bill of goods to the extent of nine hundred dollars, as in other ordinary cases of sales made by him. Whether he could not supply the goods ordered, or whether he chose, on reflection, to sell no more to one whom he had to purchase to secure an honest claim by a further venture, he could only apprehend such damages as naturally flow from a like breach. He could well expect, and there is nothing to show to the contrary, that Ramge could buy from some one else. Boston and the house of French were not the only recourse for goods. For all that appears, the goods were but ordinary cloths and trimmings, and could have been purchased in numberless places and at any time. None of the matters relied on were brought distinctly to the knowledge of French, nor are they such as can be regarded as in the contemplation of the contracting parties.

When any thing beyond the difference between the agreed and market price for the thing sold or work contracted to be done is sought to be recovered, some special circumstance is shown. Take, for example, the case of *Messmoore* v. *The N. Y. Shot and Lead Co.*, 40 *N. Y.*, 422, where profits as such were recovered.

There the plaintiff, having contracted to sell to the State of Ohio a large quantity of bullets of a certain quality and at a fixed price, deliverable at Columbus, Ohio, made a contract with the defendant at New York, by which the latter agreed to manufacture and deliver to him the same quantity and quality of bullets; and, at the time of making it, he informed the defendant of his arrangement with the State of Ohio, and that he was contracting with him for the bullets in order to carry out that arrangement. It was there held, the defendant failing to deliver, that the plaintiff could recover the difference between the price the plaintiff was to receive and the price at which the defendant was to furnish the bullets. There it will be seen the profits were fixed, and susceptible of exact computation, and that the defendant contracted with full knowledge of and in direct reference to them.

But in the case at bar nothing of this kind is shown; nor is any thing disclosed by the answer taking it out of the ordinary rule, as is so thoroughly settled by the cases.

At most, but nominal damages could be proven. Where this is the case, and the question of costs, as here, is not affected, this Court will not reverse a judgment. The judgment of the Court below is therefore affirmed.

JUSTICE LAKE concurs.

Judgment affirmed.

MASON, Ch. J., dissenting.

It is suggested that there was no consideration for the plaintiff's promise to ship and sell to Ramge the eighteen hundred dollars' worth of goods on credit. The defend-

ant promised to execute a mortgage on his real estate to secure the plaintiff their old indebtedness to them if they would sell them the further amount of eighteen hundred dollars in goods on time; and then agreed, in consideration of the execution and delivery of the mortgage, to do so. Defendant executed the mortgage, and delivered the same to plaintiffs: this was a good and executed consideration for the promise of the plaintiff. They received the benefit of this agreement from the defendant, and now refuse to perform their part of the agreement. This they cannot legally do. The contract was legal, and based upon a substantial and valid consideration moving from the defendant to the plaintiff, — the execution and delivery of the mortgage to secure his old indebtedness to the plaintiff. The defendant has a legal right to secure such damages from the plaintiff as he can show he has sustained by their failure to comply with the contract. The defendant's damages, whatever they are, much or little, is a matter of proof, and they grow out of the transaction upon which the plaintiff's claim is based; and he has a legal right to recoup the same against the claim of the plaintiff.

It is not here a question of the measure of damages, but whether the case stated in the answer alleges that the defendant sustained damages; neither is it a question of the rule of damages, but of the sufficiency of the answer whether it alleges a counter-claim. The cases stated by the majority of the courts arose, not upon the pleadings, but upon the measure of damages arising at the time. That one promise may be a good consideration for another is well settled: all stock contracts have this basis, and they have been repeatedly upheld. But, in this case, the consideration moving from Ramge to the plaintiff was an executed consideration, and was

good to support the promise of the plaintiff's therefor. The Court erred in sustaining the demurrer of the defendant Ramge. The judgment of the Court below should be reversed, and the cause remanded for further proceeding.

Burr v. Boyer.

PRINCIPAL AND SURETY. A surety will be discharged by the neglect of the creditor to have a chattel mortgage recorded, made to him by the debtor to secure the debt, if such neglect occasion a loss of the security; but the creditor is not bound to enforce by action securities which he may have taken from the debtor.

——. It is not enough that the debtor has squandered and disposed of the property: it must appear, that, by reason of the neglect to record the mortgage, the debtor has been enabled to pass and has passed the property to *bona-fide* purchasers.

——: *Extension of time.* In order that the giving of time of payment by the creditor to the principal debtor may operate to release the surety, it must be for a sufficient consideration, and without the surety's consent.

Petition in error to Lancaster District Court.

The action was upon a promissory note made by Mitchell, Hunt, and Boyer, to the plaintiff. Boyer defended, alleging that he was surety on the note for Mitchell, who at its date gave a chattel mortgage to the plaintiff upon sufficient property to secure the debt; that the plaintiff neglected to record the mortgage, and Mitchell had squandered and disposed of the property, whereby the security was lost to the surety. Boyer alleged, as a further defence, that, at the maturity of the note, the plaintiff extended the time of payment to Mitchell, provided he, Mitchell, would pay it with stone delivered in Lincoln. At the trial, a jury was impanelled: whereupon the plaintiff moved for judgment on the pleadings, which was granted.

Sessions & Hall, for plaintiff in error.

C. C. Burr, in personam.

BURR v. BOYER.

No briefs on file.

CROUNSE, J.

Ordering judgment on the pleadings was to adjudge that the facts contained in defendant's answer constituted no defence. Plaintiff's action was brought upon a note signed by Boyer, the plaintiff in error, and two others. The defendant Boyer, after admitting the execution of the note, undertakes to interpose two defences.

The first, in substance, is, that he signed the note as surety for Mitchell, another of the defendants, — a fact well known to the plaintiff; and that, at the time of the making and delivering of the note, Mitchell executed a chattel mortgage to secure the payment of the same. Further, that the plaintiff neglected to have the mortgage filed for record, and did not enforce its collection; and that the mortgagor had squandered and disposed of the mortgaged property, which was ample to have secured the amount of the note, so that the same cannot now be made available in the payment and satisfaction thereof. It is further averred, on information and belief, that Mitchell did not have at the time of instituting this suit, nor has he since had, any property from which to satisfy a judgment for the amount of the note. For these reasons, Boyer claims to be released.

The second is, that Burr, by an agreement with Mitchell, extended the time of payment beyond that fixed in the note; and for that reason, also, he should, in law, be discharged.

As to the first of these: some criticism was made at the argument upon that portion of the answer that avers, that, by neglect to file the mortgage, the mortgaged property was "squandered and disposed of" to the injury of the defendant Boyer.

It was said that the words "squandered and disposed of" do not necessarily imply that the property was sold, or any interest in it transferred to others; and, if they do, that it must be further alleged that such sales were made, if any, to purchasers in good faith, and ignorant of the existence of the mortgage. I think otherwise.

There can be no mistaking the purpose of the pleader. The destruction, secretion, or other disposition beside selling or transferring it to third parties, could in no way be affected by the record of the mortgage; and it would be an unfair presumption to say, that, when used in the connection this language is, it may have been designed to express any other disposal of the property, such as would be influenced by the law relating to the recording mortgages. Sect. 121 of the Code requires, that, "in the construction of any pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties." This will not dispense with the averment of any material fact; but where the fact is pleaded, but in an unskilful manner, the pleading should not fall under demurrer. If the allegations are so indefinite or uncertain that the precise meaning is not apparent, the remedy of the other party is an application to the Court to have the pleading in that particular made more definite and certain. *Code*, sect. 125; *Olcutt* v. *Carroll*, 39 *N. Y.*, 436.

And not only should the allegation here be held sufficient to include any sale of the mortgaged property to third persons, but the defendant should not be required to add that such sales were to parties ignorant of the existence of the mortgage. The law has provided what shall be notices to purchasers. When such notice has not been given, the presumption should obtain that such purchases were made without notice.

If that be not the fact, then it devolves on the plaintiff to maintain it. Being satisfied that the defendant has sufficiently well pleaded the fact he has undertaken to plead, I will pass to the inquiry, whether enough facts are contained in the answer to make out a defence. Did the answer show the defendant in a position to urge it, I should hold, with his counsel, that Burr's omission to have the mortgage filed was such negligent treatment of it that Boyer should be released from obligation to the extent of the damage resulting from any sale of the mortgaged property to innocent purchasers. But, in the view I take of the case, I will no more than notice that point, without entering into a discussion of the law bearing thereon. The right of the surety to insist upon a proper and careful treatment of the security given by the principal debtor to the creditor rests upon that other right of the surety to use such security to the extent of its value for his own indemnity.

Upon paying the debt of his principal, he has an undoubted right to be substituted in the place of the creditor as to all securities held by the latter for the debt, and to have the same benefit he would have therein. *Story's Eq. Jur.*, sect. 327. Both the creditor and surety are interested in the preservation of the security, that it may be applied to the purpose for which it is given; and upon both is imposed the exercise of good faith with reference thereto. "If the creditor," says Justice Story (*Eq. Jur.*, sect. 325), "does any act injurious to the surety, or inconsistent with his rights, or if he omits to do any act when required by the surety which his duty enjoins him to do, and the omission prove injurious to the surety, — in all such cases the latter will be discharged; and he may set up such conduct as a defence to any suit brought against him, if not at law, at all events in equity." Chancellor Kent, in *Hayes* v. *Ward* (4 *Johns.*

Ch., 130), discussing the duty of the creditor in such cases, observes, "The surety, by his very character and relation as surety, has an interest that the security taken from the principal debtor should be dealt with in good faith, and held in trust, not only for the creditor's security, but for the surety's indemnity. The creditor must do no wilful act either to poison it in the first instance, or to destroy or cancel it afterwards." Let the rule, as clearly expressed by these eminent jurists, be applied here.

The security taken by Burr from Mitchell, the principal debtor, was a mortgage of personal property. By statute, where there is no immediate delivery of the property mortgaged, the mortgage shall be absolutely void against the creditors of the mortgagor, and so against subsequent purchasers in good faith, unless the mortgage, or a true copy thereof, shall be filed and recorded as directed by law. *Revised Statutes*, chap. xliii. sect. 73. The chief value, then, of the security taken here, depended on the fact whether the mortgage was filed or not. With the principal debtor so irresponsible in the eye of the creditor, that, for the payment of a hundred and forty-seven dollars in thirty days, he must give two additional names and a chattel mortgage as security, can the creditor be said to have acted fairly in omitting to do the very act that was likely to give any indemnity to the sureties? Had the principal debtor pledged to the creditor his gold watch, and the creditor afterwards allowed the debtor the use of it, and the latter had sold it to an innocent third party, there can be no question but that a surety could avail himself of such wrongful treatment of the pledge by the creditor. *Capel* v. *Butler*, 2 *Sim. & Stu.*, 457; *Smith* v. *Turner*, 1 *McCord*, 443; *Sumner's Notes to Rees* v. *Berrington*, 2 *Ves.*, 540. Wherein does the case before us differ from the illustration just made? In the latter case, the wrong consists

in doing something, — passing the pledge back to the debtor: in the former, the wrong arises from the plaintiff's omission to do something, — the simple act of filing and having the mortgage recorded. And it is just behind this distinction — between doing something and omitting to do something — that the plaintiff hopes to shield himself. It is true, the books speak of the creditor being "under no obligation to exercise active diligence for the protection of the surety as long as the surety himself remains inactive;" and "that, to discharge the surety, the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge," &c. *Schroeppel* v. *Shaw*, 3 *N. Y.*, 457; *Story's Eq. Jur.*, sect. 501. I will not, for the reason I have stated, undertake a review of the cases in which this reservation in favor of the creditor is declared; but, on examination, it will be found that they will not justify the use sought to be made of them here. For the most part, they are cases involving the question as to the extent of the obligation resting upon the creditor to prosecute, and satisfy himself out of the securities before resorting to the surety. In these cases it is well held, that there is no greater obligation on the creditor to incur the expense and trouble necessarily involved in realizing any thing on the securities given than there is on the surety. The surety undertakes that his principal will pay the indebtedness at given times. If the principal fails, it is his duty to pay the same. He can, by indemnifying the creditor, have the latter prosecute actions upon the securities, or demand that they be turned over to himself upon his paying the debt. But it is one thing to convert the securities given by the debtor into money that they may be applied to satisfy the debt of the principal debtor, and quite another to preserve such securities that they may be made so available. While the

creditor may be relieved from the former, he should be held responsible for the loss of any security arising from his wrongful act, either of omission or commission.

The answer avers that Mitchell alone was indebted to Burr, and that Boyer signed the note as surety; and, at the same time of giving the note, Mitchell executed a chattel mortgage upon seven hundred dollars' worth of property in favor of Burr, which mortgage he delivered to him. There was property sufficient to protect the creditor and sureties. The property was liable at any hour to be disposed of in a way that would render the security worthless. The simplest act on the part of the mortgagee and custodian of the paper could save the surety harmless by reason of his friendly act for the benefit of the plaintiff. Can it be called an act of good faith for the plaintiff to omit so small a matter when of so great consequence to the defendant? Can it be contended that the defendant must have first interested himself in the matter of filing and recording the mortgage? This would have been unusual. The plaintiff, and not the sureties on the note, took the mortgage. The very taking of it carries with it the idea that it was given for a purpose. That purpose should only be effectual by the further act of filing it. Can he who has taken the security stop short, and omit to do that which makes it chiefly valuable, under the excuse that others did not urge him to file it, or furnish the pittance necessary to pay the recorder? Were we considering some fixed and inflexible rule of law, as in case of tender or the like, we might feel constrained to insist upon every formal requisite being complied with; but we are applying a principle based on an equitable foundation, requiring good faith and fair dealing from the several parties interested, having reference to the relation they bear to the transaction. The case of *Capel* v. *Butler*, 2 *Sim. &*

Stu., 457, is nearly in point. There one White had agreed to sell to Butler an annuity. To secure the payment of the annuity, various securities were given; and, among others, White executed an assignment of two vessels to one Pruen in trust for that purpose. The payment of the annuity was further secured by the bond of White and the plaintiff as his surety. It was one of the conditions of the bond, that, after the expiration of two years, White should be at liberty, upon certain terms, to repurchase the annuity. The transfer of the vessels was not perfected according to the forms prescribed by the registry acts; and, taking advantage of the omission, White had sold the vessels, and applied the proceeds to his own use. The annuity being in arrear, Butler brought an action upon the bond. Capel, the surety, filed his bill to restrain the action, and claimed the right to repurchase the annuity according to the terms stipulated in the condition of the bond, and to have the value of the vessels deducted from the amount which he would otherwise have been required to pay upon such repurchase. The vice-chancellor was of opinion that the plaintiff, as surety, was entitled to take advantage of the proviso for redemption; and, the value of the vessels being lost to him by the neglect of the defendant Butler, he was entitled to deduct that value from the stipulated price of redemption. It appeared, by the recitals of the bond, that the plaintiff had become surety on the faith of the vessels being effectually assigned as a security for the annuity. I do not regard this circumstance, however, as at all controlling the right of the surety to insist upon having any security taken applied to the payment of the debt; nor does it depend upon the circumstance, that the surety knew at the time that it was taken by the creditor. The rule applies equally to securities taken by the creditor subsequent

to the time of the surety becoming bound. *Pledge* v. *Buss*, *Johnson* (*English Ch.*), 663; *Story's Eq. Jur.*, *Red. Ed.*, sect. 499.

Mr. Justice Harris, in the case of *Schroeppel* v. *Shaw*, in commenting on that of *Capel* v. *Butler*, says, "For the defendant (creditor) to omit an act necessary to render the assignment effectual was equivalent to a surrender of the security to the principal debtor. It was like the case of a creditor *taking a mortgage upon personal property, and neglecting to file it;* or the omission of a creditor to protest a note held by him as collateral security, so as to charge the indorser. In these and in similar cases, surety, whose means of indemnity had been impaired by the neglect of the creditor to do what was necessary to protect the security, might well insist upon his right to be discharged to the extent of the loss sustained by reason of such neglect." In the same case, when before the New-York Supreme Court, a similar comment was made on *Capel* v. *Butler*. It was there said, "The nature of the security required something to be done at once by the creditor to make it a valid security; and hence the law should, as it doubtless did, imply an agreement on his part to perform that act, without which the security was invalid. An omission to do this would be gross neglect in an agent, bailor, or trustee, and would be a breach of good faith on the part of the creditor towards the surety." 5 *Barb.*, 580. So, without dwelling longer on this point, I am of the opinion, that to omit to file the mortgage on the part of Burr is such a breach of that trust imposed on him by the law to make effectual and to preserve the indemnity upon which the defendant Boyer had a right to rely, as to make him, in the first instance, liable. This brings me to the further consideration, whether there is still enough alleged to constitute a defence.

Conceding that Boyer might show what he has averred, that, notwithstanding he appears by the face of the note as one of three joint and several makers, he signed in fact only as surety, his obligation was, that in the event his principal, Mitchell, did not pay the note within thirty days from Oct. 17, 1870, he would. Yet by his answer, filed one year after the making of the note, and about eleven months subsequent to the time he guaranteed it should be paid, he virtually confesses that it has not been so paid. As a legal excuse for such non-payment, he urges, that, by the failure of Burr to file and have the mortgage recorded, the mortgaged property has been "squandered and disposed of by the mortgagor, Mitchell, without the knowledge and consent of him, the said Boyer; so that the same cannot now be made available in the payment and satisfaction of said note."

From what has been said, it will be understood that any liability which might fall upon the plaintiff in the premises would result from his omission to file the mortgage, rather than from any failure to satisfy his claims out of the mortgaged property. This latter he was not bound to do upon his own motion. *Story, Eq. Jur.*, sect. 501. His duty, in the first instance, was to make effectual the security given, and preserve it to await the maturity of the note. Then the duty of the defendant, Boyer, arose. It was for him then to pay the note, unless the conduct of Burr had destroyed the security on which he was entitled to rely. But, from all that appears here at that time, the property may have been all intact and in possession of Mitchell. It is claimed now, nearly one year after the defendant Boyer's obligation arose, that the property is disposed of. It does not follow, nor is it at all probable, that such was the case at the time when he, under the letter of his contract, should have paid the note. If it is the fact, it was the

duty of defendant in the Court below to make it appear. The fair presumption is to the contrary, however. Before the defendant can come into court and invoke the aid of a rule of law grounded in equity, he must not only show that the plaintiff has been guilty of a wrong, but that he himself is free from fault. For this reason, the first defence is insufficient.

As to the second: it is not enough that the creditor shall have agreed with the principal debtor to allow an extension of time for the payment of the debt. Such agreement must be for a sufficient consideration, and without the consent of the surety. The answer is insufficient in alleging want of consent. *Green* v. *Blandon Walker* (*Miss.*), 375; 5 *U. S. Dig.*, 821.

The judgment of the Court below must be affirmed.

Judgment affirmed.

Latham v. McCann.

MORTGAGE FORECLOSURE. DEFECT *of title* is no defence to an action of foreclosure of mortgage given for purchase-money, if the deed contain only a covenant of warranty: otherwise, if it contain a covenant of seizin.

Petition in error to the District Court for Otoe County.

It was an action for the foreclosure of a mortgage given by the defendant McCann to one Bear to secure two notes given by McCann as part of the purchase-money of the mortgage premises. The notes were assigned to the plaintiff after maturity. The defence alleged was a defect in the vendor's title. The plaintiff demurred to the answer; and the demurrer was sustained. Judgment being for the plaintiff, the defendant brought the case here.

I. N. Shambaugh, for plaintiff in error.

I. The defence alleged in the answer was good. The plaintiff took the assignment of the note and mortgage long after the maturity of the note, and stands in the place of the mortgagee. If Bear could not enforce payment of the same, neither can the plaintiff.

II. It does not appear that Bear ever had possession of the land; nor does it appear that McCann obtained the possession under the deed from Bear, or that he has ever been in or had such possession. Under such circumstances, the Court will not compel McCann to pay the balance of the purchase-money until the defects in the deed from Frazier to Bear have been cured, and a good title is secured to McCann. See *Steinhauer* v. *Witman*, 1 *Sergt. & Rawle*, 447. The fact that Bear

gave McCann a warranty deed can make no difference. He had no title himself, and none passed by his deed to McCann. To deny the defence set up would be to compel McCann to bring a new suit on the covenants in his deed, and thus multiply suits between these parties, when all the matters in dispute can be as well determined in this suit, and circuity of action prevented. In modern times, such defences have been almost universally sustained, where the case was such that the whole controversy could be settled in the one suit. See *Rawle on Covenants for Title*, 633. A court of equity, when all the parties in interest are before it, will determine the whole controversy, and not compel the parties to bring new actions, and thus encourage multiplicity of suits. See *Steinhauer* v. *Witman*, 1 *Sergt. & Rawle*, 447; *Rice* v. *Goddard*, 14 *Pickering*, 293; *Frisbie* v. *Hoffnagle*, 11 *John.*, 50; 2 *Nott & McCord* (*S. C.*), 166, *note*; 1 *Edwards's Ch.* (*N. Y.*), 305.

Calhoun & Croxton, for defendant in error.

A purchaser, in possession of land, cannot be relieved by a court of equity from payment of purchase-money for defect in vendor's title, without fraud charged in the bill or answer, and proved. *Noonan* v. *Lee*, 2 *Black.*, *U. S. R.*, 499; *Patton* v. *Taylor*, 7 *Howard*, *U. S. R.*, 159; *Bumpus* v. *Platner*, 1 *John. Ch.*, 213-218; *Abbot* v. *Allen*, 2 *John. Ch.*, 519; *Gouverneur* v. *Elmendorf*, 5 *John. Ch.*, 79; *Simpson* v. *Hawkins*, 1 *Dana*, 305, 308, 312; *James* v. *McKernon*, 6 *John.*, 543.

The answer does not show a failure of title, nor eviction, nor interferences with McCann's title of possession, nor in any way whatever. He does not claim to be damaged in any manner.

The pretended tender set up in the answer is no

tender. A tender, to be such, must be absolute and unconditional.

A conveyance of land by warranty deed carries with it the possession of the land. 3 *Washburn on Real Property*, p. 276, sect. 46; 3 *Washburn on Real Property*, p. 121, sect. 16.

And seizin and possession are held to mean the same thing. 3 *Washburn on Real Property*, p. 117, sect. 7.

CROUNSE, J.

The question, whether a defendant in an action brought to foreclose a mortgage given to secure a balance of the purchase-money for premises, for which he has received a deed with covenants of warranty, can, before eviction, interpose the defence of a want of title in his grantor, was, I think, rightly determined by the Court below.

The transaction between McCann and Bear seems to have been an ordinary sale of land, with no suggestion of fraud, accident, or mistake. Whether McCann bought with reference to the fact he now sets up as affecting the title of Bear or not, we cannot consider. To provide, however, against any disturbance of his possession, he accepted Bear's covenant of warranty, — the grantor's assurance that he should enjoy the premises without interruption by virtue of paramount title.

The parties, in this as in every other case, must be bound by the bargain they have chosen to enter into. The grantor might have demanded a covenant of seizin, — the assurance that the grantor had at the time of making his deed the very estate, both as to quantity and quality, that he professed to convey. In such case, a failure of title to the land might be interposed in an action on the mortgage. *Rice* v. *Goddard*, 14 *Pick.*,

293; *Tallmadge* v. *Wallace*, 25 *Wend.*, 107. So might he have reserved a portion of the purchase-money by agreement to await the clearing-up of any suspicion on the title; but he chose, for some reason, to accept a deed with covenants of warranty. He cannot now come forward and say that he will pay his note and mortgage upon certain alleged defects being remedied by Bear's or his assignee's procurement. To claim this is to ask the Court to make a new contract between the original parties. This we cannot do. With no fraud or mistake appearing, they must be held to that entered into by them. On the one side, the land has been conveyed by deed, with a covenant of the grantor that he will protect his grantee in the undisturbed possession of it: on the other hand, the grantee has promised to pay the sum expressed in the mortgage. The grantor, Bear, has kept the agreement on his part. McCann has neither been evicted; nor, as appears, has there been any adverse claim asserted whatever We cannot anticipate that any will be made; nor can we enter upon the uncertain task of inquiring into the validity or invalidity of any alleged adverse claims. It is the duty, therefore, of McCann to pay his obligation, and rely upon the covenant should he ever be molested in the possession of the land conveyed. *Platt* v. *Gilchrist*, 3 *Sand., N. Y. Superior Ct. R.*, 118; *Leggett* v. *McCarthy*, 3 *Ed. Ch.*, 126; *Van Waggoner* v. *McEwen*, 1 *Gr. Ch. R.*, 412; *Noonan* v. *Lee*, 2 *Black, U. S.*, 499; *Thomas* v. *Powell*, 2 *Cox Ch. Cas.*, 394; *Heath* v. *Newman*, 11 *Smedes & Marsh*, 201; *Wiley* v. *Fitzpatrick*, 3 *J. J. Marsh*, 584.

The judgment of the Court below must be affirmed.

Judgment affirmed.

Smith v. Hawley.

PRACTICE: *Entry of judgments of Probate Court in District Court.* If a judgment be regularly rendered in the Probate Court, and a transcript thereof be filed in the District Court, but the entry of the same in the execution-docket be defective, a purchaser of the defendant's real estate thereafter, with knowledge of the entry, will not hold it divested of the lien. His duty is to look to the transcript.

——: ——. Judgment being entered in the Probate Court against W. G. B. and J. L. B., and a transcript thereof in due form having been filed in the District Court, the clerk docketed the same on the execution-docket "W. G. & J. L. B." *Held* sufficient.

Petition in error to the District Court for Dodge County. The facts are fully stated in the opinion of the Court.

N. H. Bell, for plaintiffs in error.

The sections of our statute referred to above make these judgments a lien from the day of the *filing*, in the same manner and to the same extent as if they had been rendered in the District Court. The intention of the law, then, is evidently to give to the judgments of inferior courts, when the transcript is filed with the clerk of the District Court, the same standing as if they had been rendered in that court; and we can see no reason in the nature of things why a party should have any more "notice" in the one case than in the other. A party searching for judgment liens can find them as readily within the folds of a justice's transcript as within the covers of a court journal. It might with as good reason be asserted that the judgments of our District Courts are not liens upon real estate, unless entered on

the execution-docket. The entry, we take it, is for the same purpose in both cases.

As to the second question, we are willing to submit to the commonest understanding whether W. G. & J. L. Bowman means any thing else than W. G. Bowman and J. L. Bowman. The law will not allow a man to stultify himself in order that he may claim the immunity and protection allowed to infants and idiots. The well-known rule with regard to notice is, that whatever is sufficient to lead a man of ordinary prudence and caution to inquiry is notice sufficient; and, if he stops short of reasonable inquiry, he is guilty of negligence, and will not be protected. And, when a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona-fide* purchaser. *Williamson* v. *Brown*, 15 *N. Y.*, 354.

We think, too, that the law requiring deeds and mortgages to be properly acknowledged and recorded, to make the record notice to subsequent purchasers, &c., does not apply to a case like the present, for the reason that the record of a deed or mortgage is for the very purpose of imparting notice; and a defect or omission in the record is a defect or omission in the notice.

Is it not enough, then, that the entry in the execution-docket be such as to suggest danger? — such as would lead a man of ordinary prudence or caution to further inquiry, who, if he fails to follow that lead, is guilty of negligence?

Munger & Ghoste, for defendant in error.

I. No other construction of the statute can be properly and safely made which will afford that protection to the public in searching after encumbrances to title, and which was the obvious intention of the law-makers, than the construction that the entry of the case must be made upon the execution-docket. To say that parties are required, in every search after a perfect title, to examine through all the musty files of the clerk's office which have been accumulating for years, seems to us absurd; or, using the language of an eminent judge, an instrument might as well be buried in the earth as in a mass of records without a clew to its whereabouts; and in support of which we present the following cases: 15 *Iowa*, 510, *Barney* v. *McCartney*; 1 *John. Ch.*, 288, *Frost* v. *Beekman*; 12 *Iowa*, 14, *Miller* v. *Bradford et al.*; 25 *Iowa*, 184, *Whalley* v. *Small et al.*; *Rev. Statutes of Nebraska*, 492.

II. The defendant in error, in his petition in the Court below, alleges, that at the time of the rendition of said judgments, and at the time of his purchase, the said W. G. Bowman and J. L. Bowman were partners, doing business under the firm-name of W. G. & J. L. Bowman, in the State of Nebraska, and not incorporated. This fact, we think, was sufficient to mislead the said Hanbury, and justified him in the belief that the judgments, as entered in the execution-docket, were rendered against said Bowmans as a firm; and, if rendered against them as a firm in the firm's name, said judgments were not liens upon the real estate of W. G. Bowman and the land in question. *Rev. Statutes of Nebraska*, p. 397, sect. 27.

III. W. G. & J. L. Bowman can only be taken and understood to represent them collectively, and cannot be understood to represent them in severalty; and if this be true, that the entry made on the execution-docket

could only represent the Bowmans in a collective sense, then they must represent an association; and the judgments so entered would not give notice of liens upon the real estate of an individual member of such association. *Rev. Statutes of Nebraska*, p. 397, sect. 27; *Burrill's Law Dictionary, definition of Association; Parsons on Partnerships*, 129, *Note O, Op. of Story, J.*

LAKE, J.

In the Court below, the defendant in error files his petition to enjoin the plaintiffs in error from selling certain real estate on execution. A temporary injunction was obtained, which was afterwards, on the overruling of a general demurrer to the petition, made perpetual by the final judgment of the Court. To reverse this judgment, this proceeding is brought.

The record shows, that on the fifth day of September, 1870, the plaintiff in error, C. M. Smith, recovered two judgments in the Probate Court of Dodge County against W. G. Bowman and J. L. Bowman; transcripts of which were filed in the office of the clerk of the District Court on the twenty-ninth day of the following December, to make them liens upon the real estate of the defendants therein, as provided in sect. 561 of the *Code of Civil Procedure.*

In entering the cases on the execution-docket, the clerk entitled them as *C. M. Smith* v. *W. G. & J. L. Bowman*, and afterwards issued executions thereon in due form, directed to the said Dunham M. Strong, who, as sheriff of the county, levied the same upon the real estate in question, and advertised it for sale on the sixteenth day of December, 1871. The property levied upon was taken as the property of the said W. G. Bowman; the legal title to which was in him when said

transcripts were filed, but, before the issuing of the execution, had been conveyed to the defendant in error on the fourth day of April, 1871, who claims to hold the same, wholly freed from, and entirely divested of, any lien on account of said judgments. And this claim is based solely on the ground that the cases were defectively docketed by the clerk; that they should have been docketed as judgments against "W. G. Bowman and J. L. Bowman," and not as against "W. G. & J. L. Bowman," in order to make them liens upon the separate estate of W. G. Bowman.

This position of the defendant in error is wholly untenable. Sect. 562 of the Code provides, that "such judgment, if the transcript be filed in term-time, shall have a lien on the real estate of the judgment-debtor from the day of filing: if filed in vacation as against such judgment-debtor, said judgment shall have a lien from the day of filing; and as against subsequent judgment-creditors, from the first day of the next succeeding term, *in the same manner, and to the same extent, as if the judgment had been rendered in the District Court.*"

Now, the judgments in question were properly rendered against both of the Bowmans individually. The transcripts contained all that was requisite in such cases, and were duly filed. Up to this point no defect is pointed out, nor any objection made. But, in his petition, the defendant in error states, that, at the time of his purchase, he caused the execution-docket to be examined, and found the two judgments entered therein, as before stated; but knowing that the two Bowmans were then, and for a long time before had been, doing business as a firm, under the name and style of "W. G. & J. L. Bowman," he had good reason to and did suppose that they were rendered against them as copartners only, and constituted no lien upon the individual property of either of the partners.

It is impossible for me to accord to this statement the utmost degree of candor. To my mind it is incredible that an attorney, or even any other person possessed of sufficient legal knowledge to understand that the execution-docket was the proper place to look for judgment liens, could have examined these entries, and concluded therefrom that the real estate of W. G. Bowman was not effected thereby; especially so when it is remembered that the transcripts themselves were at hand for reference, in case of any uncertainty or ambiguity in the entries made by the clerk.

I am entirely unwilling to believe that any one engaged in the examination of titles has so little sagacity as this; but prefer to regard it as a case, where, by a narrow construction of the statute and a sharp technicality, it is hoped to cut out a judgment-creditor, and relieve an estate from a lien which the purchaser knew, or at least had good reason to know, rested upon it.

But, if there has been a substantial observance of the statutes before referred to, it is of little consequence whether the purchaser had actual knowledge of the existence of the liens or not. His ignorance of the legal effect of what was done furnishes no ground for relief. I am of the opinion that the action of the clerk, if not strictly technical, was at least substantially correct, and the judgments were valid liens upon the real estate in controversy at the time it was purchased by the defendant in error, and that he took it charged with the amount due thereon.

The judgment of the District Court, being in conflict with these views, is reversed, and cause remanded.

Judgment reversed, and cause remanded.

McCann v. McLennan.

PLEADING. *No reply* to new matter alleged in the answer is necessary, unless it constitutes a counter-claim or set-off.

CONSTRUCTION OF STATUTES. In the construction of statutes, effect must, if possible, be given to every clause; and one clause must not be placed in antagonism to another.

——. Specific provisions relating to a specific subject-matter control general provisions.

PRACTICE: *Remanding causes.* If a new trial cannot be awarded, this Court will render such judgment as the District Court should have rendered, and not remand the cause for judgment.

This was a petition in error to a judgment rendered by the District Court for Otoe County. The facts sufficiently appear in the opinion of the Court.

Shambaugh & Richardson, for plaintiff in error.

E. Archbold, for defendant in error.

CROUNSE, J.

The agreement of the attorneys in the Court below, by which the cause was submitted to the determination of the Court on the pleadings without proof, must bind the parties. They were competent to enter into the stipulation; and there is no suggestion in the record that any advantage was taken by either: had there been, the Court below was the place to seek relief from it.

The defendant, by his answer, admits the execution and delivery of the note. The answer sets up a good defence to it, however, if it is to be taken as true with-

out the introduction of proof to support it. The Court held in effect, that, by the failure of plaintiff to reply, the facts contained in the answer were to be taken as true. The answer set up new matter, but not such as constitutes either a counter-claim or set-off. The question then presented for the determination of this Court is, whether such an answer demands a reply or not: if it does, the judgment of the Court below is right; if it does not, the judgment must be ordered for the plaintiff for the amount claimed. The following sections of the Code refer to the subject. In chap. v., under the head of "Reply," we have two sections in these words: "Sect. 108. — There shall be a reply or demurrer to every material allegation of new matter set up in the defendant's answer; and every material allegation of new matter in the answer, not controverted by the reply of the plaintiff, shall, for the purposes of the action, be taken as true: but the allegations of new matter in the reply shall be deemed controverted by the adverse party. Allegations of value, or of amount of damages, shall not be considered as true by failure to controvert them. Sect. 109. — When the answer contains new matter constituting a counter-claim or set-off, the plaintiff may reply to such new matter, denying generally or specifically each allegation controverted by him; and he may allege, in ordinary and concise language, and without repetition, any new matter, not inconsistent with the repetition, constituting a defence to such new matter in the answer; or he may demur to the same for insufficiently stating in his demurrer the grounds thereof; and he may demur to one or more of such defences set up in the answer, and reply to the residue."

In the next chapter, under the head of "General Rules of Pleading," we have, — "Sect. 134. — Every material

allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer, constituting a counter-claim or set-off, not controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in the answer, not relating to a counter-claim or set-off or of new matter in reply, shall be deemed to be controverted by the adverse party as upon a direct denial or avoidance, as the case may require. Allegations of value, or of amount of damage, shall not be considered as true by failure to controvert them."

By the first of these sections, it will be seen that a reply is required to every allegation of new matter set up in the answer, with no qualification that such new matter is confined to that constituting a counter-claim or set-off; while in the last a reply is demanded only in case the answer sets up a counter-claim or set-off There is, upon their face, an apparent conflict.

Notwithstanding we may be satisfied that this seeming hostility between these different provisions was not the result of deliberate purpose of the legislature enacting them, but was the result of the haste attending the revision of the statutes by the legislature of 1866, yet, being parts of the same act, we must interpret them without reference to any former statute on the same subject, or to the history of their enactment.

One of the first and most imperative canons of construction commands us to construe statutes so as to give, if possible, some effect to every clause, and not to place one portion in antagonism to another. *Brooks* v. *Mobile School Commissioners*, 31 *Ala.*, 227. Applying this rule to sect. 108 above, we could not accept it literally and fully without destroying and annulling sect. 134. New matter is not confined to counter-claim or set-off; and it is therefore utterly impossible to require a reply to

every allegation of new matter, and at the same time give effect to sect. 134, which distinctly says that "the allegation of new matter in the answer, not relating to a counter-claim or set-off or of new matter in reply, shall be deemed to be controverted by the adverse party as upon direct denial or avoidance, as the case may require."

Another familiar rule of construction is, that specific provisions relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the law, which might otherwise be broad enough to include it. *Pelt* v. *Pelt*, 19 *Wis.*, 193; *City of Covington* v. *McNickle's Heirs*, 18 *B. Monroe*, 286; *Peyton* v. *Moseley*, 3 *Mon.*, 77. Here, in sect. 108, we have the general provision that all new matter must be replied to. In a subsequent section, this new matter is limited to such, however, as constitutes a counter-claim or set-off. In this way the whole may be harmonized, and effect given to all parts of the statute. It is saying, in effect, that all new matter amounting to a counter-claim or set-off must be replied to: that not constituting such counter-claim or set-off will be considered denied without reply.

I know that the practice has prevailed in the several districts to reply to all allegations of new matter in the answer. This no doubt has been done, not from any conviction, that, under the law, it is necessary, but because it has been thought easier to do so than hazard an adverse determination of this Court. But, as the matter is squarely presented in the case before us, I am of the opinion, that, under the existing provisions of the Code, a reply to an answer is demanded only in cases where such answer sets up new matter constituting a counter-claim or set-off.

We were asked by counsel for the defendant in error,

that, in the event we should so hold, the cause might be remanded to the Court below, so that proof might be given in support of the answers. I do not see how we can do that. There were no errors arising upon the trial which entitled either party to a new trial. Neither would it be just to the other party to do so if we could. The agreement to submit the cause to the determination of the Court without proof is explicit, and was deliberately entered into. It necessarily involved the contingency of this Court construing the statute. Should we hold a reply is necessary, the defendant demands, and would be entitled to, an affirmance of his judgment. Holding otherwise, he must yield to the effect of such determination; and it becomes the duty of this Court to render such judgment as the Court below should have rendered, or remand the cause to that Court for such judgment. Sect. 594, *Code.*

The judgment of the Court below is reversed; and judgment will be entered in the Court for the plaintiff for the amount claimed in his petition.

Judgment accordingly.

Homan v. Laboo.

Bona-fide Purchaser. Where the owner of property is induced by the fraud of another to part with it, an innocent purchaser from the party in possession will take a good title.

——: *Agent.* And it is immaterial whether the possession is obtained from the owner in person or from his agent.

Petition in error to the District Court for Otoe County.

It was an action of replevin, brought by Homan against Laboo and George Ward to recover possession of a span of mules.

Homan claimed a special ownership, growing out of the following state of facts.

The property being in possession of one Adcock, Ward, claiming the general ownership, brought suit, and replevied the same. Being unable to give the security necessary to obtain a delivery to him by the officer, he applied to Homan for that purpose. To induce Homan to become security, he agreed to deliver the property to him, to be held as indemnity against loss; and accordingly delivered the property to Homan, who took possession of the same by placing them in his stable. A few days after, without the knowledge of Homan, about daylight in the morning, Ward appeared at the stable, and, by falsely representing to the man in charge that he had arranged with Homan to give up the property to him, obtained possession of them without the knowledge of Homan, and removed them from Omaha. Afterward, at the trial of *Ward* v. *Adcock*, a verdict was rendered against Ward for the value of the mules, which Homan paid in full. Upon ascertaining that the

property was in possession of Laboo, Homan brought replevin against Laboo and Ward in Otoe County; the trial resulting in a verdict and judgment against Homan. See report of the case when before the Court on a former occasion. 1 *Nebraska*, 204.

A. J. Poppleton, for plaintiff in error.

I. In case of a sale and delivery of personal property induced by the fraud of the vendee, he takes a title voidable, but not void. In the hands of the vendee the property may be reclaimed, but not in the hands of an innocent purchaser for value. *Mowrey* v. *Walsh*, 8 *Cowen*, 239; *Parker* v. *Patrick*, 5 *Term Repts.*, 175; *Rowley* v. *Bigelow*, 12 *Pick.*, 307.

But this is only true in case of a fraudulent sale and purchase. In case possession is obtained feloniously, or even tortiously, without a delivery from or by the consent of the real owner, the person so possessing himself of the property takes no title, and can convey none. 20 *Wend.*, 267, 268; 27 *Wend.*, 285; 5 *Cush.*, 137; 1 *Douglas, Mich.; Wheelwright* v. *Depeyster*, 1 *John's*, 471; *McCarty* v. *Vickery*, 12 *John's*, 348; *Hollingsworth* v. *Napier*, 3 *Caines*, 182; *Root* v. *French*, 13 *Wend.*, 570; *Ash & Anners* v. *Putnam*, 1 *Hill*, 302; *Robinson* v. *Dancley*, 3 *Barb.*, 20; *White* v. *Gordon*, 5 *Eng. Law & Eq.*, 379.

Mere possession of personal property is not such a badge of ownership, or warrant to dispose of the same, as will protect a *bona-fide* purchaser for value. *Spraights* v. *Hawley*, 39 *New York*, 441.

Only payment or voluntary surrender of a pledge can deprive the pawnee of this security. *Edwards on Bailments*, 265; *More* v. *Woods*, 5 *N. H.*, 297; 6 *Vt.*, 123; 2 *Aik.*, 150.

The only exception to the rule, that no one can convey a better title than he has, is that of a fraudulent purchaser. In that case the purchaser may convey a good title to a *bona-fide* purchaser for value. *Edwards on Bailments*, 266.

II. The Court below erred in charging, that if Homan knowingly permitted Ward to keep possession of the property, and sell to an innocent purchaser, it would confer no title, there being no testimony to support and make applicable such an instruction. 3 *Graham & Waterman on New Trials*, 824; *Bathune* v. *McCrary*, 8 *Geo.*, 114; *Bovard* v. *Christie*, 2 *Harris Pa.*, 267; *Jones* v. *Eason*, 2 *Iredell*, 331; *Lightburn* v. *Cooper*, 1 *Dana*, 273; *Robards* v. *Wolfe*, 1 *Dana*, 155; *Fay* v. *Grimstead*, 10 *Barb.*, 321.

T. B. Stevenson and *I. N. Shambaugh*, for the defendant in error.

I. The Court will not set aside the verdict of the jury if there is any evidence to support it. In this case there is an overwhelming preponderance of evidence in favor of the verdict.

II. The instructions asked by the plaintiff were rightly refused. The first states an abstract proposition of law not applicable to the facts of this case; and the second is liable to the same objection: and, as modified and given by the Court, they were more favorable to the plaintiff than he had a right to ask.

There is no pretence that the plaintiff was the owner of the mules. He had, at best, but a mere lien on the mules to secure him against his liability as Ward's security. Even if the owner of personal property is deceived, and induced by the false and fraudulent representations of another to sell and deliver to him such

property, and it is afterwards sold by the wrongful possessor to an innocent third party for a valuable consideration, without notice of the fraud, such owner cannot follow up and reclaim the property from such purchaser. 1 *Parsons on Contracts*, 520; 2 *Kent's Comm.*, 666, *n.*; 13 *Barbour*, 372; 1 *Selden*, 48; 34 *Eng. L. & Eq.*, 607; 6 *Johnson's Ch.*, 438.

Much less can a special owner having a mere lien on the property, which he has voluntarily surrendered into the possession of the general owner, although such possession may have been obtained by the false and fraudulent representations of such owner, follow up and reclaim the same from an innocent third party who has purchased the same from the owner in good faith for a valuable consideration, and without notice of the fraud. 3 *Parsons on Contracts*, 238, 242, 243, and 244.

III. The first, third, fifth, sixth, and seventh instructions asked by the defendant Laboo, and given by the Court, laid down the law of the case correctly. If the plaintiff voluntarily suffered Ward to repossess himself of the mules, or the possession of the same was obtained from the plaintiff by the false or fraudulent representations of Ward, and the plaintiff afterwards knowingly suffered Ward to keep possession of the mules, and Ward, while in possession of the mules, sold the same to the defendant Laboo, and Laboo purchased the same in good faith for a valuable consideration, and without notice of the plaintiff's claim, the law will protect the purchaser against the claim of the plaintiff. 1 *Parsons on Contracts*, 520; 3 *Parsons on Contracts*, 238, 242, 243, and 244; 2 *Kent's Comm.*, 666, *n.* 1; 13 *Barbour*, 372; 1 *Selden*, 48; 34 *Eng. L. & Eq.*, 607; 6 *Johnson's Ch.*, 438. Laboo was an innocent purchaser; and, where one of two innocent persons must suffer by the wrongful act of a third party, the loss must be borne

by that one who placed it in the power of the third party to perpetrate the fraud.

IV. The second instruction asked by the defendant Laboo was properly given by the Court.

The transaction between the plaintiff and Ward was a pledge or mortgage of the mules to secure the liability of the plaintiff as Ward's surety, and was valid and effectual against subsequent purchasers in good faith from Ward only so long as the plaintiff had and kept the actual possession of the mules. *Rev. Stat.* 294, sect. 73; 3 *Parsons on Contracts*, 234, 238, 243, and 244.

And when the plaintiff parted with the possession of the mules, or suffered Ward to take or keep the same, he lost his lien, at least as against a purchaser from Ward in good faith for a valuable consideration, and without notice of any fraud. See same authorities.

V. The verdict is for the right party, without regard to the instructions given or refused; and the Court will not disturb it.

CROUNSE, J.

This cause comes from the District Court for Otoe County. It was an action instituted by Homan to recover a span of mules. The plaintiff's claim to recover is based on the following facts: —

On June 5, 1868, one Ward came to Homan, a livery-stable proprietor in Omaha, and requested him to sign a replevin bond in a suit just begun by Ward against another party, in whose possession he found the mules in question. Homan did so to oblige him, and upon the understanding that Ward would return to Nebraska City, where he was acquainted, and bring with him a friend who would take Homan's place on the bond, and that the mules should be left with Homan till he should be

so released. On the eighth day of the same month, Ward returned to Omaha with one Jennings. They met Homan on the street, where Ward informed him that Jennings would go on the bond; to which Homan replied, "I am glad of it." Jennings did go to the officer having the bond, and sign it; leaving Homan's name on, of course. The next morning Ward went to Homan's stable, and, in the absence of Homan, assuring Hammet, the person in charge, that he had Homan's consent to take the mules away, induced Hammet to let him have them upon paying the charges for their keeping. Ward took the mules to the vicinity of Nebraska City, where, on the third day of July, he sold them to Laboo. Laboo swears that he bought them innocently and in good faith, and paid full value for them; and there is nothing in the record to question this. Homan, on the same morning the mules were taken by Ward, was advised of the fact, but took no steps to effect their return; and, while he himself swears that he supposed them to be about Nebraska City, he never sought their return until a short time before bringing this action, — in October of the same year, — and till about the time he found himself compelled to pay the amount of damages assessed against Ward in the latter's action to recover the mules.

From all this, it is quite clear to my mind, that, at the time Laboo purchased the mules, Ward was in possession, and assuming to be the owner of them, by the tacit assent of the plaintiff. Whether this was so because of an innocent mistake by both Ward and Homan as to the effect of Jennings's signature to the bond, or whether this belief on the part of Homan was induced by the fraud of Ward, it is very evident from the conduct of Homan that he considered himself released, and permitted Ward to have the mules. In either case, the rights of innocent third parties cannot be attacked. The rule is a familiar

one, that, where one of two innocent parties must suffer by the wrong of another, he who puts it into the power of such persons to commit the wrong must bear the consequence. So, where the owner of property (whether general or special is immaterial) is induced to part with it through the fraud of another, the one so acquiring the possession can transfer a good title to an innocent purchaser. *Morey* v. *Walsh*, 8 *Cow.*, 238; *Fassett* v. *Smith*, 23 *N.Y.*, 252; *Winnie* v. *McDonald*, 39 *id.*, 240; *Hall* v. *Hincks*, 21 *Md.*, 406; *Shufeldt* v. *Pease*, 16 *Wis.*, 659.

Complaint is made to one of the instructions of the Court, which is in the following language: "Although the jury may believe from the evidence that the plaintiff, or his agent who had charge of the mules, was deceived or defrauded by Ward into parting with the possession of the mules, yet if the plaintiff or his agent voluntarily parted with the possession of the same, and afterwards, while Ward was in possession, Laboo bought them of him in good faith for a valuable consideration, and without notice of plaintiff's claim, they will find for the defendant Laboo."

The evidence shows no greater authority in Hammet than belongs to any stable-man; and such authority could not extend to the releasing of property pledged to his employer as indemnity against his liability on bonds. As an abstract proposition of law, therefore, the charge, as far as relates to the agent, is erroneous. But, in the view I have taken of the case, it is harmless. It is a matter of no consequence who let the mules go from the stable. The testimony before us admits of no other conclusion than that Homan permitted them to remain with Ward, and, in effect, indorsed what had been done by his agent.

A judgment will not be reversed because of the giv-

ing of an erroneous instruction, where this Court can see that no harm has arisen therefrom.

The judgment of the District Court must be affirmed.

Judgment affirmed.

Mills v. Miller.

Practice. If a defendant's demurrer to a petition be overruled, and he answer, he thereby waives his exception to the order.

——: *Final order in partition.* A judgment in partition made upon report of referees that the property cannot be divided, and directing a sale, and a report of the referees in making the sale, but reserving the confirmation and making of deeds to the purchaser until the coming-in of the report, is not so far final as to support an appeal to the Supreme Court.

——: *If, in partition,* judgment be entered after a demurrer to the answer has been sustained, and it recite that it is rendered on the pleadings, there is no error which this Court can notice.

1. No proof of title is necessary to make out the plaintiff's case.

2. The recital does not exclude the supposition that due proof to support the petition was made.

3. The error was one which should have been corrected below; or an application made in that behalf, and overruled, should be shown.

Mistake: *Of fact.* If two parties claim property adversely, and the subject is in litigation, and they come to an agreement in respect of their rights without fraud on the part of either, beyond the representation by one that he owns the property, the other, after a judicial decision in favor of his claims, cannot avoid the compromise.

——: *Of law.* Ignorance of law will not excuse, unless accompanied by special circumstances.

This was a petition in error to review proceedings in partition, had in the District Court for Douglas County.

To the petition filed in the District Court the defendant answered, setting up that the interest claimed by the

plaintiff in the premises was derived by him without any consideration; that the defendant had alone negotiated for and purchased the premises, and paid for the same; but that the plaintiff represented and pretended that one Lorin Miller (who was his father) had a title, either in law or equity, to the said premises, and would recover the same in an action then pending therefor; that the defendant, relying upon said representation, consented that the conveyance which was to be made of said premises should run in the name of both the said parties jointly, in consideration that the said Lorin Miller would quitclaim to said parties all his right, title, and interest in the said premises; which was done. But it is alleged in the answer, that the said Lorin Miller had no title, either in law or equity, to said premises, as the final adjudication of the action then pending determined; and that, by reason thereof, the conveyance to plaintiff by defendant's vendor was entirely without consideration, and was assented to by defendant under a mistake as to the rights of the parties in the premises; and the relief sought by the answer is, that the interest held by the plaintiff by virtue of said conveyance may be ordered to be so held in trust only for the defendant herein, and that the said plaintiff may be ordered to convey the same to the defendant.

To this answer the plaintiff interposed a general demurrer, by which every fact stated in the answer is admitted to be true. The demurrer was sustained by the Court below, and a judgment for partition entered upon the pleadings alone, and a reference for an account to be taken of rents and profits, &c.

The referees reported that the premises could not be divided, and recommended that the same be sold. Their report was confirmed; and they were directed to sell the premises, and report their proceedings upon the sale to

the Court for its examination. At this point the defendant arrested the proceedings by this petition in error and his *supersedeas* bond.

G. W. Doane, for plaintiff in error.

I. The demurrer to the answer ought to have been overruled, because the facts stated were a good defence to the petition.

1. The misstatements of the plaintiff as to Lorin Miller's title, whether known to him to be untrue or not, were in fact false, as the final determination of the Court proved. They therefore misled the defendant, and entitle him to relief.

2. This was not a case of mutual concession of rights for the sake of peace; for there was no controversy between these parties whatever, and none to which they, or either of them, were parties: so that their adjustment had no effect, and could have none, upon the then pending litigation between the father of the defendant, Lorin Miller, and other parties. This was simply the case of a misrepresentation, made under a mistake, it may be, of rights, whereby one party has been induced, without any consideration whatever, to admit another into a conveyance. Can it be, that, after the discovery of the mistake, a court will not relieve the party against the consequences of it?

It may be said that "ignorance of the law does not excuse," and that a party cannot be relieved against a mistake of law. To this I reply, 1st, That, by the allegations of the answer, it appears that the mistake was one of fact; namely, that Lorin Miller had some title, either in law or equity, to the premises, and would recover the same in an action then pending. The case presented by the answer is just this: An entire stranger

to the title comes to the purchaser and holder of the legal title, and represents to him that a third person has the better title, and will recover the property, and thereby induces the real owner to convey to him, the stranger, an undivided equal interest in the property, upon condition that the intruder, the pretended holder of the title, shall quitclaim his pretended interest to the said parties jointly. Subsequent adjudication develops the fact, that the third person had no title whatever. This, then, was a simple mistake of fact as to the defendant; although it may have been a mistake of law as to the plaintiff, and the one pretending to hold the title. Now, what consideration passed from the plaintiff to the defendant for the interest which he is now endeavoring to enforce? None whatever. It was not a compromise of doubtful rights; for the plaintiff had no rights to compromise. Neither was any litigation ended or prevented by it; for the answer shows that the litigation then pending between Lorin Miller and other parties, in which the question of the title to this property was involved, went on to final judgment. The plaintiff intruded himself into the title without paying any consideration therefor, or returning to the defendant any benefits whatever for the interest which he acquired by the conveyance obtained through, and paid exclusively by, the defendant.

2d, It is not a universal rule, that mistakes of law cannot be relieved against. The instances of relief being afforded in this class of cases have been so numerous, and so many exceptions have been admitted to it in the later adjudications, that the old Latin maxim has lost much of its force as applied to civil actions. One most important exception to the rule as announced by Lord Mansfield is, that "where money is paid under a mistake, *which there was no ground to claim in conscience*, the party may recover it back." *Bize* v. *Dickason*, 1 *L. R.*,

285. The same rule would apply to a conveyance made, "which there was no ground to claim in conscience," as in this case. In *Hunt* v. *Rousmanier's Adm'r*, 1 *Peters*, 16, the Court say, "It is not the intention of the Court to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of law." In the same case, which came before the Court on appeal from an order sustaining a demurrer to the bill, and which is reported in 8 *Wheaton*, 174, Chief Justice Marshall, delivering the opinion reversing the decree, remarks, "We find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity;" and in that case, while admitting that "we find no case which we think precisely in point," still says, "We are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity is incapable of affording relief." In the course of delivering the opinion in the case just cited, the learned chief justice refers to the case of *Landsdowne* v. *Landsdowne*, reported in *Mosely*, 364, which was a case in which the right of the heir-at-law to an estate was contested by a younger member of the family, and by agreement referred to arbitration, and the arbitrator decided against the heir-at-law. He executed a deed in compliance with the award, and afterward filed a bill, and was relieved against his conveyance, on the principle that he was ignorant of his title. The chief justice says, "If he was ignorant of any thing, it was of the law which gave him, as eldest son, the estate he had conveyed to a younger brother." In what respect does that differ in principle from this case, except that in this case there are none of the considerations of preserving family peace which *might* have weighed in the other, and which have so often been controlling con-

siderations in sustaining conveyances? It is alleged in the answer, and admitted by the demurrer, that the defendant acted under a mistake as to his rights in the premises, and as to the rights which Lorin Miller had therein, *and that that mistake was created and fostered by the assertions of the defendant as to Lorin Miller's title!* This is stronger than either the case of *Hunt* v. *Rousmanier*, or that of *Landsdowne* v. *Landsdowne*, cited above. In the latter case, the Lord Chancellor (King) is reported as saying, "that the maxim, *ignorantia juris non excusat*, was in regard to the public, — that ignorance cannot be pleaded in excuse of crimes, — but did not hold in civil cases."

"Private right of ownership is matter of fact; it may be the result, also, of matter of law: but, if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded on a common mistake." *Cooper* v. *Phibbs*, 15 *W. R.*, 1053.

"If a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his indisputable property to another under the name of 'compromise,' a court of equity will relieve him from the effect of his mistake." *Naylor* v. *Winch*, 1 *Sim. & Stu.*, 555. In *Brigham* v. *Brigham*, 1 *Ves. Sen.*, 126, the plaintiff had purchased an estate which already belonged to him under a mistake of law; and the Court ordered the defendant to refund the money, holding that "there was a plain mistake, such as the Court was warranted to relieve against."

In *Pusey* v. *Desbouvrie*, 3 *P. Wms.*, 315, a daughter made her election to accept a legacy in lieu of her orphanage part in the estate. It appeared very clearly that she did this under a mistake as to her legal rights:

and Lord Chancellor Talbot said it seemed hard that she should suffer for her ignorance of the law, or that the other side should take advantage of that ignorance; and ruled accordingly.

II. The other errors assigned in the petition are upon questions of practice, a portion only of which will be noticed.

1. Judgment for partition and for an account was given upon the pleadings only.

The Partition Act, sect. 809, provides that "each of the parties, plaintiff and defendant, must exhibit his documentary proof of title, and must file the same, or copies thereof, with the clerk." This is the evidence upon which alone an order of partition is authorized to be made; and the evidence is required to be placed with and remain among the files. This was not done in this case; but the judgment was rendered, as the entry shows, upon the pleadings alone. The rule of the Code, that all the allegations of the petition not denied by the answer are to be taken as true, does not apply to this kind of special statutory proceeding: and sect. 810 indicates the cases in which the statements of the petition shall be taken as true; namely, when not contradicted by the answer *or by the documentary proofs exhibited as required.* This shows clearly that the documentary proof cannot be dispensed with by any allegations in either petition or answer.

2. That the order of sale was made before an account had been taken of rents and profits, receipts and disbursements, by the said parties on account of the said premises. The petition states that Mills has received the rents of the premises, and has expended certain amounts in improvements and "advances," and asks for an account. If an account is to be taken, is it not equitable and proper that the account should have been

taken before the parties were required to determine the bids which they would make upon the property, and especially before the plaintiff should be subjected to the possibility of being dispossessed of his improvements and property under the sale, when it might turn out by the account that there was a large balance in his favor, for which he would be entitled to be reimbursed out of the use of the property? If a sale is made, it follows, under the finding of the Court, that each party is entitled to a moiety of the proceeds. This distribution being made, as the parties have the right to insist it shall be after the sale, what security has either party for the balance which may be found due to him upon the account being taken? He has no lien, of course, upon the property, for the purchaser takes the title of both parties; whereas, if the account was first taken, the lien of either party would remain until the sale, and would be then transferred to the fund. This is the universal rule in equity; and this case is to be governed by the ordinary rules obtaining in courts of equity.

3. The sixth, seventh, and eighth grounds of error assigned in the petition can be considered together.

They all call in question the regularity of providing in the order of sale for the performance of those acts which can only follow the sale and its confirmation, such as the execution of a deed to the purchaser, and that the sale and conveyance shall be valid and effectual forever; that the purchaser be let into possession, and that any person in possession at the time shall deliver possession to the purchaser on production of the referee's deed, &c. All these acts can only follow the confirmation of the sale; and there is no authority for making such an order until the sale has been duly reported to the Court, the proceedings by the referees found to

be regular and in accordance with law and the order of Court, and the confirmation ordered. This is to anticipate that a sale has been regular in advance of its being made.

G. J. Gilbert and *A. Swartzlander*, for defendant in error.

I. The answer sets up no legal or equitable defence.

1. The petition shows that the parties are tenants in common, with equal interests in the premises, and that Mills is largely indebted to Miller for rents. The answer, not denying these allegations, sets out that the parties hold by two deeds, — one from Merritt, and the other from Lorin Miller, who originally claimed adversely to each other, Mills holding the deed from Merritt, Miller the deed from Lorin Miller.

2. No fraud, misrepresentation, or concealment, is charged in the answer. Mills's means of knowing what would be the "*final adjudication of the action then pending, in which the said title was involved*," were the same as those of Miller. It appears that Mills preferred to act upon his own belief and judgment, rather than to remain longer in uncertainty as to what would be the ultimate judgment of the Court. All the terms of the compromise are fulfilled on both sides, which results in a mutual settlement of all controversy respecting the title. Had the "*action then pending*" been decided otherwise than it was, and adversely to the title derived from Merritt, the defendant Miller would have no cause of complaint against Mills because the consideration on his side had failed. Both were equally liable to be mistaken as to the "rights of the parties in said premises;" and the Court cannot now relieve either party from the consequence of such liability.

II. In support of the ruling of the Court below in sustaining the plaintiff's demurrer, the current of authorities is entirely uniform.

1. The prevention of litigation is not only a sufficient but a highly-favored consideration; and no investigation into the character or value of the different claims submitted will be entered into for the purpose of setting aside a compromise, it being sufficient if the parties thought at the time that there was a question between them. 1 *Parsons on Contracts*, 364; 4 *Met.*, 272; 14 *Cow.*, 12; 5 *Watts*, 259; 3 *Hill*, 504.

2. It matters not if the inducement on one side proves wholly worthless. 3 *Hill*, 504; 4 *Met.*, 270.

3. When parties meet on equal terms, and adjust their differences, both are concluded from any further litigation of the matter. 4 *Denio*, 189; 7 *Mich.*, 133.

4. The settlement of a doubtful claim or a legal controversy is a good consideration. 2 *Mich.*, 145; 7 *id.*, 127; 8 *id.*, 37; 2 *Penn.*, 531; 12 *Wend.*, 381.

III. A suit for partition does not embrace the object of adjusting adverse titles and encumbrances. 9 *Cowen*, 344.

IV. The proceedings were regular. The defendant was allowed to amend his answer, but neglected to do so; and the cause rightly proceeded without answer.

V. The directions in the order of sale were proper; and it is to be presumed that the referees will execute the order according to law.

CROUNSE, J.

It was quite useless to insert in this record the demurrer to the petition and the order of the Court overruling it. By answering, the defendant lost the benefit, if any, of his exception to the order. *Brown* v. *Saratoga*

R. R. Co., 18 *N. Y.*, 495; *Campbell* v. *Wilcox*, 5 *West Jurist*, 208; *Cleaswater* v. *Meredith*, 1 *Wal.*, 42; *Aurora City* v. *West*, 7 *id.*, 92; *Young* v. *Martin*, 8 *id.*, 354.

Sect. 582 of the Code, in defining what may be reviewed, says, —

"A judgment rendered or final order made by the District Court may be reversed, vacated, or modified by the Supreme Court for errors appearing on the record." No final order has been made in the case. The object of the action is to obtain partition between the parties of the premises described. Among the first of the orders made is that sustaining a demurrer to the defendant's answer. This is followed by the Court declaring the interest of the respective parties, and the appointment of referees, as provided by the statute, to make division accordingly. They are to report whether actual partition can be made. To this defendant's counsel excepts generally. The referees, reporting that actual partition cannot be made, are, by a further order of the Court, directed to sell in a manner pointed out in the order: and, while the order contains that which might have been reserved on a subsequent or final order of the Court, they are required to report their proceedings under this order of sale; and, if confirmed, deeds are to be made to the purchaser of the premises. The record does not disclose whether any sale has been made. If it had been made, it might not have been confirmed: exception to some of the proceedings had in the sale might be taken, which would form the proper subject of review here. So, whatever may be our determination upon the record before us, we may be called on to pass upon those questions liable to arise subsequent to the proceedings as disclosed in the record here. *Clestes* v. *Gibson*, 15 *Ind.*, 10; *Cook* v. *Knickerbocker*, 11 *id.*, 230; *Hunter* v. *Hunn*, 25 *Miss.*, 349; *Ivory* v. *Delone*, 26 *id.*,

505; *Gates* v. *Salmon*, 28 *Cal.*, 230; *Peck* v. *Vanderberg*, 30 *id.*, 11. This objection might be regarded as decisive of the case, although not urged by counsel, as consent cannot impose upon the Court the duty of passing on a case not provided for by statute, — one which might come again before us at no distant day. *Mabry* v. *Dickrey*, 31 *Ala.*, 243.

Notwithstanding several exceptions appear from the record to have been taken, nevertheless, for reasons hereinafter stated, but one presents any question for our consideration. This is the exception taken by defendant to the order of the Court sustaining the demurrer to defendant's answer; and, inasmuch as it was not relied on in the argument, it may be briefly noticed and disposed of.

The answer, in substance, avers that these parties derived title from Merritt, and one Lorin Miller, father of the plaintiff, at a time when said Merritt and Miller were in litigation respecting it. Miller paid to Merritt six hundred dollars, who quitclaims his interest to Mills and Miller, the parties here; while Lorin Miller does the same with respect to his interest. Subsequent to this arrangement, the Court, having before it the question as to the right of Merritt and Lorin Miller to the property, determined in favor of the former. It is now claimed that Mills was induced to yield a joint interest in his purchase from Merritt, and accept an interest in what he believed a right of Lorin Miller, by the representations of the plaintiff that his father had a title in law or equity to the same, and under a mistake as to the rights of the parties in said premises.

There is no defence in this. No fraud is alleged, nor does there appear any mutual mistake of facts. The question of right to the property, as between Merritt and Lorin Miller, was before the courts for determination

when Mills purchased. What the plaintiff may have said was, at most, but the expression of an opinion as to what the courts would decide. Mills had the same means of concluding what would be the final result, and it was folly in him to rely on the declarations of Miller in the premises. Whether too impatient to await the Court's determination, or choosing not to hazard an adverse determination, the parties entered into the arrangement upon equal footing, paying the price and accepting the interest respectively that the situation justified. Either as a matter of ordinary business, or as the amicable adjustment of a thing in litigation, the transaction has the support of law. *Russell* v. *Cook*, 3 *Hill*, 504 ; *Stewart* v. *Ahrenfeldt*, 4 *Denio*, 189 ; *Barlow* v. *Ocean Ins. Co.*, 4 *Met.*, 270 ; *Gates* v. *Shults*, 7 *Mich.*, 133 ; 1 *Pars. on Con.*, 364.

Viewed as a mistake of law, the defendant's position is no better. The parties were of equal ability to enter into the agreement, and had equal facilities for determining, each for himself, the true state of the title. Either was at liberty to speculate upon the probable result of the litigation then pending ; and, from any thing that appears, each equally liable to be mistaken. With no fraud practised on him, Mills is bound by any misinterpretations of the law with respect to the true state of the title to the land purchased. *Ignorantia juris non excusat* is a maxim by which he is governed. To show that the maxim is not inflexible, and that this case should be regarded as an exception, the case *Pusey* v. *Desbouvrie*, 3 *Peere Williams's Reports*, 315, is urged upon our attention. There the daughter of a freeman of London had a legacy of ten thousand pounds left her by her father's will, upon condition that she should release her orphanage share ; and, after her father's death, she accepted the legacy, and executed the release.. Upon a bill after-

wards filed by her against her brother, who was executor, the release was set aside, and she was restored to her orphanage share, which amounted to forty thousand pounds. Lord Chancellor Talbot, among other things, says, in delivering his opinion, "It is true it appears that the son did inform the daughter that she was bound either to waive the legacy given by the father, or release her right to the custom; and, so far, she might know it was in her power to accept either the legacy or the orphanage part. But I hardly think she knew she was entitled to have an account taken of the personal estate of her father, and first to know what her orphanage part did amount to; and that when she should be fully apprised of this, and not till then, she was to make her election; which very much alters the case. For probably she would not have elected to accept her legacy, had she known or been informed what her orphanage part amounted unto before she waived it and accepted the legacy."

Mr. Justice Story, in commenting on this case, says, "It is apparent from this language that the decision of his lordship rested on mixed considerations, and not exclusively upon mere mistake or ignorance of law by the daughter. There was no fraud in her brother: but it is clear that she relied on her brother for knowledge of her rights and duties in point of law; and he, however innocently, omitted to state some most material legal considerations affecting her rights and duties. She acted under this misplaced confidence, and was misled by it; which of itself constituted no inconsiderable ground for relief. But a far more weighty reason is, that she acted under ignorance of facts; for she neither knew nor had any means of knowing what her orphanage share was when she made her election. It was therefore a clear case of surprise in

matters of fact as well as of law." *Story's Eq. Jur.*, sect. 118. That case is readily distinguished from the one at bar. Here the parties treated upon equal terms. All the facts surrounding the state of the title to the property in question were open to both. Neither suppressed any fact, and neither was called upon to disclose any thing to the other. For the plaintiff to declare that Lorin Miller had a title to the property was but the expression of an opinion which he was at perfect liberty to make, and was one that had warranted the employment of counsel, and defending such claim in court.

But, as covering this case more completely, Judge Redfield, in a further comment on the case of *Pusey* v. *Desbouvrie* and the observations of Justice Story above, remarks, "But we should be careful not to understand the proposition here laid down as having any just application to the subject of compromising doubtful and uncertain rights, or to the disposition of contingent or uncertain interests. In such cases, where the parties have equal means of knowledge, no relief in equity will be afforded on the ground of results being different from what the parties anticipated; for this is one of the hazards of that class of contracts which each party incurs by the very nature of the contract." *Story's Eq. Jur.*, sect. 118.

The demurrer to the defendant's answer, in my opinion, was correctly sustained; and the first assignment of error must fall. Passing to the second, it is averred "that the said Court erred in ordering partition to be made of the premises in the said petition described." Where, how, or in what respect, the Court erred, counsel has left this Court to study out. The record or brief of counsel does not make any suggestion in aid of this point. Under a petition containing all the necessary averments,

with no denial of any facts therein set out, how it is that the Court erred in ordering partition is incomprehensible to me.

The third assignment of error is, "that the said Court erred in rendering judgment for a partition of said premises, and for an account of rents and profits upon the pleadings only, after an order sustaining the demurrer of the said plaintiff to the answer of the said defendant." To this there are several answers.

First, I do not believe it necessary for the plaintiff to exhibit and file his documentary proof, or copy of same, with the clerks, as is claimed to be necessary under sect. 809 of the Code, in a case conducted as this was. The next section says, "If the statements in the petition are not contradicted in the manner aforesaid, or by the documentary proof exhibited as above required, they shall be taken as true." Here the statements in the petition were not only not contradicted, but, by the interposition of the demurrer, they were admitted to be true. Neither the sense nor the letter of the statute required the exhibition of the documentary proof. Second, It does not follow, because the journal entry recites that "this cause came on to be heard on the pleading," that no proof was taken, if any was necessary. In *Cook* v. *Hancock*, 20 *Texas R.*, p. 2, we find a judgment entry in these words: "And now come the parties by attorney and announce themselves ready for trial, and, waiving a jury, submit the cause to the judgment of the Court; and it appearing, upon an inspection of the pleadings by the Court, the Court rendered a judgment for the plaintiff, it is ordered that the plantiff recover of the defendant, A. H. Cook, the sum of $4,544.56, being the principal and interest due on the notes in controversy." The error assigned was, "giving judgment on pleadings without evidence to sustain allegations." The Court

says, "It is merely the idle and superfluous expression of the person who drew up the judgment. It was not necessary to state the facts on which it was predicated. Whether the statement, 'upon an inspection of the pleadings,' be regarded as inconsistent, or as only partial, it will not render the judgment erroneous." If it were error for the Court to order judgment upon the pleadings without the taking and filing proof as claimed, it is the duty of counsel relying on such error to show clearly that no such proof was taken. If any presumptions are to be introduced, they will rather be in support of a judgment than against it.

Third, A further answer is, that the objection is for the first time specified in the petition filed in this Court. The defendant being properly brought before the Court, and called upon to answer the petition of the plaintiff, failing to build up a defence of fraud or mistake, attempts no other, and so admits the facts stated in plaintiff's petition to be true. Still, by counsel he lingers in court, and confines himself to excepting to every order of judgment made in the case, but does not trouble himself to point out in what particular it is objectionable, asks for no modification, nor furnishes any reason or argument in support of any objection. This makes quite easy work for counsel, but quite hard for courts, if they are to examine carefully each step taken, and surmise what possible objection may be urged against their orders when they come to be reviewed in the appellate court.

Take the exception to the first order next after that taken by the order sustaining the demurrer. It is, simply, "To which order defendant excepts." The order excepted to fixes the interest of the respective parties; appoints referees to make partition, who shall inquire whether the premises are capable of actual division, and report accordingly. Against so much of the order no

fault is found here; nor do I see that any can be. But it turns out, however, that here, for the first time, objection is made to the introductory or formal part of the order suggested by the taste of the clerk or attorney who draughted it, which recites that the Court acted upon the pleadings, without it appearing affirmatively that proof was exhibited. Why was nothing said about this in the Court below? There was the place to present that question. If the attention of the Court had been challenged to this point, and the proof had been in fact exhibited, it would have been quite easy to modify the entry so as to show the fact, or, by omitting any reference to the pleadings, destroy the foundation for any inference that no proof was taken. If any thing beyond the admission of the truth of the allegations of the petition, arising from the defendant not denying them, was deemed necessary to warrant the order or judgment made, it was the duty of counsel to insist upon it in the Court below. Objecting to the entry of judgment without proof, or moving to modify or vacate the same if entered for such reason, clearly expressed in the motion, would have brought the subject directly to the attention of the Court. Should the opinion of the Court have been adverse to that of counsel, a bill of exceptions would have saved the point for our examination.

An exception is an objection taken to a decision of the Court upon a matter of law. *Code*, sect. 307. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party causing it to be noted at the end of the decision that he excepts. Sect. 310. As in the instance of defendant's exception to the order of the Court sustaining the demurrer to his answer, the grounds of the objection to the answer are stated in the demurrer, — that facts sufficient are not

therein contained to constitute a defence. The answer, demurrer, and the order upon it, are properly parts of the record. *Code*, 446. We therefore have clearly before us the grounds of objection, the decision of the Court, and the exception thereto. So, in cases tried by the Court without a jury, the Court may be called upon, under sect. 297, to state in its finding its conclusions of law as well as of fact found. Here the party may cause to be noted at the end of such findings his exceptions to such conclusions as he may choose to except to. But to what does the defendant object here? and what are the grounds of objection? Must the Court come to a standstill, and review every step in the proceeding, starting with the question of jurisdiction, and satisfy itself that every thing has been regularly done, at the hazard of having its judgment reversed upon points never disclosed, or adroitly concealed? Most assuredly not. Appellate courts are provided to review the proceedings and correct the errors of inferior ones. Before a party is entitled to be heard here, he must have exhausted his remedy in the Court below. For that purpose he must have presented the several questions of law fairly and fully, and must have obtained an unequivocal ruling thereon. If dissatisfied with the decision of the Court, he may preserve an exception. Here, to be of any avail, the record should show that the objection set out in the third allegation of the petition in error was distinctly presented to the Court. From the record we cannot conclude but that proof was exhibited: if it was not, it may have been expressly or tacitly waived. We will not guess that error was committed. It is the duty of the party complaining, not only to show that error occurred prejudicial to him, but to present here a record showing affirmatively and clearly that such is the fact.

In *Lawther* v. *Agee*, 34 *Mo.*, 372, it is said, "An irregular judgment will not be reversed on writ of error in first instance here; but the defendant must have applied in Court below to set it aside." In *Alshuler* v. *Yandes*, 17 *Ind.*, 291, an action was brought on a note, as well as to enforce a vendor's lien. There was a judgment directing the property to be sold, without any inquiry as to sufficiency of personalty as there required. It was held that application should have been made to the Court below to correct the alleged errors.

Ingersoll v. *Bostwick*, 22 *N. Y.*, 425, was an action to recover specific personal property. By the New-York Code, the judgment should have been in the alternative for the return of the property or for its value. The judgment was for the value of the property absolutely. It was held that it was an irregularity that should have been corrected in the Court of original jurisdiction. *Hunt* v. *Bloomer*, 3 *Kern*, 341; *Magee* v. *Baker*, 4 *id.*, 435; *Oldfield* v. *New-York and Harlem R. R.*, 4 *id.*, 310; *Smith* v. *Grant*, 15 *N. Y.*, 590; *Otis* v. *Spencer*, 16 *id.*, 610; *Carman* v. *Pultz*, 21 *id.*, 55; *Chamberlain* v. *Dempsey* 36 *id.*, 148.

The several assignments of error are open to the same criticism.

The judgment of the District Court must be affirmed.

Meyer v. The Midland Pacific Railroad Company.

PRACTICE: *Instructions to jury.* It is the duty of the Court, by proper instructions, to direct the attention of the jury to the essential features of the case, and to such testimony as legitimately bears thereon, and not suffer the minds of the jurors to wander into the regions of conjecture, especially in a case the circumstances of which, or of the parties thereto, appeal strongly to their sympathies.

——: ——. If the instructions given by the Court to the jury are so general in their nature as not to draw necessary distinctions, or are indefinite in their language, and strongly tend to mislead and divert attention from the real issues, or are not founded on nor applicable to the testimony, the verdict will be set aside, and a new trial ordered.

——: *Disregard of instructions.* If the jury disregard the testimony and the instructions of the Court, and return a verdict not supported by the former, nor in obedience to the latter, their finding should be promptly set aside, and a new trial ordered.

RAILROADS: *Negligence.* The speed with which railroad-cars are run in a city or village must be regulated with due regard to the safety of the inhabitants and passengers, and to all the circumstances. A reasonable rate of speed in the open country is not reasonable in a thickly-settled town.

——: ——. But a railroad company is not liable for an injury when its negligence only remotely contributed thereto.

——: ——. And, if due diligence be exercised in running the train across a street in a city, the company is not liable, simply because it was running there, for an injury to a child which suddenly placed itself on the track in front of the cars.

——: ——. It is not the duty of an engineer of a train of railroad-cars, whenever he sees a child of tender years running towards it, to slack his speed lest the child stop in front of the train, and suffer injury. The relative positions of the child and the train are to be taken account of by the engineer; and he must exercise the judgment of a prudent person, having due regard to all the circumstances and to the safety of his passengers.

MEYER *v.* THE MIDLAND PACIFIC RAILROAD COMPANY.

RAILROADS: *Negligence.* It is not negligence for a railroad company to dig and leave open a ditch across its track, two feet wide and eight inches deep, to carry off the surface-water.

——: ——. A railroad company is not liable for an injury sustained while its road is being built and operated by contractors who own the cars and engine by which the injury is committed, and of which the company had, at the time, no control.

Error to District Court for Otoe County.

The plaintiff was a girl of three and a half years of age; and the defendants were the Midland Pacific Railroad Company, and the members of the firm of J. N. Convers & Company, contractors for building the railroad company's railroad. On the 21st of May, 1870, while the contractors were constructing, operating, and had exclusive possession and control of the road, a construction-train ran over and killed a brother of the plaintiff, about two years old, and seriously injured the plaintiff, so that it was necessary to amputate her leg. The accident occurred in Nebraska City, where Eleventh Street crosses the railroad-track. At this point a ditch had been dug by the contractors across the track, about two feet wide and six or eight inches deep, for the purpose of passing the surface-water from one side of the road to the other. It was not certainly and clearly shown how the children came to be on the track: but the evidence tended strongly to show that they were playing on the track; and, just as the train was coming up, they were in the ditch, not visible to the engineer, and suddenly raised up when it was too late to stop the train. The other circumstances material to the case, the testimony, and the instructions to the jury, are stated in the opinion of the Court. The jury rendered a verdict for the plaintiff for ten thousand dollars.

Shambaugh & Richardson, for plaintiffs in error.

MEYER v. THE MIDLAND PACIFIC RAILROAD COMPANY.

1. The Court below erred in its instructions to the jury. The question of negligence was left wholly to the jury; and they were left at liberty to find the defendants guilty of negligence according to their own whims and prejudices, and without regard to law. In most cases, negligence is a mixed question of law and fact, to be found by the jury under the instructions of the Court. It is the duty of the Court to tell the jury what facts will amount to negligence, and leave it to the jury to find whether such facts have been proven or not. See 1 *Hilliard on Torts* (3d ed.), pp. 116, 117; 14 *Johns.*, 304; 4 *Zabr*, 268; 30 *Penn.*, 462; 35 *N. H.*, 277; *Law Reg.*, *Dec.*, 1862, 76; 24 *Vermont*, 487.

2. The charge of the Court is also erroneous in this, — that it took from the jury the consideration of the negligence of the plaintiff and her parents as the proximate and direct cause of the injury, and told the jury in express terms that negligence could not be imputed to her, although her parents suffered her to wander to and be upon the railroad-track, unattended by any person of suitable age and discretion; and although she recklessly and incautiously threw herself on the railroad-track, in front of and close to the approaching train, and thereby caused the injury. This is not the law. We are aware that attempts have been made by some text-writers, and in some of the adjudged cases, to distinguish between the case of an adult and that of a child under the age of discretion in cases like the one at bar: in the former, holding that the negligence of the plaintiff, if it contributed to the injury complained of, was a bar to the action, although the defendant was also guilty of negligence; and in the latter, that the plaintiff, although it is proved that she and her parents were guilty of gross negligence, is entitled to recover, if it is shown that the defendant was guilty of any degree of negligence, how-

ever slight. But this distinction is not well founded, and cannot be maintained. An examination of the authorities will show that the weight of authority is the other way; and that in an action like this, where the plaintiff's negligence caused the injury, he cannot recover, whether he be an adult or child, or of sound or unsound mind, although it is shown that the defendant's negligence contributed to the injury. See 1 *Hilliard on Torts* (3d ed.), 147, 148, 149; *Willetts* v. *Buffalo*, 14 *Barbour*, 585; *Hartfield* v. *Roper*, 21 *Wendell*, 617; 2 *Hilliard on Torts* (3d ed.), 367; 4 *Duer*, 439; 4 *Allen*, 283; 8 *Gray*, 123; 18 *N. Y.*, 422; 24 *N. Y.*, 430; *Sedgwick on Damages*, 103, 158, 539; 9 *Allen*, 401; 27 *Ind.*, 513; 28 *Ind.*, 287; 42 *Ill.*, 174. Nor is there any reason in the distinction.

The argument in favor of the exemption of a child from the imputation of negligence is based upon the idea, that it lacks sufficient judgment and discretion to enable it to take care of itself; and that the servants and agents of the railroad company are bound to know its condition, and to use greater care and caution than in the case of an adult. But this argument, and the reasons upon which it proceeds, reaches beyond the case of children, and applies to deaf, blind, and idiotic persons who may chance to be on or about a railroad, and who, on account of such afflictions, are incapable of using that degree of care and caution which is necessary to their safety, and which may be expected of others not thus incapacitated. And how are the agents and servants of the company to know that a person seen standing on or near the road-track belongs to one of these unfortunate classes? Must they stop the train every time a person is seen standing on or near the track, and institute an inquiry to ascertain if such person is of suitable age and discretion, and possesses all the necessary faculties, to enable him to take

care of himself? Or, if they fail to do this, is the company to be held liable for every injury that may occur, without regard to the fault or negligence of the person injured? To do this would be impracticable; and the absurdity of the proposition is its best refutation.

3. But, even if negligence cannot be imputed to the plaintiff, we think she cannot recover in this action, as the evidence shows that the accident occurred without any fault or negligence of the defendants, their agents or servants, and that no ordinary or reasonable degree of caution or prudence on their part could have prevented it; and we insist that the Court erred in refusing the instructions asked by the defendants. 47 *Penn.*, 304, 305; 4 *Duer*, 445; 18 *N. Y.*, 422; 24 *N. Y.*, 430; *Sedgwick on Damages*, 539.

4. The Court erred in refusing the second instructions asked by the defendants. The instruction was based upon the facts of the case, and stated the law correctly. If, while the train was in motion, the plaintiff ran on and upon the track in front of the cars, and so near to the same that it was impossible to stop the train before it struck her, the defendants cannot be held liable for the injury.

This instruction should have been given as asked; and the fact that the Court afterwards gave this instruction, with certain qualifications added thereto by the Court, only made the error the greater.

These qualifications required the defendants to do certain things which would be impracticable, and indeed impossible of performance. The instruction as qualified told the jury, "that, if the conductor or engineer might have seen the plaintiff running in the direction of the road, it was his duty to stop the train until he learned whether she intended to cross it or not." Suppose the conductor could or did see the plaintiff running in the

direction of the road in front of the train: could he stop it? and is it the duty of the engineer to keep watch over the surrounding country on either side of the road to see what is going on there? or can he be expected or required to do so? It is the duty of the engineer to keep the track in view, and see that it is clear of obstructions, and to give notice, by blowing the whistle or ringing the bell, when approaching crossings, and to use all reasonable precautions to avoid accidents and collisions at such places. The testimony shows he did all this; and nothing more ought to be required of him, and it would be impossible for him to do more without neglecting the duties of his position. If he were required to stop his train every time children were seen running or playing on either side of the road, it would be difficult to proceed with his train through a town or thickly-settled community, and the annoyance would become intolerable. See 1 *Redfield on Railways* (4th ed.), 548, *note* 15.

If persons are seen approaching the road, is it reasonable to suppose that they intend to keep on, and place themselves in a position that exposes them to danger? Would not the reasonable presumption in such case be, that they would stop short of such position? and is the company to be mulcted in damages because the engineer acted upon the latter and more reasonable presumption?

The qualified instruction as given by the Court was erroneous for the further reason, that there was no testimony conducing to show that the child was or might have been seen running in the direction of the road until just before she got on the track in front of the train, and after it was too late to stop the same in time to prevent the accident. There was no evidence on which to predicate such an instruction; and for this reason, if for no others, the giving of the qualified instruction was error.

5. The refusal of the third instruction asked by the defendants was error. This instruction, like the second, was based upon the facts of the case, and ought to have been given. This instruction simply declared the law to be, that "the fact that the train was crossing a public highway at the time of the accident did not render the defendants liable for the injury if the plaintiff placed herself upon the track in front of the cars, and so near the same, that it was impossible, by the use of due diligence, to prevent the train from running over her." This is certainly the law; and the proposition is complete in itself, and needs no qualification.

The qualification added by the Court is the same as that attached to the second instruction; and, for the same reasons, the giving of the third instruction with the qualifications added by the Court was error.

6. The Court erred in refusing the fourth instruction asked by defendants.

They can only be held liable for such negligence as caused the injury. Though the company, their agents or servants, may have been negligent in many respects, yet, if their negligence did not cause the injury, they are not liable; and, to make the defendants liable, it must be shown that their negligence was a direct and actual, and not merely a constructive wrong, and one that is the proximate cause of the injury, and not merely the remote and incidental cause of it. It must be such negligence as directly and naturally contributes to the injury. See 2 *Redfield on Railways* (4th ed.), 230 and *note* 12, 235 and *note* 29; 2 *Hilliard on Torts* (3d ed.), 366, 367; 13 *Ill.*, 551; 13 *Ind.*, 89; 4 *Duer*, 445.

The instruction stated the law correctly, and should have been given as asked; and the giving of this instruction afterwards with the modification added by the Court was error. The Court told the jury, in effect, that the

defendants were liable if their negligence "contributed to cause the injury." Under this instruction, the jury were not bound to find that the negligence (if any) of the defendants was the proximate and direct and actual cause of the injury, but were left at liberty, and indeed instructed, to find for the plaintiff, if the defendants were guilty of any negligence, which, in any remote or indirect manner, contributed to bring about the causes which led to the accident and the consequent injury to the plaintiff. The defendants cannot be held liable on proof of some negligence which in some way or other may have contributed to cause the injury, but only upon proof of negligence which was the proximate cause, and directly and actually caused the injury.

It is hard to comprehend the full meaning of this instruction as modified and given by the Court. It excludes the idea, that the defendants can only be held liable if their negligence was the direct and actual cause of the injury; and is broad enough to justify the jury in finding for the plaintiff, if, in their opinion, the defendants had been negligent in any matter, which, in any remote or indirect manner, was connected with or contributed to cause the injury. In one sense it may be said that the defendants' omission to place guards or sentinels at the crossing to warn all persons of the approach of the train, or to stop the train and examine the crossing to see if any persons were near or about to cross the road, before proceeding over the crossing, contributed to cause the injury; and yet the defendants were not bound to do either of these things, and cannot be held liable for the omission.

7. The Court erred in refusing the fifth instruction asked by the defendants.

The digging of a ditch under the road-track to pass the surface-water from the one side to the other, and

leaving the same open for that purpose, was not negligence. The defendants had a perfect right to do so. The ditch was outside of the travelled way, across the track; and in many cases, owing to the formation of the ground, the accumulation of water, and other causes, it is absolutely necessary to construct ditches for that purpose. This was not negligence; and the refusal of the Court to so instruct the jury left them at liberty to find negligence from this fact alone.

8. The Court erred in overruling the defendants' motion for a new trial.

9. The verdict is not sustained by sufficient evidence, and is contrary to law.

10. The verdict is clearly against the weight of the evidence; and, for this reason, the Court will reverse the judgment. 4 *Zabr*, 277.

11. There is a total lack of evidence as to a part of the defendants, and no sufficient evidence to authorize a verdict against the others. The M. P. R. W. Co. was not operating, and had no control over the road, and is not liable. See 2 *Hilliard on Torts* (3d ed.), 376, 377; 1 *Redfield on Railways* (4th ed.), 503, sect. 129 and *note* 1; 1 *Allen*, 9.

Stevenson & Hayward, for defendants in error.

I. The exception to the charge of the Court to the jury, going as it did to the whole of it, cannot avail the plaintiff in error. The charge consisted of several propositions, some of which are admitted to be good law; and it was incumbent on the plaintiff in error, if any one of them was, in his opinion, erroneous, to direct the attention of the presiding judge to the objectionable clause. *McReady* v. *Rogers*, 1 *Neb.*, 128, 129; *Anderson* v. *Anderson*, 23 *Texas*, 639.

II. The question of negligence is a question of fact to be found by the jury; and it was proper to leave it to the jury. *Tabor* v. *Mo. Valley R. R. Co.*, 2 *American R.*, 519; 2 *Red. R. W.* (4th ed.), p. 251, *note* 16; *Oakland R. Co.* v. *Fielding*, 48 *Penn. State*, 320; *Shearman & Redfield on Negligence* (2d ed.), p. 59, *note* 2, p. 13 and *notes* 1 and 2.

III. The Court gave the jury instructions as to what would constitute negligence. If the plaintiffs in error claimed a more full and definite instruction upon that point, it was their duty to have requested it: not having done so, they cannot now complain. *Goodrich* v. *Eastern Railroad*, 38 *N. H.*, 390.

IV. The Court told the jury, that, if a child was injured through the negligence of the parties running the cars, they were not relieved simply because the parents may have been wanting in their duty towards the child; but that, if the child was guilty of negligence, then they were released; and that the question of negligence on the part of the child was with the jury. This is undoubtedly the law. If the child was injured through the negligence of the plaintiffs in error, they are liable, unless the child was negligent. The girl was guilty of no negligence, but was attempting to save her brother, as the engineer swears. The law has so high a regard for human life, that it will not impute negligence to an effort to preserve it. *Eckert* v. *Long-Island Railroad*, 3 *American*, 723; 43 *New York*, 502; 1 *Hilliard on Torts* (3d ed.), p. 149, *note* "a," part 3, also p. 146; 2 *Red. R. W.*, p. 225; *Shearman & Redfield on Negligence* (2d ed.), p. 59, *note* 2; *North Penn. R. Co.* v. *Mahoney*, 57 *Penn. St.*, 187.

A child of three years cannot be held to the same rules of care that apply to a grown person. 3 *American Law Times*, p. 42; *Bellfont. & Ind. R. C.* v. *Snyder*,

18 *Ohio State*, p. 399; *Ray* v. *Tenn. R. R. Co.*, 3 *American R.*, 634; *Phil. & Read. R. R. Co.* v. *Spearin*, 11 *Wright*, 304, or 47 *Penn St.*, 300; *Smith* v. *O'Conner*, 12 *Wright*, 218; *Bridge* v. *Goodwin*, 19 *Conn.*, 507; *Robinson* v. *Bove*, 22 *Vt.*, 213; *Daley* v. *Norwich & W. R. Co.*, 26 *Conn.*, 591; *Shearman & Redfield on Negligence*, pp. 59, 60, also p. 13, *note* 2.

V. It is said that the same rule that would relieve a child from the imputation of negligence applies to deaf persons. This is not true, because, in the case of deaf persons, there is nothing showing to others their condition; while all who see a child must know at once that it is incapable of great care, and are bound to conduct themselves toward it with the greatest care. 1 *Redfield on Railways* (4th ed.), 548, and *note* 15; *Robinson* v. *Cone*, 22 *Vt.*, 213; *Shearman & Redfield on Negligence*, p. 61.

There was no error in the modification made by the Court to the second and third instructions asked. The instructions as given were correct; and it is no error to change instructions if they are correct as given. *Abbott* v. *Striblen*, 6 *Clark (Iowa)*, 197; *Hobbs* v. *Outlaw*, 6 *Jones's Law*, 174.

VI. It is clearly the law, that if, by good care and watchfulness, the party in charge of a train of cars can see a person asleep on the track, or a child approaching the track as though it intended to cross the track, it was his duty to so have his train in hand, that, if possible, he may, if the child goes on to the track, or if the person asleep does not awake, prevent an accident. To hold the reverse would be monstrous. *East Tenn. & Ga. Rail W.* v. *St. John*, 5 *Sneed*, 524; *Morrisy* v. *Wiggins Ferry Co.*, 43 *Mo.*, 380; 42 *Mo.*, 79.

Especially is this so when the child is in a public highway. The testimony shows that the ground ascended

to the south from the track, and that the girl came on to the track from the south. The engineer should have seen her.

There was no error in the modification made by the Court in the fourth instruction asked. The change made no material difference, and could not have injured the plaintiff in error. All the negligence need not be with the railway company to enable an injured party to recover. *Chicago & Alton R. Co.* v. *Pondrom*, 51 *Ill.*, 333; see *Stout* v. *Railroad Co.*, *American Leg. Reg. for April*, 1872, p. 232, where the judge uses the same language, — "as contributed to cause;" see *Shearman & Redfield on Negligence*, p. 10, *note* 2, and cited cases; 43 *Ill.*, 64.

VII. It was no error to refuse the fifth instruction asked. Such instruction, if given, would have taken from the jury one fact which they alone could consider. The jury were to find, from all the facts, whether there was negligence or not. There was a conflict of testimony as to the depth, width, and location of the ditch; and the Court had no right to decide whether or not leaving it open was negligence. See cases previously cited as to facts for jury.

VIII. There is evidence to sustain the verdict; and, although the proof may be conflicting, the verdict will not be set aside. *Breese* v. *State*, 12 *Ohio State*, 156; *State* v. *Lamont*, 2 *Wis.*, 437; *Cook et al.* v. *Holmes et al.*, 5 *Wis.*, 107; *Hendy* v. *Smith*, 28 *Georgia*, 308; *Bowman* v. *Tarr*, 3 *Clark (Iowa)*, 574; *McKnight* v. *Wells*, 1 *Mo.*, 13; *Robbins* v. *Alton Ins. Co.*, 12 *Mo.*, 380; 5 *U. S. D.*, p. 574; *Graham & Waterman on New Trials*, vol. i. 389; *Scott* v. *London Dock Co.*, 3 *Hurl & Colt*, 596; referred to in 28 *U. S. Digest.*, 436, sect. 104.

IX. The verdict is clearly according to the law of the case, and is fully sustained by the proof: therefore it

will not be set aside for any technical error. *Graham & Waterman on New Trials*, 388–398.

The train that did the injury was under the direct control of J. N. Converse, the superintendent of the company; and the company is, therefore, liable. The railway company is liable for the acts of its contractors and servants. *Lowell* v. *Boston and Lowell Railway*, 23 *Pick.*, 24; see *Redfield's Railway Cases*, 375; *Mayor of New York* v. *Bailey*, 2 *Denio*, 433; *Elder* v. *Bemis*, 2 *Met.*, 599; *Wiswall* v. *Bronson*, 10 *Ird.*, 554.

X. The defendants in error insist that the judgment in this case should not be set aside, because the evidence shows beyond a doubt that the plaintiffs in error had not for some months used their road, and that they, knowing that no one had any reason to expect that it would be then used, without any notice to the people along the line of the road, started out a train of cars, with no regular brakeman and no fireman, on a Saturday afternoon, and, while in the limits of the city, ran their train faster than it had ever run before; and even after they had seen other children on their track, and knew that children were playing along and upon the track, they used no more precaution, but kept up the same rate of speed. This, under the peculiar circumstances, was negligence so gross, that it shows little care for human life.

Again: all the testimony shows that the crossing could be seen from the bridge, which is from six hundred to eight hundred feet from the crossing where the accident happened. The witness, —— Shorck, swears, that from the brewery, five hundred feet away, he could and did see the children. The engineer must have seen them if he had not neglected his duty. "Circumstances change and make duties; and that which would be an ordinary use of one's rights, may, by a change of cir-

cumstances, become negligence, and want of due care." 3 *American R.*, 631, and cases there cited. This company, by allowing children for some months to play on their track, had thrown parents off their guard, and were bound to use the greatest of care and vigilance in again running over the road. 29 *Md.*, 420.

Agnew, Judge, in the case last cited, says, —

"Culpable negligence is doing something which a reasonable, prudent, and honest man would not do under all the surrounding circumstances." *Frankford, &c., Turnpike Co.* v. *Phil., &c., R. R. Co.*, 54 *Penn. St.*, 345; 17 *Mich.*, 99.

In the original petition filed in this case, Thomas T. Thompson was named as a member of the firm of Converse & Co. The petition was afterward amended by inserting the name of Joseph T. Thomas in place of Thompson. By oversight, the correction was not made upon the judge's docket. The verdict was written, and the name of Thomas T. Thompson inserted, as in the original title of cause, instead of Joseph T. Thomas. The judgment in this case follows the verdict. This is a clerical error, and no cause for reversal. See *Nebraska Code*, p. 416, sect. 145, p. 496, sect. 583 and sect. 595; *Huntington* v. *Ziegler*, 2 *Ohio State*, 10; *Sanders* v. *Etcherson*, 36 *Georgia*, 404; *People* v. *Ah Kim*, 34 *Cal.*, 189; *Clough* v. *Clough*, 6 *Foster (N. H.)*, 24; *Cervantes* v. *United States*, 16 *Howard U. S.*, 619; *Little* v. *Larrabee*, 2 *Greenleaf*, 37; *Hickman* v. *Barnes*, 1 *Miss.*, 156; *Wilford* v. *Grant, Kirby*, 114; *Wood* v. *Tallman, Cox*, 153. See 28 *U. S. D.*, p. 626, sects. 13 and 18, and paragraphs 25 and 27; 15 *U. S. D.*, p. 556, sect. 2, and p. 34, sect. 2; 2 *U. S. D.*, pp. 663 and 665.

XI. Even if the negligence of the parents could be charged to the infant, was the parent in this case guilty of negligence in allowing even small children to play

upon a railroad-track which had not been used for a long time, and which he had no reason to think would be used? The testimony shows that children were on the track all along the line. This shows that this parent took the same care of his children that other parents in the neighborhood did; and it will hardly be contended that none of them were "reasonable, prudent, and honest" men.

It was no positive act of the parent that placed this child in danger. He, a poor man, did the best he could; but the child strayed away for an instant. Shall the child, when injured by a positive wrong, be without any redress? "A negligent wrong has been done; the child was incapable of contributing to it: then why should not the wrong be compensated?" *Opinion of Agnew*, cited above. *Shearman & Red. on Neg.*, p. 32; *Coek* v. *Champlain & Co.*, 1 *Denio*, 91.

In cases like this, the rule *in pari delicto* is not applicable, the parties not being considered as equally at fault. 1 *Hilliard on Torts*, 145; *Central R. R. Co.* v. *Davis*, 19 *Geo.*, 437.

XII. The Midland Pacific Co. cannot claim to be exempted from liability for damages done on their road because the road belonged to them. It was being built for them under their control; and they had been by law invested with authority to execute a work involving the exercise of the right of eminent domain, and affecting the rights of third parties: they are liable for the faithful execution of the power; and they cannot escape responsibility by delegating to others the power with which they have been intrusted. *Lesher* v. *Wabash Nav. Co.*, 14 *Ill.*, 85; *Lowell* v. *Boston & Lowell Railway*, 23 *Pick.*, 24.

The railway company were bound to see that the road, the crossings, and the ditches were in a condition to do no

harm to third persons, who, in the exercise of their rights, might be passing over them; and, if they were not in such condition, they are liable, and guilty of negligence. *Danville, &c.*, v. *Stewart*, 2 *Met.* (*Ky.*), 119; *Shear. & Red. on Neg.*, 587, *notes* 1 and 4, and cases cited; *Godly* v. *Hodly*, 20 *Penn. St.*, 387; 2 *Hilliard on Torts* (3d ed.), pp. 292–297; *Colegrove* v. *New York*, 6 *Duer*, 382.

LAKE, J.

This is a proceeding in error, brought to reverse the judgment of the District Court for Otoe County, rendered in an action instituted by the defendant in error to recover damages for personal injuries alleged to have been sustained by her in consequence of the carelessness of the plaintiffs in error in running a train of cars over said company's railroad within the corporate limits of Nebraska City.

The errors complained of may all be included under three general heads: first, errors of the Court in the instructions given to the jury on its own motion; second, errors in refusing to charge as requested by the defendant; and third, that the verdict is not sustained by sufficient evidence. I will notice these alleged errors in the order here indicated.

The first objection cannot be sustained. The record shows that the Court instructed the jury upon several questions involved in the case, among which was that of the contributory negligence of the plaintiff's parents in permitting so young a child to wander from home into the dangerous locality of the accident, as affecting her right to recover for the injuries sustained.

While I am not now prepared to give an unqualified approval to all that is contained in this charge of the

learned judge who presided at the trial, yet, there being several propositions included therein which are undoubtedly correct, and entirely applicable to the case, and the exception going to the whole charge, it cannot be sustained. *McReady* v. *Rogers*, 1 *Neb.*, 124.

On the question of the parents' negligence, we find the courts very much divided in opinion as to whether it should be permitted to prejudice the plaintiff's right to a recovery; and, for the reason that we can dispose of the case without passing upon it, we prefer at this time to leave it undetermined.

It is next objected that the Court refused the second request for instructions, but gave it in a modified and objectionable form.

In the refusal to give the instructions as presented, I perceive no error. It was in these words: "If the jury believe from the evidence, that, while the defendants' cars were in motion, the plaintiff ran on to and upon the railroad-track in front of the cars, and so near to the same that it was impossible to stop the train before the same struck and passed over her, they will find for the defendants."

This is not the law. It would permit those in charge of the train to run it at the highest possible rate of speed in a quite thickly-settled portion of a city, without incurring any liability whatever for an injury done; when by a reasonably moderate rate, such as is usual in such localities, it would not have happened. I am of the opinion that an injury done under such circumstances might render the defendants liable.

It is doubtless true, even in the absence of a statutory regulation upon the rate of speed upon railroads within the thickly-settled portion of cities and villages, that a reasonable rate must be observed, which is to be determined from a due consideration of all the

circumstances. A proper regard for the safety of the inhabitants and their property imperatively requires that this should be so. It is but an application of the same wholesome rule to railroad companies in running their trains that would govern an individual in driving a team of horses along a public thoroughfare. Here it is quite clear that a rate of speed that would be entirely justifiable in the open and sparsely-settled country, might, in the crowded streets of a city, be considered as criminal carelessness. *The Frankford and Bristol Turnpike Co.* v. *The Philadelphia Railroad Co.*, 54 *Penn. St.*, 345.

But, while there was no error in the refusal to give this instruction, I am quite certain, that, as modified, it was erroneous, to the prejudice of the defendants. The modification is in these words: "This is the law: Unless the conductor or engineer in charge of the train, by the exercise of care and watchfulness, might have seen the child or children running directly towards the track, so as to cross it, and, from their size and conduct, knew the child or children to be under the years of discretion, it was then the duty of those in charge of the train to check its speed if possible, and put the same under such control, if practicable, as to be able to avoid a collision with the children if they continued their course on to and across the railroad-track."

This modification of the instruction, if taken in its unqualified literal sense, and as quite likely to be understood by the jury, would imply an imperative duty on the part of an engineer, whenever he sees a child of tender years running towards the track, to slack his speed, lest he might, perchance, stop in front of the moving train, and suffer injury, *and this without reference to the relative position of the child and train.* This would be a most unreasonable requirement, and not at all consistent

with the proper exercise of the rights of the company in respect to their own property or their duty to the travelling public. But another fault is, it is altogether too indefinite, and has a strong tendency to mislead the minds of the jury, and to divert them from the real issues of the case.

The post of an engineer while running a train of cars is one of very great responsibility and danger. It not unfrequently calls for the immediate exercise of his judgment under circumstances that are well calculated to appall even the stoutest heart. It is his duty continually to exercise the greatest care consistent with the business in which he is engaged; and especially is it his duty to keep the track constantly in view, in order that any visible defects therein, or objects which may have been placed thereon, calculated to endanger his train or the safety of the passengers, may be avoided. He should also be watchful to a reasonable extent upon both sides of the track, to prevent all unnecessary collision with animals which might run upon the track from the immediate vicinity. But, while all this is due from an engineer, he should not be expected to perform impossibilities, or exercise a prescience that is greater than ordinarily falls to the lot of man.

Undoubtedly, if the engineer had seen this little child "running directly towards the track," in front of the moving train, with the apparent intention of going upon or crossing it, and so near as to lead a prudent person to conclude, unless the train were stopped or its speed slackened, a collision would be probable, had he failed to do all in his power to prevent it, having, of course, a due regard for the lives of those on board the train, he would have been guilty of culpable negligence, and his employers liable for the injury. But this is not the only substantial objection to this instruction as given to

the jury. It supposed a state of facts to exist which there was no evidence to support. There was no testimony tending even to show that the child was seen "running towards the track," or that she was in a position where she could have been seen by the engineer one moment sooner than she was, as sworn to by him. It is altogether probable, and it seems to be generally conceded, that she and her little brother were concealed in the small ditch which crossed the track at the place of the accident, and stepped out of it upon the track when the train was so near, that, by the efforts which were put forth, it was not stopped until the engine had passed over them.

The tendency of this instruction was to mislead the jury, and give them to understand that they were at liberty to resort to mere conjecture to enable them to account for what the testimony failed to show; and that they might infer the existence of a state of facts, in respect to the relative position of the parties, which the testimony would not warrant. There was no evidence upon which to predicate this instruction. The charge of the Court to the jury should always be founded on, and be applicable to, the testimony; and when it is not, and is calculated to mislead the jury in considering the facts of the case, the judgment ought to be reversed. *Meredith* v. *Kennard*, 1 *Neb.*, 312, and cases there cited.

The third instruction requested by the defendants, and refused by the Court, was as follows: "The fact that the train was crossing a public highway at the time the accident happened does not render the defendants liable for the injury to the plaintiff, if the jury find from the evidence that the plaintiff placed herself on the track in front of the cars, and so near to the same, that it was impossible, by the use of due diligence, to prevent the cars from running over her."

This is no doubt a correct proposition of law, and entirely applicable to the testimony which the jury were called upon to consider. The refusal of the Court to give it left the jury to infer that the defendant was liable merely because the accident happened at a street-crossing, notwithstanding they may have been in no fault whatever in running the train; as, for instance, in their efforts to stop it just as soon as the perilous situation of the child was discovered.

This will not do. It is the right of a party to a suit, by proper instructions, to have the minds of the jury directed to the essential features of the case, and their attention challenged to the testimony which should influence them in making up their verdict. They should also be advised of the legal effect of the establishment of, or failure to establish, the material facts of the case. When, however, this is not done, but, on the contrary, their minds are diverted from the real issues to be tried, and permitted to wander outside of the testimony into the region of mere conjecture, for the purpose of finding an excuse for returning a verdict in accordance with their own sympathies and desires, the chief value of a judicial trial is lost; and it is impossible to measure the injurious consequences that are likely to follow. More especially is this so in a case like the one at bar, where the jury had before them, as plaintiff against a railroad company, a mere child, who, by so terrible an accident, had been so unfortunate as to be made a cripple for life while perhaps endeavoring to rescue her little brother, who was so shockingly crushed to death.

The fourth instruction requested by the defendants ought to have been given without the modification made by the Court. The instruction was as follows, with the modification of the Court inserted therein in brackets: "The negligence which will render the defendants lia-

ble for the injury to the plaintiff must be such negligence as [contributed to cause] caused the injury."

By refusing the instruction as tendered, and giving it as changed, the jury were given to infer, that any negligence of the defendants that in any way "*contributed to cause*" the injury, no matter how remote it may have been, was sufficient to fix their liability.

This instruction was altogether too general, and entirely failed to draw the proper distinction between that negligence which may have been existing and present at the time of the accident and that which could have had only a very remote and indirect bearing or influence upon it. *The Philadelphia and Reading R. R. Co.* v. *Spearen*, 47 *Penn. State*, 300.

The fifth instruction refused by the Court was predicated upon the fact, that, just where the accident happened, there was a small open ditch, some two feet in width by from six to eight inches in depth from the bottom of the ties, for conducting the water across the track. By it the Court was asked to instruct the jury, that the mere fact that the defendants had dug the ditch, and left the same open, was not an act of negligence on their part which would render them liable; but the Court held otherwise, and denied the request. In this, I think, there was manifest error, which no doubt largely contributed to the verdict against the defendant.

But it is insisted on behalf of the plaintiff, that, because there was a conflict of testimony as to the size and exact location of the ditch, it was rightfully left to the jury to say whether leaving it open was an act of negligence on the part of the railroad company. This would be correct, if the ditch, as described by either of the witnesses, could be regarded as evidence tending to show negligence. Not only has no case been cited, but, after a pretty careful research, I have not been able to find

one, which furnishes any support to the position taken by the plaintiff's counsel.

The digging of this ditch, and keeping it open, to pass the surface-water from one side of the track to the other, was not at all unusual, nor can it be regarded as an act of negligence. This the Court should have told the jury; and the refusal to do so left them at liberty to find negligence from this fact alone. Where a fact is relied upon as constituting negligence, the Court should, especially if requested, inform the jury, whether, if the fact be proven or admitted, they are at liberty to infer negligence therefrom. The jury have no right to determine that a given act is one constituting negligence in opposition to the judgment of the Court. And where, by a fair consideration of all the evidence, there is nothing shown to warrant a verdict against one or more of the defendants, it is the right of the Court to either nonsuit the plaintiff, or direct the jury to return a verdict against him as to such defendant. As to the Midland Pacific Railroad Company, this clearly is the course that should have been pursued, there being no evidence against them.

But did the testimony warrant a verdict against either of the defendants? As to the railroad company, it is very clear that they were in no way responsible for the accident. The principle of *respondeat superior*, which has been invoked, and is relied upon by counsel for the plaintiff, has no application here. The relation of principal and agent, or master and servant, as to the railroad company, did not exist.

The testimony shows that B. C. Smith and J. T. Thomas, on behalf of themselves and their associates, had entered into a written contract with the railroad company, whereby they undertook and agreed to build and fully equip the road from Nebraska City to Lincoln

entirely at their own labor and expense; and, at the time of the accident, the defendants, J. N. Converse & Co., were engaged in the construction of the road under this contract, only a very small portion of which had been done.

The persons engaged in the work were not under the control of the railroad company, nor had any portion of it been accepted or taken possession of by them. The locomotive and cars were the property of J. N. Converse & Co., used by them upon the work; and the engineer who was in charge at the time of the accident was in their employ, and under their exclusive control, and in no wise answerable to the company. *Boswell et al.* v. *Laird et al.*, 8 *Cal.*, 469.

Upon this state of facts, the Court very properly instructed the jury, in substance, that if they believed from the evidence, that, at the time the injury to the plaintiff occurred, the Midland Pacific Railroad was being built by J. N. Converse & Co. under a contract with the Midland Pacific Railroad Company, and that the train of cars that ran over the plaintiff was owned and operated by J. N. Converse & Co., and that the Midland Pacific Railroad Company had not at the time of the accident any control over said road or train, then the latter could not be held liable for the injury. This instruction was correct; and, had the jury been guided solely by the testimony, they could but have found that the exact state of facts existed which they were told would release the railroad company from all liability. There was no conflict in the testimony on this point; but still the jury saw fit to totally disregard both the evidence and instruction of the Court, and return a general verdict against all the defendants. For this disregard of their duty, the verdict, at least as to the railroad company, should have been promptly set aside.

But what is the testimony upon which it is relied to support the judgment against the other defendants? Is it sufficient to sustain the verdict against any of them? If so, I apprehend there would be no difficulty or impropriety, under our code, in affirming it as to them; and, as to those against whom there is no testimony, to set it aside.

It is alleged in the petition, and the *gravamen* of the charge is, that the injury was caused by the gross carelessness of those in charge of the train in running it. It is in these words: that the defendants, "by and through their carelessness, negligence, improper conduct, and default of themselves and their said servants, and for a want of due care and attention in that behalf, caused one of their locomotives, and train of cars attached thereto, to approach the said crossing of said Eleventh Street and public road, and then and there caused their said locomotive, and train of cars attached thereto, to pass rapidly over the track of said railroad, and strike, run against, and over, the said plaintiff, and break one of the legs of the said plaintiff, and otherwise bruised and injured the said plaintiff; by reason whereof," &c.

This was the sole charge against the defendants; and a reference to the testimony of the plaintiff will show that it was all directed to its support. It was, in fact, the sole cause of action. It is true, that, upon argument, allusion was made to the small ditch before mentioned, and it was made the subject of a request for an instruction by the defendants; but no complaint is made of it in the petition, nor is there any thing in the testimony respecting it which should work the least prejudice to either of them. *The Illinois Central Railroad Co.* v. *Middlesworth*, 43 *Ill.*, 64.

Upon the question of negligence in the running of the train, there were several witnesses examined on the

part of the plaintiff, whose statements as to the speed at which it was going, although somewhat conflicting, are no more so than should be expected under all the circumstances. They were occupying different positions at the time; and their minds being more or less diverted to other matters made it impossible that their accounts of the transaction should be altogether harmonious.

The witness Thompson testified that he "did not see the spot where the accident occurred, but saw the train immediately before." His opinion was, that, when he saw the cars, they were going "at the rate of about twelve miles per hour;" that he "judged so from the speed of a horse." But, on cross-examination, he swore that he "did not know the rate of speed the cars were going." Indeed, the entire testimony of this witness shows that his opinion as to the speed of the train was of very little value.

Mrs. Kearney, who lived but a short distance from the place of the accident, saw the train, but "did not know how fast it ran;" thinks it "ran faster than she had ever seen it do before" when passing her house.

Mrs. Hastings's testimony is substantially the same on this point.

Guy A. Brown testified, that, at the time of the accident, he was at work in his garden, about four hundred feet from where it happened; that he heard the whistle sound "Down brakes" when the locomotive was about fifty feet or more from the crossing; that he saw men at work at the brakes, and the train was stopped with the rear end of the hindmost car just west of the street. He thought the train was moving at the rate of from twelve to fifteen miles an hour when he first saw it, but would not be at all positive about it.

The witness Shorck is the only person, except the engineer in charge of the locomotive, who pretends to have

seen the plaintiff and her brother near the track before the injury. He swears that he saw them sitting between the ties, "about two hundred and twenty-eight or three hundred and thirty-eight yards" in front of the approaching train, which was running very fast, — faster than they were accustomed to run; but he gives no estimate of their speed.

But a due consideration of all the testimony of this witness compels me to give it very little weight. I am convinced he was swearing at random. For instance, when asked whether the speed of the train was slackened at all, he answered, that "they did not until they struck the children: then they did." When asked how far they ran after striking the children, he says, "From three to five yards." This could not have been possible, if the speed was as testified by any one of the witnesses. Not only does all the other testimony for the plaintiff establish, but the common experience of every person who has the least knowledge of a moving train of locomotive and cars shows, the utter worthlessness of this kind of testimony. It is entitled to no credit whatever, and should be disregarded, especially when it conflicts with that of other credible witnesses.

The witness Cash called by the plaintiff, who has had large experience as an engineer in the running of locomotives, and who is, to all appearance, a very fair witness, swears that a train like this, composed of locomotive, tender, and one car, on this track, if skilfully handled, and running from five to six miles an hour, could have been stopped within about fifty yards; and, if going at the rate of twelve miles an hour, within about one hundred yards.

Now, the plaintiff's witness, Brown, while he somewhat loosely estimates the speed of the train when he first discovered it at about twelve miles an hour, says

very frankly that he is in no wise certain about it; and testifies, that, when the whistle sounded "Down brakes!" the train was about fifty yards from the crossing where the accident occurred; that he saw persons applying the brakes, and the train was stopped just west of the crossing. This shows quite conclusively that the speed of the train between the bridge and the place of the accident could not have exceeded five or six miles an hour, and that, upon the call of "Down brakes!" every reasonable effort was put forth to avoid a collision and save the plaintiff. I am of the opinion that there is next to a total want of evidence to support the charge of carelessness in the running or stoppage of the train, on the plaintiff's own showing; while there is a large number of witnesses called by the defendants whose testimony all goes to confirm this conclusion.

It only remains to inquire whether the engineer was at all remiss in the duties resting upon him, — in keeping watch for objects upon the track, and in giving warning of the approach of the train. On this point I find no difficulty. The testimony shows most conclusively, that, from the time of starting from the depot, he used the whistle at all highways and crossings, fifty yards from each, and kept the bell constantly ringing; that he had the track constantly in view, and saw neither of the children until he was within about eighty feet of the crossing before spoken of.

The engineer swears, that, if the children had been on the track, he could have seen them; that he first saw the boy, and supposed he rose from the ditch; that he whistled "Down brakes" immediately, reversing the engine, and did all in his power to stop the train. The plaintiff he did not see until the locomotive was just about to strike her, and when he was exerting himself to the utmost to save the boy.

After a very careful consideration of this case, I am forced to the conclusion, that the verdict as to all the defendants is clearly and palpably against the weight of evidence, and should not be permitted to stand. For these several reasons, the judgment must be reversed, and a trial *de novo* awarded.

Judgment accordingly.

Strader v. White.

EVIDENCE: *Impeaching witnesses.* It is competent to show that a witness has made statements out of court upon a material point of the case, contradicting his testimony, when, on his examination, he has denied, after having his attention directed to the fact, having made such contradictory statements.

PRACTICE: *Exceptions to charge.* A general exception to the whole of a charge of the Court to the jury, composed of several distinct propositions of law, will not avail the party making it, even though some of the propositions be not tenable.

PARTNERSHIP: *Contribution of services.* If a person contract with a partnership to contribute his services to the enterprise, for which he is to be compensated by a proportion of the profits, he becomes a member of the firm, and liable for its debts, although he do not stipulate to bear any part of the losses.

——: *Secret partner.* If a party become interested in an enterprise so as to be chargeable as a partner with the debts of the firm, he will not be suffered to escape by the device of a colorable transfer of his interests to others.

——: *Inconsistent verdict.* A verdict against three persons is not inconsistent because it holds one party as a secret partner and the other two as partners as to third parties, when the former, to conceal his relation, has made a colorable transfer to the latter, and they hold themselves out as partners.

Error to Cass District Court.

The facts are fully stated in the opinion.

Shambaugh & Richardson, for plaintiffs in error.

1. The Court below erred in admitting in evidence the deposition of Samuel G. Willard. The evidence, if admissible at all, could only have been used as evidence

in chief; and we contend it could not have been used as such, for the reason that the declarations of G. Fred White could not be given in evidence to affect his co-defendant, F. A. White, and also for the further reason that a partnership cannot be proved by evidence of the declarations of one of the members of the supposed firm. 2 *Greenleaf on Evidence*, sect. 484; 1 *Greenleaf on Evidence*, sect. 177.

Such declarations cannot be used against other persons; and this evidence could not be used against G. Fred White, because, being evidence in chief, it should have been offered as such, and an opportunity afforded the defendants to meet and disprove it by other proofs.

But the deposition was not offered as evidence in chief, but as rebutting evidence: certainly it cannot be regarded as such. If the evidence tended to prove any fact, it was that a partnership existed between all the defendants. This was the sole question at issue; and, the burden of proof being on the plaintiff, he was bound to offer all his evidence in chief in the first instance, and could not split up his case, and keep back a part of the evidence until the defendants had closed their case, and then offer the evidence in rebuttal, and thus deprive the defendants of an opportunity to meet and repel it by contrary proofs.

And this evidence was inadmissible as impeaching testimony, because no sufficient foundation had been laid by the cross-examination of G. Fred White.

2. The Court erred in admitting the evidence of the witness McCartney for the same reasons urged against the admissibility of the deposition of Willard.

3. The Court erred in its instructions to the jury. The assignment by Wadsworth & Everest of the one-third part of the net profits which might be made on their railroad contract to C. J. & G. Fred White, in payment

for the services which they (the Whites) had agreed to render them, did not constitute a partnership as between Wadsworth & Everest and the Whites, nor as to third persons as creditors of Wadsworth & Everest. If a person agrees to render services or perform labor in the prosecution of any enterprise or business, and stipulates for a certain share of the profits, or even net profits, of such business, as compensation and payment for such service or labor, he does not thereby become a partner even as to third persons. *Loomis* v. *Marshall*, 12 *Conn. R.*, 69; *Denny* v. *Cabot*, 6 *Metcalf*, 82; *Voorhees* v. *Jones*, 29 *N. J.* (5 *Dutcher*) *R.*, 270; *Story on Partnership*, sects. 36–49, inclusive; 1 *Denio*, 337; 17 *Mass.*, 197–206; 8 *Cushing*, 556; 3 *Comstock*, 132; 6 *Pickering*, 335; 5 *Denio*, 68; 3 *Hill*, 162; 15 *Ill.*, 31; 1 *Barr.*, 255; 5 *Gray*, 58; 10 *Johnson*, 226; 3 *Pickering*, 435; 6 *Greenleaf*, 76; 15 *Sergt. & Rawle*, 137; 20 *Wendell*, 70; 21 *Vermont*, 548; 14 *Pickering*, 192; 43 *Ill.*, 437.

The true rule is laid down in *Story on Partnership*, sects. 36, 38, 39, 49: "That a participation in the profits of a business is only presumptive evidence of a partnership, and therefore liable to be repelled and overcome by other circumstances, and not of itself overcoming or controlling them; that the circumstances under which the participation in the profits exists, and the actual intention of the parties, may be shown; and that if no partnership were intended between the parties, and it can be shown that the portion of the profits is taken, not in the character of a partner, but in the character of an agent, as a mere compensation for labor and services, then a party stipulating for a share of such profits cannot be held liable as a partner as to third persons, unless when the parties sought to be charged had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons."

It is not pretended that the Whites held themselves out to the world as partners of Wadsworth & Everest; nor is there the slightest evidence that the plaintiff supposed, when he entered into the contract with Wadsworth & Everest, that the Whites, or either of them, were members of that firm; nor is there any evidence tending to show that the Whites, or either of them, have done any thing which operated as a fraud or deceit upon the plaintiff or others.

No profits were realized on the contract; and the defendants, C. J. & G. F. White, received no compensation for their services. The plaintiff contracted with Wadsworth & Everest alone, and has not been damaged by the assignment by Wadsworth & Everest to C. J. and G. F. White of a share of the profits for their services.

4. The Court erred in refusing the first instruction asked by the defendants. The terms and conditions of the assignment were sufficient to repel the presumption of a partnership, and showed that the interest in the profits stipulated for was not taken in the character of a partner, but in the character of an agent, as a compensation for labor and service. Such an agreement will not constitute a partnership. See *Story on Partnership*, sects. 36, 38, 39, 49. And the refusal of the third instruction asked by defendant was, for the same reasons, error.

5. The second and fourth instructions asked by defendants should have been given; and their refusal was error.

If the recitals and statements of facts in the assignment were not sufficient of themselves to repel the presumption of a partnership, still such assignment could only raise the presumption of a partnership, which might be repelled by evidence showing that it was in consideration upon the payment for labor and services to be rendered by C. J. & G. Fred White; and the evidence of C.

J. & G. Fred White, if true, was sufficient to repel such presumption. See *Story on Partnership*, sects. 36, 38, 39, 49. Their testimony in this particular stands uncontradicted, and must be taken as true.

6. The refusal of the fifth instruction asked by defendants was error. All the defendants Whites cannot be held liable as partners of Wadsworth & Everest. If F. A. White became a partner with Wadsworth & Everest in the railroad contracts, as testified to by them, then C. J. & G. Fred White cannot be held liable as members of the same firm, because Everest swears that the share of F. A. was at his request assigned to C. J. & G. Fred White to prevent F. A. from being publicly known as a partner in the firm. C. J. & G. Fred, then, had no such interest as would make them liable to third persons for the debts of the firm. A silent or dormant partner is held liable only because he has an actual interest in the partnership; and, by taking a share of the profits, he takes away a part of the funds or assets of the firm to which creditors have a right to look for payment of their debts. In this view of the case, C. J. & G. Fred had no actual interest in the partnership, and could not actually share in the profits, if any were made; but the same would belong to F. A., who was the real and actual owner of the same. How, then, can C. J. & G. Fred be held liable for the debts of Wadsworth & Everest? Certainly not by the assignment of the one-third interest in the profits of the contract, if they took no actual interest in such profits, but the same still belonged to F. A., who still remained a silent partner of the firm, and the real and actual owner of such profits.

But, on the other hand, if C. J. & G. Fred White are held liable as partners of Wadsworth & Everest, it can only be on the ground, that, by the assignment of the one-third interest in the profits, they took and had an

actual interest in the same, and were the owners of such profits.

If that was the case, how can F. A. be also held liable as a partner?

The assignment to C. J. & G. Fred was made anterior to the contract between plaintiff and Wadsworth & Everest; and, if that assignment was sufficient to vest in C. J. & G. Fred such an interest in the partnership as would make them liable for the debts of the firm, then F. A. had no interest in the firm when the plaintiff contracted with it, because the witness Everest expressly states that it was the one-third interest of F. A. which was assigned to C. J. & G. Fred. Even if F. A. was once a secret member of the firm, yet, if he parted with his interest in the firm before the plaintiff's debt was contracted, he cannot be held liable for such debt.

There is no pretence that F. A. was known to the plaintiff or others as a member of such firm. If he had an interest in it, it was a silent or dormant interest, which would render him liable only for such debts as were contracted while he retained and owned such interest. When he retired from the firm, or his interest was assigned to C. J. & G. Fred, his liability ceased, except as to such debts as were contracted before such retirement.

Mr. Story, in his work on Partnership, fifth edition, sect. 159, says, "In the first place, then, a dormant partner is not liable for any debts or other contracts of the firm, except for those which are contracted during the period that he remains a dormant partner.

"Upon his retirement, his liability ceases, as it began, *de jure*, only with his accession to the firm. The reason is, that no credit is in fact, in any such case, given to the dormant partner. His liability is created by operation of law, independent of his intention, from his mere participation in the profits of the business; and therefore it

ceases by operation of law as soon as such participation in the profits ceases, whether notice of his retirement be given or not." The same rule is laid down by Collyer and Gow on Partnership, and in Kent's Commentaries, and is supported by the adjudged cases. 5 *Peters U. S.*, 573; *Collyer on Part.*, 384; 2 *Nott & McCord*, 429.

As it was the one-third interest of F. A. which was assigned to C. J. & G. Fred, and this was done before the plaintiff's debt was contracted, and the plaintiff had no knowledge of such interest, but contracted with Wadsworth & Everest only, supposing them to be the only parties interested in the business of the firm, it follows that all the Whites cannot be held liable for such debt, but only those who were the owners of that interest when the debt was contracted. This view of the case ought to have been presented to the jury; and the fifth instruction asked by the defendants should have been given. The jury should have been told that they could only find against such of the defendants Whites as were the owners of the one-third interest at the time the plaintiff's debt was contracted; and the refusal of the fifth instruction was error.

D. Gantt & T. B. Stevenson, for defendants in error.

I. The judge charged the jury, in respect to the defendant F. A. White, as follows: "If you are satisfied from all the testimony, that, at the time Strader entered into the contract, he (F. A. White) was interested in the profits, he must be held to be a partner, and liable in this action. On the other hand, if the testimony fails to satisfy your minds that he entered into this secret arrangement, or, having entered into it, had parted with all his interest to his brothers before Strader took his contract, and had ceased to be such

secret partner, then he cannot be held liable to the plaintiff in this action." This charge clearly submits the whole question of this defendant's liability to the jury as one of fact, to be determined by them upon the evidence. This was proper, and surely affords no ground for complaint.

The jury were correctly instructed in respect to the law of partnership: "With respect to third persons, an actual partnership may subsist where there is a participation in the profits, even though the participant may have most expressly stipulated against the usual incidents of that relation." 1 *Smith's Lead. Cases*, part ii. 1183; *Margin*, 974 (6th Am. ed., 1866).

"A man who shares in the profits, although his name may not be in the firm, is responsible for all its debts." *Winship* v. *Bank U. S.*, 5 *Peters*, 561; *Champion* v. *Bostwick*, 18 *Wend.*, 185; *Purviance* v. *McClintee*, 6 *S. & R.*, 261; *Cushman* v. *Bailey*, 1 *Hill*, 526; *Bromley* v. *Elliott*, 38 *N. H.*, 287, 302; *Wood* v. *Valette*, 7 *Ohio N. S.*, 172; *Smith* v. *Hollister*, 32 *Vt.*, 695; *Ward* v. *Thompson*, 22 *How.*, 333; *Hazzard* v. *Hazzard*, 1 *Story*, 371–374; *Goldsmith* v. *Berthold*, 24 *How.*, 542; *Story on Part.*, 56.

To receive a portion of the profits for services in carrying on the business constitutes a partnership *inter sese* as well as in respect to third persons. *Story on Part.*, sect. 58, p. 90.

Lord Eldon said, "If a man, as a reward for his labor, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner; and no arrangement between the parties themselves could prevent it." *Story on Part.*, sect. , p. 54; and see sect. , p. 96; sect. , p. 97; *Dob* v. *Hasley*, 16 *John.*, 34, 40.

II. It was the duty of the Court to determine the

legal effect of the assignments of interest by Wadsworth & Everest to G. F. and C. J. White. The construction of written instruments is the province of the Court; and it is of the utmost importance that this province should not be invaded by the jury. *Levy* v. *Gadsby*, 3 *Cranch*, 186; *Moore* v. *Miller*, 4 *S. & R.*, 279; *Dennison* v. *Wertz*, 7 *S. & R.*, 372; *McCoy* v. *Lightner*, 2 *Watts*, 351.

The Court gave the jury a correct construction of the assignments, and charged them in accordance with the well-settled principles of law. See the authorities cited in the first point of this brief.

III. The admissions of G. F. White were clearly good evidence against himself, if for no other purpose. *Brahe* v. *Kimball*, 5 *Sand.*, 237; *Spencer* v. *Campbell*, 9 *W. & S.*, 32.

But, where there is a community of interest and design, the declarations of one of the parties are evidence against the rest. *Snyder* v. *Laframoise*, *Breese*, 268.

And, if two persons combine to effect a given object in an action against one of the confederates, the declarations of the other, who is not a party to the suit, may be given in evidence as part of the *res gestæ*. *Clayton* v. *Anthony*, 6 *Rand.*, 285.

In an action against two or more defendants on a joint contract, the confession of one of the defendants is evidence against all. *Martin* v. *Root*, 17 *Mass.*, 222.

IV. The exception to the charge of the judge is general, and therefore unavailable.

When the judge's charge extends to a review of the case, any particular matter deemed objectionable should be pointed out at the time; and when he lays down a number of legal propositions for the guidance of the jury, some of which are deemed objectionable, the party should specify at the time to which, in particular, his

exception is intended to apply. Until this has been done, the party has no just ground for complaint. And a party cannot avail himself of a general objection to the decision of the Court, even if objectionable in part, because of the want of precision in stating it at the trial. *Camden, &c., Transportation Co.* v. *Belknap*, 21 *Wend.*, 359; *McAlister* v. *Read*, 4 *Wend.*, 485; *Read* v. *McAlister*, 8 *Wend.*, 112.

LAKE, J.

In July, 1869, Albert J. Wadsworth and David Everest, who for some time previous had been doing business together as partners, under the firm name of Wadsworth & Everest, entered into a contract with J. N. Converse & Co. to build a portion of the road-bed of the Midland Pacific Railroad. On the 20th of August following, the defendant in error, as sub-contractor under Wadsworth & Everest, took the job of grading sections 28, 29, and 30 of said road, which he duly performed, and from time to time received payments thereon; so that, at the time of bringing this suit, there was still due him the sum of about sixteen hundred dollars.

Upon the trial in the Court below, there was no controversy as to the amount of the balance due to Strader on his contract; the real issue being, whether the Whites, or either of them, were so connected with Wadsworth & Everest in their contract with J. N. Converse & Co., as to make them liable to third persons, as partners with Wadsworth & Everest, for debts contracted and liabilities incurred in carrying forward the work.

Upon this issue, the jury found for the plaintiff; and, judgment having been rendered on the verdict, it is here

now insisted, that, because of certain alleged errors of the Court below upon the trial, the judgment and verdict should be set aside, and a new trial awarded.

I will notice the several errors in the order of their assignment.

The plaintiff, to maintain the issues on his part, produced several witnesses whose testimony tended very strongly to show, that, before and at the time Wadsworth & Everest took the job, there existed between them and Francis A. White, who at this time was president of the Midland Pacific Railway Company, a secret arrangement, by which the latter was to have a one-third interest in any contract for grading which they might be able to secure; that in order to make this interest secure, and at the same time have it appear that he was a disinterested party, Francis A. brought forward his two brothers, the defendants C. J. and G. F. White, and had his one-third interest duly transferred to them by a written assignment in these words: "For and in consideration of the services to be rendered by C. J. White and G. F. White, we hereby transfer and assign one-third of the net profits of the contract taken by us of J. N. Converse & Co. to do the earth-work, from station 528 to the west end of section 39, inclusive, of the Midland Pacific Railway, to the said C. J. White and G. F. White; and it is further agreed that we shall furnish said G. F. White a weekly statement of all expenditures to be charged to account of contract. Said G. F. White may attend to financial disbursements, and C. J. White may superintend and sub-let said work.

"Dated Aug. 2, 1869.

(Signed) "WADSWORTH & EVEREST."

The plaintiff having rested his case, the defendant G. F. White was called, and testified that "F. A. White

had no interest in the assignment, was not present when it was made, and knew nothing about it. It was given to myself, and brother C. J. White, in payment for services to be rendered by us, — myself as paymaster, and C. J. White as superintendent."

On cross-examination, this witness was interrogated as to whether he had made certain statements out of Court, relative to his and his brother's connection with Wadsworth & Everest in the grading contract, in conflict with what he had sworn to in his examination in chief; and he answered, that he had not.

The plaintiff then offered to prove, by the deposition of Willard and the oral testimony of the witness McCartney, that he had made the very statements out of Court attributed to him; viz., "that Wadsworth & Everest's check was good for fifty thousand dollars at any time, anywhere, from the fact that he and his brothers were partners in the contract;" and also "that he, G. F. White, and his brothers, run that thing; that Wadsworth & Everest were doing the work for them." To this the defendants' counsel objected, for the reason, among several others, that the declarations of G. F. White were not admissible in evidence against F. A. White, and were not proper impeaching testimony. The Court, however, overruled the objection, and permitted his contradictory statements to be given to the jury.

In this we perceive no error. The testimony was very clearly admissible for the purpose of impeaching the credibility of G. F. White on a very material branch of the case; and this, doubtless, was the very purpose for which it was received. This evidence of contradictory statements is a very common mode of discrediting a witness, and is resorted to for the purpose of exciting in the minds of the jury a distrust of his testimony as to

the particular transaction on which the discrepancy arises, and in some cases, indeed, to even raise grave doubts as to the truth of his entire testimony. In all such cases, however, the Court should enforce the rule requiring the statement to be material to the issue, and of giving the witness an opportunity to declare whether he made it; and, if he desires to do so, to explain the nature and particulars of the conversation, and under what circumstances, and with what motive, it was made. In this case, it appears that all of these precautions were duly observed; and we perceive no just ground for complaint on the part of either of the defendants on account of the ruling of the Court.

The next ground of error alleged is, "that the Court erred in the charge and instructions given to the jury on the trial of said action."

Referring to the record, we find that the Court gave to the jury quite an extended charge, going over the entire case, and laying down several distinct propositions of law as applicable to the facts which the jury might find from the evidence. To this the defendants' counsel interposed a general exception in these words: "To the giving of which charge and instructions by the Court, the defendants F. A. and G. F. White, by their counsel, except."

Now, there are several propositions of law contained in this instruction to which no objection is urged, and which, it is conceded, state the law correctly. Where this is the case, it is well established in practice that a general exception to the whole charge will be unavailing, even though some of the propositions contained in it be untenable. Each specific portion which is claimed to be erroneous must be distinctly pointed out, and specifically excepted to. *McReady* v. *Rogers*, 1 *Neb.*, 124. While this rule of practice is a sufficient

answer to so general an exception, we have nevertheless carefully examined the instructions in detail, and are satisfied that they laid down the law of the case correctly, and that they were quite as favorable to the defendants as the testimony would warrant.

At the conclusion of this general instruction, the defendants' counsel tendered the following, which the Court refused to give; and thereupon exceptions were duly taken.

1. "That the assignment from Wadsworth & Everest to C. J. and G. F. White did not constitute them partners with Wadsworth & Everest, nor render them liable to third persons for the debts of the firm.

2. "That the assignment read in evidence only raised a presumption of a partnership; and that such presumption might be rebutted by evidence that it was made in consideration of or in payment for services to be rendered by C. J. and G. F. White.

3. "That the presumption of a partnership was repelled by the terms of the assignment.

4. "That the evidence of C. J. and G. F. White, if true, was sufficient to repel the presumption of such partnership.

5. "That, upon the testimony in this case, the jury could not find against all of the defendants Whites, — to wit, Francis A., Charles J., and G. Frederick White, — as partners with Wadsworth & Everest."

The first four of these propositions present the single question, whether, as to third persons, C. J. and G. F. White are liable as copartners with Wadsworth & Everest for debts contracted in the prosecution of the work. The Court held them liable, and so instructed the jury. Was this instruction right?

It is observable that there is nothing at all ambiguous in the contract, except, perhaps, as to the kind and

amount of the "services to be rendered" by the Whites in consideration of the interests thus transferred to them. This point, however, is made entirely clear by their own testimony, which is wholly consistent with the terms of the assignment, and shows that they were to be of a personal nature, and entirely devoted to the performance of the work from which the profits so assigned were to be derived, and out of which the plaintiff's demand originated. The financial management of the enterprise was placed under the sole control of G. F. White, to whom weekly statements of all expenditures to be charged to account of the contract were required to be made; while the chief superintendency of the work — the sub-letting of contracts, &c. — was intrusted to C. J. White. Indeed, the situation of the respective parties to this arrangement would seem to justify the remark made by G. F. White to the witness McCartney, — "that he and his brothers run this thing."

A partnership has been well defined to be a voluntary contract between two or more competent persons to place their money, effects, labor and skill, or some of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. *Story on Partnership*, sect. 2. More briefly it is defined to be a contract in which two or more persons agree to put in something in common, with the view of dividing the benefit which may result from it.

Here we have very clearly presented the ingredients necessary to constitute a partnership. Are any of them wanting in the contract we are considering? We have the parties competent to contract, each contributing his due proportion to the common stock, with the positive agreement to share the profits in definite proportions between them. The contributions of the Whites, it is true, was not of money or property, but of their skill and

services, which very frequently are quite as valuable as, and even more requisite than, any thing else, to insure the success of a venture. As to the defendants Wadsworth & Everest, the contract is silent as to their contribution; but they may be fairly presumed to have undertaken to furnish whatever else was essential to complete the work, inasmuch as they were the original contractors, and alone answerable to J. N. Converse & Co. for the due performance of the work; while the two Whites were let in afterwards to share in the profits upon terms mutually agreed upon between them. It is very clear that we have all the elements combined which are necessary to a partnership as defined by any elementary writer, even as between the parties themselves.

It is argued, however, that there is no agreement on the part of the Whites to share in the losses which might occur, and therefore they cannot be held to be partners. This proposition is altogether untenable. In the first place, they could receive no compensation for their skill and labor except out of the *net profits*. If these failed, they must necessarily share in the losses, at least to the extent of the value of the skill and labor contributed by them.

It has been held, that where one person advanced funds for carrying on a particular trade, and another furnished his personal services only in carrying on the trade, for which he was to receive a proportion of the net profits, they were partners between themselves as well as to third persons. *Story on Partnership*, sect. 58, and cases there cited. And this doctrine is well supported by a large number of cases, both in this country and in England.

In the case of *Manhattan Brass and Manufacturing Co.* v. *Sears et al.*, 45 *N. Y.*, the Court used this language: "To constitute one a partner as to third persons. it is

not necessary that he should agree to share in the losses of the business. Sharing in the profits is sufficient. The reason is, that sharing in the profits deprives creditors of a part of the means of payment."

The point, however, that is pressed upon our attention with the greatest force and confidence by the learned counsel for the plaintiffs in error is, that in no event can all three of the Whites be held to be liable as partners; that even admitting there were such an arrangement at the outset between Francis A. White and Wadsworth & Everest as would make them partners, yet, it being shown that the former had transferred his interest to his brothers, he thereby ceased to be a member of the firm, not only *inter sese*, but as to third persons also.

There is much plausibility and apparent force in this position; and it raises the only question upon which there seems to be any division between the members of this Court as to the correctness of the rulings of the Court below upon the trial.

Upon this question the jury were charged in these words: "The plaintiff has introduced some testimony tending to show that Frank A. White was a silent partner in this grading enterprise. That he was to have a one-third interest in the contract is testified to by the witnesses Wadsworth and Everest, but that this interest was to be held in the names of his brothers Charles and George. You also have the testimony of Frank A. White himself, who denies that he was a partner, or that he had any interest whatever in the contract as to profits. You also have the testimony of his brothers bearing upon this point.

"If you believe the testimony of Everest as to the arrangement which he says was entered into between Wadsworth and himself and Frank A. White as to sharing in the profits of the contract, even though he

procured the transfer of that interest to his brothers Charles and George so that he might not be known in the transaction, yet if you are satisfied from all the testimony, that, at the time Strader entered into his contract, he (Frank A. White) was still interested in such profits, he must be held liable in this action. On the other hand, if the testimony fails to satisfy your minds that he entered into such secret arrangement, or, having entered into it, had parted with all his interest therein, and had ceased to be such secret partner before Strader took his contract, then he cannot be held liable in this action."

This instruction stated the law of the case correctly; and there being some testimony before the jury tending to show that F. A. White was really interested in the work until its completion, notwithstanding the nominal transfer to his brothers, it only remains to inquire whether that testimony was sufficient to justify the verdict.

The defendant Everest swears positively that "the firm of Wadsworth & Everest was composed of Albert J. Wadsworth, David Everest, and Francis A. White. Frank White was to have one-third interest in the contracts. This was a private arrangement, and was made about the 25th of June, 1869; and it was arranged at the same time that White's interest should be assigned to his two brothers, which was done about the 5th of August following." He further swears that the reason given by White for the assignment of his interest to his brothers was, "that he wanted it kept secret that he was in." Considering his relation to the railroad company, it is not very remarkable that he desired secrecy; for, in the language addressed to Wadsworth & Everest, "he wanted to see them do well and make money, *and he wanted to make some too.*"

Wadsworth testifies to substantially the same facts. He says, "The agreement between Everest and myself and Francis A. White, that he (White) should have an interest in the contracts for the building of the railroad, was made in the back room of White's office in Nebraska City. White did not want any outside parties to know that he had an interest in the contracts." On cross-examination he says, "It was the understanding that he (White) was to become security for the performance of the contract; and he was to have a one-third interest." It also appears from the testimony of this witness that frequent consultations were had with both F. A. and C. J. White about the work, sub-letting it, &c.

John McGimity, who was one of the sub-contractors, testifies that he made his contract with C. J. White; but it was executed in the name of Wadsworth & Everest. In answer to the question of who paid the laborers under the Wadsworth & Everest contract, he said, "I do not know personally who paid them, except a few whom I paid myself, under the direction of F. A. White, who was custodian of the funds and securities for the parties, — the firm of Wadsworth & Everest." He also swears that "J. N. Converse & Co. caused regular monthly estimates for work done to be made in accordance with their contract; and payments for the same have been made in full. A portion of the payments were made to Wadsworth & Everest, a portion to F. A. White upon the order of Wadsworth & Everest, and portions to sundry parties who performed the work, at the instance of F. A. White as custodian of the funds."

Other portions of the testimony might be cited to show that the question of F. A. White's interest in the contract was fairly before the jury; but this is enough to furnish a solid foundation for their verdict. It is true that F. A. White contradicts nearly every thing that tends

to implicate him as a partner in the transaction: but, after a careful review of all the testimony, we are satisfied that the arrangement as detailed by Wadsworth & Everest in their testimony was actually entered into, and that F. A. White thereby became interested with them as a secret partner in their railroad contracts; that, notwithstanding his formal transfer to his brothers, he continued in fact to retain his interest therein until the completion of the work. Whether this conclusion be absolutely true or not, does not matter: it was a question for the jury to determine; and they having found that he was a partner, and there being testimony before them, which, if true, would justify their verdict, it ought not to be disturbed. Now, is there any inconsistency in the verdict being against all three of the Whites? The evidence would justify a finding against Francis A. White as a partner with Wadsworth & Everest *inter sese;* while his brothers, in virtue of the assignment, their peculiar relation to the work, and the understanding of the parties, might have been taken and held as partners as to third persons only.

Judgment affirmed.

CROUNSE, J., dissenting.

The first allegation of error in this case is, that the Court below permitted the deposition of Samuel G. Willard to be read, against the objection and exception of the defendants, in the District Court. The testimony of Willard was as to declarations made by one of the defendants (G. F. White) to him, that he and one or both of the other Whites were partners. The deposition was not read on the part of plaintiffs in the Court below until the introduction of his rebutting evidence. It was objected that it should have been brought forward when

plaintiff introduced his evidence in chief; and further, that a partnership could not be established by the declarations of one alleged partner as against the others. To establish the fact that G. F. White was a partner, the evidence was proper, considered apart from the question as to the time it was offered.

And although the rule is as stated by counsel, and is one which should be adhered to, except for good reasons, yet it is not inflexible; but it is a matter resting with the Court before which the trial is had to permit either party to introduce testimony out of the prescribed order. Here was reason for its introduction on the rebuttal: G. F. White had testified on his own behalf as a defendant. While on the stand, his attention was directed to a conversation with Willard at the time and place subsequently sworn to by Willard; and he denied having said what was imputed to him. Willard's testimony was calculated to impeach him, and could only be brought on at the time it was.

The testimony of McCartney was objected to for like reason. We see no error in the admission of that of either.

Next, complaint is made of the charge of the judge given to the jury, as well as his refusal to charge as requested. As to the former, the charge was at length, covering several propositions, some of which are undoubtedly good. We took occasion to announce the familiar rule in *McReady* v. *Rogers*, 1 *Neb.*, 124, that such an exception is unavailing. In such case it becomes the duty of the party excepting to point out the specific part or parts to which he excepts. *Walsh* v. *Kelley*, 40 *N. Y.*, 556; *Hart* v. *The Rensselaer and Saratoga Company*, 4 *Seld.*, 37; *Osgood* v. *Osgood*, 2 *Seld.*, 233; *Haggard et al.* v. *Morgan*, 1 *Seld.*, 422; *Jones* v. *Osgood*, 2 *Seld.*, 233; *Caldwell* v. *Murphy*, 1 *Kern.*, 416; *Zabriskie and Others*

v. *Smith*, 3 *Kern.*, 323; *Magee* v. *Badger and Others*, 34 *N. Y.*, 247.

Passing to the instructions asked by the attorneys for the defence, and which the Court refused to give, we find among them this request of the Court to say, "That upon the testimony in this cause the jury could not find against all of the defendants Whites." To understand whether such request should have been complied with, we must know the issue made, and the testimony given bearing thereon.

The action is for work performed, and is brought against Everest, Wadsworth, F. A. White, C. J. White, and G. F. White, as partners, doing business under the firm name of Wadsworth & Everest. The answer denies the existence of any partnership of the Whites.

On the 31st of July, 1869, Everest & Wadsworth entered into a contract with Converse & Co. to grade a certain portion of the road-bed of the Midland Pacific Railroad. By writing annexed to the agreement between Converse & Co. and Wadsworth & Everest, F. A. and C. J. White became sureties for the performance, by Wadsworth & Everest, of the contract; and a clause is inserted in the agreement itself, that they shall have the right to receive payments for work done, and receipt for the same as fully as Wadsworth & Everest.

Aug. 28 of the same year, the plaintiff below (Strader), in writing, agreed to do the work on a certain portion of the road then taken to grade by Wadsworth & Everest. To recover an unpaid balance for work so done, this action was brought. There is no suggestion, nor is there any evidence to show, that Strader, at the time of engaging to do the work, understood, or had any reason to believe, that any of the Whites were interested with Wadsworth & Everest; and, as Wadsworth & Everest alone appeared in the transaction, no right of action

arises against the Whites from their having held themselves out as partners, whether they were such in fact or not. Neither does it appear from the testimony that they ever received any of the profits, if any there were, out of the contract of Wadsworth & Everest with Converse & Co.

To connect F. A. White with the partnership, we have the testimony of Everest, who says, "The firm of Wadsworth & Everest was composed of Wadsworth, Everest, and Francis A. White. F. A. White was to have a one-third interest in the contract. This was a private arrangement between Wadsworth & Everest and F. A. White. The arrangement was made about the 25th of June, 1869; and it was arranged at the same time that F. A. White's interest should be assigned to his two brothers, Charles J. and G. Frederick. . . . We never made any other arrangement about it. . . . This was not in writing. . . . We transferred one-third interest to his brothers about the 5th of August, 1869. This was in writing." A copy of this writing, the original being burned, was read in evidence, as follows: —

"For and in consideration of services to be rendered by C. J. White and G. F. White, we hereby transfer and assign one-third of the net profits of the contract taken by or of J. N. Converse & Co. to do the earthwork from station 528 to the west end of section 39, inclusive, of the Midland Pacific Railway, to the said C. J. and G. F. White; and it is further agreed that we shall furnish said G. F. White a weekly statement of all expenditures to be charged to account of contract. Said G. F. White may attend to financial disbursements, and said C. J. White may superintend and sub-let said work." This is dated Aug. 2, 1869, and signed by Wadsworth & Everest.

Wadsworth testifies, "The firm of Wadsworth & Ev-

erest was composed, as I understand, of A. J. Wadsworth, David Everest, and Francis A. White. The agreement between myself and Everest and Francis A. White, that he (White) should have an interest, was made in White's office. White did not want any outside parties to know he had an interest in the contract, but wanted his brothers, C. J. White and G. F. White, to attend to his interest in the contract."

F. A. White denies that he ever took or wanted a one-third interest; that as a friend to Wadsworth & Everest, who had worked on the same road of which he was an officer, and having waited in expectation of this contract, he gave them his assistance in procuring it; that, in consideration of his signing as surety, Wadsworth & Everest were to trade at the store of G. F. White and Fitchie.

Much argument has been expended in this Court upon the question, as to whether the assignment of Wadsworth & Everest to C. J. and G. F. White, giving them a third of the net profits of their contracts, constituted C. J. and G. F. White partners, and, as such, made them liable with Wadsworth & Everest. Without discussion of that question, let it be conceded that the Court held correctly, — that a party who contracts for a share of the profits thereby becomes liable as a partner. Either the assignment to C. J. and G. F. White was for their own benefit, or for the benefit of F. A. White. There is no evidence whatever from which the jury were authorized to find that a two-thirds interest in the contract was assigned. Wadsworth & Everest, in their evident anxiety to swear in as many sharers in their loss as possible, do not in the remotest manner claim that a two-thirds interest was so disposed of. If C. J. and G. F. White took in their own right, no claim can be made against Francis A. White. If they took, pursuant to the agreement sworn

to by both Wadsworth and Everest, the interest for F. A. White, then they have no interest in fact; and, not having held themselves out as partners, they should be released. Upon the construction given the assignment by the Court, there is no evidence upon which the question, whether either F. A. White was, or C. J. and G. F. White were partners, and, if so, which, might be determined by a jury. But there is no evidence in the record to warrant the jury finding all three of the Whites liable as partners; and it was error, in my opinion, for the Court to refuse so to charge.

It is not the province of this Court to disturb the finding of a jury, where it has evidence to support it, merely because such finding is against the weight of evidence. *Browne* v. *Vredenburgh*, 43 *N. Y.*, 195.

But the finding of a material fact without evidence to sustain it is an error of law. *Mason* v. *Lord*, 40 *N. Y.*, 476.

The judgment should be reversed, and a new trial awarded.

Stevens v. Cooper.

SPECIFIC PERFORMANCE. The agent of judgment creditors bid off land in his own name at the execution sale, and afterwards received a sum of money for releasing the property from the sale to the judgment debtor; notwithstanding which the sale was confirmed, and deed made to the agent. *Held*, that the agent and the creditors may be compelled by decree to convey the title so acquired to the debtor.

LAKE, J.

We see no reason for interfering with the decree of the District Court, believing it to be fully sustained by the evidence. The case is this: At the December term, 1859, of the District Court for Otoe County, the defendants, Cooper & Clarke, recovered a judgment against William Anderson and others, which thereupon became a lien upon the land in dispute.

On the eleventh day of May following, the plaintiffs, in consideration of the sum of two hundred and fifty dollars by them paid, and without actual knowledge of the judgment, became the purchasers of the land, which was thereupon duly conveyed to them by Anderson and his wife. On the 27th of November, 1861, an execution was duly issued on the judgment, and the land in question sold and conveyed by the sheriff to the defendant, Julian Metcalf, a member of the firm of McCann & Metcalf, who were the agents of Cooper & Clark, in the management and collection of the claim upon which said judgment was rendered. Although the sale was nominally made to Metcalf, the bid was actually made by one Silas Smith, who was the confidential clerk of McCann & Metcalf, and authorized to act for them in the matter; and the title was taken by Metcalf, and taken by him as the agent of C. & J. Cooper, defendants, who were

the successors of Cooper & Clarke, and the real owners of the judgment at this time. Thus far there is no controversy between the parties.

On the part of the plaintiffs it is claimed, that after the sheriff's sale, but before it was confirmed, there was an arrangement between Anderson and Metcalf, Smith acting for Metcalf, whereby, for a valuable consideration then paid, this particular tract was to be released from the execution sale, — in other words, redeemed, — and no confirmation had. This the defendants deny; which constitutes the main issue between the parties.

Although the evidence on this branch of the case is somewhat conflicting, we think the preponderance is very decidedly with the plaintiffs.

Anderson, the judgment debtor, testifies, that, between the time of making the sale and the confirmation, he went to McCann & Metcalf's place of business, and made an arrangement with Silas Smith, their agent, to redeem the land for the sum of twenty-five dollars, the amount it had been bid off for, which he then paid; that Smith thereupon agreed to have this tract "thrown out," and released from the execution.

The plaintiff Waters also swears that he was present when Anderson redeemed the land; that he first learned it had been taken and sold on execution from Silas Smith, who informed him that he had bid it off on an old judgment: whereupon he at once sought out Anderson, from whom he had bought it, and went with him to McCann & Metcalf's bank to fix the matter up; that he was present, and heard the arrangement by which Anderson was to pay the sum of twenty-five dollars, and the land to be released. This satisfied him, and he went away.

D. J. McCann, the senior member of the firm of McCann & Metcalf, testifies that Smith had been a long

time in their employ as confidential clerk, and had ample authority to make the agreement to release the land.

This is all the positive testimony there is of the arrangement to redeem the land. Smith is dead; and the defendants all swear that they know nothing about it. It is a noticeable fact, however, that neither of the defendants ever paid any taxes on the land, or exercised any other act of ownership over it; nor did they seem to understand or suppose that they had any interest therein until the fall of 1869, when, the plaintiffs discovering that it had not been released from the execution, but had been deeded by the sheriff to the defendants, their agent requested that it be conveyed to them.

Upon a careful examination of the testimony, we do not hesitate to declare that it would be exceedingly unjust and unequitable to permit the Coopers, who, as the successors of Cooper & Clark, now hold the legal title to the land, to retain it from the plaintiff. The arrangement was fairly entered into to redeem it from the sale, and the agreed consideration therefor fully paid, which at the time was satisfactory to all concerned. Afterwards, in proceeding to perfect the title in Metcalf by procuring a sheriff's deed to be made to him, a fraud was perpetrated upon both Anderson and the plaintiffs, which the defendants ought not now to take advantage of. To permit them to do so would be a grievous hardship to Anderson, who, so far as the record discloses, appears to be an upright man, anxious both to pay his just debts and to protect the plaintiffs in their purchase. It would result in making him liable to the plaintiffs upon his deed for the consideration-money paid him for the land, leaving the present holders of the title in the full enjoyment of the estate, without the payment of a single dollar therefor. This would be a mockery of justice.

The decree of the District Court being in favor of the plaintiffs is right, and must be affirmed.

Decree affirmed.

G. B. Scofield, for appellants.

Shambaugh & Richardson, for appellees.

Hallenbeck v. Hahn.

CONSTITUTIONAL LAW: *Construction.* The constitution of this State confers plenary legislative power upon the General Assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the constitution itself.

——: ——. The provisions of the constitution, that "the State shall never contract any debt for works of internal improvement, or be a party in carrying on such works," and that the debts of the State "shall never in the aggregate exceed fifty thousand dollars," refer to the State alone, and not to the municipal corporations.

——. Municipal aid to railroads. The act of the legislature of Feb. 15, 1869, authorizing any county or city of this State to issue bonds to aid the construction of railroads, does not conflict with the provision of the Bill of Rights, that "the property of no person shall be taken for public use without just compensation therefor."

Argument 1. The provision relates to the taking of private property by the exercise of the power of eminent domain, and not by the exercise of the taxing power; between which powers there is a wide difference.

2. A railroad company is a public body; or, if a private corporation, it is an agent of the public to perform a public function.

3. When the constitution of this State was adopted, many other States had constitutions containing similar provisions, which the courts thereof had held not to inhibit such legislation.

INJUNCTION: *The collection of taxes.* Equity will not enjoin the collection of taxes on account of irregularities in the proceedings of the taxing officers, unless they are void, or levied upon property which is exempt; nor if a part of the tax be just, and a part be not just, will it interfere, unless tender of the part due be made.

——: *Realty.* A sale of realty for taxes will not be restrained because the owner has personalty out of which it might have been collected.

HALLENBECK v. HAHN.

Petition in error to the Douglas District Court.

This was a petition filed by the owner of personal and real estate to restrain the sale of the realty for taxes levied thereon; which sale the defendant, as the county treasurer, had advertised, without attempt to distrain upon the plaintiff's personalty. One and the chief ground alleged for complaint was, that a large portion of the taxes was to be applied to pay the interest upon a large amount of bonds issued by the county to the Omaha and North-western and the Omaha and South-western Railroad Companies to aid them in building their several railroads. Another ground of complaint was, that there were sixteen different irregularities, which were enumerated and set forth at length, which, as was claimed, invalidated the taxes.

The defendant filed a general demurrer, which the District Court sustained; when, upon judgment of dismissing, the petition was entered, and the plaintiff brought this petition in error.

G. W. Ambrose, for plaintiff in error.

I. The sale will cast a cloud upon the title of the plaintiff. A void decree was declared to be a cloud, and set aside. *Morris* v. *Hagle*, 37 *Ill.*, 150. A sale under a judgment lien, which was no lien, was declared to be a cloud, and sale enjoined. *England* v. *Lewis*, 25 *Cal.*, 357; *Pettit* v. *Sheppard*, 5 *Paige*, chap. 501. An irregular tax deed is a cloud. *Lyon* v. *Hunt*, 11 *Ala.*, 295. So an attempted sale on an invalid execution restrained. *Burt* v. *Cassity*, 12 *Ala.*, 734. Invalid street improvements declared to be a cloud. *Oakley* v. *Trustees, &c.*, 6 *Paige*, chap. 264.

That taxes are a perpetual lien upon real property no

one will doubt: they are so made by statute. Sect. 5, p. 82, *S. L. of* 1871.

We have not a complete remedy at law against this injury. *Pixby* v. *Higgins*, 15 *Cal.*, 127; 21 *Conn.*, 488; 19 *N. H.*, 91; 3 *P. Wms.*, 296; 1 *Hamp.*, 692; 13 *Peters*, 203; 18 *N. Y.*, 515; *Wood* v. *Chamberlain*, 2 *Black*, 430.

If this illegal tax is enforced, our property will be taken without due process of law (11 *Mich.*, 129; 12 *N. Y.*, 209); for the law has not been followed, and the proceedings are a mere arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice. *Cooley on Consti. Lim.*, 517 to 520.

II. The remedy at law is not adequate. The remedy must be adequate; that is, full and complete. 1 *Story Eq. Juris.*, sect. 33; *Dr. Leiber's Ency. Americana*, art. "Equity."

If the remedy at law be a partial one, then it cannot be said to be adequate: it fails to restore to the party that which, by an unwarranted, unauthorized, and unconstitutional proceeding, and without due process of law, has been taken from him.

What is to be done with the funds arising from this illegal sale?

Part goes to the county, part to the general school-fund, and part is paid directly over to the treasurer of the State. What becomes, then, of the part of this illegal public plunder which is taken from the citizen without *due process of law*, and which goes into the coffers of the State? Can it be reached? If so, how? The State cannot be sued. The law compels the defendant to pay the money collected for taxes into the county and State treasuries.

Then sue the officer. Ah! but his warrant is his protection (sect. 37, *Laws of* 1869): he is bound to obey

the commands of his warrant. And even if he be not, and the sale is made or not made according to his supreme pleasure, when and under what circumstances did he ever *promise* to repay? and can there be a recovery without it?

It will be seen at a glance that in no event can the part paid into the State funds ever be reached. The county of Douglas never had the money: the treasurer obeyed the law, and paid it to the proper custodian. Sect. 75, *Laws of* 1869; 12 *Wallace*, 1; 10 *Wallace*, 676; 3 *Howard*, 250; 3 *Black*, 478; *First Nat. Bank* v. *Douglas County, by Judge Miller; U. P. R. R.* v. *Lincoln County, by Judge Dillon.*

III. This Court is competent to inquire into the validity or invalidity of railroad or other bonds. 10 *Wallace*, 676.

IV. The rule, that he who seeks equity must do equity, does not require the payment or tender of so much of the taxes as were legal before the enforcement of those which were illegal will be restrained; for our statute prohibits the officer from receiving payment of a part of the taxes. *Session Laws of* 1869, p. 212, sect. 93.

J. C. Cowin, for the defendant in error, elaborately argued the questions raised upon the proceedings of the taxing officers, and the jurisdiction of equity to restrain by injunction the tax-sale of the plaintiff's realty. His brief does not appear among the files of the Court.

J. M. Woolworth, intervening in behalf of parties holding bonds issued by counties to railroad companies to aid them in constructing their works, argued the single question of the constitutional validity of such instruments upon the following brief: —

I. All of the general rules of constitutional construc-

tion which are applicable to the subject support the validity of the statute by virtue of which these securities were made.

1. It is utterly inadmissible for the Court to import into the constitution a limitation upon the legislative power, drawn from abstract reasoning, relative to the proper functions of government.

(1.) This appears from the fact, that, by such process, the proper functions of government, as well free as arbitrary government, are not ascertainable, but are disclosed only by an historical examination of the objects to which they have been in fact applied. 3 *Burke's Works*, 227 (Little & B.'s ed.); 3 *id.*, 310; *id.*, 192; 3 *Webster's Works*, 13, 305.

(2.) The same appears from the disagreements which prevail as to the just occasion for the exercise of such powers, several instances of which were mentioned.

(3.) The same appears from the fact, that the same reason is not assigned to support the exercise of particular powers by different writers, of which several instances were cited.

(4.) And in a multitude of cases it has been held, that the powers of government, and of its several departments, are to be ascertained from the constitution, and not from a consideration of elements supposed to inhere in the nature of the subject. *The People* v. *Draper*, 15 *N. Y.*, 532, 543; *Commonwealth* v. *Hartman*, 5 *Harris*, 119; *Lexington* v. *McQuillan's Heirs*, 9 *Dana*, 514; *Sears* v. *Cottrill*, 5 *Mich.*, 251; *Twitchell* v. *Blodgett*, 13 *id.*, 127; *Commonwealth* v. *McClusky*, 2 *Rawle*, 374.

2. The Court is not justified in annulling a legislative act, unless satisfied beyond a reasonable doubt that its repugnancy to the constitution is irreconcilable upon any just construction of the two instruments. *The Cincinnati, &c., Railroad* v. *Commissioners*, 1 *Ohio St.*, 77, 82;

Wellington v. *The Petitioners, &c.*, 16 *Pick.*, 95; *Louisville* v. *Hyatt*, 2 *Mon.*, 178; *Sears* v. *Cottrill*, cited above; *Twitchell* v. *Blodgett*, cited above.

Such repugnance cannot exist to the extent called for by the rule in the case of this statute, which, in at least one hundred cases, decided upon great consideration and by three hundred different judges, have been held constitutional. A list of these cases was presented.

3. The power of taxation is, by the constitution, vested in the General Assembly, with plenary discretion in its exercise. What is sometimes called a limitation upon the power — namely, that, under the sanction of the name, the property of one person shall not be taken and conferred on another — is more rightly a perversion of the power. *Cincinnati, &c., Railroad* v. *Commissioners*, cited above; *Sharpless* v. *Philadelphia*, cited above; *Spier* v. *Blairsville*, 50 *Pa. St.*, 161; *In the Matter of the Trustees*, 31 *N. Y.*, 582; *The People* v. *Brooklyn*, 4 *N. Y.*, 419; *Providence Bank* v. *Billings*, 4 *Pet.*, 563; *McCollough* v. *Maryland*, cited above; *Weston* v. *Charleston*, 2 *Pet.*, 466; *Cheney* v. *Hoover*, 9 *B. Mon.*, 345; *Litchfield* v. *McOmber*, 43 *Barb.*, 288; *Bradshaw* v. *Omaha*, 1 *Neb.*, 16.

(1.) The twentieth section of the Bill of Rights, reserving to the people the powers not expressly granted, does not modify the rule, for the grant of legislative power is plenary; nor does that limiting the power of the State to contract debts apply. These clauses, taken from the Ohio Constitution, were construed in *The People* v. *Flagg*, 46 *N. Y.*, 401; *Cass* v. *Dillon*, 2 *Ohio St.*, 607; *Baker* v. *Cincinnati*, 11 *id.*, 534.

(2.) And compensation within the meaning of the thirteenth section is secured. *Thomas* v. *Leland*, 24 *Wend.*, 65, 68; *Mirrick* v. *Amherst*, 12 *Allen*, 500; *Bank of Rome* v. *Rome*, cited above.

(3.) The objection, that the tax is levied for a private purpose, rests on the ground, either that the object is private, or the means for attaining the object is private: on which we submit the following points: —

II. The duty of providing its citizens with roads, furnished with the most approved means of communication and locomotion, always has been regarded as, and is in fact, one of the most obvious and imperative duties devolving upon governments; and may be discharged by its own officers and agents appointed for the purpose, or by the employment of private parties. *Rogers* v. *Burlington*, 3 *Wallace*, 663; *Beekman* v. *Saratoga, &c., Co.*, 3 *Paige*, 74.

1. That this has been so regarded, witness the great roads of ancient times; the railroads of Europe, built and operated by government; the Erie Canal, still a public work in New York; the early railroad system of Michigan; and our own system of highways, managed by public officers, and supported by taxation.

2. This public duty may be devolved upon a private person as well as be discharged by the government directly. Such duties have been devolved on private parties, as mail-carriers, banks, toll-bridge companies, &c., and they have been clothed with quasi-public character. *McCollough* v. *Maryland*, 4 *Whea.*, 416, 417; *Osborn* v. *United-States Bank*, 7 *id.*, 738, 860, 862; *Boston Water-Power Co.* v. *Boston R.*, 23 *Pick.*, 360, 396; *Cottrill* v. *Myrick*, 3 *Fairf.*, 222, 233; *Union Pacific Railroad Co.* v. *Lincoln Co.*, *Dillon*, 314, 323.

3. The fallacy of the argument on the other side consists in confounding the means and the end in respect of the power. If the ultimate object is legitimate, the legislature must be left free to select the means by which the same may be accomplished, provided only they be not inappropriate thereto. *McCollough* v. *Mary-*

land, as cited above, 421; *Osborn* v. *United-States Bank*, 9 *Whea.*, 738, 859; *In the Matter of Townsend*, 39 *N. Y.*, 171, 174; *Miner's Ditch Co.* v. *Zelerbach*, 37 *Cala.*, 543, 577.

III. But a railroad company, incorporated under the general law of this State, is, in the aspect here under consideration, a public agent, and not a private corporation.

1. A railroad company, viewed with reference to the interests of its stockholders, is a private corporation; but, viewed with reference to its duties to the public, it is a public agent: and it is in reference to this latter aspect that it is here presented for our consideration. *In the Matter of Townsend*, 39 *N. Y.*, 171, 183; *Swan* v. *Williams*, 2 *Mich.*, 427.

2. Its character is not to be determined by the test of any abstract definition, but by a consideration of the manner in which it has been treated.

3. The railroad has been treated as a public agent in several ways.

(1.) By the State retaining the control over it, which is one approved test of its public character. *West-River Bridge Co.* v. *Dix*, 546, cited above, *R. S.* 213, *et pass.*

(2.) By the conferring upon it the prerogative franchise of eminent domain. 25 *Vt.*, 442; *Boston, &c., Co.* v. *Railroad*, 23 *Pick.*, 360; *Bloodgood* v. *Mohawk Co.*, 18 *Wend.*, 9; *Beekman* v. *Saratoga, &c., Co.*, cited above.

(3.) By the exercise in its behalf of the taxing power. See cases cited under First Point, 2.

(4.) By the grant of the prerogative franchise of exacting tolls upon what has been repeatedly held to be a highway. *Williams* v. *New-York Central*, 18 *Bark.*, 222, 246; *State* v. *Rives*, 5 *Ind.*, 297; *Northern Railway* v. *Concord Railway*, 7 *Fost.*, 183; *Bloodgood* v. *Mohawk*

Co., cited above; *Bonaparte* v. *Camden Co.*, 1 *Bald.*, 205; *Bradley* v. *New-York Co.*, 21 *Conn.*, 294.

(5.) By the grant of vast bodies of the public land and vast amounts of the public funds to the Union Pacific Railroad Co., which is, equally with other such companies, formed for private profit. *Union Pacific Railroad* v. *Lincoln Co.*, *Dillon's C. C.*, 314; *Thompson* v. *Union Pacific Co.*, 9 *Wall.*, 579.

IV. If the principles above laid down are sound, no just distinction exists between a subscription to stock and a donation in aid of the work. *Chicago Railroad* v. *Smith*, decided in the Supreme Court of Illinois, not reported; *Stewart* v. *Supervisors*, 30 *Iowa*, 9; *Augusta Bank* v. *Augusta*, 49 *Me.*, 507; see also *Pettiman* v. *Taswell Co.*, 19 *Ill.*, 406; *Robertson* v. *Rockford*, 21 *id.*, 451; *Rogers* v. *Burlington*, cited above; *Blanding* v. *Burr*, 13 *Cal.*, 343; *Guilford* v. *Supervisors*, 13 *N. Y.*, 149.

E. Estabrook, for plaintiff in error, in reply.

I. The sale threatened by the treasurer is illegal.

1. The tax in question was levied in part to pay principal and interest upon bonds amounting to three hundred and fifty thousand dollars, issued as a donation, Jan. 5, 1870, to the Omaha and South-western and Omaha and North-western Railroad Companies.

Money thus demanded is not a tax.

Taxes are defined to be burdens or charges imposed by the legislative power of a State upon persons or property to raise money for public purposes. *Blackwell on Tax Titles*, 1 *id.*, 27–30; *Johnson*, 92; *id.*, 77; *Bleeker* v. *Ballou*, 3 *Wendall*, 263; 2 *Beawvier's L. Doc.*, 578; *The People*, ex rel., *The Detroit and Howell R. R. Co.*, v. *The Township Board of Salem, Michigan*, *Reports* 1, *Am. Law Reg.*, *August*, 1870, p. 437; *Whiting* v. *Sheboygan*

Railway Company, *Wis. Sup. Ct. Reports*, *Am. L. Reg.*, *March*, 1870, p. 156; *Garrard-County Court* v. *Kentucky-River Navigation Company*, *Am. L. Reg.*, *March*, 1871, p. 151; and *Redfield's Note*.

It ceases to be taxation, and becomes plunder. *Sharpless* v. *Mayor*, 21 *Penn. St.*, 168; *Grim* v. *Weisenberg School District*, 57 *Penn. St.*, 433; *Bradhead* v. *Milwaukie*, 9 *Wis.*, 652. A tax for a private purpose is a sale as in *Language's Wapello Co. Case*, 13 *Iowa*, 405; 21 *Ency. Brit.*, 37; *Webster's Dic.*; *New Am. Encyc.*, vol. xv. p. 807; *Proy* v. *North. Lib.*, 31 *Pa. St.*, 69; *Cooley on Court Limitations*, 479–487. The name means *tribute*, and belonged to the king's treasury. 4 *Inst.*, 216–233; *Northern Lib.* v. *St. John's Church*, 13 *Pa.*, 104–107; *Camden* v. *Allen*, 2 *Dutch*, 398. A similar law was vetoed in California because it was unconstitutional; and the people of Illinois voted the right to issue bonds out of their constitution. See also, on this point, 11 *Peters*, 433; 51 *Barbour*, 316; 38 *Pa.*, 81; 51 *id.*, 9; *Walker* v. *Cincinnati*, 21 *Ohio St.*, 14.

2. A railroad company is not a public body for whose use money, under the guise of taxes, can be extorted from the citizen; for it is composed of private individuals, whose rights are not enlarged by their association together, nor filing articles of incorporation. No such talismanic effect can flow from such trivial formalities as to change private citizens into a public body. Nor can any argument be drawn from the fact that the power of eminent domain is intrusted to this association of private individuals. They hold that power as a franchise, which Webster defines to be "a particular privilege conferred by grant from a sovereign or government, and vested in individuals;" and which Blackstone defines as "a part of the king's prerogative in the hands of the subject." From these definitions, it appears that the

conferring upon a person does not make him any the less a private person, nor any the more a public body. Hotel-keepers, hackmen, owners of grist-mills on water-courses, peddlers, and all that class of persons who are licensed by public authority, exercise certain rights withheld from private persons. The pack-peddler is distinguished from a private person by compliance with the license law, and he serves a public necessity. The railroad company does no more. A single individual owning all the land between two points, and building a railroad from one to the other, would not be the proper recipient of county bonds to aid this, his private enterprise. Nor does the fact that several are associated together for the purpose, and file articles of association, enlarge their rights.

3. A distinction should be made between this case, where the bonds were a donation to the company, and cases where bonds were issued for stock subscribed. In the latter case, title is acquired to a marketable commodity, which may be again sold, and the county reimbursed, or the profits of the investment will be paid into the county treasury. *Rogers* v. *Burlington*, 3 *Wallace*, 663; *Whiting* v. *Sheboygan R. R. Co.*, *Wis. Reg.*, *Am. L. Reg.*, *March*, 1870, p. 171, and note by Dillon; *Walker* v. *Cincinnati*, *Am. L. Reg.*, April, 1872, 354; 51 *Barbour*, 312; 36 *Alabama*, 410; 29 *Ind.*

4. The principle of uniformity lies at the foundation of all correct systems of taxation. *City of Chicago* v. *Larned*, 34 *Ill.*, 203; *Blackwell on Tax Titles*, 4–7; *Kent's Commentaries*, 331.

This principle is here violated. While one county may give much, another county equally benefited may give little, or none at all. In this case, to illustrate, the county of Douglas gives to the Omaha and South-western Railroad Company a hundred and fifty thousand

dollars, having less than five miles within its limits; while Sarpy County, in which fifteen miles of the same road are constructed, opening up valuable stone-quarries, gives nothing. The benefit of the proposed road is confined to the localities through which the line may pass; while it may be a positive injury to remote portions of the county, whose inhabitants are nevertheless compelled to contribute equally of their substance.

5. The right to issue bonds of a county to aid a railroad company, and to levy taxes for their payment, must be strictly in pursuance of the directions of the statute conferring such right. *Talcott* v. *Pine Grove, in U. S. Circuit Court for Michigan*, before Emmons, Withey, and Longyear, J.J., 10 *Wallace*, 676; 3 *Comst.*, 401; *Blackwell*, 42–51; 53–57, 61–67, 78, 79; 124, 125; 215, 219, 251, 259, 260–267, 293, 294, 315, 515, 628; 1 *Devereau & Battle, Eq.*, 218; *Dwarris*, 743–749; 10 *Wend.*, 186–188; 9 *Pick.*, 414; 8 *Geo.*, 30; *Dudley*, 132; 47 *Mo.*, 484; *Tyler on Eject.*, 235–538; 3 *Washburn on R. P.*, 202–210; 6 *Wallace*, 268, 269; *Howard*, 260; 4 *Hill*, 76, 92.

(1.) This principle was violated because the levy should have been made specifically for each road. *Blackwell*, 40, 163; *State* v. *Falkinburgh*, 3 *Green*, 320; *Camden and Amboy R. R.* v. *Hillyear*, 3 *Harrison*, 11; *Laws of* 1869, p. 92, sect. 1.

(2.) The records of the clerk's office do not show that a copy of the question submitted was posted up at the place of voting during the day of election, and the other acts required by the statute. *R. S.*, 40, sect. 21; *Session Laws of* 1869, p. 100, sects. 17 and 18. These must appear upon the face of the record. *Blackwell*, 39, 40, 71, 72, 77–79, 100, 101, 205, 206, 213, 214, 245, 247, 249, 265, 311–313, 319; *Am. L. R.*, *September*, 1870, 582; *Beatty* v. *Mason*, 30 *Md.*; *Hamilton* v. *Valiant*, 30 *Mich.* "It matters not that it may be difficult to com-

ply with such a rule." *Tyler's Law of Ejectment*, 536; also 3 *Washburn on Real Property*, 203–210.

"Independent of statute, the very nature of the proceeding implies the necessity of perpetuating the evidence in writing, and forbids a resort to the memory of man for proof of any material fact connected with it." *Id.*, 513; *Rix* v. *Croke*, 1 *Cowper*, 26; *Gilbert* v. *Columbia Turnpike Co.*, 3; *Johnson's Cases*, 107; *Games* v. *Stiles*, 14 *Peters*, 322; *Blackwell*, 514–516, 533; *Worthing* v. *Webster*, 45 *Maine*, 270.

(3.) The place appointed to hold the election in Omaha Precinct No. 3 was the "Mount House," corner of Davenport and Ninth Streets. There was no such house at the place designated. No election was held at that place, nor at any other place on Ninth Street; yet it appears that three hundred and sixteen votes for such bonds, and three against, were counted.

(4.) The levy made is in excess of the annual sum to be paid on said bonds. *Blackwell*, 158–162, and authorities there cited; *Session Laws*, 1870, p. 15.

II. There were radical errors in the proceedings of the taxing officers.

1. The assessor did not take the oath required by the law to support the constitution of the State. Art. II., sect. 25, *Const. of Neb.*; 9 *N. H.*, 491; 1 *Foster*, 40, 400; 6 *id.*, 182; 13 *S. & R.*, 208; 30 *Me.*, 319, *Blackwell*, 256, 257.

2. The assessment blank was defective.

3. No record remains in the clerk's office that the precinct assessors met at the time and place required to equalize their assessments. *Blackwell*, 110–113.

4. Nor did the county commissioners meet for the purpose of correcting the assessment roll. *Blackwell*, 110–113; *S. L.*, 1869, p. 190, sect. 27.

5. The tax-list for said year 1870, made out and kept

by the county clerk as the property of the county, has upon it no official seal. *Blackwell*, 114; *S. L.*, 1869, p. 195, sect. 37.

6. The said plaintiff had at the time said tax was due, and from thence hitherto, and still has, an abundance of personal property in the county of Douglas, out of which said taxes could have been made. *Blackwell*, 138, 176–178, 221, 225, 251, 489; *S. L.*, 1871, p. 81; *Tyler on Ejectment*, 537.

7. The notice of sale of said land is irregular and insufficient, and not conformable to the law in this, among other things: to wit, it fixes commencement of sale at ten o'clock A.M., while the law provides that it shall commence at nine o'clock A.M.; it gives no time for the close of the sale, while the law provides that it shall continue until four o'clock, P.M. *Blackwell*, 213, 215, 223, 225, 233, 262, 347; *S. L.*, 1869, p. 201, sect. 55.

8. The description of the land advertised to be sold is imperfect and insufficient in this, among other things; to wit, the township and range are not sufficiently indicated. *Blackwell*, 123–137, 147, 148, 206, and *Re.*, 226, 356.

9. There is no evidence as to the time when the assessment list of the precinct wherein said land lies was returned, or deposited or filed with the county clerk. *Blackwell*, 118–123; *id.*, 170, 255; *S. L.*, 1869, p. 186, sect. 24.

10. The description of said land in said list and duplicate in the office of the county clerk and county treasurer is vague, uncertain, and insufficient. *Blackwell*, 123–137, 147, 148, 206 and *note*, 226, 356; *S. L.*, 1869, p. 188, sect. 24, sub. 2.

11. The amount of valuation and tax in said lists is vague, uncertain, and insufficient; there being no entry,

mark, or character, to indicate the signification of the figures found in the column of amounts, as shown by diagram above. *Blackwell*, 202; *Lawrence* v. *Fast*, 20 *Ill.*, 338, 340, affirmed in 1 *Wallace*, 398; *Lane* v. *Bommelman*, 21 *Ill.*, 147.

12. The grounds and buildings of a large number of religious societies in the county of Douglas aforesaid, such societies being corporations duly organized under and by virtue of the laws of Nebraska, and amounting in value to at least fifty thousand dollars, were excluded from the assessment list of 1870, and were regarded and treated by all the assessors of said county as exempt from taxation. *Blackwell*, 4, 6, 20, 30, 408–410; 2 *Kent*, 321; *Law Register*, August, 1871, p. 493, and *note* by Redfield; *id.*, 504; *Tyler on Ejectment*, 535; *Weston* v. *The City of Charleston*, 2 *Pet., S. C.*, 449; *Brewster* v. *Hough*, 10 *N. H.*, 138.

13. The names of owners are omitted in the list of lands published as delinquent. *Blackwell*, 144.

III. Injunction is an appropriate remedy. *Blackwell*, 481–799; 4 *Kernan*, 9; 6 *Minnesota*, 106; 9 *Wis.*, 402; *id.*, 410; *Wis.*, 272; *Nash's Pleading and Proctor*, 440, and authorities there cited; *Lockwood* v. *City of St. Louis*, 24 *Mo.*, 20; *Fowler* v. *City of St. Joseph*, 37 *Mo.*, 228; *Leslie* v. *The City of St. Louis*, 47 *Mo.*, 479; *Anderson et al.* v. *The City of St. Louis et al.*, 486; *Ewing* v. *The City of St. Louis*, 5 *Wall.*, 413; *Dows* v. *The City of Chicago*, 11 *Wall.*, 108; 13 *Barb.*, 567; 24 *id.*, 181; *Hilliard on Inj.*, 455; *Bradshaw* v. *Omaha*, 1 *Neb.*, 16 *Session Laws*, 1871, p. 124; *Burnet* v. *Cincinnati*, 3 *Ohio*, 61; 6 *Ohio*, 53; 5 *Wall.*, 74; 3 *Pet.*, 206, 210, 272, 282; 6 *Wall.*, 268; 5 *Wall.*, 413; 14 *N. Y.*, 534; 22 *Ga.*, 369; 4 *Iowa*, 500; 29 *Me.*, 196; 6 *John's Chancery*, 28; 26 *Wendall*, 132; 9 *Paige*, 388; 12 *Wall.*, 1.

CROUNSE, J.

The chief ground relied on, and perhaps the real inducement leading the plaintiff to apply to the Court below for an injunction to restrain the defendant, as treasurer of Douglas County, from enforcing the collection of taxes assessed against the plaintiff by a sale of his real estate, is, that, to the extent of four mills on the dollar, the tax is to apply in liquidation of the three hundred and fifty thousand dollars of bonds voted by said county in aid of the construction of the Omaha and Northwestern and the Omaha and South-western Railroads. It is averred in the petition, that said levy was unauthorized, illegal, and void, because, among other reasons, said bonds were a gift or donation to said roads, the same being private corporations; and such bonds and the interest thereon cannot be made chargeable as a public tax.

This question was argued very ably and at great length; and although for good and sufficient reasons, resting in well-established principles of equitable jurisprudence, which will hereinafter be noticed, the judgment of the District Court refusing an injunction might be sustained, it is expected that this Court will express itself upon the question of the validity of the law authorizing the issue of these bonds. I have had occasion to announce my views in reference thereto when sitting in the District Court; but in view of its importance, and the magnitude of interests involved, it is well for this, the Court of last resort, to seize the first opportunity to put the matter at rest. As long as the law remains on our statute-books, and as long as it is impossible for railroads to be constructed through counties so as to confer equal benefits upon all sections alike, so long will there be rebellion against taxes levied in their support. While this continues, an uneasiness will necessarily possess the

holders of bonds already issued, and a doubt be thrown over those which may hereafter be put forth, which must result in a prejudice to the credit of the State, which can only be removed by a final adjudication by this tribunal.

The law under which these bonds were issued is entitled, "An Act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds, to aid in the construction or completion of works of internal improvement in this State, and to legalize bonds already issued for such purpose," and was approved Feb. 15, 1869. Without reciting the several sections relating to the manner of voting, the canvass of the votes, the issue of the bonds, and the legalization of those previously issued, so much of the law as undertakes to give the authority is contained in sect. 1, which reads as follows: —

"Sect. 1. — *Be it enacted by the Legislature of the State of Nebraska*, That any county or city in the State of Nebraska is hereby authorized to issue bonds to aid in the construction of any railroad, or other work of internal improvement, to an amount to be determined by the county commissioners of such county or the city council of such city, not exceeding ten *per centum* of the assessed valuation of all taxable property in said county or city, *provided* the county commissioners or city council shall first submit the question of the issuing of such bonds to a vote of the legal voters of said county or city in the manner provided by chapter nine of the Revised Statutes of the State of Nebraska for submitting to the people of a county the question of borrowing money."

Nothing is said against the manner of passing this act. Let it further be conceded, that the action of the county commissioners has been in strict pursuance of it, and it would seem that our duty in the premises is quite simple, — to examine our constitution, and see whether this

law runs counter to any of its provisions: for, unless the constitution is violated in some of its parts, the plain office of this Court is to declare the act constitutional. With any question as to the wisdom of the law or the policy of its enactment, we, in common with all citizens of the State, may have our opinion; but we have no right to avail ourselves of our position to give effect to such opinion, unless it accords with principle and authority. The province of the Court has too frequently and too unmistakably been declared, to be misunderstood or disregarded. I will encumber this opinion with citations from only a few of the hundreds of cases which might be adduced to show, that in respect to legitimate subjects of legislation, as taxation, the legislature is supreme, except where restricted by the constitution.

"All legislative power," says Chief Justice Church in *The People* v. *Flagg*, 46 *N. Y.*, 401, "is conferred upon the Senate and Assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the constitution itself. The distinction between the United-States Constitution and our State Constitution is, that the former confers upon Congress certain specified powers only, while the latter confers upon the legislature *all* legislative power."

Chief Justice Redfield, in the case of *Thorpe* v. *Rutland and Burlington Railroad Company*, 27 *Vermont*, 142, says, "It has never been questioned, so far as I know, that the American legislatures have the same unlimited power in regard to legislation which resides in the British Parliament, except where they are restrained by written constitutions. That must be conceded, I think, to be a fundamental principle in the organization of American States. We cannot well comprehend how, upon

principle, it should be otherwise. The people must, of course, possess all legislative power originally. They have committed this in the most general and unlimited manner to the several State legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular State in question."

Mr. Justice Baldwin of the Supreme Court of the United States used this language in the case of *Bennett* v. *Boggs*, 1 *Bald.*, 74: "We cannot declare a legislative act void because it conflicts with our opinions of policy, expediency, or justice. We are not the guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance. The remedy for unwise or oppressive legislation within constitutional bounds is by appeal to the justice and patriotism of the representatives of the people. If this fail, the people, in their sovereign capacity, can correct the evil; but the courts cannot assume their rights. There is no *paramount* and *supreme* law which defines the law of nature, or settles those great principles of legislation which are said to control State legislatures in the exercise of the powers conferred on them by the people in the constitution."

In Illinois, the Supreme Court of the State has said the true inquiry is, whether "the will of the representatives, as expressed in the law, is or is not in conflict with the will of the people as expressed in the constitution; and, unless it is clear that the legislature has transcended its authority, the courts will not interfere." *Lane* v. *Dorman*, 3 *Scam.*, 238.

In *Morrison* v. *Springer*, 15 *Iowa*, 304, the Court say they "will declare a law unconstitutional only when it is clearly, palpably, and plainly inconsistent with the provisions of that instrument."

Mr. Justice Miller of the same Court, in a later case, *Stewart* v. *Sups. of Polk Co.*, says, "It seems clear by logical deduction, and upon the most abundant authority, that this Court has no authority to annul an act of the legislature, unless it is found to be in clear, palpable, and direct conflict with the written constitution."

In *ex parte Selma and Gulf Railroad Company*, 45 *Alabama*, 696, in a case like the present, Mr. Justice Peters, in delivering the opinion of the Court, says, "Unless it appears that there is some express limitation imposed on the legislature by the State constitution, which fetters the General Assembly in its power to make such a grant to the county as that exercised under the act in question in this case, it is reasonable to conclude that none such exists. The omission to make the limitation leaves the power as broad as the sovereignty itself; that is, 'absolute and irresistible.'"

Judge Manning, in *Sears* v. *Cottrell*, 5 *Mich.*, 251. says, "If it be said the law is unnecessarily severe, and may sometimes do injustice without fault in the sufferer under it, our reply is, These are considerations that may very properly be addressed to the legislature, but not to the judiciary: they go to the expediency of the law, and not to its constitutionality. When courts of justice, by reason of such objections, however well founded, seek for some hidden and abstruse meaning, in one or more clauses of the constitution, to annul a law, they encroach on the power of the legislature, and make the constitution instead of construing it. They declare what the constitution should be, not what it is. The tendency of courts at the present day is, we think, too much in that direction. Hence, to some extent, the great number of constitutional questions that are constantly being brought before the courts for adjudication. The time was, and the period is not far distant, when

courts were reluctant to declare a statute void, and did not feel warranted in doing so, unless they could lay their finger on the particular clause that was violated, and the conflict between the statute and constitution was obvious."

This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us, sovereignty resides with the people. Were they acting as a whole for themselves, there can be no doubt but this, or any other law that should receive a majority sanction, would be conclusive. But, parcelling out the exercise of their sovereign power to the three departments of government, — the legislative, the executive, and the judicial, — to the first has been committed, except what has been abandoned to the Congress of the United States, the exercise of the whole sovereign law-making power as completely and absolutely as possessed by the people, subject only to such limitations as the people may have chosen to impose. These limitations are set out in the State constitution. In the exercise of this power the legislature has divided the State into certain subdivisions, and created municipal corporations known as counties. Its authority so to do no one disputes. Of itself, a county has no inherent power: what it has comes from legislative grant. For the proper administration of justice, court-houses and jails must be built. To afford means of intercourse, and the transportation of persons and produce, roads and bridges must be constructed. It may be necessary to sue or be sued, contract and be contracted with. All these things the legislature has said a county may do, and no one doubts its right so to declare.

In the case before us the legislature has gone farther. In addition to ordinary highways, it has permitted counties, by donations to such persons or corporations as

shall engage in building them, to introduce improved roads — railroads — by which the people can transport themselves and their property much more quickly and at less cost than by ordinary roads. If, then, the power of the legislature is full enough to confer upon counties the several powers I before enumerated, it must be broad enough to convey this additional privilege, unless they have exercised a power not legislative, or in exercising legislative powers they have transcended some limitation found in the constitution. We may well, therefore, call upon those who challenge the validity of the law of 1869 to point out the section of that instrument which has been disregarded in its enactment; in the language of one of the cases I have cited, "to lay their finger on the particular clause that is violated."

Sect. 6 of the article on finance in the constitution says, "The State shall never contract any debt for works of internal improvement, or be a party in carrying on such works." This plainly can have no other reference than to the State considered as a sovereign corporation. It does not mean the State considered territorially certainly: that is inanimate, and could not be a party in carrying on any work. It cannot mean the State in all its parts: the State is made up of individuals and corporations both private and public. To say that individuals shall not engage in carrying on works of internal improvement, is to say that no works of that character shall be engaged in at all within the State. There is no more reason why private corporations should not engage in such works than that individuals should not. To contend that counties, precincts, and cities shall not so engage, is to forbid the construction of roads, bridges, ferries, streets, sidewalks, wharves, drains, waterworks, gas-works, — all of which are works of internal improvement.

Neither can any objection against this legislation be found in that other section of the same article (sect. 4) which says, "For the purpose of defraying extraordinary expenditures, the State may contract public debts; but such debts shall never in the aggregate exceed fifty thousand dollars." This, like the other section, means what it says, — the State, and not counties and cities. *Expressie unius est exclusio alterius.* There is not a county in the State, nor a city of any pretensions, but has incurred indebtedness of greater or less amount, — some a great way beyond the limit here fixed. There is, perhaps, never a time that the State proper is not up to this limitation of indebtedness; and it cannot be supposed that it was the purpose to limit the aggregate of indebtedness of all the school districts, counties, and cities, at any one time, to fifty thousand dollars! But counsel had not the presumption to urge this; and I will not pursue the discussion of that which is patent upon its face. It needs not authority: but I cite *Board of County Commissioners of the County of Leavenworth* v. *Miller*, 7 *Kansas;* *Cass* v. *Dillon*, 2 *Ohio St.*, 612–616; *Slack* v. *R. R. Co.*, *B. Monroe*, 1; *Dubuque* v. *R. R. Co.*, 4 *Greene*, 1; *Prettyman* v. *Sups.*, 19 *Ill.*, 406, 411; *City of Aurora* v. *West*, 9 *Ind.*, 77–79; *Clark* v. *City of Janesville*, 10 *Wis.*, 136, 170; *Cooley's Con. Lim.*, 216–219.

Nor is the law obnoxious to sect. 13 of the Bill of Rights, which declares, "The property of no person shall be taken for public use without just compensation therefor." No specific property is sought to be taken from the plaintiff for public use. Nothing is demanded but a tax assessed against him in common with all tax-payers of the county. The section referred to governs the exercise of the right of eminent domain by the public, as in the appropriation of one's land for highways, railroads, and like purposes. The distinction is

well expressed by Mr. Justice Butler in *Booth* v. *Town of Woodburry*, *Am. Law Reg.*, *N. S.*, vol. v. p. 212, where he says, "Exacting money by taxation, and taking private property for public use, are different things. Both, it is true, are, in one sense, the exercise of a right to take the property of individuals for public use; but there is a broad distinction between them. Taxation exacts money from individuals as their share of a justly imposed and apportioned general public burden; and the equivalent is presumptively received in the benefits conferred by the government. Property taken for public use from one or more individuals only, by right of eminent domain, is taken, not as his or their share of an apportioned public burden, but as something distinct from and more than his or their share of the public burdens; and therefore the justice and necessity of a constitutional provision for compensation." This same distinction is recognized by Judge Redfield in a note to the same case. See also, upon the same point, *The People* v. *Mayor of Brooklyn*, 4 *Comstock* (*N. Y.*), 424. The distinction is admitted by judges who contend for the invalidity of laws like this. See *Hanson* v. *Vernon*, 27 *Iowa*, 28.

The sections to which I have alluded are the only ones I find in the constitution of this State which afford the slightest pretext upon which to found an argument or claim that the Act of 1869 is in conflict with the organic law. But even these are not pointed out by counsel as opposed to the enactment of the law. Neither do I understand that it is claimed that any provision of that instrument has been disregarded. The duty of the Court would be, then, to declare, as has been done by the courts of some twenty-six States having constitutions no more restrictive than ours, in more than a hundred different cases, that the legislature may pass a law authorizing municipalities to vote bonds in aid of the con-

struction of railroads, and that such laws are valid, and must be enforced by the Court.

But we are invited by counsel into a broader field, — one where the Court can exercise authority at will, untrammelled by constitutional references. The substance of the demand upon us is, that if the people will not adopt a constitution sufficiently restrictive, or, having adopted one, will not amend it so as to limit the legislature, and the legislature will persist in enacting laws like the one in question, and a majority will insist on voting aid to railroads, the Court, in its defence of an "outraged minority against the assaults of that hydra-headed monster the majority," should rise superior to all, and annul the law. This demand is made upon the authority of the new light, set up in the cases of *Whiting* v. *The Sheboygan Railway Co.* and *The People* v. *Salem*, recently delivered in the courts of Wisconsin and Michigan respectively, and which furnish the repertory, to a large extent, for the argument addressed to this Court. The doctrine is both novel and startling. In one other State, laws like this were at one time declared unconstitutional. In *Hanson* v. *Vernon*, 27 *Iowa*, 28, this conclusion is reached by the Supreme Court of Iowa. But Judge Dillon, who delivered the opinion of the Court, was not bold enough to cut loose from the constitution. He says, "As a judge, I lay claim to no right to annul an act of the legislature because I deem it unwise or impolitic, or because it does not square with my notion of natural equity and jurisprudence. . . . Justice has her imperial seat in the bosom of every man. On these, and not on specific constitutional provisions, must reliance be had in many cases of indefensible legislation; the remedy being to secure a repeal of the law, and not its judicial annulment." After this eloquent confession of subordination to the constitution, and expression of

respect for the legislature, we might expect the Court to place its finger on the clause between which and the law there is that plain, palpable, and unmistakable conflict which alone should lead a court to declare void a solemn act of the legislature, bearing the approval of the executive of the State, and under which rights to the extent of millions of dollars have become involved. But I confess, that the greatest conflict I discover is between the above proclamation of the Court and its fulfilment. Instead of pointing out any section which in terms, or by any seeming intendment, inhibits the legislature from authorizing municipalities to aid in the construction of railroads or other works of internal improvement, the Court says, "I think I shall be able to convince the impartial judgment of any lawyer or intelligent man that the Act of 1868 (the law authorizing the bonds) is not a valid or legitimate exercise of the taxing power; that, though the money demanded of the citizens is called a tax, it is not such, but is in fact a coercive contribution in favor of private railway corporations, and violative, not only of the general spirit of the constitution as to the sacredness of private property, but of that specific provision which declares 'that no man shall be deprived of his property without due process of law' (*Bill of Rights*, sect. 9), — a provision which is adequate to protect the owner from being despoiled of his property by an unauthorized law or illegal tax."

It will occur to any one, that, if any tax is "illegal," it may be because the law under which it is levied is "unauthorized;" and, if the law is "unauthorized," it must be because the legislature has transcended some limit in its enactment. If so, why invoke the above section of the constitution "to protect the owner from being despoiled of his property"? The general power of the Court is sufficient without the aid of that section.

Again: "without due process of law" and "except by the law of the land" are alike in meaning. *Cooley's Constitutional Limitations*, 1 *Am. Law Reg., N. S.*, 26. But every statute is the law of the land, unless restrained by some constitutional provision. To prove that it is not a statute, that the law is void, it must be shown wherein the constitution is violated. To say that no man shall be deprived of his property without due process of law in this case, is but saying that the law is void because it is void. This section has a place in perhaps all the American constitutions, being imported into them from Magna Charta, which was extorted from King John by the barons of England. The definitions of this clause are perhaps more diverse than those of any other in the constitutions. In one case the phrase is held to mean one thing; in another case another meaning is extracted. But, when a court is resolved on pronouncing a law void, it serves a convenient purpose to refer the law to this section. Used originally to save the people, through the legislative branch, from the arbitrary conduct of the sovereign, exercised through his judges, its use is completely reversed; and we find that the people are to be saved, under it, from the unwarranted acts of the legislature, through the judges.

The argument of the learned judge who delivered the opinion in *Hanson* v. *Vernon* is, like all his productions, quite able, and displays great ingenuity. It illustrates, however, the remark of Mr. Justice Manning in *Sears* v. *Cottrell*, *supra*, where he says, "When courts of justice, by reason of such objections, however well founded, seek for some hidden and abstruse meaning, in one or more clauses of the constitution, to annul a law, they encroach on the powers of the legislature, and make the constitution instead of construing it. They declare what the constitution should be, not what it is." It is

evident that the Court regarded the legislature as unwise in enacting the law, and the people as very unwise and reckless in loading themselves very heavily with burdens in aid of railways. The author of the opinion introduces a very touching picture of the "disaster, the child of extravagance and debt and dishonor, the unbidden companion of bankruptcy, as the bitter but legitimate consequences" of their action. As it forms no argument for or against the validity of the law, and although the Court disclaims being influenced by such consideration, the idea cannot be repressed, that it is possible the mind of the Court, although unconsciously, was moved by a strong desire to annul the law. If the financial condition of Iowa, as represented by her learned judge, is not accepted as an apology for the conclusions reached, it will at least be regarded as the incentive to the display of that astuteness which finds inhibition against this kind of legislation hid under a section, where, throughout more than a quarter of a century of litigation over railroad bonds, it had never been discovered. The case of *Hanson* v. *Vernon*, however, does not stand even as the law of Iowa to-day. The Supreme Court of that State has expressly overruled it in the late case of *Stewart* v. *The Supervisors of Polk County*. The opinion of the Court, delivered by Mr. Justice Miller, must remain unanswerable so long as courts confine themselves to the limits of the constitution, and as long as the purposes for which railroads are constructed are regarded as sufficiently public to warrant the exercise of that high sovereign prerogative, — eminent domain.

With more consistency, however, and with a boldness which is really sublime, the Court, in the case of *The People* v. *Salem*, 20 *Mich.*, 452, in pronouncing the invalidity of the railroad-aid law, refuses to submit to the embarrassment which must arise from trying to show a

law unconstitutional which is not opposed to the constitution. Failing to find any constitutional limit upon the authority of the legislature to legislate upon any subject, the Court feels at liberty to consider the justness or propriety of the law, or to examine to see whether there is not, in the language of the Court, "some limitation upon the legislative power inherent in the subject itself," and approve or condemn accordingly. Mr. Justice Cooley, who delivers the opinion of the Court, in speaking of the general authority of the State to prescribe and determine the objects to be provided for, fostered, or aided, through the expenditure of the public money, says, "It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend the exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words." This I can but regard as a most dangerous rule. It is not only opposed to the settled doctrine relating to constitutional limitation as pronounced in numberless cases, but opposed to the rule as recognized by the Supreme Court of Michigan, proclaimed by Judge Cooley himself. In the case of *Twitchell* v. *Blodgett*, 13 *Mich.*, 127, this learned judge says, "It is conceded to be the settled doctrine of this Court, that every enactment of the State legislature is presumed to be constitutional and valid; that, before we can pronounce it otherwise, we must be able to point out the precise clause in the constitution which it violated; and that the conflict between the two must be clear, or free from reasonable doubt; since it is only from constitutional provisions, limiting the legislative power and controlling the legislative will, that we have authority to declare void any legislative enactment." Then

the Court regarded itself possessed of authority to annul a statute only when it is in clear conflict with some express provision of the constitution: now it feels warranted in doing so upon the fancied conflict with some limitation inherent in the subject legislated upon.

But what is this "inherent limitation"? where the repository in which it may be looked for? how are we to know it when it is found? The legislature, of course, is forbidden to judge of it. The Court assumes the sole power of determining it. It may be styled judicial limitation. But this judicial limitation is likely to vary as it is applied by different courts. Even the same court differs in its opinion at different times, as is illustrated by the change of mind in the Court of Michigan as to the true province of the judiciary in considering constitutional questions. Courts are but men clothed with official power. Men differ widely about theories of government, and the proper subjects to be encouraged and aided. Scarcely any law of general operation but conflicts with some one's opinion of right. Judges, as men, must have their notions, and some very peculiar ones, as to the true sphere of government; and all certainty as to questions of constitutional law is at an end if they are allowed to destroy legislation which does not square with their views. Then where is the legislature to look to determine the validity of any law it is about to pass? If the rule announced is true, no enactment of the legislature can be said to be valid until it has undergone the test of judicial limitation. No instrument can be made, nor right acquired, under it, till it is ascertained that the courts will permit the law to stand.

If this Court were to consent to set aside the law of 1869 for other reasons than that it conflicts with the constitution, let us see upon what ground or argument it is asked. "Taxes," we are told, "are defined to be bur-

dens or charges imposed by the legislative power of a State upon persons or property to raise money for public purposes." The definition is a good one. We are further told, that money demanded to pay bonds, donated to these railroads, "ceases to be taxation, and becomes plunder." This expression, denouncing taxes of this kind as plunder, took its origin, I believe, in a dissenting opinion in the railroad-bond case of *Sharpless* v. *Mayor*, 21 *Penn. St.* No doubt it was pronounced in something of that kind of humor which so frequently is discovered in dissenting opinions, and has served to give an air of spirit to most of the arguments delivered since on that side of the question. Counsel give it a prominent place in their brief. Judge Cooley quotes it. But I cannot believe it is put forward as argument. It has no legal signification, neither does it form any standard by which to try the validity of any law. Many of our people think it plunder to pay a tax to build a half-million-dollar penitentiary in which to confine a stage-coach full of prisoners. The resident of a city, who is taxed to pay for the improvements upon one street which draws business from and depreciates the value of his property and business on another, regards the tax as plunder. To the man with more property than children, a tax under a free-school system, to pay for the education of his neighbor's children, seems plunder; while some are so averse to the payment of any levies in support of government as to regard all taxes as plunder. But the wisdom of man is incapable of devising any system of taxation which can work equally and do exact justice to all. The location of a railroad cannot well be made so as to accommodate all alike. In this respect it does not differ from the location of county roads or district schoolhouses. The contests concerning each are frequently bitter; but the nine-tenths who favor the intro-

duction of the highway or the railroad, as in this case, are equally to be protected by the Court with the remaining tenth who so bitterly oppose. So, unless the Court is to be moved by passion instead of reason, the charge of "plunder" is entitled to no consideration. We pass on to notice further objections urged against this tax.

I think I fully and fairly state the main proposition of counsel when I say, it is claimed, that, these railroad companies being private corporations, these bonds are donated to a private purpose, and that taxation can only be upheld in support of public, and not private purposes; that a railroad serves a public need only as a hotel, a hackman, or a pack-peddler, does; that each controls and receives the profits of its or his own business; and that taxation can as well be maintained in support of the latter as in aid of the former.

In authorizing the tax in question, the legislature assumed that it was for a public purpose. The framers of this law were public men, understanding the nature of the duties in the discharge of which they were engaged; and I have not the vanity to believe that my judgment of what is a public purpose is better than theirs. What is more, questions as to the true objects of government, and what is of sufficient public interest to justify taxation, are for the legislative, and not the judicial, branch of the government to determine. If the Court were ready to travel out of its legitimate sphere, and invade the province of legislative discretion in matters of governmental concern, who could point us to the line of distinction between subjects of sufficient public benefit to warrant taxation and those to which it must be denied? It is said that a railroad serves a public need only as a hotel or pack-peddler does. But does that help us any? The same may be said of a common highway. The com-

mon highway is a means for the passage of passengers and freight. A railroad is the same. The highway carries no one. To make it useful involves the expense of owning or hiring teams. So does the use, by the citizens, of a railroad involve expense. But experience shows that passengers and freight can be better, more expeditiously, and more cheaply, transported by rail than over common highways. With respect to its use by the public, the railroad is as free as a common highway. The railroad company is bound by law to furnish suitable accommodations, and serve all alike: so, in fact, the railroad serves the public more fully than a common highway. So, if there is any basis for saying that the government shall not aid railroads because they are like hotels or pack-peddlers as to their benefits, it may be said that government should not support common highways. The same argument would destroy most of the objects of government.

The point more particularly which was sought to be made by counsel by so extravagant a comparison as that between a railroad and a pack-peddler is, that, if the Court will allow aid to be granted to the one, it must to the other; and that, before long, the government will be subsidizing pack-peddlers, hackmen, and like subjects. The Court should stand by any legitimate or necessary result which may flow from a position taken: and I confess, that if pack-peddling shall become of so great public importance as to require it; if "the greatest happiness of the greatest number," which is said to be the end of a good government, demands that the legislature shall permit bonds to be voted to aid pack-peddlers in their business, — I see no authority for interfering.

The fault with this kind of argument is, that it denies to the legislature the possession of any wisdom or integrity. It assumes that that body is a pack of knaves or

pirates, intent upon plundering the people; and that it is the duty of the Court to keep a sharp eye upon them. I have that confidence in the legislature to believe that it will be some time before the Court will be called upon to pass upon the validity of bonds issued in aid of pack-peddling. A principle is not to be destroyed because, in its application, it may be abused.

Another objection relied on is, that these bonds are given to a "private" corporation. What matters it if the means employed are private, if the object attained is a public purpose? Is the public benefited any the less whether the road is operated by the public or by private corporations? Many States build railroads and canals. Their power to do so, if not restrained by their respective constitutions, is admitted, even in these adverse decisions. But the history of this class of enterprises shows that it is economy to aid a private company, rather than to build and assume the management of a railroad as a State. More than this, governments are not formed to operate railroads, or to make money. If the roads are built by the public, it is for the purpose of meeting a public need, — to develop the country, improve trade and commerce, and give improved facilities to the people to transport themselves and products. If all this can be done as well, and more economically, through private than public property, I can see no objection to its being so done.

In his work on Constitutional Limitations, Judge Cooley, in treating of the public benefit of a railroad which warrants the taking of private property on which to build them, answers this same objection. He says (p. 537), "And while there are unquestionably some objections to compelling a citizen to surrender his property to a corporation, whose corporators, in receiving it, are influenced by motives of private gain and emolu-

ments, so that *to them* the purpose of the appropriation is altogether private; yet, considering it to be settled that these highways are a public necessity, if the legislature, reflecting the public sentiment, decide that the general benefit is better promoted by their construction through individuals or corporations, it would be pressing a constitutional maxim to an absurd extreme if it were to be held that the public necessity should only be provided for in the way which is least consistent with public interest." *Beckman* v. *Saratoga and Schenectady R. R. Co.*, 3 *Paige*, 73; *Wilson* v. *Blackbird-Creek Marsh Co.*, 2 *Pet.*, 251; *Bonaparte* v. *Camden and Amboy R. R. Co.*, 1 *Bald.*, 205.

The United-States Government employs private corporations and persons to carry the public mail. It aids the construction of railways, that the mails may be the more speedily transported; that supplies, munitions of war, and troops, may be carried, to the end that the public may be better protected and cared for. It was never urged before that the only way this could be effected would be for the government to own and operate its own roads.

The State has no public printer, but hires its printing done. It has no public wolf or gopher killer, but encourages private persons to work a public good, and pays them in taxes gathered from the public. Even the State whence emanates this new light upon donations to railroads gives donations to salt manufacturers, although the property is private; and the courts sustain the law. See *People* v. *State Auditor*, 9 *Mich.*, 327; *East Saginaw Company* v. *The City, &c.*, 19 *Mich.*, 278.

In the consideration of this question thus far, a railroad corporation has been considered as strictly private. In the view I take of the matter, it is of little importance whether it be regarded as private, public, or *quasi-*

public. The end attained is the object to be kept in view. If that is public, it matters not whether the means employed be public or private. Yet is not a railroad corporation a public one? In many respects it is. It certainly is subject to public control and restraint not common to the hotel or pack-peddler. The peddler trades with whom he pleases: the railroad company must serve all alike. The farmer goes and comes when he pleases: the railroad company must run on time, or pay the penalty. The one charges what he chooses: the other may be governed by the State in respect to its rates. The peddler may change or abandon his business: the railroad company, after becoming a thoroughfare, must keep it up; and every dollar of its earnings must, if necessary, be applied to keep up its maximum efficiency as required by law. In the case of *State* v. *New-Haven Company*, *Conn.*, 538, a railroad company refused to run trains over a part of its road. It was coerced to do so by *mandamus*. Ellsworth, J., says, "What right had it to covenant it would not run its cars to tide-water, as its charter prescribes and the public accommodation requires?" In the case of *Erie County* v. *Casey*, 26 *Penn. St.*, 287, in which a charter was repealed, and the government took possession of the road, and it was urged that it was seizing private property, Mr. Justice Black says, "This act takes nothing but the road. Is that private property? It is a public highway, solemnly devoted to the public use. When the lands were taken, it was for such use, or they could not have been taken at all. Railroads established upon land taken by right of eminent domain, by authority of the Commonwealth, created by her laws as thoroughfares for commerce, *are her highways*."

But to show distinctly, and conclusively as I maintain, the public character of this class of enterprises,

and to show how railroads are like common highways, and unlike the property they have been compared with, I refer, lastly, to the grant of the exercise of the sovereign right of eminent domain. The constitution of this, as well as of other States, provides that private property shall not be taken for public use without just compensation. This implies that it can only be taken for public use, and not for private purposes. But our statute (chap. 25, R. S.) permits the citizen's farm to be cut in two, or his house to be destroyed, if necessary, to build railroads. The same law has a place upon the statute-books of every State in the Union; and the courts of all, Michigan included, maintain the validity of the law. Why is this? Only because the railroad is a matter of public use, a public benefit. A corner lot might be coveted as an eligible spot on which to build a hotel. The owner of the lot refusing to sell, the hotel cannot be built there. There is no way to obtain it. It is private property, and the constitution will not permit it to be taken except for public use. The hotel is not for public use in the sense of the constitution. Government has never engaged in hotel-keeping, nor deemed it necessary to provide therefor. From the earliest time, however, government has assumed the duty of furnishing facilities for travel. Roads are of so great use, and so indispensable, that government has charged itself with the duty of providing them. Hotels can be dispensed with.

How is it, then, that we can regard a railroad as public till we have invaded the most sacred rights of the citizen by wresting his land from him, willing or unwilling, and immediately become blind to its public character when we undertake to use the taxing power, which has no limit under the constitution?

On this point, Mr. Justice Valentine, in as able an

opinion upon the question of the validity of bonds under a like law, delivered in the case of *Commissioners of Leavenworth County* v. *Miller*, 7 *Kansas Report*, as it has been my pleasure to read, says, "We have the combined authority of every legislature, of every executive, and of every court, in the United States, that the construction and operation of a railroad, even in the hands of a (usually called) private corporation, is a public purpose; for, if it were otherwise, every lawyer in the land knows that the sovereign power of eminent domain could not be exercised in its favor. This ought to be conclusive of the question. But it is said it is not *such* a public purpose as will support taxation. Strange indeed! The power of eminent domain is limited in its scope and operation to but few subjects. At every step it is traversed and opposed. Everywhere the plea of inexorable necessity must be interposed in its favor, or its progress is ended. Not so with taxation. As we have already seen, taxation is the most universal, broad, sweeping, and unlimited power possessed by governments. It is the power to destroy, and has no limit except in the will of the sovereign. (Per Marshall, C. J., in *McCullough* v. *Maryland*, 4 *Wheat.*, 316–425.) No instance has been shown, nor can be shown, where the government may aid a thing by the power of eminent domain, where it cannot also aid it by the power of taxation. No instance has been shown, nor can be shown, where the government may aid a thing by the exercise of any of its sovereign powers, where it may not also aid it by taxation."

This argument in support of legislation in aid of railways is insurmountable to those who contend to the contrary; and it is interesting to see the attempts made to overcome it. In *Hanson* v. *Vernon*, the Court says, by way of argument, "The Iowa statute authorizes any person or corporation designing to construct a canal, or

a railroad, or a turnpike, graded, macadamized, or plank road, or a bridge, as a work of public utility, although for private profit, to take such reasonable amount of private real estate as may be requisite for a right of way, not exceeding one hundred feet wide, upon paying therefor," &c. The author of the opinion then remarks, "Can the legislature tax the citizen, and compel him to assist any person or corporation designing to construct such works for private profit? Who is bold enough to claim it? I deny that it can be done. The property that can be taken by the exercise of the right of eminent domain is restricted to the actual amount required to execute the undertaking, and is generally limited to one hundred feet in width; and full value in money must be paid. But the amount of tax that may be levied is limited, and no return or compensation to the tax-payer is contemplated." For the Court to say, that, while private property may be taken for the works enumerated, a tax for the same purpose cannot be upheld, is a mere *petitio principii*. Although the gain or profit, if any, may go to a private corporation, the work is public in its ends and objects, or why can private property be taken? The highway, railroad, or plank road, if built through the exercise of the high sovereign prerogative of taking private property, becomes public, and subject, to a large extent, to public control. The State demands that it be free to all, that the rate of toll may be governed and fixed by it, and that no discrimination be made as against any person. For a purely private road or bridge, the right to take private property does not exist. If the road be of so public character, then, as to warrant despoiling the property of the individual citizen; if the public necessity for roads be so great as to demand this, — why not aid it still further by public tax? But the Court says, in effect, that the

citizen whose specific property is confiscated receives pay, and the one whose property is taken as tax receives none. This is standing the pyramid on its apex. It has always been thought that nothing but inexorable public necessity would drive a man from his hearth, lay waste his trees and ornaments, upon which fancy, affection, or association, had placed a value beyond any sum that could be fixed in the manner the law provides. It is now intimated that the pay received is a controlling consideration. The remark, that, in taxing for the support or introduction of railroads, "no return or compensation to the tax-payer is contemplated," is entirely unfounded, in my judgment. A return or compensation is contemplated to the tax-paying public when the sovereign prerogative of the right of eminent domain is conferred upon railroad companies; but, from the nature of the thing, only those tax-paying citizens whose property is taken are called upon to contribute. But that same public benefit which justifies the exercise of the right of eminent domain is the return or compensation contemplated for the tax-payer. If, by "return or compensation," the learned judge means actual money paid back, then no tax is valid, as it is never paid as an investment. If by the expression is meant a return of public benefit, then the return is the same as that arising from money paid for opening and repairing common highways; only the return is greater in the one case than in the other. By the one, persons, rich and poor, can transport themselves or freight in one-third of the time, and at one-third of the expense, it can be done by the other.

As the Michigan Court displays more boldness in its rejection, so it shows more originality in the application of old principles of law. In answer to this same objection, this Court says, "Every man has an abstract

right to the exclusive use of his own property, for his own enjoyment, in such manner as he shall choose; but if he should choose to create a nuisance upon it, or to do any thing which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the centre of the earth; but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation." After giving other illustrations of the maxim, "Enjoy your own property in such a manner as not to injure that of another person," the Court goes on to say, "Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needed industry has a right to exist, and the community has a right to demand that it be permitted to exist; and if, for that purpose, a peculiar locality, already in possession of an individual, is essential, the owner's rights to undisturbed occupancy must yield to the superior interest of the public."

Why this argument is introduced, unless it be to found upon it the point, that property thus taken is not taken solely under the inherent right in sovereignty to take property of the citizen when it is deemed for the benefit of the public, I do not know. But I confess, while I can understand why one citizen, in digging on his own lot, should not undermine his neighbor, or conduct the business of slaughtering in the heart of a city or town to the offence of surrounding citizens, or do any other act positively offensive or damaging, in violation of the maxim, *Sic utere tuo*, I cannot comprehend why a farmer, in the peaceful enjoyment of his land in the country, offending no one, should yield his property for any strictly private enterprise, whether it be to build railroads on it, or to locate a dance-house thereon.

The author of the opinion, in the case of *Commissioners of Leavenworth* v. *Miller*, *supra*, says of this same argument, "There has been a half-expressed, half-suppressed claim, that the right of eminent domain is not exercised in favor of railroad corporations because of their public character, but that it is exercised under the maximum, *Sic utere tuo ut alienum non lædas*. This is comic as well as novel. Because a man must so *use* and *enjoy* his own property so as not to injure the rights of others, it is claimed that he may be totally deprived of its use, and must allow a *strictly private corporation* (as is claimed) to take possession of it, and use and enjoy it."

In the Salem case, we discover what would seem to be the rule laid down to guide courts in determining what they will permit the legislature to allow taxation for, and what they will forbid. The Court says, "We perceive, therefore, that the term 'public use,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely *a term of classification to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclinations.*"

At the hazard of appearing stupid, we must again confess our inability to comprehend the rule. Where must this usage be settled? Not in a new State like ours: for we have to pass our first laws to begin. Then to what State or county look for this settled usage? and what constitutes such usage? If passing laws by the legislature, authorizing municipal aid to private corporations, under a constitution no more restrictive than ours, and their validity being upheld by the courts, constitutes a settled usage, we can refer to Connecticut,

Georgia, Kentucky, Maine, Missouri, Mississippi, Illinois, Indiana, New York, South Carolina, Iowa, Kansas, and a number of other States, where this has been done. If it is answered that this usage has not existed long enough, I can only say, that it runs back to near the time of building the first railroad; and it can hardly be demanded that laws should have been passed a century before, in anticipation of their discovery or invention. It has always been regarded the duty of government to furnish accommodation or facilities for travel and commerce; but should the public be denied the advantage of railroad communication, because, before their introduction, usage had settled upon common highways, or be compelled to wait till private interest supplies them? Left to private inclination or interest, it is safe to say that not one mile of the twelve hundred miles of railroad which traverse this State to-day would have been built without local or government aid. What would be the condition of Nebraska, as respects the wealth, population, and comfort of her people, I will leave others to estimate, reference being made to States with and without railroads, as well as to those parts of our own State which are and which are not traversed by them. Governments are the subjects of growth and improvement. If the doctrine here enunciated had obtained at an early period, and each succeeding generation had been forced to confine its governmental power to the bands which confined its predecessors, we should be wanting many of those facilities, conveniences, and comforts provided by government at the present day. Again: what are proper objects of public support has been determined differently by different governments, governed by interest or the peculiar views of the majority. So the rule here proclaimed is so uncertain in its application as to afford us really no aid.

The different conclusions reached in declaring railroad-aid bonds invalid are only limited by the number of cases. In *Hanson* v. *Vernon*, the law under which the bonds were issued was found to be in violation of an express section of the Iowa Constitution.

Under a constitution quite similar in Michigan, the Court found no section of the constitution violated; but, differing with the legislative and executive departments of that State as to the true theory of government, it decided in its own favor, and enforced its judgment by declaring the bonds invalid.

In the third case, *Whiting* v. *The Sheboygan Railroad Company*, determined by the Supreme Court of Wisconsin, the Court seems oblivious of the existence of a constitution in that State, as it makes no reference to it, but concludes that bonds donated to a private corporation are invalid, while bonds issued in payment for stock subscribed for by the municipality may be good. In other words, the public may put its hand into A's pocket and take out money, and, against A's will, compel him to engage in railroading; and at the same time it cannot donate the same money outright to the company. No other reason is given than that, "to the extent of the stock subscribed, the municipality *owns* the road, and it may be said to be *public* property." The road, as an entirety, is no more or less public because a municipal corporation owns stocks. It may share profits or loss like an individual. The officers elected to control the road, under the charter, will not be public officers. The road subserves no greater public end with county subscription to stock than without it. This distinction has no leg of principle to stand upon, and is approved by none, but is expressly repudiated by even those who maintain the invalidity of this kind of bonds generally. Judge Brewer, who dissents from the opin-

ion of the majority of the Court in the Kansas case, says, "A law which compels a citizen to invest his means, whether little or much, part or all, in a railroad enterprise, even though it secure to him a share in the profits of the enterprise, trespasses on his uncontrollable right to invest his means in any business he chooses."

Thus I have hastily glanced at the decisions of the courts of last resort of the three States that have pronounced railroad bonds invalid. They follow no cases, are followed by none, and disagree among themselves. The case of *Hanson* v. *Vernon* has been overruled and set aside in the State of Iowa. The case of *Whiting* v. *The Sheboygan Railroad Company* in Wisconsin, with its qualified opinion, establishes no principle. This leaves the Salem case in Michigan to "stand out," in the language of Judge Swayne in *Gelpcke* v. *Dubuque*, 1 *Wall.*, 205, "in unenviable solitude and notoriety." This case stands opposed (making the statement upon the authority of a brief of one of the counsel before me, and I have examined many of the cases myself) to no less than ninety-three cases in the supreme courts of twenty-six States, and thirty-five cases in the Federal courts, affirming the validity of such securities as these, under constitutions, in almost every instance, with provisions more specific and stringent than ours. The case was decided by a divided court. So revolutionary in its character is it regarded, that, in several cases determined since in other States on the same question, it is expressly condemned. The United-States Court, which makes it a rule to follow the construction placed upon a statute or the constitution by the State courts, refuses to obey the rule with respect to this decision. The Circuit Court for Michigan at once came to the rescue of the financial credit of that State, and of the holders

of railroad-aid bonds who were stricken down by the decision in the Salem case, and, in the case of *Talcott* v. *The Township of Pine Grove* (*Bench and Bar*, vol. i., Nos. 3 and 4), condemns the Salem case, as not only opposed to the well-settled law as established by the courts of the different States as well as the Federal courts, but opposed also to the settled law of Michigan. The opinion was delivered by Judge Emmons, and is most able and exhaustive. The decisions are so numerous and so uniform, "that the rule here laid down pervades the jurisprudence of the United States." *Rogers* v. *Burlington*, 3 *Wallace*, 663. The opinions, in many of the cases, are marked by the profoundest legal ability. Their reasoning is unanswerable. But, whatever conviction I might have, I should hesitate long before opposing such an array of authority: indeed, I should have no right to do so. Legal principles are fixed by long-recognized and uniform repetition. Rights grow up on the strength of principles so established. The rule, *stare decisis*, is binding on the Court. Not only should this Court follow the line of authorities in the interpretation of our constitution, but it should follow the interpretation put upon it and as understood by the people of the State.

When our constitution was adopted, a score of States, with constitutions quite as restrictive as ours, had passed laws like the Act of 1869. The courts of the several States, as well as of the United States, had uniformly held such laws constitutional. Copying these constitutions, we adopted the interpretation which had been given them. That this interpretation was so accepted is evinced by the enactment of the law itself. In further proof that the construction so given it by one legislature is in accord with the views of the people, successive legislatures, fresh from the people, have

permitted it to stand. In further corroboration that this construction harmonizes with the views of the people, and that the people regard the bonds issued as having the sanction of law, the Constitutional Convention which assembled in the summer of the year 1871 submitted the following with the new constitution then framed: "No county, city, town, township, or other municipality, shall ever become subscribers to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of, such corporation; provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such donation where the same has been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." This, together with the entire proposed new constitution, was rejected. But the proposition itself, by the most direct implication, assumes that the old constitution is sufficiently broad to cover the Law of 1869. This is enforced by the express proviso, that bonds issued prior thereto are valid. The people, by the rejection of this proposed denial of the right to the legislature to authorize such bonds, whether in subscription for stock, or donations, maintain the existence of such right in the legislature. In view of all this, we cannot annul the Act of 1869. We should not be asked to do so. It is but appealing to us to rise superior to the legislature, the executive, and even the people themselves, and usurp a power never given us. Having faith in the integrity of the courts of this State, and believing that they are no wiser than the sages who have settled the law by these numberless opinions, persons have invested in these bonds; and they are now in the hands of innocent, *bona-fide* holders. We have received their value. The growth and prosperity of

the State is largely owing to the capital thus induced; and a regard for the fearful consequences which must follow an adverse decision should lead us to give no willing ear to such appeals. The plaintiff may feel aggrieved. This law, like countless others, may work comparative injustice. But with the mass of the people of that county — a county whose superior rank in wealth is so largely indebted to the introduction of railroads — these obligations are held sacred. They, in common with the mass of people of the State, would shrink from the remotest suggestion of repudiation. They would gladly be saved from a decision against the validity of this class of obligations. The cloud that must fall upon Nebraska's credit, in her infancy, from the importation of "repudiation," would be crippling to her prosperity, and disgraceful to her citizens. We must rely upon the energy and integrity of our people. Our State is full of native wealth lying in her soil and climate. Productions are almost worthless without bringing the soil alongside of the market. This requires capital. Capital leaves where good faith is wanting. I have the highest faith in the good sense of the people. When they shall discover that subsidizing railroads is detrimental to the interests of the State, like the people of Illinois and of some other States have done, they will prohibit it by an amendment of the constitution. But, with the constitution as it is, we can only declare the Law of 1869 constitutional; and finding that the bonds were properly issued, in accordance with an overwhelming vote of the county in their favor, they are declared valid.

We pass next to consider some of the other numerous objections made against the tax levied upon the property of the plaintiff in error. These consist of averments of alleged irregularities in the assessment of his

property in the levy of the tax, and in its attempted collection. In the consideration of them, it must be borne in mind that we are sitting, as far as this case is concerned, as a court of equity, and not as a court of law, to review and correct errors in that regard. We are to do justice to the plaintiff, and exact the same of him. If any irreparable injury is about to be done him, such as cannot be righted in a court of law, we may interfere. But, from the allegations of plaintiff's petition, it is admitted that he is the owner of a large amount of real and personal property. We also know that the government must be kept up, roads must be repaired, bridges built, schools supported, and the very courts whose services he has commanded must be sustained. To do all this requires an annual levy of tax; and the plaintiff should pay such portion of it as the value of his property bears to the aggregate of taxable property. To ascertain the amount of taxable property, to levy the required tax, and collect it from the thousands of taxable inhabitants, involves numberless steps, and the services of various officers more or less deficient in the qualities necessary to a proper discharge of their several duties. That many mistakes and irregularities should attend all this is more than likely. Many of these are *harmless*. When otherwise, a vigilant person can effect a timely correction. If his property is assessed too high, application can be made to the Board of Equalization for reduction. Other illegal proceedings, as has been held by this Court, may be corrected by proceedings in error. Whatever, as a court of law, we may be constrained to hold when trying the title to property based on a sale for taxes irregularly levied, as a court of equity our concern is as to the ultimate right of the matter. Here, as we have said, the plaintiff confesses to the ownership of a large amount of prop-

erty on which a tax should be paid. That the tax-list for the year 1870 has no seal impressed on it; that there is no evidence filed with the county clerk as to the time when the assessment-list of the precinct wherein the plaintiff's lands lie was returned or deposited, and objections of a like technical character,—do not necessarily prove that the tax assessed against the plaintiff is not just. The complaint that church property of the county is exempt from taxation, and plaintiff's proportion of tax thereby increased, is untenable. This is in accordance with universal custom; and the right to do so is nowhere denied in the authorities. *Cooley's Con. Lim.*, 514; *High on Inj.*, sect. 358; *Muscatine* v. *Mississippi, &c.*, 1 *Dillon's C. C.*, 536.

If it be true that the commissioners of the county did not sit the full three days required by statute to equalize assessments, the objection is but technical as put forward here. It is not claimed that the plaintiff's property is assessed beyond its true value; or that he attempted or desired to appear before the Board of Equalization, and was prevented from doing so by their failure to sit the prescribed time. More than this: in any event, if, for this or for any other reason, he is called upon to pay a tax larger than he in justice ought to pay, he must at least conform to that first rule of equity, and offer to pay the amount justly due from him, before he can ask to be relieved from the payment of the balance. This offer he nowhere makes; and, for this reason alone, he should be turned from a court of equity. *Story's Eq. Jur.*, sect. 64, *e*; *High on Inj.*, sect. 363; *Hersey* v. *Supervisors, &c.*, 16 *Wis.*, 185; *Bond* v. *Kenosha*, 17 *id.*, 284; *Mills* v. *Johnson*, *id.*, 589; *Palmer* v. *Napoleon*, 16 *Mich.*, 176: *Taylor* v. *Thomson*, 42 *Ill.*, 10; *Board of Commissioners* v. *Elston*, 32 *Ind.*, 27. Although the revenue-law does not permit the treasurer

to accept of only a part of the tax levied, yet this does not discharge the party from the duty of making the offer to the Court, which is not so restrained. But neither in the petition nor in the argument has the plaintiff expressed a willingness to pay any part of the tax, but defiantly seeks to avoid it all, asserting every objection, down to the most trivially technical.

Notwithstanding, then, the various objections urged against the proceedings of the precinct assessors and of the county commissioners, which have resulted in the determination of the sum the plaintiff should pay as his proportion of the tax levied, there is nothing which shows to the Court that it is unjust or inequitable that he should pay the sum demanded; and with any of the objections against the manner of assessing his property, or the like, we have nothing to do in this action.

I have looked at but few of the numerous authorities cited in support of the several objections urged by counsel. From those I have examined, I am satisfied that most, if not all, relate to actions of ejectment, trespass, or other purely legal cases. While the authorities are not entirely uniform, the rule seems to be pretty generally established, that equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities or errors in the assessment of the tax, or in the execution of the powers conferred upon taxing officers; the remedy at law being deemed sufficient in such cases. *High on Inj.*, sect. 355; *Clinton, &c., Appeal*, 56 *Pa. St.*, 315; *O'Neal* v. *Virginia, &c.*, 18 *Md.*, 1; *Livingston* v. *Hallenbeck*, 4 *Barb.*; *Macklot* v. *Davenport*, 17 *Iowa*, 379; *Center, &c., Co.* v. *Black*, 32 *Ind.*, 468; *Warden* v. *Supervisors, &c.*, 14 *Wis.*, 618; *Kellogg* v. *Oshkosh, id.*, 623; *Exchange, &c.*, v. *Hines*, 3 *Ohio St.*, 1; *Jackson* v. *Detroit*, 10 *Mich.*, 248; *Williams* v. *Mayor, &c.*, 2 *Mich.*, 560; *Greene* v.

Mumford, 5 *R. I.*, 472; *Schofield* v. *Walkins*, 22 *Ill.*, 66.

Upon a question of the importance and general interest of this, coming before this Court for the first time, I may be pardoned for incorporating in this opinion some of the arguments of other courts in support of the position here taken.

In *Chicago &c.*, v. *Frary*, 22 *Ill.*, 34, Mr. Chief Justice Caton, in stating the grounds upon which relief is refused in cases of irregularities attending the assessment of property and the levy of taxes, says, —

"We have in this case been called on to inquire in what cases the power of a court of equity may be exercised to restrain the collection of the revenue of the State. The decisions of this Court show, that, in a large majority of the cases involving the regularity of the proceedings for the collection of the revenue, we have met with irregularities in the proceedings to such an extent as to destroy the titles to real estate acquired at tax sales. In this way has a court of common law afforded a remedy for irregularities in the execution of the revenue-laws. The same and even additional redress is afforded to parties whose personal property is seized for a tax illegally assessed. If, in all these cases, the Court of Chancery had taken the matter in hand, and examined the regularity of the proceedings, whenever an attempt was made to collect the revenue and restrain its collection, if it were shown that the law had not been complied with in the assessment of the taxes, the result would have been, that, in many if not in most cases, the collection of the revenue would have been enjoined, and taxes would not have been collected. Under such an administration of the laws, with so complicated a revenue system as ours, rendered so by a tender regard for the rights and interests of the citizen, no government

could exist for a single year. Let us now, by sustaining this bill, stretch out the strong arm of this Court, and stay the hand of the collector in any case where any irregularity can be shown in the assessment of the revenue, and a flood of injunctions would be spread over the land at once. State and county revenue would cease to be collected, at least till the termination of protracted litigation, and the wheels of government would stop. It is no answer to say, 'Let those whose duty it is to administer the revenue-law do it with greater care, and do every thing which the law requires, and at the time specified, and be careful that they do no more than is required.' We must take things as they are, and look at practical results. Neither precedent nor reason will warrant the use of the writ of injunction for such purposes, and to produce such results. Where the law affords an adequate remedy, this writ cannot be used; and, especially where greater mischief will flow than good result from it, the Court will always withhold this species of relief. Equity cannot attempt to prevent, any more than it will redress, all wrongs. It is not in ordinary but in extraordinary cases that this writ is properly invoked. If the law can redress the wrong, if it can repair the injury, equity must suffer it, and let the courts of law redress it. This is the general rule, to which there are no doubt exceptions, and exceptions, too, in cases of the collection of taxes. Those exceptions are confined almost if not entirely to cases where the tax itself is not authorized by law; or, if the tax itself is authorized, it is assessed upon property which is not subject to tax. . . . Where an injunction has been finally sustained, it will generally, if not always, be found to be of this class. It is possible that cases may sometimes be found where this distinction has been disregarded from inadvertence, or from the peculiar circumstances

connected with them. We can find no other basis for a reasonable and practical distinction. If we permit the injunction to be issued where the tax is authorized by law, and the thing taxed is liable to that tax, there is no stopping-point short of enjoining all taxes whenever an irregularity has intervened. This power the Court of Chancery has never assumed, nor could it without the most disastrous consequences to the State."

Macklot v. *City of Davenport*, 17 *Iowa*, 379, was a case brought to enjoin the collection of a tax where the party had been improperly assessed too high. In disapproving the course of resorting to courts of equity to enjoin the collection of taxes, Mr. Justice Cole, in speaking for the Court, among other things, says, —

"The correct and, we believe, the ordinary method of fixing the rate of tax necessary to be levied in any given year, for a city, county, or a state, is, first to ascertain the amount or assessed value of the property in such city, county, or state, and then ascertain the amount of revenue necessary to carry on the government for which the tax is to be levied; and from these *data*, which ought, for the safety of such government, to be fixed and certain, the rate is easily and certainly determined. But suppose, that after such rate has been fixed, and the levy made accordingly, every tax-payer is at liberty to controvert the correctness of his assessment, and, when the collector calls for his tax, he may enjoin the collection on the ground of error in the assessment, and litigate the question for a series of years, even the ordinary pendency of equity causes, — and in many cases such litigants would doubtless be successful, whereby the collection of the revenue would be indefinitely delayed, and greatly reduced in amount, — what would become of the government? how, in the mean time, would our schools and charitable institutions be sup-

ported? and in what manner could the executive, legislative, and judicial departments of such government be kept in healthful and successful operation? To hold that such course could be pursued would be to hold that the government had provided for its own strangulation at the hands of one of its departments.

"Again: it is a well-recognized fact, that more or less error has always been connected with the assessment, levy, and collection of taxes. This fact finds abundant verification in the almost universal failure and insufficiency of tax-titles. This has been true, not only of Iowa, but of every State in the Union. This insufficiency of tax-titles has resulted from the errors and irregularities in the assessment, levy, and collection of taxes: and, if a tax-payer may enjoin the collection of the taxes for an error in the assessment, he may enjoin for any other error; and to sustain such injunction, and to hold that taxes may be enjoined for errors and irregularities, would result in a flood of injunctions all over the land, and stay the collection of revenue to the bankruptcy of every government, city, county, or state."

Expressions like those contained in the foregoing quotations might be multiplied at great length; but I will pass to consider an objection dwelt upon by counsel for plaintiff, and upon which the Court is divided.

At one of the more recent sessions of the State legislature, the revenue-law of 1869 was so modified as to direct the treasurer, in the collection of taxes, to first proceed against the tax-payer's personal property before offering to sell his lands. *Laws of* 1871, p. 81. The petition in this case avers that the plaintiff is possessed of abundant personal property out of which to make the tax; and, for this reason, asks that the treasurer be enjoined from selling his lands. The demurrer admits, of course, that he has the personality as claimed. To

obey the law, then, the treasurer should first proceed against that.

It is not necessary to stop and consider what may come from his disobedience. It may be suggested that sect. 4 of the same law subjects an officer, for the neglect to discharge any duty devolving upon him in the collection of taxes, to the payment of one hundred dollars. It further occurs to me, that if it is true in fact, as admitted by the demurrer for the argument, that the plaintiff has plenty of personal property to satisfy the tax demanded, there will be no bidders for plaintiff's land; or, if sold, that a questionable title must follow. If the title fails, the treasurer or his bondsmen, under another section of the same law of 1871, will be liable for the amount of tax so improperly collected.

All this, or even more, may befall the treasurer for failure to discharge his duty. But how does it help the plaintiff's standing before a court of equity? He appears here the admitted debtor to the government, which he should help to sustain for the amount of tax levied against him. He is shown to be the owner of lands; admits that he has an abundance of personal property; and no doubt has money in his pocket to pay his tax, as he must have to fee lawyers to resist it. Yet he asks this Court to aid him in his effort to avoid its payment by holding that it should be made out of one kind of property rather than another, — to say that the treasurer's neglect may serve as his excuse for not paying his just indebtedness. If he has such an abundance of personal property as will satisfy this tax under a forced sale, it is very certain that it can be better sold or pledged by himself to obtain the money than it could be by a public officer. To me it would have the appearance of trifling to permit the plaintiff to shield himself behind this supposed technical advantage to avoid discharging his just

obligation to the public. If this were a void tax, or if the plaintiff's property was exempt, or, for like reason, no tax was due from him, and the title to his realty was in danger of being clouded by this sale, we might interfere. But there is nothing of that in the case, — nothing which brings it under any head of equitable cognizance. The tax is due; and common justice demands that it should be paid. With the manner of its collection we have nothing to do. The plaintiff may save both his personal and real property by paying a just claim. If he refuses to do this, it is of little concern to us, as an equitable question, whether the treasurer sell the real or personal property; or whether he throttle the plaintiff, and force him to perform his duty to the government which protects both him and his property.

The judgment of the Court below must be affirmed.

JUSTICE LAKE concurs.

MASON, Ch. J., dissenting.

John Hallenbeck, the plaintiff in this case, filed his petition in the Douglas-county District Court on the eighteenth day of September, 1871, against the defendant, W. J. Hahn, who is county treasurer of Douglas County.

The object and prayer of the petition was to restrain the defendant, as such treasurer, from selling certain real estate of which plaintiff was owner in possession, lying in Douglas County, and fully described in the petition, to set aside the levy and assessment for the year 1870, and for damages and costs. The grounds upon which this relief is claimed are very voluminously set forth in the petition. After stating that the defendant is county treasurer of Douglas County, and, acting

as such treasurer, is about to sell said real estate for the alleged reason that the taxes due thereon for the year A.D. 1870 are unpaid, the plaintiff proceeds to set forth, that on the thirtieth day of November, 1869, a proposition was submitted by the county commissioners of Douglas County to the electors thereof, to issue a voluntary donation of three hundred and fifty thousand dollars, in county bonds of the county, to certain railroad corporations to aid in their construction.

The proposition, the canvass of the votes cast on the proposition, the resolution of the county commissioners after the canvass to issue the bonds in accordance with the vote, and the notice of such resolution published by them, are all fully set out in the petition; and various alleged irregularities in those proceedings are specifically set forth, besides those which appear upon the face of the proceedings.

The petition further shows that the tax for which the defendant proposes to sell the plaintiff's real estate is, in part, to pay the interest on those bonds.

I do not regard it necessary to consider in detail, nor indeed to consider at all, the soundness of the various objections made by plaintiff of the validity of the tax levied to pay the interest. The conclusion which I have come to renders such consideration unnecessary, if not improper.

Grave and serious questions were raised by the plaintiff's counsel on this point, which deserve, even at this time, a passing notice.

Had the plaintiff relied solely upon the fact, that the tax for which defendant was about to sell his land was to go in part to pay the interest on the bonds so donated and issued to these railroad corporations, the Court would have been called upon to consider these questions, which would then have been as vital and important to

the plaintiff's case as they are vital and important in themselves. It would then have been a vital question, whether these are limits to the taxing power which are not expressed or implied in the provisions of our constitution. It might also have been a question, whether the legislature may delegate a power which it may not itself exercise; whether the legislature may delegate to the various counties and municipalities of the State the power to contract debts, and loan their credit to aid in the construction of railroads, when the whole State is restrained from so doing by constitutional inhibition. I understand it to be at least doubtful, if, under our present constitution, a statutory enactment donating the bonds of a county to a private corporation, and providing for their payment by a tax upon the property and inhabitants of such county, would not be absolutely null and void. If this be true of the legislature, — of the head and source of the taxing power, — I am unable at this time, from any argument I have yet heard, to see why it is not, for a stronger and greater reason, true of those to whom it has delegated, or attempted to delegate, its authority.

I am clear that there are no limits to the taxing power except those fixed by the constitution. For, granted, as an abstract of principle, that a tax should never be laid except for government strictly so called; yet, before the taxing power can be subject to the control of the courts, we must be able to define with judicial precision what the object and purposes of government are. And who will undertake to do this? This power is committed to the legislature, itself subject to the restraint imposed by the constitution. If we seek to give to government a purely regulative character, — and, by that, its object is to secure the protection of its individual members, — what shall we say of the laws

establishing and levying taxes for the support of our common schools and universities, of the premiums awarded by government for various kinds of excellence in labor and invention, all clearly of a different character? Whatever may be true in the abstract and as a philosophical principle, it must be admitted as a fact, that the purposes of government are varied and infinite, all tending to one end; namely, the well-being of society. What will best secure this is a political, not a judicial, question. And the power of determining what is for the well-being of society is committed to the wisdom and judgment of the legislature, with no limitations or restrictions except those imposed by the constitution. It may, then, be laid down as a principle, in no case to be departed from, that when the legislature has by enactment of its own, or of those to whom it has lawfully delegated its authority so to do, provided for levying and collecting a tax, courts have no right to interfere and inquire whether the taxing power has been legitimately exercised. The legislature is the exclusive judge in such cases, unless they be restrained by constitutional limitation. In that case the Court acquires jurisdiction to restrain and confine the legislative enactment within the limits prescribed by the constitution.

But the latter question is, to my mind, of greater difficulty, and involves considerations much more serious. Certainly, if the legislature may delegate a given power to the electors of a county, it may exercise that power itself. This will be conceded by all. The legislature, being desirous to consult the will of the electors of that locality which is to bear the burden, assigns to them the decision of the question, whether or not money shall be borrowed for a given purpose, and a tax levied to pay the debt thus created. It is the

act of the legislature, nevertheless; and possesses the same validity as if done by the legislature, and no more. If it, then, be admitted that the courts have no authority to define the limits of the taxing power, only two questions can be raised here; namely, May the legislature, under our constitution, delegate its authority to borrow money and contract debts? Second, if it may do so, are the debts thus contracted by county, state, or public, debts in such a sense as to come within any of the limitations of the finance article of our constitution? Or, in other words, is this class of debts and obligations, contracted by counties and municipalities, by legislative authority, to make a present and gift to a railroad company, obnoxious to any provision of our present constitution? I have thus defined what I conceive to be the real issues involved in our branch of this case. But I am not prepared, nor do I think it entirely proper as the case now stands, to give an opinion upon them. They are destined, without doubt, at no distant day, to be raised and decided in this Court, when they will receive that grave consideration which their importance demands. Nor am I disposed at this time to inquire into the alleged irregularities in the voting of this debt and the accompanying tax. If these irregularities are substantial, they are fatal; if merely formal, it is otherwise.

It is sufficient for the decision of this case that it is alleged in the petition, and admitted by the demurrer, that, at the time and ever since the tax became due, the plaintiff was possessed of ample personal property and effects in this county, out of which the tax might have been collected.

The allegation is in general terms: but it is sufficient; and, if it were not, the defect could not be reached by general demurrer. Such a demurrer admits the truth of the allegation in all its breadth.

Our statutes provide (1870, 1871, p. 81) that the county treasurer shall first proceed to make the tax out of the personal property of the delinquent.

The question, then, is, Will the Court enjoin the county treasurer from selling the real estate of the delinquent when said delinquent has personal property out of which the tax may be collected?

The power, or rather duty, of the Court to interpose by injunction to restrain the collection of a tax, has been variously decided in different tribunals; and the authorities are somewhat conflicting. In *Ottawa* v. *Walker*, 21 *Ill.*, 605, the power was exercised when the tribunal levying the tax acted without authority of law. So in *Burnet* v. *Cincinnati*, 3 *Ham.*, a sale of land for a tax which had not been assessed in accordance with the charter and ordinances of the city was restrained; and this case was cited, commented on, approved, and followed, in *Culbertson* v. *Cincinnati*, 16 *Ohio*, 574. So in *Kennoup* v. *Boling*, 11 *Cal.*, 380, a sale of real estate for a valid tax was restrained, because the officer selling had no authority to sell, his term having expired.

On the other hand, it is laid down in numerous cases, that, when nothing but the mere question of taxation is involved, the issue is strictly out of law, and equity can take no cognizance thereof; that a party aggrieved by an illegal tax has an ample subsidy at law, and a court of equity has no authority to restrain the collection of an illegal tax; that the unlawful collection of a tax is a mere trespass, not to be enjoined without allegations and proof of impossible injury therefrom. 23 *Conn.*, 232; *Mintons* v. *Hays*, 2 *Cal.*, 590; *Wilson* v. *Mayer*, *&c.*, 4 *E. D. Smith*, 675: *Ritter* v. *Patch*, 12 *Cal.*, 298. As the announcement of an abstract principle, I do not know that the doctrine above laid down is open to objection.

It is not in the general principle that ought to govern

that the various tribunals have differed from each other: the point of difference is to be found in the application of the principle. No court has ever interfered when the issue was conceded to be one of mere taxation. Irreparable injury without adequate remedy at law has always been the ground of equitable interposition.

The question to be decided here, as in all other cases, is, Is the injury irreparable in the judicial sense of the term, or the remedy at law adequate? Suppose the tax to be in all respects legal, and all proceedings in relation thereto up to the time of collection valid and regular: should the treasurer then, in disregard of duty enjoined on him by law, without making an effort to collect the tax out of the personal property of the delinquent, proceed to sell his real estate therefor? What is the nature of the injury that will ensue? and where and what is his remedy at law? The power to collect taxes is a high sovereign prerogative; and it is in accordance with the spirit of our institutions that its exercise should be strictly confined within the limits prescribed by it.

To say that the treasurer, though required by law to exhaust his remedy against the personal property of the delinquent before proceeding to sell his real estate, may nevertheless disregard this limitation upon his power, and proceed against the real estate in the first instance, is to frustrate and make void the law, instead of administering it. A cloud is thus cast upon the plaintiff's title: a deed thus given may ripen in time into a perfect indefeasible estate; and the plaintiff, though in no fault, may be deprived of his title and possession by the illegal and wrongful acts of a petty officer. Whether this is an irreparable injury or not is to be left to each one's own consciousness and sound judgment in the absence of decisive authority; but I, for one, see no room for two opinions.

In such cases the question is not one of mere taxation, and never can be. Courts of equity interfere when one sets up and asserts a colorable title, and will enjoin him from so doing. Shall they not also interfere when an attempt is made to create one, and especially one which, by a brief lapse of time, becomes perfect? Where is the remedy at law? I confess I am unable to conceive one. Here is no trespass for which an action will lay. The action of trespass, if it were adequate, does not lie; and, if it lay, it would be wholly inadequate. It might answer in case of personal property wrongfully seized, but not here. It has been suggested that the delinquent may pay the money under protest, and then sue to recover it back. Suppose, however, he does not want to pay it, or has not got it to pay: is the officer then justified in violating the law and his just duty? Again: whom shall he sue to recover back the money? The county or the county treasurer, or give him the option to sue either. Still, if the tax be legal and valid, may not the one thus sued set off the amount due from the delinquent for taxes? I see no valid reason why this may not be done; and, if it may, it reduces that reasoning to an absurdity. The plaintiff is clearly entitled to an injunction, unless we conclude to override the positive provisions of the law, and hold that delinquent taxes are to be collected in the best way and manner which the officer charged with that duty can devise, consulting his own good pleasure and ingenuity alone. I am not prepared to so decide. In my opinion, the judgment of the Court below should be reversed.

Morton v. Green.

Ejectment. An action for the recovery of real property under the Code can only be supported by showing a legal title in the plaintiff as contra-distinguished from an equitable title.

——. The holder of a receiver's certificate cannot, after the entry upon which the paper was issued has been cancelled, maintain an action of ejectment; for he has only an equitable title; and this notwithstanding sect. 411 of the Code of Civil Procedure, making such certificate proof of title equivalent to a patent against all but the holder of an actual patent.

——: *Jurisdiction.* The courts of law are without jurisdiction to interfere in controversies between adverse claimants of the public land until the government has, by the issuing of the patent or otherwise, parted with the legal title.

Error to the District Court for Lancaster County.

It was ejectment brought by Morton, Hopkins, & Manners, against Green & Smith, to recover the south half of the north-east quarter of section twenty-one (21), and the north half of the south-east quarter of section twenty-one (21), and the south-east quarter of the north-west quarter of said section twenty-one (21), all in township number ten (10), north of range number six (6), east of the sixth principal meridian. Green & Smith being lessees of the State, it intervened to defend the title. The petition and the answer of Green & Smith were in the usual form. The answer of the State alleged that it was the owner of the lands, and claimed title by virtue of the Act of Congress, approved July 22, 1854, entitled "An act to establish the office of Surveyor-General of New Mexico, Kansas, and Ne-

braska, to donate to actual settlers therein, and for other purposes;" also the act of Congress, approved on the 19th of April, A.D. 1854, entitled "An act to enable the people of Nebraska to form a constitution and State government, and for the admission of the State into the Union on equal footing with the original States;" and the act of Congress, approved Feb. 9, A.D. 1867, entitled "An act for the admission of the State of Nebraska into the Union;" and the State claims, and it has, through its proper officers, selected and located, said lands, and performed each and every act necessary to be done on its part to perfect its said titles to said lands. The cause was tried before Lake, J., and a jury. On the trial the plaintiff introduced in evidence two certificates, as follows: —

REGISTER'S OFFICE, NEBRASKA CITY, N.T.,
Sept. 12, 1859.

Military land-warrant, No. 80,268, in the name of Johanna George Elerle and Christine Constantin, has this day been located by John W. Prey upon the north half of south-east quarter of section twenty-one (21), and north-west quarter of the south-west quarter of section twenty-two (22), in township ten (10), north of range six (6), east, subject to any pre-emption claim which may be filed for said land within thirty days from this date.

Contents of tract located, one hundred and sixty acres, R & R 38. The dates of assignments in all cases must be given at the time they are acknowledged, and no assignment of this certificate will be regarded.

AND. HOPKINS, *Register.*

Military Bounty Land Act of 28th September, 1850.

MORTON *v.* GREEN.

REGISTER'S OFFICE, NEBRASKA CITY, N.T.,
Sept. 12, 1859.

Military land-warrant, No. 10,027, under the name of William B. Davis, has this day been located by John W. Prey upon the south half of the north-east quarter, the south-east quarter of the north-west quarter, and the north-east quarter of the south-west quarter, of section twenty-one (21), in township ten (10), north of range six (6), east, subject to any pre-emption claim which may be filed for said land within forty days from this date.

Contents of tract located, one hundred and sixty acres, R & R 57. AND. HOPKINS, *Register.*

The plaintiffs then showed several mesne conveyances from Prey to themselves, and rested. The defendants then offered in evidence a certified copy of a letter from the Commissioner of the General Land-Office to the Register and Receiver, Feb. 17, 1862. The plaintiffs objected, and the Court overruled the objection; and the defendants read the same, as follows: —

GENERAL LAND OFFICE, Feb. 17, 1862.

GENTLEMEN, — For your information, I herewith enclose you a copy of the instructions from this office of present date to the surveyor-general at Leavenworth, Kansas, respecting not only the general examination he is required to make, to the end that all salt springs, salt licks and salines, shall be reported to the District Land-Office and to this office, in order that they may be respected as reserved lands, but particularly respecting eleven locations which had been allowed at your office upon certain tracts reported as salines.

Those eleven tracts, with the name of the locator

in each case, are described in the enclosed schedule "A" herewith. As soon as the surveyor-general shall have made a report to this office of the result of the examination in the eleven cases in question, you will be advised of the definite action of the department in the matter.

Very respectfully your obedient servant,

(Signed) J. M. EDMUNDS, *Commissioner.*

Register and Receiver, Nebraska City, Nebraska Ty.

The defendants also offered in evidence a letter from the Commissioner of the General Land-Office, dated the same day, addressed to the Surveyor-General of Nebraska, &c., stating that, under the law, saline lands were reserved from sale; that it was reported to him, that, by collusion between surveyors and speculators, saline lands had not been so reported as they should have been; and directing that an examination be made by the latter officer into the character of the lands here in question among other tracts.

The proceedings of the surveyor-general in pursuance of the above letter and his report were, under the plaintiff's exception, read in evidence, showing that the lands in question were salines; also a letter from the commissioner to the register and receiver of the Local Land-Office, dated June 20, 1862, that the locations, the certificates of which are above given, were cancelled because the lands were saline, and therefore reserved from sale; also evidence under like exception that the register and receiver had accordingly noted the cancellations on their plat and tract books; also a letter from the commissioner to the local officers, dated Aug, 15, 1862, directing them to return to the General Land-Office the patents for the lands here in question, which had some

years before been sent to them for delivery to the parties. Oral evidence was given showing that the lands were salines.

The Court directed the jury to find a verdict for the defendants; which they did. Judgment being entered thereon, the plaintiffs filed this petition in error.

D. Gantt, for plaintiffs in error.

1. The Court erred in overruling the objections to, and admitting in evidence, the letters of the Commissioner of the General Land-Office, the letters of the surveyor-general, and reports of sub-agents of the government, because the same were *ex-parte* proceedings, and offered to show that the entry of the lands in question was cancelled by land-officers, who were successors to those who made and approved the contract with the purchaser.

By such contract of purchase of the land, the purchaser acquired a "vested right," which can only be set aside or cancelled according to law by a proper judicial tribunal, and not by the land-officers. *U. S. Constitutional Amendments*, Art. V.; *Astrom et al.* v. *Hammond*, 3 *McLean*, 109; *Morton* v. *Blankership et al.*, 5 *Mo.*, 355; *Johnson* v. *Tousley*, *Sup. Ct. U. S.*, last term; *United States* v. *Stone*, 2 *Wallace*, 535–537; *United States* v. *Bank of Metropolis*, 15 *Peters*, 401; *Merrill* v. *Hartwell*, 11 *Mich.*, 20; *Harty* v. *Hull*, 2 *Binn.*, 511; *United States* v. *Willard*, — *Paine*, 539; *Janes* v. *Lawler*, 33 *Ala.*, 340; *Ware* v. *Brush*, 1 *McLean*, 535.

2. The only fair and legitimate construction of the fourth section of the Act of July 22, 1854, is to apply its provisions and inhibitions exclusively to the *donation system* of lands provided in the second and third sections. Any other interpretation will produce contra-

dictions in the act which cannot be harmonized; and will also bring this act in direct conflict with the proviso of the eleventh section of the Act of April 19, 1864. *Sturgis* v. *Crowninshield*, 4 *Wheat.*, 202.

3. The eleventh section of the Act of 19th April, 1864, clearly and distinctly recognizes a "vested right" to the land in question in J. W. Prey, grantor of plaintiffs, and thereby operates as a clear, sufficient, and indubitable affirmation and confirmation of title in the purchasers, and estops the United States from denying a "vested right" in the lands in the plaintiffs. *Fletcher* v. *Peck*, 6 *Cranch*, 137; *Strothers* v. *Lucas*, 12 *Peters*, 454; *Van Rensselaer* v. *Kearney*, 11 *How.*, 325; *Penrose* v. *Griffith*, 4 *Binn.*, 231.

4. The Act of May 18, 1796, that of March 26, 1804, and all other land acts of the government providing for the disposal of public lands, must, in respect to every one of such acts, according to every rule of construction, be limited in its application to those lands only which are designated in the act, and can extend only to lands in that Territory designated to which the Indian title had been extinguished. *Reynolds* v. *McArthur*, 2 *Peters*, 426; *Danforth's Lessee* v. *Thomas*, 1 *Wheat.*, 158; *Cherokee Nation* v. *State of Georgia*, 5 *Peters*, 17–48.

James E. Philpott and *Seth Robinson*, for Green & Smith, defendants in error.

I. 1. The act of the Commisioner of the General Land-Office in cancelling Prey's entry was not a ministerial duty, but a matter resting in his judgment and discretion, and within his jurisdiction, requiring the construction and consideration of many acts of Congress. *Gains* v. *Thompson*, 7 *Wallace*, 347, and cases there cited; *Bates* v. *Herron*, 35 *Ala.*, 117; *O'Brien* v.

Perry, 1 *Black*, 132; *Harkness* v. *Underhill*, 1 *Black*, 316.

And the following cases to the contrary are not supported by any principle of sound reasoning, and the point was not necessary to their determination: *Groom* v. *Hill*, 9 *Miss.*, 323; *Perry* v. *O'Hunlon*, 11 *Miss.*, 585; *Arnold* v. *Grimes*, 2 *Iowa*, 1; *Brill* v. *Styles*, 35 *Ill.*, 305.

2. The operation of such action on the part of the commissioner was not, indeed, to destroy any of the equities of the plaintiffs or Prey; but it was effective to settle the question of the legal title between the plaintiffs and the United States: otherwise the plaintiffs might compel the issuance of a patent, and thereby clothe themselves with the legal title; but it is settled that this cannot be done. *Gains* v. *Thompson*, above cited.

3. The only ground upon which it can be claimed that the plaintiffs ever possessed the legal title to the land in controversy is furnished by sect. 411 of the Code of Civil Procedure, which makes the usual duplicate receiver's receipt proof of title equal to a patent against all but the patent itself. But, whatever force this section may be entitled to, it is subject, nevertheless, to the following qualifications, which are operative here; namely:—

(1.) The first qualification is, that whenever the question in any court, State or Federal, is, whether the title to land once the property of the United States has passed, that question must be resolved by the laws of the United States; but whenever, according to those laws, the title shall have passed, then that property, like all other property, becomes subject to State legislation, so far as that legislation is consistent with the admission that the title passed and vested according to

the laws of the United States. *Wilcox* v. *Jackson*, 13 *Peters*, 517; 3 *Washburn on Real Prop.*, 169.

(2.) The second qualification is, that until the patent has actually been issued, and the title passed in accordance with the laws of the United States, it remains subject to the control, judgment, and discretion of the executive department of the General Government; and it is only after the legal title has so passed from the United States, and the matter has ceased to be under the control of the executive department, that courts of justice will interfere, and decree the legal title to belong to the person against whom the department has decided. *Gains* v. *Thompson*, above cited.

4. How, then, can it be contended that the plaintiffs have legal title, when that title is impeached and effectually destroyed by the very record which is adduced in support of it?

5. Now, the legal title to the lands in controversy is vested either in the plaintiffs or in the defendants, or in the United States. It is not in the plaintiffs, for the reasons above stated. If it be not in the plaintiffs, it is immaterial in which of the others it may be; for, if it be in either, the judgment of the Court below must be affirmed. If it be in the United States, the plaintiffs cannot prevail in any form of action: not in ejectment to recover the possession, because, to do that, they must allege and prove a legal estate in themselves; not by bill to recover the title, because the United States is not a party, and could not be made a party. If it be in the defendants, they may prevail by first filing a bill to recover the legal title, but not in an ejectment to recover the possession.

The cancellation of Prey's entry left the plaintiffs but a mere equity. *Gains* v. *Thompson*, 7 *Wallace*, 347, 353; *Lytle* v. *Arkansas*, 9 *How.*, 315; *Barnard* v. *Ash-*

ley, 18 *How.*, 43; *Garland* v. *Wynn*, 20 *How.*, 6; *Bates* v. *Herron*, 35 *Ala.*, 117; *Brill* v. *Styles*, 35 *Ill.*, 305; *O'Brien* v. *Perry*, 1 *Black*, 132; *Harkness* v. *Underhill*, 1 *Black*, 316; *Hester* v. *Kembaugh*, 9 *S. & M.*, 130.

And no case can be found where ejectment has been supported upon a mere entry, backed only by a duplicate receiver's receipt, where the legal title has actually passed from the government to the defendant, or where the government has refused, through its proper officers, to part with the legal title, except in those States where ejectment will lie upon an equitable title; and Missouri is such a State. *O'Brien* v. *Perry*, above cited; see *Wilcox* v. *Jackson*, 13 *Peters*, 517.

Where the legal title has not passed from the government, or where it has passed to one party, another party holding a mere duplicate receiver's receipt necessarily has but an equitable title at best; and an equitable title will not support an action of ejectment. *Jackson* v. *Harrington*, 9 *Cow.*, 88; *Jackson* v. *Sisson*, 2 *Johns. Cas.*, 321; *Jackson* v. *Van Slyck*, 8 *Johns.*, 486; *Jackson* v. *Demont*, 9 *Johns.*, 60; *Robinson* v. *Campbell*, 3 *Wheat.*, 212; *Fenn* v. *Holme*, 21 *How.*, 481; *Hickey* v. *Stewart*, 3 *How.*, 750; *Adams on Ejectment*, 43 *et seq.*, and *note* 1, and cases cited; *Tyler on Ejectment*, 74 *et seq.*, and cases cited.

And the only way in which an equitable title can be assisted at law is by allowing the presumption to prevail in certain cases that there has been a conveyance of the legal estate. *Jackson* v. *Pierce*, 2 *Johns.*, 226; *Adams on Ejectment*, 44, *note* 1.

6. By special statute in some States, an equitable title which will support an action for a conveyance will support ejectment. *Adams on Ejectment*, 44, *notes; Tyler on Ejectment*, 73. But in this State, by express enactment,

the action can only be maintained by him who holds the legal estate. *Code of Civil Procedure*, sect. 626.

II. Upon the second question which arises in the case the defendants rely upon the following points and authorities to sustain the judgment of the court below: —

1. Whenever a tract of land has been appropriated to public use, or reserved for any purpose, it is severed from the mass of the public domain; and subsequent laws are not construed to embrace it, though they do not in terms except it. *Wilcox* v. *Jackson*, 13 *Peters*, 513.

2. The following acts of Congress are applicable to the case at bar, and, if there were no others, would fully sustain the action of the commissioner in cancelling Prey's entries: Act 18th May, 1796, sect. 3; 1 *U. S. Stat.*, 466. Act 26th March, 1804, sect. 6; 2 *U. S. Stat.*, 277. Act 21st April, 1806, sect. 11; 2 *U. S. Stat.*, 391. Act 3d March, 1811, sect. 10; 2 *U. S. Stat.*, 665.

3. These and the following acts clearly show that the uniform policy of the government has been to reserve all saline lands from private entry, and to grant them to the several States: Act 3d March, 1807, sect. 2; 2 *U. S. Stat.*, 438. Act 29th February, 1808, sect. ; 2 *U. S. Stat.*, 470. Act 6th March, 1820, sect. 6, subd. 2; 3 *U. S. Stat.*, 547. Act 27th September, 1850, sect. 14; 9 *U. S. Stat.*, 500. Act 14th February, 1853, sect. 9; 10 *U. S. Stat.*, 159. Act 14th February, 1859, sect. 4, subd. 4; 11 *U. S. Stat.*, 383. Act 29th January, 1861, sect. 3, subd. 4; 12 *U. S. Stat.*, 127. Act 19th April, 1864, sect. 11.; 13 *U. S. Stat.*, 49.

And these acts further show that the form of the grant of salt springs is uniform, and that there is nothing peculiar in the grant to this State.

4. The Act of 22d July, 1854, sect. 4, 10 *U. S. Stat.*, 308, expressly reserves saline lands in this State from

entry or sale, and is conclusive, not only against the title, but the right of the plaintiffs.

5. The defendants, being in possession under color of title, might impeach even a patent. *Crammelin* v. *Minter*, 9 *Ala.*, 594.

Robert H. and *James L. Bradford*, and *George H. Roberts*, *Attorney-General*, for the State, argued the same points, and also submitted a printed argument of forty-eight pages.

E. Wakeley, in reply for plaintiffs in error.

CROUNSE, J.

This was an action to recover the possession of lands, commonly styled an action of ejectment, and is purely legal in its character. The plaintiffs assert and must maintain a legal title to the lands claimed. Sect. 626, *Code of Civil Procedure*. By the laws of some States, ejectment may be sustained by proof of an equitable right to the lands, the possession of which is sought; and an examination of some of the cases urged upon the attention of this Court will show them to have arisen under laws of that kind, and of course they can have no bearing here.

The plaintiffs claim as grantees of one Prey. Prey's pretended title is from the United States, and is based on his attempt, in the year 1859, to obtain the lands in question by the location of land-warrants thereon. In the month of September of that year, he located his warrants, and received the usual certificate from the local land-office at Nebraska City. This was followed by the transmission of patents from the General Land-Office to the Local Office. Before their delivery, how-

ever, the Commissioner of the General Land-Office at Washington, ascertaining that these lands were saline and not agricultural lands, recalled the patents, and cancelled the location of Prey; claiming that the lands were not subject to location or sale, but that they were reserved by the Act of Congress of July 22, 1854.

To show how the defendants, Green & Smith, came into possession, I may remark, that, by the act of Congress admitting Nebraska as a State into the Union, "all salt springs within said State, not exceeding twelve in number, with six sections of land adjoining, or as contiguous as may be to each, shall be granted to said State for its use, the said lands to be selected by the governor thereof within one year after the admission of the State, and, when so selected, to be used or disposed of on such terms, conditions, and regulations as the legislature shall direct; *provided* that no salt spring or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall, by this act, be granted to said State." I may say, in passing, that this proviso has no peculiar application to the lands in question, being such as is usually attached to lands of like kind. Nebraska was admitted in March, 1867. In June of the same year the governor made selection of saline lands, including those in question. This selection was, at the time of the trial, before the land department at Washington for approval. In the mean time the legislature of Nebraska had given authority therefor, and the governor had leased these saline lands to said Green & Smith, who took possession of the same, and whom the State has been let in to defend. Whether the act admitting Nebraska, and the selection of these lands by the governor, gives title to the State without patent or other evidence of title, I will not stop to discuss. The

plaintiffs aver that they "are seized in fee of" the lands in dispute. This they must maintain without reference to the strength of defendant's title.

The highest evidence of plaintiffs' title would be a patent from the United States. This they cannot produce; and they admit, that, for their failure to show one, they could not hope to succeed were it not for sect. 411 of the Code of Civil Procedure, which is relied on. That section says, "The usual duplicate receipt of the receiver of any land-office, or, if that be lost or destroyed or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent." But it is answered, the certificate in this case has been cancelled or destroyed by the return of, or offer to return, the warrants, and the cancellation of Prey's location. To this it is replied, that the commissioner could not, by an *ex-parte* proceeding, destroy Prey's right to the land in question; that, admitting that, if these lands were reserved by law, the location was void, yet the commissioner was wrong in his interpretation of the Act of July, 1854.

Upon this branch of the case the argument of counsel on both sides was very able and elaborate; but in the view I take of the case I shall not follow in the discussion, nor consider the many interesting points debated. It is enough to know that the grantor of the plaintiffs not only never received a patent for these lands, but his right to do has most forcibly been denied by those acting for the United States. While, on the other hand, these lands have been selected under the general grant made by Congress, the State's lessees have entered upon them, and, from all that appears, are holding them with no suggestion of opposition from the government. What-

ever grounds Prey or his grantees may have to demand a patent from the government constitute at most an equitable right, which in a proper suit, with proper parties, might be declared. Until they can show this patent, they are not "seized in fee of" the lands in question. When a patent shall have rightfully passed to them, the United-States authorities cannot destroy it. Before it has passed, this State, by its courts or its legislature, is not competent to wrest it from the United States. Congress is given full power to dispose of the public lands of the United States, and to make all needful rules and regulations respecting the same. Sect. 3, Art. IV., *U. S. Constitution.* Accordingly Congress has, from time to time, passed laws providing for the sale or donation of the public lands; has appointed the officers through or by whom the title shall pass from the government to the grantee, and prescribed the steps to be taken before title shall pass. In the case before us, the first requirement for a valid location of these lands is, that they should be subject to sale or location. The first officers to act upon this question are the officers of the local land-office. They might refuse to permit a location on lands properly subject to it, or allow a location on lands properly reserved. Their action is not conclusive. An appeal is provided to the Commissioner of the General Land-Office from the decision of the local officers. From this officer an appeal can again be taken to the Secretary of the Interior Department. Many mistakes are likely to be committed by these different officers in disposing of the public lands; but their correction is left with these public officers in the control of their respective departments, and in the discharge of their several duties. But, until the issuance of a patent and the parting with the title by the government, the courts cannot interfere. *Litchfield* v. *The Register and Receiver*, 1 *Wool-*

worth's Circuit-Court Reports, 308; *Brewer* v. *Kidd*, 23 *Mich.*, 440; *Marbury* v. *Madison*, 1 *Cranch*, 137; *Kendall* v. *Stokes*, 12 *Peters*, 608; *State of Mississippi* v. *Johnson, President*, 4 *Wallace*, 475. In the cases of *Smiley* v. *Sampson*, and *Tousley* v. *Johnson*, reported in 1 *Nebraska Reports*, this Court sustained suits brought to recover the legal title from those who had wrongfully obtained patents from the government which of right should have been issued to the plaintiffs. We there felt at liberty to review and overrule the decision of the Federal officers in their interpretation or construction of United-States laws; and we were sustained in the United-States Supreme Court for so doing. But it will be remarked that the Court took no action, nor entertained jurisdiction, until a patent had been issued, and the lands had passed from the United States, and had fallen, in common with all other lands within the State, under State control or jurisdiction.

In *Bagnell* v. *Broderick*, 13 *Peters*, 450, it is said, "Congress has the sole power to give dignity and effect to titles emanating from the United States; and the whole legislation of the Federal Government in reference to the public lands declares the patent the superior and conclusive evidence of legal title: until it issues, the fee is in the government; by the patent, it passes to the grantee, and he is entitled to recover the possession in ejectment." As the State cannot compel the surrender by the government of a title, so it cannot, by any law it may pass, declare that to be a title that is not in fact such under the laws and regulations of the United States. Congress has granted a number of salt-springs and a quantity of lands to the State. The governor is selected to designate them. No provision is made for the issuing of patents for them, as under general land-laws. As between the United States and the State of Nebraska, the title to the lands selected may be regarded by both

as in the latter. Yet the plaintiffs, with a certificate that may have been unadvisedly issued in violation of law, and perhaps fearing to test the strength of their claim by appeal to the highest land-officer, seek to obtain the possession of lands upon a certificate worthless between themselves and the government, because they chance to hold it, and the State has no patents. This is attempting a use of the section of our Code referred to never designed, and one wholly unwarranted. To those familiar with delays attending proceedings in the land department, the purpose of the section is evident. It is quite usual for years to intervene between the purchase of a piece of land and receiving a patent therefor. That it is competent for the State to pass a law which will enable a purchaser to defend his possession of lands purchased from the General Government, and for which he has paid his money and taken his certificate, I will not question. There he holds in harmony with the government, his certificate is in force, and his right is complete, except the possession of the patent, which is sure to follow. The case is entirely different where it appears that a patent is denied, and the very certificate is destroyed as far as the government is able to do it. It is not the design of this law to enable a party to build up a right on an empty technicality like this, in subversion of well-established rules governing the acquirement of public lands. It applies in cases where the possessor of the certificate holds harmonious relations with the government.

In *Astrom et al.* v. *Hammond*, 3 *McLean's C. C., R.* 109, a bill was filed to restrain collection of taxes on land for which no patent had yet issued. The Court says, "Until the patent is issued, the purchaser has not the legal title; but having made his entry of the land, and paid his money for it, the government can no more

dispose of the land to another person than if the patent had issued. The final certificate, obtained on the payment of the money, is as binding on the government as the patent. "To language like this we are pointed, to show, that, being possessed of his certificate, Prey's right cannot be thus destroyed by the cancellation of his location. Taking the language alone, and as applied to the case there before the Court, it is all very proper; holding, as the purchaser did no doubt, in harmony with the government, he had every right in and to the land that a patentee would have, and should pay tax accordingly. And further: if the lands were subject to entry, and had been properly entered, with no superior claim ahead of it, the government could not destroy his right to the land, and his claim to have the patent for it; that is, it could not legally do so. But, as will be seen by reference to the cases cited above, although the purchaser may be entitled to a patent, the evidence of legal title, yet he could not compel its delivery by *mandamus*, nor enjoin the land-officers from giving the patent to a claimant not legally entitled to it. The purchaser, however clear his right may seem to be, must, when disputed, prosecute his claim through the several branches of the land department; and, if he fails there, he may, after the government has parted with the legal title by issuing a patent to another, proceed against such other person to obtain the legal title." This rule is well established; and there is nothing in *Astrom et al.* v. *Hammond*, or in those cases containing like expressions, which militates against it, or which is authority upon which to predicate the argument, that, because one is entitled to a legal title, he may, therefore, prosecute ejectments without first obtaining it.

The construction I place upon this action will, I think, be seen by a full reading of the section. In case

of the certificate being lost, or beyond the reach of the party, it provides that the certificate of the receiver, that the books of his office show the sale of a tract of land to a certain individual, may be introduced in evidence; the object evidently being to show, that, as between the purchaser and the United States, the former is rightly in possession, or is entitled to be. If, however, the books of the receiver were produced, or a transcript of them was offered in this case, the reverse of this would be shown. Further support of this view is found in the fact, that this section is standing alone, under a title relating to Evidence, with no other pertaining to public lands or equitable titles. If it had been the design to permit a recovery of the possession of lands upon proof of equitable right, there is no reason why it should be confined to the single case of a holder of a receiver's certificate.

For want of time, I have not investigated the correctness of the additional ground upon which my associate placed his decision in the District Court, that these lands were reserved, and not subject to sale or location. Neither have I deemed this the proper case in which to enter upon such examination. I choose to place my decision upon the one ground, that, under our statute to maintain ejectment in a case like this, the plaintiff must produce a patent, or show that he holds a final certificate in harmony with the government. If the plaintiffs are entitled to a patent, let them first obtain it: then ejectment will be in order. If they are not entitled to one, the Court should not permit them to build up a claim to lands of great value, to which they have no right, upon a simple certificate unlawfully and unadvisedly issued.

Justice Lake concurring in that conclusion, the judgment of the Court below is affirmed.

MASON, Ch. J., dissenting.

The question which must, in my opinion, determine this controversy, is, Were the lands in question reserved from sale by any or all of the several acts of Congress in relation thereto? If they were so reserved, the plaintiff cannot recover; and, if they were not, the plaintiff's grantees might legally enter the same, and their title by purchase is good until the contract of purchase from the government is legally set aside or annulled.

The first question depends entirely upon the construction of certain acts of Congress; and it may be well to advert for a moment to some of the rules and principles governing the interpretation of statutes. The end and aim of all interpretations or constructions is to ascertain the will or intention of the lawgiver. In order to find this intention, we must look first to the words of the statute. If these are clear and explicit, and convey no doubtful meaning, then there is no room for interpretation. Where there is no ambiguity, there can be no construction. It is not admissible to search for occult meanings when the words themselves are perspicuous and unambiguous; but when the words of a particular clause of a statute are ambiguous, or when, taken literally, they would plainly contradict other clauses of the same statute, or lead to some manifest absurdity, or to some consequences which we see plainly could not have been intended, or to result manifestly against the general term, scope, and purpose of the law, then we may apply the rules of construction to ascertain the meaning and intent of the lawgiver, and bring the whole statute into harmony if possible.

These principles being universally received by courts and jurists, I cite no authorities to sustain them. Keeping them distinctly in mind, let us proceed to consider

the statutes of Congress bearing upon this case, and the saline lands in controversy.

The question of reservation turns mainly, but not entirely, upon the construction of the fourth section of the Act of 1854. In my opinion, the eleventh section of the Act of 1864, admitting Nebraska into the Union, has a most important bearing on the question at issue, which will hereafter be considered.

But let us first consider the fourth section of the Act of 1854. That section occurs in an act providing for the disposition of the public lands in New Mexico, Kansas, and Nebraska. In one respect, the act under consideration is peculiar. It is really two distinct acts in one. From the first to the tenth section, the act seems to be devoted entirely to the public lands of New Mexico. At the tenth section, a new act commenced making exclusive provisions for public lands of Kansas and Nebraska. Whoever shall read this statute, will see, that although it purports to be, and is, one statute in form, yet in fact and in substance it contains two several and distinct laws, — one wholly applicable to New Mexico, the other entirely devoted to Kansas and Nebraska. It is in the part of this statute applicable to New Mexico that the fourth section occurs. The material clause of that section is as follows: "None of the provisions of this act shall extend to mineral or school lands, saline, military, or other reservations, or lands settled on or occupied for the purpose of trade and commerce, and not for agriculture."

Now, it is contended that these words must be taken literally, and that they apply to the whole statute, as well to the provisions going before the fourth section as to those which follow it, as well to the provisions of the statute relating to the public lands of Nebraska as to those which have reference to the public lands of New Mexico.

Here it is inferred that the saline lands of Nebraska were, by the terms of this fourth section, reserved from sale; it being expressly provided in the part of the statute relating to the lands of Kansas and Nebraska, that the provisions should be authorized to cause the surveyed lands of those Territories to be exposed to sale from time to time, in the same manner, and upon the same terms and conditions, as the other public lands of the United States. It seems to me quite impossible to give to the fourth section the construction suggested and contended for by the defendants, because it will be presently shown conclusively that such a construction would make the act plainly contradict itself. It would be absurd to say literally that none of the provisions of this act extend to school lands, because the fifth and sixth sections which immediately follow provide in express terms that sections 16 and 36 in each township in said Territory shall be reserved for the purpose of being applied to schools in said Territory, and that a quantity of lands equal to two townships shall be reserved for the establishment of a university in said Territory. Giving the act the literal construction claimed for it by the defendants, and put upon it by the Court below, it is made to contradict itself, since some of its express conditions so extend to school lands; whereas the terms of the fourth section, taken literally, declare that some of its provisions shall extend to school lands, &c. Hence we have the right to infer and conclude that the construction insisted upon by the defendants is a false interpretation of the fourth section, and that those who framed that section did not intend to apply its terms to the subsequent sections of the act. To my mind it is perfectly clear that the framers of the act intended the fourth section to apply to what immediately preceded it; that is to say, that none of the foregoing provisions of this act shall extend to mineral or

school lands, salines, &c. The second and third sections of the Act of 1854 provide for donations of land to the amount of a hundred and sixty acres in the Territory of New Mexico, on condition of actual settlement and improvement upon the same. In this the manifest purpose of Congress is obvious. It was to invite and tempt agricultural settlers into a far-distant, sparsely-populated, and sterile Territory. No donations were necessary to induce the enterprising miner or salt-maker to occupy and develop the invaluable saline or mineral lands of the Territory. Hence Congress did not intend that that class of emigrants should have the benefit of the donation clause: therefore the fourth section, — "none of the provisions of this act shall extend to mineral, school, or saline lands, or to military or other reservations."

Can any one doubt what was in the mind of the framers of this statute when the fourth section was drawn? Their minds were then upon the provisions which had gone before, not those which were yet to follow the fourth section.

It was the manifest intention of Congress to protect the mineral, school, saline, and other reserved lands of New Mexico, by express terms, from the operation of the donation clause which preceded the fourth section. But for this provision of the fourth section, the invaluable mineral lands of that Territory might have been given away without promoting the real object of Congress in the donation clause; which was, to encourage actual settlement and improvement by agricultural emigrants. Could it possibly have been the intention of Congress, by applying this fourth section to all subsequent provisions of the act, to make a general reservation of all mineral, school, and saline lands in New Mexico, Kansas, and Nebraska? This is exactly what the defendants contend for, and what was ruled in the Court below. The defendants

contend, that by applying the fourth section, not to what preceded it in the act, but to all the other provisions of the act, Congress intended to reserve from sale all mineral lands, all school lands, and all saline lands, in the three Territories referred to. Now, if this be so as to New Mexico, why did Congress, in the next section of the act, expressly reserve from sale for school-purposes the sixteenth and thirty-sixth sections, and two townships for university-purposes for that Territory? Why, if Congress had already reserved in the fourth section lands for school-purposes, should this language be used by that body in the fifth section? — "Sections 16 and 36 in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory," &c. And why is language of the same import used in the sixth section? Why not say, "The foregoing reservations, or the reservations made in the fourth section, shall consist of the sixteenth and thirty-sixth sections, or a quantity equal to two townships," &c.?

From what is said in the fifth and sixth sections, is it not clear that Congress did not consider the language of the fourth section as providing for a reservation at all, but only as a provision withdrawing all mineral, saline, school lands, &c., in the Territory of New Mexico, from the operations of the donation clause contained in the eighth section of said act? The defendants contend that it was the purpose of the fourth section to reserve from sale the saline, mineral, and school lands of all three Territories, — New Mexico, Kansas, and Nebraska. This could not have been its purpose as to the school lands of New Mexico, since these were expressly reserved by the fifth and sixth sections of the same act, as we have seen.

Nor could it have been the intention of the fourth sec-

tion to reserve from sale the school lands of Kansas and Nebraska, because Congress had already, in the most express and unequivocal manner, reserved from sale the school lands of Kansas and Nebraska. See Act of May, 1854, creating a Territorial government for these Territories, sects. 3 and 16. Now, as these acts were in full force and unrepealed, it would have been a work of supererogation for Congress to provide a second time for the reservation of school lands in these two Territories. Certainly, if the fourth section was intended to work a reservation of saline and mineral lands, it was equally its purpose to reserve the school lands. But we have seen that it was not its purpose to reserve the school lands; and we conclude that it could not have been intended as a provision for the reservation of saline and mineral lands, but simply a prohibition to prevent the occupancy of the mineral, saline, and school lands of New Mexico by settlers, under the donation clause of the act which was contained in the sections preceding the fourth section of the act. The very same argument, by which it is sought to be shown that it was the purpose of the fourth section to operate as a reservation of mineral and saline lands, would also demonstrate that it was intended to work reservation of school lands.

Thus the fourth section provides that none of the provisions of the act shall extend to mineral, school, or saline lands. Then, if none of its provisions extend to these lands, the President, under the last clause of the act giving him the authority to cause the surveyed lands of Kansas and Nebraska to be sold, would have no authority to expose to sale any saline, mineral, or school lands. Nothing whatever is here said about any reservation of lands; but, according to the argument of the defendants and the ruling of the Court below, it is to be inferred, from the fourth section and the last clause

of the act taken together, that Congress intended to prohibit the President from selling the specified classes of lands. The reservation is a matter of inference, not of express provision. But, if Congress in this way intended to restrain the President from selling mineral and saline lands, it is clear that they also intended to provide that he should not expose to sale the school lands of Kansas and Nebraska which had been especially reserved by a previous act.

If, by this circumlocution, it was intended by Congress to reserve the mineral and saline lands from sale, it must have been its purpose to reserve again the school lands which had already been reserved.

How absurd to suppose that the Congress of the United States intended by the fourth section, taken in connection with the last clause of the act, to provide that the President of the United States should not be authorized to expose to sale the school lands of Kansas and Nebraska! Those school lands had been expressly reserved from sale. This reservation placed the school lands beyond the power of sale by the President.

Why, then, provide again that he should not sell them? If it was the purpose of Congress to reserve from sale the saline lands of Kansas and Nebraska, why has not Congress said so in express terms in some one of the various statutes relating to those Territories? Why this circumlocution? Why deem so important a thing to be made out by mere inference drawn from fine, sparse arguments? We have seen, that, in the acts organizing Territorial governments for Kansas and Nebraska, Congress had occasion to legislate, and did in fact legislate, upon the subject of reservations. This subject of reservation in Nebraska was under its consideration. Congress made a reservation of school lands in express and unequivocal terms.

Why, if it was intended by Congress to withhold the saline lands of Nebraska from sale, did not that body then say so in express terms? A few words would have removed all doubt. Why were not these few words uttered? Why did Congress pass in silence the reservation of saline lands while providing for other reservations, leaving the reservation of saline lands in Nebraska to be made out by the conjuration of magic by some astute legal dialectician?

It is remarkable that Congress had, in several prior acts organizing governments for Territories, or providing for the sale of public lands therein, incorporated express provisions reserving the saline lands from sale. Some of these various acts must have been present to the mind of Congress when the statute relating to Kansas and Nebraska was framed and passed. Why, then, did Congress omit from the statute relating to Kansas and Nebraska any express provisions reserving the saline lands in those Territories from sale? The only rational answer is, that Congress did not intend to reserve from sale the saline lands of Kansas and Nebraska, and therefore omitted the provision in question. This conclusion, as to the purpose of Congress in regard to the reservation of the saline lands of Kansas and Nebraska, is rendered very plain and imperative by the proviso to the section of the act admitting those Territories into the Union relating to salt springs. After providing that all salt springs within said State, not exceeding twelve in number, with six sections of lands adjoining, shall be granted to said State, &c., the said lands to be selected by the government thereof, we find the following proviso: "That no salt springs or lands, the right whereof is now vested in any individual or individuals, or which shall hereafter be confirmed or adjudged to any individual or individuals, shall, by this act, be granted to said State."

Now, here is a clear recognition of the fact that individuals might, prior to the passage of these acts, have acquired vested rights to saline lands in Kansas and Nebraska. This proviso speaks, not of mere claims set up or asserted by individuals, but of vested rights acquired by them. Now, if all saline lands had been reserved from sale by previous acts of Congress, how could any vested rights have accrued to individuals in such lands? If the President had sold and patented any reserved lands, his acts in so doing would have been void. The purchaser would have acquired no title; and his entry upon the lands under his void patent would have been a trespass. It would have been absurd for Congress to speak of a right acquired to reserved lands as a vested right; and, even if Congress had been disposed to pass an act for the sale of such trespasses, that body would not have been guilty of the absurdity of calling his claim a vested right.

Suppose the President had sold and conveyed reserved lands out of the sixteenth section: would Congress, if it had made provision for the sale of the purchaser, have called his claim a vested right in the land? This proviso renders it indubitable to my mind that it could not have been the intention of Congress to reserve from sale the saline lands of Kansas and Nebraska. But suppose the saline lands of Kansas and Nebraska had been, in fact, reserved from sale by act of Congress: what then? I insist, that, even in that case, the proviso in question would have been a clear and indubitable confirmation of a title acquired by the purchase and payment of the money to the United States for the land.

If these saline lands were reserved at all, they were of course reserved to the United States: such reservation, if made, was not to any State or Territory, but to the United States. It was, beyond doubt, perfectly

competent for the United States to grant these reserved lands at any time before they became vested in the States to any individual or individuals; and this grant could be made either by an act of Congress directly to the grantee, or by a patent from the President, confirmed and recognized by a subsequent act of Congress. Nor would it be necessary that Congress should, by direct and technical language, confirm a sale and patent title to reserved lands. Any language in an act of Congress subsequent to the sale by the government, and the receipt of the purchase-money, clearly implying a recognition of the purchaser's title, would amount to a confirmation, and render the title perfect against all the world. Now, what do we find the facts to be in the case at bar, assuming, which is not the fact, that the lands in question were reserved? The lands were offered at public sale by the President of the United States, and not sold for want of bidders. They were subsequently entered at private entry by the plaintiff's grantees, and the government received the purchase-money therefor: this was a bargain and sale. Subsequently the government of the United States issued patents for the lands, and forwarded the same to the local land-office for delivery. For some cause, they were not delivered. The President issued patents to be delivered to the purchaser, the plaintiff's grantees. Up to this time, no State or individual had acquired any right to the land in question. What next? Congress, in an act making a donation to the State of Nebraska, not of all the salt lands in the State, but of a certain limited quantity thereof, expressly provided that no salt lands in the State, the right whereof is now vested in any individual or individuals, shall by this act be granted to said State. To what lands, the right whereof was then vested in individuals, could Congress probably

have referred, except to such as the President had sold and received the purchase-price thereof, and patented to individuals? Who could probably have had a greater claim upon the equitable consideration of Congress than the individual who had purchased the lands from the Executive, and paid his money into the public treasury for it? How could any individual, in the estimation of Congress, have acquired any vested rights in reserved lands, except by purchase from the government or a patent from the President?

Congress did then, beyond doubt, recognize the title acquired by the plaintiffs' grantees to these saline lands in controversy as a vested right; and they, by express provision, refused to grant the same to the State of Nebraska.

If this language does not amount to a confirmation of title in these plaintiffs and their grantees, it is idle and useless to talk of the meaning of words. Who shall take away these vested rights, recognized by Congress, to lands which that body had the power to dispose of at pleasure?

Can this State afford to thus wrong and outrage the humblest of her citizens in his rights of property? I cannot in silence consent that this Court shall lend its sanction to an outrage so palpable and plain to my mind. It is doubtless true, that Congress, when adopting the proviso in question, had in view the fact that some of the purchasers of saline lands may have made valuable improvements, and expended money for manufacturing purposes, and that it would have been an act of the greatest injustice for the government to donate the lands thus held to the State under such circumstances.

It is sufficient to say, that it is plain that Congress did not donate any saline lands to the State to which any

individual or individuals had acquired a vested right. It will not be denied that these plaintiffs and their grantees had acquired a vested right in these lands by the payment of the purchase-money and the contract of bargain and sale.

The only question which remains to be considered is the effect of the attempted cancellation of the certificate of purchase issued to plaintiffs' grantees, and the refusal of the government officers to deliver the patent for these lands.

Groven v. *Hill*, 9 *Mo.*, 324. The facts of that case were as follows: It was an action of ejectment, brought by Hill, the defendant in error, to recover the possession of a tract of land in Montgomery County. The declaration contains two counts. In the first place, the plaintiff claimed the east half of the north-west quarter of section 32, township 47, range 5; and in the second count he claimed forty acres, part of the eighty-acre tract in the first count mentioned. The defendants pleaded the general issue, and also the plea of former recovery. To the plea of former recovery the plaintiff replied *nul tiel* record. Upon the trial of the issues, the defendant, to support the plea of former recovery, offered in evidence the record of a former suit between the same parties, concerning the forty-acre tract mentioned in the second count of the declaration; which record was rejected. Upon the general issue, the plaintiff offered in evidence the receiver's receipt and usual certificate of entry for the east half of the north-west quarter of section 32, township 47, range 5. The defendant then submitted proof, showing, that on the 1st of February, 1833, he sent an agent to St. Louis to enter the forty-acre tract described in the plaintiff's declaration; that said agent applied to enter said tract, but was informed that it

could not be entered, as there was at that time a vacancy in the office of receiver, but that he might leave his money with him until a receiver was appointed. This was accordingly done. During the month of August following, hearing of the appointment of a receiver, the defendant again sent his agent to St. Louis for the purpose of entering the land; but it was discovered that the plaintiff had in the mean time entered it. The register, however, informed the defendant's agent that he would write to the Commissioner of the General Land-Office, and have Hill's entry cancelled. A correspondence between the said commissioner and the officers at St. Louis was then read in evidence, from which it appeared that the commissioner had in fact vacated and cancelled Hill's entry, and directed the Land-Office to allow Groven to enter the land, and ordered Hill's entry to be repaid. The money was tendered to Hill, but declined. Groven's certificate of entry was dated Aug. 16, 1833. A jury was waived, and cause tried before the Court, and issues found for Hill. There was a motion for a new trial, which was overruled. Hill, the defendant, held a cancelled certificate of entry of prior date to the uncancelled certificate of entry held by Groven for the same land. The Court say the question is narrowed down to the relative value of an entry made in March, 1833, and a subsequent entry of the same lands in the following August; no patent being issued in either case, and there being no imputation of fraud in either case. Both titles being of equal dignity, the one prior in time must prevail. As to the proceedings at Washington subsequent to the sale of the land to Hill, in which it seems the Commissioner of the General Land-Office undertook to cancel and vacate the entry, and authorized a return of the purchase-money, it is not perceived how those proceedings, admitting

them to be properly authenticated and duly authorized by law, could affect the merits of Hill's title. If Hill's entry was illegal or void, that fact would be shown, but must be shown to the satisfaction of the Court in which the action is pending.

It is probably the duty of the commissioner to revise the proceedings of the register and receiver, and vacate entries which may have been illegally made, and thereby arrest the completion of a title originating in fraud, mistake, or violation of law; but, until his action assumes a shape recognized by law, it cannot effect a previous sale. The sale stands for what it is worth at the time it was made, and cannot be vitiated or annulled, cancelled or set aside, by any subsequent *ex-parte* proceedings of the officers, provided it was legal and valid at the time it was made; and of its legality and validity the courts must necessarily be the judges.

In the absence of proof showing any illegality, fraud, or irregularity, the oldest entry must prevail over a subsequent entry. It is not pretended that the lands here in controversy were reserved from sale, or that they were not subject to private entry, or that there was any fraud or illegality in the entry and purchase of the same. If these lands were subject to private entry, I cannot conceive how there could be any fraud in the entry of the same. The government says to all its citizens, "Pay the price fixed by law per acre, and take the lands." The citizen accepts the proposition of the government, pays the price, and takes his certificate of entry. No power short of a judicial proceeding in a court of competent jurisdiction can set aside this contract of bargain and sale. The action of the commissioner in attempting to do so is a mere nullity, and does not affect the legality of the certificate of purchase. See *Stephenson* v. *Smith*, 7 *Mo.*, 610; *Graves's*

Heirs v. *Frulsom*, 16 *Mo.*, 543; *Carman* v. *Johnson*, 29 *Mo.*, 89.

In that class of cases in which the land department of the government is made a special judicial tribunal to determine questions of settlement, inhabitancy, and improvement between conflicting claimants to the same tract of land, the right to review and reverse their judgments is not denied in respect to all questions and matters committed to such judicial discretion.

But in cases like the present, where the land department is invested with no judicial power, but simply acts in an uninterested capacity to receive the purchase-money, issue the certificate of entry, and issue the patent, the purchaser's rights cannot be affected by an arbitrary fiat of cancellation. The Commissioner of the General Land-Office, in this class of cases, has no power to cancel the certificate of entry; and his attempt to do so is a nullity.

In the case of *Smiley* v. *Sampson*, determined in this Court, and reported in 1 *Nebraska*, the question under consideration being, whether the Act of Congress of March 3, 1843, prohibited a second filing on unoffered lands, the Secretary of the Interior having held that it did, and for that reason alone rejected Smiley's filing his pre-emption claim to the land, this Court said, "This is a question of law upon which we are bound by no opinion of the officers. Our inquiries are independent of such opinion, except as the reason assigned by the secretary and his high official position entitle it to respect. And the Court further say, the honorable secretary was clearly wrong in holding that Smiley exhausted his right under the pre-emption law, when, in 1857, he filed on one piece of land; and that, having withdrawn that statement, 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." Again: in the same case the Court say, "It is a well-established principle, that when an individual in the prosecution of a right does every thing that the law requires of him to do, and he fails to attain his right by the misconduct or the unlawful act or neglect of a public officer, the law will protect him;" and they cite, in support of this proposition, *Lytle* v. *Arkansas*, 9 *How.*

What are the facts presented in the case at bar? The commissioner undertook to cancel the entry of the lands in controversy. If they were not subject to private entry, if they had been reserved, the purchaser would acquire no right to the land by his entry; and the land department might rightfully treat the entry as a nullity, — as void, and of no effect. If the lands in controversy were subject to sale and private entry, the purchaser, by the payment of the money and the issuance of the certificate of entry, acquired an equitable title to the land, and a right to the patent. The patents were issued by the government, as this record shows, and forwarded to the local land-office for delivery, but were not delivered. The effect of our statute making the certificate of entry, or the usual duplicate receipt of the receiver of any land-office, or if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, proof of a title equivalent to a patent against all but the holder of an actual patent, is to permit a recovery in ejectment in this class of cases upon an equitable title. The holder of such a certificate has only an equitable title. Until the patent issues, the legal title is in the government. These plaintiffs, then, had the equitable title to these lands, evidenced by the usual duplicate receipt of the receiver of the land-office.

The plat-books showed a cancellation of this receipt. Was this act of cancellation authorized by law? Was it a legal act, or an act unauthorized by law, and void? The plaintiffs' grantees were purchasers from the government for value. I do not think the fiat of a mere government official ought to be accepted by the courts as a sufficient reason for annulling a contract, even when the State of Nebraska is to be benefited thereby, and the wrong thus done was to one of the humblest of her citizens. A mere subordinate officer ought not to be allowed to place himself above the law. I know of no way of annulling contracts but by consent of parties, or by judicial proceedings for that purpose. The act of the land department in cancelling the entry of these lands, being unauthorized and illegal, did not take away the legal effect of the certificate of entry, nor deprive the plaintiffs of any of their vested legal rights. It is a fundamental doctrine of the English common law, and with us an elemental constitutional principle, that no person shall suffer without express law, either in his life, limb, liberty, good name, or *estate*, nor without being first brought to answer by due course of law. If this be so, can the mere fiat, the arbitrary and unauthorized act, of a ministerial officer of the Federal Government, destroy the evidence of title to the estate of the poorest citizen, and thus deprive him of his vested property rights? Where is the due course of law in thus depriving the citizen of his possession of his estate? What disposition is made, in the holding of the majority of this Court, of the undeniable right of the citizen to be held before the evidence of title to his estate is annulled and destroyed, and he by that means deprived of his estate? What becomes of the rule which requires that due proof shall precede conviction, and that private property shall not be taken for public use without com-

pensation, and shall not be taken at all for private use without the consent of the owner?

But in this case at bar we have said the patent had been issued to the plaintiffs' grantees, but not delivered by the ministerial officer of the government. The Court say in 2 *Wallace*, 535, *United States* v. *Stone*, "A patent is the highest evidence of title, and is conclusive as against the government, and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal. In England this was done by *scire facias;* but a bill in chancery is found a more convenient remedy." Again: in *Carrol* v. *Safford*, 3 *How.*, 460, the Court say, "When land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held for it a final certificate, which could no more be cancelled by the United States than a patent. An officer of the land-office is not competent to cancel or annul a certificate of entry or a patent. That is a judicial act, and requires the judgment of a court. Until a patent is issued, the purchaser has not the legal title; but having made his entry of the land, and paid for it, the government can no more dispose of the land to another person than if the patent had been issued. The final certificate obtained on the payment of the money is as binding on the government as the patent. No person can be deprived of life, liberty, or property, without due process of law." The Court say in *Morton* v. *Blankership & Reden*, 5 *Mo.*, 355, "The proceedings by which Hayden's entry was attempted to be vacated were clearly not proceedings authorized by any law of the land, and were, therefore, an attempt to deprive him of his property without due process of law. If his title was defective, this defect under the existing law could be determined only in the courts of justice. The attempt to vacate

Hayden's entry was an attempt to deprive him of his property without the intermittence of the judgment of his peers, contrary to the law of the land, without any due process of law, and in a mode unknown to the land. In attempting to vacate Hayden's entry, the commissioner attempted to do that which he had no power to do; and, as he had no power to vacate, Hayden's entry was not vacated.

I adopt the principle above laid down; and it follows that the act of the Commissioner of the Land-Office in cancelling the entry of these lands was unauthorized, without any legal authority, and a mere nullity, and did not destroy the legal effect of these certificates. The mere fact that these certificates of entry of the lands in question were declared void, and cancelled by the Commissioner of the General Land-Office, did not have the effect of vacating the entry. He is not a judicial officer, and has no power to decree the revision of contracts. His determination in relation to the validity of the sale of these lands concluded no one in his rights, and did not destroy the legal effect of the certificate of the Receiver of the General Land-Office. They should then be given the effect which the statute-law of our State has declared they shall have. If the rule is established, that the commissioner may, by his own unauthorized fiat, cancel certificates of entry and patents at any time before the delivery of the patent, then indeed the citizen will be deprived of his property without due process of law, and will hold his possessions, not by law, but by the grace of the Commissioner of the General Land-Office.

The record shows errors in the admission of evidence which was objected to by the plaintiffs, and exceptions noted to the same. It would follow, from the views here expressed, that the admission of the *ex-parte* proceed-

ings had before the commissioner was error, as well as the report of the sub-agent of the government in respect to these lands; but it is not necessary to consider these questions. The judgment of the Court below should be reversed, and judgment entered here for the plaintiffs.

APPENDIX,

CONTAINING THE

DECISIONS OF THE UNITED-STATES SUPREME COURT

UPON

QUESTIONS OF LOCAL INTEREST IN THIS STATE.

Myers v. Croft.

This action, brought in the United-States Circuit Court for Nebraska, was an ejectment, upon the trial of which it appeared that one Frailey pre-empted the land, and conveyed it to the Sulphur-Springs Land Company before the patent issued. After the patent issued, Frailey conveyed the land to the plaintiff. The case is reported in 13 *Wallace*, 291. It was argued by *H. Cobb* and *L. Douglas*, for Myers; *Redick & Briggs*, for Croft.

Mr. Justice Davis delivered the opinion of the Court.

In relation to the first objection, — that the Sulphur-Springs Land Company was not a competent grantee to receive the title, — it is sufficient to say, in the absence of any proof whatever on the subject, that it will be presumed the Land Company was capable in law to take a conveyance of real estate. Besides, neither Frailey, who made the deed, nor Myers, who claims under him, is in a position to question the capacity of the company to take the title after it has paid to Frailey full value for the property. *Smith* v. *Sheeley*, 12 *Wallace*, 538.

The other objection is of a more serious character, and depends for its solution upon the construction to be given the last clause of the twelfth section of the Act of Congress of Sept. 4, 1841. The act itself is one of a series of pre-emption laws, conferring upon the actual settler upon a quarter-section of public land the privilege (enjoyed by no one else) of purchasing it on complying with certain prescribed conditions. It had been the well-defined policy of Congress, in passing these laws, not to allow their benefit to inure to the profit of land speculators; but this wise policy was often defeated. Experience had proved that designing persons, being unable to puchase valuable lands, on account of their withdrawal from sale, would procure middle-men to occupy them temporarily, with indifferent improvements,

under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done, and the speculation accomplished, the lands were abandoned.

This was felt to be a serious evil; and Congress, in the law under consideration, undertook to remedy it, by requiring the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation, but in good faith, to appropriate it to his own use. In case of false swearing, the pre-emptor was subject to a prosecution for perjury, and forfeited the money he had paid for the land; and any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of *bona-fide* purchasers for a valuable consideration. It is contended by the plaintiff in error that Congress went farther in this direction, and imposed also a restriction upon the power of alienation *after* the entry; and the last clause in the twelfth section of the act is cited to support the position.

This section, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "And all assignments and transfers of the right hereby secured, prior to the issuing of the patent, shall be null and void."

The inquiry is, What did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he obtained his patent? or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go farther: this was the right to pre-empt a quarter-section of land, by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and, independently of the legislation of Congress, assignable. *Thredgill* v. *Pintard*, 12

Howard, 24. The object of Congress was attained when the pre-emptor went with clean hands to the land-office, and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue, in the usual course of business, in the General Land-Office, until several years after the certificate of entry is given; and equally well known that nearly all the valuable lands in the new States admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts, we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners until the government should choose to issue the patent.

If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject.

Johnson, Plaintiff in Error, v. Towsley.

This case, reported in 1 *Nebraska*, 95, was carried by writ of error to the United-States Supreme Court. The case of *Smiley* v. *Sampson*, 1 *Nebraska*, 59, was also carried to that Court. The former is reported in 13 *Wallace*, 72; and the latter, *id.*, 91.

Mr. Justice MILLER delivered the opinion of the Court.

The record before us is brought here by a writ of error to the Supreme Court of the State of Nebraska, for the purpose of revising a judgment of that Court affirming a decree in chancery of one of the District Courts of that State.

The plaintiff in error, Johnson, having secured from the United States a patent for eighty acres of land, the subject of this controversy, a suit was brought in the proper courts of Nebraska by Towsley, the defendant in error, to compel a conveyance of the title thus held, on the ground, that, in equity, he was entitled to it; and the Nebraska courts decreed as prayed for by him.

The jurisdiction of this Court rests on two grounds, found in the twenty-fifth section of the Judiciary Act, or perhaps we should rather say in the second section of the Act of Feb. 5, 1867, which seems to be a substitute for the twenty-fifth section of the Act of 1789, so far as it covers the same ground.

The defendant in error relied on his patent as conclusive of his right to the land, as an authority emanating from the United States, which was decided against him by the State Court; and he relied upon certain acts of Congress as making good his title; and the decision of the State courts was against the right and title set up by him under these statutes.

Undoubtedly the case is fairly within one or both of these clauses of the Act of 1867; and the conclusiveness of the patent, and the right of the plaintiff in error claimed under the statutes, must be considered.

JOHNSON, PLAINTIFF IN ERROR, *v.* TOWSLEY.

The contest arises out of rival claims to the right of pre-emption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the Commissioner of the Land-Office, their action was affirmed: but, on a further appeal to the Secretary of the Interior, the action of these officers was reversed on a construction of an act of Congress, in which the secretary differed from them; and under that decision the patent was issued to Johnson.

It will be seen, by this short statement of the case, that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which were passed upon by the register and receiver, by the commissioner, and by the Secretary of the Interior; and we are met at the threshold of this investigation with the proposition, that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties, not only in the land department, but in the courts and everywhere else.

This proposition is not a new one in this Court in this class of cases; but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fulness of argument which it has not perhaps before received, and with reference to statutes not heretofore considered by the Court, we deem the occasion an appropriate one to re-examine the whole subject.

The statutory provision referred to is the tenth section of the Act of June 12, 1843 (11 *U. S. Statutes*, 326), which declares that the eleventh section of the general pre-emption law of 1841 shall "be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land-Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

The finality here spoken of applies in terms to the decision of the commissioner, and can only be supposed to attach to that made by the secretary by some process of reasoning, which implies the absurdity of making the decision, on appeal to the secretary, less conclusive than that made by the inferior officer.

But the section under consideration is only one of several enactments concerning the relative duties, power, and authority of the executive departments over the subject of the disposition of the public lands; and a brief reference to some of them will, we think, show what was intended by this amendment.

By the first section of the act to re-organize the General Land-Office, approved July 4, 1836 (5 *U. S. Statutes*, 107), it was enacted, that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands, . . . and the issuing of patents for all grants of land, under the authority of the United States, shall be subject to the supervision and control of the Commissioner of the General Land-Office, under the direction of the President of the United States. In the case of *Barnard's Heirs* v. *Ashley's Heirs* (18 *How.*, 45), it was held that this authorized the commissioner to entertain appeals from the decisions of the register and receiver in regard to pre-emption claims; and it is obvious that the direct control of the President was contemplated whenever it might be invoked. Afterward, when the Act of Sept. 4, 1841, was passed, which so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights, the eleventh section provided that all questions as to the right of pre-emption, arising between different settlers, should 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 Treasury of the United States.

This provision, in the class of cases to which it referred, superseded the functions of the Commissioner of the Land-Office, as revising officer to the register and receiver, and, so

far as the Act of 1836 associated the President with the commissioner, superseded his supervisory functions also. It left the right of appeal from the register and receiver to the Secretary of the Treasury direct as the head of the department. The eleventh section of the Act of 1843, so much relied upon by plaintiff in error, the operative language of which we have quoted, was clearly intended to remedy this defect or oversight, and to restore to the commissioner his rightful control over the matters which belonged to his bureau. In the use of the word *final*, we think nothing more was intended than to say, that with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry in that department. But we do not see, in the language used in this connection, any intention to give to the final decision of the Department of the Interior, to which the control of the land system of the government had been transferred, any more conclusive effect than what belonged to it without its aid.

But, while we find no support to the proposition of the counsel for plaintiff in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine, that, when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others.

That the action of the land-office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand, there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and execu-

tive action, however solemn the form which the result of that action may assume, when it invades private rights; and, by virtue of this power, the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land-office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value; and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to; and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land-office.

It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it: but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party; and, if the holder of the first patent refuses to surrender it, they issue a second. In such a case as this, have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land-officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights? Such is the case of *Stark* v. *Starr*, 6 *Wallace*, 402, in which the patent was issued to one party one day, and to the other the day after, for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined, except by a court of equity? Which patent shall prevail? and what conclusiveness or inflexible finality can be

attached to a tribunal whose acts are in their nature so inconclusive? So also the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land-office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity as a ground of interference in such cases, the legal title has passed from the United States to one party, when in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, "a court of equity will," in the language of this Court in the case of *Stark* v. *Starr*, just cited, "convert him into a trustee of the true owner, and compel him to convey the legal title."

In numerous cases this has been announced to be the settled doctrine of this Court in reference to the action of the land-officers. *Lytle* v. *Arkansas*, 22 *How.*, 192; *Garland* v. *Wynn*, 20 *How.*, 8; *Lindsey* v. *Hawes*, 2 *Black*, 559.

Not only has it been found necessary in the interest of justice to hold this doctrine in regard to the decisions of the land-officers of the United States, but it has been found equally necessary in the States which have had a system of land sales. Numerous cases are found in the courts of Kentucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title, instead of the elder patent, by an inquiry into the priority of location or some other equitable matter; or have compelled the holder of the title under the patent to convey, in whole or in part, to some persons whose claim rested on matters wholly anterior to the issuing of the patent.

There is also a similar course of adjudication in the State of

Pennsylvania; and we doubt not they may be found in other States. Several of the Kentucky cases have come to this Court, where the principle has been uniformly upheld. *Finly* v. *Williams*, 9 *Cranch*, 164; *McArthur* v. *Williams*, 4 *Wheaton*, 488; *Hunt* v. *Wickliffe*, 2 *Peters*, 201; *Green* v. *Liter*, 8 *Cranch*, 229.

It is said, however, that the present case does not come within any of the adjudicated cases on this subject; that in all of them there has been some element of fraud or mistake on which the cases rested. Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction; for this Court does not assert, and never has asserted, that all the matters passed upon by the land-office are open to review in the courts. On the contrary, it is fully conceded, that when those officers decide controverted questions of fact, in the absence of fraud or impositions or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede, that when, in the application of the facts as found by them, they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this Court decided in the case of *Batchelder* v. *Minnesota*, 1 *Wallace*, 109; and in the case of *Silver* v. *Ladd*, 7 *Wallace*, 219. In this latter case a certificate under the Oregon donation-law, given by the register and receiver, was set aside by the commissioner, and his action approved by the secretary; and the action of each of these officers was based on a different construction of the act of Congress. This Court held that the register and receiver were right; that the certificate conferred a valid claim to the land; and that the patent issued to another party by reason of this mistake must inure to the benefit of the party who had the prior and better right.

This Court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government; and, in reference to the pro-

ceedings before the officers intrusted with the charge of selling the public lands, it has frequently and firmly refused to interfere with them in the discharge of their duties, either by *mandamus* or injunction, so long as the title remained in the United States, and the matter was rightfully before those officers for decision.

On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another; and we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

In the case now under consideration, the complainant made his declaratory statement, and proved his settlement to the satisfaction of the register and receiver, and they gave him a patent certificate. The defendant, Johnson, contested complainant's right before these officers, and asserted that he was entitled to the pre-emption right for the same land; and, when they decided in favor of Towsley, he appealed to the commissioner. This officer approved the decision of the register and receiver, and an appeal was taken by Johnson to the Secretary of the Interior. The secretary, or rather the assistant secretary, as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption for another tract of land, which he had voluntarily abandoned; and it is clear, that, but for his construction of the statute on that subject, Towsley would have received the patent which was awarded to Johnson.

We must therefore inquire whether the statute, rightly construed, defeated Towsley's otherwise perfect right to the patent; and this inquiry requires consideration of some of the features of our system of land-sales. One of these is, that after the

surveys are made in any given locality, so that the different tracts can be identified by the descriptions used in these surveys, they are not subject to sale by private entry at the land-office until there has been a public auction, at which the lands so surveyed are offered to the highest bidder. The time and place of this sale, and the lands offered for sale, are made known by a proclamation of the President. The object of this public sale, and of withholding the lands from private entry, is undoubtedly to secure to the government the benefit of competition in bidding for these parcels of land, supposed to be worth more than the price fixed by Congress, at which they may afterward be sold at private entry; but as the tide of emigration was greatly in advance of these public sales, and indeed of the surveys, it was found that settlers who had made meritorious improvements were unable to secure the land on which they had settled without bidding at public auction against parties who took into consideration the value of the improvments so made, and who would get them by the purchase.

To remedy this evil, several of the earlier pre-emption laws were passed; and they only included settlements made prior to the passage of those laws.

The Act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed, but not open to private entry, as well as land which could be bought at private sale. It protected settlements already made, and allowed future settlements to be made with a right to pre-emption, which was a new feature in the pre-emption system.

As, however, these settlements might now be made on lands subject to private sale, and the settler was allowed a year in which to make his entry and pay the money, the fifteenth section of the act required the settler on such lands to make a declaratory statement if he intended to claim a right of pre-emption, in which he should declare such intention, and describe the land. This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale for the time allowed the settler to perfect his entry and pay for the land.

But an experience of two years seems to have shown that this privilege of withdrawing particular tracts from private sale was subject to abuse by persons who filed declarations for several tracts, when they could only receive one as a pre-emptor; thus delaying the sales, and preventing others from settling on or buying, with a view to a purchase by themselves or friends when it became convenient to do so.

To remedy this evil, Congress, when it came to legislate again about the right of pre-emption, by the Act of 1843 enacted, by the fourth section, "that where an individual had filed, under the late pre-emption law, his declaration of intention to claim the benefit 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."

As the only declaration of intention required by the Act of 1841 (which is undoubtedly the one referred to as the late pre-emption law) was, both by its express terms and by the policy which dictated it, confined to pre-emptions of land subject to private entry, we entertain no doubt that this section was limited, in like manner, to that class of lands. As to lands not subject to private sale, no declaration of intention was required by the Act of 1841; and the reference to such a declaration in the Act of 1843 would be without any thing on which to base it.

This view is made still clearer by the fact that the next succeeding section of the Act of 1843 does introduce distinctly, as a new and separate provision, the requirement that settlers on the land *not yet proclaimed for sale* are required to make a similar declaration, *within three months from the time of settlement*, on pain of forfeiting their pre-emption right in favor of the next actual settler, but making no provision whatever for the case of two declarations by the same party on different tracts of land. We are therefore of opinion, that the effect of a double declaration in defeating the right of the pre-emptor to the tract which he finally claims to purchase is limited to lands subject at the time to private sale. The land in controversy in this suit was never subject to private entry;

and the application of the principle by the secretary to Towsley's case was, as we think, a misconstruction of the law, through which his right was denied him.

But it is argued, that, if the pre-emption claim of Towsley was not governed by the fourth section of the Act of 1843, it certainly was by the fifth section of that act; and, as he did not file his declaration of intention within three months from the time of settlement, his claim was forfeited, and gave him no right.

The record shows undoubtedly that his settlement commenced about eight months before he filed his declaration; and it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section. It declares, that, where the party fails to make the declaration within the three months, his claim is to be forfeited, and the tract awarded to the next settler in order of time on the same tract who shall have given such notice, and otherwise complied with the conditions of the law. The words, "shall have given such notice," presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement, or has given notice of such intention, then no one has been injured by the delay beyond three months; and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration, or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration; and for all other settlers, by saying, if this is not done within three months, any one else who has settled on it within that time, or at any time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or

made a settlement, we think his right was not barred by that section, under a sound construction of its meaning.

There are other questions presented in the brief, such as supposed defects in the bill, and whether, on the evidence, Towsley made the necessary settlement and owned the improvements, which are not within the cognizance of this Court. It is also argued that Towsley forfeited his right by entering into contracts by which his title should inure to the benefit of others than himself, in violation of the thirteenth section of the Act of 1841; but, as no such matter is put in issue in the pleadings, we cannot consider it here.

We are of opinion that the decree of the Supreme Court of Nebraska must be affirmed.

Mr. Justice CLIFFORD dissenting.

I dissent from the judgment of the Court in this case, upon the ground that the case is controlled by the Act of Congress which provides that the decision of the Commissioner of the General Land-Office shall be final, unless an appeal is taken to the Secretary of the Interior. In my judgment, the decree of the commissioner is final if no appeal is taken; and, in case of appeal, that the decision of the appellate tribunal created by the Act of Congress is equally final and conclusive, except in cases of fraud or mistake not known at the time of the investigation by the land department.

The Chicago, Burlington, and Quincy Railroad Company v. The County of Otoe.

This was an action brought in the United-States Circuit Court for the District of Nebraska upon certain coupons detached from bonds issued by the defendant to the Burlington and Missouri-River Railroad Company, by which they were transferred to the plaintiffs. On the trial the judges differed in opinion, and certified the points to the Supreme Court, where it was argued by *J. M. Woolworth* for the plaintiffs, and *Gilbert B. Scofield* for the defendants.

Mr. Justice STRONG delivered the opinion of the Court.

The first question upon which the judges of the Circuit Court divided was, whether the act of the legislature of Nebraska, approved Feb. 15, 1869, authorizing the county of Otoe to issue bonds in aid of a railroad outside of the State, conflicts with the constitution of that State. The record contains an agreed statement of facts, exhibiting, *inter alia*, the act, the constitutionality of which is in controversy. Its preamble recited that the qualified electors of Otoe County had, at an election held for the purpose, authorized the commissioners of the county to issue its bonds to any railroad in Fremont County, Iowa, that would secure to Nebraska City an eastern railroad connection, to the amount of two hundred thousand dollars; and its first section, therefore, enacted that the said commissioners should be authorized to issue one hundred and fifty thousand dollars of the bonds aforesaid to the Burlington and Missouri-River Railroad Company, or any other railroad company that would secure to Nebraska City a direct eastern railroad connection, as a donation to said railroad company, on such terms and conditions as might be imposed by said county commissioners.

The second section enacted that said bonds, when so issued,

should be binding obligations on said county, and be governed by the terms and conditions of an act entitled "An Act to enable counties, cities, and precincts to borrow money or to issue bonds to aid in the construction or completion of works of internal improvements in the State, and to legalize bonds already issued for such purpose," approved February, A.D. 1869. Under this act, the bonds, for the interest upon which this suit was brought, were issued by the commissioners of the county to the Burlington and Missouri-River Railroad Company; and by that company they were negotiated to the plaintiffs.

Unless we close our eyes to what has again and again been decided by this Court, and by the highest courts of most of the States, it would be difficult to discover any sufficient reason for holding that this act was transgressive of the power vested by the Constitution of the State in the legislature. That the legislative power of the State has been conferred generally upon the legislature is not denied; and that all such power may be exercised by that body, except so far as it is expressly withheld, is a proposition which admits of no doubt. It is true, that, in construing the Federal Constitution, Congress must be held to have only those powers which are granted expressly or by necessary implication; but the opposite rule is the one to be applied to the construction of a State constitution. The legislature of a State may exercise all powers which are properly legislative, unless they are forbidden by the State or National Constitution. This is a principle that has never been called in question. If, then, the act we are considering was legislative in its character, it is incumbent upon those who deny its validity to show some prohibition in the constitution of the State against such legislation. And that it was an exercise of legislative power is not difficult to maintain. No one questions that the establishment and maintenance of highways, and the opening facilities for access to markets, are within the province of every State legislature, upon which has been conferred general legislative power.

These things are necessarily done by law. The State may establish highways or avenues to markets by its own direct action; or it may empower or direct one of its municipal divisions to establish them, or to assist in their construction. Indeed, it has been by such action that most of the highways of the country have come into existence. They owe their being, either to some general enactment of a State legislature, or to some law that authorized a municipal division of the State to construct and maintain them at its own expense. They are the creatures of law, whether they are common county or township roads, or turnpikes, or canals, or railways. And that authority given to a municipal corporation to aid in the construction of a turnpike, canal, or railroad, is a legitimate exercise of legislative power, unless the power be expressly denied, is not only plain in reason, but it is established by a number and weight of authorities beyond what can be adduced in support of almost any other legal proposition. The highest courts of the States have affirmed it in nearly a hundred decisions; and this Court has asserted the same doctrine nearly a score of times. It is no longer open to debate.

Then what is there in the constitution of the State of Nebraska which denies this power to the legislature? There is no direct or express prohibition. General legislative power is vested in the legislature. None was reserved to the people of the State. There are, however, certain restrictions that may be noticed. The constitution declares that "the property of no person shall be taken for public use without just compensation;" and it is earnestly contended that this prohibits the legislature from passing any laws in aid of the construction of a railroad that may result in the imposition of taxes. It is said that the Act of Feb. 15, 1869, is taking private property for a public use without compensation. It would be a sufficient answer to this to say that a similar provision is found in the constitution of almost every State, the legislature of which has been held authorized to legalize municipal subscriptions

in aid of railroad companies. It has never been held to prohibit such legislation as we are now considering. But the clause prohibiting taking private property for public use without just compensation has no reference to taxation: if it has, then all taxation is forbidden; for "just compensation" means pecuniary recompense to the person whose property is taken equivalent in value to the property. If a county is authorized to build a court-house or a jail, and to impose taxes to defray the cost, private property is as truly taken for public use without compensation as it is when the county is authorized to build a railroad or a turnpike, or to aid in the construction, and to levy taxes for the expenditure. But it is taken in neither case in the constitutional sense. The restriction is upon the right of eminent domain, not upon the right of taxation.

We find nothing else in the constitution of the State that can, with any reason, be claimed to restrain the power of the legislature to authorize municipal aid to railroads or other highways. There is a clause that declares "the credit of the State shall never be given to, or bound in aid of, any individual association or corporation;" and another that ordains that the debts of the State shall never, in the aggregate, exceed fifty thousand dollars: but these refer only to State action and State liability. *Patterson* v. *Board of Supervisors of Yuba*, 13 *Cal.*, 175.

In view, therefore, of the organic law of the State, and of the decisions which have been made in regard to other similar constitutional provisions both in the highest courts of the States and in this court, we think it cannot be doubted that the legislature of Nebraska had authority to authorize its municipal divisions to incur indebtedness and to impose taxation in aid of railroad companies.

It is urged, however, against the validity of the act now under consideration, that it authorized a donation of the county bonds to the railroad company; and it is insisted, that, if even the legislature could empower the county to subscribe to

the stock of such a corporation, it could not constitutionally authorize a donation. Yet there is no solid ground of distinction between a subscription to stock and an appropriation of money or credit. Both are for the purpose of aiding in the construction of the road; both are aimed at the same object, securing a public advantage, obtaining a highway or an avenue to the markets of the country; both may be equally burdensome to the tax-payers of the county. The stock subscribed for may be worthless, and known to be so. That the legislature of the State might have granted aid directly to any railroad company by actual donation of money from its treasury, will not be controverted. No one questions, that, in the absence of some constitutional inhibition, the power of a State to appropriate its money, however raised, is limited only by the sense of justice and by the sound discretion of its legislature. If the power to tax be unrestricted, the power to appropriate the taxes is necessarily equally so. Accordingly, nothing has been more common in the State and Federal governments than appropriations of public money raised by taxation to objects in regard to which no legal liability has existed. State legislatures have made donations for numerous purposes wherever, in their judgment, the public well-being required them; and the right to make such gifts has never been seriously questioned. As has been said, the security against abuse of power by a legislature in this direction is found in the wisdom and sense of propriety of its members, and in their responsibility to their constituents. But if a State can directly levy taxes to make donations to improvement companies, or to other objects, which, in the judgment of its legislature, it may be well to aid, it will be found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State, created to carry out its will. When they are authorized or directed to levy a tax, or to appropriate its proceeds, the State, through them, is doing indirectly what it might do

directly. It is true, the burden of the duty may thus rest upon only a single political division; but the legislature has undoubted power to apportion a public burden among all the taxpayers of the State, or among those of a particular section. In its judgment, those of a single section may reap the principal benefit from a proposed expenditure, as from the construction of a road, a bridge, an almshouse, or a hospital. It is not unjust, therefore, that they should alone bear the burden. This subject has been so often discussed, and the principles we have asserted have been so thoroughly vindicated, that it seems to be needless to say more, or even to refer at large to the decisions. A few only are cited. *Blanding* v. *Burr*, 13 *Cal.*, 343; *The Town of Guilford* v. *The Supervisors of Chenango County*, 3 *Kernan*, 149; *Stuart* v. *Supervisors*, 30 *Iowa*, 9; *Augusta Bank* v. *Augusta*, 49 *Maine*, 507; *Railroad Co.* v. *Smith*, *Ill.*, — a case decided by this court, and not reported.

One other objection to the constitutionality of the act is urged: it is, that it authorized aid to a railroad beyond the limits of the county, and outside the State. There is nothing in this objection. It was for the legislature to determine whether the object to be aided was one in which the people of the State had an interest; and it is very obvious that the interests of the people of Otoe County may have been more involved in the construction of a road giving them a connection with an Eastern market than they could be in the construction of any road wholly within the county. But that the objection has no weight may be seen in *Gelpcke* v. *Dubuque*, 1 *Wallace*, 175; *Walker* v. *Cincinnati*, 21 *Ohio*, 14.

We conclude, therefore, that the act of the legislature of Feb. 15, 1869, is not in conflict with the constitution of the State.

The second question upon which the Circuit Court divided was, "whether the county commissioners of Otoe County could, under the Act of Feb. 15, 1869, lawfully issue the bonds from which the coupons in suit were detached, without the proposition to vote the bonds for the purpose indicated, and also a tax

to pay the same being or having been submitted to a vote of the people of the county, as provided by the act of the Territorial legislature of Nebraska, passed Jan. 1, 1861." This question we answer in the affirmative. If the legislature had power to authorize the county officers to extend aid on behalf of the county or State to a railroad company, as we have seen it had, very plainly it could prescribe the mode in which such aid might be extended, as well as the terms and conditions of the extension; and it needed no assistance from a popular vote of the municipality. Such a vote could not have enlarged legislative power. But the Act of 1869 was an unconditional bestowal of authority upon the county commissioners to issue the bonds to the railroad company. It required no precedent action of the voters of the county. It assumed that their assent had been obtained. That, prior to 1869, the sanction of approval by a local popular vote had been required for municipal aid to railroad companies or improvement companies, is quite immaterial. The requisition was but the act of an annual legislature, which any subsequent legislature could abrogate or annul.

It must therefore be certified to the Circuit Court, *first*, that the Act of Feb. 15, 1869, is not unconstitutional; and, *second*, that the county commissioners of Otoe County could lawfully issue the bonds from which the coupons in suit were detached, without any submission to a vote of the people of the county of the proposition to approve the bonds, or a tax for the payment thereof.

Let it be certified accordingly.

MILLER, Justice. — I am requested to state that the Chief Justice, Mr. Justice DAVIS, and myself, dissent from the opinion in this case.

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