REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

JANUARY AND JULY TERMS, 1873 AND 1874.

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COUNSELOR-AT-LAW.

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NEW ASSIGNMENT.

JUDGES

OF

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE,

GEORGE B. LAKE.

ASSOCIATE JUSTICES,

DANIEL GANTT.

SAMUEL MAXWELL.

ATTORNEY GENERAL,

JOSEPH R. WEBSTER.

REPORTER,

LORENZO CROUNSE.

CLERK,

GUY A. BROWN.

PREFACE.

THE general plan adopted by my predecessor has been followed in this volume. The opinions, however, have been collected and arranged under the head of the terms. respectively, at which they were delivered. This arrangement begins with the first term held by the present Justices. In cases where decisions were announced before, but the opinions have been subsequently filed, the opinions are collected in an appendix.

Liberty has been taken to omit portions of the briefs of counsel, where they are quite lengthy—particularly such parts as relate to questions not considered by the court, and some attention has been given to verifying references, to see that the correct volume and page are given.

My time having been mostly engaged in other directions, this volume has mainly been prepared by GUY A. BROWN, ESQ., of Lincoln. His relation to the court for years, and his experience in compiling the General Statutes of Nebraska, have qualified him to bring into the work that perspicuity and accuracy so desirable in the reports of judicial decisions. My labor has been little more than revisory.

L. CROUNSE.

LINCOLN, October, 1874.

SUPREME COURT RULES.

ADOPTED JULY TERM, 1869.

RULE I.

The transcript of all records filed in any case shall be either printed or written in a fair legible handwriting, with marginal reference to each paper or order composing the record. And any record may be stricken from the files for non-compliance. And in no case shall the fees of the clerk be taxed for a transcript of a record not prepared in compliance with this rule.

RULE II.

Before entering upon the argument of any cause, counsel for the respective parties shall furnish to each member of the court, and to the opposing counsel, one copy; and to the clerk of the court for the use of the reporter, three copies of his brief or argument, neatly printed on good quality of paper, with a margin of at least an inch and a half.

RULE III.

Either party to a cause in this court may have the record therein when deemed proper, printed; and the cost thereof, not exceeding ten copies, shall, if the court so order, be taxed in the costs.

RULE IV.

Transcripts of records prepared for the supreme court should be made substantially in the manner following:

.....
.....

Pleas before the District Court of Nebraska, at a term begun and holden in the county of.....on the....day of ....A. D. 18..., before the Hon. J. H. G., Judge of the ....Judicial District of the State of Nebraska.

A. B.....
agt.
C. D.....

Be it remembered, that heretofore, to-wit: on the.... day of.....A. D. 18...., a petition was filed in the office of the clerk of the District Court, in and for the county of....in the words and figures following, to-wit:

[Here insert the petition in full.]

[Proceed in the same manner in relation to whatever paper is filed, such as the original notice, or a petition for attachment, etc.]

If the cause has come from another county by a change of venue, begin as above, "Be it remembered," and state in manner all that was done in the county *from* which the venue was changed.

And afterwards there was filed in the office of the said clerk a notice in the words and figures following, to-wit:

[Here insert the notice in full.]

And afterwards, to-wit: on the.....day of.....A. D. 18...., there was filed in the office of said clerk, an answer in the words and figures following, to-wit:

[Here insert answer in full.]

[Should the clerk doubt what the paper properly is, let him call it a "paper in the words and figures following," etc.]

Where a paper is filed in term time, add the day of the term to the day of the month, as in the next form.

And afterwards, to-wit: on the.....day of....A. D. 18..., it being the.....day of the.....Term of the said

Court, the said A. B. (or plaintiff) filed the following demurrer to the answer of said C. D. (or of the said defendant), to-wit:

[Here insert demurrer in full.]

[If a party files more than one pleading at the same time, they should be numbered in their legal order, as for instance, a demurrer, and answer, and the transcript may say . . . (stating the date) . . . the said C. D. (or defendant) filed his demurrer, and answer, which are filed *de bene esse*, or subject to the rule.]

And now, on this....day of.....A. D. 18..., it being the....day of the said.....term thereof, this cause coming on for hearing on the plaintiff's demurrer to the defendant's answer, [copy the entry of the proceedings of the court, sustaining or overruling the demurrer.]

And afterwards, on the....day of the said....it being the....day of the said term, the said plaintiff filed his replication in the words and figures following, to-wit:

[Here set out replication in full.]

And afterwards, on the same day, the said defendant filed motion and affidavit for a continuance, as follows, to-wit:

[Here set out copy of motion and affidavit.]

And the same being now heard and considered by the court, the said motion is sustained, and it is ordered that this cause be continued until the next term of the court, (at the cost of the defendant.)

In District Court,....County.

A. B........
agt. } Term, A. D. 18 .
C. D... ....

And now, on this....day of....., it being the....day of said term, this cause coming on for trial, came a jury, to-wit:........, ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., ..., twelve good and lawful men, who were sworn well and truly to try the issue between the said parties, and a true verdict to render, according to the law and

evidence given them in court. The jury retired to consider on their verdict, and afterwards, on the same day, the jury returned into court and rendered their verdict, as follows:

[Here insert in full the verdict as rendered.]

(Or if the jury does not return until next day)—

A. B.....
agt.
C. D.....

And now, on this.....day of....., A. D. 18..., the jury in the foregoing cause returned into court and rendered their verdict as follows:

[Here insert in full the verdict as rendered.]

And afterwards, on the.....day of.....A. D. 18..., being the.....day of said term, the plaintiff (or defendant) filed his bill of exceptions in the words and figures following, to-wit:

[Here insert in full the bill of exceptions.]

Now, on this....day of.....A. D. 18..., the plaintiff filed his motion for a new trial, to-wit:

[Here insert in full the motion for a new trial.]

And now, on this.....day of.....A. D. 18..., this cause coming up for hearing on the motion of the plaintiff for a new trial, it is considered by the court that the same be overruled (or, as the case may be.)

Then add final entries of record, comprising final judgment, etc., and certificate of clerk.

NOTE.—The foregoing form is only an example, and is to be varied according to the circumstances. The actual facts of the case will dictate *what* is to be *done*, but in all cases it is to be done substantially in *like manner* with the above, giving the proper order and date of the filing of papers, and incorporating them at the proper dates into the proceedings of the court.

It will be understood that it is not necessary in all instances to send up the *whole* of the record, but the clerk may be guided by the directions of the appellant or plaintiff in error. See also as to transcripts for Supreme Court. *Morgan v. Larsh*, 1 *Neb.*, 361. *McDonald v. Peniston*, 1 *Neb.*, 324. *Smith v. Fife*, 2 *Neb.*, 10.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1873.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.
" DANIEL GANTT, } ASSOCIATE JUSTICES.
" SAMUEL MAXWELL, }

CHARLES HAGENBUCK, PLAINTIFF IN ERROR, V. ALEXANDER REED, TREASURER OF WASHINGTON COUNTY, DEFENDANT IN ERROR.

Taxation: SCHOOL LANDS. Lands donated to this state by the United States for school purposes, and which have been sold on credit, are subject to taxation, although the state has not actually parted with the legal title.

1. Such lands are not exempt from taxation under the provisions of section one of the act providing a system of revenue, approved February 15th, 1869.

2. The right to possess, enjoy, and dispose of such land, which is essential to ownership, is no longer in the state but for the time being in the purchaser.

———: ———. And if the land so taxed was sold at a tax sale, the state would not be estopped from the enforcement of her lien for the purchase price of the land.

Statutes: RULE OF CONSTRUCTION. In the construction of a statute, effect must be given, if possible, to all its several parts. No sentence, clause or word should be rejected as meaningless or superfluous, if it can be avoided; but the subject of the enactment and the language employed, in its plain, ordinary and popular sense, should be taken into account, in order to determine the legislative will.

THIS was a petition in error brought to reverse the judgment of the district court of Washington county.

The legislature having, on the 24th day of June, A. D. 1867, passed an act providing for the sale of school lands donated to the state of Nebraska by the general government, the plaintiff in this action, at the sale of such lands in June, 1869, became the purchaser of the southeast quarter, and the southwest quarter, of section sixteen, township eighteen north, of range ten east of the sixth principal meridian, paying one-tenth of the purchase money, and giving his promissory note payable January 1, 1880, for the balance, with interest payable annually in advance. Being in possession of the lands above mentioned, the same were assessed for taxation in 1871. Plaintiff having failed to pay the taxes so assessed, the defendant, being county treasurer, distrained the property of the plaintiff and advertised it for sale. This action was then brought to enjoin the sale and upon trial thereof, the court below dismissed the same for want of equity. To reverse this judgment the cause was brought to this court.

Carrigan and Osborne, for plaintiff in error.

I. The lands must be the subject of taxation, or the assessment is utterly void, and all subsequent proceedings are illegal. *Blackwell on Tax Titles*, 406, and cases there cited.

II. The lands were school lands, the property of the state, and are, by the provisions of our revenue law,

exempt from taxation, and should be omitted in the lists. *General Statutes* 1873, *section one*, 896.

III. When our statute uses the words "property of the state," it should be construed to extend to lands owned by the state. And where a statute uses the word "owner," it refers to the owner of the legal title, the person owning the fee; so also, where the word "title" is used in a statute, it refers to the legal as well as to the equitable title. Interests are not created by statutes. *Wright v. Bennet*, 3 *Scammon*, 258. *Whiteside Divers* 4 *Scammon*, 336. *Blackwell on Tax Titles*, 421. *Emerson v. The Inhabitants of the county of Washington*, 9 *Maine*, 88.

IV. The legal title to school lands contracted to be sold, remains in the state. *General Statutes* 1873, *section* 14, 994.

V. Lands should be listed in the name of the owner of the fee, in the name of the lessor or mortgagor, and if not so listed, shall be entered by the assessor as unknown. *General Statutes* 1873, *section* 13, 900.

VI. It may be insisted that section two of the revenue act includes this class of lands. But such construction cannot be given it, in connection with the first section exempting lands owned by the state. The word "bought" necessarily implies a sale, and the legal definition of a sale is "a transmutation of property from one person to another for a consideration." 1 *Blackstone Com., Book II*, 446. There is certainly no change of property in this case, and the only proper construction to give the language above cited, is where the state sells, *i. e.* conveys, the property, and relies on the responsibility of the purchaser for payment. It cannot be presumed that the legislature would provide for the taxation of property, when by force of law the taxes would have to be refunded,

which would in some instances be the case if lands of this class were held subject to taxation; certainly the legislature never intended to compel the revenue officers to do that which is useless. Courts will look to the absurd consequences which will follow such a construction of the statute. *The People v. The Canal Commissioners*, 3 *Scammon*, 153.

VII. Courts may give a sensible and reasonable interpretation to legislative expressions which are obscure, but they have no right to distort those which are clear and intelligible. *Pearce v. Atwood*, 13 *Mass.*, 344. The first sub-division of the first section, of the "act to provide a system of revenue," is clear and intelligible, having a fixed legal meaning, and can be construed in no other way than to exempt lands owned by the state from taxation, and so long as the title to the lands remains in the state, the lands cannot be sold for taxes.

VIII. Taxes are made a lien on the lands on which the levy is made. Legislatures never create liens and deny the means of enforcing them.

Ballard and Walton, for defendant in error.

I. The court should presume that the legislature intended the most reasonable and beneficial construction of their acts, where the design of them is not apparent, and such intention should be collected from the whole act. *Inhabitants of Somerset v. Inhabitants of Dighton*, 12 *Mass.*, 383. *Mason v. Finch*, 2 *Scammon*, 224. *Davis v. Haydon*, 3 *Scammon*, 35. *Jackson v. Van Zandt*, 12 *John.*, 175.

II. Where it is apparent that by a particular construction of a statute in a doubtful case, great public interests will be endangered or sacrificed, it ought not to be presumed that such a construction was intended by the leg-

islature. *The People v. Canal Commissioners*, 3 *Scammon*, 153.

LAKE, CH. J.

The only question discussed by counsel at the bar, and the only one passed upon by the district court is, whether school lands, which have been sold on time, under the act relating thereto, approved June 24, 1867, are subject to taxation before the state has actually parted with the legal title.

Were we inclined to be very technical, the case could be disposed of without meeting this question. The fact that the plaintiff has a plain and adequate remedy at law, furnishes a satisfactory answer to the prayer of his petition. In view, however, of the great importance of the question presented for our consideration, we have thought best not to ignore it altogether, but briefly to give our views of the situation of these lands with reference to our revenue laws.

The land in question is a part of section sixteen, donated to the state, by the United States, for school purposes, and is embraced within the provisions of the act "to provide for the registry of school lands, for the control and disposition thereof, and to provide for the safe keeping of the funds derived from the sale and lease of said lands," approved June 24, 1867. Under the authority of this act the land in question was purchased by the plaintiff, on credit

On the part of the plaintiff it is urged that inasmuch as the legal title to this land is still in the state, and must remain there until the purchase money shall have been fully paid, it falls within the operation of the first subdivision of section one of the act to provide a system of revenue, approved February 15, 1869, by which the property of the state, including school lands, is declared to be

exempt from taxation, and therefore that the levy of taxes upon it was without authority and wholly void. We think that this argument and the conclusion reached by counsel, require a construction to be given to the several statutes bearing upon this question which is altogether unwarrantable. Even the act of June, 1867, if alone considered, would hardly justify this conclusion. By section twelve it is provided that "no land shall be *sold* for less than its appraised value;" by section fifteen, that "within three days after the receipt of any purchase money for lands *sold as above* the treasurer shall notify the county clerk, etc.;" and by section sixteen, that "payments for land *sold* under the provisions of this act shall be made as follows; for prairie lands, one-tenth of the price cash in hand, and for other lands, one-half cash in hand, with a promissory note for the remainder to mature on the first day of January, 1880, * * * and in case of non-payment of interest or principal, the land shall be surrendered, with the improvements, to the state." And so on throughout the entire act, the land disposed of under its provisions, is treated as no longer belonging to the state, but to the purchaser at the sale. The right to possess, enjoy and dispose of it, which is essential to ownership, is no longer in the state, but for the time being, at least, in the purchaser. It is true that he may by the terms of said act, in the contingency of non-payment of the purchase money, be required to surrender the land, together with the improvements, to the state, but until then he, and not the state, is to be regarded as the real owner of the land.

By section two of the revenue law, already referred to, it is provided that "all other property," (except that which is specifically exempted by section one) "real and personal, within the state, is subject to taxation; and this section is intended to embrace lands and lots in towns, including lands bought from, or donated by, the United

States, and from this state, whether bought on credit or otherwise." Now to us it seems quite clear that the plaintiff's land is included in this description of property subject to taxation. It had been the property of the state, but at the time the taxes were levied it had been "*bought on credit*" by the plaintiff, who thereby became the owner, not in fee to be sure, but nevertheless the owner in the same sense that he would have been, had his purchase been made from a private person on like terms. The act providing for the sale of school lands being in force at the time of the passage of the revenue law of 1869, it must have been in the contemplation of the legislature, when the latter was framed, as will appear quite evident, from a due consideration of the language just quoted.

No doubt the legislature was well aware of the fact that under the act of 1867, a very large quantity of the state's school lands had been sold, and that in most instances a credit had been given as the statute provides, the state in the meantime retaining the legal title as security for the unpaid purchase money. It therefore seems to us, that if it had been the intention of the legislature to exempt these lands from all the burdens of government, very different language would have been used; but intending the contrary of this, that they should be taxed, and made to bear their just proportion of the expenses of the state, no words more apt than those employed could have been selected to accomplish that object. Should we sanction the construction contended for by the plaintiff in error, what would become of the words "*whether bought on credit or otherwise*" found in section two of the revenue act? To what lands could they possibly refer, if not to such as these? It seems to us, that they must have direct reference to lands in the situation of plaintiff's, or they are without meaning.

We do not conceive that the idea advanced by counsel

upon the argument at the bar, that in the event of a sale of the land for non-payment of taxes, the state would lose the unpaid purchase money, is of any force whatever. It is true the tax deed would run in the name of the state, but she would not thereby be estopped from the enforcement of her lien for the purchase price of the land, as provided in the act above referred to. This contingency has been carefully guarded against, and it is accordingly provided that the purchaser at the tax sale takes the land subject to all *claims, liens, or incumbrances*, which the state may have thereon. *General Statutes* 1873, *Section* 67, 923.

In giving a construction to a statute we must, if possible, give effect to all its several parts. No sentence, clause, or word should be rejected as meaningless or superfluous if it can reasonably be avoided; but we should take into account the subject of the enactment, the language employed in its plain, ordinary and popular sense, and from a due consideration of all these, determine what the legislative will must have been. By the application of this rule to the several statutes bearing upon this question we are led to the conclusion that the plaintiff's land is fairly within the operation of section two of the revenue act, and was rightfully taxed.

We are therefore of the opinion, not only upon the technical ground first stated, but because the land in question was a proper subject of taxation, that the judgment of the district court was right and must be affirmed.

GANTT, J., and MAXWELL, J., concur.

JUDGMENT AFFIRMED.

D. J. McCANN, PLAINTIFF IN ERROR, v. WILLIAM McLENNAN, DEFENDANT IN ERROR.

Judgment: POWER TO VACATE. When an application to set aside a judgment is at common law, and made long after the term at which the judgment was rendered, courts will act with great caution and rarely exercise their authority by the vacation of such judgment.

———: ———. The power to vacate is discretionary, but when this discretion of the court is spoken of, a sound legal discretion is meant.

———: MOTION TO SET ASIDE AND MODIFY. In an application to set aside a judgment, and from affidavits filed it, for the first time, appeared that the note upon which the action was brought, was executed by defendant to the plaintiff upon a contract between the parties, in which plaintiff agreed he would not bid on a certain tract of land, at the time being offered at public sale by the United States, and thereby enable the defendant to purchase the same at the minimum price fixed by law for United States lands; *held*, that the moving party was *particeps criminis* with the other party, in the violation of statute law, and the commission of an act contrary to public policy, and consequently had shown no ground to entitle him to the relief prayed for.

Agreement: AUTHORITY OF COUNSEL. Agreements relating to the conduct of a suit, and its proceedings during the trial, made by attorneys in the case in open court and entered upon the record, are binding upon the parties.

THIS case comes before this court upon motion of the attorney of McLennan, to set aside a judgment rendered at the July Term, 1872, in favor of McCann. The case is reported in 2 Nebraska Reports, 286.

From the report of that case, and the affidavit filed in support of this motion, it appears that the action in the district court, brought by McCann against McLennan, was based on a promissory note by the latter to the former.

McLennan's answer, after admitting the execution of the note, was, in brief, that the note was given in consideration that McCann would abstain from bidding—as he threatened to do—on certain public lands which McLennan desired to purchase, thereby permitting the lands to be bid in by the latter at the minimum government price;

that the contract was illegal, against public policy, and should defeat a recovery upon the note.

The plaintiff's attorney chose not to file a reply to this answer, and by stipulation duly entered into by the attorneys for the respective parties, it was agreed that the court should take the case and order judgment on the pleadings, and without proof.

As the Code of Procedure stood at the time of trial it was a question not yet settled by this court, whether an answer containing no set-off or counter-claim, such as was the answer in this case, demanded a reply. The district court holding the affirmative, and that the allegations of the answer not being denied must be taken as true, directed judgment for the defendant for his costs.

This court adopting an opposite interpretation of the code, held no reply necessary. No proof having been given to support the allegations of the answer, and the execution of the note being admitted, the parties were held bound by the stipulation of the attorneys referred to, and judgment was entered in this court for the amount claimed in the petition, in favor of the plaintiff.

To effect a modification of this judgment, permitting the cause to be returned to the court below that testimony might be given in support of the answer upon another trial, this motion was made.

E. Wakely, for the motion.

I. N. Shambaugh and *E. Richardson, contra.*

GANTT, J.

An application is now made by motion, to vacate and modify the judgment rendered in this case, at the last regular term of this court. No grounds are set forth in the motion showing reasons why it should be maintained by the court. It is simply a motion to vacate and modify

the judgment, and whether such motion should or should not be dismissed upon motion to strike it from the files of the case, it is not necessary to now express any opinion.

The defendant disclaims filing his motion under the provisions of Chapter II, Title XVI, of the Civil Code, and hence this application is one at common law.

In *Kemp and Buckey v. Cook and Ridgely*, 18 *Maryland*, 131, the court says: "The power of setting aside judgments upon motion is a common law power incident to courts of record, and exercised usually under restraints imposed by their own rules, and *rarely* after the term has passed, during which the judgment was rendered." And it is said that even in applications under the statute, "when the court acts in the exercise of its *quasi* equitable powers, it will properly consider all the facts and circumstances of the case, and require the party making the application to show he has acted in good faith, and with ordinary diligence." When the application is at common law, and made long after the term at which the judgment was rendered, the court will certainly act with great caution, and rarely exercise this authority; and it must be a strong case to call into exercise this authority. And furthermore, the court cannot be governed by its ideas of what is just and proper, for the grounds on which it exercises this power, are well settled by decisions almost amounting to definite and fixed rules. But it is said the power is a discretionary one. It is such, but when this discretion of the court is spoken of, a sound legal discretion is meant, not an arbitrary *sic volo*. It is not a discretionary power in opposition to the settled principles of law and equity.

But the ground upon which this motion is made is stated in defendant's affidavit filed with the motion; and that is, that the note upon which the action was brought, was executed by defendant to plaintiff upon a contract between the parties, in which plaintiff agreed he would

not bid on a certain tract of land, at the time being offered at public sale by the United States, and thereby enable the defendant to purchase the same at the minimum price fixed by law for United States Lands; and this is the first evidence of any adduced in court showing the ground upon which the action is founded. The contract was made in violation of statutory law, and it was contrary to public policy. It is a well settled principle of law that courts will not enforce such contracts, and will not lend their aid to relieve either party connected with such transaction. *Willard's Equity*, 47. *Thompson v. Davies*, 13 *John.*, 112. *Forsythe v. The State*, 6 *Ohio*, 21. *Marshall v. Baltimore and Ohio Railroad*, 16 *Howard*, 334. And if such contract is fully executed it will not be disturbed by the courts, and the money paid on such contract cannot be recovered back. *Inhabitants of Worcester v. Eaton*, 11 *Mass.*, 375. But in respect to such contract the court will leave the parties where it finds them. *Howell, Adm'r v. Fountain*, 3 *Kelly*, (*Georgia*) 181. *White a. Hunter*, 3 *Foster*, 131.

In this application the moving party is *particeps criminis* with the other party in the violation of statutory law, and the commission of an act contrary to public policy, as shown by his own affidavit; and he now invokes the aid of this court to relieve him from the liability which he has incurred by his own unlawful contract. As the rule of law seems well settled that money paid on such contracts cannot be recovered back, and that the courts will not lend their aid to either party, but will leave them where they find them, it seems very clear that the defendant has shown no ground to entitle him to relief in this court.

But the record shows an agreement of the parties submitting this cause, to the decision of the court upon the petition and answer. Although this agreement was made by the attorneys, yet, being made matter of record in the

case in open court, preparatory to the trial and decision, it is binding upon the parties, and the court will enforce such agreement. *Miller's Appeal*, 30 *Penn., State*, 478. It will not be interfered with simply because the party has improvidently waived certain defenses. *Bingham v. Board of Supervisors of Winona County*, 6 *Minn.*, 136. *Ignorantia legis neminem excusat* is an old maxim with which attorneys are familiar, and certainly they are presumed to be careful in making agreements on the trial of causes in open court, and to fully comprehend the effect of such agreements. Hence, agreements relating to the conduct of a suit and its proceedings during the trial, in open court and entered upon the record, will conclude the parties. *Staples v. Parker*, 41 *Barb.*, 648.

It is not alleged that any fraud was practiced on the defendant in obtaining the agreement on record. Indeed it seems to have been prepared by defendant's counsel, and accepted by plaintiff's; and as no extrinsic cause or reason is shown why this judgment should be set aside, in must upon well settled principles of law conclude the parties.

The motion to vacate and modify the judgment is overruled.

LAKE, Ch. J., and MAXWELL, J., concur.

MOTION OVERRULED.

THE SIOUX CITY AND PACIFIC RAILROAD, PLAINTIFF IN ERROR, V. WASHINGTON COUNTY AND THE BOARD OF COUNTY COMMISSIONERS THEREOF, DEFENDANTS IN ERROR.

SAME V. SAME.

Practice: APPEAL. An appeal, from a decision made by county commissioners sitting as a board for the equalization of taxes, does not lie to the district court.

———: ———. The two boards being separate tribunals, the right of appeal from the decisions of one board, which is allowed by statute, does not necessarily imply the right of appeal from the decisions of the other.

———: FINAL ORDER: PETITION IN ERROR. The decision of the county board of equalization, in fixing the assessed valuation of property and in making the levy for taxes, is a *final order*, and as such may be reviewed in the district court upon petition in error.

Equalization of taxes: POWERS OF COUNTY BOARD. The county board of equalization can only exercise such powers as are expressly granted by statute, and when the law prescribes the mode they must pursue in the exercise of these powers, it excludes all other modes of procedure.

———: ———. The county board has no right to meet, and re-assess property for taxation, at any other time than that fixed by law; but, while the time fixed is intended to operate as a notice to all persons who may feel aggrieved, yet the county board cannot, at any time, *increase* the assessed valuation without notice to the person whose rights and interests are affected thereby.

THESE were two cases commenced in the district court of Washington county, the first being an appeal from the decision of the board of county commissioners in overruling the petition and motion of the Sioux City and Pacific Railroad, to set aside the action of the board in raising the assessment of said railroad from six to twelve thousand dollars per mile, and the other being a petition

[a] Since the rendition of this decision, the statute has been amended giving the county board of equalization "the right to raise or lower the valuations of any or all property as may be deemed just and proper," etc. *General Statutes* 1873, *sec.* 27, *page* 907. *See also page* 939, *sec.* (123.)

in error alleging manifest errors in the proceedings of said board concerning the same assessment.

Both cases were heard at the November Term, 1872, of the district court. The appeal case was dismissed for want of jurisdiction, and the petition in error being overruled, judgment was rendered sustaining and affirming the proceedings of the board of equalization.

To review these judgments two petitions in error were filed in this court.

The material facts involved are fully stated in the opinion of the court.

Isaac Cook and *N. M. Hubbard*, for plaintiff in error, presented a lengthy argument, from which the following points are taken:

These two cases involve substantially the same questions, and may be argued together.

I. Had the district court jurisdiction to hear the appeal *de novo?*

First. This depends upon the jurisdiction of the board of county commissioners to entertain plaintiff's petition to set aside its own order, previously made, raising the assessment. And this raises the question whether the order of the board of the 16th day of May, 1872, is either a *decision* upon matters "properly cognizable before them," as provided by section 32, page 42 of the *Revised Statutes* of 1866, or "final order made" as provided by the code, Sec. 580.

1. If it is not such a "decision" or "final order made," *in a judicial sense*, while it might be the subject of appeal or error, it would nevertheless be within the power of the board to set it aside upon application.

2. The words "decision" and "final order," as used in the statute, have the same import as the word "judgment." 1 *Bouvier's Law Dictionary*, 382, 525.

3. A judgment implies, *ex vi termini*, a court, jurisdiction of the subject matter, of parties, plaintiff and defendant, and either a dispute between the parties, or default, or *nil dicit*, by one of them. *Bouvier's Law Dictionary*, 676.

4. The order of May 16, 1872, has neither the character of a void or a voidable judgment, nor a "decision" or "final order," but is merely an order of the board on its own motion, and ought to be set aside upon application of any person interested, if either unjust or illegal. It is not even an *ex parte* order, because no person applied for it.

5. It is not different in principle from ordering the repair of a court house, and appropriating funds for that purpose and afterwards rescinding its own action. Such matters are always within the control of the board. It is only such matters as have been *contested* before the board, by parties interested, and where the board has decided the controversy, which are regarded as such *judicial acts* that they are beyond the revising power of the board, and from which an appeal or error must be taken to review them.

Second. If this view is correct the appeal ought to have been heard *de novo* by the district court, and not dismissed.

Third. But this question is not very material, except as a question of practice, because if the action of the board, in making the order of May 16, is of a judicial character, and subject only to appeal or error, we have the case properly before this court on error, and are in a position to obtain a decision upon the questions in both cases.

II. Had the board of county commissioners authority in law to raise the assessment from six to twelve thousand dollars per mile? This question is involved in both cases.

We rely upon the following general principles which we believe applicable to the construction of revenue statutes, and to the powers of civil corporations.

1. Revenue statutes are to be construed most favorably to the citizen, *Sewall v. Jones*, 9 *Pick.*, 414.

2. When an act requires a thing to be done in a particular way, that way alone can be pursued. *Tallman v. The Treasurer of Butler County*, 12 *Iowa*, 531. *Wilbur v. Crane*, 13 *Pick.*, 284.

3. The express mention of one thing implies the exclusion of all others. *Coke's Littleton*, 210, *Broom's Maxims*, 505.

4. All statutes are to be construed according to the apparent intent of the legislature, to be gathered from the entire language used in connection with the subject-matter and purpose of the law. *Rawson v. The State*, 19 *Conn.*, 292.

5. Municipal corporations have, and can only exercise, such powers as are expressly granted, and such incidental ones as are necessary to make these powers available, and are essential to effectuate the purposes of the corporation; and these powers are strictly construed. 2 *Kent Com.*, 298. *Clark v. City of Des Moines*, 19 *Iowa*, 212. *Mayor of Albany v. Cunliff*, 2 *New York*, 165. *Hodges v. Buffalo*, 2 *Denio*, 110. *Dill v. Wareham*, 7 *Met.*, 438. *Western College v. Cleveland*, 12 *Ohio State*, 375. *Commissioners v. Cox*, 6 *Ind.*, 403.

6. The difference between a citizen and civil corporation is radical and fundamental. The one may do anything not prohibited by law, while the other can do nothing except what the statute expressly permits. And this idea obtains special force when the sovereign power of a state, by a special statutory process, takes private property for public use or for taxes without due process of law.

M. Ballard, for defendant in error.

I. As to the appeal.

First. The revenue act is complete in itself and provides for no appeal. *Section* 32, *Chapter* IX, *R. S.* 1866 does not apply, and no appeal exists except by authority of statute.

Second. What the plaintiff in error chooses to call a decision which is here appealed from, was that made by the commissioners on July 1, refusing to reverse their action of nearly fifty days before. An appeal contemplates a trial. A trial contemplates a jury, if one be demanded, unless the matter be of equitable cognizance; and it will not be supposed that commissioners exercise equitable jurisdiction. What should be the issue submitted to the jury? Whether the commissioners acted rightfully or wrongfully in refusing to reverse their previous action?

If any error was committed it was that of law, and must be reached, if at all, by proceedings in error, and not by appeal.

Third. The appellant could not effect by indirection that which could not be reached directly. The act of the commissioners really complained of, and sought to be reached, is that of May 16. No appeal was taken from that within twenty days. *Sec.* 33, *Chap.* IX, *Revised Statutes*, 1866. Courts will not tolerate such circumvention. *Nuckolls v. Irwin*, 2 *Neb.*, 60.

Fourth. The statute provides for no reversal, or modifications of decisions or orders made by the commissioners, by petition or otherwise. Their action upon such petition in dismissing it, or refusing to comply with its prayer, was not a decision upon a matter "properly cognizable before them." Hence no appeal.

Fifth. At the time plaintiff in error appeared before

the board July 1, the assessment of the road with the valuation of all property had, if the law was obeyed, passed to the state board of equalization, and had become the subject of state levy, and therefore beyond the control of the commissioners. *Laws of* 1869, *Sec.* 29, *page* 191. And the presumption is that officers have done their duty. *Parish v. Golden*, 35 *New York*, 466.

Sixth. If the commissioners had no authority in law to change the assessment, then it is clear that their error was one of law, and not to be reached by appeal. If within their authority it is exclusively so. To equalize is not *ex vi termini*, to fix the exact value of the company's road, but it involves the value of other property, especially other roads, the relative value of the several items assessed. This is a matter not to be ascertained by jury or court, nor was it the intention of the legislature to substitute the judgment of the latter in place of the former.

II. As to the proceedings in error.

First. We think the plaintiff in error unfortunate in the selection of its remedy. A judgment or final order may be reversed on error. *Sec.* 580 *of the Code.* Here is no judgment. Neither is there a final order in the sense of the code. The equalization complained of was but a proceeding *in fieri*—a step towards collecting the aggregate of taxable property of the county, upon which the state was to make its levy, and the county for itself as well as for the precincts.

Second. The statute has provided a way to obtain redress, to-wit: to appear before the board of equalization at the time fixed. When a remedy is provided by statute, that alone must be pursued: 4 *American Law Register, N. S.*, 442. It cannot be said that the commissioners were not acting as a board of equalization. They may sit more than three days, and adjourned to the 16th of May.

1. It will be presumed that public officers have done their duty. *Parish v. Golden*, 35 *New York*, 466.

2. Where the record leaves any question in doubt, the doubt will be resolved in support of the judgment. It is the duty of the party alleging error to make it distinctly appear.

3. Neither can it be said that the company shall have any favor because it had no notice of the commissioner's action in time to be present. No notice is provided by statute nor remedy given to those who fail to appear at the time fixed by statute. *Hambleton v. Dempsey*, 20 *Ohio*, 168.

4. The statement of the superintendent was not made out and transmitted in the prescribed time, and did not reach the county in time to be acted upon on the third Monday of April, as required by law. "No man can take advantage of his own wrong." *Broom's Maxims*, 209.

Third. Considerations of public policy and inconvenience preclude the idea of proceeding under the provisions of the Code relating to error. The difference between the value as fixed by the superintendent and the commissioners is $117,600. This sum had passed to the state authorities, and formed a material item in fixing the rate of taxation, and when this case was heard in November, state, county, and precinct taxation had attached. It was beyond the power of the court, in a purely legal action, to render any judgment which could reach through all these matters, and correct the errors complained of. If it could do so, it might undertake it at any time within the three years given in which to institute proceedings in error, as provided by the code. And if so, what must be the judgment of the court?

Fourth. It is sufficient for us to show that the plaintiff in error has mistaken the remedy, and not to indicate what it should have been. But it occurs to us, that if

the commissioners had a clear legal duty to perform under the statute, a mandamus would have been awarded to compel them to do it while the matter was under their control.

Blackstone says, 3 Com., 110: "It is the peculiar business of the court of King's Bench to superintend all inferior tribunals, and therein enforce the due exercise of those judicial or ministerial powers, with which the crown or legislature have invested them, and this not only by restraining their excesses, but also quickening their negligence, and obviating the denial of justice."

In *Barhyte v. Shepherd*, 35 *New York*, 238, Judge Hunt, in a case denying the liability of assessors for not exempting a minister under the New York statutes, says: "The remedy by mandamus, to correct the action of assessors in similar cases, is now of frequent occurrence, and relief could have been obtained by that proceeding." *The People, ex rel. Peabody v. The Attorney General*, 13 *How P. R.*, 179. *Bank of Utica v. City of Utica*, 4 *Paige*, 400. *The People v. Supervisors of New York*, 18 *Wend.*, 605. *The People v. The Assessors of Watertown*, 1 *Hill*, 616.

Fifth. Conceding that the plaintiff in error has chosen the proper proceeding, yet there is no error in the record.

1. Such construction ought to be put upon a statute as may best answer the intention which the makers had in view. 9 *Bac. Abr.*, 246.

2. When the intention is in doubt, the court will interpret the law to be what is consonant with equity. 9 *Bar. Abr.*, 246. *Kerlin v. Bull*, 1 *Dall*, [178]. *Crocker v. Crane*, 21 *Wend.*, 211. *Chamberlain v. Western Transportation Company*, 45 *Barb.*, 218.

3. It was the duty of the legislature, not only to provide for the taxation of all property in the state, but to make such taxation equal.

GANTT, J.

One of these cases was brought into the district court on appeal, and the other by petition in error from a decision of the board of county commissioners of Washington county, and both involving the same subject matter, they will be considered together in this opinion.

In the appeal case it is complained that on the 16th day of May, 1872, the county commissioners, by their order of that date, increased the assessed valuation of plaintiff's railroad from $6,000 to $12,000 per mile; and the plaintiff, by petition, asked the board to reverse that order, and to levy the tax on said road at the valuation of $6,000 per mile, the amount assessed by the auditor of state. The board dismissed the complaint, and from that decision the plaintiff appealed to the district court.

It appears from the record that a motion was made to dismiss the appeal, but it does not appear that anything was done upon that motion, for the record shows that without any disposition of it, or any pleadings in the district court, a jury was waived, the case was tried to the court upon the proofs offered, and that the court found "as matter of conclusions of law: *First.* That the board had no authority to entertain or determine the petition of plaintiffs, etc.; *Second.* That the district court had no jurisdiction of the cause," and therefore rendered judgment of dismissal for want of jurisdiction. Will an appeal lie to the district court? Is it the proper remedy? Chapter IX, Revised Statutes of 1866, provides for a "Board of County Commissioners," and very clearly and fully defines their powers and duties, and fixes the times when their regular sessions shall be held. The powers conferred, and duties enjoined, are distinctly stated in this chapter; and in the exercise of these powers, the board acts judicially. Section 32 provides "that from all decisions of the board of commis-

sioners, upon matters properly cognizable before them, there shall be allowed an appeal to the district court, by any person aggrieved." This right of appeal is only from the decisions of the "board of commissioners." The act of February 15, 1869, *Laws of* 1869, *page* 179, *General Statutes*, 896, provides for a "board of equalization for the county," and that the county commissioners of each county shall constitute such board. This "board of equalization" is a new one, created for a distinct object and purpose, different in name from that of a "board of county commissioners," and from the decisions of this new board there is no statutory provision for an appeal to the district court. Hence, there is no remedy by appeal from its decisions.

If the statute is defective in this respect, it is not the province of the court, by construction, to inject new provisions into it, for it is alone the province of the legislature to alter or amend statutory enactments.

It seems clear that the board of county commissioners and the board of equalization are two distinct offices—the former created by the act of 1866, and the latter by the act of 1869. By legislative enactment the functions of clerk of the district court and register of deeds are conferred on the county clerk, yet no one will pretend to interpret such legislation as merging the three distinct offices into one, neither does the act conferring on the county commissioners the functions of a board of equalization, merge the two offices into one. Hence, the two boards being separate tribunals, it is clear that the right of appeal from the decisions of one board being allowed by statute, does not necessarily imply the right of appeal from the decisions of the other board, but rather, that the express allowance of appeal in the one case, implies its exclusion in the other.

Again, the appeal allowed from the decisions of the board of commissioners, is allowed only upon "matters

properly cognizable before them." The relief sought by the plaintiff was the reversal of the order made by the board on the 16th day of May. The board of county commissioners as *such board* had no authority to act in the matter, and therefore there was no "matter properly cognizable before them." The board of equalization had no authority to act in the matter at the time, and under the circumstances, as will hereafter be shown, and therefore its proceedings in the matter, on the 16th day of May, are simply void. It may be further stated that no grant of power is given to this board to review and reverse, or modify its decisions, and hence from the want of such statutory authority, it seems clear that when the board have once acted and made its final order in such matters, its power is exhausted. It exercises powers expressly granted. Therefore, in any aspect of the case, and under well established rules of construction of such statutes, there was no matter properly before the board—there was no subject-matter before it, over which it had jurisdiction, and hence the court below properly dismissed the appeal, and its judgment must be

AFFIRMED.

The second case was brought into the district court upon petition in error. It appears from the record that the board met on the 18th day of April, and by adjournment again met on the 16th day of May, and at this last meeting, without notice to the plaintiff, "ordered that the assessment of the Sioux City and Pacific Railroad be raised to $12,000 per mile." The district court "sustained and affirmed this proceeding" of the board, and rendered judgment in favor of the defendant for costs. The power to correct errors and grievances in respect to the assessment of taxable property, is vested exclusively in the board of equalization, and the nature and character of the functions of this board show clearly that it acts

judicially. Now the first inquiry is: Can the decisions of this board be reviewed in the district court upon petition in error? Section five hundred and eighty of the code provides that a "final order made by any tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the district court, may be reversed, vacated, or modified by the district court." *General Statutes*, 628. But is the decision of the board, raising the assessed valuation of the plaintiff's road to $12,000 per mile, a final order? I think it is. It fixes the assessed valuation of the road per mile, and in determining the rate of taxation, in making the levy and in collecting the tax, this order cannot be reviewed, altered, or modified. In all these proceedings this decision is conclusive, and therefore, in respect to the rights and interests of the plaintiffs, it is an absolute determination of the subject-matter, so far as the functions of the board are concerned. Hence the conclusion is irresistible, that the proceeding is a "final order." And it being the final order of a board, inferior in jurisdiction to the district court, the petition in error is a proper remedy, and is clearly allowed by the statute.

The next inquiry is in respect to the powers of the board of equalization, and this substantially includes all the errors assigned in the plaintiff's petition.

In the discussion of these powers, it will relieve the case of much difficulty to first obtain a clear perception of the rule of construction of statutes relating to municipal officers.

It was insisted on the argument that the law presumes all officers have done their duty; this is true in some respects, but when the acts of officers who exercise judicial functions of limited jurisdiction are questioned, the rule is well settled that they must not only show they acted within the authority granted, but it must also appear of record that they had jurisdiction. *Frees v. Ford*, 6

New York, 176. *Yates v. Lansing*, 9 *John.*, 437. *Reynolds v. Stansbury* 20 *Ohio*, 353. *Wheeler v. Raymond*, 8 *Cowen*, 314. *Bloom v. Burdick*, 1 *Hill*, 130.

Again, the grant of powers to such officers must be strictly construed, because when acting under special authority they must act strictly on the conditions under which the authority is given. They can only exercise such powers as are especially granted, or as are incidentally necessary for the purpose of carrying into effect such powers; and when the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure. 2 *Kent's Com.*, 298. *Treadwell v. Commissioners*, 11 *Ohio State*, 183. *Commissioners v. Cox*, 6 *Ind.*, 403. *Hoover v. Hoover*, 5 *Blackford*, 182. *White v. Conover*, 5 *Id.*, 462. *Murphy v. Napa Co.*, 20 *Cal.*, 497. *Church v. Hubbart*, 2 *Cranch*, 167. *Bank of Augusta v. Earle*, 13 *Peters*, 587. *Thomson v. Lee County*, 3 *Wallace*, 327.

The statute provides that the board of equalization shall hold a session of at least three days, at the county seat, commencing on the third Monday of April in each year, at which time persons feeling aggrieved by anything in the assessment roll, may apply to the board for correction of any supposed error in the listing or valuation of his property. The time of meeting is definitely fixed by statute, and it seems clear that it was the intention of the law giver, that this time fixed by statute should operate as notice to all persons who might feel aggrieved. Therefore, this provision of the statute cannot be regarded as directory merely, or simply as a matter of form, but as a matter of substance.

In the case at bar, the board, regardless of the time fixed by the statute, met on the 16th day of May, and then made their order re-assessing plaintiff's road. But it is said the board met under adjournment on the 28th day of April. This fact will not help the case, as there is no

statutory provision authorizing an adjournment over several weeks. Such power is not delegated to the board; but suppose the statute should be so construed as to allow such adjournment, then the board might again adjourn for several weeks, and double the assessed valuation of some other person's property, and so on *ad infinitum*. Such construction would vest the board with absolute power to tax the property of the citizen as it might choose, and this too without notice. This cannot be the law; it is opposed to the letter and spirit of the statute; it would establish a precedent too dangerous to be tolerated, and the legislature never intended to grant to the board powers so dangerous and so liable to abuse. The board can exercise no such power.

But again, as already stated, the action of the board on the 16th day of May was had without notice to the plaintiffs. Will it be supposed that the board can indefinitely increase the assessed valuation of the property of the tax payer, at any time, without notice to him? Certainly it cannot; and however full and complete might be the jurisdiction of the board over the subject-matter, yet the party interested has, according to the plainest principles of justice, a clear right to a hearing and to a day in court, and any other view stands opposed to reason, justice, and sound policy, and to all those general principles which, in all cases, allow a party to be heard before his rights of property can be affected by any tribunal. This is the universal law of the land, and must be strictly complied with in the issuance and service of summons, in order to enable the court to render a valid judgment.

Surely then the doubling of the assessed valuation of a person's property does as vitally affect his rights and interests as the rendition of a judgment against him. Hence, it is clear that the board can have no jurisdiction, without notice to the person whose rights and interests

are to be affected by its decision. This is the only safe rule; any other might lead to great injustice.

The judgment of the district court must be reversed, and the proceedings and decisions of the county commissioners had on the 16th day of May, are hereby reversed, vacated, and set aside.

Judgment in the appeal case AFFIRMED. *Judgment in the case brought to district court by petition in error,* REVERSED, *and proceedings of county commissioners vacated and set aside.*

LETTIE C. MCCLARY, PLAINTIFF IN ERROR, V. THE SIOUX CITY AND PACIFIC RAILROAD COMPANY, DEFENDANT IN ERROR.

Practice: DEMURRER. When the objections stated in a demurrer are not those provided by the code, it can only be considered as a general demurrer that the petition does not state facts sufficient to constitute a cause of action.

Common carriers: THEIR LIABILITY. Common carriers of passengers are liable *only* where the injury has arisen from their own neglect. And while it is a general rule that, if they are in the least degree negligent, they are liable, yet only for such damages as are the natural and direct result of the act complained of.

———: ———. Thus, where a train of cars was running three-quarters of an hour behind the usual, ordinary, and advertised time for the running of trains upon the road of a carrier, and was upset by a sudden gust of wind which crossed the track, but not that portion of the track where the train would have been if running on time, whereby a passenger was injured, *Held*, that the injury complained of was not the natural result of the train being behind time, and that the damages sustained were too remote to entitle a recovery against the carrier.

THIS was a petition in error to review the judgment of the district court of Dodge county. The case is fully stated in the opinion of the court.

E. Wakely and *Munger & Ghost* for plaintiff in error, submitted the following points:

I. Was the fact of the defendant running its train behind time, as stated in the petition, negligence?

II. If so, was such negligence of the defendant the proximate cause of the injury complained of?

As to the first point, we submit:

1. The running of a train out of its regular, usual and advertised time of running, constitutes negligence. *Angell on Carriers*, 439. *General Statutes of Nebraska* 1873, sections 121, 122, page 198. *Chicago, Burlington and Quincy Railroad v. George*, 19 *Illinois*, 510. *Weed v. The Panama Railroad Company*, 17 *New York*, 362.

2. The mere fact of a train being behind time is sufficient evidence of negligence to raise the presumption of liability. *Shearman and Redfield on Negligence*, 328. *Flinn v. Philadelphia Railroad Company*, 1 *Houston's Delaware*, 469.

3. The distinctions between the several degrees of negligence are merely theoretical, and *wholly incapable of any practical application. Perkins v. The New York Central Railroad Co.*, 24 *New York*, 196. *Smith v. The Same*, 24 *New York*, 222. *Wells v. The Same*, 24 *New York*, 181.

As to the second point, we submit:

1. Common carriers are liable for injuries not resulting from the act of God; and if negligence of the carrier contributes to cause or bring about the injuries complained of, then it is not the act of God, and the carrier is responsible.

2. If the defendant be guilty of negligence and an accident occur, the *immediate* cause of which is the act

of God, but which would not have occurred had the defendants not been guilty of such negligence, then in that case the rule, "*causa proxima et non remota spectatur*" does not apply so as to excuse the defendant. *Read v. Spaulding*, 30 *New York*, 630. *Miller v. Steam Navigation Company*, 10 *New York*, 431. *Lowe v. Moss*, 12 *Ill.*, 477. *Parsons on Contracts*, 159, 160, 161. *Sedgwick on Measure of Damages*, 88, 89. *Hart v. Allen*, 2 *Watts*, 114. *Davis v. Garrett*, 6 *Bingham*, 721. *Crosby v. Fitch*, 12 *Conn.*, 410. *Powell v. Deveney*, 3 *Cushing*, 300. *Colegrove v. New York and New Haven R. R.*, 20 *New York*, 492. *Pittsburg City v. Grier*, 22 *Penn. State*, 54. *Michaels v. New York Central R. R.*, 30 *New York*, 564.

3. If defendant's negligence concurred with some event (other than plaintiff's fault), to produce plaintiff's injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are clearly connected with the injury in the order of events, the defendant is responsible, even though his negligent act was not the nearest cause in the order of time. *Brehm v. Great Western Railroad Company*, 34 *Barb.*, 256. *McCahill v. Kipp*, 2 *E. D. Smith*, 413. *Mott v. Hudson River Railroad Company*, 8 *Bosworth*, 345.

4. The rule is general that a wrong doer, or one guilty of negligence, cannot escape the consequences thereof because of the contributing negligence of another. *Shearman & Redfield on Negligence*, 31, and cases there cited. On this principle it is, that a plaintiff whose negligence contributes to the injury, cannot recover, although the defendant's negligence also contributed thereto, and although the injury would not have happened but for defendant's negligence. So if the wrongful acts of two or more persons contribute to produce injury, and one of

them is sued, it is no defense that the injury would not have resulted but for the negligence of *another.*

In this case, the injury happened in consequence of two concurring causes; *First*, the negligence of the defendant; *Second*, the act of God.

Without the first or without the second, no accident would have happened to the train. But as defendant's negligence, the fact that the act of God also contributed thereto, is no more a defense than would have been the fact that the negligence of another person or another corporation contributed to it. It is enough that without the defendant's negligence no injury would have happened to the plaintiff.

5. The statutes of Nebraska provide that every railroad company operating its road in this state, shall be liable for all damages inflicted upon the persons of passengers while being transported over its road, except in cases where the injury done arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice. *General Statutes*, 1873, *Sec.* 147, *page* 203.

In the light of this statute, it is *neither necessary to allege nor prove negligence* of the defendant, as by it they are made insurers of the safety of their passengers; and the injuries alleged, having occurred to the plaintiff while "a passenger, being transported" over the road of defendant, they are clearly liable therefor.

Isaac Cook and N. M. Hubbard, for the defendants in error, contended:

I. There is nothing alleged in plaintiff's petition, which constitutes negligence. The only point upon which it is based is, that the train was behind its usual and advertised time, but whether it was thus *behind time* through any negligence of the defendant is not stated.

The petition stands or falls upon this question. Is it negligence, *per se*, to run a train out of its usual and advertised time?

1. There is no law, or custom, or statute requiring railroads to run their trains at any particular time, or that requires them to follow their own time cards. If they advertise the starting and running of trains at particular times and fail to do so, any person relying thereon, and who suffers damage thereby, may perhaps recover, but this is the extent—it is not negligence.

2. If it be negligence to run out of advertised time, it must not only be lawful, but it must be the duty of a railroad company to stop its train, if it should get behind time, and not run it at all till its next advertised time and trip came about. Railroads could not be operated under such a rule.

If the plaintiff had alleged that the cause of the train being behind time, on the day of the accident, was by reason of the negligence of defendant, its servants or agents, then the inquiry would fairly arise, whether such negligence was such a *proximate* cause of the injury as would render the defendant liable. But no such allegation is made in the petition. The petition was framed with care. The pleader no doubt knew, that if he alleged negligence of defendant as the *cause* of being behind time, it could be easily rebutted, for the very storm, which finally blew the train from the track, had prevented them from being "on time." So the question recurs, if a train is unable without fault of the company, or its servants, to make its usual time, is it negligence *per se* for the train to proceed further?

II. But suppose it be conceded that the defendant was guilty of negligence in being behind time, and in running its train behind time when the accident and injury occurred.

The question then is, was such negligence the proximate cause of the injury.

The general rule is now settled that damages to be recovered must always be the *natural and proximate* consequences of the act complained of. 2 *Greenleaf's Evidence*, 239.

Parsons states the rule thus: "Every defendant shall be held liable for all those consequences which might have been foreseen and expected as the results of his conduct, but not for those which he could not have foreseen, and was therefore under no moral obligation to take into his consideration." 3 *Parsons on Contracts, Fifth Edition*, 179.

Lord Bacon expresses the correlative of this proposition thus: "It were infinite for the law to judge of the causes of causes, and their impulsion one on another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." *Maxims of the Law, Regula* 1.

It is said in many of the cases where these rules are involved, that the application is difficult.

It would seem that no such difficulty exists in the case at bar. Here was a train of cars three-fourths of an hour behind its time, by the negligence of defendant, (not so alleged but admitted now for the purpose of argument), when a sudden gust of wind blows the train from the track and injures the plaintiff. The occurrence is very extraordinary, and therefore very little to be expected. We are unable to find a case in the books showing such an accident. It seems impossible to say, that the most acute human foresight could have reasonably anticipated, or forecast, any such accident as happened to this train, and especially by reason of its being just three-fourths of an hour behind time.

The theory of the plaintiff is, that where human negligence concurs with the *vis divina* to produce an injury,

the rules of proximate and remote causes of injury do not apply, and that negligence will give a right of action, notwithstanding the *vis divina* was the proximate, and the negligence was the remote cause of the injury.

There is some conflict of authorities on this question as applied to insurance companies and to common carriers of goods. But railroads are absolute insurers of goods, except loss from the *vis divina*, or public enemies, and are not insurers of the safety of passengers, but only held to the exercise of extraordinary care.

We think the weight of authorities would exonerate defendant in this case for the loss of goods, and are therefore more than sufficient to defeat a recovery.

The most ably considered case in our judgment is *Morrison v. Davis and Co.*, 20 *Penn., State*, 171. And that case was also cited in *Denney v. New York Central Railroad*, 13 *Gray*, 481, and especially approved.

In any other than a carrier case the question would present no difficulty. The general rule is, that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast; and not for those which arise from the conjunction of his fault with other circumstances that are of an extraordinary nature.

Thus a blacksmith pricks a horse by careless shoeing; ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use; but it could not anticipate that by reason of the lameness the horse would be delayed in passing through a forest until a tree fell and killed him or injured the rider; and such injury would be no proper measure of the blacksmith's liability. The true measure is indicated by the maxim *causa proxima, non remota spectatur.*

MAXWELL, J.

The petition in this cause states that the defendants "are a corporation operating and running a certain railroad in the state of Nebraska, between the city of Fremont, in the county of Dodge, to some point in the county of Cuming, at or near the town of West Point, in said county, and that said defendant was a common carrier of passengers in cars over and upon said railroad, for hire and reward; and thereupon the said plaintiff on the fifth day of July, 1871, at the special instance and request of the said defendant, became and was a passenger on the said railroad of the said defendant aforesaid, and in the cars thereof, to be safely carried from Fremont, Nebraska, to West Point, for a certain hire and reward paid to the said defendant in that behalf, and the said plaintiff was then received by the said defendant in the cars and on the road aforesaid as such passenger, to be carried thereby as aforesaid; yet the defendant not regarding its duties in that behalf, did, by its agents, negligently conduct the running of its said train of cars over said railroad, in which plaintiff was a passenger, out of the regular, usual, and advertised time for running such cars between the places aforesaid, and did run their said cars, in which plaintiff was a passenger, out of such regular, usual, and advertised time, and were at the time of committing the injuries hereinafter complained of, running about three-fourths of an hour behind the regular, usual and advertised time of the running of the same, and were at a point on said railroad at the time of committing the injuries herein complained of, several miles away from the place where such cars would have been at the time, had they been running the same on the regular, usual, and advertised time of running said cars, and because thereof were suddenly and violently thrown from the track by a sudden gust of wind which crossed that

part of the track, but not the part of the track where the said cars would have been if the train had been running on its usual, ordinary, and advertised time, upsetting the car in which plaintiff was seated, thereby greatly injuring plaintiff by her being badly cut and bruised, and became sick, lame, and unable to walk, and was wholly unable to attend to the transaction of her necessary business to the present time, to her damage in the sum of ten thousand dollars."

The defendant demurred to the petition on the ground:

"*First.* That there is no law requiring defendant to run its cars on its usual and advertised time.

Second. It is not shown by the petition that defendant's train at the time of the injury complained of was behind its usual and advertised time, through any negligence of defendant or its servants or agents.

Third. The damages claimed are remote and consequential and not the probable or natural consequences to be apprehended from the negligence alleged by plaintiff."

The code provides that the defendant may demur to the petition only when it appears upon its face,

First. That the court had no jurisdiction.

Second. That the plaintiff has not legal capacity to sue.

Third. That there is another action pending between the same parties for the same cause.

Fourth. That there is a defect of parties plaintiff or defendant.

Fifth. That several causes of action are improperly joined.

Sixth. That the petition does not state facts sufficient to constitute a cause of action.

The objections stated in the demurrer not being any of those provided by the code, can only be considered as a general demurrer "that the petition does not state facts sufficient to constitute a cause of action." *General Statutes, Sec.* 95, 540.

The demurrer was sustained by the district court, and judgment of dismissal entered, to review which, the cause is now brought here.

The general rule is, that even a wrong doer is liable only for the proximate consequences of his act or default, and this rule is certainly applicable to cases of mere negligence.

Injuries caused only remotely by reason of negligence, cannot be charged to the party in fault.

It is contended in this instance that while the injury was occasioned by the act of God, yet had the train been running on time, the accident would not have occurred, therefore the negligence of the defendant, in permitting the train to be three-fourths of an hour behind time, is the proximate cause of the accident.

Common carriers of goods are not only responsible for any loss or injury to the goods they carry, but the law raises an absolute and conclusive presumption of negligence whenever the loss occurs from any other cause than the act of God or the public enemy.

In the case of *Forward v. Pittard*, 1 *Term*, 27, in which the plaintiff's goods while in possession of the defendant as a common carrier, were consumed by fire, it was found that the accident happened without any actual negligence in the defendant, but that the fire was not occasioned by lightning. The court held that "a carrier is in the nature of an insurer. It is laid down that he is liable for every accident except by the act of God, or the king's enemies."

To prevent litigation the law presumes against the carrier unless he shows it was done by the king's enemies, or by such an act of God as could not happen by the intervention of man.

And it is held that if the carrier wrongfully delay the transportation of goods, and because of the delay they are injured by a flood, the carrier would be liable. *Lowe v.*

Moss, 12 *Ill.* 477. *Reed v. Spaulding*, 30 *New York* 630.

This is the law as to common carriers of goods, and it is contended by the plaintiff that the same rule applies to common carriers of passengers. As a rule the liability of the common carrier of goods does not depend upon his negligence, because he insures the owners of all the goods he carries against all loss or injury, not caused by the act of God or the public enemy. The exception to this rule in the case of the carrier of passengers is, that he is liable *only* where the injury has arisen from his own negligence; he does not warrant the safety of passengers, but as far as human care and foresight go, he will provide for their safe conveyance; but if he is in the least degree negligent he is liable, because the law requires him to do all that care and skill can do for the safety of his passengers. The only negligence alleged in the petition is, that the train was three-fourths of an hour behind the regular and advertised time, and it is contended by plaintiff that that of itself is such an act of negligence as entitles the plaintiff to recover. While it was the duty of the defendant to have adopted such rules and regulations for the running of their trains, as would insure the safety of their passengers, and having adopted them, must conform thereto as far as possible, or be responsible for the consequences resulting therefrom, yet they are responsible only for such damages as are the natural and direct result of the act complained of. *Redfield on Railways*, 2d *Edition*, *Section* 154. *Dunton v. Great Northern Railway*, 34 *Eng. Law and Equity*, 154.

In this case the injury complained of, not being the natural result of the train being behind time, is too remote to entitle the plaintiff to recover. All the justices concurring the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

EUGENIE COURVOIRSIER, PLAINTIFF IN ERROR, V. LOUIS BOUVIER, DEFENDANT IN ERROR.

Pleading: AVERMENTS OF PETITION. A petition which seeks to have a trust declared, should clearly set forth all the facts and circumstances attending the transaction, from which the trust is claimed to result.

Resulting trust. Where the plaintiff conveyed land to his wife through the medium of a trustee, claiming that the title thereto was to be held by her in trust for him, and afterwards accepted a life lease to a portion of the land, it was held, in an action brought to have a trust declared and to obtain a re-conveyance of the land:

1. That the acceptance of the lease was a conclusive recognition of the wife's title, and estopped the plaintiff from setting up any claim to the residue of the premises.

2. That the idea of a resulting trust was entirely unsupported by the facts of the case.

BOUVIER, the defendant in error, brought his action against Eugenie Courvoirsier in the district court of Washington County, to obtain a re-conveyance of certain real estate, formerly owned by him, and which he had conveyed to her through the medium of a trustee, she being at the time of said conveyance the wife of Bouvier. Judgment being rendered in his favor, Mrs. Courvoirsier brought the cause here by petition in error. The facts fully appear in the opinion of the court.

Carrigan and Osborn, for plaintiff in error.

I. The petition does not state a cause of action in this, that the petition shows that the parties were husband and wife, and that the conveyance was made for the purpose of vesting the legal title in the plaintiff in error; and while we do not maintain the early doctrine that a wife cannot be the trustee of a resulting trust in favor of her husband, yet we assert that the conveyance of lands from husband to wife or child creates no presumption of an implied trust, but on the contrary, the law presumes the

conveyances to be an advancement. While it may be true that the presumption of advancement may be rebutted, yet the facts that can destroy this legal inference must appear on the face of the bill before issue can be joined; there is no allegation in this bill upon which an implied trust can be founded.

The petition shows that at the time of the conveyance the plaintiff in error agreed to re-convey to Louis Bouvier upon his return from New Orleans. Now, if this be true, certainly there can be no resulting trust, for by the understanding of the parties the trust was declared as to the whole of the property, and a declaration of trust, though by parol, prevents the creation of a resulting trust by operation of law. *Washburn on Real Property*, 168. 1 *Spencer, Eq.*, 496. *Dennison v. Goehrign*, 7 *Penn., State*, 175.

Upon the above grounds we maintain that the court erred in overruling the demurrer to the petition.

II. Upon the issue joined on the trial it appeared that the conveyance had been made without any valuable consideration, moving from Vanier to Bouvier, or from Mrs. Courvoirsier to Vanier, yet as alleged in the petition, the conveyance was made to Vanier for the purpose of enabling Bouvier to legally vest the plaintiff in error with the legal title to the said lands. Vanier then was a trustee. Mrs. Courvoirsier the beneficiary, and when Vanier conveyed to Mrs. Courvoirsier there was in her a union of the legal and equitable estates, forming a perfect and indefeasible title in her, and here applies the old, familiar rule of law, "that one trust will not support another."

III. No resulting trust can be raised in favor of the grantor in opposition to a deed absolute upon its face and containing a covenant of warranty. *Leman v. Whitly*, 4 *Russell*, 423. 1 *Greenleaf on Evidence*, *sec.* 266. *Moore v. Moore*, 38 *New Hampshire*, 382. 2 *Wash-*

burn on Real Property, 174, 175. *Squire v. Harder*, 1 *Paige*, 494.

IV. There being no circumstances going to raise an implied trust, can the alleged understanding create an express trust? Express trust can only be created by writing, and cannot be proven by parol. *Sturtevant v. Sturtevant*, 20 *New York*, 39; 4 *Kent Com.* 306. *Steere v. Steere*, 5 *Johns Ch.*, 1.

V. The learned Judge in the district court found that the plaintiff in error had *fraudulently* acquired title to the land. Now, in the bill there is no pretense of fraud or mistake, and no proof whatever was offered of any undue influence exerted by the plaintiff in error, and certainly there should be some allegations of fraud, duress or undue influence, before a court would undertake to establish a constructive trust.

VI. Implied or constructive trusts must be proven by the most positive evidence, and unless the trust be fully established, courts will refuse their aid.

VII. The proof shows that the said Louis Bouvier, long after his return from New Orleans, took a life lease of a portion of the premises so conveyed. Bouvier was a tenant for life, and can he now deny the title of his landlord?

VIII. The proof further shows that Bouvier was, at the time, heavily in debt considering his resources; that he left the state; that the plaintiff in error paid a great portion of the debts of Bouvier then existing, and improved the land, supported their children, and was in undisputed possession of said land (except that portion leased to said plaintiff) for the space of thirteen years, and can the grantor after all these years ask the aid of a court to relieve him from the consequence of his own act?

IX. The court erred in admitting the testimony of Bouvier as to his intention at the time of making the conveyance in the petition mentioned; the effect of the deed must be controlled by the recitals therein contained, and can only be impeached by fraud in the grantee or mutual mistake, all of which should appear from circumstances immediately attending the act, and not from the desires of one of the actors thirteen years after.

X. If the allegations in the petition, supported by the testimony of the defendant in error and Vanier, can be taken as true, then there was a declaration of an express trust, which precludes the existence of an implied or resulting trust, and which can only be created by writing. No written evidence of an existing trust was alleged and proved, and parol evidence of an express trust cannot be received. *Rev. Stat.* 1866, *Sec.* 62, 92.

Ballard & Walton and E. Wakely, for defendant in error.

I. The trust which is alleged by the defendant in error, is a resulting trust arising from the fact that the conveyance to Mrs. Bouvier was a voluntary conveyance by her husband without consideration, with the intention that she should take as trustee for the grantor.

This is a trust "by act or operation of law." *Sec.* 62, *Ch.* 43, *Rev. Stat.* 1866.

That such a trust may be proven by parole is not denied in this case, and cannot be denied. The proposition is established by a multitude of authorities.

In *Tiffany and Bullard on Trusts*, *p.* 23, it is said:

"But *resulting trusts* are expressly exempted from the operation of the statute (of frauds); and there can be no doubt that the facts and circumstances tending to establish the resulting trust may be proved by parole."

In *Hill on Trusts, p.* *108, the principle is thus stated:

"In the absence of any direct admission or declaration of the trust a variety of circumstances, arising from the nature of the transaction and the conduct and relative situation of the parties, will constitute ingredience of evidence from which the court will infer it to have been the intention of the party not to divest himself of the beneficial ownership by the execution of a voluntary conveyance."

II. The rule is the same, although there is an affinity or relationship between the grantor and grantee. But, if the relationship is a near one, as between father and son, or husband and wife, the presumption that the grantee's interest was intended to be a beneficial one is stronger than when the grantee is a stranger. This is the only difference. *Hill on Trusts, p.* 108 *and notes; Sidmouth v. Sidmouth,* 2 *Bear.* 254; *Jackson v. Matsdorf,* 11 *John.* 91; *Taylor v Taylor,* 4 *Gilm.*, 303; *Tremper v. Barton,* 18 *Ohio,* 418; *Kilpin v. Kilpin,* 1 *M. & K.*, 550; *Pierce v. Hakes,* 23 *Penn. St.*, 243; *Baylis v. Newton,* 2 *Vern.*, 28; *Vandenberg v. Palmer,* 4 *K. & J.*, 204; *Cecil v. Butcher,* 2 *J. W.*, 565.

III. The circumstance of the conveyance being made from Bouvier to Vanier, and by the latter to Mrs. Bouvier, does not affect the principle involved.

It is not the case of engrafting a trust upon a trust.

The conveyance to Vanier was upon a trust that he should convey to Mrs. Bouvier. Had he refused to do so a question of title would have arisen between him and his grantor, not necessary to here discuss. But clearly, upon the authorities, there would have been a resulting trust to Bouvier, arising from the fact of a conveyance being made upon a trust which failed. *Hill,* *91, 2, *and notes.*

But, he *did execute the trust.* He was a mere conduit to pass the title from Bouvier to his wife. And her title was of precisely the same nature as if Bouvier had conveyed directly to her

Had Vanier owned the land, and Bouvier purchased it and furnished the consideration, and caused it to be conveyed to his wife, she would still have taken it in trust. There would have been a resulting trust to Bouvier belonging to the first class, as defined by text writers, "where the purchase is made by one person in the name of another."

So that it is wholly immaterial whether the case is to be regarded as one of the class just mentioned, or of the class in which we place it, namely, where there is a voluntary conveyance with an intention that the grantee shall take in trust.

We insist that upon the evidence, so far as it appears, it is clear that there was no intention that Mrs. Bouvier should take an absolute title or beneficial estate.

LAKE, CH. J.

THIS action was brought in the court below to have a trust declared, and to obtain a re-conveyance of certain real estate formerly owned by the defendant in error, and which he had conveyed through the medium of a trustee, in the year eighteen hundred and fifty-eight to the plaintiff in error, who was then his wife. The court found the equities with the complainant, and decreed a reconveyance of the premises.

To support the judgment of the court below, it is necessary that the record disclose such a state of facts, connected with the transfer of the title from Bouvier to his wife, as would establish a resulting trust in his favor.

But it is objected on the part of the plaintiff in error, that there is no cause of action stated in the petition, that

giving it the most favorable construction possible, no resulting trust is shown in favor of Bouvier. I am inclined very strongly to this conclusion.

The substance of what is alleged to establish the trust is, that being about to leave his home for New Orleans, to obtain work, in 1858, "and thinking it would be convenient and advisable that the title to said real estate should be vested in his wife, in case of the plaintiff's death during his absence, the plaintiff voluntarily, and without consideration, and in order to vest the title in the said defendant, conveyed said premises" to her. That it was the understanding, both of himself and wife, that she was to hold the property in trust for him and not as her own.

Now, the fact that Bouvier was about to leave home for a time, of itself, was not of much significance, nor is the other fact, that the conveyance was without any consideration of a pecuniary nature, for it has long been the settled doctrine of the courts, that a voluntary conveyance of either real or personal property, if duly executed and acted upon, will be held to be valid and binding on the grantor. As to the allegation, that it was the understanding of the parties to the deed, that the grantee should hold the land in trust, it may be answered, that this was the very fact necessary to be shown by the acts of the parties and circumstances attending the transaction, and those acts and circumstances should have been set forth in the petition.

In *Perry on Trusts*, 109, the rule is laid down, that "the trust should be fairly alleged in the bill, not only in terms, but all the facts must be set out, from which the trust is claimed to result." And this is in strict analogy to the rule of pleading under our code, which requires the *facts* constituting the plaintiff's cause of action to be stated.

But if we hold the petition to be sufficient, and go to

the facts disclosed on the trial, is the defendant in error any better off?

This conveyance was made in 1858, when the land was of very little value indeed, and has been in the possession and under the control of the grantee, without any interference on the part of Bouvier, until the commencement of this action. Not only this, but it is shown that some six years after the transfer of the title to his wife, he took from her a life lease to fifty acres of the land which he now holds. This we think is a conclusive recognition of the title of plaintiff in error, and effectually estops Bouvier from setting up any claim to the residue of the premises. It establishes, very satisfactorily, that the idea of a resulting trust was of recent birth, and entirely unsupported by the facts of the case.

The decree of the district court is reversed, and the cause remanded with instructions to dismiss the action at the costs of the plaintiff.

The other justices concurring, judgment will be entered accordingly.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1873.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.
" DANIEL GANTT, } ASSOCIATE JUSTICES.
" SAMUEL MAXWELL, }

THOMAS TALLON, PLAINTIFF IN ERROR, V. JOHN B. ELLISON AND SONS, DEFENDANTS IN ERROR.

Attachment: AFFIDAVIT. The ground for an attachment may be stated in the affidavit in the language of the statute, without specifying more particularly the facts intended to be alleged.

——— : BURDEN OF PROOF. The charge thus made if denied by the defendant, must be sustained by the plaintiff to the satisfaction of the court; upon the plaintiff, by the denial, is thrown the burden of proof.

——— : ———. *Ellison v. Tallon*, 2 *Neb.*, 14, cited and approved.

Chattel Mortgage. A mortgage of a stock of goods, where the mortgagor continues in possession thereof, and disposes of the same in the usual and ordinary course of trade, is void as against the creditors of the mortgagor and subsequent purchasers in good faith.

THIS was a petition in error to reverse a judgment of the district court of Douglas county. The facts are substantially as follows:

On the eleventh day of November, 1868, R. B. Price and Thomas Tallon, the plaintiff in error, being engaged in business as merchant tailors at Omaha, Nebraska, executed a mortgage on their stock of goods to Jones and Stutsman, of Leavenworth, Kansas, to secure the payment of $5000. The mortgagors remained in possession and continued to sell the goods mortgaged. Price and Tallon afterwards dissolved partnership, and the latter continued the business in his own name. On the 16th day of November, 1869, Tallon executed a mortgage to Ryland Jones to secure the sum of $4500, and this mortgage appears to have been intended to take the place of the one executed by Price and Tallon to Jones and Stutsman. On the same day Tallon gave another mortgage on his stock of goods to White, Heath & Co., of New York, to secure the payment of $653.58. All of these mortgages were duly recorded in the office of the county clerk. Tallon remained in possession and continued to sell the goods, and treated them in all respects as his own. On the 22d of September, 1869, the defendants in error sold Tallon a bill of goods to be paid for in thirty, sixty, and ninety days. Upon this bill of goods payments were made at various times reducing the debt to defendants in error, to $901. On the fourth of April, 1870, an action was brought against Tallon to recover the amount of this debt, and judgment was duly rendered thereon against him. That cause came before this court to obtain a reversal of the order made by the court below in dissolving the attachment issued therein, and is reported in 2 *Nebraska, page* 14. On the eighth day of December, A. D. 1869, the defendants in error sold Tallon another bill of goods amounting to $801.42, and the same not being paid for when due, the defendants in error brought suit against Tallon, and caused an order of attachment to issue against his property, under which the sheriff levied upon the property covered by the mort-

gages to Jones and White, Heath & Co. The plaintiff in error moved to dissolve this attachment, which motion was overruled by the court, and judgment thereupon rendered against Tallon. To reverse this judgment the cause was brought here by petition in error.

George W. Doane, for plaintiff in error.

There are three grounds of error assigned in this petition, namely:

I. In overruling the motion to set aside the service and to dismiss for want of service.

II. In overruling the motion to discharge the attachment.

III. That the facts set forth in the petition in the court below are not sufficient in law to constitute a cause of action.

The plaintiff in error relies principally upon the ground contained in the second allegation, namely: "That the court erred in overruling the motion to discharge the attachment levied in said action, upon the affidavits filed therein."

As said ruling was based entirely upon the fact that certain chattel mortgages had been given by the plaintiff in error upon his stock of goods, with which he continued to trade in the ordinary course of business, which was held to be a fraud *per se*, (the plaintiff in error being expressly relieved from any suspicion of intentional fraud, or fraud in fact,) I will confine my citation of authorities solely to that point.

The attorney for defendants in error has cited numerous decisions (mainly in New York and Ohio, however) to sustain his position, but it will be observed that in each of the cases cited in which this doctrine of fraud *per se*

was announced, there was shown by the proofs to have been either,

1st. An express reservation of the power of sale to the mortgagor in the mortgage itself, or

2d. An express agreement outside of the mortgage that the mortgagor might sell or dispose of the property mortgaged, or

3d. The sale of the mortgaged property by the mortgagor with the knowledge and consent of the mortgagee, whereby such an agreement must be necessarily inferred.

Neither of these conditions is shown by the proofs to exist in this case. On the contrary the very fact which appears, that one of the mortgagees, Jones, resided at Leavenworth, Kansas, and that the others, White, Heath & Co., resided in New York City, while the business of Tallon was carried on in Omaha City, repels the inference of such knowledge and consent. The existence of facts from which fraud is to be inferred should never be assumed, but the facts should be themselves clearly established, and the inference therefrom irresistible. The defendants in error ask this court to assume that the mortgagees knew of the manner of dealing with the mortgaged property by Tallon, and that they consented thereto, and from these *assumed facts* to infer an agreement that he might so deal with them, from which agreement they ask that the mortgages be declared fraudulent as to creditors, and that Tallon gave them "*with intent* to defraud creditors." The whole theory of the New York and Ohio decisions is based upon the existence of a collusive and fraudulent agreement between the mortgagor and mortgagee, which agreement either appears in the mortgage itself, or is established incontrovertibly by facts *aliunde*. Then according to those decisions, the law infers fraud. But there is not a single instance in which such an inference has been drawn in the absence of proof of collusion or

agreement between the mortgagor and mortgagee. The very reason and basis of the decisions, is the collusive agreement between the parties to withdraw the property of the debtor from the reach of his creditors. Without this there could be no implication of fraud. How, then, can it be inferred, in the absence of any proof of such an agreement, or of any facts from which such agreement must necessarily be implied, that a chattel mortgage in the usual form, containing the ordinary conditions, was given "with intent to defraud creditors?" The proof shows that the original mortgage to Jones and Stutsman was given with the full knowledge of all the creditors at the time, of the mortgagors. Those who became creditors subsequently have no reason to complain of the giving of the mortgage, for they are placed in no worse condition than they were in, at the time they extended the credit to the mortgagor.

The first mortgage from Tallon to Jones & Stutsman was given and recorded Nov. 11, 1868, and the renewal mortgage to Jones alone was given and recorded Nov. 16, 1869, as also the mortgage to White, Heath & Co. The debt upon which this suit was brought was contracted Dec. 8, 1869.

The whole question as to the good faith of the plaintiff in error in his dealings with the defendants in error, as well as the effect of the chattel mortgages upon the question of good faith in his dealings with his creditors, came under review in this court in the case of *Ellison v. Tallon* at a previous term, upon precisely the same state of facts as shown by the record, as is exhibited in this case, and it was there expressly found, that "the preponderance of proof is clearly with the defendant, and against the truth of the charge made for obtaining the attachment." *2nd Nebraska, page* 14. These questions have therefore become *res adjudicata* as between these parties, and I submit that when an adjudication has once been

had in a court of last resort, upon questions of fact, involving nothing more than the pecuniary interests of the parties themselves, such decision should stand, unless it appears very clearly that an injustice has been done.

The facts in this case all show conclusively that no injustice was done by that decision, but that the only injustice in the case was in the original attachment proceedings, whereby the business of an honest man was broken up and his credit ruined.

It is claimed, however, that a rule of law was violated by the previous decision and it is now attempted to have engrafted upon our laws the rule adopted in Ohio and New York, that the reservation of a power of sale to the mortgagor in a chattel mortgage, or an agreement to that effect outside of the mortgage, is a fraud *per se*, and utterly inconsistent with the idea of good faith. I humbly submit, that in those cases in which this rule has been adopted as an inflexible *rule of law* to be applied in all cases without reference to other facts and circumstances connected with the transaction, it has been carried beyond reason, and the weight of authority.

I shall content myself with a citation of some of the authorities in which the opposite doctrine has been emphatically announced, namely, that such a reservation or agreement is at most but a fact or circumstance to be considered in connection with other facts and circumstances, in determining the character of the transaction. *Spencer v. Deagle*, 34 *Missouri*, 455. *Briggs v. Parkman*, 2 *Met.* 258. *Jones v. Huggeford*, 3 *Met.* 515. *Barker v. Hall*, 13 *N. H.* 298. *Thornton v. Davenport*, 1 *Seam.* 296. *Torbert v. Hayden*, 11 *Iowa*, 435. *Wilhelmi v. Leonard*, 13 *Iowa*, 330. *Adler, et al., v. Claflin, et al.*, 17 *Iowa*, 89. *Hickman v. Perrin, et al.*, 6 *Coldwell*, (*Tenn.*) 135. *Gay v. Bidwell*, 7 *Mich.* 519.

Under these decisions, the fact of the sale of the mortgaged goods in the ordinary course of business by the

plaintiff in error, even if it were shown to have been with the knowledge and consent of the mortgagees, would be only a fact to be taken in connection with other facts in determining the character of the transaction. But I insist that the proofs do not bring this case within the rule stated in the cases cited by attorney for defendants in error, in that they fail to show any agreement or assent on the part of the mortgagees, to the disposition of the goods by the mortgagor, and while their security might be lessened by such disposition, that could give no cause of complaint to other creditors, and especially to those who become such after the mortgages had been given and entered of record.

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

As to the assignment of error in sustaining the attachment, defendants in error say that the grounds upon which the attachment was granted are:

I. That the plaintiff in error (Tallon) fraudulently contracted the debt for which suit was brought. This is entirely a question of fact, and is fully established by the affidavits in attachment.

II. That the plaintiff in error (Tallon) had disposed of a part of his property with the intent to defraud his creditors. As to this ground of attachment the defendants in error say:

1. That the affidavits show that Tallon gave chattel mortgages upon his entire stock of goods, upon which he was doing the business of a merchant tailor, but that he retained possession of such stock long after the maturity of the mortgages, and treated it and disposed of it as his own, in the regular course of his business, and with the full knowledge and consent of the mortgagees. This the law demonstrates a *legal fraud*, a disposition of one's

property in fraud of the rights of creditors. The Court of Appeals of the state of New York has repeatedly decided this question under statutes precisely the same as our own and from which the statutes of Ohio were copied. *Griswold v. Sheldon*, 4 *N. Y.*, 581, 587–594. *Edgell v. Hart*, 9 *N. Y.*, 213, 216–219. *Ford, et al., v. Williams*, 13 *N. Y.*, 577, 583–584. *Gardner v. McEwen*, 19 *N. Y.*, 123, 125, 126. *Russell v. Winne*, 37 *N. Y.*, 591, 593–599. *Wood v. Lowry*, 17 *Wend.*, 123, 125. *White v. Cole*, 24 *Wend.*, 116.

2. The Supreme Court of Ohio has also decided the same question in the same way, under the same statutes, from which our own statutes were copied after the rendition of said decisions. *Collins v. Myers, et al.*, 16 *Ohio*, 547, 552, 556. *Freeman v. Rawson*, 5 *Ohio State*, 1, 6, 12. *Harman v. Abbey*, 7 *Ohio State*. 218, 220.

3. The Supreme Courts of Illinois, Indiana, Wisconsin, Pennsylvania, New Hampshire, and Massachusetts have all held that such mortgages are fraudulent *per se* and void. *Hanford v. Obrecht*, 49 *Ill.*, 146. *Jordan v. Turner*, 3 *Blackf.* (*Ind.*) 314. *New Albany Ins. Co. v. Wilcoxson*, 21 *Ind.*, 355. *Place v. Langworthy*, 13 *Wis.*, 629. *Young v. M' Clure*, 2 *Watts and S.* (*Pa.*,) 147. *Welsh v. Bekey*, 1 *Penn.*, 57. *Milne v. Henry*, 40 *Penn. State*, 352. *Robbins v. Parker*, 3 *Met.*, 117.

III. But it is contended by the plaintiff in error that the Nebraska Statutes make such transfers only *prima facie* fraudulent when the mortgage is duly recorded, and that the consideration and good faith of the mortgages in question, are established by the affidavits of the plaintiff in error. In answer to this the defendants in error say:

First. That there is nothing in their affidavits which in any way "make it appear" that these mortgages were made in good faith and without intent to defraud creditors. By the statutes, the *onus probandi* is upon the

plaintiff in error. No facts are stated. The consideration is not disclosed or sworn to, nor in fact anything except the mere conclusion of law that they were made in good faith and without intent, etc.

Second. That the statutes only cover cases where the property mortgaged is left with the mortgagor, to be *used* by him until default, and not to cases, where, by agreement of the mortgagor and mortgagee, the former is to retain, not only the possession and the use of the property, *but the right to barter and sell the same, and treat it as his own.* This distinction is strongly and distinctly made in the cases above cited—especially in the cases of *Edgell v. Hart,* and *Russell v. Winne.*

IV. But the plaintiff in error will doubtless claim that the mortgages were of record when the indebtedness to the defendants was contracted, and hence notice to all the world, and the defendants consequently cannot claim to be injured by it. In answer to this the defendants say:

First. That the Statutes of Nebraska, page 394, Sec. 12, define the term "*creditors*" to mean "all persons who shall be creditors of the vendor or assignor *at any time while such goods and chattels shall remain in his possession or under his control.*"

Second. That the object of recording a mortgage is to give notice to subsequent purchasers, and it is notice to them, but there is no law making it notice to a person selling goods to the mortgagor on open account. He can not be charged with notice unless *actual notice* is brought home to him, which has not been done in this case.

Third. If the mortgage is a fraud upon creditors *actual notice* of the lien is not sufficient to conclude a creditor from attacking the mortgage. *White v. Cole,* 24 *Wend.*, 123, 124. Much less will *constructive notice,* by registration, effect this right.

V. Plaintiff in error also contends that the Nebraska

Statutes, make the question of fraudulent intent always a question of fact. *General Statutes*, 395, *Sec.* 20. But the statutes do not cover the case *where a stock of goods or property consumable in the use* is mortgaged and mortgagor retaining the possession and treating it as his own. *Edgell v. Hart, Russell v. Winne, and other cases cited above.*

VI. The only way in which the plaintiff in error seeks to get over this fraudulent transfer by mortgage, is by swearing to good faith and good intentions. In the case of *Coston v. Paige*, 9 *Ohio State* 397, Judge Gholson says in a case analagous to this one, "*There is this clear advantage on the part of the plaintiff, that distinct and positive allegations are charged which are not met by the defendant; while the statements in the defendant's affidavit are to a great extent not matters of fact, but of belief in the good conduct and intentions of the defendant.*"

VII. It is also contended that the supporting affidavits of defendants in error are only cumulative and are not responsive to the affidavits of plaintiff in error. If true, this should have been taken advantage of below, by motion to suppress, and if overruled exception taken. The record does not show any such motion. The plaintiff in error cannot now raise any such objection.

In conclusion, defendants in error say that the first ground of attachment being purely a question of fact and the court below having sustained the attachment, the supreme court should not reverse, unless it *clearly* appears that the finding was contrary to the evidence. That upon the second ground the authorities are overwhelmingly in favor of the attachment, while public policy requires that all such transactions as the mortgages in question should be discountenanced.

MAXWELL, J.

The only alleged error insisted upon in the argument of this cause, was as to ruling of the court below upon the motion to dissolve the attachment issued therein.

The agent of the defendants in error swears in his affidavit that at the time the credit was given, Tallon, although really insolvent, assured him that his entire indebtedness did not exceed the sum of fifteen hundred dollars, and that his stock on hand and debts due largely exceeded his total indebtedness, and it is alleged that the credit was given solely on the strength of these representations. Tallon admits that he stated to the agent of the defendants in error, that his indebtedness to other houses did not exceed the sum of fifteen hundred dollars, and that no inquiry was made about mortgages, and for that reason he said nothing to the agent about his goods being mortgaged. The agent for the defendants in error also says, that it was not until about the 27th day of March, 1870, that defendants in error were informed of the existence of the mortgages on the stock of goods, that at that time the entire stock of Tallon would not pay more than seventy per cent. of his liabilities, and that Price was insolvent.

The grounds set forth in the affidavit for an attachment in the court below were:

"*First.* That the defendant had fraudulently contracted the debt.

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 for an attachment. *General Statutes*, 556. An affidavit for an attachment is sufficient if it be in the words of the statute. *Ellison v. Tallon*, 2 *Neb.*, 14. *Coston v. Paige*, 9 *Ohio State*, 397.

The charge thus made if denied by the defendant, must be sustained by the plaintiff to the satisfaction of the court; upon the plaintiff, by the denial, is thrown the burden of proof. *Id.*

It is clearly shown in this case that the plaintiff in error at the time he made his first purchase of goods, Sept. 22, 1869, in answer to the inquiry of the agent of the defendants in error, as to the amount of his indebtedness to other houses, stated that his indebtedness was about the sum of fifteen hundred dollars, evidently intending to convey the impression that that was the entire amount of his indebtedness, although there were mortgages on his stock at that time exceeding the sum of five thousand dollars. The principle is well established, that if a party for the purpose of obtaining credit, make false representations as to his solvency or of the condition of his financial affairs, whereby the other party relying on these statements is induced to sell his goods or part with his property, it is manifestly a fraud on such party. And the misrepresentation may be either by words, or acts, or the suppression of material facts, with intent to deceive. The important inquiry, therefore, in all this class of cases is, whether one party has been wilfully deceived or misled by the other to his injury; for if this be once shown, redress will be afforded without regard to the means by which the deception was affected. *Story's Eq.* § 192. *Hanson v. Edgerly*, 9 *Foster*, 345. *Denny v. Gilman*, 26 *Maine*, 149. *Allen v. Addington*, 7 *Wend.*, 10. *Kidney v. Stoddard*, 7 *Met.*, 252.

A further question arises as to the effect of the mortgages to Jones and Stutsman, Ryland Jones, and White, Heath and Co., on the goods of the plaintiff in error.

A mortgage of chattels is a sale with a condition. The legal title passes to the mortgagee, subject to the mortgagor's right to perform the condition and after default the legal title is said to become absolute in the mortgagee.

Our statute 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." *General Statutes*, 393, *sec.* 11.

Many respectable authorities were produced on the argument of this case, to show that a mortgage of goods and chattels, with possession and power of sale in the mortgagor, is a valid mortgage against the creditors of the mortgagor. With due respect to the ability displayed in a number of the opinions thus cited, we cannot regard them as the law upon that subject. "The very nature of a mortgage is to fasten a lien upon specific property, and the courts have gone far enough when they have permitted an honest possession in the mortgagor; because that opens up a door by which an honest vendee, may be defrauded by purchase without notice, but in this case there is no specific lien, but a floating mortgage which attaches, swells, and contracts as the stock in trade changes, increases, or diminishes, or may wholly expire by entire sale and disposition, at the will of the mortgagor. Such a mortgage is no certain security upon specific property; it all depends upon the honesty and good faith of the debtor, and as he might dispose of it to a creditor at will, to satisfy a debt, we see no reason why a

creditor may not seize it against his will, for the same purpose. In such a case the whole right to dispose of the property to pay a debt depends on the will of the debtor." *Collins and McElroy v. Myers*, 16 *Ohio*, 554. *Freeman v. Ransom*, 5 *Ohio State*, 1. *Harman v. Allen*, 7 *Id.*, 218. *Edgell v. Hart*, 9 *New York*, 217. *Diver v. McLaughlin*, 2 *Wend.*, 596. *Griswold v. Sheldon*, 4 *New York*, 588.

Such a mortgage is void as against creditors and subsequent purchasers in good faith. The judgment of the district court is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE GANTT, concurs.

LUTHER L. MILLS, PLAINTIFF IN ERROR, v. LORENZO RICE, DEFENDANT IN ERROR.

Covenant: PLEADING. In an action for breach of covenants of warranty, it is necessary to allege substantially an eviction by title paramount.

———: ———. Where it was alleged in the petition that by reason of an outstanding, adverse title, which ripened into a perfect and indefeasible title, the plaintiff was ousted and dispossessed entirely from all possession of the premises by due course of law, *it was held* sufficient as an allegation of eviction by title paramount.

———: ———. An allegation in the petition "that possession of the premises had never been obtained," *held* to be immaterial not being a breach of the covenant.

Pleadings: SUFFICIENCY. The sufficiency of pleadings as to certainty, precision and definiteness, which do not amount to such absolute omission as to constitute no ground of action or defense, must be objected to by motion, and can afford no ground for demurrer.

Statute of limitations: DEMURRER. If the petition, in an action for breach of covenants of warranty, does not show when the cause of action accrued, by reason of ouster and dispossession of the premises, the statute of limitations cannot be interposed by a general demurrer.

THIS was an action of covenant. To the petition, the defendant interposed a general demurrer which was sustained by the district court of Nemaha county. The cause was then brought here by petition in error. The case is fully stated in the opinion of the court. Mills, who was plaintiff in the district court, was plaintiff in error here.

J. H. Broady, for plaintiff in error, contended:

I. The general common law rule in assigning breach of covenant, is to negative the covenant. 1 *Chitty's Pleading*, 332, 333. *Jones County v. Sales*, 25 *Iowa*, 27.

II. The covenant against incumbrances is broken, if at all, as soon as made; and action lies *before* eviction or other disturbances thereby, and breach is sufficiently assigned under the code practice, (which has revolutionized the old system) by negativing the language of the covenant, if there be no motion made to compel the pleader to be more definite and specific by pointing out the character of the incumbrance. *Swan's Pleading and Practice*, 23, 24, 166–168. *Trustees, etc., v. Odlin*, 8 *Ohio State*, 293. *Prindle v. Caruthers*, 15 *New York*, 425. 2 *Washburne's Real Property*, 2d *Ed.*, 693, 706. *Prescott v. Trueman*, 4 *Mass.*, 627. *Funk v. Creswell*, 5 *Iowa*, 62. But we have gone further than merely negativing the covenant against incumbrances, and alleged an incumbrance which ripened into complete title and ousted us, and if they wished more particularity, should have asked for it by motion, which is substituted by the code for special demurrers; and under the code practice a demurrer waives all objections for indefiniteness or uncertainty, and admits the truth of the allegation, however much it savors of a question of law. See above cited code authorities in New York and Ohio. Also,

Swan's Pl. and Pr., 194, 198 and 489, the latter reference giving the Ohio form of petition in such cases, under the code.

The breach of this covenant is taken out of the statute of limitations. The allegations of the petition on that subject being in the language of the statute must be construed to mean whatever the same language in the statute means. *Rev. Statutes*, 1866, *Sec.* 20, 396. *Cole v. Jessup*, 10 *New York*, 103, 104, *and cases there cited. Taylor v. Fitch*, 12 *Ohio State*, 175.

III. The same facts that constitute a breach of covenant against incumbrances, may also constitute a breach of covenant for quiet enjoyment, and also a breach of the covenant of general warranty, and such is the case in this action as shown by the petition. *Sedgwick on the Measure of Damages*, 152, 153. *Funk v. Creswell*, 5 *Iowa*, 62. *Prescott v. Trueman*, 4 *Mass.*, 628. Hence, the above cited code authorities apply with full force on the assignment of breaches of the last two named covenants. The demurrer admits that we have been ousted and dispossessed, and the assignments are good against the demurrer.

The causes of action on these two covenants are nowhere brought within the statute of limitations, which does not begin to run until breach, the time of which is not shown in the petition, and they fail to file the motion to compel certainty of time, and thereby waive any such objection. *Crisfield v. Storr*, 36 *Maryland*, 129.

IV. The whole deed should not be copied in the petition nor attached thereto, but only the covenants declared upon. Besides, any objection on this subject must be taken by motion and cannot be taken by demurrer. Demurrer, under the code, is not to rectify defects of form but to finally decide the law of the case. *Swan's Plead-*

ing and Practice, 194, 198, 199, 170. *Brandt v. Foster*, 5 *Iowa*, 287, 291.

V. The demurrer should not have been sustained, if cause of action is shown on any of the covenants. *Brown v. Tomlinson*, 2 *G. Greene*, (*Iowa*), 526.

E. W. Thomas, on the same side, argued:

I. Two objections are urged against the petition, to-wit:

First. That there is no sufficient allegation of the breach of any of the covenants; and

Second. That it appears from the face of the petition that the cause of action is barred by the statutes of limitation.

II. The petition sufficiently alleges the breach of the covenants of *seizin* and *right to convey*. All the authorities agree that in assigning a breach of these covenants, it is unnecessary to do more than negative the words of the covenants generally. *Rawle on Cov.*, 53. *Bacon v. Lincoln*, 4 *Cush.*, 212.

III. A breach of the covenant of *quiet enjoyment* also, is sufficiently alleged. In assigning a breach of this covenant it is sufficient to state that the possession of plaintiff has been interrupted by some lawful title which existed at the time of the conveyance to the covenantee, and it is not necessary to set out that title particularly. *Rawle on Cov.*, 182. *Foster v. Pearson*, 4 *Term.*, 617. 2 *Greenl. Ev.*, *Sec.* 243.

IV. A breach of the covenant against *incumbrances* is sufficiently alleged. The existence of a paramount title is a breach of this covenant. *Cornell v. Jackson*, 3 *Cush.*, 309.

The petition sets out sufficiently a breach of the covenant of *general warranty*. In assigning a breach of this

covenant, all that is necessary to allege is that the plaintiff was evicted, or ousted, under an adverse title. In a case in Indiana it was said, "The main thing to be averred is the eviction by paramount title; the manner of the eviction is a matter of evidence, and need not be alleged." *Reese v. McQuilkin*, 7 *Ind.*, 450. *Rawle on Cov.*, 309.

VI. We contend further, that under the code practice, when the question arises on demurrer, the negativing of the language of any covenant is a sufficient allegation of breach of that covenant. If the defendant had desired more particularity in the statement, he should have moved to make the petition more definite. He could not take advantage of indefiniteness by demurrer. *Swan's Pl. & Pr.*, 23, *and* 166 *to* 168. *Trustees, &c. v. Odlin*, 8 *Oh. St.*, 293. *Prindle v. Caruthers*, 15 *N. Y.*, 425. *Funk v. Creswell*, 5 *Ia.*, 62.

VII. It is said that the petition shows upon its face that the cause of action was barred by the statutes of limitation. This objection certainly cannot apply to the causes of action founded upon the breach of the covenants for *quiet enjoyment*, or of *general warranty*, for these covenants could not have been broken until there was an eviction, and the petition does not show upon its face when that took place. If the allegation was not sufficiently specified, the remedy of the defendant was to move to make it more definite.

VIII. But we contend further, that the petition does not show upon its face that the causes of action founded upon the breach of the covenants of *seizin, of good right to convey*, and against *incumbrances*, were barred by the statutes of limitation. It is true that the weight of American authority is in favor of the position, that these covenants are broken, if at all, at the instant of their cre-

ation; and it follows that immediately upon the execution of the deed which purported to convey the estate, a right of action upon these covenants enured to the plaintiff. *Rawle on Cov.*, 342, 602. *Mott v. Palmer*, 1 *New York*, 573.

IX. It is contended, further, that the court will presume that the statutes of limitation of Illinois are the same as those of Nebraska. We say that this rule has no application here, for two reasons, to-wit:

First—Because it is a rule of evidence, and not of pleading.

Second—Because no such presumption will apply to a *statute law*, particularly the statute of limitations. 1 *Greenl. Ev.*, *Sec.* 488.

X. It is perhaps true, that where it appears on the face of the petition, that under the statute of limitation no action can be brought, the defendant may demur on the ground that the petition does not state facts sufficient to constitute a cause of action. *Sturges v. Burton*, 8 *Oh. St.*, 215.

XI. This rule, however, makes quite a change in common law pleadings, and should be confined strictly to those cases only where it clearly appears from the face of the petition, without resorting to presumption, that the cause of action was barred when the action was commenced.

XII. Besides, we further say, that if the cause of action would otherwise fall within the statute of limitations, the petition states facts which take it out of their scope. The allegations of the petition on that subject, being in the language of the statute, must be construed to mean whatever the same language in the statute means. *General Statutes*, *Sec.* 20, 526. *Cole v. Jessup*, 10 *N. Y.*,

103, *and cases there cited. Taylor v. Fitch,* 12 *Oh. St.,* 175.

Hewett and Newman, for defendant in error, argued:

The demurrer was properly sustained, for the reason that the petition did not state facts sufficient to constitute a cause of action against defendant, in the following particulars.

1. The petition counts upon the breach of the covenants for quiet enjoyment, by saying that "plaintiff has not been permitted to quietly enjoy, or to enjoy at all," but does not state that it was by reason of any act or default of defendant, and does not state any specific act of interference or disturbance of his quiet enjoyment by defendant or any other person, so that it may have been a tortious trespass or interference with which defendant had nothing to do. The covenant for quiet enjoyment requires the assignment of a breach by a specific ouster or eviction by a paramount legal title. 4 *Kent Com.* 479. *Marston v. Hobbs,* 2 *Mass.* 433, 437. *Mitchell v. Warner,* 5 *Conn.* 497–522. *Swan's Pl. and Pr.* 493.

2. The nature of the encumbrance which constituted a breach of covenant as to freedom from incumbrances should have been shown, in order that it may appear whether it was a legal and paramount right. 4 *Kent,* 479.

The petition merely states that "at the time of the conveyance the premises were not free from incumbrances, and that there was an outstanding right and title adverse to the title conveyed by defendant," which has since ripened into a perfect and indefeasible title, but he does not state what sort of an outstanding title or right it was; nor does he state that it was a legal or paramount title to that conveyed. 4 *Kent Com.* 471. *Kellogg v. Ingersoll,* 2 *Mass.* 97, 101, *where breaches are specially assigned. See also forms in* 2 *Greenl. Ev.* § 242, *note* 6. *Swan's*

Form, Pl. and Pr., 492. *Prescott v. Trueman*, 4 *Mass.* 627.

3. The breach of covenant of warranty is stated thus: "And said defendant has failed to warrant and defend," etc. This is insufficient without alleging an eviction by a paramount legal title, and stating specially the act constituting the breach. 4 *Kent Comm.* 471, 479. *Marston v. Hobbs*, 2 *Mass.* 433, 437. *Kortz v. Carpenter*, 5 *Johns.* 120. *Inness v. Agnew*, 1 *Ohio*, 387. *Owen v. Thomas*, 33 *Ills.* 320. *Brandt v. Foster*, 5 *Iowa*, 287. *Swan's Pl. and Pr.* 490. *Crisfield v. Storr*, 36 *Md.*, 129. *Chitty Pl.* 369, 408–9.

4. The breach of the covenants of seizin and right to convey, which are not asserted in this case, may be assigned by merely negativing the words of the covenant. But the exception to the general rule is, that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned. The covenants against incumbrances, quiet enjoyment, and general warranty, come within the exception, and require the breaches to be specially assigned. *Marston v. Hobbs*, 2 *Mass.* 437, *and cases cited above, and Camp v. Douglass*, 10 *Iowa*, 586.

5. Our code requires plaintiff to state the facts constituting his cause of action. *Civil Code Sec.* 92. "A fact is a thing done; an act, an event." *Swan Pl. and Pr.* 146. *Nash, Pl. and Pr.* 52. And defendant is required to answer under oath. How can he admit or deny, unless the facts are specially stated?

6. The cause of this action accrues, if at all, at the time of the conveyance; for the injury arose, if at all, from the existence of an incumbrance under which the premises were sold. 4 *Kent*, 471. No time is stated for the breach of any other covenant.

The statute of limitations began to run therefore on the 24th day of April 1857, and the action is shown on the

face of petition to be barred, unless the plaintiff has stated some fact to bring the case within one of the exceptions which suspend the running of statute. This he has not done. He merely states that defendant absconded, and concealed himself *from plaintiff*. Now the statute begins to run from the time plaintiff *might have brought his action, not from the time that he knew that he could.* 3 *Parsons Contracts*, 90, 92. He has merely attempted to save himself by stating the time when he knew he could bring his action.

There is nothing in the petition to show but what the contract arose in this state. If it did not arise in this state, plaintiff should have shown that the defendant came into this state within five years; if it did arise in this state, it is barred. *Ruggles v. Keeler*, 3 *Johns* 263. *Story Conf. Laws*, § 576, 577.

Objection that action is barred by limitation may be taken by demurrer. *Lawrence v. Sinnamon*, 24 *Iowa*, 80.

GANTT, J.

The petition states that the defendant for the consideration mentioned in the deed, sold and conveyed in fee-simple to the plaintiff, lot eight in block eight, in a certain addition to the town of Kankakee in the state of Illinois, and covenanted to the plaintiff, that he was seized in fee of the premises; that he had a good right to convey the same; that said premises were free from all incumbrances; that the said plaintiff should quietly enjoy the same; and that the defendant and his heirs, executors and administrators would forever warrant and defend the title to the said premises against the lawful claims of all persons. The breaches alleged are, that the premises were not free from incumbrances; that the plaintiff had not been permitted to enjoy said premises, or to enjoy them

at all, and that the defendant failed to warrant and defend the title to said premises.

These allegations simply negative the words of the covenants against incumbrances and for quiet enjoyment and warranty. But in pleading the breaches there is the further averment that at the time of the conveyance by defendant to plaintiff, there was an outstanding title, adverse to that conveyed by defendant to plaintiff, which has since ripened into a perfect and indefeasible title to the premises, under which the premises have been sold, and the plaintiff has been deprived of the right and title to the same, and was ousted and dispossessed wholly from all possession, right and title to the same by due course of law.

To this petition the defendant interposed a general demurrer; and in support of the demurrer it was argued that to merely negative the covenants is not sufficient to maintain the action, except in covenants of seizin and right to convey.

The rule of law seems to be well settled, that in actions for breach of covenants of warranty, and for quiet enjoyment, it is not sufficient to merely negative the words of the covenants, for these covenants protect only against an ouster from the possession or enjoyment of the premises; and there can, therefore, be no breach assigned without alleging substantially an eviction by title paramount. *Rawle on Covenants*, 181, 308. *Paul v. Whitman*, 3 *Watts and Sergeant*, 410. *Sedgwick v. Hollenback*, 7 *Johns*, 380. *Blanchard v. Hoxie*, 34 *Maine*, 378. *Wait v. Maxwell*, 4 *Pick.*, 87. *Hayes v. Bickerstaff*, *Vaughan*, 118.

But in *Witty v. Hightower*, 12 *Smedes and Marshall*, 478, it is said that an averment of "an actual ouster, or eviction, or holding out under paramount title" is necessary: and in *Day v. Chism*, 10 *Wheat*, 451, it is held that although an eviction must be substantially alleged, yet

no formal words are prescribed with which the allegation is to be made. "It is not necessary to say in terms, that the plaintiff has been evicted by title paramount to that of the defendant." The averment that the defendant "had not a good and sufficient title to the said tract of land, and by reason thereof was ousted and dispossessed of said premises by due course of law, says the court, "contains all the facts which constitute an eviction by title paramount." *Banks v. Whitehead*, 7 *Ala.*, 85. *Reese v. McQuilkin*, 7 *Indiana*, 451.

In the case at bar, the plaintiff has alleged that by reason of an outstanding, adverse title, which has ripened into a perfect and indefeasible title, he was ousted and dispossessed entirely from all possession of said premises by due course of law. I think this allegation of title paramount, and of breach of covenant by ouster and dispossession by due course of law, brings the case sufficiently within the rule laid down in the cases above cited.

Another objection raised to the pleading is, that the plaintiff avers that he has not been permitted to enjoy the premises at all, which, perhaps, is equivalent to alleging that he had not been able to obtain possession of them,—and also avers that he was ousted and dispossessed of them by due course of law. These averments are inconsistent; but if the inconsistency could not be taken advantage of by motion, yet, still, as is said in *Day v. Chism*, 10 *Wheat*, 453, "the allegation that possession has never been obtained is immaterial, because not a breach of the covenant, and may be disregarded on general demurrer."

It is, however, contended that the petition is too uncertain and indefinite. It is true the case is not stated with that definiteness, precision, and consistency which should be obtained in pleadings; but it is said that the "sufficiency of pleadings, as to certainty, precision, definiteness, and consistency of allegation, which do not amount to such absolute omission as to constitute no ground of

action or defense, must be taken advantage of or objected to by motion, under the provisions of the code, and can afford no ground for demurrer or assignment of error." *Trustees, etc., v. Odlin*, 8 *Ohio State*, 296.

In respect to the statute of limitations raised on the demurrer, it is only necessary to remark that the face of the petition does not show when the right of action accrued by reason of ouster and dispossession of the premises, and therefore, so far as the action rests on the breach of the covenants of warranty and for quiet enjoyment, this ground of defense is not well taken on the demurrer.

I am of the opinion that there is substance enough in the petition to maintain it against a general demurrer, and therefore, the judgment must be reversed, and the cause be remanded for further proceedings; and it will be in the power of the district court to allow the plaintiff to amend his pleading.

REVERSED AND REMANDED.

LAKE, CH. J., and MAXWELL, J., concur.

GEORGE M. MILLS, PLAINTIFF IN ERROR, v. GEORGE L. MILLER, DEFENDANT IN ERROR.

Practice: APPOINTMENT OF REFEREES. The district court has authority, in proceedings in partition, to appoint a referee to take an account of rents and profits, as well as three referees to make partition of the premises.

———: AMENDMENT OF PLEADINGS. The discretion exercised by the district court, in the amendment of pleadings, is a legal discretion, and if it appears that the amendment sought to be made, is in furtherance of justice, it will be held to be error to refuse such amendment.

THIS action was commenced in the district court of Douglas county, to obtain a partition of certain real estate therein situated, and for an account of the rents and profits of the same.

The court entered a decree appointing three referees to make partition of the premises, and another referee to take an account of the rents and profits. The referees appointed to make partition reported that the premises could not be divided and recommended that they 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 a *supersedeas* bond, and brought the case to this court by petition in error. A hearing being had at the special February Term, A. D. 1872, the judgment of the district court was affirmed. *Mills v. Miller*, 2 *Neb.*, 299. Afterwards, and upon the coming in of the report of the referee appointed for the purpose of taking an account of rents and profits, the court found the sum of $1,409.50 due the defendant in error on account of rents and profits, and entered judgment, directing that the proceeds arising from the sale of the premises be applied in payment of said sum to the defendant in error, and the balance to be equally divided between the parties to the suit.

To review these proceedings, the cause was again brought to this court. A general statement of the case appears in the opinion of the court. Mills, the plaintiff in error here, was defendant in the court below.

O. P. Mason and *Seth Robinson*, for plaintiff in error, submitted the following points:

I. There is in fact but one cause of action, not two, and there is no analogy between this case and an action to recover possession of real property. The case at bar resembles more closely a suit for dower and for an account of rents and profits, which is never divided into two causes of action. 2 *Van Santvoord's Pleading*, 289.

II. But even if there be two causes of action in this

case, the code has limited the number of referees which may be appointed, in any case, to three The court has no power to appoint more, and it is error to appoint more. *Code of Civil Procedure, Sections* 298, *et seq.*, *and* 812, 820, 829, 834.

III. The report should have determined the amount of Creighton's incumbrance.

Gilbert and *Swartzlander*, for defendant in error, contended:

I. The court below did not err in overruling the motion of the plaintiff in error for leave to file an amended answer to the petition of the defendant in error.

First. The motion was made more than a year after the ruling of the court sustaining the demurrer to the original answer, during which time the cause was referred to a referee to take an account of the rents and profits, etc., and a large amount of testimony was taken on the part of the defendants as well as the plaintiffs, and closed on both sides, and a report thereon by the referee made and filed in the court; and also the question of actual partition of the premises was referred during the same time to other referees, who duly filed their report which was confirmed by the court.

Second. The plaintiff in error failed to show any defense whatever to the petition, but based his motion solely upon a false allegation, alleging "that affiant has had no opportunity until this term to make an application to file an amended answer." The court very properly denied the motion.

II. The order of the court below for an account to be taken before J. R. Hyde, referee, did not and could not embrace any matters not referred to in the pleadings. The referee was not only to take testimony, but to report

the same to the court with his conclusions thereon, giving to such report the character of a verdict of a jury, so that this court will not disturb the findings thereon by the court below on questions of fact.

The finding of the court stands precisely like the verdict of a jury. To except to the verdict of a jury when returned would be a novel practice indeed. Neither has the exception to the finding or to the final judgment of the court anything to recommend it but its novelty. *The State v. Swartz*, 9 *Ind.*, 221.

III. The plaintiff in error claims that the court erred in finding the sum of $1,409.50 due from the plaintiff in error to the defendant in error, and in ordering the same to be paid to the said defendant out of the proceeds of the sale of the premises. The court did not err, but a mistake was made in entering said order or judgment upon the record of the court in not ordering *twice* said sum to be paid to the said defendant in error out of the proceeds of the sale of said premises, which mistake was afterwards corrected by the court.

MAXWELL, J.

On the 30th day of July, 1870, George L. Miller and wife filed their petition in the district court of Douglas county against George M. Mills and wife, defendants, setting forth "that said plaintiff and defendant had been seized as tenants in common and joint owners, since the 21st day of December, 1868, each of the undivided one-half of the west thirty-four feet of lot number seven, in block number one hundred and twenty in the city of Omaha, and that said George M. Mills had received the rents and profits of said premises from the date of their said joint ownership, and praying for partition and an account.

The defendant demurred and upon the overruling of

the demurrer, filed an answer. To this answer the plaintiff demurred, and this demurrer was sustained by the court. The court found the facts stated in the petition to be true, and rendered judgment in partition, appointing three referees to make partition of the premises. The court also appointed a referee to take an account of the rents and profits of the premises since December 21, 1868, and of the improvements thereon made by the parties respectively, to take testimony offered by either party as to the value of the use of the premises from said date, and the amount received by the parties, and the amounts expended for taxes, insurance, and repairs, to all which defendant excepted. The referees appointed to make partition made their report, stating that the premises could not be divided without great prejudice and injury to the owners, and recommending that a sale of the same be made. The court confirmed the report of the referees, and ordered a sale of the premises, to which defendant excepted.

The referee appointed to take an account, found the amount due defendant in error to be $1,559.50. Defendant then asked leave to file an amended answer, which motion was overruled by the court, defendant excepting thereto. Defendant then filed thirteen exceptions to the report of the referee, the first, second, and third of which were sustained by the court, on the ground, *first*, that the report did not state an account of the rents and profits; *second*, that the report failed to show the amount expended for improvements; and *third*, that the report failed to show the items of the amounts paid for taxes and repairs. The cause was again referred to the same referee, who again reported the balance due Miller at $1,559.50, when exceptions were filed to this second report of the referee. After a hearing the court modified the report of the referee, finding the amount due the defendant in error to be $1,409.50, and rendered judg-

ment against Mills for that amount, and a decree that the same be paid out of the proceeds of the sale of said premises, to which defendant excepted, and the defendant now brings the case, by petition in error, to this court.

The counsel for plaintiff in error expressly disclaims any error in the record prior to the appointment of the referees by the court to make partition.

Our statute provides, in cases of partition, as follows:

"SEC. 809. Each of the parties appearing, whether as plaintiff or defendant, must exhibit his documentary proof of title, if he has any, and must file the same, or copies thereof, with the clerk."

"SEC. 810. If the statements in the petition and answer are not contradicted in the manner aforesaid, or by the documentary proof exhibited as above required, they shall be taken as true."

"SEC. 811. After all the shares and interests of the parties have been settled in any of the methods aforesaid, judgment shall be rendered confirming those shares and interests, and directing partition to be made accordingly."

"SEC. 812. Upon entering such judgment the court shall appoint referees to make partition into the requisite number of shares." *General Statutes*, 652.

Section three hundred and one of the code provides, that "in all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and, if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception." *General Statutes*, 576.

This is the general provision in the chapter providing for a trial by referees; how far it is applicable to the case at bar will be hereafter considered. A referee is a person to whom a cause, pending in court, is referred by the

court, to take testimony, hear the parties and report thereon to the court, and upon whose report, if confirmed, judgment is entered.

While the parties appointed to make partition are styled referees, their duties are such only as are pointed out in the law providing for partition. Their report is not liable to be set aside by filing exceptions thereto, under the general provisions relative to the report of referees. But, as under the practice in chancery, if either party is dissatisfied, upon good cause being shown, the report may be set aside by the court, and new referees appointed as often as may be necessary, or the report may be amended in respect to any mere formal inaccuracy. 1 *Van Santvoord's Equity Practice*, 551. And it has been held that the report would not be disturbed, except upon the grounds similar to those upon which the verdict of a jury would be set aside and a new trial granted. *Doubleday v. Newton*, 9 *Howard's Practice*, 71.

It is contended by the plaintiff in error, that the court erred in appointing a referee to take and state an account between the parties. Story says, 1 Equity, Sec. 65, "cases of a different nature involving equitable compensation, to which a court of law is utterly inadequate, may easily be put; such for instance, as cases where one party has laid out large sums in improvements upon the estate; for, although under such circumstances, the money so laid out does not in strictness constitute a lien on the estate, yet a court of equity will not grant partition without first directing an account, and compelling the party applying for partition to make due compensation; so where one tenant in common has been in the exclusive enjoyment of the rents and profits, on a bill filed for partition and account, the latter will also be decreed." *Brownson v. Gifford*, 8 *Howard's Practice*, 390.

Our code provides, section two hundred and ninety-eight, *General Statutes*, 575, that "all or any of the issues

in an action, whether of fact or law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court entered upon the journal." And the following section says, "when the parties do not consent, the court may, upon application of either, or of its own motion direct a reference in either of the following cases: *First.* Where the trial of an issue of fact shall require the examination of mutual accounts, or where the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account; in which case the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein. *Second.* Where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect. *Third.* Where a question of fact, other than upon the pleadings, shall arise upon motion or otherwise, in any stage of an action."

A purely legal action cannot be referred except by consent of parties, as neither party can be deprived of the right to a trial by a jury in such cases, and in actions involving an account between the parties, it is only in cases of a purely equitable nature that a reference can be ordered, without consent of the parties.

Partition in this state is regulated by statute, and is a matter of right to any party holding title in common with others; and while in former times, in a certain class of cases, partition was made in actions at law, yet the action is equitable in its nature. We think the court had authority to appoint a referee to take the proof and state an account between the parties in this case. There are many cases involving questions of trust, and the like, where the allegations of the petition are denied by the answer, where a referee cannot be appointed, except by

consent, until the court has found such trust or agency to have existed, but in this case the court before the appointment of the referee, had found the facts stated in the petition to be true and had rendered judgment thereon.

It is contended by the plaintiff in error that the court erred in overruling defendant's motion for leave to file an amended answer. While the entire subject of amendments is in the discretion of the courts before which the case is tried, yet it is a legal discretion, and if it should be made to appear to a reviewing court that the amendment sought to be made, of any pleading, process, or proceeding, is in furtherance of justice, it will be held to be error to refuse such amendment, but the court may prescribe the terms upon which the amendment may be made. In this case the record shows that no amended answer was sought to be filed until after judgment fixing the shares of the respective parties and ordering partition had been rendered, and referees to make partition had been appointed, and made their report; and no reason is assigned for the delay, nor does it appear that the plaintiff in error had any defense whatever to the action.

We have examined the evidence included in the bill of exceptions in this case, and find the judgment fully sustained by the evidence.

We see no error in the record, and the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE GANTT concurs.

JOHN RODDY AND PATRICK RODDY, PLAINTIFFS IN ERROR, v. EDWARD, MARY, CATHERINE, FRANCIS AND ELLEN RODDY, MINORS AND INFANTS, BY THEIR NEXT FRIEND, MICHAEL RODDY, DEFENDANTS IN ERROR.

Trust: WHAT EVIDENCE NECESSARY TO ESTABLISH IT. In order to fasten a trust on property of any description, by means of a parol declaration, the words employed must amount to a clear and explicit declaration of trust; they must also point out with reasonable certainty the subject matter of the trust, and the person who is to take the beneficial interest. Loose and indefinite expressions and such as indicate only an incomplete and executory intention are insufficient for this purpose.

——: ——. Where a party testified that he gave money to a son for the purpose of buying land, to be held in trust by two other sons for his younger children, while his son testified that the land was bought with the joint means of father and sons, the understanding being that the title should remain in the sons, and that the father should have a home on the land; and the fact also appearing that the sons had given the father a life lease to a portion of the land, the consideration of which was the amount of his contribution to the common fund invested in the land, the sons also agreeing to pay the taxes upon the same, and the father accepted such lease and occupied the demised premises for a term of years, *held*, that the evidence was not sufficient to establish a parol declaration of trust.

THIS action was commenced in the district court of Otoe county, by the defendants in error, to enforce an alleged trust as to certain lands known as the undivided half of lot two in section twenty-nine, and thirty-two and a half acres off the west side of the south west quarter of section thirty-one, township nine, range fourteen, east, the legal title to which was in the plaintiffs in error.

The cause was tried at the September term, A. D. 1872, of the district court before Mr. Chief Justice Mason, and judgment was entered granting to the defendants in error thirty-seven and six-tenths hundredths, (.376), of the land above described, as well as a like interest (.376), in one hundred and twenty-seven and a half acres of the south west quarter of the same section. The

former tract of land had been purchased by one of the plaintiffs in error from one Compton, with money furnished by Michael Roddy, Sr., and the latter tract from one Calvert, by the joint means of two sons of Michael, and the petition in the case only alleged that a trust was declared as to the tract of land bought from the said Compton. The court below found, however, that a trust existed in favor of the minor children of Michael Roddy, Sr., to the extent of .376 of the tract of land bought from Calvert, as well as that purchased from Compton.

To reverse this judgment of the district court the cause was brought here by John and Patrick Roddy, defendants in the court below, upon petition in error. The facts fully appear in the opinion of the court.

S. H. Calhoun argued the cause for plaintiffs in error, on a brief prepared by himself and *John H. Croxton*, and contended that the court erred in decreeing to the defendants in error .376 of the land bought from Compton and Calvert, when they only claimed and prayed in their petition, that the land purchased from Compton was bought in trust for them, and offered proof to establish the trust to that extent alone.

After a recital of the important facts set out in the evidence, and contending that no trust was proven, the following points and authorities were submitted.

I. The decree is contrary to law, because it grants relief which is not asked for in the petition, and is inconsistent with that demand. *Adam's Equity*, 688–89, *Note* 1. *Wilkin v. Wilkin*, 1 *Johns., Ch.* 111. *Franklin v. Osgood*, 14 *Johns*, 527. *English v. Foxall*, 2 *Peters*, 595. *McCosker v. Brady*, 1 *Barb. Ch.*, 329. *Smith v. Trenton and Delaware Falls Co.*, 3 *Green Ch.*, 505.

II. The defendants in error will not be permitted to

recover the relief granted in this case, because they have made unfounded allegations of fraud in their petition and reply, and have utterly failed to establish them. They must be confined to the relief asked in the petition, if they have proven a case to entitle them to it. *Adam's Equity*, [303], *note* 1. *Price v. Berrington*, 3 *Macn. & Gord.*, 486. *Eyre v. Potter*, 15 *Howard*, 56.

III. In an action for the recovery of real estate, the complaint must describe the real estate with reasonable certainty. *Leary v. Langsdale*, 35 *Ind.*, 74. *Macmillen v. Terrel*, 23 *Ind.*, 163. *Boxley v. Collins*, 4 *Blackf.*, 320. *Hill v. Stocking*, 6 *Hill*, 314. *Taylor's Landlord and Tenant, Sec.* 72, (*a*).

I. N. Shambaugh and *E. R. Richardson*, for defendants in error.

I. Under the testimony in the cause, we find that Michael Roddy, Sr., gave to his son, John Roddy, the money to purchase land, and the land when purchased was to be for the use and benefit of the defendants in error herein, infant children of the said Michael Roddy, Sr., and half brothers and sisters to the plaintiffs in error. John took the money and purchased land, and the deed was taken in the names of James and Patrick Roddy. As soon as John Roddy accepted the money and purchased land with it, a *trust* resulted which no act of either John or Michael Roddy, Sr., could divest these infant defendants in error of.

Trusts in real property as separate from legal ownership may be created, either by an express declaration of the trust, or it may be raised upon certain facts by implication of law. *Elliott v. Armstrong*, 2 *Blackf.*, 198. *Story's Equity Jurisprudence, Sec.* 1201.

Where a man buys land with the money of another the

land will be held by the grantee in trust for the person who pays the consideration.

II. Under the evidence in the case the court below did not err in declaring a trust in favor of the defendants in error—even though John Roddy, the purchaser, took the deed in the names of his brothers, Patrick and James Roddy, instead of himself. James afterwards conveyed his title to John and the title now is in the names of John and Patrick Roddy, the plaintiffs in error herein, and the court did not err in declaring them (the plaintiffs in error) trustees for the defendants in error. *Pugh v. Pugh*, 9 *Ind.* 132.

It was a resulting trust and can be enforced in equity, or the money could be recovered by the defendants in error. *Fausler v. Jones*, 7 *Ind.*, 277. *McDonald v. McDonald*, 24 *Ind.*, 68.

III. The decree is right and for the right parties. The amount of money invested in land by John Roddy for the children was $611.00—the whole amount of which was, with the money of Patrick, James and John, invested in the land purchased from Compton and Calvert. Therefore the children would be entitled to such share of the land as $611.00 is to the whole amount of money invested. There is no error in the decree, but if there is, it is a mere clerical error which this court can modify, and if this court can, without reversing and remanding, so modify the decree or order of the court below as to do substantial justice to all parties, this court will do so—or pronounce such judgment as the court below should have done.

IV. The plaintiffs in error seek to take advantage of a lease made by James and Patrick Roddy of the Compton place, for and during his, Michael Roddy's, natural life, for the consideration of seventy sovereigns. This

lease was drawn seven months after the purchase of the premises, and was acknowledged a year after its date. Michael Roddy had no power to defeat the trust that had been created by his accepting the lease. As soon as the money was invested in land, and for the special purpose, as was declared, of the money paying for land for the young children, the trust was so far complete that Michael Roddy, Sr., nor the boys could defeat the trust, or bar the rights of the *cestui que trust*, by leasing or accepting a lease for the premises.

LAKE, CH. J.

The decree of the court below, in this cause, cannot be sustained. The petition even if fully supported by the evidence, would not justify a recovery as to all of the land. It is not contended that a trust was declared as to any of the land, except that portion of it known as the Compton tract, and yet the court found that one existed also as to the one hundred and twenty-seven and a-half acres purchased from one Calvert. The decree, therefore, to the extent that it affects this last mentioned tract, must be reversed as a matter of course.

We will next inquire whether the defendants in error are entitled to any relief as to the residue. The petition shows substantially that in the year 1864, Michael Roddy, the father of the defendants in error, came from Canada to this state, where the plaintiffs, his sons, had previously settled and were then living, bringing with him a small amount of money, consisting of about three hundred and eighty-five dollars in gold coin, which he at once handed over to his son John, to be by him invested in land. That shortly thereafter, on the 28th day of May, John purchased the Compton land, being the undivided half of lot two in section twenty-nine, and thirty-two and a-half acres taken from the west side of the south-west quarter

of section thirty-one, town nine, range fourteen, using therefor a portion of the funds thus intrusted to him by his father, under an agreement that he should take and hold the title in trust for the defendants in error. It is further alleged, that John in disregard of said agreement, procured the deed to be made from Compton to his brothers James and Patrick, who took the same without any consideration on their part, and with full knowledge of the rights of defendants in error. That afterwards John purchased the interest held by James and that he and Patrick now hold the legal title to the entire tract.

The plaintiffs in error, who were defendants in the court below, filed separate answers admitting the receipt of the money by John, and the purchase of the land at the time stated, but they expressly deny the trust. They allege that on the arrival of their father in Otoe county, he handed his money over to his son John for safe keeping, and after paying one hundred dollars to James, and fifty dollars to John for money advanced by them to aid him in coming to this country, requested him to invest what remained in land. That after deducting the one hundred and fifty dollars going to James and John, the residue, amounting to some four hundred dollars in currency, together with upwards of twelve hundred dollars belonging to James and Patrick, which they had also trusted to John for this purpose, was put into a common fund and used in the purchase, not only of the Compton land, but also of an adjoining tract containing something over one hundred and twenty-seven acres, bought of John Calvert; the entire cost of both pieces being sixteen hundred and twenty-five dollars.

They further allege that their father's name was not inserted in the deed by his own request; that he expressed a desire to have the deeds made to James and Patrick, with the understanding that he should have a home on the land as long as he should live. That afterwards, on

the 27th day of February, 1865, in order to carry out this understanding, James and Patrick, at John's instance, gave to their father a life lease to forty acres of the land so purchased from John Calvert, which he received as a full compliance with the agreement and understanding of all the parties at the time of the purchase; and that he still retains the same.

I have examined this record very carefully with the view of ascertaining whether it is possible to uphold the claim of the defendant in error to the Compton tract, or in fact to any portion of these lands, beyond the interest secured to him by said lease, even if the petition were properly amended so as to conform to the finding of the district court.

The defendants in error rely upon a parol declaration of trust, to which the plea of the statute of frauds might have been successfully interposed, had the plaintiffs in error seen fit to do so. In order however to fasten a trust on property of any description, by means of a parol declaration, the words employed must amount to a clear and explicit declaration of trust, they must also point out, with reasonable certainty, the subject matter of the trust, and the person who is to take the beneficial interest. Loose and indefinite expressions, and such as indicate only an incomplete and executory intention, are insufficient for this purpose. *Hill on Trustees*, 91.

Judging the testimony by this rule, I find myself entirely unable to reach a conclusion favorable to the alleged trust. James and Patrick, the immediate grantees from Compton, were not present when the purchase was made; they had intrusted the investment of their money to their brother John, in whose judgment and honesty, both they and the father, at the time, seem to have had the greatest confidence. It is certain, therefore, that they did not personally declare the trust, when they took the deed, and they could only have done so through their

agent John. But did he declare it for them? In the first place there is no testimony that he had any authority so to do, and secondly, he denies most unequivocally that he did so. But if we look to the testimony of the father alone, leaving John's emphatic denial out of the question, we are no better off. His account of the transaction is altogether too indefinite and uncertain to base an express trust upon. He says, "I gave John the money and he was to buy land with it in Otoe county for my youngest children by my second wife. He bought the place from Compton; he paid four hundred and twenty-five dollars for it. I told him to take the deed to James and Patrick in trust for my smaller children. Edward and Mary were the only ones of the plaintiffs then born. The provision was made only for Edward and Mary. Nothing was said about those that might be born afterwards."

And the witness Compton, from whom the land was purchased, called on behalf of the defendants in error swears that at the time of the purchase, "John said his father had the money to pay for it. That it was for a home for his father while he should live, then it was for his two brothers, and that was the reason the deed was made to them."

But in addition to all this, the conduct of the parties, especially that of the father, in respect to the land, throws a flood of light upon the transaction, and confirms me in the belief that it was substantially as claimed by the plaintiffs in error. They insist that the understanding was, that their father should have a home on the land, thus bought with their joint means, and this we find secured to him by a life lease to forty acres of the land, of his own selection, in which lease, the amount of his contribution to the common fund invested in the land, is given as the consideration. He is also relieved from the burden of taxes levied upon the land, by a provision incorporated in the lease that they shall be paid by the lessors. This insures

to him the use of it, so long as he shall live, without any further charge or expense whatever. This we think corroborates very strongly the theory of plaintiffs in error in this case, and shows very satisfactorily, that in all this business, they have been very considerate and have exercised the utmost good faith toward their father. There seems to be no good reason why, at this late day, this arrangement should be disturbed.

The judgment must be reversed, and the action dismissed at the cost of the defendant in error. A special mandate will be sent to the district court to enforce this judgment.

DECREE REVERSED, AND CAUSE DISMISSED.

MR. JUSTICE GANTT, and MR. JUSTICE MAXWELL, concur.

HESTER ANN SEXSON, PLAINTIFF IN ERROR, V. SIMON KELLEY, MICHAEL NOONAN, AND PATRICK FAHEY, DEFENDANTS IN ERROR.

Liquor selling: CONSTRUCTION OF STATUTES. By section three hundred and fifty of the criminal code of 1866, all the powers and duties devolving upon the county commissioners, in relation to the granting of license for the sale of liquors, are conferred upon the proper authorities of all towns and cities, within the incorporated limits thereof; but this provision does not change in a single particular, the conditions with which an applicant for license must comply.

———: BOND FOR LICENSE. Where a bond is made to a city, instead of to *the county*, and contains no provision for the payment of all *damages* which may be adjudged against the licensed parties, as provided by the statute, such bond is a nullity, and no action for a breach of its conditions can be maintained thereon.

THIS was a petition in error to reverse the judgment of the district court for Lancaster county. The facts are fully set forth in the opinion of the court.

H. S. Jennings, for plaintiff in error.

James E. Philpott and *Seth Robinson*, for defendants in error, stated the case and contended:

I. The bond runs to the city of Lincoln and not to the county of Lancaster as the statute requires, and it is only upon the statutory bond that an action like the plaintiff's can be brought.

II. The bond is not conditioned to pay all damages which may be adjudged against the obligees, and therefore it does not appear from the petition that the condition of the bond is broken.

III. A party suing at law on a bond or other written instrument must, if he recover at all, recover according to its terms.

> "Tarry a little;—there is something else.
> This bond doth give thee here no jot of blood;
> The words expressly are, a pound of flesh."
>
> * * * *
>
> "Shed thou no blood; nor cut thou less nor more
> But just a pound of flesh."
>
> —*Merchant of Venice, Scene I, Act IV.*

GANTT, J.

The defendants, Kelley and Noonan, obtained a license from the authorities of the City of Lincoln to sell malt, vinous, and spirituous liquors, for one year from June 6, 1871. The plaintiff, the wife of James Sexson, brought this action, on the bond, against these defendants, and Fahey, their surety, to recover damages alleged to have been sustained by reason of Kelly and Noonan selling intoxicating liquors to her husband—making him drunk.

The defendants demurred to the petition on the ground that it does not state facts sufficient to constitute a cause

of action. The court sustained the demurrer and rendered judgment accordingly. To reverse that judgment the cause is now brought here by petition in error.

Section 336, chapter 29, of the criminal code, *Revised Statutes*, 1866, 671, confers on the county commissioners authority to grant and issue license to any person or persons who shall comply with the provisions of the act. One of these provisions is that the applicant shall "file with the county clerk his bond to *the county*, in the sum of not less than five hundred dollars, nor more than five thousand dollars, with good and sufficient security, to be approved by the county commissioners, conditioned that during the continuation of his license, he will not keep a disorderly house; that he will not allow gambling with cards, dice, or any other implement or devices, used in gambling within his house, or within any out-house, yard, or other premises under his control, and for the payment of all *damages*, fines and forfeiture, which may be adjudged against him under the provisions of this chapter."

By section 350, "all the powers and duties in this chapter, devolving upon the county commissioners, shall belong to and be exercised by the proper authorities of any or all towns and cities of this state, within the incorporated limits thereof." This section merely confers on the city authorities the powers and duties of the commissioners, within the city limits, and authority to increase the license within the city limits, and to make needful rules and pass ordinances to carry out the intent of the law. It does not, in one particular, change the conditions with which the applicant for license must comply.

The act requires the applicant to execute his bond to the *county;* this is a statutory requisition, and the city authorities cannot disregard it and take a valid bond in any other name as obligee. The condition of the bond provides against the keeping of a disorderly house, and

all gambling, and for the payment of all *damages*, fines, and forfeitures; this is also a statutory requisition, and the city authorities cannot disregard it and take a bond with other conditions.

The bond sued on is made to the *City of Lincoln*, and contains no condition for the payment of all *damages* which may be adjudged against the licensed parties; but simply provides for the payment of all fines, forfeitures, and penalties, and the compliance with the statutes of Nebraska, and the ordinances of the city, "*so far as relates to the matters in the bond.*" There is no provision in the statute authorizing such bond, and there is no power conferred on the city authorities to provide for or accept such bond; hence, the bond and the proceedings of the city authorities in the matter are nullities.

The rule of law is well settled, that statutes conferring power upon municipal officers must be strictly construed. And the doctrine that municipal bodies can exercise only such powers as are especially granted them, or such as are necessary to carry into effect the powers expressly granted, is too well established to cite authorities in support of it. *Vide, The Sioux City and Pacific R. R. v. Washington County, ante page* 30.

Again, the law having clearly provided the course to be pursued in applications for license, and the nature and condition of the bond, and the party to whom it must be made, all other modes of procedure are excluded.

For these reasons we think the demurrer was rightly sustained by the district court, and its judgment ought to be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL concurs.

ANDREW J. CROPSEY, PLAINTIFF IN ERROR, V. E. A. WIGGENHORN, DEFENDANT IN ERROR.

Practice: VERIFICATION OF PLEADINGS. An agent having in his possession, as such agent or attorney, a written instrument for the payment of money only, may verify a pleading when such instrument constitutes the substantive cause of action, whether the relief sought is at law or in equity.

——— : APPEARANCE. A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally.

——— : ———. 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.

——— : ———. The voluntary appearance of a defendant, is a waiver of all defects in the summons.

——— : MOTION FOR A NEW TRIAL. To entitle a party to a review of any alleged errors transpiring upon the trial of a cause, a motion for a new trial must be made distinctly setting forth the errors complained of.

Preston v. Wells, Fargo and Co. Appendix. Porter v. Chicago and Northwestern Railway Co., 1 Neb., 14. Johnson v. Jones, 2 Neb., 136. The Midland Pacific Railway Co. v. McCartney, 1 Neb. 404; and Mills v. Miller, 2 Neb., 317, cited and approved.

THIS was a petition in error from the district court of Saunders county. Plaintiff in the court below had judgment, and one of the defendants, Andrew J. Cropsey, brought the cause here. The case is fully stated in the opinion of the court.

Seth Robinson, for plaintiff in error, after stating the case, contended:

First. The code authorizes the amount claimed by the plaintiff to be endorsed on the summons in actions for the recovery of money only, but in no other case. *Code of Civil Procedure, sec.* 64.

Second. An action to foreclose a mortgage, or for any relief, except a mere judgment for money, is not an action

for the recovery of money only; and if in such an action the amount claimed by the plaintiff be endorsed on the summons, it is irregular and calculated to mislead the defendant, and a judgment by default will not be rendered, or if rendered will be reversed. *Watson v. McCartney*, 1 *Neb.*, 131. *Nash's Pleading and Practice*, 781, 782, 783.

Third. Nor did the defendant, Cropsey, waive this defect in the process by making a special appearance for the purpose of moving to strike the petition from the files for a defect in the verification. The rule is this: If the defendant does anything, or takes any step in the case which can be fairly construed into an admission that the case is properly in court he will be held to have waived not only defects in the process, but the process itself. *Schaefer v. Waldo*, 7 *Ohio State*, 309. *Evans v. Iles*, *Id.*, 233. *Ulmer v. Hiatt*, 4 *G. Greene*, 439. *Allen v. Lee*, 6 *Wis.*, 478. *Schell v. Leland*, 45 *Missouri*, 289. *Lampley v. Beavers*, 25 *Ala.*, *N. S.* 535. *Frazier v. Resor*, 23 *Ill.*, 88. *Abbott v. Semple*, 25 *Ill.*, 107. *Johnson v. Buell*, 26 *Ill.*, 66.

Fourth. A motion to strike the petition from the files for defective verification, properly guarded by a special appearance, so far from being expressly or by implication an admission that the case is properly in court, strikes at the foundation of the action, and if sustained a new summons must issue, and so the whole case falls to the ground, summons and all. *Code of Civil Procedure*, *Sec.* 62, 112. *Nash's Pleading and Practice*, 99. *Stevens v. White*, 1 *Western Law Monthly.* And the true test is, that if the objection of the defendant be of such a nature that, if sustained, new process must issue before the court can properly proceed to render judgment in the case, then a special appearance for the purpose of making that objection is not a waiver of defective process.

Fifth. The motion to strike the petition from the

files ought to have been sustained. It was patent on the record that the petition was not founded on a written instrument for the payment of money only, but upon a mortgage which was sought to be foreclosed. *Watson v. McCartney*, 1 *Neb.*, 131.

Sixth. No judgment for money was asked, nor could properly be rendered; and in the absence of any averment in the affidavit of verification, showing that the case is one where the attorney of the party may properly verify, it cannot be presumed.

Seventh. The attorney's authority to verify is specially restricted to certain instances named, and he may verify when and because the pleading is founded upon a written instrument for the payment of money only, which is in his possession, not simply when he may see fit to swear it is so founded. The averment that the instrument is one for the payment of money only is not a traversable averment, but only that it is in the attorney's possession. The court must judge the character of the instrument.

Eighth. Without express statutory enactment, it is beyond the power of a court of equity to make any other decree on a bill for the foreclosure of a mortgage, than that of strict foreclosure; that is, that the mortgagor, unless he redeem within a fixed time, be forever barred of redeeming. The power to decree a sale of the mortgaged property (unless provided for in the mortgage), or to render a judgment for the amount secured, or for the deficiency, whether before or after sale, does not exist except by statute. *Adams' Equity*, 308. *Dunkley v. Van Buren*, 3 *Johns. Ch.*, 330. *Riley v. McCord*, 24 *Missouri*, 365. *Downing v. Palameeter*, 1 *Monroe*, 66. *Burr v. Beers*, 24 *New York*, 178.

Ninth. And for this reason a judgment in a suit for a foreclosure for the amount due, unless authorized by statute, as in Ohio and Iowa, is erroneous and void.

Carleton v. Byington, 24 *Iowa*, 172. Authorities above cited.

Tenth. A judgment void for want of jurisdiction or for any reason, may be reversed. *Evans v. Iles*, 7 *Ohio State*, 233. *Capron v. Van Noorden*, 2 *Cranch*, 126. But this judgment is not void.

Wilson and Sprague, (with whom was *T. M. Marquette*), for defendant in error.

I. The errors complained of in said assignments, if errors at all, have been waived by appearing and moving the court to strike the petition from the files. *Bank of Valley v. Bank of Berkley*, 3 *West Va.*, 386. *Marsden v. Soper*, 11 *Ohio State*, 503. *Brown v. Webber*, 6 *Cush.*, 560. *Porter v. Chic. & N. W. Railway Co.*, 1 *Neb.*, 14. *Ulmer v. Hiatt*, 4 *G. Greene*, 439. *Campbell v. Swasey*, 12 *Ind.*, 70. The summons is not void and may be amended. *Nash's Pleading*, 117. *Patterson v. The State*, 10 *Ind.*, 296.

II. The foundation of a suit to foreclose a mortgage on real estate, given to secure a promissory note, is the note itself. *Chick v. Willetts*, 2 *Kan.*, 384.

III. There is no reason why he should not have the same right to verify a pleading founded upon a promissory note secured by mortgage, as he would have to verify a pleading founded on a promissory note alone. *Smith v. Rosenthal*, 11 *How. Practice R.*, 442. *Boston Locomotive Works v. Wright*, 15 *How. Practice R.* 253.

IV. The fact that a personal judgment was rendered, as well as a decree to sell the mortgaged property, is waived. *McCarthy v. Garraghty*, 10 *Ohio State*, 438.

V. There is no personal judgment rendered against plaintiff in error, and if there was, there is no showing

that it was prejudicial to him. *Ohio Life Insurance and Trust Co. v. Gibbon* 10 *Ohio State*, 557.

MAXWELL, J.

On the first day of March, 1872, Major C. Long executed and delivered to the defendant in error a promissory note for the sum of twenty-five hundred dollars payable in one year from the date thereof, with interest from maturity at the rate of twelve per cent per annum, and to secure the payment thereof, Long and wife executed and delivered to the defendant in error, a mortgage on the east half of lot twelve in block twenty-four, in that part of Ashland, known as Flora City. The mortgage was duly recorded on the eighth day of March, 1872. On the thirty-first day of October, 1872, Long and wife conveyed the premises, subject to the mortgage, to Edward B. Woodbury. On the eighteenth of March, 1873, Woodbury conveyed the premises to plaintiff in error. Suit to foreclose the mortgage was commenced in the district court of Saunders county on the first day of April, 1873. Major C. Long, Caroline Long, and the plaintiff in error were made defendants. Summons was issued and served on the defendants. On the 24th of April, 1873, the defendant filed the following motion:

"And now comes the defendants by Seth Robinson, their attorney, and appearing specially for this motion, and not for any other purpose, and move the court here to order that the petition in this cause be struck from the files, on the ground that the affidavit of verification of said petition is insufficient and defective in this, to-wit: that said affidavit is made by the attorney for the said plaintiff, whereas it should have been made by the defendant himself; that no sufficient reason is shown in said affidavit, why the same is not made by the said plaintiff, or why the same is made by plaintiff's attorney."

The verification of the petition is as follows:

STATE OF NEBRASKA, } ss.
Saunders county. }

T. B. Wilson being sworn says, he is one of the attorneys of the above named E. A. Wiggenhorn, the plaintiff herein, duly authorized in the premises, that the above pleading of E. A. Wiggenhorn, is founded upon a written instrument, for the payment of money only, and is now in the possession of this affiant, and that the facts and allegations in the foregoing pleading of E. A. Wiggenhorn are true as affiant believes.

T. B. WILSON.

At the May term, 1873, of the district court in Saunders county, after argument, the court overruled the motion, to which defendants excepted. A judgment was rendered for the amount claimed in the petition, and for the sale of the mortgaged premises to satisfy the same.

A petition in error is now filed in this court by Cropsey, one of the defendants in the court below, to reverse that judgment. The errors assigned are:

"*First.* That the summons in said action, served upon the said Andrew J. Cropsey, the plaintiff in error, was endorsed as follows to-wit: "amount claimed of the defendants by the plaintiff is $2500.00, and interest from March 1, 1873, at 12 per cent," whereas the action was for the foreclosure and sale of mortgaged premises, and not for the recovery of money only.

Second. That the summons served upon the said Andrew J. Cropsey, was endorsed with the amount claimed to be due, as in actions for the recovery of money only, whereas said action was for the foreclosure of a mortgage upon real estate.

Third. The said court erred in overruling the motion of the defendant in the court below, to strike the petition of the plaintiff from the files.

Fourth. The court erred in rendering judgment against the defendants, including the plaintiff in error, for the amount due on the note and mortgage described in the petition.

Fifth. The court erred in rendering judgment against the said Andrew J. Cropsey, the plaintiff in error, for the amount found due on the note and mortgage described in the petition of the plaintiff in the court below.

Sixth. That judgment was given for Wiggenhorn when it ought to have been for plaintiff in error."

Section 120 of the code provides, that when the affidavit is made by the agent or attorney it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney, only:

First. Where the facts are within the personal knowledge of the agent or attorney.

Second. Where the plaintiff is an infant or of unsound mind.

Third. Where the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in possession of the agent or attorney.

Fourth. Where the party is not a resident of, or is absent from the county. *General Statutes*, 543.

In the case of *Smith v. Rosenthal* 11 *Howard Pr.*, 442, the court held, "that an affidavit of verification of a complaint on a promissory note, made by the attorney of the plaintiff, stating in addition to what is required in an affidavit of verification of the party, that he is such attorney, and that he has in his possession the note on which the action is brought, is a sufficient verification. *Treadwell v. Fasset*, 10 *Howard Pr.*, 184. *Wheeler v. Chasley*, 14 *Abbott*, 441.

But it is contended by the attorney for the plaintiff in

error, that this provision applies only to actions at law, and has no application to suits in equity.

Under the code, "the distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing, are abolished, and in their place shall be but one form of action to be called a civil action." *General Statutes*, 524.

This abrogation of the forms of pleading, and the adoption of a uniform system of remedies in the courts, does not abolish the distinction between law and equity in the determination of causes, nor require that every cause of action shall be set forth in the same manner. Many cases occur in which courts of law and equity entertain concurrent jurisdiction. Judge Story, says: "the concurrent jurisdiction, then of equity, has its true origin in one of two sources; either the courts of law, although they have general jurisdiction in the matter, cannot give adequate, specific and perfect relief, or under the actual circumstances of the case they cannot give any relief at all. The former occurs in all cases where a simple judgment, for the plaintiff or for the defendant, does not meet the full merits and exigencies of the case, but a variety of adjustments, limitations, and cross claims are to be introduced, and finally acted on, and a decree, meeting all the circumstances of the particular case between the various parties, is indispensable to complete distributive justice." *Story's Equity Jurisprudence Sec.* 76.

Section 429 of the code of civil procedure provides, that "judgment may be given for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled." *General Statutes*, 596.

This section, derived from the practice of courts of equity, is also applicable, in many cases, in actions at law, and relief may be obtained under the code, in all cases

where it could be granted before either at law or in equity. The object of requiring pleadings to be verified by oath of the party, his agent or attorney, is to secure as far as possible, a correct statement of the cause of action or defense, and no greater proof is required of either party in consequence thereof. All fictitious issues are abolished. A party is required to set forth, in ordinary and concise language, his cause of action or defense, and his prayer for such relief as he thinks himself entitled to.

In this case we are asked to hold, that an attorney holding an instrument for the payment of money, where relief is sought in equity, cannot verify the pleading. We cannot give so narrow a construction to the code, and must hold, that in all cases an agent or attorney having in his possession, as such agent or attorney, such instrument for the payment of money, may verify a pleading, where such instrument constitutes the substantive cause of action, and this is true whether the relief is sought at law or in equity.

The question now arises, whether the appearance of the defendants in the court below was general or special. In the case of *Porter v. The Chicago and Northwestern R. R. Co.*, 1 *Neb.*, 14, the court held "that a defendant may appear specially to object to the jurisdiction of the court either over his person or the subject matter of the suit, but if by motion, or other form of application to the court, he seek to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." In *Johnson v. Jones*, 2 *Neb.*, 136, the court held, "that the jurisdiction of the court attached to the defendant, when he is legally served with summons, without regard to the defects contained in the petition."

The cases cited are decisive in this case, and we must hold, that the appearance of the defendants in the court below was a general appearance.

No objections were made to the summons in the court

below. It is not necessary to cite authorities to prove, that a voluntary appearance of a defendant is a waiver of all defects in the summons.

No motion for a new trial, or to vacate or modify the decree, seems to have been made in the court below. In the case of *The Midland Pacific Rail Road Co. v. McCartney*, 1 *Neb.*, 404, the court quoted approvingly the language of Judge Stewart in the case of *The State v. Swartz*, 9 *Indiana*, 221. "It is due to the lower court that its errors, if any, be pointed out there, so that it may retrace its steps while the record is yet under its control." And in the case of *Mills v. Miller*, 2 *Neb.*, 317, the court says: "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 ruling of the court, he may have an exception." *Vide Preston v. Wells, Fargo & Co.*, *Appendix.*

This case is brought here on error. It is the duty of a party who feels himself aggrieved by a judgment of the district court, in all cases brought here on error, to take the necessary steps by motion, in such court, to set aside, vacate, or modify the judgment, distinctly setting forth the errors complained of, and excepting to such ruling on the motion as he may be dissatisfied with; he may then bring the matter here for review on his exceptions.

MR. JUSTICE GANTT concurring, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOHN O'DEA, PLAINTIFF IN ERROR, V. WASHINGTON COUNTY, DEFENDANT IN ERROR.

Appeal Bond. Steps taken by filing an appeal bond to obtain a review of an award made by appraisers, of damages on account of the laying out of a public highway, is a *proceeding* in an action, and clearly within the statutory meaning of that term; and if such bond be found to be defective it may be amended in the appellate court, by consent of sureties, or a new bond may be filed

THIS was a petition in error brought to reverse the judgment of the district court of Washington county. The case is fully stated in the opinion of the court.

Carrigan & Osborn, for plaintiff in error.

I. The bond was defective in not having two sureties. Was this an error prejudicial to the defendant? Section 145 of the civil code provides that "the court, in *every stage of an action*, must disregard any error or *defect* in the pleadings or proceedings, which does not affect the substantial rights of the adverse party." *General Statutes*, 546. In this bond the surety was sufficient for fifty times the amount of the penalty, and the defendant could not have suffered by reason of want of another name thereon.

1. The law requires the bond to be approved by the county commissioners, and this approval was a judicial act, the legality and propriety of which cannot be attacked in a collateral proceeding.

2. The county commissioners are the agents of the county, and as such agents, their approval estopped the county from taking advantage of the defect in the bond which they had approved.

II. The court should have permitted the amendment requested by plaintiff.

1. An appeal bond is a proceeding within the mean-

ing of section 144 of the code, above quoted. *Irwin v. Bank of Bellfontaine*, 6 *Ohio State*, 81.

2. An appeal bond may be amended with the consent of the sureties. *Wilson v. Allen*, 3 *Howard's Practice Rep.*, 369.

III. In view of reason and authority we insist:

1. That after the approval of the bond by the commissioners, while in session, they could not afterwards take advantage of the defects.

2. That the defects were not prejudicial to the defendant.

3. That the court should in furtherance of justice, have permitted the plaintiff to amend his bond to comply with the law.

M. Ballard, for defendant in error:

I. Section twenty-four, General Statutes, 956, says, "the bond shall be signed by two or more good and sufficient sureties, in such sum as shall be approved by the county commissioners." The law defines the *number* of sureties, but leaves the *sum only* to the discretion and approval of the county commissioners. The commissioners do not by statute approve as to the number of sureties.

II. If the county commissioners have the power to approve a bond with only one surety, they have the same power to approve a bond with no surety whatever; hence the people of a county are not liable for the personal misconduct or negligence of the county commissioners in the performance of their official functions. *The Board of Commissioners of Hamilton County v. Mighels*, 7 *Ohio State*, 109. *The Commissioners of Gallia County v. Holcomb*, 7 *Ohio*, 232. *Board of Chosen Freeholders of Sussex County v. Strader*, 3 *Harr.*, (*New Jersey*), 108. *Hedges v. The County of Madison*, 1 *Gilman*, 567.

III. Can we infer that the bond being given with only one surety, was a mere mistake, a clerical error? Not so for the record in this case, and the argument of plaintiff seems to show that the one surety or more was purposely and intentionally left off the bond. When the defect in the proceeding is so gross, or is committed under such circumstances as to indicate that the defect itself was designed, and not simply a mistake, a court will refuse permission to amend, because no mistake has in fact been made. *Irwin v. Bank of Bellfontaine*, 6 *Ohio State*, 81.

LAKE, CH. J.

This case presents but a single question for our determination.

It appears that a public highway was laid out across the plaintiff's land, and appraisers appointed to assess his damages as provided in section twenty-four, chapter sixty-seven, of the General Statutes. From the award made by these appraisers the plaintiff appealed to the district court, and to perfect the same, executed a bond to the state in the sum of five hundred dollars, which bond conforms strictly with the provisions of the statute, save that there is but a single surety, while at least two are required. For this defect the defendant moved to quash the appeal, and the plaintiff asked permission to remedy the omission by an amendment of the bond so as to comply fully with the letter of the statute. The motion to amend was denied and the appeal quashed. This is the ground of the alleged error.

It is not pretended that the present surety is not abundantly responsible for the amount of the penalty of this bond, nor is his liability thereon at all questioned, but the sole objection urged against it is a technical one,

that the statute requires it to be "signed by two or more."

The supreme court of Ohio, in the case of *Irwin and others v. The Bank of Bellfontaine*, 6 *Ohio State*, 81, which we conceive to be strikingly analogous to this, held that an amendment should be permitted. This decision was made under the code of Ohio, then but recently adopted in that state, wherein the provision as to amendments was substantially the same as that found in our own.

Section 144 of our code of civil procedure provides that "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 the party, or by correcting a mistake in the name of the party, or a mistake in any other respect. * * * And whenever any proceeding taken by a 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." And the section following is in these words: "Sec. 145. The court in every stage of an action *must* disregard any error or defect in the pleadings or proceedings, which does not effect the substantial rights of the adverse party."

In construing these provisions, Mr. Justice Swan, in the case above cited, uses this language:

"Is the filing of an appeal bond a *proceeding?* The word is generally applicable to any step taken by a suitor to obtain the interposition or action of a court. Steps taken, by which the judgment of a court is vacated, and the case taken to, and the appearance of parties effected in another tribunal is a proceeding, and a very important one, in the progress of a civil action. It is as clearly a proceeding by which a suitor takes steps to prosecute his action, or defense, in an appellate court, as is the suing out of process at the commencement of an action, or the

filing of a petition in error with process served. Besides, the term *proceeding* is used in the section of the code referred to, to distinguish all other steps taken in an action, from those embraced in the word *pleading.*"

We believe that this construction of the term "proceeding" as here used is in full accord with the liberal spirit in which our code was framed, and which seems to pervade it throughout; and we feel fully warranted in applying that familiar rule of construction by which courts are usually governed when considering statutes which have been borrowed from a sister state, and in accordance therewith, presuming that in the adoption of these provisions from the code of Ohio, it was the intention of the legislature, to take also the construction which had been given to them by the courts of that state.

We conclude therefore, that the giving of this bond, it being one of the necessary steps required to be taken to obtain a review of the judgment of the appraisers, on the question of damages, in the district court, is a "*proceeding*" and clearly within the statutory meaning of that term, and if found to be defective, may be amended upon such terms as are just and proper.

It may be urged however that the question of amendment in a case like this is a matter exclusively within the discretion of the district court. To a certain extent this is doubtless true. So long as it is apparent that the exercise of such discretion is not unreasonable, and has due regard to the substantial rights of all parties affected thereby, this court should not presume to interfere. But when it is clear that there must have been a radical misapprehension of the true spirit and scope of the statute under consideration, and in consequence thereof a suitor is deprived of a substantial right, possibly to his great pecuniary injury, it is most unquestionably our duty to interpose and grant him suitable relief.

In holding as we do, we have the support of the decis-

ions, not only of the courts of the state whence our code was derived, but of those also of Illinois and Iowa, under statutes, which although not identical in terms, yet in reality, are no more liberal than our own. *Boorman v. Freeman*, 12 *Ill.*, 165. *Mitchell v. Goff*, 18 *Iowa*, 424.

The plaintiff must be permitted within a reasonable time, with the assent of the present surety, to amend his bond now on file; or he may give a new bond in the sum of five hundred dollars with at least two good and sufficient sureties to be approved by the clerk of the district court.

The judgment of the court below is reversed and the cause remanded with instructions to proceed in conformity with this opinion.

JUSTICES MAXWELL and GANTT, concurring, judgment accordingly.

REVERSED AND REMANDED.

ORSON GOODRICH, PLAINTIFF IN ERROR, V. JOHN S. MCCLARY, DEFENDANT IN ERROR.

Evidence: ADMISSION OF PAROL TESTIMONY TO EXPLAIN WRITTEN CONTRACT. Parol evidence is admissible to supply an omission in a written contract, which, in case of a disagreement between the parties, would otherwise be ambiguous and wholly inexplicable.

———: ———. And this in no wise trenches upon the general rule, that the terms of a contract must not be changed or varied by oral testimony.

———: ———. G. and M. entered into an agreement, by which G. agreed to deliver to M. his cutting of wool on a day named; but the contract being silent as to the number and kind of sheep which G. owned at the time it was made, *held* that parol testimony was admissible to show that fact.

Examination of witnesses: FORM OF QUESTION. Although the form of a question put to a witness is objectionable, yet if the answer does not respond directly to the question, but gives the facts, as in response to an interrogatory properly put, the error is without prejudice and will be disregarded.

Damages. In an action upon a contract for the delivery of a certain amount of wool, the true rule of damages is the difference between the contract and market price at the time and place of delivery.

ERROR to the district court of Madison county.

Goodrich was defendant in the court below, and, judgment being rendered against him, brought the cause here by petition in error. The facts are fully set forth in the opinion of the court.

W. A. Marlow, for plaintiff in error.

The court erred in overruling defendant's motion to strike out of plaintiff's petition in the court below, irrelevant matter, as appears from the bill of exceptions; also, in allowing evidence to go to the jury over defendant's objection, tending to change and vary the terms of the written contract sued on in this action. The same rules of law that apply to the first error complained of, will apply to the second.

I. Irrelevant matter is such as is inadmissible in evidence, or not material to the facts constituting the cause of action or defense. If the contract sued on is definite, certain and unambiguous, then the matter sought to be stricken out of p'aintiff's petition could not be given in evidence on the trial of the case. If the contract is definite, certain and unambiguous, then the court erred in allowing any evidence to go to the jury, over defendant's objection, tending to change and vary the terms of the contract. We claim that the contract is neither uncertain, indefinite, or ambiguous; that it is as certain as the English language can make it.

The law presumes that everything that was agreed upon and understood between the parties was embodied in the written contract. It is not claimed by McClary that there was any mistake or fraud in the transaction. He expects to recover on the written contract, not as it is, but asks

the court to allow him to add to and change it to suit his own convenience. There is no rule of construction that will apply in this case. The very idea of construction implies a previous uncertainty as to the meaning of the contract, for when this is clear and unambiguous, there is no room for construction and nothing for construction to do. Courts will not, by construction of a contract, defeat the express stipulations of the parties. 2 *Parsons on Contracts*, 500. If the learned judge was correct in his rulings in the court below, our opinion is that it is lost time and a waste of paper, to reduce contracts to writing for the purpose of making more definite and certain as to what the parties intend. The statute of frauds, requiring certain contracts to be in writing, is a humbug, if the court was correct in its ruling in this case, for the reason that it would be impossible to draft a contract that could not be changed and varied by parol evidence. The law does not require men to do foolish things. By examining the evidence in this case, we must come to the conclusion that McClary and Goodrich did a very foolish thing, when they drafted the contract on which this action is founded, the plaintiff being allowed to vary the written contract from the one sued on.

II. The court erred in allowing evidence to go to the jury, over defendant's objection, of the market value of wool at Norfolk, Nebraska, on the fifth day of June, 1872, and other places, for the reason that the plaintiff in his petition claims general damages only. Damages which necessarily and generally result from the injury complained of, may be recovered without any special statement of their nature, but such proximate and natural damages, as result from the injury, but which are not the inevitable and necessary result, must be specially stated in the petition, otherwise the plaintiff will not be permitted to prove them on the trial. *Swan's Plead-*

ings and Precedents, 229. 1 *Chitty's Pleadings*, 338. *Johnson v. Matthews*, 5 *Kansas*, 118. *Vanderslice v. Newton*, 4 *New York*, 130. 2 *Greenleaf on Evidence*, 261. There is no question as to the measure of damages in this case; the rule of damages being the difference between the purchase price and the market value of wool at Norfolk on the fifth day of June, 1872, *provided special damages be claimed.* The petition claims *general damages.* The plaintiff is entitled to recover under the petition as it stands, all damages which are the natural, necessary, and inevitable result of the injury complained of. Wool is a marketable article; to-day it may be worth twenty-five cents per pound, and to-morrow, one dollar per pound, and *vice versa.*

Munger & Ghost, for defendant in error, presented, among others, the following points:

I. The evidence introduced to show the number of sheep, and number of pounds of wool, did not change, vary, or contradict the terms of the written contract, but only explained what was meant and intended by the parties, in the use of the words, "*his cutting of wool.*" Such evidence was proper. 1 *Greenleaf on Evidence*, 325.

II. If the contract sued upon is definite, certain, and unambiguous, then one fleece of wool of two pounds would fill the contract, and McClary would be required to pay *one hundred dollars*, at the time the same was delivered, *or fifty dollars per pound.* We do not think this or any other court will lend its aid to defeat the obvious intention of the parties. It is evident from the terms of the contract, in providing that McClary should pay Goodrich one hundred dollars at the time of the delivery of the wool, and the balance when he received returns from the same, that the words, "his cutting of

wool," were used, intended, and understood by the parties, as expressing *proximately* an amount of wool, understood and contemplated by the parties at the time of the execution of the contract, and were not used or intended to, and do not *abstractly* express the intention of the parties.

III. All evidence introduced to show the market price of wool at other places than Norfolk, was brought out by plaintiff in error, on cross-examination of McClary, and by his own testimony; hence *he* cannot complain.

IV. Is the difference between the contract price and market price, on the day of delivery, in actions like this, *special damages* in such a sense as to require *special pleading?* The best, and in fact the only method by which to determine this question, is to enquire, what the reasons are for requiring special damages to be alleged in any case. An examination of all the authorities, we think, fully supports the doctrine, that where the damages are the necessary result, or are legally inferred from the facts stated, *or if the defendant is sufficiently apprised of the plaintiff's claim,* from such statement of facts, then they are termed general and may be recovered under the general plea of *ad damnum. Sedgwick on the Measure of Damages, Fourth Edition* 682, *note* 1. Now to apply this rule to the case at bar, the measure of damages is the difference between the contract price and the market price at Norfolk, on the day on which the wool was to have been delivered; hence can it be claimed that under the pleadings the defendant was not apprised of the extent and nature of plaintiff's claim, when the law has so *definitely* settled that the difference in price as above stated, is the only damage which can be legally claimed by the plaintiff?

Our position, that the damages recovered in the court

below are proper damages, under the general plea and without further pleading, has been settled and fully sustained by the authorities. *Burrel v. New York and Saginaw Salt Co.*, 14 *Mich.*, 34. *Hallock v. Belcher*, 42 *Barbour*, 199.

LAKE, CH. J.

McClary sued Goodrich in the court below to recover damages alleged to have been sustained by him in consequence of the failure and refusal of Goodrich to deliver a quantity of wool which he had sold to McClary.

A very brief and crude memorandum of the contract entered into for the delivery of the wool, is attached to the petition and is as follows:

"Agreement made this 8th day of April, 1872, between Orson Goodrich and J. S. McClary. That Orson Goodrich delivers his cutting of wool to J. S. McClary, by June 5th, 1872, at Norfolk, Nebraska, at 38½ cents per pound, the understanding that on delivery of wool at Norfolk, to advance one hundred dollars, and the bal. as soon as gets return from said wool.

Signed this 8th day of April 1872.

Advanced on the above, five dollars.

(Signed.) ORSON GOODRICH.
J. S. MCCLARY.

It is further alleged that the wool thus contracted for, was that which was then growing on Goodrich's entire flock of sheep, numbering about four hundred and seventy-five head; that by reason of the failure to deliver the wool, the plaintiff McClary was damaged to the amount of five hundred dollars.

The defendant, Goodrich, in his answer admits the making of the contract, but alleges that he duly tendered the wool, which McClary refused to receive.

The case was tried to a jury who returned a verdict for McClary for the sum of ninety-one dollars and seventy-six cents, upon which, after a motion for a new trial was overruled, judgment was duly rendered, to reverse which, the cause is brought to this court.

Several exceptions were taken to the rulings of the court, during the progress of the case; but we notice only those which we deem important; and these may be included under two heads.

1. Those which relate to the admission of parol testimony in explanation of the memorandum, and

2. Those which relate to the rule of damages.

It is clearly shown by the evidence that soon after making this contract, and before shearing his sheep, Goodrich sold his entire flock to one Thomas, of Fremont, thus disabling himself to comply with his agreement. Why this sale was made does not distinctly appear, but it is quite probable that an advance in the price of wool may have had something to do with it. But whatever may have been the inducement, it is enough for us to know that it was voluntary on his part, and that he purposely put himself in a position to violate his agreement and thereby damage McClary.

It is urged upon our attention, with a good deal of earnestness, that the words, "*his cutting of wool*" should be construed to mean such wool alone as Goodrich should actually shear from sheep which he happened to have on hand at the time of shearing, whether they were few or many, and that no testimony should have been given as to what particular sheep, or the number thereof, were intended by the parties.

To such a construction we cannot assent. We think it is clear that both parties intended by the use of these words, to include all the wool grown upon all the sheep which Goodrich had on hand when the contract was made, unless

decreased by some unavoidable cause, and without fault on his part.

We must hold, therefore that it was important to know the number and kind of sheep, which Goodrich owned at the date of this contract, and inasmuch as the memorandum is silent on this point, resort to parol testimony was strictly proper. In holding thus we in no wise trench upon the rule, so urgently invoked by counsel for plaintiff in error, that the terms of a written contract must not be changed and varied by oral testimony. It does not change the contract but supplies an omission, without which, in case of disagreement of the parties, it would be ambiguous and wholly inexplicable.

It is true that the form of the question put to McClary is objectionable. He was asked to give his "understanding of what was meant by the words, *cutting of wool.*" This was entirely immaterial, and the objection should have been sustained; but inasmuch as the answer did not respond directly to the question, and gives the facts as they transpired, the conversation between the parties on the point in dispute, the error was without prejudice and must be disregarded. His answer was that "the contract was made with reference to a flock of from four hundred and sixty to four hundred and seventy head of sheep, which Goodrich then owned."

As to those exceptions which go to the rule of damages recognized by the court in the admission of testimony, it is only necessary to say, that the true rule of damages is the difference between the contract and market price, at the time and place of delivery, and that we fail to discover any error in this particular.

From a careful examination of the record, we are convinced that if either party has reason to complain it is not the plaintiff in error, most certainly, but rather the defendant in error because of the smallness of the damages which the jury gave him. When a person takes upon

himself the responsibility of a deliberate violation of his engagements, he must not be surprised if he finds courts and juries quite ready to compel him to make good the loss which he thereby occasioned.

JUSTICES GANTT and MAXWELL concurring, the judgment must be affirmed.

JUDGMENT AFFIRMED.

JAMES E. LANPHERE, JACOB S. SPAUN, AND JOHN C. SEMONES, PLAINTIFFS IN ERROR, V. SOPHIA LOWE, DEFENDANT IN ERROR.

Fixtures erected by a tenant during his term, the removal of which will not injure the demised premises, or put them in a worse plight than they were before, are in law deemed personal property, and may be mortgaged as chattels, or levied on as personalty, and sold upon execution, and the purchaser at such sale has the right to enter upon the premises to remove them. A building put on the leased premises by the tenant, and set on blocks, without cellar or foundation under it, *held* to be such fixture.

Chattel mortgage and lease: PRIORITY OF LIEN. A tenant of demised premises under a lease, containing a provision that all unpaid rent and taxes should be a special lien upon all improvements and buildings which might be placed upon the premises, and forbidding their removal till so paid, but which lease was not recorded, executed a chattel mortgage upon a building which he had erected thereon, after the leasing of the premises. In an action brought by the lessor to enjoin the mortgagees from removing or interfering with the building in question, *it was held*,

1. That the building, although erected on land of the lessor, yet being personalty, and subject to all the incidents of personal property, the mortgagees were not charged with notice sufficient to put them upon inquiry as to any legal or equitable title of the lessor.

2. That the lease, not having been put on record, could not affect the rights and liens of third parties without notice.

3. That the mortgagees secured by their mortgage a lien upon the building, and a superior equity to the claim of the lessor under the provisions of the lease.

4. That the provisions of the lease, to secure a lien on all improvements that might be erected on the premises, for the payment of rent and taxes, was not a mutual agreement to erect any such improvements, but a mere effort on the part of the lessor to create a lien upon something not *in esse*. *Per* GANTT, J.

THIS action was commenced by Sophia Lowe, in the district court of Douglas county, to obtain an injunction perpetually restraining the plaintiffs in error from removing or interfering with a certain frame building situated on a portion of lot five, in block one hundred and thirty-four, of the city of Omaha.

Upon a trial of the cause, before Chief Justice Lake, a decree was entered against the plaintiffs in error, perpetually enjoining them from removing or interfering with the building in question. The cause was then brought here by petition in error. The facts are fully stated in the opinion of the court.

Spaun & Pritchett for plaintiffs in error.

I. James E. Lanphere owned the building in question, and, but for the clause in his lease with Lowe and the chattel mortgage, would have been at liberty to remove and dispose of the same at his own pleasure. The sole claim and right to the building which Mrs. Lowe acquired or can have, is by virtue of the clause in the lease, and her action and claim is founded upon it. The building was, and is a personal chattel, and never was attached in any way to the freehold, and the priority and rights of Mrs. Lowe, and of the plaintiff in error, Spaun, must be determined upon the principles of law applicable to lienors of personal property. That the evidence in the case abundantly shows that the building was a personal chattel, and so even as between vendor and vendee. *Burrill's Law Dictionary, title — Fixtures. Fisher v. Saffer*, 1 *E. D. Smith*, 612. 2 *Smith's*

Leading Cases, 99. 2 *Kent Com.*, 345. *Walker v. Shearman*, 20 *Wend.*, 636. *Teaff v. Hewitt*, 1 *Ohio State*, 430. *Lowenberg v. Bernd*, 47 *Missouri*, 297.

II. The building being personal property, the plaintiff in error, Spaun, as assignee of Richards & Motheshead, the mortgagees, is entitled to priority over Mrs. Lowe, if Richards & Motheshead actually advanced value for the mortgage, and had no notice of Mrs. Lowe's claim under the lease. *Bennet v. Earll*, 21 *Wend.*, 117. *Milliman v. Neher*, 20 *Barb.*, 36. *Wood v. Lester*, 29 *Barb.*, 146. *Johnson v. Crofut*, 53 *Barb.*, 274. *Baskins v. Shannon*, 3 *New York*, 310. *Story's Equity Pleadings*, *Sec.* 604.

III. The evidence shows that Richards & Motheshead parted with value for their mortgage, and that Motheshead had no notice of Mrs. Lowe's rights, and evidence of the other partner, Richards, was offered upon the trial to show that he had no notice, but was ruled out by the court, in which it is claimed the court erred.

IV. The priorities of the liens or rights of Mrs. Lowe, and plaintiff in error, Spaun, were fixed when the chattel mortgage was filed for record. *Meech v. Patchin*, 14 *New York*, 71.

B. E. B. Kennedy, for defendant in error, contended:

I. The legal title to the land on which this building stood being in the defendant, the mortgagee was charged with notice sufficient at least to put him upon inquiry as to any legal or equitable right of the defendant in the property.

The legal presumption is that all the buildings and improvements are attached to and form a part of the realty until the contrary is shown.

The landlord has a lien on growing crops. *Case v. Hart and Humphrey*, 11 *Ohio*, 364. And, by parity of reason, on all improvements which are in their nature connected with the realty.

II. The building was not subject to attachment or execution levy. *Otis v. Wood*, 3 *Wend.*, 498.

GANTT, J.

This is an action for an Injunction to restrain plaintiffs from removing a building off land of the defendant.

On the 28th of September, 1869, the defendant demised to Lanphere a part of a vacant lot of ground in Omaha City, for the term of five years. Lanphere agreed to pay defendant for the use of the premises, the taxes accruing thereon during the term, and a certain stipulated rent for each year, to be paid quarterly. He took possession under a written lease, and afterwards placed on the ground certain improvements, and has occupied the same in part as a dwelling house, and in part as a house of trade or business.

The lease provides that in case he shall fail to pay the rent and taxes, the defendant might, at her option, declare the lease at an end and re-take possession of the premises; and further provides, "that all unpaid rents and taxes, that shall remain against said premises, shall be and they are hereby made a special lien upon all improvements and buildings which may be erected or placed upon said premises, and that no improvements or buildings shall be removed from said premises, while any rents which have become due, are unpaid, or any taxes remain unpaid upon the same."

It is alleged that the plaintiffs were about to remove the building off the premises, and that they had conspired together to defraud the defendant; therefore the defend-

ant asked for a perpetual injunction, and prayed that it may be adjudged she had a valid and prior lien upon the building, to secure the payment of the rent and taxes, superior to the claim of the plaintiffs. The lease was not recorded.

On the 21st of October, 1869, Lanphere in order to secure the payment of a note to Richards and Motheshead, executed and delivered to them a chattel mortgage on the building, which was recorded December 21, 1869. The mortgagees assigned the note and mortgage to the plaintiff Spaun, who denies the lien of the defendant, and denies any conspiracy and fraud, and says that neither he nor Richards and Motheshead ever had any knowledge or notice whatever that defendant claimed, or could have, any lien upon the building by virtue of the lease or otherwise; and he claims that by virtue of the mortgage, and the recording of the same, he has a prior and superior lien to any lien of the defendant upon the building.

It appears that sometime after the execution of the lease, the building was put on the leased premises by the tenant, and set on blocks, without any cellar or foundation under it, and was so placed on the premises for a dwelling house, and house of trade or business, and was so occupied by the tenant.

Now, if this building shall in law be deemed personal property, then it must necessarily follow as a sequence that it is subject to chattel mortgage, and is liable to levy and sale upon execution for debts of the tenant. Therefore, the first question for consideration is, what fixtures erected by a tenant during his term, upon the demised premises, are removable by him? for, if removable, then such fixtures are personalty, and not real property.

The general common law rule is, that whatever is annexed to the freehold becomes part of it; but as far back as we can trace the rule in the books, it was not inflexible, and had its exceptions. As between tenants

for life or in tail, and remainder-man or reversioner, it was construed liberally in favor of the former. And in *Van Ness v. Pacard*, 2 *Peters*, 143, it is said, that "an exception of much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufacturers, fixtures which were erected to carry on such business, were allowed to be removed by a tenant during his term, and were deemed personalty for many purposes." And the "question whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick chimney. The sole question is whether it was designed for the purpose of trade. * * * * And the fact that the house was used for a dwelling house, as well as for trade, is no ground to declare that the tenant was not entitled to remove it." *Lawton v. Lawton*, 3 *Atk.*, 13. *Penton v. Robart*, 2 *East*, 88. *Pooles Case*, 1 *Salk.*, 368.

And this right of removal, in later decisions, is so far extended as between landlord and tenant, that a "tenant for life, for years or at will, may, at the expiration of his estate, remove from the freehold *all* such improvements as were erected or placed there by him, the removal of which will not injure the premises, *or put them in a worse plight than they were in when he took possession.*" *Whiting v. Brastow*, 4 *Pick.*, 310.

However, as between vendor and vendee, the rule is different from that of landlord and tenant. In the former case, anything of a permanent nature fitted for and actually applied to use upon the premises by annexing the same, becomes part of the realty and passes to the vendee, though it might be removed without injury to the premises. 1 *Washburn on Real Property*, 15. But in the latter case, whatever a tenant affixed to the leased

premises may be removed by him during his term, provided the same can be done without injury to the freehold. Nor will a conveyance of the premises by the landlord, interfere with the rights of the tenant in respect of such fixtures. *Ibid* 18, *Sec.* 27.

In the case at bar the demised premises were vacant when demised to the tenant, and the tenant put his building on the same and set it on blocks, without a foundation under it. The removal of such a building clearly comes within the rule, that the tenant may remove from the freehold all improvements erected by him, the removal of which will not injure the premises, or put them in a worse plight than they were in when he took possession.

And it seems clear also, upon principles well founded in reason and public policy, that the rule of law is well established, that buildings placed upon leased premises by the tenant, to be used for the purpose of trade and business, *are in law deemed personal property*, and may be mortgaged as chattels, or levied on as personalty, and sold upon execution, and that the purchaser at such sale has the right to enter upon the premises to remove them. *Lemar v. Miles*, 4 *Watts*, 332. *Doty v. Gorham*, 5 *Pick.*, 487. *Van Ness v. Pacard*, *supra.*

And I think, upon principle, the rule with equal force applies to all other fixtures erected by the tenant, which are removable during his term.

The second question raised in the case, and urged by counsel is, that the building being on the land of defendant, the mortgagees were charged with notice sufficient to put them upon inquiry as to any legal or equitable right of the defendant. In some cases it is true, that a party may have sufficient notice to put him upon inquiry in respect to the subject matter in controversy ; but if, as I think very clearly appears, the building is in law deemed a personalty, subject to all the incidents of personal prop-

erty, then this doctrine of notice does not apply to this case, because at the time the mortgage was given, and when the same became forfeited, the property was in the possession of Lanphere, the tenant.

But in respect of claims of lien by written pledge the notice, to be sufficient, must be full, clear, and explicit; it must express the amount or sum for which the property was bound, and generally must give substantially the same information as would be given by an inspection of the deed. *Denny v. Lincoln*, 13 *Met.*, (*Mass.*), 203. And the notice must be certain and true in point of fact, not vague and general expressions resting on hearsay. *Butler v. Stevens*, 26 *Maine*, 484. The law does not favor secret liens.

The third question raised by the pleadings, and urged in the argument, is, whether the defendant has a valid, prior lien, by virtue of the lease, on the building to secure the payment of the rent and taxes, superior to that of the mortgagees, under the mortgage, upon the same? The provision in the lease to secure a lien on the building, is not a contract between the defendant and the tenant, in which they mutually agree that the tenant shall erect certain buildings, and the defendant shall have an interest in the same, to the extent of all unpaid rent and taxes. It is not a mutual agreement, fixing the interests of the parties in respect of a building to be erected by the tenant. The tenant was under no contract, and entered into no contract to erect such building or any other improvement whatever. But it was an effort on the part of the defendant to create a lien, somewhat in the nature of a chattel mortgage, upon a something not *in esse*.

Can a valid charge be made upon a thing not in existence? I think it cannot. It is a very ancient rule of law, that a man cannot grant or charge that which he has not; and in *Jones v. Richardson*, 10 *Met.*, (*Mass.*),

488, it is said that this "is a maxim of law too plain to need illustration, and which is fully supported by all the authorities." *Bac., Abr., Grants, D,* 2. *Cadman v. Freeman,* 3 *Cush,* 309. 2 *Kent Com.,* 703. *Head v. Goodwin,* 37 *Maine,* 187. *Robinson v. Donnelle,* 5 *Maul and Selw.,* 228. *Chynoworth v. Tenney,* 10 *Wis.,* 400.

This doctrine is applied to mortgages of goods which may be subsequently acquired by the mortgagee; it is equally applied to sales of personal property, and rights of property. *Chesley v. Josselyn,* 7 *Gray,* 490. *Rice v. Stone,* 1 *Allen,* 569. The lease not having been put upon record, it could not affect the rights or liens of third parties without notice. They are protected by the registry acts of our state. *Sheldon v. Conner,* 48 *Maine,* 584. There is no evidence showing that the mortgagees of the tenant had any notice whatever of the defendant's claim of lien upon the building. The building is a personalty, and was in possession of the tenant when the mortgage was executed. At the time the lease was executed the building, as appears by the facts before us, had no existence as the property of the tenant. Therefore, in any aspect of the case, as it is now before this court, I think the mortgagees secured by their mortgage a lien upon the building, and a superior equity to any claim of the defendant against the same. The judgment of the district court is reversed, and cause remanded for a new trial.

REVERSED AND REMANDED.

MR. JUSTICE MAXWELL concurs.

FREDERICK SCHADE, SR., AND FREDERICK SCHADE, JR., PLAINTIFFS IN ERROR, V. MARIA W. BESSINGER, DEFENDANT IN ERROR.

Evidence: PROVING DEED A MORTGAGE. To vary the legal import of an absolute deed, especially when fraud, accident, mistake, or surprise, is not alleged, the evidence in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear, certain, and conclusive, before a court of equity will determine such deed to be a mortgage security only.

———: ESTOPPEL BY DEED. Where a party voluntarily surrenders the legal evidence by which his claim could be supported, and directs his grantor to make a deed to another person, he is estopped from introducing secondary evidence to defeat a title made with his own knowledge and consent, and for which he received satisfactory consideration.

THIS was an action of ejectment brought by Maria M. Bessinger, against Frederick Schade, Sr., and Frederick Schade, Jr., for the recovery of the possession of a certain tract of land in Richardson county.

The facts in the case are substantially as follows:

Frederick Schade, Sr., a native of Germany, emigrated to the United States, and in the year 1864 married Maria M. Bessinger. Shortly after the marriage she advanced the sum of two hundred dollars, and Schade, Sr., bought of one Theodore Hoos the tract of land in controversy, paying therefor the sum of five hundred dollars. After the purchase, both parties, as husband and wife, moved on the premises, erected a house, made some improvements, and lived together thereon until 1868. Shortly after the purchase, Schade, Sr., to whom the deed from Hoos had been made, erased therefrom his own christian name, and inserted in its place that of his wife Maria. Schade, Jr., coming from Germany, Maria for the first time, learned that Schade, Sr. had a wife and children then living in Germany. She continued, however, for some time thereafter, to live with Schade, Sr., performing the

labor and duties she had done before, and the deed made as above stated was destroyed, (never having been recorded), and Hoos made another to the plaintiff as Maria M. Bessinger. In 1868 she abandoned Schade, Sr., and at the commencement of this action in 1870, was living separate and apart from him. In the meantime Schade, Sr. conveyed the land to Schade, Jr., and they together continued in possession of the premises.

The cause was tried at the November term, 1871, before Mr. Chief Justice Mason, sitting in the district court of Richardson county, and judgment rendered in favor of the plaintiff, which on motion of defendants was set aside and a new trial granted. At the second trial in June, 1872, the court again found the issues to be in favor of the plaintiff, and rendered judgment accordingly. On motion of defendants this finding and judgment was set aside and another trial granted. The third trial took place in November, 1872, and the court again rendered judgment in favor of the plaintiff. The defendants filed a motion for a new trial, which was overruled by the court. To reverse this finding and judgment the Schades, who were defendants in the court below, brought the cause here upon petition in error. Considerable testimony was taken before a referee in the court below, the important portion of which is referred to in the opinion of the court.

A. Schoenheit, for plaintiffs in error, submitted the following points:

I. Was the changing of the first deed *a void act?* or, in other words, did the deed, as changed, and afterwards destroyed, and the making of the other deed, divest the plaintiff in error, Schade, Sr., of the estate, and vest in the defendant in error, Maria M. Bessinger, the legal title and estate of said premises?

We contend that the changing of the first deed did not, nor its destruction, nor the making, etc., of the second deed invest the defendant in error with the legal title; nor did any or all of said acts divest Schade, Sr. of the legal estate in and to said premises. 2 *Washburn Real Property*, § 12, 557, and authorities there cited. *Rifener v. Bowman*, 53 *Penn. State*, 313. *Lewis v. Payn*, 8 *Cowen*, 71. *Hatch v. Hatch*, 9 *Mass.*, 307. *Chessman v. Whittemore*, 23 *Pick.*, 231.

II. Is the instrument under which the defendant in error claims, a deed or a mortgage?

Burchard, in substance, testifies that Schade, Sr., at the time said witness wrote the deed, said that he, Schade, Sr., "wished to secure Mrs. Bessinger for the money he had borrowed of her, and her work; but, that for the purpose of preventing the children of Schade, Sr., from contesting the matter, the deed was made absolute in its terms." The testimony of Mary Beimly, Charles Beimly, the defendant in error herself, and Charles Walther is in substance the same. These are all the witnesses in behalf of the defendant in error upon that point.

Schade, Sr., states the deed, etc., was made for the purpose of securing the payment of money loaned by the defendant in error to said Schade, Sr., with interest, etc., and that she was to re-convey the premises to him as soon as she was paid. Schade, Jr., states that she acknowledged that fact to him.

William McLennan, for defendant in error, contended:

I. The defendant in error has clearly established by the proof, that the property was purchased and conveyed to her as a settlement upon her after the marriage; that she gave Schade, Sr., a portion of the money, and that no understanding, agreement, or arrangement of any kind

was made, by which the property was to be conveyed to these plaintiffs in error, or any of them, on any terms whatever.

II. Schade, Sr., procured a marriage with the defendant in error, by his false and fraudulent representations to her, and the property was purchased, as he stated, for a home for her. She exercised all acts of ownership over the property from the time of the conveyance to her, up to the time of the commencement of this action, by improving the land, paying the taxes, etc., and there is no testimony showing his dissent of the same. Nor is there any testimony, except that of Schade, Sr. and Schade, Jr., showing the slightest grounds for claiming that she was to hold the property in trust for any purpose whatever. Slight as such testimony is, it is clearly and emphatically contradicted by testimony of the defendant in error, and a number of disinterested witnesses.

III. The marriage of the defendant to the plaintiff, Schade, Sr., was a sufficient consideration for said conveyance, and it will not change the consideration, although the marriage afterwards appears to have been a nullity, it being brought about by the false and fraudulent representations of the Schade, Sr. 2 *Parsons on Contracts*, 71. *Waters v. Howard*, 8 *Gill*, 262.

IV. The law will not presume that the deed to Maria M. Bessinger was given as a mortgage, or made to her in trust, but such fact must be clearly established, and the onus is on the party making the allegations to prove them.

V. Trusts are not to be presumed, when the papers on their face are absolute, and if the property was a gift from F. Schade, Sr., to the defendant in error, her title to the property is complete against all persons, except

creditors of said F. Schade, Sr., who were creditors at the time the conveyance was made.

VI. The creditors named in said answer were subsequent creditors, and have no equity as against said defendant in error, and were they creditors who had an equity, their rights cannot be investigated until they commence their action for that purpose, and then only to the extent of their debts and no more. *Parson on Contracts*, 120-122. *Gower v. Mainworing*, 2 *Vesey, Sen.*, 89. *Cole v. Wade*, 16 *Vesey, Jr.*, 43. *Packard v. Nye*, 2 *Met.*, 47. *Green v. Winter*, 1 *Johns. Ch.*, 26. *Manning v. Manning*, 1 *Johns. Ch.*, 527. *Schieffelin v. Stewart*, 1 *Johns. Ch.*, 620. *Stone v. Hackett*, 12 *Gray*, 227.

GANTT, J.

THIS is an action in ejectment, and the plaintiffs in error, who were defendants in the district court, rested their defense, mainly, on these two grounds: *First*, that the deed from T. Hoos to the defendant, although a conveyanee absolute, yet it was intended to be and was a mortgage security only; and, *Second*, That Schade, Sr., was the purchaser and owner of the land, the first deed being made to him as grantee, and therefore the second conveyance by Hoos to defendant in error, did not divest him of the legal estate in the premises.

But upon an examination of the evidence stated in the bill of exceptions, I think it fails to sustain either the first or second defense; and this is the unanimous opinion of this court. The testimony of N. W. Burchardt, C. F. Walther, and T. Hoos, who are wholly disinterested witnesses, clearly shows that Schade, Sr., originally purchased the land in controversy for the defendant in error, as a consideration for money she furnished and labor and services she performed for him. C. F. Walther further

testified that he wrote the deed in which the name of Frederick Schade was inserted as grantee, and, that a short time afterwards, he came to him and told him the deed was to be made to the defendant in error, and that then, by consent of the parties, the name of Frederick Schade was erased from the deed, and the name of Maria M. was put in the place of it as grantee. N. W. Burchardt further testifies that Schade told him he "wanted to give her the land to be her own in fee simple without condition," and that he requested him to write a deed from T. Hoos to Maria M., which was written at his request, and was executed by Hoos and delivered to her; and that the first deed, not being recorded, was by the consent and understanding of all parties, cancelled and thrown aside. It seems quite certain that Schade, Sr., when he contracted for the purchase of the land, and afterwards, intended that it should be conveyed to the defendant in error in fee simple without condition whatever, and this intention is manifested both by his acts and declarations.

But it is urged that upon the cancellation of the first deed, the second one was executed to the defendant in error as a mortgage security only. It is true, under the rule of law, now well established, that a formal conveyance may be shown to be a mortgage by intrinsic evidence. And this rule seems to be founded on the principle, that, in such case, the proof raises an equity which does not contradict the writing or affect its validity, but simply varies its import so far as to show the true intention and object of the parties without a written defeasance, and establish the trust purpose for which the deed was executed. But to thus vary the legal import of such deed absolute, and especially when fraud, accident, mistake or susprise, is not alleged, the evidence in reference to the understanding and intention of the parties, at the time of the execution of the writing, must be clear,

certain and conclusive, before a court of chancery will determine such writing to be a mortgage security only. *Stevens v. Cooper*, 1 *John Ch.*, 429. In the case under consideration, the proof falls far short of showing that the writing was intended as a mortgage, but on the contrary the evidence manifestly shows, that the intention and purpose of Schade was to vest in the defendant in error an absolute legal estate and interest in and to the premises.

Again, it was urged by counsel that the cancellation of the first deed to Schade as grantee, and the execution and delivery of the second one by Hoos to the defendant in error, did not, in law, divest him of the legal estate in the premises. I think this is not the law of this case. We find as exceptions to the general rule of law on this subject, that an unrecorded deed of land voluntarily given up, and cancelled by the parties with intent to re-invest the estate in the grantor, will, as between the parties and all subsequent claimants under them, operate as a re-conveyance, and revest the estate in the grantor. *Tomson v. Ward*, 1 *N. H.*, 9. And in *Commonwealth v. Dudley*, 10 *Mass.*, 403, it is said that "where A, being seized and possessed of land purchased by him of B, by a deed duly executed but not recorded, contracted to sell the land to C, and for that purpose cancelled B's deed, who at A's request made a new conveyance to C., it was holden that C's title was valid notwithstanding A. continued in the occupancy of the land jointly with C. after the last conveyance."

Such conveyance operates as an estoppel arising from the voluntary surrender of the legal evidence by which alone the estate could be supported; and a conveyance to a third person, makes a good title to the latter by operation of law. *Trull v. Skinner*, 17 *Pick.*, 215. *Nason v. Grant*, 21 *Maine*, 160; and the grantee, by his voluntary act, having put it out of his power to produce the

deed, in law will not be permitted to introduce secondary evidence in violation of his understanding, and thereby defeat the fair intention of the parties. *Mussey v. Holt*, 4 *Foster*, 252.

Frederick Schade, having voluntarily surrendered the legal evidence by which his claim could be supported, and having directed a deed to be made to the defendant in error for the premises, is estopped from introducing secondary evidence in violation of his undertaking; it would be fraudulent in him to attempt to defeat a title made with his knowledge and concurrence, and for which, as it appears, he received a satisfactory consideration. The other justices concurring, the judgment must be affirmed.

JUDGMENT AFFIRMED.

ARBA HOLMES, PLAINTIFF IN ERROR, v. W. T. WILHITE AND JOHN L. COLUMBIA, DEFENDANTS IN ERROR.

Practice: EXCEPTIONS. Exceptions relating to instructions given to a jury must be reduced to writing during the term at which the trial took place.

Contract: RESCISSION: RECOVERY OF AMOUNT PAID. Plaintiffs and defendants entered into a contract whereby defendants agreed to furnish plaintiffs certain machinery for the erection of a mill, including an iron tube to go through the dam, the whole to be completed on the first day of December, 1868. Plaintiffs on their part agreed to complete the dam, and erect the mill house ready for the machinery, by the fifteenth day of October, 1868. Although not a part of the written contract, plaintiffs claimed that to enable them to erect the dam and the mill-house by the time limited, it was agreed that the tube for the dam should be furnished by the first of October, 1868. The defendants did not deliver it until late in November. Although, thus delayed, plaintiffs received the tube and completed the dam, but never erected the mill-house or did anything further under the contract. Shortly after they brought suit against defendants, to recover back money advanced on the contract, and for damages. *Held*, that if the tube was necessary to the proper completion of the dam, it should have been furnished whenever the dam was in that state of

advancement to require it, and not being so furnished, plaintiffs might have terminated the contract; as they did not chose to do this but received the tube and completed the dam, no rescission of the contract was shown, and plaintiffs were not in a situation to recover back the money they had advanced on it.

THIS was an action upon a contract in the following terms: "This article of agreement entered into this 20th day of August, 1868, between Holmes and Gould of the first part, and Wilhite and Columbia of the second part, witnesseth; that Holmes and Gould of the first part do agree to furnish to the parties of the second part the following: one tube to go through the dam, 36 or 40 inches in diameter, 18 or 20 feet long. One 30 inch Franklin Turbine Wheel. 2 pr. of 3½ feet old quarry burrs. 1 Bolt and Conveyor Reel, 30 inches diameter, 20 feet long. 1 set of blast elevators complete. 1 set of wheat elevators. 1 set of meal elevators. 1 Smut Machine to clean from 20 to 40 bushels per hour. 1 pair beam scales to weigh 20 bushels with hopper for do. All the shafting, gearing, pullies, and belts to run the above named machinery, also all the lumber necessary to do the mill-wright work, and to do the same with the exception of the flume. The above named work to be completed December 1st, 1868, for the sum of $4,870, in payments as follows: $1,000 cash in hand $1,200 forty days after date. $1,170 on completion of the mill, and the balance $1,500 to be divided into three equal payments as follows. $500 a note at 60 days. $500 a note 90 days, and $500 note at 120 days from completion of mill. In consideration of the above the 2d parties agree to put the dam and flume complete, ready for the wheel; also to finish all the timber for the hust and build the mill-house complete, with floors and stairs, and also agree to have the mill-house ready for machinery by October 15, 1868; and do also agree to do all the hauling of machinery from the machine shop, and board all the hands while at work on the mill. They also

agree to pay to the parties of the first part, the sum of $4,870 in payments as above.

(Signed.) HOLMES AND GOULD.
WILHITE AND COLUMBIA.
By WILHITE.

Plaintiffs alleged as a breach, that although they duly performed all the conditions of the agreement, on their part which could be performed, and were on the first day of December, 1868, and afterwards, ready and willing and duly offered to receive said machinery, and have such mill wright work done, but the defendants refused to furnish and deliver the machinery and do the said work; that defendants wholly failed to comply with their said agreement, to the great damage of plaintiffs, in the sum of six thousand two hundred and fifty dollars; that plaintiffs paid defendants sixteen hundred dollars upon the contract; and that plaintiffs erected the mill-house and made ready for the machinery and mill wright work in all things.

Defendant, Arba Holmes, in his answer, denied the allegations of the petition, and alleged that he and the said Gould did enter upon and commence the said work, and did procure and find the material necessary for performing the conditions of said agreement, on their part to be performed; that they prepared a large part of the machinery, and delivered to the plaintiffs the tube to go through the dam; that the plaintiffs did not by the 15th of October, 1868, build the mill dam, put in the flume and erect the mill house; that plaintiffs did not make the payments for said machinery according to the said agreement; and that by reason of the default on the part of plaintiffs, the defendant had been damaged in the sum of two thousand dollars.

Defendant admitted the payment of six hundred dollars in cash, and a span of mules worth four hundred dollars,

and asked judgment against plaintiffs for the sum of one thousand three hundred and fifty dollars.

The cause was tried before Mr. Chief Justice Mason, sitting in the district court of Otoe county, and a jury, at the March Term, 1871.

On the part of the plaintiffs John L. Columbia testified: "We commenced work on the 26th day of August. We did not get the tube on the first of October. On the last of November they sent the tube to us. We were ready for the tube about the middle of September, and sent for it the first of October, 1868, but it was not ready. Gould sent it about the last of November. We paid $600 in money and $450 in mules when the contract was signed, and afterwards $200 on the first of October, 1868. The tube was forty-two inches in diameter and eighteen feet long, and was worth $200 in a mill, but to us without the other machinery, was worth nothing. Gould sent to get the length of the shafting through the mill. Gould said in October, 1868, that they could not finish the machinery according to contract. The iron tube was to go through the stone dam, and be cemented into the dam, and without the tube we could not go on with the dam, and as they did not furnish the tube in time, we could not finish the dam before the ground froze, and the tube and dam both were washed out and rendered useless that winter. The mill was to rest on the dam, and could not be put up till the dam was done."

W. T. Wilhite also testified: "We sent two teams about October 1st, 1868. We sent a team a second time in November, after the tube. Each time Gould said they had not any of the machinery ready. On the first of May, Gould said he would finish the machinery if he could, and that he had some commenced but never finished it, or any of it, except the tube. We got out the timber, lumber and frame for the mill, and were ready in time to go on with the mill if we could have got the

machinery, but as we never got the machinery we lost all the timber, which now lies on the ground and is worthless. Gould said in the spring of 1869 that nothing but the tube was done. In October, 1868, the foreman showed me some machinery that they had begun to work out, but nothing was then complete. Gould said in the spring of 1869, that he had been obliged to cut up most of the shafting and to use considerable of the machinery in other mills. I was in the foundry in May, 1869, and no machinery was completed then."

William Lambert, a witness for the plaintiffs, corroborated the testimony above given, concerning the delay in the arrival of the tube and the erection of the dam.

On the part of defendant, Arba Holmes testified: "We proceeded with the work on the machinery for the mill, as far as we could before the mill house and dam were erected; about the first of October, 1868, we sent our millwright to take the measurement of the mill buildings so that we could proceed with the work; he found they had no buildings up and nothing in readiness. The last of October Wilhite was at the foundry, when I showed him the different articles of machinery made for them, and he was well pleased with them. This was after my dissolution of partnership with Gould; I informed Wilhite that Gould would continue and complete the work for them when they were ready for it; I did not see or hear of them until the following May, when I had some talk with them about the mill, and they left to make some arrangements with Gould; I did not see them until the fall of 1869, when they called at my house and demanded the money paid back to them. I answered them that I could not pay them any money, but if they would let me know when they got ready for the machinery I would finish it; I took an invoice of machinery that we had worked out, and the same was worth twelve hundred and fifty dollars, and the same could not be sold for one-half what it cost

us to work it out. The tube sent to plaintiffs was worth two hundred and fifty dollars cash. Gould mortgaged all the machinery in the foundry and it was sold on the mortgage in the spring of 1869."

John M. Bingham testified: "Defendant purchased a boiler shell, to be used in a flume to convey water to the wheel for the mill, and got all shafting necessary to run the mill and gearing, except one section of the main shaft, which was not got out because defendant did not know how long it was to be made, until the mill-house was put up. * * These materials were obtained by the defendant for plaintiffs in the summer and fall of 1868. All of the castings I have mentioned were got out before the month of October, 1868. I was on the grounds where the mill was to be put, in March, 1869, and neither the mill-dam or mill-house were then completed."

William L. Soper testified: "No mill-house was erected. Plaintiffs built a wall across the river, six feet at the bottom, and four feet at the top. It was a convex wall, with wing walls, about eighteen feet long. I do not think it was a sufficient mill dam. I saw the tube in the wall. It now lies in the river about one hundred feet below the wall where it was placed. It was washed out two or three weeks after the erection of the wall. Material was hauled for a building some time in the fall, and month of December, 1868."

W. W. Soper testified: "The plaintiffs have not since the fall of 1868, erected either a mill dam or the mill house. The tube was there in the fall of 1868. It was washed out in the latter part of the fall, or first of the winter of 1869. Material for a building was hauled there in the fall of 1868, but it was never erected."

Certain instructions to the jury were asked for by the defendant which were refused by the court. The jury returned a verdict for plaintiffs in the sum of eleven hundred and thirty-five dollars. Defendant filed a motion

for a new trial, and the same was taken under advisement by the court. At the December Term, 1871, the court overruled the motion for a new trial, and rendered judgment on the verdict.

The defendant, Arba Holmes, brought the case to this court by petition in error.

Seth Robinson, (with whom was also *E. E. Brown,*) for plaintiff in error, presented the following points:

I. *First.* Holmes and Gould were bound, upon performance by Wilhite and Columbia, to perform on their part by the first day of December, 1868; and in no case could they be liable for a breach of their agreement, and no such breach could possibly happen before that time, unless, after performance by Wilhite and Columbia, they distinctly incapacitated themselves to perform, and this they did not. 2 *Pars. Contr.*, 666, 667, *and notes.*

Second. The application of the principle above stated to the present case is not affected by the fact that irrelevant testimony, not objected to, was admitted, tending to show that Wilhite and Columbia proposed to erect their mill in such form that one end of it would rest on the dam, which would, therefore, have to be built, and the tube which was to go through the same furnished, before the mill-house could be erected. If is not affected by such testimony for the following reasons: 1st. The contract contains no covenant or provision for the erection of the mill in such form. 2d. It is not necessary that mills, in general should be so erected. 3d. There is no proof that the mill in controversy must needs have been so erected, or that Holmes and Gould knew that it must; which proof, though clearly objectionable in this case, if admitted without objection, might have justified the verdict, there being no error in the instructions.

Third. But Holmes and Gould were bound to perform by the first day of December, only in case Wilhite and

Columbia performed by the fifteenth day of October; and if the latter failed then, but performed after that, Holmes and Gould were entitled to a reasonable time after such tardy performance to perform on their part and to such damages as they might have sustained by reason thereof.

Fourth. Performance by Wilhite and Columbia was a condition precedent to their right to demand performance of Holmes and Gould. *Barruso v. Madan*, 2 *Johns.* 145. *Cunningham v. Morrell*, 10 *Johns.*, 203. *Parmelee v. Oswego & S. R. R. Co.*, 6 *N. Y.*, 74. *Grant v. Johnson*, 5 *N. Y.*, 247.

Fifth. The rights of the parties under the contract appear to be these: 1st. Performance by Wilhite and Columbia was a condition precedent but substantial performance was sufficient, so that though they failed to perform on the precise day, yet afterwards should perform, as such partial failure would not in this case be destructive of the contract but compensable in damages, and as Holmes and Gould had already received a substantial portion of the price to be paid, they were bound to perform within a reasonable time after such tardy performance. 2 *Pars. Contr.*, 679, 681. 2d. But here is, by confession, a total failure on the part of Wilhite and Columbia to perform the condition precedent, rendering performance by Holmes and Gould impossible. By the default of the former the latter never had an opportunity to perform. The former cannot recover on any ground; being themselves in default, they cannot take advantage of their own wrong to rescind the contract and recover the money paid. 2 *Pars. Contr.*, 679. And having wholly failed to perform the condition precedent they cannot sue on the contract for a failure which was inevitable by reason of their own default. *Holmes v. Boydston*, 1 *Neb.*, 346. 2 *Pars. Contr.*, 675. *Chitty Contr.*, *637-*638.

Sixth. The mill-house was never erected, and therefore the verdict cannot be sustained, independently of any errors in the instructions of the court. From and after the fifteenth day of October, 1868, Holmes and Gould became vested with a right of action against Wilhite and Columbia for failure to perform on their part; and this right of action could only be divested by an accord and satisfaction or a technical release. *McKnight v. Dunlop*, 5 *N. Y.*, 537. *Bowman v. Teall*, 23 *Wend.*, 306.

II. *First.* But, if it were possible to uphold the verdict by the testimony, still the court erred. Wilhite and Columbia, being by the contract first to perform and failing to do so, Holmes and Gould could not be in default. 2 *Pars. Contr.*, 675. Though the latter were unable to perform, though they distinctly and unequivocally disabled themselves to perform, it would make no difference. For, where the plaintiff is bound by a covenant in the nature of a condition precedent, he is bound to perform it before he can complain of the defendant on any account. *Robb v. Montgomerg*, 20 *Johns.*, 15. *Sage v. Ranney*, 2 *Wend.*, 532. *Champion v. White*, 5 *Cow.*, 509.

In such case the rule is this: The plaintiff may, notwithstanding the defendant has incapacitated himself, go on and perform and then recover of the defendant his damages, relying upon the contract; or he may immediately rescind and recover what he has paid.

Second. A contract rescinded in part is rescinded in whole, rescinded as to one party is rescinded as to both. *Lattimore v. Harson*, 14 *Johns.*, 330. *Coolidge v. Brigham*, 1 *Met.*, 547. *Towers v. Barrett*, 1 *Term*, 133. *Gillett v. Maynard*, 5 *Johns.*, 85. *Chitty on Cont.*, 640* *note* 2. *Battle v. Rochester Bank*, 3 *N. Y.*, 88. *Hunt v. Silk*, 5 *East*, 449. *Conner v. Henderson*, 15 *Mass.*, 319.

Stevenson and Hayward, for defendants in error, contended:

Exceptions must be reduced to writing at the same term at which the case is tried and verdict rendered. *Code, Sec.* 308.

If it be the law that a case may be passed over three terms of the court, and a bill of exceptions prepared, signed and filed fourteen months after the trial, then the statute may be entirely evaded, the protection from long delays entirely lost to parties and no correct and complete bill of exceptions can be made. Cases must then come to this court, as this does, on so much of the testimony as counsel can remember for fourteen months. If it can be done one year, it can be for five years. This is clearly not the law. *Monroe v. Elburt*, 1 *Neb.*, 74. *Doe v. Brown*, 6 *Ohio State*, 12. *Kline v. Wynne*, 10 *Ohio State*, 223. *Hicks v. Person*, 19 *Ohio* 426.

But the exceptions filed show no error. The plaintiff in error, Holmes, cannot insist upon the first point in his motion for a new trial, because the record shows that at the time his first instruction was modified and changed by the court, he expressly *accepted* of such modification.

If both parties failed to comply with the terms of the contract, the plaintiffs below could recover back the money paid on the contract. The testimony of two witnesses, both undisputed, shows that about the first of October, 1868, Gould said they could not have the machinery ready according to their contract. Also, that in the winter of 1869, Gould cut up and used in other mills, most of the machinery that he had commenced, and Holmes swears that Gould mortgaged the machinery, and that in the spring of 1869, it was all sold under the mortgage. This shows that they failed to comply with, and abandoned the contract. This gave plaintiffs a right to recover back the

money paid on the contract. *Eaton v. Redick*, 1 *Neb.*, 308.

The whole proof shows that Wilhite and Columbia went on in good faith, made their first payments, put in their dam, got out the timbers and lumber for the mill, and on the 1st of October, 1868, were ready to use and sent for the machinery. They had then done all that could be done, without the tube. In November, after the tube was received, they did the best that men could do to go on with the contract; while Holmes and Gould did nothing, but abandoned the contract and sold out their stock and machinery. They can not be benefited by their own wrong. 1 *Graham and Waterman on New Trials*, 323. *State v. Wissmark*, 36 *Missouri*, 592.

The third, fourth, and fifth points depend upon the weight and sufficiency of the evidence and cannot be decided where all the proof is not before the court. This case had lain fourteen months after trial and it was impossible for any counsel to remember all the evidence. The whole testimony of one Powell is left out. The plaintiffs below examined the carpenter who did the work on the mill, and not one word of his testimony is here. This court cannot consider the sufficiency of the proof unless it is all before the court. *Midland Pacific R. R. v. McCartney*, 1 *Neb.*, 404. *Morton v. Sanders*, 1 *Dana*, 14.

If this court were to consider these points, then the verdict should not be disturbed, because there is testimony sustaining it. *Breese v. State*, 12 *Ohio State*, 156. *State v. Lamont*, 2 *Wis.*, 437. *Cook v. Helms*, 5 *Wis.*, 107. *Lockwood v. Stewart*, 12 *Wis.*, 628. *Hendy v. Smith*, 28 *Georgia*, 308. *Bowman v. Torr*, 3 *Clarke*, (*Iowa*), 574.

Where the evidence is conflicting the verdict should not be set aside. *Edminston v. Garriston*, 18 *Wis.*, 594. *Robbins v. Alton Ins. Co.*, 12 *Missouri*, 381. 1 *Graham*

and Waterman on New Trials, 389. *McKnight v. Wells*, 1 *Missouri*, 13.

The verdict is clearly according to law. The plaintiffs were entitled to recover back the money paid, with interest. The jury gave them less than was paid even if we allow Holmes and Gould all that Holmes swore the tube was worth. The damages were too low, and of this Holmes cannot complain. Justice has been done between the parties, and the court will not grant a new trial, even if there has been a technical error. *Graham and Waterman on New Trials*, 388–398.

No other points were made in the motion for new trial and no others can be considered. *Midland Pacific R. R. v. McCartney*, 1 *Neb.*, 404.

LAKE, CH. J.

Several errors are alleged to have occurred in the court below, but the only one we can here consider is that which relates to the sufficiency of the evidence to sustain the verdict. Those exceptions relating to the instructions given to the jury, were not reduced to writing during the term at which the trial took place, as the statute positively requires, and therefore they must be deemed to have been waived.

But we think that, giving to the testimony all that can possibly be claimed of it by the defendants in error, it will not support the verdict, and therefore a new trial will have to be awarded.

By the terms of the written contract, about which there is no dispute, the plaintiff in error and one Gould, who was his partner, agreed to furnish certain machinery, lumber and labor, in the erection of a mill, which the defendants in error had undertaken to build. And it was stipulated that the same was to be completed by the first day of December, 1868.

On the part of Wilhite and Columbia, the defendants in error, it was agreed that they would put in the dam and flume complete, ready for the wheel, build the mill house complete and have it ready for the said machinery by October 15, 1868. And this appears to have been necessary in order to have enabled Holmes and Gould to perform their part of the contract within the stipulated time.

The testimony shows that both parties entered upon the performance of their respective portions of the work, but the dam even was not completed until sometime after the first of December, the time fixed upon for the completion of the mill-wright work by Holmes and Gould.

Shortly after the completion of the dam, however, it was washed out, and destroyed, and Wilhite and Columbia never erected the mill house which was to receive the machinery and work of the plaintiff in error. In this condition of affairs, Wilhite and Columbia seek to recover back the money advanced to Holmes and Gould, something over a thousand dollars, and the question to be decided is, can they do it?

It ought, perhaps, to be stated that it is claimed by the defendants in error, that the delay in the completion of the dam was occasioned by the failure of Holmes and Gould to furnish a certain iron tube, valued at some two hundred and fifty dollars, to go through the dam, in time to have enabled them to get it ready any sooner than they did.

The weight of testimony seems to be, that it was, in fact, necessary to have this tube when the dam was being built, so as to insert and cement it in its proper place, and it may have been the understanding of the parties that it should have been ready the first of October, as is claimed. If the fact be established that the tube was necessary to the proper completion of the dam, so as to fit it for the reception of the mill house, one end of

which it was to support, then I am of the opinion that it would be a reasonable construction of the contract to hold, that it should have been furnished whenever the dam was in that state of advancement to require it, and in time so as not to delay the work. And if it had not been so furnished, it is very likely that Wilhite and Columbia might have terminated the contract, and recovered back the money they had advanced thereon.

But they did not chose to do this. They received the tube about the last days of November, without any serious objection so far as can be gathered from the record, and went on and completed the dam, notwithstanding they had suffered a delay of considerably over a month, in consequence of not getting it earlier. Soon after this the dam was destroyed, as before stated, and nothing further was done by either party toward the completion of the work.

I do not think any rescission of the contract has been shown, but, on the contrary, that it is still open and subsisting between the parties to it. This being so, Wilhite and Columbia are not in a situation to recover back the money they had advanced on it.

The judgment must be reversed, and a new trial awarded.

REVERSED AND REMANDED FOR TRIAL DE NOVO.

MR. JUSTICE MAXWELL concurs. MR. JUSTICE GANTT, having been of counsel in the court below, did not sit.

WILLIAM H. BOYER, PLAINTIFF IN ERROR, v. WILLIAM P. CLARK AND AARON M. MCCANDLESS, DEFENDANTS IN ERROR.

Set-off. As a right demandable, set-off can only be applied to the purposes for which it is conferred by statute; and, in Nebraska, this statutory right extends only to actions founded on contract, and not to mutual judgments.

———: ———. To set off one judgment against another is not a *legal* power; it is discretionary, and the propriety of its exercise must be determined from all the circumstances of each case in which the set-off is sought to be made.

———: ATTORNEY'S LIEN. The lien of an attorney, upon a judgment obtained by him, to the extent of his reasonable fees and disbursements, is paramount to any rights of the parties in the suit or to any set-off.

———: UNLIQUIDATED DAMAGES. A claim for damages, the recovery of which is still uncertain, or a claim which arises *ex delicto*, cannot be the subject of set-off.

ON the 27th day of December, 1872, Boyer obtained a judgment against W. P. Clark, for the sum of $37.89, and $9.15, costs of suit. At the time Boyer commenced that action, he procured an order of attachment against the property of Clark upon the usual undertaking therefor. Clark employed McCandless as attorney to procure the dissolution of this attachment, and being unable to pay McCandless for his services, assigned to him all his right, title, and interest in said undertaking, and all right of action that might accrue to him by virtue of the same. McCandless procured the dissolution of the attachment, and judgment was then rendered against Clark as above stated. An action was then brought on the undertaking by McCandless, but in the name of Clark, for damages sustained by Clark for the wrongful issuance of the order of attachment, and judgment thereon rendered against Boyer for the sum of $10.00 and $6.50 costs of suit. Clark at once assigned this judgment to McCandless.

Boyer then brought his action in the district court, asking that the judgment recovered by him against Clark be set off against the judgment recovered against him by Clark, and assigned to McCandless. To the petition filed by Boyer, McCandless answered, setting up the facts here stated. To the answer Boyer filed a general demurrer, which was overruled by the court, and judgment rendered, dismissing the petition; and for costs. To reverse this judgment the cause was then brought to this court by petition in error.

Seth Robinson, for plaintiff in error, presented the following points:

First. McCandless' claim to the judgment against Boyer, if it has any basis at all, is founded upon the assignment of the undertaking before the judgment, or the assignment of the judgment afterwards, or his lien as an attorney. There is no other foundation for it, and if all these fail, his claim must fall to the ground, and Boyer is entitled to a decree.

Second. If his claim is founded upon the assignment of the undertaking before judgment, it must fall. Such an undertaking is a mere chose in action. 1 *Bouv. Law Dict.*, 265. 1 *Pars. Contr.*, 233, *note a. Gillet v. Fairchild*, 4 *Denio*, 80. And it is well settled that the assignee of a chose in action, even without notice, unless it be a negotiable promissory note or bill of exchange, takes it subject to all the equities which exist against it in the hands of the assignor at the time of the assignment. *Bouvier's Law Dict.*, 265, 4. *Ellis v. Messervie*, 11 *Paige*, 467. *Murray v. Lylburn*, 2 *Johns., Ch.*, 441. *Clate v. Robison*, 2 *Johns.*, 595. 1 *Pars. Contracts*, 223 *note a. Code of Civ. Pro., Gen. Stat. utes, Sec.* 31, 528.

Third. If this be law, and it was never yet questioned,

then it follows, inevitably, that upon suit brought by Clark upon the undertaking, whether for his own benefit or the benefit of his assignee, or upon a suit brought by his assignee in his own name, Boyer was entitled to set off his judgment against Clark. But though he was entitled to do this, he was not bound to do it, and though he omitted to do it, and suffered judgment to go against him by default, and this judgment after its recovery, was assigned for value, the equities of the defendant in such judgment are nevertheless superior to the title of the assignee, and he may maintain a bill to compel a set-off, notwithstanding such assignment. *Dorsey v. Reese*, 14 *B. Mon.*, 157. *Code Civ. Proc., Sec.* 99–102, *Gen'l. Statutes*, 540.

Fourth. His claim as assignee of the judgment rests upon no better foundation. For that, too, is a mere chose in action, is not invested with the peculiar character of negotiable paper, and passes to the assignee charged with all the equities which could be asserted against it in the hands of the assignor at the time of the assignment, including the equitable right of set-off. *McJilton v. Love*, 13 *Ill.*, 495. *Chamberlain v. Day*, 3 *Cow.*, 353. *Burtis v. Cook*, 16 *Iowa*, 194. *Duncan v. Bloomstock*, 2 *McCord*, *319. *Ballinger v. Tarbell*, 16 *Iowa*, 491. *Gay v. Gay*, 10 *Paige*, 370. *Dorsey v. Reese*, 14 *B. Mon.*, 157.

Fifth. If this claim is to rest upon his lien as an attorney upon the judgment recovered, it must likewise fall. For the lien of an attorney upon the judgment which he obtains, is always subordinate to the equities subsisting between the parties. *Nicoll v. Nicoll*, 16 *Wend.*, 446, *and cases cited. Noxon v. Gregory, 5 How. Pr.*, 339. *Hill v. Brinkley*, 10 *Ind.*, 102. *Russell v. Conway*, 11 *Ill.*, 93. *The People v. N. Y. Com. Pleas*, 13 *Wend.*, 649, *and cases cited.*

It may be objected that it does not appear that the

demand upon which Boyer's judgment was recovered was of a nature to be set-off in a suit under the undertaking. The answer to that is that the petition makes a *prima facie* case; the answer does not show that his demand was not of such a nature, and not being allowed under the present holding of the Supreme Court to make a reply, he had a right to show the nature of his demand by proof upon the trial. In other words, matter which the plaintiff might reply in avoidance, if a reply were proper, he may now prove without replying. *Code of Civ. Pro.*, *Sec.* 124. *General Statutes*, 545, *note* 1. *McCann v. McLennan*, 2 *Neb.*, 286.

E. E. Brown, for defendant in error, contended.

I. The right to set off one judgment against another is merely an equitable right. The ground upon which relief is granted is the equitable control which courts are authorized to exercise over the parties and proceedings in cases before such courts to prevent injustice. The right of set-off is not superior in equity to the equity of the attorney's lien; and to allow the set-off would be to do, and not prevent injustice. *Dunkin v. Vandenbergh*, 1 *Paige*, 623. *Makepeace v. Coates*, 8 *Mass.*, 451. *Dunklee v. Locke*, 13 *Mass.*, 525. *Rider v. The Ocean Insurance Company*, 20 *Pick.*, 259.

II. Unliquidated damages arising from a breach of contract give no right of set-off, either in law or equity. At the time the defendant Clark assigned the undertaking to McCandless, he assigned only a contingent right of action. The damages, if any, were unliquidated, consequently no right of set-off existed at the time, and no right or claim that accrued after the assignment can be made available in set-off. *Hackett v. Connett*, 2 *Edw. Chan.*, 72.

III. In this case, however, there is still a higher equity in favor of the attorney McCandless, which renders the preceding points immaterial. That is the contract which was entered into by Clark, with McCandless, before the judgment was obtained whereby Clark assigned to McCandless his interest in the undertaking, upon which the judgment was obtained, with any right of action that might accrue thereon. After this agreement was made, Clark ceased to have any interest in the recovery in that action. Whatever judgment he should recover therein, of right belonged to the defendant McCandless, and not to the defendant Clark. In executing the assignment of the judgment, Clark did nothing but what in equity he would have been compelled to do. The plaintiff, therefore, has no claim, either legal or equitable, to have this judgment, which, although recovered in the name of Clark, did not, in fact, belong to him, applied in reduction of the judgment which Clark owes the plaintiff. *Ely v. Cooke*, 28 *New York*, 365.

GANTT, J.

This is an action in equity to set-off one judgment against another. The plaintiff avers that on the 27th day of December, 1872, he recovered a judgment against the defendant Clark, which remains unsatisfied, and that on the 3d day of January, 1873, the defendant Clark recovered a judgment against him; that the defendants refuse to set off this judgment against the plaintiff's judgment, and plaintiff therefore prays that the set-off may be made. The defendant McCandless answers the plaintiff's petition, and avers, that at the commencement of his action, the plaintiff procured an order of attachment to be issued and levied on the property of Clark, and that the defendant Clark employed him to procure the discharge of the attachment, and as compensation for his services, Clark

agreed to assign, and did assign to him the undertaking given by plaintiff to procure the issuance of the order of attachment; that the action upon the undertaking was for his sole use and benefit, and that he was the owner of the judgment, and the cause of action upon which the judgment was obtained. To this answer the plaintiff demurs on the ground that the answer does not state facts sufficient to constitute a defence to the plaintiff's petition. The demurrer was overruled by the court below, and judgment of dismissal, and for costs was rendered.

The demurrer admits all the facts stated in the answer, and by this admission, it appears that before the plaintiff had established his claim against the defendant, Clark, by judgment, and before any right of action had accrued to the defendant, Clark, on the undertaking given by plaintiff to procure his order of attachment, the defendant, Clark, had assigned all his interest in the instrument to the defendant, McCandless, who accepted the same as compensation for his services in procuring the discharge of the attachment. This was an assignment of an instrument upon which a cause of action might or might not accrue; a cause of action afterwards did accrue upon the instrument, but at the time and before the right of action accrued, it was the property of the defendant, McCandless.

Now is the plaintiff entitled to have so much of his judgment set off against the judgment recovered in the name of Clark, as shall be equal to it and thereby extinguish said judgment? By section thirty-one of the code, it is only provided that in an action by the assignee of a thing in action, his action shall be without prejudice to any set-off *now allowed;* but negotiable instruments transferred upon good consideration before due, are not subject to set-off. This section, however, simply gives the right of set-off in an action by the assignee, and limits the set-off to such as is *now allowed.* Section one hundred and four provides that the set-off can only be pleaded in an

action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court. At common law a set-off is not allowed. *Ross and Ricker v. Johnson*, 1 *Handy*, 388; but the defendant was entitled to retain or claim by way of *deduction* all just allowances or demands accruing to him, or payments made by him in respect of the same transaction or account which formed the ground of action. But this was not a set-off, in the strict legal sense of the word, because it was not in the nature of a cross demand or mutual debt, but a *deduction* rendering the sum to be recovered so much less. 1 *Chitty's Pleadings*, 601.

Set-off, therefore, as a right demandable can only be applied to the purposes for which it is conferred by statute; and this statutory right extends *only to actions* founded on contract, and not to mutual judgments. Hence, as the code gives the right of set-off, *only in actions* founded on contract, an application to set off mutual judgments is not a statutory right.

The power, however, to do so is an inherent one in the court, and not being conferred by statute, it is not a *legal* power nor its exercise demandable of right; it is discretionary, and the propriety of its exercise must be determined from all the circumstances of each case in which the set-off is sought to be made. *Burns v. Thornburg*, 3 *Watts*, 88. *Holmes v. Robinson*, 4 *Ohio*, 91.

The application being one addressed to the discretion of the court, it will be exercised so as to do equity, and not sanction fraud or inflict injury. "But in order to warrant the set-off, it seems to be well settled that the actual debts must exist in the same right." *Holmes v. Robinson, supra. Duncan v. Lyon*, 3 *Johns Ch.*, 351.

But in the case at bar, the payments are not mutual and do not exist in the same right. The one is owned by the plaintiff, and the other by the defendant, McCandless;

and for this reason, and in view of the fact that McCandless for a good consideration became the owner of the instrument, the subject matter of his action, before it became a ground of action, and therefore acquired an equity equal to if not superior to the claim of the plaintiff, it seems clear a court of equity should refuse the application of the plaintiff.

But it seems clear that the defendant, Clark, never had a cause of action, or such tangible interest in the instrument which could, under any circumstances, be made the subject of, or become subject to set-off. And hence, whether we consider the case as one purely in equity, or in the light of an attorney's lien, I think that McCandless has a superior equity to that of the plaintiff in the subject matter of the action. In *Shapley v. Bellows*, 4 *New Hampshire*, 353, it is laid down as a general rule of law that an attorney has a lien upon a judgment to the extent of his reasonable fees and disbursements in the suit in which it was obtained, and that this right of lien is paramount to any rights of the parties in the suit, or to any set-off.

Again, although Swan in his Treatise seems to argue that unliquidated damages may be made the subject of set-off, under almost any circumstances, under the statutory right, yet I could not find one case in Ohio which goes to the extent of his view of the statute; but on the contrary I find in *Evans v. Hall*, 1 *Handy*, 434, it is held that a claim for unliquidated damages is not the subject of set-off. And I think the weight of authority clearly establishes the rule of law that a claim sounding merely in damages, the recovery of which is still uncertain, or a claim which arises *ex delicto*, cannot be the subject of set-off. *Jones v. Grew*, 1 *Blackf*, 191. *Wright v. Smith*, 3 *Watts. and Serg.*, 534. *Sherman v. Ballou*, 8 *Cow.*, 309. *Hopkins v. Megquire*, 35 *Maine* 80. *McCracken v. Elder*, 34 *Penn. State*, 239. *Hackett v. Connett*, 2

Edwd. Ch., 72. *Edwards v. Davis*, 1 *Halst.*, 104, 390. *Nims v. Rood*, 11 *Vermont*, 96. *Tribble v. Taul*, 7 *Monroe*, 455. *McKinney v. Bellows*, 3 *Blackf.*, 31. *Dyer v. Dewy*. 1 *Gill and John*, 440. *Burgess v. Tucker*, 5 *Johns*, 107.

In *Duncan v. Lyon*, 3 *Johns Ch.*, 358. Chancellor Kent says, "that to authorize a set-off the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated * * * and courts of law and equity follow the same general doctrines on the subject of set-off."

In any view of the case, the judgment of the district court was right and must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL concurs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1874.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.
" DANIEL GANTT, } ASSOCIATE JUSTICES.
" SAMUEL MAXWELL, }

SANFORD RECTOR, ADMINISTRATOR, APPELLANT, v. WILLIAM AND CAROLINE ROTTON, APPELLEES.

Homestead exemption.—The provisions of the statutes of this State, exempting from attachment, levy, or sale, upon execution or other process, the homestead owned and occupied by any resident, being the head of a family, do not apply to a sale of such homestead under a decree of foreclosure of a mortgage given thereon.

———. The homestead right is a purely personal one which the owner may at any time waive or renounce; and it may be lost, if the owner does not, at the time the levy is made upon it, notify the officer of what he regards as his homestead. *Per* LAKE, CHIEF JUSTICE.

Mortgage foreclosure: ORDER OF SALE. In the foreclosure of a mortgage, the court merely enforces a contract of sale voluntarily made by the owner of the premises; and it is not necessary that an order of sale be issued to the officer charged with the execution of the decree. The judgment is his warrant of authority, and none other is required.

Estoppel. After a judgment or decree *in rem*, a party to the record is estopped from asserting any claim to the property, either as a homestead or otherwise, which might have been determined in that suit.

Rector v. Rotton and Rotton.

THIS was an appeal from an order of the district court for Otoe county, setting aside a sheriff's sale of certain real estate under a decree of foreclosure, on the ground that it was a family homestead. The facts are fully set forth in the opinion of the court.

Mr. Justice Gantt, having been of counsel in the court below did not participate in the decision of the cause in this court.

E. F. Warren, for appellant, Sanford Rector, presented among others the following points:

I. Can a homestead be sold at judicial sale under a decree of foreclosure of a mortgage thereon, executed by the head or heads of the family?

The homestead right is a purely *personal* one, and personal rights may always be waived by the parties to whom they have accrued, and this even though granted by the constitution. *Emburg v. Conner*, 3 *New York*, 511. *Root v. Wagner*, 30 *Id.*, 17. *Sherman v. McKean*, 38 *Id.*, 266. *Wheeler v. Huston*, 52 *Id.*, 641. *State v. Melogue*, 9 *Ind.*, 196. *In re Cross Bankrupt*, 2 *Dillon Cir. Court Rep.*, 320.

And the execution of a ortgage in proper form is such waiver.

The statutes of this state contain no provisions prohibiting the alienation, sale, or mortgage of the homestead, or any other property exempted from sale, and the mortgage in this case was executed with all the formalities required for the conveyance of real estate.

If the owner cannot make a *conditional* sale, neither can he make an *absolute* one. The inevitable legal and logical conclusion of the argument of Rotton and wife is to prohibit alienation at all; a conclusion repugnant alike to the well settled principles of law and common sense. Such doctrine makes his homestead his prison.

This identical question was expressly decided in the U. S. Circuit Court, in the case of Cross, Bankrupt cited *supra,* in the well considered opinion of Dillon, J.

We insist that an *order of sale* is not such "process" as is contemplated by the statutes. *In re Cross, cited supra. Ely v. Eastwood,* 26 *Ill.*, 107. *Smith v. Mace, Id.*, 150. *Stevens v. Meyer,* 11 *Iowa,* 183.

II. But we insist further that after the decree of the district court was rendered, it became too late for either Rotton or his wife to claim the homestead as exempt from sale. Their only remedy was to have excepted to the same, and prosecuted an appeal or writ of error therefrom to this court, for the reversal of that portion of said decree. Such decree, ordering the property to be sold, is conclusive upon the question of exemption as well as all others. *Slaughter v. Detiney,* 15 *Ind.*, 49. *Perkins v. Bragg,* 29 *Ind.*, 507. *Haynes v. Meek,* 14 *Iowa,* 320. *Baxter v. Dear,* 24 *Tex.* 17. *Tadlock v. Eccles,* 20 *Id.*, 782. *Lee v. Kingsley,* 13 *Id.*, 68. *Larson v. Reynolds,* 13 *Iowa,* 579.

The matter is *res judicata* in this case, and both are estopped from alleging it to be exempt. Such decree can be assailed for *fraud* only, in a direct proceeding for that purpose. Cases cited *supra.*

III. A final decree in chancery is as conclusive as a judgment at law. *Sibbault's case,* 12 *Pet.*, 492. *Kelsey v. Murphy,* 26 *Penn. State,* 78. *Bank of U. S. v. Beverly,* 1 *How.*, 148. *Low v. Mussey,* 41 *Verm.*, 393.

IV. An adjudication is final and conclusive not only as to the matters actually determined, but as to every other which the parties *might have litigated* and have had decided, both in respect to matter of claim and of defense. *Harris v. Harris,* 36 *Barb.*, 88. *Clemens v. Clemens,* 37 *New York,* 59.

V. To render a matter *res judicata*, it is not essential that it should have been distinctly and specifically put in issue by the pleadings; it is sufficient that it be shown to have been tried and settled in the former suit. *Biglow v. Winsor*, 1 *Gray*, 299. *Davis v. Talcott*, 12 *New York*, 184. *Bell v. Raymond*, 18 *Conn.*, 91.

VI. To affirm the order appealed, will be to assert that the district court is powerless to enforce its judgments and decrees solemnly entered, and thus render the administration of justice a farce.

Seth Robinson, for appellees.

LAKE, CH. J.

There were several questions urged upon our attention on the argument of this cause, but we shall only consider those necessarily involved in the decision thereof.

I. The principal question, and the one to which I shall first give attention is, whether, under the law of this state before the act of the legislature, approved February 20, 1873, *General Statutes*, 403, a homestead was liable to sale under a decree foreclosing a mortgage, duly executed by the mortgagor, while it was being occupied by him with his family.

The record discloses that the premises in controversy have for several years last past, and now are, occupied by the said Rotton and wife as their homestead; that on the fourth day of November, 1871, a decree of foreclosure and sale in the usual form was made by the district court, and on the seventeenth day of December, 1872, the lot was sold, in due form, by the sheriff of the county to the plaintiff, in pursuance of said decree.

On an order to show cause why the sale should not be confirmed, the defendants interposed the single objection

that the premises in question, being then occupied as a homestead, could not be sold under the decree; and this appears to be the first time the claim of homestead was set up by them to this property.

Section (five hundred and sixteen) of the code of civil procedure, provides that "a homestead, consisting of any quantity of land not exceeding one hundred and sixty acres, and the dwelling house thereon and its appurtenances, *to be selected by the owner thereof*, and not included in any incorporated city or village, or instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city or village, and according to the recorded plat of such incorporated town, city or village, or in lieu of the above, a lot or parcel of land not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks and lots, owned and occupied by any resident of the state being the head of a family, shall not be subject to attachment, levy, or sale, upon execution or other process issuing out of any court in this state, so long as the same shall be owned and occupied by the debtor as such homestead."

And by the following section it is further provided, that "whenever a levy shall be made upon the lands and tenements of a householder being the head of a family, whose homestead has not been selected by metes and bounds, such householder may notify the officer at the time of making the levy, of what he regards as his homestead, with a description thereof within the limits above prescribed, and the remainder alone shall be subject to sale under such levy."

Now it is contended by the defendants that the section first above cited affords a complete protection to their homestead, not only as against an attachment, or an ordinary execution issued upon a money judgment, but also

against a decree of court directing it to be sold under a mortgage voluntarily given to secure a *bona fide* indebtedness. In other words, that the legislature intended by this section to prevent any valid judicial sale of mortgaged premises so long as they shall be occupied as a homestead. To this construction of the statute I cannot give my assent.

The homestead act was passed for the purpose of protecting the home of the family against a sale without the consent of the owner. But the right thus guaranteed to the head of a family is a purely personal one which he may at any time waive, or renounce at his own pleasure; and while he is secure in its possession and enjoyment as against the demands of ordinary creditors, yet he is not thereby prohibited from either selling it or investing the proceeds in other property, or pledging it for the payment of his debts if he chooses so to do.

The legislature never intended, by this statute, to assume a guardianship over the owner of a homestead, and render him disqualified to make valid contracts respecting it. It imposes no restraint upon him whatever in this respect; even the wife, when the title is in the husband, has no power to prevent him from making such disposition of it as he may think best.

It is true that in some states it is otherwise, and the wife is required to give her written assent before the husband can alienate, or in any manner deprive the family of the benefit of the homestead when once acquired. But in this state the legislature has not as yet thought proper to invest the wife with any such authority over the property of the husband.

The statute protects the homestead from "attachment, levy, or sale, upon execution or any other process issued out of any court within this state." But this cannot be held to include all judicial sales, most certainly; nor can it apply to a sale under a decree of foreclosure, when no

process whatever is issued to seize the mortgaged premises in order to acquire jurisdiction over them.

In case of foreclosure, which is a proceeding *in rem*, the decree of the court operates directly upon the mortgaged property; no writ or other process of the court is resorted to, to bring it within its jurisdiction. By its judgment the court simply enforces a contract of sale voluntarily made by the owner. Nor is it at all necessary that an order of sale be issued by the clerk of the court to the officer charged with the execution of a decree; the judgment is his warrant of authority, and none other is required.

There can be no doubt, that under the provisions of our exemption act, a mortgaged homestead is not protected from judicial sale under a decree of foreclosure. No other conclusion can be reached from the language employed.

II. But as I have said, the right secured to the head of a family by the homestead act is a personal one, and being personal it may, of course, be waived; it may be lost, even where no contract has been made respecting it, by not claiming the protection of the statute at the proper time.

In section (516) before referred to, we have seen that the homestead shall "*be selected by the owner thereof,*" and in section (517) that when a levy is made upon the lands and tenements of one "whose homestead has not been selected by metes and bounds; he may notify the officer at the time of the levy of what he regards as his homestead." This of course requires affirmative action on the part of the debtor; he is not permitted to lie idly by and permit a sale of his homestead to be made, and then come forward and lay claim to it as exempt from sale. And such was the ruling of the supreme court of Indiana under a statute quite similar to our

own in this respect. *State v. Melogue*, 9 *Ind.*, 196. And how much greater reason for requiring vigilance in asserting the right when the court is proceeding to adjudge a sale upon an issue joined between the parties.

The rule of law, applicable alike to proceedings in equity, and actions at law, undoubtedly is, that after a judgment or decree *in rem* against him, it is too late for a party to the record to assert any claim to the property, either as a homestead or otherwise, which might have been made and determined in that suit. Were it otherwise it would be quite difficult to put an end to litigation. *Slaughter v. Detiney*, 15 *Ind.*, 49. *Perkins v. Bragg*, 29 *Ind.*, 507. *Emburg v. Conner*, 3 *New York*, 511. *Sibbault's Case*, 12 *Pet.*, 492. *Bank of the United States v. Beverly*, 1 *How.*, 135.

The question, therefore, of whether the property in controversy is exempt under the homestead act must be considered *res judicata*, and not be again opened to discussion. The defendants are estopped from questioning the correctness of the decree, which must hereafter be regarded as a final determination of the rights of the defendants to the subject-matter of the suit.

The decree of the district court must be reversed, and an order entered confirming said sale.

JUDGMENT ACCORDINGLY.

MR. JUSTICE MAXWELL concurs.

ZACCHEUS SHED AND WILLIAM A. MARLOW FOR THEMSELVES, AND AT THE REQUEST, AND IN BEHALF, OF TWO THOUSAND OTHERS HAVING A COMMON INTEREST IN THE SUBJECT MATTER OF THIS SUIT, PLAINTIFFS IN ERROR, V. JOSEPH J. HAWTHORNE, JOHN P. EATON, JOHN C. SEELY AND CORNELIUS DRISCOLL, DEFENDANTS IN ERROR.

Injunction: PUBLIC NUISANCE: A petition for an injunction to remove or abate a public nuisance, will not be sustained unless it clearly shows that the plaintiff does or will sustain a special damage—a personal injury *distinct* from that which he suffers in common with the rest of the public.

———: ———. Where it was alleged in the petition, that the defendants obstructed a public highway by the erection of a toll gate, and the demanding and taking of toll for crossing a bridge on said highway, *it was held*, on demurrer, that the case stated by the pet tion was that of a public nuisance, and that the injury complained of was not one peculiar to the plaintiff, but common to him and all others traveling over the highway, and crossing the bridge erected thereon

THIS was a petition in error to reverse a judgment of the district court for Dodge county.

It appeared from the petition of the plaintiffs that a county road had been laid out in Fremont precinct, Dodge county, commencing at the town of Fremont, and running across to the south bank of the Platte river. By virtue of a special election held in that precinct, bonds to the amount of fifty thousand dollars had been issued, and the proceeds thereof used in the erection of a bridge across the Platte river, along the line of said road. This bridge was by the county commissioners made a toll bridge, and a toll keeper was stationed thereon, and rates of toll fixed. The plaintiffs brought suit, praying for an injunction to enjoin the defendants from obstructing said county road by the erection of the toll gate, and the demanding and receiving of toll from persons crossing said bridge.

To the petition, a demurrer was filed, and upon argument before Mr. Justice Maxwell, sitting in the district court, the demurrer was sustained and judgment entered dismissing the petition at the costs of the plaintiffs.

The plaintiffs then brought the case here by petition in error.

W. A. Marlow, for plaintiffs in error, argued the cause upon a brief prepared by himself and *Zaccheus Shed*.

I. Three of the defendants, as alleged in the petition are the county commissioners of Dodge county, Driscoll, the other defendant being employed by them in their official capacity as toll keeper or tax collector on a public highway.

II. The powers and duties of a board of county commissioners, are defined by statute. *Gen'l Statutes*, 234, *Sec.* 14.

III. The manner of levying and collecting taxes is clearly defined by statute. Any law passed by the voters of a precinct, or the commissioners of a county, providing for the levying and collecting of taxes in a different way from that pointed out by statute, is a nullity.

IV. The acts of the county commissioners in levying taxes are ministerial, their duties being clearly defined by statute.

V. The principal and interest on precinct bonds issued in aid of works of internal improvement, shall be paid by tax levied and collected upon the property of the precinct. *Gen'l Statutes*, 449, *Sec.* 7.

VI. Where precinct bonds have been issued to aid works of internal improvement, it is the duty of the

county commissioners to levy a tax upon the taxable property of the precinct to pay principal and interest. *Gen'l Statutes*, 449, *Sec.* 7.

VII. One who has been compelled to pay a tax, the assessment and collection of which was unauthorized and illegal, may recover the amount so paid against those collecting the same. *Bailey v. Buell*, 59 *Barb.*, 158.

VIII. Courts of equity will interfere where there is an entire absence of authority for the assessment and collection of a tax, as where the tax is illegal, when there exists special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury. *High on Injunction*, 195, *Sec.* 354. *Williams v. Peinny*, 25 *Iowa*, 436. *The City of Jeffersonville v. Patterson*, 32 *Ind.* 140. *Mechanic's and Traders' Bank v. Debolt*, 1 *Ohio State*, 591. *Knowlton v. Supervisors of Knox County*, 9 *Wis.*, 410. *Kinyon v. Duchene*, 21 *Mich.*, 498. *Cumberland County v. Webster*, 53 *Ill.*, 141. *Clinton School District's Appeal*, 56 *Penn. State*, 315. *Livingston v. Hollenbeck*, 4 *Barb.*, 9. *Center and Warren Gravel Road Co. v. Black*, 32 *Ind.*, 468.

IX. A court of equity will interfere by injunction in the case of a single party seeking relief for himself alone, where it will avoid multiplicity of suits, and in cases where many claim a right against one. *Matheny v. Golden*, 5 *Ohio State*, 361. *Dows v. City of Chicago*, 11 *Wall.*, 108. *Williams v. Peinny*, 25 *Iowa*, 436.

X. Peculiar and extraordinary cases will arise in the complex and diversified affairs of men which perhaps cannot be classed under any of the distinct heads of chancery jurisdiction, but must be acknowledged nevertheless

to come within the legitimate powers of a court of chancery. *Oliver v. Pray*, 4 *Ohio*, 475. *Fee, Admr., v. Fee*, 10 *Id.*, 469. *McConnell v. Scott*, 15 *Id.*, 401.

XI. A county with all its officers is a necessary organization for political purposes under the government of the state. Its officers all take an oath to perform their official duty, which is in each case circumscribed and defined by statute. *Boalt v. Commissioners*, 18 *Ohio*, 13. *C. N. and Z Railroad Co. v. Commissioners*, 1 *Ohio State*, 77. *Commissioners of Hamilton County v. Mighels*, 7 *Id.*, 109.

XII. Public officers proceeding illegally, are liable in an action at law to private individuals who sustain a special injury. *Shearman and Redfield on Negligence*, *Sec.* 166–171, *note*. *Robertson v. Chamberlain*, 34 *New York*, 389.

XIII. Courts of equity will interfere by injunctions where public officers under color and claim of right are proceeding to impair either public or private rights, or where their proceedings will result in serious injury to private citizens, or where the aid of equity is necessary to prevent a multiplicity of suits. *High on Injunctions*, *Secs.* 796, 800–804. *Green v. Green*, 34 *Ill.*, 320. *Green v. Oakes*, 17 *Id.*, 249. *Oakley v. Trustees*, 6 *Paige*, 263.

E. Wakely, for defendant in error, submitted the following points:

The plaintiffs cannot maintain this action. The obstruction of a public highway, is a public, not a private nuisance, except in particular cases, when an individual sustains some injury peculiar to himself not affecting the public. The mere inconvenience to an indi-

vidual as a traveler, having occasion to pass over the obstructed highway, is not such an injury as entitles him to maintain an action for damages, or to abate or enjoin the obstruction, although he may by reason of proximity to the place where it exists, or from having to pass over the highway often in his ordinary business, suffer greater inconvenience than other members of the community. This is a difference in degree, not in kind.

This position is amply sustained by authority. I cite a small proportion of the cases maintaining it, and I think none will be found opposed. *Lansing v. Smith*, 8 *Cow.*, 146. *City of Georgetown v. Alexandria Canal Co.*, 12 *Pet.*, 91. *Bigelow v. Hartford Bridge Co.*, 14 *Conn.*, 565. *O'Brien v. Norwich and Worcester Railroad Co.*, 17 *Id.*, 372.

II. The petition does not show that the *locus* is a public highway.

It sets forth certain proceedings which are claimed to establish a highway.

These are clearly insufficient.

The pretended order laying out or establishing a highway was made by only one of the two commissioners appointed for that purpose.

The statute then in force, § 20, *Ch.* 47, *Rev. St.* 1866, did not authorize the appointment of two persons to act. And, if they had both acted, it would have been a clear violation of law. The responsibility was to be placed upon one only. It would not follow that he would come to the same conclusion if acting upon his sole judgment and responsibility as if counseling and sharing the responsibility with another.

But, whether the appointment of the two was, or was not valid, it is clear beyond doubt or argument that one of them could not act alone, and make a legal report establishing a highway. *Mericle v. Mulks*, 1 *Wis.*, 366.

Fitch v. Commissions, 22 *Wend.*, 132. *People v. Hines*, 30 *New York*, 470.

The commissioners represent the precinct whose inhabitants own the bridge. They are not, therefore, mere wrongdoers. They were simply continuing a structure already erected when the order pretending to establish a highway was made. The bridge could not be taken as a free highway without compensation.

The statutes respecting highways do not apply to this case.

III. The inhabitants of the precinct under the extraordinary powers conferred by the act of 1869, voted the bonds and with their proceeds erected a toll-bridge.

The commissioners in selling the bonds, and building the bridge with their proceeds, acted not in their official capacity, under the general laws of the state, but voluntarily as the agents or trustees of the inhabitants of the precinct.

IV. The plaintiffs, if they had a right of action, could not join. Their interests, and their damages, if any, are separate and several.

GANTT, J.

This is an action by petition praying for an injunction perpetually enjoining the defendants from obstructing a county road and bridge, situated in Fremont Precinct, Dodge county, and from demanding and taking toll for crossing said bridge. To the petition the defendants interposed a general demurrer, which was sustained, and it is now assigned for error that the court erred: *First.* In sustaining the demurrer to the plaintiffs' petition, and *Second.* In rendering judgment for the defendants. Several questions were urged on the argument as reasons for the reversal of the judgment, but the conclusion at

which we have arrived, renders it unnecessary to examine more than one of these grounds.

The allegations of the plaintiffs' petition substantially are, that the defendants have obstructed and continue the obstruction of a public highway, by the erection of a toll-gate and the demanding and taking of toll for crossing on the bridge on said highway. If, as alleged, this road is a public highway, then travel over it is a common right to the public, and therefore it must be clear that the obstruction complained of is a public nuisance, for it affects all alike who may have occasion to pass over the highway.

In *Lansing v. Smith*, 8 *Cow.*, 152, it is said that "a ditch dug in a public highway, which from the local circumstances of the country, is seldom or ever used but by one or more families, is still a *public nuisance*, not because any considerable portion of the public is injured by it, but because it obstructs a passage which all have a right to use."

And it is an ancient rule of law, that no action lies for a public nuisance, but by indictment only, because the damage being common to the public, no one can assign his particular portion of it; and the only exception to this rule is where the private person suffers some extraordinary damage, distinct from that suffered by the public at large.

In the case at bar, the petition shows that the same injury which has resulted or may result to the plaintiffs, by reason of the obstruction, must necessarily in like manner and degree result to the public at large. 3 *Black. Com.*, 219. *Bigelow v. Hartford Bridge Co.*, 14 *Conn.*, 577. *O'Brien v. Norwich and Worcester Railroad Co.*, 17 *Id.*, 375. *Moses v. Pittsburg and Fort Wayne R. R. Co.*, 21 *Ill.*, 522.

In accordance with these long and well settled principles of law, it seems to be well established, that a bill in

equity will not be entertained for an injunction to remove or abate a public nuisance, or to enjoin an obstruction which constitutes such nuisance, unless it be clearly shown that the plaintiff does and will sustain a special damage, a personal injury *distinct* from that done to the public at large; and it being clearly shown that the plaintiffs in this case cannot suffer any injury which is distinct from that which must necessarily result to the public, the judgment must be affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE concurs.

HUGHES AND BICKLE, PLAINTIFFS IN ERROR, V. S. J. M. KELLOGG, DEFENDANT IN ERROR.

Practice in supreme court. Motions to strike out part of the transcript of the court below, will not be entertained in the supreme court. Whatever objection is taken to the record, should be presented in the argument of the cause upon its merits.

Practice: EXCEPTIONS. To make exceptions to the charge of the court to the jury available to the party excepting, or to the ruling of the court in the refusal to give instructions asked for, or to the admission of testimony, the exceptions must be reduced to writing at the same term at which the trial took place.

Payment. K. sold a tract of land to H. and B., on the fourth day of December, and by agreement of parties the deed was deposited with W., a banker, who upon being paid the purchase money was to deliver the same to H. and B. On the fifth day of December H. and B. deposited with W., in part payment of the land, a check for one thousand dollars, drawn on him by G., who had money on deposit there. On the same day K. called at the bank, and received a certificate of deposit for the amount. K. was therefore credited with one thousand dollars on the books of the bank, and G.'s account charged therewith. On the sixth day of December W., the banker, failed. *Held*, that this was a sufficient payment by H. and B., and a satisfaction *pro tanto*, of the agreed consideration to be paid for the land.

THIS was an action brought in the district court of Otoe county, by S. J. M. Kellogg, the defendant in error,

against Hughes and Bickle. Upon a trial of the cause, a verdict being returned in favor of Kellogg, judgment was rendered thereon, and to reverse that judgment, Hughes and Bickle brought the cause here by petition in error. The facts fully appear in the opinion of the court. Mr. Justice Gantt, having been of counsel in the court below, did not participate in the decision of the cause in this court.

E. F. Warren, for defendant in error, moved to strike out the bill of exceptions, the same not having been reduced to writing during the term at which the trial took place, and cited the following cases: *Monroe v. Elbert*, 1 *Neb.*, 174. *Mills v. Simmonds*, 10 *Ind.*, 464. *Howard v. Burks*, 14 *Ind.*, 35. *Galbreth v. Gaskin*, 17 *Ind.*, 234. *Evanhart v. Hollinsworth*, 19 *Ind.*, 138. *Hicks v. Person*, 19 *Ohio*, 435. *Doe v. Brown*, 6 *Ohio State*, 12. *Kline v. Wynn*, 10 *Id.*, 223.

LAKE, CH. J.

The motion must be overruled. In cases brought to this court, the objections made to a record of the court below, should be presented to the court in the argument of the cause upon its merits. A motion to strike out a part of a record, is not good practice. It presents the cause to this court by piece meal. Such questions, when presented upon the argument, will be considered by the court in its determination of the cause. The motion is overruled, and the case set down for argument.

The cause then came on to be heard, and *Calhoun & Croxton*, for plaintiffs in error, contended as follows:

The verdict of the jury is not sustained by sufficient evidence, and is contrary to law. On these two points we refer to the evidence which clearly shows that Kellogg

selected and appointed Ware as his agent to hold the deed and receive the payment upon the land. Ware testifies that K. was twice in his bank on December 5, and "the certificate (ticket) was given to him the first time," that Kellogg came in the second time, about the time the bank closed. Ware says that the Odd Fellows had over $3,000 to their credit in his bank when the check was drawn and presented, and that he "heard Kellogg inquire of Farwell if Hughes & Bickle had deposited the money there." The certificate was given to him at his request, and the amount was put to his credit in the books at his request. "I was acting for Kellogg in the matter."

Ware received the check as the agent of Kellogg in payment of the $1,000, and Kellogg, with knowledge of all the facts, tried to sell his certificate to the Otoe County National Bank, and said the payment was made to him, and he had lost it, and never at any time repudiated the act of his agent in taking the payment on the check. The facts present a very strong case of recognition and ratification by Kellogg of the acts of his agent. But in this case the payment by check was accepted by Kellogg himself with knowledge of the circumstances, for Ware testifies "the certificate was given to him at his request, and the amount was put to his credit in the bank at his request." Hence, as Kellogg was advised on the 4th that the payment would be by such check, and on the next evening that the payment was made by such check, and as he afterwards went to the bank, and at his own request turned the amount so paid into a deposit to his credit, it is certainly true that in contemplation of law, the whole transaction was his own act, and carried with it the same effect as if he had received the check himself, and then went to the bank and made a deposit by it for that amount to his credit. The facts operate as an absolute payment to Kellogg of $1,000. The verdict is therefore not sustained by the evidence, because the proofs clearly show an abso-

lute payment of the $1,000 as recognized, accepted and declared by Kellogg himself, and for the same reasons it is clearly contrary to law. But if the principal say or do something from which it may be inferred that he assented to the act of his agent, it will be a confirmation. *Vanhorn v. Frick*, *C. S. & R.*, 93. Or a subsequent recognition of an act done by an agent, or where by one who assumes to act as such, is binding on the principal, if made with knowledge. And the confirmation may be by implication from the acts and doings of the principal. *Byrne v. Doughty*, 13 *Geo.*, 46.

Again, if a principal does not disclaim the act of his agent who transcends his authority, he makes the act his own. *Bredin v. Dubarry*, 14 *S. & R.*, 27. Or receiving notice of the act of his agent without objection, will be a ratification. *Shaw v. Nudd*, 8 *Pick.*, 9. Or if the principal does not choose to affirm the act of his agent, "it is his duty to give immediate information of his repudiation. The principal must, when informed, report within a reasonable time, or be deemed to adopt by acquiescence." *Law v. Cross*, 1 *Blackf.* (U. S.) 539.

E. F. Warren, for defendant in error, argued the cause upon a brief prepared by *Isaac N. Shambaugh and J. W. Miner*, and in addition to the point made upon the motion to strike out the bill of exceptions, contended:

I. Ware was the agent of both parties, but if he was the agent of Kellogg only, the result must be the same. An agent authorized to collect a debt can only receive payment in money, unless otherwise instructed by his principal. 2 *Parsons on Contracts*, 615 *and note m. Story on Agency*, *Secs.* 98, 99, 181, 413. *Ward v. Smith*, 7 *Wallace*, 447.

II. Payment in a check is conditional payment only.

If the creditor receives the money on the check, it is payment, otherwise not. The holder is not bound by receiving it but may treat it as a nullity if he derives no benefit from it, provided he has been guilty of no negligence which has caused an injury to the drawer. 2 *Parsons on Contracts*, 623 *and* 624 *and notes m and n, and cases referred to.*

III. The fact that Ware was a banker can make no difference in the rights of the parties. In the case of *Ward v. Smith*, before referred to, the agent was a bank and the bank received depreciated bank notes in payment of the debt, but it was decided by the Supreme Court of the U. S. that the receipt of such notes by the agent was not payment of the debt due the principal, and that he was not bound thereby.

IV. But in no view of the case can this transaction be considered payment to Kellogg, as the bank was broke at the time and could not have paid the money if demanded, and Hughes and Bickle have lost nothing thereby. The check was worthless when drawn. *Magee v. Carmack*, 13 *Ill.*, 289. *Lightbody v. Ontario Bank*, 11 *Wend.*, 9. *Same v. Same*, 13 *Id.*, 101. *Young v. Adams*, 6 *Mass.*, 182. *Bank of United States v. Bank of Georgia*, 10 *Wheat.*, 303. *Bacon v. Westervelt*, 29 *Conn.*, 598.

V. There was no ratification by Kellogg. Taking the memorandum of deposit in ignorance of the facts that the pretended payment was in a check on the bank, and that the bank was broken at the time, was not a ratification. An offer to sell the supposed deposit was not a ratification, nor a failure to notify plaintiffs in error that he repudiated the transaction between them and Ware, as they were not injured thereby. 2 *Parsons on Contracts*, 623 *and* 624. An act of the principal to amount to a ratification must be done with a full knowledge of all the

facts of the case, and if either of the above facts were material, the finding of the jury is decisive, as Kellogg testified he did not know that the pretended payment had been made in a check until a few days before the commencement of this suit, and that he told Bickle the day after the bank failure that the plaintiffs in error ought to make good to him the amount. In any view that can be taken of this case the verdict is supported by the evidence.

LAKE, CH. J.

Several objections were taken to the admission of certain testimony, and also to the instructions given to the jury, but the failure to reduce them to writing during the trial term will prevent a review of those questions here.

There is, indeed, but very little dispute about the material facts of this case, which are in substance as follows:

On the 4th day of December, 1871, Kellogg, the defendant in error, and plaintiff in the court below, sold a tract of land to the plaintiffs in error for the sum of fifteen hundred and sixty dollars, and by an arrangement then agreed upon, the deed was deposited with J. A. Ware, a banker in Nebraska City, who upon being paid said purchase money was to deliver it to the said Hughes and Bickle. It was further understood that a thousand dollars of the money should be paid the next day, and the remainder shortly afterwards.

On the fifth day of December, the plaintiffs in error in order to meet their engagement, borrowed a thousand dollars from Daniel Gantt, who was acting as treasurer of the society of Odd Fellows, receiving therefor his check upon Ware, which they at once deposited to the credit of Kellogg, to apply upon the deed. The check was in these words:

"$1,000.00. NEBRASKA CITY, December 5, 1871.

Banking House of J. A. Ware.

Pay to Hughes and Bickle or bearer One Thousand Dollars."

(Signed.) DANIEL GANTT,
Treasurer, etc."

On the same day, Kellogg went to Ware's bank and inquired if Hughes and Bickle had left any money for him, and on being told by the clerk that they had deposited a thousand dollars, he said he desired to leave it there, and requested a certificate for the amount which was given to him. The following is a copy:

"Deposited by S. J. M. Kellogg with J. A. Ware, Dec. 5, 1871. Checks $1,000. One Thousand Dollars, (left by Hughes and Bickel.)"

(Signed.) J. A. WARE,
FARWELL."

Thereupon Kellogg was duly credited on the bank books with one thousand dollars, and the Odd Fellows' account charged with the same amount.

At the date of the check, the Odd Fellows had something over three thousand dollars to their credit in the bank, subject to the draft of their treasurer, but Ware was not in a condition at any time during the 5th of December to pay so large a check, although he was still doing business, receiving deposits, and paying out in small amounts.

This, however, was the last day that he did business, and on the sixth day of December, the bank passed into the hands of his assignee, hopelessly insolvent. There is nothing in the record to indicate what amount Ware's creditors will be likely to receive upon their claims.

Thus matters stood until the commencement of this

suit on the 16th day of March following, Kellogg meanwhile, speaking to others of his misfortune, and treating the loss as his own. That he ever made any demand upon Hughes and Bickle to reimburse him before bringing suit is not warranted by the testimony. But it is a fact that he did on frequent occasions, endeavor to sell said deposit check for fifty cents on the dollar.

Indeed, the only point on which there is any real difference in the testimony is as to the time when Kellogg first became aware of the fact that a check, instead of money had been deposited by the plaintiffs in error. Kellogg on the one hand swears, that he supposed they had actually deposited the money until about the time he commenced this action; while on the other hand, there is considerable testimony tending strongly to show that he must have known of it on the very day the deposit was made.

From the view that I take of the law governing this transaction, however, it is quite immaterial when he first learned this fact, as it can have no possible bearing on the case. It was to all intents and purposes the same as if the amount had been paid to Ware in currency. Well may it be asked, in what better plight would Kellogg have been to-day, had the deposit been made in bank notes? Would he not have trusted to the responsibility of Ware, and received the certificate of deposit all the same? The fact is that both parties regarded this bank as a safe place of deposit, and both were willing to trust to Ware's integrity and responsibility. And especially is this true of the defendant in error, Kellogg, for instead of demanding his money, when told it had been paid in for him, he elected of his own motion, to have it passed to his credit on the books of the bank, thereby accepting the responsibility of Ware as his only security, that the money would be handed over when he chose to call for it. By this act Ware became his debtor

to the amount of the check, while his liability to the Odd Fellows' society was reduced *pro tanto.*

The proposition so earnestly pressed upon our attention, by counsel for the defendant in error, that where an agent is authorized merely to collect a debt, he has no right to accept anything in payment but money, and if he do so it will not bind the principal, is no doubt, as a general rule, correct. But suppose, in such case, the agent being indebted to the debtor of his principal, should accept payment by a cancellation of his own debt, and afterwards the principal should take the agent's acceptance for the amount, supposing that he had collected the money, would it not be considered a valid and binding transaction? And even although the agent should prove to be entirely unable to pay a single dollar of the amount, would it be contended, for one moment, that the principal could resort to his original debtor to make good to him the loss?

In very many respects a check of this description is regarded as having the character of an inland bill of exchange, and if the holder would reserve his right to resort to the drawer, he must use the same diligence in giving notice of its dishonor, as would be required of him as the holder of an inland bill. *Merchant's Bank v. Spicer*, 6 *Wend.*, 443.

I do not think that this case is at all analogous to those to which our attention has been directed, wherein the drawer of the check had no funds in the hands of the drawee; or where payment was made in the notes of a broken bank, forged paper, and the like.

In those cases nothing of value was received, nor any release of the principal debtor, and consequently no satisfaction of the demand. Here, on the contrary, we have a direction given to the banker, by one who had the money in the bank, to place the amount of the debt to the credit of the defendant in error, which was done and

fully assented to by the latter at the time, and acquiesced in by him without objec ion, for over three months thereafter.

And what is the effect of all this upon the other parties to the transaction? How does it leave them? The ac-ount of the Odd Fellows at the bank, having been charged with the amount of this check, which was paid and cancelled, they have no valid claim against Ware for the money. And the plaintiffs in error having given their note to the Odd Fellows for the thousand dollars, must pay it. From this there is n› escape. It would seem therefore, upon the broadest principles of justice, that the defendant in error having voluntarily taken Ware's certificate of depos-it for the money, ought not to be permitted to recover the amount from the plaintiffs in error, because he might otherwise, perchance, be subjected to the loss of a portion, or even the whole of it.

In my opinion this arrangement amounted substantially to what is termed "payment by delegation;" as where a debtor directs his banker to place to the credit of his creditor, with his assent, a sum of money to be applied in payment of his indebtedness to him. Where this is done and a transfer of the account actually made on the books of the bank, it is held to be equivalent to payment, even although the banker should become bankrupt and the creditor thereby lose the money. 2 *Parsons on Contracts*, 137, *and notes.*

I am of the opinion, therefore, that as between Kellogg and Hughes and Bickle, there was a payment of one thousand dollars on the 5th day of December, 1871, which was a satisfaction, *pro tanto*, of the agreed consideration to be paid for the land; and inasmuch as the verdict was in conflict with these views, the judgment must be set aside and a new trial awarded.

REVERSED AND REMANDED.

MR. JUSTICE MAXWELL concurs.

ALEXIS PAULETT, PLAINTIFF IN ERROR, v. J. M. PEABODY AND JOSEPH AND JANE BROWN, DEFENDANTS IN ERROR.

Judicial Sale. When a purchaser at a sale of land under a decree of foreclosure of a junior mortgage, in an action where the senior mortgagee is not made a party, is by false representations induced to believe that the proceeds of the sale will be applied to the payment of the prior mortgage, and that he would thereby take the title fully released therefrom, the district court is justified in setting aside such sale.

———: ———. Power and duty of the court in examining such sales, discussed by LAKE, CH. J.

ALEXIS PAULETT brought suit in the district court for Richardson county, to foreclose a mortgage upon certain real estate situated therein, executed by Joseph and Jane Brown to Holt and Scott, and by them assigned to Paulett. Louis Hax who held a prior mortgage was not made a party to the suit. A decree of foreclosure was rendered and a sale of the premises made by the sheriff, one J. M. Peabody being the purchaser. Upon motion of the purchaser who appeared specially for that purpose, the sale was set aside, and to reverse that order of court the cause was brought by Alexis Paulett, to this court upon petition in error. The facts upon which the order was based are sufficiently set forth in the opinion of the court.

George P. Uhl, for plaintiff in error.

A. Schoenheit, for defendants in error.

LAKE, CH. J.

The record in this case presents but a single question for our consideration, and this relates to the supervisory power of the district court over judicial sales when presented for confirmation.

This was a sale of real property under a junior mortgage, in a suit wherein the senior mortgagee, was not made a party.

On the hearing of the motion to confirm the sale, it was objected by the purchaser, upon a motion to set it aside, that he had been induced to purchase the property by reason of certain false representations made by the attorneys of both the plaintiff and the senior mortgagee, to the effect, that the prior mortgage would be first paid off and discharged out of the proceeds of the sale, and that he would thereby take the title to the property fully released from that incumbrance; that but for such representations he would not have bid on the property.

Several affidavits were filed in support of the motion to set the sale aside which, although not very satisfactory, yet tend to prove that the representations complained of were in fact made, and that the chief inducement to the purchase by Peabody was the fact that he supposed his money would be first applied to the payment of the prior mortgage.

A very large discretion is necessarily given to the district court in the supervision of sales of real property under its judgments and decrees. The statute, it is true, points out very clearly certain steps which must be taken by the officer charged with the duty of making the sale, not one of which can be omitted, and in respect to which the court is given no discretion. But this enumeration of duties on the part of the sheriff, is not to be considered a limitation or restriction upon the authority of the court to see to it, that in all other respects, the proceedings are properly conducted, and the sale fairly made, so that neither the parties to the suit, nor the purchaser at the sale, shall be defrauded. In this, the court must exercise a wise discretion, and so long as this is done there is no occasion for interference by this court.

Judicial sales should be conducted with the utmost

fairness and good faith. Indeed the rules which govern them are not less stringent than in ordinary cases. If a sale is made under a decree of the court, and there is shown to have been false representations, or undue concealment, in the conditions or particulars of the sale, by any person interested therein, to the injury of another, the sale should be set aside if application is made before the conveyance is executed.

The record discloses no reason why this order of the district court should be disturbed, and it is therefore affirmed.

JUDGMENT ACCORDINGLY.

MR. JUSTICE MAXWELL concurs.

DWIGHT J. MCCANN, AND PINNEY AND COMPANY, APPELLANTS, V. THE ÆTNA INSURANCE COMPANY OF HARTFORD, CONNECTICUT, APPELLEES.

Insurance: EVIDENCE NECESSARY TO ESTABLISH A CONTRACT FOR.—A decree will not be rendered against an insurance company, to compel it to issue a policy upon an alleged contract of insurance, unless there is conclusive evidence that such contract was actually made.

———: NOTICE AND PRELIMINARY PROOFS. Although there may be sufficient evidence to establish a parol contract of insurance, yet before the assured has any right of action for the loss sustained, he must make and deliver to the company a particular account of the loss, signed and sworn to, together with a statement of the whole value of the subject insured, his interest therein, and when and how the loss originated: the giving of notice and taking of preliminary proofs are conditions precedent, and must be performed before the assured is entitled to receive payment, or to sue for the loss, unless the company by some act on its part waives the performance of such conditions.

THIS was a suit in equity commenced in the district court of Otoe county, on the twenty-second day of February, A. D. 1863, by Pinney and Company and Dwight J.

McCann, against the Ætna Insurance Company of Hartford, Connecticut, wherein the complainants prayed for a decree of the court, ordering the defendant to make, execute, and deliver to them, a contract of insurance, and to recover the sum of four thousand five hundred dollars, alleged to be due on a loss suffered by them in the sinking of the steamboat Sunset, the plaintiffs being owners of one-half of said boat, and claiming to have existing at the time of the loss, an insurance in the defendant's company, to the amount stated, upon one-half of the hull of said boat.

It appeared in evidence that on the 11th day of October, 1865, while the steamer Sunset was lying at the wharf in Saint Louis, Missouri, the plaintiff, McCann, went to the agent of the defendant, at Nebraska City, Nebraska, James Sweet, and applied for an insurance on the one-half of said steamboat. The application was made verbally. Sweet, the agent, told McCann that he could not issue the policy, but would take his application and send it to the office of the general agent of the company. No written application for such a policy was made, and no premium paid. On the 17th of the same month, the steamboat, while on its way up the Missouri river, was wrecked and destroyed. Notice of the loss was given orally to the agent of defendant, at Nebraska City. No other notice or proofs of the loss seem to have been given to the defendant. On the 23d of October, 1865, the premium was tendered to the agent of the defendant, but was not received. The plaintiffs then brought this suit. The cause was tried before Mr. Justice Lake, sitting in the district court for Otoe county, who rendered a decree therein, dismissing the bill at the costs of plaintiffs. The plaintiffs then appealed to this court under the provisions of Title XXI of the code of civil procedure. *Revised Statutes*, 1866, 513. Proceedings were commenced in this court in May, 1871, but Mr. Chief Justice

Mason having been of counsel, and Mr. Justice Lake having tried the cause in the court below, could not sit in this court, and the cause was continued from term to term, until its trial at the present term before ASSOCIATE JUSTICES GANTT and MAXWELL.

Isaac N. Shambaugh, for appellants, submitted the following points:

I. An oral or verbal contract of insurance is valid unless the charter of the insurance company, or the statute laws of the state require the same to be in writing. *Bonner on Insurance*, 31, 215–217. *Parsons' Mercantile Law*, 403. *Digest of Fire Insurance Decisions*, 294. *Constant v. The Alleghany Insurance Co.*, 3 *Wallace, Jr.*, ———. *The City of Davenport v. The Peoria Marine and Fire Insurance Co.*, 17 *Iowa*, 282, 283, 284. 1 *Phillips on Insurance, sec.* 9.

1. Even if the charter of the company or the laws of the state, require the policy to be in writing, an *oral agreement to insure* is valid and binding upon the company. *The City of Davenport v. The Peoria Insurance Co.*, 17 *Iowa*, 284.

2. A contract of insurance may be made by correspondence between the parties. *Bonney on Insurance*, 31. *Tayloe v. Merchants' Fire Insurance Co.*, 9 *How.*, 390.

II. It was not necessary that the premium should be paid in advance. *Bonney on Insurance*, 30, 71. *Bouvier's Law Dictionary*, 356, *second edition.*

III. Pre-payment of premium may be waived by the agent. *Bonney on Insurance*, 238. *Sheldon v. The Atlantic Fire and Marine Ins. Co.*, 26 *New York*, 460. *The City of Davenport v. The Peoria Marine and Fire Insurance Co.*, 17 *Iowa*, 289.

IV. As to usage, *Baxter v. Massasoit Insurance Co.*, 13 *Allen* 320. *Bonney on Insurance*, 31, 213. *Story on Agency, Sec.* 77.

V. The great rule between insurer and insured is, that the parties must act in good faith. *Parson's Mercantile Law*, 432. *Bonney on Insurance*, 56.

VI. The principal is liable for the acts of his agent within the scope of his general authority, though the agent violates his private instructions. *Story on Agency, Sections* 73, 133, 452. *Bonney on Insurance*, 84, 85. *Digest Fire Insurance Decisions*, 13. *The City of Davenport v. The Peoria Marine and Fire Ins. Co.*, 17 *Iowa*, 276.

VII. As to scope of agent's business and authority, 2 *Phillips on Insurance, Sections* 1872–1880. *Bonney on Insurance*, 81.

VIII. Any rule of an insurance company may be waived expressly or by implication, by conduct of officers or agents, and alterations made ; and written agreements may be changed by subsequent oral agreements. *Bonney on Insurance*, 32. *First Baptist Church in Brooklyn v. Brooklyn Fire Insurance Co.*, 18 *Barb.*, 69. *The Peoria Marine and Fire Ins. Co. v. Lewis*, 18 *Illinois*, 553.

IX. Contract of insurance is valid and binding though the policy has not been delivered to the assured. *Bonney on Insurance*, 67. *Tayloe v. Merchants' Fire Insurance Co.*, 9 *How.*, 390. *Reynold's Life Insurance*, 64. *The City of Davenport v. The Peoria Marine and Fire Insurance Co.*, 17 *Iowa*, 276, *and cases therein cited.*

X. If the defendant's agent agreed to insure the complainant's interest in the steamboat Sunset, the defendant

is liable for the loss, although the contract was not in writing, the policy not delivered and the premium not paid, and although the agent made the contract contrary to the directions and instructions of the defendant. The contract or agreement to insure is the principal act, and the making and delivery of the policy and the payment of the premium are mere incidents which may be waived by the parties expressly or by implication without destroying or impairing the validity of the contract, and when done subsequently, will have relation back to the time of doing the principal act. *Perkins v. Washington Insurance Co.*, 4 *Cow.*, 645. *Baxter v. Massasoit Insurance Co.*, 13 *Allen*, 320.

XI. Where an agreement for insurance has been made, the court will decree specific performance of, and enforce the same. 3 *Pars. Contracts*, 374, *note k. Perkins v. Washington Insurance Company*, 4 *Cow.*, 645. *Tayloe v. Merchant's Insurance Co.*, 9 *How.*, 405.

And the court having acquired jurisdiction of the cause will not only decree a specific performance of the agreement, by compelling the insurer to make to the insured a policy as contracted for, but will proceed to give full relief by decreeing payment of the loss. *The City of Davenport v. The Peoria Marine and Fire Insurance Co.*, 17 *Iowa*, 288. 2 *Phillips on Insurance, Section* 1936.

XII. Silence of the insurer, refusal to pay the loss when notified of the same, and failure to object to the sufficiency of the preliminary proofs, amounts to a waiver of such proofs.

S. H. Calhoun, for appellee, argued the cause upon a brief filed by himself and *A. J. Poppleton*, and contended as follows:

Without recapitulating the facts of the case as shown by the pleadings and testimony, it is sufficient to say that the whole question of the right of the complainants to recover, is comprised in the inquiry:

I. As to the extent of the authority of the agent Sweet, who is alleged to have made the contract of insurance.

II. In the inquiry whether any contract of insurance was in fact made.

As to the first inquiry:

1. The proof shows conclusively that the authority of Sweet was not general, but special. In other words, he was a special agent, and not a general agent.

2. His authority in respect to insuring boats extended merely so far as taking risks upon the hulls was concerned —to receipt the proper applications and send the same to the general agent of the Ætna, which he represented, at Cincinnati. The proof shows that he had no authority to effect a contract of insurance upon the hull of the steamboat, and that McCann was aware of that fact at the time of the alleged contract of insurance. This being the case it was impossible for Sweet to make a contract binding upon the company, for the simple reason that being a special agent he had not the power and could not bind the company, even so far as McCann was concerned, whose duty it was in a case of that character to inquire into the extent of Sweet's authority. The legal proposition is this, that where the authority of an agent is general, the parties dealing with him are not bound to inquire into the extent of his authority; but where his agency is special, parties dealing with him are bound to inquire into the extent of his authority, and he cannot bind the principal beyond the scope of that authority. The following citations are conclusive on that point: *Dunlap's Paley's*

Agency, 198, *and cases cited.* 1 *Phillips on Insurance, Secs.* 20, 26.

As to the second inquiry:

1. It is a further and fatal objection to a recovery in this case, that the facts shown do not amount to a contract of insurance. There was simply on the part of McCann, a *verbal* statement of an intention to make a proposal for a risk to be taken by the company, upon the hull of his boat, without following up such statement of intention by any actual proposal; and a declaration on the part of the agent, Sweet, of a willingness to receive such proposal, and forward it to Cincinnati, in the usual course of the company's business, for acceptance, and nothing that by any possible construction, could be regarded as a contract of insurance.

2. It would be absurd to say that an application had been made for insurance and accepted, when such application was wholly silent in respect to the property sought to be insured—the amount of the risk sought to be protected—the premium to be paid—or the commencement or termination of the risk—and no details or particulars mentioned from which a third party or a court could in any way arrive at the terms of the contract between the parties; and it would be absurd to suppose that an agent acting in the capacity of Mr. Sweet, has accepted a proposal which was utterly void of all these necessary particulars.

3. In any view which a court can take of it, it is impossible to reach the conclusion that there was any contract, or agreement of the minds of the two parties upon a definite state of facts amounting to a contract of insurance between these parties. There was a simple declaration of intention to make application, with an expression of a willingness to receive such application and give it the usual course of business in said company, by sending it to the general agent to be made effective or not.

4. Further, it seems from the evidence that the complainant's *claim* to recover only on a verbal agreement to make a policy, and Mr. Phillips, in section 14, says: "A party is not legally bound to the full extent of all the ordinary risks by an agreement to make a policy—the same being executory on both sides—without some memorandum signed by him to that effect."

5. The following authorities seem to show conclusively that under the facts proved in this case, no contract of insurance was effected on which a court of equity will relieve the complainants by directing the issuance of a policy, or rendering a decree for the amount claimed. 2 *Parsons on Contracts, 5th Ed.*, 351. *Suydam v. Columbus Insurance Co.*, 18 *Ohio*, 459. *Neville v. Merchant's Insurance Co.*, 19 *Ohio*, 452.

GANTT, J.

The plaintiffs claim that on the eleventh day of October, 1865 they made a verbal application to the agent of the defendant for an insurance on the one-half of the steamboat Sunset, and that the defendant by its agent, James Sweet, accepted such application, and agreed to take the risk. The defendant denies the alleged contract of insurance on the steamboat, and makes several other defenses. Considerable testimony was taken in the case, but the substance of all the testimony in respect to the alleged contract is that of McCann, one of the plaintiffs, that on the day above stated, he went to the office of James Sweet the agent, and by verbal agreement with him as the agent, he effected an insurance on the one-half of the steamboat in the Ætna Insurance Company, and that this conversation was the only one in which he made a direct application for such insurance; also that of James Sweet, the agent, that no such contract of insurance was made; that he told McCann he could not issue such policy,

but that he could take his application and send it to the office of the general agent, and that McCann quickly left his office without leaving a written application; and that of S. H. Calhoun stating that he was in the office of Sweet at the time the conversation occurred between McCann and Sweet, and that Sweet formally told McCann he would write to the company and see if they would take the risk; that he expressly said he could not issue a policy on the hull of the boat, but it must be done by the home office, and that McCann left the office within five minutes after he entered it. It seems that Calhoun was the only person present at the time of the conversation between McCann and Sweet, and therefore all the testimony in regard to the conversation, and alleged contract of insurance is that of these three persons. We think this testimony is not sufficient to maintain the allegations of the petition. That of McCann stands without any support whatever, while that of Sweet is corroborated by that of Calhoun. And the most favorable construction which can be put on all this testimony for the plaintiff still leaves the matter in very great doubt.

In *Suydam v. The Columbus Insurance Co.*, 18 *Ohio* 459, the rule is laid down, that in an action against an insurance company to compel it to issue a policy upon an alleged contract of insurance, such action cannot be sustained, unless there is conclusive proof that such contract was actually made. If the matter is left in doubt upon the whole evidence, the suit must be dismissed. *Neville, et al., v. The Merchants and Manufacturing Insurance Company*, 19 *Ohio*, 452. 2 *Parsons on Contracts*, 351.

But suppose the evidence was sufficient to establish a parol contract of insurance between the parties. Have the plaintiffs placed themselves in a position to secure a right of action, and maintain their suit to recover damages for the loss sustained by the sinking of the boat?

The assured, sustaining loss, is required forthwith to

give notice to the company or its agent, and as soon as possible thereafter to make and deliver in a particular account of such loss, signed and sworn to by him, together with a statement of the whole value of the subject insured, his interest therein, and when and how the loss originated so far as he knows or believes. All these requirements are conditions precedent to be performed on the part of the assured, and until such statements and proofs are produced, the loss shall not be deemed payable. It is said that the "assured cannot be presumed to be ignorant of the usages of the office to which he applies for insurance," and the law will not permit him on the ground of ignorance to claim exemption from producing the notice, statements or preliminary proofs, so indispensable to his demand of payment; at least all such proofs as may be in his knowledge or possession touching the nature and extent of the loss. And it seems to be the well settled doctrine in this country that the notice and statements, supported by oath, are conditions precedent, and must be performed before the assured is entitled to receive payment or sue for the loss, unless the company by some act on its part waives the performance of said conditions. *Angell on Insurance, Sec.* 226. *Columbus Insurance Co. v. Lawrence,* 2 *Peters,* 53. *Same v. Same,* 10 *Peters,* 513. *Haff v. Marine Ins. Co.,* 4 *John,* 135.

In the case at bar, it appears from the proofs that the plaintiffs did not comply with these conditions precedent, except that a copy of protest was either left with or shown to the agent.

If in law the plaintiff could, on the ground of ignorance, claim exemption from producing the preliminary proofs, yet in this case they could not be permitted to plead such ignorance, for the proofs show that they were fully notified to produce such statement.

J. B. Bennet, general agent for the company, testifies

that McCann called at his office in Cincinnati, Ohio, and in their conversation he "distinctly requested him to submit the proofs of his loss, to reduce the statement of facts to writing and verify them by oath, to produce a protest and submit any facts bearing directly or indirectly on his claim." McCann, in his testimony, fully corroborates this testimony of Bennet; he says "Bennet informed me that no statement of the facts or proofs had been received by him, and that he could not settle the matter—that there were many questions arising from the peculiar facts of the case, etc.;" that he "returned to Nebraska City, called on Mr. Sweet and asked him if he was prepared to pay the loss; he said he was not, and I brought the suit against the defendant." The statements, etc., were demanded of McCann and he refused to furnish them, and therefore the loss alleged to have been sustained by the sinking of the boat was not payable; and without the production of these proofs, certainly the agent might well say that he was not "prepared to pay the loss." The failure of plaintiffs to produce these preliminary proofs, we think are sufficiently pleaded in the answer. It is true the defendants plead other defenses in their answer, but that does not relieve the plaintiffs from the performance of the conditions precedent. "Good faith and fair dealing is of the essence of the contract of insurance," but the evidence shows that the plaintiffs have not so acted in the premises. They failed to produce the preliminary proofs, and when requested to do so they refused, and brought their suit; and as the alleged loss is not payable until these conditions precedent have been performed they cannot maintain their action.

MR. JUSTICE MAXWELL concurring, the judgment must be affirmed.

JUDGMENT AFFIRMED.

ALEXANDER W. MORGAN AND WIFE, APPELLANTS, v. GEORGE P. BERGEN AND WIFE, GEORGE C. MERRICLE AND E. P. CHILD, APPELLEES.

Contract. REQUIREMENTS OF THE STATUTE OF FRAUDS. A contract for the sale of lands is void, unless the contract, or some note or memorandum thereof, is in writing and signed by the party by whom the sale is made, or by his agent thereunto authorized in writing.

———: PRINCIPAL AND AGENT. And such contract, to be obligatory upon the *principal* when made by the agent, must be made in the name of the *principal;* if the agent contract in *his own name*, or describes himself as agent for the principal the *contract is the contract of the agent*, and not of the principal.

———: SPECIFIC PERFORMANCE. In an action for specific performance, the contract sought to be enforced must be clearly established, and the acts of part performance must unequivocally appear to relate to the identical contract upon which the action is brought.

———: TIME FOR PERFORMANCE. Although a particular day may be fixed for the completion of a contract for the sale of lands, it is not an indispensable requisite that the party should have performed precisely at the day; if he has not been guilty of gross negligence, a court of equity will grant him relief; but parties *may* make *time* the essence of the contract; so that if there be a default at the day, without any just excuse or any waiver afterwards, the court will not interfere to help the party in default.

THIS was an appeal from a decree dismissing plaintiff's bill, brought into this court under the provisions of section 45, of the chancery code of 1864.

The cause was tried before Mr. Chief Justice Mason, sitting in the district court for Douglas county.

Chief Justice Lake having been of counsel in the court below, did not participate in the decision of the cause in this court.

The facts are fully stated in the opinion of the court.

J. M. Woolworth, for appellants, submitted the following points:

I. The decree of Judge Mason seems, in part, to be based on the fact, that George P. Bergen's authority from

his wife to sell the premises, was not in writing. To this there are two answers:

1. Admit that section 64, page 293, of the Revised Statutes, and section 84, page 297, taken together require that the authority of the agent shall be in writing, the statute in such a case, as in other cases under the statute of frauds, must be pleaded, and that is not done here.

2. However the law may be in respect of the authority of the agent, it is shown in this record that Mrs. Bergen did authorize her husband to contract for the sale of the premises, and to deliver possession. This he did, and the delivery of the possession takes the case out of the statute. So, too, Mrs. Bergen, receiving the benefit of the sale, is estopped to deny his authority. *Smith v. Sheely*, 12 *Wall.*, 358.

3. It may be well here to remark, that while the agent here contracted in his own name, we are entitled to hold his principal to the bargain. *Story on Agency, Sec.* 442–4.

4. Nor may objection be made because the writing was in the form of a bond. *Fry on Spec. Per.*, 72 *et pass.*

II. There was here no such default on the part of the appellants as entitled the Bergens to rescind nor did they rescind the contract.

1. When the first note matured, the appellants were out of possession by virtue of an adverse and superior title, against which the Bergens had agreed to warrant their title, and, until that difficulty was removed, the payment of the note could not be exacted. At the time the first note matured, the Morgans were unable to say whether the Bergens would ever be able to give them possession. To require them to pay the note at a venture would be manifest injustice, such as a court of equity would not be guilty of. And as the difficulty arose from

the fault of the Bergens, they will not be permitted to take advantage of their own wrong to forfeit the rights of the plaintiffs. 2 *Story's Eq. Jr., Sec.* 779.

2. There is another answer to this objection. Mr. Morgan testifies to notifying Mr. Bergen of the difficulty, and he promised to correct it. And it appears that it was sometime after the default in paying the note, that, suddenly, a recission was attempted. Now the rule is, that when a contract stipulates that time shall be of the essence of the contract, such a waiver as is shown here, by which the other party is thrown off his guard, will displace the stipulation. 2 *Story's Eq. Jr., Sec.* 776.

3. After Morgan had removed this difficulty by paying $120 which the other side should have been prompt to pay, these notes, by their terms, payable at no place, were not presented, nor was he informed where to make payment. A fair opportunity to comply with the agreement should, under the circumstances, in all justice, have been afforded to the Morgans, and until that was done they had no reason to suppose that they were to be suddenly stripped, not only of the property, but of the $200 which they paid on the purchase, and the $120 which they paid to protect the title.

No counsel appeared for appellee.

MAXWELL, J.

This is a bill in chancery, filed in the district court of Douglas county, on the 11th day of January, A. D., 1867, for the specific performance of an alleged contract for the sale of real estate in the city of Omaha.

The bill sets forth that on the 21st day of May, 1864, Mary, wife of George P. Bergen, was seized in fee of lots one and two, in block two hundred and sixty-five, in the city of Omaha, and that she authorized her husband to

sell the same; that on that day he contracted to sell the premises to Osa Ann, wife of Alexander W. Morgan, for $900, of which sum $200 was paid in cash, and notes for the balance were given each for $350, one at one year, and the other at two years from date. The alleged contract is in the form of a bond, and was signed and acknowledged by George P. Bergen in his own name. There was an express stipulation that time should be the essence of the contract. About a week after the purchase, complainants took possession of the premises and remained in possession thereof until about the 17th day of April, 1865, when Samuel E. Rogers obtained a treasurer's deed thereto, the property having been sold for taxes of 1861, and finding the premises vacant, took possession thereof and remained in possession of the same until the 31st day of January, 1866, when Morgan purchased Rogers' interest in the tax title, paying therefor the sum of $120. No demand of payment was made when the notes became due, nor was there any offer to pay the same or any part thereof, except on condition of deducting the rent of the premises from the time Rogers took possession until possession was again obtained by complainants. About the 4th day of October, 1866, Bergen obtained possession of the premises, and soon after Bergen and wife sold the same to George C. Merricle, who, on the 23d of the same month, sold and conveyed the premises in question to E. P. Child, who is now in possession of the same.

Default was taken against Merricle and Bergen and wife. Child answered, denying in substance the allegations of the bill. Depositions of a number of witnesses were taken on behalf of the plaintiff.

The first question presented, for our consideration, is the authority of George P. Bergen to sell the property in question.

Section five, page 392, *General Statutes of* 1873, pro-

vides: "Every contract for the leasing for the longer period than one year, or for the sale of any lands, or interest in lands, shall be void, unless the contract or some note or memorandum thereof be in writing and signed by the party by whom the lease or sale is made." Section twenty-five, of the same chapter, provides; "Every instrument required by any of the provisions of this chapter, to be subscribed by any party, may be subscribed by his agent thereunto authorized, in writing."

In this case it appears that Bergen had no written or formal authority to sell the lots in question, and while it has been held that the authority of the agent contracting for the sale of lands need not be in writing (*McWhorton v. McMahan*, 10 *Paige*, 394), yet under our statute such authority *must* be in writing. In this case the bond was made and signed by Bergen in his own name and not as the agent or attorney of his wife. It is a well established rule of law that if an agent convey or covenant in his own name, as attorney or agent of the principal, and attests the deed either in his own name, or in his own name as agent or attorney, the instrument has no operation as the deed of the principal. *Spencer v. Fields*, 10 *Wend.*, 87. *Lessee of Anderson v. Brown*, 9 *Ohio*, 151.

A contract of sale or a deed of conveyance executed by an agent, in order to bind the principal, must be executed in his name. But it is contended that even if there was no authority to sell, yet, that the two hundred dollars, paid at the time of the sale, was delivered to and accepted by Mary Bergen. If the evidence sustained that view of the case, it would be sufficient to raise the presumption of ratification. In our opinion, the evidence entirely fails to establish the fact that any portion of the $200 was paid to Mary Bergen, with knowledge that it was derived from the sale of the lots in question.

In suits for the specific performance of a contract, the

contract sought to be enforced and the acts of part performance must unequivocally appear to relate to the identical contract set up.

It is provided in the contract given by Bergen to complainants that the notes should be paid at the time they became due, and that time should be the essence of the contract.

In equity, in ordinary cases where there is nothing special in the nature of the property or of the purpose for which it was intended to be purchased, although a particular day may be fixed for the completion of a contract, it is considered that the general object being the sale of the estate for a given sum, it is not an indispensable requisite to the granting of relief, that the party seeking it should have performed precisely at the day. If he has not been guilty of gross neglect, if his laches can be reasonably explained and be shown to be consistent with fairness and good faith, a court of equity will still afford relief; but the parties may make *time* the essence of the contract, so that if there be a default at the day, without any just excuse and without any waiver afterwards, the court will not interfere to help the party in default. *Wells v. Smith*, 7 *Paige*, 22. *Benedict v. Lynch*, 1 *Johns. Ch.*, 370.

In this case no sufficient excuse is shown for the failure to pay the notes at the time they became due, and there is no evidence of waiver. There is no evidence before us as to the character of the tax title Morgan purchased of Rogers, and whatever right he acquired under that he still retains.

The judgment of the district court must be affirmed.

MR. JUSTICE GANTT concurs.

JUDGMENT AFFIRMED.

C. C. CROWELL AND Z. A. CROWELL, PLAINTIFFS IN ERROR, v. WILLIAM C. GALLOWAY, DEFENDANT IN ERROR.

Practice: RETURN DAY OF SUMMONS. No discretion is vested in the district court or the clerk thereof, in respect to the return day of a summons. The statute requires that a summons shall be returnable on the second Monday after its date, and if one be issued returnable at any other time, the court acquires no jurisdiction over the defendant.

——: ENDORSEMENT UPON SUMMONS OF AMOUNT CLAIMED. The mere failure of the clerk to endorse the amount of plaintiff's demand on a summons, is of no consequence, *unless the defendant fails to appear*; in which case judgment shall not be rendered for a larger amount and costs.

——: APPEARANCE. If a defendant intend to rely on the want of personal jurisdiction, as a defense to a judgment entered against him, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court; if he appear for any other purpose, such appearance is general and a waiver of all defects in the original process, and an acknowledgment of the complete jurisdiction of the court in the action.

THIS was an action brought by defendant in error against the plaintiffs in error in the district court of Cuming county to recover the sum of $235.80 damages, alleged to have been sustained by failure of plaintiffs in error to comply with a certain contract entered into by them and defendant in error, in relation to the purchase of a crop of wheat belonging to the defendant in error.

A summons was issued against plaintiffs in error, directed to the sheriff of Cuming county, who returned the same duly served upon Z. A. Crowell.

A summons was also issued, directed to the sheriff of Washington county, who returned the same duly served upon C. C. Crowell.

Both writs were made returnable on the *first* Monday after their date.

The Crowells appeared specially and moved to quash the writs, which motion was overruled by the court. The cause was then tried to the court, and judgment rendered against the Crowells for the sum of $221 damages, and

$12.98 costs. They then filed a motion to set aside said judgment, but no action was taken by the court below upon the motion. To review these proceedings the cause was brought into this court by the Crowells upon petition in error.

Seth Robinson, for plaintiffs in error, argued the case upon a brief filed by *Savage & Manderson* (with whom was also *R. F. Stevenson*).

I. It is unnecessary to argue the defects in the summonses by which this action was commenced in the court below. Pointed out briefly they are as follows:

1. There are two summonses in the same action, the venue of one of which is in Washington county, and the other is without a venue.

2. They are both returnable on the first Monday after their issuance, (the 14th of October) when one should have been made returnable on the 21st, and the other on the 28th of October, or the 4th of November, at the plaintiff's option.

3. The answer day should have been the 11th, the 18th or the 25th of November, instead of the 4th.

4. There is no endorsement on either of said summonses of the amount claimed.

II. These are matters affecting the jurisdiction of the court, and not cured by a special appearance for the purpose of objecting to such defects. *Malcom v. Rogers*, 1 *Cow.*, 1. *Porter v. C. & N. R. Co.*, 1 *Neb.*, 14. *Hodges v. Brett*, 4 *G. Greene*, 345. *Milbourn v. Fouts*, *Id.*, 346. *Allen v. Lee*, 6 *Wis.*, 478. *Schell v. Leland*, 45 *Mo.*, 293.

III. Even were the special appearance a waiver of all defects in the summonses, the eleventh of November, 1872, was the earliest day at which plaintiffs in error

could be required to answer. They had at least a right to that time, and a judgment taken prior to that day is irregular and void.

W. A. Marlow, for defendant in error, submitted the cause upon a brief prepared and filed by *J. C. Crawford.*

The motion made by the plaintiffs in error to set aside the judgment in the court below, was an appearance in the case, and a waiver of all irregularities in the summons. *Dix v. Palmer*, 5 *How. Pr.*, 233. *Sprague v. Irwin*, 27 *How. Pr.*, 51. *Webb v. Mott*, 6 *How. Pr.*, 439. *Porter v. Chic. & N. W. R. R. Co.*, 1 *Neb.*, 14. *Walker v. Bank of Circleville*, 15 *Ohio*, 288. *Harrington v. Heath*, 15 *Ohio*, 483. *Bisher v. Richards*, 9 *Ohio State*, 495. *Marsden v. Soper*, 11 *Ohio State*, 503. *Fee v. The Big Sandy Iron Company*, 13 *Ohio State*, 563.

We claim that the summons was sufficient to require the defendants in the court below to answer, and that the errors complained of did not affect a substantial right of the plaintiff here. The summons gave them until the third Monday after the return day in which to answer, which is all they were entitled to under the law. *Orr v. Seaton*, 1 *Neb. Rep.*, 105. It could make no difference to plaintiffs in error whether the summons was made returnable one or two days sooner or later, as the time between the issuing and serving thereof belongs to the sheriff, and it is simply directory to the sheriff to return the summons on or before a certain day, and if three weeks intervene between the return day and the answer day, then we claim that the rights of the adverse party was not prejudiced thereby, and they could take no exceptions to the manner in which they were brought into court.

"A court in every stage of its proceedings, must disregard any error or defect which does not affect the substantial

rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." *General Statutes, Sec.* 145, 546. *Worrall v. Parmalee,* 1 *New York,* 519. *Weiser v. Denison,* 10 *New York,* 68. *Scovern v. The State,* 6 *Ohio State,* 294. *Hollister & Smith v. Reznor,* 9 *Ohio State,* 1. *The Ohio Life Insurance and Trust Company v. Goodin,* 10 *Ohio State,* 557. *Courtright v. Staggers,* 15 *Ohio State,* 511.

LAKE, CH. J.

It is urged as ground for the reversal of this judgment that the court below had acquired no jurisdiction over the defendants, who are plaintiffs in error here.

The record shows that the return day of the summons was the *first* Monday after its date, instead of the second Monday, as is provided in section 66, of the civil code; and the answer day was fixed for the third Monday thereafter. The defendants appeared specially by a motion to quash the writ for these reasons, but the court overruled the motion, to which exception was duly taken, and thereupon a judgment by default was rendered for the amount of the plaintiff's demand.

The section of the statute, before referred to, provides, that "whenever the time for bringing parties into court is not fixed by statute, the summons shall be returnable on the second Monday after its date," etc. It is by virtue of this section that the court ordinarily acquires jurisdiction of the defendant in an action, and being mandatory should be strictly followed. No discretion is vested in either the clerk or the court in respect to the return or answer days, and if the plain requirements of the statute be disregarded, it is the right of a defendant to object, and thus challenge the jurisdiction of the court over him. If he do so, the writ should be quashed, and resort be had to an *alias* summons to bring him in.

For these reasons we are of the opinion that in overruling the special motion to quash the writ there is error, which but for the subsequent voluntary appearance of the defendants, would call for a reversal of the judgment.

After the judgment by default had been rendered against them the defendants filed a motion for its vacation in these words.

"Now come the said defendants by their attorneys, Stevenson and Savage, appearing for this purpose only, and move the court to set aside and vacate the judgment heretofore rendered, and entered in this action, for the sum of $221 and costs, for the reason that no amount is endorsed on the writ, for which judgment will be taken if the defendants fail to answer; and for the further reason that said summons is not made and issued in conformity to law."

The record fails to show that any action was ever taken on this motion, and for aught we know it is still pending and undetermined in the district court.

The failure of the clerk, however, to endorse the amount of the plaintiff's demand on the summons, where all the other requirements of the statute in respect to it are observed, is of no consequence, unless the defendant fail to appear. This provision is for the benefit of those defendants, who, knowing they are indebted to plaintiff, do not choose to appear and look after the case. The language is, "if the defendant fail to appear judgment shall not be rendered against him for a larger amount and costs," leaving the inference, that in case he do appear one may be rendered against him for a sum in excess of that given in the endorsement. This I apprehend is the true construction of this section.

By the last clause of this motion it is further objected "that the summons was not made and issued in conformity to law." It was urged upon the hearing that this referred especially to those defects before pointed out in

the motion to quash the writ. I think, however, that it is altogether too indefinite and uncertain to be of any avail; that it really adds nothing to what has been already stated as ground for setting aside the judgment.

It is required in a motion of this kind, that the defects relied on as ground for relief shall be distinctly pointed out, and upon the hearing none other will be considered. This leads to the conclusion that the sole objection to the judgment was the failure of the clerk to make said endorsement; and that the defects, as to the return and answer days, were thereby waived, and the jurisdiction of the court fully acknowledged.

It is a general, and we think a wholesome rule of practice, that if a defendant intend to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this, and appear for any other purpose at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process, and to have given the court complete jurisdiction over him for all the purposes of the action.

In this case, it is true, the defendants in the court below endeavored to limit their appearance to the one single object sought by their motion to vacate the judgment, and to this end declared their appearance to be special; but inasmuch as the question raised was not jurisdictional, but one which necessarily recognized the existence of a judgment that was valid and effective until set aside, and against which they sought the aid of the court that rendered it, we must hold it to amount to a waiver of all irregularities and defects in the summons bearing upon the question of jurisdiction, and also to be in effect a general appearance in the case. *Marsden v. Soper*, 11 *Ohio State*, 503.

After the filing of this motion, the proper course was

to have taken the ruling of the court thereon, which, if deemed erroneous, could have been reviewed here by proceedings in error; but having failed to do so the judgment cannot now be disturbed, and must be affirmed.

JUDGMENT AFFIRMED.

The other justices concur.

WILLETT POTTINGER, PLAINTIFF IN ERROR, v. MARY A. GARRISON, DEFENDANT IN ERROR.

Practice: JUDGMENT ON DEMURRER. To obtain the review of a decision sustaining or overruling a demurrer, the party must suffer a judgment in chief to be rendered on the demurrer; if he answers over and goes to trial upon the merits, he waives the demurrer, and cannot assign the judgment upon the demurrer as error.

THIS was a petition in error to reverse a judgment of the district court for Cass county.

To the petition of the defendant in error, who was plaintiff in the court below, the defendant filed a demurrer which was overruled by the court. The defendant then filed his answer, and a trial being had judgment was rendered against him for the sum of $174.42 damages, and $146.47 costs.

The cause was then brought to this court by petition in error.

J. C. Cowin, for plaintiff in error.

The demurrer interposed to the petition in the court below ought to have been sustained, as said petition shows the statute of limitations had run; and the cause is not taken out of the statute by reason of any fraud on the part of the plaintiff in error, no fraud being

alleged; nor is it taken out of the statute by the allegation that the defendant in error did not know that money was collected, it being nowhere shown or alleged in the petition that the relation of attorney and client, agent and principal, or any fiduciary relation existed between the parties to this action.

J. H. Brown, for defendant in error.

GANTT, J.

THE only question presented for the consideration of this court in the argument of this case is, whether the district court erred in overruling the demurrer to the plaintiff's petition; and therefore, it is to this question, alone, we direct our attention in this opinion.

The petition substantially shows that E. B. Garrison had obtained two several judgments against G. Mayfield; that he sold and transferred said judgments to the defendant in error, Mary A. Garrison, and she claimed them as her property; that the plaintiff in error, Willett Pottinger, was employed and acted as the attorney of E. B. Garrison in said two cases; that the said Pottinger was fully advised of her ownership in the judgments, and was instructed by the said E. B. Garrison to pay her the money he might collect on said judgments, and was likewise so instructed by the defendant in error; that Pottinger collected on said judgments in the aggregate the sum of $109.52, the collection of which amount by him she had no knowledge until the month of June, 1871.

To this petition Pottinger demurred; the demurrer was overruled, and leave given to answer. Pottinger then filed his answer to the petition, in the first count of which he denies Mrs. Garrison's ownership of the judgments, and her right to receive the money collected on the same; in the second count he pleads a set-off to part of the

demand, as against E. B. Garrison, and avers that said E. B. G. instructed him to retain the balance until he called for it, or sent his written order for the same; and in the third count he pleads the statute of limitations.

The reply denies the new matter set up in the answer, and alleges that Pottinger fraudulently concealed from her the collections of the money made by him on the judgments until June, 1871.

It is clear that the subject matter stated in the petition is within the jurisdiction of the court; and it is equally clear that the matter set up in the answer goes fully to the merits of the case. And whether the petition clearly shows that Pottinger was employed as an attorney in the two cases, and acted in a fiduciary capacity in making the collections of the money on the judgments, or whether the petition in this respect is obnoxious to a demurrer, it is not necessary now to consider, for the plaintiff in error in answering over and going to trial on the merits, waived his demurrer to the petition. But we think there is enough stated in the petition to show that Pottinger acted as the attorney of the owner of the judgments. The rule of law seems to be well settled, that in order to obtain a review of the decision of the district court, in sustaining or overruling a demurrer, in an appellate court, the party must suffer a judgment in chief to be rendered on the demurrer; and that if he answers over and goes to trial upon the merits, he waives this demurrer to the pleading demurred to, and error cannot be assigned upon the judgment of the district court sustaining or overruling the demurrer. *Ayres v. Campbell*, 3 *Iowa*, 582. *Abbot v. Stribler*, 6 *Iowa*, 191. *Evans v. Gee*, 11 *Peters*, 80. *Bell v. Railroad*, 4 *Wall.*, 599.

We are of the opinion that the pleadings contain substance sufficient to sustain a judgment upon a verdict; and as the plaintiff in error answered over to the merits,

and did not stand on his demurrer we need not consider what would be the result, if he had not done so.

For the reasons above stated, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE concurs.

ROBERT D. KELLY, PLAINTIFF IN ERROR, V. CHESTER L. MORSE, DEFENDANT IN ERROR.

Practice: JUDGMENT OF PROBATE COURT. It is not necessary that the record of a judgment rendered in the probate court, in cases where the amount in controversy exceeds the jurisdiction of a justice of the peace, should show that a regular term of that court had commenced on the day fixed by statute, and continued from day to day until the rendition of the judgment; it is sufficient if the proceedings show that the court was in regular session when the judgment was announced.

———: JUDGMENT UPON AN AWARD OF ARBITRATORS. In rendering a judgment upon an award of arbitrators, it is not absolutely necessary for the court to give notice to either party before proceeding to act upon the award.

Construction of statutes. The word "may" in public statutes should be construed as "must" whenever it becomes necessary in order to carry out the *intent* of the legislature; but in all other cases this word, like any other, must have its ordinary meaning.

THIS was a petition in error to reverse the judgment of the district court of Dodge county, affirming a judgment of the probate court upon an award of arbitrators, duly made and returned to said probate court, in pursuance of the agreement of submission.

The alleged errors consist in the entry of a judgment in the probate court against the plaintiff in error, on the 9th day of December, 1871, for the sum of two hundred dollars damages and $14.85 costs, being an amount found due by arbitrators, to whom he and the defendant in error had submitted certain differences between them.

No notice was given to Kelly by the probate court before proceeding to act on the award.

The section of the statute in force at that time, concerning the terms of probate court, was as follows:

"Sec. 2. It shall be the duty of the Probate Judge in each county in this state, to hold a regular term of court at his office, at the county seat of his county, on the first Monday of each calendar month, for the trial of such civil causes as may be brought before said courts." *Laws* 1870–71, 8.

W. A. Marlow, for plaintiff in error.

I. The first error complained of is that the judgment was not rendered on the award at the December term 1871, of said court, or at any regular or adjourned term of said court.

The probate court for the trial of civil cases is a court of stated terms. A judgment rendered in the probate court, when the amount involved exceeds $100, unless rendered at a regular or an adjourned term of said court, is a nullity. The record must disclose that fact. *Probate Act of* 1870. *Laws of* 1870 *and* 1871, *page* 7.

II. The second error complained of is that the probate court did not have jurisdiction to render said judgment in this, to-wit: that the judgment was rendered without notice to Kelly as the law directs. *General Statutes* 659, *Sec.* 873.

1. Rule of construction in respect to statutes, the word *may* means *must* or *shall*, when the public interests and rights are concerned, and when the public or third parties have a claim *de jure* that the power should be exercised. *Newburg Turnpike Co. v. Miller*, 5 *Johns Ch.*, 113. *Malcom v. Rogers*, 5 *Cow.*, 188. *Greenleaf on Evidence*, 220. *Schuyler Co. v. Mercer Co.*, 4 *Gilman*, 20. *Sifford v. Beaty*, 12 *Ohio State*, 189.

2. The service of notice is jurisdictional. The Probate Judge shall give notice. A judgment rendered without notice is of no more effect than a judgment without a summons.

3. The agreement states that judgment shall be entered on the award in accordance with the terms of said award, and pursuant to the statute in such cases made and provided.

Z. Shed, for defendant in error, argued:

I. The award was made and filed as appears from the record, and judgment rendered thereon in conformity with the agreement of the parties, and the finding of the arbitrators.

II. The probate court had ample authority to render the judgment. We think a reference to the original agreement between the parties will readily satisfy this court upon the question of jurisdiction. The probate court is one provided for by the constitution and laws of the state. The amount in controversy did not exceed its jurisdiction. The authority of the court to act in the premises was acquired by the written consent of the plaintiff in error which it seems to us was equivalent to an appearance in court; and the judgment was rendered in accordance with the provisions of the statute. *General Statutes*, 658.

III. The act of 1870, page 8, section 2, provides for holding a regular term of the probate court on the first Monday of each calendar month, for the trial of causes, etc. We hardly think it will be contended that the entire business of the term must be transacted on the first day of the term; and if not, is it not fair to presume that the December term of that court included the 9th day of December, the day on which this judgment was rendered?

And had the plaintiff in error been summoned to appear at the first day of said term, would he be allowed to set aside a judgment rendered against him on the ninth day thereof, when he voluntarily absented himself from the court?

IV. Superior courts will not require technicalities at the hands of inferior courts, and will view their proceedings in that light which the exigencies of communities seem to require. *Austin v. Hayden*, 6 *Ohio*, 388. *Humiston v. Anderson's Administrators*, 15 *Id.*, 556. *Barts v. Abbe*, 16 *Id.*, 408.

V. Another error assigned is that no notice was served on Kelly by the probate court before the entry of this judgment. It is truly painful for us to learn that such a dire calamity should have befallen the gentleman. But the law does not require vain things, even for the accommodation of this plaintiff in error. No notice is required by law, and if there was, we think the written agreement of parties would cure such a defect and estop the plaintiff in error from taking advantage of his own *laches*. *General Statutes*, 659, *Sec.* 873.

LAKE, CH. J.

It is urged as an objection to this judgment of the probate court, that it does not appear to have been rendered at a regular term as is required by the act regulating the practice in that court, in cases where the amount claimed exceeds the jurisdiction of a justice of the peace.

The record shows that the judgment was rendered on the ninth day of December, and inasmuch as the statute then in force on the subject required the court to be held on the first Monday of that month, it is urged that the record ought to show that the term actually commenced

on that day, and had been regularly continued to the day the judgment was rendered.

There is no force to this objection. The record sets out enough to show that the court was in regular session when the judgment was pronounced. The proceedings on the award are certified by the judge to have taken place at the December term, 1871. This is definite enough, without stating that the court had been regularly adjourned from day to day from the commencement of the term until the case was finally determined.

The only remaining objection is that no notice was given to Kelly before proceeding to act on the award. This was not necessary. The statute provides that "the court *may* require actual notice to be given to either party, when it appears necessary and proper, before proceeding to act on the award."

The position taken by counsel that the word "*may*" in the sentence just quoted from the statute should be construed as "*must*," is altogether untenable. It would defeat the very object and intent of the legislature, which, doubtless, was to leave it to the court to say, in each particular case, whether notice should be given or not. The words "*when it appears necessary and proper*," found in the context, would be meaningless if the construction contended for should be given.

Without doubt the word "*may*" in public statutes should be construed as "*must*" whenever it becomes necessary, in order to carry out the intent of the legislature, but in all other cases this word, like any other, must have its ordinary meaning. *Minor v. The Mechanics' Bank of Alexandria*, 1 *Peters*, 46.

We conclude, therefore, that the matter of notice is left to the sound discretion of the court, and so long as there is no abuse of discretion shown whereby an injury is done, the omission to give it would furnish no ground for disturbing the judgment.

In this case there appears to be no reason at all why a notice should have been given. The proceedings are quite regular, in fact unusually so, and Kelly knew that by the terms of the submission, the award of the arbitrators was to be filed at the December term of the court, so that judgment should be rendered at that time.

There is no error in the record, and the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

The other justices concur.

ANSELM MICHEL, PLAINTIFF IN ERROR, v. J. A. WARE, DEFENDANT IN ERROR.

Practice: EXCEPTIONS TO EVIDENCE. When an objection is made to the admission of any particular testimony, the ground of the objection should be stated, together with the ruling of the court, and both preserved by bill of exceptions; otherwise they will not be considered in the supreme court.

Warehouse receipt. An order drawn upon, and accepted by, a warehouseman is equivalent to a warehouse receipt, and an acknowledgment on the part of the warehouseman that he will deliver the property mentioned therein upon presentation of the order properly endorsed; and the assignee of such order who becomes the purchaser thereof in good faith, is entitled to the entire amount of the property called for therein.

———: GUARANTY. A qualification appended to a warehouse receipt, by the holder thereof, that an assignment made by him is "without guaranty" on his part, does not release him from the implied warranty that the entire amount of the property mentioned therein, was at the time of the assignment, in the possession of the warehouseman.

———: LIABILITY OF HOLDER. If the holder of a warehouse receipt, before its assignment to one who claims to be an innocent purchaser, takes out of possession of the warehouseman a portion of the property mentioned therein, he is liable for the value thereof in an action by the warehouseman, who may have made good the deficiency to the assignee.

———: ———. But it is a question for the jury to determine whether the assignee had notice of the disposal of any portion of the property mentioned in the receipt, and whether the warehouseman was justified in paying the value thereof to the assignee.

ERROR to the district court of Otoe county. The facts in the case are fully set forth in the opinion.

G. B. Scofield, for plaintiff in error.

The record in this case shows so plainly the justice of the plaintiff's claim that authorities need not be cited. The evidence of all the witnesses and the defendant himself proves that S. A. Ingham & Co. sold their interest in the three hundred and seventeen sacks of flour to J. A. Ware, the defendant; that there was a lien against it for freight charges due Thomas French; that subsequently Ware assigned his interest to French, who then became the absolute owner thereof. Ware swears himself he did not tell French he had previously given an order for forty-seven sacks, and French swears that the first he knew of it was when he arrived at Kearney City, and there demanded of the plaintiff the full number of sacks or the pay therefor.

The defendant claims that the words "without any guaranty on my part" in the assignment to French, release him from all liability on account of the deficiency. It is believed *this* court will not so hold. Supposing Ware had drawn out all but ten sacks, and then made an assignment to an innocent purchaser of the order, the same as this was done, without informing him that a portion had been disposed of, it would not be contended for a moment that he was thereby discharged from accounting to the proper party for the deficiency.

The flour was stored in the name of French, and the plaintiff, relying upon the integrity of Ware, permitted forty-seven sacks to be removed, and paid French therefor $352.50. This amount is justly due the plaintiff

from the defendant, and it was a question for the jury to determine whether French knew the forty-seven sacks were gone or not when he took the order from Ware.

The words "*without guaranty,*" applied only to quality and condition, and not to quantity, and it seems to us can be construed in no other way. *Power v. Bumcratz*, 12 *Ohio State*, 273. *McArthur v. Ladd*, 5 *Ohio*, 514. *Hale v. The Milwaukee Dock Co.*, 23 *Wis.*, 276. *Graves v. Smith*, 14 *Wis.*, 5.

The court erred in charging the jury to find for the defendant. Nothing was left for them to do—their occupation was gone, and under such a charge a trial by jury would be a farce. We think a not very careful examination of the charge to the jury will convince this court it was such a one as should not have been given. 3 *Graham & Waterman on New Trials*, 819, 821. *Gillett v. Phelps*, 12 *Wis.*, 393.

O. P. Mason and Isaac N. Shambaugh, for defendant in error.

I. No errors will be considered but such as were made in the motion for a new trial. There is no evidence of misconduct of the jury. But two other points were made. *First.* That there was no evidence to sustain the verdict. *Second.* Error in the instruction of the court.

II. The first of these objections cannot be considered because the bill of exceptions does not contain all the evidence. Other and material evidence may have been given.

III. The last objection should not be considered for the same reason. Instructions are given with reference to the evidence, and are predicated thereon, and when all the evidence shows that the plaintiff cannot recover it is the duty of the court to tell the jury so.

IV. If the testimony contained in the record was all the evidence given, we think the instruction was correct. But the instructions should not be considered because the evidence is not all here, and this court will presume that the evidence supported and justified the verdict; and when upon the whole evidence one party is clearly entitled to a verdict, it should not be disturbed because an erroneous instruction was given. Only such errors will be considered as operated to the prejudice of the losing party.

V. This court will presume the ruling of the court below to have been correct until the contrary is shown; and it is incumbent upon the plaintiff in error to show that error was committed to his prejudice.

LAKE, CH. J.

This was a proceeding in error to reverse the judgment of the district court of Otoe county. The facts in the case are substantially as follows:

In the year 1865, Thomas French, who was then engaged in the freighting business, conveyed for S. A. Ingham & Co., three hundred and seventeen sacks of flour to Fort Kearney, and stored the same with the plaintiff, Michel, a warehouseman at that place. To secure himself for transporting this flour, French stored it in his own name and took a receipt therefor. Afterwards, Ingham & Co being indebted to the defendant, Ware, in order to secure the payment thereof, drew an order on the plaintiff in these words:

"NEBRASKA CITY, January 5, 1866.

"*A. Michel, Esq.*, You will please hold subject to the order of J. A. Ware, three hundred and seventeen sacks of flour, delivered by Thomas French on our account,

and stored in his name for freight on same, subject only to the amount claimed by said French for freight.

(Signed) S. A. INGHAM & Co."

This order was duly accepted in writing by the plaintiff, on the 17th of the same month.

On the 29th of May, Ware, having occasion to do so, drew an order on the plaintiff in favor of one Dunham, for forty-seven sacks of the flour, which was duly honored; and on the 24th day of August following, made a written assignment of the order he had received from Ingham & Co., accepted by the plaintiff as before stated, to said French. The assignment is as follows:

"I hereby assign to Thomas French, all my right, title and interest in and to the within order, without any guaranty on my part.

(Signed) J. A. WARE."

August 24, 1866.

With this order thus assigned, French proceeded to Fort Kearney, and demanded of Michel the whole of the three hundred and seventeen sacks of flour which it called for, but in consequence of his having parted with the forty-seven sacks to Dunham, *on Ware's order*, he was short that much and compelled to make good the deficiency in money. Michel then brought this action against Ware, in the district court of Otoe county, to recover the sum of seven hundred and fifty-two dollars, of which sum he claimed four hundred dollars due him for the storage and handling of the flour, and the balance as the value of the forty-seven sacks which he had been obliged to make good to French.

The cause was tried before Mr. Chief Justice Mason and a jury, a verdict being returned in favor of the plaintiff for the amount claimed.

The defendant then filed a motion for a new trial, which was granted by the court.

Upon the second trial of the cause, after the testimony had been closed, the court instructed the jury as follows:

"The assignment of the order which Ingham & Co. gave the defendant, Ware, to Thomas French, only conveyed whatever interest the defendant, Ware, had in the flour stored by French, after the forty-seven sacks of flour had been delivered on the order previously given by the defendant, Ware, on the plaintiff, Michel, consequently you must find a verdict for the defendant, and from the whole evidence the plaintiff cannot recover in this action."

The jury having retired, afterwards returned into court stating that they could not agree upon a verdict, and the court again instructed them that the jury must find a verdict for the defendant, and if the jury found a verdict for the plaintiff it would be immediately set aside by the court. A verdict being then returned in favor of the defendant, judgment was rendered thereon. The plaintiff then brought the case to this court by petition in error.

It is insisted in this case, on the part of the defendant, that as a matter of law he was not liable to make good to Michel the value of the forty-seven sacks of flour for at least two reasons: *First.* Because by the terms of the assignment there was an express waiver of warranty. *Second.* For the reason that French, knowing that the forty-seven sacks had been disposed of by Ware, had no right to demand the same from the warehouseman.

The errors complained of, by the plaintiff in error, occurred during the trial of the cause and may be conveniently included under two heads:

I. Errors in the introduction of testimony.

II. Errors in the charge of the court to the jury.

As to the former we discover no ground for complaint. Even if some of the testimony was not, strictly speaking, admissible, yet the ground of the objection not being set forth, nor any exception taken to the ruling of the court, it is now too late to complain.

When an objection is made to the admission of any particular testimony, the ground of the objection should be stated, together with the ruling of the court, and both preserved by bill of exceptions; otherwise they will not be considered in this court.

But we are of the opinion that the court entirely misapprehended the character of the order given by Ingham and Co. to Ware, as well as the legal effect of its assignment to French.

Although in the form of an order, its acceptance by Michel rendered it, we think, equivalent to a warehouse receipt. It was an acknowledgment that, as a warehouseman, he held the three hundred and seventeen sacks of flour subject to Ware's order, and that he would deliver the same to whoever would present it, properly endorsed. *M'Neil v. Hill*, 1 *Woolworth Circuit Court Reports*, 96. *Conrad v. The Atlantic Insurance Company*, 1 *Pet.*, 386. *Nathans v. Giles*, 5 *Taunton*, 557.

We hold, therefore, that by this assignment of the order to French, provided that he had no knowledge that Ware had previously drawn out the forty-seven sacks, he was entitled to the entire quantity of flour called for therein.

Nor does the qualification "without any guarantee on my part," appended by Ware to his assignment, affect the transaction in this particular. The utmost effect that can be claimed for Ware from this restriction upon his liability is, that he did not assure either the quality of the flour, or the responsibility of the warehouseman. It was no release from the implied warranty, governing

in all sales of property, that the subject matter of the contract is *in esse* at the time it is made.

There was considerable conflict in the testimony as to whether or not French had notice that Ware had disposed of a part of the flour. French swore positively that he had not, and that he supposed he had bought the entire quantity mentioned in the order. Ware testifies that he does not think he told him that he had drawn out any portion of it. While the witness, Calhoun, says that he heard French say, before the assignment was made, that he knew Dunham had drawn out the forty-seven sacks.

There was also testimony before the jury, from which, perhaps, they might have found that Michel had such information as ought to have induced him not to pay French for the flour, and that he was not justified in so doing.

In this condition of the testimony it should have been left to the jury, under proper instructions, to say what effect should be given to the testimony, and whether, on the whole, the plaintiff had made out his case by the proofs or not.

We think the judge, in directing a verdict for the defendant, usurped the province of the jury, and in so doing committed an error, which calls for a reversal of the judgment.

The judgment is reversed and the cause remanded to the district court for a new trial.

REVERSED AND REMANDED.

The other justices concur.

JOHN WAGNER, PLAINTIFF IN ERROR, V. GAGE COUNTY, DEFENDANT IN ERROR.

Highway: ASSESSMENT OF DAMAGES. The measure of damages to be awarded a land owner, on account of the location of a public highway through his land, is the fair market value of the land actually taken, while special benefits may be set off against incidental damages to the residue of the tract.

THIS action was tried in the district court of Gage county, on appeal from the award of three commissioners appointed by the county commissioners of that county, to assess damages sustained by John Wagner, by reason of the location of a public road on the north line of the west half of the north east quarter of section twenty-two, in township four, north of range six, east of the sixth principal meridian, thence south through the center of said section, taking in all about six and three-fourths acres of plaintiff's land.

The cause was tried before Mr. Justice Gantt, and a jury. The plaintiff testified that the land taken for the road was worth thirty dollars per acre. Edward Arnold testified that the land so taken was worth twenty-five dollars per acre, and that the damage to the remainder of the tract was four or five hundred dollars, and one hundred and sixty rods of extra fence would have to be built on account of the location of the road. A number of witnesses for the defendant testified that the land taken was worth from fifteen to twenty-five dollars per acre, but that the road caused no injury to the plaintiff. The court charged the jury as follows:

"In your consideration of the evidence, you will not take into consideration any consequential damages that might possibly occur by reason of the location of such road, nor what might be consequential costs of erecting fences; but the measure of damages is the difference between the market value of the premises immediately

before the road was located, and the market value thereof immediately after its location."

The jury found a verdict for the defendant; whereupon the plaintiff filed a motion for a new trial, which being overruled by the court, judgment was rendered on the verdict. To reverse this judgment the cause was brought to this court by petition in error.

N. K. Griggs and *W. H. Ashby*, for plaintiff in error, submitted the following points:

I. The court erred in its charge to the jury. Inconvenience, necessity for additional fencing, and other consequential damages, incident to the location of the road, are proper subjects of consideration by the jury in the matter of compensation. *Somerville and Eastern Railroad Co., adv. Doughty*, 2 *Zab.*, 495. *Petition of the Mount Washington Road Co.*, 35 *New Hamp.*, 134. *Henderson and Nashville Railroad Co. v. Dickerson*, 17 *B. Monroe*, 173.

There were six and three-fourths acres of plaintiff's land taken, which were of the value of from fifteen to thirty dollars per acre; to this amount the plaintiff was entitled without deduction for benefits. *Sedgwick on the Measure of Damages, 5th Ed.*, 662, 666. *Henderson and Nashville Railroad Co. v. Dickerson*, 17 *B. Monroe*, 173. *Louisville and Nashville Railroad Co. v. Thomson*, 18 *B. Monroe*, 735. *The State v. Miller*, 3 *Zab.*, 383. *Bigelow v. The West Wisconsin Railroad Co.*, 27 *Wis.*, 479. *Hill v. The M. & H. Railroad Co.*, 5 *Denio*, 206. *Keasy v. The City of Louisville*, 4 *Dana*, 154.

II. The weight of authority is, that benefits can only be set off against incidental damages.

And this, we submit, is the equitable rule. But if we admit (which we do not) that benefits may be deducted

from the value of the land taken, still, it is for the *defendant to show* that the lands of the plaintiff, not taken, were *peculiarly benefited* by reason of the location of the road—receiving a benefit therefrom, not inuring to other lands in the same vicinity. *Meacham v. Fitchburg Railroad Co.*, 4 *Cush.*, 291. *Dwight v. County Commissioners of Hampden*, 11 *Cush.*, 201. *Upton v. The South Reading Branch Railroad Co.*, 8 *Cush*, 600. *Dickenson v. Inhabitants of Fitchburg*, 13 *Gray*, 546.

This the defendant failed to do; neither was there any evidence, showing benefit to plaintiff's land, introduced at the trial.

Therefore we submit that the plaintiff was entitled to the actual value of the land taken, together with his incidental damages sustained, deducting benefits from such incidental damages.

S. C. B. Dean and W. J. Galbraith, for defendant in error, contended as follows:

Section 13, article 1, of the constitution of the state of Nebraska, provides that "the property of no person shall be taken for public use, without just compensation therefor." As used in the constitution, "compensation" means simply an indemnity; that the party whose property is taken for public use, must receive in return something, the pecuniary value of which equals the amount of damages he sustains by such taking. *S. F. A. & S. R. R. Co. v. Caldwell*, 31 *Cal.*, 367. *Betts v. The City of Williamsburg*, 15 *Barb.*, 256.

Where, as in the present case, the property taken consists of a portion only of a tract of land, the compensation is to be made for the land actually taken or occupied and the damages caused to the portion remaining. These damages are a unit though consisting of separate items; and a deduction, if made for any purpose, must be made

from the gross amount. *Winona & St. Peter R. R. Co. v. Waldron*, 11 *Minn.*, 515.

Since compensation is to be made for the damages sustained where an act inflicts injury, and at the same time confers benefits, the one should be set off against the other in determining the compensation. *Winona & St. Peter R. R. Co. v. Waldron*, 11 *Minn.*, 515.

When any particular district or neighborhood is exclusively benefited by any public improvement it may be made to bear the whole expense of that improvement. *The Chic., Burlington and Quincy R. R. v. The County of Otoe, Appendix*, 2 *Neb.*, 496. *McMasters v. Commonwealth*, 3 *Watts*, 292. *Fenelon's Petition*, 7 *Penn. State*, 173. *Hill v. Higdon*, 5 *Ohio State*, 243.

Lands contiguous to a highway, and those through which it runs are generally the only lands enhanced in value by the road, and these lands should therefore bear the burden of the improvement, to the extent, at least, of their increased value. *McMaster v. Commonwealth*, 3 *Watts*, 292. *The People v. The Mayor, etc., of Brooklyn*, 4 *New York*, 419. *Nicholson v. The New York and New Haven R. R. Co.*, 22 *Conn.*, 74.

The legislature did not contemplate, and the act under which the plaintiff claims compensation does not require, payment for the land taken, but simply damages for the right of way over the land. *General Statutes*, 956, *Sec.* 24.

The rule, therefore, for determining the amount of compensation to be paid was correctly given to the jury by the court below, which is to ascertain the fair market value of the whole land without the road, and the fair market value of what remains after the road is made. The decrease, if any, is the compensation to which the party is entitled. *Fenelon's Petition*, 7 *Barr*, 173. *Symonds v. The City of Cincinnati*, 14 *Ohio*, 148. *Henry v. Dubuque R. R. Co.*, 2 *Iowa*, 288.

MAXWELL, J.

Section thirteen of the bill of rights in our constitution declares that "the property of no person shall be taken for the public use without just compensation therefor;" and that section is only declaratory of the common law. Blackstone says, "so great moreover is the regard of the law for private property, that it will not sanction the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man or set of men to do this without the consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community, for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or not. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights as modeled by the municipal law. In this and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possession for a reasonable price; and even this is an exercise of power which the legislature indulges with caution, and which nothing but the legislature can perform." 1 *Cooley's Blackstone*, 139.

Our statutes, (*General Statutes*, 955), provide the mode of locating new roads, and section twenty-four of

the chapter provides for compensation to the owner of the land.

The question arises, what is just compensation? All the cases seem to concur in excluding mere general and public benefits, which the owner of the land shares in common with the rest of the inhabitants of the vicinity, from being taken into consideration in estimating compensation. While this is the law in theory, in several of the states it seems to be disregarded.

In Massachusetts the court held, "the jury might and ought to have returned that the party sustained no damages, if such was their conviction; the benefit the owner of the land derived from the laying out of a way over it may often exceed the value of the land covered by the way." *Commonwealth v. Sessions of Middlesex*, 9 *Mass.*, 388. And the same doctrine has been held in Vermont. *Livermore v. Jamaica*, 23 *Vt.*, 361. And in Pennsylvania the court held, "the more common mode of estimating land damages, unquestionably is, to give the company the specific benefit caused to land, a portion of which is taken, in the enhancing the value of the same, and only to allow the land owner such a sum as will leave him as well off in regard to the particular land, as if the works had not been built, or his land taken. This is done by giving the land owner a sum equal to the difference between what the land would have sold for before the road was built, and what the remainder will sell for after the construction." *Harvey v. Lackawanna and Bloomsburg R. R.*, 47 *Pennsylvania State*, 428. *Troy and Boston Railroad v. Lee*, 13 Barb., 169. *Matter of Furnam Street*, 17 *Wend.*, 649.

The supreme court of Ohio, since the adoption of the constitution of 1851, hold that in all cases compensation must be made for the land actually taken. The court says, in regard to the provisions of the constitution providing for compensation, "by the one, the compensation is to be assessed without deduction for benefits, and by the

other irrespective of benefits, and by each a *full compensation* is required. Now, when is a man fully compensated for his property? Most clearly and unquestionably when he is paid its full value, and never before. The word "irrespective" relates to this full compensation, and binds the jury to assess the amount without looking at or regarding any benefits contemplated by the construction of the improvement. When this is done, and this consideration wholly excluded, the jury have nothing to do but ascertain the fair market value of the property taken. * * * Whether the property is appropriated directly by the public, or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken, as much as he might fairly expect to be able to sell it to others for if it was not taken, and this amount is not to be increased from the necessity of the public or the corporation to have it, on the one hand, nor diminished from any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised for sale upon execution, or by an executor or guardian, and without any regard to the external causes that may have contributed to make up its present value." *Giesy v. C. W. and Z. Railroad Co.*, 4 *Ohio State*, 330, 331, 332.

This seems to us to be the only just and equitable rule, requiring in all cases that compensation shall be made for the fair market value of the land actually taken, while special benefits may be set off against any local or incidental injury to the residue of the tract.

Section nineteen of the bill of rights of the Ohio constitution provides, that compensation for property taken for public use shall be assessed by a jury "without deduction for benefits to any property of the owner." This provision seems to have been incorporated in the constitution of 1851, in consequence of the decisions of

the supreme court of that state in *Symonds v. The City of Cincinnati*, 14 *Ohio*, 147, and *Brown v. The Same*, 14 *Id.*, 541, where the court held it was competent for the defense to show the benefit conferred on the owner by the appropriation, such benefit to be considered by the jury in estimating the damages. We think the words "without deduction for benefits," adds nothing to the term "just compensation," and that the same rule is as applicable in our state as in Ohio.

The jury in this case having found for the defendant, it was the duty of the court to set aside the verdict and grant a new trial.

The judgment of the district court is reversed, and cause remanded for a trial *de novo*.

REVERSED AND REMANDED.

MR. CHIEF JUSTICE LAKE concurs.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL THOMAS DARNELL V. THE COUNTY COMMISSIONERS OF HAMILTON COUNTY.

Removal of county seat: SUFFICIENCY OF NOTICE. It is an imperative requirement, in an election for the removal of a county seat, that the notice thereof should in all respects conform to the law authorizing such election.

———. ———. Thus, where the law provides that in the notice of such an election, the electors shall be directed "to designate on their ballots the place of their choice for the county seat," and the notice merely authorizes the electors to vote "for removal of county seat; against removal of county seat," such notice is insufficient, and the vote taken at the election is void.

Practice: PLEADINGS IN APPLICATIONS FOR MANDAMUS. The application for the writ and the answer are the only pleadings allowed in applications for mandamus, and if the respondent file a demurrer and the same be overruled, the writ will issue, and no further pleadings be considered.

THIS was an application to this court, in the exercise of its original jurisdiction, for a peremptory writ of mandamus to compel the county commissioners of Hamilton county to post notices of the re-location of the county seat of said county at Aurora, in accordance with the result of a vote taken at the general election on the second Tuesday of October, 1873, and to remove the records of the county to that place. The application was substantially as follows:

"To the Supreme Court of the State of Nebraska: Your petitioner, Thomas Darnell, respectfully represents and states to the court that he is a resident, freeholder and tax payer, legal voter, and the owner of a large amount of real estate in the town of Aurora, precinct of Aurora, county of Hamilton and state of Nebraska.

And your petitioner further states that on the 3d day of September, A. D. 1873, Norris M. Bray, William Worth, and Phillip C. Housel, being the board of county commissioners of said county of Hamilton in the state of Nebraska, were in legal session in Orville City, the county seat of said county of Hamilton and state aforesaid.

And your petitioner further represents that while the said board of county commissioners were in legal session as aforesaid, a petition signed by three hundred and ninety legal voters, being two-thirds of the qualified electors of the said county, was presented to said commissioners, said petition being in words as follows, to-wit:

"To the Honorable Board of County Commissioners of Hamilton County: We, the undersigned qualified voters of Hamilton county, would respectfully petition your honorable body, to call a vote to re-locate the county seat of Hamilton county at the next general election."

And your petitioner further represents, that while the said board of county commissioners were in legal session as aforesaid, finding that said petition was signed by

two-thirds of the qualified voters of the said county, made the following order, to-wit:

"Petition presented according to law by Thomas Darnell and other legal voters of Hamilton county, Nebraska, praying said commissioners to order an election to re-locate the county seat of said county, at the next general election. *Ordered* to be published in conjunction with notice of general election to be held in said county on the second Tuesday of October, 1873. The form of voting shall be as follows: "For removal of county seat." "Against removal of county seat."

ORVILLE CITY, NEB., Sept. 3d.

J. D. WESCOTT, county clerk."

And your petitioner would further represent that notice as aforesaid ordered, was published in the *Hamilton County News*, the official paper published in said county, for more than thirty days before the said general election on the 14th day of October, 1873.

And your petitioner further represents that the result of the canvass of the vote taken at said election was as follows:

Orville precinct, whole number of votes cast, fifty.

Farmers Valley precinct, whole number of votes cast, forty. Eleven votes for the removal of county seat to Aurora. Twenty-nine votes against removal of county seat.

Williamsport precinct, whole number of votes cast, thirty-eight. For removal of county seat to Aurora, thirty-eight votes.

Scovill precinct, whole number of votes cast, twenty-one. For removal of county seat, five votes.

Deep Well precinct, for removal of county seat to Aurora, seventy-one. Whole number of votes cast, seventy-seven.

Aurora precinct, for removal of county seat to Aurora, one hundred and twenty-three votes. For removal to town ten, section ten, range six, two votes. For removal to town ten, section sixteen, range six, one vote. Whole number of votes cast, one hundred and thirty.

North Blue precinct, for removal of county seat to Aurora, fifty-seven votes. For removal to town ten, range six, one vote. Whole number of votes cast, fifty-eight.

Beaver Creek precinct, for removal of county seat to Aurora, thirty-nine votes. Whole number of votes cast, forty-five.

And your petitioner further represents that thirty days have passed since said votes were canvassed, yet the said board of county commissioners hath utterly refused and still doth refuse to post notices in the precincts of said county, giving notice of the re-location of the county seat at Aurora, though often requested so to do.

And your petitioner further represents, that there are no reasons why the said board of county commissioners do not post the notices of the re-location of the county seat at Aurora as aforesaid, and that it is within their power to do so, and by their refusal, the county business is done at Orville City, to the great disadvantage and inconvenience of your said petitioner.

And your petitioner further states, that he is entirely without remedy in the premises unless it be by the interposition of the court, and he therefore prays that writs of mandamus may issue against the said board of county commissioners, and that said board be commanded to post up notices of the removal of the county seat to Aurora, and that such other order may be made in the premises as justice may require."

An alternative writ was issued, returnable during the present term.

The answer of respondents admitted that they caused the notice, set forth in the application, to be published,

but denied that the petition presented, asking for a submission of a vote to re-locate the county seat, was signed by two-thirds of the legal voters of the county; and they alleged that the notice was only for the purposes of ascertaining if two-thirds of the legal voters of the county were in favor of removal, and that the notice was not intended to submit the question of re-location, but simply to test the sense of the people upon the subject. They also alleged fraud in the presentation of the petition praying for a submission of the question to a vote of the people, and that the vote which was cast for Aurora was obtained by fraud.

A large amount of testimony was taken by deposition, and the cause submitted to the court upon the pleadings and proof.

E. E. Brown, for the relator.

Before the commissioners could make any order in the premises, they must have found that the petition was signed by two-thirds of all the electors of Hamilton county, otherwise they would have had no jurisdiction to make any order in the premises, and upon this fact their finding is conclusive, and will not be reviewed. *Mayor, etc., v. Meserole*, 26 *Wend.*, 132. *Moores v. Smedly*, 6 *John Ch.*, 28. *Hyatt v. Bates*, 40 *N. Y.*, 164.

Having found that the petition was in due form, and signed by the requisite number of electors, the commissioners ordered the clerk to give the legal notice, and the order was entered in a public record which was at all times subject to the inspection of the public. The order being made, the law defines the manner in which the question shall be submitted and how and what notice shall be given. *General Statutes, Sec.* 8, *page* 229. *People v. Hartwell*, 12 *Mich.*, 508.

As every one is supposed to know the law it must be

supposed that the voters knew what question was submitted to them. And in this case, it clearly appears that the legal presumption was true in fact, for notwithstanding the defect in the notice, the ballots cast at the election were in legal form, and over two-thirds of all the voters of the county designated upon their ballots Aurora, as the place of their choice for county seat.

An irregularity in conducting an election which does not deprive a legal voter of his vote, nor admit a disqualified voter to vote, if it cast no uncertainty on the result will not invalidate the election. *People v. Cook*, 8 *N. Y.*, 67. *Commonwealth v. Meeser*, 42 *Pa. St.*, 343. *People v. Schemerhorn*, 19 *Barb.*, 540.

The statute providing for the notice is directory only, and if a full and fair expression of the voters has been had, the election will be valid even though no notice whatever had been given. *Dishon v. Smith*, 10 *Iowa*, 218. *State v. Jones*, 19 *Ind.*, 356. *State v. Orvis*, 20 *Wis.*, 235. *State v. Yoetze*, 22 *Wis.*, 363. *People v. Cowles*, 13 *N. Y.*, 350.

It clearly appearing in this case that the defect in the notice could *by no possibility* have changed the result, over two-thirds of *all the voters in the county* having voted for Aurora as the place of their choice, and in the manner the law directs, the writ should be made peremptory.

T. M. Marquette, contra.

I. There was no submission of the question of locating the county seat to a vote of the people, such as is required by law. *General Statutes*, 229, *Sec.* 8.

1. The voters were not notified by the board of county commissioners, to designate upon their ballots at said election the place of their choice for a county seat.

2. The order simply was that they designate upon their

ballots the following: "For the removal of county seat," (if for the same), or "Against the removal of county seat."

It is evident that this at least mislead those in favor of the county seat remaining at Orville, for no votes whatever were cast for that place. *Barry v. Lank*, 5 *Cold.*, 588. *McPike v. Pen*, 51 *Missouri*, 63. *Leslie v. Saint Louis*, 47 *Id.*, 474. *Knowles v. Yeates*, 31 *Cal.*, 82.

II. Two-thirds of the votes polled at said election did not designate Aurora as the county seat, as the law requires. *General Statutes*, 229, *Sec.* 8. *People v. Wiant*, 48 *Ill.*, 263.

III. In re-locating a county seat the law must be followed. *State v. Washoe County*, 6 *Nev.*, 104. And the submission must be according to law; if uncertain, the vote is void. *The People, ex rel., William Colby v. Township Board of Woodhull*, 14 *Mich.*, 28. *The People v. The Judge of Wayne*, 19 *Mich.*, 296. *People v. Laine*, 33 *Cal.*, 55. *State v. Marlow*, 15 *Ohio State*, 114. *State v. Winkelmeier*, 35 *Missouri*, 103. *Jones v. The State*, 1 *Kansas*, 273.

1. The writ only asks respondents to do a thing they have no right nor jurisdiction to do. *Ingerson v. Berry*, 14 *Ohio State*, 315. *Shelby v. Hoffman*, 7 *Id.*, 450. *The People v. Supervisors of Greene*, 12 *Barbour*, 217.

2. Majorities count for nothing at an irregular election. *Commonwealth v. Baxter*, 35 *Penn. State*, 263.

3. There can be no election unless the county commissioners give the required notice that the voters are required to designate upon their ballots, their choice for county seat, as that is a condition precedent. *People v. Martin*, 12 *Cal.*, 409. *Westbrooke v. Rosborough*, 14 *Id.*, *180. *Beal v. Ray*, 17 *Ind.*, 554. *McMillan v. Lee County*, 3 *Iowa*, 311.

MAXWELL, J.

The principal question presented in this case is the sufficiency of the notice given of the election, to be held for the purpose of a re-location of the county seat.

Cooley, in his work on Constitutional Limitations, says: "When, however, both the time and place of an election are prescribed by law, every voter has a right to take notice of the law, and to deposit his ballot at the time and place appointed, notwithstanding the officer whose duty it is to give notice of the election has failed in that duty. The notice to be thus given is only additional to that which the statute itself gives, and is prescribed for the purpose of greater publicity; but the right to hold the election comes from the statute, and not from the official notice. * * In some cases preliminary action by the public authorities may be requisite before any legal election can be held. If an election is one which a municipality may hold or not, at its option, and the proper municipal authority decides against holding it, it is evident the individual citizens must acquiesce, and that any votes cast by them on the assumption of the right must be altogether nugatory. The same would be true of an election to be held after proclamation for that purpose, where no such proclamation has been made." *Cooley's Con., Lim.*, 603.

Section eight of the act in relation to county seats provides: "Whenever the inhabitants of any county are desirous of changing their county seat, and upon petition, being presented to the county commissioners, signed by two-thirds of the qualified electors of the county, it shall be the duty of the county board, in the notices for the next general election, to notify said electors to designate on their ballots at said election, the place of their choice for county seat; and if, upon canvassing the votes so given, it shall appear that any one place has two-thirds of the

votes polled, such place shall be the county seat." *General Statutes*, 229.

It is contended by the relators that the notice in this case is sufficient, and that the law in regard to notices of this character is merely directory; and if a vote is taken in pursuance of a general notice of this kind, at which any locality has two-thirds of all the votes cast, it should be declared the county seat. In the case of *The People v. County Officers of St. Clair*, 15 *Mich.*, 85, it was held, that where the board of supervisors by a vote of two-thirds, resolved that the county seat of Saint Clair should be removed to Port Huron, provided "*suitable guaranties*" should be given within ninety days for the erection of county buildings, free of cost to the county, but submitted to the popular vote the simple question of removal without including the proviso, the submission was void, as the law contemplates that the people and supervisors shall vote on precisely the same question."

The testimony in the case before us shows, that while two-thirds of the votes cast on the question of county seat were cast for Aurora, yet a large number voted only "for or against removal." It is clearly apparent from the evidence, also, that the matter was not fully understood by the people of the county, and there was no fair submission of the question. It is an imperative requirement in elections of this kind, that the notice of election should in all respects conform to the law so as to apprise each citizen of the county of the nature of the election, so that he may by ballot express his choice for the county seat.

LAKE, CH. J. and GANTT, J., concurring, the writ must be refused.

APPLICATION DENIED.

Before filing answer in this cause, *Marquette*, attorney

for respondents, desired to know the effect of filing a demurrer instead of an answer.

The court, per LAKE, CH. J., announced the rule to be that in this class of cases the only pleadings allowed would be the application for the writ, and the answer as contemplated by the code. Parties might file a demurrer, but if the same was overruled, the writ would issue and no further pleadings be allowed.

HENRY SPRICK, PLAINTIFF IN ERROR, v. WASHINGTON COUNTY, DEFENDANT IN ERROR.

Final judgment. A judgment in these words, viz: "It is considered, ordered, and adjudged by the court that said defendants do have and recover judgment in this action against said plaintiffs, and that said defendants have and recover of and from said plaintiffs their costs, and that execution issue therefor," is a mere judgment for costs; it is not a final judgment from which error will lie to an appellate court.

Trial: FINDINGS OF COURT. In all actions tried by the court, there must be a general finding, and when requested by one of the parties, a special finding; and if this finding be vague, uncertain, or indefinite, it will not sustain a judgment.

THIS was an application for leave to file a petition in error.

E. Estabrook, for the motion, cited section 428 of the code of civil procedure, *General Statutes*, 596, and *Lisle v. Rhea*, 9 *Missouri*, 173; and also read from *Freeman on Judgments*, Chap. I, §§ 16–36.

John I. Redick, contra.

GANTT, J.

The plaintiffs ask leave to file a petition in error in this court, and their application is made upon motion

and a certified transcript of the record from the district court.

It appears from the record that at the May term, 1871, of the district court for Washington county, the plaintiff moved for judgment on the petition and answer, which motion was argued, and the cause submitted to the court on the motion and pleadings. The motion was overruled. The journal entry of the decision of the court overruling the motion concludes as follows: "It is considered, ordered, and adjudged by the court, that said defendants do have and recover judgment in this action against said plaintiffs; and that said defendants recover of and from said plaintiffs their costs, and that execution issue therefor." Is this a final judgment disposing of the whole merits of the case? I think not. The judgment is that the defendants recover of the plaintiffs their costs. This seems to be the only true import of the language used; and therefore it is not a final judgment pronounced by the court upon the matter contained in the record. It is not in the language of such judgment. Bouvier, in his Law Dictionary, says a judgment is "the conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit." *Tidd's Practice*, 930. Again, it is said, that a final judgment is, that "it is considered by the court that the plaintiff take nothing by his writ, and that the defendant go hence without day"; or it may be that the cause may be dismissed, for such dismissal is a final decision of the action as against all claims made by it, although it may not necessarily be a final determination of the rights of the parties as they may be presented in some other action. The judgment rendered in the case, is one simply for costs, and therefore the plaintiff is yet in court, and by no means hindered from proceeding in the cause. 1 *Jac. Law Dic. Lisle v. Rhea*, 9 *Missouri*, 173. *Smith v. Sahler*, 1 *Neb.*, 311. *Leese v. Sherwood*, 21 *Cal.*, 164.

Dowling v. Polack, 18 *Cal.*, 626. 3 *Black Com.*, 395.

Again it appears from the record that there was no finding by the court in favor of the defendants. It is difficult to discover how a judgment can be maintained without the finding of some fact to sustain it. The finding may be general or special. And notwithstanding, the old settled rules of law, in the determination of actions at law and suits in equity, must, at least in some measure, be observed, yet under our judiciary system, which recognizes but one form of action called a civil action, it seems clear that the requirements of the code of civil procedure, must, so far as applicable, be applied to actions of purely an equitable nature, as well as actions at law. Section 297 of the civil code clearly provides, that in all actions tried by the court, there must be a general finding, and when requested by one of the parties, a special finding. *General Statutes*, 575. And if this finding be vague, uncertain, or indefinite, it will not maintain a judgment. *Demming v. Weston*, 15 *Wis.*, 236.

There being no final judgment pronounced by the district court, in this cause, upon which error will lie, the motion must be denied and the cause remanded to the district court for further proceedings thereon, according to law, as in actions pending in said court.

MOTION DENIED AND CAUSE REMANDED.

CHIEF JUSTICE LAKE concurs.

T. L. PHILO, APPELLANT, V. MARGARET BUTTERFIELD AND LEWIS BUTTERFIELD, APPELLEES.

Usury: The lender of money at a lawful rate of interest can not be charged with usury, when, without his knowledge or consent, the agent of the borrower applies for and negotiates a loan, and receives from the borrower a sum of money, which the borrower previously agreed to pay him if he would secure the loan.

THIS was an appeal from a decree rendered in the district court of Douglas county, brought to this court under the provisions of the act of March 3, 1873. *General Statutes*, 716. The facts fully appear in the opinion of the court.

T. W. T. Richards, for appellant, said that the evidence showed that Philo (the mortgagee,) never contracted for, nor received anything more than lawful interest; that he had no knowledge and received no part of the *bonus* paid Wright by Butterfield; that the excess over lawful interest was paid to Wright by Butterfield *for procuring the loan;* that Wright was the agent of Butterfield in the matter; and under such circumstances there was no usury in the transaction. *Tyler on Usury*, Chap. VIII, 156, 172. Such a transaction was not usurious at *Common Law. Dagnall v. Wigley*, 11 *East*, 43. *Salarte v. Melville*, 14 *Eng. Com. Law*, 73. *Baxter v. Buch*, 10 *Vermont*, 548. The common law is law within the state of Nebraska. *Gen. Stat.*, 159.

Mr. Richards also cited the following cases, as quite decisive, if not more so, upon this point. *Coster v. Dilworth*, 8 *Cow.*, 299. *Condit v. Baldwin*, 21 *N. Y.*, 219. *Elmer v. Oakley*, 3 *Lansing*, 416. *Conover v. Van Mater*, 3 *Green*, (*N. J.*,) 481. *Rogers v. Buckingham*, 33 *Conn.*, 81.

Strickland and Webster, for appellees, argued that a

bonus paid to the agent of a lender of money was usury, and that, in the cases cited by appellant as decisive of the matter in the state of New York, very able dissenting opinions were delivered, and it was very doubtful if they had been acquiesced in by other states. *Tyler on Usury*, 170. Besides, an agent cannot so deal that the profits shall belong to him, and not to the principal. *Dunlap's Paley on Agency*, 51, 62. *Armstrong v. Toler*, 11 *Wheat.*, 258. Nor is it necessary, that the lender should have had an actual intent to violate the statute, to make the contract usurious. *Ins. Co. v. Ely*, 2 *Cow.*, 706. *Maine Bank v. Butts*, 9 *Maine*, 55.

GANTT, J.

This is an action upon a note and mortgage which were executed by the defendants to the plaintiff, to secure the payment of a loan of money. The answer admits two hundred and fifty dollars to be due to the plaintiff for money borrowed, but alleges that the plaintiff ought not to recover, because the note and mortgage were given on an actual loan of two hundred and fifty dollars, and that the balance of fifty-four dollars expressed in the note was included therein as a bonus, and therefore made the loan usurious. Hence the plea of usury is the only defense.

All the evidence taken in regard to the charge of usury is substantially as follows: Lewis Butterfield testifies that he went to L. R. Wright to obtain a loan of money, and that Wright told him he could get some money for him if he could secure the payment by mortgage on real estate, but that he would have to pay a heavy interest, and then says: "we agreed that I should give a note, and mortgage for three hundred and four dollars with interest thereon, for the sum of two hundred and fifty dollars, which I did and received the two hundred and fifty dollars, and executed the note and mortgage to T. L. Philo."

The plaintiff testified that he advanced of his own money the three hundred and four dollars stated in the note, and the loan was made through Wright; also that he was to receive twelve per cent. interest, and that he had no knowledge of and had nothing to do with the individual transaction between Wright and the defendants.

L. R. Wright testifies that Butterfield came to him to hire the money, and offered to secure it by mortgage, but that he told him he had no money to spare, and knew of no one from whom he would be likely to get it, except from a man in Des Moines, if he had it; that several days after, the defendant called on him and said money was very hard to get, and that he would give fifty dollars to get it; but that he told the defendant to look around, and if he could not get the money, he would see what he could do for him; that the defendant came the third time and said it was impossible for him to get the money in Omaha; and that then the defendant agreed to pay him fifty dollars to get the money for one year at twelve per cent., and to secure it by note and mortgage. This witness also says that he went to Des Moines, mainly, to obtain the money for the defendants, and got from plaintiff six hundred dollars, and let the defendants have three hundred and four dollars, and defendants paid him fifty dollars for his time, trouble, and expense, and paid to Neville four dollars for making abstract of title and drawing papers; and further says that he acted at the request of, and as the agent for the defendants; that he had previously loaned out money for the plaintiff.

We think that this evidence as we find it in the record in this transaction, very clearly shows that Wright acted only as the agent of the defendants, and his testimony as to this fact is not contradicted by that of Butterfield. On the contrary, the testimony of Butterfield rather corroborates that of Wright.

It is also clear from the evidence, as it appears by the

record, that at the several times when the defendant applied to Wright to negotiate the loan for him, he had no money of the plaintiff's in his hands, and did not then know whether he could obtain the loan from the plaintiff.

Now the question presented for our consideration on the facts of this case is: Will the lender of money at a lawful rate of interest, be affected with the vice of usury, when, without his knowledge or consent, the agent of the borrower applies for and negotiates a loan, and receives from the borrower a sum of money which the borrower previously contracted with him to secure the loan?

It is a settled rule of law which will not be questioned, that in all cases where a person employs another as his agent to loan money for him, and places the funds in the hands of the agent for such purpose, the principal is bound by the acts of his agent; and if the agent charges the borrower of such money unlawful interest, or even demands and receives from the borrower a bonus for such loan, and appropriates it to his own individual use, either with or without the knowledge of his principal, the principal is affected by the act of his agent.

In contemplation of law, the acts of the agent in such transaction are the acts of the principal, because the nature of the business which he has placed in charge of his agent furnishes the means of violating the law. In such business transaction by agency, there cannot be an agreement between the lender through his agent and the borrower, and a separate, distinct contract between the agent and the borrower, because it is in consideration of the loan that the unlawful interest or bonus is paid, and hence, the whole transaction must be a single indivisible proposition, it is but one contract only.

It is said that, "in all cases in which the frauds and injuries of servants, have been held to affect their employers, it appears that the employment afforded the means

of committing the injury." *Dunlap's Paley's Agency*, 306.

But I apprehend, that when the person who negotiates the loan acts only as the agent of the borrower, who has employed him and contracted with him to pay him a stipulated price to secure the loan, the rule is different, and the lender, if he loans the money in good faith, at a lawful rate of interest is not affected by the vice of usury. I think, that in such a case, as between the borrower and his agent, there is a substantive, independent contract, entirely different from any unlawful contract for money; and to connect such contract with that of the loan, would be to connect distinct and independent transactions with each other, and thereby make two contracts, each one of which may be fair and legal in itself, into one which is prohibited by law. It is not the purpose of the law to inflict a loss or punishment upon an innocent person, who has not, by himself or *his* agent, participated in any transaction prohibited by law, nor by any employment on his part afforded the means of infringing the law. Hence, in accordance with these rules of law, and in their application to the facts of this case, as they appear from the record, I think that the question above propounded must be answered in the negative; and that the judgment must be reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

MAXWELL, J., concurs.

THE PEOPLE EX REL. WILLIAM TILL v. GEORGE ROY.

Partnership: LIABILITY OF EFFECTS OF, FOR DEBTS OF FIRM. The effects of a partnership cannot be released from the payment of debts against the firm, without the consent of every member thereof; and if a mere dissolution take place, it will be presumed that the assets of the firm are held by the member, in whose possession they may be found, *in trust* for the purpose of satisfying the demands of their joint creditors.

Execution: EXEMPTION. One member of a partnership, even though the head of a family, can not, under the provisions of Chap. 57, General Statutes, Secs. (512), (513), claim as exempt from forced sale upon execution, any portion of the partnership property, which has been levied upon to satisfy the claims of the firm creditors.

APPLICATION for mandamus.

George P. Uhl, for the relator.

Schoenheit and Towle, contra.

LAKE, CH. J.

In this case an alternative writ of mandamus was issued during the present term, requiring the defendant, who is a constable of Richardson county, and who, it was alleged, had seized in attachment certain of the relator's personal property claimed as exempt, to proceed as directed by section (513), General Statutes, 616, to have said property appraised, and permit him to select and retain therefrom to the amount of five hundred dollars in value, or that he show cause why he should not do so.

It appears that the relator is the head of a family, and in all other respects within the provisions of the statute authorizing a debtor to hold personal property under the five hundred dollar exemption clause. The only disputed point is as to the ownership of the property in controversy.

The answer of the defendant, after setting out the various writs by which the property was seized, alleges

that it was not the relator's, but belonged to a firm doing busines; under the name and style of William Till & Co., and that the several orders of attachment were issued in actions brought by certain creditors of said firm.

There is no question but that these goods were at one time a part of the stock in trade of said firm, of which the relator was a member, and that the several demands on which said suits are brought, are valid claims against William Till & Co. But it is contended that just about the time, or a little before the property was taken possession of by the constable, the partnership was dissolved, and a division of the assets of the firm made, whereby this particular property fell to the share of the relator.

It is the law, undoubtedly, that one member of a firm cannot hold his interest in the partnership effects exempt from the payment of the debts of the concern, without the consent of his co-partners. To hold otherwise would in many cases enable a person, so disposed, to throw upon his associates the entire burden of paying off the debts of the firm. We hold that so long as there are unpaid debts, no part of the partnership effects can be released from liability for their payment, without the consent of every member of the firm. "The *corpus* of partnership effects is joint property, and neither partner, separately, has anything in that *corpus:* but the interest of each is only his share of what remains after the partnership accounts are taken." *Taylor v. Field*, 4 *Ves.*, 196.

The testimony before us is very meagre indeed, and exceedingly unsatisfactory. The only witness called to establish the relator's claim of individual ownership over the goods, is his attorney, who only testifies that Till and his co-partner told him they had dissolved and divided the property. This is merely hearsay and proves nothing.

But suppose it were shown satisfactorily that the partnership had terminated by the agreement of the parties, and nothing more, still the relator would not be entitled

to hold this property, released from the lien of his co-partner for the satisfaction of their joint debts. To give him this right, he is required to show that such was their agreement, and that it was made *bona fide*. If nought but a bare dissolution be shown, it will be presumed that the assets of the firm are held by the member thereof, in whose possession they may be found, clothed with a trust for his former associates, to apply the same in satisfaction of the demands of their joint creditors. *Ex parte Williams*, 11 *Ves.*, 3. *Story on Partnership*, *Secs.* 360, 361.

For the reason, therefore, that the evidence does not warrant us in finding that the relator holds this property in his own individual right, released from the obligation to apply it towards the payment of these partnership liabilities, the peremptory writ must be denied, and the cause dismissed at the costs of the relator.

JUDGMENT ACCORDINGLY.

The other justices concur.

THOMAS HEADY, PLAINTIFF IN ERROR, v. SARAH ANN FISHBURN, DEFENDANT IN ERROR.

Practice: EXCEPTIONS TO CHARGE. To make exceptions to the charge of the court to the jury available to the party excepting, or to the ruling of the court in the refusal to give instructions asked for, the exceptions must be reduced to writing during the same term at which the trial took place.

New Trial: NEWLY DISCOVERED EVIDENCE. A new trial in an action for slander will not be awarded on the ground of newly discovered evidence, merely because the defendant makes affidavit that witnesses for plaintiff "would now swear that the slanderous words were spoken a few days after, instead of before, the commencement of the suit," there being no pretense that such witnesses were mistaken as to the fact that the slanderous words were uttered, but simply that they gave the time incorrectly by a very few days.

———: ———. To entitle a party to a new trial on the ground of newly discovered evidence, which he could not with reasonable diligence have discovered and produced at the trial, it is not sufficient for him to merely say that he was "unable to procure the desired testimony," but the affidavit must show the facts and circumstances sufficient to establish due diligence on his part.

THIS action was brought in the district court for Nemaha county, by Sarah Ann Fishburn, to recover damages for slanderous words alleged to have been spoken of her by Thomas Heady.

The cause was tried to a jury, who returned a verdict in favor of the plaintiff, upon which judgment was duly rendered in her favor. To reverse this judgment Thomas Heady, who was defendant in the court below, brought the cause to this court by a petition in error. Several instructions to the jury were asked for by plaintiff in error and refused by the court, but inasmuch as these instructions were not passed upon by this court, for reasons set forth in the opinion, and the arguments of counsel merely relate thereto, the briefs filed are omitted.

E. W. Thomas and J. H. Broady for plaintiff in error.

W. T. Rogers for defendant in error.

LAKE, CH. J.

One of the errors assigned in this case is that the facts set forth in the petition do not constitute a cause of action; and another is that the plaintiff in the court below has not the legal capacity to bring the suit.

Neither of these objections were urged in the argument of counsel, and therefore we supposed they were abandoned. However this may be, an inspection of the record has failed to disclose any ground for either of them. The

words alleged to have been spoken are very clearly actionable; and if there existed any fact which disqualified the defendant in error to bring suit, it is not contained in the record of the case.

Several objections were urged to the refusal of the court to give certain instructions to the jury as requested by counsel for the plaintiff in error, and also to several which were given at the request of the defendant in error; but neither of the questions thus presented can be here considered, for the reason that none of the exceptions to the ruling of the court were reduced to writing at the same term at which the trial took place.

The case was tried and verdict given at the April term, whereupon a motion was filed for a new trial, which was continued and heard at the next October term of the court, at which time the exceptions appear to have been prepared and filed. This delay is not authorized by statute. "*Time may be given to reduce the exception to writing, but not beyond the term.*" *General Statutes, section* (301), 577. *Monroe v. Elbert*, 1 *Neb.*, 174.

The only exception which we can consider is that interposed to the refusal of the court to award a new trial on the ground of newly discovered evidence.

The affidavits in support of this branch of the motion for a new trial, set forth among other things, that some of the witnesses for the defendant in error have said that they were mistaken in their testimony given on the trial, as to the time of the speaking of the slanderous words by the plaintiff in error, that it was after the action was brought and not before, as they had testified. This certainly furnishes no ground for disturbing the verdict. What is the showing upon which the court was called to act? Not the sworn statement of the witnesses themselves, as to what they would testify if again placed upon the witness stand, but those of the plaintiff in error, and his son, to the effect that they were informed they would

now swear that the slanderous words were spoken a few days after, instead of before the commencement of the suit. It is not even pretended that these witnesses were mistaken as to the fact that the slanderous words were uttered, but simply that they gave the time incorrectly by a very few days.

I fail to see how this could at all aid the plaintiff in error, for even if the time had been stated erroneously in the petition, the court would have permitted an amendment, if necessary in order that justice might be done to all parties.

Other testimony alleged to be newly discovered, is that of certain persons residing in Fremont county, Iowa, and in Gage county, Nebraska, whose residence, it is said were unknown to the plaintiff in error until after the trial.

But even if what he says he could prove by these witnesses were regarded as newly discovered evidence, it does not appear that he put forth any effort whatever to learn their whereabouts, or that he could not by the exercise of reasonable diligence on his part, have obtained their testimony in time for the trial.

The code provides that the verdict may be set aside, and a new trial granted on the ground of "*newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial.*" *General Statutes, Section* (307,) 577.

But in order to entitle a party to a new trial for this reason, he must set forth in his affidavit what particular efforts he made, as tending to establish due diligence on his part. It is not enough for him to say that he was unable to procure the testimony, for his ability or inability to obtain it, is a question of fact for the court to determine from the proofs submitted in support of the motion.

I am of opinion that the showing in support of this motion was altogether insufficient to justify a court in

awarding a new trial, and that there is no good reason shown in the record for a reversal of the judgment.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL concurs.

KYRON TIERNEY, CHARLES R. BRYANT, CHARLES N. MAYBERRY, LOUIS M. DAVIS, JAMES W. CROSSEN, ALEXANDER BIVINS, JAMES D. RUSSELL, CHARLES A. HOLMES, THOMAS APPLEGET, AND THE TOWN OF TECUMSEH, PLAINTIFFS IN ERROR, v. HORATIO N. CORNELL, DEFENDANT IN ERROR.

Practice: ASSIGNMENT OF ERRORS. No errors will be considered upon the trial of a cause in the Supreme Court, except such as are assigned in the motion for a new trial.

———: OBJECTIONS TO TESTIMONY. Where objection is made to the admission or rejection of testimony, the reason should be given. *Morgan v. Larsh*, 1 *Neb.*, 363, *cited and followed.*

Towns upon government lands. It was the intention of Congress, in passing the act "for the relief of citizens of towns upon the lands of the United States, under certain circumstances," approved May 23, 1844, to leave the execution of the trust under said act to the legislative authority of each state or territory in which any such town was situated; and the act of the Legislature of Nebraska, entitled "An act to regulate the entry and disposal of town sites," is valid and binding, because it provides such rules and regulations for the execution of the trust, as are contemplated by the act of Congress. *Cash and Spaulding, appellants*, 6 *Mich.*, 193, *distinguished.*

———. And the trustee under said legislative act, in deciding who are entitled to lots under the trust, acts in a judicial capacity, and his decision cannot be assailed in a collateral proceeding, though it might be impeached for fraud.

Statutes. Where a statute, which confers the means of acquiring a right, prescribes an adequate *special* mode of determining, by a judicial investigation, the fact upon which the right depends, that mode is exclusive.

Evidence: PRESUMPTIONS. The law will presume official acts of public officers to have been rightly done, unless the circumstances of the case overturn this presumption; and acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.

THIS was a petition in error to reverse a judgment of the district court of Johnson county. Cornell was plaintiff in the court below, and judgment being rendered in his favor, the defendants prosecuted this petition in error.

The case is fully stated in the opinion of the court.

The statutes construed are the acts of Congress for the relief of citizens of towns upon the lands of the United States, 5 *U. S. Statutes at Large*, 657, and an act of the territorial legislature of Nebraska, generally known as the "Town Site Act." *Laws of* 1858, 266.

Gillespie & Appelget for plaintiffs in error (with whom was also *E. Wakely*), presented the following points:

I. When a government puts its lands in the market it has a perfect right to prescribe the terms on which it will sell, and the mode to be pursued by the purchaser to obtain title; and when prescribed, title can be acquired in no other way; neither have either courts of law or equity a right to substitute a mode for that prescribed by statute. *Wilson v. Mason*, 1 *Cranch.*, 45. *United States v. Jonah Crosby*, 7 *Id.*, 115. *Huidekoper's Lessee v. Douglass*, 3 *Id.*, 1. *Tousley v. Johnson*, 1 *Neb.*, 95. *Ricks v. Reed*, 19 *Cal.*, 551.

II. The town site of Tecumseh was entered under a special enactment of Congress, which prescribed the mode to be pursued by the purchaser to obtain title to the same, or any portion thereof. *Act of Congress, May* 23, 1844, 5 *U. S. Statutes at large*, 656. *Laws of Nebraska*, 1858, 266. *Id.*, 1865, 50. *Id.*, 1867, 94.

III. The act of Congress, creating the trust provided for two classes of trust to be exercised over two distinct classes of property. *Cash and Spaulding, Appellants*, 6 *Mich.*, 193.

IV. The conveyance of the town site of Tecumseh, by the United States to John W. Sayre, as Probate Judge in trust for the occupants, created an express trust, and being an express trust, the trustee could legally do no act not authorized by the instrument creating the trust. Further, the acts of Congress and the territorial legislature were a part of the contract or trust, and must be complied with or no title will pass. *Act of Congress May* 23, 1844. *Laws of Nebraska above cited.* 1 *Hilliard on Real Property*, 360. 2 *Washburn do., Chap.* 3, *Sec.* 4.

V. The deed of trust from Probate Judge Sayre to John Boulware was not authorized by the instrument creating the trust, and is therefore void.

VI. The quit claim deeds from John Maulding, J. C. Lawrence, A. T. Drake and George W. Boulware to Elizabeth Boulware passed no title, inasmuch as none of the parties above named were occupants of the town site at the time of entry or any time prior to the entry.

If any of the parties who quit claimed to Mrs. Boulware did at any time have a right to demand a title of the Probate Judge by virtue of occupancy, they never exercised that right as required by law, and have now lost the right by their own *laches*, and by the acts of the legislature made in pursuance of the act of Congress.

VII. Although John Boulware may have furnished the Probate Judge with the purchase money, yet the conveyance was made to the Probate Judge in trust for the occupants (of whom John Boulware was not one) with

consent of John Boulware, therefore no trust results to John Boulware. *Norton v. Stone*, 8 *Paige*, 222. *Leggett v. Dubois*, 5 *Id.*, 114. *Story's Equity Jurisprudence*, *Sec.* 1201, *note b*. 2 *Washburn on Real Property*, 437. *Saunders on Trust*, 227.

VIII. A resulting trust will never be implied when there is an express one declared by word or writing. 2 *Washburn on Real Property*, 537.

IX. A trustee cannot delegate his trust. *Berger v. Duff*, 4 *Johns Ch.*, 369. *Hawley v. James*, 5 *Paige*, 487. *Wilson v. Towle*, 36 *New Hamp.*, 129. *Saurez v. Pumpelly*, 2 *Sand. Ch.*, 336. *Bradford v. Bellfield*, 2 *Sim.*, 264. *Cooke v. Crawford*, 13 *Sim.*, 91. *O'Reilly v. Anderson*, 8 *Hare*, 101. *Greenleaf v. Queen*, 1 *Peters*, 146. *Newton v. Bronson*, 13 *New York*, 587. *Hill on Trustees*, 175.

X. If conveyance is made *in trust* the *grantee* does not take *beneficially*. *Hill on Trustees*, *113 *et seq.*, *133.

XI. If conveyed on *void* trust, there is a resulting trust to grantor, his heirs, and next of kin. *Hill on Trustees*, *134.

Isaac N. Shambaugh and O. P. Mason, for defendants in error, presented the following points:

I. No errors of the court below were pointed out in the motion for a new trial, and none should be considered in this court. Errors relied on must be specifically pointed out. *Midland Pacific Railroad v. McCartney*, 1 *Neb.*, 404, *and authorities there cited*. *Jolly v. Terre Haute Draw Bridge*, 9 *Ind.*, 417. *Independence Plank Road Company v. Doty*, 7 *Id.*, 580. *Kimble v. Glass*, *Id.*, 589. *Davis v. Scott*, 13 *Id.*, 506.

II. In respect to "the surveying of public lands settled upon and occupied as town sites," the act of May 23, 1844, establishes an absolute right in its provisions, which provide that "it shall be legal, etc., for the corporate authority (of the town) to enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the *several use and benefit* of the occupants thereof, according to their respective interests," at the time of entry, upon showing a compliance with the requirements of the act.

It is a grant of lands, as lands, to some persons *in esse* at the time the proofs are made—not to persons who may afterwards clandestinely or otherwise get upon any portion of the lands or lots.

When the proofs show that the requirements of the act have been complied with, the parties, proprietors of the town and occupants of the lots, are *eo instanti* entitled to the benefit of the act and to have the trust established and declared in their favor. And upon the proofs and entry being made, the law must presume that the persons interested at the time, have done all that the act of Congress contemplates, to acquire, not only their rights to the land, but also a preference to the claims of all other persons, and the right to receive the land from the trustee.

It is true that this interest in the lands is at first inchoate, but nevertheless valuable—it is authorized by law—established by act of Congress, for the act says, "for the several use and benefit" of the persons entitled to the same, "according to their respective interests." Hence, it is clearly a vested interest—a vested right in the persons interested at the time the proofs are made; and the act provides the means by which the interest or right shall be perfected into a title in fee, that is, through the trustee. This interest contains the germ. it is a

vested right which expands and ripens into a perfect title.

The next paragraph in the act provides that "the execution of which trust"—what trust? The act creates but one trust,—the trustee is to "enter the land" in trust for the several use of those interested at the time the proofs are made, and the same is the trust property. This trust is held by the trustee, created by the entry of the lands and not the entry of lots. It certainly therefore is the land which constitutes the trust property. And in the execution of this trust, in the disposal of the property to the use of the beneficiaries "according to their respective interests," it is "to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory."

No doubt such rules and regulations would become necessary, for, without them, the trustee would have no guide to direct him in the disposal of the lands to the persons interested, and no rule to enable him to settle and determine disputed claims between different interested parties. Therefore, the legislature of Nebraska, by act of February 10th, 1857, prescribed the necessary rules and regulations, and by Section 1 made it the duty of the trustee to enter the lands "in trust for the several use and benefit of the occupants and *those holding by deed or otherwise.*" Section 2 provides for making deeds, etc.

This act very clearly and fully recognizes and adopts the construction which we have given to the act of Congress. It requires the trustee to execute deeds for part or parts of the land, or lots to such persons who may be entitled to the same. It makes the trustee the arbiter to determine every question, allows appeal from his decision to the district court, and hence, his action is conclusive unless appeal be taken from the same. It is not shown that any person or parties claimed prior equity

in any of the premises, and the presumption of law is that the trust was properly executed.

The trust was executed by the deed executed to Boulware. The only remedy to set aside this execution and the trust, was by appeal, as provided by the act. *Mills v. Paynter*, 1 *Neb.*, 443. *Davis & Barnes v. Murphy*, 3 *Minn.*, 125. *Leach v. Rounds*, *Id.*, 448. *Castner v. Gunther*, 6 *Minn.*, 134.

III. In a chancery cause brought to this court upon petition in error, this court cannot review the findings of the court below on questions of fact; only errors of law can be considered in this court upon petition in error. *State v. Swartz, et al.*, 9 *Indiana*, 221. *Kimble v. Glass*, 7 *Indiana*, 589.

IV. The finding judgment and decree of the court below is correct and should be affirmed.

The execution and delivery of the deed by John W. Sayre, probate judge, in whom the title to this property in controversy was vested, conveyed to and vested in John Boulware, Sr., the legal title to all the property in dispute.

The pleadings and the proofs show that John W. Sayre executed the trust vested in him by the act of Congress in compliance with and according to the law then in force in the then territory of Nebraska, entitled "An act to regulate the entry and disposal of town sites." *Laws of* 1858, 266.

John W. Sayre conveyed by this deed the absolute title to the property in controversy, and fully executed the trust vested in him by the act of Congress. Boulware took the title completely divested of any trust created by the act of Congress, of May 25th, 1844. The trust created by the act of Congress vested the title in the probate judge for the use and benefit of the occupants of the town site. The probate judge fully and completely executed

this trust in the execution of the deed to Boulware, by a private arrangement between Boulware and his associates, and Boulware took the title from the probate judge for the benefit of himself and these associates. This was purely an individual and private matter between Boulware and his associates, and the proof shows that Boulware's associates had full knowledge and acquiesced in this transaction. Neither the town of Tecumseh, nor the trustees appointed by the commissioners, nor any one else except Boulware and his associates, had any legal or equitable right to this property, and the defendant in error holds the title of Boulware and his associates, and therefore has both the legal and equitable title.

V. John Boulware, Sr., was an occupant of the town site of Tecumseh, within the meaning of the act of Congress, of May 25th, 1844, and the act of the territorial legislature of November 4th, 1858, to regulate the entry and disposal of town sites.

A person may select a town site upon the public lands, cause the same to be surveyed and platted, and induce persons to move to and occupy the town site, spend large sums of money to build up and improve the place and assist mercantile and mechanical enterprise, open roads, construct bridges to make the site accessible to commerce and travel, and never actually reside upon the town site, but in such case would come within the spirit and meaning of the acts, by sharing and participating in the benefits of the acts referred to. But the answer in this case says that Sayre, probate judge, after entering the town site of Tecumseh, under the act of Congress of May 25th, 1844, caused public notice to be given of the fact of such entry in the manner required by law, and proceeded to execute the trust in pursuance to law and the statutes of Nebraska, and deed the lands to the occupants. If this be so, and the answer admits it, the presumption is very

strong that Boulware acquired these lots and property at public sale, acting for himself and his associates, and took the title and property divested of the trust created by the act of Congress, and as a purchaser in good faith, for value.

VI. The acts of the plaintiffs in error created a cloud upon the title of defendant in error. A cloud upon a title is such a colorable right of title as would depreciate the market value of the land in the hands of one who held the actual title. The term color of title means a deed or surety of the land placed upon the records of land titles, whereby notice is given to the true owner and all the world that the occupant claims title. *Hodges v. Eddy*, 38 *Vt.*, 345.

VII. The effect of having color of title is sometimes to extend by construction, a possession beyond the actual occupation and sometimes to change the character of casual acts of entry upon land from acts of mere trespass to those of possession.

VIII. As to what constitutes color of title, any instrument having a grantor and a grantee, and containing a description of the land intended to be conveyed, and apt words for their conveyance gives color of title to the lands described. *Brooks v. Bruyn*, 35 *Ill.*, 394. *Washburn on Real Estate*, 3 *vol.*, *page* 139.

IX. The color must arise out of some conveyance purporting to convey title to a particular tract of land. A void deed may raise a color of title. *Wofford v. McKennan*, 23 *Texas*, 46. *Charle v. Saffold*, 13 *Texas*, 94. *Pillow v. Roberts*, 13 *Howard*, 472.

MAXWELL, J.

This action was originally brought in the district court of Johnson county by the defendant in error, Horatio N. Cornell, against Kyron Tierney and others above named, who are plaintiffs in error in this court.

Cornell, in his petition, alleged that John Boulware, John Maulding, J. C. Lawrence, George W. Boulware, and A. P. Drake, were proprietors and occupants of the town site of Tecumseh, in said county, located on the south half of section twenty-eight (28), in township five (5), north, range eleven (11), east of the sixth principal meridian, in the district of lands subject to sale at Brownville, Nebraska; that John Boulware, at his own expense, caused said land to be surveyed, divided and platted into lots, blocks, streets, and alleys; that said lands being so occupied and improved as a town site, John W. Sayres, then being probate judge of the county, in pursuance of the act of Congress in such case made and provided, entered and purchased of the United States in the year 1857, the said lands above described, in trust for the several use and benefit of the occupants thereof; that the said John Boulware paid and delivered into the hands of the said probate judge, the full consideration for said lands, being at the rate or price of one dollar and twenty-five cents for each acre thereof, and amounting to the sum of four hundred dollars; that said probate judge having executed and delivered deeds of conveyance in severalty to all persons and occupants who were entitled thereto, did on the first day of July, 1859, "in consideration of the premises aforesaid," sell and convey to John Boulware, by deed of general warranty, all the lands, lots, and blocks, in said town, which were not theretofore conveyed. And it is further alleged in the petition that Cornell has purchased the interest of the original proprietors of the town site, and holds the legal title to the

same; that in the month of January, 1872, Tierney and the others above named, being the trustees of said town set up a claim of title to the lots described in the petition, and that on or about the thirteenth day of February, 1872, the said trustees obtained from the probate judge of the county a deed for the lots in question; that on the 6th day of February, 1872, said trustees executed a deed of conveyance in trust to J. D. Russell, C. A. Holmes, and Alexander Bivens, to sell said lots at public sale, one-half of the proceeds to be paid to the corporate authorities; that none of the defendants in the court below are in possession of any of said lots; and that the deeds so executed by them cast a cloud upon Cornell's title. The prayer of the petition is for an injunction, and that the cloud created by said deeds may be removed.

The answer denies substantially the allegations of the petition, except as to the deeds made Feb. 6, 1872, and Feb. 13, 1872, and alleges that John Boulware, George W. Boulware, John Maulding, J. C. Lawrence, and A. P. Drake were not at the time the town site was entered, occupants of any part of said town site. The answer also alleges that there being no corporate authorities of said town, the probate judge of said county having entered said land as aforesaid, forthwith gave public notice of the facts of such entry in the manner required by law, and proceeded to execute the said trust in pursuance of law and the statutes of Nebraska, and made, executed, and delivered to each and every one of the occupants of said town site, a deed in fee simple for such part or parts, lot or lots, of such land in said town site, as each of the said occupants was lawfully entitled to; and that every person who was entitled to a deed of conveyance from the probate judge as an occupant of the town site, did or should have received such deed before the fifteenth day of April, 1859.

The testimony was taken before a referee, and the cause

heard at the adjourned term of the court held in January, 1873. The court found all the issues in favor of Cornell and rendered a decree as prayed in the petition.

A motion for a new trial was filed, the grounds assigned therefor being:

"*First.* Because the finding in this case is not sustained by sufficient evidence, and the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Second. Because of error of law occurring at the trial and excepted to by defendant.

Third. Because of irregularities by which defendants were prevented from having a fair trial.

Fourth. Because of the admission of improper testimony excepted to at the time."

As this cause comes here by petition in error, no errors can be considered except such as were assigned in the motion for a new trial.

Upon the trial of the cause Cornell offered in evidence patents from the United States, to John W. Sayre, Judge, etc., for the tract of land occupied by said town, and three deeds executed by the probate judge of said county, and delivered to John Boulware. The first of said deeds, dated April 15, 1859, conveyed in fee to said Boulware fifty-four lots in said town. The second of said deeds, of the same date, conveyed in fee twenty-two lots in said town. The third deed, dated July 15, 1859, conveyed to John Boulware, "as trustee for the special use and benefit of the shareholders, and all persons having a legal interest in said town site, all lands, lots and blocks which are not deeded up to this date." The defendants in the court below objected to the introduction of these deeds in these words: "Three deeds from probate judge Sayre to John Boulware to which defendants except and object. Objection overruled. Defendant excepts." No reason is given why these deeds should not be used as evidence, and this

court has already decided that where objection is made to the admission or rejection of testimony, the reason should be given. *Morgan v. Larsh*, 1 *Neb.*, 363.

Cornell also introduced deeds tending to prove that he now holds the legal title of Boulware, and his associates for the lots in question. Tax receipts for the taxes of the years 1866, 1867, 1868 and 1869, were also introduced by him, and evidence to prove that John Boulware paid four hundred dollars to enter the land in question.

On the part of the defendants in the court below, J. C. Lawrence, one of the original proprietors, testified that he caused a house to be built on the town site in 1857, but did not occupy it himself; that in the year 1860, he moved on the town site and continued to reside there for five years thereafter; and that he never knew of the Boulwares, Drake, or Hixen erecting a dwelling house on the town site.

John Maulding, one of the original proprietors, testified that he paid eleven dollars of the fees for entering the town site; that he had lived on the town site for the last five or six years; that at the time of the entry of the town site the Boulwares lived at Nebraska City; that Lawrence also lived at Nebraska City; that he did not think Hixen or Drake were in the country; and that Dr. William S. Walker, C. A. Goshen, Field and Trick, were all the persons that he remembered as living on the town site at the time.

Copies of the county commissioner's record were also introduced showing the first organization of the town, by the appointment of trustees, Feb. 4, 1867; also an entry dated Aug. 3, 1868, declaring the town a body corporate; also an entry dated June 7, 1869, ordering a dissolution of the incorporation, at the request of a majority of the taxable inhabitants; also an entry dated January 29, 1872, declaring the town a body corporate, and appointing Tierney, Bryant, Mayberry, Davis, and Crossen, plaintiffs

in error, trustees; also the organization of the town company, Nov. 17, 1856, whereby it appeared that John Boulware, had thirty shares, J. C. Lawrence, thirty shares, I. P. Drake, thirty shares, G. W. Boulware, thirty shares, A. Hixen, thirty shares, and twenty vacant shares, being two hundred shares in all, and that J. C. Lawrence was president of the company, and W. T. Walker, secretary; and an agreement to build houses on the town site, under pain of forfeiture.

The chief defense relied on by the plaintiffs in error, appears to be the fact that none of the parties, through whom Cornell claims title, were occupants of the town site at the time of the entry thereof by the probate judge of Johnson county, in January, 1859, and we are referred to the case of *Cash and Spaulding*, 6 *Mich.*, 193, to show that no title passes by a deed in such a case.

That was an appeal from the decision of Judge Goodwin, judge of the district court. On the 20th day of June, 1857, Henry Selby presented his petition to the circuit judge, representing that he was equitably entitled to the undivided half of lot six (6) in section twenty-five (25) within the limits of the town site of Ontonagan, of which he was then in the actual occupancy and possession as tenant in common with James K. Paul; that he acquired the right thereto by a quit claim deed from said Paul, dated November 1, 1856; that there was no other claimant or person in possession claiming adversely to petitioner and Paul; and he therefore prayed the judge, as trustee, under an act of the legislature, to hold in trust and convey lands included in the town site of Ontonagan, to allow his claim and execute a deed of said premises to him. Daniel S. Cash appeared and excepted to the jurisdiction of the circuit judge to proceed to adjudicate upon claims and lots, or other execution of the trust, on the ground that the legislature had provi-

ded no such rules and regulations for the execution of the trust, as were contemplated by the act of Congress of May 23, 1844. These exceptions were overruled, and Selby then filed an amended petition, setting forth in addition to the above, that the lot contained seventeen and sixty one-hundredths acres, and that petitioner took possession in April, 1855, and built a house thereon. Cash answered the amended petition, averring that the lot was never occupied by any person for the purposes of trade and that Cash had a valid claim thereto as pre-emptioner. The legislature of the state of Michigan passed an act, which was approved January 29, 1853, whereby the district judge was authorized to enter the several lots on section twenty-five, including only so much as was actually within the town site, and the trustee was directed to convey the lots, by granting to James K. Paul such lots as he might hold free from the claims of any other person by virtue of an equitable pre-emption thereto, and to all other occupants such lots as they held by virtue of contract with Paul. No other rules and regulations were made on the subject by the legislature. The court says, "Mr. Cash does not claim to have occupied the land as a trader, or as the inhabitant of a town, and his occupancy, therefore, would not come within the act of Congress, and if any portion of the subdivision had been occupied legitimately for town purposes he could not pre-empt it, and the law does not allow the judge to enter any sub-division not settled and occupied as a town site, and if this was not so occupied it was not withdrawn from private pre-emption. While the act of Congress leaves the details of the use of the proceeds to the surplus fund, to be regulated by the legislature, it is very clear that the law designed that they should be used for the common benefit in some way. * * * In the absence of any legal representative, at least, we think any one interested had a right to

appear and protect the common fund. The legislature created the trustee a tribunal, but instead of empowering him to do impartial justice, undertook by the act itself to dispose substantially of the whole matter. The whole tract is given to James K. Paul and his grantees. No one else was authorized to be considered or receive relief. The trust cannot legally be carried out under such a law."

And Judge Manning in the same case, page 214, says: "The act leaves it altogether to the local legislature, if the power be not in the trustee, to determine what disposition shall be made, within the objects of the trust, of town lots belonging to the community at large, and of the proceeds of such as may be sold."

The court held substantially, that the legislature had undertaken to dispose of the whole trust to Paul and his grantees, and authorizing no one else to be considered, and that as the act did not provide rules and regulations for the administration of the trust, it was therefore, void. There is not the least intimation in the opinion of the court, that with proper rules and regulations, allowing the trustee to decide who were entitled to a conveyance of any portion of the land held in trust, that if he erroneously conveyed to a party not entitled thereto, that the deed would be void, and would pass no title. Yet that is substantially what is claimed by the plaintiffs in error in this case. Our statute in force at that time, regulating the disposal of town sites, provided that the corporate authorities of the town, if incorporated, and if not incorporated, then for the probate judge of the county wherein the town was situated, to enter at the proper land office, the land so settled upon and occupied, and hold the same in trust for the several use and benefit of the occupants thereof, and those holding deeds or otherwise according to their respective interests, and deeds to be made accordingly. There was also a provision for determining the

rights of adverse claimants to lots, and allowing an appeal to the district court.

The act of Congress provides that if the town is not incorporated, the judges of the county court of the county in which such town may be situated, shall enter at the proper land office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; "*the execution of which trust as to the disposal of lots in such town, and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the state or territory in which the same is situated.* Provided, that any acts of said trustees not made in conformity to the rules and regulations herein alluded to, shall be void and of none effect."

The trustee in a case of this kind, in deciding who are entitled to lots under the trust, acts in a judicial capacity and cannot delegate his authority to another; and if in making the trust deed dated July 1, 1859, he had done so, the deed would be void. But the answer *admits* that the probate judge entered the land and forthwith gave public notice, *as required by law*, of the fact of entry, and proceeded to execute said trust *in pursuance of law and the statutes of Nebraska*, and made, executed, and delivered, to *each and every one of the occupants* of said town site, a deed in fee-simple for such part or parts, lot or lots, of said land in said town site as *each of said occupants* were lawfully entitled to.

Inasmuch as our statute then in force provided that the probate judge was to make deeds to occupants and those claiming by deed or otherwise, it necessarily gave that officer the power to decide who were entitled to deeds, with the right of appeal from such decision to a higher court. And such a decision can not be assailed in a

collateral proceeding, although it might be impeached for fraud. 2 *Phillips on Evidence*, 19, *note* 262.

And where a statute, which confers the means of acquiring a right, prescribes an adequate *special* mode of determining by a judicial investigation, the fact upon which the right depends, that mode must be exclusive. *State v. Marlow*, 15 *Ohio State*, 114. *The Little Miami R. R. Co. v. Whitacre*, 8 *Id.*, 590.

The provision of the act of Congress that any acts of said trustee, not in conformity to the rules and regulations prescribed by the legislature, should be void, can only apply to acts committed without authority; and it does not change the rule that acts of a municipal officer, done without authority, are void.

The law will presume official acts of public officers to have been rightly done unless the circumstances of the case overturn this presumption; and acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter. *Bank of the United States v. Dandridge*, 12 *Wheat.*, 70. *Combs v. Lane*, 4 *Ohio State*, 112. *Ward v. Barrows*, 2 *Id.*, 241.

Parsons says "cases often say that fraud makes a contract *absolutely void*, but by this it cannot be meant that the innocent party cannot waive the fraud and insist on the contract. And such a waiver would be inferred from his continuing to treat as his own, the property which came to him by reason of the fraud. The mere lapse of time, if it is considerable, goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded party to discover the fraud at a much earlier period, by the exercise of ordinary care and intelligence, it would be almost conclusive." 2 *Parsons on Contracts*, 782.

It is not claimed by the plaintiffs in error, that the full value of the lots in controversy was not paid at the time

of the purchase, nor is there any offer on their part to restore the purchase money, It appears that all the facts in relation to the purchase by John Boulware and other shareholders, were well known to the occupants of the town for more than twelve years prior to January 29, 1872, and no objection whatever made to Cornell's title.

The equities of the case are clearly with the defendant in error, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE concurs.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL., CHARLES H. GERE AND OTHERS, PLAINTIFFS IN ERROR, V. JOHN J. GOSPER, SECRETARY OF STATE, JEFFERSON B. WESTON, AUDITOR, AND HENRY A. KOENIG, TREASURER, DEFENDANTS IN ERROR.

Contract: CONSTRUCTION OF. In the construction of a contract, the acts to be performed under it and the manner of performance may be considered; and such a construction should be adopted as will give effect to the provisions which carry out the evident intent of the contract; and the whole contract should be considered in determining the meaning of any or all of its parts.

———: PUBLIC PRINTING. The contractors for public printing agreed, by the terms of their contract, to furnish "paper, *super royal, forty pounds* to the ream; sheets folded *octavo* (*four times*); and sheets stitched" for a certain price, and guaranteed that the materials furnished should be of full weight and quality. The law, under which the contract was let, provided that the volumes of laws should be printed in "*royal octavo form*," and that the work done should be equal in quality to certain specimens kept by the secretary of state. In an action brought by the contractors to recover compensation for the printing of a number of volumes of laws, where the paper furnished was of the kind known as *royal*, in sheets 19 by 24 inches in size, but weighing only *twenty* pounds to the ream, *it was held*, that a compliance with the terms of the contract required paper 24 by 38 inches in size weighing *forty* pounds to the ream, and should contain sixteen leaves and thirty-two pages of printed matter to the sheet, printed on both sides; and that each sheet for folding and stitching should contain sixteen pages.

Practice: ADMISSIONS IN PLEADING. The plaintiff asserted a claim for an allowance for waste attending public printing, and the defendant admitted that an allowance was due but not to the extent claimed; *held*, that it was error for the court to reject all claim for allowance. It should have found, upon this claim, for the plaintiff, at least to the extent admitted by the pleadings.

THIS was an application for a mandamus brought in the district court for Lancaster county, by the relators, more familiarly known as the State Journal Printing and Publishing Company, of Lincoln, Nebraska, to compel the defendants to audit and allow a certain account for printing the local laws of the Ninth Session of the Legislature, printed by the relators under a contract with the State, and in pursuance of the provisions of an act entitled "An act to provide for the publication of the General Statutes of Nebraska, approved February 18, 1873. The section of that act directing the publication of the local laws of the session, is as follows:

"SEC. 10. The laws passed at this session of a private, local, and temporary nature, shall be printed and published in pamphlet form, under direction of the secretary of state, in a separate volume from the General Statutes herein provided for. Five hundred copies of said laws shall be printed, and one copy of the same sent to each member of the present legislature, and five copies to each county in the state." *General Statutes*, 1085.

Section seven of the act to provide for state printing is as follows:

"SEC. 7. The laws shall be printed in *royal octavo form*, on good small pica type, the pages to be of the same size and form as those in the laws of the tenth session of the territorial legislature of Nebraska, with similar marginal notes, and index to the general laws." *General Statutes*, 517.

Section fifteen of the act is as follows:

"SEC. 15. The secretary of state shall keep in his

office, for inspection, a specimen of each kind, style, and quality of the work required to be done, and material to be used in the several cases; and the work done or material used shall in all cases be equal in quality to the specimens so kept by the secretary of state."

The relators alleged in their petition that they were awarded the contract for state printing, on the 6th day of December, 1872, for the period of two years; and that the same was awarded in separate contracts corresponding to the seven several and respective classes set forth in the advertisement for bids, and in accordance with the provisions of an act entitled "An act to provide for state printing," approved June 18, 1867. *General Statutes*, 515.

The contract under classes four, six, and seven, under which the relators claimed compensation in this case, is as follows:

CLASS 4.

44 cents per thousand ems long primer composition.

35½ cents per quire paper, *super royal, forty lbs. to ream.*

4 cents per quire, twenty-four impressions, press work.

CLASS 6.

25 cents per one hundred sheets of flat cap, one fold.

20 cents per one hundred sheets flat cap, stitched.

$1.70 per one hundred paper covers for octavo pamphlets, including composition, paper, and press work.

15 cents per one hundred covers put on such pamphlets.

17 cents per one hundred sheets *folded octavo, (four times).*

CLASS 7.

18 cents per one hundred sheets folded octavo.

$1.80 per one hundred paper covers for laws and journals, inclusive of paper, composition, and press work.

After setting forth the above facts, and alleging that they had fully complied with the terms of their contract, and had printed and delivered to the secretary of state the five hundred copies of the local laws required by the act above referred to, the relators further allege in their petition, as follows:

"And your relators also show that a sheet of octavo form, or royal octavo form, is one which will contain eight leaves or sixteen pages; that when paper is printed in royal octavo form it is necessary to cut each sheet in two parts in the center, before the same can be folded and stitched, and it is the proper legal and universal rule to count in and for folding and stitching, each of the pieces so made as a sheet of paper; that an impression of press-work is eight printed pages; and that it is usual, legal and reasonable to allow ten per centum for wastage on all items of work and material performed and furnished, where a contractor undertakes to do a piece of work for so much per item of work and materials furnished, and not for a fixed price in gross by the job. And your relators also show that in their account for the printing of said five hundred copies of local laws, they have charged for the several items of work and materials therein mentioned as hereinbefore claimed to be correct, to-wit: sixteen pages to the sheet of paper, and for folding, stitching, and impressions of press work eight pages to the sheet of paper, and ten per centum on each of the several items mentioned in said account, for wastage, and nothing more.

That on the 12th day of September, 1873, there was due and payable to your relators for the same work and materials, as shown in said account, the following sums of money, viz: For composition, one hundred and sixty-five dollars and thirty-three cents; for press work, sixteen dollars and sixty cents; for paper furnished, sixty-nine dollars and twenty-five cents; for paper covers, nine dollars and thirty-five cents; for putting on said covers,

eighty-two cents; for folding, fifteen dollars and eighty-nine cents; for stitching, eighteen dollars and seventeen cents; making a total sum of two hundred dollars and ninety-four cents. And your relators further show that inasmuch as they have complied with the terms of their said contract, the condition of their bond, and the provisions and requirements of the law, in respect of said work and materials, it is the duty of John J. Gosper, Secretary of State, Jefferson B. Weston, Auditor, and Henry A. Koenig, Treasurer, to examine the said account and vouchers, and correct all errors and overcharges therein, and make the just and proper deductions for the same; and after said account shall have been so examined by said officers, and all errors and overcharges corrected and the just and proper deductions made therefor, it is their duty to certify the same to be correct; and when such account shall have been examined, audited and certified as aforesaid, it is the duty of the auditor upon presentation thereof, to draw his warrant on the state treasurer for the amount thereof, payable out of any moneys in the treasury appropriated for that purpose.

And your relators further show, that under and by virtue of an act of the Legislature, approved February 27, 1873, entitled "an Act making appropriations for current expenses for the years 1873 and 1874," the sum of ten thousand dollars was appropriated for the printing of the laws and journals, exclusive of the General Statutes, and that no part of said sum has yet been expended or paid out, except the sum of two hundred and twenty dollars and seventy-four cents paid to your relators as hereinafter mentioned; and the balance thereof, considerably exceeding nine thousand dollars, still remains in the treasury. And your relators also show, that including ten per centum for wastage on the several items of work and material mentioned, your relators, in doing and performing said work, performed 375,755 ems of composition,

390 quires of 24 impressions of press work, and furnished 195 quires of paper, and 550 paper covers, and put on said covers and folded and stitched 9350 sheets, counting the said work and materials as above claimed to be correct; yet your relators show, that the said officers, in the auditing and examining of said account, estimated the paper furnished for said work at sixteen leaves or thirty-two pages to the sheet, royal octavo, and folding and stitching at sixteen pages or eight leaves to the sheet, and insisted upon allowing and paying for those items at that rate, and no more, making in that way a difference of one-half of those items against your relators, and they refuse to correct their said estimates, although repeatedly requested so to do; and they also refused to allow your relators ten per centum for wastage upon the said items, but on the contrary allowed two per centum for wastage upon the number of quires of press work performed as aforesaid, and upon the number of quires of paper allowed and counted by them as aforesaid. And your relators also show that the said work as allowed and estimated by said officers, came to two hundred and twenty dollars and seventy-four cents, and the relators have been paid that sum, but there is still due them for the said work and material the further sum of seventy-three dollars and twenty cents. * * * Wherefore relators pray that a writ of mandamus may issue against the said John J. Gosper, Secretary of State, Jefferson B. Weston, Auditor, and Henry A. Koenig, Treasurer, commanding them to audit, examine and certify the said account of your relators, and in so auditing and examining the said account, to estimate the paper furnished for said work at eight leaves or sixteen pages to the sheet royal octavo, and the folding and stitching at four leaves or eight pages to the sheet, and allow your relators ten per centum for wastage on the several items in said account mentioned."

The respondents answered admitting the contract of the relators to be as above stated under classes four, six, and seven thereof, and then alleged as follows:

"And respondents further say that the ordinary and common book paper weighing forty pounds to the ream. and of suitable size to fold and use without waste, for making a book of the form, style, and kind, known in trade as a super royal octavo book, contains twenty quires and no more, of twenty-four sheets each quire, each sheet thereof being about 24 by 38 inches in size, and that each sheet folds into thirty-two pages, all of the size and description required by the terms of said contract; that paper of that description weighs forty pounds for each and every ream, and two pounds for each and every quire thereof; that the said volume of laws of a private, local and temporary nature contain one hundred and thirty-six pages and no more, being four and one-quarter sheets of said paper; and that five hundred copies and no more were required to be by said contractors printed; and that all the paper necessary to be used and contained in the whole five hundred copies of said laws is eight-eight and one-half quires, except a reasonable loss or waste to be supplied for waste in printing, which these relators aver not to be more than two per centum upon a number of five hundred copies. And in the auditing of said account under said contract and act of the legislature, these respondents found and certified to the auditor, that said relators had performed and furnished three hundred and forty-one thousand, five hundred and ninety-six (341,596) ems composition, at forty-four cents per thousand; eighty-eight and one-half (88½) quires of paper, super royal, forty pounds to the ream, at thirty-five and one-half cents per quire; three hundred and fifty-four (354) quires of press work of twenty-four impressions, at four cents per quire; folding four thousand two hundred and fifty (4,250) sheets, at

seventeen cents per one hundred; stitching four thousand two hundred and fifty (4,250) sheets, at twenty cents per one hundred; five hundred (500) paper covers, at one dollar and seventy cents per one hundred; putting on five hundred (500) covers, at fifteen cents per one hundred.

The respondents found the charges made in said account of relators, greatly in excess of the terms fixed by the contract, the greater portion of such excess being in the items of paper, press work, folding and stitching; and respondents further found that relators were not entitled to waste in the items of composition, covers, folding and stitching, and that an allowance of two per centum was a full and ample allowance for waste upon the items of paper and press work, and as in duty bound these respondents refuse to allow more therefor. And the respondents thereupon found to be due to said relators, for publishing said laws, the amounts above referred to, making a total of two hundred and twenty-one dollars and seventy-four cents; and afterwards, and on the same day, certified the same to the auditor, and these respondents aver that the above was a complete and just auditing of the said account. And these respondents have no knowledge or information, as to the usual and customary way of printing upon sheets to be used for the making of a book of the kind described, and deny the allegations of the petition relative thereto, and deny that it is necessary so to do; but on the contrary aver, that a form for printing pages of an octavo book may be so imposed, as that a sheet forming thirty-two pages or sixteen leaves may be printed, folded, and stitched, into a book of the kind the relators printed, without dividing such sheet; and further aver that only by means of such imposition and printing of sixteen pages to one impression, can the relators comply with the terms of their said contract; that a sheet so printed, upon a form of

sixteen pages so imposed needs to be folded four times and no more, for use and binding into a book of the kind described. And these relators aver, that whether or not said respondents did or did not print, divide into parts and fold the paper in the manner alleged, yet under their said contract they are entitled to charge for folding one sheet only to every thirty-two pages in said book contained; and these respondents therefore deny that it is necessary to cut each sheet into parts in the manner described, or that it is the proper and legal rule to count and charge for the folding or stitching of each of the parts, into which the relators aver that they divide the same. And the respondents deny that they have failed or refused to audit or certify the said account for the said relators, or any account whatever, or that the relators are entitled to receive any other sum on said account, than as certified and paid as aforesaid; and respondents deny that said relators have used said 177 3-11 quires of paper, or any paper in excess of 88 7-11 quires as aforesaid, in said publication, or have folded or stitched 8,500 sheets as charged, or have furnished any materials or have performed any work or service, or are entitled to any allowance for waste other than or greater than audited, found, certified and paid as herein aforesaid; or that said claim of ten per centum for waste is reasonable, customary or just."

Upon the trial of the cause before Mr. Chief Justice Lake, sitting in the district court, S. D. McDonald, a witness called by relators, testified that he had resided in Kansas since 1859; that he had been publisher and proprietor of a printing office for from twenty to twenty-five years; that he had charge of the state printing of Kansas for seven years; that the term *royal* applied to paper, was used to designate its size alone, and meant a sheet 19 by 24 inches in size, and that to bring it to octavo form it must be folded *three* times; that a royal sheet could

not be folded *four* times and be in octavo form; that a ream of royal paper is 480 sheets 19 by 24 inches in size; that the universal rule is to fold in sheets of eight pages or four leaves; and that eight pages or four leaves is a sheet of folding and stitching; that you cannot fold a sheet of sixteen or thirty-two pages; that if paper is printed on a form of sixteen or thirty-two pages it must be cut into sheets of eight pages for folding and stitching or they will not register; that a sheet 24 by 38 inches in size would not be *royal* paper, but would make two royal sheets; that eight pages of a book printed in octavo form is an impression of press work, and twenty-four impressions of press work of eight pages make a quire of press work; that there is a custom among printers to charge ten per cent. for wastage, where the contractor does the work at so much per item, and not a gross sum for the job; that the term *super royal* designates a sheet of paper 20 by 28 inches in size; that the book in question contains eight and one half twenty-fourths of a quire of royal paper, seventeen twenty-fourths of a quire of press work, and seventeen sheets of folding and stitching; that the paper weighs *twenty* pounds to the ream *royal;* that paper of that size is never made *forty* pounds to the ream.

On cross-examination this witness testified, that he had not examined the contract; that the value of paper was in proportion to the number of pounds; that the wastage on paper consists of the outside quires of a bundle of paper, of from five to ten sheets in getting the form ready, and that these items will average ten per cent; that it is the custom to charge for folding and stitching the blank pages that precede and succeed the printed matter; that a form of press work is eight pages; that part of a form of press work is charged as a full form; that if sixteen pages are set up, the form is still eight pages octavo; that if sixteen pages are set up, it does not alter the case; that if the printer could profitably set up and print thirty-two

pages, it would not matter; that a printer may cut his paper into eight page forms and print it, or he may print it in sixteen page forms and then cut it; that a royal octavo page is about 6 by 9½ inches; that if he were required to print a book with pages of that size, and to fold the sheet four times, the paper to weigh *forty* pounds to the ream, he would use paper 24 by 38 inches, sixteen pages to the form, thirty-two pages to the sheet, which must be cut in two before binding; that if he was to order *forty pound* paper he would receive paper of that weight; that paper is always ordered by giving the size of the sheet required and its weight per ream; that in the volume of laws printed by the relators, there are 4¼ sheets of paper 24 by 38 inches, 32 pages to the sheet, that will weigh fully forty pounds to the ream; that in the whole five hundred copies of the said laws, there are two thousand one hundred and twenty-five sheets 24 by 38 inches in size, four thousand two hundred and fifty *royal* sheets, and nine thousand and five hundred sheets of folding and stitching; and that the terms "royal" and "super royal" were used to designate size and nothing else.

Upon a re-direct examination, this witness testified that if he were required to print a book in *royal or super royal octavo* form, and to furnish therefor *royal* or *super royal* paper, and to fold such paper *four* times, he would say it could not be done, as it would have to be folded across the printed page.

A number of witnesses were called by the relators, who testified to substantially the same facts.

The respondents called E. F. Gray, who testified that there was not a sheet of *royal* or *super royal* paper in the books printed by the relators; that it was *double medium*, and so known among the trade; that it was printed on a sixteen page form; that the first form had eight pages; that it took two hundred and fifty sheets of paper for each form for the five hundred copies; that it took two

thousand sheets of double medium paper to print the eight forms, five hundred copies, sixteen pages to the form, one hundred and twenty-five sheets to print the half form; that there are about eighty-nine quires of forty pound paper, two impressions to each sheet, 24 by 38, and four and one-fourth sheets paper to each book printed on sheets 24 by 38, backed and cut in two; that the terms *royal* and *super royal* had nothing to do with the case, not a sheet of either having been used; the proper rule for wastage is eleven quires to five hundred sheets; that to fulfil the requirements of the contract he would use paper 20 by 28, super royal, or 19 by 24 royal; that if he ordered royal paper weighing *forty* pounds to the ream, he should expect paper 19 by 24 inches in size of that weight; that paper was sold by the pound and size or weight wanted; that regular *double medium* size, such as the book in question was printed on is 24 by 38.

Upon cross-examination, this witness testified that the difference between the paper used and that which ought to be used was that the paper used was *double medium*, 24 by 38, and that required was royal, 19 by 24, or 20 by 25; that the book would have been much larger if of royal octavo size; that the book printed by relators was not royal octavo; that he never saw the laws of the tenth territorial session; that if a sheet of paper used in the book, namely 24 by 38, or *double medium* proper, was cut in two, it would make two sheets of royal paper, 19 by 24 inches in size; that there would be no difference in the workmanship, quality, or materials of a book, whether printed on the paper used, or on royal paper; that the only difference would be that in the one case there would be sixteen pages to an impression, and in the other only eight pages; and that the press work would only be half as much, but the result would be the same in all respects.

A number of other witnesses for respondents testified to substantially the same facts.

The court found all the issues in favor of the defendants; and further found "that the paper required by the contract in the petition mentioned, is twenty-four inches by thirty-eight inches in size, and should contain sixteen leaves, and thirty-two pages of printed matter to the sheet, printed on both sides; that each sheet of folding and stitching contains sixteen pages; and that no waste upon any of the items mentioned in relator's account should be allowed." Judgment of dismissal, and against the relators for costs, was then rendered, and to reverse this judgment and finding of the court the relators brought the case here by petition in error.

Seth Robinson, for plaintiffs in error, argued at length, the claim of the relators, contending, *inter alia*, as follows:

I. It is admitted and clearly proved that the work done and materials used were fully equal in workmanship, style, quality, and weight of paper, to the specimens furnished by the secretary of state, that the volumes were printed in royal octavo form, on good small pica type, with pages of the same size and form as those of the tenth session of the territorial legislature, and with similar marginal notes and index; that the workmanship and materials were in all respects satisfactory to the defendants. No question is made on these points, nor is there any dispute as to the amount of work done or materials furnished. General Statutes, §§ 7, 15, pages 517, 519.

II. But the real question (barring for the present the matter of wastage) is how the price of the work shall be computed, that is, upon what principle the computation shall be made; and the question arises in this way: The contract provides (see contract, class 4) that the relators

shall furnish for this class of work (general and local laws, etc.,) super royal paper, that is, paper in sheets 20 inches by 28 inches in size, weighing 40 pounds to the ream, at thirty-five and one-half cents *per* quire. On the other hand, the law provides, (see sections 7 and 15 above cited) that they shall use royal paper, that is, paper in sheets, 19 inches by 24 inches in size, and that the quality shall correspond to the specimens furnished. In fact, the relators did furnish royal paper, weighing only 20 pounds to the ream, but fully complying with the law and fully equal to the specimens furnished; and of all this no complaint is made. But the relators purchased their paper in sheets double the royal size, that is, 24 inches by 38 inches in size, and, having a press suitable for that purpose, printed it in that size. Now, because this paper, taken in double sheets, as printed by the relators, happens to weigh just 40 pounds to the ream, it is insisted by the defendants, and it was found by the court, that the paper intended by the contract was neither super royal nor royal in size, but twice the size of the latter, namely: 24 inches by 38 inches in size, making 16 leaves or 32 pages; and that it is only for a quire of such paper that the relators are entitled to thirty-five and one-half cents.

Again, as to folding and stitching: This seems to have been treated by the parties as coming within class 6 of the contract instead of class 7, and, if that construction be adopted, the sheets are required to be folded *octavo* (four times,) and for 100 sheets of folding relators were to receive 17 cents and for 100 sheets of stitching, 20 cents (see contract, class 6.) But a sheet to be folded *octavo*, that is in 8 pages, can only be folded twice and the two clauses, *octavo* and *four* times are repugnant. But it so happens that the paper, as purchased and printed by the relators, if folded four times, that is, not in 8 pages but in 32 pages to the sheet will make the pages of the required size.

The defendants however, do not insist that the paper shall be folded four times, as that is shown by the testimony to be practically impossible, but in 16 pages to the sheet, making each royal sheet of paper one sheet of folding instead of two, and while the court considered that they were entitled to the full benefit of the clause *four times*, yet the finding was entered in accordance with their construction.

The court also found, that 16 pages were an impression of press work instead of 8. But as there was no issue on that point, and as the relators and the defendants are agreed upon 8 pages, that finding of the court was quite gratuitous and will not be regarded.

So the questions to be considered here are four in number, namely:

First. Are the relators entitled to relief by *mandamus?*

Second. If they are, what is the size of the paper which the relators agreed to furnish at thirty-five and one-half cents a quire?

Third. How many pages are to be counted to the sheet of folding and stitching?

Fourth. What amount for wastage, if any, are the relators entitled to?

I. The right to the relief:

It is, perhaps conceded, that if the facts set forth in the petition are true, the relators are entitled to the relief demanded.

1. There is no doubt that the relators have a clear legal right to be paid for their work according to the true intent and meaning of the contract, and that they have no other adequate remedy.

2. It being conceded that the work is in all respects properly and faithfully done, and no dispute arising as to the amount performed, it is equally evident that the

defendants have no final discretion to say in what manner the compensation shall be adjusted, or what amount is due the relators therefor. The court, in such cases, will settle the legal principle which should govern their action and direct them how to proceed. *Dillon, Mun. Corp.*, 626, *and cases cited. The People v. Judges*, 20 *Wend.*, 658. *Hull v. Supervisors of Oneida*, 19 *Johns.*, 259, 263. *Adriance v. City and County of N. Y.*, 12 *How. Prac.*, 227. *Judges of Oneida Common Pleas v. People*, 18 *Wend.*, 78.

II. The size of the paper which the relators contracted to furnish.

1. The law requires royal (19 by 24) not super royal (20 by 28) paper, and the law is made a part of the contract by express reference; and if there were any dispute upon this point, which there is not, the requirements of the law must govern the actions of the parties, although no direct reference were made to its provisions. Therefore, the relators were not in fault in furnishing paper royal size, instead of super royal. *Vide section* 7, *Printing Act of* 1867. *General Statutes*, 515.

2. The law requires that the materials shall be fully equal in quality to the specimens furnished by the secretary of state. The contract requires that the paper shall weigh 40 pounds to the ream. The relators complied with the requirements of the law, and the paper which they used was fully equal to the specimens furnished and entirely satisfactory to the defendants both in weight and quality. *Vide section* 15, *Printing Act of* 1867. *General Statutes*, 519.

3. If the relators had used super royal paper, it must have been cut to royal size and the result would have been the same.

4. But it is not contended that the relators should have furnished super royal paper. thus making a super royal

octavo volume, but it is claimed that they should furnish paper twice the royal size (24 by 38.) Is there any principle of construction upon which this position can be maintained?

a. It cannot be maintained on the ground that paper double the royal size, as furnished, weighs just 40 pounds to the ream, for that is accidental, and it might have weighed 35 pounds, 45 pounds, or any other number.

b. It cannot be maintained on the ground that the paper, being of half the weight, cost half the price (if that be a fact established by the proofs;) first, because that too is accidental; and, second, because though it be granted for a moment and for the present purpose, that the contract controls the provisions of the statute, nevertheless the state is entitled to a deduction, not for the difference in the cost of the paper, but for the difference in the value of the book, for this is the measure of damages; and it is proved that the paper used is better for the purpose and makes a better book than the paper contracted for. Even if the work were in this respect defective, the defendants received it knowing the defect, and are bound for the contract price. *Cook v. Brandeis*, 3 *Met. Ky.*, 555. *Reed v. Randall*, 29 *N. Y.*, 358. *Attix v. Pelan*, 5 *Clarke Iowa*, 336. *Neville v. Frost*, 2 *E. D. Smith*, 62. *Francois v. Ocks*, 2 *E. D. Smith*, 417.

c. The only ground on which it can be maintained with any show of reason is, that this work is required to be folded and stitched under class 6 of the contract which requires the paper to be folded four times; and the only paper which can by possibility be folded four times into royal *octavo* form is paper twice the royal size, such as the relators purchased for their use.

5. This is the only rational principle on which the position can be maintained; and, granting that it has any foundation, we are in this case, that we have a contract to furnish, at an agreed price, *royal* paper, to be *folded*

four times into royal octavo form, which contains two repugnant clauses, namely: *royal octavo*, and *folded four times;* and the answer to this position is:

1. Classes 4 and 6 are two distinct and separate classes of work, and are expressly required by law to be let and awarded in two several and separate contracts, which are likely to be and frequently are awarded to different individuals: and, therefore, the terms of the two are not to be construed together. *Vide sections* 3 *and* 12, *Printing Act of* 1867, *General Statutes*, 515, 519.

2. But, if they are to be construed together, the case of the defendants is no better off; for, in instruments *inter vivos*, the rule is that of two repugnant clauses, the first is to be retained and the latter rejected: and this rule demands that the term *royal*, more especially as it is a term of art, and has a fixed and technical signification, shall stand. *Bacon's Abr. Tit. Grants.* (I). 2 *Pars. Contr.*, 513, *and note. Chitty's Contr.*, 90. *Shep. Touch.*, 88. *Cope v. Cope*, 15 *Sim.*, 118. *Furnival v. Coombe*, 5 *M. & G.*, 736, *and argument of Manning, Serjt. Sir Anthony Mildway's Case*, 6 *Coke*, 41*b*. *Co. Lit.*, 146 *a*.

Some of these cases are of deeds, but the same rules of interpretation prevail in case of deeds as of simple contracts. *Addison on Cont.*, 162. *Seddon v. Senate*, 13 *East.*, 73.

3. This practical construction, adopted by the parties, binds the relators to take 17 cents per 100 for folding and 20 cents for stitching, and nothing for binding (compare classes 6 and 7); but it estops them no further.

III. How many pages are to be counted to the sheet of folding and stitching?

1. This work comes under class 7, but seems to have been treated as coming under class 6. Under the former

class the sheet is required to be folded *octavo*, that is, in 8 pages, and here is no difficulty.

2. But under the latter class it is required to be folded *octavo* (*four times*). This is impossible, as only a sheet of eight pages can be folded *octavo*, and only a sheet of 32 pages can be folded *four times*.

3. Then, here we have again two repugnant clauses, which cannot stand together. The first must be retained and the latter rejected.

IV. Are the relators entitled to wastage?

1. It is to be observed that the statute is silent on the subject; unless the latter clause of section 20 of the printing act of 1867 be held to apply, which provides that the defendants shall, in no case, allow constructive charges, *or any other than is specifically named in the act.*

2. But is wastage a constructive charge, and is it not specifically named in the act?

3. A constructive charge is understood to be one not expressly named, but arising by construction or inference. In this case, the proof is that the work and materials for which wastage is charged are in fact actually done and furnished, but being difficult to calculate are averaged at a *per centum*, fixed by custom, under the name of wastage; so, in fact, when examined into, it is found to be not a constructive charge and to be specifically named.

V. It may be remarked, generally, that upon all these four points the immense preponderance of the testimony on the part of the plaintiffs ought to have great weight as to the proper method of computation, there being no statutory rule.

J. R. Webster, Attorney General, for defendants in error, (with whom was also *J. C. Cowin*,) submitted the following points:

In the trial of this action it was testified, among other things, as follows:

1. That the term royal, as applied to book papers, designates paper 19 by 24 inches, sizes varying slightly from that dimension being sometimes termed royal.

2. That royal octavo form designates a form of eight pages, so imposed or arranged as to cover or print one side of a royal sheet.

3. That royal paper is not made or used for book purposes weighing forty pounds to the ream, and if made would be unsuitable for book purposes.

4. That the usual and ordinary book paper for manufacture of a royal octavo book is made, sold and used in sheets of 24 by 38 inches, weighing forty pounds to the ream of such sized paper.

5. That forty pound book paper, suitable for the manufacture of the book printed, as understood in the trade, means paper 24 by 38 inches.

6. That paper was furnished and used by relators, 24 by 38, weighing forty pounds to the ream of that size.

7. That four and one-half sheets 24 by 38, and of the contract weight, were necessary to print one copy of the local laws, or nine sheets 19 by 24, technically royal, weighing but twenty pounds to the ream, without waste.

8. That royal paper can not be folded four times for manufacture of an octavo book.

9. That paper of a given quality is valued and sold by weight, the scale of prices ranging within ordinary sizes, about in the ratio of its weight.

10. On the question of waste, the testimony is conflicting, but is made with reference to the custom of printers and not with reference to the contract, the weight of evidence being, as respondents submit, that it is the custom of printers to allow eleven quires of the paper,

double sheet, to five hundred sheets, being a waste on paper of fifty-six to the one thousand, and that no waste is allowed on press work, folding, stitching, binding or putting on covers.

11. *As tending to explain the contract*, in an answer to the interrogatory, "If it were required to print a book with pages of the size required for the local laws, and to use paper of a size to fold four times and weigh forty pounds to the ream, what kind of paper would be used and how many pages to the form (or one side of the sheet)?" the witnesses generally testified that it would require paper 24 by 38 inches, which would make sixteen pages to the form, and thirty-two to the sheet.

This is the paper used, the mode of computation adopted by the respondents, and which they claim to be the kind required, the relators claiming that paper 19 by 24, technically royal, weighing but twenty pounds to the ream, fulfills the contract.

12. It is admitted by respondents that super royal paper (20 by 28) was not necessary or suitable to make this book of the size required by law as the increased size of paper would be trimmed or cut away and wasted in the finishing of the book to the regulation size. To work without waste, it was necessary that the paper should be of some size germane to royal.

This action turns upon the construction of the contract, which is a question of law for the court after the meaning of the technical terms has been found. There is no dispute between the parties as to the meaning of the terms super royal, octavo, and octavo form. These terms being admitted to mean just what the relators claim for them, what construction shall be placed upon the contract?

I. The contract must be construed with reference to the known authority and powers of the officers of the

state with whom the relators contracted, and the provisions of the law under which the contract was made. *McVey, et al., v. Ohio University*, 11 *Ohio*, 134, 136. *Smith v. Parsons*, 1 *Ohio*, 236, 242. *Darling v. Peck*, 15 *Ohio*, 65, 68.

II. The contract must be construed with reference to the situation of the parties, the acts to be performed, and the manner of performance, and with reference to the whole instrument, and the effect of any proposed construction. *Merrill v. Gore*, 29 *Me.*, 346, 348–9. *Saunders, et al., v. Clark*, 29 *Cal.*, 299, 304. *Rose v. Roberts*, 9 *Minn.*, 119, 122. *Racouillat v. Sansevain*, 32 *Cal.*, 376, 392–397.

III. Where parties have contracted for the furnishing and working up of material for a particular purpose, it will not be held that a material wholly unsuitable was intended, even if in technical terms described, and when the material technically described, would be wholly unsuitable to the purpose intended, but the usual and ordinary material used for the purpose answers partially to the descriptive terms of the contract, the usual and ordinary material will be held to be intended, although the technical terms may not be applicable thereto. This only can effectuate the intention of the parties. All the parts of the contract should be examined to explain the ambiguity. *Chase v. Bradley*, 26 *Me.*, 531, 540. *Merrill v. Gore*, 29 *Me.*, 346, 348. *Gray v. Clark. et al.*, 11 *Vt.*, 583, 585. *Warren v. Merrifield*, 8 *Met.*, 93, 96.

In this case the relators technically contracted to furnish a material unsuitable in weight (super royal paper 20 by 28 inches, weighing forty pounds per ream); on the other hand, the ordinary book paper, suitable for the purpose, is larger than royal, is 24 by 38 inches in size

and weighs forty pounds to the ream. It should be held to be the material intended by the contract.

IV. The words super royal and royal octavo, form no part of the contract. The former secretary of state, auditor, and treasurer who let the contract, had no power to contract for the printing of the laws in that form. These words then, being out of the contract, and mere surplusage, the relators merely contracted to furnish suitable paper for the purpose, weighing forty pounds to the ream, and the ordinary suitable paper weighing forty pounds to the ream is contended for by respondents. *Sec. 7, Printing Act of* 1867, *General Statute*, 517. *See Class* 4, 6 *and* 7 *of Contract.*

V. If the words super royal and super royal octavo are not mere surplusage, then the relators cannot recover in this case, for in that view, the former secretary of state, auditor and treasurer, exceeded their powers in contracting for the publication of the laws in that form, and the contract is void *pro tanto*. Had the relators in all things exactly fulfilled the terms of their contract, they could not recover. Can they recover where confessedly they have not fulfilled? Were this a contract between individuals, the work or material being accepted, the contractor might recover on a *quantum meruit*, or a *quantum valebat;* but not so in this action—their legal right must be clear, certain, absolute, positive, perfect and complete. *The People v. Forquer, Breese*, 104, 114. Their only proper relief is by recourse to the legislature. *The People v. Talmage*, 6 *Cal.*, 256, 258.

VI. The evidence is given with reference to the custom of printers, and not the right of relators to charge for waste under their contracts. The contract is for that of the several classes of printing an entire contract. The

contract under class four is a contract not for composition by the thousand ems, nor for furnishing paper, but for printing and furnishing ready for the binder, the required number of copies of the laws, compensation being reckoned by the thousand ems for the composition, by the quire for the paper contained, and the necessary impressions of press work. Under the contract the relators are not entitled to waste. They are not in the relation of separate contractors for paper, and can only charge for the paper in the book printed and delivered in good condition and ready for the binder.

MAXWELL, J., after reviewing the evidence above quoted, and as given in the record, delivered the opinion of the court as follows:

The workmanship and material in this case are conceded to be superior to the specimen copy, and the only matter in dispute is the proper construction of the contract. It is contended by the relators, that where a term having a well known meaning is used to designate the *size* of paper, as *royal* or *super royal*, where paper is furnished by the quire or ream at so much per quire as in this case, that they are entitled to be paid thirty-five and one-half cents per quire for each quire of royal or super royal paper used in the book, and that the provision in the contract that the paper used shall weigh forty pounds to the ream should be rejected; *first*, because it is a general proposition that where clauses are repugnant and incompatible, the earlier prevails in deeds and other instruments *inter vivos; second*, because the law is made a part of the contract by express reference, and sections seven and fifteen require that the laws shall be printed in "royal octavo form."

The proof clearly shown that a sheet of paper designated as *royal* is 19 by 24 inches in size, and that a sheet

known as *super royal* is about 20 by 28 inches in size, and that there is no such term as double royal applied to paper. It also clearly appears that paper of the quality here used weighs but *twenty* pounds to the ream where the sheet is royal 19 by 24 inches or super royal 20 by 28 inches. There is no proof as to the relative cost of paper 19 by 24 as compared with that 24 by 38 inches in size, but several witnesses testified that paper is always bought by the pound, without regard to the size, and is furnished of the quality and weight ordered, from which it is reasonable to infer that paper 19 by 24 inches in size is worth but half as much as paper of the same quality 24 by 38 inches.

The rule of construction contended for by counsel for the relators, applies to *deeds* and *grants* on the principle that if anything is granted *generally*, and other words follow that go *to destroy* the grant, they are rejected as being repugnant; but the rule does not apply where the words are merely explanatory, and not repugnant to the grant. Chancellor Kent says: "the rules of construction of contracts are the same in courts of law and equity, and whether the contract be under seal or not under seal. The mutual intention of the parties is the great and sometimes difficult object of inquiry, where the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law when it becomes necessary will control even the literal terms of the contract, if they manifestly contravene the purpose; and many cases are given in the books in which the plain intent has prevailed over the strict letter of the contract." 2 *Kent Com.*, 555.

"If the intention be doubtful it is to be sought after by a reference to the context and to the nature of the contract. It must be a reasonable construction and according to the subject matter and motive. *Sensus verborum ex causa dicentis accipiendus est, et secundum subjectam materiam.* The whole instrument is to be viewed

and compared in all its parts so that every part of it may be made consistent and effectual." *Id.* 555.

"It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex antecendentibus et consequentibus.* Every part of it may be brought into action in order to collect from the whole, one uniform and consistent sense if that may be done." *Barton v. Fitzgerald*, 15 *East*, 541.

In the construction of a contract, the acts to be performed under it and the manner of performance may be considered; and such a construction should be adopted as will give effect to the provisions which carry out the evident intent of the contract. *Merril v. Gore*, 29 *Maine*, 346.

In this case, if we take the *entire* contract into consideration, there is clearly an agreement on the part of the relators to furnish paper similar to the specimen, (which appears to have been a copy of the session laws of the tenth session of the territorial legislature) or to be at least of as good quality and weighing *forty* pounds to the ream.

The rule is well established that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict; it is therefore contended that section seven of the printing act prescribing the *size* of the paper to be used as *royal* means paper 19 by 24 inches in size, and that *super royal* paper if used could not be folded to form more than eight leaves *royal octavo*, and that the relators have therefore fully complied with the terms of the contract by using *royal* paper 19 by 24 inches in size, although it weighs but twenty pounds to the ream, and that the term "*royal octavo*" found in the law should prevail over the express provisions of the contract that the paper should weigh *forty* pounds to the

ream, and that all material should be of full weight and quality.

We do not think there is any conflict between the terms of the statute and the contract. While the proof shows that there is no such term as double royal applied to paper, it clearly appears that paper twice the size of royal, weighing *forty* pounds to the ream, is in common use, and that paper of that kind was in fact used in printing the laws in this case.

The proof shows clearly that the sheets 24 by 38 inches required by the contract, should be cut into two sheets, 19 by 24 inches, before folding and stitching, and we are of the opinion that allowance should be made for the folding and stitching of each of such sheets. This is also in accordance with the finding of the court below.

The answer admits that the relators are entitled to waste on press work and paper, but claim that the relators are not entitled to more than two per cent. therefor. On the issues made by the pleadings the court should have found the amount of waste to which the relators are entitled under the pleadings and proof, and as the proof upon this point is conflicting the cause must be remanded to the district court with instructions to find the amount due relators for waste upon press work and paper.

JUDGMENT ACCORDINGLY.

MR. JUSTICE GANTT concurs.

THE PEOPLE OF THE STATE OF NEBRASKA, EX REL., C. H. GERE, AND OTHERS, PLAINTIFFS IN ERROR, V. J. B. WESTON, STATE AUDITOR, DEFENDANT IN ERROR.

Practice: DEMURRER. A party who stands upon his general demurrer to a pleading, thereby admits the material facts averred, and must take all the consequences which result from such admission.

Construction of statutes. To ascertain the intent of the legislature is the cardinal rule in the construction of statutes.

———: ———. The act of February 27, 1873, appropriating a sum sufficient to defray the expense of printing and binding the General Statutes of 1873, in accordance with the terms and provisions of an act providing for the publication of said Statutes, approved February 18, 1873, *does not by implication repeal* the latter act, nor any of the provisions of the general law regulating the public printing of the state. These are statutes *in pari materia*, and being construed together disclose that it was simply the intention of the legislature to allow the contractors partial payments during the progress of printing the General Statutes, the accounts therefor being audited and paid as provided by the act of June 18, 1867, for the payment of state printing.

THIS was an application for a mandamus brought in the district court of Lancaster county. The defendant had judgment, and the relators brought the cause here by petition in error.

The opinion states the case, except that portion of the petition of the relators which contains the contract under which the relators were executing the public printing, and that portion of the defendant's answer which sets up the mode of computation pursued by the auditing board, of which the defendant was a member. These facts, however, are fully set forth in the previous case where the contract under which the relators claimed compensation, is construed, and decision rendered in favor of the method of computation pursued by the auditing board.

Seth Robinson, for plaintiffs in error.

I. Has the whole or at least the latter clause of section

three of the act, entitled, "an act making appropriations for the current expenses of the years 1873 and 1874" any force and validity? No objection to the validity of the section can be effectual which does not rest on some constitutional ground, but the only provisions of the constitution which can be held to affect the section in question, are contained in sections 19 and 30, article II, legislative. The objection that the section of the act violates either of these sections of the constitution, cannot be maintained.

First. Every act making appropriations for expenses to be incurred or services to be performed in future, the amounts whereof, as is generally the case, are or may be at all contingent or dependent on circumstances, must either provide a mode of determining the amount to be paid, or, what in effect is the same thing, must leave that business to the discretion of some auditing officer. And this provision of the constitution is to be construed liberally so long as the title of the act is not obviously made a cover for legislation incongruous in itself. *Cooley, Const. Lim.*, 144–146, *and cases cited. People v. Mahany*, 13 *Mich.*, 495. *Morford v. Unger*, 8 *Iowa*, 82. *Whiting v. Mt. Pleasant*, 11 *Iowa*, 482. *State v. Bowers*, 14 *Ind.*, 195. *State v. County Judge*, 2 *Iowa*, 280. *Indiana Central R. R. Co. v. Potts*, 7 *Ind.*, 684. *Brewster v. Syracuse*, 19 *N. Y.*, 116. *Supervisors, etc., v. People*, 25 *Ill.*, 181. *Fireman's Association v. Lounsbury*, 21 *Ill.*, 511. *Hall v. Bunte*, 20 *Ind.*, 304. *Walker v. Dunham*, 17 *Ind.*, 483. *State v. Board of Com's*, 26 *Ind.*, 522. *Underwood v. McDuffie*, 15 *Mich.*, 361.

Second. The expense of printing the General Statutes of the state comes as fairly within the meaning of *current expenses* as that of printing the statutes of a particular session. It is an expense which the legislature, whose decision is final, have adjudged it necessary or expedient to incur.

Third. That the latter clause of this section does by implication repeal a portion of section 6 of the act, approved February 18th, 1873, above cited, is quite true. If that repeal had been by express words and the intention to repeal indicated in the title, there could be no question as to its validity. *Cooley, Const. Lim.*, 145. *Gabbart v. Railroad Co.*, 11 *Ind.*, 365. *Conner v. Mayor, etc, of N. Y.*, 5 *N. Y.*, 285.

But if the repeal be valid when done in express words, when the intention to do so is expressed in the title, it is equally valid when done by implication, and when no such intention is expressed in the title. For, if the repeal be a distinct subject, to express it in the title would not make it valid, but the whole act would be void; if it be not a distinct subject, it is not necessary to express it in the title, in order to make it valid. *Sedg. Stat. Const. Law*, 125. *Cooley, Const. Lim.*, 152. *Vide also authorities above cited.*

Fourth. If this repeal were of the entire printing act, the case would be different. But it is not; it is only of that portion which relates to the appropriation to pay for this work, and the manner of its disbursement.

Fifth. If the section be void, as in violation of section 19, legislative article, then each of the several subjects above named would require a separate act. But the fact is, every law is a repeal by implication of all existing laws, so far as they are, in their provisions, in any respect inconsistent with the new enactment. And legislation on this theory is impossible. *Sedg. Stat. Const. Law*, 125.

II. When a doubtful provision of statutory law is presented for the consideration of a court, there are three cardinal tests which may be applied to it, in order to ascertain the legislative intent: *First.* The inspection of the statute itself. *Second.* The comparison

of acts *in pari materia*. *Third.* The equity of the statute.

1. But be it observed that these rules are never to be resorted to for the purpose of *raising*, but only for the purpose of *resolving*, a doubt. Where the legislative intent is clear, the court has no business with the motive of the legislator, the policy of the act, or the probable consequences of enforcing it. *Sedg. Stat. Law*, 229, 242, *et seq.* *Bosley v. Mattingly*, 14 *B. Mon.*, 89. *Case v. Wildridge*, 4 *Ind.*, 51.

2. If the construction contended for by the defendant be adopted, the latter clause of the section under consideration is nullified; but if that contended for by the relators be adopted, the provisions of all the several acts concerning public printing, will be allowed to have some force and effect. For this construction harmonizes them all to hold that the secretary of state is to make progressive estimates, 75 *per cent.* of which is to be paid from time to time, and that on the final settlement the secretary of state, auditor, and treasurer, shall examine, audit and certify the accounts; and the cardinal rule in applying any test of interpretation is, that the provisions of any act, or any number of acts, are to be harmonized together and so construed as to give some effect to every part. *Sedg. Stat. Law*, 237, 247–251. *Att'y Gen'l v. Detroit*, 2 *Mich.*, 138. *Board of Comm'rs v. Cutler*, 6 *Ind.*, 354. *McMahon v. Chicago R. R. Co.*, 5 *Id.*, 413. *McCartee v. Orphan Asylum*, 9 *Cow.*, 437.

3. Being a special enactment, containing provisions inconsistent with any prior general law, it must be taken as a repeal of such law *pro tanto*. *Jersey City v. Jersey City R. R. Co.*, 20 *N. J. Eq.*, 360. *Ex parte Smith*, 40 *Cal.*, 419. *Rich v. Keyser*, 54 *Penn. State*, 89.

4. The rule that repeals by implication are not favored in law, is a rule of interpretation, and has no

application where the legislative intent is clear, and the acts plainly inconsistent with each other. It is as much the duty of a court to respect a repeal by implication as one in express words, and no case can be found to the contrary. *Sedg. Stat. Law*, 124, *and cases cited. Brown v. McMillan*, 7 *M. & W.*, 196.

III. If the section in question is allowed to stand, the return of the defendant is wholly insufficient. His duty is clear, and it is for the performance of that duty alone he is held responsible. He cannot claim to champion the interests of the state, or sit in judgment upon the action of a co-ordinate branch of the executive department. Had he alleged in his return fraud and collusion between the relators and the secretary of state, it would have been equally insufficient. For it is none of his business. *Danly v. Whitely*, 14 *Ark.*, 687.

J. R. Webster, *Attorney General*, (with whom was also *J. C. Cowin*,) for the defendant in error.

I. Fraud vitiates all proceedings and transactions into which it enters, and were the secretary of state the sole auditing officer, the auditor would be justified in refusing payment. The case of *Danly v. Whitely*, *in* 14 *Ark.*, to the contrary, ought not to be accepted as a good authority, although in that case the secretary of state was apparently the sole auditing officer. See case as cited in *Moses on Mandamus*, 96. 2 *Kent's Com.*, *483, *note b. Jones v. Emery*, 40 *N. H.*, 348, 350. *Van Meter v. Jones*, 1 *Green, N. J., Ch.* 520. *Goodhue v. Berrien*, 2 *Sandf., Ch.* 631. *State ex rel., etc., v. Leak*, 5 *Ind.*, 359. *State ex rel., etc., v. Marston*, 6 *Kan.*, 524.

II. The respondent is one of the board as well for auditing the accounts for printing of the General Statutes as for other state printing, unless former legislation

relating to auditing of claims for state printing is repealed, as regards the publication of the General Statutes, by the third section of the appropriation bill of February 27, 1873.

Section 6, act of February 18, 1873, to provide for publication of the General Statutes.

Section 20, act of June 18, 1867, to provide for state printing, pp. 1086 and 520 General Statutes.

But,—

First. Such repeal cannot be intended by the third section of the appropriation bill above cited. Repeals by implication are not favored. The provisions of the section are not inconsistent with former legislation for the auditing of state printing. *State ex rel., etc., v. Rackley*, 2 *Blackf.*, 249. *Pearce v. Atwood*, 13 *Mass.*, 324, 344. *Looker v Brookline*, 13 *Pick.*, 343, 348. *Hirn v. State*, 1 *O. St.*, 15, 21. *Kearney v. Buttels, et al.*, *Ib.*, 362, 367. *Town of Ottawa v. LaSalle*, 12 *Ill.*, 339.

Second. Such construction is not necessary to effect the object of the provision, its apparent object and purpose being for the financial relief of the contractor by allowing partial payments as the work progresses. *State ex rel., &c., v. Wright*, 17 *O.*, 32. *Burgett v. Burgett*, 1 *Ham.*, 469, 470. *Thayer v. Dudley*, 3 *Mass.*, 296, 298. *Holbrook v. Holbrook*, 1 *Pick.*, 248, 254. *Mendon v. The County, etc.*, 10 *Pick.*, 235, 242.

Third. The acts of February 18, 1873, and February 27, 1873, so far as they relate to the payment of bills for printing the General Statutes, were passed at the same session of the legislature, and must be held to be *in pari materia*, and must receive a construction that will give effect to each if possible. *The State ex rel., v. Rackey*, 2 *Blackf.*, 249. *Church v. Crocker*, 3 *Mass.*, 17, 21.

III. The auditor can draw warrants only upon specific appropriations made by law. Aside from his duty as

one of the auditing board of printing, it is his duty to ascertain the amount of the appropriation, and not to exceed it. The appropriation is specific in purpose, but not in amount. It is alleged and believed by respondent to be $13,067.47, and no more. It is so admitted by the demurrer. No more than seventy-five per centum of that amount can be drawn before completion of the work. *Sec.* 1, *Art. V, Const. Neb. Sec.* 3, *appro. act, Feb.* 27, 1873, *Local Laws*, 41. *State ex rel., etc., v. Wright*, 17 *O.*, 32, 33. *The People ex rel., v. Burrows*, 27 *Barb.*, 89, 93.

IV. The right of the relators must be clear, or the writ will not issue. It is the duty of the auditor not to exceed the amount of the appropriation. He cannot be required to do an unlawful act. Were the respondent not one of the auditing board, and were there a difference of opinion between him and the competent auditing authority as to the amount of the appropriation, mandamus would not issue until the amount of the appropriation had been clearly ascertained and fixed, and the rights of the relators were clear. *Sec.* 1 *Art. V, Const. Nebraska. State ex rel., etc., v. Wright*, 17 *O.*, 32. *The People ex rel., etc., v. Burrows*, 27 *Barb.*, 89, 93. *The Board ex rel., etc., v. Grant*, 9 *S. & M.*, 77, 89. *Swan, Auditor, etc., v. Work*, 24 *Miss.*, 439, 444. *Fitch v. McDiarmid*, 26 *Ark.*, 482, 490. *The People v. Forquer, Breese*, 104, 114.

GANTT, J.

The relators, in substance, say that in December, 1872, they entered into a contract with the proper officers of the state to do the state printing; that a part of the work was the printing of five thousand volumes of the General Statutes, and that by an act approved February 27, 1873, as this work progressed, the secretary of state certified to

the auditor of state an estimate of the value of the work accomplished, and the latter issued warrants to them for seventy-five per cent. of the value thereof; but that on the twenty-second day of September, 1873, the secretary made an estimate of work finished up to that time, in addition to all previous estimates and certified the same to the auditor, and that they demanded the issuance of a warrant for seventy-five per cent. of the amount thereof, but that the auditor refused to issue such warrant, on the ground that in his opinion such estimate, added to those already made for which warrants had been issued, exceeded the amount of the contract price for publishing such General Statutes; and they prayed that a mandamus issue against the auditor, etc. An alternative mandamus was allowed.

The answer of the defendant is very long, and among other allegations, he avers that the auditing and settlement of the accounts for the publication of the General Statutes, was to be made by a board consisting of the state treasurer, the secretary of state, and state auditor; that the secretary of state pursued a mode of computation utterly at variance with the correct and just mode of computation, and the mode adopted by the board, and that the effect of his mode of computation was to double the quantity of paper, making each ream of paper, weighing sixty pounds, to consist of forty quires of one and one-half pounds per quire, and that by such estimates he certified to the auditor the work done on the publication of the General Statutes. And again, that the estimates made by the secretary were greatly in excess of the full contract price of the printing of the General Statutes, and that the secretary of state, and the relators, well knew that the amount already certified was the full contract price of said work and more. And again, that the certificate of work done by the relators, *was made by the secretary of the state through sheer indifference and reckless*

disregard of the public interests, or utter imbecility of judgment or was by him made fraudulently and corruptly colluding and conniving with the relators, with a view to, and for the collusive, corrupt, and fraudulent purpose of obtaining warrants in excess of the amount to which the said relators would be fully entitled for the publication of said General Statutes. And again, that the estimates of the value of work, certified by the secretary, were manifestly erroneous and exaggerated estimates of work accomplished on the publication of the Statutes.

To this answer the plaintiffs interposed a general demurrer; and upon a hearing thereof, before Mr. Chief Justice Lake sitting in the district court for Lancaster county, the demurrer was overruled, and plaintiffs standing on their demurrer the cause was dismissed at their costs.

The plaintiffs now complain that the district court erred:

1. In overruling the demurrer to defendants answer. 2. In ruling that the facts set up in said answer and return constitute a defense to the writ of relators. 3. In giving judgment for the defendant and not for the plaintiffs.

The demurrer admits the truth of all facts alleged in the answer, which are material to the case. The demurrer, therefore, admits as *facts*, that the estimates made by John J. Gosper, Secretary of State, of the value of the work as it progressed, was manifestly erroneous, exaggerated, and greatly in excess of the full contract price of the entire work to be performed, and the secretary of state and relators well knew this fact; that the certificate was made by the secretary *through a reckless disregard for the public interests, or utter imbecility of judgment, or fraudulently and corruptly by collusion with the relators with a view to obtain warrants in excess of the*

amount to which the relators were entitled for the publication of the Statutes.

These allegations, as well as many others set forth in the answer, are material to the case, and if they are true they show a gross violation of duty on the part of the certifying officer. And again, if these facts be true, and under the pleadings they must be taken as true by the court, they constitute a full and complete defense to the writ, and application of the relators, for besides the allegations of fraud and collusion, they show clearly that not only estimates in excess of seventy-five per cent. of the whole contract price, has already been certified to the auditor, but that the estimates already made exceed the full contract price of the work performed.

To draw warrants for an amount exceeding seventy-five per cent. of the work accomplished, is a direct violation of the law, and a fraud upon the state; and surely, it will not be seriously contended that the court, by its process, shall be made the instrument of consummating such a fraud upon the paying party. It must be understood that a party who stands upon his general demurrer to a pleading, thereby admitting the material facts to which he demurs, must take all the consequences which necessarily result from his admissions. This is a principle of law in respect to pleading which is too long, and well settled, to require authority in support of it.

But it is contended on the part of the relators, that by section three of the act of February 27, 1873, entitled "an act making appropriations for the current expenses of the years 1873 and 1874," all prior acts relating to filing, auditing, and payment of accounts for public printing, were repealed by implication, in respect to the printing and payment of the General Statutes; and as a construction of this section was earnestly pressed upon the court, I will now examine the question.

This section appropriates a sum sufficient to defray the

expense of printing and binding the General Statutes "in accordance with the *terms* and provisions of an act" providing for the publication of the General Statutes, approved February 18, 1873. This language seems not only to indicate clearly the intent of the legislature, but expressly declares that the expenses must be paid "*in accordance with the terms and provisions*" of the former act.

The act of February 18, 1873, to which reference is made in the act under consideration, provides that the contractors for public printing shall print and deliver to the secretary of state five thousand volumes of said General Statutes, "and the accounts therefor *shall be audited and paid as provided by law for the payment of state printing.*" *General Statutes*, 1084, *Sec.* 6.

Now the law here referred to, providing for state printing, is the act of June 18, 1867. *General Statutes*, 515. Section eighteen of that act provides the time when, and the manner in which the state printer shall file his accounts; and section twenty declares that the secretary of state, auditor and treasurer, shall audit and examine such accounts, and provides specially how such examination of accounts shall be made. This is the only act in force, which confers all the necessary powers and defines the duties of an auditing board of the accounts for state printing.

These several acts must be taken as statutes *in pari materia*, and construed together as one law. This is a well settled rule of law in respect to statutes relating to the same subject matter.

It is, however, contended that the latter clause of the act of February 27, by implication repeals that of February 18, 1873, and all of the act of June 18, 1867, so far as they relate to the auditing and payment of the accounts for printing the General Statutes.

This clause provides that as the work progresses, upon

the application of the contractors, the secretary of state shall certify to the auditor the value of the work accomplished at the time, and that upon such certified estimates the auditor shall issue to the contractor his warrant on the treasurer, "not exceeding seventy-five per cent. of the work so certified, the balance to be paid upon completion of the work." This clause must be construed in connection with the immediately preceding one, which declares that these expenses must be paid in accordance with "the terms and provisions" of the act of February, 1873, and hence, the "accounts shall be audited and paid as provided by law for the payment of state printing."

In this view of the section, it is, I think, plainly discovered that it was the intention of the legislature to simply allow the contractors *partial payments* as the work progressed, and that upon the certified estimates of this work by the secretary of state, the auditor should not draw his warrant on the treasurer to exceed seventy-five per cent. of the amount of such estimates.

In the case of the *Town of Ottawa v. La Salle*, 12 *Ill.*, 341, it is said that "it is a maxim in the construction of statutes that the law does not favor a repeal by implication. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to each other, or unless in the latest statute some express notice is taken of the former, plainly indicating an intention to repeal it. And when two acts are simply repugnant, they should, if possible, be so construed, that the latter may not operate as a repeal of the former by implication." *Dwarris on Statutes*, 674. *Bac. Abr. Tit. Stat. D. Bowen v. Lease*, 5 *Hill*, 221. *Planters' Bank v. The State of Mississippi*, 6 *Smed & M.*, 628. *Hirn v. The State of Ohio*, 1 *Ohio State*, 21.

And again it is a rule of interpretation of statutes, that the law is the best expositor of itself, that every part of it is to be taken into view for the purpose of discovering

the mind of the law giver, that the details of one part may contain regulations and subject matter, restricting the intent of general expressions or words in another part of the same law, and hence, that every part of the law is to be considered, and the legislative intent is to be extracted from the whole of it.

Now in construing these several acts together as statutes *in pari materia*, by the test of these rules of interpretation, we think they may stand together as one complete, harmonious system—one consistent law, and this construction certainly gives effect to the manifest intention of the legislature. The act of February 27, allows partial payments to the contractor as the work progresses, but provides that the expense of printing and binding shall be defrayed "in accordance with the terms and provisions" of the act of February 18, 1873, which provides that the accounts for printing and binding shall be audited and paid, as provided by law for the payment of state printing, and the act of June 18, 1867, is the only general law providing for such payment.

We are of the opinion that the demurrer was properly overruled, and that in the finding and judgment of the district court, in favor of the defendant, there is no error, and its judgment must be affirmed.

JUDGMENT AFFIRMED.

Mr. JUSTICE MAXWELL concurs.

ROBERT KITTLE, PLAINTIFF IN ERROR, v. RILEY DE LAMATER, DEFENDANT IN ERROR.

Contract: INTERPRETATION. A contract to print and publish a map containing a lottery scheme, and the execution of a note in payment thereof, constitutes but one transaction, and should be construed as one entire contract.

———: LEX LOCI. Unless a contract is by its terms to be performed in another state, it must be governed by the laws of the place where it is made.

———: ILLEGAL CONSIDERATION. In a contract for the sale of goods in the common and ordinary course of trade, with knowledge merely of the purpose for which they are intended, the vendor cannot set up his own illegal intent as a bar to an action for the recovery of the purchase money; but where the unlawful purpose enters into and forms a part of the contract, payment cannot be enforced. *Per* GANTT, J.

Promissory Note: ENDORSEMENT. To constitute a valid endorsement of a promissory note, there must be, in addition to the mere act of writing the name on the back of the note, a delivery and acceptance of it by the endorsee.

———: DEFENSE TO ACTION UPON. While it is true as a general principle of law, that a note is good in the hands of an endorsee, though it may not be valid as between the original parties, yet if it is transferred after maturity, the endorsee takes it subject to all the equities which exist between the maker and the promisee; or if the note be founded upon an illegal consideration, prohibited by some positive statute, no recovery can be had, even though the endorsee may not be privy to the original transaction; or if the endorsee is implicated in the original transaction, the maker may set up any defense which would have availed against the promisee. But in order to make the latter defense available, it must clearly appear that the endorsee had notice of such circumstances as would have avoided a recovery on the note in the hands of the original promisee.

———: DEFENSE: EVIDENCE. Where the maker of a negotiable promissory note is sued by an endorsee, and pleads that the note was given upon an illegal contract prohibited by statute, and also pleads that the note was not transferred to the endorsee before it became due, all the evidence in respect to the contract between the original parties, and the endorsement and delivery of the note to the endorsee, should be submitted to the jury for their determination.

ERROR to the district court of Dodge county. Suit on a promissory note for one thousand dollars, dated April

10, 1872, and payable sixty days after date at the Park Bank, New York, given by plaintiff in error, Robert Kittle, to Asher & Adams, and by the latter endorsed in blank and deposited for collection in the Park Bank, New York, May 25, 1872. Defendant in error, Riley DeLamater, claimed to be the owner of the note, having received the same in payment of a debt owing to him by Asher & Adams, and that it was assigned and delivered to him by endorsement before it became due. The defense was, that the note was given on a contract between Kittle and Asher & Adams, wherein the latter agreed to print for Kittle certain maps containing a lottery scheme; that the consideration for which the note was given had failed, the maps having never been delivered; that the defendant in error was not the *bona fide* holder of the note; that the note was never transferred to him before it became due; and the law of the state of New York prohibiting lotteries. The answer was denied by the replication, except as to the law of New York concerning lotteries, which was admitted. Upon the trial of the cause before Mr. Justice Maxwell, sitting in the district court for Dodge county, and a jury, the defendant in error offered in evidence the note sued upon and the protest thereto attached, and then rested his case. The plaintiff in error to maintain the issues on his part, read in evidence the deposition of DeLamater, who testified that he purchased the note, before it became due, of Asher & Adams; that Asher and Adams owed him and he took the note in payment of the debt; that it was not *actually delivered* to him, but deposited in the Park Bank by Asher & Adams for collection, who endorsed the same in blank, and *told him* that they put it in the bank to his credit; that he *never saw* the note until after it was protested; and that he never exercised any act of ownership over the note until after its protest when he sent it to Nebraska to be sued upon in this action. De Lamater also testified that he

knew of the *transaction* which caused the note to be given, *before* he purchased the note. The plaintiff in error then offered to show from his own testimony that the consideration for which the note was given was illegal, and that De Lamater knew of its illegality before he received the note, and before the note became due. The defendant in error objected, and the objection was sustained by the court to which exceptions were taken. The court then directed the jury to return a verdict against the plaintiff in error for the amount claimed, upon which after the overruling of a motion for a new trial, judgment was entered. Kittle, who was the defendant in the court below now brings the cause here by petition in error. The questions asked the plaintiff in error by his counsel, which were objected to, will be found in the opinion of the court.

Shed & Marlow, for plaintiff in error.

I. The consideration of a promissory note being for the performance of an act which is prohibited by statute, the note is void, and no recovery can be had. *Marienthal, Lehman & Co. v. Shafer*, 6 *Iowa*, 223. *Dolson v. Hope*, 7 *Kan.*, 161. *Wide v. Webb*, 20 *Ohio State*, 431. *Tracy v. Talmage*, 14 *New York*, 162. 2 *Pars. Contr.*, 673–675. 1 *Pars. Notes and Bills*, 212.

II. The consideration of a promissory note being partly illegal, the whole note is void, and no recovery can be had. *Metcalf Contr.*, 246. *Baldwin v. Palmer*, 10 *N. Y.*, 232. *Stanley v. Nelson*, 28 *Ala.*, 513. *Deering v. Chapman*, 22 *Maine*, 488.

III. When the sale of an article is not prohibited by statute, and the article sold is to be used for an illegal purpose, which is known to the seller at the time the sale is made, and the seller does anything beyond making the

sale, by assisting the purchaser in the unlawful enterprise for which the article was purchased, no recovery can be had. *Tracy v. Talmage*, 14 *N. Y.*, 162. *Tantum v. Kelly*, 25 *Ark.*, 209. *Wood v. Stone*, 2 *Cold.*, 369.

IV. A note made in one state, but sued in another, is governed as to questions of illegality of consideration by the laws of the state where it was made, if those laws are properly pleaded and proved. *Hull v. Augustine*, 23 *Wis.*, 383.

V. This action being brought by an assignee, who alleges that he purchased the note before due, and having introduced it in evidence to the jury, the defendant was called upon to re-but the presumption of the plaintiff's having purchased it before due, in order to lay a foundation for his defense.

VI. The note in question being deposited in the Park Bank, by the payees to their credit, the bank held it as a special deposit. *Story on Bailments, Sec.* 88.

VII. A promissory note, purchased before maturity, with notice that the consideration was for the doing of an act prohibited by statute, or was given without consideration, is a sufficient foundation to allow the maker to prove those facts when pleaded as a defense to the action.

N. H. Bell, for defendant in error.

I. The evidence shows that the note was endorsed in blank by payees, and was in possession of the defendant in error on the trial in the court below; therefore, there was a *prima facie* presumption of law in his favor to the extent that he was the owner of it; that he took it for value before dishonor, and in the regular course of business. *Peter v. Prout*, 3 *Gray*, 502. *Hunter v. Kibbe*,

5 *McLean*, 279. *Warren v. Gilman*, 15 *Maine*, 70. *Kelley v. Ford*, 4 *Iowa*, 40.

II. De Lamater was then *prima facie* an innocent holder, and entitled to recover on the note without further proof, in the first instance, than the introduction of the same in evidence.

III. The burden was upon the plaintiff in error, at the very threshold of his defense in the court below, to show clearly that the note was transferred after maturity, or that the endorsee was apprized of such circumstances as would have avoided the note in the hands of the endorser. *Parker v. Challis*, 1 *N. H.*, 254. And this too, before any proof could be made of the failure or illegality of consideration, for these are no defenses against a note in the hands of an innocent purchaser.

IV. Receiving the note in payment and extinguishment of a pre-existing debt, was in the "usual course of business," and entitled the defendant in error to protection. *Percival v. Frampton*, 2 *Comp. Mees. and Ros.*, 180. *Swift v. Tyson*, 16 *Peters*, 1. *Riley v. Anderson*, 2 *McLean*, 589. *Varnum v. Bellamy*, 4 *Id.*, 87. *Bank of Sandusky v. Scoville*, 24 *Wend.*, 115. *Carlisle v. Wishart*, 11 *Ohio*, 172.

V. If this was an accommodation note, as contended by plaintiff in error, and there was no restriction as to the mode of using it, then Asher & Adams, payees, could transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defense. *Rutland Bank v. Buck*, 5 *Wend.*, 66. *Lathrop v. Morris*, 2 *Sandf.*, 7. *Mohawk Bank v. Corey*, 1 *Hill*, 513. *Matthews v. Rutherford*, 7 *La.*, 225. *Appleton v. Donaldson*, 3 *Penn. State*, 386. *Lord v. Ocean Bank*, 20 *Id.*, 384. *Boyd v. Cummings*, 17 *New York*, 101.

VI. We think the court did not err in sustaining plaintiff's objections to the questions asked Robert Kittle on the trial because no foundation had been laid for an inquiry into the consideration of the note. At most, responsive answers to those questions would only have shown that the consideration for the note was the printing of certain maps containing a lottery scheme, and that plaintiff knew that such was the fact at the time the note was executed. But this evidence would have been immaterial and irrelevant under defendant's answer, because defendant pleads, or tries to plead, not a want, but a failure of consideration which this evidence would in no way have tended to show, and because the *printing* of maps containing a lottery scheme is not illegal in New York state, nor elsewhere to our knowledge.

VII. Knowledge on the part of the plaintiff at the time he took the note that it was not to be paid on a specified contingency, is not sufficient to defeat his right to recover, although the contingency had then happened, if he was ignorant of this fact. *Adams v. Smith*, 35 *Maine*, 324. *Ferdon v. Jones*, 2 *E. D. Smith*, 106. *Davis v. McCready*, 4 *Id.*, 565.

VIII. The holder of negotiable paper does not lose his rights by proof that he took the paper negligently, nor unless fraud be shown. *Raphael v. Bank of England*, 17 *C. B.*, 161. *Matthews v. Poythress*, 4 *Georgia*, 287. *Ellicott v. Martin*, 6 *Maryland*, 509. *Lawson v. Weston*, 4 *Esp.*, 56. *Goodman v. Harvey*, 4 *Nev. and M.*, 372. *Goodman v. Simonds*, 20 *How.*, 343.

GANTT, J.

This action is founded on a promissory note made by Kittle, the defendant in the district court and plaintiff in error here, at New York, April 10, 1872, by which he promises

to pay to the order of Asher & Adams, one thousand dollars, sixty days after date, at the Park Bank, New York; and De Lamater, the plaintiff in the district court and defendant in error here, alleges that before the note became due, it was transferred and delivered to him by endorsement. Kittle, in his answer, denies the transfer of the note before it became due, and that De Lamater ever was the owner of the same; and alleges that the note was by him given to Asher & Adams, on a contract between him and them, wherein they agreed to print and publish for him a large number of maps, which were to be numbered respectively from one upwards, and agreed to print on said maps a lottery scheme, to be known as the Eureka Map Lottery Scheme for the distribution of 258 prizes by chance, varying from $50 to $20,000; and that of the amount received on the sale of the maps, $100,000 were to be devoted to the founding of a National Institute for the relief of travelers in distress, and $100,000 to the purchasers of the Eureka Maps. And he further alleges that the contract was made with said Asher and Adams for the purpose of disposing of property in Nebraska, by drawing or lottery, and they knew that such was the object of such scheme, and that they aided and assisted him in preparing said scheme and agreed to publish the same. And he further alleges, that the said Asher & Adams wholly failed to comply with their contract and that he never received the maps; and further pleaded the statute of New York, prohibiting raffling and lotteries, which makes it a highly penal offense to "open, set on foot, carry on, promote or draw, publicly or privately, any lottery, game or device of chance, of any nature or kind whatsoever, or by whatsoever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, or real estate, or money, goods, or things in action," and providing further that "no person

shall by printing, writing, or in any other way, publish an account of such illegal lottery, game or device, stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket or share therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same; whoever offends against this provision shall be deemed guilty of a misdemeanor," which is punishable by fine and imprisonment. The replication denies each allegation of the answer, except the law of New York on the subject of lotteries, which is admitted as stated in the answer. Upon these pleadings the cause went to trial by a jury.

In the consideration of the questions raised by the assignment of errors, it may first be observed, that in law it seems clear that the contract to print and publish the Eureka Map and Lottery Scheme, as alleged in the answer, and the execution of the note by the plaintiff in error to Asher & Adams, must all be taken as one transaction, and as constituting but one contract. *Wing v. Cooper*, 37 *Vermont*, 178. Now the first question presented for our consideration is: Does the contract come within the statute of New York prohibiting lotteries, etc? Is the entire contract, as between the plaintiff in error and Asher & Adams, void under the statute?

The record shows that the contract to print and publish the Eureka lottery scheme was made, and the note was executed and made payable in New York, and without any terms for the performance of any one act in respect to the subject matter of the contract or payment of the note elsewhere. Therefore, so far as the entire contract is concerned, it must be governed by the laws of the state of New York; for it is a well established rule of law that, unless a contract is by its terms to be performed in another state, it must be governed by the laws of the place where it is made.

It is said that "the *lex loci* operates not only in respect

to the nature, obligation, and construction of contracts, and the formalities and authentications requisite to the valid execution of them, but also as to their discharge." 2 *Kent Com.*, 459.

It is a general rule that whatever constitutes a good defense by the law of the place where the contract is made, or is to be performed, is equally good in every other place where the question may be litigated. *Jewell v. Wright*, 30 *New York*, 264.

The statute makes it a penal offense to *set on foot, to promote*, either publicly or privately, any lottery, or to *print, write*, or in any other way to publish an account of any such illegal lottery, stating the *prizes* therein or any of them, or the *price of a ticket or share therein*, or in any way to *aid or assist* in the same. The plaintiff in error substantially alleges that Asher & Adams contracted to *print* and *publish the maps for the purpose of disposing of property by drawing or lottery*, knowing such was the object of the scheme, and that they also *aided and assisted* him in preparing said scheme. I am of the opinion that these allegations, if true, clearly brings the entire contract within the prohibitions of the statute in respect to the contracting parties. And this construction of the contract, I think, is sustained by the decisions of the courts of New York. *Charles v. The People*, 1 *New York*, 184.

It is true that in *Tracy v. Talmage*, 14 *New York*, 176, Selden, J., says, "I consider it as entirely settled by the authorities that it is no defense to an action brought to recover the price of goods sold, that the vendor knew that they were bought for an illegal purpose;" and Lord Mansfield has said, "The seller indeed knows what the buyer is going to do with the goods; but the interest of the vendor is totally at an end, and his contract complete by the delivery of the goods." Undoubtedly this is the law in respect to the sale of goods in the common and

ordinary course of trade, and numerous authorities could be cited in support of it. But in *Tracy v. Talmage, supra*, the rule is also clearly enunciated, that if it is made a part of the contract that the goods shall be used for such illegal purpose, or if the vendor has done some act in aid or furtherance of the unlawful design, there cannot be a recovery. The learned *Justice* says, that "where the seller does any act which is calculated to facilitate the smuggling, such as packing the goods in a particular manner, he is regarded as *particeps criminis*, and cannot recover."

In *Waymall v. Reed*, 5 *T. R.*, 590. Buller, J. says, that "this cause does not rest merely on the circumstances of the plaintiff's knowledge of the use intended to be made of the goods; for he actually assisted the defendant in the act of smuggling, by packing the goods up in a manner most convenient for that purpose."

In *Cannan v. Bryce*, 3 *Barn and Ald.*, 179, Abbott, J. says, that "it will be recollected that I am speaking of a case wherein the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object." *Lightfoot v. Tennant*, 1 *Bos. and Pull.*, 551. *McKinnall v. Robinson*, 3 *Mees. and Wels.*, 434.

I think the rule of law is well established in reason and upon sound policy, as well as by authority, that in a contract for the sale of goods in the common and ordinary course of trade, with knowledge merely of the purpose for which they are intended, the vendor cannot set up his own illegal intent as a bar to an action for the recovery of the purchase money; but that where the unlawful purpose enters into and forms a part of the contract, payment cannot be enforced.

But it is contended that the defendant in error is an innocent holder of the note, and that it was endorsed to him before it became due. How did he obtain it? It is said that

he took it in part payment of an old debt due to him from Asher & Adams. But was the note endorsed before due and delivered to him or in good faith deposited in the hands of a third person for him?

To constitute a valid endorsement there must also be a delivery and acceptance by the endorsee of the note. This doctrine appears to me to be so well expressed in *Clark v. Sigourney*, 17 *Conn.*, 519, that I adopt it as a sound principle of law. The court says: "It is a universal principle, applicable to every contract, whether executed or executory, evidenced by a written instrument, that the instrument must be delivered by the party making the transfer or promise, to the party to whom it is made, and be accepted by the latter; the delivery by the former being evidenced by his assent to the transfer or promise, and the acceptance of the latter, the evidence of his consent to receive it; and both unitedly showing the meeting of the minds of the parties in the transaction, which is the consummation of the contract.

The delivery however may not be expressly proved, since it may be and usually is, presumed from the circumstances, and especially from the fact that the instrument is in the hands of the party to whom it purports to have been made; a presumption however which may be disproved.

On principle, therefore, the mere act of writing the name on the back of the note, is not sufficient to constitute an endorsement of it; but to complete it as such, the further act of delivery of it by him to the person to whom a title in it is intended to be transferred is necessary." *Adams v. Jones*, 12 *Adl. and El.*, 455. *Marston v. Allen*, 8 *Mees. and Wels.*, 494. *Clarke v. Boyd*, 2 *Ohio*, 60.

But again it is contended that the note is good in the hands of the endorsee, though it may not be valid as between the original parties. This is true as a general

principle of law, but there are exceptions to this general rule and these exceptions may, perhaps, be embraced in three classes.

The first is when the note is transferred by endorsement after it becomes due. In such case the endorsee takes the note, subject to all the equities existing between the original parties. In the second class, the endorsee may not be implicated in, or privy to, the original transaction between the parties, yet there can be no recovery on the notes, if the contract was founded on an illegal consideration, prohibited by some positive statute, or the performance of which is *malum in se;* and the third class is when "the endorsee is implicated in or privy to the original transaction, and on that account the promisor is permitted to set up any defense which would have availed against the promisee. Because the holder's knowledge of that part of the original transaction, which would render the note invalid between the first parties to it, prevents him from being defrauded, and makes him rely solely on the responsibility of the endorser. This reliance is the consequence and not the cause of the notes being discredited." *Perkins v. Challis*, 1 *New Hamp.*, 255. *Aspinwall v. Commissioners*, 20 *How.*, 379. *Tracy v. Talmage*, 14 *New York*, 176. *Pars. Contr.*, 381.

But in the third class of exceptions in order to make the defense available, it must clearly appear that the endorsee had notice of such circumstances as would have avoided a recovery on the note in the hands of the original promisee. And it is said that the question whether the endorsee had notice, is one which must be fairly submitted to the jury to determine. *Hull v. Augustine*, 23 *Wis.*, 385.

Now according to the principles of law which seem to be well settled, I am of opinion that the whole evidence in respect to the contract between the original parties, and in respect to the endorsement and delivery of the

note by Asher & Adams to the defendant in error should have been admitted and submitted to the jury for them to determine.

The record shows that the plaintiff in error having testified to a conversation between him and Asher & Adams, in regard to the Eureka Map transaction, at which time the defendant in error was present and wrote a receipt from Asher & Adams to the plaintiff in error for the note in question, the following questions were propounded to him, which were objected to, and the objections were sustained by the court, to which rulings of the court the plaintiff in error then excepted, viz:

1. State whether or not during the conversation between you and Asher & Adams, in the presence and in the hearing of De Lamater, any maps were exhibited containing the lottery scheme set out in your answer? 2. State whether or not, at any time prior to the alleged transfer of this note, and subsequent to the making of the same, you had any conversation with De Lamater, or in his presence and hearing, by which he was advised and informed of the fact that the note was executed in payment of the maps and lottery scheme set up in your answer? 3. What knowledge, if any, had De Lamater before the alleged transfer of the note, that this note was given in payment for the printing of a map containing a lottery scheme in the state of New York? 4. What was the consideration of this note? 5. State what was the contract between you and Asher & Adams concerning the maps and lottery scheme for which the note was given?

To maintain his defense it was necessary for Kittle to clearly prove that the note was given upon an illegal contract, positively prohibited by law, or, if the case came within the third class of exceptions named, where the original transaction would render the note invalid between the first parties, then to prove De Lamater's implication

in, or full knowledge of, the circumstances of the original contract before he received the note, if he received it before it became due. Hence, I think the court erred in sustaining the objections to the above questions.

If the contract was an illegal one, prohibited by law, the answers to the questions propounded to the witness might tend to disclose such fact. And certainly it was competent for Kittle to show that De Lamater had been before he received the note, fully informed and advised of the circumstances between Kittle and Asher & Adams, and had full knowledge of the nature and character of the contract between them, upon which the note was given.

The judgment of the district court must be reversed, and cause remanded for further proceedings.

REVERSED AND REMANDED.

CHIEF JUSTICE LAKE concurs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1874.

PRESENT:

HON. GEORGE B. LAKE, CHIEF JUSTICE.
" DANIEL GANTT, } ASSOCIATE JUSTICES.
" SAMUEL MAXWELL, }

CHARLES F. TAYLOR, PLAINTIFF IN ERROR, V. TILDEN & MCFARLAND, DEFENDANTS IN ERROR.

Practice in Probate Court: BILL OF EXCEPTIONS: Exceptions to the opinion of the probate judge upon questions of law arising during the trial of a cause, unless such cause is tried *by a jury*, cannot be made the subject of a bill of exceptions, by which the errors complained of can be reviewed in the district court upon petition in error.

———: APPOINTMENT OF A PERSON TO ACT AS PROBATE JUDGE. In the absence of a record showing why a person, not the probate judge, exercised the functions of that office, and no exception being taken as to the right of such person to try a cause, it will be presumed that he was appointed to act during the temporary absence of the probate judge, as provided by Section (93) 35, Chap. 14, General Statutes, p. 270.

———: Statutes concerning probate court reviewed and considered by GANTT, J.

THIS cause was originally commenced in the probate court of Douglas county, by Tilden and McFarland, and upon a trial thereof before A. N. Ferguson, special probate judge, without a jury, judgment was rendered in

their favor against Charles F. Taylor. A bill of exceptions, showing certain proceedings in the cause, was signed by the said Ferguson and a transcript of the record, together with a petition in error, was filed in the district court by the said Taylor. Tilden and McFarland moved to dismiss the petition in error. The court sustained the motion and entered judgment of dismissal. To reverse this judgment, Taylor brought the cause to this court, by petition in error. The argument of counsel, being but a review of statutes which are fully set forth in the opinion of the court, are omitted.

E. Estabrook, and W. M. Francis, for plaintiff in error.

G. W. Ambrose, for defendants in error.

GANTT, J.

THIS is an action by petition in error, alleging errors to have occurred on the trial of the cause in the probate court. It appears from the record that no jury was demanded, but that the cause was tried before the judge. The errors complained of, mainly, relate to the ruling of the judge upon the admission or rejection of evidence offered on the trial of the cause. Exceptions were taken at the time to the ruling of the judge, and a bill of exceptions was prepared and signed by the judge. The question, therefore, now presented for determination by this court is, whether in a case, not tried by a jury, in the probate court, exceptions to the opinion of the judge upon questions of law arising during the trial, can properly be made the subject of a bill of exceptions.

The act concerning the organization, powers, and jurisdiction of probate courts, provides that probate judges

shall have, and exercise, the ordinary powers and jurisdiction of a justice of the peace, and shall have concurrent jurisdiction with the district court, in all civil cases, in any sum not exceeding five hundred dollars, and that the "provisions of the code of civil procedure, relative to justices of the peace, shall, where no special provision is made in this sub-division, apply to the proceedings before the probate judge." *General Statutes*, 1873, *p.* 263. The twenty-sixth section of the act provides that in *all* civil actions brought in the court, "either party may appeal from the judgment of the probate court, or prosecute a petition in error, in the *same manner* as provided by law in cases tried and determined by justices of the peace," and the provisions of the justices' code are, that "in all cases which *shall be tried by a jury* before a justice of the peace, either party shall have the right to except to the opinion of the justice upon any question of law arising during the trial of a cause; and when either party shall allege such exceptions, it shall be the duty of the justice to sign and seal a bill containing such exceptions, if truly alleged, with the point decided, so that the same may be made a part of the record in the cause." *General Statutes*, 1873, *p.* 682, *Section* (880). It need hardly be observed that all these parts of acts must be construed together as one act; and, when taken together, it is not only clear that appeal and the prosecution of petition in error, in respect to causes tried in the probate court, must be in the *same manner* as in cases tried before justices of the peace, but that in such cases a bill of exceptions to the opinion and ruling of the court upon questions of law, arising during the progress of the trial is confined alone to causes tried by a jury.

Under statute of *Westm.* 2, which gave a bill of exceptions to "any one impleaded before the judges," it is held that this right does not extend to an inquiry of damages executed at the bar of the court, although such

a trial resembles a trial of an issue of fact, because there is nothing in the statute giving a bill of exceptions in such a proceeding. *Bell v. Bell*, 9 *Watts*, 47. In the case of *Field v. United States*, 9 *Peters*. 202, Marshall, C. J., said that, "as the case was not tried before a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions."

The statute does not give the right of a bill of exceptions to the ruling of the probate judge or justice of the peace, upon questions of law arising during the trial before them, in cases not tried before a jury, and hence, such bill of exceptions cannot be considered in an appellate court, because it is an act without authority of law, and a nullity.

But it is contended that the provisions of the general code of civil procedure, under title XVI, entitled "Errors in Civil Cases," are sufficiently broad in their scope and effect to support a petition in error upon alleged errors taken by bill of exceptions, during a trial before a justice of the peace without a jury. Section 580 provides that "a judgment rendered or final order made by a probate court, justice of the peace * * * may be reversed, vacated or modified by the district court." But it is clearly seen that under these statutory provisions it is *only* upon a judgment rendered or final order made, a petition in error is allowed; and the order must be one which affects a substantial right in an action, which in effect determines the action and prevents a judgment, or which affects a substantial right in a special proceeding, or upon a summary application in an action after judgment; and in such case the petition in error brings up to the appellate court the judgment or decision of the inferior court, together with the transcript of the record, and bills of exceptions constitute no part of such record unless made so by some statutory provision. But these statutory provisions, under title XVI of the

code, nowhere provide for such bill of exceptions to be taken to the ruling of a justice of the peace, upon questions of law arising during the progress of the trial. This right is given in the justice's code, and only in cases tried by a jury.

It is, however, alleged as error, that A. N. Ferguson, who tried the case, had no authority to try and determine the same and render judgment. There is nothing in the record showing why he exercised the functions of probate judge; and it does not appear that any exception as to his right to try the case was taken at the time. It must therefore, be presumed that by reason of the temporary absence of the probate judge from the county, the county commissioners under the 35th section of the act relative to probate courts, appointed him to act in place of the probate judge during his absence; and the statute confers on such appointee all the powers, and subjects him to the same duties, restrictions and liabilities, as prescribed by law respecting probate judges. Hence, upon such appointee during the time he exercises the functions of probate judge, under such appointment, the act confers all the powers and duties, and subjects him to all the restrictions and liabilities prescribed by law respecting probate judges. We do not discover any error in the judgment of dismissal of the case by the district court.

JUDGMENT AFFIRMED.

POLLY WAMSLEY, AND SELIA WAMSLEY, AND OTHERS, HEIRS OF ASBURY WAMSLEY, DECEASED, APPELLANTS, V. JESSE CROOK AND JOHN HALL, APPELLEES.

Practice: RECORDS FOR SUPREME COURT. In chancery causes commenced prior to the act of 1867, abolishing distinctions between actions at law and suits in equity, and carried by appeal to the supreme court, the *entire* record should be brought to this court.

Witnesses: CONSTRUCTION OF STATUTES. The statute, Gen. Stat. 1873, Sec. 329, p. 582, provides that no "person having a direct legal interest in the result of any civil cause or proceeding, shall be a competent witness therein, when the adverse party is an executor, administrator or legal *representative* of a deceased person." *Held*, that the word *representative* applies to any person or party who has succeeded to the rights of the deceased, whether by purchase, descent, or operation of law.

Estoppel. W. and wife, in order to secure the payment of a debt owing by W. to C., conveyed a certain tract of land to C., by deed absolute. Afterwards C. sold the land to H. At the time of this sale W. was absent, but his wife was present consenting thereto, and out of the purchase money paid by H., the debt due C. was first paid, $150 paid to the wife, and a note executed by H., payable to her, for the balance of the purchase money. W. being advised of the transaction directed his wife to take the purchase money. After the death of W., in an action to recover possession of the land by the widow and heirs, it was *held*, that plaintiffs were *estopped* from denying the validity of the sale and deed, there being no evidence of fraud on the part of the defendants.

———. W. and wife had no right to any part of the purchase money, unless their title passed to the purchaser.

———. One cannot be permitted to receive both the purchase money and the land.

APPEAL from Cass county district court.

The action was commenced on the 26th of August, 1865, in the district court of Richardson county, by Polly Wamsley, the widow, and Selia Wamsley, and others, heirs of Asbury Wamsley, against Jesse Crook and John Hall.

At the April term, 1871, of the district court of Cass county, to which the cause had been removed, the cause

was dismissed upon the pleadings and proof, at costs of plaintiffs, and they brought the record to this court by appeal. During the trial of the cause in this court, at the July term, 1873, it appeared that the depositions of the defendants, which had been suppressed by the district court, did not appear in the record. Thereupon further argument in the cause was suspended, and the question being put by *Seth Robinson*, of counsel for appellants, whether in chancery causes, commenced prior to the abolishment of the distinction between actions at law and suits in equity (*Laws of* 1867, 71. *Gen'l Stat.*, 707), as this case was, and carried by appeal to this court, the whole record should be brought up by the appealing party, including depositions suppressed by the court, it was, *per curiam*, answered in the affirmative. And it appearing from the record that certain depositions on the part of plaintiffs had been likewise suppressed, an order was made directing the clerk of the district court to send up a transcript of all suppressed depositions. Upon the record thus made, the cause was heard at the present term.

Seth Robinson, for appellants, argued the cause on briefs filed by himself, *Isham Reavis*, *O. P. Mason*, *and I. N. Shambaugh.*

I. While, perhaps, in the ordinary acceptation of the term, *legal representatives* mean *executors* and administrators, nevertheless its signification varies with the connection in which it is used, and it may mean *heir*, *descendant*, *next of kin*, *grantee*, *legatee*, *devisee*—in short, any person or party who has succeeded to the rights of a deceased person, whether by *purchase*, *descent*, *or operation of law;* and while executors and administrators are, generally speaking, the *personal* representatives of the deceased, and represent him in respect of the personalty,

heirs, next of kin, etc., are *real* representatives, and represent the ancestor in respect of the *realty*. But even heirs may, under certain circumstances, be personal representatives; and the term *legal* in this connection simply means *lawful*, and is applied without distinction to both real and personal representatives. *Baines v. Ottey*, 7 *Eng. Ch.*, 465. *Walter v. Makin*, 9 *Id.*, 148. *Booth v. Vickers*, 28 *Id.*, 7. *Ward v. Bowen*, 14 *Wis.*, 40. *Kelton v. Hill*, 59 *Me.*, 259.

II. The transaction, though in the form of a deed and bond to reconvey, was, in fact and in law, a mortgage. 2 *Washb. Real Prop.*, 45, 46, *and cases cited.*

III. While the mortgagee, no doubt, may purchase the equity of redemption and so acquire an absolute title, courts of equity always regard the transaction with suspicion and jealousy, and it will be avoided for fraud actual or constructive, or for any unconscionable advantage taken by the mortgagee in obtaining the title. It will be sustained, say the Courts, *if perfectly fair and for an adequate consideration. Russell v. Southard*, 12 *How.*, 139, 154. *Hyndman v. Hyndman*, 19 *Vt.*, 9. *Perkins v. Drye*, 3 *Dana*, 170, 174, *et seq. Remson v. Hay*, 2 *Edw., Ch.* 535, 543. *Holridge v. Gillespie*, 2 *Johns. Ch.* 30. 2 *Washb., Real Prop.*, 67, 68.

IV. To construe the language of Asbury Wamsley into a ratification of the sale to Hall when he tells his wife that he supposes her receipt of the money will make no difference; to take it and go to Ohio; to save the remainder until his return, and then he would have the land back, is manifestly absurd. It was after the transaction was done. It does not authorize her expressly or by implication, to yield possession of the mortgaged premises. It clearly and unequivocally repudiates the transaction as a sale, and as clearly and unequivocally asserts

a right to redeem. So it is plain the title of Asbury Wamsley did not pass.

V. But granting for the sake of argument, that Asbury Wamsley's title passed to Hall, still the wife of the mortgagor is entitled to be endowed of the mortgaged lands.

By the execution of the mortgage the lands became charged with the indebtedness which it was intended to secure, but the legal estate was still in the mortgagor, and the wife was still dowable of the lands. No act, no deed, release or conveyance of the husband or judgment or decree confessed by or recovered against him could prejudice her right, and it could be barred in but two ways, viz: 1st, by a decree of foreclosure, to which she was a party, and 2d, by a formal deed duly executed, acknowledged and delivered, to which she was a party. 1 *Washb. Real Prop.*, 212, *and cases cited. Tyler Inf. & Cov.*, 541, *sec.* 395. *Gen. Stat., chap.* 17, *sec.* 3, 13. *Contra, Reeve's Dom. Rel.*, 124, *et seq., but see note* 1, 125. *Swaine v. Perrine*, 5 *Johns., Ch.* 482. 1 *Smith's L. C.*, 812. *Tyler Inf. & Cov.*, 702, 726, 727. *Glidden v. Strupler*, 52 *Penn. State*, 400.

VI. And as her right to dower of the equity of redemption is unquestionable, so is her right to redeem the premises from the mortgage.

E. W. Thomas, for appelles.

I. The testimony shows that Asbury Wamsley, through the agency of his wife, Polly, for a valuable consideration, voluntarily canceled the instrument of defeasance, and delivered the same to Hall. This gave to the deed which Asbury had previously made to Crook, the effect of an original absolute conveyance, even if such deed was originally intended to operate as a mortgage.

1 *Washb. Real Prop.*, 496. *Trull v. Skinner*, 17 *Pick.*, 213. *Harrison v. Trustees*, 12 *Mass.*, 456. *Marshall v. Stewart*, 17 *Ohio*, 356. *Venum v. Babcock*, 13 *Ia.*, 195. *Caruthers, Adm'r, v. Hart*, 18 *Ia.*, 579. 4 *Greenleaf's Cruise*, 7, *note.*

II. If a person receive the benefit of an act done without authority on his behalf, and hold it after knowledge of the facts, he will be held to have ratified the transaction. *Chitty's Contr.*, 233, *note.* 2 *Kent's Com.*, 615. *Matthews v. Gillis*, 1 *Ia.*, 253. *Dann v. Cudney*, 13 *Mich.*, 239.

III. The plaintiffs are estopped from denying the validity of the sale and deed to Hall. 2 *Smith's Lead. Cases* 262. 1 *Amer. Lead. Cases*, 595. 2 *Story's Eq. Jur.*, 1542, 1546. *Deford v. Mercer*, 24 *Ia.*, 118, *and note.*

IV. This principle is not confined to voidable sales, but extends to cases where the sale is void. *Deford v. Mercer*, 24 *Ia.*, 118, *and note.*

V. As Asbury did not repudiate the acts of his wife after the same came to his knowledge, this amounts to a ratification, and also creates an estoppel. *Burlington Gas Light Co. v. Green, Thomas & Co.*, 22 *Ia.*, 508. 2 *Smith's Lead. Cases*, 660.

This principle applies, although Asbury was not present at the sale, but afterwards tacitly ratified the same, by not objecting thereto in time to prevent Hall from paying the notes, which he had given to Mrs. Wamsley. *Thompson v. Blanchard*, 4 *N. Y.*, 303.

VI. We think that the depositions of Hall and Crook are admissible in evidence. The adverse parties in this action are not the legal representatives of a deceased person. The term "legal representative" is a phrase which

has acquired a peculiar meaning in law, and means executor or administrator. *Beezley, adm'r, v. Burgett,* 15 *Ia.*, 192, 2 *Bouv. Law Dict., Title Representatives.*

The object of the statute is to exclude the testimony of interested persons only as to transactions had with the deceased personally.

GANTT, J.

In this action the plaintiffs ask for a decree of the court, declaring that the defendants hold a certain tract of land in trust for the plaintiffs, and that a conveyance be made by said defendants to plaintiffs, and also that an account of rents and profits of the premises be taken, etc.

The principal facts in the case are that, on the 16th day of August, 1862, Asbury Wamsley and Polly, his wife, by deed absolute, with general warranty, sold and conveyed the land to Jesse Crook, and on the 22d day of October following, Jesse Crook and wife sold and conveyed the same lands to defendant, Hall. The deed, however, from Wamsley and wife to Crook, was intended to secure the payment of a debt, owing by Wamsley to Crook. At the time the sale was made by Crook to Hall, Asbury Wamsley was in the military service of the United States, but Polly, his wife, was present, consenting to the sale, and at the same time it was agreed and arranged by the parties that out of the purchase money to be paid by Hall, he should first pay the debt due Crook, then pay Mrs. Wamsley $150, and by direction of Mrs. Wamsley, that he execute his note to her payable to her, for the balance of the purchase money. This was done. Mrs. Wamsley says that after the sale to Hall she advised her husband, Asbury, of the transaction, and that he directed her to take the money and go to Ohio if she wished, and take care of the remainder until his return.

He never returned, but died in the military service on the first or second day of March, 1863, and after his death, she disposed of the note, given for the balance of the purchase money, and used the proceeds thereof for her own benefit, and never offered to return the purchase money to Hall.

The proofs in the case were taken before a referee, appointed by the district court for that purpose, and upon the filing of his report a motion was made by plaintiffs to suppress the testimony of Crook and Hall, the defendants, which motion was sustained. Now the two material questions raised in the argument of the case, are: 1. Did the district court err in suppressing the testimony of the defendants? 2. Did the court err in "finding that the plaintiffs are not entitled to any relief as prayed in their bill, and the dismissing of said bill at costs of plaintiffs?"

In respect to the first question, the statute provides that no "person having a direct legal interest in the result of any civil cause or proceeding, shall be a competent witness therein, when the adverse party is an executor, administrator, or legal representative of a deceased person." *General Statutes, Sec.* 329, *p.* 582.

It is said that "in legal parlance, the executor or administrator is most commonly called the legal representative. In regard to things real the heir is also the legal representative, and so is the devisee, who takes by purchase; and the assignee or grantee is also a legal representative of the assignor or grantor, in regard to things assigned or granted." And it is also said that "general expressions in law must be construed to have a general application, unless there be clear indication that they were intended to be used in a restricted sense. Representative is one who exercises power derived from another." *Grand Gulf R. R. v. Ryan,* 8 *S. & M.*, 275. *Davis v. Davis,* 26 *Cal.*, 37. *Kelton v. Hill,* 59 *Me.*, 259.

Hollister v. Young, 41 *Verm.*, 160. And in *Kimball v. Kimball*, 16 *Mich.*, 211, it is said "the evident intent of the statute was to exclude any person having a direct legal interest in the result of the cause, when the adverse party is an executor, administrator, or legal representative of a deceased person, so as to prevent the living from testifying against the representative of the dead. Death having sealed the lips of the one, the law seals the lips of the other." *Malady v. McEnery*, 30 *Ind.*, 278. It seems to be the settled rule of law that the word *representative* as used in the statute was intended by the law-giver to designate the person or party who succeeds to the rights of the deceased, whether by purchase, descent or operation of law; and this rule seems to be well founded in reason and sound policy, for any other construction would leave the person or party succeeding to such rights, at the mercy of parties claiming adversely to such rights.

The language of the statute is imperative. If a person has a direct legal interest in the result of the cause, when the adverse party is the legal representative of the deceased, he shall not be a competent witness. Whatever may be the ground of his claim, he is excluded as a witness in the case. Hence the court did not err in sustaining the motion to suppress the testimony of defendants.

In respect to the second question, it may be first observed, the doctrine seems to be well settled that if a conveyance of realty shows upon its face to be in fact a mortgage, its character cannot be affected by any agreement between the parties as to the redemption or other incidents of a mortgage, for the right of redemption attaches as an inseparable incident, created by law, and cannot be waived by agreement. 1 *Wash. Real Estate*, 496. *Wing v. Cooper*, 37 *Verm.*, 181. But "where an absolute deed is given accompanied by a simultaneous instrument, operating by way of defeasance, and afterwards the parties, by fair mutual stipulations, agree that

the defeasance shall be surrended and cancelled, with an intent to vest the estate unconditionally in the grantee, by force of the first deed, by such surrender and cancellation the estate becomes absolute in the mortgagee. The original conveyance stands unaffected in form and legal effect; it conveys an estate in fee; the only party who could even claim a right to deny that operation by engrafting a condition upon it has voluntarily surrendered the only legal evidence by which that claim could be supported, and is thereby estopped from setting it up." *Trull v. Skinner*, 17 *Pick.*, 215.

Mrs. Wamsley consented to the sale of the land to the defendant Hall, and her husband, then in the army, being advised by her of the transaction, directed her to take the purchase money. Their only title to the money depended upon the effect of the sale, in divesting the first grantee of any estate in the land, and converting that estate into money by passing the title to purchaser Hall. It was upon this ground alone, in law or equity, that the Wamsley's could take the purchase money. And the receipt and acceptance of the purchase money, was an affirmation that the title had passed to Hall, the purchaser, by virtue of the deed from Crook to him. It is a well settled rule of law that one cannot be permitted to receive both the purchase money and the land. And the application of this principle of estoppel "does not depend upon any supposed distinction between a void and voidable sale The receipt of the money, with the knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience and therefore binds the rights of the party in one case as well as in the other;" and it is said that "equitable estoppels of this character apply to infants as well as adults, to insolvent trustees and guardians as well as persons acting for themselves, and have place as well where the proceeds arise from a sale by authority of law, as

where they spring from the act of the party." *Smith v. Warden*, 19 *Penn. State*, 430, *and cases cited. Stroble v. Smith*, 8 *Watts*, 281. In 2d Smith's Leading Cases, 663, it is said that "when those who are entitled to avoid a sale, adopt and ratify it, by receiving the whole or any part of the purchase money, equity will preclude them from setting it aside subsequently, for reasons which are too plain for statement." *Ibid*, 660, *et seq.* And as there is no evidence tending to effect the defendants, or either of them, with fraud in the transaction, the decree of the district court must be affirmed.

DECREE AFFIRMED.

Mr. JUSTICE MAXWELL, concurred LAKE, CH. J. having tried the cause in the district court did not sit.

WILLIAM A. BROWN, PLAINTIFF IN ERROR, v. HIRAM HURST, DEFENDANT IN ERROR.

Practice: NEW TRIAL: VERDICT. A verdict will not be set aside merely because there is an apparent conflict in the testimony, or where the court is inclined to differ with the jury upon the weight of the evidence; but it should appear to a reasonable certainty, that injustice has been done to the party complaining, by the failure of the jury to give to the whole testimony its proper weight in determining the question submitted to them.

———: EXCEPTIONS TO CHARGE must be taken at the time the charge is given.

PETITION in error from the district court of Otoe county.

The opinion states the case.

C. W. Seymour, for plaintiff in error.

E. R. Richardson, for defendant in error.

I. The evidence in the court below was clear that Hurst never signed the note, or intended to sign the

note; and if the evidence was conflicting, and the question purely one of fact, the supreme court will not disturb the verdict. *Clark v. Davis*, 7 *Texas*, 556. *Sims v. Chance*, *Id.* 561. *Lessees of Ludlow v. Park*, 4 *Ohio*, 40. *State v. Lamont*, 2 *Wis.*, 437. *Bates v. Bates*, 27 *Iowa*, 110.

II. There were no exceptions made to the charge of the court by plaintiff in error in the court below, and the record discloses none, and this court will not take notice of any errors therein, unless the same were excepted to by plaintiff.

LAKE, CH. J.

This action was brought in the court below, upon a promissory note purporting to have been executed by the defendant in error, and payable to Kirkham & Cone or bearer. The petition alleges that Kirkham & Cone sold and transferred the note, before maturity, for a valuable consideration, to one Ensign, who afterwards, for a like consideration, transferred it to the plaintiff.

The defendant denies the execution and delivery of the note to Kirkham & Cone, but makes no denial of the other allegations of the petition. There are several other facts embodied in the answer, relative to the appointment of the defendant as an agent, by the said Kirkham & Cone, for the sale of a certain article of farm machinery called the Improved Triumph Seeder and Cultivator, which appointment was, as the defendant says he understood, signed in duplicate, he keeping one, and Kirkham & Cone the other. He further alleges that if his genuine signature was attached to the note, "it was obtained without his knowledge, by the fraudulent substitution of one paper for another, or by some other surreptitious or fraudulent means unknown to him."

The cause was tried to a jury and a verdict returned in

favor of the defendant, whereupon the plaintiff moved for a new trial upon two grounds, viz: *First*, that the verdict was not sustained by sufficient evidence. *Second*, that the court erred in the instructions given to the jury.

The motion for a new trial was overruled, and judgment rendered on the verdict, to all of which exceptions were duly taken by the plaintiff, who now brings the cause here by petition in error.

Several errors are assigned for a reversal of the judgment, but as they all relate to what took place at the trial, we can only notice such as were assigned in the motion for a new trial.

The only issue upon which the jury were called to pass, was whether the defendant executed the note in question. To prove that he did sign the note, the plaintiff offered himself as a witness, and testified that he sent word to Hurst that he had the note. That Hurst at first said he could not deny that he may have signed it, but would go and see a lawyer. After he had seen a lawyer, he said he did not sign it. James Moore testified that he had seen Hurst write his name as many as three times, and his best impression was that it was his genuine signature.

On the other hand, the defendant swore that he never signed the note. That Kirkham & Cone never asked him to give a note, and he never gave it. He further testified that the signature looked like his, but he could not say that it was, or was not, his signature. He was certain, however, that he never gave the note, and if his name was signed to it by himself, it was brought about by some trick or deception practiced upon him, at the time of signing the agreement of agency, or at the time he thought he was signing a copy of said agreement.

Mrs. Hurst, the wife of the defendant, testified that she was present during the entire time of the transaction of the business between Kirkham & Cone and her

husband, and that no note was signed by her husband, or even mentioned by any of the parties.

This is the substance of the testimony which most certainly was very conflicting. It requires a very careful consideration, not only of what was said by the witnesses, but also their manner of testifying, and their appearance upon the witness stand, to find out the real truth of the case, all of which furnish very valuable aid to the jury in determining the real value of oral testimony.

We do not think that this record presents such a case of preponderating evidence against the finding of the jury, as would warrant us in interfering with the discretion exercised by the court below in refusing a new trial.

The jury who try the cause, and the court before whom it is tried, have much better opportunities to determine the credibility and effect of testimony, than we possess, and we ought therefore to hesitate before disturbing a verdict, rendered by a jury and confirmed by a court possessing such advantages, merely because there is an apparent conflict in the testimony. *Breese v. The State*, 12 *Ohio State*, 146.

A verdict will not be set aside merely because the court is inclined to differ with the jury upon the weight of the evidence; but it should appear to a reasonable certainty, that injustice has been done to the party complaining, by the failure of the jury to give to the whole testimony its proper weight in determining the question submitted to them, otherwise the verdict ought not to be disturbed.

As to the objection interposed to the instructions given to the jury, all that need be said is, that the record does not disclose that any exceptions were taken in the court below when the charge was given. This fact will preclude the plaintiff from complaining here, and the errors, if any there were, in this respect, must be taken to have

been waived. For these reasons the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

All the justices concur.

GEORGE F. CAW, PLAINTIFF IN ERROR, V. THE PEOPLE OF THE STATE OF NEBRASKA, DEFENDANTS IN ERROR.

Criminal Law: EVIDENCE: RES GESTAE. Threats of the deceased towards the accused, which were made some time after the deceased had received the wound of which he died, constitute no part of the *res gestae*.

——: CIRCUMSTANTIAL EVIDENCE. Testimony that the ground, just where the deceased was struck, was covered with stones or pieces of rock, *held* admissible, where the character of the wound on the skull indicated that it could not have been produced with the fist.

——: STATUTES CONSTRUED. Provisions of the criminal code of 1866, that the jury, in all cases where the punishment shall be by confinement in the penitentiary, shall fix the term of imprisonment, are not affected by the enactment of the criminal code of 1873, where an offense is committed and an indictment laid under the former code. The proviso in the latter act "that the manner of procedure, etc., shall be in accordance with the provisions of this code," is only intended to apply to matters *merely formal*, such as organization of juries, conduct of the trial, etc.

Practice in Criminal Cases: VERDICT. In the absence of a record showing the whole of the testimony submitted to the jury, the appellate court will presume that the verdict was abundantly supported by the evidence.

——: INSTRUCTIONS TO JURY. Instructions asked for by the accused, which were predicated on the assumption that there was testimony from which the jury might find that the accused was first assaulted by the deceased, and in danger of being seriously beaten by him, there being nothing in the evidence to warrant such assumption, *held* to be properly refused.

——: ——. Instructions containing mere abstract propositions of law, which could not arise upon the testimony, furnish no just ground for the reversal of a judgment; otherwise, if they were so worded as to lead the jury to infer the existence of a state of facts entirely at variance with the evidence. The court should not mislead the jury by directing their attention to a point upon which there is no testimony.

———: ———. An instruction in these words, "the accused is presumed innocent until the contrary be proved, and if the evidence satisfies you, beyond a reasonable doubt, that he is not guilty of the charge alleged against him in the indictment, it is your duty to acquit," *held*, erroneous.

———: SEPARATION OF JURY. A jury impaneled to try a prisoner upon an indictment for murder, were allowed to separate during the progress of the trial. It did not appear that any of the jurors left the court room, though some of them held conversations with the spectators. Affidavits were filed to show that these conversations had no relation to the case on trial; *held* that the verdict should not be disturbed.

———: ———. When the jury have been permitted to separate on the trial of a criminal cause, it will be presumed, unless the record discloses the contrary, that they were admonished by the court as required by *Section* 484, *p.* 830, *General Statutes*, 1873.

THE plaintiff in error was indicted for murder, tried and found guilty of manslaughter at the March term, A. D. 1873, of the district court of Richardson county. Upon the trial of the cause before Mr. Justice Gantt, sitting in that court, and a jury, the plaintiff in error testified on his own behalf that the deceased approached to within two feet of him; that the deceased had his right hand and fist drawn up towards his chest; that he, the prisoner, thought he saw a stick or club in the right hand of deceased, and that the deceased was about to strike him; that he then struck the deceased with his fist, hitting him somewhere on the head, and knocked him down, etc. It also appeared in evidence that there were loose rocks and pieces of stones lying round about where the crime was committed. A son of the deceased also testified that he was standing near the prisoner at the time the deceased came up; that deceased was walking at his usual gait, not in a threatening manner or attitude, that when deceased came within about two feet of the prisoner he spoke, saying, "George, if you have anything to say, say it to me;" that the prisoner then struck the deceased and he fell beside the lime box, and the prisoner jumped upon him.

The following instructions asked for on the part of the plaintiff in error, were refused by the court:

"If the jury believe from the evidence that William T. Blair made an assault upon the prisoner, then the prisoner was not bound to wait until Blair actually struck him, but under such circumstances the prisoner would have been justified in making use of sufficient force to repel the attack upon him."

"If the jury believe from the evidence that William T. Blair committed an assault upon the prisoner, or that he advanced upon the prisoner in a threatening manner, and came so near to him, and under such circumstances, as would have induced a man of ordinary firmness to believe that he was about to be struck by Blair, and that the prisoner did so believe and then struck the said Blair, only to protect himself against such expected blow, intending to use no more force than a man of ordinary firmness and prudence would have believed under the circumstances to be necessary for that purpose, then the jury will find the defendant not guilty, although they may believe that the prisoner used more force than was really necessary for that purpose."

All other material facts appear in the opinion of the court.

E. W. Thomas and Schoenheit & Towle, for plaintiff in error.

The evidence tended to prove that the deceased made the first assault; and that the prisoner, having reasonable ground to believe that the deceased was about to strike him, struck the deceased with his fist only, and not with a dangerous or deadly weapon, solely for the purpose of defending himself against such apprehended attack, using no more force than he believed necessary, or than a man of ordinary firmness would have believed necessary under

the circumstances. The evidence further tended to show that the wound on the head then received by the deceased, was the result of accident only, and was probably, occasioned by his falling upon a stone, or upon a sharp stake which were near the spot where he fell. There was no evidence that the prisoner made use of a dangerous or deadly weapon.

Many of the instructions given by the court would probably have been correct, if the evidence had shown conclusively that the prisoner made use of a dangerous or deadly weapon, or that he intended to kill the deceased, but we submit that the instructions given were inappropriate and incorrect under the proof in the case. We think the errors in the instructions arise from not making a distinction between the right of *perfect* and of *imperfect* defense as defined by Bishop in his work on Criminal Law. 1 *Bishop Cr. Law, Secs.* 840 *to* 860, 874.

The first instruction asked for by the defendant and refused by the court, was in substance, that if the jury should believe that the deceased made the first assault, the defendant was not bound to wait until he was actually struck, but would be justified in making use of sufficient force to repel the expected blow. The court erred in refusing to give this instruction. 1 *Bish. Cr. Law, Secs.* 867, 872. 3 *Black Com.*, 3 *to* 5. *Roscoe Cr. Ev.*, 260. *People v. Campbell*, 30 *Cal.*, 314. 2 *Archb. Cr. Prac.*, 282, *note*. *Scribner v. Beach*, 4 *Den.*, 450.

The third and fourth instructions asked for by the defendant and refused by the court, are based upon the proposition, that if the deceased advanced upon the defendant in such a threatening manner as would have induced a man of ordinary firmness to believe that he was about to be struck, and the defendant did so believe, and then struck the deceased only to defend himself, intending to use no more force that was necessary, or than a man of ordinary firmness would have believed neces-

sary under the circumstances, the prisoner could not be found guilty under the indictment. The court erred in refusing to give these instructions. 2 *Bish. Cr. Law, Sec.* 31, 32. *The State v. Davis*, 1 *Iredell*, 125. *Shorter v. The People*, 2 *N. Y.*, 193. *Hill v. Rogers*, 2 *Iowa*, 68. *The People v. Yslas*, 27 *Cal.*, 630. 2 *Whart. Cr. Law, Sec.* 1242–3. *The People v. Tannan*, 4 *Park. Cr. R.*, 514.

Whether the belief and reasonable grounds of belief existed or not, is a question of fact, and should have been submitted to the jury. *Meredith v. The Commonwealth*, 18 *B. Monroe*. 56.

When there is testimony tending to show that the defendant had reasonable grounds to believe, and did believe, that the deceased was about to strike him even if such testimony comes from the defendant alone, and is in conflict with all the other evidence in the case, the question should be submitted to the jury. *Commonwealth v. Woodward*, 102 *Mass.*, 160.

If the defendant had good cause to believe, and did believe that the deceased was assaulting him, and was about to strike him, then he had a right to use whatever force was necessary to repel the expected blow, short of using a deadly weapon, or of intentionally taking his life. If in the employment of necessary force the party resisting is killed, the homicide is not punishable. 1 *Bish. Cr. Law, Sec.* 861. *The State v. Merril*, 2 *Dev.*, 269.

The court erred in instructing the jury as to the effect of threats by defendant against the deceased, as the bill of exceptions shows that there was no evidence whatever that the defendant had used such threats. Such instruction could have had no other effect than to mislead the jury.

The court erred in instructing the jury that if the evidence proved beyond a reasonable doubt that the defendant was not guilty of the charge it was their duty to

acquit. Such an instruction was calculated only to mislead the jury, and to produce an impression upon their minds that it was incumbent upon the defendant to prove his innocence.

The court erred in charging the jury that the defendant could not avail himself of the claim of self-defense, unless he had good cause to believe that the deceased was about to commit a known felony, and there was no reasonable way for the defendant to escape.

The court erred in excluding evidence as to declarations made by the deceased immediately after the blow was struck. 1 *General Ev. Sec.*, 108. *The People v. Yslas*, 27 *Cal.*, 630.

We think the court erred in instructing the jury to fix the term of imprisonment of the defendant in the penitentiary. *Brown's Gen. Stat, Nebr.*, 832. *Id.*, 782.

In criminal cases the court are at least *quasi*-counsel for the deceased, and will overlook no defect in the record whether expressly assigned or not. *Reed v. The State*, 15 *Ohio*, 222.

J. R. Webster, Attorney General, for the People.

I. This court will not review or consider alleged errors in the instructions of the court below, based upon the evidence heard at the trial. The entire evidence is not embodied in the record, and is not before the court. It will be presumed that there was evidence which would justify the charge, although it does not appear at large. *Homan v. Laboo*, 1 *Neb.*, 204, 208. *The Midland Pacific R. R. Co. v. McCartney*, 1 *Neb.*, 398, 403. *State v. Shelledy*, 8 *Iowa*, 477, 511.

II. The first, third, and fourth instructions asked by the defendant, were properly refused. They were not, in the form asked, applicable to the particular case, and, though abstractly correct, were calculated to mislead the

jury. The instructions, as modified and given, were as favorable to the defendant as the evidence would justify so far as aught in the record appears. *The Commonwealth v. Drum*, 58 *Penn. St.*, 9, 21. *Stewart v. The State*, 1 *Ohio State*, 66, 71. *The Commonwealth v. Fox*, 7 *Gray*, 585, 586. *The State v. Trimmer*, 19 *Iowa*, 144, 148. *The State v. Wismark*, 36 *Mo.*, 592.

III. The alleged error in the charge which seemed, separately considered, to raise a presumption against innocence is fully cured by the context in immediate connection therewith, is not ambiguous and could not mislead the jury. *Hilliard on New Trials, Ch. XI*, § 23, *and cases cited. Sheehan v. Dalyrmple*, 19 *Mich.*, 239, 243.

IV. The court did not err in instructing the jury that the apprehension of an impending assault would not support a plea of self-defense in a case of homicide, unless the slayer also had reasonable cause to apprehend, and did apprehend, the loss of his own life or greivous bodily harm. *Commonwealth v. Drum*, 58 *Penn. St.*, 9, 21. *People v. McLeod*, 1 *Hill*, 421. *Payne v. Comm.*, 1 *Mete* (*Ky.*), 370. *State v. Neeley*, 20 *Iowa*, 109. *Rippy v. State*, 1 *Head.*, 217.

V. The rejection of evidence offered by the defendant, of subsequent threats of the deceased, he then smarting under the injury, was no error. The threats or "declarations" were made after the event (a physician had been summoned and arrived at the house), and formed no part of the *res gestae;* they in no way show malice on the part of the deceased; they do not tend to prove that the deceased made the first assault, or was about to inflict or meditated inflicting serious injury upon the accused, or that his conduct gave the accused reasonable ground

to apprehend such injury at the time the mortal wound was inflicted.

Declarations of the injured person to be admissible as a part of the *res gestae* must be made at the time of, and with reference to the injury, and must tend to characterize the act. *State v. Shelledy*, 8 *Iowa*, 477, 506. *The Commonwealth v. McPike*, 3 *Cush.*, 181, 184. *Lund v. Tyngsboro*, 9 *Cush.*, 36, *and cases cited. Donnelly v. The State*, 2 *Dutch.*, 601, 612. *Elkins v. Hamilton*, 20 *Vt.*, 627, 630.

VI. The admissibility of declaration of persons as a part of the *res gestae*, is very much confided to the discretion of the judge who has become familiar with all the antecedents in the conduct of the cause, and is a matter with which this court will not lightly interfere. *Commonwealth v. McPike*, 3 *Cush.*, 181, 184. *Donnelly v. State*, 2 *Dutch.*, 601, 612.

VII. The evidence admitted for the state against objection of the defendant, falls into four heads: *First.* Declarations of the accused made at the time relative to the injury. *Second.* Declarations subsequent, of his belief of its dangerous and fatal character. *Third.* The surroundings of the place where the injury was done, the accessibility of stones, etc. *Fourth.* The character of the injury itself.

The first are clearly admissible as a part of the *res gestae.* The second show the belief of the deceased as to the fatal character of the wound. The third and fourth as circumstantial evidence, tending to show that the injury was inflicted with a stone or other hard and rough instrument, and was felonious.

VIII. The court committed no error in leaving to the jury the fixing of the term of imprisonment. The offense was committed, and the indictment laid, under

the former criminal code which assured to the accused not only a trial as to his guilt before a jury of the county, but also that such jury, in view of all the circumstances, should fix the term of his imprisonment.

A. J. Weaver, District Attorney First Judicial District, for the People.

I. When a bill of exceptions does not profess to set out all the evidence, it will be presumed that a state of facts existed, to which the instructions complained of were applicable. *Shaw v. The State*, 4 *Indiana*, 553.

II. It is no ground to reverse a judgment if there be error in one part of the charge, when the same is explained or corrected in some other part of the charge. *Uhl v. The People*, 5 *Parker's Criminal Rep.*, 410. *The People v. Robinson*, 2 *Id.*, 287, 302, 303.

III. It is no ground to reverse a judgment, even if the court should commit an error in laying down an abstract proposition of law, nor is it error because the court refuses to instruct upon points not reached by the evidence. *Shorter v. The People*, 2 *New York*, 202. *Stewart v. The State*, 1 *Ohio State*, 73.

IV. As to error complained of, in the separation of the jury. *See Evans v. The State*, 7 *Indiana*, 271.

V. When the ground of exception is that the verdict is not sustained by sufficient evidence, or is contrary to law, and the court has overruled a motion for a new trial made on that ground, the bill of exceptions shall set out *the* evidence. *General Statutes*, 1873, *Sec.* 482, *p.* 829.

VI. It was right for the jury to fix the term of imprisonment, as provided by the law in force at the

time the crime was committed. *Hartung v. The People*, 22 *New York*, 104. *Fletcher v. Peck*, 6 *Cranch*, 87–138.

VII. The instructions asked for by the prisoner were properly refused, for if Caw believed himself about to be attacked, as supposed by the instructions asked for, his duty was to avoid the necessity of defending himself. *The People v. Sullivan*, 7 *New York*, 398.

LAKE, CH. J.

The plaintiff in error was indicted and tried for the crime of murder, found guilty of manslaughter, and sentenced to the penitentiary for the term of eight years.

Several exceptions were taken, on behalf of the plaintiff in error, during the trial in the district court, to the admission and rejection of certain testimony, but we perceive no just ground for complaint in this respect, as only a very small portion of the testimony was preserved in the bill of exceptions.

The record before us shows that the prisoner offered to prove that the deceased, some time after he received the wound of which he died, but during the same evening, made threats against the prisoner, and declared that "he could and would clean him out;" and that he made threats to go out and look for the prisoner and fight him. This testimony was rejected on motion of the district attorney, and, as we think, properly. It constituted no part of the *res gestæ*, and could shed no legitimate light on the transaction.

Again, it is objected that the State was permitted to prove that the ground just where the deceased was struck, was covered with stones or pieces of rock, left from building a wall under the house a short time before. This testimony was properly admitted. The character of

the wound on the skull of the deceased, certainly indicated that it could not have been produced with the fist. It was a very important circumstance, and eminently proper to be shown to the jury that there was an article or substance at hand, with which the prisoner could have produced the wound of which the deceased died.

It is urged as ground of error, that the jury were permitted to fix the term of the defendant's imprisonment. The crime was committed before the taking effect of our present criminal code, under which the trial was conducted. In such cases it is provided that "no offense committed, and no fine, forfeiture, or penalty incurred under existing laws, previous to the taking effect of this code, shall be affected by the repeal of any such existing laws, but the punishment of such offenses, the recovery of such fines and forfeitures shall take place as if said laws repealed had remained in force; *provided*, that the manner of procedure for the enforcement or imposition of all such punishments, and the collection of all such fines and forfeitures, shall be in accordance, or as nearly in accordance with the provisions of this code as the nature of the case will admit." *General Statutes*, 782. By section 175 of the criminal code in force when this offense was committed, it is provided that "in all cases where the punishment shall be by confinement in the penitentiary, the jury shall say in their verdict for what term the offender shall be confined." *Rev. Statutes* 1865, page 632.

Under these two provisions it has been the practice, throughout the entire state, to permit the jury, in cases arising under our former code, to fix the term of imprisonment in the penitentiary, and we see no reason for interfering with such practice. Besides, we think this construction is the proper one, and strictly in conformity to the legislative will on the subject. Mark the language used: "No offense committed * * * or penalty

incurred, previous to the taking effect of this code, shall be affected by the repeal, etc., but the punishment of such offenses * * * * *shall take place as if said laws repealed had remained in force.*"

It is true that under a proviso in the same section it is enacted, "that the manner of procedure for the enforcement or imposition of all such punishments * * * shall be in accordance with the provisions of this code (new code) as the nature of the case will admit." But this, evidently, was only intended to apply to matters *merely formal*, such as the organization of juries, mode of producing testimony, etc., in respect of which there is marked difference between the two codes.

It is also claimed that the verdict is not supported by the evidence. But this point cannot be considered here. We have no means of knowing what testimony the jury had before them. It was not preserved by bill of exceptions, which is necessary when the verdict is attacked on this ground. In the absence of a record showing the whole of the testimony submitted to the jury, this court will presume that the verdict was abundantly supported by the evidence. This rule is too well settled to need the citation of authorities in its support.

Several exceptions were also taken to the refusal of the court to give certain instructions to the jury, as requested by the prisoner's counsel. These instructions were predicated on the assumption, that there was testimony from which the jury might find that the prisoner was first assaulted by the deceased, and in danger of being seriously beaten by him unless he protected himself by striking. There is nothing in the testimony before us that warrants this assumption. There is nothing to show, or that even tends to show, that the prisoner had any reasonable apprehension of personal harm to himself at the hands of the deceased. Even his own testimony would not warrant such conclusion, while that of all the other witnesses abso-

lutely forbids it. These instructions were rightly refused. It is not error to refuse an instruction upon a question of law which has no application to the case as made by the testimony.

Several instructions appear to have been given to the jury upon abstract propositions of law, to which exceptions were taken by the prisoner's counsel. It is not claimed that these propositions were not correctly stated, but it is urged that being outside of the case it is error. We do not so understand the law. Many cases are to be found wherein it is held that even an erroneous instruction, on a point entirely outside of the case as made by the evidence, furnishes no just ground for the reversal of a judgment otherwise correct.

In the case of *Stewart v. The State*, 1 *Ohio State*, 66, the court says: "It will also be admitted that, in a criminal as well as civil cause, before a judgment can be reversed for error in the charge to the jury, it must appear that some evidence was given tending to prove a state of case in which the charge would be material. If the charge was upon a mere abstract question of law, that could not arise upon the testimony, and could not influence the jury, its character, however erroneous furnishes no ground to reverse the sentence." And surely if an erroneous statement of the law, upon an abstract question furnishes no just ground for the reversal of a judgment, a correct statement ought not to have that effect.

Undoubtedly if the instruction were so worded as to lead the jury to infer the existence of a state of facts, entirely at variance with the evidence, it would furnish a sufficient reason for setting aside the verdict. The court should not mislead the jury by directing their attention to a point upon which there is no testimony. *Snyder v. Wilt*, 15 *Penn. State*, 59. *American Transportation Company v. Moore*, 5 *Mich.*, 368.

Among the several instructions given by the judge on

his own motion, we find the following: "I may now here further charge you as a general rule of law, that the accused is presumed innocent until the contrary be proved. *And if the evidence satisfies you, beyond a reasonable doubt, that he is not guilty of the charge alleged against him in the indictment, it is your duty to acquit.*"

We are satisfied that this instruction was given inadvertently, and although an exception was taken by the prisoners counsel, the attention of the judge could not have been particularly challenged thereto, else it would have been corrected. It doubtless resulted from an oversight.

But the instruction is clearly erroneous and had a direct tendency to prejudice the prisoner. In such case we are not at liberty to say, after a verdict of guilty, that he was not prejudiced, although we may be reasonably well assured that he was not.

Another objection urged upon our attention is, that during the progress of the trial the jury were permitted to separate. From the affidavits of Edwin S. Towle, A. Schoenheit and William Mast, it would appear that during the temporary absence of the judge, the jury did separate and intermingle somewhat with the spectators in and about the court room, and that two of their number held conversations with other persons during such separation.

The prosecution does not deny that the separation actually occurred at the time mentioned, but it is insisted, and several affidavits are filed to show that the separation was by direct permission of the court; that the jury during such separation were in charge of the bailiffs of the court, and that no improper conduct on the part of any one of them was indulged in. The two jurors who are charged with holding conversations, severally make affidavit that nothing at all improper took place, at least so far as they were concerned. They give the subject of the conversa-

tions complained of, and show very satisfactorily that it had no relation whatever to the case on trial, and in this they are supported by the persons with whom the conversations took place.

Our statute permits the separation of jurors, by consent of the court, in all criminal trials, at any time before the final submission of the cause; but it is required in such case "that they shall be admonished by the court that it is their duty not to converse with, or permit themselves to be addressed by any other person on the subject of the trial, etc." *General Statutes* 1873, *Sec.* 484, *page* 830.

There is nothing in the record to show that this admonition was not given, and in such case we are bound to presume that the court performed its duty in that regard.

But even if the jury were not admonished by the court on this particular occasion as to their duty in this respect, in view of the very full and satisfactory showing of what actually occurred, and what was said by the two jurors who engaged in conversation with outside parties during this brief separation, we are of opinion that the verdict should not, for that reason alone, be disturbed.

In the case of *The People v. Douglass*, 4 *Cowen*, 26, Judge Woodworth, in delivering the opinion of the court, said: "We cannot lay down any general rule for all cases like this which may arise. They will be attended with different circumstances. We do mean to be understood, however, as saying that the mere separation of the jury, *without any further abuse*, is not sufficient ground for setting aside a verdict."

There are several other objections in this record, which however, we do not care to notice. Save in the erroneous instruction given to the jury upon the law of reasonable doubt, before considered, we find nothing that calls for a

reversal of the judgment. But, because of that instruction, a new trial must be awarded to the plaintiff in error.

JUDGMENT ACCORDINGLY.

MR. JUSTICE MAXWELL concurring.

GEORGE R. McCALLUM, PLAINTIFF IN ERROR, v. GUY A. BROWN, DEFENDANT IN ERROR.

Practice in the Supreme Court. A cause pending in the Supreme Court, plaintiff in error failing for two successive terms to appear and prosecute the same, will, on motion of defendant in error, be dismissed at costs of plaintiff in error.

THIS was a motion to dismiss a cause pending in this court. The grounds of the motion being that plaintiff in error had failed for two successive terms to prosecute the same.

E. Wakeley, for the motion.

PER CURIAM. Motion sustained and cause dismissed at costs of plaintiff in error.

DISMISSED.

HENRY A. KOENIG, STATE TREASURER, PLAINTIFF IN ERROR, v. THE OMAHA AND NORTH WESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

Grants. When the right to property is vested by grant for a particular purpose, by legislative authority or otherwise, the legislature cannot vest it for another. If the legislature declares the purpose to which the subject matter of a grant shall be applied, its power over it is exhausted, and it cannot by legislative grant be appropriated for another and different purpose, except in case of a grant with conditions subsequent, where there is a clear forfeiture, by the grantee of the conditions annexed to the grant.

Constitutional law: STATUTES CONSTRUED. The act of the legislature of Nebraska, approved February 15, 1869, donating to railroad companies which should comply with its conditions, the lands donated to the State by the United States, for works of internal improvement, is a *contract* between the State and the railroad companies which have accepted the grant of lands contained in that act; and the act of the legislature, approved March 1, 1871, which undertakes to dispose of a portion of the same lands for the purpose of building highway bridges across the Platte river, impairs the obligations of the contract between the State and the railroad companies above cited, and is unconstitutional and void.

ERROR to the district court of Lancaster county.

The opinion states the case.

J. R. Webster, Attorney General, for plaintiff in error, said, *inter alia,* that the defendant in error could only be allowed the relief prayed for, and granted by the court below, upon the assumption that the act of 1869 operated as a grant, or that, upon acceptance of its provisions, it became a contract between the state and the companies so accepting, neither of which views could by any fair construction of the act be maintained. That the act was not a grant was so clear by its own terms that this branch of the question was out of the enquiry in its construction.

And the defendant in error could not claim its benefits as a grant, nor yet as a contract, for either must be

between parties in existence and capable of assent at the time of its making. Two parties *in esse* were requisite in either case, and the defendant in error had no existence at the time of the passage of the act of 1869, nor until nearly a year thereafter. Nor were there, by any parties, mutual promises provided for by the act, nor other provisions which would make it effectual as a contract with, for, or by a corporation thereafter to be organized, and then contemplated. To construe the act as a contract on the part of the state would defeat the claim of the defendant in error, for it then had no existence or power to contract or to receive a grant, nor was its future existence contemplated or provided for. In framing acts of this nature it would be found that legislatures provide that they should operate in favor of future corporations, if such was the intention.

The act of 1869 was neither a grant nor a contract. Its provisions are the gratuitous offer of a bounty, an aid, or subsidy to such parties as during the continuance of its good pleasure should comply with the conditions imposed. The act was valid no longer, and no further than the good pleasure of the legislature, moved by considerations of public interest might prompt a continuance of the offer of its bounty to aid the development of this particular class of public improvements, and no rights could, or did, under the act of 1869, become vested until full compliance with the terms and conditions imposed. The companies did not become entitled to the benefits of the act in entirety. The benefits it confers are claimable and receivable in moieties. They did not become entitled to the maximum of benefit by merely commencing to comply with its conditions. Their rights became vested only in the several moieties provided in the act as the several sections of their roads were completed. And should the state, from any considerations of public interest moving the legislature to that course,

recede from the offer of its bounty before, by the completion of any certain ten mile section the bounty for that section was fully earned the companies would have no vested interest in the lands to which, under the act, before such action of the legislature they might become entitled, which would enable the defendant in error to maintain this action, which was one in effect against the state for specific performance. If damaged by such action they might equitably have a claim upon the legislature for relief, but they would have no right that would enable them to defeat legislation enacted from paramount consideration of public interest requiring other use or appropriation of some portion of the lands.

The law of 1869 would not bear the construction contended for by the defendant in error. The companies accepting its conditions were under no obligation to fulfill its conditions. They were required to obligate themselves to nothing. Their acceptance would have no binding force upon them ever to accept the conditions of the act. They might at any time abandon their enterprise, after completion of some section of their road and receipt of the state bounty. They were bound to nothing further. They need never extend their road. They need never equip it with rolling stock. They need never make it subservient to any public interest. They were to make it ready for the rolling stock, and nothing more. They were required to carry no burden, to do no service for the state or the public. They might even remove their iron, material, and structures. They might wholly dismantle and abandon their line and their franchise. This was not the language or conditions of contract. There was no mutuality of obligation. Every element of contract was wanting. But if it did not bind the companies, if it did not bind the defendant in error, it did not bind the state. It was a mere bounty, subsisting only during the good pleasure of the legislature to

be rescinded in its pleasure, at any time before full performance by the companies.

In support of these views *Mr. Webster* cited the following cases: *The East Saginaw Manufacturing Co v. The City of East Saginaw*, 19 *Mich.*, 259. *Fletcher v. Peck*, 6 *Cranch.*, 87, 136. *Dayton v. Coy*, 13 *Ohio State*, 81, 92. *Stourbridge Canal Co. v. Wheeling*, 2 *Barn and Ald.*, 792, 793. *Charles River Bridge v. Warren Bridge*, 11 *Peters*, 420, 545. *Illinois and Michigan Canal v. C. R. I. & P. R. R. Co.*, 14 *Ill.*, 312, 331–2. *Trustees v. Rider*, 13 *Conn.*, 87, 93. *Plank Road Co. v. Husted*, 3 *Ohio State*, 578. *Smith on Contracts*, 88. 2 *Parsons on Contracts*, 5*th Ed.*, 517, 519, *and cases cited. Church v. Crocker*, 3 *Mass.*, 17, 21. *The State v. Rackley*, 2 *Blackf.*, 249. *United States v. Arrendondo*, 8 *Peters*, 738.

Clinton Briggs, for defendant in error, urged that the act in question was a grant, although it did not by itself constitute a contract, but when any company had complied with the conditions of the act, then the contract between it and the state was complete; that this contract was mutual, the state granting the lands for a specific purpose—the company accepting the same upon the conditions imposed; that being a contract it was protected both by the Federal and State constitutions, and the act of 1871, granting a portion of these lands for another purpose was unconstitutional and void. *Dartmouth College v. Woodward*, 4 *Wheaton*, 518. *McCracken v. Haywood*, 2 *How.*, 612. *The Binghampton Bridge*, 3 *Wall*, 51. *McGee v. Matthias*, 4 *Wall.*, 143. *People v. Commissioners*, 53 *Barb.*, 70. *Penrose v. Erie Canal Co.*, 56 *Penn. State*, 46. *Warren v. Lyons City*, 22 *Iowa*, 351.

GANTT, J.

The defendant in error was plaintiff in the district court, and by its petition alleged, *inter alia*, that it is a corporation duly created under the laws of this state, and as such company commenced and built ten consecutive miles of a first class railroad, which was examined and approved by commissioners as directed by law, who made report of their examination to the governor of this state, and that the governor accepted and ratified such report, and thereupon twenty thousand acres of land were patented to the defendant in error; and that all this was done before February 15, 1870; that afterwards the defendant in error built sixteen additional miles of such railroad, ready for the rolling stock, ten miles of which have been examined, and the defendant in error is entitled to receive an additional twenty thousand acres of land for the same, and that it intends to build at least fifty consecutive miles of said road within two years. It is further alleged that the expenditure of money in the construction of the road was upon the faith and credit of the act, approved February 15, 1869, disposing of the five hundred thousand acres of land granted to this state by the United States for works of internal improvement, and upon the belief that the lands so granted would be held for the purposes alone expressed in the above named act of the legislature of this state. *Laws of* 1869, 153. It is further alleged that six railroad companies have complied with the conditions of this act, and have received lands amounting in the aggregate to two hundred and eighty thousand acres, and that of the remaining two hundred and twenty thousand acres, one half will be disposed of within the next ninety days. It is further alleged that by act of March 1, 1871, (*Laws of* 1871, 171), fifty sections of these internal improvement lands were diverted to aid in the construction of highway bridges across the Platte

river, which the state treasurer is directed immediately to select and set apart for such purpose, and that the state treasurer is about to make the s lection of the fifty sections according to the terms of this last act, and that if such selection should be made it would work great and irreparable injury to the defendant in error, and it was therefore prayed that the plaintiff in error be perpetually enjoined from complying with the terms of the act of March 1, 1871. To this petition a general demurrer was interposed. The demurrer was overruled and the injunction made perpetual. The overruling of this demurrer and the giving of judgment for the defendant in error, and not for plaintiff, is now assigned as error.

By the act of February 15, 1869, each railroad company within the state shall be entitled, upon certain conditions, to two thousand acres of land for each mile of road it may construct, as a first class railroad, after the passage of the act; and "*this grant is upon the express condition*" that no company shall receive the land until it shall have built ten consecutive miles of such railroad, which must be examined, accepted and approved by commissioners to be appointed by the governor, and in like manner such company shall receive lands as each ten consecutive miles of its road shall be completed, but in no case shall such company receive more than one hundred thousand acres; that the land received by such company shall not be sold at less than one dollar and twenty cents per acre, and must be sold within five years in tracts not larger than one hundred and sixty acres. And it is declared as a "positive condition of this *grant*" that "no company shall receive any lands after the expiration of five years from the time this act becomes a law, and whenever the land held by the state, for the purposes aforesaid, shall be exhausted in the manner provided by this act, the governor shall notify all railroad companies who may have filed their assent to its conditions, to that effect, and no

lien upon the state for lands in aid of the construction of any railroad within the state shall thereafter be valid." These are the conditions annexed to the grant, so far as need be now noticed.

The land was granted to the state by the United States by the act of Congress of September 4, 1841, 5 *U. S. Statutes at Large*, 455, which declares that "there shall be, and hereby is *granted* to each new state that shall hereafter be admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such state before its admission, and while under a territorial government, for the purposes of internal improvement, as shall make five hundred thousand acres of land." This grant was made only for the purpose of internal improvement, and the state held the lands for this specific purpose. It could make no other disposition of them, but had the right to designate to what works of internal improvement the lands should be granted, and therefore by virtue of this authority, the legislature of the state, by the act of February 15, 1869, entitled "an act to dispose of the public lands granted to the state of Nebraska, for works of internal improvement," *granted* these lands to railway companies within the state, upon conditions subsequent annexed to the grant.

The defendant in error alleges that six railroad companies have accepted the conditions of the grant, and complied with the same so far as is required by the act, and therefore have acquired vested rights to the lands. But the counsel for plaintiff in error insists that the act was neither a grant nor a contract, but that its provisions are the gratuitous offer of a bounty, an aid or subsidy; and in support of this position, cites the case of *The East Saginaw Manufacturing Co. v. The City of East Saginaw*, 19 *Mich.*, 258, *et seq.* It appears that the case arose under a legislative act which provided that "all property, real and personal, used for the manufacturing

of salt, shall be *exempt* from taxation for any purpose." The court says that "the act of 1859 is clearly in its nature and purpose a bounty law and nothing else," and discusses at some length the nature, force, and effect of such a law; and says that "it has been too often remarked, to render it important for us to enlarge upon it here, *that the power of taxation is one of the essential powers of sovereignty*, which the state must exercise again and again, as often as its needs, or its interests may require, and one that cannot in the least be crippled or abridged, without to that extent crippling the state, impairing its vitality, and in some degree endangering its existence. It is upon this ground that it has been so often and so earnestly denied by learned and able jurists, that it is within the grant of authority to any legislative body chosen as representatives of the people, to enter into any contract by which they bargain away any portion of the power to levy taxes for the needs of the government."

The main question determined in this case seems to have been, that the legislature could not by legislative act enter into any contract to bargain away any portion of the power to levy taxes for the needs of the government, because such power of taxation is one of the essential powers of sovereignty, and cannot be abridged without to that extent crippling the state, impairing its vitality, and in some degree endangering its existence.

But this Michigan act was one to "*exempt*" property from taxation. Exemption is defined to be an immunity, freedom from any service, charge, burden, taxes, etc., to which others are subject. And in such case the court says that "we must not forget that the promise and obligation, whatever it is, is on the side of the state only. Those who accept the bounty promise nothing and bind themselves to nothing." But in respect to a grant, Bouvier says that it is a generic term applicable to all transfers of

real estate; and it is said that a grant made by law vests an indefeasible and irrevocable title. 3 *Wash. Real Estate*, 173. In the case of *Terrett v. Taylor*, 9 *Cranch*, 50, 57, it is said, "we have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such doctrine is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to a free enjoyment of their property legally acquired." And in the case of *Warren v. The Mayor of Lyons City*, 22 *Iowa*, 355, it is said, "nothing can be clearer than that if a grant is made for a specific, limited, defined purpose, the subject of the grant cannot be used for another."

Hence, it may be laid down as a rule of law, that when the right to property is vested by grant for a particular purpose, by legislative authority or otherwise, the legislature cannot vest it for another. The legislature having declared the purpose to which the subject matter of the grant shall be applied, the legislative power over it is exhausted, and it cannot by legislative grant be appropriated for another and different purpose, except in case of a grant with conditions subsequent, when there shall be a clear forfeiture by the grantee of the conditions annexed to the grant.

In the case at bar, the defendant in error accepted the legislative grant of the land with a condition subsequent. It has so far complied with the terms of the grant, and has a period of five years to fulfill the conditions.

Upon the authority of the old maxim, *exampla illustrant, non restringunt, legem*, it may be observed that legislative grants of land with conditions subsequent, have frequently been made for purposes of internal improvement, and I am not aware that the legality and binding contracts of such grants have ever been questioned, when the conditions have been complied with.

However, if the conditions be broken, then the title of the grantee, by reason of such breach, is at once divested, without any entry or other action on the part of the state, as is required to defeat the estate in the case of private grant. *Kennedy v. McCartney*, 4 *Port. (Ala.)*, 141. 3 *Wash., Real Estate*, 172. But it is said if in making a grant, there be conditions subsequent annexed which becomes impossible by the act of the grantor, the estate becomes absolute. 3 *Wash., Real Estate*, 181.

Is the grant a contract? In 1850, by act of Congress, the United States granted all swamp and overflowed lands in Arkansas to the state, on the condition that the proceeds of the lands, or the lands themselves, should be applied, as far as necessary, in reclaiming them for cultivation. The state accepted the grant, and in 1851, by legislative act, provided for the disposition of these lands. In the case of *McGee v. Matthias*, 4 *Wall*, 155, the court says: "It is not doubted that the grant by the United States to the state upon conditions, and the acceptance of the grant by the state, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject matter, sufficient consideration, and consent of minds." And again, it is said that "a grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant." A contract executed and a contract executory contains obligations binding on the parties, and as the clause in the constitution which inhibits any law impairing the obligation of contracts, uses the general term "contract," without distinguishing between those which are executory and those which are executed, it must be construed to comprehend both classes of contracts; and the inhibition applies as well to contracts made with the state as to contracts made

between two individuals. *Fletcher v. Peck*, 6 *Cranch*. 137. *Enfield v. Permit*, 5 *New Hampshire*. 280.

In the case at bar, the parties to the contract, under the act of February 15, 1869, are the state and the railroad companies who have accepted the grant of lands, and who have so far, as required, complied with the conditions of the contract. It is a contract on the faith of which individuals have largely invested their money. It is, therefore, a contract within the letter and spirit of the constitution, which provides that "no law impairing the obligation of contracts shall be passed." And as the act of March 1, 1871, disposes of a portion of the same lands to another and different purpose, it impairs the obligations of the contract made between the state and the railroad companies, under the act of February 15, 1869, and is unconstitutional and void. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL concurred. LAKE, CH. J., having tried the cause in the district court, did not sit.

ISAAC WEIL AND ISAAC CAHN, PLAINTIFFS IN ERROR, V. FREDERICK F. LANKINS AND CAROLINE E. LANKINS, DEFENDANTS IN ERROR.

Creditor's Bill. An attaching creditor cannot maintain an action, in the nature of a creditor's bill, to have an alleged fraudulent conveyance from his debtor set aside. Such an action can only be maintained by a judgment creditor.

ERROR to the district court of Seward county. The opinion states the facts of the case.

Seth Robinson, for plaintiffs in error.

First. The only question in the case is this: Is an attaching creditor entitled, by virtue of the levy of an attachment on the property of his debtor, to maintain a petition in the nature of a creditor's bill to set aside fraudulent conveyances and incumbrances of the attached property made by his debtor prior to the attachment?

Second. The general principle, grounded on reason and deducible from the authorities, is that where property is subject to execution, and a creditor seeks to have a fraudulent conveyance or obstruction to a levy and sale removed, he may file a bill as soon as he has obtained a lien upon the property, whether by attachment, judgment, or the issuing of execution. *Tappan v. Evans*, 11 *N. H.*, 311. *Stone v. Anderson*, 6 *Foster*, 506. *Bay State v. Goodall*, 39 *N. H.*, 223. *Robert v. Hodges*, 16 *New Jersey Equity*, 299. *Williams v. Michenor*, 3 *Stockt.*, 520. *Bigelow v. Andress*, 31 *Ill.*, 322, *and cases cited. Rinchey v. Stryker*, 28 *N. Y.*, 45. *Falconer v. Freeman*, 4 *Sandf., Ch.*, 565. *Conroy v. Woods*, 13 *Cal.*, 626, 633. *Castle v. Bader*, 23 *Cal.*, 75. *Bump Fraud. Conv.*, 511, 513.

Third. The lien acquired by the levy of an attachment is a specific and particular lien, giving the creditor

a right to have satisfaction out of the property levied on. It is therefore, similar in character and equal in dignity to a lien by mortgage and superior to a judgment lien, which is of a general nature. *Burnell v. Robertson*, 5 *Gilman*, 282. *Carter v. Champion*, 8 *Conn.*, *549, *558. *Merriam v. Sewall*, 8 *Gray*, 316, 320. *Franklin Bank v. Batchelder*, 23 *Maine*, 60. *Davenport v. Tilton*, 10 *Met.*, 320. *Downer v. Bracket*, 21 *Verm.*, 599. *Vreeland v. Bruen*, 1 *Zabr.*, 214.

Fourth. Our statute (Code Civ. Proc., Sec. 212,) like the statutes of all other states, provides that the order of attachment binds the property attached from the time of service; but this statute cannot be stretched to cover the demands of the case at bar, where prior to the commencement of the attachment suit the defendant has conveyed the property, though fraudulently, to a third person not a party to the suit; and no doubt a *bona fide* purchaser, without notice, *pendente lite*, from such fraudulent grantee, would take the title unaffected by the pendency of the suit. The doctrine of *lis pendens* applies only to those who acquire some interest in the subject-matter of the suit from a defendant therein after the pendency thereof. *Stuyvesant v. Hone*, 1 *Sandf. Ch.*, 419. *Stuyvesant v. Hall*, 2 *Barb. Ch.*, 151. *Drake on Attach.*, *Sec.* 224.

T. M. Marquette and H. C. Page, for the defendants in error.

Before a creditor's bill can be brought, the remedy at law must first be exhausted by obtaining a judgment, issuing an execution, and having it returned *Nulla Bona*. *Newman v. Willetts*, 52, *Ill.*, 98. *Turner v. Adams*, 46 *Mo.*, 95. *Tantum v. Green*, 21 *N. J.*, *Eq.* 364. *Griffin v. Nitcher*, 57 *Me.*, 270. *Cripen v. Hudson*, 13 *N. Y.*, 161. *High on Injunction*, 25, 26, 27, 94 *and* 250.

MAXWELL, J.

On the 16th day of September, 1871, the plaintiffs in error, commenced an action against Frederick F. Lankins in the District Court of Seward County, to recover the sum of $735.39, and caused an order of attachment to be issued against the property of said Lankins. Lots 7, 10 and 11, in Block 12, in the town of Seward, were attached as the property of Lankins, the title at that time being in the name of Caroline E. Lankins, the wife of Frederick F. Lankins. On the 13th day of February, 1872, the plaintiffs in error filed their petition in said court, reciting the above facts, and alleging that the transfer of said lots to Caroline E. Lankins, was made after said indebtedness accrued, and for the purpose of defrauding creditors, more particularly the plaintiffs in error, and praying that said deed might be set aside, and the legal title declared to be in Frederick F. Lankins.

The defendant, Caroline E. Lankins, demurred to the petition of plaintiffs in error on the ground that the facts therein stated were not sufficient to constitute a cause of action. The demurrer was sustained by the court and plaintiffs excepted.

The cause is brought to this court by petition in error.

It appears from the petition that at the time the plaintiffs below commenced the action to set aside the conveyance to Caroline E. Lankins as fraudulent, they had not recovered a judgment against Frederick F. Lankins, and the only ground on which they base their claim to relief is, that they have a *lien* on said property by reason of the attachment.

In the case of *Brooks, et al., v. Stone, et al.*, 19 *Howard, N. Y. Pr. R.*, 395, the court held, "where a plaintiff is an *attaching creditor* of real estate, in an action for money due on a bond, he cannot sustain an action to set

aside an alleged fraudulent judgment of confession previously made by the defendant, and have an injunction to restrain the sale of the attached property, under and by virtue of such alleged fraudulent judgment. The plaintiff's complaint in such case, does not show that he is entitled to the relief demanded, as it does not show that he is a *judgment creditor*, and his remedy at law exhausted. *Non constat* that he will ever get a judgment."

In the case of *Jones v. Green, et al.*, 1 *Wallace*, 331, the court held: "A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the debtor's property, or some fraudulent transfer of it. In the first case the court, when its aid is invoked, looks only to the execution, and the return of the officer to whom the execution was directed. The execution shows that the remedy afforded at law has been pursued, and of course, is the highest evidence of the fact. The return shows whether the remedy has proved effectual or not; and from the embarrassments which would attend any other rule the return is held conclusive. * * *

In the second case the equitable relief sought rests upon the fact that the execution has issued and a specific lien has been acquired upon the property of the debtor by its levy, but that the obstruction interposed prevents a sale of the property at a fair valuation. It is to remove the obstruction, and thus enable the creditor to obtain a full price for the property that the suit is brought." We think it is clear that a creditor's bill to set aside a fraudulent conveyance, can only be maintained by a *judgment creditor*. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

ANDREW TYNAN, PLAINTIFF IN ERROR, V. GEORGE TATE, DEFENDANT IN ERROR.

Arbitration. The mode of proceeding by arbitration provided by statute, is not exclusive. An award upon a submission, valid at common law, may support an action.

ERROR to the district court of Nemaha county. The opinion states the case.

J. H. Broady and E. W. Thomas, for plaintiff in error.

The court erred in refusing to allow the plaintiff to prove a parol submission to arbitrators, and an award thereunder. The General Statutes of Nebraska have not changed the law in relation to submitting matters in controversy to arbitration, except in cases where the parties enter into a submission in pursuance of the provisions they contain. They do not declare all other submissions void, nor do they affect a parol submission; such submission is as valid as it ever was. Statutes like the one in Nebraska, prescribing a certain form of submission to arbitration, and for enforcing, by special proceedings in court, awards made thereunder, are very common, and are never construed as taking away the common law mode of arbitration. Unless the parties desire to make the award a judgment of a court, under the statute, upon which an execution may issue, they may submit matters in controversy by bond or contract in writing, or even by verbal agreement. *Miller v. Brumbaugh*, 7 *Kansas*, 343.

In the above case, the question is carefully considered, and many authorities are cited. *Burnside v. Whitney*, 21 *N. Y.*, 148. *Dickerson v. Tyner*, 4 *Blackford*, 253.

I. N. Shambaugh, Stevenson & Hayward, and W. T. Rogers, for defendants in error.

MAXWELL, J.

The petition states that in the spring of 1871, defendant employed plaintiff to break one hundred and twenty-six and one-half acres of land at $2.90 per acre; that plaintiff completed the breaking by the 20th day of June, 1871; that a dispute arose between the parties as to the number of acres broken up, and the matter was submitted by agreement of the parties to T. Duncan, E. Phillips, and Doctor Collins, each party agreeing to abide the award; that the arbitrators so appointed made their award; that plaintiff had broken one hundred and twenty-one and one-half acres of land, the pay for which, amounting in the aggregate to the sum of $353.56. Defendant paid plaintiff on said award the sum of $270, leaving a balance of $83.56.

The defendant answered, denying the allegations of the petition. On the trial of the cause in the district court the plaintiff, testifying in his own behalf, was asked the following question: "Will you state to the jury all you know about a submission to the arbitration of T. Duncan, E. Phillips and Doctor J. Collins, of the matters in controversy in this case?" Defendant objected to the question on the ground "that the petition did not state any such arbitration as the statute provides for," which objection was sustained by the court, and to which ruling plaintiff excepted. Plaintiff then offered to prove the terms of the alleged arbitration and the award, to which defendant objected. The objection was sustained, and plaintiff excepted. The jury found a verdict for the defendant, upon which judgment for costs was entered.

The only question in this case is, whether an award of arbitrators not in conformity to the statute, is valid and binding on the parties. At common law "a submission might be either by word or deed. If the submission be by word there is no remedy to enforce the party to

perform the award; but reciprocal actions on the case, and an action of debt will lie, if money be awarded, for it is in the nature of a simple contract." 1 *Bacon's Abr.*, 306. "But now an action may be maintained in all cases on the submission itself." *Purslow v. Bailey*, 2 *Ld. Raymond*, 1039.

In the case of *Burnside v. Whitney*, 21 *N. Y.*, 148, the court said: "It has been often held that the statute prescribing certain forms for submission to arbitrators, and allowing the parties to agree that a judgment of a court of record, designated in the instrument of submission, should be rendered upon the award, was cumulative merely, not exclusive; and that an award pursuant to the submission which would have been valid at common law, but which did not conform to the statute, would support an action." *Browning v. Wheeler*, 24 *Wend.*, 258. *Diedrick v. Rickley*, 2 *Hill*, 271.

Arbitrators being chosen, and they acting within the scope of their authority, the award becomes the act of the parties, and decides the rights of the parties, as effectually as a judgment, and is as binding, until set aside by a proper proceeding.

The provisions of our statute in relation to arbitration is not exclusive, but cumulative merely, and where parties have submitted matters of difference to arbitrators of their own selection, and an award has been made in pursuance of such submission, the award will be deemed valid and binding until set aside.

The court therefore erred in excluding the testimony of the plaintiff as to the submission and award. The judgment of the district court must therefore be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHIEF JUSTICE LAKE concurs.

THE CONTINENTAL INSURANCE COMPANY OF THE CITY OF NEW YORK, PLAINTIFF IN ERROR, V. N. LIPPOLD, DEFENDANT IN ERROR.

Insurance: NOTICE OF LOSS. A condition in a policy of insurance requiring the insured, in case of fire, to give immediate notice of his loss, need not be literally complied with. The exercise of due diligence, and the giving such notice as may be reasonable in the particular case, is all that can be demanded.

———: ———. The clause in a policy of insurance relating to preliminary proofs, notice, etc., should always be construed with great liberality.

ERROR to the District Court of Richardson county. The opinion states the facts of the case. Plaintiff in the court below, Lippold, had judgment and defendant brought the cause here by petition in error.

J. H. Broady and E. W. Thomas, for plaintiff in error.

It is not disputed that the building was burned April 13th or 15th, 1871. This is stated in the petition, the answer, the testimony of Lippold, and in his letter of July 15th, 1871, to Taylor the Superintendent of the Ins. Co. at Chicago. It is clear from the evidence, that the first and only notice of the fire given to the company was contained in the said letter to Taylor.

The policy required that "immediate written notice of the loss should be given to the company in New York, or at the office of the Western Department in Chicago." The bill of exceptions shows that the proper notice was not given, and no excuse is shown for the failure to give the same.

The giving of the notice in the manner, and within the time required by the policy, is a condition precedent without which no recovery can be had. *Gies v. Bechtner*, 12 *Minn.*, 279. *Inland Ins. and Dep. Co. v. Stauffer*,

33 *Penn. St.*, 397. *Davis v. Davis*, 49 *Me.*, 282. *Cornell v. Milwaukee Mut. Ins. Co.*, 18 *Wis.*, 387.

The notice in this case was not given within the time required by the policy. The giving thereof three months after the fire, was neither a literal nor a substantial compliance with the condition of the policy. *Inman v. West. Fire Ins. Co.*, 12 *Wend.* 452. *McEvers v. Lawrence*, 1 *Hoff. Ch.*, 171. *Mellen v. Hamilton Ins. Co.* 17 *N. Y.*, 617. *Trask v. State Fire and Mar. Ins. Co.*, 29 *Penn. St.*, 198. *Whitehurst v. N. C. Mut. Ins. Co.*, 7 *Jones Law N. C.*, 433.

The giving of the notice to Walther, the local agent at Arago, cannot be deemed a compliance with the conditions of the policy. *Cornell v. Milwaukee Mut. Ins. Co.*, 18 *Wis.*, 387. *Patrick v. Ins. Co.*, 43 *N. H.*, 621.

If it should be contended that the assured had a right to depend on Walther's giving the notice, we say if he employed or requested Walther to notify the company, Walther was *pro hoc vice* the agent of the assured, and not of the insurance company, and it was incumbent upon the assured to prove that his said agent did give the notice within the required time. Not only has nothing like this been proved, but Walther himself testifies that he did not give such notice. Under the pleadings the burden of proving that notice was given lies upon the assured.

There is nothing in the evidence tending to show that the insurance company waived its objections to the fact that the notice was not given in time. If there is any such waiver, it must be in Taylor's letter to Lippold, dated August 16th. But this letter cannot be construed as a waiver. *Cornell v. Milwaukee Ins. Co.*, 18 *Wis.*, 387. *Edwards v. Baltimore Ins. Co.*, 3 *Gill.*, 176. *St. Louis Ins. Co. v. Kyle*, 11 *Mo.*, 278. *Trask v. State Fire and Mar. Ins. Co.*, 29 *Penn. St.*, 198. *Bartlett*

v. Union Mut. Ins. Co., 46 *Me.*, 500. *Barnes v. Union Mut. Ins. Co.*, 45 *N. H.*, 21.

The court erred in refusing to grant a peremptory non-suit on the trial. The courts of this state, in a proper case, have the power to take the evidence given by the plaintiff from the jury, and order a peremptory non-suit. *Ellis & Morton v. Oh. L. Ins. Co.*, 4 *Oh. St.*, 628 *and authorities there cited. Allen v. Pegram*, 16 *Iowa* 174.

A. Schoenheit and J. D. Gilman, for defendant in error.

I. The company is estopped from requiring of the insured technical proof of the loss, etc., when its agent, when called upon by the insured, does anything which leads the insured to believe that such proof, etc., is unnecessary, or lulls the assured into a belief that such proofs are not required. *Manhattan Insurance Company v. Stein & Zang*, 5 *Bush.*, 652. *Ætna Insurance Co. v. Jackson & Co.*, 16 *B. Mon.*, 242.

II. When the company declines to receive the proof of loss or to pay the loss because of insufficiency or informality of proofs, or because made out of time, it is bound to declare to the assured the grounds of such refusal, as then known or believed to exist by its officers or agents, otherwise the objection will be waived. *O' Conner v. Hartford Fire Insurance Co.*, 31 *Wis.*, 160. *Killips v. Putnam Fire Insurance Co.*, 28 *Wis.*, 472. *Tayloe v. Merchants Fire Insurance Co.*, 9 *How.*, 390. *Columbia Insurance Co. v. Lawrence*, 10 *Peters*, 507. *Clark v. New England Mutual Ins. Co.*, 6 *Cush.*, 342. *Vos v. Robinson*, 9 *Johns*, 192.

MAXWELL, J.

On the 11th day of May, 1870, the plaintiff in error insured a dwelling house for defendant in error, situated in the town of Arago, for the sum of $350.00, the policy to continue in force until the 11th day of May, 1875. The policy contained a provision that in case of loss, defendant in error should immediately notify the general agent at Chicago. The insurance was effected through a local agent residing in the town of Arago. On the 16th day of April, 1871, the house was destroyed by fire. A few days after the fire, defendant in error requested the local agent at Arago to notify the company of the loss. The local agent stated that he had seen the general agent, and had a conversation with him in reference to the loss. About the 15th day of July, 1871, defendant in error employed one Gus. Doerfelt to write a letter for him to the general agent of the company, stating the loss of the property. On the 16th day of August, 1871, the general agent addressed a letter to defendant in error, stating that there were suspicious circumstances connected with the fire which ought to be explained. On the 1st day of January, 1872, the defendant in error made formal proof of loss, and transmitted the same to the general agent at Chicago. Suit was instituted against the company, in the district court of Richardson county, on the 22d day of January, 1872. The cause was tried by a jury, and the defendant in error recovered the sum of $253.78.

The only errors assigned are: *First.* That the court erred in overruling the motion for a non-suit. *Second.* That the court erred in overruling the motion to set aside the verdict. The only objection urged by the plaintiff in error, in this court, as ground for reversing the judgment of the court below, is that no notice of the loss was given, in the time required by the terms of the

policy. No action can be maintained on the policy until the *proof* of loss is made, or waived by some act of the insurer. Yet it is a sufficient compliance with the condition of a policy, requiring notice of loss to be given "forthwith" or "immediately," that the party has used due diligence under all the circumstances. *New York Insurance Co. v. National Insurance Co.*, 20 *Barb.*, 475. *Bumstead v. The Dividend Insurance Co.*, 12 *New York*, 81.

In the case of the *Columbian Ins. Company v. Lawrence*, 2 *Peters*, 50, a certificate accompanied the proof of loss not in conformity to the conditions of the policy. The case was reversed in the supreme court and remanded to the circuit court and afterwards dismissed by plaintiff without prejudice. A new certificate was procured from a magistrate in compliance with the rules of the company, on the 14th day of February, 1829, five years after the loss, and an action was commenced thereon in September, 1831. The condition of the policy required "all persons assured by the company, sustaining any loss or damage by fire forthwith to give notice to the company, or as soon thereafter as possible to deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same by their own oath and affirmation, and by their books of account, or proper vouchers, as shall be reasonably required; and shall procure a certificate under the hand of a magistrate, or sworn notary of the town or county in which the fire happened, not concerned in such loss, directly or indirectly, importing that they are acquainted with the character and circumstances of the person or persons insured; and do know or verily believe that he, she or they, really and by misfortune, without any kind of fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and until such affidavit and certificate are produced

the loss claimed shall not be payable." The court, says Story, J., 10 *Peters*, 513, "We think the true intent and meaning of it is, that the certificate must be procured within a reasonable time after the loss. It would be a most inconvenient course to adopt a different construction, not required by the terms of the clause or the context, as it would make the material inquiry not the production of the certificate, but the possible diligence of procuring it. * * * So that it is manifest, that the assured would not be entitled to maintain any action, until he had furnished all the preliminary proofs; so that the delay is not injurious to the company, but solely to the assured, by depriving him of his right to judgment until it is procured. * * * We are of opinion, that under all the facts and circumstances, the non-production of the proper certificate at an earlier period is fully accounted for; and that the proper certificate was procured in a reasonable time. * * * If the company had contemplated the objection, it would have been ordinary fair dealing to have apprised the plaintiff of it." *Westlake v. Saint Lawrence Ins. Co.*, 14 *Barb.*, 206. *Clark v. New. Eng. Ins. Co.*, 6 *Cush.*, 342. *Francis v. Ins. Co.*, 1 *Dutcher*, 78. *Bartlett v. Union Mutual Ins. Co.*, 46 *Me.*, 500.

The clause in a policy as to preliminary proofs, notice, etc., should always be construed with great liberality; and it only requires reasonable information to be given so that the company may be enabled to form some estimate of its rights and duties before it is obliged to pay. *McLaughlin v. Wash. Co. Ins. Co.*, 23 *Wend.*, 525. *Lawrence v. Ocean Ins. Co.*, 11 *John.*, 240. *Smith's Mercantile Law*, 516, *note* 10.

In this case, no objection is made to the form of the proof of loss furnished in July, 1871, nor is the refusal to adjust the loss put on the ground that it is not in proper form. If objection is made by the company to the form

of the proof of loss, it is its duty to notify the party of the alleged defect, and failing to do so, it will be deemed waived. A contract of insurance, like other contracts, should receive, if possible, such construction as will carry it into effect. The insurer having received the consideration for assuming the risk, there is no reason why he should be discharged from liability in case of loss, on slight or merely technical grounds. In this case it was a proper question to the jury, whether the plaintiff in the court below had used due diligence in furnishing the preliminary proofs of loss. The motion for a non-suit was therefore properly overruled, and the question having been fairly submitted to the jury, who found in favor of the defendant in error, we see no error in the record. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

CHIEF JUSTICE LAKE concurred.

SEAMAN C. RIPLEY, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF GAGE COUNTY, DEFENDANTS IN ERROR.

Mechanic's lien: COUNTY BUILDINGS. The lien given mechanics, under the statutes of Nebraska, for work done or materials furnished for the erection, etc., of any house, mill, or any other building, does not apply in the erection of *public buildings* for the use of a county.

———: SUB-CONTRACTOR. No valid claim exists in favor of a sub-contractor, against the owner of a building, unless such building is also subject to a lien, under the law, in favor of the person for whom the work is done, by such sub-contractor.

———: ———. Statutes relating to Mechanic's Lien, and power of county commissioners in the erection of public buildings, reviewed per LAKE, CHIEF JUSTICE.

ERROR to the District Court of Gage county. It was an action brought by plaintiff in error, under the statute

relating to "mechanic's liens," the claim being for material furnished as a sub-contractor for the erection of a court house owned by defendant in error. The defendant in error demurred to the petition, and the same being sustained, judgment dismissing plaintiff's petition, and for costs, was entered. The cause was then brought here by petition in error.

Colby & Sale, (with whom was also *William H. Ashby*), for plaintiff in error.

I. Counties, in the exercise of the express and substantive powers conferred upon them by statute, take, by implication, all the reasonable and ordinary modes of executing such powers which a natural person may adopt; their contracts are to be construed in the same manner, and they are bound by the same general laws. *Touchard v. Touchard*, 5 *Cal.*, 306. *Dillon on Corporations*, 387.

The power to erect public buildings is expressly given by our statute to counties, and the defendant, in the building of the court house, for which the said materials were furnished, was but exercising an express power. The letting of contracts, with the power of sub-contracting is one of the reasonable and ordinary modes adopted by natural persons in the exercise of similar powers, and this was the mode adopted by the defendant in the erection of the court house, as set forth in plaintiff's petition. Hence we must conclude, on general principles, that the defendant is liable for materials furnished by the plaintiff as sub-contractor, in the same manner and to the same extent as a natural person.

II. The terms used and the remedies given by the statute, under which plaintiff's action was brought, are of a general nature, and are as applicable to municipal corporations as to persons, unless there is some express exception elsewhere in the laws of the state by which

they may be modified. The remedy is against *any building* and the *owner of any building*, which must include, according to the established interpretation of statutes, corporations, and their property. Each organized county is made by statute a body corporate, and as such is empowered to sue and be sued. Thus a county is given all the legal rights and remedies of a natural person, unless elsewhere specially restricted. But the right to sue implies no greater legal privileges than the liability to be sued implies legal obligations; and hence all the remedies of a natural person may be exercised *against* a county, unless specially excepted. *General Statutes, Chap.* 13, *Sec.* 1. *Houck on Liens*, 78. *Dillon Mun. Corp.*, 387. *Maher v. City of Chicago*, 38 *Illinois*, 266.

What are the exceptions to the liability of a county to respond to legal remedies? We submit that there is but one exception given by our statute that can by any process of reasoning, be tortured into exempting counties from liability under the mechanic's lien law, and that is contained in chapter 13, section 6, of the General Statutes. This provides that when a judgment shall be obtained against a county, no execution shall issue thereon, but that the amount of the judgment shall be levied and collected by tax. *R. S.*, 1866, *Chap.* 9, *Sec.* 31. *Walker v. Whitehead*, 16 *Wallace*, 314.

This section, by a reasonable interpretation, would seem to apply only to judgments in personal actions, and is not intended to restrain actions *in rem* against the property of the county.

The power to purchase and sell property, and to borrow money on the credit of the county, as given by our statute, would seem to carry with it the power to mortgage and pledge. In fact, the authorities agree that the power to mortgage, if not expressly given nor denied, would be an incident to the power to hold and dispose of property and to make contracts. *Dillon on Mun. Corp.*,

434. *Branham v. Mayor of San Jose*, 24 *Cal.*, 585. *Adams v. Memphis & Little Rock R. R.*, 2 *Cold.*, 645.

Now, it follows, as counties can mortgage and pledge their property, that the property so mortgaged and pledged can be reached by proceedings *in rem* notwithstanding the statute exempting their property from seizure by ordinary executions.

Therefore, we must conclude that the foreclosure of a mechanic's lien against a county, which is a proceeding *in rem* purely, is not restrained by the section referred to, but that that section applies only to personal actions; and we must further conclude that in proceedings to reach particular property either on a contract, as in the case of a mortgage, or by statute, as in the case of a mechanic's lien, a county stands in precisely the same position as a private corporation or a natural person.

And it is believed that, although there is some apparent conflict in the authorities, yet that, when rightly understood, they concur in sustaining this view. *See* 17 *Indiana*, 225, where the supreme court decides that *prima facie* a lien can be foreclosed against a public building; and also 3 *Allen* (*Mass.*), 307, where a lien is foreclosed against a school-house. *See Houck on Liens*, 84, where it is held that even where there can be no execution, still a lien could be enforced.

III. Plaintiff's action is not brought for the foreclosure of a lien against the property of the county, but is a purely personal action. *Chapter* 42 *of the General Statutes* provides remedies for two separate classes of persons, viz: contractors and sub-contractors. To contractors a specific lien is given against the property, for the erection of which materials were furnished, or upon which the labor was expended. To sub-contractors only an action at law against the owner of the building is given. The remedy in the first case is by a proceeding

in rem, but in the second case it is by an action *in personam*. Plaintiff's action is of the second class, and seeks no specific property, and hence the objections brought against the foreclosure of a lien would not apply. Indeed we could admit, for the purpose of argument, that a mechanic's lien could not be foreclosed against a municipal corporation, and still the remedy sought by plaintiff would stand against the defendant.

The only arguments against the foreclosure of a lien against a county are, first, that the property of a county is exempt by statute from execution; and second, that the exercise of such a remedy might subject a county to great embarrassment and loss. But these reasons have no force whatever when applied to the present case, because neither of those results could, by any construction, follow the judgment asked. There is no demand against any particular property of the county, and only a personal judgment, to be collected in the ordinary way, by taxation, is desired. The remedy given is in the nature of a garnishment, and the reasoning which the weight of authority gives for making municipal corporations liable as garnishees, applies with even greater force to their liability to the statutory remedy given to sub-contractors. The only reason which can be brought against their liability is the inconvenience to which they might be subjected, which reason appears most trivial when taken in connection with a statute which allows them all legal remedies—all the ordinary modes of exercising their express powers—and permits them to enter into the complex relations of buying and selling property, borrowing money, and contracting debts.

IV. Municipal corporations are liable to garnishment, not only for ordinary debts, but also for the salaries of their officers due and unpaid. *City of Newark v.*

Funk, 15 *Ohio State* 462. *Morse v. Towns*, 45 *New Hamp.*, 185. *Culver v. Hall*, 20 *Conn.*, 416. *Dillon on Mun. Corp.*, 113.

S. C. B. Dean and W. J. Galbraith, for defendant in error.

I. The act of the legislature, by virtue of which the plaintiff seeks to make the county liable, is not intended to apply to municipal corporations. The language of the entire act does not admit of such a construction. The act ought not to be extended by judicial construction to persons or things the legislature has not included therein. In this respect it should be strictly construed. *Ayers v. Revere, et al.*, 1 *Dutcher*, 481. *Brady v. Anderson*, 24 *Ill.*, 112. *Phillips v. Stone*, 25 *Ill.*, 80. *Thompson v. Yates*, 28 *Howard Prac.*, 147. *Roberts v Fowler*, 3 *E. D. Smith*, 632. *Williams v. Controllers*, 18 *Penn. State*, 275. *Cook v. Head*, 21 *Ill.*, 425.

II. A construction of the act making it include municipal corporations is contrary to public policy. The public interests would suffer if the officers of municipal corporations were compelled to give their attention to contracts and claims arising therefrom, between the parties mentioned in the act. *The People, ex rel., Spaun v. Mayor of Omaha*, 2 *Neb.*, 166. *Williams v. Controllers*, 18 *Penn. State*, 275. *People, ex rel., Hudson v. Butler*, 2 *Neb.*, 5.

III. The sections of the act under which the plaintiff proceeds are intended to apply only to such property as is the subject of a mechanic's lien by virtue of section first of said act. The intention of the legislature is by the first section to secure persons performing labor, furnishing materia', etc., for the owner or his agent, by a lien against the building, etc. The intention of the section,

under which the plaintiff proceeds, being to secure those who furnish material, perform labor, etc., for the contractor, by giving them a claim on subsequent payments. We hold that it was the intention of the legislature only to allow claims, on such subsequent payments, in such cases, as where by the first section a mechanic's lien could be had. The public buildings of a municipal corporation are not the subject of a mechanic's lien. The intention of a lien is to give the plaintiff such a claim upon the property which is the subject of it, as that it may be sold to satisfy the same; and public buildings cannot be sold by virtue of an execution. The legislature has provided a method for satisfying judgments against municipal corporations which we hold to be exclusive. *General Statutes of Nebraska, page* 934. *Culbertson v. Duly*, 7 *Watts & Sergeant*, 197. *Williams v. Controllers*, 18 *Pa. State*, 275. *Dillon on Corporations*, 432 *and* 433, *and cases cited in note* 1, *p.* 433.

IV. The portion of the act under which the plaintiff proceeds is in the nature of garnishment, and such process cannot be had against a municipal corporation, unless expressly provided by the act. *Spaun v. Omaha*, 2 *Neb.*, 166. *Burnham v. The City of Fond du Lac*, 15 *Wis.*, 193. *City of Erie v. Knapp*, 29 *Penn. State*, 173.

The petition of the plaintiff does not show a demand or a presentation to the commissioners. The only way the claim could be paid (granting the liability,) is by orders drawn on the county treasurer. Owing to the multifarious character of the public business, the commissioners are not supposed to know the kind, or even the existence of claims, until the same are presented, and neither they nor the county are in default until the demand is made. The public would be greatly injured under a contrary rule. *Luzerne County v. Day*, 23

Penn. State, 141. *Love v. Commissioners of Chatham*, 64 *N. C.*, 706. *Brewer v. Otoe County*, 1 *Neb.*, 373. *General Statutes*, 234, 238.

LAKE, CH. J.

The single question presented for our determination in this case, is whether our mechanic's lien law can have any application whatever in a case where work is done, or materials are furnished for the erection of county buildings.

The case has been so ably presented, and the authorities so fully cited, in support of the position taken by the respective counsel, that I have been greatly aided in my examination of the question.

This precise question being a new one in this court, in view of the great conflict in the authorities cited from the various states, we feel at liberty to give that construction which seems to us to be most in harmony with the policy of our own statutes, and the previous decisions of this court upon analogous questions.

The lien law in question provides remedies for two distinct classes of persons viz: original contractors, and subcontractors, laborers, and material men. To the former there is given by the first section of the act a specific lien against the property, in the erection of which the work was done, or materials were furnished, while to the latter there is given no lien upon the structure, but, by a compliance with the requirements of section two, they may, under certain conditions, have a personal claim against the owner thereof, to be enforced by an ordinary civil action.

The plaintiff seeks to recover against the county, as a material man, under section two, he having furnished to Messrs Binns and Fordham, the contractors for the erection of a court house, the brick used by them in its con-

struction, and having also taken all the steps required by the statute to entitle him to recover the amount of his demand from the owner of the building, if it belonged to a private person.

It is undoubtedly true that the real object of the legislature in giving to mechanics and other persons, liens for work done in, or materials furnished for the construction of any building, was to furnish them with a substantial security for the payment of their demands, where none existed before, as against the owner thereof. But in case of contractors for the erection of public buildings, there was no necessity for any such protection, for ample provision already existed for raising the necessary funds, on account of any such demand, the public credit being pledged for the payment of all just demands against the county.

Section fourteen, of chapter thirteen, General Statutes, 235, among other things provides, that the board of county commissioners shall have power "to borrow upon the credit of the county a sum sufficient for the erection of county buildings." This power, it is true, can only be exercised by permission of the electors of the county. Undoubtedly if the county had the necessary funds on hand, not pledged by the statutes to other uses, the commissioners could, of their own motion, and without a vote of the electors of the county, appropriate the same to the erection of a court house or other necessary county buildings, but it is equally clear that they have no authority to pledge the credit of the county to obtain the money for such purpose, unless expressly authorized by a vote of the people to do so.

Again, it is expressly provided in section six, of the same chapter, above referred to, that no execution shall be issued on a judgment against a county, but that the amount thereof shall be raised by a tax levied upon all the taxable property within such county.

Now, I consider it to be quite manifest from these statutes, that the legislature never intended that county buildings should be subject to sale by judicial process, no matter what the character of the demand may have been upon which the judgment was rendered, and that they are necessarily as completely withdrawn from the operations of the mechanics lien law, as if they had been expressly excepted by the most positive and unambiguous words. But should we hold otherwise, it would follow, as a necessary sequence, that in case of a recovery by a contractor under the provisions of the lien law, the building in question could be seized and sold for its satisfaction, for it cannot be said that the lien exists unless the structure may be sold to satisfy it.

But it was urged upon the argument, with considerable force, that although it shall be held that the *first* section of the act has no application to county buildings, yet as the remedy sought by the plaintiff, under the *second* section, is personal merely, and the judgment when recovered, to be satisfied by the levy of a tax for that purpose, as the statute provides, and not by a sale of the court-house, there is no good reason why the action may not be maintained.

This position, though urged with much plausibility, cannot be sustained. It is very clear to my mind, that the second section of the act applies only to those cases where the original contractor may have a lien on the building, under the first section. No other conclusion can possibly be reached without totally disregarding the plain letter of the statute.

By section one it is enacted that "any person who shall perform any labor, or furnish any materials for the erection, reparation, or removal of any house, mill, manufactory, or other building or appurtenance, *by virtue of a contract or agreement, express or implied with the owner thereof, or his agent, shall have a lien,*

etc." From this it will be seen that it is essential to the existence of the lien, that the work be done, or the materials be furnished, under a contract or agreement with the owner of the building or his agent.

The second section, under which the plaintiff has proceeded, provides that "every mechanic, or other person, doing or performing any work, or furnishing any materials for the erection, reparation, or removal of any house, mill, etc., erected, repaired, or removed, *under a contract or agreement, express or implied, between the owner thereof, or his agent, and the builder or other person,* * * * * whose demand for work so done, or materials furnished, has not been paid, may deliver to the owner of such building, or his agent, an attested account of the amount and value of the work and labor thus performed, or materials thus furnished, and remaining unpaid," and thereupon such owner, or agent, is required to retain the amount thereof out of subsequent payments due the contractor, for the benefit of the person doing such work, or furnishing such materials. By subsequent sections, it is provided what steps shall be taken by the owner of the structure to ascertain the correctness of the account, and also under what circumstances he shall be liable, at the suit of such sub-workman or material-man, for the amount thereof. But it should be observed, that by unambiguous language, the remedy afforded by the second section is confined to those cases, exclusively, wherein there is a contract or agreement between the owner of the building, or his agent, and the person for whose benefit the work is done, or the materials are furnished, the very cases indeed, in all respects, wherein the original contractor would be entitled to have a lien, upon the structure, for the amount due him on account of its construction.

Indeed, I think the conclusion is irresistible, that both the first and second sections of the act refer to precisely

the same kind of structures, and that a mechanic or other person performing labor, or furnishing materials, as contemplated by the second section, can have no valid claim therefor against the owner of the building, unless such building could be subject to a lien, under the law, at the instance of the person for whom the work was done, or the materials were furnished.

The legislature having made ample provision for the payment of debts contracted for public buildings, this must be held to be exclusive, and to forbid a resort to any other method. Nor is there any hardship in this rule, for all persons who deal with municipal corporations, either directly or indirectly, are chargeable with full knowledge of their powers and liabilities, under the statutes creating or regulating them, and of course must be held to act at their peril.

For these reasons the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

MR. JUSTICE MAXWELL concurs.

APPENDIX

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA,

PRIOR TO

JANUARY TERM, 1873.

PRESENT:

HON. OLIVER P. MASON, CHIEF JUSTICE.
" GEORGE B. LAKE, } ASSOCIATE JUSTICES.
" LORENZO CROUNSE, }

THE PEOPLE, EX REL., A. W. TENNANT v. DELOS PARKER.[a]

Constitutional law: CONVENING THE LEGISLATURE BY PROCLAMATION. A proclamation by the executive calling for a convention of the legislature, issued under section nine, title "Executive" of the Constitution, may be revoked by a second one promulgated for that purpose, and any attempt on the part of members to assemble in pursuance of the first call, is without authority, and every act done by them as a legislative body is void.

———. MASON, CH. J., dissented.

IN this case a writ of *habeas corpus* issued out of this court, directed to the defendant, Parker, the purpose of which was to test his authority to hold the relator, A. W. Tennant. The facts necessary to the understanding of the case are these:

The Governor of Nebraska having been impeached and

[a] Decided February term, 1872.

removed from office, W. H. James, who was elected Secretary of State at the same time and for a like term with the Governor, became, and during the time hereinafter mentioned, was Acting Governor of the state. During the same time Isaac S. Hascall was a State Senator, and at an adjourned session of the legislature was elected President of the Senate.

Acting Governor James left in February, 1872, to attend to business of the state at Washington. Hascall, who resided in Omaha, learning of James' absence, went at once to Lincoln, the capital, and under pretense that the document was one certifying that some person was a notary public, obtained from James' private secretary the Great Seal long enough to get its impress to a paper of which the following is a copy, and which was published in some of the papers of the state:

PROCLAMATION FOR CONVENING THE LEGISLATURE.

In accordance with the provisions of the Constitution of the State of Nebraska, and by virtue of the authority vested in the Governor to convene the Legislature by proclamation on extraordinary occasions, and as the occasion contemplated by the Constitution now exists, it being necessary to have immediate legislation to encourage and promote immigration, to improve the finances of the state, and for other purposes that more fully appear in the subjects of legislation hereinafter contained, I, Isaac S. Hascall, President of the Senate and Acting Governor of the State of Nebraska—a vacancy existing in the office of Governor, and the Secretary of State being absent from the state,—do hereby convene the Legislature, and call upon the members thereof to meet at the capitol, in the city of Lincoln, on Thursday, the fifteenth day of February, A. D. 1872, at 3 o'clock P. M., for the purpose of taking action upon the following subjects of legislation:

1st. The encouragement of immigration, and the appropriation of money for that purpose:

2d. The issuance of fifty thousand dollars in state bonds, the sale and disposition of the same, the funding of the state indebtedness, and the improvement of the finances of the state.

3d. To declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy where no provision is made for that purpose in the Constitution.

4th. The investigation of the official conduct of any state officer, and if deemed expedient, the impeachment of any such officer for any misdemeanor in office.

5th. The common schools of the state, and the amendment or repeal of any laws relating thereto, or to the funds for the support of the same.

6th. The amendment of any law relating to cities and towns.

7th. The defining of the boundaries of counties in the unorganized territory of this state, and providing for the organization of the same.

8th. The appropriation of any money that may be deemed necessary for the welfare of the state.

9th. To provide for the better securing and safe keeping of state prisoners.

10th. To provide for increasing the jurisdiction of probate judges in civil cases.

11th. The correction and approval of the journals of the last regular session of the Legislature.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Nebraska, [SEAL.] this eighth day of February, A. D. 1872.

ISAAC S. HASCALL,
Acting Governor of the State of Nebraska.

Acting Governor James being advised of what had been done by Hascall, returned at once to the state, and put forth his proclamation, of which the following is a copy:

PROCLAMATION.

WHEREAS, on the eighth day of February, A. D. 1872, Isaac S. Hascall, President of the Senate, did issue a call convening the Legislature of the State of Nebraska, at Lincoln, on the fifteenth day of February, A. D. 1872.

And, WHEREAS, such action on the part of said President of the Senate was and is null and void, no extraordinary occasion having arisen for the assembling of the said Legislature, the state not being threatened with foreign aggressions, depredations, nor direct hostilities; nor has occasion arisen rendering adequate provisions necessary to overcome unexpected calamities, nor to suppress insurrection, nor other important exigencies arising out of the internal intercourse between the states;

And, WHEREAS, the occasion for the exercise of the authority vested in the President of the Senate, by the seventeenth section of the executive article of the constitution, has not arisen,—my absence from the state not having been of that character for which provision is made in the constitution;

And, WHEREAS, the people have been burthened with the accumulated cost of long and repeated sittings of this Legislature, the said Legislature having recently been in session, and having had all and the several subjects mentioned in said call, under consideration, and having refused to legislate upon the several matters and subjects,

Now, therefore, I, William H. James, Secretary of State, and Acting Governor of the State of Nebraska, do hereby revoke, rescind, and annul the said proclamation of the said President of the Senate, and do hereby request and enjoin the members of the Legislature that they do

not meet at the Capitol in pursuance of said call on the 15th day of February, A. D. 1872.

Done at the city of Lincoln, this thirteenth day of February, A. D. 1872, in the fifth year of the State of Nebraska, and of the Independence of the United States the ninety-sixth year. In testimony whereof, I have hereunto signed my name, and caused to be [SEAL.] affixed the great seal of the State of Nebraska.

WILLIAM H. JAMES.

(By the Acting Governor).

WILLIAM H. JAMES, Secretary of State.

The sections of the constitution upon which it was presumed to base these several proceedings, are found under the title of Executive, and are as follows:

"SEC. 9. He, (the Governor,) may, on extraordinary occasions, convene the Legislature by proclamation, and shall state to both houses, when assembled, the purpose for which they have been convened."

"SEC. 16. In case of the impeachment of the Governor, his removal from office, death, resignation, or absence from the state, the powers and duties of the office shall devolve upon the Secretary of State, until such disability shall cease, or the vacancy be filled."

"SEC. 17. If during the vacancy of the office of Governor, the Secretary of State shall be impeached, displaced, resign, die, or be absent from the state, the powers and duties of the office of Governor, shall devolve upon the President of the Senate, and should a vacancy occur by impeachment, death, resignation, or absence from the state, of the President of the Senate, the Speaker of the House of Representatives shall act as Governor till the vacancy be filled."

At the time fixed by the first proclamation, several

members met at Lincoln. More remained away, disclaiming any authority to meet as a legislative body. Those who gathered were discountenanced by Acting Governor James, who refused them admission into the legislative halls. They, however, overcame his resistance, and, taking possession, proceeded to organize. Parker was appointed, among others, as a sergeant-at-arms, for the Senate, and ordered to arrest and bring in absentees. Under this order he claimed to hold the relator, Tennant.

M. H. Sessions, for the relator.

I. It is a maxim in the law that it requires the same strength to dissolve as to create an obligation. 1 *Black. Com.*, 144.

II. If power is given to *create a thing*, it implies a power to preserve it; and of necessity the control of the thing created. *Potter's Dwarris on Statutes*, 671.

III. The doctrine that the decision of an executive, as to the convening the legislature by proclamation, when once made is final, may, for the sake of the argument, be conceded. The question is, in what does the finality consist? It is not that he who issued it cannot, upon reflection reconsider his own judgment, and action, and recall and revoke the same. Its finality is simply this, that no other officer or department of government can interfere or control *his* discretion or judgment in the matter when once exercised. *Cooley's Con. Lim.*, 39, 40, 42. *Brightly's Federal Digest*, 74. 2 *Bacon's Abridg.*, 655, 675. *The People, ex rel., v. Hatch*, 19 *Ill.*, 283.

IV. Again it is contended, and the proofs show that Hascall has never in good faith entered upon, or assumed the duties of executive of this state, but has only attempted to perform one official act as governor, and

that in a clandestine and fraudulent manner. Supposing that Hascall instead of issuing a *proclamation* as he did, had issued a pardon for every convict in the penitentiary, and sent the same to the Warden, and thereupon they had been released from prison, but that upon finding out the true state of the case, the Warden recaptures them. The prisoners bring *habeas corpus* to be released from their imprisonment, upon the ground that they had been pardoned out. Can there be any doubt about the court holding that he had not in good faith entered upon the duties of acting governor, and the pardon fraudulent, and if so void, and the recapture legal? *Commonwealth v. Halloway*, 2 *Vol. A. L. Register*, 474.

If fraudulent in the supposed case, it would be in the case at bar, and the proclamation issued a nullity.

E. Wakeley, for the relator, presented by oral argument the following points in substance:

I. The court must take judicial notice whether the legislature is, or is not in session.

If a majority of the members assemble at a time when they have no constitutional right to do so; or at a time not appointed by law, and when they had not been convened by the governor's proclamation, they are not a legislature, and courts cannot so regard them.

The constitution makes each house the exclusive judge of the qualifications of its members. But it does not make either house, or both houses exclusive judges as to whether they are or are not lawfully sitting.

The constitution provides that all regular sessions of the legislature after the first, shall commence on the first Thursday, after the first Monday in January.

It would be absurd to claim that if a majority should assemble the first Monday of December, and organize in

form, a court would be compelled to recognize them as lawfully in session.

Courts take judicial notice of executive proclamations, and must know judicially whether or not there is or has been, a proclamation under which the session can be held. And, if a proclamation once made can be, and has been lawfully revoked, courts take the same judicial notice thereof, as of the proclamation.

II. It is very doubtful if the absence of acting governor James under the circumstances shown, was such an absence as devolved the duties of the office on Hascall. He was absent temporarily, and on official business. It is not a fair construction of the constitution that the moment the governor crosses the state line, the secretary may step into the governor's office and issue a pardon or convene a legislature. In the case at bar, Hascall glided in with the stealth of an Indian; clandestinely affixed the seal to his prepared document; and vanished like an apparition. It is a more reasonable construction that the absence must be such as to make it necessary for the secretary to take possession of the executive office and clothe himself with its *indicia*.

III. Granting that the proclamation was lawfully and constitutionally issued, it could be, and was, lawfully and constitutionally revoked.

The power of the governor is to "convene" the legislature—not merely to issue a proclamation to that end. Convening a body, is bringing its members together. The power to convene is a continuing power until the purpose is accomplished.

The object of the constitution must be considered, in order correctly to interpret its provisions. The power to convene the legislature on extraordinary occasions is conferred on the governor to provide for unexpected emer-

gencies. He is the sole judge of the necessity or expediency of exercising it. The necessity may exist when the proclamation is issued, and utterly pass away before the time when the legislature is to meet. Why should not the governor's discretion continue to that time?

By the terms of the constitution he "shall state to both houses when assembled, the purpose for which they have been convened." "And when so convened (the legislature) shall transact no business except such as relates to the objects for which they were so convened, to be stated in the proclamation of the governor." If the reason no longer exists, and there is no further object to be accomplished by the meeting, why should the governor, who is made by the constitution the sole judge of the necessity of asking the legislature to assemble, and has the sole power of prescribing the subjects on which it shall legislate, be denied the power to recall his request, or mandate? Constitutions can be changed; laws may be repealed. Shall a governor's proclamation be held irrevocable? Does it go forth like a planet hurled into space to move forever?

Can it be doubted that if the governor should find reasons to change the time named for the meeting he could do so? Might he not extend it if satisfied that a quorum could not assemble in time? Might he not shorten it, if satisfied that the emergency required it?

The sole argument against the power to revoke is that it is not given in terms. But in constitutions, as in laws, powers may be implied from the necessity, or reason of the case.

A familiar instance is the implied power of the President of the United States to remove officers appointed by himself. If the office is filled he cannot effectively appoint an officer to hold it without removing the incumbent. Hence, it has been held, from the beginning, that he could remove without an express power to do so.

The power to convene a body implies a power to prevent its convention, before this is accomplished. The power is not executed fully until the convention has taken place. Until fully executed it may be withheld. If the power in question was *only to issue a proclamation*, I grant that when once issued, the power would be exhausted. But this narrow and word-catching construction of the constitution cannot stand against the palpable object and purpose of the provision.

(Counsel also cited instances in the preliminary history of Great Britain, where proclamations convening the houses of parliament had been recalled before the meeting.)

E. E. Brown, Seth Robinson, and Isaac S. Hascall, contra.

CROUNSE, J.

In the few hours given the court for the determination of the grave questions involved in this case, I cannot undertake to review the history of the several proceedings out of which they have arisen. In fact, I choose to avoid any further publication of the disgraceful transactions that have attended the administration of our state government—transactions which have made the character of the state the subject of jeer abroad, and occasioned every good citizen to blush to acknowledge that he is a member of it.

Whether the first proclamation was legally issued, and of any validity, I will not at this time, stop to enquire. Upon that point I may express myself hereafter. But as a majority of the court are agreed upon the effect of the second one, I will briefly state my views thereon.

Under the theory of our government, the people are sovereign. The exercise of acts of sovereignty are given

to the several branches of government whose duties and limits are prescribed in the organic law adopted by the people. To the legislature is given the power, and upon it is imposed the duty of making all laws, subject to the constitution. Inasmuch as the people cannot undertake to create legislatures and set them at work at such times as legislation might be proper and necessary, they have directed that such legislatures meet every two years, on a day fixed, for purposes of general legislation.

But emergencies may arise when it might, for the welfare or safety of the state, become necessary to have legislation at other times than those provided as above. The determination of the question as to when such an occasion has arisen, resides with the people, of course, for whom this legislation is to be made. It is impracticable, and in fact impossible, to collect the sense of the people in any way in time to make the action of the legislature available. They, therefore, have chosen to commit the exercise of this judgment to the governor of the state. In this he stands in the place of the people.

Did the people see that they were threatened with invasion, or that any exigency had arisen demanding the convening of the legislature, they might command, and it would be the duty of the legislature to obey.

After having commanded, and before such convention, if the exigency had passed away, the people might countermand the order so given, and it would be the duty of the legislature to respect and obey such command.

Does any other reasoning obtain where the governor, for this purpose stands in the place of the people. I think not.

The governor is constituted the sole judge of the necessity for calling the legislature, and he must like the people, be the sole judge as to when such necessity has passed away. His judgment is not like a judicial decree,

based on certain fixed facts upon which the law attaches its judgment. In that case the judgment is final as far as the tribunal pronouncing it is concerned.

But the governor's decision is a political one, exercised for the well-being of the state. He may conceive a danger to exist which does not exist in fact, or the threatened danger may have passed away. His judgment is, that the facts exist which demand an assembling of the legislature. If he should find that he was mistaken as to the facts, or the emergency had passed away, his judgment is changed. He is none the less the representative of the people for this purpose, and the judge of the necessity of a meeting of the legislature, after he has issued his proclamation, than he was at the time he issued it.

His proclamation is no deed or instrument conveying any right to the legislators which when once issued, is irrevocable; neither can I see any ground for assuming that its issuance involves any trick or technicality which should override the broad reason on which it is founded.

The proclamation is but a command. This command is based on the judgment of the governor, acting for the people who assumes that an emergency exists, demanding a meeting of the legislature. If the emergency does not exist, this judgment is erroneous, and is changed, and the expression of this change is communicated through the revocation.

The several proclamations are but the expressions or announcements of these different conditions of affairs, and are binding on the legislature.

The different proclamations may be treated as issued by one and the same person. The court is dealing with the officer, rather than with any individual. The proclamation issued first, being the only warrant under which a legislature could convene, having been revoked and annulled, there exists no authority under which a legis-

lature can be legally assembled at this time. This being so, there can no authority issue from the pretended legislature to hold Mr. Tennant, and he must be released.

LAKE, J.

This case presents at least two important questions for the consideration of the court. They are not only important, but so novel in their character, that ordinary sources of legal information afford us but a dim light to direct us in our investigation.

So true is this, that even the learned counsel upon both sides, who have argued the case with their customary ability, and who usually fortify their positions with apt adjudged cases, have been compelled to admit their inability to find in the books of reports a single case wherein these precise questions or even those strongly analogous thereto have been determined by the courts.

The questions to be considered are, first, was Isaac S. Hascall, as President of the Senate, authorized to issue his proclamation for the convening of the legislature, and second, if he was so authorized, could Secretary James, in the exercise of his functions as acting Governor of the state, revoke such proclamation and thereby prevent the convening of that body in legal session? If the court shall consider either, that, under all the circumstances, the president of the senate had no authority to act in the premises, or being authorized to act, what he did may be annulled, the imprisonment of the relator is illegal and he must be released therefrom.

Upon the first proposition my own mind is not clear. I can say, however, when the question was first presented to me I was strongly inclined to the opinion insisted upon for the respondent, that so soon as the governor sets his foot beyond the limits of our state, the officer next in succession therein, may at once assume all the

authority, and exercise all or any of the duties pertaining to the executive department of government But when I reflect upon the possible consequences of such a construction of the constitution, upon the disgraceful tricks, strifes and exhibitions, which might be entailed upon the people of the state, of which our present attitude presents a sad and humiliating commentary, I am induced to hesitate and cast about me for a more salutary rule, one which, while it will insure the efficient administration of the affairs of state during a brief temporary absence of the executive, will at the same time protect this department of the government against unnecessary and ill-advised intrusion.

The conclusion to which a majority of the court have arrived on the second question will enable us to decide the case before us, without further notice of this one. I shall take occasion hereafter, however, to examine it more at length.

Admitting, however, that the exigency existed, by the temporary absence of the then acting governor from the state, for the assumption of executive authority by the president of the senate, and that in pursuance of the provisions of the constitution he duly issued his proclamation for the convening of the legislature in extra session, is the issuance thereof of such an act when done, entirely beyond executive control?

The constitution provides for the regular sessions of the legislature. These can be held at no other time. But the necessity and propriety of their assembling oftener than at these stated periods, is left by the constitution entirely to executive discretion.

This discretion is wisely lodged in the governor of the state, who is presumed to be well advised when an extraordinary occasion has arisen which demands prompt legislative action.

With the exercise of this discretion up to the time of

convening the legislature no one can interfere. The whole matter is left entirely to the will of him who for the time being, is invested with the executive authority of the state.

But if, for any good and sufficient reason, the executive shall become satisfied that the necessity which induced the call has passed, or that it was unadvisedly made, it is not only his right, but his duty to revoke the same, that the people may be saved the expense which would otherwise be laid upon them.

Nor does it matter whether the revocation be by the same person who issued the proclamation or not, so long as he is for the time being in the legitimate exercise of the executive functions of the government.

It is not the act of the individual strictly speaking, but of the executive, in which there is, in one sense, no *interregnum*.

In this case it is shown that the secretary of state, in the legitimate exercise of the authority invested in that officer, has declared that the proclamation theretofore issued for the convening of the legislature was ill-advised; that in fact no extraordinary occasion had arisen rendering it necessary for the legislature to assemble in extra session, and therefore he revoked the same.

I am clearly of the opinion that the legislature is not now in legal session, and has no authority to compel the attendance of absent members; that all and every act done at this time, as a legislative body, is without the shadow of authority and absolutely void, and that, therefore, the relator should be released from custody.

This conclusion being also concurred in by my brother Crounse, IT IS SO ORDERED.

MASON, CH. J. dissenting.

The idea of judicially declaring a co-ordinate department of the government, an illegal body, and any acts

which it may do, null and void, is so novel and startling as to arrest attention and demand careful examination. The suggestion that the judiciary can declare the legislature illegally assembled, and a body without authority, rests upon the assumed right of this department to pass upon the legal existence of a co-ordinant branch of the government, and if true is dangerous to civil liberty. If this can be done, and the judicial power of the state declare the legislative department illegal and proceed to destroy and annihilate it, the next day upon some specious pretext the executive department may be made to share the same fate, and thus the judicial power will be made to sap and undermine the constitution, and destroy the liberties of the people.

The three co-ordinate departments of the state government are absolutely independent of each other, and one of them can not enquire into the motives controlling the action of the other. The three departments are not merely equal, they are exclusive in respect to the duties assigned to each.

It is now proposed that the judicial power shall institute an enquiry into the conduct of the legislative department and form an issue of fact and law to try the legality of the dealings of the legislature with one of its own members. If this can be done, we may enquire, upon application made by a fugitive from justice from a sister state for discharge from arrest on the warrant of the executive, whether the acting executive holds his office by legal right. It is sufficient, however, that he is *de facto* acting as such executive. In this case it was sufficient that the legislature had met and organized as the legislature, and was acting as such, and that Tennant the relator, was a member of the senate, and was adjudged by the senate as guilty of contempt. That senate could alone deal with him for such contempt. To sustain this writ and discharge the applicant would be a direct attack upon the

independence of the legislature, and a usurpation of power subversive of the constitution. I say nothing of the right of the state to institute a legal enquiry to determine whether the legislature was rightfully assuming to exercise legislative functions.

There are certain things of which this court is bound to take judicial notice, of which are the sittings of the legislature and its established and usual course of proceeding, and the privileges of its members. Not the *time* fixed by law for the sittings of the legislature, but of the sittings of the legislature. We must then judicially know that the Senate and House of Representatives met in legislature assembled at the Capitol in Lincoln on the fifteenth day of February, A. D. 1872, and are still in session, and that the Constitution declares (section seven, title Legislature) "that each house shall be the judge of the election and qualifications of its own members, and a majority of each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and compel the attendance of absent members in such manner and under such penalties as each house shall provide." The senate is the exclusive judge of who constitute its members, and the legislature alone can determine for itself whether it is legally assembled. We must judicially take notice of the fact of the sittings of the legislature and having taken notice of such sittings, it is not legally competent for this court to withdraw the relator from the custody of the senate of this state, where he now is, charged with a violation of its rules, and discharge him while the proceedings against him by that body are still pending and undetermined. The senate sitting *de facto* as such, now has possession of the relator and has legal power and capacity to hear and determine for itself the question of its own jurisdiction and right to act in the premises. The legal presumption in such cases always is, that the tribunal thus

assuming to act will determine the question of its own jurisdiction correctly, until it has acted finally upon it. It is a rule of law, founded upon sound principles and comity, which is, and, for the prevention of unpleasant collisions, always should be recognized between the co-ordinate branches of the state government, that each is legally competent to determine its own jurisdiction, when it has acquired *de facto* prior jurisdiction over a person or subject matter, and this court ought not to interfere or seek to arrest the action of the senate, while the case is still pending and undetermined. The rule is sustained by all the analogies of law, and finds a recognition in the constitution itself, by the separation and distinct recognition of the legislative, executive, and judicial departments of the government. And this principle is distinctly recognized by judicial tribunals in the following cases. *Smith v. M'Iver*, 9 *Wheat*, 532. *Hagan v. Lucas*, 10 *Pet.*, 400. *Taylor v. Carryl*, 20 *How.*, 594. *Ex parte Robinson*, 6 *McLean*, 363. *Keating v. Spink*, 3 *Ohio State*, 105. *Hurd on Habeas Corpus*, 199. This doctrine is sound in principle and tends to promote harmony between tribunals and the three departments of government. If another department of the state government were thus to interfere with our action and withdraw from our custody a prisoner upon trial before us charged with contempt and set him at large, on the ground that we had no legal existence as a court, we should resist such an attempt to the utmost. Shall we not extend to the co-ordinate departments of the state, the same comity and the same confidence we claim for ourselves? In support of the principles here contended for, we cite, *Ex parte Booth*, 3 *Wis.*, 145. *Ex parte Bushnell. Ex parte Langston, et al.*, 8 *Ohio State*, 600.

The senate, in the first instance, is the sole and exclusive judge of its own legal existence, and having determined that question, its judgment cannot be impeached

in this collateral way. It would be unjust, absurd and impracticable to have a trial for the same offense going on at the same time in two distinct co-ordinate tribunals under the same government. As in this case, the senate, as a senate *de facto*, has the relator in custody for contempt, and before trial or hearing before it, we hear and determine the case by deciding that no senate exists. Has not the senate the right to pass upon that question in the first instance? And in a case before this court for contempt, might not the senate with like propriety resolve that this court had no legal existence, and hence there could be no contempt? The relator being in the custody of the senate for an alleged contempt, this court has no jurisdiction to determine such contempt, or to determine the legality of the organization and meeting of that body. This court cannot enquire into the legality of the meeting and organization of the legislature assembled, or of either house thereof, in the manner here sought by *habeas corpus*. Each house is the sole judge of the qualification and election of its own members, and of its own *de facto* existence. To declare illegal the assembling of the legislature, upon the hearing of a writ of *habeas corpus*, is to my mind a usurpation of judicial power, and an unwarrantable assault upon a separate and independent department of the state government, and such usurpation ought to be vigorously resisted. The decision of the majority of this court, cuts loose from the safe moorings of the law and time honored custom, and without compass, chart, mast, or rudder, to guide its course, enters upon a piratical and unwarranted cruise against the legislative department of this state.

Where did this court receive its commission and authority to pronounce a criticism upon the conduct of a co-ordinate department of the state government, and because its conduct did not come up to its standard of propriety, denounce and then destroy it?

This is sufficient to dispose of the case, but other questions have been presented which have been raised and argued at the bar of the court.

First. Was Isaac S. Hascall, President of the Senate, authorized to issue his proclamation convening the legislature?

Second. If he had such authority, could W. H. James, Secretary of State, revoke that proclamation when he returned to the state?

Section sixteen of the constitution, title "Executive," reads as follows: "In case of impeachment of the governor, his removal from office, death, resignation, or absence from the state, the powers and duties of the office shall devolve upon the secretary of state, until such disability shall cease or the vacancy be filled." Section seventeen reads as follows: "If during the vacancy of the office of governor, the secretary of state shall be impeached, displaced, resign, die, or be absent from the state, the powers and duties of the office of governor shall devolve upon the president of the senate; and should a vacancy occur by impeachment, death, resignation, or absence from the state, of the president of the senate, the speaker of the house of representatives shall act as governor till the vacancy be filled." The contingency provided for in section sixteen, quoted above, happened to this state on the fourth day of June, A. D. 1870, and the succession in the executive office fell upon the secretary of state, W. H. James. It is admitted and proven that secretary James was absent from the state, when Isaac S. Hascall issued his proclamation convening the legislature. The powers and duties of governor had fallen upon Isaac S. Hascall, President of the Senate, by the express terms of the constitution, and he was not only *de facto* but *de jure* in the exercise of the powers and duties of that office, and might rightfully and lawfully exercise the powers

and perform all the duties which any governor could. In the exercise of these powers as governor, he issued his proclamation convening the legislature. We cannot institute an enquiry into the conduct of the executive, in order to determine whether his motives were good or bad. If this could be done, we might enquire what motives induced the executive to approve a bill or withhold that approval, and in case of withholding it corruptly, issue our mandate and compel him to approve it. To institute such an enquiry, would, however, be a direct attack upon the independence of the executive and subversive of the constitution. Chief Justice Marshall said, in *Fletcher v. Peck*, 6 *Cranch.*, 131, "it would be indecent in the extreme, upon a private contract between two individuals, to enter into an enquiry respecting the corruptions of the sovereign power of the state." And this point is expressly ruled in *Wright v. Defrees*, 8 *Indiana*, 302, 303. The principle settled in *Marberry v. Madison*, 1 *Cranch*, 137, is that the official acts of the heads of the executive department, as organs of the president, which are of a political nature, and rest, under the constitution and the laws, in executive discretion, are not within judicial cognizance. Our state constitution recognizes three distinct, independent, and co-ordinate departments of the government in this state, with as much perspicuity as does the federal constitution in the United States. Applying then the principle settled in the case last cited, and this court has no jurisdiction to impeach or question the validity of the proclamation convening the legislature. That proclamation having been constitutionally and lawfully issued by Isaac S. Hascall, President of the Senate, upon whom the duties and powers of the office of governor had devolved, this court cannot legally make enquiry into the motives which actuated him, or impeach his official conduct in that regard.

It now remains to consider the power of the secretary of state, upon his return to the state and assuming gubernatorial functions, to revoke the proclamation issued by the president of the senate, during his absence. The executive department of this state possesses such powers as the constitution and the laws have conferred upon it and none other. The only implied powers it possesses, are such as are necessary or convenient to carry into practical execution the powers granted by the constitution and the laws. *Hamilton v. Saint Louis County Court*, 15 *Missouri*, 13, *per Bates arguendo. Matter of Oliver Lee and Co's Bank*, 21 *New York*, 9.

The ninth section of the Nebraska constitution, title "Executive," reads as follows: "He (the governor) may on extraordinary occasions convene the legislature by proclamation, and shall state to both houses, when assembled the purpose for which they have been convened." The power to convene or assemble the legislature by proclamation is expressly given, but the power to revoke the proclamation convening that body will be sought for in vain—it is not in the constitution—it is not in the laws of the state—it finds support nowhere. After the executive proclamation convening the legislature is issued his power in respect to that matter is exhausted, until the legislature is assembled. When they are assembled it is his duty to state the purpose for which they have been convened. If the extraordinary occasion, which moved the executive to convene the legislature, has passed away or ceased to exist, it is still his duty to state to both houses, when assembled, the purpose for which they have been convened and that in his judgment it has ceased to exist. The legislature may then review the judgment of the executive, and indirectly call it in question by proceeding to pass such laws, and transact such business as relates to the object for which they were so convened, or they may adjourn without transacting any business. In

support of the doctrine here laid down, Cooley in his work on "Constitutional Limitations" page 49, says, that in such a case (that is when the governor has issued his proclamation convening the legislature upon extraordinary occasions) the decision of the governor is final so far as to compel the legislature to meet.

But section nine, above quoted, must be construed with section twelve, title "Legislative," which is as follows: "but the legislature may on extraordinary occasions be convened by proclamation of the governor, and when so convened shall transact no business, except such as relates to the objects for which they were so convened, to be stated in the proclamation of the governor." The language of this section is, "the legislature may on extraordinary occasions be convened *by proclamation.*" The language of section nine, title "Executive" is, "he may, on extraordinary occasions, convene the legislature *by proclamation.*" The words "*by proclamation*" are synonomous with the phrase "*with proclamation.*" He may convene the legislature with a proclamation. What is it that convenes them? It is the proclamation, an official document expressly authorized by the constitution, and which the members of the legislature are morally and legally bound to obey. They have no discretion. It is their duty to convene as commanded in the proclamation. The proclamation is vitalized with the potent energies of the law the moment it is issued. It takes effect at once. It is a law unto the members of the legislature and they must yield obedience to its authority. The executive power of the government of this state cannot revoke laws, whether operating upon all the people, the members of the legislature or judiciary. The executive can, with the same propriety, and with equally sound reason, by proclamation revoke the constitutional provision which vests jurisdiction in this court. The proclamation is made by authority of the constitution, and is a

canon which may compel the assembling of the legislature. *Kendall v. Inhabitants of Kingston*, 5 *Mass.*, 324. *Cooley's Constitutional Limitations*, 40. *Martin v. Mott*, 12 *Wheaton*.

The authority to vitalize and call into life the dormant power, granted in the constitution, to convene the legislature on extraordinary occasions is vested in the executive. The way in which he can do this is specifically pointed out. It is to be done by the executive proclamation. Such a proclamation having been issued, the legislature is as much bound to assemble as they are on the first Monday in January, biennially after July, 1866, which is expressly required by the constitution. The proclamation convening the legislature, calls into life a constitutional requirement which is dormant until the proclamation is issued. After that time, the executive can no more suspend the operation of this constitutional provision, which requires the legislature to meet at the time named in his proclamation, than he can revoke or suspend any other constitutional requirement. He can no more revoke that constitutional provision, than he can take away from this court the jurisdiction conferred on it by the constitution. If the former may be revoked so may the latter. There is the same power to revoke in the one case as in the other. In the latter case the jurisdiction of the court lies dormant until vitalized by legislative action providing for its exercise; in the former, the legislature was scattered over the state, and their powers were dormant until called into life by the executive judgment, that an extraordinary occasion existed, and the issuance of the proclamation convening them, and stating therein the objects for which they are so convened. The objects stated therein are the limits of their jurisdiction, as the constitution expressly so provides. To this extent the legislature are required to exercise their discretion and judgment, and to meet and consider the objects named in

the proclamation. The executive can not revoke a law or take away a right, and the attempt to do so is an act of usurpation. The legislature are compelled by law to come together in obedience to the proclamation convening them, and having so assembled together in obedience to law are entitled to their pay and mileage. If the executive can revoke his proclamation of convocation, he destroys this legal and vested right to pay and mileage. Are legislators to be compelled to assemble at the capitol from remote parts of the state; to leave their homes and their business and enter upon the public service; to march to the field of their labors, and turning their attention to the objects stated in the proclamation, prepare bills to meet the extraordinary occasion mentioned therein, and when they have arrived at the capital, be dispersed and sent home by a proclamation of revocation, empty handed and without pay, insulted by the executive, and informed by the supreme court that they are an illegal body?

This imaginary power of revocation is without foundation in reason. Why say, the executive can revoke before the two houses organize and not after? If one house organize before the other, may he revoke as to the unorganized house, and not as to the other? Where is the law or reason for fixing the limit of this power of revocation, if it exist at all, at the precise instant of time before they organize? But we are not informed whether the dangerous power of revocation ceases when a temporary organization is effected, or not until a permanent organization has taken place. Where is the law for the establishment of an arbitrary limit to this dangerous power of revocation? There is none. It is without law or reason to support it. The truth is, no power of revocation exists. We will illustrate the power contended for with one practical example. The law admitting Nebraska into the Union, passed by Congress, was inoperative until the state legislature should adopt what is known as the

fundamental condition, and the President of the United States should give force and effect to the act by declaring the state to be admitted into the Union by proclamation. He issued his proclamation on the second of March, 1867, declaring Nebraska admitted into the Union. Could the president revoke that proclamation at any time before our senators and representatives assembled at Washington and took their seats? The president was authorized to issue that proclamation by an act of Congress. The executive of this state, as we have seen, is authorized to convene the legislature by proclamation on extraordinary occasions. In each case the proclamation is authorized by law, and the particular thing to be done is designated, and the object to be attained named. In neither case is any power of revocation conferred, and for that simple reason none exists. If the conclusion of the majority of this court is correct, Governor James might issue his proclamation in a case of extreme danger, or a universally conceded "extraordinary occasion," and then be compelled upon pressing and important business to leave the state. In such a case the succession would fall upon the president of the senate, by the terms of the constitution, and willing to see the state destroyed, its treasury plundered and carried away, and the spoils divided between himself and the invaders, he would revoke the proclamation of the patriotic Governor James, issued to make provision for her defense, and the state would be left trembling, paralyzed, and powerless in the hands of demagogues and traitors.

Many of the members of the present legislature came from remote parts of this state, on the proclamation issued by Acting Governor Hascall, to the capitol, in discharge of their official duty; many never saw or heard of any proclamation of revocation until they arrived at the capitol on the morning of the day the legislature was to meet. Who ought to bear the loss of this time and expense?

The constitution gave the governor power to convene the legislature. He did so. They obeyed his command, convened at the capitol, and are now told that they are an illegal body, without existence, and are left to pay their own expenses and bear their loss of time. They are denied the common right guaranteed to all animate beings, that of their own existence, and by a majority of this court declared—*dead*—slain by REVOCATION. Can it be possible that the law sanctions such a proceeding? A majority of this court have so ruled. I believe their ruling to be based on an erroneous construction of our constitution, and a failure to recognize the perfect independence of the legislative department of the government, and their sovereign, supreme, and exclusive right to determine their own legal existence and contempts against their own body. It is enough for this court to know that this legislature has a *de facto* existence, and that its members are not only *de facto* but also *de jure*, members of the legislative assembly of the state of Nebraska, and that we are bound to take notice of its sittings, recognize its rights, privileges and prerogatives, and not destroy it because at this instant of time it may seem popular to do so. Courts should yield to no clamor and shrink from no responsibility. Our constitution is clear upon this question. That constitution is the form of government, delineated by the mighty hand of the people, in which certain principles of fundamental law are established. The constitution is certain and fixed. It is the express and established will of the people, and is the supreme law of the land. It is paramount to the power of the executive, and all other departments of the government, and can be revoked or altered only by the authority that made it. The life-giving principle and the death-dealing stroke must proceed from the same hand. What is the executive? The creature of the constitution. To this he owes his existence. From this and the laws he

derives his authority. They are his commission, and to them he must conform all his acts or they will be void. The constitution is the work of the people themselves in their original sovereign capacity. Law is the work or will of the legislature in their derivative and subordinate capacity. The one is the work of the creature, the other the creator. The constitution and laws fix the limit to the exercise of executive authority, and prescribes the orbit within which it must move. There can be no doubt that every act of the executive, repugnant to the constitution or laws, or which is not authorized by them, is null and void. We have shown that the act of revocation was without authority of law, and against the powers granted to the executive by the constitution. He could by proclamation convene or assemble the legislature, but he has no power to revoke that proclamation, nor prorogue the assembly. The legislature have met and organized under the proclamation convening them, notwithstanding the revocation. This fact we are judicially bound to know. They are a legislative assembly *de facto* and *de jure*, and the relator ought to be remanded to the custody of the sergeant-at-arms of the senate, subject to the action of that body.

NOTE.—It may be proper to remark that the foregoing opinions of the majority were delivered immediately upon the conclusion of the argument of counsel. It was, I believe, the purpose of my associate, as I know it was my own, at some future day, to discuss more fully the novel questions involved in this case. The press of business, however, incident to the discharge of the double duty as judge of both the district and the supreme courts permitted no return to the subject during my term of office. Although in the shape presented, they were not designed for publication in the reports, yet as the case is a leading and important one, I have chosen to insert the opinions as they are, rather than omit the case altogether.

The dissenting opinion was written and filed some time after the matter was disposed of. It shows the earnestness of its author, and would seem to discover a little of that feeling which the case was calculated to arouse, but which I am sure did not extend to all the members of the bench. That "courts should yield to no clamor and shrink

from no responsibility," is good as a principle of judicial ethics. But as the declaration was not called for in settling the questions submitted, the insinuation that the volume of noise rather than the weight of argument had something to do in controlling the action of any member of the court, is wholly gratuitous. It adds nothing to the strength of the opinion, to the dignity of the court, nor to the character of its decisions. The presumption that courts discharge their duty honestly, is one that always prevails. When a member undertakes to strengthen that presumption by his own certificate of superior integrity, he betrays a suspicion of it, too frequently shared by the public.—LORENZO CROUNSE.

WILLIAM H. HOOVER, ASSIGNEE, ETC., PLAINTIFF IN ERROR, v. LUTHER D. ROBINSON, DEFENDANT IN ERROR [a]

Bankruptcy. The assignee of a bankrupt under the United States bankrupt law of 1867, can maintain an action in a state court in his own name, for property claimed to belong to the estate of the bankrupt.

THIS was a civil action commenced in the district court of Nemaha county, by William H. Hoover, assignee in bankruptcy of Andrew J. Scott. The case was submitted on the following agreed state of facts:

That Scott prepared and swore to a petition for the purpose of filing the same in the United States District Court for the District of Nebraska, on the ninth day of April, A. D. 1868; that said Scott filed said petition in said court on the fifteenth day of May following: that on the second day of June of the same year, said Scott was adjudged a bankrupt; that the plaintiff was appointed assignee in bankruptcy of the estate of said Scott on the sixth day of July, A. D. 1868, and on the last named day, the estate of Scott was assigned to said Hoover in accordance with the provisions of the United States bankrupt law, approved March 2, 1867. That the property, for the value of which this action was brought, was bought by said Andrew J. Scott of Thomas Beard, on or about the fifteenth day of April, A. D. 1868; that on or about the

[a] Decided at Special Term, February, 1872.

first day of June following, said Scott sold said property back to Beard; that said Beard sold said property to the defendant before the commencement of this action; that before the commencement of this action, and after defendant purchased and took possession of the said property, and while defendant had possession thereof, plaintiff demanded the same of the defendant, with which demand defendant refused to comply; that the property in controversy was worth seventy-five dollars; that plaintiff claims said property wholly by virtue of said assignment to him as assignee, and that defendant claims said property wholly by virtue of said purchase from Beard: that Scott purchased said property from Beard on credit and gave his note therefor; that at the time above stated Beard returned Scott's note and took back the property, and that defendant believed said property belonged to, and was owned by Beard when he purchased the same.

The court below decided that it had no jurisdiction, and dismissed the suit. To review this judgment a petition in error was filed in this court.

E. W. Thomas and J. H. Broady, for plaintiff in error, among other points, presented the following:

The assignee in bankruptcy succeeds to all the rights of a bankrupt, and for the purpose of collecting in the assets, may go into any state tribunal into which the bankrupt himself could have proceeded if there had been no bankruptcy; and has the additional privilege of proceeding in the court of bankruptcy. It is his duty to choose the least expensive mode of procedure in the interest of the estate. In this case it was not only his right, but his duty to proceed in the state courts. The assets, when collected, are of course distributed only by the courts of bankruptcy. 14 *U. S. Statutes at Large*, 517. *Ward v. Jenkins*, 10 *Metcalf*, 583. *In re Hugh Campbell*, 1

Bankrupt Register. In re Thomas Noakes, 1 *Bankrupt Register,* 164. *Maurer v. Franz.* 4 *Bankrupt Register,* 242. *Peiper v. Hanna,* 5 *Bankrupt Register,* 252.

No counsel for defendant in error.

MASON, CH. J.

The question raised in the present case is whether the assignee of a bankrupt under the United States bankrupt law of 1867, can maintain an action in the state courts of Nebraska, in his own name as such assignee for property which he claims belongs to the estate of the bankrupt, on the state of facts set forth in the record presented to this court. Chancellor Kent says, "state courts may in the exercise of their ordinary, original and rightful jurisdiction, incidentally take cognizance of cases arising under the constitution, the laws and treaties of the United States." 1 *Kent Com.* 397. Congress does not confer jurisdiction upon the state courts, but creates a legal right in the assignee in bankruptcy to recover the property of the bankrupt. The jurisdiction is the ordinary jurisdiction of state courts acting upon legal rights which have been created by Congress. The law of Congress affects the rights and imposes obligations upon the parties litigant. These rights may be enforced by the state courts in the ordinary exercise of their jurisdiction. They enforce a legal right or compel the performance of a legal obligation. This is but the exercise of the jurisdiction conferred upon the state courts by the laws creating them. The state courts are to give force and effect to the laws of Congress as the supreme law of the land. This bankrupt law is the law of Nebraska as much as any statute enacted by our own legislature, deriving its vitality from another source but of equal authority. The

national government has the constitutional authority to pass a bankrupt law and declare what shall constitute acts of bankruptcy, and at what time in the proceedings, and under what circumstances the debtor shall be deprived of all personal control of his property; to provide for his legal representative, and vest in such representative all the rights of the bankrupt, as to the institution of actions at law in his own name, as fully and effectually as the same would vest in an administrator appointed under the provisions of the state law. The bankrupt law vests all the property of the bankrupt in the assignee, and confers upon him power to sue as fully and effectually as could the bankrupt himself; and a debt due to the bankrupt or property withheld from him by any person, is such right of property and vests in the assignee. The assignee by operation of law becomes the legal representative of the bankrupt and entitled to sue in his own name in the capacity of assignee and this by virtue of a general law of Congress having effect throughout the whole Union.

Mitchell v. Great Works Milling and Manufacturing Co., 2 *Story R.* 655. *Ward v. Jenkins*, 10 *Metcalf*, 583. 14 *U. S. Statutes at Large*, 517.

We think there was error in the court below in finding that it had no jurisdiction, and its judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN IRWIN AND OTHERS, PLAINTIFFS IN ERROR, V. STEPHEN F. NUCKOLLS AND OTHERS, DEFENDANTS IN ERROR.[a]

Practice: SETTING ASIDE JUDGMENT. A party having appealed from a judgment of the district court, to the supreme court, has so recognized it as to be estopped from assailing it as having been irregularly entered.

At the March term, 1872, of the district court of Otoe county upon affidavits tending to show that a judgment entry upon the journal of said court for the March term, 1869, was irregularly entered, and without authority of court placed there, motion was made by defendants in error for an order vacating the same. The court, Chief Justice Mason, presiding, granted the order, which was excepted to, and to reverse which the case is brought to this court.

For any fuller understanding of the facts, beyond those stated in the opinion, reference may be had to the case of *Nuckolls v. Irwin*, 2 *Neb.*, 60.

Seymour & Wardell, for plaintiff in error.

Calhoun and Croxton and G. B. Scofield, for defendants in error.

CROUNSE, J.

This case is not a stranger in this court. Several attorneys appear as parties on one side of the case, and to recover from an adverse decision therein, they have displayed tact and persistence which it is hoped they will discover in all their efforts for others. From the affidavits incorporated in the record, and from what appears in this court, it is shown that this was a case which, although arising in the first judicial district, was, because of disqualification of the judge assigned to that district, heard

[a] Decided July Term, 1872.

before the judge of the second. The judgment following the trial was adverse to the plaintiffs in the court below, the defendants in error here. That judgment may be found on the records of the district court of Otoe county, approved with others, for the March term, 1869. Although an attempt was made a year and a half thereafter to ignore this one, and to place another judgment upon record, I am satisfied that it was not from any real distrust that the entry of March, 1869, was not a regularly entered judgment. The appearance docket of this court shows, and it is not denied by any one, that an effort was made to appeal from the decree or judgment of March, 1869, which was attended by a fatal miscalculation of time in which such appeal should have been taken. Hence the proceeding at the October term, 1870, and the attempt to appeal which immediately followed. *Vide Nuckolls v. Irwin*, 2 *Neb.*, 60. Assuming then, as we are warranted in doing, that the judgment of March, 1869, which has been set aside by the last order of the district court, has been appealed from, the party so appealing is estopped now from assailing it as having been irregularly or wrongfully entered. A party must take his stand somewhere. If the entry was irregular and unauthorized, it was known to the parties when the attempt was made to appeal from it. The defendants in error were not required to recognize it, either as the subject to appeal from, or as the foundation upon which to build another judgment. But, having accepted it, first as a judgment, and next as a finding, as their own advantage suggested, without questioning the regularity of its entry, they cannot now deny what they have thus admitted.

The case of *The People v. The Albany and Sus. R. R. Co.*, 39 *How., Pr.*, 51, is quite in point. In that, there was a motion made by one party to set aside a judgment for irregularity, after appeal had been taken by the same party. Among other things, Judge Johnson in

delivering his opinion, says: "It appears very clearly and plainly from the moving papers, and indeed the contrary is not pretended, that the counsel for the moving party knew, and were fully aware of all the acts and omissions on the part of the attorney and counsel of the other party, in whose favor judgment was rendered and entered, before and at the time such judgment was entered, and before the appeal was brought and perfected. Upon this state of facts, all the irregularities complained of, up to and including the entry of the judgment, if such they were, have been waived and cured by the appeal, and are no longer available to the party against whom the judgment is rendered. Conceding for the purposes of this point, that the things complained of were irregularities for which the judgment would have been set aside, had the defeated party taken advantage of that in due season, still, having passed them by, and taken another and different step in the action, they cannot now go back and take up these alleged irregularities and have them passed upon as if they were still open and available. They have each and all been waived and forever cured by the appeal. It was an onward step without regard to the irregularities, which were as well known to the moving party then as now, and which placed all parties in a new and different relation to each other. This principle of waiver of irregularities in proceedings in action, on the part of any party who might have taken advantage of them had he chosen to do so, by moving in the action afterwards as though the proceedings had been regular, has been so long established in practice, and is so well settled, that it admits of no doubt or question. The exception is, that the waiver does not extend to irregularities of which the party was wholly ignorant when the subsequent steps were taken. I shall not undertake to cite authorities on this question. The books are full of cases on the subject, and the principle is as old as the

history of practice and proceedings by action. Had not the contrary doctrine been strenuously contended for by the several eminent counsel of the moving party, I should not have supposed that any doubt could have existed in the minds of the profession in regard to it. * * The appeal had consigned all irregularities to the dead past beyond recall or resuscitation."

The order of the court below must be reversed.

REVERSED.

MR. JUSTICE LAKE concurs.

WELLS, FARGO & CO., PLAINTIFFS IN ERROR, v. DAVID PRESTON, DEFENDANT IN ERROR.[a]

Practice: MOTION FOR A NEW TRIAL. To entitle a party to a review of any alleged errors transpiring upon the trial of a cause, a motion for a new trial must be made, embodying all the errors complained of, as reasons why such new trial should be granted.

———: ———. If the errors complained of are not so set forth, and opportunity given for their review by the court, no error has been committed, and no error appears on the record. *Per* CROUNSE, J.

THIS was a petition in error brought to reverse a judgment of the district court of Douglas county. Upon the trial of the cause in that court, a verdict being given in favor of the plaintiff and against the defendant, motion for a new trial was filed, but not within the time prescribed by the code. Upon motion of the plaintiff, the motion for a new trial was stricken from the files, and judgment rendered on the verdict. To reverse this judgment, the cause is brought to this court by Wells, Fargo & Co., who were defendants in the court below, upon petition in error. The counsel for defendant in error moved to dismiss the same on the grounds above stated.

[a] Decided at July term, 1872.

E. Wakeley, for the motion.

J. M. Woolworth, contra.

The failure to file its motion for a new trial, within three days after verdict, will not deprive this plaintiff in error of the privilege of being heard here.

1. The errors complained of were duly excepted to at the trial, and are by the bill of exceptions made to appear on the record, and are therefore within section five hundred and eighty-two of the code of civil procedure, notwithstanding objection was not a second time made to them by a motion for a new trial.

And at common law the bill had to be abandoned before the motion for a new trial could be heard. *Fabrigas v. Mostegn*, 2 *W. B.*, 929. *Doe v. Robnty*, 2 *Barn & A.*, 367. *Andrews v. Adams*, 15 *Q. B.*, 1001.

2. Overruling a motion for a new trial cannot be assigned for error. *Blunt's Lessee v. Smith*, 7 *Wheaton*, 248. *Warner v. Norton*, 20 *Howard*, 448, 461.

3. The question was not in the Midland Pacific Railway cases, 1 *Nebraska*, 398, 406, 407, a motion having been filed there, but not covering the points raised in this court.

4. The error which may be reached by the motion, is one which has not been duly excepted to when it happened, and our code follows the common law in this particular. *Minchin v. Clement*, 1 *Barn. & A.*, 2.

5. Good excuse for the delay in filing was shown, and it should not have been stricken from the file. *Price v. Duggan*, 3 *Man. & Granger*, 641, 40 *English Common Law*, 784.

CROUNSE, J.

Application for a new trial must be made within three days after the verdict or decision is given in the trial court, unless unavoidably prevented. This is so declared by section three hundred and sixteen of the code. *General Statutes*, 1873, *page* 578. In this case no such application was made within the prescribed time. The one made was for this reason stricken from the files, and the case stands as though no motion had been made.

In the case of *The Midland Pacific Railroad Company v. McCartney*, 1 *Neb.*, 398, it was the purpose of this court to declare the rule that unless a motion for a new trial was made in the court below, no alleged errors occurring on the trial would be reviewed here. The record in that case, however, shows that a motion of that kind was made, but it did not embrace many of the alleged errors which this court was asked to examine into. Beyond those set forth in the motion for a new trial we refused to notice any. The record therefore, did not call for an announcement of the rule as broadly as it was the design of the court to pronounce it. So we take the occasion here to distinctly repeat, that to entitle a party to a review of any alleged errors transpiring on the trial of a cause in the court below, a motion for a new trial must have been made in that court, embodying the errors complained of as reasons why a re-trial should be granted.

A new trial in that court is expressly provided for by the code. Section three hundred and fourteen directs that the verdict or decision shall be vacated and a new trial granted for several reasons, among which is for errors of law occurring at the trial and excepted to by the party applying for the new trial. With the power expressly given to the inferior court to grant it, why should a party be allowed to come in the first instance to

this court and ask for a new trial? Until he shall have exhausted his remedy in the court below he should have no hearing here. This is but the repetition of a well established rule of practice. *Mills v. Miller*, 2 *Neb.*, 317. But it is said, it seems idle to apply to the same court committing the errors for a correction of them. It would be sufficient to answer, that they who enacted the statutes thought otherwise, and it becomes us to see that the purpose of the provision is effected. But to me there seems evident propriety and wisdom in the rule which requires a motion for a new trial to be made.

Questions will arise upon the trial in the admission of or rejection of testimony, or in the charge of the judge to the jury. These from necessity must be summarily disposed of. The authorities are not present. Court and counsel are not quite clear in their opinions. Jurors and suitors are waiting and the business of the term pressing. A decision is given by the court which, upon reflection, or upon an examination of the law bearing on the point involved would be changed. It is not only economy of time and money to the parties, but it is but justice to the court that opportunity should be given to review decisions thus hastily made. Three days' time is given in which to move for a new trial. In that time the party feeling aggrieved by any ruling of the court may satisfy himself of the correctness of his position, and be prepared to furnish the authorities. If time be required to argue and consider the questions raised, it may be done at the same term; if not, the hearing may be had at a subsequent term. But it is more than probable that a discussion of the several points as fully and in the light of the same authorities, would result the same in the one court as in the other; and the more is this likely to be so because of the peculiar constitution of this court, made up as it is of the judges who preside in the district court.

Nor is there in the rule here announced any conflict,

as has been urged, with that provision of the code which declares that "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." *General Statutes*, 1873, *page* 628. A false proposition of law given in the charge to the jury is none the less false because not excepted to, but to obtain a review of it, it has ever been held that a party must except to the particular part complained of. So the record might show the admission of improper testimony to the prejudice of one of the parties; but to bring it under review, it must further appear that the party complaining of it, addressed an objection to the court. This submitted the question to the court for its decision whether such evidence was proper. Then if dissatisfied with the ruling of the court, the party objecting must cause his exception to the ruling of the court to be noted. Without then both an objection and exception appearing, the admission of improper evidence, even to the prejudice of a party, is not that error appearing on the record as is contemplated by the section last referred to. It is going but one step farther to say, that unless the attention of the court is again called to such of the errors complained of during the trial, by a motion for a new trial, and time and opportunity given for their review deliberately, there has been no error committed by the court, and no error appears on the record.

In this case as there are no errors complained of, except such as transpired upon the trial, and they not having been passed upon on motion for new trial, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JOHN MCCORMICK, PLAINTIFF IN ERROR, V. WILLIAM LAWTON, DEFENDANT IN ERROR.[a]

Mechanic's Lien: PARTIES. A person who has sold and assigned all his interest in premises upon which there is a mechanic's lien, is not a necessary party to a petition for foreclosure.

———: REQUISITES OF NOTICE. Although the statute (*R. S.*, 1866, *Chap.* XXXV) requires that where work is done upon written contract, the lienor shall file "the same or a copy thereof," with the statement of work done and material furnished, yet if he is prevented from so doing by the wrongful act of the party for whom the labor is performed, he will not thereby lose his lien. And *semble*, parol evidence of the contents of such contract would be admissible. *Per* MASON, CH. J.

———. A husband, with the knowledge and consent of his wife, entered into a contract for the erection of a dwelling house upon her separate estate. The wife assisted in the giving of instructions to the workmen as to the manner in which the work should be done. *Held:*

1. That the husband acted as the agent of the wife in entering into such contract.

2. That the building and lot upon which it was situated, were subject to the mechanic's lien for the value of his labor, and cost of the material furnished.

ERROR to the district court for Douglas county. The case is fully stated in the opinion of the court.

John I. Redick, for plaintiff in error.

E. Wakely, for defendant in error.

MASON, CH. J.

The defendant in error William Lawton, who was plaintiff in the court below, alleges in his petition there filed, that he was employed by one J. C. McKoy, on the 18th of October, 1868, who was at that time in that behalf acting as the agent of Lillie McCoy his wife, to do certain mason work in and about the building of a dwelling house and cistern, on lot four in block eighteen, in Omaha

[a] Decided July Term, 1872.

City; that a part of the work was done under a contract and a part was extra work; that the work was completed about June 4, 1869; that the balance due therefor was twelve hundred and nineteen dollars and ninety cents; that when said agreement was made and until the 2d of January, 1869, the legal title to said lot was in John Campbell; that Campbell conveyed the same to Lillie McCoy, wife of J. C. McCoy, and that said J. C. McCoy and Lillie McCoy, on the same day conveyed the said lot to John McCormick, who still holds the legal title thereto. And it is further alleged that at the time Lawton was employed to do said work, Lillie McCoy was the equitable owner of said lot, and held a contract for the conveyance thereof, and that in pursuance of said contract on said last date the lot was conveyed to her; that in all these matters J. C. McCoy was acting as the agent of Lillie McCoy; that a part of the work was done after John McCormick bought the premises; that he knew of the contract and assented to the same, and requested the completion of the work; that on the 25th of August, 1869, Lawton filed his account under oath for record, in pursuance to the statute in such cases made and provided. Lawton asks that he be decreed a lien upon the said premises for the work and material, and that the same be sold to pay his claim. McCormick in his answer asks that Lawton be required to make proof of the allegations in his petition, and denies that McCoy was the agent of his wife, and denies her knowledge concerning the contract, and also denies that Lawton has a lien.

The first error assigned is the ruling of the court below upon the demurrer of the defendants to the petition of the plaintiff. A suit to enforce a mechanic's lien is in the nature of a suit to foreclose a mortgage. *Ainsworth v. Atkinson*, 14 *Ind.*, 538. When the mortgagor has conveyed his equity of redemption absolutely, the assignee only need be made a party to the bill to foreclose. *Shaw*

v. Hoadly, 8 *Blackf.*, 165. *Swift v. Edson*, 5 *Conn.*, 531. *Story's Equity Pleading*, 197. It is alleged in the petition and admitted by the demurrer that John McCormick is the assignee of J. C. McCoy and Lillie McCoy of the property upon which Lawton claims a mechanic's lien. No personal judgment is sought against J. C. McCoy or his wife. It is only sought to enforce the alleged lien against the particular lot, and McCoy and his wife have sold and assigned all their interests in the lot and premises to John McCormick. McCoy and his wife are not parties in interest to this controversy; they have no interest in the property against which the lien is sought to be enforced, and are not necessary parties. There was no error in overruling the demurrer. If a mortgagor become bankrupt and his estate be assigned under the bankrupt laws, his assignees only need be made parties to the bill. *Addeus v. Holbrook*, 1 *Harris, Ch. Pleadings*, 29, 1808.

It is also assigned as error that no copy of the contract under which the work was done was filed with the statement for a mechanic's lien. It appears that J. C. McCoy, upon some pretext, had procured the contract from one Dufrene, with whom it had been deposited for safe keeping, and left the state with it, thus by his own wrongful act rendering it impossible for Lawton to file a copy of the contract as required by section seven, chapter thirty-five, Revised Statutes, 1866. (*General Statutes*, 1873, *page* 467.) It plainly appears from the evidence that J. C. McCoy secured the written contract from Dufrene, and that it has not been seen since, and that McCoy has left the state, his whereabouts being unknown. To deny Lawton his lien upon the premises, on the ground that no copy of the written contract was filed with the account for record as by law required, or to exclude parol evidence of its contents would be to allow McCoy to take advantage of his own wrongful

act. It clearly appears from the record before us that John McCormick, the assignee of McCoy of the lot and premises, had full knowledge of the work done and material furnished by Lawton, and that the same were not paid for. All these plaintiffs in error took such interest as they possess, charged with all the equities of the defendant in error.

When the wife is the owner of the fee of the lots, and the husband contracts for the erection of a dwelling house on the same, and the wife gives directions and instructions to the workmen, as to the kind and character of dwelling to erect, and the manner in which the work shall be done, in the absence of counteracting proof, it will be presumed that the husband acted as the agent of the wife in entering into such contract. This view of the case is certainly greatly strengthened by our statutes which provide, that any real estate belonging to a married woman may be managed, controlled, leased, demised or conveyed by her, by will or by deed, in the same manner and with the same effect as if she were single. *Revised Statutes*, 1866, *Chap.* 43, *Sec.* 47.

The mechanic has done the work, furnished the material, and finished the dwelling house on the lot and estate of Lillie McCoy. Her separate estate has received the benefit; shall the price of this labor and cost of material be a charge thereon, or shall the mechanic lose the same? The wife was present and not only assented to the contract, but encouraged the mechanic to go on with the work, and gave directions how the same should be done. The equities of Lawton, the defendant in error, are strong and manifest in this case. The contract was made by the husband for the erection of a dwelling house on the lot and property of his wife. It is alleged and proven to have been made with the assent of his wife, and she herself exercised a general supervision over the work, and the tendency of legislation in our state is to vest married

women with the right to use and control their property, contract and be contracted with, with power to ratify and confirm contracts made in respect to the property belonging to them. *Laws of* 1871, *page* 68.

The statute giving the mechanic a lien for labor and material ought to receive a liberal construction, and not one that will put it out of the power of the husband and wife to improve the property of the wife by the erection of a dwelling house for the family. *Littlejohn v. Millirons*, 7 *Ind.*, 125.

JUDGMENT AFFIRMED.

JOHN AND JANE Y. IRWIN, APPELLANTS, v. CALHOUN & CROXTON, APPELLEES.[a]

Practice: APPEALS. Since the passage of the act of 1867, abolishing distinctions between actions at law and suits in equity, and repealing Title 24 of the Code of 1866, entitled "Chancery," no appeal lies to the supreme court. The only remedy for obtaining a review of judgments rendered in the district court, whether in actions legal or equitable, is by petition in error.[b]

———: ———. The general course of legislation upon the subject of "Appeals," considered and reviewed by CROUNSE, J.

MOTION to dismiss appeal.

Calhoun & Croxton, for the motion.

Seymour & Wardell, contra.

CROUNSE, J.

This, with several other equity causes, it is attempted to bring into this court on appeal, and we are asked to review a great mass of testimony and reach a conclusion

[a] Decided special February term, 1872.

[b] See General Statutes, p. 716, and note 2, page 645.

upon the whole record, embodying no bill of exceptions, motion for new trial, or other points to which the attention of the court below was directly called or that of this court especially directed. Since the act of June, 19, 1867, abolishing the distinction between actions at law, and suits in equity, and repealing title twenty four of the code of 1866, entitled "chancery," this cannot be done. Although this mode of proceeding has prevailed at preceding terms, it has been done by indulgence—counsel not objecting and the court not choosing to volunteer in raising any question. But at this term, the right being challenged, we are constrained to hold that there is no warrant, under existing statutes for this manner of review.

The pretended appeal is sought to be founded on title twenty-one of the code of civil procedure of 1866. The first section of that title, being sec. 675 of the code, provides the time in which "appeals hereafter to be tried" shall be taken, and the manner in which it is to be done. But neither under that title, nor by any live statute, is it provided that appeals may be taken; and appeals do not exist by any right other than by statute.

The first act of the first legislature of the territory of Nebraska, was to adopt certain parts of the code of Iowa. *Laws of* 1855. Section 552 declares, "from the decision of the district court an appeal lies to the supreme court." Then follows immediately, and under another head or sub-division, the direction as to the time in which, and the manner of taking such appeal, which, with some amendments enacted at the third session, (*Laws of* 1857, 89,) constitute the title referred to above, as found in the code of 1866. At the fifth session of the legislative assembly, (*Laws of* 1858, 109), the code was modeled after that of the State of Ohio. This code abolished the "distinction between actions at law" simply, "and the forms of all such actions and suits" theretofore existing, and relates solely to actions at law. This code

was, at the time of its adoption, substantially as it stands to-day in the Revised Statutes. It provides the way of prosecuting an action at law to judgment. It further provides, (*sec.* 522, *Laws of* 1858, 197,) that "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." A petition in error is to be filed in the supreme court, and with it a transcript of the proceedings had in the district court. Certain alleged errors of the court below, which it is proposed to review, are frequently brought into the record by bills of exceptions containing portions of the testimony. But it is rarely ever the case that it is necessary to bring up all the testimony.

Under the Organic Act, as it was interpreted, proceedings in suits in equity were kept distinct. In the year 1864 an act, known as the Chancery Act, was passed providing the manner of conducting these. After issue joined, the cause was usually referred to a master who took the proofs in writing. If objection was taken to any question, the master did not decide on its competency, materiality, or relevancy, but simply made a note of it. Upon the pleadings, the proofs thus taken, and depositions if any, the case was submitted to a judge of the district court, as chancellor, and a decree rendered, or final order made. From such decree or final order an appeal to the supreme court could be taken. The appeal was taken by filing in the office of the register of the court in which the action was brought, a notice in writing of the appeal. When this was done, and a minute thereof, and of the date of its being done, made in the appearance docket, the appeal was deemed properly taken. *Laws* 1864, *Sec.* 45 *p.* 162. Within six months after filing the notice of appeal, the appellant was required to file in the office of the clerk of the supreme court a certified transcript of the proceedings had in the cause, containing the pleadings

and decree rendered, or final order made thereon, and all the depositions of record offered in evidence, and all other evidence of record offered on the hearing of the cause. Upon the record thus constituted the cause was heard as though it were an original case in the supreme court, and imposed on this tribunal the task, frequently, of reading and considering great volumes of testimony in manuscript.

Upon the revision of the laws of a general nature, in the year 1866, these two laws, substantially, the one regulating proceedings in actions at law, and the other the Chancery Act, regulating proceedings in suits in equity, were incorporated in the Revised Statutes. In their appropriate places respectively, will be found the mode of reviewing a judgment rendered in an action at law, and the manner of reviewing a decree rendered in a suit in equity. *R. S.* 1866, *p.* 520. In the same volume, however, sandwiched between a title on one side relating to "Contempts," and on the other by one on "Boats," is found Title 24, having for its subject "Appeals from the District to the Supreme Court." Although for a long time obsolete, yet the title had never in terms been repealed, and was presented by the compiler of the statutes to the legislature of 1866, as a law in force. That body, in the hurry which attended the labor of revising so many statutes, in the few days allowed, omitted to discard it. Yet until the repeal of the "Chancery Act," or so much of the Code of Civil Procedure as relates to chancery proceedings, no use could be, or was, as I believe, made of it.

On becoming a state, and relieved from the force of the Organic Act creating the territorial government, one of the first acts of the state legislature was to repeal the "Chancery Act," and to abolish the distinction between actions at law and suits in equity. There can be no doubt that the purpose was to have but one course of proceeding

for either class of cases, and to extend it to proceedings on review, as well as to any other stage of a case. Uneducated under the modern practice which discards the difference between proceedings in legal and in equitable actions, some were ready to accept this title under question as authority, under which to seek a review of judgments in actions of an equitable character. But there is no more authority for attempting to *appeal* from a judgment in an action of an equitable nature, than there is from one purely legal. The distinction is not made in terms and must be entirely assumed. To permit judgments in either class of actions to be reviewed in two different ways would lead to great confusion, and could not have been intended.

With so much of the Revised Statutes as is known as the "Chancery Act" repealed, the only express authority for appealing to the supreme court, from the decrees or judgments of the district court in cases generally, is blotted out. The context, giving the right of appeal, as found in the early statutes, was not brought into the Revised Statutes with Title 24. That right was repealed by the enactment of the Revised Statutes, and, by inadvertence, sections were brought into the laws, providing for the manner of taking appeals, when there is no law providing that they may be taken. The only way then for obtaining a review of judgments rendered in the district court, whether in actions legal or equitable, is by petition in error.

Sec. 6, of the act amending the Code of Civil Procedure, which undertook to provide for a general mode of review by appeal, instead of by petition in error, having first been declared by this court unconstitutional and then repealed, (*Laws of* 1871, 113,) needs not to be considered.

This case, as well as others in like condition, must therefore be stricken from the calendar, as not having been properly brought into this court.

APPEAL DISMISSED.

EDITHA J. DAWSON v. H. W. MERRILLE.

THIS was an appeal from a judgment of the district court for Lancaster county. The cause was tried, and decision rendered at the July term, 1872. A statement of the case and opinion by *Mason, Ch. J.*, appears in 2 *Neb.*, 119. The following opinion of *Mr. Justice Crounse*, was, however, overlooked in the publication of that volume.

CROUNSE, J.

The trial in this case was to the court. No request was made under section 297 of the civil code, for a separate statement of conclusions of facts from those of law, and we cannot therefore see upon what the determination of the court proceeded, nor well review the several propositions discussed by counsel. Still, from the record brought here, I cannot discover how any other conclusion could have been reached than that arrived at.

The alleged contract, to enforce which, against the defendant, this action was brought, purports to be the mutual agreement of the subscribers thereto, upon "consideration of the mutual agreements and covenants therein expressed." What are these agreements and covenants? Among them cannot be "the express condition that the capitol and other public buildings be located at, or adjoining, Lancaster." The location of the capitol is a state matter, a subject of public concern with which none of the subscribers had anything to do, or which they could in any way lawfully influence. More than this, none of the subscribers undertook to build, or to have built, the capitol at Lancaster. There is no mutuality in this.

The only other suggestion of a foundation is the promise of the other subscribers. This will not bear

examination. A simple agreement by ten persons each to give A. one hundred dollars is without consideration —*a nudum pactum.* 1 *Pars. on Contracts, 4th Ed.*, 378. Nor is the promise more binding by agreeing that all or any portion of the money so promised shall be paid to such one of the number as a majority may designate. In such case it would be open to the further objection, that it would be in the nature of a gambling or wagering contract. Where, for a valid consideration, one agrees to convey his farm to him who shall be named by any person, or number of persons, mentioned, I concur with counsel that such an agreement is valid. But the case is different where the consideration of the promise is, that the person agreeing to convey is to have a chance that he may be the person to whom lands may be conveyed by others making like promises.

Then, again, how, or upon what basis is the fortunate grantee to be determined? The writing leaves this very uncertain. It says the subscribers shall convey to "such of the parties hereto as may be agreed upon by a majority." When and where is that agreement to be made? Shall it be upon meeting of all, or by a majority upon notice to all? It seems that the mere chance of the defendant, resting upon no rule or basis as disclosed by the writing, was subject to be destroyed by the arbitrary disposition of a majority. Whether this majority may have reached their conclusions by throw of dice, or with reference to some right or order, would appear to be a matter of no great consequence. The fact that they did agree that Merrille should convey to Dawson, it is insisted, is sufficient. How the court found as to the fact that a majority did agree, we are uninformed in the absence of special finding. Did it appear, however, that the court found against the plaintiff, I should be slow to interfere with its finding. Where the plaintiff's right depends upon the decision of a majority, the court might well

insist that an unequivocal decision, by a clear majority, be made out by undoubted proof. But upon the face of the writing I am of the opinion that it is too uncertain in this particular. It can be fairly gathered from it that one of the inducements to, or a part consideration for, defendant's parting with his land, was that he might by some chance or rule receive it or some other land in return. This contingency rested on the agreement of a majority. From the contract it should appear how this was to be effected—upon what basis it was to proceed, so that the parties interested might resist an improper determination, or insist on their rights under it.

Conceding that the agreement shows, or by the introduction of other evidence can be made to show, all that is claimed by the plaintiff, to-wit: that, in order to secure the location of the state capital at Lancaster, around which place the several subscribers were the owners of lands like to be enhanced in value by such location, the parties agreed to donate to the state certain lands, and to such of the parties whose lands might be taken for capital purposes more than they should in fairness contribute, still, the plaintiff in prosecuting his action is opposed by other insuperable propositions of law. The act providing for the location of the capital and state buildings, makes the governor, secretary of state, and auditor, commissioners for the purpose of such location. On or before the 15th day of July, 1867, they were required on actual view, to select from the lands belonging to the state, within certain prescribed limits, a suitable site of not less than six hundred and forty acres in a body, due regard being had to its accessibility from all parts of the state, and its general fitness for a capital. *Laws of* 1867, 52. The state asked no donations, nor empowered the commissioners to receive any. Very evident reasons suggest themselves for having the capital located on lands belong to the state. The state owned large quantities of

lands, and by the location of the capital on some part of them, the balance thereabouts must necessarily be enhanced in value. Whether these donations were to be given in part to those who were most influential with the commissioners; whether any portion was to be given to the commissioners, or any of them; or whether to be given to the state does not appear. It is very evident, however, the purpose was to influence the action of the commissioners, and that, too, in the interest and to the profit of the donors, regardless of the interest of the state. In this respect the agreement is against public policy, and a court of equity will not lend its aid in its enforcement.

Again, it is admitted that the lands in question were entered and settled upon by the defendant as a homestead under the laws of the United States, and upon which he had some years yet to live before he could obtain a patent for it from the government. The very admission shows that the defendant had no title in law, or right in equity, that he could convey. But, it is said, it was understood that the several tracts were to be conveyed as soon as the legal title should be acquired by the respective signers. This is not so said in the writing, nor is it consistent with that provision which says that "said conveyances are to be executed immediately upon the location being announced by the commissioners." To show a different agreement, or to modify that introduced as having been entered into in writing, would be a violation of the most elementary rules. 1 *Greenleaf Ev.*, *Sec.* 275. *Pym v. Blackburn*, 3 *Sumner's Ves.*, 38. With more plausibility might the defendant contend that his agreement was to abandon his homestead right so that the party designated might enter as a pre-emptor or for the purpose of a homestead, than that the plaintiff could claim that he had bargained for years of toil, residence, and cultivation, by the defendant and his family, in order that a patent might be obtained which should be handed

over at once to the plaintiff. A written contract would be of little consequence if, in so important particulars, the matter must rest in parol.

However, let the plaintiff be indulged in the still further concession, that such was the understanding, he then is no better off. Such agreement is opposed to the spirit of the Homestead Act. The act evidently proceeded from a desire to benefit the poor man, and the man of limited means who might be desirous of possessing a home for himself and family. While the government demands good faith and an honest purpose on the part of the applicant for its bounty, it protects him carefully in the attainment of his object. The person seeking to avail himself of the benefit of this law must make oath that the land entered is taken for the purpose of actual settlement, and that it is not directly, or indirectly, for the benefit of any other person or persons whatsoever. In applying for his patent, after five years residence, he must again swear, among other things, that no part of the land has been alienated. *Chap.* 75, *Acts and Res., 2d Sess. 37th Congress.* More than this, no lands acquired under the act shall in any event become liable for the satisfaction of any debt contracted prior to the issuing of any patent therefor. But we are told that here was no alienation—simply an agreement to convey—and because there is no inhibition against agreeing to convey, such agreement must stand. It is true that there was no alienation in fact, for the very good reason that the defendant had no title to convey. "It is laid down as a general rule," says Bacon, (*Abr. Tit. Grants, D.* 2,) "that a man cannot grant or charge that which he hath not." Any right of the plaintiff to a conveyance from the defendant, after receiving his patent, relates back to and is founded upon the alleged agreement, when he had no estate to convey, and when he was expressly forbidden to alien. Yet we are asked, by ingenious construction, to say that an applicant can, in

one hour, enter upon a piece of government land, making oath that he does so for the purpose of actual settlement, and not directly or indirectly for the use or benefit of any other person or persons whomsoever, and, in the next hour, such other person, whom the policy of the law excludes, can make a valid agreement which shall wrest the title from the settler as soon as it is obtained from the United States. In other words, we are requested to hold that while the settler cannot alien by deed in form, he can do so by another writing which will be equally efficacious, if this court will only declare it so. It would illy become a court of equity to thus lend its aid in the contravention of the manifest provisions of the act designed for the benefit of poor homesteaders. The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

OPINION OF THE JUDGES.

Constitutional Law: IMPEACHMENT OF THE GOVERNOR. The functions of the Governor are, under the provisions of the Nebraska constitution, entirely suspended, and devolve upon the Secretary of State, from the time of the impeachment of the Governor, by the House of Representatives, and during the trial thereof by the Senate. *Per* LAKE AND CROUNSE, JJ.

THE House of Representatives, during its session in 1871, having prepared articles of impeachment against David Butler, Governor, by resolution submitted the *quære* to this court, then in session, whether the impeachment of the Governor suspended him from office during his trial. MR. JUSTICE LAKE and MR. JUSTICE CROUNSE responded as follows:

To the Honorable, the House of Representatives of the Legislature of the State of Nebraska:

GENTLEMEN: In response to the resolution presented to the Supreme Court by your honorable body, in which

you request the opinion of the court upon the question, "Does the impeachment of the Governor by the House of Representatives suspend him from office during the trial?"

We have to say—

1st. That the question does not come to us in such a form as to enable us, as a court, to give an authoritative decision thereon. But in view of the great importance of the question, not only to your honorable body, but to all branches of government, we feel it to be a duty to accede to your request, and extend to you such aid as this informal expression of opinion may give.

2nd. Section 28, article 2, of our state constitution, confers upon the House of Representatives the *sole* power of impeachment and the next section provides what officers may be impeached, among which is the governor.

Section 16 of the article entitled "Executive," provides in what contingencies the powers and duties of the governor shall devolve upon the secretary of state. They are five in number, viz:

1. His impeachment.
2. His removal from office.
3. His death.
4. His resignation.
5. Absence from the state.

From this enumeration it is seen that the *first* contingency named in the constitution whereby the duties of the office of Governor devolve upon the Secretary of State, is that of impeachment. The language of the constitution is direct, positive, and entirely unambiguous.

We conclude therefore, that it is the law that all the functions of the Governor are entirely suspended, and devolve upon the Secretary of State from the time of his impeachment by the house of representatives, and during

the trial thereof by the Senate. All of which is respectfully submitted.

GEO. B. LAKE, *Justice.*
L. CROUNSE, *Justice*

MR. CHIEF JUSTICE MASON responded as follows:

To the Honorable, the House of Representatives of the State of Nebraska:

IN response to the interrogatory submitted to the court, a sense of judicial propriety forbids that I express any opinion thereon. The question may arise between parties who may become individually interested in its determination, and the court then be compelled to authoritatively determine the question. At present the action of the court would be without authority, the court having no jurisdiction over the question submitted, or the parties interested in its determination, and an expression of opinion by me, as one of the members of the court, would only complicate the court in the determination of a question incident to impeachment, while the constitution and laws have, for wise reasons, removed both the principal question, with all its incidents, from this court. In my humble judgment the court should avoid complicating the judicial department of the state in this matter, until the question is presented in such form that its opinion may be authoritatively expressed.

O. P. MASON, *Chief Justice.*

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