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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1878.

VOLUME VII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

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By GUY A. BROWN, Reporter of the Supreme Court,

In behalf of the people of Nebraska.

THE SUPREME COURT

OF

NEBRASKA.

CHIEF JUSTICE.

SAMUEL MAXWELL.[a]

JUDGES.

GEORGE B. LAKE,

AMASA COBB.[b]

ATTORNEY GENERAL.

GEORGE H. ROBERTS.

CLERK AND REPORTER.

GUY A. BROWN.

DEPUTY.

HILAND H. WHEELER.

---

a. Chief Justice, under the provision of section 6, Art. VI, of the Constitution, Chief Justice Daniel Gantt having died May 29, 1878.

b. Appointed by the Governor to fill the vacancy caused by the death of Chief Justice Daniel Gantt.

DISTRICT COURTS

OF

NEBRASKA.

JUDGES

A. J. WEAVER, - - -	First District.
S. B. POUND, - - -	Second District.
JAMES W. SAVAGE, - -	Third District.
GEORGE W. POST, - -	Fourth District.
WILLIAM GASLIN, Jr., - -	Fifth District.
E. K. VALENTINE, - - -	Sixth District.

PROSECUTING ATTORNEYS.

JAMES P. MAULE, - -	First District.
GEORGE S. SMITH, - - -	Second District.
CHARLES J. GREENE, - -	Third District.
M. B. REESE, - - -	Fourth District.
C. J. DILWORTH, - -	Fifth District.
J. B. BARNES, - - -	Sixth District.

The volume of laws quoted as the "Revised Statutes" refers to the edition prepared in 1866 by E. ESTABROOK.

The volume of laws quoted as the "General Statutes" refers to the edition prepared in 1873 by GUY A. BROWN.

This volume contains a report of all decisions handed down prior to the October Term, 1878, not previously reported. Opinions completed by Chief Justice Gantt prior to his death were not filed until the July Term, 1878, and they are consequently placed among the decisions of that term.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1878.

PRESENT:

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

AULTMAN & TAYLOR MANUFACTURING COMPANY, APPELLEE, v. E. H. RICHARDSON AND OTHERS, APPELLANTS.

1. **Deed:** MISTAKE IN GRANTEE'S NAME. A mistake or abbreviation in the name of a grantee in a deed does not necessarily invalidate the deed, but such mistake or abbreviation may be explained and made certain and definite by extrinsic evidence

2. ———. The *habendum* in a deed cannot divest the estate vested by the grant in the deed; and when it is repugnant to the grant it must be treated as of no validity or effect.

APPEAL from the district court of Johnson county Tried below, before WEAVER, J. The facts are stated in the opinion.

S. P. Davidson, for appellants, cited 3 Wash. on Real Property, Secs. 7, 26. *Simms v. Hervey*, 19 Iowa, 288. *Chase v. Palmer*, 29 Ill., 306. *Ames v. Ames*, 5 Wis., 166. *Hull v. Brown*, 25 Wis., 650. *McKnight v. The President, etc., of Mineral Point*, 1 Pinney, 99.

T. Appelget, for appellee, cited *Chamberlain v. Crane*, 1 N. H., 64. *Bridge v. Wellington*, 1 Mass., 219. *Wallace v. Wallace*, 4 Mass., 135. *Pray v. Pierce*, 7 Mass., 381. *Litchfield v. Cudworth*, 15 Pick., 23. *Porter v. Ingram*, Harper, 492. *Ingram v. Porter*, 4 McCord, 198. 3 Kent Com., 422. Shepherd Touchstone, 89. *Tyler v. Moore*, 42 Penn. St., 376. 2 Hilliard on Real Property, 339, 372. *Adams v. Frothingham*, 3 Mass., 352. 3 Washburn on Real Property, Secs. 36, 61.

GANTT, CH. J.

This is a foreclosure case, and is brought into this court upon appeal. The mortgage deed was executed by the defendants, E. H. Richardson and Parmelia Richardson, to secure the payment of two promissory notes. These defendants denied "that they ever executed, acknowledged, and delivered to plaintiff the mortgage particularly described and set out in the petition;" but on the trial of the cause they "admitted that they signed the paper which purports to be the mortgage, and which is attached to the petition, but denied that the said paper was a mortgage." The objections to the deed offered in evidence are that "it is irregular, uncertain and indefinite;" in this, the grantees therein are "Aultman & Taylor, M'f'g Co." It is insisted that the deed does not contain the name of a grantee, and it is therefore void. But in this case grantees are named in the mortgage deed; and the only question is, whether the abbreviation by letters of the words "Manufacturing Company" will invalidate the deed.

The case of *Chase v. Palmer*, 29 Ill., 306, relied on, only decides that a deed without *any* name of a grantee, when it was executed and acknowledged, is invalid, because a deed is a writing sealed and delivered by the parties, and when executed there must be in every grant a grantor, a grantee, and a thing granted; and the case of *Simms v. Hervey*, 19 Iowa, 288, is to the same effect. This is the common law rule.

In *Ames v. Ames et ux.*, 5 Wis., 166, the court say there was a fatal variance between the mortgage described in the bill and the one offered in proof, in this, that "the bill states the mortgage was conditioned for the payment of $130.72 and interest, according to the note described in the mortgage, while the mortgage offered in evidence was conditioned for the payment not only of the note, but also to secure the payment of $7 annually to the mortgagees or the survivor, for life;" *held*, that it is essential to correctly describe the condition of the mortgage in the petition, because the averment of the condition is descriptive of that in the mortgage, and should correspond with it.

It will easily be observed that the question raised and decided in the above cases is very different from that raised in the case at bar, and therefore cannot properly be applied to the one under consideration. But do the abbreviations used in the name of the grantees invalidate the mortgage deed? We think not.

In *Staak v. Sigelkow*, 12 Wis., 241, the question in regard to a mistake or abbreviation in the name of the grantee is fully discussed, and, after a review of English and American authorities, it is *held* that such mistake or abbreviation does not necessarily invalidate the deed, for it may be explained. This construction seems to be based on the general and familiar doctrine that deeds must be construed, if it be practicable, so as to give effect to the intent of the parties. *Webb v. Den, et al.*, 17 How., 579.

Again, the mortgage is an incident to the debt, and so far as respects its determinate value, it cannot be detached from the debt; and therefore it follows or passes with the assignment of the debt; hence, the notes and the mortgage must be considered together. *Richards v. Kountze*, 4 Neb., 208. Now, when the mortgage, and the notes which are particularly described in its conditions as to amount, date and interest, are taken together, the latent ambiguity caused by the abbreviation in the names of the grantees is explained and made certain, definite, and clear. There can be no doubt about this, or as to the intent of the parties; and this intent must govern.

Again, it was urged in the argument for defendants that because the *habendum* is inconsistent with the grant, it invalidates the deed. In answer to this point, it is only necessary to state that the *habendum* cannot divest the estate vested by the grant in the deed, and that when it is repugnant to the grant, it must be treated as of no validity or effect. 3 Wash. on Real Estate, 642. 4 Kent Com., 529.

The final decree must now be rendered in this court in favor of plaintiffs against the defendants, E. H. Richardson and P. Richardson, for the amount of the two notes and interest thereon, with costs, and the usual order of sale of the mortgaged premises.

DECREE ACCORDINGLY.

MARTIN B. CUTLER AND GEORGE R. MICKELWAIT, PLAINTIFFS IN ERROR, v. J. J. ROBERTS, DEFENDANT IN ERROR.

1. **Principal and Surety:** BOND: CONDITIONS. A bond which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered

by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it upon the condition that it should not be delivered unless it should be signed by other persons, who did not sign the same, if the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution.

2. ——: ——. LIABILITY OF SURETY: Where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding, and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part thereof as sureties, it will not be valid as to those that do sign until the condition is complied with.

3. ——: ——: ——. If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor, to be delivered to the obligee only upon certain conditions which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond.

4. ——: ——: ——. A statutory bond must conform substantially to the requirements of the statutes in respect to its penalty, conditions, form, and number of sureties. The statute in such case enters into and forms a part of the contract, and a surety may insist, as a defense in an action on such a bond, signed by but one surety where two are required, that he is not liable thereon, the bond not being perfect on its face, unless he waive the defect.

ERROR to the district court for Cass county. Tried below, before POUND, J. The facts appear in the opinion.

E. L. Kelley and *R. B. Windham*, for plaintiffs in error.

Where a person signs his name in blank as surety to a bond, and hands it to his principal to have completed and signed by others and handed over to the proper authority, he makes that person his agent for the whole

business, and is estopped and bound by his action, without regard to any secret instructions as to any conditions on which it should be completed and filled. *McCormick v. Bay City*, 23 Mich., 457. *Smith v. Peoria*, 59 Ill., 412. *The State v. Garton*, 32 Ind., 1. *Wright v. Harris*, 31 Iowa, 272. *Johnson v. Weatherwax*, 9 Kan., 75.

A bond executed with one surety may be enforced, notwithstanding the statute under which it was given requires two sureties, if it does not provide that any other shall be void. *Bank v. Cresson*, 12 Sergt. and Rawle, 306. *The People v. Johr*, 22 Mich., 461. *Insurance Co. v. Brooks*, 3 Am. Law Reg., N. S., 502, note.

The defendant in error, in his evidence, completely failed to show that he signed said stay bond upon condition that another should sign with him, or that there was anything further to be performed prior to delivery whatever. Nor is it even claimed that any particular person should sign with him, or that the bond should not be delivered until the signature of another surety was obtained.

Chapman & Sprague, for defendant in error.

For the sake of this argument suppose we admit that this *is* a good bond at common law, but is not good as a statutory bond that will authorize a stay of execution under our statute, then it becomes important to inquire what are the liabilities incurred by the giving of such a bond, and the rights acquired thereunder, and in order to do this we ask what was the object to be obtained by giving said bond? Why of course it was to obtain a stay of execution upon this judgment, and if none was authorized by this bond then the consideration of the bond failed, and could not be enforced against the maker. But suppose we go further and admit that it is good as a common law bond, and being good as such, that it

would and did authorize the stay as a common law bond, but not as a statutory bond, then it would only be an obligation upon which a right of action might be based, but would not authorize the issuing of an execution and a sale of defendant's property without giving him his day in court.

The plaintiff in error says that "the defendant in error in his evidence completely failed to show that he signed said stay bond on condition that another should sign with him." Now in this statement he is laboring under a grave mistake, for Roberts says in his testimony that at the time he signed it he told Rouse that the law required two. But if nothing had been said, the law requires it, and everybody is presumed to know the law. Rouse also in his testimony states that Roberts made this statement, and that he would obtain another if the law required it. Where a bond is signed on condition that another is to sign the same before it is to be delivered, it is void if not signed by that other. *People v. Bostwick*, 32 N. Y., 445. *Lovett v. Adams*, 3 Wend., 380. *Bronson v. Noyes*, 3 Wend., 188. *Linn County v. Farris*, 52 Mo., 75. *State v. Potter*, 21 American, 440. *Dair v. United States*, 16 Wall., 1. *Pauling v. United States*, 4 Cranch, 218. *State Bank v. Evans*, 3 Green (N. J.), 155. *Bibb v. Reed*, 3 Ala., 38. *Blake v. Sherman*, 12 Minn., 420. *Sharp v. United States*, 4 Watts., 21. *Johnson v. Weatherwax*, 9 Kan., 75.

MAXWELL, J.

On the eighteenth day of May, 1875, Howard Mayfield and Daniel Mayfield commenced an action in the probate court of Cass county against John Rouse, on a promissory note, to recover the sum of $250 with interest at twelve per cent from the eighth day of November, 1867. The note upon which the suit was

brought was payable to Howard Mayfield and Daniel Mayfield. On the eighth day of June, 1875, judgment was rendered on said note against said Rouse, for the sum of $293.81 and costs. Afterwards, and before the eighteenth day of June, 1875, Rouse presented a stay bond to J. J. Roberts, and requested him to sign the same as surety, which he did. The bond is in the following form:

"Know all men by these presents, That we, John Rouse as principal, and ——— as sureties, are held and firmly bound to Howard Mayfield and Daniel Mayfield, plaintiffs in the above entitled cause, in the sum of $628.90," etc.

Roberts notified Rouse at the time he signed the same that the law required two sureties on the bond. Rouse promised to procure an additional signer to the same, but failed to do so, and transmitted the bond by mail to the probate judge who made the following endorsement thereon; "June 20, 1875; stay bond filed; J. J. Roberts." Afterwards, although at what time does not appear, the names of Howard Mayfield and Daniel Mayfield, as plaintiffs, were erased from the judgment record, and the name of J. D. Howard inserted in lieu thereof. Afterwards, on motion of the attorneys for the Mickelwaits, the name of J. D. Howard was stricken from the record and the names of Howard Mayfield and Daniel Mayfield reinserted. The judgment was then assigned to George and R. Mickelwait, who, on the fifteenth day of May, 1876, caused an execution to issue on said judgment, which was levied on certain personal property of Roberts, Rouse having become insolvent. Roberts thereupon commenced an action against the sheriff, Cutler, to restrain the sale of said property, and to declare the stay bond void. A decree was rendered in his favor in the court below, to reverse which the defendants bring the cause into this court by petition in error.

This is a suit in equity. The act of March 3, 1873, Gen. Stat., 716, provides that actions in equity may be brought into this court by appeal, but the remedy by appeal is not exclusive. A party may bring a case into the supreme court either by appeal or by petition in error, as he may elect, by taking the requisite steps therefor. *White v. Blum*, 4 Neb., 558.

But in order to review an action in equity on error, the errors complained of, which occurred on the trial, must be brought before the district court by a motion for a new trial, or they will be considered as waived. *Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 406. *Mills v. Miller*, 2 Neb., 317. *Wells, Fargo & Co. v. Preston*, 3 Neb., 446. *Cropsey v. Wiggenhorn*, 3 Neb., 117. *Singleton v. Boyle*, 4 Neb., 415. There having been no motion for a new trial in the court below, the alleged errors cannot be reviewed in this court.

This is decisive of the case, but as the questions raised by the assignment of errors were argued before the court, without objection on the part of the defendant in error, we will review the principal question raised by the assignment of errors, viz: the liability of the surety. A large number of authorities are cited by the plaintiff in error to show that the defendant in error is liable on the bond.

The case of *Lewis, Governor, etc. v. Stout*, 22 Wis., 234, was an action on a bond, wherein the defendants bound themselves to the state of Wisconsin, by a bond to the governor thereof, and his successors in office as trustee for the benefit of the state. *Held*, on demurrer to the petition, that the bond was properly executed.

In *Dair v. United States*, 16 Wall., 1, in an action on an official bond, the sureties answered "that the said James Dair and William Davidson signed the said writing obligatory upon the day of its date, as sureties, at the instance of Jonathan Dair, one of the principals, but

that it was signed by them upon the condition that said writing obligatory was not to be delivered to the plaintiff until it should be executed by one Joseph Cloud, as co-surety; that the said writing obligatory upon its signing by them upon the condition aforesaid, was placed in the hands of the said principal, Jonathan Dair, who afterwards, without the performance of that condition and without the consent of the said James Dair and William Davidson, delivered the same to the plaintiff. And that when the bond was so delivered *it was in all respects regular upon its face, and that the plaintiff had no notice of the condition.*" It was held that there was nothing on the face of the paper, or in the transaction itself, to put the officer on inquiry, or to raise even a suspicion in his mind that a condition was annexed to the delivery of the bond, that there was nothing left for the officer to do but to accept the bond and issue the license, and as the sureties had confided in Dair, it was more consonant with reason that they should suffer from his misconduct than the government.

In *Du Boise v. Bloom*, 38 Iowa, 512, the plaintiff recovered judgment against the defendant in the circuit court. Within ten days after the adjournment of the term, the defendant filed in the office of the clerk of the court a stay bond, which was duly approved, but on which the sureties did not justify. The court held, that it is not made a condition of the stay, that the sureties shall make affidavit as to the value of their property; that whatever liability the officer may incur on account of a failure to observe the provisions of the statute, such failure does not invalidate a stay otherwise regularly taken.

In *The State v. Peck*, 53 Me., 284, Peck was elected state treasurer for the year 1858, and presented a bond to the legislature, apparently duly executed by all whose names appeared therein. It appeared that some of the

sureties signed the bond only upon condition that certain other gentlemen, who had been co-sureties with them for Peck the previous year, should sign the same. The bond was delivered by the sureties to Peck, who delivered the same to the legislature, without stipulation, reservation, or condition. It was held, that the sureties were bound, although the bond was not signed by the other persons designated, the obligee having no notice of such condition, and nothing to put him on inquiry as to the manner of its execution.

In *The State v. Pepper*, 31 Ind., 76, the court held substantially, that when a bond has been signed and delivered to the principal obligor by a surety, upon the condition that others, *not named in the instrument*, shall sign before it is delivered to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of such condition, or of circumstances which should put him upon inquiry, the condition imposed will not avail the surety.

In *The People v. Johr*, 22 Mich., 462, the defendant, as treasurer of St. Clair county, had given bond to the auditor-general, conditioned that he would pay over and account for all moneys he should receive for sale of land for taxes at the annual tax sales in said county. The bond was approved by one circuit court commissioner of said county, but there was no approval by the prosecuting attorney, or the other circuit court commissioner; nor was there any express approval of the auditor-general on the bond. The court held substantially, that without the approval of the prosecuting attorney and the other circuit court commissioner, the auditor-general might have refused the bond, and declined to allow the defendant to make the sales. But the treasurer having been permitted to make the sales and receive the money on the faith of the bond, his sureties could not be permitted to make the objection that the bond did not conform to the statute.

In the case of *The People v. Bostwick*, 32 N. Y., 445, the bond in suit was executed by the defendants as sureties. The bond was handed to Bostwick, with the distinct understanding that it was not to be used unless it should be signed by one Dickinson as co-surety. The bond was never signed by Dickinson. The bond was perfect and complete on its face, and no insertion of Dickinson's name as one of the obligors. It was held, that there had been no delivery of the bond, and it was therefore void as to the surety.

In *Blake v. Sherman*, 12 Minn., 424, under a statute requiring in actions in attachment a bond in at least the sum of $250, with *sufficient sureties*, the court held, "This section of the statute is not to be regarded as directory. There must be a bond (a term well understood), with a penalty, and a condition, and with *two* or more sureties."

In the case of *Fletcher v. Austin*, 11 Vt., 449, the court say: "Where a bond contains in the obligatory part the names of several persons as sureties, if a part sign with an understanding and on the condition that it is not to be delivered to the obligee until signed by the others, it is not effectual as to those who do sign until the condition is complied with." To the same effect, see *Bank v. Evans*, 3 Green (N. J.), 155. *Duncan v. The United States*, 7 Peters, 448.

From a careful examination of the authorities, we think the following rules may be deduced.

First. That a bond, which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be signed by other persons,

who did not sign the same, if it appear that the obligee had no notice of such condition, and nothing to put him upon inquiry as to the manner of its execution, provided he has been induced upon the faith of such bond to act to his own prejudice.

Second. That where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part as sureties; it will not be valid as to those that do sign until the condition is complied with.

Third. If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor to be delivered to the obligee only upon certain conditions, which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond.

Fourth. That a statutory bond must conform substantially to the requirements of the statute in respect to its penalty, conditions, form, and number of sureties.

The act approved February 23, 1875, "To provide for stay of executions and orders of sale," Laws, 1875, page 49, provides that: "On all judgments for the recovery of money only, except those rendered in any court on appeal or writ of error thereto, or against any officer or person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for the breach of any official duty, there may be stay of execution, if the defendant therein shall, within twenty days from the rendition of judgment, procure *two or more* sufficient freehold sureties to enter into a bond, acknowledging themselves security for the defendant for the payment of the judgment, interest, and costs," etc.

The law in such a case enters into and forms a part of

the contract, and a surety may insist as a defense, in an action on a bond signed by but one surety, that he is not liable thereon, the statute being notice to all parties concerned that two sureties were required; unless the surety waive the condition prescribed by the statute.

A waiver is defined to be an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. *Livesey v. Omaha Hotel*, 5 Neb., 50.

In the case at bar the bond was signed by but one surety, who delivered the same to the obligor to procure an additional surety, and file the same with the probate judge of Cass county. No additional sureties were obtained, but the bond was transmitted by mail to the probate judge, who failed to approve the same, but marked it filed. This bond did not comply with the statute, and was not sufficient to authorize a stay of execution.

The judgment of the district court discharging the surety is therefore affirmed.

JUDGMENT AFFIRMED.

GANTT, CH. J., concurs.

LAKE, J.

I assent to the affirmance of the judgment solely on the ground that no motion for a new trial was made in the court below, but express no opinion on the question discussed by the majority of the court.

THE STATE OF NEBRASKA, EX REL. JOHN H. AMES V. SILAS GARBER, GOVERNOR.

1. **Statutory Construction:** COMMISSION TO REVISE THE GENERAL LAW: LIMITATION OF ITS POWERS. The commissioners appointed to revise the general laws of the state, under the act of February 16th, 1877, are limited in the performance of their duties to the first day of January, 1878.

2. ——: ——: ——. After the time limited the members of the commission could perform no acts under the law, nor are they entitled to receive from the state any compensation for any services performed ostensibly under its provisions.

APPLICATION for mandamus.

S. B. Galey and *M. H. Sessions*, for the relator.

The act in question is clearly directory. *Hurford v. City of Omaha*, 4 Neb., 350. It clearly comes within the rule laid down in *People v. Allen*, 6 Wend., 486. Where the statute specifies a time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory merely, unless the nature of the act required to be performed, or the language used by the legislature show that the designation of time was intended as a limitation of power. *Id.*, *Gale v. Mead*, 2 Denio, 160. *Hart v. Plum*, 14 Cal., 149. *Pond v. Negus*, 3 Mass., 230. *Smith v. Crittenden*, 16 Mich., 156. 2 Am. Law Reg., 409. *Clark v. Hoskins*, 6 Conn., 108. *Smith v. People*, 47 N. Y., 330.

T. M. Marquett, for the respondent.

LAKE, J.

This is an application for a peremptory writ of mandamus to compel the governor to approve and sign a voucher presented to him for that purpose for services alleged to have been performed by the relator, as a member of the commission appointed under the act of the legislature, approved February 16th, 1877, to revise the general laws of the state. This act provides in its fifth section that all vouchers for the payment of such compensation must "be approved by the governor and secretary of state."

It stands admitted that the service for which the ac-

count was rendered was performed, but since the first day of the present month. And the governor places his refusal to approve the account solely on the ground that under the act creating the commission its members "are not entitled to receive pay for services rendered, nor to in any manner disburse moneys appropriated by said act * * * * after the first day of January, 1878."

In other words the refusal to perform the act required of him is based upon the supposition that the existence of this commission is limited by the act in question to the first day of January, 1878, and that consequently after that time its members could perform no act under the law, nor be entitled to receive from the state any compensation for any service performed ostensibly under its provisions.

In view of the unfinished condition of the work that it was designed they should perform and the consequences of our sustaining the governor in his construction of this statute, we had hoped to reach a conclusion different from that to which he seems to have arrived, but we have been unable to do so.

By section 3 it is provided that "they (the commissioners) shall, by the first day of January, 1878, complete the duties assigned them, make a report to the governor of what they have done, what changes have been made, and what amendments and further legislation they deem necessary." This is very plain language, and it is pretty evident that the legislature considered the time given amply sufficient for the purpose, and that they designed the work to be fully completed by the first day of January, 1878. But in addition to this section, and obviously in order that it might be fully understood that they were limited expressly to this time, it is further provided in section 5, that "the sum of one thousand dollars, or as much thereof as may be necessary, is hereby appropriated for the use of said commission, for stationery

and such clerical force as they may find necessary, *in order to complete their labors by the time provided in section three of this act.*"

We are very well aware of the rule frequently applied by courts, by which words in a statute, apparently of limitation, are held to be merely directory. This subject was pretty fully discussed, and the rule applied, in the case of *Hurford v. The City of Omaha*, 4 Neb., 336. And when it can be gathered from a consideration of the entire act, that such was the legislative intent, there is no doubt that the court should give to the language that construction.

But looking to the act before us, we see nothing that would justify us in giving to the words employed to express the legislative will any other than their plain and ordinary meaning. By assuming the language to be merely directory, it seems very clear to us that we would be doing violence to the clearly expressed will of the legislature, that this commission should cease their labors, and make a final report of their work done, by the first day of January, 1878. If they can proceed with their work, at the expense of the state, for any time after the period fixed by the legislature, it must follow that practically there is no limit whatever to the time that may be occupied, or the expense incurred, but the will of the commission itself. We are very certain that the possibility of such a result could not have been contemplated by the legislature, or very different language would have been employed. "In the case of all written laws, it is the intent of the lawgiver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it." *Cooley Con. Lim.*, 54.

We think the governor has given to the act in question its proper meaning, and therefore the prayer of the relator must be denied.

WRIT DENIED.

WILLIAM EDWARDS, PLAINTIFF IN ERROR, v. MORAUD SCHUTT, DEFENDANT IN ERROR.

Appeal: ACTIONS OF REPLEVIN IN JUSTICE'S COURT. In an action of replevin to recover possession of specific property, commenced before a justice of the peace, and tried by a jury, an appeal may be taken from the judgment of the justice of the peace to the district court, without regard to the amount in controversy.

ERROR to the district court for Douglas county. Tried below before SAVAGE J.

Stull & Burnham, for plaintiff in error, cited *Rollston v. Osenbaugh*, 2 W. L. M., 138. *Martin v. Armstrong*, 12 Ohio State, 548.

GANTT, CH. J.

The plaintiff in error took an appeal to the district court from a judgment rendered against him in favor of defendant in error, by a justice of the peace, upon the verdict of a jury, in an action brought to recover possession of specific property. On motion of defendant, the district court dismissed the appeal, on the ground that the amount in controversy was less than twenty dollars Hence, the only question now raised in the case is, whether an action in replevin before a justice of the peace comes within the purview of section 985 of the civil code, which provides that "if neither party de-

mands a greater sum than twenty dollars, and the case is tried by a jury, there shall be no appeal." In replevin, it is said that "the property in the thing, and not damages for its detention, is the real matter in dispute. The affidavit of property in, and the right to possession of, the article, and its wrongful detention by the defendant, takes the place of a bill of particulars." It is alone upon the affidavit that process can issue, and upon it and the defense of the defendant to it, the case must be heard and determined. The statute requires no statement of value of the property to be set forth in the affidavit, nor any amount of damages caused by the detention of the property. The defendant cannot set up in defense any demand by way of counter claim or set-off. The main fact in issue is not a sum of money demanded, less or greater than twenty dollars, but it is *the right of property* in the thing in dispute. It is, therefore, difficult to discover upon what principle of construction section 985 can apply to an action for the recovery of specific property. In respect to appeals in actions of replevin there seems to be no special provision in the statutes; but section 1,006 provides generally that "in *all* cases not otherwise specially provided for by law, either party may appeal from the final judgment of a justice of the peace to the district court of the county where the judgment was rendered." And section 1,017 provides that: "Appeals in the following cases shall not be allowed: *First.* On judgments rendered on confession. *Second.* In jury trials, where neither party claims in his *bill of particulars a sum* exceeding twenty dollars. *Third.* In actions for the forcible entry and detention, or forcible detention only, of real property. *Fourth.* In trials of the right of property, under the statutes, either levied upon by execution or attachment." These provisions were taken from the statutory laws of Ohio, and the supreme court of that state, in defining the right of ap-

peal in actions commenced to recover possession of specific property, in *Martin v. Armstrong*, 12 Ohio St., 551, say, that "the last two subdivisions indicate very clearly the purpose and scope of the second. The suits to which they refer are all proceedings *in rem*—suits to recover the possession of specific real or personal estate. In such actions the plaintiff does not file a bill of particulars, claiming a specific sum of money, and the defendant is not permitted to set up either a counter claim or set-off. If the second subdivision was intended to prohibit appeals in *all* jury trials where there is not a bill of particulars claiming a sum exceeding twenty dollars, there was no necessity for enacting either of the last two subdivisions. The established rules of construction require courts to give effect, if practicable, to every part of a statute, and it is therefore our duty to construe the second division as not to render the third and fourth altogether useless and unmeaning." 7 Cush., 89; 2 Mich., 138. This can only be done by applying section 985 to actions before a justice of the peace to recover a sum of money, demanded in a *bill of particulars*, and not to actions brought to recover the possession of specific real and personal property. In *Martin v. Armstrong*, the question is very fully discussed, and we think the construction given to these statutory provisions, in that case, is the correct interpretation of the law, and the only one which will harmonize and give effect to each of these several provisions of the statute.

The appeal having been properly taken, the final order of the district court dismissing it must be reversed, and the cause be remanded with instructions to reinstate the appeal of plaintiff in error, and to proceed in the case according to law.

JUDGMENT ACCORDINGLY.

JAMES B. MCCLEERY, PLAINTIFF IN ERROR, V. EDWIN M. ALLEN, DEFENDANT IN ERROR.

1. **Trusts.** Where a trust is created and declared, it must be capable of being executed without conflicting with the laws of the state.

2. ———: ASSIGNMENT FOR BENEFIT OF CREDITORS. An insolvent debtor may make an absolute assignment of all his property to a trustee, to be applied in payment of his debts; but in such case it is the duty of the trustee at once to apply the property to the purpose for which the trust was created.

3. ———: ———. While such a trust cannot be executed instantly, yet the delay must only be such as necessarily results from a reasonable exercise of the power given to the trustee.

4. ———: ———: CONDITIONS. FRAUD. A debtor cannot, when a debt is due, avoid the obligation of immediate payment, nor can he, without the consent of the creditor, extend the period of credit. Therefore, if an assignment contains a provision, from which it appears that the debtor, at the time of its execution, intended to prevent the immediate application of his property to the payment of his debts, it will render the instrument void on its face.

5. ———: ———: ———: ———. Where an assignment contained a provision authorizing the assignee "to dispose of the same in any manner whatsoever as freely and lawfully as the assignor could do himself, which the said party of the second part, trustee as aforesaid, may deem advisable to do, tending in his opinion to convert the same into money, for the benefit of all interested," *Held*, that this authorized a sale on credit, and rendered the instrument void on its face.

ERROR to the district court for Adams county.

It was an action of replevin brought by Allen, the defendant in error, against McCleery, plaintiff in error, to recover possession of a stock of lumber, etc., which the latter had levied upon, as sheriff, under a writ of execution, as the property of one Van Alstine, the execution debtor. Allen claimed title by virtue of an assignment made to him by Van Alstine, for the benefit of all

the creditors. Upon a trial of the cause, before GASLIN, J., and a jury, the assignment was sustained and judgment entered accordingly in favor of the defendant in error. To reverse this judgment, the sheriff brought the cause to this court by petition in error, claiming that the court erred in permitting the assignment to Allen to be read in evidence to the jury, and in giving certain instructions touching the validity and sufficiency of the assignment in law.

Moudy & Abbott and *Lamb, Billingsley & Lambertson*, for plaintiff in error, cited Burrell on Assignments, Secs. 223, 224. *Brigham v. Tillinghast*, 13 N. Y., 215. *Nicholson v. Leavitt*, 6 N. Y., 510. *Rapalee v. Stewart*, 27 N. Y., 310. *Sackett v. Mansfield*, 26 Ill., 21. *Pierce v. Brewster*, 32 Ill., 268. *Whipple v. Pope*, 33 Ill., 334. *Kayser v. Heavenrich*, 5 Kan., 324. *Dudley v. Whiting*, 10 Kan., 47. Bump on Fraudulent Conveyances, 365-370. *Sutton v. Hanford*, 11 Mich., 518.

O. P. Mason and *James Laird*, for defendant in error.

No brief on file.

MAXWELL, J.

The only question to be determined in this case is, whether the assignment from Van Alstine to Allen was fraudulent and void on its face as to creditors. The assignment contains the following provisions: "That the said party of the second part, assignee and trustee as aforesaid of the said property as aforesaid, shall sell and dispose of said property aforesaid with convenient diligence, either at public or private sale, and for the best prices he can obtain therefor, for cash; and to dispose of the same in *any manner whatsoever* as freely and lawfully as the assignor could do himself, which the said

party of the second part, trustee as aforesaid, *may deem advisable to do, tending, in his opinion, to convert the same into money, for the benefit of all interested.*"

In *Nicholson v. Leavitt*, 6 N. Y., 510, the assignment was made "upon trust that the said parties of the second part, and the survivors of them, do and shall, in such manner and at such time or times, either at public or private sale, *or for cash, or upon credit, or partly for cash and partly upon credit*, and by and under such terms and conditions as they shall think reasonable and proper, absolutely sell, convey, and dispose of all and singular the said estate and property hereby conveyed and assigned." The court say: "It has always been understood that when an individual has incurred an obligation to pay money, the *time* of payment was an essential part of the contract; that when it arrived, the law demanded an immediate appropriation by the debtor of his property in discharge of his liability; and if he failed, would itself, of its own process, compel a performance of the duty."

In that case it was held that the assignment was fraudulent and void as against the creditors of the assignors.

In *Brigham v. Tillinghast*, 13 N. Y., 215, the assignment contained the following provision: "The said parties of the second part shall forthwith take possession of all and singular the premises aforesaid, and shall, as soon as practicable and expedient for the best interests of all concerned and interested therein, convert all and singular the premises and estate aforesaid into money *or available means*, and, after deducting the reasonable costs and charges of executing the trust herein mentioned, shall pay and apply the *moneys* and *means* arising therefrom in the manner and form following," etc. The court say: "The trustees, under this assignment, would be authorized to sell all or any portion of the as-

signed property on credit, and take in payment notes, bonds, mortgages, or other available means, even if they would not be authorized to exchange it for other property." The assignment was held to be fraudulent and void as to creditors.

In *Rapalee v. Stewart*, 27 N. Y., 310, it was held that a provision in an assignment, that the trust property "be converted into cash, or otherwise disposed of to the best advantage" by the assignee, was authority to sell on credit, and avoided the assignment.

In *Woodburn v. Mosher*, 9 Barb., 255, the authority to the assignees was to convert the property into money "within such convenient time as *to them* shall seem best." It was held that the assignment was void upon its face.

In *Keep v. Sanderson*, 12 Wis., 391, it was held that a clause in an assignment authorizing the assignee to sell and dispose of the assigned property "upon such terms and conditions as in his judgment may appear best and most to the interest of the parties concerned," was authority to sell on *credit*, and that it was void as to creditors, adhering to the decision in *Keep v. Sanderson*, 2 Wis., 42.

Section 17, Chap. 25 of the Gen. Stat., provides that: "Every conveyance or assignment, in writing or otherwise, of any interest in land, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, * * * as against the persons so hindered, delayed, or defrauded, shall be void."

The authority to the trustee in the case at bar "to dispose of the same in any manner whatsoever as freely and lawfully as the assignor could do himself which the said party of the second part, trustee as aforesaid, may

deem advisable to do, tending, in his opinion, to convert the same into money, for the benefit of all interested," is not only authority to the trustee to sell on credit, but would authorize him to exchange the property assigned for other property, or for notes, bonds, mortgages, or other forms of indebtedness, if in his opinion it would thereby be more readily converted into money.

Where a trust is created and declared, it must be capable of being executed without conflicting with the laws of the state.

An insolvent debtor may make an absolute assignment of all his property to a trustee for the payment of his debts; but in such case it is the duty of the trustee to make an immediate application of the property to the purposes for which the trust was created. It is not to be expected that this can be accomplished instantly, but the delay must be such as necessarily results from a reasonable exercise of the power given to the trustee, and be merely incidental.

A debtor cannot, by an assignment, avoid the obligation of immediate payment when a debt is due; nor can he, without the consent of the creditor, extend the period of credit; therefore, any provision in an assignment from which it appears that the debtor, at the time of its execution, intended to prevent the immediate application of his property to the payment of his debts, will make the instrument void as to such creditors as are hindered or delayed.

In the case at bar, the instrument is void upon its face, and the court should so have instructed the jury. The judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DAVID M. JIMMERSON, PLAINTIFF IN ERROR, v. ROBERT W. GREENE, DEFENDANT IN ERROR.

1. **Replevin:** WHAT INTEREST PLAINTIFF MUST HAVE IN THE PROPERTY. To maintain this action the plaintiff must show such an interest as entitles him to the immediate possession of the property claimed.

2. ———: ———. The surety on the undertaking given by the plaintiff, as such, has no legal interest in the property replevied; nor can he maintain an action of replevin against one wrongfully dispossessing such plaintiff of the property.

ERROR to the district court for Saline county. Heard upon a demurrer to the petition before WEAVER, J., who sustained the demurrer and entered judgment dismissing the case.

M. H. Sessions and *J. H. Grimm*, for plaintiff in error, cited *Burrows v. Stoddard*, 3 Conn., 160. *Clark v. Skinner*, 20 Johns., 465. *Hartwell v. Bissell*, 17 Johns., 128. *Miller v. Adsit*, 16 Wend., 335. *Poole v. Symonds*, 1 N. H., 289. Story on Bail, §§ 94, 105. *Selleck v. Phelps*, 11 Wis., 380. *Acker v. White*, 25 Wend., 613. *Thayer v. Hutchinson*, 13 Vt., 504. *Hunt v. Robinson*, 11 Cal., 262. *Crittenden v. Lingle*, 14 Ohio State, 182. *Smith v. McGregor*, 10 Ohio State, 461.

Hastings & McGintie, for defendant in error, cited *Walpole v. Smith*, 4 Blackf., 304. *Wheeler v. Train*, 3 Pickering, 254. *Waterman v. Robinson*, 5 Mass., 63. *McCurdy v. Brown*, 1 Duer, 101. *Noble v. Epperly*, 6 Indiana, 415. *Marienthal v. Shafer*, 6 Iowa, 223. *Pattison v. Adams*, 7 Hill, 126. *Wheeler v. Allen*, 51 N. Y., 37. *Wood v. Orser*, 25 N. Y., 348. *Gillerson v. Mansur*, 45 Maine, 25. *Becknith v. Philleo*, 15 Wis., 223. Property that has been replevied and delivered to

plaintiff is not in the custody of the law. *Hagan v. Deuell*, 24 Ark., 216. *Kayser v. Bauer*, 5 Kansas, 202.

LAKE, J.

This was an action of replevin, and the question for our consideration is whether the demurrer to the petition was properly sustained.

To maintain this action the plaintiff must show such an interest as entitles him to the immediate possession of the property claimed. Does the plaintiff show such an interest? We think not. His only claim to the property as declared in his petition is based upon the fact that he was a surety on a replevin bond in an action brought by Samuel E. Wilson against Harvey Macklin, in which this identical property was taken and delivered to said Wilson, from whose possession it was taken by the defendant herein.

By the replevin proceeding against Macklin, Wilson became possessed of the goods, and there is no allegation from which it can be inferred that he at any time transferred that interest, or any right whatever in the property, to the plaintiff in error. The petition, if true, shows most clearly that Wilson, the person to whom the property was delivered upon the execution of the undertaking, was the only one entitled to its possession, or who had the right to complain of the defendant's interference with it. The simple fact that the plaintiff was surety for Wilson on the undertaking gave him no legal interest in or control over the property. If Wilson had put it into his possession to hold as security for going upon the undertaking the case would have been very different. That would have given him an interest, to protect which he could have resorted to this action.

We have been referred to several authorities which were supposed to sustain the plaintiff's view of this

case, but they fall far short of doing so. These are cases wherein receiptors of goods taken in attachment, or on execution, have been held to have such an interest therein as will support the action against persons wrongfully interfering with their possession.

But a receiptor of goods occupies a situation very different from that of the plaintiff in this case. His title for the time being is as valid as that of the officer from whom he receives it, and he can hold the property as against all persons who cannot show a better one.

There is no error in the record, and the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

DANIEL DOODY, PLAINTIFF IN ERROR, v. PATRICK VAUGHN, DEFENDANT IN ERROR.

County Commissioners: JURISDICTION IN LOCATING PUBLIC ROADS. In an application to the board of county commissioners. to establish a new public road, the posting of four notices in the manner required by the statute, and the presentation of a petition to the board for such road, signed by at least ten land holders, residents of the county, are essential pre-requisites which must be complied with before the board can acquire any jurisdiction over the subject-matter of the location and opening of such new road.

ERROR to the district court for Lancaster county Tried below before POUND, J. The case was originally brought by Doody before a justice of the peace, for trespass upon lands. Defendant justified under claim that the *locus in quo* was a public road. Judgment for defendant, and plaintiff appealed to the district court. On appeal, the case was tried upon a stipulation of facts, and affidavit received as a deposition, the suffi-

ciency and competency of the facts and records, as evidence to establish the highway, only being questioned. If plaintiff recover, it was stipulated that judgment should be rendered in his favor for $1 and costs. Further facts appear in the opinion.

Webster & Burr, for plaintiff in error, cited *Robinson v. Mathwick*, 5 Neb., 252. *State, ex rel. Sims v. Otoe County*, 6 Neb., 129. *Williams v. Holmes*, 2 Wis., 129. *Ferris v. Bramble*, 5 Ohio State, 109. *In re Wells County Road*, 7 Ohio State, 16. *Damp v. Dane*, 29 Wis., 419. *Thompson v. Multnomah*, 2 Oregon, 34. *Austin v. Allen*, 6 Wis., 134. *Dolphin v. Pedley*, 27 Wis., 469.

A. C. Ricketts, for defendant in error.

The board of county commissioners, in opening and locating a highway, under the general road law, act in a *quasi* judicial capacity, and their proceedings, however irregular, will not subject their judgments to collateral impeachment while unreversed. *Heirs of Ludlow v. Johnson*, 3 Ohio, 553. *Sheldon v. Newton*, 3 Ohio State, 494. *People v. Carpenter*, 24 N. Y., 86. *Felter v. Mulliner*, 2 Johns., 457. *Voorhees v. Bank of United States*, 10 Peters, 449. 2 Phillips on Evidence, 4.

If the records and files of the board of county commissioners are regular in form, and contain everything required by the statutes to be preserved and kept, such records and files will prove, *prima facie* at least, that the proposed road has a legal existence. Our statutes nowhere require that the notices of the application for a highway shall be recorded or preserved.

The only record affirmatively required seems to be that mentioned in section 21, which has been fully complied with. The service of notice is no act or part of the

duties of the board of county commissioners, and therefore does not come within the provision of section 41, page 239 of Gen. Stat. *Arnold v. Flattery*, 5 Ohio, 271. *Anderson v. Com. of Hamilton Co.*, 12 Ohio State, 625. *Beebe v. Scheidt*, 13 Ohio State, 406. *Willis v. Sproule*, 13 Kan., 257.

GANTT, CH. J.

This action was brought to recover damages for an alleged trespass by defendant in error upon the lands of the plaintiff. The defendant set up as a defense that the land on which the trespass is alleged to have been committed is a public road, and was used as such road. It is however admitted, "that the road supervisor has never worked the alleged highway across plaintiff's land, and that a wet ravine, impassable for wagons when not frozen over, crosses the alleged highway on one part of the plaintiff's land * * * that the line of the alleged highway never has been used by the public as a wagon road or highway." The main question raised in the case is, whether the board of county commissioners had acquired jurisdiction to act in the matter of the location and opening of the road in question in this case.

Section nineteen of the act relative to roads, declares that "whenever the inhabitants in any county desire the opening of a new road * * * they shall give at least twenty days' notice, by posting a notice on the court-house door, and at three other public places in the vicinity of the road sought to be located * * * setting forth the time when they will apply by petition to the board of county commissioners, giving a particular statement of the location * * * sought to be effected;" and section twenty declares that "upon the presentation of a petition of at least ten land-holders,

residents of the county, after notice given as provided in the preceding section, the board of county commissioners shall proceed to hear the parties interested in the case," etc.

According to these statutory provisions, the posting of four notices in the manner designated, and the presentation to the board of a petition for the road, signed by at least ten land-holders, residents of the county, are essential pre-requisites, which must be complied with before the board can acquire or exercise any jurisdiction over the subject-matter of the location and opening of a new road.

It is true, a petition in this case was presented to the board, signed by a sufficient number of persons, but it does not appear from the record that any of these persons were "land-holders;" and the evidence shows that only two notices were posted, setting forth the time when the application would be made.

In *The Sioux City & Pacific Railway v. Washington County*, 3 Neb., 41, it is held, that "when the acts of officers who exercise judicial functions of limited jurisdiction are questioned, the rule is that they must not only show they acted within the authority granted, but it must also appear of record that they had jurisdiction."

In *Robinson v. Mathwick*, 5 Neb., 255, it is said, that "the board of county commissioners is a tribunal possessed of but very limited jurisdiction, which is clearly defined by the statutes, and it is essential that all the facts necessary under the statutes to authorize their action in any given case, be affirmatively shown. If they presume to act without an observance of these plain statutory requirements, it would be without authority; and whatever they might do would be merely void."

In *State, ex rel. Sims v. Commissioners of Otoe County*, decided at the last term of this court, it is held

that if the notices are not posted in the manner prescribed by law, the county commissioners have no jurisdiction of the case.

In *Williams v. Holmes*, 2 Wis., 144, it is held that jurisdiction of inferior tribunals should affirmatively appear, "and as such jurisdiction is not to be presumed, it is necessary that a strict compliance with the statute shall appear;" that a petition for a new road "signed by others than freeholders would be utterly nugatory;" and "therefore, before the paper can serve the purpose of conferring jurisdiction upon the supervisors, it should be shown that the same is signed by six freeholders of the town."

And in *Damp v. Town of Dane*, 29 Wis., 428, it is again held that a petition, signed by the requisite number of freeholders, is essential to give the board jurisdiction, and that "a deficiency of but one in the required number of qualified petitioners, is as fatal to the validity of the proceeding as would be the absence of any petition."

It is only necessary to further remark that it seems clear to us, the doctrine laid down in the above cases gives the correct interpretation of the law; it is supported by authority, and is the only safe rule for the guidance of officers who exercise such limited jurisdiction; for if they could in one instance disregard the plain requirements of the law, then it would be difficult for either legislatures or courts to fix any boundary to their action.

The judgment of the court below must be reversed, and under the stipulation of the parties in the record, judgment is now rendered in this court for plaintiff, Daniel Doody, and against defendant, Patrick Vaughn, for the sum of one dollar and costs.

JUDGMENT ACCORDINGLY.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, APPELLEE, v. BOARD OF COMMISSIONERS OF LANCASTER COUNTY, APPELLANT.

1. **Taxation:** RAILROAD PROPERTY. It is the duty of the proper officers of a railroad company, whose road is situated in more than one county, to list under oath, for assessment and taxation, the road bed, superstructure, right of way, rolling stock, side tracks, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation, and transmit the same to the state auditor, on or before the first day of March in each year.

2. ——: ——. All other property of a railroad company is to be assessed by the assessor of the city, ward, or precinct in which it is situated, in the same manner as is provided for the assessment of real estate, but land used for necessary side tracks is not subject to such assessment.

3. **Railroads:** SIDE TRACKS AND DEPOT GROUNDS. While lands taken and appropriated for right of way and side tracks, otherwise than by consent of the owner, cannot exceed two hundred feet in width, yet this does not prevent the company from purchasing, with the consent of the owner, all the land they may require for side tracks and depot grounds.

4. **Pleading:** PETITION. Where a defendant interposes a denial to a petition, the only question in issue is the truth of the facts stated in the petition.

5 ——: NEW MATTER IN DEFENSE. All new matter constituting a defense must be pleaded.

THIS was an appeal from the district court of Lancaster county, being tried there before POUND, J.

Brown, England & Brown for appellant, the county board.

No brief on file.

T. M. Marquett, for appellee.

1. A railroad and all its appurtenances are treated in law as one entire thing, and cannot be taxed or sold for taxes in parcels. *The Toledo & Wabash R. R. Co. v. City of Lafayette*, 22 Ind., 262. *North Hampton County v. Lehigh Coal Co.*, 75 Penn. St., 461. Hilliard on Taxation. *New Haven R. R. v. Hayden*, 117 Mass., 433.

2. The right of way, including depot grounds, is taken for public use, and we only hold an easement in the same. *Kellog v. Malin*, 50 Mo., 496. 1 Redfield on Railroads, 249, note (4).

3. The right of way is not taxable unless so made by express words. *Worcester County v. Worcester*, 116 Mass., 193. *Wayland v. County Com'rs.*, 4 Gray, 500.

4. What is the meaning of road bed, superstructure, right of way, rolling stock, side track, furniture, and fixtures? Road bed and superstructure include all depot grounds and water stations. Cooley on Taxation, 151, note 1. *Railroad v. Burks*, 6 Penn. St., 71. *Wayne County v. Del. & Hudson Canal Co.*, 15 Penn. St., 351–357. *State v. Hancock*, 33 N. J., 315. *Milwaukee R. R. Co. v. Milran*, 35 Wis., 27. *Osborn v. Hartford R. Co.*, 5 R. Cases, 229. *C. & N. W. R. R. Co. v. Miller*, 72 Ill., 146.

5. The policy is to tax the road as a whole, and this would be co-extensive with the right to take land for the use of the road. *The Milwaukee & St. P. R. R. Co. v. City*, 34 Wis., 273–278. *Harlem Gas Co. v. Mayor*, 33 N. Y., 318.

6. A liberal construction should be given to the statute which adopts the theory of taxation that the road for taxation is a unit; and only when the legislature designates some portion for taxation separately can it be so taxed. *The Milwaukee & St. P. R. R. Co. v. Crawford County*, 29 Wis., 116.

MAXWELL, J.

On the first day of April, 1870, the state of Nebraska, through the governor thereof, sold and conveyed to the plaintiff the following described real estate in the city of Lincoln, for depot grounds, viz.: "Bounded on the north by S street, on the west by fifth street, on the south by O street, and on the east by seventh street, said tract being about 1,400 feet in length by 700 in width."

Said tract has not been laid off into lots and blocks, but is known and described in the plat of the city as "depot grounds."

It appears from a plat on file in the case, that a number of the side tracks of the plaintiff's railroad are located on the tract, and that the depot, water tank, and round house are situated thereon.

In the year 1874, the assessor of the city of Lincoln *assumed* that said land was laid off into blocks, and proceeded to assess the same as follows:

Block 256, assessed at $3,250; block 257, assessed at $3,250; block 258, assessed at $3,250; block 259, assessed at $3,250; block 268, assessed at $2,500; block 269, assessed at $2,500; block 246, assessed at $3,900; block 247, assessed at $3,900. Afterwards the county commissioners of Lancaster county levied taxes thereon to the amount of $964.

It is claimed in the petition and not denied in the answer that said tract of land was assessed by the state board of equalization for the year 1874.

The plaintiff brought an action in the district court of Lancaster county to enjoin the collection of the tax, and obtained a decree as prayed for in its petition, to reverse which the defendants bring the cause into this court by appeal.

Section seventeen of the revenue law (Gen. Stat. 900)

provides that the president, secretary, superintendent, or other principal accounting officers within the state at the time of the assessment of every railroad or telegraph company, whether incorporated by any law of this state or not, when any portion of said railroad or telegraph company is situated in more than one county, shall list for assessment and taxation, verified by the oath or affirmation of the person so listing, all the following described property belonging to such corporation within the state, viz.: road bed, superstructure, right of way, rolling stock, *side track*, telegraph lines, furniture and fixtures, and personal property belonging to such corporation.

It is also provided that the state board of equalization shall value and assess the property of the corporation at its actual cash value for each mile of said road or line, etc.

There is no claim in the answer of the defendants that machine or repair shops or other buildings are located on said grounds, nor were any such buildings assessed.

The only questions for our consideration are, first, the authority of the assessor to assess the property in question; second, the authority of the county commissioners to levy the tax complained of.

Section one hundred and five of the chapter entitled "Corporations" (Gen. Stat., 193), provides, that any railroad corporation shall be authorized to pass over, occupy, and enjoy any of the school, university, saline, or other lands of the state; *provided*, that no more than one hundred feet in width from the center of the roadway survey of such corporation, on either side, shall be taken for roadway; and not to exceed twenty acres, to conform to the subdivisions of the government survey, in any one tract, for each section of twelve consecutive miles of such railroad, shall be taken for station, depot grounds, machine shops, turn-outs, side tracks, warehouses, and other appurtenances to a railroad, etc.

Section eighty-one (Gen. Stat., 186), provides that a railroad company may appropriate so much real estate as may be necessary for the location, construction, and convenient use of its road, including all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, side tracks, turn tables, and water stations, all materials for the construction and repair of said road and its appurtenances, and a right of way over adjacent lands sufficient to enable such company to construct and repair its road, and a right to conduct water by aqueducts, and the right of making proper drains, *provided*, that the lands so held, taken, and appropriated, *otherwise than by the consent of the owner*, shall not exceed two hundred feet in width, etc.

There is no restriction upon the authority of the company to purchase, with the consent of the owner, all the real estate they may require for side tracks and depot grounds. In the case at bar, the present and prospective business of the company would seem to justify them in the purchase of the lands in controversy for side tracks and depot grounds.

The road bed, superstructure, right of way, rolling stock, side tracks, telegraph lines, furniture and fixtures, and personal property of a railroad company, are not to be assessed by a city, ward, or precinct assessor, but the statute makes it the duty of the assessor of the city, ward, or precinct in which are situated machine or repair shops, or other buildings or grounds, to assess the same, and make return thereof, in the manner now provided for the assessment and return of real estate. But there is no allegation in the answer of the defendants that any machine or repair shops, or other buildings are situated on the lands in controversy. The answer consists of certain denials of facts stated in the petition. The rule is well settled that where a defendant interposes a general denial to a petition the only question in

issue is the truth of the facts stated in the petition. All new matter constituting a defense must be pleaded in the answer. *The A. & N. R. R. v. Washburn*, 5 Neb., 124.

The code requires the defendants, in a case like the one under consideration, to make a plain, concise, and distinct statement of the facts which they claim render the lands in controversy taxable. The petition alleges that this land is used for side tracks and depot grounds, and the plat on file and agreed statement of facts tend to prove the allegations of the petition. Such being the case the lands are to be assessed by the state board of equalization, and not by the precinct assessor.

The action of the assessor in assessing this land, and that of the county commissioners in levying taxes thereon, are therefore null and void. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

MARY CALLAHAN, APPELLANT, v. EDWARD B. CALLAHAN, APPELLEE.

1. **Divorce:** CONFLICTING TESTIMONY. In a case brought to the supreme court on appeal, where no question of law is involved, and the testimony is conflicting and pretty evenly balanced, the finding of the court will not be disturbed.

2. ———: ———. In order to justify a reversal of the finding of the court below, on a question of fact, such finding must be shown to be clearly wrong.

3. ———: ALIMONY. A reasonable allowance of alimony, during the pendency of an action for divorce brought into the supreme court upon appeal, will be made.

APPEAL from the district court of Douglas county.

Tried below before SAVAGE, J., who rendered judgment in favor of defendant.

J. L. Webster, for appellant.

J. C. Cowin, for appellee.

LAKE, J.

This is an appeal from Douglas county. The action was brought to obtain a divorce from the bonds of matrimony, the only ground relied upon being that of extreme cruelty—the charge of habitual drunkenness, which is also contained in the petition, having been abandoned. The court below found the issues in favor of the defendant, and dismissed the action, and the case is brought here for review.

The question presented by the record is one of fact only, no question of law being raised. The simple issue is as to whether the charge of extreme cruelty is established by the evidence adduced upon the trial, and which is now before us in the form of a bill of exceptions.

As the case is presented by the petition and testimony of the plaintiff, the alleged extreme cruelty, which was the immediate cause of the commencement of these proceedings for a divorce, occurred on or about the twentieth of May, 1876. It is true that before this time there had been, on several occasions, some difficulties and broils, which show pretty conclusively that the utmost harmony and kind feeling did not at all times prevail in their home. But there was, certainly, nothing that would have furnished a sufficient reason for granting a divorce, even by the plaintiff's own showing, up to the occurrence which resulted in her leaving the defendant.

From this it is seen that the result of the case must depend upon the defendant's treatment of his wife at the time she left him; and if this be not shown to have amounted to what is known as extreme cruelty, by at least a fair preponderance of the evidence, then the charge must fail, for upon the plaintiff rests the burden of proof.

The alleged cruelty on this occasion, as shown by the petition, is: "That at said time and place said defendant did strike, assault, beat, and maltreat this plaintiff, to her great personal injury, and that said defendant did, then and there, threaten to do greater damage and personal injury to plaintiff, and did attempt to do this plaintiff further bodily harm, and was prevented from so doing by a bystander, who caught and held said defendant until this plaintiff escaped." This is a very general charge, indeed, and of itself, unexplained by the testimony, can hardly be said to make a case of extreme cruelty. But it was sufficient to admit evidence, and to that we must resort to ascertain the character of the injuries.

It would not be profitable to enter upon a critical examination and discussion of the testimony given by the several witnesses in this opinion. We have, however, read it carefully, and agree with counsel that, as to the vital points in the case, it is absolutely irreconcilable, and pretty evenly balanced, so that it is perhaps impossible to say with certainty just where the exact truth of the matter rests.

It is barely possible that the story told by Mrs. Callahan on the witness stand, if it were entirely uncontradicted, might sustain the charge of extreme cruelty, although her testimony is open to much criticism, and is far from satisfactory on very many points. She says, for instance, of the affair of the twentieth of May, when she left her husband, that he "grabbed me, and struck

me, and kicked me from foot to head," and "he grabbed my hair and pulled me as I ran." But as to the striking and kicking, she is entirely unsupported; and as to the pulling of her hair, but a single witness, a Miss Lynch, corroborates her story. As to Miss Lynch, she seems to have taken too much interest in the case to entitle her to the utmost credit. Again, if the defendant had struck and kicked his wife, in the way she would evidently lead us to believe, there must have been some visible marks left on her person, which, in the condition of her mind at that time, she would not have been slow in exhibiting to her friends. But of all the numerous witnesses called in her behalf, not a single one saw any mark of violence upon her body, or heard from her the least complaint of personal injury. In fact, the case seems to be almost entirely wanting in those indicia that invariably accompany an honest, well-founded charge of personal violence.

In addition to this inherent weakness of the plaintiff's proof on this point, we have the positive denial of the defendant that he either struck or kicked the plaintiff, or pulled her hair, or committed any violence upon her. And in this he is fully corroborated by the only witness, a Mr. Arnold, who was in the house with the parties during the entire affray.

In the condition in which we find the testimony, even if it had not already been passed upon by a court receiving it directly from the lips of the witnesses themselves, we do not think we would be warranted in holding the charge of extreme cruelty to be made out. And further, we think that, in a case of so great conflict in the testimony as is here presented, the finding of the court in which the case was first tried is entitled to our respect, and should not be disturbed unless it is shown to be clearly wrong.

For these reasons, the finding and judgment of the

court below are affirmed, and a judgment entered dismissing the case, at the costs of the plaintiff.

JUDGMENT ACCORDINGLY.

Prior to the argument of the above case, plaintiff filed a motion for the allowance of $100 alimony.

Per Curiam—The motion is sustained.

THE STATE, EX REL. JAMES O. CARTER, V. THE BOARD OF PUBLIC LANDS AND BUILDINGS.

1. **Board of Public Lands and Buildings:** POWERS. The board of public lands and buildings are the successors of the board of prison inspectors; but they possess no power except such as is conferred by the constitution of 1875, or by statute. They possess no authority to appoint or remove the physician of the penitentiary, such power being vested in the governor.

2. **Board of Prison Inspectors.** The relator was appointed physician by the board of prison inspectors, and was to hold his office during the pleasure of said board. *Held*, That when the board ceased to exist by limitation of the constitution, the appointment of the relator terminated.

3. **Officers:** WHEN THEIR POWERS CEASE. As a general rule, where the term of a particular officer is fixed by statute, his power ceases with the expiration of that term, unless there is a provision that he shall hold his office until his successor is elected and qualified. But where the practice has been for officers to hold over until their successors are elected and qualified, their acts are valid.

4. ———: HOLDING BY APPOINTMENT. An appointment, unlimited as to its term, continues in force until revoked, or the authority by which it was made ceases to exist.

5. ———: AUTHORITY CEASES WHEN APPOINTING POWER IS ABOLISHED. The death or removal of members of a particular board who are vested with the appointing power, their places being filled with others, does not annul appointments already made,

because the board continues to exist, with full power to make or revoke appointments. But upon the abolition of the board, without a saving clause as to its appointments, the authority of those persons who merely hold office during its pleasure ceases.

ORIGINAL application for mandamus.

Lamb, Billingsley & Lambertson, for the relator.

The constitution, by abolishing the inspectors and creating the board of public lands and buildings as their successors, did not annul the appointments made by the board of inspectors in pursuance of the powers conferred upon them by law. Const., secs. 5, 14, Art. XVI. The physician of the penitentiary is expressly by statute made an officer. Gen. Stat., 1036, 1042. He was an officer at the date of the adoption of the new constitution, and was an officer of state, performing important public functions, receiving a stated salary, fixed by the legislative appropriations of the state. Laws, 1877, 237–38. Laws, 1875, 225. The above sections of the constitution, together with section 5, page 1023, General Statutes, clearly indicate that all officers created by the statutes of this state, hold until their successors are selected and qualified. The later decisions of the courts support this theory of the tenure of office. Dillon on Municipal Corporations, sec. 158. *Overseers of Poor v. Sears*, 22 Pick., 122, 130. *People v. Fairbury*, 51 Ill., 149. *Stratton v. Oulton*, 28 Cal., 44. *McCall v. Byram*, 6 Conn., 428. *Cordiell v. Frizee*, 1 Nevada, 130. *School District v. Atherton*, 12 Metcalf, 105. *People v. Stratton*, 28 Cal., 382. *State v. Wells*, 8 Nevada, 105. *Heys v. Walters*, 46 Ga., 387.

MAXWELL, J.

The relator sets forth in his application that on the ninth day of May, 1873, the board of prison inspectors,

pursuant to the laws of the state, duly appointed and commissioned him physician of the penitentiary of the state; that he was to hold said office, with all the rights, privileges, and emoluments thereof until his appointment and commission should be revoked according to law; that he entered upon the duties of his office on the first day of June, 1873, and continued to discharge the same until the sixteenth day of March, 1877, when the defendants, without cause, and without authority of law, passed an order excluding the relator from said office, and instructed the warden of the penitentiary to exclude him from the performance of the duties of said office, and not to recognize him as physician of the penitentiary; and that said order is still in force, and said defendants still exclude the relator from exercising the duties of said office; that said relator has never been removed from said office, nor his appointment or commission been revoked; that the relator has from time to time repeatedly insisted and demanded from said defendants permission to exercise and discharge the duties of said office, but that they keep him out of the same, and wrongfully deprive him of the rights, privileges, and franchises thereof. Wherefore the relator prays that a writ of mandamus may issue against the said defendants, commanding them to rescind and revoke their said illegal order to the warden of the penitentiary, and to permit the relator to exercise and discharge the duties of the office of prison physician, and commanding them to restore the relator to the exercise and enjoyment of the duties of said office.

Section 17, of chapter 76, of the General Statutes, provides that the chaplain and physician of the penitentiary shall be appointed by the board of prison inspectors.

Under the provisions of the constitution of 1875, the prison inspectors remained in office until the first Thurs-

day after the first Tuesday in January, 1877, when their office terminated.

Section 19, of article V, of the constitution of 1875, provides that "the commissioner of public lands and buildings, the secretary of state, treasurer, and attorney-general, shall form a board, which shall have general supervision and control of all buildings, grounds, and lands of the state, the state prison, asylums, and all other institutions thereof, except those for educational purposes; and shall perform such duties, and be subject to such rules and regulations as may be prescribed by law."

The act approved February 13, 1877, establishing a board of public lands and buildings, provides that "the board shall have power, under the restrictions of the act, to direct the general management of all of said institutions, and be responsible for the proper disbursement of the funds appropriated for their maintenance, and shall have reviewing power over the acts of the officers of such institutions, and shall, on the part of the state, at regular meetings as hereafter directed, audit all accounts of such officers," etc.

Section 7 provides that: "It shall be the duty of the board to take cognizance of all charges or complaints made against said public officers, and at a regular meeting to give an impartial hearing to such charges and the defense against them, if any, and report the charges, evidence, and their conclusions in the matter, to the governor, within six days after the determination of such investigation."

Section 10, article V, of the constitution of 1875, provides that: "The governor shall nominate, and by and with the consent of the senate (expressed by a majority of all the senators elected, voting by yeas and nays), appoint all officers whose offices are established by this constitution, or which may be created by law, and whose

appointment or election is not by law herein provided for."

The board of public lands and buildings are the successors of the board of prison inspectors, but they possess no power except such as is conferred by the constitution of 1875, or by statute. They possess no power to appoint or remove the physician of the penitentiary, such power being vested in the governor.

The relator claims to have been appointed prison physician by the board of prison inspectors, and was to hold his office during the pleasure of said board. The board of prison inspectors ceased to exist, by limitation of the constitution, in January, 1877. By what authority then does the relator claim the office in question? The appointment being held merely at the pleasure of the board of inspectors, was revoked when the board ceased to exist.

Story, in his work on agency, section 469, says: "It follows from what has been said, that when the power of an agent is revoked or terminated, that also of any substitute appointed by and under him, it being a dependent power, is ordinarily also revoked."

In this case the board of public lands and buildings had no authority to continue the relator in office. His authority, therefore, to discharge the duties of the office of prison physician was determined when the board of prison inspectors ceased to exist.

The relator not being entitled to the office, the application for the writ must be denied.

WRIT DENIED.

Upon an application for leave to file a motion for a re-hearing, *Lamb, Billingsley & Lambertson*, for relator, contended:

The rule of agency upon which this decision is based is, that when the power of an agent is revoked or termi-

nated, that also of any substitute appointed by and under him, it being a dependent power, is ordinarily also revoked.

The physician was not the agent or deputy of the inspectors, but the agent of the state. In a certain sense the state authorized the inspectors to fill an agency created by the state, which appointment it ratified, and which agent the state recognized and paid him a salary. If this was a case where a principal had conferred upon a board the power of *appointing* an agent for him, and the board had delegated *the appointing power* to some one else, then the revocation of the appointing power of the board would annul the appointing power of the agent. If the state had appointed the board of inspectors to perform the duties of physician, and the board had employed the relator as deputy to assist it in the performance of the functions of the office, then the rule of agency cited by the court would apply, and the revocation of the powers of the inspectors would do away with all assistants and deputies. But can it be urged that when the power of appointment and removal was vested in the inspectors, and in the exercise of this power of appointment the relator was appointed, therefore when the appointing power was transferred from the board to the governor, that which they had rightfully done was annulled? We can hardly think the court will say that the board no longer has authority to appoint, and for that reason that which they were empowered to do is undone, or in other words, the board has no longer any power to remove the relator, therefore the relator is removed. Even though the appointing power was completely abrogated, instead of transferred to the governor, still we think the relator would hold until his successor was selected and qualified.

Is this case distinguishable in principle from *State, ex rel. Davis, v. Bacon*, 6 Neb., 285? Did not the decision

of the court in that case clearly recognize the validity of Bacon's title to the office of principal of the blind asylum? If so, and the determination of the existence of the trustees of the blind asylum left its appointees in office, why should the death of the board of inspectors nullify its appointments? Each of the boards have the same power of appointment and removal. For the power to appoint, for an undefined term, in the absence of a statute to the contrary, gives the power to remove at the discretion and will of the appointing power. *Ex parte Hennen*, 13 Peters, 135. *State v. Bays*, 6 Neb., 167. If the theory enunciated by the court be correct, all the appointees of the directors of the deaf and dumb asylum, the appointees of the board of trustees of the blind asylum, and the other appointees of the inspectors of the penitentiary, have no title to their positions, and have been enjoying the emoluments of their offices and places without any legal right thereto. In conclusion, with all due regard for the opinion of the court, we are constrained to urge, that the death of the board of inspectors did not kill off its lawful progeny.

MAXWELL, J.

This is an application for leave to file a motion for a rehearing, assigning various grounds therefor, only two of which will be noticed.

The application is made by the attorneys of the relator, and, in support of the application, we are referred to section 5, Art. XVI, of the Constitution, which provides that "all persons now filling any office, or appointment, shall continue in the exercise of the duties thereof, *according* to their respective commissions, elections, or appointments, unless by this constitution it is otherwise directed."

There is no claim that the relator was appointed for a

definite period of time, and the decision in the case is placed expressly on the ground that he merely held his office during the pleasure of the board of prison inspectors. Had the statute prescribed the length of time a party appointed prison physician should hold the office, and that period had not elapsed, the sections cited would be in point. But it has no application whatever to this case.

Section 14, Art. XVI, applies only to the officers named in that section, and has no application whatever to the case of the relator.

The general rule is, that where the term of a particular officer is fixed by statute, his power ceases with the expiration of that term, unless there is a provision that he shall hold his office until his successor is elected and qualified. *Rex v. Atkins*, 3 Mod., 12. *Rex v. Earle*, 1 Strange, 627. *Fort v. Prouse*, Id., 625. *Mayor of Durham's Case*, 1 Sid., 33. Willc., 292. Glover, 173. Dillon on Mun. Corp., Sec. 156.

But where the practice has been for officers to hold over until their successors were elected and qualified, their acts are valid. *Chandler v. Bradish*, 23 Vt., 416. *Overseers v. Sears*, 22 Pick., 122. *School District v. Atherton*, 12 Met., 105. *Dow v. Bullock*, 13 Gray, 136. *People v. Fairbury*, 51 Ill., 149. *McCall v. Byram*, 6 Conn., 428.

An appointment unlimited as to its term continues in force until revoked, or the authority by which it was made ceases to exist. The death or removal of members of a particular board who are vested with the appointing power, their places being filled by others, does not annul appointments already made; because the board continues to exist, with full power to make or revoke appointments, although its members have changed. But upon the abolition of the board, without a saving clause as to its appointments, the authority of those

persons, who merely held office during its pleasure, ceases.

The attorneys for the relator endeavor to avoid this dilemma by insisting that he holds over until his successor is appointed and has qualified.

But the statute does not include the case at bar, and the authorities cited do not apply. It is apparent, after a careful re-examination of the case, that all the questions involved have been fully and fairly considered. The application to file a motion for a rehearing is therefore denied.

JUDGMENT ACCORDINGLY.

SAMUEL E. WILSON, PLAINTIFF IN ERROR, v. HARVEY MACKLIN, DEFENDANT IN ERROR.

1. **Practice:** REPLEVIN: AFFIDAVIT. Filing an affidavit in an action of replevin is a proceeding. The term *proceeding* is used in the code of civil procedure to distinguish all other steps taken in an action from those embraced in the word *pleading*.

2. ———: ———: ———. In replevin, the statute requires the affiant to swear that the goods and chattels claimed were not taken in execution on any order or judgment against the plaintiff. The affiant is not to determine the validity of the judgment, and cannot in *that* proceeding question its correctness.

3. ———: ———: ———. When the affidavit is defective, it is the duty of the court, even after a motion to dismiss on that ground is filed, to permit it to be amended.

4. ———: RIGHTS OF SUITOR; AMENDMENT OF PLEADINGS. If a suitor has been deprived of a substantial right, by the refusal of the court to permit an amendment, the supreme court, in a proper case, will grant him relief.

5. ———: ———: ———. The application to amend, however, should be made before the cause is dismissed. The better practice is, to make the order conditional, that, in case of failure to amend in time, and on the terms prescribed, the action be dismissed.

ERROR to the district court for Saline county. The facts appear in the opinion.

M. H. Sessions, for plaintiff in error, cited *Frink v. Flanagan*, 1 Gilm., 35. *Cutler v. Rathbone*, 1 Hill, 204. *Adams v. Hubbard*, 30 Mich., 104. *Williams v. West*, 2 Ohio State, 82. *Grace v Mitchell*, 31 Wis., 533. *Wise v. Withers*, 3 Cranch, 331. *Elliott v. Piersol*, 1 Pet., 340. *Grumond v. Raymond*, 1 Conn., 46. *Gould v. Scannell*, 13 Cal., 430. *Warner v. Hunt*, 30 Wis., 200. *Black v. Winterstein*, 6 Neb., 224.

Hastings v. McGintie, for defendant in error, cited Gen. Stat., 552. *Bilbo v. Henderson*, 21 Iowa, 56. *Booth v. Ableman*, 16 Wis., 460. *Macklot v. City of Davenport*, 17 Iowa, 379. *Carney v. Doyle*, 14 Wis., 270. *Reynolds v. Sallee*, 2 B. Monroe, 8. *Saffel v. Wash*, 4 B. Monroe, 92. *Cromwell v. Owings*, 7 Harris & Johnson, 55. *Wiley v. Kelsey*, 9 Ga., 117. *Bridges v. Nicholson*, 20 Ga., 90. *Hamson v. Weare*, 4 Iowa, 13. *Billings v. Russell*, 23 Penn. State, 189. *Moore v. Robinson*, 6 Ohio State, 302. *Simpson v. Hart*, 1 Johnson's N. Y. Ch., 91. *Wesson v. Chamberlain*, 3 Comstock, 331. *Cochran v. Loring*, 17 Ohio State, 409. *Newman v. City of Cincinnati*, 18 Ohio, 323. *Buell v. Cross*, 4 Ohio, 330. *Goss v. McClaren*, 17 Texas, 107.

MAXWELL, J.

This an action of replevin. The plaintiff filed an affidavit in the court below describing certain personal property, and alleging "that the said plaintiff is the owner of the said goods and chattels, and entitled to the immediate possession of the same; and that said goods and chattels are wrongfully detained from him by defendant, and that the said goods and chattels were not taken in execution on any order or judgment against

said plaintiff, *but were taken by execution issued against plaintiff on void judgment*, or for the payment of any tax, fine, or amercement assessed against him, or by virtue of any order of delivery—issued under chapter two or eleven of the code of civil procedure."

The defendant moved to dismiss the case on the ground that there was not a sufficient affidavit filed as required by the statute. The motion was sustained, and leave given to the defendant to prove the value of the property taken under the writ. Afterwards the plaintiff filed a motion to amend the affidavit, which was overruled, to which the plaintiff excepted. The parties then entered into an agreement as follows:

"It is agreed by and between said parties to said action, that a jury shall be waived to assess the damages of said defendant, and that a return of the property mentioned in said plaintiff's affidavit for replevin cannot be had, and that the damages of said defendant is seventy-five dollars and ninety-nine cents."

Judgment was rendered against the plaintiff for the sum of $75.99 as provided in the agreement, to reverse which the plaintiff brings the cause into this court by petition in error.

Filing an affidavit in an action of replevin is a *proceeding*. The term proceeding is used in the code of civil procedure to distinguish all other steps taken in an action from those embraced in the word *pleading*. *O'Dea v. Washington County*, 3 Neb., 122. *Johnson v. Jones*, 2 Neb., 137.

The affidavit in the case at bar is clearly defective. The statute requires the affiant to swear that the goods and chattels were *not taken in execution on any order or judgment against the plaintiff*. The affiant is not to determine the validity of the judgment, and cannot in *that* proceeding question its correctness. When the affidavit is defective, it is the duty of the court, even after

a motion to dismiss on that ground has been filed, to permit it to be amended.

It is claimed by the defendants, that the question of amendment is exclusively within the discretion of the district court, and therefore cannot be reviewed by this court.

In *O'Dea v. Washington County*, *supra*, the court say: "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." *Mills v. Miller*, 3 Neb., 95.

The application to amend, however, should be made before the cause is dismissed. The better practice is, to make the order conditional, that, in case of failure to amend in the time and upon the terms prescribed, the action be dismissed.

As the plaintiff made no attempt to amend until the action had been dismissed, the court did not err in overruling the application. The stipulation entered into by the parties is a waiver of all errors. It is agreed that the property described in the affidavit cannot be returned, and that the damages sustained by the defendant are seventy-five dollars and ninety-nine cents. This is decisive of the case. The judgment is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

C. L. KEIM & CO., PLAINTIFFS IN ERROR, v. P. O. AVERY AND W. C. KERN, DEFENDANTS IN ERROR.

1. **Usury.** Where a party contracts to pay 18 per cent interest upon a promissory note at the time of its execution and delivery, the contract will be tainted with usury, although the rate of interest is not expressed in the note.

2. ——: SURETY MAY PLEAD. A surety may plead as a defense to a promissory note, that usurious interest was agreed upon by the parties at the time of the execution of the note.

3. **Pleading:** AMENDMENT OF PLEADING. If a plea of usury is defective in its statement of facts, yet if testimony is introduced without objection, showing the existence of a contract for illegal interest, the court after verdict will permit the answer to be amended to conform to the facts proved.

4. **Practice:** SETTING ASIDE VERDICT. A verdict will not be set aside because a party was surprised by testimony which was merely cumulative, and which could not affect the result.

ERROR to the district court for Richardson county. Tried below before WEAVER, J. The facts appear in the opinion.

Isham Reavis and *A. R. Scott*, for plaintiffs in error.

1. Usury must be specially pleaded, and there must be no uncertainty with reference to the parties committing it. The answer in this case charges that the plaintiffs contracted for usurious interest, but does not state with whom. Unless the unlawful contract was made with the defendants, they cannot plead it in defense of this action. This proposition seems so clear, that authority is hardly necessary in support of it. And it avails the defendants nothing that the plaintiffs failed to take advantage of the defective pleading in the court below. The objection that a petition does not state facts sufficient to constitute a cause of action, or that an

answer does not state facts sufficient to constitute a cause of defense, may be urged at any time, or in any court.

2. To constitute the offense of usury there must be an agreement that he who has the use of the money shall pay the owner of it more than lawful interest, and none but privies or parties can take any advantage of this defense. *Sternburg v. Callanan*, 14 Iowa, 255. A plea of usury cannot be interposed by a party who is not privy to the contract in action. *Drake's Exr. v. Chandler*, 18 Grattan, 909. Usury laws are designed to protect the borrower from being obliged to pay more than the amount limited thereby for the loan or forbearance of money, and not to prevent the lender from receiving such excess from third parties who voluntarily undertake to pay it. *McArthur v. Schenk*, 31 Wis., 673. The defense of usury is personal to the borrower, his heirs or representatives. *Stephens v. Muir*, 8 Ind., 352. *Stein v. Association*, 18 Ind., 243. A verbal agreement, made contemporaneously with the execution of a promissory note for more than legal interest, the additional promise is nugatory. *Butterfield v. Kidder*, 8 Pick., 513.

H. T. Hull, for defendant in error.

The 18 per cent interest contracted for by the plaintiffs in this case was more than the maximum allowed by law, was usury, and may be pleaded by the defendants whether agreed upon by them directly or by their agent, or even if not known by defendants, and if they derived no advantage from the transaction. *Cheney v. White*, 5 Neb., 261. Where, by the terms of a contract between the lender and the borrower, if the lender receives or reserves or contracts for a greater rate of interest than the maximum allowed by law, such contract is affected

by the vice of usury (and it makes no difference whether the usurious interest is expressed in the terms of the instrument given for the payment of the debt created by the loan, or whether it is taken as a bonus, or is secured by any other corrupt agreement, device, or shift at the time of the contract), the whole transaction constitutes only one contract. *Gillmore v. Woolcock*, 13 Wis., 589. *Lear v. Yarnell*, 3 A. K. Marsh, 419. *Marshall v. Law*, 9 Conn., 65. *Bank U. S. v. Waggener*, 9 Peters, 399. *Richards v. Kountze*, 4 Neb., 206. The agreement, not the note, governs as to usury. *Sands v. Smith*, 1 Neb., 111. 8 Wend., 550. 13 Wend., 505.

MAXWELL, J.

The plaintiffs brought an action in the district court of Richardson County upon a promissory note, of which the following is a copy:

"$500. FALLS CITY, NEB., Oct. 20th, 1874.

"On the 20th day of December, 1874, we promise to pay to C. L. Keim & Co., or order, the sum of five hundred dollars, without defalcation, for value received, * * * payable at the Falls City bank, Falls City, Nebraska.

"P. O. AVERY,
"WM. C. KERN."

The note contained the following endorsement:

"C. L. Keim & Co. received on within January 21st, 1876, $500 (five hundred dollars)."

The defendants answered the petition of the plaintiffs alleging "that at the date and delivery of said note said plaintiffs contracted for eighteen per cent interest thereon from the date thereof until the payment thereof; that on January 21st, 1876, said defendants paid said note in the full sum of $500; that said plaintiff contracted for illegal and usurious interest on said note," etc.

No reply was filed to the answer. On the trial of the cause, the jury found a verdict for the defendants, on which judgment was rendered dismissing the case. The cause is brought into this court by petition in error.

The errors assigned are:

First, that the court erred in overruling the motion for a new trial. *Second*, that the answer tendered no issue. *Third*, that the court erred in rendering judgment in favor of defendants. *Fourth*, that the court erred in not granting a new trial. *Fifth*, that the court erred in not rendering judgment for the plaintiffs.

On the trial of the cause P. O. Avery, one of the defendants, on cross-examination, testified as follows:

Q. Did you promise to pay eighteen per cent on this note?

A. Well, I so understood it.

Q. I want a direct answer; "yes" or "no," whether you promised to pay eighteen per cent on this note?

A. Yes, sir.

C. L. Keim, one of the plaintiffs, called as a witness in their behalf, testified as follows:

Q. What interest did you contract for at the delivery of this note?

A. Eighteen per cent.

Q. Who was to pay the eighteen per cent?

A. The Association.

It appeared from the testimony in the case, that the money was loaned to the "Humboldt Patrons Association," and that the defendants were merely sureties. When the note became due, the interest thereon for 180 days was paid, and the time of payment extended. The only question at issue is, whether the contract was usurious or not.

Section five, of chapter 34, General Statutes, 446, provides that: "If a greater rate of interest than is hereinbefore allowed (12 per cent) shall be contracted for or

received, or reserved, the contract shall not therefore be void; but if, in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken, or reserved, the plaintiff shall only recover the principal without interest, and the defendant shall recover costs; and if interest shall have been paid thereon, judgment shall be for the principal, deducting interest paid."

There appears to be no question about the rate of interest agreed upon in this case, one of the plaintiffs having testified that the rate was *eighteen per cent.*

A surety may plead as a defense to an action on a promissory note, that usurious interest was agreed upon by the parties at the time of the execution of the note. It is not necessary, to constitute usury, that the illegal interest be expressed in the note.

It is claimed that the answer of the defendant fails to set up a sufficient plea of usury to make an issue or constitute a defense. It appears from the bill of exceptions that the plaintiffs themselves proved the contract to be usurious. Such being the case, it would be the duty of the court (if necessary), to permit an amendment of the answer to conform to the facts proved. But the answer is sufficient, after verdict, to sustain the judgment.

A number of affidavits were filed in support of the motion for a new trial, showing that Avery had testified on a former trial that no rate of interest was agreed upon, and that, in consequence thereof, the plaintiffs were taken by surprise. The testimony of Avery was merely cumulative, and could not affect the result.

The judgment is clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

HOWARD KENNEDY, PLAINTIFF IN ERROR, v. OTOE COUNTY NATIONAL BANK, DEFENDANT IN ERROR.

1. **Banks.** I., the president of a national bank in Nebraska City, obtained from K., in the city of Omaha, his (K.'s) promissory note for the sum of $2,000 payable to I., or order, and payable on demand, for the purpose of purchasing stock in the bank of which he was president. I. procured the note to be discounted by his bank, and had the proceeds thereof placed to his credit therein, and he afterwards drew the same out by checks on the bank. None of the officers of the bank, except the president, were aware of the character of the note, or that it had been given for stock. *Held*, in an action on the note, that the bank was entitled to recover.

2. ———: WHEN BOUND BY ACT OF A PRESIDENT. Representations of the president of a bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible. *Merchants Bank v. Rudolf*, 5 Feb., 527, cited and adhered to.

3. ———: ———. Like other agents, the president of a bank must act within the scope of his authority, in order to bind his principal, unless his acts have been ratified.

ERROR to the district court for Otoe county. Tried below before POUND, J., and a Jury. Verdict for plaintiff there. Judgment. Motion for a new trial overruled. Cause brought up by defendant, Kennedy, upon petition in error. The facts of the case are sufficiently stated in the opinion.

S. H. Calhoun, for plaintiff in error.

1. The president of a national bank is its chief executive officer, and has a general supervision of its affairs—notice to him will be notice to the bank. *McCann v. State*, 4 Neb., 324, and cases there cited. The same is true of a stockholder (who is a party to the transaction) of an incorporated banking association.

Stockdale v. Keys, 79 Penn. St., 251. An endorsee of such a note cannot recover when he is implicated in, or privy to, the original transaction. *Kittle v. DeLamater*, 3 Neb., 326.

2. All the circumstances tend to show that this was an arrangement between the president and the cashier of this bank to get Kennedy's paper to use as assets in lieu of the money which had been paid out of the bank to the original owner or owners of some of the stock then held in Irish's name, and not an ordinary discounting of a note payable by Kennedy to Irish and endorsed by Irish to the bank. This note was never protested, showing that the bank with regard to this note never followed the usual course of business. All the payments on this note were made by Irish, except one payment of $10, being money of Kennedy's in Metcalf's hands, and misapplied by Metcalf, without Kennedy's knowledge or consent, upon this note, and the bank never claimed anything from Kennedy until Irish became insolvent. If it was an ordinary discounting of paper, where was the profit? What was realized for the benefit of the stockholders in this bank? For the evidence all shows that it was not discounted a single penny, that Irish was credited with the full amount. The peculiar manner of making this pretended discount is noteworthy. It was not done at the counter or at the officer's desk, but in a back room, and instead of being an open and usual transaction, Metcalf quietly places on file a memorandum in his own handwriting for the book-keeper to enter up.

If a bank officer receive a promissory note from the maker, no consideration passing, and place the note in the bank in order to make a show of assets, even if such object be known to the maker, he is not liable on the note. *Agricultural Bank v. Robinson*, 24 Me., 276. *Lime Rock Bank v. Hewitt*, 50 Me., 269. And the agents knowledge of want of consideration, when acting for the

principal, is notice to the principal, however that knowledge may have been acquired. *Union Bank v. Campbell*, 4 Humph., 396. *Fulton Bank v. Canal Co.*, 4 Paige, 137. 2 Parsons on Notes, 27, 28, 29. Edwards on Bills, 316, 317.

3. In order to recover on accommodation paper plaintiff must have received the same in good faith, and whatever shows him to have received it *mala fide*, or with notice of the facts, will defeat his right of recovery. Edwards on Bills, 320, and note 5. *Woodhull v. Holmes*, 10 Johns., 270. *Skilding v. Warner*, 15 Johns., 270. *Brown v. Taber*, 5 Wend., 566. *Wardell v. Howell*, 9 Wend., 170. *Small v. Smith*, 1 Denio, 583.

M. L. Hayward, for defendant in error

The testimony shows clearly that Irish and Kennedy alone knew how or why the note was executed. Metcalf and Ashton swear that they never knew anything about it. The note bears date June 23d, 1873, and on June 24th, 1873, it was presented at the bank by Irish, and discounted by the cashier in the ordinary manner over the bank counter. It was discounted for cash, and the money used by Irish, not to buy or pay for stock, but for his own private use. (See testimony of Ashton.) The note bears interest from date at 12 per cent, hence bank could not pay less than its face. Act of Congress, 1864, sec. 30. Morse on Banking, 16, 20. Its bearing interest shows that the maker's intention was to have it run some time. *Lockwood v. Crawford*, 18 Conn., 361, 371. For this reason and because interest was promptly paid it was allowed to run. A demand could only be required to hold Irish the endorser, and his paying the interest on the note for over two years made such demand unnecessary. Irish was a director of the bank, hence he had due notice that the note was not paid. *Merchants Bank v.*

Rudolf, 5 Neb., 541. When the interest was not paid then Metcalf called on Kennedy for interest and principal, thus showing that there was no collusion between Kennedy or Irish and Metcalf. One payment of $10 was made on the note out of Kennedy's money, and he made no objection, although notified at once. When requested to pay the note Kennedy made no defense, but pleaded only hard times and asked for time. The bank having discounted the note one day after its date for value with no notice of any fraud, took the note with all the rights of an innocent indorsee of time paper bought before maturity. 1 Parsons on Contracts, 218. *Furman v. Haskins*, 2 Caines, 369. *Merritt v. Todd*, 23 N. Y., 28. *Hendricks v. Judah*, 1 Johns., 319. Story on Notes and Bills, 208, note 3. *Thurston v. M'Kown*, 6 Mass., 428. Bank officers cannot bind the bank by an unlawful act, nor outside the place of business, nor outside the line of business of the bank as this transaction clearly was. Sec. 8, act of congress, 1864. *Merchants Bank v. Rudolf*, 5 Neb., 539. *Miller v. McIntyre*, 1 Peters, 59 and 60. *United States v. Dunn*, 6 Peters, 51. *Bank of Metropolis v. Jones*, 8 Id., 12. *First National Bank v. Ocean National Bank*, 60 N. Y., 291. *Franklin Bank v. Stewart*, 37 Me., 519. *Washington Bank v. Lewis*, 22 Pick., 24. *Harper v. Calhoun*, 7 How. (Miss.), 203. *Wyman v. Hallowell*, 14 Mass., 262. *Lloyd v. West Branch Bank*, 15 Penn. State, 172. *Bank Com'rs v. Bank of Buffalo*, 6 Paige, Ch., 497. *Merchants Bank v. State Bank*, 10 Wallace, 675-6.

MAXWELL, J.

In the year 1875, an action was commenced in the district court of Otoe county against the plaintiff in error and O. H. Irish, to recover the sum of $2,000 and interest, upon a promissory note, of which the following is a copy:

"$2,000. NEBRASKA CITY, June 23d, 1873.

"On demand, I promise to pay to O. H. Irish, or order, two thousand dollars, at the Otoe county National Bank, with interest at the rate of 12 per cent per annum, for value received. "H. KENNEDY."

On the back of the note were several endorsements of payments of interest. The note on the day after its date was transferred to the defendant in error.

The plaintiff in error answered the petition of the defendant in error, alleging that he received no consideration for said note whatever, and that the defendant in error was not an innocent purchaser or holder thereof; that said note was made as an accommodation note, to enable Irish to purchase certain additional shares of stock in the bank of the defendant in error, and that the cashier of said bank had agreed to carry said note; that he was led to believe that he had nothing to fear therefrom, as the stock would pay said note if it became necessary, and that the dividends would pay the interest thereon; that the object of purchasing additional shares of stock was to enable the then cashier, and his friends, to control the bank, and elect Irish president thereof; that being induced by these representations, and being willing to accommodate said parties, and upon no other consideration he executed the note in question, and delivered the same to Irish for the purpose of being endorsed and delivered to the defendant in error, upon the understanding and agreement hereinbefore set forth; that at the time of delivering said note to Irish, he (Irish) delivered to plaintiff in error twenty shares of the stock of said bank, to be held by him as security against liability on his part upon said note, of all of which facts the bank had full knowledge; that afterwards the bank requested the plaintiff in error to deposit said shares in said bank for safe keeping, agreeing that said shares should be held by it for the purpose of securing said note; that plain-

tiff in error relying upon said representations deposited said shares in said bank, that the bank disposed of said stock and appropriated the proceeds thereof to its own use, and that no part thereof has been applied to the payment of the note.

The plaintiff in the court below filed a reply to the answer, denying all the allegations of new matter therein contained.

It appears from the testimony in the case that Kennedy, prior to the time of the execution and delivery of the note in controversy, had another transaction with the defendant in error, whereby he purchased twenty shares of the stock of the bank, giving his note therefor to the bank. This stock appears to have been purchased by him at the request of, and apparently as an act of friendship for, Metcalf, the cashier of the bank. It is claimed by the plaintiff in error, that the note in controversy, although payable to Irish, was in fact to be delivered to the bank as a part of the first transaction. In our opinion the proof entirely fails to sustain this view of the case.

Kennedy, on cross-examination, testified as follows:

Q. He (Irish) said to you, did he, that he wanted the note to buy stock with?

A. That was it exactly; that was the conversation.

Q. Was that the conversation about the time you gave the note?

A. At the date of the note. That was the conversation on that occasion and on previous occasions.

Q. That he wanted the note to buy stock with?

A. Yes, sir.

Q. Do you know what he did with that note?

A. Nothing, only what was afterwards developed.

Q. At the time you signed the note, you are positive he gave you the stock right there and then—handed it over to you?

A. Yes, sir, certificates of stock.

Q. You don't know whether he bought this stock?

A. No, sir.

Q. Nor how he paid for it?

A. No, sir.

It also appears from the testimony that the note was signed and the stock delivered to the plaintiff in error in Omaha.

The plaintiff in error also testified that the original transaction with the bank, whereby he had purchased and held 20 shares of bank stock, was terminated and his note cancelled on the 24th day of June, 1873, the same day, as appears from the testimony, the bank discounted the note in controversy. It also appears from the testimony of Benjamin D. Ashton, teller and bookkeeper of the bank, that the note in controversy was discounted by the bank on the 24th day of June, 1873, and the amount thereof placed to the credit of Irish, who drew the same out by checks on the bank. In this Ashton is fully corroborated by the cashier. There is an entire failure of proof to show that the twenty shares of stock left in Kennedy's possession as security for the payment of the note were ever delivered to the bank by Kennedy or any one for him, or that the bank sold the same or any portion thereof. The representations of the president of a bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible. Like other agents, a bank president must act within the scope of his authority in order to bind his principal; unless his acts are ratified.

In *Merchants Bank v. Rudolf*, 5 Neb., 527, it was held that statements made by a cashier, at casual interviews away from the bank, as to payments having been made upon its securities, were not binding upon the

bank. We think that decision states the law correctly, and is applicable to this case.

From a careful examination of the entire record, we are satisfied that justice has been done in the case. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE UNION CENTRAL LIFE INSURANCE CO., PLAINTIFF IN ERROR, v. JAMES MCHUGH, DEFENDANT IN ERROR.

Life Insurance: DEFAULT IN PAYMENT: PAID-UP POLICY: MEASURE OF DAMAGES. A life insurance policy provided that a certain part of each premium be allowed as a loan or credit and as a debt against the policy until paid or cancelled by profits or otherwise, and further provided that after a certain time, and after full annual payments of premiums during this time, upon default and surrender of the policy by the insured, the company should issue to him a new paid-up policy for an equitable amount, subject to the outstanding loans or credits: *Held*, that upon a breach of the covenant to issue such new paid-up policy by the company, the measure of damages, after full payment of all premiums accrued before such default, is the fair cash value of the new paid-up policy at the time of the breach of contract, with interest thereon.

ERROR to the district court of Douglas county. Tried below before SAVAGE, J., and a jury. The case is stated in the opinion.

George E. Pritchett, for plaintiff in error.

This judgment should be reversed, because the plaintiff was only entitled to recover the value of the paid-up policy to which he was entitled, and the only evidence as to its value proved it to be less than the amount which he owed the company. The plaintiff could not

recover upon the theory of a rescission of his contract with the company, because the parties could not be put in *statu quo*. He could not return to the company the five years' insurance which he had had. 2 Parsons on Contracts, 678. *Hunt v. Silk*, 5 East, 449.

Leavitt Burnham, for defendant in error.

1. The contract of insurance, for breach of which action was brought by defendant in error, though made up of several parts, was entered into as an entirety, and must be treated as such; and any breach thereof, was a breach of the whole. 3 Parsons' Contracts, sec. 189. 2 Id., sec. 619.

2. Defendant in error was entitled to recover such damages as he suffered by failure to fulfill the whole contract. 3 Parsons' Contracts, secs. 187, 189. *Masterton v. Mayor*, 7 Hill, 61. *Shaffer v. Lee*, 8 Barb., 412. *Royalton v. R. & W. Turnpike Co.*, 14 Vt., 311. And the jury might also inquire if there were aggravating and unjustifiable circumstances connected with the breach that would also entitle the defendant in error to recover therefor. Field on Damages, 58, 61, and cases cited. *Jones v. Steamship Cortes*, 17 Cal., 487. *Stonesheifer v. Sheble*, 31 Mo., 243. *Hall v. Delephane*, 5 Wis., 206.

GANTT, CH. J.

On the twenty-eighth of August, 1872, the plaintiff in error insured the life of the defendant in error in the sum of $2,500, at a semi-annual payment of $31.25, with participation in profits, for the term of his natural life, for the benefit of Mary McHugh, provided that ten dollars of each semi-annual premium is allowed as a credit or loan, bearing interest at six per cent from their respective dates, and acknowledged as an indebtedness against the policy until paid or cancelled by profits or

otherwise. The policy contains this covenant: "And the said company do hereby further promise and agree that if, after the premiums on this policy for not less than three complete years of insurance have been duly paid to the company, this policy should cease in consequence of default of payment of any subsequent premium, this company will, on the surrender of this policy, issue in lieu thereof (provided such surrender be made within sixty days of such default) a new paid-up policy, subject to any loans or credits outstanding against this policy, for an equitable amount, which shall not be less than the sum below: After three full annual payments, $240; after four full annual payments, $317; after five full annual payments, $390; and a like equitable amount for any greater number of payments."

Ten semi-annual payments of $21.25 were made, and then the defendant made default of payment of premium on his policy, and within the time specified he surrendered the same, and demanded the issuance to him of a paid-up policy, which the plaintiffs refused, and he brought action to recover damages for a breach of the contract.

Under the terms of the policy ten dollars of each semi-annual premium, not paid, is a credit or loan bearing six per cent, and acknowledged to be an indebtedness against the policy until paid or cancelled by profits or otherwise; and that after a period of not less than three years, and "after the full annual payments" to the company have been duly paid, the company will issue to the defendant a new paid-up policy. The five years loans, amounting in the aggregate to one hundred dollars, were not paid by the defendant. It is therefore very clear, according to this contract, that the plaintiff only covenanted to issue a new paid-up policy upon the full payment of all the premiums up till the time default was made; but in this case there was an indebtedness

against the defendant of unpaid premiums, which the plaintiff's uncontradicted testimony tended to show, after deducting the accrued dividends, was $86.31; and yet the jury rendered a verdict in favor of defendant in error for $212.50, being equal to the aggregate of all premiums paid by defendant during the five years insurance on his life.

It is insisted that the defendant received no benefit for the premiums he paid, and therefore his damages must be the amount he paid to plaintiffs. But did he not receive any benefit? The answer is, that during these five years he had an insurance of $2,500 on his life, and if he had died during this time the plaintiffs would have been compelled to pay that amount. The plaintiff, by the contract, agreed to take this risk, and for it the defendant agreed to pay the premiums specified; and the fact that the contingency did not happen during this time did not lessen the consideration received by the defendant.

Now, in respect to the rule of damages, Pothier says that the parties are deemed to contemplate only damages and interest which a party might suffer from the non-performance of the contract in respect to the particular thing which is the object of it (1 Evans Poth., 91); and therefore, under the contract in this case, the measure of damages is, after full payment of all premiums accrued before the default of payment, the fair cash value of a new paid-up policy at the time of the breach of the contract, and the jury ought to be so instructed. The only evidence tending to show what was the cash value of such policy, at such time, was offered by the plaintiffs, and the jury wholly disregarded this testimony. The verdict, therefore, is not sustained by the evidence, and the judgment of the court below must be reversed, and the cause be remanded for trial *de novo*.

REVERSED AND REMANDED.

ROBERT KITTLE AND JOHN A. SMILEY, PLAINTIFFS IN ERROR, v. RILEY DE LAMATER AND THOMAS TURNER, DEFENDANTS IN ERROR.

Attorney's Fees: INJUNCTION. K. obtained a temporary order of injunction against D. for a certain period of time, upon executing a bond with surety in the sum of $500. No steps were taken to dissolve this injunction, and no counsel appeared for D. until the order had expired by operation of law, when counsel appeared for D., and resisted an application for another order, which was allowed upon the deposit of a certain sum of money by K., and afterwards dissolved: *Held*, that D. cannot recover damages for the alleged payment of attorney's fees, in an action on the bond given upon the allowance of the first order.

ERROR to the district court for Dodge county. Tried below before POST, J. The case is stated in the opinion.

Marlow & Munger, for plaintiff in error, cited Revised Statutes U. S., 173. *Bein v. Heath*, 12 How., 168. *Oelrichs v. Spain*, 15 Wall., 211. 16 Albany Law Journal, ————.

N. H. Bell, for defendants in error, cited *Noble v. Arnold*, 23 O. S., 264. *Corcoran v. Judson*, 24 N. Y., 106. *Edwards v. Bodine*, 11 Paige, 223. *Behrens v. McKenzie*, 23 Iowa, 333. *Langworth v. McKelvey*, 25 Iowa, 48. *Thaie v. Quan*, 3 Cal., 216. *Prader v. Grim*, 13 Cal., 585. *Morris v. Price*, 2 Blackf., 457. *Derry Bank v. Heath*, 45 N. H., 524. *Ryan v. Anderson*, 25 Ill., 372. *Garret v. Logan*, 19 Ala., 344.

GANTT, CH. J.

This is an action upon an injunction bond, to recover attorney's fees alleged to have been expended in defending the suit in equity, and in procuring a dissolution of the order of injunction.

It appears from the record that the defendant in error,

R. De Lamater, had recovered a judgment against plaintiff in error, R. Kittle, in the district court of Dodge county, and that execution was issued thereon, and placed in the hands of defendant, Turner, sheriff of the county; that some time afterwards Kittle commenced suit in equity, in the same court, to enjoin the collection of this judgment. On the nineteenth of June, 1875, Kittle procured the cause to be transferred to the U. S. circuit court, and on the twenty-first of the same month the circuit court made an order as follows: "Temporary injunction allowed to remain in force until the twentieth day of July, 1875, and until modified or dissolved by proper authority, complainant first to give bond in the sum of five hundred dollars in the usual form; notice of time and place of hearing motion for renewal or continuance of injunction to be given to respondents five days before the time of hearing the same." The next proceeding in the circuit court was on the 18th day of December, 1875, and is as follows: "This cause came on to be heard on the motion of the complainant for a temporary injunction herein, and was argued by counsel of the respective parties. Whereupon it was ordered by the court, that a temporary injunction be allowed, as prayed for by said complainant, until the further order of the court, upon said complainant depositing with the clerk of the district court for Dodge county, Neb., the sum of twenty dollars, as security for the payment of the costs of re-advertising the sale of the property in question, should the injunction be dissolved." And on the first of February, 1876, the circuit court made an order remanding the cause to the "district court of Dodge county, Neb., for want of jurisdiction on the part of the court to proceed herein. The temporary injunction heretofore allowed in the case is hereby dissolved."

The defendant in error, in his petition in this case, in the court below, says that "said temporary order of in-

junction expired by lapse of time and operation of law;" and N. H. Bell, attorney for defendants, testifies that "under the law it expired as provided by law;" that upon a notice given by plaintiff "that the injunction was to be heard in open court, on the twentieth of July, 1875," he went to Omaha, and some days thereafter he "resisted a further continuance of the injunction, and it was argued by Mr. Kittle on the one side and Judge Savage and myself on the other, before Judge Dundy. Judge Dundy took it under advisement and held it until the next term of the circuit court."

Now, from the petition and this evidence, it seems clear that the only question argued in July was Kittle's motion for another order of injunction, which was taken under advisement by the Judge, and decided on the eighteenth of December, as shown by the court record. It is therefore evident that no steps were taken to dissolve the first order, and that defendant incurred no expense for attorney's fees in regard to that order. The bond was given upon the allowance of this first order, and the obligors can be liable only for damages incurred under that order; and hence, as no attorney's fees were incurred by defendants by the allowance of that first order, there certainly is no liability on the bond for such damages; and therefore the defendants failed to prove any cause of action.

It is not necessary, under the pleadings in this case, to consider whether the defendants suffered any damage by reason of the allowance of the second order of injunction, or what effect the remandment of the case to the district court of Dodge county by the circuit court, for want of jurisdiction, has upon the rights and liabilities of the parties in respect to the allowance of the second order. But for the reasons given in this opinion, the judgment of the district court must be reversed and the cause be remanded.

REVERSED AND REMANDED.

ROBERT KITTLE, PLAINTIFF IN ERROR, v. EDWARD G. ST. JOHN, DEFENDANT IN ERROR.

1. **Landlord and Tenant:** TERMINATION OF LEASE. When by the terms of a lease of real estate for five years, the lessee may terminate the lease at the end of either year, upon giving to the lessor six days' written notice, such written notice must be served on the lessor, as required by the contract.

2. ——: EVIDENCE. Parol testimony is not admissible to prove the surrender of leased premises. Under the statute of frauds, such surrender can only be done by some note or memorandum in writing, subscribed by the party surrendering the same.

ERROR to the district court for Dodge county. Tried below before POST, J. The case is cited in the opinion.

M. H. Sessions and *Robert Kittle*, for plaintiff in error, cited *Tondro v. Cushman*, 5 Wis., 579. *Mattis v. Robinson*, 1 Neb., 3. *Hatch v. Fowler*, 28 Mich., 205. *Filley v. Duncan*, 1 Neb., 134. *Leonard v. Burgess*, 16 Wis., 41. Taylor, Landlord and Tenant, 482. *Bailey v. Wells*, 8 Wis., 141. *Rowan v. Lytle*, 11 Wend., 616. *Cronmellin v. Theiss*, 31 Ala., 412. *Jackson v. Eddy*, 12 Mo., 132.

GANTT, CH. J.

On the tenth of September, 1872, defendant rented from the plaintiff fractional block No. 224, in the city of Fremont, together with the warehouse, rights, and appurtenances thereunto belonging, for the term of five years, at a certain stipulated annual rent, payable quarterly in advance. It was further stipulated as follows: "And in default of any payment, at the time due, of rent, or should said warehouse be closed or the premises not be used in the ordinary grain or lumber business for more than one month at any time, Robert Kittle may

terminate this lease, by first giving six days' written notice, served on any one occupying said premises at such time, or thereon. This lease may be terminated by E. G. St. John, at the end of either year, by the same notice as above, served at R. Kittle's office, or on him."

The plaintiff sued the defendant for the quarter's rent due on the tenth September, 1876. The defendant, in his answer, admitted the execution of the lease, and set up as a defense that, on or about the tenth of August, 1876, he verbally notified the plaintiff that he "wished" to terminate the lease and surrender the premises on the tenth of September, 1876, that being the end of the fourth year of said lease, and alleged that the plaintiff then informed him "that was all right, and then and there waived the service of a written notice." The plaintiff, in his reply, denied "that he ever in any way consented to or received the surrender of the premises, or that the defendant ever surrendered the same, by parol or otherwise."

In regard to the question of notice, the defendant testified as follows: "I had a conversation with Mr. Kittle, on or about the tenth of August. I told him, after we had talked some, before leaving, I told him positively I wished to give up the warehouse on the tenth of September. His answer was, all right. I understood him to take it as a notice to give it up. I never thought any more about it, except that it was an agreement—all the notice I would have to give him." This testimony falls far short of proving the allegation alleged in defendant's answer. It does not show any waiver of the service of a written notice by the plaintiff. What the defendant *understood* and *thought* is not evidence, because the witness must testify to facts and not his understanding of what occurred.

Again, in regard to this conversation, the testimony of the plaintiff is in conflict with that of defendant.

But to terminate the lease at the end of any one year, during the term mentioned therein, the parties by their contract required six days' written notice; and without any such notice having been given, and without any release or re-conveyance of his interest in the premises, the defendant offered parol testimony to prove a surrender of the estate to the lessor at the end of the fourth year. This testimony was admitted. Now, section three, of Chap. XLIII, Revised Statutes (1866), relative to Frauds, provides that there shall be no surrender of a lease of real estate exceeding a term of one year, "unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party * * * surrendering the same." Therefore all the parol testimony offered by the defendant, in respect to a surrender of the leased premises by defendant to plaintiff, was incompetent, and in direct violation of the above statute.

In *Bailey v. Wells*, 8 Wis., 141, 158, it is held that such testimony is inadmissible, and that "if there has been any surrender in fact, it could only be done by some note or memorandum in writing, subscribed by the party surrendering the same. * * * The circuit court, therefore, very properly refused to permit the plaintiff in error to show an oral surrender of the leased premises to the lessor." *Martin v. Kepner*, 1 W. L. J., 396. *Rowan v. Lytle*, 11 Wend., 16.

The judgment of the district court must be reversed, and the cause be remanded for trial *de novo*.

REVERSED AND REMANDED

ROBERT KITTLE, PLAINTIFF IN ERROR, v. WILLIAM R. WILSON AND ALFRED P. HOPKINS, DEFENDANTS IN ERROR.

1. **Promissory Note:** EXTENSION OF TIME OF PAYMENT. An agreement by the indorsee of a promissory note for a definite extension of the time of payment, in consideration of an agreement by the maker to pay a greater rate of interest than that provided for in the note, is binding upon them, and if made without the consent of the indorser will release him from all liability thereon.

2. ———: HOW EXTENSION OF PAYMENT TO BE AVAILED OF. This defense is a legal one, and should be made by the indorser in the action against him on the note; but if he neglect to do so and suffer judgment to go against him, he cannot afterwards make it available as a ground for enjoining the enforcement of such judgment.

APPEAL from the district court for Dodge county. Tried below before POST, J.

Robert Kittle, pro se, upon the points passed upon by the court, cited *Bank of Steubenville v. Hoge*, 6 Ohio, 17. Chitty on Contracts, 6 Ed., 533.

LAKE, J.

This case comes here by appeal from the district court for Dodge county. The object of the action is to perpetually enjoin the collection of a certain judgment rendered by the county court of that county against this plaintiff as indorser of a promissory note, executed by one William Martin to the said plaintiff, and by him indorsed and transferred to the defendants. It appears that this note was originally secured by a mortgage executed by Martin upon certain real estate which had been foreclosed, and this judgment was for the balance remaining unsatisfied after the sale of the mortgaged premises.

The sole ground upon which this injunction is asked as stated in the petition is, that the defendants, without the knowledge or consent of the plaintiff, entered into an agreement with the maker of the note to extend the time of payment thereof from the 4th of October, 1874, to the 24th day of February, 1877, in consideration of an agreement by the maker to pay interest at the rate of twelve per cent per annum—the note by its terms drawing only ten per cent. And it is alleged that this extension was actually given.

There can be no doubt that if the facts respecting this extension were precisely as alleged in the petition, they would, if established, have been a good defense to the action against the plaintiff in the county court. An agreement between the indorsee and maker of a promissory note, for any definite extension of the time of payment, in consideration of an agreement by the latter to pay an increased rate of interest, is binding upon them, and if made without the consent of the indorser, will release him from all liability on the note.

But this defense was a legal one, and should have been made to the action on the note. By suffering judgment to go against him in that suit, the plaintiff has lost the advantage which the extension gave to him, and cannot now make it available as a ground for resisting the enforcement of the judgment. There is no equity in the petition, and the judgment of the court below dismissing the action must be sustained.

JUDGMENT ACCORDINGLY.

JEWELL A. DAVIS, PLAINTIFF IN ERROR, v. JOHN D. NELIGH, DEFENDANT IN ERROR.

1. **Promissory Note:** SET-OFF. Any set-off to a promissory note which would have been good between the original parties, may be pleaded against an indorsee who acquires it after maturity. He takes it subject to any right of set-off which the maker had against any prior holder.

2. ——: ——. T., the owner of a promissory note, had it drawn payable to K., or order. T. retained possession of the note until after it became due, and received from the maker thereof the full amount due thereon. Afterwards he delivered the note to K. It did not appear that K. paid any consideration whatever for the same. K. indorsed the note and delivered it to C. E. T., the wife of T,, who assigned the same for a valuable consideration to D. In an action on the note, *Held*, that the note was subject to the set-off from the maker of the note to T.

3. **Practice:** DEFECT IN VERDICT. Where a verdict is defective in form merely, the court may direct the jury to amend it, or it may be amended by the court, with the consent of the jury, before they are discharged.

4. **Interest How Computed.** Interest on a judgment or debt due, is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there is a surplus, it is applied upon the principal, and so *toties quoties*, taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest.

ERROR to the district court for Dodge county. Tried below before VALENTINE, J. The facts appear in the opinion.

Uriah Bruner, for plaintiff in error.

Where set-off is allowed against a plaintiff, the indorsee of a note after maturity, for equities between antecedent parties, no set-off which arose after the transfer will be available against the indorsee. 2 Daniel on

Negotiable Instr., sec. 1,437. *Davis v. Miller*, 14 Gratt., 8.

And the burden of proof of the date of the indorsement and of ownership is on the defendant. 2 Harrison, N. P. 1,255. 1 Greenlf. Ev., 78. *Perkins v. Moon*, 7 C. & P., 408. 1 Daniel on Neg. Instr., 600, sec. 813. *Way v. Richardson*, 3 Gray, 412. *Vallett v. Parker*, 6 Wend., 615. *Holme v. Karsper*, 5 Binn., 469; *McCann v. Lewis*, 9 Cal., 246. *Hall v. Allen*, 37 Ind., 541. *Horton v. Bayne*, 52 Mo., 531. *Phillis Kirk v. Pluckwell*, 2 M. & S., 393.

The highest authorities in England, as well as in this country, hold that a negotiable note transferred after maturity is subject to the infirmities and equities attaching thereto in the hands of the antecedent parties, but only such as attach to *the note transaction itself*. Story on P. N., 178, and foot notes. Chitty on Bills (13 Am. Ed.) [*220] 251. Story on Bills (Sharswood's Ed.) 529. *Robinson v. Lyman*, 10 Conn., 30. 2 Daniel Neg. Inst., 384–6, secs. 1,435–7. *Campbell v. Rusch.*, 9 Iowa, 337. *Shipman v. Baumer*, 10 Id., 208. *Lewis v. Denton*, 13 Id., 441. *Davis v. Miller*, 14 Gratt., 8. *Annon v. Houck*, 4 Gill, 332. *Hughs v. Large*, 2 Barr, 103. *Epler v. Funk*, 8 Id., 468. *Clay v. Coterell*, 6 Harr., 413. *Burrow v. Moss*, 10 B. & S., 558. *Oulds v. Harrison*, 28 Eng. Law & Eq., 534.

A promissory note is a contract, the terms of which cannot be explained or varied by extrinsic testimony unless attacked for fraud. No fraud is either alleged or attempted to be proved. Nor is there any trust expressed in the note. *Giles v. Comstock*, 4 N. Y., 270. *Graves v. Porter*, 11 Barb., 592. *Babbett v. Young*, 51 N. Y., 238.

Crawford & McLaughlin, for defendant in error.

As no one is a *bona fide* holder who has notice of a defense against the paper, no one who takes it after dishonor is such *bona fide* holder, because the dishonor itself is notice to him that there is some defect or defense. Hence the rule that one who takes paper for value, after dishonor, is open to all equitable defenses. 1 Par. N. & B. 244, 275. The said Kryger being merely a nominal payee, or fictitious person, the note would pass by the indorsement of Thompson, and the name of L. Kryger could be written as well by Thompson as by Kryger himself. In either case, whether the assignment was made to Kryger by delivery from Thompson, or to the plaintiff by Thompson's indorsement, either and each of them would take the note without prejudice to any set-off or other defense which the maker, John D. Neligh, had against Thompson at any time before notice of the assignment. Gen. Stat., sec. 31, 106, code of civil procedure ; also sec. 4, chap. 32, Gen. Stat. *Follet, Adm'r v. Buyer*, 4 Ohio State, 586. *Hill v. Butler*, 6 Ohio State, 207. 1 Nash's Pleading and Practice, 220. 2 Parsons Notes and Bills, 605. *Spencer v. Morgan*, 5 Ind., 146. Civil Code, Neb., sec. 104.

MAXWELL, J.

This was an action brought in the district court of Cuming county, upon a promissory note, of which the following is a copy:

"$505.00. Banking House of Bruner, Neligh & Kipp,
"West Point, Neb., Nov. 7th, 1872.

"Two months after date, I promise to pay to Leonard Kryger, or order, five hundred and five dollars, for value received, negotiable and payable without defalcation or discount, at the banking house of Bruner, Neligh, and Kipp, at West Point, Nebraska, with interest at the rate of 12 per cent per annum from date.

"(Signed) JOHN D. NELIGH."

The note contained the following indorsements thereon:

"Pay to E. C. Thompson.

"L. KRYGER.

"E. C. THOMPSON."

The defendant answered the petition of the plaintiff, and alleged that the note was made payable to Leonard Kryger, at the request of John B. Thompson, who paid the consideration therefor; that Kryger never had any interest in the note, but held the same in trust for Thompson; that Kryger indorsed and delivered the note to E. C. Thompson, wife of John B. Thompson, long after the maturity thereof, and without consideration; that at the commencement of the action, John B. Thompson was indebted to the defendant in the sum of $635.96, for money paid at his request, etc.

The plaintiff, in his reply, denied the facts set forth in the answer.

On the trial of the cause, the defendant testified that the consideration of the note was paid by J. B. Thompson; that it was made payable to Kryger at Thompson's request, as he did not want any one to know that he held a note against the defendant; that in February, 1873, he saw the note in the hands of J. B. Thompson, and that the note at that time had no endorsements thereon. The defendant also testified that he had paid to J. B. Thompson, at various times since the note became due, the amount of set-off claimed in the answer, and that the same was paid before he had any notice of the assignment. This is not denied.

The only proof introduced by the plaintiff consisted of the note in controversy, and the deposition of C. E. Thompson, from which it appears that the note was assigned to the plaintiff for a valuable consideration.

The plaintiff in error insists that the indorsee of an overdue note takes it subject to such equities as attach

to it in itself, and only to such; and not to those equities arising out of collateral matters, nor to any set-off which is not good against his indorser. This was undoubtedly the rule at common law. *Chalmers v. Lanier*, 1 Camp., 383. *Burrough v. Moss*, 10 B. & C., 558. *Whitehead v. Walker*, 10 M. & W., 696. *Crippe v. Davis*, 12 Id., 159. *Oulds v. Harrison*, 10 Exch., 572. *Stein v. Yglesias*, 1 C., M. and R., 565. *Goodall v. Ray*, 4 Dowl., 76. *Hughes v. Large*, 2 Barr., 103. *Wharton v. Hopkins*, 11 Ired., Law, 505. *Renwick v. Williams*, 2 Md., 356. *Tinsley v. Beall*, 2 Kelly, 134. *McAlpin v. Wingard*, 2 Rich., 547. *Gullet v. Hoy*, 15 Mo., 399. *Hankins v. Shoup*, 2 Ind., 342. *Metcalf v. Pilcher*, 6 B. Monroe, 529. *Haxtun v. Bishop*, 3 Wend., 13. *Bridge v. Johnson*, 5 Id., 342. *Johnson v. Bridge*, 6 Cow., 693. *Bank of Niagara v. McCracken*, 18. Johns., 493. *Kennedy v. Manship*, 1 Ala., 43. 2 Parsons on Notes and Bills, 603.

But the rule has no application in this state. Under the code, any set-off to a note, which would have been good between the original parties, may be pleaded against an indorsee who acquires it after maturity. He takes it subject to any right of set-off which the maker had against any prior holder. *Peabody v. Peters*, 5 Pick., 1. *Stockbridge v. Damon*, Id., 223. *Sargent v. Southgate*, Id., 312. *Braynard v. Fisher*, 6 Id., 355. *Greer v. Burdett*, 9 Id., 265. *Shirley v. Todd*, 9 Greenleaf, 83. *Baxter v. Little*, 6 Met., 7. *Pelter v. Prout*, 3 Gray, 502. *Bond v. Fitzpatrick*, 4 Id., 88. *Martin v. Trobridge*, 1 Vt., 477. *Savage v. Davis*, 7 Wend., 223. *Furniss v. Gilchrist*, 1 Sandf., 53. *Hedges v. Seely*, 9 Barb., 214. *McKenzie v. Hunt*, 32 Ala., 494. 2 Parsons on Notes and Bills, 604. *Nixon v. English*, 3 McCord, 549. *Perry v. Mayo*, 2 Bailey, 254.

The indorsee of a note overdue takes the legal title; but he takes it with notice on the face of the note that

it is discredited, and is therefore subject to all payments and offsets in the nature of payment. *Baxter v. Little*, 6 Metc., 7.

This is decisive of the case. While it is clearly shown that the note was taken in the name of Kryger, it also appears that Thompson gave the consideration therefor, and was the owner. It is also shown that the defendant paid Thompson the full amount due on the note after it became due, but before he had notice of the assignment to the plaintiff.

The jury returned the following verdict: "We the jury, duly impaneled and sworn in the above cause, do find no cause for action.

"(Signed.) WILLIAM FROST, Foreman."

Whereupon the court instructed them as follows: "Gentlemen, you have evidently intended by your verdict to find for the defendant, if such is your intention, you will simply say: 'We find for the defendant,'" to which instruction the plaintiff excepted. We see no error in this. The verdict was defective in form only, and might, with the consent of the jury before they were discharged, have been corrected by the court.

The third instruction as to the mode of computing interest is clearly erroneous. The rule established by this court in *Mills v. Saunders*, 4 Neb., 193, we regard as correct, that interest on a judgment or debt due, is computed up to the time of the first payment, and the payment so made is first applied to discharge the interest, and afterwards, if there be a surplus, it is applied upon the principal, and so *toties quoties*—taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. But as the verdict was for the defendant, the error was without prejudice to the plaintiff.

The judgment of the district court is clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

JEWELL A. DAVIS, PLAINTIFF IN ERROR, v. JOHN D. NELIGH, DEFENDANT IN ERROR.

1. **Witnesses.** The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such.

2. ———. But where a witness has related a portion of what took place at a particular time or place, or a part of a particular transaction, he may be cross-examined as to matters showing the *entire transaction.*

3. **Promissory Note.** When an overdue note is assigned, the assignee takes it subject to all equities existing between the maker and the payee. In an action on the note, the maker may show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment he had paid it.

4. ———: SET-OFF. The maker may also set-off any liquidated demand which he held against the payee at the time of the assignment, but claims subsequently acquired, even though they had their origin in previous transactions, are not the subject of set-off.

ERROR to the district court for Cuming county. Tried below before VALENTINE, J., and a jury. Verdict for defendant. The facts appear in the opinion.

Uriah Bruner, for plaintiff in error.

The testimony offered by the defense shows that the transfer by J. B. Thomson, the payee mentioned therein, to L. Kryger, was made prior to the alleged sale of the house by Mr. Thompson; and that the order referred to was made nearly a year before the settlement between Mr. Thompson and Mr. Neligh, when they had a settlement of thousands of dollars. The said order is not on Mr. Neligh, nor is it for two hundred and fifty-eight dol-

lars, but simply for "two hundred and fifty-eight." Mr. J. B. Thompson testifies that prior to the time that he left for California, he and Mr. Neligh settled all their claims between themselves, and that this note was not paid.

The defendant can certainly have no set-off against the plaintiff for a claim he may have or have had against Mr. Thompson at any time prior to the date of the commencement of this action unless the plaintiff shall also be permitted to have all the transactions between Mr. Thompson and Mr. Neligh settled up. It was therefore error to refuse on cross-examination by the plaintiff the interrogatories 46, 47, and 48, which said interrogatories were intended to show how the accounts and cross-demands stood between the plaintiff and Mr. Thompson.

The order by Mr. Thompson on Krause was for 258, nothing to indicate what those numerals stand for. Were there no other objections the amount in the order is too uncertain to be allowed for the purpose of a set-off. Figures without anything to indicate the denomination are simply numerals—barren figures—that are often employed to indicate anything else that may be numbered, as dollars; or if money is indicated, the denominations may be either eagles, dollars, cents, or mills. *People v. S. F. Savings Union*, 31 Cal., 136. *Hurlburt v. Butenop*, 27 Id., 56. *Tilton v. O. C. R. R. Co.*, 3 Saw., 24. *Lawrence v. Fast*, 20 Ill., 341. *Lane v. Bommelman*, 21 Id., 147. *Woods v. Freeman*, 1 Wall., 399. Upon the subject of set-off, see cases cited *ante* p. 79.

Crawford & McLaughlin, for defendant in error.

Where cross-demands have existed between persons under such circumstances, that if one brought an action against the other, a counter-claim, or set-off, could have

been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the demands must be deemed compensated, so far as they equal each other. Code, § 103. Negotiable paper cannot be transferred after due to defeat the right of set-off. *Ross & Ricker v. Johnson*, 1 Handy, 383. *Follett, administrator, v. Buyer*, 4 O. S., 591. 2 Parsons on Notes and Bills, 603–4.

Plaintiff in error insists that there is no ground for allowing defendant's set-off, because it does not arise out of the note transaction. There was no valid indorsement of the note by Thompson prior to May, 1875, when Thompson still had possession of it, and claimed to own it, and the plaintiffs in error are bound by the admissions of their own witness. Defendant's claims were all due and payable prior to May, 1875, and therefore are available as a defense or set-off in an action by the indorsee.

MAXWELL, J.

This is an action on a promissory note, made by the defendant to one J. B. Thompson, or order, on the fourth day of December, 1871. The note was given for the sum of $800, and was payable at the banking house of Bruner, Neligh & Kipp, at West Point. On the fourteenth of August, 1872, a payment of $500 was indorsed on the note. The plaintiff claims to be the assignee of the note, and asks for judgment in the sum of $366.66 with interest.

The defendant in his answer to the petition denies: First, that the plaintiff is the owner of the note. Second, that he is a *bona fide* holder for value before the maturity thereof. Third, that defendant claims as a set-off against said note the sum of $258 paid to E. Krause on the order of J. B. Thompson, the payee of said note, said

order bearing date January 19, 1871. Fourth, the defendant also claims a set-off against said note for the sum of $400 paid to, and received by J. B. Thompson, for a house owned by Thompson and defendant.

The plaintiff, in his reply, denied the new matter contained in the answer.

On the trial of the cause the defendant was called as a witness in his own behalf, and testified as follows on his direct examination:

Q. What was the $400 for, set up in your answer?

A. I and Thompson built a house together; afterwards it was sold; Thompson collected all the money received therefor, and failed to pay over my share.

Q. This was the latter part of October when the house *and block* were sold?

A. Mr. Thompson received on the sale of this house $600; he never paid any part of it to me *in money*, nor did anybody pay it to me for him.

On cross-examination he testified as follows:

Q. You say that you and J. B. Thompson were in partnership?

A. With me in this house in Neligh City. The house was built the latter part of February, 1873.

* * * * * *

Q. Did you not state in your direct examination that you and Thompson built this house together in partnership?

A. I stated that we built it together.

Q. What other business did you carry on in partnership with Mr. Thompson, if any?

Objected to by defendant as immaterial; objection sustained. Plaintiff excepted.

The cross-examination of a witness must be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine him upon other matters, the party desiring such examination must

make the witness his own and call him as such. 1 Greenleaf's Ev., sec. 445. But where a witness has related a portion of what took place at a particular time and place, or a part of a particular transaction, he may be cross-examined as to matters showing the entire transaction. It is only in this way that the situation of the witness with respect to the parties and to the subject of litigation can be shown, as well as his interest, motives, inclination, and prejudices, and his means of obtaining correct knowledge of the facts to which he has testified. 1 Greenleaf's Ev., Sec. 446.

In this case the plaintiff was entitled on cross-examition to inquire of the defendant as to the nature and extent of the partnership referred to, particularly in a case like this, where the defendant had testified that Thompson "never paid him any part of it (the price of the house) *in money*, nor did anybody pay it to me for him."

When an overdue promissory note is assigned, the assignee takes it subject to all equities existing between the maker and the payee. In an action on the note the maker may show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment he had paid it. The maker may also set off any liquidated demand which he held against the payee at the time he received notice of the assignment, but claims subsequently acquired, even though they had their origin in previous transactions, are not the subject of set-off. *Follet v. Buyer*, 4 Ohio State, 502.

The question of notice does not arise. The instructions given by the court on its own motion appear to cover all the questions arising in the case. The court, therefore, did not err in refusing to give the instructions asked by the plaintiff. Where, however, the court refuses to give instructions because previously given, *the refusal should be placed on that ground.*

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. WILLIAM H. B. STOUT, DEFENDANT IN ERROR.

1. **Construction of Statutes:** ACTIONS AGAINST THE STATE. Section 1 of the act approved February 14, 1877, entitled "An act to provide in what courts the state may sue and be sued," covers all the various claims and demands on which the state may be sued.

2. ——: ——. The sixth section of the act does not enlarge the classes of claims upon which actions can be brought, but it simply designates those on which actions *may* be brought in the district court of the county in which the capital of the state is located.

3. **On What Claims the State May be Sued.** The state can be sued only on claims that have been first presented to the auditor of public accounts for adjustment, and which have been in whole or in part rejected.

4. **What Claims may be Audited.** The auditor is authorized to audit and adjust only such claims as are "*provided for by law.*" In case of those not so provided for, he is required to make report "to the next legislative assembly," together with such recommendation as he "may deem just."

5. **Actions against the State:** JURISDICTION OF: HOW ACQUIRED. By the act approved February 17, 1877, "To provide for the adjustment of claims against the state treasury, etc.," the right to bring an original action against the state is denied, and the only mode by which the courts can acquire jurisdiction in such cases is by an appeal, as provided in section 2 of said act.

THIS was an action brought in the district court for Lancaster county, on the first day of June, 1877, by W. H. B. Stout against The State of Nebraska, for breaches

of a contract, entered into by the said Stout and the board of prison inspectors on behalf of the state, for the erection of a penitentiary, on land selected and owned by the state. This contract was made June 14, 1870, under the provisions of an act approved in 1870. Gen. Stat., 1032. It required the completion of certain portions of the building on or before the fourteenth day of June, 1871, according to plans and specifications, for the sum of $307,950, payments to be made as follows: "At the end of each and every month after the commencement of said work seventy-five per centum of the work and value of the work done during the then preceding month, to be measured and estimated according to the contract price aforesaid, and after the due completion of said work as herein specified the remainder of said sum of $307,950 remaining due and unpaid."

By provisions of an act approved February 10, 1871 (Laws 1871, p. 78. Gen. Stat., 1043), the time for the erection of the penitentiary, and the contract for building it, was extended to the term of five years from the passage of the act of 1870, and the contractor was allowed to draw "ninety per cent of the value of the work certified to have been done," as it progressed. By a further act of the legislature the time fixed for the building of the penitentiary was extended to March 4, 1877 (Gen. Stat., 1045), and the ten per cent retained by the state, and which had accumulated under the prior acts, was directed to be paid to the contractor.

The first cause of action set forth in the petition was for $4,402.12 interest on the reserve fund of 25 per cent retained by the state under the original contract, and on the reserve of 10 per cent retained by the state under the act of February 10, 1871, from the date of each estimate respectively up to February 26, 1873, the time when, under the act of that date, the accumulations of this reserve fund were directed to be paid to

the contractor; except, that under the act of February 10, 1871, 15 per centum of the reserve fund mentioned in the original contract was paid to the contractor, amounting to the sum of $8,414.35, the interest whereof, up to February 26, 1873, amounting to $1,684.36, was deducted from said sum of $4,402.12, leaving the sum of 2,717.76 alleged to be due the plaintiff.

The second cause of action was for $2,866.06, a like claim of interest on the 10 per cent reserve fund retained by the state from the date of each estimate respectively after the passage of the act of February 26, 1873, up to the completion of the work on the 29th of December, 1876.

The third cause of action was for interest arising in delays of payment, *i. e.* where an estimate was issued and dated and some considerable time elapsed before the warrant in payment thereof was drawn. This amounted, after deducting the sums of $583.94 and $894.13, which had already been allowed and paid by the act of the legislature funding the state indebtedness, to $1,332.68. This cause of action also contained an item of $653.30, alleged to be due as interest on $20,095.58 reserve fund accumulated upon the completion of the work, December 29, 1876.

The fourth cause of action was for $21,025.64, alleged to be due on account of loss suffered by the contractor in selling the warrants issued to him by the state auditor for that much discount from their face, there being no money in the treasury to the credit of the penitentiary fund to pay the same.

The fifth cause of action was for $9,056.25, alleged to be due on account of extra expense incurred by the contractor in employing an overseer of the work, which the plaintiff alleged he would not have been put to if the state had complied with the terms of the contract on its part.

The sixth cause of action was for $7,100, alleged to be due on account of loss and damage accruing to the plaintiff in being obliged, through default of the state, to keep upwards of $12,000 employed in the use of machinery, implements, derricks, etc.

The seventh cause of action was for $13,233.83, alleged to be due on account of broken stone owned by the plaintiff and purchased by the prison inspectors and used by them in rendering the penitentiary grounds fit for occupancy and use.

The eighth and last cause of action was for $177.40, alleged to be due on account of certain cell rock retained by the prison inspectors to be used in the erection of future cells in the penitentiary.

The total claim thus alleged to be due was for $57,040.81 and interest on the amounts set up in the seventh and eighth causes of action from December 29, 1876.

There was an answer by the state denying specifically its liability under the several causes of action contained in plaintiff's petition, and setting up a counter claim of $2,300 alleged to be due from the plaintiff on account of convict labor used and employed by him.

By agreement of parties the cause was referred to Paren England, who made a report of the testimony taken by him, his finding of facts and conclusions of law, wherein he found the total amount due the plaintiff to be $41,777.11.

Exceptions to the report of the referee were filed by the Attorney General, and Lamb, Billingsley & Lambertson on behalf of the state, and together with his report were submitted to POUND, J., who found as follows:

1. That the acceptance by the plaintiff of payment, February 23, 1873, of the reserve of the contract price theretofore retained was an acquiescence in the terms of

said act of the legislature extending the time of the performance of said contract and a consent thereto, and that the plaintiff is not in justice and right entitled to claim interest upon the reserve set forth in his second cause of action before the full completion of said building, and from that time, December 29, 1876, till April 26, 1877, the time of payment, amounting to $533.90 only.

2. That plaintiff, having as aforesaid consented to and acquiesced in the said extension of time, is in justice and right entitled to claim, under his sixth cause of action, for the expense of superintendence of the construction of said building, only from June 14, 1871, to February 23, 1873, the time when the extension of time was made and agreed to, a period of one year, eight months, and nine days, amounting to the sum of $2,033.33.

3. That upon the eighth cause of action the proof of the purchase of the four cell rocks by the defendant's inspectors is insufficient to sustain said cause of action, except as to one of said cell rocks which the defendant has appropriated and used, and the value of which is found to be $44.35; and that sum only the plaintiff in his eighth cause of action ought to recover.

The report of the referee, except as aforesaid, ought in justice and right to be in all things confirmed and judgment thereon entered. The plaintiff is entitled in justice and right to recover therefore on his several causes of action as follows:

First cause of action	$733 06
Second cause of action	533 90
Third cause of action	1,393 84
Fourth cause of action	19,530 09
Fifth cause of action	2,033 33
Sixth cause of action, no recovery allowed	———
Seventh cause of action	10,766 00

Eighth cause of action.....	$ 44 35
Amounting to the sum of.....	$35,034 57
Less the set-off found due and allowed defendant	339 34
Leaving the amount justly due plaintiff....	$34,695 23

Judgment was therefore rendered for the above amount and costs in favor of plaintiff. To reverse this judgment the state brought the cause up by petition in error.

T. M. Marquett (with whom was *Lamb, Billingsley & Lambertson*) for plaintiff in error.

1. By the act giving jurisdiction to cases like the one at bar, the proceeding is made the same as in other cases in law and equity, and what will be error in an ordinary case, will be error in this. *McBane v. The People*, 50 Ill., 506. Courts will go beyond the assignment of errors upon the record to take into consideration the error relating to jurisdiction. *McMahon v. Rauhr*, 47 N. Y., 67. *Lee v. Figg*, 37 Cal., 328. *Levi v. Daniels*, 22 Ohio State, 38. *Columbus R. R. Co. v. Simpson*, 5 Id., 251. *Evans v. Iles*, 7 Id., 233. *Delafield v. The State*, 2 Hill, 159. *Capron v. Van Noorden*, 2 Cranch, 126. *Collins v. Sanders*, 46 Mo., 389. *Jones v. Tuller*, 38 Mo., 366. *Way v. Way*, 64 Ill., 406–445. *Moreal v. Bush*, 46 Cal., 79. *Culver v. Third National Bank*, 64 Ill., 532. *Phillips v. Quick*, 68 Ill., 324.

2. The sixth section of the act of February 14, 1877, under which this act is brought, is unconstitutional, for the reason that it gives jurisdiction to the district court of Lancaster county not given to other district courts of the same class in the state. *Jefferson Co. v. Jones*, 63 Ill., 531. *People v. Rumsey*, 64 Ill., 44. *Myers v. People*, 67 Ill., 503. *People v. Mead*, 66 Ill., 135. *Mitchell v. People*, 70 Ill., 141.

3. The action then must be brought under the first section of the act of February 14, 1877. But under that act to give jurisdiction to the district court, the claimants must first present the claim to the auditor, and it must be by him disallowed, or it must be a claim that has been referred to the court by the legislature; one or the other of these facts must appear before the district court has jurisdiction.

4. The matters stated in the petition do not constitute any cause of action in either equity or law. Freeman on Judgments, 113. *Fithian v. Monks*, 43 Mo., 522. *Simonson v. Blake*, 20 How., Pr., 484. *Weidner v. Rankin*, 26 Ohio State, 522. The petition and findings of the court do not sustain the judgment. *Mitchell v. Milhoan*, 11 Kan., 617.

5. The law under which the contract was made provided a particular mode of obtaining payment of a particular fund, and never became a debt against the state. In legal effect warrants drawn on penitentiary fund are promissory notes, and are payments. Dillon Mun. Corp., 746. *Sharp v. Contra Costra County*, 34 Cal., 284. *People v. Supervisors*, 10 Wend., 363. *People v. Bond*, 10 Cal., 566. *Kingsberry v. Petis Co.*, 48 Mo., 208. *Fairchild v. R. R. Co.*, 15 N. Y., 337. *Clark v. Polk county*, 19 Iowa, 248. *McCauley v. Brooks*, 16 Cal., 27.

6. The defendant in error has received the principal debt in full, and cannot be allowed to maintain a suit for interest. *Robbins v. Cheek*, 32 Ind., 328. *Southern Central R. R. Co. v. Moravia*, 61 Barb., 180. The state never pays interest unless there is an express law for it. Sedgwick Const. Law, 337. *Dodd v. Miller*, 14 Ind., 443.

7. Defendant in error, by accepting the payments made by the state in pursuance of the law making the extension, acquiesced in it and is estopped from deny-

ing the contract as modified. *Bersch v. Sander*, 37 Mo., 104.

8. When the state failed to pay as per agreement, Stout could then do one of two things. *First.* He could abandon the work, then his damages would be the amount the work would be worth at contract price, less the cost of constructing the building. *Grand Rapids and Bay City R. R. Co. v. Van Dusen*, 29 Mich., 444. *Second.* Or he might elect to waive delay and proceed to perform the work under contract. This he did, and did accept the contract as modified by the state, and did, as he alleges in his petition, proceed to perform his part of it as modified by delay, and has accepted the advantages of the delay, and he cannot now be heard to complain. *McCord v. Westfall R. R. Co.*, 3 La. Ann., 285. *Nelson v. Plimpton Fire Proof E. Co.*, 55 N. Y., 484. *Holmes v. Wilhite*, 3 Neb., 147.

9. The fourth cause of action amounts to this and nothing more—that defendant in error, after the estimates were made, and after he had accepted the warrants drawn on the penitentiary fund for the same, sold them for less than their face, and now claims the amount of discount. The plaintiff was to receive his payment by a warrant drawn on the penitentiary fund. The law makes this payment. But if it did not, the acceptance by the defendant and payment, would be payment in full. *Lake v. Trustees*, 4 Denio, 520. If it be true that defendant in error has a claim against the state because he sold the warrants below par, then, with few exceptions, everybody that ever sold a state warrant in Nebraska would have a claim on the state; on the same principle, every person that ever sold a county warrant below par would have a claim against the county. And every person that ever sold a promissory note of any person below par would have an action against that person for the difference. This would be, in effect, grant-

ing extra compensation to the contractor after the contract had been entered into. *Foster v. Coleman*, 10 Cal., 278. And this would be unconstitutional. Const., Sec. 24, Art. II.

10. But it is claimed that the defendant need not have a case which is upheld by law. That though by the law of the land he has no case, yet the judge is to render a judgment as right and justice may require. See Sec. 4 of act of February 14, 1877. Right, when applied to claims due from one person to another, means, Bouvier says, "A well founded claim." Right, Webster defines as being "lawful." Another definition—"Conformity to human laws; when applied to law suits, it means that the judge shall decide according to law and justice."

11. The plain old right and justice, as administered by our courts, is what the defendant is entitled to. Nothing more; nothing less.

J. R. Webster and L. C. Burr (with whom was *O. P. Mason*) for defendant in error.

1. Section 6 of the act under consideration is not unconstitutional. The state may adopt any mode, or appoint any board, or tribunal, or court, and establish such rule as it may deem advisable for the settlement and liquidation of claims against it. It will not be denied but that the legislature might have allowed and authorized the payment of the claim of the defendant in error, and that such action on the part of the legislature would be binding upon the state. They, the legislature of the state, had jurisdiction and control of the whole subject matter. They might allow or reject the claim; they might refer the same to the courts for determination; they might appoint or designate a particular person to whom it should be referred for determina-

tion; they might, and did, in the act, authorize the district court to pass upon this claim as well as all others, establish and prescribe rules by which the court should be guided in this determination. These were according to equity and right. It will not be denied but the legislature of the state might refer this claim, or claims of like character as this, to the district court of Lancaster county for determination; and if the legislature might so refer each claim to that court *seriatim* when presented to it, can counsel give a reason why it might not in anticipation fix the county of Lancaster, where the records and archives of the state and its officers and seat of government are, as the venue for actions against the state?

2. It is incompatible with the honor and dignity of government that grievances committed by the public should be determined merely upon principles of strict legal liability. They should be redressed upon broad principles of natural equity. 1 Blackstone, 243, and citations. Cooley on Taxation, 481. And the legislature may compel the recognition of mere equitable obligations where no legal obligation exists, and local auditing officers may recognize and pay such obligation. Cooley on Taxation, 88-91. *Friend v. Gilbert*, 108 Mass., 408. *Brewster v. Syracuse*. 19 N. Y., 116. *Guilford v. Supervisors*, 13 N. Y., 143, 149.

3. The controversy is to be decided "*according to justice and right as upon the amicable settlement of a controversy*, and the award and judgment is to be rendered as, upon the testimony, right and justice may require." In determining the construction to be put upon this statute, the whole statute ought to be so construed that all its provisions may be harmonized. Sec. 4, act of February 4, 1877. *Scott v. State*, 22 Ark., 369. *Davey v. B. & M. R. R. R. Co.*, 31 Iowa, 553. And incongruities, if any there be, are to be so construed

as to harmonize with the general intent of the whole. *Commonwealth v. Conyngham*, 66 Penn. St., 99. *State v. Button*, 25 Wis., 109. The form of expression "justice and right," carefully avoiding words of technical meaning like law and equity, familiar alike to legislators, lawyers, and judges, itself suggests a disregard of technicality, and that rule of precedent that might control in like case where the status of the parties at the inception of the wrong complained of were on a standing of equal advantage before courts. And this form of expression, coupled with the words "*award*" and "*amicable settlement of the controversy*," make it evident that the form of expression was not accidental, but that the words were carefully selected because they expressed the sense of the legislature that public controversies should be decided upon the principles indicated and approved by the foregoing authorities.

4. Adjudicated upon these principles, does the petition state facts constituting a cause of action? Had the parties stood upon an equality before the courts, the contractor, on the first default, could have rescinded and sued for damages, and for the whole amount of the work done, but this, the state, shielding herself behind the ægis of sovereign power, did not allow. Upon what ground could the state refuse payment for all work done? *Only that a contract provided* that a reserve should be retained. *But that contract the state first violated.* Had the state not then shielded herself behind the screen of sovereignty, giving her immunity from legal process, the contractor could at once have rescinded the contract and have sued for *the whole amount* of the work done. He could have recovered at once the reserve per centum of the work, and damages also for breach of the contract. But rescission was impossible, for the state permitted no suit to be brought against her. His money was expended, his capital jeopardized, and

he was compelled to proceed. He could not rescind. But was not the state in justice and right morally bound to pay interest for the money of the contractor that she thenceforward retained from him, and had and enjoyed, and prevented him by her power and cloak of sovereign immunity from enjoying? We think so. It is, therefore, insisted that the contractor should be paid interest on all the reserve for all the time it was withheld, as well as for interest arising from delays of payment.

5. Discounts. Of this cause of action it is not claimed that the facts would make a cause of action between private parties standing in equality before the law, where the injured party could rescind and enforce his rights by action. No such relation existed. The state, until the commencement of this action, held herself securely shielded behind her sovereignty, beyond the reach of legal process. The contractor, crushed by the burden of his embarrassments, was compelled to sell, and did sell, the dishonored paper of the state, given him—forced upon him—as payment of his right and just claims, under a contract calling for money payment, and made at a time when apparent sales of its lands then in actual progress were fair upon their face and promised to realize a fund in money for his payment; and in faith of payment in money the state and the contractor, of five competing bidders the lowest, entered into contract.

The prices the contractor realized for his paper, forced upon him in lieu of money due under the contract, varied from 77 to 96½ per centum of its face, and for long portions of the time and great portion of the value of the work was but 80, 85, 89, and 90 cents. Under the principles of adjudication established by the act under which this suit is brought, and supported, and conceded by the authorities cited under that head, do justice and right dictate that the state should refuse to reimburse him? Or rather, do not justice and good faith require

that the state should reimburse? On breach of the contract and dishonor of the paper he could not be released of his contract. He could not tender back the unpaid warrant to the auditor, and demand faithful performance by the state. What is his damage—his just and rightful indemnity? The difference between the value and face of the paper—between the value paid and the amount agreed to be paid. This, so far as proven and found by the court, was $19,530.00.

6. Plaintiff in error has released errors in the proceedings by obtaining the benefit of the stay under the provisions of § 12, and no case can be found where the state is exempt from the consequences of its *own affirmative* and *voluntary act* in the conduct of a cause in court, or from the operation of the rules of practice in court in causes to which it is a party, and the consequences of doing any affirmative act, which consequences are forced by general statute. When Auditor Weston filed the certificate claiming a stay of the judgment, he elected, on behalf of the state, to take a stay rather than error or appeal.

LAKE, J.

The conclusion to which we have come in this case renders it quite unnecessary for us to notice many of the questions discussed so ably, and at length, by the respective counsel. The action in the court below was brought under the provisions of the act of February 14th, 1877, entitled "An act to provide in what courts the state may sue and be sued." The duty of enacting a law upon this subject was enjoined upon the legislature by section 22, Art. VI, of our present constitution, which declares that: "The state may sue and be sued, and the legislature shall provide by law in what manner and in what courts suits shall be brought."

Recognizing the fact that this section of the constitution required legislative action before the state could be properly sued, the act in question was passed, the first section of which provides in what courts, and upon what particular demands, actions against the state may be brought, as follows:

"SEC. 1. That the several district courts of the judicial districts of the state as now provided for and established by the constitution of the state, and of such judicial districts as may hereafter be provided by law, shall have jurisdiction to hear and determine the following matters:

"*First.* All claims against the state filed therein, which have previously been presented to the auditor of public accounts, and have been in whole or in part rejected or disallowed.

"*Second.* All claims or petitions for relief that may be presented to the legislature, and which may be by any law, or by any rule or resolution of the legislature, or either house thereof, referred to either of said courts for adjudication.

"*Third.* Of all set-offs, counter-claims, claims for damages, liquidated or unliquidated, on the part of the state against any person making a claim against the state, or against the person in whose favor such claim arose."

This section designates, and includes all the various claims and demands on which the state may be sued, and also the courts in which actions thereon may be brought. From the language employed it is clear that jurisdiction in these matters is conferred upon all the district courts alike in which such suits may be instituted, no distinction whatever being made.

It was suggested in argument that the sixth section confers a separate and enlarged jurisdiction upon the district court for the county in which the capital of the state is located, but we think otherwise. By the first clause of this section it is enacted, that: "The state may

be sued in the district court of the county wherein the capital is situate, in any matter founded upon, or growing out of a contract, express or implied, originally authorized or subsequently ratified by the legislature, or founded upon any law of the state." This simply designates certain claims on which actions *may* be brought in that court, and it may be observed that it covers every claim that can possibly fall within the *first* class mentioned in section one—the class to which it is said the claims now under consideration belong. It is scarcely possible to imagine a claim, within the design of this act, that would not necessarily be founded either upon a contract, express or implied, or upon some law of the state. Indeed, we think that all of the claims embraced in the *first* class mentioned in section one, and which, to give the court jurisdiction over them, must be first presented to the auditor of public accounts and by him rejected, either in whole or in part, are very clearly covered by the clause just quoted from section six. Therefore, to hold that the sixth section was intended to give a jurisdiction independent of that conferred by section one, by authorizing actions to be brought on claims without first procuring the action of the auditor thereon, it would follow, necessarily, that the first section, to the extent that it contemplates action by the auditor of public accounts, would be entirely nugatory, and the holder of any claim upon the state, if so disposed, could at once sue, and obtain judgment thereon. He could do this even although the auditor had the authority, and stood ready to audit the claim, and draw his warrant upon the treasurer for the full amount due. Surely such a result could not have been contemplated in the passage of this act. In order, therefore, to give due effect to each of these sections, we conclude that in no case can an action be maintained against the state, unless the claim on which it is brought

be first presented to the auditor of public accounts for adjustment, and by him rejected, in whole or in part. And the petition should contain an allegation to this effect. It may be proper here to say, however, that, as we shall hereafter show, this authority of the auditor in the *allowance* of accounts is somewhat modified by subsequent legislation requiring the approval of the secretary of state.

But there is another fact that must not be lost sight of in this connection. In passing this act the legislature evidently had in mind the existing statutes relating to the audit of claims against the state, which being *in pari materia*, must also be considered in order to give to it a proper construction. By the light of these existing statutes it is clear that it is not every possible claim that may arise that the auditor is authorized to audit or adjust. In this particular his duties are very clearly defined, and a bound is set beyond which he cannot go. By the first clause of section 4, chapter IV, Revised Statutes, 1866, it is made the duty of the auditor: "To audit, adjust, and settle all claims for services rendered, or expenditures made for the benefit of the state, *provided such services are rendered, or expenditures made, by authority of law*, except only such claims as may be expressly required by law to be audited and settled by other officers and persons." Gen. Stat., 1012. Under this provision it is manifest that no claim could be settled by the auditor that was not "provided for by law," and should he assume to act in any matter not falling within the authority here given, in disregard of this limitation, such action would be clearly void, conferring no right whatever upon the holder of the claim as against the state.

But recognizing the fact that possibly claims might arise, not anticipated and provided for by the legislature, it was enacted by section nine, of the same chapter, that

"in case of claims, the adjustment and payment of which are not provided for by law, no warrant shall be drawn by the auditor, or countersigned, or paid by the state treasurer, but all such claims shall be reported to the next legislative assembly, with such recommendation as the auditor may deem just." Gen. Stat., 1014. The legislature thereby reserving to itself the right of making such disposition of claims of this sort as the circumstances of each particular case might seem to require. And there is nothing in the legislation of 1877 which in the least degree changes or modifies the law as it then was respecting the adjustment of this class of claims. Their recognition and payment now, as formerly, rest solely upon the discretion and sense of justice of the legislature.

This being our opinion of the effect to be given to the several provisions of the statute bearing on the case, how stand the claims which are the subject of this controversy? In the first place, we might say that inasmuch as there is no allegation in the petition that these claims had been presented to the auditor of public accounts, and by him rejected, either in whole or in part, a cause of action is not set forth. But this is a matter of pleading merely, not reaching the root of the difficulty, to which we prefer to go. In our opinion, had this allegation been made it would have been all the same, the radical defect resting in the character of the claims themselves. It was not claimed on the argument of the case, nor do we think it can be, with the least show of reason, that any one of the alleged causes of action were proper for the auditor to have allowed. Indeed, after a most careful examination, we are quite satisfied that there was no law by which he could have justified his conduct had he assumed to pass upon them with a view to their adjustment. The claims all, either directly or indirectly, grow out of the contract between the state and the defendant

in error for the building of the state penitentiary, and his work under it, and by the laws under which this work was done, the adjustment of all demands, for which the state could possibly be made justly liable, was given to the board of prison inspectors, in whose sole charge the whole business was placed. The auditor had no voice whatever in the matter of ascertaining what was due to the contractor, but he was simply required, from time to time, to draw warrants upon the proper fund in his favor for such amounts as the inspectors certified was due, less the percentage which the state had stipulated to retain until the completion of the work. The claims not being such as the auditor could take cognizance of, it follows that, under our construction of the act of February 14th, 1877, no authority was given to bring the action, and that consequently the district court was without jurisdiction to adjudge upon their validity.

In our discussion of the case thus far, we have proceeded upon the theory that, upon claims which the auditor could adjust and settle, original actions might be brought thereon in case of their total or partial rejection. And if we look alone to the act of February 14th, under which this proceeding was instituted, this theory is doubtless the true one. But we are of the opinion that, by a subsequent act, "To provide for the adjustment of claims upon the state treasury," etc., approved February 17th, 1877, the right to bring an original action against the state is denied, and that the only mode of procedure by which the court can acquire jurisdiction is by an appeal from the decision of the auditor and secretary of state, whose joint action is now required in the approval of claims. It is provided in the second section of this act that: "Such appeal may be taken in the manner provided by law in relation to appeals from county courts to such district courts, and shall be prosecuted to effect as in such cases. *Provided, however*, that the party taking

such appeal shall give bond to the state of Nebraska in the sum of two hundred dollars, with sufficient surety, to be approved by the clerk of the court to which such appeal may be taken, conditioned to pay all costs which may accrue to the auditor of public accounts by reason of taking such appeal. No other bonds shall be required." And in the following section it is further provided that: "If either party feel aggrieved by said judgment (of the district court), the same may be reviewed in the supreme court as in other cases."

Thus there is provided a cheap, simple, and very convenient method of obtaining a review in the courts of the decisions made by the officers specially appointed to audit and adjust these claims in the first instance, if the claimant be dissatisfied. And, under the rule laid down by this court under a similar statute respecting the adjustment of claims against counties, it would seem to be the only mode by which the finding of these officers can be reviewed. But, as if to place this matter beyond all question, the fourth section provides that: "No claim which has been once presented to such auditor and secretary of state, and has been disallowed, in whole or in part, shall ever be again presented to such officers, or in any manner acted upon by them, *but shall be forever barred, unless an appeal shall have been taken, as provided in section two of this act.*"

In view of the several statutes to which we have called attention, we must hold: *First.* That no action can be maintained against the state upon any claim that is not first presented to the auditor of public accounts for audit, as the statute requires, and which has been rejected in whole or in part. *Second.* And that the only mode by which the courts can obtain jurisdiction of such claim is by an appeal, as provided in section two of the act approved February 14th, 1877.

For these reasons the judgment of the district court

is reversed, and the case dismissed at the cost of the defendant in error.

JUDGMENT ACCORDINGLY.

SAMUEL G. OWEN AND R. H. OAKLEY, PLAINTIFFS IN IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Claims Against the State: ACTIONS ON: JURISDICTION. The state cannot be sued, on claims for supplies furnished on its credit, by original action. The only mode by which the courts can acquire jurisdiction in such cases is by appeal from the decision of the auditor and secretary of state.

ERROR to the district court for Lancaster county. Heard upon demurrer to petition before POUND, J., who sustained the same, and rendered judgment dismissing the cause for want of jurisdiction.

Harwood & Ames, for plaintiffs in error.

George H. Roberts, Attorney-General, and *T. M. Marquett*, for the State

LAKE, J.

The action in the court below was an original proceeding to recover $875.32, money alleged to be due from the state to the plaintiffs as assignees of a large number of accounts for supplies, etc., furnished on the credit of the state by the persons from whom they were received.

The case falls within the rule that the state cannot be sued upon claims by original action, but only by appeal from the decision of the auditor of public accounts and

secretary of state. It follows, therefore, that the district court was without jurisdiction, and its judgment dismissing the action must be affirmed.

JUDGMENT ACCORDINGLY.

ROBERT H. AND JAMES L. BRADFORD, PLAINTIFFS IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Claims Against the State:** EMPLOYMENT OF ATTORNEY FOR THE STATE NOT VALID WHEN THERE IS NO LAW AUTHORIZING IT. The claim on which the action was brought was for the recovery for services performed by the plaintiffs as attorneys in an action against the state, under an employment by the attorney general, by which they were to have a fee of ten thousand dollars, contingent upon a judgment being finally recovered favorable to the state, which was obtained. *Held*, that there was no law authorizing the employment, and, if actually made, was void, and all services performed under it gratuitous, imposing no legal obligation on the state to pay for them.

2. ———: ———. If, in view of the services rendered, there be a moral obligation to pay for them, this is a consideration that may be addressed to the legislature, but which neither the auditor nor the courts can recognize.

3. ———: ACTIONS AGAINST THE STATE: HOW COURTS GET JURISDICTION IN. The courts can acquire jurisdiction in actions on claims against the state only by an appeal from the decision of the auditor of public accounts and secretary of state.

ERROR to the district court for Lancaster county. Heard upon a demurrer to the petition before POUND, J., who sustained the same and rendered judgment dismissing the cause for want of jurisdiction.

Lamb, Billingsley & Lambertson and *George W. Covell*, for plaintiffs in error, insisted that plaintiffs

were duly and legally employed, and that the services they rendered were under a contract with the state, authorized by law; that by act of 1867 power and authority were granted the governor: 1. To select and employ an attorney to prosecute any and all actions necessary and proper to secure the right of the state in or to any property owned or claimed by the state, in any court or in any county or state in the union. 2. To select and employ an attorney to defend any action which may be brought against the state, or any of its officers in respect of any property owned or claimed by the state. Laws 1867, p. 84; that by the act of February 9, 1867, until there should be an attorney general, there was devolved upon the attorney, so appointed by the governor, "in addition to those devolved upon him" by the act under which the governor appointed him, such duties "as are usually performed by the attorney general of a state." Laws 1869, p. 64. That in this case as alleged in the petition the employment was made by the attorney general "by and with the advice and consent of Hon. W. H. James, then the governor of the state;" that the authority conferred by these acts upon the governor was not repealed by the act providing for the election of an attorney general, Laws, 1869, p. 164; and quoted *in extenso* the second, third, and fourth points in the brief of *J. R. Webster* in the case of *The State v. Stout*, ante p. 99, as applicable to the claim of the plaintiffs here.

T. M. Marquett, for the defendant in error.

Plaintiffs in error are afraid that the honor and dignity of the state will suffer, and they invoke for the claimants "broad principles of natural equity," and claim that neither the laws governing courts nor the constitution apply to them. The logical sequence is this—that per-

sons who hold claims against the state are a favored class, who can alone make wings of "justice and right" to fly to that mystic region above and beyond the trammels of law, and where such unjust things as contracts and written constitutions do not exist; but where for them a straight and narrow pathway leads to the treasury, whose doors, without stint or delay, turn softly on golden hinges to admit them. Yet if I do not very much mistake this court, "these wings" will unfeather in their flight, and claimants against the state must fall to a common level with all other litigants, and stand up to the rack where is fed that good old fodder of "justice and right," as administered by our courts. *Stevens v. Ross*, 1 Cal., 95.

LAKE, J.

The action in the court below was brought against the state under the act of February 14th, 1877, which provides in what courts the state may sue and be sued. The claim on which the action was based was for legal services, alleged to have been rendered by the plaintiffs, as attorneys, on behalf of the state, in the suit of *J. Sterling Morton v. Jesse T. Green and The State of Nebraska*, concerning certain saline lands, and in the several courts through which the case was carried to the supreme court of the United States, where the title of the state to the property in dispute was finally confirmed.

In view of the recent decision made by this court in the case of the *State v. Stout*, decided during the present term, and which involved a consideration of the same questions, substantially, that are presented, it is unnecessary to again go over them in detail, or to refer particularly to the several statutes that were referred to and construed in that case, and by which we reached the

conclusion that, as the law now stands, the courts can acquire jurisdiction in actions on claims against the state only by an appeal from the decision of the auditor of public accounts and secretary of state, as provided in the act of February 17th, 1877.

In this case the claim was not presented to the auditor for adjustment, nor was it indeed one which that officer had authority to consider. The employment under which the services were rendered is alleged to have been by George H. Roberts, the attorney general, by which it was agreed that they were to have a fee of *ten thousand dollars*, contingent upon the event of the final decision of the controversy being in favor of the state.

It is needless to take time in discussing the validity of this employment. It is enough to say that there was no law authorizing it, and if such an engagement were formally entered into, it was absolutely void, and all services performed under it were merely gratuitous, imposing no legal obligation on the state to pay for them. If it be supposed that, in view of the services rendered by the plaintiffs, and all the circumstances attending the transaction, the state is under a moral obligation to compensate them, this is a consideration that may properly be addressed to the legislature, but which neither the auditor nor the courts can recognize in any manner whatsoever.

For the reason, therefore, that the district court had no jurisdiction of the subject matter of the action, the judgment dismissing the case is affirmed.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. STILLMAN N. WHITE, DEFENDANT IN ERROR.

THIS was a case brought up by petition in error from the district court for Butler county. It was an action brought by White to recover $488.09, money alleged to have been paid for school lands of the state purchased by White, but which, as alleged in the petition, the officer acting for the state had no authority to sell. The state demurred to the petition, which, upon argument before POST, J., was overruled, and the state electing to stand on its demurrer, judgment was entered in favor of White for the principal and interest of his claim, amounting to $620.03.

N. Millet & Son, for plaintiff in error.

C. J. Phelps for defendant in error.

LAKE, J.

This case is clearly within the rule announced in the case of *The State v. Stout*, decided at this term. There is no law by which the defendant in error can maintain his pretended claim against the state. It is not one which the auditor is authorized to allow, and consequently was properly rejected by that officer when presented to him for audit. Besides, under the rule referred to, even if the claim were a valid one, the only mode by which the decision of the auditor can be reviewed is by appeal.

The judgment of the district court having been rendered without jurisdiction, must be reversed, and the case dismissed, at the cost of the defendant in error.

JUDGMENT ACCORDINGLY.

FRANCIS G. STARK, APPELLANT, v. EDGAR A. BALDWIN, APPELLEE.

1. **Public Lands of the United States:** PRE-EMPTION. Where it is sought to deprive a party of his right to pre-empt lands belonging to the United States, upon the ground that he is disqualified, by reason of a former filing upon entered lands, from availing himself of the benefits of the act of September 4, 1841, the burden of proof is on the party asserting such disqualification, and he must establish, by clear and satisfactory evidence, the fact that the party seeking to pre-empt has previously filed his declaratory statement upon lands subject at the time to private entry.

2. ———: GRANT TO B. & M. R. R. Lands within the B. & M. R. R. grant are not subject to private entry, and in regard to settlement and entry under the homestead and pre-emption laws are to be regarded as unoffered lands.

3. ———: PRIORITY OF SETTLEMENT. Other things being equal, priority of settlement determines the rights of parties in cases arising under the homestead and pre-emption laws.

4. ———: ———. Where the party making the prior settlement has in all respects complied with the law, he is entitled to the lands without regard to anything which a party making a later settlement thereon may have done.

APPEAL from the district court for Lancaster county. Tried below before POUND, J., who found upon the issues joined in favor of the defendant. The opinion states the case.

W. F. Chapin, *J. M. Robinson*, and *G. W. Lowley*, for appellant.

1. The secretary of the interior decided against Starks for the simple reason that he had previously, as was claimed by said secretary, had a filing on lands subject to private entry, and that filing prevented him from making any other valid filing on lands which were not subject to private entry. The land in controversy, though once offered and subject to private entry, became,

by the withdrawal for railroad purposes, unoffered or not subject to private entry; it was also taken out of the class of lands subject to private entry by having been covered by a homestead entry. *Stalnaker v. Morrison*, 6 Neb., 362. 2 *Lester*, p. 129, sec. 19, p. 238 and 239, p. 259, sec. 6.

2. The decision of the land department that Starks had a previous filing, and for that reason was not a qualified pre-emptor, is not conclusive, but may be examined, reviewed, and passed upon by this court. *Smiley v. Sampson*, 1 Neb., 70 and 74. *Shepley v. Cowan*, 1 Otto, 330.

Cobb & Marquett, for appellee.

MAXWELL, J.

On the thirteenth day of June, 1864, the plaintiff entered as a homestead the north-west quarter of the north-east quarter, and the north half of the north-west quarter of section 19, in township 10, range 7 east of the sixth principal meridian, in Lancaster county, the land being within the grant to the B. & M. R. R. Co. Afterwards, apparently being under the impression that he could not perfect his title to the same, he sold his claim for a trifling sum, and removed from the land. The party to whom he sold the claim appears to have been unable to enter the land, and in the year 1867 the plaintiff again removed on to the land in controversy, erected a dwelling house thereon, and has continued to reside on said land until the present time.

On the seventeenth day of June, 1870, the plaintiff tendered to the register of the proper land office his declaratory statement of his intention to pre-empt said land, under the provisions of the act of September 4, 1841, and offered the necessary proof to entitle him to pre-empt the same, together with the amount of money

required in payment therefor. His right to make the pre-emption was rejected upon the ground that the land had reverted to the B. & M. R. R. Co.

On the twenty-eighth day of April, 1871, the Secretary of the Interior decided that lands, situated like those in controversy, reverted to the United States, and not to the railroad company, and on the tenth day of June, 1871, the plaintiff again appeared before the officers of the proper land office, and "offered to prove up and pay for said land."

On the twenty-third day of August, 1870, Charles E. Van Pelt settled upon said land, and tendered to the receiver of the proper land office his declaratory statement of his intention to pre-empt the same. The statement was refused upon the ground that the land had reverted to the railroad company. Afterwards, on the tenth day of June, 1871, Van Pelt obtained a soldier's homestead on said land, and twelve days thereafter he pre-empted the same, dating his settlement June 20, 1870.

The plaintiff contested the right of Van Pelt to enter said land, and the case was finally decided against the plaintiff, and in favor of Van Pelt, by the Secretary of the Interior.

On the twenty-third day of June, 1873, Van Pelt and wife conveyed the land in controversy to the defendant herein.

In the year 1874, the defendant commenced an action of ejectment against the plaintiff, to oust him from said premises.

This is a suit in equity to restrain the defendant from prosecuting said action, and to require him to convey the legal title to said land to the plaintiff.

The case appears to have been decided against the plaintiff herein by the Secretary of the Interior, upon the ground that he had previously filed upon lands subject to private entry.

From a careful inspection of the record in the case, we are of the opinion that the testimony entirely fails to establish the fact. The plaintiff and two other witnesses deny positively that he made the filing, said to have been made by him in Dodge county about the year 1860.

Where it is sought to deprive a party of his right to pre-empt lands belonging to the United States, upon the ground that he is disqualified by reason of a former filing from availing himself of the benefits of the act of September 4, 1841, the burden of proof is on the party asserting the disqualification. And he must establish, by clear and satisfactory evidence, the fact that the party seeking to pre-empt has previously filed his declaratory statement upon land subject at the time to private entry.

The lands in controversy, being within the railroad grant, were not subject to private entry, and in regard to settlement and entry were to be regarded as unoffered lands. See *Stalnaker v. Morrison*, 6 Neb., 363.

The plaintiff made an application to file his declaratory statement of his intention to pre-empt said lands in June, 1870. His claim was rejected upon the sole ground that the lands belonged to the railroad company. Afterwards the Secretary of the Interior having decided that the lands in question had reverted to the United States, and were open to settlement under the homestead and pre-emption laws, the plaintiff, who had continued to reside thereon, endeavored to renew his filing, and to enter said land under the pre-emption laws. The application was refused and the right of pre-emption denied.

That the plaintiff settled upon the lands in controversy before Van Pelt, and was actually residing thereon with his family at the date of Van Pelt's settlement, there is no question. Therefore, if he has in all respects complied with the law, he is entitled to the land without

regard to anything which Van Pelt or defendant may have done.

Other things being equal, *priority* of settlement determines the rights of the parties in cases arising under the pre-emption law. *Towsley v. Johnson*, 1 Neb., 100.

As in our opinion the plaintiff conformed to the requirements of the pre-emption law, he has the equitable title to the lands in controversy. It follows that the judgment of the district court must be reversed, and a proper decree is entered in this court in favor of the plaintiff. The plaintiff to pay to the clerk of this court, within ninety days, the amount paid by Van Pelt for entering said land, together with the fees for entering the same, and interest on said sums to the date of payment. The money to be paid to the defendant, who shall thereupon convey the legal title to said lands to the plaintiff.

DECREE ACCORDINGLY.

THE BOARD OF COUNTY COMMISSIONERS OF RICHARDSON COUNTY, PLAINTIFF IN ERROR, v. STEPHEN B. MILES, DEFENDANT IN ERROR.

1. **Taxes**: SALE OF LANDS FOR. Prior to the passage of the act of February 18, 1875 [Laws 1875, p. 96], a sale of lands for taxes, where the owner thereof had sufficient personal property in the county, out of which the taxes could have been made, would be without authority of law.

2. ———: CONDITIONS OF SALE. The statute is notice to a purchaser at a tax sale of the conditions of the sale, and the treasurer has no authority to impose conditions or to enter into stipulations in regard to the sale, not authorized by law.

3. ———: ACTION TO RECOVER PRICE BID AT TAX SALE. The highest bidder at a tax sale may enforce his bid by compelling the treasurer to issue a certificate of sale of the land purchased.

And the treasurer, in the name of the county, under the provisions of section 58 of the revenue law, may maintain an action against the highest bidder to recover the amount of his bid.

4. ———: PURCHASE MONEY MUST BE PAID. A bidder cannot be permitted to purchase lands at a delinquent tax sale, and afterwards treat the sale as void, and refuse to pay the purchase money.

5. ———: ———. The object of the law is to raise revenue, and at the same time protect, as far as possible, the rights of the owner of the land by inviting competition at the sale.

6. ———: RETURN OF LANDS SOLD. Section 59 of the revenue law does not require the treasurer to file the return of lands sold in the clerk's office of his county until the amount bid therefor has been collected and paid.

ERROR to the district court for Richardson county. Tried below before WEAVER, J., and a jury. Verdict for defendant. The opinion states the case.

Frank Martin and *E. W. Thomas* for plaintiff in error.

If the defendant bid off the lands at the tax sale, he bid *caveat emptor*, and the defendant was bound to know before he bid that the officer had done all that the law required him to do. Cooley on Taxation 522, and cases there cited. He cannot complain that he got nothing by his bid, because the very worst that could happen to him would be to have the title fail on account of some irregularity, and in that event the statute saves him his rights and makes his claim a lien on the land. Gen. Stat., 936, sec. 118. And if the whole proceeding is void and worthless, then the purchaser may recover of the county, etc. Gen. Stat. 924, sec. 70.

We think that the principle is clear that in revenue laws where there are several provisions for the protection of the purchaser, that he is bound to first exhaust his remedy or remedies against the owner of the prop-

erty and the property itself before he can ask the county to reimburse him. If this is the law, then he must stand by his bid, and if any of the owners of lands choose to make a defense to his claim and his title be defeated, then he had his remedy by foreclosing his lien on the land.

J. H. Broady and *C. Gillespie*, for defendant in error.

1. There was no error in overruling motion to require defendant to set out specifically what resident lands were sold. Gen. Stat., p. 616, sec. 49. Cooley on Taxation, 306. Blackwell on Tax Titles, 177. *Johnson v. Hahn*, 4 Neb., 147.

2. The doctrine of *caveat emptor* is based upon the absence of any responsible source to which the purchaser can look for his relief in case of loss. It has here been applied only to those who have paid the money, and thereby completed the sale. Never in an action for a specific performance has it ever been set up in the lids of the law. The arguments of the plaintiff are that, however irregular, illegal, and void this sale, that with this same *caveat emptor* the defendant must take the land and pay his money, although he gets nothing by so doing. If he had paid his money, they might so argue; if he had gone as a blind ass into this *caveat emptor* ditch, possibly he might be compelled to stop there; that not even the Sunday-working chancellors of the law would help him out. But surely he will not be driven into this ditch whether or no. This cannot be made a procrustean bed into which Miles must be fitted. The whole doctrine of *caveat emptor* is simply this: that there being no warranty in fact or law, the purchaser buys at his peril. 17 Pick., 475. 2 John., Ch. N. Y., 519. 5 Iowa, 293. But the doctrine of *caveat emptor*

can in no sense apply here, because the statute of this state, on page 924, sec. 71, specially enacts that the purchaser shall be saved harmless by the county for all these irregulariti s. If the purchaser can recover back after he has paid the money, if the county must return the money for reason of these defects, it is rooted and based in the very rocks of reason, the great source and fountain of all law, that he should not pay his money at all. This is true to stop circuity of action and needless litigation. If the county must pay back, there is no use in going up this hill, if it must at once come down again. Gen. Stat. Neb., 924, sec. 71. 4 Cow., 682.

MAXWELL, J.

The plaintiff brought an action against the defendant in the district court of Richardson county, under the provisions of section 58 of the revenue law, to recover of the defendant the amount bid by him for certain lands, at the sale thereof for delinquent taxes in that county, in September, 1874.

The plaintiff claims judgment for the sum of $25,-352.05.

The defendant answered the petition of the plaintiff, and alleges:

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

Second. The defendant denies all the facts stated in the petition.

Third. The defendant alleges that certain lands described in the petition, which the plaintiff claims were bid in by the defendant were owned by parties residing in the county, who had sufficient personal property therein, out of which the tax could have been collected, but that the treasurer refused to collect any of said taxes on said real estate, out of said personal property.

The plaintiff filed a motion to require the defendant to make the third count of his answer more definite, by stating which particular parcels of land were owned by parties who had sufficient amount of personal property in the county to pay the tax due thereon. The motion was overruled by the court, to which the plantiff excepted.

In overruling this motion the court erred. Prior to the act of February 18, 1875 (Laws, 1875, p. 96), it was the policy of the law to resort to the land itself only where all other remedies had failed to enforce a satisfaction of the tax. *Johnson v. Hahn*, 4 Neb., 144. And a sale of land for taxes, where it is shown that the owner had sufficient personal property in the county, out of which such taxes could have been made, would be without authority of law, and would be a good defense to the action. But it is the duty of the defendant to specifically point out the tracts of land which he claims were illegally sold.

On the trial of the cause the jury found a verdict for the defendant. The court having overruled a motion for a new trial, rendered judgment thereon. To reverse which the plaintiff brings the cause into this court by petition in error.

It is claimed on the part of the defendant, that at the time of the sale of the land referred to he made an agreement with the treasurer of Richardson county, whereby he (the defendant) was to bid for such tracts as he saw fit, and that he might select therefrom certain lands on which he had mortgages, and certain other tracts of land owned by non-residents, and that the other tracts bid off by him were to be taken back by the treasurer and the sale cancelled. This is denied.

Section 56 of the revenue law provides that: "On the first Monday of September of each year, between the hours of nine A.M. and four P.M., the treasurer is

directed to offer at public sale * * * all lands on which the taxes for the previous year remain unpaid," etc

Section 57 provides that the person who offers to pay the amount due on the smallest governmental subdivision of land for the *smallest portion* of the same, is to be considered the highest bidder, etc.

The statute is notice to the purchaser of the conditions of the sale. The treasurer has no authority to impose conditions, or enter into stipulations not authorized by law.

The highest bidder at a tax sale may enforce his bid by compelling the treasurer to issue a certificate of sale for the lands purchased. And the treasurer, in the name of the county, under the provisions of section 58 of the revenue law, may maintain an action against a bidder to recover the amount of his bid. A bidder cannot be permitted to purchase lands at tax sales for delinquent taxes, and afterwards treat the sale as void, and refuse to pay the purchase money. The object of the law is to raise revenue, and at the same time protect, as far as possible, the rights of the owner of the land by inviting competition at the sale. But to permit bidders at such sales to repudiate their contracts would entirely defeat the object of the law.

It is urged that the treasurer did not, on or before the first Monday in October succeeding the sale, file in the office of the county clerk of his county a return of the sale of lands, showing the lands sold, the names of the purchasers, *and the sums paid by them*, and also a copy of the notice of sale, with a certificate of the advertisement, verified by an affidavit, such certificate being evidence of the regularity of the proceedings. It is evident that this return is not to be filed until the sums bid are collected. It only applies to *actual* sales, and where the money is paid. In a case like the one at bar, the return containing the description of the lands in

controversy should not be filed until the amount of the tax is collected.

The instructions of the court to the jury, being in conflict with these views, were erroneous.

The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

GEORGE W. FRENCH, PLAINTIFF IN ERROR, v. MARTHA L. ENGLISH, DEFENDANT IN ERROR.

1. **Practice in Supreme Court:** DISMISSAL OF ACTIONS. Where judgment was rendered May 17th, 1877, and a petition in error was filed in the supreme court, December 13th, 1877. *Held*, on a motion to dismiss for want of jurisdiction, that the motion must be sustained.

2. ———: ———. Cases may arise where it would be proper to set up the limitation by answer; but where it appears on the face of the papers that they were not filed within the time prescribed by the statute, the defect may be taken advantage of by motion.

MAXWELL, J.

This is a motion to dismiss the cause on the ground that the petition in error was not filed within six months from the date of the judgment, the judgment being rendered May 17th, 1877, and the petition in error being filed December 13th, 1877.

The act to amend section 592 of the code of civil procedure, approved February 24, 1875, provides that "no proceeding for reversing, vacating, or modifying judgments or final orders, shall be commenced unless within six months after the rendition of the judgment

or making of the final order complained of. Laws 1875, p. 40.

The act approved February 15, 1877, extended the time to one year. Laws 1877, p. 14.

Section one of an act approved February 21, 1873, provides "that every act passed by the legislature, which contains no provisions as to the time when it takes effect, shall take effect and become a law from and after the first of next June." Gen. Stat., 1056.

As the act of 1877 was not in operation at the time the judgment was rendered, and more than six months having elapsed before the cause was filed in this court, the motion to dismiss must be sustained.

It is claimed that the objection can only be made by answer setting up the statutory limitation. Cases may arise where it would be proper for a party to file an answer setting up the limitation. But where it appears on the face of the papers that they were not filed within the period prescribed by statute, the defect may be taken advantage of by motion. The motion to dismiss is sustained.

JUDGMENT ACCORDINGLY.

Cobb & Marquett for the motion.

S. B. Galey and *James E. Philpott, contra.*

AUGUSTUS C. RUDOLF, PLAINTIFF IN ERROR, v. LEROY S. WINTERS, DEFENDANT IN ERROR.

1. **County Courts**: JUDGMENT: ERROR. Error will lie upon a judgment or final order of the county court which affects a substantial right and in effect determines the action, or which

affects a substantial right in a special proceeding, or upon a summary application in an action after judgment, when the same appears on the record of the county court.

2. **Contract against Public Policy.** A contract to operate in grain options, to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is *contra bonos mores*, and against public policy.

3. ———. Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain.

THIS was a petition in error to reverse a judgment of the district court for Lancaster county, POST, J., of the fourth district, presiding. The facts appear in the opinion.

Webster & Burr, for plaintiff in error, cited *Renard v. Sampson*, 12 N. Y., 561. *Baxter v. Downer*, 29 Vt., 412. *Reed v. McGrew*, 5 Ohio, 375. *Munford v. Wilson*, 15 Mo., 540. *Berry v. Bacon*, 28 Miss., 318. *Begg v. Jerome*, 7 Mich., 145. *Judah v. Trustees*, 16 Ind., 56. *Dexter v. Snow*, 12 Cush., 594.

Lamb, Billingsley & Lambertson, for defendant in error.

No brief on file.

GANTT, CH. J.

The defendant in error sued the plaintiff in the county court upon the following due bill:

"Lincoln, June 29, 1875.

"Due the bearer, L. S. Winters, five hundred and twenty-five dollars, on demand. A. C. RUDOLF."

To this cause of action the plaintiff in error pleaded as a first defense that some time afterwards it was by and between the defendant in error and himself "ex-

pressly agreed that the sum of money evidenced by this instrument should be and remain in his hands as the advance or capital deposited" by defendant in error, as his portion of moneys to be invested in grain options in Chicago, in which venture each party should receive a certain proportion of the profits and pay a certain proportion of the losses, and that their venture in such grain options resulted in a loss largely in excess of the amounts invested by the respective parties, which loss he paid, whereby the defendant in error became largely indebted to him. To this count in the answer the defendant in error interposed a general demurrer, which was sustained by the county court. The case was submitted by Winters upon the pleadings, and judgment was rendered by the county court upon the pleadings against Rudolf for $57.41 and costs. The case was taken to the district court on error, and on motion of defendant in error it was dismissed on the ground of want of jurisdiction.

Two questions are presented for determination: *First* —Whether error will lie to bring up to the district court for review the decision of the county court upon the demurrer; and if error will lie, then: *Second*— Whether the contract pleaded is a good defense to the action. The first question must be answered in the affirmative.

In *Taylor v. Tilden, et al.*, 3 Neb., 340, it was held that "the statute does not give the right of a *bill of exceptions* to the rulings of the county judge or justice of the peace, upon questions of law arising during the the trial before them, in cases not tried by a jury, and that such bill of exceptions cannot be considered in an appellate court, because it is an act without authority of law"; but it is quite clearly stated that, under section 580 of the civil code, upon a judgment rendered or final order made which affects a substantial right and in effect

determines the action, or which affects a substantial right in a special proceeding, or upon a summary application in an action after judgment, a petition in error is allowed.

And in *Kellogg v. Huntington*, 4 Neb., 96, it was again held that there was no authority for a bill of exceptions in such case, and the court observed that "as no error appears in the record of the county judge, and none such is affirmed here," the judgment was affirmed.

In the case at bar, the error complained of does not arise upon a bill of exceptions to the rulings of the judge upon questions of law arising during the trial of the cause, but it "appears upon the record of the county judge"; it is a judgment which finally disposes of the plaintiff's first ground of defense set up in his answer, and therefore the case comes within the provisions of section 580.

Now, is the contract pleaded a good defense to the action? It is a subsequent alleged contract to operate in grain options, restricted, however, "to the purchase of margins upon grain," and to be adjusted according to the differences in the market value thereof. Will the law sanction such a transaction?

In *Pickering, et al., v. Case*, 79 Ill., 328, it is held that such a contract "is but an optional contract, in the most objectionable sense, and being in the nature of a gambling transaction, the law will not tolerate it." It is very clear that such a gambling contract is *contra bonos mores* and against public policy; and the doctrine is well settled, that whenever a contract is founded on an illegal transaction, or grows out of an illegal act, or is so connected with it as to be inseparable from it, the law will not sanction it.

In *Steers v. Laishley*, 6 T. R., 61, a case in which a broker who had been concerned in stock-jobbing transactions, and who had paid the losses, drew a bill of

exchange for the amount on the defendant, and after its acceptance, indorsed it to a person who knew of the illegal transaction, for which it was drawn, the court held that such indorsee could not recover on the bill.

In the case at bar, the defendant did not require the aid of an illegal transaction to establish his case; the execution of the instrument is not denied, nor that it was given for a full consideration; and, moreover, it is a fact expressive of some meaning that the due bill remained in the possession of the defendant. The plaintiff in error, who was defendant below, sets up as a defense the illegal contract, and asks the court to sanction it. It will not do to say that the results of the illegal transaction constitute the only subject of controversy, because the contract itself is specially pleaded, and not a new promise, founded on a consideration, unconnected with the illegal act. The mere results of the transaction, when not evidenced by a new promise inseparable from the illegal act, could not be shown until the contract is established which produced them. However, the test in such cases is, whether the party requires the aid of the illegal transaction to establish his claim; and if he cannot proceed without showing that he has broken the law, the court cannot assist him whatever may be his demand. *Swan v. Scott*, 11 S. & M., 164. In the case under consideration, the real question put in issue by the answer is the illegal contract, and therefore the plaintiff in error is the actor; he alleges the corrupt contract, and is the *moving party*.

In *Holman v. Johnson*, Camp. 343, Lord Mansfield held, that no court will lend its aid to a man who founds his claim upon an immoral or illegal act.

In *Russell v. De Grand*, 15 Mass., 39, Parker, C. J., says: "The rule of law is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain."

It may be said that it has become an axiom in the law, that when a claim is bottomed on an immoral and illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain.

The court below having erred in dismissing the cause for want of jurisdiction, its judgment must be reversed; but the judgment of the county court must be affirmed.

JUDGMENT ACCORDINGLY.

IRA D. KEMERER, ET AL., PLAINTIFFS IN ERROR, v. THE STATE, EX REL. J. GARBER, DEFENDANT IN ERROR.

1. **County Board:** POWERS. The board of county commissioners have no power to review, vacate, or set aside its former adjudications.

2. ———: AUDITING COMPENSATION OF PUBLIC OFFICERS. Where the compensation for services rendered for the county is definitely fixed by law, the audit of the same and drawing a warrant therefor, by the board, are merely ministerial duties unattended with the exercise of any official discretion, and therefore, in such case, the board cannot make such compensation any greater nor any less than that fixed by the law.

3. **Mandamus.** The application for a writ of mandamus must show a prior demand and refusal, and must set forth facts which clearly impose upon the respondent a duty which the law enjoins upon him as resulting from an office, trust, or station.

4. ———. If the relator sets up in his application a claim, the payment of which is not allowed by law, it is a fatal objection to a mandamus.

ERROR to the district court for Nuckolls county. Tried below before WEAVER, J. The opinion states the case.

H. S. Kaley, for plaintiffs in error, cited Gen. Stat., 234, sections 14, 23, 26, 40. *Connor v. Morris*, 23 Cal., 450. High's Ex. Leg. Rem., secs. 101–104. *Clarke v. DesMoines*, 19 Iowa, 219. *Linden v. Case*, 46 Cal., 171. *Keller v. Hyde*, 20 Cal., 594. *The People v. Wood*, 35 Barb., 656. *Com'rs of Jefferson Co. v. Patrick*, 12 Kan., 605. Dillon's Mun. Corp., 55, 665. *Supervisors of Richmond Co. v. Van Clief*, 1 Hun., 454. *State, ex rel. Baen, v. Yaetman*, 22 Ohio State, 546. *Board of Supervisors v. Ellis*, 56 New York, 620.

James Laird and *J. S. Gilham*, for defendant in error.

The commissioners had jurisdiction to allow the amount they did, and their judgment is conclusive in all subsequent and collateral proceedings. *Brewer v. Otoe County*, 1 Neb., 382. *Brown v. Otoe County*, 6 Neb., 111. *State, ex rel. Clark, v. Buffalo County*, 6 Neb., 454. *Evans v. Percifull*, 5 Ark., 424. *Snelson v. The State*, 16 Ind., 29. *Robinson v. Board of Supervisors*, 16 Cal., 212. *Carrol v. The Board*, 28 Miss., 38. *Voorhies v. The Bank*, 10 Pet., 479. *Smiley v. Sampson*, 1 Neb., 56.

The statute prescribing the amount the clerk is to receive does not affect the jurisdiction of the commissioners to determine the amount. It only guides the commissioners as it would any other court after jurisdiction has been acquired. The commissioners must still audit the claim of the clerk, and that their judgment may be good on error they must follow the law, and it is so with every claim presented for their allowance. There is no claim so peculiar, so high or so low, but its amount is fixed by law, statutory or common, and the commissioners are as apt to err in the allowance of one as the other. The attempt of the commissioners to rescind the allowance of the claim was wholly without jurisdiction and void.

GANTT, CH. J.

This case is brought here on error from the judgment of the district court, allowing a peremptory writ of mandamus against the plaintiffs in error to compel them to issue certain county warrants in favor of defendant, the relator.

It appears from the record that the defendant was county clerk, and that he presented to the board of county commissioners three several bills, amounting in the aggregate to $295.30, for preparing the tax list and duplicate for the year 1876.

On the thirteenth of November, 1876, the board audited and allowed his claims; but on the fifth of April in the following year, the board reconsidered and rescinded the former adjudication of the relator's claim. It further appears that the assesed value of property of the county for the year 1876 was $701,183.80. The errors alleged are substantially, that the court erred in rendering judgment allowing the writ; that the judgment is not sustained by the evidence, and is contrary to law.

It may first be observed that the proceedings of the board, had on the fifth day of April, 1877, reversing and rescinding its former action in regard to the claim of the relator, is a mere nullity, because it has no power to review, vacate, or set aside its former adjudications. *State, ex rel. Clark, v. Buffalo County*, 6 Neb., 454.

But, again, the audit and allowance of the relator's claim by the board, on the thirteenth of November, 1876, cannot have the effect of an adjudication, and must be treated as simply void; because the board has no judgment or discretion to exercise in the matter.

The fees of the county clerk for preparing the tax list and duplicate are definitely fixed by law, and the board cannot make them any greater or any less; and there-

fore the duty of the board is merely ministerial, and that is, to issue a warrant to the clerk for the amount so fixed by law for preparing the tax list and duplicate. Section 3, of the act of February 23, 1873, provides that: "For preparing tax lists and duplicates in counties where the assessed value of property shall not exceed two million dollars, the clerk shall receive compensation at the rate of *one-fourth of one mill for each dollar* of such valuation as shown by such tax list, which *shall be paid by warrant* on the county treasurer." The tax list when completed is kept in the office, and from the assessed value of property, as footed up in this list, the board, by simple calculation, can easily ascertain the amount of fees the law allows the clerk in the case. This is merely a ministerial act and not judicial. High on Ex. & Leg. Rem., §§ 101 and 105. *Shaw v. Howel et al.*, 18 La. Ann., 195. *Apgar v. Trustees*, 5 Vroom, 309. In the case at bar, it appears that the assessed value of property of the county was $701,183.80, and therefore the fees of the clerk for preparing the tax list and duplicate, as fixed by law, amount to $175.30. For this amount he is entitled to a warrant; but in his affidavit for the writ he makes no claim for a warrant for this amount.

Now, in an application for the writ, it is not only absolutely necessary to show a prior demand and a refusal (*Leonard v. House*, 15 Ga., 473), but it is also essential to set forth facts which clearly impose upon the respondent the duty which it is sought to compel him to perform. *People v. Town Board*, 14 Mich., 28. The statute in relation to mandamus provides that "the writ may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law *specially enjoins as a duty* resulting from an office, trust, or station," and that the "writ must state concisely the fact showing the obligation of the

defendant to perform the act, and his omission to perform it."

In this case the writ would compel the respondents to perform an act which is *not specially enjoined by law as a duty* to be performed by them, but to perform an act which would be an infringement of the law. This is a fatal objection to the mandamus. Even a failure to allege that there is money not otherwise appropriated by law out of which the money is directed to be paid, is fatal to a mandamus. *Redding v. Bell*, 4 Cal., 334.

The judgment of the court below must be reversed, and the action must be dismissed without prejudice to the relator's right to his fees allowed by law.

JUDGMENT ACCORDINGLY.

ANDREW WISE, PLAINTIFF IN ERROR, v. CHARLES H. FREY, DEFENDANT IN ERROR.

1. **Partnership Property:** EXEMPTION FROM EXECUTION. CONSTRUCTION OF STATUTE. Section 521, of the code of civil procedure, which provides that: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property," applies only to individual debtors, and exempts only individual property.

2. ——: ——: ——. The property of a partnership is not exempt from execution for the satisfaction of a judgment against the partnership. And where, upon the levy of such an execution upon the goods of a firm, its members undertook to divide them in severalty between themselves with the view of enabling each one to claim and hold his share exempt: *Held*, that by the levy a valid lien was acquired which it is not in the power of the firm, either by sale, or a division between its members, to destroy or prejudice.

ERROR to the district court for Cuming county.

R. F. Stevenson, for plaintiff in error, cited *Stewart v. Brown*, 37 N. Y., 350. *Howard v. Janes*, 50 Ala., 67. *Newton v. Howe*, 29 Wis., 536. *Gilmans v. Williams*, 7 Wis., 329. *Servanti v. Lusk*, 43 Cal., 238. *Brown v. Harris*, 67 North Carolina, 140. *Radcliff v. Wood*, 25 Barb., 52. Freeman on Executions, 342. *Carpenter v. Harrington*, 25 Wendell, 370. *Ford v. Johnson*, 34 Barb., 365. *Robinson v. Wiley*, 15 N. Y., 494.

Crawford & McLaughlin, for defendant in error, cited *Sutcliffe v. Dohrman*, 18 Ohio, 181. *Gaylord, Son & Co. v. Imhoff & Co.*, 26 Ohio State, 317. *Tills' Case*, 3 Neb., 261. Central Law Journal, vol. 4, p. 527. Id., vol. 5, pp. 364, 390.

LAKE, J.

This was an action in replevin to recover the possession of certain personal property which the defendant, as sheriff, had taken under several executions issued against the property of a partnership, of which the plaintiff was then a member. The question presented is as to the sufficiency of the petition to show a good cause of action.

The petition shows the existence of the partnership, the recovery of the several judgments, and the levy of the executions upon the property in question. It further appears that after the goods were seized by the sheriff the members of the firm conceived the idea of making a division of the partnership effects between themselves, evidently in order to enable such of them to claim and hold his share, or at least a portion thereof, as exempt from forced sale, under Sec. 521 of the code of civil procedure, which provides that: "All heads of families who have neither lands, town lots, or houses

subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property."

Under a statute of Ohio, very similar to our own, the supreme court of that state, in a very well considered case, held that there was nothing in it to justify the inference that the legislature, in passing it, intended to provide for any other than individual debtors, and for the exemption of individual property from sale on execution. *Gaylord, Son & Co. v. Imhoff & Co.*, 26 Ohio State, 317. It is clear, therefore, that as this property at the time of its seizure belonged to the partnership, it was not exempt from judicial sale, and was rightfully taken by the sheriff to satisfy the executions which he held.

If the judgments on which these executions were issued had been against the plaintiff in his individual capacity a very different question would be presented. Where such is the case it seems to be pretty generally held, under statutes like ours, that the defendant in exetion may claim his exemption out of his share of the partnership effects. *Servanti v. Lusk*, 43 Cal., 238. *Newton v. Howe & Drury*, 9 Am. Rep., 616, and cases cited.

We think that by this levy the execution creditors acquired a valid lien upon the property taken for the satisfaction of their respective judgments, which it was not in the power of the firm either by sale, or by a division between its members to destroy, or in any degree prejudice.

We are of the opinion, therefore, that the demurrer to the petition was properly sustained, and that the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

EMMANUEL BRUNSWICK & CO., PLAINTIFFS IN ERROR, v. SAMUEL MCCLAY, DEFENDANT IN ERROR.

1. **Practice:** ERROR: ASSIGNMENT OF ERROR. On a proceeding in error, when the assignment is "that the finding of the said court is against the law and the evidence," and no specific error of law is pointed out in the motion for a new trial, and the judgment being clearly warranted, by the finding of all the issues in favor of the defendant, the only question raised is simply whether the verdict of the court, upon the facts, is supported by the evidence.

2. **Chattel Mortgage:** POSSESSION OF PROPERTY BY THE MORTGAGOR: PRESUMPTION OF FRAUD FROM. In a controversy between the mortgagee and creditors of the mortgagor concerning mortgaged property found in possession of the latter, evidence showing that the mortgage "was made in good faith, and without intent to defraud such creditors," is imperatively required to overcome the legal presumption of fraud arising from such possession.

3. ——: ——: ——. In order to prevent such presumption of fraud in favor of creditors of the mortgagor, and the necessity of proof by the mortgagee of good faith in the execution of the mortgage to overcome it, an actual and continued change of possession of the mortgaged property is required.

4. ——: ——: ——. And where the mortgaged property, consisting of two billiard tables, kept by the mortgagor, a saloon keeper, in his saloon, for the use of his customers, was permitted to remain in his possession, although placed nominally in the charge of his bar-tender, and used in the business of the mortgagor; *Held*. That there was no such "actual and continued change of possession" as the statute requires to prevent the presumption of fraud as to creditors of the mortgagor.

ERROR to the district court for Lancaster county.

D. G. Hull, for plaintiffs in error.

Cobb & Marquett, for defendant in error.

LAKE, J.

The action below was brought by the plaintiffs in error to obtain the possession of two billiard tables and

accompanying furniture, which they claimed under a chattel mortgage executed to them by Michael Graham. The defendant had levied upon and held the property by virtue of several executions in favor of Graham's creditors. The court, without the aid of a jury, found the issues generally in favor of the defendant, and rendered judgment accordingly, to reverse which the case is brought here.

Six errors are formally assigned, but being substantially alike, they are fairly included within the first, viz.: "That the finding of said court is against the law and the evidence." This is a very general assignment. No specific error of law is pointed out here, nor was there in the motion for a new trial in the court below; and the judgment being clearly warranted from the finding of all the issues in favor of the defendant, it follows that the only question for our consideration is simply whether the verdict of the court upon the facts of the case is supported by the evidence.

This is virtually a controversy between the mortgagee of goods and chattels, and creditors of the mortgagor. Although there was no testimony to prove it, the fact that the mortgage was duly recorded is admitted by defendant's counsel in their brief. But it was neither proved nor admitted that the instrument had been renewed as the law requires. Gen. Stat., secs. 14, 15 Ch. 25. Neither was there any testimony showing that the mortgage "was made in good faith and without any intent to defraud such creditors," which is imperatively required to overcome the legal presumption of fraud, which the law attaches when the controversy is between the mortgagee and a creditor of the mortgagor, and concerning mortgaged property found in possession of the latter. Sec. 11, same Statutes.

It is contended, however, with much earnestness on behalf of the plaintiffs, that they took possession of the

property before the executions were levied, and thereby avoided the necessity of a renewal or proof of *bona fides*. If possession had been actually taken and retained under the mortgage, this would probably have been so. On this point, however, the utmost that is shown is, that some two months before the executions were levied, Hull, the agent of the plaintiffs, went to Graham's saloon and with his assent took nominal possession of the tables, at the same time putting them in charge of one Carr, who was then and for a long time afterwards in Graham's employ as bar-tender. The tables were not removed from the saloon, but remained there in their usual place, and were used by Graham in his business, and to his profit, precisely the same as he did before Hull went there, and until after the levy was made. This shows beyond a doubt that the "*actual and continued change of possession*," which the statute requires to prevent the presumption of fraud, was entirely wanting.

We not only fail to discover any want of testimony to support the finding, but we do not see how the court could have found otherwise from the evidence before it.

JUDGMENT AFFIRMED.

JOHN H. ROE, AND OTHERS, PLAINTIFFS IN ERROR, v. SYLVESTER S. ST. JOHN, DEFENDANT IN ERROR.

Assessment of Property for Taxation: AUTHORITY OF PRECINCT ASSESSOR. Under our statutes, a precinct assessor not only has the authority, but it is his sworn duty, to see to it that all property within his jurisdiction, liable to taxation, is entered on the assessment roll. Nor will the fact of a sworn list having been made by the owner justify the assessor in neglecting to assess property which he knows has been omitted.

ERROR to the district court for Kearney county. Tried below before GASLIN, J. The facts are sufficiently stated in the opinion.

Sam. L. Savidge and *E. C. Calkins*, for plaintiffs in error.

Where the return is made in accordance with the statute by the taxpayer, such return is conclusive as to the articles enumerated and the value of non-enumerated property. *Matheson v. Town of Mazomanie*, 20 Wis., 191. *Ketchum v. Town of Mukwa*, 24 Wis., 303. *White v. City of Appleton*, 22 Wis., 639. The building which the assessor assumed to place upon the roll as personal property was a part of the realty and could not be severed for the purpose of taxation, or if we concede that the plaintiffs had the right to remove the same during their term, still it remained a part of the realty as between every one, except the lessor and the lessee and their privies. *Flanders v. Cross*, 10 Cush., 514. Cooley on Taxation, note 1, p. 275. Land and other real estate should be valued as such, irrespective of the separate estate that individuals may have in the same. Cooley on Taxation, p. 288, and cases there cited. Sec. 13, p. 900, Gen. Stat. *Parker v. Baxter*, 2 Gray, 185.

John Barnd, for defendant in error, cited Gen. Stat., 939, Sec. 1. *Lanphere v. Lowe*, 3 Neb., 137. *Whiting v. Barstow*, 3 Pick., 311. *Doty v. Gorham*, 5 Pick., 489. *Chatterton v. Saul*, 16 Ill., 151. *Goff v. O'Conner*, 16 Ill., 421. *Dooley v. Crist*, 25 Ill., 551. *Kelley v. Austin*, 46 Ill., 156. *Curtis v. Riddle*, 7 Allen, 187, and cases there cited. *Hinckley v. Baxter*, 13 Allen, 139.

LAKE, J.

This was an action brought by the plaintiffs against the defendant, who was assessor of Kearney precinct,

Buffalo county, for the recovery of damages alleged to have been sustained by reason of a wrongful assessment of property in their name for taxation.

Although there are no less than twenty-seven errors assigned, there is really but a single question to be decided, and that is—whether an assessor has authority to assess taxable property which the owner has neglected or refused to include in his verified list.

That the property in question was assessable, and belonged to the plaintiffs, there is no doubt; nor is it questioned that the plaintiffs omitted to include it in their return to the assessor. It was a frame building erected by the plaintiffs upon leased ground for business purposes, and was owned and occupied by them at the time of listing property for that year. The manner of its construction, whether placed upon the surface of the earth, or on posts set into the ground, is unimportant. As between the owner of the lot and the plaintiffs it was personal property, and so it was as to all the world besides. It is clear that the building could have been sold or removed from the lot at the option of the plaintiffs, and could have been levied on as personalty to satisfy a judgment against them. *Lanphere et al. v. Lowe*, 3 Neb., 131.

This brings us to the only real question in the case. Had the assessor authority to include this property in his return, it having been omitted by the plaintiffs in their sworn statement? Whatever might have been considered the limit of the assessor's power in this respect prior to the act of February 27, 1873 (Gen. Stat., 939), there can be no doubt that, under this act, his authority to do so was ample. The first clause of section one provides: "If on the assessment roll there be an error in the name of the person assessed, or any taxable property shall not be entered thereon, the name may be changed, *and the property entered on the list by the as-*

sessor after the roll shall be returned to the county clerk," thus permitting the assessor, even after his return has been made, to put upon the list any property that ought to have been entered, but which, by mistake or design, has been omitted. This provision evidently implies that under the law, as it stood at the passage of this act, the assessor was already empowered to make such corrections up to the very time of delivering his assessment roll to the county clerk, but not afterwards. And this authority seems to be fairly included in section 25 of the general revenue act, which provides that: "In every case where a person, required to list property for himself, or in behalf of another, shall neglect or refuse to list the same, the assessor shall proceed as directed in section nine of this chapter, * * * * and a neglect to make it shall be taken as a refusal."

Section nine here referred to provides that when any person, having property that should be listed, by reason of absence or sickness fails to make the statement required of him, or shall refuse to do so, "the assessor shall ascertain, according to the best information he can obtain, the number and value of the several species of property required," etc., to the end that every person having property liable to taxation shall be subjected to his due proportion of the burdens of government.

We consider it very clear that, under our statutes, the precinct assessor not only has the authority, but it is his sworn duty to see to it, that all property which he can discover within his jurisdiction, liable to taxation, is entered on the assessment roll. Nor will the fact of a sworn list having been made by the owner justify the assessor in neglecting to assess property which he knows has been omitted. There is no error in this record.

JUDGMENT AFFIRMED.

WILLIAM S. LEA, PLAINTIFF IN ERROR, v. DANIEL MCLENNAN, DEFENDANT IN ERROR.

1. **Practice:** SETTING ASIDE VERDICT. Where there is sufficient testimony to warrant a jury in finding a verdict, it will not be set aside as being contrary to the evidence simply because, in the opinion of the court, a preponderance of the testimony is against it, it being exclusively the province of the jury to weigh the evidence, and judge of the credibility of the witnesses. But the rule has no application where there is an entire failure of proof.

2. ———: ———. L. brought an action against M. for money paid by him as surety. M. in his answer pleaded payment by the conveyance of certain real estate. The testimony showed that M. had conveyed real estate to L. to enable him to sell and convey the same, and apply the proceeds on the amount due from the defendant. It also appeared that L. had failed to sell the real estate. *Held*, the proof failed to show payment.

ERROR to the district court for Dodge county. Tried below before POST, J.

E. F. Gray and *G. L. Loomis*, for plaintiff in error.

Marlow & Munger, for defendant in error.

MAXWELL, J.

On the thirty-first day of July, 1871, the defendant, as principal, and the plaintiff, as surety, executed and delivered to P. M. Miles, of Litchfield, Illinois, a promissory note for $1,000 and interest. In 1875 judgment was recovered against the surety on said note. The surety having paid the same, brought an action against the defendant, in the district court of Dodge county, to recover the amount of the judgment and costs.

The defendant, in his answer, admits the execution of the note, but alleges that on or about the first day of March, 1875, the plaintiff offered to pay said note, if

defendant would convey to him certain real estate in the county of Montgomery, and state of Illinois; that, on or about the first day of April, 1875, the defendant accepted said proposition and conveyed said real estate to the plaintiff, who accepted the same in full satisfaction of said indebtedness. The plaintiff, in his reply, denies all the facts set forth in the answer.

On the trial of the cause, the jury returned a verdict for the defendant, upon which judgment was entered. The cause is brought into this court by petition in error.

The character of the conveyance of the real estate in controversy is the only matter in dispute, the defendant insisting that it was in full satisfaction of the debt, while the plaintiff contends that he took the title simply to enable him to convey the land, in case it could be sold for a satisfactory price.

A letter, dated March 12, 1875, written by the defendant to the plaintiff, was introduced in evidence, in which the defendant says: "Your favor of the tenth inst. is just at hand; contents noted. Should the lots not sell for enough to pay the note, I will pay the difference just as soon as I am able, and will make it a point to pay it the very first chance. I shouldn't want the lots sold for a little or nothing. Get all you can for them."

The letter of the tenth inst. referred to, was not introduced in evidence, nor were steps taken to require its production.

On the twenty-fifth of March, 1875, one McEwen wrote to the plaintiff that he had a good chance to sell the lots in question for a "gas factory," and requested him to send a deed for the same to the plaintiff. At the same time, and in the same letter, the plaintiff requested the defendant to give him a deed so he could make a title to the property.

On the twenty-eighth of March, 1875, the defendant wrote to the plaintiff: "I have no objection to you hav-

ing the deed for the lots, if you can make a sale of them and pay off the note; for God knows I want it paid, and want it paid with those lots. * * * I will trust to your honor in regard to selling the lots and paying the note with the proceeds." In the same letter he sent an order to C. M. Stetson, his agent, to deliver a deed to the plaintiff for the lots in controversy, as he had made arrangements with him to take them in "settlement of that note that he was security on for him to P. Miles."

On the fifteenth of April, 1875, the defendant wrote to the plaintiff, urging him to send him the note upon which the plaintiff was surety.

On the eleventh of May, 1876, the defendant, in answer to a letter written to him by one Jones, an attorney for the plaintiff, says: "I thought that the five lots that I had would more than pay the note off. Mr. Lea wrote me and said that he had a chance to sell them, and requested me to make him a deed for them. I did so, thinking it would square the matter up. As soon as he got the deed to the lots, I was informed that he had no chance to sell them. * * * I wish that I could square the matter up and have done with it." The letter to which this was an answer was not introduced in evidence on the trial; nor does it appear that any steps were taken by the plaintiff to require its production.

The testimony entirely fails to show that the plaintiff ever made a contract with the defendant to accept a deed to these lots in full satisfaction of the debt. The letters, taken together, clearly show that the deed was delivered to Lea to enable him to sell the lots to the best advantage, and to enable him to convey the same. The defendant appears to have been anxious to pay the debt and save the surety harmless, so far as his means would permit. And throughout the entire transaction it is apparent that he was desirous that the property

should be sold for the best price attainable, and that the proceeds should be applied in payment of the judgment.

There is no claim of bad faith on the part of the plaintiff in obtaining the title to these lots; nor is there any pretense that, at the time he obtained title to the same he had not reasonable grounds to believe that he could sell the same to the gas company at a reasonable price. The only question at issue is that of payment, and that the proof fails to establish.

It is urged on the part of the defendant, there being a conflict of testimony, and the jury having found in favor of the defendant, that the verdict and judgment should not be disturbed. The rule undoubtedly is, where there is sufficient testimony to sustain the verdict, that it will not be set aside as being contrary to the evidence simply because, in the opinion of the court, a preponderance of the testimony is against it, it being exclusively the province of the jury to weigh the evidence and judge of the credibility of witnesses. But the rule can have no application in a case like the one at bar, where there is an entire failure of proof on the part of the defendant. The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

A. F. BLAIR AND GEORGE W. CRESSMAN, PLAINTIFFS IN ERROR, v. WEST POINT MANUFACTURING COMPANY, DEFENDANT IN ERROR.

1. **Practice:** SERVICE ON DEFENDANT. Before service by publication, or personal service of the summons out of the state, can be made, an affidavit must be filed with the clerk of the court, setting forth that service of the summons cannot be made in the state on the defendant or defendants to be served, and that the case is one of those mentioned in section 77 of the civil code.

2. ——: AFFIDAVIT. An affidavit should show on its face that it was taken within the officer's jurisdiction.

3. **Removal of Cause to United States Circuit Court.** Where a petition for the removal of a cause from the state court to the circuit court of the United States, in connection with the pleadings, fails to show that the cause is removable, it is not error for the court to deny the application.

4. ——: JURISDICTION. In cases arising under the constitution, laws, and treaties of the United States, the *subject matter* gives the jurisdiction without regard to the citizenship of the parties. But when questions of that character are not involved, it is the citizenship of the parties alone that confers the jurisdiction, and it must appear on the face of the record that the citizenship of the parties supports the jurisdiction.

5. ——: ——. Where a petition is filed to remove a cause on the ground that it is between citizens of different states, and the facts stated in the petition are denied by answer, the court has authority to examine the grounds upon which it is sought to oust it of jurisdiction, and it is the proper tribunal to make the examination.

6. ——: ——. The authority of congress to impose duties on the state courts, or otherwise to act directly upon them, may well be questioned.

7. ——: ——. In cases where jurisdiction can only be acquired by reason of the parties being citizens of different states, the circuit court cannot entertain jurisdiction if it appears that the action is between citizens of the same state; such judgment would be void.

8. ——: POWER OF DISTRICT COURT. Where an application to remove a cause is in proper form, and the facts are such as bring the case within the provisions of the law for the removal of causes, it is the duty of the district court to proceed no further in the case, and should it do so, this court will correct the error and order the cause certified to the circuit court.

9. **Pleading:** ANSWER. A party may be permitted to answer upon such terms as to the payment of costs as may be prescribed by the court, at any time before judgment is rendered, and where it is apparent that he has a meritorious defense, the court must permit the answer to be filed.

ERROR to the district court for Cuming county. Tried

below before VALENTINE, J. The facts necessary to an understanding of the points passed upon by the court appear in the opinion.

John D. Howe and *Stevenson & Fraris*, for plaintiffs in error.

1. When the jurisdictions of the state and federal courts are concurrent, as here, the jurisdiction of the courts of that judicial system which first attaches is exclusive, and the decision of the court first obtaining possession of the cause is final and conclusive. It is believed that the decisions of both state and federal courts are agreed upon this proposition. 4 Am. Law Reg. (O. S.), 49. *Sifford v. Beatty*, 12 Ohio St., 189. *Taylor v. Carryl*, 12 Harris (Pa.), 259. *Spinning v. Brown*, 2 Disney, 336, 445, 373. *Adams v. Adams*, 7 Ohio St., 84. *Ex parte Bushnell*, 8 Ohio St., 599. *Merrill v. Lake*, 16 Ohio, 374, 405. *West v. Morris*, 2 Disney, 415. *Keating v. Spink*, 3 Ohio St., 105, 120. *Riggs v. Johnson County*, 6 Wall., 166. *Schuyler v. Pelissier*, 3 Edw., Ch., 191. *Mead v. Merrit*, 2 Paige, Ch., 402. *Hagan v. Lucas*,10 Pet., 400.

2. When the petition and bond were filed in the court the jurisdiction of the court was *ipso facto* ousted, and all of its proceedings thereafter were *coram non judice*. It was error in the court to enter a default or to further act. *Berry v. C. R. I. & P. Co.*, Central Law Journal, vol. 5, p. ——. 2 Central Law Journal, 616, 679, 630, 290. *Cook v. Ford*, 4 Central Law Journal, p. ——. 7 Chicago Legal News, 241. 2 Central Law Journal, p. 275. 10 Chicago Legal News, No. 6. Dillon on Removal of Causes, 33. *Herryford v. The Ætna Insurance Co.*, 42 Mo., 151. *Stevens v. Phœnix Ins. Co.*, 41 New York, 149. *Kanouse v. Martin*, 15 How., 198. *Gordon v. Longest*, 16 Pet., 97. *Ins. Co. v. Dunn*, 19 Wall., 215. *French v. Hay*, 22 Wall., 250.

3. It was an abuse of discretion to refuse to open the default. Puterbaugh's Ch. Pl. & Pr., 90. *Scales v. Laber*, 51 Ill., 232. *Wooster v. Woodhull*, 1 Johns. Ch., 539. *Parker v. Grant*, 1 John. Ch., 630.

4. The petition and bond for removal were sufficient, but the application was overruled. This was error.

Crawford & McLaughlin, for defendant in error.

1. The question whether or not a default shall be opened, rests in the discretion of the court, and where this is not abused the supreme court will not interfere. *Orr v. Seaton*, 1 Neb., 107. *Rogers & Tallman v. Cumings*, 11 Iowa, 459. *Clarke v. Hedge & Heaton*, 10 Iowa, 528. *McNulty v. Everett & Morse*, 17 Iowa, 481. *Bolander v. Atwell*, 14 Iowa, 35.

2. The court held, and very properly we think, that the application to transfer the jurisdiction to the United States court, came too late. That a trial was had and a decree entered without questioning the jurisdiction of the court, or in any manner bringing to its notice that any proceedings had been filed for removal, and that thereby the plaintiff had waived all rights he may have had to insist that the cause was by such bond and petition transferred. *Home Ins. Co. v. Curtis*, 32 Mich., 402. *McCallon v. Waterman*, 4 Central Law Journal, 413.

3. It is an exploded doctrine, if it ever did exist, that the mere filing of a petition and bond is a removal *ipso facto*. *Armory v. Armory*, 95 United States Supreme Court, 186. If the filing of a petition and bond is not of itself a removal of the cause, then something else must be done by the party seeking the removal. The attention of the state court must be called to the fact before entering upon the trial, on the merits, or before default, and then the court may inquire into the

sufficiency of the petition and bond. If sufficient, and the attention has been called to it within the proper time, it is then the duty of the court to accept the petition and bond and proceed no further in the case. If not sufficient, or if its attention is not called to the fact until the trial has been commenced upon its merits, or a default has been entered, then it is the duty of the court to disregard the application for removal and retain its jurisdiction. *Home Insurance Co. v. Curtis, supra. Armory v. Armory, supra. Indianapolis R. R. Co. v. Risley*, 50 Ind., 60. We have not examined authorities cited by counsel in support of the proposition that the filing of the petition and bond, *ipso facto*, ousts the jurisdiction of the state court; suffice it to say, that if all those authorities do sustain the proposition, it is not the law, and they have each and every one of them been overruled by the supreme court of the United States in the case of *Armory v. Armory* above referred to.

MAXWELL, J.

On the third day of May, 1877, the defendant in error filed a petition in the district court of Cuming county against the plaintiff in error, and one George W. Cressman, alleging that they claimed some interest in lots 3 and 4 in block 4, in the town of West Point, and praying that the title might be quieted in the plaintiff. Summons was duly issued thereon, returnable on the fourteenth of May, requiring the defendant therein to answer on the fourth day of June, 1877. The sheriff appointed one Samuel Miller to serve the writ.

Miller made his return under oath, stating that he summoned the within named defendants, by delivering a certified copy of the summons, with the endorsements thereon, to the said George W. Cressman, on the ninth

day of May, 1877, and to the said A. F. Blair, on the eighth day of May, 1877. There is no venue stated in the affidavit. The defendants made a special appearance, and moved to quash the service of the summons, assigning various reasons therefor. The motion was overruled, to which the defendants in the court below excepted.

On the fourth day of June, 1877, a petition and bond for the removal of the cause to the circuit court of the United States were duly filed.

On the next day a default was taken against Blair and Cressman, which on the same day they moved to set aside, and asked leave to answer. The proposed answer set forth that Cressman, on the sixth day of November, 1876, filed a mechanic's lien on said lots for work and labor and for machinery furnished to the plaintiff (defendant in error) under a contract, and that there was due thereon the sum of $5,686.77; that after filing said lien, said Cressman assigned the same to Blair; that prior to the commencement of this action he had commenced an action in the circuit court of the United States to foreclose said lien, and that said cause is now pending in said court.

On the ninth day of June, 1877, the motion to set aside the default and permit Blair and Cressman to answer was taken up. The motion was sustained as to Cressman and overruled as to Blair.

A decree was thereupon rendered against Blair, the court finding: "That the defendant A. F. Blair having failed to answer or demur to the petition of the plaintiff herein filed, the court further finds that said defendant * * * nor any one for them have any estate in or are entitled to the possession of said real estate, or any part thereof." The defendants in the court below were perpetually enjoined from claiming an interest in the property.

On the same day in which the decree was rendered the motion to remove the cause to the circuit court of the United States was taken up and overruled, upon the ground of the insufficiency of the petition and bond.

Section 81 of the code of civil procedure provides: "In all cases where service may be made by publication, and in all other cases where the defendants are non-residents, and the cause of action arose in this state, suit may be brought in the county where the cause of action arose, and personal service of the summons may be made out of the state by the sheriff, or some person appointed by him for that purpose."

In all cases where service of a summons is made on a person without the state, proof of such service must be made by affidavit.

It is clearly shown by the record that the defendants in the court below were non-residents of this state. It also appears that the case is one that falls within the fourth sub-division of section 77 of the code, in which service may be made by publication, or by personal service of the summons out of the state. But before service can be made by publication, or by personal service of the summons out of the state, an affidavit must be filed setting forth that service of summons cannot be made within the state on the defendant or defendants to be served, and that the case is one of those mentioned in section 77. No affidavit was filed in this case, therefore there was no valid service of the summons. *Fiske v. Anderson*, 33 Barb., 75. *Litchfield v. Burwell*, 5 How., Pr., 341. 1 Code Rep., N. S., 41. *Morrell v. Kimball*, 4 Abbott Pr., 352.

The objection, that the affidavit of service of the summons has no venue, is well taken. An affidavit should show upon its face that it was taken within the officer's jurisdiction. The motion to quash, therefore, should have been sustained.

After the motion to quash the service had been overruled, the plaintiffs in error entered a general appearance, and filed the petition and bond to remove the cause to the circuit court of the United States. On the next day a default was taken against them, while the application to remove the cause was pending and undisposed of. It is remarkable that no effort was made by the plaintiffs in error to have the court pass upon the petition for the removal of the cause, before attempting to have the default set aside. No particular objection to either the petition or bond filed for the removal of the cause has been pointed out, and they appear to be sufficient. But in case of the refusal of the state court to accept the petition and bond, if the cause thereafter proceeds to trial and final judgment, such judgment is not void, but voidable. And where the petition for removal, in connection with the pleadings, fails to show that the cause is removable, the judgment will not be erroneous. *Gordon v. Longest*, 16 Pet., 97. *Insurance Co. v. Dunn*, 19 Wall., 214. *Kanouse v. Martin*, 14 Howard, 23; Id., 198. *Stevens v. Phœnix Ins. Co.*, 41 N. Y., 149. *Holden v. Putnam Fire Ins. Co.*, 46 N. Y., 1. *Savings Bank v. Benton*, 2 Metc. (Ky.), 240. Dillon on Removal of Causes.

We are aware that there are a number of cases which hold that after a proper application to remove a cause has been refused by a state court, all subsequent proceedings therein are without jurisdiction and therefore void. *Herryford v. Ins. Co.*, 42 Mo., 151. *Akerly v. Vilas*, 1 Abb. U. S., 284. 1 Bissell, 110. *Fisk v. U. P. R. R.*, 6 Blatchf., 362. Id., 8, 243. *Stevens v. Phœnix Ins. Co.*, 41 N. Y., 149. Dillon on Removal of Causes. But these decisions do not meet with our approval.

Section one, of article III, of the constitution of the United States provides that: "The judicial power of the United States shall be vested in one supreme court,

and such inferior courts as the congress may from time to time ordain and establish."

Section two, of article III, provides that: "The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made by their authority; to all cases affecting ambassadors or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of *different* states; between citizens of the same state claiming land under grants of *different* states; and between a state or the citizens thereof and foreign states, citizens, or subjects."

This prescribes the extent of the authority of the United States courts, beyond which Congress cannot authorize them to act, and jurisdiction assumed by them outside of these limits is without authority of law.

In *Turner v. The Bank of North America*, 4 Dallas, 8, the supreme court of the United States say: "The circuit court is a court of limited jurisdiction, and has cognizance of only a few cases specially circumstanced, and a fair presumption is, that a cause is without its jurisdiction until the contrary appear."

In cases arising under the constitution, laws, and treaties of the United States, the *subject matter* gives the jurisdiction without regard to the citizenship of the parties. But when questions of that character are not involved, it is the citizenship of the parties *alone* that confers the jurisdiction. And it must appear on the face of the record that the citizenship of the parties supports the jurisdiction. *Course v. Stead*, 4 Dallas, 22. *Montalet v. Murray*, 4 Cranch, 46. *Hodgson v. Bowerbank*, 5 Id., 303. *Sullivan v. The Fulton Steamboat Co.*, 6 Wheat., 450. *Dodge v. Perkins*, 4 Mason, 435.

Where a petition is filed to remove a cause on the ground that it is between citizens of different states, and the facts stated in the petition are denied by answer, may the court not hear testimony to determine whether the allegations of the petition are true? The question to be determined is one of fact, and in no manner depends on the construction to be given any law of the United States.

The court having obtained jurisdiction of the subject matter and the parties, no valid objection can be urged against its examining the grounds upon which it is sought to oust it of its jurisdiction. And it is the proper tribunal to make the examination.

The act of congress of March 3, 1875, assumes to take from the state courts this power.

In *Hadley v. Dunlap*, 10 Ohio State, 9, the supreme court of Ohio say: "As the state courts do not derive their powers and jurisdiction from the federal government, the authority of congress to impose duties upon such courts, or otherwise to act directly upon them, may well be questioned."

These views of the supreme court of Ohio meet our approval. Suppose the circuit court of the United States should assume jurisdiction in a case between citizens of the same state, where jurisdiction could only be acquired by reason of the parties being citizens of different states, its judgment thereon would be absolutely void. 1 Paine C. C., 486, 498. *Jackson v. Twentyman*, 2 Peters, 136.

Where, however, the application is in the proper form and the facts are such as to bring the case within the provisions of the law for the removal of causes, it is the duty of the district court to proceed no further in the cause. And should it do so, this court will correct the error, and order the cause certified to the circuit court.

The act of March 3, 1875, requires the application

for removal to be made before or at the term at which the cause could be first tried, *and before the trial thereof.*"

In the case at bar the application to remove the cause appears to have been filed at the proper time, but it does not appear to have been brought to the attention of the court until after the motion to set aside the default and to permit the plaintiffs in error to answer had been overruled and a decree had been entered in favor of the defendant in error. The plaintiffs in error make no explanation of the cause of their failure to call up the application for removal, and they appear to have voluntarily submitted to the jurisdiction of the court.

The court should have set the default aside and permitted the plaintiffs in error to answer. A party in default may be permitted to answer upon such terms as to the payment of costs as may be prescribed by the court, at any time before the judgment is rendered. And where it is apparent that the party in default has a meritorious defense to the action, the court must permit the answer to be filed. The court cannot deprive a suitor of a substantial right under the plea of the exercise of discretion. *O'Dea v. Washington Co.*, 3 Neb., 122. *Mills v. Miller*, Id., 95.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

J. E. BURBANK, PLAINTIFF IN ERROR, v. THOMAS ELLIS, DEFENDANT IN ERROR.

1. **Towns on Public Lands:** DEED FOR LOTS HOW EXECUTED. Where a town is located on the public lands, the mayor of the town, or if there is no mayor, the chairman of the board of

trustees if the town is incorporated, and if the town is not incorporated the county judge of the county in which the town is situated, is required to execute and deliver to each person who may be legally entitled to the same, a deed in fee simple for the lot or lots of such land as the party demanding the same may be legally entitled to.

2. ———: ———. The municipality does not acquire the legal title to the site. It is held by the mayor, chairman of the board of trustees, or judge of the county, in trust for the use of the occupants of the town and those entitled to deeds.

3. ———: ———. The failure of the mayor to recite in a deed the authority under which the conveyance is made, does not invalidate the conveyance.

4. **Deeds:** ACKNOWLEDGMENT. The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The acknowledgment is no part of the deed itself.

5. ———: ———. A certificate of acknowlegment is sufficient if it shows that the requirements of the statute have been complied with in substance.

6. ———: ———. A certificate which shows that: "On the 29th day of September, 1862, personally appeared before me, David Dorrington, mayor of Falls City," etc.: *Held*, a sufficient statement of the identity of the grantor.

7. **Lots in Towns on Public Lands.** The publication of the notice provided for in section four of the act approved Nov. 4, 1858, is not complete until thirty days *after* the first day of the publication thereof. Lots which remain unconveyed, and are *vacant* and *unoccupied*, are to be advertised and sold after the expiration of six months from the time of the completion of the publication of notice.

ERROR to the district court for Richardson county. Tried below, before WEAVER, J.

Isham Reavis, *Aug. Schoenheit*, and *E. W. Thomas*, for plaintiff in error, cited *Tecumseh Town Site Case*, 3 Neb., 267. *Mills v. Paynter*, 1 Neb., 443. *Davis & Barnes v. Murphy*, 3 Minn., 125. *Leech v. Ranch*, 3 Minn., 448. *Castner v. Gunther*, 6 Minn., 134. So far as concerns the execution of the deed to Burbank

we say this was the execution of a power given by statute, and that to the due execution of a power a recital of, or even an express reference to it, is not necessary; the intent to execute it is matter *en pais*, to be collected from all the circumstances. *Crane v. Lessee of Morris*, 6 Pet., 598. *Bishop v. Semple*, 11 Ohio St., 277. The district court should have allowed plaintiff to prove by parol evidence that Dorrington was mayor, and that when he made the deed in question, he did so for the purpose of executing the power given to him. *Gourley v. Hankins*, 2 Iowa, 75.

George P. Uhl, for defendant in error.

1. The court decided that the deed was the individual deed of Dorrington. This was right. Dillon on Mun. Corp., §450. *Coburn v. Ellenwood*, 4 New Hamp., 99. *Touchard v. Touchard*, 5 Cal., 306. *Brinley v. Mann*, 2 Cush., 337. *The People ex rel. Hunter v. Peters*, 4 Neb., 254. *Bank of Metropolis v. Guttschlick*, 9 Peters 19.

2. The city of Falls City was incorporated on the 13th of January, 1860. Sess. Laws 1859–60, p. 172. And by sections one and two of that act, the said city can only take and dispose of real property by the name of "Falls City," and the Town Site Act was passed *on the 4th of November*, 1858. Sess. Laws 1858, p. 266. The patent introduced is dated on the 20th day of February, 1862, and the deed which was excluded is dated 29th September, 1862. It appears from these different dates, that at the time Falls City entered the lands in the patent described, she could only enter them in her corporate character, viz.: "Falls City," and the patent conveying the land to the corporate authorities was really a conveyance to the city of Falls City. *New Market v. Small*, 45 N. H., 87. And every conveyance must come

from the "City of Falls City," and not from any particular individual: although the legislature has provided that the "mayor" shall be the agent by whom the conveyance shall be executed, it must still be executed in the name of "Falls City." *See authorities cited above.*

3. The acknowledgment to their pretended deed does not state that D. Dorrington was known to the officer taking the acknowledgment, which is an absolute requisite of the law. Gen. Stat. Neb., p. 879, §38. R. S., p. 279, § 43. Laws 1856. 12 Iowa, 389. A defective acknowledgment cannot be aided by parol evidence. 4 Ia., 381. 4 G. Green, 162, and authorities there cited. 1 Iowa, 413. 13 Ohio, 116. 1 Pet., 328–338.

MAXWELL, J.

The plaintiff brought an action of ejectment against the defendant, in the district court of Richardson county, to recover possession of lots 19, 20, 21, and 22, in block 65, in the town of Falls City.

The defendant in his answer to the plaintiff's petition, *First*, Denied all the facts stated therein. *Second*, Alleged that he was the owner of said lots, and in actual possession thereof, and that he had made lasting and valuable improvements thereon. *Third*, That he purchased said lots at a sale of the same for delinquent taxes in the year 1869, and that on the fourth day of September, 1872, the treasurer of Richardson county, in pursuance of the conditions of said sale, delivered to the defendant a deed to the same; and therefore the plaintiff's cause of action is barred by the statute of limitations.

The plaintiff in his reply to the answer denied the validity of the tax deed.

On the trial of the cause, the plaintiff introduced in evidence a patent from the United States to certain

trustees as the town council of Falls City, as the proper corporate authorities thereof, in trust for the several use and benefit of the occupants thereof, according to their respective interests under the act of May 25, 1844, and to their successors and assigns in trust, as aforesaid, the south-east quarter of section ten, in township one north, of range sixteen east of the sixth principal meridian.

The plaintiff then offered in evidence a deed of conveyance from the mayor of Falls City to himself, of the lots in controversy. The following is a copy of the deed:

THIS DEED WITNESSETH, That I, David Dorrington, Mayor of the Town of Falls City, Richardson county, Nebraska Territory, for and in consideration of one dollar to me in hand paid by J. Edward Burbank, do hereby grant, bargain, sell, and convey, unto the said J. Edward Burbank, his heirs and assigns, forever, the following described real estate, situate in said town, county, and territory, to-wit: * * lots 19, 20, 21, and 22, in block 65. * * And in my official capacity will warrant and defend the same against the claims of all persons whomsoever.

Witness my hand and official seal this 29th day of September, 1862.

(Signed) DAVID DORRINGTON,
Witness present, Mayor. { FALLS CITY SEAL }
GEORGE VANDEVENTER.

TERRITORY OF NEBRASKA,
COUNTY OF RICHARDSON. } ss.

On this 29th day of September, A.D. 1862, personally appeared before me the undersigned county clerk, in and for said county, David Dorrington, Esq., mayor of the city of Falls City, and signed and acknowledged the

above instrument of writing to be his voluntary and official deed.

Given under my hand and official seal, at my office in Falls City, the day and year last above written.

GEO. VAN DEVENTER,
County Clerk.

{ Seal. }

Objections were made by the defendant to the introduction of the deed in evidence, which were sustained by the court, and the deed excluded.

The defendant offered no evidence. Judgment was rendered for the defendant in the court below, to reverse which the plaintiff brings the case into this court by petition in error.

The fifth section of the act "to regulate the entry and disposal of town sites," approved November 4, 1858 (Laws, 1858, p. 266), provides that: "After the lapse of thirty days from the first day of publication of such notice the mayor of the town, or if there is no mayor, the chairman of the board of trustees, if such town is incorporated, and if the town is not incorporated, then the county judge of the county wherein the town is situated shall, on demand, execute and deliver to each person, who may be legally entitled to the same, a deed in fee simple for the part or parts, lot or lots, of such land as the person demanding may be lawfully entitled to, on the payment by such person of his proportion of the purchase money of the land, together with his proportion of such sum as may be necessary to pay for streets, alleys, squares, and public grounds, and all costs and expenses necessarily incurred in the entry of the land."

Section six provides for determining the question of title, where two or more persons claim title adversely to the same lot, lots, or lands.

Section eight provides that any person aggrieved by the determination of the mayor, chairman of the board of trustees, or county judge, may appeal to the district court, etc.

Section eleven provides that: "At the expiration of six months *after notice has been given* by publication of the entry of the town site, all lots not conveyed by deed shall be advertised for sale and sold to the highest bidder."

Section one of the act of congress in relation to town sites on the public lands, approved May 23, 1844 (5 Statutes at Large, 657), provides that: "Whenever any portion of the surveyed public lands has been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the existing pre-emption laws, it shall be lawful, in case such town or place shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judges of the county court for the county in which such town may be situated, to enter at the proper land office, and at the minimum price, the land so settled upon 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 said 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," etc.

The legislature, in pursuance of the authority here granted, has provided that the mayor of the town, or if there is no mayor, the chairman of the board of trustees, if the town is incorporated, and if the town is not incorporated, the county judge of the county wherein the town is situated, shall execute the trust, by making and delivering to each person who may be legally entitled to the same, a deed in fee simple for the lot, or lots, of lands

which the party demanding the same may be legally entitled to.

The municipality does not acquire the legal title to the site. It is held in trust by the mayor, chairman of the board of trustees, or judge of the county, for the use of the occupants of the town and those entitled to deeds. In the execution of the trust it is usual for the mayor, or other officer, making a deed to recite therein the authority under which the conveyance is made, but the failure to do so will not invalidate the deed. The objection, therefore, that the power is not recited in the deed is untenable.

Objection is made that the deed was made by Dorrington as an individual, and not as mayor. It purports to be his deed as mayor of Falls City, and is not his individual deed.

Objection is made to the form of acknowledgment. Section two, chapter 61, of the Gen. Stat., provides that: "The acknowledgment must be made or proved, if in this state, before a judge or clerk of any court, or some justice of the peace, or notary public therein; but no officer can take any such acknowledgment or proof out of his state jurisdiction."

Section thirty-eight provides that: "No acknowledgment of any conveyance having been executed shall be taken by any officer, unless the officer taking the same shall know, or have satisfactory evidence, that the person making such acknowledgment is the person described in and who executed the conveyance."

"Acknowledgment" is defined to be the act of one who has executed a deed, by going before some competent officer or court and declaring it to be his act or deed. Bouvier Law Dict., 56.

The function of an acknowledgment is twofold: to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded.

Id. The acknowledgment is no part of the deed itself. It is required by the statute as evidence of execution, or as authority for registration. *Lessee of Foster v. Dennison*, 9 Ohio, 125. A certificate is sufficient if it show that the requirements of the statutes have been complied with in substance.

In this case the certificate of acknowledgment states that "on the twenty-ninth day of September, 1862, personally appeared before him, David Dorrington, mayor of Falls City," etc. This is a sufficient statement of the identity of the grantor.

The defendant insists, that after the expiration of six months from the date of entry of the town site, all judicial discretion of the mayor ended, and a deed executed by him after that period had elapsed is null and void.

Section four of the act "to regulate the entry and disposal of town sites," approved November 4, 1858, provides for notice to be given of the fact of entry, and that no deeds for the land, or any part thereof, shall be executed and delivered within the period of thirty days *after* the first day of the publication of such notice.

Section eleven provides that "at the expiration of six months *after notice has been given by publication* of the entry of any town site, as provided in section four, the proper authorities shall advertise and sell such lots as are not conveyed by deed, and remain *vacant* and *unoccupied*." The publication of the notice provided for in section four is not complete until thirty days *after* the first day of the publication thereof; and the six months referred to in section eleven does not commence to run until the publication of the notice provided for in section four is complete. The date of publication of the notice does not appear, and in the absence of proof to the contrary, the presumption is, that the officer did his duty, and that the deed was made within the time prescribed by the statute.

The court therefore erred in excluding the deed from the jury, and this being decisive of the case the judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMAS METZ, APPELLEE, v. THE STATE BANK OF BROWNVILLE, NEBRASKA, IMPLEADED WITH T. C. CUNNINGHAM, SHERIFF, APPELLANT.

1. **Judgment:** LIEN. A judgment is not a specific lien on the real estate of the judgment debtor. It is merely a general lien thereon, and is subject to all prior liens, either legal or equitable. The lien merely confers the right to levy on the real estate of the judgment debtor, to the exclusion of other adverse interests subsequent to the judgment.

2. ———: ENTERING JUDGMENT. In addition to the general index provided for by statute, in which the names of the parties to an action, both direct and inverse, shall be entered, the judgment record must also contain the names of the judgment debtor and the judgment creditor, arranged alphabetically.

3. ———: MUST BE INDEXED. A judgment which is valid as soon as rendered, does not become a lien upon real estate as against a subsequent purchaser, without notice, until properly indexed. And a purchaser need not search for judgment liens further than to examine the proper index.

4. ———: ———: NOTICE. A subsequent purchaser, however, is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation, and in case of his failure to do so, he cannot plead ignorance of such facts as an examination of the record would have disclosed.

5. ———: ———: ———. In 1874, a judgment was recovered in the probate court of Richardson county against H., and in February, 1875, a transcript thereof was filed in the office of the clerk of the district court, but the name of the *judgment debtor*

was not entered in the general index under the letter H., nor were the names of the judgment debtor and judgment creditor arranged alphabetically in the judgment record. H., at the time the transcript was filed, owned certain real estate in the county, which he afterwards sold and conveyed to M., who had no actual notice of the filing of the transcript. In an action by M. to enjoin a sale of the premises on an execution issued on the judgment; *Held*, that the lien of the judgment did not attach to the land so as to affect the purchase.

6.——: ——: ——. *Quære.* Whether the entry of a judgment against defendants, in the firm name alone, creates a lien on real estate.

APPEAL from Richardson county, by defendant, The State Bank of Brownville, Nebraska.

J. H. Broady and *Isham Reavis*, for appellant.

As between the judgment debtor and creditor there is no need of indexing at all, except as mere matter of convenience, all must admit. As between them, all must admit that the judgment was a lien from the time of filing, whether indexed or not. If it became a lien as to them when filed, it continued to be a lien against the land—against everyone; and the principle of protection to *bona fide* purchasers awarded under the laws of registration of deeds does not obtain, because the law of registration of deeds is made for the very purpose and object and protection to purchasers, while the court record of judgments is for altogether a different purpose—namely: to perpetuate the evidence of the debt or claim, for the old claim is merged in the judgment, and the judgment becomes the only claim or matter between the original parties. The indexing is not of the substance, but may be called a luxury—simply for the convenience of all concerned in the record, and a convenience principally, and almost wholly, to subsequent purchasers, who may wish to inquire for liens against the lands. Making the index is a work enjoined on the

clerk by the law, for the convenience of subsequent purchasers, and when doing it the clerk acts officially; and while he is the agent, rather of the law than either of the parties, he is really doing a work for the convenience and benefit of subsequent purchasers, and if he omits that work, is liable in damages to the parties to be benefited by that work, namely, the purchasers. *Hesse v. Mann*, 40 Wis., 560. *Chatham v. Bradford*, 50 Ga., 327. *Bishop v. Sneider*, 46 Mo., 472. *Curtis v. Tyner*, 24 Vt., 338. *Sexton v. Rhames*, 13 Wis., 99. *Schell v. Stein*, 76 Pa. St., 398. *Green v. Garrington*, 16 Ohio State, 548. *Cook v. Hall*, 1 Gilm., 579. *Merrick v. Wallace*, 19 Ill., 486. 4 Central Law Journal, p. 340. *Throckmorton v. Prince*, 28 Texas, 605.

Schoenheit & Thomas, and *E. B. Stephens*, for appellee, Metz.

1. We think that it is not material in this case to decide whose duty it was to see that the entry on the judgment record was made. It is evident that no lien could be obtained until that entry was made. We would, however, submit to the court, that as the entry on the judgment record is made a condition precedent to the obtaining of a lien, it was the duty of the party insisting upon the lien to see that the statute was complied with. *Buchan v. Sumner*, 2 Barb., Ch. 195. *Frost v. Beekman*, 1 Johns., Ch. 299.

2. In states whose statutes are not as favorable to our view as those of Nebraska, it has been held that the indexing of a judgment is an essential part of the record, without which the judgment is ineffectual to impart notice to a subsequent purchaser. 5 Central Law Journal (April 13–27, 1877), 340, 387, 449. Freeman on Judgments, Sec. 343. *Buchan v. Sumner*, 2 Barb., Ch. 165. *Barnes v. McCarty*, 15 Iowa, 510. *Miller v. Brad-*

ford, 12 Iowa, 14. *Jenning's Lessee v. Wood*, 20 Ohio, 261. *Frost v. Beekman*, 1 Johns., Ch. 288. *Thompson v. Mack*, Harr. (Mich.), Ch. 150.

MAXWELL, J.

On the twenty-first day of September, 1874, the state bank of Brownville, Nebraska, recovered a judgment against William Hall for the sum of $374.85, and costs, in the probate court of Richardson county. On the thirteenth day of February, 1875, the bank procured a transcript of the judgment, and filed the same in the office of the clerk of the district court of Richardson county, Hall at that time being the owner of certain real estate in said county. The cause of action upon which the judgment was recovered was a promissory note given by Hall to the bank, which was signed by Theodore Hill and Lewis Hill as sureties; no service was had upon either of the sureties, and no judgment taken against them.

The transcript was entered on the judgment record as follows:

"State Bank of Brownville, Nebraska, v. William Hall, Theodore Hill, and Lewis Hill, partners as Theodore Hill and Company.

"Transcript from records of probate court, filed February 13, 1875.

"Against whom judgment was rendered—William Hall.

"Date of judgment, September 21, 1874.

"Amount of judgment, $374.85.

"Names of parties entitled to fees:

"Attorney's fee $30 00

"Costs in probate court ..... 5 50"

In the general index to the records of the district court, the entries were as follows:

"PLAINTIFFS:

"Bank, the state of, Brownville.

"DEFENDANTS:

"Theodore Hill and Co.

"JUDGMENT DOCKET.

"Book, 1	Page, 64	Amount, $374 85	Month, September 21	Year, 1874"

"DEFENDANTS:

"Hill, Theodore and Co.

"PLAINTIFFS:

"State Bank, Brownville.

"JUDGMENT DOCKET:

"Book, 1	Page, 64	Amount, $375 85	Month, September 21	Year, 1874"

On the twenty-second day of September, 1875, Hall sold the real estate in controversy to the plaintiff for the sum of $2,500, and gave him a bond by which he obligated himself to execute a deed in fee simple for the premises on or before the first day of April, 1876, upon the payment of $2,400, $100 having been paid at the time of the execution of the bond. Two days thereafter the plaintiff, with the aid of the county clerk, examined the county records, for the purpose of ascertaining the condition of the title to the property in question, and in consequence of the general index and the judgment record, or either of them, failing to show under the letter "H" that Hall was a judgment debtor, the plaintiff had no notice of the filing of the transcript.

The deed from Hall and wife to the plaintiff is dated March 4, 1876, and purports to have been filed for record February 13, 1876. It is not claimed by the defendants that the plaintiff had actual notice of the judgment until after he had received a deed for the land. It

is apparent, therefore, that the mistake is in the date of the deed, and not in the filing.

In March, 1876, the bank caused an execution to issue on the judgment, which was levied upon the lands in controversy. The plaintiff commenced an action to enjoin the sale under the execution, and on the hearing the court rendered a decree in his favor, to reverse which the defendant brings the cause into this court by appeal.

Section 321 of the code of civil procedure, which took effect September 1, 1873, provides that: "The clerk of the district court shall keep at least eight books, to be called the appearance docket, the trial docket, the journal, the complete record, the execution docket, the fee book, the general index, and the judgment record."

Section 322 provides that: "On the general index he shall enter the names of the parties to any suit, both direct and inverse, with the page and book where all proceedings in such action may be found. The judgment record shall contain the *judgment debtor* and the *judgment creditor*, arranged alphabetically, the date of judgment, the amount of the same, and the amount of costs, with the page and book where the same may be found. Transcripts of judgments from justices of the peace, or courts of probate, filed in the district court shall be entered upon said judgment record; and whenever said judgment is paid off and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Gen. Stat., 529.

Section 18, chapter 14, General Statutes, provides: "That any person having a judgment rendered by a probate court may cause a transcript thereof to be filed in the office of the clerk of the district court in any county of this state, and when said transcript is so filed and *entered upon the judgment record*, such judgment shall be a lien on real estate in the county where the same is filed, and where the same is so filed and *entered*

upon such judgment book, the clerk of such court may issue execution thereupon in like manner as execution is issued upon judgments rendered in the district court."

The only question necessary to be considered in this case is, whether or not indexing is an essential part of the record, without which filing the transcript of the judgment by the clerk of the court would be ineffectual to impart notice of the lien to a subsequent purchaser.

It is said that the docket is an index to the judgment, invented by courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. Tidd's Practice, 939. Freeman on Judgments, Sec. 343.

A judgment is not a specific lien on the real estate of the judgment debtor. It is merely a general lien upon such real estate, and is subject to all prior liens, either legal or equitable. *Rodgers v. Bonner*, 45 N. Y., 379. Freeman on Judgments, sec. 378.

The lien of the judgment is not an interest in the real estate of the debtor. The judgment creditor has neither a *jus in re* nor a *jus in rem*, as regards the debtor's property. The lien merely confers the right to levy thereon, to the exclusion of other adverse interests, subsequent to the judgment. *Grevemeyer v. Ins. Co.* 62 Penn. St., 342. *Conrad v. Ins. Co.*, 1 Peters, 386. *Kemper v. Adams*, 5 McLean, 507. *Schaffer v. Cadwallader*, 36 Penn. St., 126. *Thelusson v. Smith*, 2 Wheat., 396.

In addition to the general index provided for by statute, in which the names of the parties, both direct and inverse, shall be entered, it is also provided that the judgment record shall contain the *judgment debtor* and the judgment creditor, arranged alphabetically, etc. It is apparent, therefore, that the legislature intended that an alphabetical index should constitute a part of the record. Therefore judgments, which are valid as soon

as rendered, do not become liens upon real estate as against subsequent purchasers, without notice, until properly indexed. And such purchasers are not required to search for judgment liens further than to examine the proper index. *Hance's Appeal*, 1 Penn. St., 408. *Ridgway & Co's Appeal*, 15 Penn. St., 177. *Wood v. Reynolds*, 7 W. & S., 406. *Buchan v. Sumner*, 2 Barb., Ch. 167. *Braithwaite v. Watts*, 2 Cromp. & J., 318. Freeman on Judgments, sec. 343.

A subsequent purchaser, however, is affected with such notice as the index entries afford; and if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril. But the index in this case imparted no notice to the plaintiff, it being—"Defendants,"—"Hill, Theodore & Co."

It may be questioned whether the entry of the firm name of the defendants, without their christian names, creates a lien, but in this case no judgment was rendered against Theodore Hill & Co.

It is an indispensable element in a judgment record, in order to give subsequent purchasers notice of the filing of a transcript, that the names of the parties, plaintiff and defendant, be entered in the alphabetical index.

Webster defines "Index" to be—that which points out—that which indicates or manifests. One great object of an index is to render the contents of a book readily accessible. At this time, when inventions to save labor are in active demand, it will not be presumed that the legislature in providing for an index to the judgment record, intended it to be a useless appendage, of no validity—a mere trap for the unwary, or that a purchaser, notwithstanding the index, must spend days or weeks examining the records, in order to ascertain the condition of the title of the property he is about to pur-

chase. Such was not the legislative intent. The index affords a cheap, ready, and convenient method of ascertaining the condition of the title to real estate, and is made a part of the record, and a purchaser may rely upon it as being correct. As to the objection made by the plaintiff to the judgment against Hall, it appears from the record that the court had jurisdiction, and the plaintiff cannot now assail it for irregularities. The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE LINCOLN BUILDING & SAVING ASSOCIATION, APPELLEE, v. MICHAEL GRAHAM, APPELLANT.

1. **Corporations.** Though a corporation may be so defective as to render the franchise wholly invalid in a proceeding against it by the state, still its corporate existence, when acting under color of a franchise, cannot be questioned in a suit where it would arise collaterally.

2. ———: INTEREST ON LOANS. Persons associated and incorporated under section 123 and subsequent sections of Chapter XXV of the Revised Statutes of 1866, for the transaction of lawful business, have no authority as a corporation to charge and receive interest on loans made by them, to exceed the maximum rate allowed by law; and all loan contracts made by such corporation for interest in excess of the rate fixed by law, are affected with the vice of usury.

3. **Statutes.** An expository statute, which is substantially in the nature of a mandate to the courts to construe and apply a former law, not according to judicial, but according to legislative judgment, is inoperative, and cannot control the courts in interpreting the law and declaring what it is.

4. ———. The making of statutory laws, and their exposition and application to cases as they arise, are clearly and distinctly two different functions—the former is allotted by the constitution to the legislature, the latter to the courts.

THIS was an appeal from a decree rendered in the district court for Lancaster county. Tried below before POUND, J., who found the amount due plaintiffs to be the sum of $220.38, and that there was still to become due from the defendant Graham the sum of $10.17 per month, for each and every month yet to elapse before the stock in the plaintiffs' association shall become of the value of $200 per share. A decree was accordingly rendered directing the sale of the mortgaged premises, to satisfy said sum of $220.38, the surplus, if any, to be retained in court to abide the further order thereof; plaintiffs to pay the costs. From this decree defendant appeals.

Brown, England & Brown, for appellant.

1. The defendant is not estopped from denying the legal organization of the plaintiff, if its incorporation was void. *Welland Canal Co. v. Hathaway*, 8 Wend., 480. Angell & Ames on Corporations, 353.

2. The act of the legislature approved February 18, 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads and other purposes, to become bodies corporate," did not cure the defect in the plaintiff's organization. Said act is unconstitutional and void, for the following reasons, to wit: (a) It contains two subjects. (b) The object is not expressed in its title. (c) It is retroactive, and impairs the obligation of contracts then existing, or what is the same principle, attempts to make a contract where none existed before its enactment. Constitution 1867, Art. I, Sec. 12. Sedgwick on Con. Law, 192. Cooley on Con. Lim., 369. *Medford v. Learned*, 16 Mass., 215.

3. The evidence clearly proves the transaction to have been usurious. *Riesin v. The William Tell Saving*

Fund Association, 39 Penn. St., 137 and 154. *Philanthropic Association v. McKnight*, 35 Penn. St., 470. *Melvill v. American Benefit, etc.*, 33 Barb., 103. *Mutual Savings Bank v. Willcox*, 24 Conn., 147.

Harwood & Ames, for appellee.

1. The constitutional provision to which the act is said to be obnoxious, has been frequently construed, and it has been universally held that any matter properly connected with the subject named in the title and calculated to carry out its spirit and object is included therein, within the meaning of the constitution, and may properly be included in the act. *Tuttle v. Strout*, 7 Minn., 464. *People v. State Ins. Co.*, 19 Mich., 392. *McCaslin v. State*, 44 Ind., 151. *State v. Town of Union*, 33 N. J. L., 350. *Simpson v. Baily*, 3 Oregon, 515. *The People v. Commissioners*, 47 N. Y., 501. It appears distinctly from the title of this act, that its object is to authorize the incorporation of associations to transact just such a business as is transacted by the plaintiff, and the legalizing of such incorporations already existing is a proper part of the subject matter.

2. The contract is not usurious within the meaning of our statute on the subject of interest. The transaction is a mutual one, by which the borrower profits to as great a degree as members who do not borrow, and is equally interested in the allowance of premiums, and the prompt payment of interest and dues. The dues, however, have properly nothing to do with the loan, and do not affect its character one way or the other. They are paid solely in consideration of membership and for the purpose of raising a fund to be loaned, and are demandable equally from those who borrow and those who do not. The interest is at 12 per cent, the rate allowed by law, and may as well be paid monthly as in any

other way. The principal sum advanced or loaned to the member is never to be repaid, and the penalties are demandable only in case of a default of payment, whether by borrowers or non-borrowers, and at the worst cannot be regarded otherwise than in the light of the penalty to a common law bond. As they are incurred or not, at the option of the payor, they cannot be construed to make the contract usurious. What can be so construed is not apparent *Lucas v. Greenvill B. Ass.*, 22 Ohio St., 339. *Citizens Mutual Loan Ass. v. Webster*, 25 Barb., 263. *Burbage v. Cottow*, 8 Eng. L. and Eq. R., 57. *Spencer v. Tilden*, 5 Cow., 144, 149. *Hall v. Doggett*, 6 Cow., 652. *Cumming v. Williams*, 4 Wend., 680. *Hall v. Hoggart*, 17 Wend., 280.

GANTT, CH. J.

This is an appeal from a decree rendered in an action to foreclose a mortgage. The plaintiff claims to be a corporation, organized under the general incorporation laws of this state. From the record in the case, it appears that the defendant was a shareholder in the association of ten shares of stock; that he purchased one thousand dollars, being equal in amount to five shares of stock; that he executed the mortgage in question in the case to plaintiff for the sum of one thousand dollars, but actually received on the loan only $517.60, and that the balance of the one thousand dollars was retained by plaintiff as a bonus on the loan. Upon taking the loan and execution of the mortgage, the five shares held by the defendant reverted to the association. It further appears from plaintiff's own testimony that during the years 1872, 1873, and 1874, the defendant made payments on this loan and five shares which had reverted to the association in the aggregate to the amount of $356.31.

The first defense to this action is, that the "Lincoln Building and Saving Association was not a corporation duly organized under the laws of the state," but "that the plaintiff was organized for an illegal purpose to evade and violate the laws of the state on the subject of interest, and was illegal, and all its acts void." This is not a denial of the corporate existence of the association, but substantially an allegation that it was illegally incorporated for an illegal purpose.

In *Abbott v. Omaha Smelting Co.*, 4 Neb., 420, it is held, that "in order to establish a corporation it is necessary to show user of a corporate franchise by an association of persons, though the organization may be so defective as to render the franchise wholly invalid in a proceeding against it by the state," but "the existence of such corporation, acting under color of a franchise, cannot be questioned in a suit where it would only arise collaterally, because the state, the party chiefly concerned, could not be heard by counsel." *Buffalo Railway v. Cary*, 26 N. Y., 77.

The second defense to the action is the plea of usury. It was admitted that the association was incorporated under section 123, and subsequent sections of chapter XXV, of the general incorporation laws of this state. R. S. 1866, p. 232. Gen. Stat. 1873, p. 198. Section 123 provides, that "any number of persons may be associated and incorporated for the transaction of any lawful business." Sections 124 and 137 grant and define the corporate powers of the association, and provide that it may "make by-laws, not inconsistent with any existing laws, for the management of its affairs." Now, at the time the plaintiff was incorporated, Chapter XXVIII of the Revised Statutes of 1866 provided that the rate of interest upon a loan or forbearance of money should not exceed twelve per cent per annum. But article seven of the articles of the association provides that the funds

of the association shall be put up at auction and sold to the member who shall offer the highest bonus therefor, and that he shall execute his mortgage to the association for the full amount, which shall bear interest at the rate of twelve per cent per annum, payable monthly; and that the purchaser of two hundred dollars shall be held to have received his final dividend on one share of stock, which shall revert to the association. Hence, it seems that, although the plaintiff claims to be a building and saving association, yet according to the facts in the case, when considered in the light of the laws under which it was incorporated, and under which the loan was contracted, it clearly appears to be an institution organized to loan out its funds at usurious rates of interest, in such manner, and to receive payment in such way, as to evade the penalties of the usury laws. But, however ingenious such device may be contrived, it cannot receive the sanction of the courts, because it is a violation of "existing laws;" and therefore the transaction between the parties in this case must be treated as a mere loan of money, under a contract which is tainted with the vice of usury. *Reiser v. Tell Association*, 39 Pa. St., 142. *Denny v. West Phila. S. & B. Association*, 39 Pa., St., 156. *Melville v. Am. Benefit B. A.*, 33 Barb., 114.

The loan was contracted and the mortgage was executed on the second day of August, 1872, and the plaintiff had no authority in law to receive a bonus or usurious interest upon the loan made by it. It has been held several times by this court, that if, "by the terms of the contract between the lender and the borrower, the lender receives or reserves a greater rate of interest than the maximum allowed by law, such contract is affected with the vice of usury; and it makes no difference whether the usurious interest is expressed in terms in the instrument given for the payment of the debt created by the

loan, or whether it is taken as a bonus, or secured by any other corrupt agreement, device or shift, at the time of the contract." *Richards v. Kountze*, 4 Neb., 200.

But it is contended on the part of the plaintiff, that all the acts and contracts of the association were legalized and made valid and binding by the act of February 18, 1873, entitled "An act to enable associations of persons for raising funds to be loaned among their members for building them homesteads, *and other purposes*, to become bodies corporate." The words "and other purposes" must be treated as a mere nullity, because they express nothing, as a compliance with the constitutional provision which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title."

Then, the title is simply to enable associations of persons to become bodies corporate for the purposes expressed. But section three legalizes "all contracts and loans made by any corporation or association already formed," under chapter XXV of the Revised Statutes of 1866, with any member thereof, and section four defines what "shall be deemed in law a waiver of anything in such contract or loan that might be deemed usurious in the same under the laws of this state, at the time the same was made and securities given." And we are now asked to disregard the vested rights accrued to defendant by virtue of the laws under which the contract was made, and to determine the rights of the parties under the act of 1873. To do so would not only give this act a retroactive operation, but it would also give effect to an expository law in which one legislature attempts to interpret the statutes written by another legislature seven years before, and thereby adjudicate upon private rights which had accrued under the former laws. The law under which the loan was made, not only inhibited the bonus reserved by the plaintiff, but it also gave the de-

fendant the right to protect himself against the payment of such usury, and save his property from such usurious exactions. This is a vested right under the law, of which the constitutional provision declares he shall not deprived, and therefore it seems plain that this act of 1873 must be destitute of a retroactive force, not only because it is judicial, but also because it contravenes that provision of the constitution which declares that no person shall be deprived of his life, liberty, or property without due process of law. It is well understood, as a fundamental principle in our system of government, that the making of statutory laws, and their exposition and application to cases as they arise, are clearly and distinctly two different functions; the former is allotted by the constitution to the legislature, the latter to the courts.

Again, the two sections referred to are not in the nature of a declaratory statute, nor are they in the nature of a curative act; but they purport to be an interpretation of former laws, and are substantially in the nature of a mandate to the courts to construe and apply the former laws, not according to judicial, but according to legislative judgment. Can the legislature exercise such judicial authority? By Art. II, of the constitution, the powers of the government are divided into three distinct departments, "the legislative, executive, and judicial, and no person or collection of persons, being one of these departments, shall exercise any power properly belonging to either of the others," except as therein expressly directed or permitted. Hence the powers of the legislature are to enact laws, not to expound them; and the powers of the courts are to interpret the law, declare what it is, and apply it to cases as they arise.

In respect of the small amount exacted from the defendant as fines, it is only necessary to observe that the law under which the plaintiff was incorporated did not

give it authority to impose such fines, and therefore the amount so paid must be applied in discharge of the debt *pro tanto*.

We conclude that, according to the law under which the loan was contracted, the transaction between the parties must be treated simply as a loan of money, and, under our statute relating to interest, the plaintiff is entitled to receive only the principal of the debt contracted, less the bonus reserved and the payments actually made by the defendant to the plaintiff; and after making these deductions, we find there is still due to the plaintiff, on the debt, the sum of $161.39. Therefore the usual decree will be rendered for plaintiff for the amount so found in its favor, and the plaintiff to pay the costs.

DECREE ACCORDINGLY.

THE LINCOLN BUILDING & SAVING ASSOCIATION, APPELLEE, v. C. S. BENJAMIN AND E. BENJAMIN, APPELLANTS.

PER CURIAM. This case being in all respects similar to that of the Lincoln Building & Saving Association v. Michael Graham, it is only necessary to remark that for the reasons given in that case, the loan contracts in this must be held as usurious. The two loans aggregate the sum of one thousand dollars; but it is admitted the defendants received only $590, the balance having been reserved by plaintiff as a bonus on the loans. It is also admitted that the defendants have paid on these loans, in all, the sum of $388.56. Now, under the law relating to interest, the plaintiff is entitled only to the payment of the principal of the debt contracted by the

loan, less the bonus reserved and the payments actually made by the defendant. After making these deductions, we find there is due to the plaintiff, on the two loans, a balance of $201.44. Therefore the usual decree will be rendered for plaintiff for the amount so found due in favor of plaintiff; the plaintiff to pay the costs.

DECREE ACCORDINGLY.

STRITE AXTELL, PLAINTIFF IN ERROR, v. THOMAS F. WARDEN, DEFENDANT IN ERROR.

1. **Exemption.** When the head of a family resides upon lands owned by him as a homestead, he cannot receive the benefit of the exemptions provided by section 521 of the code.

2. ———: HOMESTEAD. It is matter of no consequence whether the lands so occupied by him as a homestead have been entered under the homestead or pre-emption laws of congress, or under the act permitting purchase of lands, known as "offered lands."

3. ———: HOMESTEAD ON PUBLIC LANDS OF THE UNITED STATES. When a person has entered lands under the homestead act of congress, and has resided upon and cultivated the same over five years, and in all respects has complied with the requirements of the law, he is the real owner of such lands; the United States holds the legal title simply as trustee for such owner, without any interest in such lands, except a mere special interest for the amount of unpaid fees.

ERROR to the district court for Jefferson county. Tried below before WEAVER, J.

John Saxon, for plaintiff in error.

This plaintiff was within the statutory provisions. He was, it is true, the owner of various parcels of land in that county, but as none was *subject* to exemption as

a *homestead* under the laws of this state, he stood in the same position as though he had no lands, town lots, etc. A government "homestead" is a very different thing from a "homestead" under the laws of this state. It is not of the same nature or quality. It does not proceed from the same source, and a government homesteader does not and cannot claim it or anything pertaining to it under the laws of this state. The thing itself and all of its qualities, attributes, rights, perquisites, and privileges, proceed from and are governed and regulated by, not the laws of this state, but the United States. We take it to be conclusive against a person's claim to a government homestead, when it is shown or admitted as a fact that he is residing on lands or town lots which are subject to exemption as a homestead under the laws of the state. We are not aware of any holding that a residence or occupancy of a government homestead is a satisfaction of the provisions of the laws of this state.

Brown, England & Brown, for defendant in error, cited *Bellinger v. White*, 5 Neb., 401. 43 Tex., 199. *Hagenbuck v. Reed*, 3 Neb., 17. *Jarvis v. Hoffman*, 43 Cal., 315. *Kirkaldie v. Larrabee*, 31 Cal., 455. If the plaintiff had possession, use, and occupation of his homestead; if he held such homestead as owner under a valid legal contract; if upon his death his homestead would descend to his widow or heirs; if he was legally liable to pay taxes thereon, even without completing his proofs; if, more than that, he had power to pledge, mortgage, and even sell his homestead land, he must certainly be an owner of such homestead within the meaning of our statutes for the purposes of this action, and therefore not entitled to the exemption of $500 worth of personal property claimed, and the judgment of the district court in this action ought to be affirmed.

GANTT, CH. J.

Upon a judgment he obtained against the plaintiff in error, in the district court of the county, the defendant in error caused an execution to be issued, by virtue of which the sheriff levied on personal property of the plaintiff, on the 26th of June, 1876, and afterwards sold the same.

By an agreed statement of facts, it is admitted that the plaintiff is the head of a family, and that he filed an inventory of his personal property, as required by law, for the purpose of availing himself of the exemptions under section 521 of the civil code. It is also admitted that at the time the judgment was rendered, the plaintiff was the owner of two hundred and forty acres of lands in the county; that of these lands one piece of forty acres has been sold for taxes, and there was a lien on the same against Thomas Axtell, from whom he purchased the same; that pursuant to a verbal agreement previously made, he deeded one hundred and sixty acres of these lands, being the north-west quarter of section twenty-two, in township three north, of range two east, to his son. It is further admitted that, on the 28th of October, 1869, the plaintiff, under the act of congress, entered the north-west quarter of section twenty-one, in the township and range aforesaid, as a homestead, and has since that date continuously resided thereon, and did in all respects comply with the requirements of the homestead laws. Under this state of facts, the plaintiff in error insists that he was entitled to personal property exempt from forced sale on execution to the value of five hundred dollars; and brought this action in the district court to recover damages for selling the property so levied and sold upon the execution.

Section 521 of the code provides that "all heads of families, who have neither lands, town lots, or houses

subject to exemption as a homestead, under the laws of this state, shall have exempt from sale on execution the sum of five hundred dollars in personal property."

Now, according to the facts admitted, exclusive of the forty acres sold for taxes and the land deeded to his son, the plaintiff owned two hundred acres of lands, and resided on one hundred and sixty acres of these lands as his homestead. We think this fact is decisive of the case. The proposition that a person having secured a homestead under the acts of congress, by complying in all respects with the requirements of the laws, is entitled to have exempt from sale on execution personal property to the value of five hundred dollars, unless he owns other lands, lots, or houses also, as a homestead, cannot receive the sanction of the law. The law provides one homestead only for the head of a family, and while he resides upon and enjoys all the rights and privileges of such homestead, he cannot receive the benefits of the exemptions provided by section 521; these exemptions are designed for those only who own neither lands, town lots, or houses as a homestead. And it is matter of no importance whether the lands so occupied as a homestead have been entered under the homestead or pre-emption laws of congress, or under the law permitting the purchase of lands known as "offered lands."

The plaintiff in this case has continuously resided on his homestead over six years, and it is held in *Bellinger v. White*, 5 Neb., 401, that "by residing upon and cultivating the land for more than five years, he could complete his title at any time by making final proof and paying the fees required by law. The United States did not own the lands, but held them simply as a trustee, having no interest therein except a mere special interest for the amount of unpaid fees. The plaintiff was the real owner, and could not be deprived of the title except through his own neglect." And in *Cheney v. White*,

Ibid, 261, it is held that "the mere delay of the officers of the government, in such case, in issuing the evidence of the title—the patent—could not be held to deprive him of the right to make such disposition of the land, either by deed or mortgage, as he might desire."

Therefore, the plaintiff being the owner of the one hundred and sixty acres of land, upon which he resided as his homestead, he was not entitled to the benefits of the exemptions provided by section 521. He was, however, entitled to the benefits of the exemptions provided for in section 530, and for aught that appears in the record, he may have availed himself of the benefit of such exemptions.

Finding no error in the judgment of the court below, the same is affirmed.

JUDGMENT AFFIRMED.

STRITE AXTELL, PLAINTIFF IN ERROR, v. THOMAS F. WARDEN, DEFENDANT IN ERROR.

1. **New Trial.** In a petition for a new trial, under section 318 of the civil code, on the ground of newly-discovered evidence, it is not sufficient to allege that the plaintiff "has learned, since the term of the court and the trial," certain matters constituting the grounds for a new trial; the allegations must be affirmatively stated, and not upon information.

2. ———. In such case, the law requires the moving party to show that he has exercised reasonable diligence to discover and produce such evidence at the trial; and his failure to do so deprives him of all claim to a new trial.

3. ———. The petition is liable to demurrer, if it does not state facts sufficient to entitle him to a new trial, when they are admitted to be true.

ERROR to the district court for Jefferson county. Tried below before WEAVER, J.

John Saxon, for plaintiff in error.

The petition sets up as a ground of reversal and new trial, a fraudulent concealment of facts on the part of defendant, which, if known, would have resulted in a verdict in favor of the plaintiff instead of the defendant.

Both the facts and the concealment of them are admitted by the demurrer.

Is it fraud, or fraudulent practice, for a party to an action to conceal from the court and jury facts, which, if divulged, must necessarily defeat him in his case, and give the verdict to his adversary? We think it is, when those facts so concealed within his own knowledge, would not tend to his conviction of a criminal offense. They are not privileged otherwise; and his oath as a witness, requiring him to testify the truth, *the whole truth*, etc., is violated if he do conceal them. Freeman on Judgments, sections 99, 100, 489, 490, 491, 493, and authorities cited. Did the plaintiff use due diligence? This question, we submit, must be answered by the court upon the allegations of the petition as admitted by the demurrer. The judgment was erroneous, because given upon demurrer. The code does not provide for such a proceeding in these cases.

Brown, England & Brown, for defendant in error, cited: Gen. Stat. 578, secs. 314 and 318. *Heady v. Fishburn*, 3 Neb., 366. *Barry v. Blumenthal*, 32 Mo., 29. *Mays v. Deaver*, 1 Iowa, 216. *Jenny Lind Co. v. Bower*, 11 Cal., 194. *Arnold v. Skaggs*, 35 Cal., 684. *Caldwell v. Dickson*, 29 Mo., 227. *Moss v. Vroman*, 5 Wis., 147. The petition did not set forth the newly discovered evidence, and was insufficient for that reason. 3 Graham & Wat. on New Trial, 1071, 1067. *Shepherd v. Shepherd*, 5 Halsted, 250. *Lessee of Ludlow*

Heirs v. Park, 4 Ohio, 44. *Suggs v. Anderson*, 12 Geo., 461. *Ewing v. McConnell*, 1 A. K. Marsh (Ky.), 188. *Albert v. Woodbury*, 22 Me., 246.

GANTT, CH. J.

This is an application by petition for a new trial, on the ground of newly discovered evidence.

The original action was brought by defendant in error against the plaintiff in error, to recover damages for property burned up by a prairie fire, alleged to have been set out on the eleventh of November, 1873, by plaintiff. The plaintiff in his petition states as ground for a new trial: *First*, "that he has *learned* since said term of court and said trial, that one O. C. Burch and one Isaac Packer * * did each of them set out a prairie fire on or near their respective premises, on the eleventh day of November, 1873," and that these fires ran upon the premises and burned the property of defendant. *Second*, that the "defendant had knowledge of the setting out of said fires by Packer and Burch when he commenced his action against this plaintiff," and fraudulently concealed the same. In the verification to the petition, the plaintiff "on oath says, that he believes the facts stated" therein are true. Upon these statements rest all the other allegations in the petition; and they constitute the grounds upon which the plaintiff bases his right to a new trial—and the second statement necessarily depends on the first. It will therefore be observed that the statement in the petition is not one of fact in respect of the matter stated, but is upon information, and the affidavit merely states a belief in this information. Does such an allegation constitute sufficient grounds to support the petition?

The rule seems to be well settled that upon a motion for a new trial on the ground of newly discovered evidence, the application must be accompanied with the

affidavit of the witness by whom the alleged facts can be proved, so that the court may be able to judge of its force and effect; and the application will be denied if supported only by the affidavit of the party interested, unless sufficient cause is shown why that of the witness cannot be produced. 3 Graham & Waterman on New Trial, 1021. *Cummins v. Walden*, 4 Blackf., 308. And on the question of diligence the party should negative every circumstance from which negligence may be inferred (*Crozier v. Cooper*, 14 Ill., 141. *Laflin v. Herrington*, 17 Ill., 403); and the allegation "that the witness knew a material fact which he did not disclose furnishes no excuse, if he was not questioned as to it;" for if he was not interrogated as to the matter "it will indicate such want of diligence as to deprive the party of all claim for a new trial on the ground of newly discovered evidence." 3 Graham & Waterman on New Trials, 1029.

Now in view of these general principles in regard to an application by motion for a new trial on the ground of newly discovered evidence, it seems very clear that when the application is made by petition, under section 318 of the civil code, the party must state in his petition facts, which, if admitted to be true, constitute sufficient grounds to grant a new trial; and the facts must be affirmatively stated, and not merely upon information. If any other rule were adopted it would open the door to endless applications for new trials.

In *Arnold v. Skaggs*, 35 Cal., 687, it is held that in an application for a new trial on the ground of newly discovered evidence, it is not sufficient for the moving party to state what *he has learned* certain persons know about the matter and that he believes the same to be true.

In *Caldwell v. Dickson*, 29 Mo., 228, it is said that "it is not enough for the moving party to swear that he

is *informed*, and *believes*, or has *learned* that new evidence has been discovered, or a new witness has been found." The issue to be raised in an application by petition for a new trial, is not whether the plaintiff "has learned" certain matters since the trial. On the contrary, it must be an issue upon facts affirmatively stated in the petition. It has been determined upon demurrer that it is not a sufficient averment of facts in a petition to state the plaintiff is so informed. 1 Madd., 565. *Ford v. Peering*, 1 Vesey, Jr., 77.

Again, this case comes within that provision of the code, under which a new trial may be 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." This statute requires the party to use reasonable diligence to discover and produce the evidence at the trial, and his failure to do so deprives him of all claim to a new trial; but in the case at bar, the petition does not contain any averment that the plaintiff exercised any such diligence whatever, nor does it give any reason why he did not do so. This defect in the petition is fatal. *Sulley v. Keuhl*, 30 Iowa, 278.

In conclusion, it only remains to remark that the general rule is that when the objection to a petition or pleading appears upon its face, advantage may be taken of it by demurrer. And the demurrer only admits what is well pleaded, and as the petition in this case is not well pleaded, it receives no aid from the technical admission. *Evans v. Instine*, 6 Ohio 118. The judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

JOSEPH B. LOWRIE AND OTHERS, PLAINTIFFS IN ERROR, V. GEORGE B. FRANCE, DEFENDANT IN ERROR.

1. **Practice:** ERROR: EXCEPTIONS. When errors of law and irregularities occurring at the trial are the grounds on which a new trial is moved, in order to entitle a party to a review of the decision of the court on the motion an exception is necessary.

2. ———: ERRORS MUST BE SPECIFICALLY POINTED OUT. In proceedings in error, if the petition below set forth a good cause of action, in a matter within the jurisdiction of the court, in order to obtain a review of the judgment, the particular ground upon which it is claimed to be erroneous must be specifically pointed out; otherwise it will be presumed that the judgment is right.

3. ———: SPECIAL FINDING: WAIVER OF. Where the court is requested under the statute to state its findings of fact and of law separately, and omits to do so, if no exception be taken, this will be considered as a waiver of the demand, and an acquiescence in a general finding upon the issues.

ERROR to the district court for Seward county. Tried below before POST, J.

N. S. Scott, for plaintiff in error.

George B. France, pro se.

LAKE, J.

This was an action by the defendant in error to foreclose a mortgage executed by the plaintiffs in error to Henry Wortendyke as security for the payment of a promissory note, payable to the order of said Wortendyke, and by him assigned to the defendant. The answer set up the defense of a usurious consideration, which was known to the defendant when he received the note. All of the allegations respecting the usury were put in the issue by the reply.

On the trial the plaintiffs in error, with a view of excepting to the decisions of questions of law, requested the court to state its conclusions of fact and law separately, as is provided in section 297 of the code of civil procedure. This, however, the court did not do, but found generally for the defendant in error, and thereupon decreed a sale of the mortgaged premises to pay the amount found to be due. To this decree there was simply a general exception.

The next step in the case was a motion for a new trial on the grounds:

First. That the decision of the court is not sustained by sufficient evidence, and is contrary to law.

Second. Errors of law occurring at the trial and excepted to by the defendants at the time.

Third. Irregularities in the proceedings of the court by which said defendants were prevented from having a fair trial.

On the hearing of this motion a conditional order was entered "that the same be sustained unless the said plaintiff, George B. France, remit the sum of $96." The remitment was accordingly made, and thereupon the motion for a new trial was overruled. To this order no exception was taken, so that we must presume that the parties were then satisfied with the result.

The case, however, is brought to this court for review, and several errors are assigned, the first of which is, that: "The court erred in rendering judgment for the plaintiff in the said action." As an assignment of error this is altogether too general to be regarded. No reason is given for the supposition that the court erred in giving this judgment. It is not denied that the petition sets forth a good cause of action, nor that the evidence was ample to sustain it. When this is the case, in a matter within the jurisdiction of the court, the particular ground on which it is claimed that the judg-

ment is erroneous must be specifically pointed out, or it will be presumed to be right.

The second error assigned is, that "the judgment is too large." By this we suppose is intended that it is for more than was really due on the note. But even if this be the fact there is nothing in the record from which it can be known. The judgment is within the amount claimed by the petition, and the evidence not having been preserved we must presume it to have been ample to justify the court in its findings.

The third error complained of is the failure of the court "to find specifically upon the matters in issue as requested by the defendants." There can be no doubt that the case was one in which the court might be required, if requested, to state its findings of fact and law separately, and the refusal or failure to do so, if properly availed of, would be good cause for reversal. In this case, however, the record shows no exception on this ground at the rendition of the judgment, nor is the failure to comply with this request even suggested in the motion for a new trial. This must be considered as a waiver of the demand, and an acquiescence in a general finding.

Several other errors are assigned, but they are such as necessarily depend upon the testimony produced on the trial, and there being no bill of exceptions, nor agreed statement of what the evidence was, they are not in a situation to be considered.

JUDGMENT AFFIRMED.

CHARLES H. FREY, PLAINTIFF IN ERROR, v. WENZEL DRAHOS, DEFENDANT IN ERROR.

1. **Practice:** PRESUMPTION. In a proceeding in error every presumption must be in favor of the correctness of the judgment of the court below. It is only "for errors appearing on the record" that the judgment of a district court can be properly reversed.

2. **Replevin:** DAMAGES: EVIDENCE. Where in an action of replevin tried to the court without a jury it was found that the use of the property while held by the plaintiff was worth $519, and that during the same time the property had depreciated in value $218, but neither of these items having been *allowed as damages*, and the testimony not having been preserved: *Held*, that there was no means of ascertaining whether they ought to have been allowed as damages or not, but that the inference to be drawn from the fact that the court below did not allow them is, that the evidence did not warrant it.

3. ———: ———: ———. If the property of a judgment debtor, in his possession or under his control, be seized by a sheriff in execution, and afterwards replevied from him by one having no interest therein, the true measure of the officer's damages is its value together with interest from the time it was taken. But in such case the defendant should not have damages for the detention or use of the property in addition to its value, for this would be compensating him twice for the same injury.

4. ———: ———: ———. But where the property is levied on, not in the possession of the judgment debtor, but in the possession of the plaintiff, who is holding it under a purchase made in good faith, but from a person having no authority to sell it, the debtor laying no claim whatever to it, the propriety of permitting the officer, in addition to the full amount due on his executions, to recover also for the benefit of the debtor may well be doubted.

5. ———: ———: ———. It is the duty of the court, upon finding the defendant entitled to property replevied from him, to proceed to assess adequate damages in his favor. The "right of possession only" carries with it the right to have at least nominal damages, independent of proof of any actual loss sustained. But the failure to assess damages can be corrected only

by motion for a new trial, and the preservation of all the evidence bearing on the question.

6. ——: ——: ——. While a judgment in favor of the defendant for a return of the property which fails to award at least nominal damages, is for that reason technically defective, still if it conform in this respect to the finding of fact which is not questioned by motion for a new trial, the judgment will not be reversed on that ground.

THIS was a petition in error to reverse a judgment of the district court for Cuming county. The case came before this court in 1877, and is reported 6 Neb., 1. At the adjourned November term, 1877, of the district court of Cuming county, held January, 1878, the case was again tried. A jury being waived, a trial was had to the court, and a special finding of the facts and the law made. After finding that the plaintiff in replevin had no interest in the property, and was not entitled to the possession of the same, but that the defendant was entitled to the possession by virtue of a levy thereon as the property of the Grange Company of Cuming county, under two executions, in favor of the First National Bank of Omaha, and against said Grange Company, the court found as a matter of law, that the defendant, having only a special interest in the property was entitled to recover to the extent of such special interest only, and rendered judgment accordingly. Further facts appear in the opinion.

Crawford & McLaughlin, for plaintiff in error.

1. When the suit is between the general owner, or a special property man, or one having only a lien on the property, as by levy under execution, and a mere stranger, the measure of damages, as against such stranger, is the full value of the property and damages for the detention according to the general rule; and if the party recovering has only a special property in the goods, he

recovers the balance for the general owner, to whom he is responsible for any excess after satisfying his lien. Sedgwick on Damages, Sec. 482, 483, and 501. 2 Parsons on Cont., 118. *Hays v. Riddle*, 1 Sand., 248. *Buck v. Remson*, 34 N. Y., 383. *Booth v. Abelman*, 20 Wis., *22. *Rawley v. Gibbs*, 14 Johns., 385. *Brizee v. Maybee*, 21 Wend., 144. Field on Damages, Sec. 837. *Fallon v. Manning*, 35 Mo., 271. *Frei v. Vogel*, 40 Mo., 149. *Ingersoll v. Van Bokkelin*, 7 Cow., 670, and note. *Chamberlain v. Shaw*, 28 Pick., 278. *Augier v. Tauton*, 1 Gray, 621. *Hyde v. Cookson*, 21 Barb., 92. 2 Greenleaf on Evidence, Sec. 649. *White v. Webb*, 15 Conn., 302.

2. Judgment must conform to finding. *Black v. Winterstein*, 6 Neb., 224.

3. The value of the use of the property during the time of detention may be recovered where the property has a usable value, such as a horse, wagon, steam engine, etc. *Allen v. Fox*, 51 N. Y., 562. *Williams v. Phelps*, 16 Wis., *81. Field on Damages, Sec. 826. *Morgan v. Raynolds*, 1 Mont. (Ter.), 163. *Clapp v. Walters*, 2 Tex., 130. *Darby v. Cassaway*, 2 H. & J., 413. *Butler v. Mehring*, 15 Ill., 488. *McGavock v. Chamberlain*, 20 Ind., 219. So also may damages be recovered for any deterioration of property while detained. Field on Damages, Sec. 831. *Gordon v. Jenny*, 16 Mass., 455.

R. F. Stevenson, for defendant in error, cited *School District v. Shoemaker*, 5 Neb., 36. *Hewson v. Saffin*, 7 Ohio, 587. *Pugh v. Calloway*, 10 Ohio State, 488. *Jennings v. Johnson*, 17 Ohio, 154. *Latimer v. Motter*, 26 Ohio State, 482. The defendant in error would not be liable for damages for unlawful detention to the true owner until after demand, it having been shown that he obtained his title to the property from the Milburn wagon company, who purchased the same at a chattel

mortgage sale, and certainly if he would not be liable to the true owner for damages of that character, there being no demand on him for the property, he cannot be held to respond to a party who only has a special interest in the property. *Arthur v. Wallace*, 8 Kan., 267.

LAKE, J.

It should not be forgotten that every presumption must be in favor of the correctness of the judgment of the court below. It is only "for errors appearing on the record" that the judgment of a district court can be properly reversed. Code of Civil Procedure, Sec. 582. As to all questions of fact they must stand as found by the court below, there being no evidence before us, nor any foundation laid for their review. The only questions, therefore, which we can consider concern the judgment pronounced upon the facts as found.

The substance of the findings of fact is: *First*, That the defendant in error, who was plaintiff below, purchased the property in question at a public sale, and in good faith, but from one who, as it appears, was a stranger to the title, and that consequently he "did not have the right of possession of the said goods and chattels at the commencement of the action." This purchase was made "on the sixth day of December, 1875," and, although not so expressly found, still we think it reasonably inferable, before the executions hereafter referred to were levied upon the property. In other words that at the time the executions were levied the property had been purchased by the defendant in error, who then had it in his possession, under an honest claim of ownership. *Second*, That the plaintiff in error "was by virtue of two executions to him directed as sheriff of Cuming county * * * entitled to the possession of said goods and chattels at the commence-

ment of this action. That said executions are unsatisfied; then there was due thereon the sum of four hundred and eighteen dollars and fifty-one cents, the amount of said executions and interest to date of this judgment, together with costs," &c. *Third*, "That at the time the property was replevied it was of the value of one thousand and ten dollars, and that the value of the use of said chattels, during the time of the detention by the plaintiff, is five hundred and sixteen dollars, and that said goods and chattels have depreciated in value since the commencement of this action in the sum of two hundred and eighteen dollars."

The record further shows that: "The court finds, as question of law on the facts stated, that defendant (plaintiff in error) should have return of the property, or, on failure to return, damages to the amount of his special interest as sheriff, being the amount of the two executions, together with interest from the commencement of this action to date, and his costs expended." And a judgment substantially conforming to these conclusions of law was thereupon rendered.

The main grounds of objection to this judgment are: *First.* That with the order for the return of the property there was not also included damages equal to the full value of its use, together with its depreciation in value while held by the defendant under the order of replevin. *Second.* That on the contingency of a non-return of the property the damages were limited to the amount called for by the two executions, whereas it is contended that the recovery ought to have been in a sum equal to its full cash value at the time it was replevied, together with the value of its use while the plaintiff in error was deprived of its possession.

Of the first of these objections it may be said, that if the plaintiff in error had been the real owner of the property the rule contended for would probably have

been applicable, but not necessarily so, as to at least a portion of it.

In the case of *Barney v. Douglass*, 22 Wis., 464, it was held that the owner of a steam engine could not recover for its use during the time it was wrongfully detained without showing that he was in a situation to use it, and was prevented from doing so by such detention. And this we think is a reasonable rule. It does not appear whether this property was in use or not. In this case it is true that the court found from the evidence that the use of the property while held by the defendant in error was worth $519, and that during the same time it had depreciated in value $218, but whether under the evidence these items ought to have been allowed as damages we have no means of ascertaining. The inference to be drawn from the fact that the court below did not allow them is, that the evidence did not warrant it. As to the depreciation in the value of the articles, this may have been without the slightest fault on the part of the defendant in error, and under such circumstances as would make it most unjust to hold him accountable for it.

If the property of a judgment debtor, in his possession, or under his control, be seized by a sheriff in execution, and afterwards replevied from him by one having no interest therein, the true measure of the officer's damages is its value, together with interest from the time it was taken. *Buck v. Remsen*, 34 N. Y., 383. *White v. Webb*, 15 Conn., 302. *Hall v. Jenness, et al.*, 6 Kan., 356. But in such case the defendant should not have damages for the detention, or use of the property, in addition to its value, for as is well said in *Garrett v. Wood*, 3 Kan., 231, "this would be compensating him twice for the same injury." But in this case, as before shown, the defendant in error, at the time of the levy, was in the peaceful possession of the property under a claim of ownership, and for aught that appears with no

one, save the plaintiff in error with his executions, questioning the soundness of his title. It does not appear that the execution debtor himself laid any claim whatever to it. Under these circumstances the propriety of permitting the officer, in addition to the full amount due on the executions, to recover for the benefit of such debtor may well be doubted.

Section 191 of the code of civil procedure, concerning replevin, provides that: "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find *either* in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant."

In this case the court, by consent of the parties, took the place of the jury in the determination of questions of fact, and found, not that the defendant in the action "had the right of property," which we have reason to suspect might have been proper, but merely that he was "entitled to the possession of said goods and chattels at the commencement of the action," and omitting altogether to assess damages, except contingently upon a non-return of the property.

It was the duty of the court, upon finding that the defendant was entitled to the possession of the property, to have proceeded to assess adequate damages in his favor as the statute directs. The "right of possession only" carries with it the right to have nominal damages at least, independent of proof of any actual loss sustained. But an error of this sort can be corrected only by a motion for a new trial, and the preservation of all the testimony bearing on the question.

Section 7, of an act to amend the code of civil pro-

cedure passed February 26, 1873, provides what sort of judgment shall be rendered on the several findings that may be had in replevin cases. It enacts that: "The judgment in the cases mentioned in sections one hundred and ninety, and one hundred and ninety-one, and in section one thousand and forty-one of said code, shall be for the return of the property, or the value thereof, in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Gen. Stat., p. 713. Now while this judgment, in failing to award at least nominal damages with a return of the property, is not technically correct, still it follows strictly the findings of fact, and in all other respects conforms in all essential particulars to this section of the statute. We see nothing in this judgment prejudicial to the plaintiff in error, and therefore it must be affirmed.

JUDGMENT AFFIRMED.

MAX RICH, PLAINTIFF IN ERROR, v. THE STATE NATIONAL BANK OF LINCOLN, NEBRASKA, DEFENDANT IN ERROR.

1. **Banks:** CONTRACT BY OFFICERS: ESTOPPEL. O., the president of a bank, informed one R. that they were about to reorganize the bank, and that if he would act as director thereof, and his firm would give the bank all their business as they had done before, and use their influence in its behalf, that they would give him ten shares of the stock. R. accepted the proposition, and was elected and served as a director, and the firm of which he was a member continued to do business with the bank. *Held*, 1st, that the agreement was a sufficient consideration to entitle R. to the ten shares of stock. 2d. That the president professing to act for the bank in the transaction, and the bank receiving the benefits derived from the contract, thereby ratified his action.

2. **Practice in Supreme Court.** Ordinarily where cases pending in the supreme court are reached in their regular order on the docket, they will not be passed to the foot of the docket or continued, except by consent of both parties.

3. ——: AGREEMENTS OF ATTORNEYS. Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced; but oral agreements, entered into out of court, will not be recognized or considered.

4. **Banks:** POWER OF OFFICERS. As a rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of persons having no knowledge to the contrary.

5. ——: ——. No officer of a bank can bind it by a promise to pay a debt which the corporation does not owe, and was not liable to pay, unless the bank authorized or has ratified the act; but ratification is equivalent to original authority to act in the matter, and corporations are bound in the same manner as natural persons.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Mason & Whedon, for plaintiff in error.

Brown, England & Brown, for defendant in error.

MAXWELL, J.

The plaintiff brought an action in the district court of Lancaster county against the defendant to recover the value of ten shares of the stock of the State National Bank, which it is claimed the defendant has wrongfully converted to its own use. The stock is alleged to be of the value of $1,400.

The defendant in answer to the petition of the plaintiff, denied all the facts therein contained, except that the defendant was a corporation.

On the trial of the cause, the court directed the jury

to find a verdict for the defendant, to which the plaintiff excepted. The court having overruled a motion for a new trial, rendered judgment dismissing the case. The case is brought into this court by petition in error.

On the trial of the cause the plaintiff, against the defendant's objection, introduced in evidence a copy of the list of names and residences of shareholders of the State National Bank as it existed on the first Monday of July, 1874, from which it appeared that the plaintiff was credited at that time with ten shares of the stock of the bank.

It also appears in evidence that the plaintiff was elected one of the directors of the bank in January, 1874, and continued to act in that capacity until the following January.

Section 5146 of the Revised Statutes of the United States (Statutes at Large, vol. 13, 102) provides that: "Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director."

Section 5147 provides that: "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title; that he is the owner, in good faith and in his own right, of the number of shares of stock required by this title, subscribed by him or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged as security for any loan or debt."

The plaintiff testified that in January, 1874, Owen, the president of the bank, sent for him and informed him that there would be a new organization of the bank. He states that he informed Owen that he did not think that Oppenheimer, of his firm, "would stay with the

bank." Next day he was sent for again, and informed that *they* had concluded that if he would act as director of the bank, and give them all their business, as they had done before, and use their influence, they being one of the oldest firms in the city, and doing a heavy business with the bank, that they would give him ten shares of their stock. That he told them that he would accept the proposition, and in pursuance of that agreement they had done all their business with the bank, and he had acted as director thereof. The witness also testified that he was informed there were no certificates of stock, and that it would be transferred on the books of the bank. He also testified that the business of the firm amounted to from $60,000 to $80,000 per year; that he never demanded his certificates of stock until after the failure of the firm of which he was a member; that at the time he made the demand the officers of the bank refused to deliver the same to him.

The agreement entered into by the plaintiff for the firm of which he was a member, with the president of the bank, appears to have been fully carried out on the part of his firm, and is a sufficient consideration to sustain the contract for the stock in question. The president was professing to act for the bank, and, so far as appears, the bank ratified his action by receiving the benefits derived from the contract.

Under the circumstances developed by the testimony in this case, it may be that the bank is estopped from denying that the plaintiff is the owner of the stock in controversy, but as this question was not discussed on the argument, we will not examine it. The judgment of the district court is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

UPON application for leave to file a motion for a rehearing, the following opinion was filed:

MAXWELL, J.

I. The defendant asks leave to file a motion for a rehearing in the case, assigning as grounds therefor that the cause was disposed of without argument made or brief furnished on the part of the defendant, and that the failure of the defendant to file a brief was occasioned by misapprehension, etc.

Rule II of this court provides, that all causes from the same judicial district shall be placed together on the docket in the numerical order of the several districts, commencing with the first judicial district; and they shall be taken up and heard in this order, allowing one week for hearing causes from each judicial district. This arrangement is made for the convenience of attorneys who desire to argue their causes orally before the court. Cases, however, may be submitted on behalf of either or both of the parties at any time, upon filing briefs of the points relied on.

It is our desire to afford attorneys every reasonable facility to properly present the points, relied on by them, to the court. But ordinarily, where cases are reached in their order, some disposition must be made of them; and they will not be passed to the foot of the docket except by consent of both parties. The failure to observe this practice would occasion great inconvenience to attorneys, and would obstruct and delay the hearing of causes.

Written agreements of attorneys, or oral agreements entered into by them in open court in regard to the disposition of cases, will be enforced; but oral agreements entered into out of court will not be recognized or considered.

II. It is claimed that the court, in the decision of the case, overlooked important questions both of law and fact.

The action was brought to recover the *value* of ten shares of the stock of the State National Bank, claimed to be of the value of $1,400, and which the plaintiff alleges the defendant unlawfully converted to its own use. As a general rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of third persons having no knowledge to the contrary. *Minor v. Mechanics Bank*, 1 Peters, 46. *Frankfort Bank v. Johnson*, 24 Me., 490. *Merchants Bank v. State Bank*, 10 Wall., 604. *Cook v. State National Bank*, 52 N. Y., 96.

And it may also be laid down as a rule, that no officer of a bank can bind it by a promise to pay a debt which the corporation does not owe, and was not liable to pay, unless the bank authorize or has ratified the act. *Salem Bank v. Gloucester Bank*, 17 Mass., 1. *Merchants Bank v. Marine Bank*, 3 Gill., 97.

Section 36 of the act of congress of June 3, 1864, provides that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association.

Section 40 provides that "the president and cashier of every such association shall cause to be kept, at all times, *a full and correct list of the names and residences*

of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted; and such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted, and *a copy of such list*, on the first Monday of July in each year, *verified by the oath of such president or cashier*, shall be transmitted to the comptroller of the currency."

Section 5 provides, that associations for carrying on the business of banking may be formed by any number of persons *not less than five.*

A copy of the list of stockholders of the State National Bank in July, 1874, properly verified by the cashier, was introduced in evidence, from which it appears that the plaintiff at that time was credited on the books of the bank as being the owner of ten shares of stock. It also appears that nearly all the stockholders were directors of the association.

It is urged with great persistency, that the defendant is not liable, because buying and selling the stock of the bank itself is no part of its business. It is true, that the law does not permit banks to speculate on their stock, and only in certain contingencies are they permitted to purchase it. The law was evidently designed to guard the rights of the public by requiring those who appear on the books of the banks as owners, to be so in fact; consequently the bank is prohibited from loaning money on the security of its shares, under any circumstances. But it does not follow, that where, as in this case, a bank has made, or ratified, a contract with a party to act as director, and do his business with it, in consideration of receiving ten shares of stock, that after the bank has secured the benefits arising from the contract, it cannot be enforced. This is not an action for specific

performance, but for damages for the conversion of stock. The bank held the plaintiff out to the world as an owner of its stock, and thereby secured whatever credit might be derived from his character as a business man. As an owner of at least ten shares of its stock he was made one of its directors, and given a voice in the management of its affairs, with the tacit assent, at least, of its stockholders.

The law requires a director to take an oath that he is the *owner* of at least ten shares of stock, and also requires the president and cashier to make out a list of its stockholders on the first Monday of July in each year, and verify the same by oath. Can the defendant now be permitted to say, that its books were incorrect, and the oaths of its officers false? I think not. The defendant is bound by its own record, and cannot be permitted to deny its correctness in the absence of fraud or mistake

It is apparent from the testimony that the firm of which the plaintiff was a member had been in business for a number of years, and was transacting an extensive business. It is also disclosed, that the firm was about to withdraw its business from the bank. In this condition of affairs the proposition was made by Owen to the plaintiff, and accepted by him, and the contract thus made was ratified by the defendant. This is certainly a sufficient consideration to entitle the plaintiff to recover. And counsel for the defendant admit, that if the bank owned stock, and the president had authority to sell it, the consideration would be sufficient to uphold the sale. But it is claimed, that he had no authority, unless specially authorized, to bind the bank in a contract of this kind.

In *Kennedy v. The Otoe County National Bank*, ante p. 59, it was held, that the president of a bank, like other agents, could bind his principal only while acting within the scope of his authority; unless his acts were

ratified. And in this case, so far as the record discloses, Owen had no original authority to enter into the contract with the plaintiff; but it is apparent that the contract thus made was accepted and ratified by the bank. The ratification is equivalent to original authority to act in the matter which has been ratified; and the same rule applies to corporations which is applied to natural persons. *Fleckner v. United States Bank*, 8 Wheat., 363. *Essex T. C. v. Collins*, 8 Mass., 299. *Hayden v. Middlesex*, 10 Id., 403. *Salem Bank v. Gloucester Bank*, 17 Id., 28. *White v. Westport Manufacturing Co.*, 1 Pick., 220. *Balkley v. Derbu Fishing Co.*, 2 Conn., 252. Id. 260. *Hoyt v. Thompson*, 19 N. Y., 207. *Peterson v. The Mayor*, 17 Id., 449. *Baker v. Cotter*, 35 Me., 236. *Church v. Sterling*, 16 Conn., 388. *Bank of Penn. v. Reed*, 1 W. & S., 101. *Haward v. Pilgrim Society*, 21 Pick., 270. *Despatch Line of Packets v. Bellamy Manufacturing Co.*, 12 N. H., 205. *Planters Bank v. Sharp*, 4 S. & M., 75. *Burrill v. National Bank*, 2 Metc., 167. *Walworth County Bank v. Farmers' L. & T. Co.*, 16 Wis., 629.

After a careful re-examination of the entire case, it is apparent that no question, either of law or fact, has been overlooked in its determination. The application to file the motion for a re-hearing is therefore denied.

JUDGMENT ACCORDINGLY.

C. W. HAMILTON AND OTHERS, PLAINTIFFS IN ERROR V. GEORGE THRALL, DEFENDANT IN ERROR.

1. **Contract:** COVENANTS. As a general rule the covenants of a contract will be considered and held as dependent conditions to be performed by the respective parties, unless it very clearly appears, from the nature of the covenants, they intended them to be independent; and the common intention of the parties must be collected from the entire instrument; and therefore one clause or condition of the contract must be interpreted by the others, whether they precede or follow it.

2. ———: EVIDENCE. When the parties have reduced their contract to writing, the law presumes that all previous and contemporaneous negotiations and conversations leading to the contract, are merged in it, and cannot be varied by parol testimony.

ERROR to the district court for Douglas county. The action was brought there by Thrall against Hamilton and others to recover the sum of fifteen hundred dollars damages, on account of the alleged failure of said last named parties to comply with the terms of a certain contract entered into by said Thrall with one Horbach, trustee for Hamilton and others, the material portions of which are set forth in the opinion. Thrall had paid his monthly rent of $500 for eleven months until the twelfth month, which he refused to pay, and brought this suit claiming that instead of the property mentioned in the contract costing $25,000, as had been agreed upon, the cost did not exceed the sum of $19,768.92; that his payment of rent had been made before the discovery by him of the non-compliance by the other parties of the terms of said contract, they having in their possession the invoices of the goods and freight bills, and having withheld the same from said Thrall.

Upon a trial of the cause before SAVAGE, J., and a jury, the court gave the following instructions:

1. The defendants agreed to furnish and rent to the

plaintiff, hotel furniture to the amount of $25,000, the letting being for one year and the rent fixed at $6.000. It is clear from the testimony that the defendants failed to furnish and rent goods to the full value agreed upon. Unless, therefore, the plaintiff has waived his rights under the contract he is entitled to be reimbursed for the loss sustained by such failure.

2. The main question for you to pass upon therefore is, was there such a waiver on the part of Mr. Thrall? If Mr. Thrall knew the quantity and prices of the goods furnished, and so knowing declared himself satisfied with the same, continued to pay rent from month to month without objection, and never intimated any dissatisfaction until near the close of his lease, these circumstances furnish evidence tending to show such waiver, the strength of which is for you to determine.

3. Of course if Mr. Thrall did not know the invoice price of the goods, then his expressions of satisfaction or his failure to object would not constitute a waiver.

4. If you find there was such waiver as above mentioned then your verdict should be for the defendants, who would in that case be entitled to receive the amount of one month's rent under the case, with interest up to the first day of this term.

5. In case, however, you find there was no such waiver the remaining question is as to the measure of the damages to which the plaintiff is entitled. The plaintiff ought to be required to pay as rent only such proportion of the rent agreed upon ($6,000) as the amount of the invoice price and freight of goods furnished and rented bore to the agreed amount ($25,000). For example, and merely for the purpose of illustration, suppose that the invoice and freight of the goods actually furnished and rented was $20,000, or four-fifths of $25,000, then the plaintiff would be required to pay as rent only four-fifths of $6,000. You should bear in

mind, however, in computing the amount which the plaintiff is entitled to recover, that the rent for the last month of the lease, to-wit: $500, has not been paid by the plaintiff. If you find, after applying the principles above enunciated, that the plaintiff is entitled to a greater deduction from his agreed rent than $500, you should return a verdict for the excess, with interest to June 4, 1877. If the deduction which you make from the agreed rent ($6,000) is less than $500, you should find for the defendants for the difference, with interest as above. If such deduction just equals $500 you should find a verdict simply for the defendants.

The defendants requested the court to instruct the jury as follows, which the court refused to do, and defendants excepted.

1. If the jury are satisfied from the evidence that the defendants furnished carpets and furniture, including office safe for the hotel, referred to in the agreement, at the time therein required, which cost by invoice with freight added at least $25,000, then it will be the duty of the jury to find a verdict in favor of defendants.

2. The fact that Mr. Thrall agreed to and did buy from the defendants that portion of the goods ordered for the furnishing of the hotel, commonly considered perishable, would not, under the agreement, require defendants to furnish other goods and furniture to make up the amount of $25,000, exclusive of such perishable goods, provided the entire amount furnished by defendants, including said perishable goods, equaled said sum according to invoice and freight added.

3. If the jury find from the evidence under the instructions of the court that the plaintiff is not entitled to recover on the claim set forth in his petition, then it will be the duty of the jury to find a verdict in favor of defendants for the sum of $500 and interest from October 1, 1874, on account of the item of rent for last month.

4. If the jury are satisfied from the evidence that Mr. Thrall knew, or had the means of knowing, the amount of carpets and furniture furnished by defendants under their agreement, and paid rent under their agreement for eleven months, and made no objection to the amount of carpets, furniture, etc., actually furnished by defendants, as not being sufficient in quantity or value, but continued in possession of the hotel property to the end of his original term of rental without objection, he cannot recover in this action, and the jury will find for defendants, notwithstanding the fact that the carpets and furniture actually provided, exclusive of the perishable goods so called, did not amount to the full sum of $25,000.

The jury returned a verdict in favor of Thrall, assessing his damages at $860.41, upon which, after the overruling of a motion for a new trial, judgment was entered, exceptions taken, and cause up brought by petition in error.

Redick & Connell, for plaintiffs in error.

It is hard for us to see how the court can divide the contract; it is not only one entire transaction (and, as we think, plain upon its face), but most clearly expresses the intent of the parties to it.

The fact that Thrall had the invoices in his possession before the goods were put into the hotel, and before he signed the contract; that he checked off the goods in the presence of Pratt and Caldwell, and must have known just what goods had been ordered and were going into the hotel; the fact that he, in the event he kept the hotel, would be liable for the value of the goods under said contract; that when he opened the house he expressed himself more than satisfied; the fact that he, as shown by the record, paid his rent for eleven months without a

murmur or objection; being in the hotel all this time, having every means of knowing the amount of furniture in said hotel, and being a practical landlord of long experience, furnishes overwhelming evidence of the fact that *that* was the true intent of the parties to said contract, and that no objection was made until after a new lease of said premises had been given.

Parsons on Contracts, 2d volume, page 408, in speaking of the construction of contracts, uses this language: "So, too, the situation of the parties at the time, and of the property which is the subject matter of the contract will often be of great service in guiding the construction; because this intention will be carried into effect so far as the rules of language and the rules of law will permit." Now, here were these parties figuring together, one agreeing to lease certain furniture that had been ordered, with the several bills before him, and agreeing to take and buy or advance the money on the perishable articles then ordered; the other party agreeing to buy it back in the event he did not take a second lease of the hotel, together with whatever else of such perishable stuff that he might buy in the interim, etc. Now, could it be possible that it was not the intention of all the parties to the contract, that it was clearly understood just as it was carried out for the first eleven months? and was it not an after-thought on the part of Thrall to make this technical defense to the payment of his rent? Again, on page 501: "It is a rule that the whole contract should be considered in determining the meaning of any of its parts. The reason is obvious; the same parties make all the contract and may be supposed to have had the same purpose and object in view in all of it, and if this purpose is more clear and certain in some parts than in others, those which are obscure may be illustrated by the light of others." 3 Story, 122. *Chase v. Bradley*, 26 Maine, 531. *Merrill v. Gore*, 29 Ind., 346. *Haywood v. Perrin*,

10 Pick., 228. *Grey v. Clark*, 11 Vermont, 583. 8 Metcalf, 96.

In construing a contract it is immaterial in what part of a contract a particular agreement or covenant is inserted, as the whole contract taken together must determine the true intent of the parties.

A contract may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject, will be held to constitute but one contract, and the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together. *Newall v. Wright*, 3 Mass., 138. *Sawyer v. Hammatt*, 15 Maine, 40.

George W. Doane and *E. Wakeley*, for defendant in error.

It is admitted that the "carpets and furniture, including office safe," which were furnished *and rented* to Mr. Thrall, did not cost by invoice, with freights added, to exceed $20,086.38. But it is insisted, on behalf of plaintiffs in error, that the cost of the perishable goods, which were purchased outright by Thrall and paid for by him on the first of October, 1873, amounting to $5,677.30, should be included in the furniture which the trustee agreed to furnish and *rent* to Thrall for one year from October 1, 1873, to October 1, 1874. In other words, that Thrall made a contract by which he agreed to buy furniture and pay the full cash value therefor, and also that he would pay rent upon the same furniture at the rate of 24 per cent upon its value for one year after his purchase of the same. The proposition seems upon its face so absurd a one, as not to be worthy of consideration, unless the terms of the contract expressly

require such a construction of it, or the situation of the parties and the attendant circumstances seem to demand it. It is not claimed that the contract itself contains any such provision. On the contrary, the language of the contract is not ambiguous in that respect. It separates very clearly the furniture, which was to be furnished and rented to Thrall, from the perishable goods, all of which is mentioned as already provided, and which was to be purchased and paid for by Thrall, and become his absolute property. It is very evident from the provisions which were made in regard to the leasing of the furniture, and also from those in regard to the sale of the perishable goods, that the two were considered and treated of independently, and rested each upon different considerations. All the provisions of the contract seem to be so clear and unambiguous, and to show so plainly the intention of the parties, that there cannot, as it seems to us, be any difficulty in construing it; and the construction placed upon the contract below was the correct one, and there was no error in the instruction to the jury concerning it.

GANTT, CH. J.

The question upon which this case depends, and upon which it must be decided, is the construction to be given to the written contract between John A. Horbach, trustee for the plaintiffs in error, and George Thrall, defendant in error.

In this contract Horbach, trustee, party of the first part, "agrees to furnish and rent for use, in the hotel known as the Grand Central Hotel in Omaha, carpets and furniture, including office safe, to cost by invoice with freight added at least twenty-five thousand dollars, to be in said hotel and ready for use in time to enable (George Thrall) the party of the second part to comply

with the condition of his lease of said hotel as to time of opening, and to rent the same to the party of the second part for the term of one year from the first of October, 1873, for the sum of six thousand dollars, and to sell the same to the said party of the second part at the end of this lease at cost, less eight per cent. The party of the second part agrees to take the furniture at the rate and for the time specified, and pay therefor monthly in twelve equal payments of five hundred dollars each, and buy the same on the first of October, 1874, at the price above named, provided he takes a new lease of the hotel as specified in the lease aforesaid. The party of the second part agrees that he will buy of the party of the first part that portion of the goods *ordered* for furnishing the hotel, which are commonly considered perishable, consisting mainly of sheets, pillow slips, towels, napkins, and table damask, in A. T. Stewart & Co.'s bill, and the goods *ordered* by said party of the first part from the Meridian Britannia Company, and also glassware *ordered* from J. T. Griffin, and the crockeryware *ordered* from S. Burns, aggregating approximately six thousand dollars, and to pay for the same on the first day of October next. In consideration of this purchase the party of the first part agrees that in the event the party of the second part does not continue the lease of the said hotel according to the provisions of his lease aforesaid, he, the said party of the first part, will purchase of the said party of the second part, at the expiration of the said lease, such of the above described goods, together with such additions as from time to time may be required to be added, as are fit for use in said hotel, at three-quarters of the cost thereof, and pay for the same October first, 1874."

On the part of the plaintiffs in error, it is insisted that all the stipulations in this contract are dependent on each other and must be construed together as one

entire transaction. On the part of the defendant in error it is contended that the provisions of this contract in regard to the leasing of the furniture, and those in regard to the purchase of the perishable goods by defendant, and their repurchase by the trustee, are independent stipulations, each resting upon different and independent considerations; and that, according to this construction, by the terms of the leasing of the furniture, the plaintiffs covenanted to furnish the hotel with furniture to cost, with freight added, the sum of twenty-five thousand dollars in excess of the value of the perishable goods purchased by defendant. We think that the construction contended for by the defendant cannot be maintained, because it seems quite clear from an examination of the instrument that the different stipulations are so dependent on each other, that neither one can be effective without the other. The covenant to purchase perishable goods by the defendant could not be enforced without the lease of the furniture; and the lease of the furniture could not be enforced without the purchase of the perishable goods, for the enforcement of the one stipulation depends upon compliance with the other.

In *Bank of Columbia v. Hagner*, 1 Peters, 465, it is said that: "Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to the contract are to be considered independent or dependent; yet it is evident the inclination of the courts has strongly favored the latter construction as being obviously the most just;" and even where several instruments are made at the same time relating to the same subject matter, they must be construed together as one transaction to discover what was the true contract between the parties. *Makepeace v. Harvard*, 10 Pick., 298. *Penniman v. Hartshorn*, 13 Mass., 90.

Therefore, "the great object, and indeed the only foundation of all rules of construction of contracts, is to come at the intention of the parties; and any rule which leads us aside from this grand object, is to be disregarded." *Gray v. Clark*, 11 Verm., 385.

And it is a familiar principle in the construction of contracts that the common intention of the parties must be collected from the entire contract; that is, one clause or condition must be interpreted by the others in the same contract, whether they precede or follow it. The maxim is *ex antecedentibus et consequentibus fit optima interpretatio.*

Another rule is that when the parties have reduced their contract to writing, the law presumes that all the previous and contemporaneous negotiations, and conversations leading to the contract, are merged in it, and cannot be varied by parol testimony. *Coffing v. Taylor*, 16 Ill., 470. *Stevens v. Cooper*, 1 John. Ch., 429.

In the light of these principles, the contract must be construed. Then from an examination of the contract as one entire transaction, it seems clear that the leading purpose of the parties was to have the hotel supplied with furniture to the value of at least twenty-five thousand dollars, and that this amount of furniture was ordered before the contract was executed. The trustee acting for the plaintiffs, agreed to furnish and rent for use in the hotel, furniture to cost by invoice, with freight added, not less than twenty-five thousand dollars; the language of the contract clearly indicates that this was the extent of the covenant to furnish goods, and also that these goods were then ordered, for the defendant agreed to "buy that *portion* of the goods *ordered* for furnishing the hotel (referring to the goods mentioned in the first clause of the instrument) commonly considered perishable," aggregating approximately the value of six thousand dollars; and at least some invoices of goods are specially referred

to by the names of the persons from whom they were purchased. But it is further stipulated that in case the defendant shall renew his lease of the hotel, the trustee will then sell to him the remainder of the goods ordered at cost, less eight per cent; or that in the event he shall not continue his lease of the hotel, then the trustee will purchase from him the perishable goods sold to him, and such additions as from time to time may be required to be added, as are fit for use in the hotel, at three-quarters the cost thereof, and pay for the same October 1, 1874. Therefore, when we view this instrument as one entire contract, with conditions dependent on each other, and take into consideration the situation of the parties, the risks incurred in the use for which the goods were furnished, and the fact that the defendant did voluntarily pay the rent for eleven months, it seems clear that the common intention of the parties as collected from the entire transaction is, that in consideration of the several conditions to be performed by the trustee, the defendant agreed to pay the rent stipulated to be paid by him.

It is only necessary to further observe that, according to the views expressed in this opinion, the court below erred in giving to the jury the instructions excepted to, and in refusing to give those asked by the plaintiffs in error. The judgment must be reversed, and the cause be remanded.

REVERSED AND REMANDED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

APRIL TERM, 1878.

PRESENT:
HON. DANIEL GANTT, CHIEF JUSTICE.
" SAMUEL MAXWELL, } JUDGES.
" GEORGE B. LAKE, }

GILBERT B. SCOFIELD, PLAINTIFF IN ERROR, v. HENRY BROWN, ADMINISTRATOR OF THE ESTATE OF JACOB SHOFF, DECEASED, DEFENDANT IN ERROR.

1. **Practice**: INSTRUCTIONS TO JURY: EXCEPTION. Where the record does not show that any exception was taken to the charge of the court to the jury, no foundation is laid for a review of the instructions in the supreme court.

2. ———: TESTIMONY: PETITION IN ERROR: MOTION FOR A NEW TRIAL. To entitle a party to a review of the ruling of the court below on the admission or rejection of testimony it is necessary that the alleged error should be specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below.

3. ———: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative to that which had already been produced.

ERROR to the district court for Otoe county. Tried below before POUND, J.

G. B. Scofield, pro se.

J. C. Watson, for defendant in error.

LAKE, J.

This is a petition in error from Otoe county. The action below was brought against the defendant as the administrator of the estate of Jacob Shoff, deceased, to recover the possession of a piano which the plaintiff had purchased from one William Findley, who was a son-in-law of Shoff. Findley claimed the piano through his wife, to whom, it was contended, it was given by her father, some time before her marriage. The plaintiff's right to recover in the action depended upon the establishment of the fact that the gift was actually made. The defendant claimed the property as belonging to the estate of the deceased.

The first two errors assigned related to the instructions given to the jury, and to others requested, but which were refused by the court. It is not shown by the record that any exception was taken to the action of the court in either of the particulars; therefore no foundation was laid for a review here. *Wells, Fargo & Co. v. Preston*, 3 Neb., 444.

The third error assigned is that the answer sets up no defense to the petition. This, however, seems to have been abandoned, inasmuch as it is not referred to by the plaintiff in his brief. But there is nothing in the objection, for an inspection of the answer shows that it contains not only a complete denial of all the several allegations of the petition, but also a positive averment that the property in controversy belonged to the estate

of Jacob Shoff, and that the defendant as administrator was entitled to the possession of it.

Under the fourth and fifth heads of the assignment it is averred that the court "erred in ruling out the evidence of the plaintiff offered on the trial," and "in admitting the evidence offered by the defendant on the trial of said action." But neither in the petition in error, nor in the motion for a new trial, nor even in the plaintiff's brief, is any reference made to any particular testimony received or excluded, and in respect to which it is claimed that the court ruled erroneously. This assignment is much too general to be regarded. The particular testimony, concerning which it is claimed that errors were committed, ought to have been specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below. *Cropsey v. Wiggenhorn*, 3 Neb., 108. *Gibson v. Arnold*, 5 Neb., 186. But notwithstanding the non-observance of this rule of practice in this case, we have examined the several rulings of the district judge upon the admission of evidence, and fail to discover anything of which the plaintiff can justly complain.

The only remaining point to be noticed is the refusal of the court to set aside the verdict and grant a new trial, on the ground of newly discovered evidence. This evidence consists of verbal admissions, said to have been made by Jacob Shoff, on several occasions, that the piano belonged to his daughter, Mrs. Findley. But in view of the testimony of William Findley, who was a witness for the plaintiff on the trial, these admissions would be merely cumulative evidence. In answer to a question as to his wife's ownership of the piano, this witness answered: "To the best of my knowledge she was, having so informed me herself, *and I was so informed by her father, Jacob Shoff*." Again he was asked, "Do you know of your

own knowledge that this piano was ever given to your late wife, and if so, how do you know it?" Answer: "I was so informed by my wife, *and Jacob Shoff*." Question. "When, where, and in what manner did he so inform so you?" Answer. "In conversation with him at the time of my first sickness. This was at my residence in Nebraska City. The idea was that he was explaining how much he was worth, and what provision he had made, and was going to make for his children." And in answer to a question as to just what Shoff said, he stated: "I do not remember the exact conversation, but I know that the piano was mentioned as a part of Mattie's (Mrs. Findley) inheritance." The newly discovered testimony is of the same character as this which we have quoted, the only difference being that the admissions were made to other persons, and on different occasions. The rule is well established that a new trial will not be granted on the ground of newly discovered evidence when it is merely cumulative. *Fox v. Reynolds*, 24 Ind., 46. *The People, ex rel. v. Superior Court of New York*, 10 Wend., 285. *Bullock v. Beach* et al., 3 Vt., 73. *Gardner v. Mitchell*, 6 Pick., 114.

Finding no error in the record the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

MINERVA JOHNSON AND HARRISON JOHNSON, PLAINTIFFS IN ERROR, v. MARY C. BEMIS, DEFENDANT IN ERROR.

1. **Execution Sale.** Where there is no prohibition in the statute, a sheriff, who has levied an execution upon real or personal property of the debtor before the return day of the writ, may sell such property after the return day thereof. And this rule applies to an order of sale.

2. ———: PRACTICE: MOTION TO SET ASIDE SALE. A motion to set aside a sale, or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be considered.

3. ———: ———: ———. An affidavit in support of a motion to set aside an order confirming a sale, which alleges that the attorney for the plaintiff before the sale promised to purchase the premises "at the full amount called for in the decree, unless the same were purchased by some one else at a higher bid," there being no allegation that any one desiring to purchase the premises was thereby deceived, or prevented from bidding, or that the premises could be sold for a higher price than that already bid, is not sufficient to authorize the court in setting aside the sale.

ERROR to the district court for Douglas county.

Tate & Shropshire and *John D. Howe*, for plaintiffs in error.

W. J. Connell, for defendant in error.

MAXWELL, J.

A sale under an order of the court was made of certain real estate belonging to the plaintiffs in error, and the sale confirmed. Afterwards a motion was filed to set aside the order of confirmation upon grounds: *First.* That the sale was unauthorized and void, having been made after the return day of the order of sale. *Second.* For errors in the appraisement. *Third.* Because the property was not advertised according to law. *Fourth.* For other reasons appearing on the face of the return.

Before any action was had, on this motion, the plaintiffs in error filed a second motion to set aside the order of confirmation assigning as grounds therefor that W. J. Connell, attorney for the defendant in error, prior to the sale, had promised the plaintiffs in error that he would

bid the full amount of the decree at the sale of the premises under the order, unless the same was purchased by some one else at a higher price, that said Connell in purchasing said premises did not bid the amount due on the decree. The second motion was supported by an affidavit of Harrison Johnson, one of the plaintiffs in error, and agent of Minerva Johnson. The motions were overruled by the court, and the cause brought into this court by petition in error.

The objection that the sale was made after the return day of the order is untenable. Where there is no prohibition in the statute, a sheriff who has levied an execution upon real or personal property of the debtor before the return day of the writ, may sell such property after the return day thereof. *Phillips v. Dana*, 3 Scammon, 551. *Cox v. Joiner*, 4 Bibb, 94. *Lester's Case*, 4 Humph., 283. *Logsdon v. Spivey*, 54 Ill., 104. *Savings Inst. v. Chirm*, 7 Bush., 539. *Heywood v. Hildreth*, 9 Mass., 393. *Smith v. Spencer*, 3 Ired., 256. *Kane v. McCown*, 55 Mo., 181. *Remington v. Linthicum*, 14 Pet., 84. *Wheaton v. Sexton*, 4 Wheat, 503. *Barnard v. Stevens*, 2 Aiken, 429. *Doe v. Stone*, 1 Hawks, 329. *Stewart v. Severance*, 43 Mo., 322. *Taylor v. Gaskins*, 1 Dev., 295. *Wright v. Howell*, 35 Iowa, 288. *Guitler v. Martin*, 3 Md., 146. *Pettingill v. Moss*, 3 Minn., 223. *Wood v. Colvin*, 5 Hill, 230. *Moreland v. Bowling*, 3 Gill, 500. *Devoo v. Elliot*, 2 Cai., 243. *Bank of Mo. v. Bray*, 37 Mo., 194. Freeman on Executions, Sec. 106. And the rule applies to an order of sale of real estate.

The remaining objections set forth in the first motion are too indefinite to authorize the interference of the court. A motion to set aside a sale, or order confirming a sale, should point out specifically the errors complained of. As to the grounds assigned in the second motion, even if the statement is true, that the attorney for the defendant in error before the sale promised to purchase

the premises "at the full amount called for in the decree, unless the same were purchased by some one else at a higher bid," it is not sufficient to authorize the court to set aside the sale, there being no fraud or imposition shown. The promise, if made, may have imposed a moral obligation upon the attorney to keep his word, but so far as appears from the record imposed no legal obligation. A fair sale appears to have been had, at which all who desired to bid had an opportunity. There is no complaint that the plaintiff or her attorney prevented any one, desiring to purchase, from bidding, and there is no claim that the premises sold for less than two-thirds of the appraised value. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

FRANK C. MILLER, PLAINTIFF IN ERROR, v. THE B. & M. R. R. COMPANY, DEFENDANT IN ERROR.

1. **Practice:** FINAL JUDGMENT. Where a demurrer to a petition is sustained in the court below, to authorize a review of the case by the supreme court, there must be a final judgment dismissing the case.

2. ———: ———. The recitals in the record were as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant, and against the plaintiff, for the costs of this action taxed at $11.20:" *Held*, not a judgment, but a mere recital that one had been rendered for costs.

ERROR to the district court for Fillmore county.

Conner & Maule, for plaintiff in error.

T. M. Marquett, for defendant in error.

MAXWELL, J.

The pretended judgment in this case is as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court. after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant, and against the plaintiff, for the costs of the action taxed at $11.20."

This is not a judgment, but a mere recital that one was rendered. *Preuit v. The People*, 5 Neb., 377.

It nowhere appears that the cause was dismissed. Where a demurrer to a petition is sustained in the court below, to authorize a review of the case by the supreme court there must be a final judgment dismissing it. Otherwise a party might obtain leave of court to amend his petition and proceed in the case. As there is no final judgment, the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED.

THE UNION PACIFIC R. R. CO., V. THE BOARD OF COUNTY COMMISSIONERS OF SAUNDERS COUNTY.

Taxation: EXEMPTION: TIMBER ACT: CONSTITUTIONAL LAW. The legislative act of Feb. 12, 1869, entitled an "Act to encourage the growth of timber and fruit trees," is repugnant to the constitution of 1875, and is therefore inoperative; and all deductions made under it from the assessments of lands for each acre planted and cultivated with forest and fruit trees, are made without authority of law; they are mere nullities, and must be so treated by the county commissioners in levying the necessary taxes for the current year.

ORIGINAL application for an injunction against the commissioners of Saunders county, who it was alleged would allow, as precinct assessors had done, certain exemptions on account of the cultivation of timber and fruit trees, under act of 1869. General Statutes, 88.

A. J. Poppleton and *John M. Thurston*, for plaintiff.

M. B. Reese, for defendant.

GANTT, CH. J.

This is an action in equity relating to the revenue of the state. It is complained that under the act of February 12, 1869, the assessors of the county have, for the year 1878, made and allowed "deductions from the legal valuation and assessment of taxable property in said county, in about the sum of one hundred and twenty thousand dollars, for the cultivation of forest and fruit trees, and if the assessment as made by said assessors is permitted to stand, and the said deductions as made by them are to be allowed by the county commissioners of said county, in making up the county assessment and tax list, and in levying and collecting taxes, then there will be about one hundred and twenty thousand dollars' worth of taxable property in said county that will escape taxation, and the balance of the taxable property of the county will have to pay the entire tax levied in said county for state, county, and other purposes," etc., etc. The only question presented for determination is, whether the act referred to, entitled "An act to encourage the growth of timber and fruit trees," is operative under the new constitution.

Section one provides "that there shall be exempt from taxation of the property of each tax payer, who shall, within the state of Nebraska, plant and suitably culti-

vate one or more acres of forest trees for timber, the sum of one hundred dollars annually, for five years, for each acre so planted and cultivated; *provided*, that the trees on said land shall not exceed twelve feet apart, and shall be kept in a healthy and growing condition." The second section in like manner provides for an exemption of fifty dollars annually, for five years, for each acre planted and cultivated with fruit trees. Section one, article IX, of the constitution of 1875 declares that "the legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises." But section two of the same article provides that "the legislature may provide that the increased value of lands, by reason of live fences, fruit and forest trees grown and cultivated thereon, shall not be taken into account in the assessment thereof," and by act of February 19, 1877 (Laws, 1877, p. 45), the legislature made such provision, in the language employed in the constitution. Now, under the old law, one hundred dollars for each acre of forest trees, and fifty dollars for each acre of fruit trees planted and cultivated, were to be annually deducted for five years; but between these specific deductions for each acre so planted and cultivated with forest and fruit trees, and the increased value of lands by reason of such trees and live fences, the difference may be large in amount. The two provisions are inconsistent with each other, and hence, it seems clear, that under the new constitution, such annual deductions for each acre so planted and cultivated with forest and fruit trees cannot be made. Therefore, the act of February 12, 1869, being repugnant to the new constitution, is inoperative, and all deductions made under it from the valuation of lands for the year 1878, by the assessors, are without authority of law; they are mere nullities, and must be so treated by the board

of county commissioners in levying the necessary taxes for the current year.

The decree must be that all such deductions made from the valuation and assessment of lands in said county are void and of no effect, and that the order of injunction be issued as prayed in plaintiff's petition.

DECREE ACCORDINGLY.

P. J. HOOKER, PLAINTIFF IN ERROR, v. ANDREW HAMMILL, AND OTHERS, DEFENDANTS IN ERROR.

1. **Chattel Mortgage:** EXECUTION AND ACKNOWLEDGMENT. The several sections of chapter 43 of the Revised Statutes of 1866, in relation to the execution and acknowledgment of deeds, mortgages, *and other instruments in writing required to be recorded*, are to be construed together, and apply to and include chattel mortgages.

2. **Practice:** JUDGMENT IN REPLEVIN. In replevin, where a verdict is returned in favor of the defendant, the judgment must be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding the property and costs of suit.

3. ———: ———: DAMAGES. As elements of damage, the jury may consider the decrease in value of the property from the time of the replevin, with interest on its entire value.

ERROR to the district court for Saline county. Tried below before WEAVER, J. The facts appear in the opinion.

Hastings & McGintie, for plaintiff in error.

The main point in the case seems to be as to the verdict and the judgment rendered thereon.

The plaintiff offered at the trial of the cause below to prove that the property could be returned to defendants, and that the same was ready to be delivered to defendants on an order of the court. This evidence the court excluded and charged the jury as asked by the defendants in their second instruction. This is clearly erroneous, because General Statutes of Nebraska, section 9, page 713, provides that the judgment shall be for a return of the property, or the value thereof, in case a return cannot be had, and a replevin bond must be conditioned for a return of the property to the defendant in case a judgment for a return thereof be rendered. Showing that a judgment against a plaintiff in replevin must be in the alternative.

In *Hall v. Jenness*, 6 Kansas, 364, it was held that the court committed a serious error in rendering a judgment for money absolutely, and that judgment should have been rendered in the alternative, for a return of the property, or for the value thereof, in case a return could not be had. This construction has uniformly and repeatedly been placed upon the statutes in New York, which are similar to our own. *Dwight v. Enos*, 9 New York, 470. *Fitzhugh v. Wiman*, Id., 559. *Wood v. Orser*, 25 N. Y., 348, 355, 360. *Seaman v. Luce*, 23 Barb., 240, 248. *Glann v. Younglove*, 27 Barb., 480. *Gallarati v. Orser*, 4 Bosw., 94. *Garrett v. Wood*, 3 Kansas, 231, 235. And in Wisconsin, under a statute identical with ours, the same principle has been laid down. *Smith v. Coolbaugh*, 19 Wisconsin, 107. *Single v. Schneider*, 24 Wisconsin, 299. *Battis v. Hamlin*, 22 Wisconsin, 669. *Arthur v. Wallace*, 8 Kansas, 267. *Ward v. Masterson*, 10 Kansas, 77. *Nickerson v. Chatterton*, 7 California, 568. A plaintiff has a right to return property replevied by him, and it is error for a court to deprive him of that right. *Hall v. Jenness, et al.*, 6 Kansas, 365.

George B. France, for defendant in error.

The certificate of acknowledgment is defective. Our statute requires a chattel mortgage to be acknowledged, and it cannot be lawfully recorded, unless it has been previously acknowledged. General Statutes, pages 394, 481, 872, 875. 2 Hilliard on Mort. 451. *Hodgson v. Butts*, 3 Cranch, 140. *Hamilton v. Mitchell*, 6 Blackf., 132.

The mortgage itself is inconsistent in describing the mortgagor as receiving one thousand dollars in hand, when the condition shows that the mortgagor received nothing, and the mortgagee merely went security on an attachment bond for the mortgagor. 2 Hilliard on Mort. 339. *Southwick v. Hapgood*, 10 Cush., 119. *Belknap v. Wandel*, 11 Foster, 92.

The defendants did not claim in their answer a return of the property described in plaintiff's petition, and therefore they had a right to waive a return and take judgment for the value only. *Pratt v. Donovan*, 10 Wis., 378. *Morrison v. Austin*, 14 Wis., 601. *Farmer's Loan and Trust Co. v. Com'l Bank of Racine*, 15 Wis., 424. *Smith v. Coolbaugh*, 18 Wis., 106.

We think there is both reason and justice in preserving this option to the defendants in this case; for when the plaintiff has taken the defendants' property in his possession unjustly, though he do so by legal process, there certainly can be no reason why the defendants should not, if they so desire, have the right to compel him to abide by the consequences of his own wrongful acts and pay for the property. Indeed, in many instances, it would work a hardship to defendants to compel them to receive their property after the same had been badly used for a year or more by the plaintiff.

MAXWELL, J.

In August, 1875, the plaintiff commenced an action of replevin before a justice of the peace, against the defendant, to recover the possession of a threshing machine. The property was appraised at $350, and the justice thereupon certified the cause to the district court. The case was tried in December, 1876, and a verdict rendered in favor of the defendant for the sum of $277.08, upon which judgment was rendered. The case is brought into this court by petition in error.

I. On the trial of the cause the plaintiff offered in evidence a chattel mortgage, which was excluded because not properly acknowledged. This is assigned for error.

Section sixteen of chapter 43 of the Revised Statutes of 1866 provides that: "All deeds, mortgages, *and other instruments of writing which are required to be recorded*, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers in good faith without notice." Gen. Stat., 875.

Section seventeen provides that: "They shall not be deemed lawfully recorded unless they shall have been previously acknowledged or proved in the manner herein prescribed." Gen. Stat., 875.

Section two requires the grantor to acknowledge the instrument to be his voluntary act and deed.

Section forty-three provides that: "No acknowledgment of any conveyance having been executed shall be taken by any officer, unless the officer taking the same shall know or have satisfactory evidence that the person making such acknowledgment is the person described in, and who executed such conveyance." Gen. Stat., 879, Sec. 38.

Section seventy-three provides that: "Every mort-

gage, or conveyance intended to operate as a mortgage, of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed and recorded as directed by law." Gen. Stat., 394, Sec. 14.

These sections are parts of the same chapter of the act of February 12, 1866, entitled an "Act for revising, amending, consolidating, and re-enacting the civil and criminal codes, and the laws of a general nature, of the state of Nebraska," and they must be construed together as one law. And according to the provisions of this law it is quite clear that not only deeds and mortgages, but all "other instruments of writing which are required to be recorded" * * * "shall not be deemed lawfully recorded unless they have been previously acknowledged or proved *in the manner herein prescribed.*" A chattel mortgage, as seen by section seventy-three, must be recorded, and therefore it clearly comes within the statute, and must be acknowledged to entitle it to be recorded.

The mortgage in the case at bar was given to the plaintiff to indemnify him against any loss he might sustain by reason of signing a certain attachment bond, in an action wherein Jacob Brong was plaintiff and Frank Handy was defendant. No testimony whatever was offered by the plaintiff to show that he had sustained any loss or damage in consequence of signing said bond, or that his liability thereon still continued. This was essential, even if the mortgage had been properly acknowledged, to entitle the plaintiff to recover. The court therefore did not err in excluding the mortgage.

II. Section one hundred and ninety-one of the code of civil procedure provides that: "In all cases where the

property has been delivered to the plaintiff, where the jury shall find upon the issue joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant."

Section seven of the act approved February 26, 1873, provides that "the judgment in cases mentioned in sections 190 and 191 and in section 1041 of the code, shall be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of same, and for damages for withholding said property, and costs of suit." Gen. Stat., 713.

These provisions of the statute are mandatory. The court has no discretion in the matter.

In *School District v. Shoemaker*, 5 Neb. 38, it was held that if the jury find in favor of the defendant they must assess him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages.

Where the defendant succeeds and a verdict is returned in his favor for a return of the property, he is also entitled to damages. And as elements of damage, the jury may consider the decrease in value of the goods from the time of the replevin, with interest on their entire value. *Frey v. Drahos*, ante p. 194. *Rowley v. Gibbs*, 14 Johns, 387. *Brizee v. Maybee*, 21 Wend., 146.

But the judgment of the court must be in the alternative. As the ruling of the court below was contrary to these views, the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

FARRAR & WHEELER, PLAINTIFFS IN ERROR, v. INMAN H. TRIPLETT, DEFENDANT IN ERROR.

1. **Pleading in Chancery and Under the Code.** Under the former chancery practice whenever any ground of defense was apparent from the bill itself, either from the matter contained in it, or from defects in its frame, or the case made by it, the proper mode of taking advantage of it was by demurrer. But under the code, if a pleading is correct in *substance* but not in *form*, the remedy is by a motion to have it made more definite and certain.

2. **Practice:** DEMURRER TO ANSWER. If a good defense is defectively stated in an answer, and a demurrer thereto on that ground is overruled, the party demurring, in order to avail himself of his exception taken to the ruling of the court thereon, must rest on his demurrer. If he reply he thereby waives his exception. But this rule has no application where the facts stated in the answer of themselves constitute no defense. *Pottinger v. Garrison*, 3 Neb. 223, distinguished.

ERROR to the district court for Saline county. Tried before WEAVER, J. The facts appear in the opinion.

M. B. C. True, for plaintiffs in error.

The court should have sustained the demurrer to the fifth defense. The words of the answer show plainly that the indebtedness incurred by the alleged agent was the *individual indebtedness* of the agent. There is nothing in the answer to show that the agent had any authority from plaintiffs to incur the indebtedness for them, and there is no allegation that the indebtedness was incurred for or on behalf of the plaintiffs. Besides, the promise of the agent, if authorized by usage even, could avail nothing, as it was a verbal contract, contradictory of the written contract in the note. *Seiple v. Irwin*, 30 Penn. State, 513. There is no defense in the answer.

Hastings & McGintie, for defendant in error.

1. The error complained of by plaintiff in the overruling of the demurrer of plaintiff in error to the fifth defense in defendant's answer cannot now be considered by this court, as the record discloses that the plaintiff in error filed a reply to that count in the defendant's answer and thereby waived the error if error there was. *Campbell v. Cowden*, Wright's R., 484. *Mitchell v. McCabe*, 10 Ohio, 405. *Pottinger v. Garrison*, 3 Neb., 221, and numerous cases there cited. *Mills v. Miller*, 2 Neb., 308, and cases there cited. This proposition is too self-evident to be pursued further.

2. Representations by the vendor of the quality of the thing sold or of its fitness for a particular purpose, intended as a part of the contract of sale and relied upon by the vendee, constitute a contract of warranty. *Richardson v. Grandy*, Supreme Court of Vermont, American Law Register (Nov., 1877), 687. Story on Sales, 299, Sec. 357, and cases there cited.

3. A principal is always bound by all the acts of the agent done within the general scope of his authority, even though the agent violate his private instructions. Story on Sales 294, Sec. 350 and cases there cited.

MAXWELL, J.

The plaintiffs brought an action against the defendant in the district court of Saline county, upon a promissory note dated March 15, 1873, calling for the sum of $90, in eighteen months from the date thereof.

The defendant answered the petition of the plaintiffs, alleging *first*, that the note in question was given for a sewing machine which was warranted to be a first-class machine in all respects, but which proved to be utterly worthless and of no value whatever; *second*, the defend-

ant claimed a set-off in the sum of $90 upon a claim due to C. S. Triplett from the plaintiffs, for a sewing machine fraudulently obtained by them, which claim had been assigned to the defendant; *third*, the defendant set up a counter claim for the sum of $15 for extras for the machine, which the defendant had purchased from the plaintiffs, but which had not been delivered; *fourth*, the defendant claimed there was due him from the plaintiffs the sum of $25 for services rendered in selling sewing machines; *fifth*, the "defendant alleges that at the time he bought said machine of said plaintiffs as aforesaid, one Lyman S. Allen was the agent of said plaintiffs, duly authorized to transact the business of said plaintiffs, and while the said Lyman S. Allen was acting as such agent, he became indebted to said defendant in the sum of $30, for board and lodging, food and necessaries furnished to said Lyman S. Allen by said defendant, and that said Lyman S. Allen then and there agreed to and with this defendant to endorse said amount on said note mentioned in said plaintiffs' petition, but has wholly failed so to do."

The plaintiffs demurred to the fifth count of the answer, assigning as grounds therefor, that the facts stated therein constituted no defense to the action. The demurrer was overruled, to which the plaintiffs excepted. The plaintiffs thereupon filed a reply to the several counts, denying the facts therein stated.

On the trial of the cause the jury returned a verdict in favor of the defendant for the sum of $15, upon which judgment was rendered. The plaintiffs bring the cause into this court by petition in error.

The defendant insists, that even if the fifth count of the answer fails to state a cause of defense, yet, as the plaintiffs have filed a reply to the same, denying the facts therein contained, the error, if any, in overruling the demurrer, is thereby waived.

By the former chancery practice, whenever any ground of defense was apparent from the bill itself, either from the matter contained in it, or from defects in its frame, or in the case made by it, the proper mode of taking advantage of it was by demurrer. 1 Mtfd. Eq. Pl., 107. 1 Barb. Ch. Pr., 105. 1 VanSantvoord's Eq., 183. But under the code, if a pleading is correct in *substance*, but not in *form*, the remedy is by motion to have it made more definite and certain.

If a good defense is defectively stated in an answer, and a demurrer thereto on that ground is overruled, the party demurring, in order to avail himself of his exception upon the ruling of the court thereon, must rest on his demurrer. If he reply he thereby waives his exception. But this rule has no application where the facts stated in the answer of themselves constitute neither a defense or counterclaim. And this rule is not in conflict with that laid down in *Pottinger v. Garrison*, 3 Neb. 223, in which the court say: "We are of the opinion that the pleadings contain substance sufficient to sustain a judgment upon a verdict."

In the case at bar, the defense set up in the fifth count of the answer entirely fails to show a liability on the part of the plaintiffs. The contract set up is that of the agent alone, and so far as appears, was made in his name and the credit given to him. The promise made by him to endorse the amount due upon the note in question therefore does not affect the plaintiffs. The demurrer should have been sustained.

The fourth defense is equally untenable. The defendant in his direct examination testified that: "Lyman Allen employed me to go with him to help sell machines. He said if I would go with him and help sell machines he would bear all expenses if we sold to the amount of $25, and would give me $2 for each machine we sold."

Q. "How much did you sell?"

A. "We sold twelve machines."

On cross examination he testified as follows:

Q. "What did he (Allen) say in connection with Farrar and Wheeler about employing you?"

A. "He didn't say anything."

It appears from the testimony, that Allen was selling machines on commission, and employed the defendant to aid him. There is not a particle of testimony tending to show that the defendant was employed by any authority from the plaintiffs, or that he supposed that he was selling machines for them.

As to the third defense, there is no proof whatever of the *value* of the extras purchased by the defendant. It appears that Allen represented them to be of the value of $10.

The second defense is not sustained by the testimony. C. S. Triplett testified: "It was in the spring of 1873, William Wren came to my place; he was selling machines for the company. He was acting for them as special agent, he said, under this Lyman Allen—selling machines for him, and came to talk something about trading horses, and so we talked about trading, and finally made a trade. I traded him a stallion which we valued at $250—he was a very fine horse—and I took a horse—I think it was $57, and he was to give me the difference, and he gave me one of these machines for the difference and counted it $90." * * * * "He stopped me one evening and asked me if I would not loan him this machine, so he might sell it again, so he could send on that many more notes, as he was expecting to sell this machine by selling others, and said it would be an advantage to him to send on that, and as quick as he could get around to it he would fetch me another one—when he would be over in selling." * * * * "Well, I kind of hesitated, and thought once I would not let him have it. I spoke to my wife about it, and finally

he spoke so fair about it—and I finally let him have the machine if he would fetch me another one right away. At that time I was with him selling machines," etc. He further testified that the machine in question was sold to one Brown, and a note taken therefor in the name of Farrar and Wheeler. He also testified that soon thereafter he saw Allen and told him that he had bought the machine of Wren, and he said "that was all right."

It is evident from this testimony that loaning the machine to Wren was a personal affair between C. S. Triplett and Wren, and therefore, the plaintiffs are not liable for the same.

The testimony as to the character of the warranty is vague and indefinite. In no view that we can take of the testimony can the judgment of the court below be sustained. The judgment is therefore reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, v. ROBERT DICK & SON, DEFENDANTS IN ERROR.

1. **Practice:** JOINDER OF PARTIES. At common law the general rule is, that all parties must join and be joined by their names in an action; and such is the general import of our code which provides that the precipe and petition must contain the *names* of the *parties* to an action, and their *names*, both direct and inverse, shall be entered in the index.

2. ——: ——: PARTNERSHIPS. But it is specially provided by statute that when persons use initial letters or contractions of their christian names to bills of exchange, &c., they may be designated by such initials or contractions of the christian name; and that companies not incorporated, and partnerships formed for

the purpose of carrying on any trade or business or for holding any species of property in this state, may sue and be sued in the name assumed by them.

3. ——: ——: ——: CONSTRUCTION OF STATUTE. These special provisions, being exceptions to the general rule, must be construed strictly, and the exact mode of procedure prescribed by them must be closely pursued.

ERROR to the district court for Saline county. The case is stated in the opinion.

W. H. Morris, for plaintiff in error.

It is the common law that a partnership, as such, cannot maintain an action as a partnership. A suit by initials, except where expressly authorized by statute, is a fatal description of the person. *Herf & Co. v. Shulze*, 10 Ohio, 264. An action can be brought in this state by a partnership as such, only by reason of a special and peculiar statute which fully sets out the special facts that must exist and the things that must be done by a party desiring to make this special permission available. Gen. Stat., 527 §§ 24, 26. When a party brings an action under a special statute, the statute must be expressly followed, and no jurisdiction is obtained unless the statute is pursued. The summons in this case was issued by the county judge in his jurisdictional capacity as a justice of the peace and is governed by the same code as that that relates to justices of the peace. A summons issued by a justice of the peace in the name of a partnership, without any further description or designation, is a nullity.

When a proceeding is expressly directed to be taken by statute its omission amounts to a nullity. McNamara on Nullities, p. 20. *Mortimer v. Pigott*, 2 Dowling, 616. *Garratt v. Hoopor*, 1 Dowling, 28. *Thompson v. Sisson*, 5 Cent. Law Journal, 215. An irregularity may

be waived; a nullity never can be. McNamara on Nullities, p. 21. *Holmes v. Russell*, 9 Dowling, 487, and cases cited. There is no more power even by appearance, to confer jurisdiction on the court in case of a partnership suing solely as such, without following the statute strictly, than there would be to confer jurisdiction, by consent, where the plaintiff was notoriously, and appeared in the record, as an insane person, an idiot, or an infant. The court by law can gain no jurisdiction, and no appearance or consent of parties can confer it. *Miller v. Post*, 1 Allen, 434.

GANTT, CH. J.

This action was commenced before the county judge, "exercising the ordinary powers and jurisdiction of a justice of the peace," by defendants in error against plaintiff in error, for the possession of certain personal property and for damages for the detention thereof. The property was replevied and delivered to defendants in error. The plaintiff in error appeared specially and excepted to the jurisdiction of the judge for want of proper parties, but the exceptions were overruled, and the judge found for the defendants in error and entered judgment accordingly, and for damages in excess of the appraised value of the goods.

The bill of exceptions found in the record must be laid aside, because it was not authorized by law. *Taylor v. Tilden*, 3 Neb., 340. The only question we can consider is, whether the action will lie in the firm name only of the defendants in error.

It is well understood that, at the common law, in an action brought by partners, all the members of the firm must be made plaintiffs. The omission of the name of any partner as plaintiff may be taken advantage of at the trial under the general issue; or if it appear on the face

of the pleadings, it is fatal on demurrer, or on a motion in arrest of judgment, or on error. It has always been the rule at law, that all the parties in interest must join and be joined by their proper names, in an action or suit, and such is the general import of our code, for it provides generally that the precipe and petition must contain the *names* of the *parties* to the action, and their *names*, both direct and inverse, shall be entered in an index. §§ 63, 92, 322, and 1088. And the only exceptions to this general rule are: *first*, by section 23, it is specially provided that in actions upon bills of exchange, promissory notes, or other instruments, whenever any of the parties are designated by the initial letter or letters or contraction of the christian name, such persons may be designated by the name, initial letter or letters or contraction of the christian name; and section 24 specially provides that any company not incorporated, or partnership formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, may sue and be sued by the name such partnership may have assumed to itself, or be known by; section 25 provides the mode of process in such cases, and section 26 specially provides that when any such company shall sue in its partnership name it shall give security for costs. And under section 1085 the "provisions of the code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace."

This seems pretty clearly to bring within the jurisdiction of justices of the peace, the form of actions specially provided for in sections 23, 24, 25, and 26 of the code. But this mode of bringing an action by a partnership being unknown at the common law, and different from the general import of the statutes in respect of parties to an action, these special provisions must be strictly con-

strued, and the exact mode of procedure required of partners must be closely pursued. *Lease v. Vance*, 28 Iowa, 509. *Bailey v. Bryan*, 3 Jones, L., 357.

The partnership may assume to itself any fictitious name and sue by such name, and no person be responsible for costs, in case the cause should be adjudged in favor of the defendant; the real parties suing are unknown to the defendant and to the court, and therefore the law wisely declares that the company *shall* procure some responsible resident of the county as security for costs. This is an essential prerequisite to the maintenance of the action, and it is but a reasonable and just condition precedent in an action where the plaintiffs are unknown and their action is brought in an assumed name.

Another requisite is that it must appear that the company is formed to carry on some trade or business, or to hold some species of property in this state, and is not incorporated. In the case at bar, it appears from the record that the requirements of the special provisions were not complied with; and therefore the judgment of the district court, and also the judgment of the county judge must each be reversed and the cause remanded, with leave to defendants in error to amend and to give surety for costs upon payment of all costs which have accrued since the filing of the motion to dismiss for want of jurisdiction.

JUDGMENT ACCORDINGLY.

ST. JOSEPH & DENVER R. R., PLAINTIFF IN ERROR, v. MATTHEW F. BALDWIN, DEFENDANT IN ERROR.

1. **Government Grant of Land to Railroad:** RIGHT OF WAY. In the year 1869, B. purchased from the United States the south-east quarter of the south-east quarter and the north-west quarter of the south-east quarter of section eleven in township one, range three, in Jefferson county, Neb. In July, 1866, Congress passed an act granting to the state of Kansas for the use and benefit of the St. Joe & Denver R. R. Co., every alternate odd section of land for a distance of ten miles on each side of the track, and providing that, if, when the line or route was definitely fixed, the United States had sold any section so granted or any part thereof, or that the right of pre-emption or home stead settlement had attached to the same, or they had been reserved by the United States, that other lands might be selected in lieu thereof. The act also granted the right of way to said company across the public lands. In 1871 the plaintiff located its line through the above described lands. B. took the necessary steps under the statutes of the state for the assessment of damages, and judgment was rendered in his favor for the sum of $200. *Held*, that B. was entitled to compensation for the right of way.

2. ——: ——: Such lands were subject to entry and settlement, until the plaintiff had filed maps of its line designating the route, with the Secretary of the Interior, and the lands had been withdrawn from market, under the provisions of section four of the act.

ERROR to the district court for Jefferson county. Tried below before WEAVER, J. The case is stated in the opinion.

Doniphan & Reed and *John Saxon*, for plaintiff in error.

This question brings up for construction *only* the sixth section of said act. The right of way is granted *completely* by that section. It is the only subject matter of that section, and none of the other sections are connected

by the slightest relations of context with it. It is encumbered with no limitations, no conditions, no restrictions. It is not possible in the construction of it to reach out for aid to the other sections. For so completely does it stand isolated and disassociated from them, that the rule, that in the construction of an instrument or a statute you must take the *whole* of it into consideration, has no application to this question. Plaintiff in error holds that the said grant of the right of way, as made by section six, is operative in said Railroad Company's favor from July 23, 1866, the day the act was approved, and that the acquisition of all interests in land over which said road "*may pass*," and which constituted a part of the "*public domain*," when the act was passed, were subject to the right of way granted by said section. The defendant in error, on the other hand, claims that the right of way given by said section does not attach in said Railroad Company's favor on the day when said act was approved. That in the construction of this section, to gather its legal import, it is necessary to consult the previous sections of the act; that the same conditions, restrictions, and limitations, as qualify the grant of *land* made in the first section of said act, also qualify the grant of the *right of way* made in the sixth section. And they zealously claim that when, as in section one, the route of the said railroad becomes *definitely fixed*, it appears that land in the line of the road has been sold, homesteaded, or pre-empted, not only does the railroad lose the land thus sold, homesteaded, or pre-empted, as is provided for in said section one, but they lose also the *right of way* granted by the said section six. They insist that the road must be *definitely fixed* and *located*, and that the *same conditions* must be performed by the company as are necessary under said act to vest the title of the land granted in the company, before the *right of way* is available to the company. The plaintiff in error

claims that such a construction cannot be maintained. The words employed by said section six are, "be and the same *is hereby* granted." These are words of *present granting*, and import an *immediate* transfer of title. 21 Wallace, 44. 9 Wallace, 95. 53 Mo., 563. 11 Iowa, 450. 92 U. S., 741.

The subject matter of the first section is land, that of the sixth, the right of way. The *grantee* or trustee mentioned in the first section is "The State of Kansas,"—the grantee in the sixth section is the "*Saint Joseph & Denver City Railroad Company.*" We have then, in this act of Congress, *two distinct*, *separate grants*, with different subject matters, and different grantees. A grant is but a contract of the sovereignty. We have then, in this act, two contracts; and by what rule of law will it be claimed that the *conditions* of *one* contract can be made applicable to another when the subject matter is totally different; when there is no reference making it a part, and when even the contracting parties are different? *Central Pacific R. R. Co. v. Dyer*, 1 Sawyer, 641. *Leavenworth R. R. Co. v. United States*, 92 United States, 733.

Brown & Marshall, and *Slocum & Hambel*, for defendant in error.

The company never had a right of way over the lands of the United States lying in Kansas, where it had a legal existence, until it had filed with the Secretary of the Interior maps of its lines definitely designating and fixing the route and location of its road. *Western Pacific R. R. Co. v. Tevis*, 41 Cal., 489. *Alabama & Florida R. R. Co. v. Burkett*, 46 Ala., N. S., 569. *California Northern R. R. Co. v. Gould*, 21 Cal., 255. Lacey's R. R. Digest, 255, Sec. 809-810.

It is insisted that the grant of the right of way is a

separate and independent grant, and that section six is to be construed as if it stood alone; that the land grant is to the state of Kansas, while the grant of the right of way is directly to the company; but this position we insist is not tenable. True, the grant of the right of way is directly to the company "for the construction of a railroad as proposed." As proposed where? Is it not "as proposed" in the preceding sections of the act? Can it be doubted that the words "as proposed" refer to the location of the road as defined in section one? Congress had no power to permit a Kansas corporation to build a railroad in Nebraska. This permit can only be given by Nebraska alone. *United States v. Rock Island R. R. Bridge Co.*, 6 McLean, 517. *Glemer v. Lime Point*, 10 Cal. 229.

MAXWELL, J.

On the twenty-third day of July, 1866, Congress passed "an act for a grant of lands to the state of Kansas to aid in the construction of the Northern Kansas Railroad Company." Section one of the act provides: "That there is hereby granted to the state of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly, via Maryville, in the same state, so as to effect a junction with the Union Pacific Railroad, or any branch thereof, not farther west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection. But in case it shall appear that the United States have, *when the line or route of said road is definitely fixed*, sold any section or any part thereof granted as aforesaid, or that the right

of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the tier of sections above specified, so much land, in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlement have attached as aforesaid," etc.

Section four provides: "That as soon as the said company shall file with the Secretary of the Interior maps of its lines, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

Section six provides: "That the right of way through the public lands be and the same is hereby granted to the said Saint Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed," etc.

On the twenty-seventh day of October, 1869, the defendant purchased from the United States the south-east quarter of the south-east quarter, and the north-west quarter of the south-east quarter of section eleven, in township one, range three, in Jefferson county, Nebraska, and has continued to own said lands ever since.

In the year 1871, the plaintiff located its line of road over the above described lands, taking a strip through the same about two hundred rods in length and two hundred feet in width. The defendant took the necessary steps under the laws of this state to have the damages assessed, and an award was made in his favor. On appeal

from the award to the district court, he recovered judgment for the sum of $200. The cause was brought into this court by petition in error.

The railroad company set up as a defense, that by the act of Congress approved July 23, 1866, they were granted the right of way through the public lands of the United States, and they insist that this was a grant *in presenti*, which took effect without regard to the location of their line, and that therefore all lands sold by the United States after the passage of the act, and before the location of the road, although sold without reserve and for full consideration, were taken subject to this grant. No such construction can be given to the act. Construing its provisions together, it is apparent that the right of way was granted only across such lands as were owned by the United States at the time of the location of the line of the road. The plaintiff might with equal propriety insist that they were entitled to all the odd numbered sections for ten miles on each side of the road, although the same had been entered prior to the location of the line. Such lands were subject to entry and settlement, until the plaintiff had filed maps of its line, designating the route, with the Secretary of the Interior, and the lands had been withdrawn from market under the provisions of section four of the act.

A party purchasing agricultural lands from the United States, without reservation or condition, takes the entire title to the same. He acquires a right of property therein, of which he can be divested only for public use, and on just compensation being made for the same. As the defendant herein was the owner of the lands in controversy at the time of the location of plaintiff's line across the same, he is entitled to damages for the right of way. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE SOUTH PLATTE LAND COMPANY, APPELLANT, v. THE BOARD OF COUNTY COMMISSIONERS OF BUFFALO COUNTY, AND OTHERS, APPELLEES.

1. **Equity Jurisdiction:** COLLECTION OF TAXES: INJUNCTION. Courts of equity will enjoin the collection of an erroneous or illegal tax, when the enforcement of the assessment would lead to a multiplicity of suits, or produce irreparable injury, or cast a cloud on title to real estate, or when the assessment on the face of the proceedings is valid, and requires extrinsic evidence to show it is invalid, or when the officers transcend their authority.

2. **Taxes:** EQUALIZATION: POWERS OF COUNTY BOARD. The county commissioners, acting as a board of equalization, cannot raise the assessment on property without giving notice to the owner; and if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject matter, and their proceedings are void, and of no effect.

3. **Precinct Bonds for Erection of Bridges.** Under the act of February 15, 1869, enabling counties, cities, and precincts to issue bonds in aid of internal improvements, precincts may issue such bonds to aid in the construction of bridges for public use, and when such bonds are issued in conformity with the provisions of the law, they are valid, and the collection of taxes, levied on the property of the precinct to pay the interest thereon, may be legally enforced.

THIS was an appeal from a decree of the district court of Buffalo county, by GASLIN, J. dismissing plaintiff's petition.

T. M. Marquett and *O. P. Mason*, for plaintiff, cited *Sioux City & Pacific R. R. v. Washington County*, 3 Neb., 43. *Postlewaite v. Cleghorn*, 43 Ill., 428. A tax founded on an assessment which, from corrupt or malicious motives, is made excessive may be enjoined in equity. Cooley on Taxation, 547. *Albany & C. R. R. Co. v. Canaan*, 16 Barb., 244. *Leffert v. Board of Supervisors of Calumet County*, 21 Wis., 688. *Milwaukee*

Iron Co. v. Hubbard, 29 Wis., 57. *Merrill v. Humphry*, 24 Mich., 170. *Republic Life Insurance Co. v. Pollak*, Supt. Ct., Illinois, 7 Chicago Legal News, 357. So may any other tax be enjoined in equity which is rendered unequal and unfair by fraudulent practices of the officers, or in which the party is deprived by like practices of important and substantial rights which the law intends to secure to him, such for instance, as the right of appeal from an assessment or writ of error or to be heard by the board of review or equalization, before his assessment should be raised. *Darling v. Gunn*, 50 Ills., 424. Cooley on Taxation, 547. *Rood v. Mitchell County*, 39 Iowa, 444.

The facts averred in relation to said Kearney special tax, not being denied by the answers of the defendant, are admitted, and hence no proof was offered by either party. That this tax is levied to build a bridge in said precinct of Kearney is admitted. This tax, the Kearney special of 9 mills on the dollar, is unknown to the law and unauthorized by it. The bridge itself is a county bridge, and under the exclusive management and control of the county. It is an improvement of the county and for the county, and the expense of the structure cannot be transferred to the precinct and the burden imposed upon the property situate in a single precinct. Here all of the property of the county is exempt from the burden of tax for the erection of this bridge except the property of Kearney precinct, and the bridge itself is a county improvement, a county structure. This cannot be done. *Weeks v. Milwaukee*, 10 Wis., 242-263. *Exchange Bank v. Hines*, 3 Ohio State, 1. *Adams v. Beman*, 10 Kans., 37. *Henry v. Chester*, 15 Vt., 460.

Sam L. Savidge, for defendant.

Equity will not interfere by injunction to restrain the

enforcement of a tax proceeding on the ground of irregularities, or errors in the assessment of the tax, or in the execution of the power conferred upon the taxing officers; the remedy at law being deemed sufficient in such cases. High on Injunctions, Sec. 355. *Macklott v. Davenport*, 17 Iowa, 379. *Warden v. Supervisors*, 14 Wis., 618. *Center v. Black*, 32 Ind., 468. *Kellogg v. Oshkosh*, 14 Wis., 623. *Exchange Bank v. Hines*, 3 O. St., 1. *Jackson v. Detroit*, 10 Mich., 248. *Williams v. Mayor*, 2 Mich., 560. *Chicago v. Frary*, 22 Ill., 34. *Hallenbeck v. Hahn*, 2 Neb., 427. Cooley on Taxation, 528, 529, and 540. *Hershey v. Fry*, 1 Iowa, 596. *Games v. Robb*, 8 Iowa, 199. *Kansas Pacific R. R. v. Russell*, 8 Kansas, 561. *West v. Balford*, 32 Wis., 168. *Arnold v. Middleton*, 39 Conn., 401.

The statutes give notice that the board of equalization will meet at a time and place certain, and no special notice is necessary to a tax-payer, in order to give the board power to raise or lower the assessments upon his property. Gen. Stat., 907, Sec. 27. *Hambleton v. Dempsy & Co.*, 20 Ohio, 173. *Sioux City and Pacific R. R. v. Washington Co.*, 3 Neb., 42. The commissioners as a board of equalizalion had power to raise or lower the assessed value of plaintiff's property at the time and in the manner they did. American Law Register, 570. 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 and its action is final. Cooley on Taxation, 291. *Bellinger v. Gray*, 51 N. Y., 616. Gen. Stat., 907, Sec. 27.

GANTT, CH. J.

This is a suit by injunction, and in the petition it is

substantially alleged, that the county commissioners, acting as a board of equalization for the correction of errors in the listing and valuation of property, without notice and without authority, did largely increase the assessed value of considerable portions of plaintiff's lands, situated in the county; that unless restrained the defendants will sell said lands, and that by these proceedings a cloud is cast upon plaintiff's title to said lands. In the court below, the defendants made their defense by answer solely upon the merits of the case, and did not question, but submitted themselves to the jurisdiction of the court.

In the case of *The Bank of Utica v. The City of Utica*, 4 Paige, 399, the subject matter of the action was an illegal tax, and though the complainant had a complete remedy at law, still, as the parties submitted themselves to the equity jurisdiction, the chancellor passed upon the case and enjoined the collection of the tax; *Utica Manufr. Co. v. Supervisors*, 1 Barb., Ch. 451. When parties thus submit to the jurisdiction of a court of equity, it may perhaps be proper to pass upon the case. The general rule, however, is that a court of equity will not entertain an action by a party aggrieved for relief against an erroneous or illegal tax, unless the special circumstances of the case bring it within some acknowledged head of equity jurisdiction; namely, when the enforcement of the assessment would lead to a multiplicity of suits, or would produce irreparable injury, or cast a cloud on the title to real estate, or when the assessment on the face of the proceedings is valid, and requires extrinsic evidence to show it is invalid, or when the officers transcend their authority. Cooley on Taxation, 542, 543, 547, and authorities cited. *Johnson v. Hahn*, 4 Neb., 149.

In the case at bar, it appears from the record that the commissioners, without notice, did make new and largely

increased assessments of plaintiff's lands, and their action in this respect appears valid on the face of their proceedings; but if they acted in the matter without authority their proceedings are invalid, and cast a cloud on the plaintiff's title. Cooley on Taxation, 542. *Dean v. Madison*, 9 Wis., 408.

Therefore the main question presented for consideration is, whether the commissioners, acting as a board of equalization, can re-assess property without giving notice to the owner. Section twenty-six of the general revenue law requires the assessors of each county to meet at the office of the county clerk, on the first Monday of April in each year, "for the purpose of equalizing the assessments, aud shall return their lists to the county clerk on or before the second Monday of the same month." After this equalization is made by the assessors, the tax-payers have opportunity until the third Monday of the month to examine the assessments of their property, and any person who may feel aggrieved by anything in the proceedings of the assessors may then apply to the county board, pursuant to the provisions of section twenty-seven, for the correction of any supposed errors in the assessment of his property. Such complaint is in the nature of an appeal from the decisions of the assessors to the county board, and the time fixed by the statute is notice when such complaints must be heard. But it is insisted that as section twenty-seven constitutes the county commissioners also a board of equalization, and provides that the "said board shall have the right to raise or lower the valuations of any or all property (except property valued by the state board) as may be deemed just and proper," absolute power resides in this board to re-assess property as it may choose; and that as the statute fixes the time when the board shall meet, it may exercise this power without giving notice to the owner of the property. If this position were tenable, then it might be-

come necessary for all the tax-payers of the county to continually attend the office of the board throughout the entire year, in order to protect their rights of property, for the section gives the board "power to adjourn their sessions from time to time," without any limitation, and, therefore, no person can know at what time the board may invade his rights of property by an unjust assessment without his knowlege. Certainly such absolute power to tax the property of the citizen without notice would establish a precedent too dangerous to be tolerated, and it is not to be supposed that it was the intention of the legislature to confer on the board a power so dangerous and so liable to abuse.

Tax is property, and the constitution declares that no man shall be deprived of his property without due process of law; and it is said the term means "a course of legal proceedings, according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," and, except in proceedings *in rem*, the party whose rights are to be affected in any proceeding, must be brought within the jurisdiction of the tribunal competent to pass upon the subject matter, by service of process or his voluntary appearance. But if the proposition contended for is maintainable, then the board, by its arbitrary act, may, without due process of law, raise the tax on property of the citizen, without limit and without his knowledge.

In *Sioux C. & P. R. R. v. Washington Co.*, 3 Neb., 43, it is said that: "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 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; * * * 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."

In California the statute requires the board to meet on the first Monday in August, and provides that it may hold sessions from time to time until the second Monday in September. It also gives the board power to add to or deduct from any valuation, whether the said sum was fixed by the owner or the assessor. And in *Patten v. Green*, 13 Cal., 329, the court, in construing the statute says: "We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose, without giving notice to the owner. It is a power liable to a great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power. The publication of notice of the sittings of the board amounts to no protection to the owner, for the sessions of the board are, or may be, from the first Monday in August until the second Monday in September, and it could scarcely be expected that every tax-payer is to wait upon the board all this time to see if his taxes are to be increased. The words of the statute seem to require a complaint, or some proceeding analogous to this; at least that there is something to be done, however informal, in the nature of a controversy, or contestation, or in the nature of a judicial enquiry. There can be no considerable difficulty in giving this notice, and we think the best interests of the state require it."

It seems to me that if the proposition contended for on the part of the defendants is to be maintained it must be at the sacrifice of those great principles upon which private rights repose for their security, and which are secured by the solemn guaranties of the constitution, and

therefore I must conclude that the county commissioners, acting as a board of equalization, cannot interfere with those rights and re-assess property without first giving notice to the owner.

It is further complained that the plaintiff is charged with a special tax to pay interest on Kearney precinct bonds, issued to aid in building a bridge in said precinct, and it is alleged that this tax was levied without authority of law, and is void.

In respect of this cause of action it is only necessary to observe that in the case of *The Union Pacific R. R. Co. v. Commissioners of Colfax County*, 4 Neb., 450, it is held that "a bridge of this kind is a work of internal improvement within the meaning of our statutes," and that under section 19, chapter 9, of the Revised Statutes of 1866, and the act of February 15, 1869 (Gen. Stat., 448), entitled "an act to enable counties, cities, and precincts to borrow money on their bonds, or to issue bonds to aid in the construction or completion of works of internal improvements in this state," counties and precincts may, in conformity with the provisions of these statutes, issue bonds to aid in the construction of a public bridge, and that when so issued "the bonds will be valid." And the statute specially provides that when such bonds are issued by a precinct, "the tax to pay the same shall be levied upon the property within the bounds of such precinct." *Fremont Building Association v. Sherwin*, 6 Neb., 50. Therefore, according to the statute and the law as settled by this court, the tax to pay the interest on these bonds was legally and properly levied on the property within the bounds of the precinct.

DECREE: This cause came on for hearing on appeal from the district court of Kearney county, and was argued by counsel, and now, on mature consideration thereof, this court finds that the proceedings of the county commissioners, at their session in April,

1874, acting as a board of equalization for said county, in raising the assessments on the lands of the plaintiff, to-wit: the north-east quarter and the south-east quarter of section two, in township eight north, of range sixteen west, the north half of the north-west quarter, and the north half of the north-east quarter, and lots one, two, three, and four, in section eleven, in township eight north, of range sixteen west, acted in the matter without notice to the plaintiff, and consequently without jurisdiction of the plaintiff or the subject matter. It is therefore ordered and decreed that the defendants, and each of them, be perpetually enjoined from collecting, or in any way enforcing the collection, of any and all taxes levied on said increased amount of assessments upon said lands of the plaintiff, and that said additional or increased assessments so made by said board be deemed, and are hereby declared to be, void, and of no effect. And it is further ordered and decreed that the petition of the plaintiff, so far as it relates to the tax levied to pay the the interest on the bridge bonds issued by Kearney precinct, be and the same is hereby dismissed.

JULIUS NORMAND AND OTHERS, APPELLANTS, v. THE BOARD OF COUNTY COMMISSIONERS OF OTOE COUNTY, AND O. P. MASON, APPELLEES.

An Appeal to the Supreme Court will only lie upon a final order or decree.

APPEAL from Otoe county.

S. H. Calhoun, for appellant.

Mason & Whedon, for appellees.

MAXWELL, J.

The journal entry of the judgment in this case is as follows: "The said several demurrers were argued by counsel and submitted to the court, and the court being fully advised in the premises, it was considered by the court that the said demurrers and each of them be sustained, to which ruling of the court, in sustaining each of said demurrers, the plaintiffs excepted. And thereupon said cause came on further to be heard upon the motion of the said defendants to dissolve the injunction heretofore allowed in said cause; and the court being fully advised in the premises, it is considered and adjudged that said injunction be and the same is dissolved, to which ruling of the court the said plaintiffs except: and thereupon the said plaintiffs having elected to stand upon their petition and not asking or desiring to amend the same, the defendants moved the court for judgment on the demurrers aforesaid, and the court being fully advised in the premises, it is considered adjudged and decreed that the said defendants have and recover of and from the said plaintiffs their costs, taxed herein at three dollars and twenty cents, and that execution issue therefor: to all of which the plaintiffs then and there excepted," etc.

This is a mere judgment for costs, and is not a final decree. An appeal to this court will only lie upon a final order or decree. The cause must therefore be remanded to the district court for further proceedings.

REVERSED AND REMANDED.

JULIETTE B. GILLETTE, PLAINTIFF IN ERROR, v. F. C. MORRISON, ADMINISTRATOR, DEFENDANT IN ERROR.

1. **Judgment:** REVIVAL OF. The revival of a judgment is but a continuation of the original action. Where it is sought to revive an action upon the ground that the cause has abated by reason of the *death of the defendant*, the only questions at issue upon such motion are, *First*, the death of the defendant; *Second*, the substitution of the administrator and heirs of the estate. In that proceeding, if the cause of action survive, the court has no authority to inquire into the merits of the case.

2. ——: ——. The right to revive an action is not dependent on the discretion of the court or judge making the order, but, under the conditions and within the time limited by statute, is a matter of right.

3. ——: ——. An action pending against a deceased person at the time of his death, may, if the cause of action survive, be prosecuted to final judgment; and the executor, administrator, or heir may be admitted to defend the same.

ERROR to the district court for Otoe county. Tried below before POUND, J. The facts appear in the opinion.

A. C. Ricketts, for plaintiff in error, cited Civil Code, secs. 454, 455. *Gibson v. Carter*, 28 Georgia, 510. *Moore v. Hamilton*, 44 New York, 666.

Thomas B. Stevenson and *M. L. Hayward*, for defendant in error.

MAXWELL, J.

On the twenty-fifth day of January, 1870, I. P. Mumford executed and delivered to A. Heffley a promissory note of which the following is a copy:

"$844.77. Jan. 25th, 1870.

"Ten days after date, I promise to pay to the order of

A. Heffley, eight hundred and forty-four dollars and seventy-seven cents at the rate of 12 pr. ct. interest per annum, value received."

"(Signed) I. P. Mumford."

To secure the payment of the note in question, Mumford and wife, at the time of the execution of the note, executed and delivered to Heffley a mortgage upon the south-west quarter of section nine, township eight, range thirteen, in Otoe county.

On the twenty-seventh day of January, 1870, Heffley endorsed the note in controversy and assigned the same, together with the mortgage, to the plaintiff herein.

In February, 1872, proceedings to foreclose the mortgage were instituted in the district court of Otoe county, and Mumford and wife and Heffley were made defendants, and were each personally served with summons. Afterwards the petition was amended and certain parties holding liens upon the land were made defendants. Mumford and wife answered the petition, alleging that they had made certain payments on the note and mortgage amounting to the sum of $61.87. While the action was pending in the district court Mumford died, and Logan Enyart was appointed administrator of his estate, and the cause was revived against the administrator and heirs of the estate.

In September, 1874, a decree for the sum of $1153.80 was rendered against the heirs of Mumford and A. Heffley. A sale was had of the mortgaged premises, and in March, 1875, judgment for a deficiency was rendered against Heffley for the sum of $947.17. At the September term of said court the judgment against Heffley on his motion was set aside and vacated.

In February, 1876, Heffley died, and Norman Heffley and C. W. Heffley were appointed administrators of his estate. In June, 1876, the plaintiff filed a motion to revive the action against the administrators. The ad-

ministrators, in answer to the motion to revive, allege "that there is no cause of action against them, and never was any cause of action against A. Heffley, deceased. That the judgment in this case is against the estate of I. P. Mumford, deceased, and a portion of such judgment, if not all, has been paid to the plaintiffs herein. These administrators aver that they have been administrators for about six months past of the estate of A. Heffley, deceased, who died February 17, 1876, that no such claim or judgment as is sought to be revived and enforced in this case has been proved or allowed in the probate court of Otoe county, Neb., or elsewhere, against the estate of A. Heffley, deceased," etc. The motion to revive the action was overruled, to reverse which the plaintiff brings the cause into this court by petition in error. Pending argument here, the cause by consent of parties was revived in the name of F. C. Morrison, administrator *de bonis non* of Heffley's estate.

Section 464 of the code provides that: "Upon the death of a defendant in an action, wherein the right, or any part thereof, survives against his personal representative, the revivor shall be against him; and it may be against the heirs or devisees of the defendant, or both, when the right of action, or any part thereof, survives against them."

Section 472 provides that: "If either or both parties die after judgment, and before satisfaction thereof, their representatives, real or personal, or both, as the case may require, may be made parties to the same, in the same manner as is prescribed for reviving actions before judgment; and such judgment may be rendered and execution awarded as might or ought to be given or awarded against the representatives, real or personal, or both, of said deceased party."

The revival of a judgment is but a continuation of the original action. *Irwin v. Nixon*, 11 Penn. St., 419.

Eaton v. Hasty, 6 Neb., 419. Herman on Executions, Sec. 79. *Wolf v. Pounsford*, 4 Ohio, 397.

At common law, after a year and a day a judgment is presumed to be satisfied or released, and therefore execution on it is not allowed without giving notice, by *scire facias* to the defendant to come in, and show if he can, by release or otherwise, why execution ought not to issue. 2 Bouvier's Law Dict. 499. In such case the only questions are payment, or release of the judgment. And where, under the statute, when it is sought to revive an action upon the ground that the cause has abated by reason of the *death of the defendant*, the only questions at issue upon the motion are, *First*, the death of the defendant; *Second*, the substitution of the administrator and heirs of the estate. In that proceeding, if the cause of action survive the court has no authority to inquire into the merits of the case. And where the application is in proper form, and made within the time prescribed by statute, the order must be granted as a matter of right.

In *Carter v. Jennings*, 24 Ohio State, 188, the court, in construing the statute from which our own is derived, say: "The right to revive an action under title 13, chapter one of the code, is not dependent on the discretion of the court or judge making the order, but, under the conditions and within the time therein limited, is a matter of right." The district court therefore erred in overruling the motion to revive.

It is claimed that the court has no jurisdiction. The record shows that Heffley was personally served with summons, and that judgment was rendered against him, which, on his motion, was set aside.

Section 228 of chapter 17, General Statutes, provides that: "All actions and suits which may be pending against a deceased person at the time of his death, may, if the cause of action survive, be prosecuted to final judgment;

and the executor or administrator may be admitted to defend the same, and if the judgment shall be rendered against the executor or administrator, the court in rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims duly allowed against the estate."

The jurisdiction of the court is clear and explicit, but as to the merits of the case we express no opinion. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. SCHOOL DISTRICT OF OMAHA, PLAINTIFF IN ERROR, V. MAYOR AND COUNCIL OF THE CITY OF OMAHA, DEFENDANT IN ERROR.

Taxes for School Purposes in Cities of the First Class. The "act relative to public schools in cities of the first class," does not confer power on the board of education to impose or levy and collect taxes for school purposes; its power is merely to report to the city council an estimate of the funds required for the ensuing fiscal year, and it is the duty of the city council to levy and collect the necessary amount of taxes for such school purposes, the same as other taxes.

ERROR to the district court for Douglas county. Heard before SAVAGE, J., who refused the application made by the relator for a mandamus to compel the defendant to levy certain taxes, according to an estimate made by the relator.

The motion was for a writ requiring the levy of eight mills, or of a rate which would raise the amount estimated to be necessary. The question presented was whether the city council had authority to revise and control this

estimate, and to determine for itself whether or not it was necessary to raise such amount; and whether it had a discretion to provide for a less amount than that estimated by the board.

E. Wakeley, for plaintiff in error.

C. F. Manderson and *John M. Thurston*, for defendant in error.

GANTT, CH. J.

This cause is brought here on error to the decision of the district court upon an application for a peremptory writ of mandamus. The question raised in the case has reference to the proper construction of section 26 of the "act relative to public schools in cities of the first class."

In the interpretation of a statute, it is said that such construction ought to be put upon it as may best answer the intention which the makers had in view, and that this intention is sometimes to be collected from the act itself, and other acts *in pari materia*. Now if the act in question shall be tested by this rule, the intention of the makers of the statute, as to the powers and discretion of the city council in the levy and collection of taxes for school purposes, will perhaps be more satisfactorily ascertained.

Under the general school law of 1869, establishing a system of public instruction for the state, full power is given to each school district, or the qualified voters thereof, to "impose a tax on all the taxable property of the district," not exceeding ten mills on the dollar of the assessed value thereof, for building school-houses, and to "impose such tax as may be necessary to pay teachers, to keep the school-house in repair, and to provide the necessary appendages, and pay and discharge any debts or liabilities of the district lawfully incurred."

And between the first and third Mondays in June, in each year, the board is authorized to "make out and deliver to the county clerk" of the county in which the district is situated, a report in writing of all the taxes so imposed "to be levied on all the taxable property of the district, and to be collected by the county treasurer at the time and in the same manner as state and county taxes are collected." And if the qualified voters of the district fail to determine these matters, then it is made the duty of the district board to determine the same. Gen. Stat., 966, 967. Here the power to determine the amount of tax required, and to impose the same on all taxable property of the district, is vested in the school district, or qualified voters thereof, and if they fail to attend to this matter, then the power is vested in the district board; and the county clerk simply performs a ministerial duty in extending the tax so imposed upon the tax list to be collected by the county treasurer.

But the act of February 6, 1873, "relative to public schools in cities of the first class," by section four provides: "That the affairs of the school district hereby created shall be conducted exclusively by boards of education, *except as otherwise provided by this act.*" This section contains a summary of the powers of the board of education, subject, however, to the limitations which may be imposed on its exercise of power; and section twenty-six seems clearly to come within the exceptions, for it only provides: "That the board of education shall annually, during the month of June, report to the city council an estimate of the amount of funds" required for all the different school purposes for the fiscal year next ensuing, and then authorizes and requires the city council "to levy and collect the necessary amount the same as other taxes." Gen. Stat., 987. The power of the board is merely to report an estimate of the funds required; it has no power to impose a tax, or to

levy and collect a tax for school purposes; on the contrary, the power to impose the tax necessary for such purposes, and to levy and collect the same, is vested in the city council.

From a comparison of the language employed in the two acts it seems clear that this difference of grant of power to the two school boards, or districts, was intentional; and the wisdom and the policy of the law in this respect are for legislative consideration, and not for the courts to determine. Finding no error in the judgment of the court below, the same is affirmed.

JUDGMENT AFFIRMED.

D. H. WHEELER AND OTHERS, APPELLEES, v. THE CITY OF PLATTSMOUTH AND OTHERS, APPELLANTS.

1. **Cities of Second Class:** STREET BONDS: CONSTITUTIONAL LAW. Subdivision XXXVIII, Section 31, of the act relating to cities of the second class is constitutional; and the authority to issue street bonds to contractors is not restricted by section 39 of the same act, nor is the issue of such bonds regulated by the provisions of the act of February 15, 1869.

2. ———: TAX FOR STREET IMPROVEMENTS. Cities of the second class cannot levy a tax for street improvements to exceed five mills on the dollar for any one year; and any tax for street improvements in excess of this amount is illegal and void.

3. ———: SCHOOL TAXES. Under the act of February 15, 1875, "relating to public schools in cities of the second class," the aggregate of school tax for all school purposes shall in no one year exceed one per cent upon all the taxable property of the district.

4. ———: FUNDING BONDS. Authority is given to cities of the second class to issue funding bonds, without having first submitted the question to a vote of the legal voters of the city.

5. ———: GENERAL INDEBTEDNESS. The *proviso* in subdivision XL, Section 31, of the act relating to cities of the second class—

"That the bonded indebtedness shall not, at any one time, exceed twenty per cent of the value of the real estate of such city, according to the assessment of the preceding year," is an independent proposition which relates to the entire bonded debt of the city, and therefore all bonds issued in excess of the amount so limited are without any authority of law and void.

APPEAL by defendant from a decree rendered by POUND, J., presiding in the district court for Cass county. The case is stated in the opinion.

Sam M. Chapman and *T. M. Marquett*, for appellant.

John L. Webster and *Ralph E. Gaylord*, for appellees.

GANTT, CH. J.

This is a suit in equity to enjoin the collection of certain taxes, and is brought into this court upon appeal. The several questions presented for determination will be considered in the order in which they appear in the pleadings.

I. It is complained that certain street bonds, bearing date December 13, 1873, were issued without authority of law and are void, and therefore the taxes levied to pay the same are illegal. These bonds were issued under sub-division XXXVIII of section 31 of the act relating to cities of the second class. It confers on the city council power "to issue, from time to time, street bonds to contractors, or other persons performing work or furnishing materials in said city, on such terms and in such manner as the council may provide." It is contended that this subdivision is unconstitutional because it contains no provision restricting the power of taxation as required by section 4, art. VIII of the constitution of 1867 Gen. Stat., 64. But it will be observed that the constitution does not prescribe the character of the restrictions which shall be imposed on this power of taxation. It is

left to legislative discretion to determine the character and extent of these restrictions; and as the legislature has fixed upon some limitation upon taxation by the act relating to cities of the second class, we think the ground taken in the argument on the part of the plaintiff is not tenable.

Section 32 provides that "before the city can make any contract for building bridges or sidewalks, *or for any work on streets*, or for any other works or improvements, an estimate of the cost thereof shall be made by the city engineer, and submitted to the council, and no contract shall be entered into for any works or improvements for a price exceeding such estimate"; and by subdivision II, of section 31, for opening, widening, and grading streets, the city is limited to a tax not exceeding five mills on the dollar of the assessed value of real estate within the corporate limits of the city.

These provisions of the act not only limit the power of taxation for grading streets to the estimate made by the city engineer, but also limit the power within five mills on the dollar of the assessed value of real estate. Whether these restrictions will as effectually guard the citizen against abuse of the power as others which might have been imposed, is a question for legislative consideration and not for the courts to determine; and therefore "it must be inferred that these were all the restrictions the legislature deemed important" or necessary, (Cooley on Const. Lim., 518,) and "we know of no rights conferred upon the courts to interfere with the exercise of a legislative discretion which the constitution has delegated to the law-making power." *Maloy v. Marietta*, 11 Ohio St., 639.

Again, subdivision XXXVIII gives the city council no authority to borrow money on the credit of the city; it merely confers on them the power to issue street bonds to contractors, and therefore the bonds can only

be issued for an existing debt, previously contracted. And the council can make no such contract for grading a street or for any other work or improvement until an estimate of such work is first made by the city engineer, and no contract shall be entered into for any such work for a price exceeding the estimate so made; and hence it seems quite clear that the issuing of such bonds cannot be restricted by sub-division XXXIX, which confers a general power to borrow money on the credit of the city upon certain conditions, nor come within the provisions of the act of February 15, 1869, which enables counties, cities, and precincts to borrow money on their bonds to aid in the construction of internal improvements. Gen. Stat., 448.

But, again, section 18, art. XVI of the new constitution, which was adopted, declares that: "If this constitution be adopted, the existing constitution shall cease in all its provisions on the first day of November, A.D. 1875." The old constitution did, then, *cease in all its provisions*, and must be considered, except as to transactions past and closed, as if it never existed; therefore, what authoritative effect can it now have in determining the question, whether a statute is or is not constitutional? It is said that "the general rules of interpretation are the same, whether applied to statutes or constitutions." Sedg. Stat. & Const. L., 19. And in *Key v. Goodwin*, 4 Moore & Payne, 351, the rule is stated to be that "a statute repealed is as completely obliterated from the records of Parliament as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded while it was an existing law." *Johnson v. Hahn*, 4 Neb., 146. *Ex parte McCardle*, 7 Wallace, 514. The statute in question is not, nor is it claimed to be, repugnant to the new constitution.

II. It is complained that the city has levied a five mill tax for street improvements without any authority of law, and that such tax is illegal and void. In the discussion of the question raised by this complaint, it may first be remarked that, as the taxing power is vested in the legislature, and as it is the exclusive province of the legislature to apportion and direct the assessment of taxes, no property can be lawfully taxed without legislative authority; and hence there must not only be legislative authority shown for every levy of taxes, but the method prescribed by the legislature for the assessment of property and levy of taxes must be pursued. *Turner v. Althaus et. al.*, 6 Neb., 54. *State v. Lancaster Co.*, 4 Neb., 540. *Clark v. Davenport*, 14 Iowa, 498. *Burlington v. Kellar*, 18 Iowa, 65. Cooley on Const. Lim., 518. 2 Kent Com., 299.

Subdivision II, section 31, of the "act to incorporate cities of the second class and define their powers," authorizes for street improvements assessments on property within the corporate limits of the city, not exceeding five mills on the dollar for any one year. This is the extent of the authority given to levy taxes for street improvements, and the bonds for the street improvements must be paid out of this five mill tax; but in addition to the levy so authorized by law, the city council levied a five mill tax "for the payment of principal and interest on three street bonds issued for work done on Chicago avenue." This additional levy for street improvements we think is clearly without authority of law. For, as the authority to levy taxes for street improvements is, by subdivision II, fixed at a certain rate or per centage on the assessed value of property within the city limits, the power to levy other taxes for the same purposes is not to be implied from the fact that there is authority given to provide for a sinking fund to pay at maturity the bonded indebtedness of the city. Cooley on Taxa-

tion, 210. *Leavenworth v. Norton*, 1 Kan., 432. If the limit upon the taxing power of the city for street improvements as fixed by subdivision II were to be disregarded, then, indeed, it would make no difference how strongly the legislature may inhibit excessive taxation, for the city council might, by resorting to the power to make contracts, impose upon the tax-payers a tax unlimited in amount or duration. *United States v. Burlington*, 2 Am. L. Reg., 396.

III. It is complained that the city council levied taxes for school purposes largely in excess of the amount authorized by law, and that all such excess of taxes is illegal and void. They levied a tax of twenty-four mills for general school purposes, but distributed the same for raising school funds as follows: For payment on high school furnace bond one-half mill; for payment on high school bonds five and one-half mills; for support of schools five and three-fourths mills; for teachers' wages four and one-half mills, and for sinking fund seven and three-fourths mills.

Now, section 26 of the act of February 25, 1875, "relating to public schools in cities of the second class," Laws 1875, p. 208, provides that the "board of education shall annually, during the month of June, report to the city council an estimate of the amount of funds required for the support of the schools for the fiscal year next ensuing, the amount of funds required for the purchase of school sites, the erection and furnishing of school buildings, and *the payment of interest upon all school bonds issued for school purposes, and the creation of a sinking fund for the payment of such indebtedness*," and if approved by the council they are required to levy and collect the necessary amount, the same as other taxes. But section 27 provides, "that the *aggregate* school tax shall, in no one year, exceed one per cent upon all the taxable property of the district."

The latter section fixes a positive limitation of taxes for the whole assemblage of subjects mentioned in the preceding section, and therefore, in the distribution of the taxes for the different purposes designated in section 26, the council cannot, in any one year, levy these taxes in the aggregate to exceed one per cent upon all the taxable property of the district. This is the extent of the power conferred, and it is said that "it is a familiar rule that in the execution of the power to tax, the municipalities must confine themselves closely within the power conferred." Cooley on Taxation, 257, and authorities cited.

It was, however, urged in the argument for defendants that the limitation upon taxation for school purposes, contained in section 27, refers only to the estimate of funds required for the support of the schools for the fiscal year next ensuing, and that this interpretation of the law may be inferred from sections 29, 30, and 31; but this position is not tenable, because the limitation is general in its operation, and refers with equal force to each one of the subjects mentioned in section 26, and not to any one in particular. Sections 29, 30, and 31 do not modify or affect this limitation, or give any authority to levy and collect any other or additional taxes; they simply provide the mode in which money may be borrowed upon bonds, and for the sinking fund mentioned in section 27.

IV. It is charged that the city council, without any authority of law, by ordinance of June 14, 1873, issued certain bonds to fund indebtedness of the city, and that they have levied a two and one-half mill tax to pay interest on said bonds, and that such tax is illegal and void.

Subdivision XL of section 31 provides: "For issuing bonds for the purpose of funding any and all indebted-

ness now existing, or hereafter created, of the city, now due or to become due." The only conditions imposed in the issue of such bonds are that they shall be payable in not less than ten years and not more than twenty years, and shall bear interest at a rate not exceeding ten per cent per annum, and shall not be appropriated for the purpose of funding the indebtedness at less than ninety cents on the dollar.

But subdivision XXXIX, which confers power "to borrow money on the credit of the city, and pledge the credit, revenue, and property of the city for the payment thereof," provides that no such money shall be borrowed "until the city council shall be instructed so to do by a majority of all the votes cast at an election held in such city for that purpose." Here is a complete restraint upon the power to borrow money until the council shall be instructed so to do by the majority of the votes cast at an election held for that purpose. It is therefore very clear that the legislature has made an obvious distinction between the power to issue funding bonds and the power to borrow money on the credit of the city. In the one case it has delegated the power to issue bonds without a vote of the people, and in the other it has required such vote before such power can be exercised at all.

It is not the province of the courts to pronounce such legislation, in regard to the powers of municipal corporations, void, because it may deem it imperfect or impolitic, for it is alone the province of the legislature to pass laws for the incorporation of cities and define their powers and duties; and for an abuse of this legislative discretion the only remedy is by an appeal to the legislature itself, unless the party complaining can rest his case upon some prohibition of the constitution, or some right secured by that instrument. *Turner v. Althaus et al*, supra.

But a different and more important question is pre-

sented for consideration by the latter proviso in subdivision XL of section 31. It provides "that the bonded indebtedness shall not at any one time exceed twenty per cent of the value of the real estate of such city, according to the assessment of the preceding year." Is this limitation general as to all indebtedness of the city? or does it relate only to the funding bonds? The language of the proviso is general in its terms; and includes "the bonded indebtedness" of the city, and is not restricted to funding bonds only. It is said that "a proviso in deeds or laws, is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided." *Voorhees v. Bank of U. S.*, 10 Peters, 471. And it is not necessarily limited in its effect to the section where it is found, but may extend to other sections, or to the whole act. *United States v. Babbitt*, 1 Black, 61. *Mechanics Bank Appeal*, 31 Conn., 72-3.

The proviso in question, it seems from the general language employed, must be construed as an independent proposition, which relates to the entire bonded debt, and is for the purpose of preventing an abuse of the taxing power. And if this restriction can be disregarded by the council, then the bonded debt of the city might be increased without limit, and by consequence taxation may be so increased as to become an intolerable burden, without remedy. This can be done by contracting debts in various ways, and by issuing funding bonds for such debts. But I think the proviso is a complete restriction on the power to issue such bonds; and it is a familiar principle that the officers of a municipal corporation cannot bind the municipality beyond the limits of the powers expressly granted.

It is said that "a corporate body is constituted of all the inhabitants within the corporate limits. The in-

habitants are the corporators. The officers of the corporation, including the legislative or governing body, are merely the public agents of the corporation. Their duties and their powers are prescribed by statute. Every one may therefore know the nature of these duties, and the extent of their power." *Clark v. Des Moines*, 2 Am. L. Reg., 156. And every person who contracts with the officers of a corporation must, at his peril, take notice of the limits of their powers.

Prof. Dwight in his note to the case of *Gould v. Sterling*, 1 Am. L. Reg., 290, very justly observes that: "It seems very clear that no representations by an agent can ever establish the fact of an agency. * * If a person who is not in fact authorized represents that he has power to execute a promissory note for another, the instrument, so far as the supposed principal is concerned, is utterly void. The negotiability of the note will have no effect upon the question, as the inquiry turns upon the existence of the note itself. The term 'negotiability' presupposes the existence of an instrument made by a person having capacity and power to contract in that particular manner. * * * An agent can no more enlarge his powers by means of unauthorized representations than he can create them." And in the same case Justice Selden says that: "One who takes a negotiable promissory note or bill of exchange, purporting to be made by an agent, is bound to inquire as to the power of the agent." This principle applies to municipal officers, because they are only the agents of the corporators; and it is said in respect of them: "The true rule is, that the want of corporate power, or the want of authority in the municipal officers, cannot be supplied by their unauthorized acts or representations." Therefore, when they transcend the exact limits of the power granted, their act is inoperative and absolutely void. It is without authority. And in *The Town*

of East Oakland v. Skinner, 4 Otto, 258, it is said that: "Where there is a total want of authority to issue bonds, there can be no such thing as a *bona fide* holding."

Now, the record shows (and it is not controverted) that when the council, on the fourteenth of June, 1873, passed the ordinance to issue the bonds, the bonded debt of the city was then in excess of the twenty per cent of the value of the real estate of the city, according to the assessment of the preceding year. Therefore there was a total want of authority in the municipal officers of the city, acting as agents of the corporators, to issue the bonds. And having transcended the limits of the power granted, the bonds issued under this ordinance derive no force from the fact of their being negotiable in form; the act was unauthorized and inoperative, and the bonds are simply void.

The additional five-mill tax for street improvements; all the taxes for school purposes in excess of one per cent upon all the taxable property in the district, and the two and one-half mill tax to pay interest upon the funding bonds, levied for the year 1876, and also the three mill tax to pay interest on funding bonds; the taxes for school purposes in excess of one per cent upon the taxable property of the district; and the additional five mill tax for street improvements for the year 1877, must be enjoined and the injunction made perpetual; but as to all other taxes, the collection of which is asked to be enjoined by the plaintiffs in their petition, the injunction is dissolved and the petition dismissed. And it is further decreed that the bonds issued under the ordinance of June 14, 1873, in excess of the twenty per cent of the value of the real estate of the district, are void.

DECREE ACCORDINGLY.

CONSTANTINE T. SCHLUETER, PLAINTIFF IN ERROR, v. RAYMOND BROTHERS & CO., DEFENDANTS IN ERROR.

Assignment: ATTACHMENT. Property held by an assignee, under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts.

ERROR to the district court for Saline county, to which the cause had been brought on error from the county court.

Hastings & McGintie, for plaintiff in error, cited *Lupton v. Cutter*, 8 Pick., 298. *Gore v. Clisby*, Id., 555. *Tucker v. Clisby*, 12 Id., 22. *Sanford v. Bliss*, Id., 116. *Price v. Masterton*, 35 Ala., 483. *Lightfoot v. Rupert*, 38 Id., 666. *Kimball v. Mulhern*, 15 Ill., 208. *Case v. Ingersoll*, 7 Kan., 367.

M. B. C. True, for defendants in error.

The interest of the garnishee relates solely to a just determination of the amount due from him to the judgment debtor. He can have no interest in the disposition of that amount after it is determined to his satisfaction. But the question in this case is—not as to the amount due from him but—to whom shall he pay the money he holds.

Clearly, then, sections 29 and 30 of the code of civil procedure apply here, and must exclude plaintiff from this litigation, because he has no real interest in the subject matter. Garnishment proceedings are but a part of the original suit. The judgment debtor, whose property is sought to be taken by such proceedings, has an interest in the just determination of the amount due from the garnishee, and disposition of the money under the order of the court, and of all the proceedings of the court he

takes constructive notice, if not actual. The affidavit, the foundation of the suit by garnishment, is filed in the original action. A judgment in attachment or garnishment is a judgment in rem, and all persons interested in the subject matter of the judgment are parties to the action and bound by it. Broom's Legal Maxims, 956–7. *Croudson v. Leonard*, 4 Cranch, 434. *Hollingsworth v. Barbour*, 4 Peters, 475.

GANTT, CH. J.

The defendants in error recovered a judgment against Brigham and Hassler in the county court. Execution was issued on this judgment, upon which the officer made return that he could find no property whereon to levy the same. The plaintiff in error was then summoned as garnishee, touching the rights, credits, and property of Brigham and Hassler in his possession. To this garnishment his answer substantially states that on the 22d of August, 1876, Brigham and Hassler made and executed to him a voluntary assignment of all their property and effects of every description whatever, for the benefit of all their creditors; that he accepted the trust, and was proceeding with the execution of the same when he was summoned as garnishee. The irregularity of the mode of proceeding in the county court in taking this answer must not prejudice the rights of the plaintiff in error, and therefore the answer will be considered as if it had been properly taken.

On the fifth of March, 1877, the county court ordered that C. T. Schlueter pay into the court the sum of $128.88, within thirty days, to be applied in payment of the judgment of defendants in error against Brigham and Hassler.

Under section 249 of the civil code, this amount, if not paid by the garnishee according to the order of the

court "shall be collected by execution, as in other cases, as near as may be," and therefore the order is final and may be reviewed upon error.

The only question presented for our consideration by the record of the case is, whether property in the possession of an assignee, under a valid assignment for the benefit of creditors, is liable to attachment for the assignor's debts. In this case, the assignment was made without any preferences being declared; it provides for an equal distribution among all the creditors of Brigham and Hassler. And in such case, it seems to be the well settled rule of law that the property in the hands of the assignee is not subject to attachment or garnishment.

In *Case v. Ingersoll*, 7 Kan., 372, it is decided that "property held by an assignee, under a valid assignment for the benefit of creditors, is not subject to attachment or garnishment for the assignor's debts." Drake on Attachment, § 511. *Colby v. Coates*, 6 Cush., 558. *Farmers' Bank v. Beaston*, 7 Gill. & John., 431. *Cook v. Rogers*, 14 Am. L. Reg., 633, and authorities cited.

In *Brashear v. West*, 7 Pet., 614, it is said "that a general assignment of all a man's property is, *per se*, fraudulent, has never been alleged in this country. The right to make it results from that absolute ownership which every man claims over that which is his own. * * * A conveyance of all his property for the payment of all his debts is not of itself calculated to excite suspicion."

In the case at bar, the assignment is not shown to be fraudulent, and there is no pretence that the plaintiff in error was not a suitable person to be assignee. The judgment of the district court and also that of the county court is reversed, and the action in garnishment is dismissed with costs.

JUDGMENT ACCORDINGLY.

DAVID COOK, PLAINTIFF IN ERROR, v. CHARLES POWELL, DEFENDANT IN ERROR.

Practice: SETTING ASIDE VERDICT. A verdict will not be set aside on the ground that it is contrary to the evidence, unless it is clearly so. A court will always hesitate to set aside a verdict where doubts of the propriety of doing so arise out of a conflict in oral evidence.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J

A. N. Ferguson, for plaintiff in error.

C. F. Manderson, for defendant in error.

MAXWELL, J.

The errors assigned are:

First. That the verdict is not sustained by sufficient evidence.

Second. That the verdict is against the law of the land.

Third. That there is, and was, no evidence to sustain the verdict.

Fourth. That the verdict was for the defendant when it should have been for the plaintiff.

No exceptions were taken on the trial of the cause. The only question therefore presented to this court is the sufficiency of the evidence to sustain the verdict. The rule is well settled that the verdict of a jury will not be set aside on the ground that it is contrary to the evidence, unless it is clearly so. A court will always hesitate to set aside a verdict where doubts of the propriety of doing so arise out of a conflict in oral evidence. *The A. & N. R. R. Co. v. Washburn*, 5 Neb.,

126. *Seymour v. Street*, Id., 85. *Blackburn v. Ostrander*, Id., 219. *Storms v. Eaton*, Id., 464.

As there is a conflict in the testimony in this case, and the questions of fact appear to have been fairly submitted to the jury, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

GALWAY, SEMPLE & CO., APPELLEES, V. WILLIAM MALCHOW AND OTHERS, APPELLANTS.

1. **Recording Act:** MORTGAGE: NOTICE. Under our recording act the record of a mortgage is notice only as to the lands actually described therein. As to lands omitted from the description by mistake it will be treated the same as if it were unrecorded.

2. ——: UNRECORDED CONVEYANCE: JUDGMENT LIEN. To defeat a prior unrecorded deed or mortgage, it is not enough for one to show merely that he is a judgment creditor of the grantor, but in addition to this it must appear that his claim or lien is evidenced by some instrument "*required to be recorded*," and it must also be filed for record before such prior conveyance.

3. ——: PRIORITY OF LIEN. Where land intended to be included in a mortgage is omitted by mistake, and a judgment is subsequently recovered against the mortgagor the lien of the judgment creditor is subject to the equity of the mortgage.

4. **Lien of Judgment.** The lien of a judgment does not exceed the actual interest which the judgment debtor had in the land at the time it was rendered; and it is subject to every equity existing against the debtor at the time of its rendition. *Bennett v. Fooks & Moffitt*, 1 Neb., 465, overruled.

APPEAL from a decree of foreclosure entered by VALENTINE, J., in the district court of Cuming county. The appeal was taken by The State Bank of Nebraska and Kirby & Howe, defendants, who had recovered certain

judgments against Malchow, after the recording of a mortgage given by him to plaintiffs. Further facts appear in the opinion.

R. F. Stevenson, and *Carrigan & Osborn*, for appellants.

A judgment lien takes priority over a defective or unrecorded mortgage. *Van Thorniley v. Peters*, 26 O. S., 471. Freeman on Judgments, Sec. 36. *Hopping v. Burnam*, 2 G. Greene, 39. *Holloway v. Plattner*, 20 Iowa, 121. *Semple v. Burd*, 7 S. & R., 288. *Jacques v. Weeks*, 7 Watts, 261. *Martin v. Dryden*, 1 Gilman, 187. *Jones v. Jones*, 16 Ill., 117. *Giteau v. Wisely*, 57 Ill., 433. 4 Pick., 252. 10 Pick., 72. 1 Met., 212. 20 O. S., 68. The same doctrine has been asserted by this court. *Filley v. Duncan*, 1 Neb., 134. *Bennett v. Fooks*, 1 Neb., 465. *Uhl v. May*, 5 Neb., 157.

Crawford & McLaughlin, for appellees, cited *Ellis v. Townley*, 1 Paige's Ch., 280; *Gouveneur v. Titus*, 6 Paige, 347; *Hoadland v. Latourette et al.*, 1 Green Ch., 254; *Eppes v. Randolph*, 2 Call, 103–154; *Everett v. Stone*, 3 Story, 447; *Lodge v. Tyseley*, 5 Sims., 79; 2 Story's Equity, §1503 b.; Willard's Equity Jurisprudence, page 74, 76; *Fitch v. Winchelsea*, 1 Peere Williams, 277; *Prior et al. v. Penpraze*, 4 Price Exch., 99; *Legard v. Hodges*, 1 Vesey Jr., 477; *Lake v. Doud*, 10 Ohio, 415; *Touseley v. Touseley*, 5 Ohio State, 78; *Morgan v. Spangler*, 14 Ohio State, 12; *Filley v. Duncan*, 1 Neb., 134

LAKE, J.

This is an appeal from the district court for Cuming county. The action was brought to correct a mistake

in the description of mortgaged premises, and at the same time to obtain a foreclosure and sale of the lands intended to be conveyed.

That a mistake was made, by which one hundred and sixty acres of the land intended to have been conveyed was erroneously described as being in section *twenty-eight* instead of section thirty-three, in which it really lay, is admitted. And it is not denied that, as between the immediate parties to the instrument, the correction is within the jurisdiction of the court and should be made. But equity goes farther than this, and makes good, defects existing in mortgages contrary to the intention of the parties, even against subsequent judgment creditors claiming under the party who is bound in conscience to correct the mistake. Willard's Equity Jurisprudence, 75; Freeman on Judgments, Sec. 359.

The real controversy is raised by those of the defendants who, having recovered judgments against the mortgagor, subsequently to the execution of the mortgage, now insist that they thereby acquired liens upon the lands concerning which the mistake was made, paramount to that of the plaintiffs' under the mortgage.

It must be conceded that under our recording act, the record of this mortgage furnished constructive notice only as to the lands correctly described. As to those omitted it must be treated precisely the same as if it had remained unrecorded. The mortgagees derived no advantage whatever from having placed it on record, and thus we have squarely presented the question, as between an unrecorded mortgage and a subsequent judgment against the mortgagor—which is entitled to preference? We have been referred to numerous authorities supposed to support the claims of the respective parties, some holding that the mortgage, and others that the judgment in such case, will prevail. But most of them were cases arising under recording acts so

different from our own, that they throw very little light on the question here presented.

By Sec. 16, Chap. 43, Rev. Stat. (Gen. Stat., Chap. 61), it is enacted that: "All deeds, mortgages, and other instruments of writing, which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all creditors and subsequent purchasers, in good faith without notice, and all such deeds, mortgages, and other instruments, shall be adjudged void as to all such creditors and subsequent purchasers without notice, *whose deeds, mortgages, and other instruments, shall be first recorded: Provided*, that such deeds, mortgages, or instruments shall be valid between the parties.

This section, down to the words *italicised*, is substantially the same as Sec. 30, Chap. 30, of the Revised Statutes of Illinois, which provides that: "All deeds, mortgages, and other instruments of writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice, and all such deeds and title papers shall be adjudged void as to all such creditors and subsequent purchasers without notice, until the same shall be filed for record."

Under the operation of this section the supreme court of that state has held that as between an attachment, or judgment creditor, and the grantee in an unrecorded conveyance, the former is to be preferred. *Martin v. Dryden, et al.*, 1 *Gilm.* 187. *Massey v. Westcott, et al.*, 40 Ill., 160. *McFadden v. Worthington*, 45 Ill., 362. While there can be no doubt of the soundness of the rule adopted in these cases under the statute of Illinois, which makes the instrument void "*until the same shall be filed for record*," it is very clearly inapplicable

to ours, which makes it void only as to "such creditors and subsequent purchasers," without notice, *whose deeds, mortgages, and other instruments shall be first recorded.*" Therefore to defeat a prior unrecorded deed or mortgage, it is not enough for one to show merely that he is simply a judgment creditor of the grantor, but, in addition to this, it must appear that his claim, or lien, is evidenced by some instrument which, in the language of the first clause of the section, is "*required to be recorded.*" This section evidently has no reference whatever to simple judgment creditors who, by force of another statute (Sec. 477, code of civil procedure), have a general lien upon all of the lands of the *debtor* lying within the county where their judgments are rendered. That this is so is made apparent by reference to the next section, which points out still more specifically, if possible, the kind of instruments included in section sixteen. It declares that: "They shall not be deemed lawfully recorded unless they have previously been acknowledged or proved in the manner herein prescribed."

The great importance of that portion of section sixteen which we have put in italics must not be overlooked. It imposes a very serious obstacle in the way of a creditor, or subsequent purchaser, who seeks to defeat one claiming under a prior deed or mortgage. These are strong words of limitation, which we find in no other recording act to which we have access, save that of Wisconsin, which, by sec. 27, provides that: "Every conveyance of real estate within this state hereafter made, which shall not be recorded as provided by law, shall be void as against any subsequent purchaser * * * * whose conveyance shall first be duly recorded."

In *Fallass, adm'r, v. Pierce et al.*, 30 Wis., 443, the supreme court of that state had occasion to consider the effect of these words, and held: "Without the deed to

such subsequent purchaser *first upon record* the title under the prior unregistered deed must still be preferred. Under the statutes of the states, to which reference has been made, this is not so. It is enough there if the subsequent purchaser for a valuable consideration, and without actual notice, looks upon the record at the time of purchase, and finds no conveyance from his grantor there recorded. He is not required to put his deed first upon record in order to be protected against *prior* conveyances from his grantor, but only to do so in order to protect himself against *subsequent bona fide* purchasers, for value, from the same grantor, or in the line of recorded conveyances from him."

We think that this is a very clear statement of the proper effect of these words of the Wisconsin statute, which, although not identical, are substantially the same as those employed in our own. We are aware that in the case of *Bennet v. Fooks & Moffit*, 1 Neb., 465, a construction of this section of our statute appears to have been announced by the territorial supreme court the very reverse of that which we now feel constrained to give to it. With all due respect, however, to the court, as then composed, we must say that we do not see how that conclusion could have been reached without completely ignoring the words, "*whose deeds, mortgages, and other instruments, shall be first recorded.*"

As we have already shown, our recording act confers no advantage whatever upon a mere judgment creditor, whose lien upon the estate of his debtor is declared by another statute. And this lien is a legal one, and does not exceed "the actual interest which the judgment debtor had in the estate at the time the judgment was rendered." *Brown v. Pierce*, 7 Wall., 205. It is well settled that a judgment lien on the land of the debtor is subject to every equity which existed against the debtor at the rendition of the judgment; and courts of equity will

always limit the lien to the actual interest of the judgment debtor." Freeman on Judgments, Sec. 357, and cases cited. *Swarts et al. v. Stees, et al.*, 2 Kansas, 236.

We are of the opinion, therefore, that, under the statute in question, the liens of these judgment creditors have no standing as against the equitable liens of the prior mortgages. And the judgment of the court below, being in conformity with these views, it must be affirmed.

JUDGMENT AFFIRMED.

FRANCIS MOORE AND JOHN A. EATHERLY, PLAINTIFFS IN ERROR, v. GEORGE L. KEPNER, DEFENDANT IN ERROR.

1. **Replevin:** ANSWER. In an action of replevin, the defendant answered "that he does not unlawfully detain the said goods and chattels of the said plaintiff," etc. *Held*, that the answer put in issue the plaintiff's right of property and right of possession.

2. ——: ——: Under the code, the gist of the action is the unlawful detention of the property.

3. **Surety on Replevin Bond.** As a rule sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity to defend; but this rule has no application where a surety has signed an undertaking for one of the parties in an action of replevin. In such case by becoming surety he submits to the jurisdiction of the court and is concluded by the judgment.

4. ——: JUDGMENT. In replevin where judgment is rendered in favor of the defendant, ordinarily he is entitled to damages for the decrease in value of the property, with interest on its entire value. If the property cannot be returned the defendant is entitled to the value of the property at the time the same was taken, with interest thereon to the time of trial.

ERROR to the district court of York county. Tried

before POST, J. The facts of the case appear in the opinion.

Lowley & Leese and *Edward Bates*, for plaintiffs in error.

1. The plea of *non detinet* admits the right of property in the plaintiff, and only puts in issue the detention by the defendant. *Ingalls v. Bulkley*, 15 Ill., 224. *Wells v. McClenning*, 23 Ill., 358. *Homan v. Laboo*, 1 Neb., 204. *Bourk v. Riggs*, 38 Ill., 320. *Chandler v. Lincoln*, 52 Ill., 74. 1 Chitty Pleadings, 488, 499.

2. The court erred in rendering judgment against Francis Moore as principal, and John A. Eatherly as surety, and awarding execution on the same, when the said John A. Eatherly has not had his day in court. No man shall be condemned unheard. Powell Appellate Proceedings, 106, sec. 9. Gen. Stat., 555, sec. 196. Id., 668, sec. 906. Freeman on Judgments, 125, sec. 126, note. Broom's Legal Maxims, 112.

3. The judgment is erroneous. The damages are assessed at $50 and a return of the property. The jury find the value of the property to be $125; that is the highest estimate shown by the testimony. Now in case a return cannot be had, the judgment is for $125, the value of the property, and $50 damages for the detention, &c., making in all $175. Where the measure of damage in an action of trover would be the value of the property, to-wit: $125 and interest. Sedgwick on Damages, 625, note 1. Sedgwick on Damages, 624, note 1. *Jennings v. Johnson*, 17 Ohio, 154. *Garrett v. Wood*, 3 Kan., 231. *Hull v. Jenness*, 6 Kan., 365.

George B. France and W. T. Scott, for defendant in error.

1. The defendant pleaded the general issue and

alleged "that he did not wrongfully detain the said goods and chattels from the said plaintiff." And this plea raises all the questions that can arise in an action of replevin, and property in the defendant can be given in evidence under this plea. *Oaks v. Wyatt*, 10 Ohio, 344. *Ferrell v. Humphrey*, 12 Ohio, 112. 2 Nash's Pleading and Practice, 834. *Walpole v. Smith*, 4 Blackf., 304. *Wilson v. Fuller*, 9 Kas., 176. *Snook v. Davis*, 6 Mich., 156. *Craig v. Grant*, 6 Mich., 447. *Jansen v. Effey*, 10 Iowa, 227, 231. *Ford v. Ford*, 3 Wis., 399. *School District v. Shoemaker*, 5 Neb., 36.

2. A party who signs the undertaking provided for in section 1007 of the Code, as surety for the appellant in appeal, thereby becomes a party to the suit then pending, and is liable to have judgment entered against him with his principal, upon failure of his principal to sustain his cause, and sec. 37, Gen. Stat., 257, is not unconstitutional on the ground that it deprives the surety of his day in court. *Gildersleeve v. The People*, 10 Barb., 35. *Pratt v. Donovan*, 10 Wis., 378. *Lewis v. Garrett*, 5 How. (Miss.), 434.

MAXWELL, J.

The plaintiff, Moore, brought an action of replevin against the defendant in the county court of York county for the recovery of a yoke of oxen. On appeal to the district court the defendant filed the following answer to the petition:

"And the said George L. Kepner, defendant, now comes and for answer to the petition of the said plaintiff says that he does not unlawfully detain the said goods and chattels of the said plaintiff, and of this he puts himself upon the country."

The court held that the answer put in issue the palintiff's right of property and right of possession. This is assigned for error.

The action of replevin originally lay for the recovery of chattels taken by distress. To maintain the action there must have been an unlawful taking. 1 Dall., 157. 2 Bouvier's L. Dict., 441. *Mellor v. Leather*, 18 Eng. Law and Equity, 239. *Pangburn v. Patridge*, 7 Johns., 140. *Thompson v. Button*, 14 Johns., 87. *Ilesley v. Stubbs*, 5 Mass., 283. *Weaver v. Lawrence*, 1 Dall., 157. *Stoughton v. Rappalo*, 3 Sergt. and Rawle, 562. *Galvin v. Bacon*, 11 Maine, 28. *Sayward v. Warren*, 27 Id., 453. *Daggett v. Robins*, 2 Blackf., 415.

But under the code of civil procedure, the gist of the action is the unlawful detention of the property. *Haggard v. Wallen*, 6 Neb., 271. *School District v. Shoemaker*, 5 Id., 38. *Ferrell v. Humphrey*, 12 Ohio, 113.

An answer, therefore, which denies the unlawful detention of the property, puts in issue the plaintiff's right to the property and right of possession of the same.

Objection is made that judgment was rendered against Eatherly as surety, without notice. As a rule, sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity to defend. But this rule has no application where the surety has contracted in reference to one of the parties to an action in court in the nature of the one at the bar. In such case, by becoming surety, he submits to the jurisdiction of the court, and is concluded by the judgment. The court therefore did not err in rendering judgment against the surety.

Objection is made that the damages are assessed at $50 and a return of the property, and that the value of the property was found to be $125.

Section 191 of the code provides that: "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon the issue joined for the

defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor they shall assess such damages as they think right and proper for the defendant."

Section 7 of the act approved February 26, 1873, provides that "the judgment in the cases mentioned in sections 190, 191 and 1041 of the code shall be for a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." Gen. Stat., 713. Where judgment is rendered in favor of the defendant, ordinarily he is entitled to damages for the decrease in value of the property since the time of the replevin, with interest on its entire value. If the property cannot be returned, the defendant is entitled to the value of the property at the time the same was taken with interest thereon to the time of trial.

The verdict is sufficient to sustain a judgment in favor of the defendant, although somewhat informal. The judgment, however, does not conform to the verdict, and is therefore set aside. But as justice appears to have been done in the premises, judgment will be rendered in this court in favor of the defendant for a return of the property and fifty dollars damages, or in case a return cannot be had, that the defendant recover from the plaintiff the sum of $125, together with the interest thereon; and that the defendant recover costs.

JUDGMENT ACCORDINGLY.

PARK G. DOBSON, ADMINISTRATOR, PLAINTIFF IN ERROR, v. MARY DOBSON, AND OTHERS, DEFENDANTS IN ERROR.

Equity Jurisdiction: APPEAL. Where a party has been prevented from complying with the legal requisites to obtain an appeal, by the default or absence of the justice or judge of the court in which the cause is pending, and not by any default or laches on his part, the appeal may be taken and perfected after the expiration of the time limited by statute, and such appeal must be treated in the appellate court as though it had been taken within the time prescribed by law.

ERROR to the district court for Seward county. Tried below before POST, J.

Norval Brothers and *Lowley & Leese*, for plaintiff in error.

The court will observe that the accident or surprise of which we complain, took place after the term when the trial at law was had, and of course, after the power of the court who tried the cause had terminated. The county court could have granted a new trial within ten days by granting an appeal, but after that time it had no power to relieve. In general, when it is proper for a court of law to grant a new trial, if the application is made while that court has such power, it is equally proper for a court of equity to do so, if the application be made on grounds arising after the court at law has ceased to have power. Hilliard on New Trials, 588, note a. *Colyer v. Langford*, 1 A. K. Marshall, 174. *Horn v. Queen*, 4 Neb., 108. *Hoskins v. Hattenback*, 14 Iowa, 314. *Phelps v. Peabody*, 7 Cal., 50. The law will protect an individual who, in the prosecution of a right, has done all that the law requires him to do, but fails to attain his right by reason of the neglect or misconduct of a public officer. *Smiley v. Sampson*, 1 Neb.,

83. *Lytle v. Arkansas*, 9 How., 333. Id., 22 How., 193.

McKillip & Page, for defendants in error

In cases where time to appeal is limited by statute the appellate court is not authorized to extend the time for appealing, though the delay is fully excused. *Stone v Morgan*, 10 Paige, 615, and cases cited. A party will not be aided by a court of equity after a trial at law, unless he can impeach the justice of the verdict, or report, by facts, or on grounds of which he could not have availed himself before, or was prevented from doing it by fraud or accident, or by the act of the opposite party without any prejudice or fault on his part. *Duncan v. Lyon*, 3 John, Ch. 351-6. We submit that there is *laches* on the part of the plaintiff—*First*, In not using diligence to ascertain the decision complained of before the judge left the state, to-wit, the 12th day of June, 1876. *Second*, In not filing the application for an appeal within the ten days, with the records, which seem to have been accessible, or at the office, which was visited on divers days from the 7th to the 17th. *Third*, In not commencing the action earlier. The court will take notice of the fact that two terms of the district court intervened between the time of the decision complained of and the institution of this action. An attempted appeal was taken to the district court from the county judge's decision, to which motion to dismiss was filed at the November term, 1876, for the reason that the appeal had not been taken in time. At the May term, 1877, the petition was dismissed for that reason. Plaintiff's attorneys then, knowing the point to have been taken that the appeal was irregular, elected to stand upon the question of the regularity of the appeal, otherwise this action should have been brought so as to have been before the

district court at the May term, 1877. It was not in fact commenced until October, 1877.

GANTT, CH. J.

The plaintiff, as the administrator of the estate of Alexander Dobson, deceased, rendered, under oath, a final account of his administration, to which exceptions were taken by Mary Dobson, one of the heirs of the deceased. On the fourth of June, 1876, a hearing upon the exceptions was had before the county judge, who then took the matter under advisement, and on the seventh, he rendered a decree disallowing about six hundred dollars of the plaintiff's credits, and on the twelfth, he left the county and was temporarily absent until the tenth of August following.

The plaintiff had no knowledge of the disallowance having been made until after the judge had left the county, and then endeavored to obtain an appeal from this decree to the district court, but by reason of the absence of the judge from the county, he, without any fault or negligence on his part, was prevented from filing his application in writing for an appeal within the time required by the statute.

Upon the return of the judge, the plaintiff filed his application, etc., and caused a transcript of the record and proceedings of the case to be filed in the district court, which appeal, so taken and filed in the district court, was, on motion of the defendants, dismissed for the reason that the appeal was not taken within the ten days required by the statute. These facts are all admitted by general demurrer to plaintiff's petition. The demurrer was sustained in the court below and the cause dismissed. The plaintiff asks in his petition a new trial, or such relief as in equity he is entitled to.

It was strongly urged in the argument for plaintiff

that the decree of the county court should be vacated and a new trial granted. As a general rule, equity will grant a new trial in cases of newly discovered evidence, surprise, fraud, or when a party from some unavoidable circumstance, and without any laches or want of reasonable diligence on his part, is deprived of the means of defense; but the case at bar is not one of this sort. It is one in which the party, not by any default or laches on his part, but by reason of the absence of the officer, was deprived of his appeal within the time required by statute. In such case, we think the proper course is to have the appeal entered and treated in the appellate court as though it had been taken within the time prescribed by statute. The maxim is, *actus curiae neminem gravabit.*

In *Clapp v. Graves*, West. L. Monthly, Nov. No., 1859, the party applied for an order for appeal at the proper time, but the court did not announce its decision until the time had passed. A motion to vacate the order was denied. Daley, J., said: "It is a general rule, when an act is to be done within a certain time, in which the concurrence of the court is necessary, and the party has done all that he is required to do to obtain the decision of the court, he is not to suffer by the court's delay."

In *Pearson v. Rawlings*, 1 East., 405, Lord Kenyon said that, "it is by no means unusual to make entries of judicial acts *nunc pro tunc* by leave of court"; and Powell, in his work on Appellate Proceedings (p. 420), observes that if the court below refuse to make such entry in a proper case "the appellate court would treat the case as though it had been done."

In *Louderback v. Boyd*, 1 Ash., 380, it is held that where a party has been prevented from complying with the legal requirements to obtain an appeal by the conduct or default of the justice, the appeal may be made after the expiration of the time required by the statute

and the transcript be filed after the term. *Noble v. Houk*, 16 S. & R., 421.

The law will not permit the plaintiff to be prejudiced in his rights by reason of the absence of the judge. It gives him ten days within which to take his appeal; but by reason of the absence of the judge he was prevented from obtaining his appeal within that time. He was entitled to do this after the return of the judge. Therefore, the decree of the court below in this case is reversed; plaintiff's appeal taken from the decree of the county court and dismissed by the district court at the May term, 1877, must be reinstated and the case be proceeded in to trial, with the same effect in all respects as though the appeal had been taken and completed within the time required by the statute.

DECREE ACCORDINGLY.

THOMAS J. CAMPBELL, APPELLEE, v. WILLIAM NESBITT AND FELICIA A. HOLMES, APPELLANTS.

1. **Estoppel.** Generally, whether acts or admissions of a party shall operate by way of estoppel or not, must depend upon the circumstances of each case, and therefore there can be no fixed and settled rules of general application to regulate estoppel *in pais*, as in technical estoppels.

2. **Attachment of Note and Mortgage.** The attachment of a note and mortgage debt is in effect a seizure of the same, and in law is regarded as an assignment to the attaching creditor of such note and mortgage, and gives such creditor the same right to enforce the payment of the money from the garnishee as the debtor himself previously had.

3. ———: RIGHTS OF ATTACHING CREDITOR. The attaching creditor cannot be deprived of the right acquired by virtue of his attachment, in such case, unless by a person who has previously acquired a valid right to the property thus attached

APPEAL from a decree rendered by POUND, J., foreclosing a mortgage, given by Nesbitt to Bennett, and by him assigned to plaintiff, upon certain lands in Nemaha county.

J. H. Broady, for appellants, cited *Nesbitt v. Campbell*, 5 Neb., 429. *Board v. Scoville*, 13 Kan., 32. *Marchand v. Bell*, 21 La. Ann., 33. *McDermot v. Donegan*, 44 Mo., 85. Estoppels *in pais* are not favored. They operate to deprive a man of his property without consideration or consent, and do not obtain except when the conduct is fraudulent, or grossly negligent, showing such utter disregard of the rights of others as in law amounts to fraud. Bigelow on Estoppel, 441 and 467. *Henshaw v. Bissell*, 18 Wall., 271. *Spencer v. Carr*, 45 N. Y., 406. *Wilcox v. Howell*, 44 N. Y., 398. *Holden v. Putnam Ins. Co.*, 46 N. Y., 1. *Roe v. Jerome*, 18 Conn., 138. But suppose there is an estoppel against Nesbitt. Tnere is none against defendant Holmes. As to her the case is precisely the same as if the subject of estoppel was not in the controversy at all, and never had been. She placed that note and mortgage into the custody of the law by her garnishment. Drake on Attachments, 453. By her garnishment she also obtained a vested right and privilege in that mortgage—her only security of which, by the decision of the district court, she is deprived without fault on her part, and without title thereto on the part of him to whom the district court gave the same. Creditors are entitled to better application of the fruits of their diligence. *Brashear v. West*, 7 Peters, 621. *Weil v. Tyler*, 38 Mo., 545.

W. T. Rogers, for appellee.

No brief on file.

GANTT, CH. J.

This is a foreclosure case, and is brought into this court upon appeal. The note and mortgage in the case were executed by defendant William Nesbitt to one Samuel Bennett. The note became due on the tenth day of March, 1872. In 1872 and 1873 the defendant Felicia A. Holmes recovered judgments against Samuel Bennett and J. F. Bennett, and on the third of July, 1874, by proper process, she attached the debt due Samuel on the above note and mortgage, and summoned defendant Nesbitt as garnishee. On the third of August, 1874, defendant Nesbitt filed his answer to the garnishment, and admitted there were about seventeen hundred dollars due Samuel Bennett on the note and mortgage, which had then been due about two years. On the sixth of October, 1874, at a regular term of the district court it was "ordered by the court that the said William Nesbitt do pay to the said" Felicia A. Holmes the sum of $945.57, being the amount remaining unpaid on her judgment against Samuel Bennett. And on the seventeenth of November, 1874, Samuel Bennett assigned the note and mortgage to the plaintiff, Thomas J. Campbell.

The plaintiff testified, that in the last of October, 1874, he and Daniel Bennett, son of Samuel Bennett, went to see Nesbitt; that he then "asked him if that note and mortgage were all right, and he said it is all right, go ahead; that he was looking to have $800 in a few days from Illinois—may be $1,000, and he would get it all and would pay me." This conversation is admitted by Nesbitt in his testimony; but he testifies further, that at the time of the October term, 1874, of the district court, and for some time, he was in Illinois, and that shortly after his return home, in that month, the Bennetts informed him, in his precinct, that nothing was done in the proceedings against him as gar-

nishee, and that he believed they told him the truth about the matter. Under these facts, the court below found that Samuel Bennett was the owner of the note and mortgage at the time of the garnishment, and continued to be the owner of the same up to and until the transfer of the same to the plaintiff; that defendant Nesbitt is estopped from making any defense against the plaintiff in this action, and that the rights of defendant Holmes, acquired by said proceedings in garnishment, are not such as can be made the foundation of a defense against the action of foreclosure by the plaintiff; and found all the other issues in favor of plaintiff, and rendered a decree generally for plaintiff.

In regard to estoppels *en pais*, it is said that from the manner in which a party must avail himself of them, it is obvious that there can be no fixed and settled rules of general application to regulate them, as in technical estoppels; that in many and probably most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of each case. "The doctrine of estoppel *en pais* is founded upon principles of equity and justice, and is only applied to conclude a party by acts or admissions, intended to influence the conduct of another, when in good conscience and honest dealings he ought not to be permitted to gainsay them." *Wilcox v. Howell*, 44 N. Y., 402; 8 Ward, 484; 6 Adolph & Ellis, 469.

Now, from the circumstances under which the declarations were made by Nesbitt in the conversation with plaintiff as above mentioned, it seems clear that what he said can only be referred to an honest and proper motive, and not to any bad faith, or intention to influence the conduct of the plaintiff by willful misrepresentations. But as Nesbitt has not paid the sum attached in his hands, he has no defense to the payment of this portion of the note and mortgage debt; and there-

fore the only matter that concerns him is, that he shall be protected against the payment of this sum to both plaintiff and the attaching creditor, Holmes.

There is, however, no difficulty in this respect, for by the attachment there was in legal effect a seizure of the note and mortgage belonging to Samuel Bennett to the extent due from him to Holmes, the attaching creditor; and, in law, this seizure is regarded as an assignment of so much of the note and mortgage debt to the attaching creditor, Holmes; and gives to her the same right to enforce the payment of the money by the garnishee that the debtor, Bennett, previously had. And the attaching creditor cannot be deprived of this vested right acquired by her attachment, except by a person who had previously acquired a valid right to the property thus attached. *Rushton v. Rowe*, 64 Pa. St., 65. *Board of Education v. Scoville*, 13 Kan., 32. *Edgarton et al. v. Hanna et al.*, 11 Ohio St., 323. *Giddings v. Coleman*, 12 N. H., 153. Therefore, F. A. Holmes is entitled to be paid out of the note and mortgage debt the sum of $945.51, with interest thereon from October 6th, 1874, and to a decree for that amount, she having, by virtue of the proceedings in garnishment, become the owner of that amount of the note and mortgage debt.

The finding must be, first for defendant Holmes for $945.51, with interest thereon from October 6th, 1874, amounting, with principal and interest, to the sum of $1,276.43; and second, in favor of plaintiff for the residue of the note and mortgage debt with interest thereon. Decree and order of sale of premises

ACCORDINGLY.

D. J. McCANN, PLAINTIFF IN ERROR, v. R. L. McDONALD & CO., DEFENDANTS IN ERROR.

1. **Partnership:** PRACTICE. M. and S. were sued as surviving partners of the firm of R. & Co. No service was had upon S. Upon the trial of the cause, testimony was introduced tending to prove that M. was a member of the firm at the time of the death of R., but it appeared that S. was not a member at that time. *Held*, that the evidence against M. was sufficient to sustain the allegations of the petition, and that the failure to connect S. with the firm would not prevent a recovery against M.

2. **Verdict.** The verdict of a jury, where the evidence is conflicting, will not be set aside on the ground that it is against the weight of the testimony, unless it is clearly so.

3. **Witnesses.** The question of the credibility of the witnesses is alone for the jury to determine.

4. **Partnership.** Where the existence of a partnership is denied, and there is no evidence to establish its existence, the statement of a party claiming to be a partner binds no one but himself; but this rule has no application where there is testimony establishing the existence of the partnership. *Converse v. Shambaugh*, 6 Neb., 376.

THIS cause came up on error from Otoe county. It was tried there before POUND, J., and a jury.

E. F. Warren, for plaintiff in error.

The declarations of Rider as to who composed the firm are clearly inadmissible to charge McCann. *Pleasants v. Fant*, 22 Wall, 116. *Converse v. Shambaugh*, 4 Neb., 376. *McPherson v. Rathbone*, 7 Wend, 216. *Nelson v. Lloyd*, 9 Watts, 22. *Cottrell v. Van Dusen*, 22 Vt., 511. *Jennings v. Estes*, 16 Me., 233. *Lambert v. Smith*, 1 Cranch C. Ct., 361. *Thompson v. Richards*, 14 Mich., 172. *Bank v. Moore*, 13 N. H., 99. *Pierce v. McConnel*, 7 Blackf., 170. *Tuttle v. Cooper*, 5 Pick., 414. *Dutton v. Woodman*, 9 Cush., 255, and

cases *ad infinitum.* A declaration by one of two joint parties that the other was not his partner at the time of the alleged contract is admissible evidence. *Starke v. Kenan*, 11 Ala., 818. In an action against a partnership, the declarations of a partner, made before difficulty arose, and under indifferent circumstances, are receivable to show that a co-defendant was not a member of the partnership. *Danforth v. Carter*, 4 Iowa, 230.

G. W. Covell, for defendants in error.

Where an ostensible or known partner retires from the firm he will still remain liable for all the debts and contracts of the firm, as to all persons who have previously dealt with the firm and have no notice of his retirement. Collyer on Partn., 2, 368 to 371, 2d edit. Gow on Partn., 240 to 252, 3d edit. 2 Bell Comm., 640, 5th edit. *Clapp v. Rogers*, 2 Kernan, 283. *Pope v. Risley*, 23 Missouri, 185. Story on Partn., 215. *Deering v. Flanders*, 49 N. H., 225. *Zollar v. Janvrin*, 47 N. H., 324. *Kenney v. Atwater*, 77 Pa., 34. *Lyon v. Johnson*, 28 Conn., 1. *Carmichael v. Greer*, 55 Ga., 116. All the partners may be bound after the dissolution of the partnership by a contract made by one partner, in the usual course of business, and in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. *Hunt v. Hall*, 8 Ind., 215. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. *Johnson v. Totten*, 3 Cal., 343. *Page v. Brant*, 18 Ill., 37. *Williams v. Bowers*, 15 Cal., 321. *Ennis v. Williams*, 30 Ga., 691. *Vernon v. Manhattan Co.*, 17 Wend. (N. Y.), 524. *Conro v. Port Henry Iron Co.*, 12 Barb., 27. *Fettrech v. Armstrong*, 5 Robt., 339. *Williams v.*

Birch, 6 Bosw., 299. *Little v. Clark*, 36 Pa. State, 114. *White v. Murphy*, 3 Rich. (S. C.), 369.

MAXWELL, J.

In the year 1874 the defendants in error brought an action against the plaintiff herein, in the district court of Otoe county, to recover the sum of $1,516.80. The petition was afterwards amended, and the action brought against the plaintiff herein and one W. W. Smith, as surviving partners of the firm of O. S. Rider and Company. No service was had upon Smith. The plaintiff in error answered the petition, denying all the facts therein stated.

In 1876 the case was tried to a jury, and a verdict rendered against the plaintiff in error for the full amount claimed in the petition. The cause is brought into this court by petition in error.

The plaintiff insists that the proof fails to show that McCann *and Smith* were surviving partners of O. S. Rider and Company. And therefore the proof that McCann was a partner does not sustain the allegations of the petition. It is a sufficient answer to this objection to say, that there is proof tending to show that McCann was a partner in the firm of O. S. Rider and Co., and therefore liable for the payment of the partnership debts. McCann claims that the partnership was dissolved on the first day of June, 1871, and that, at that time, he ceased to be a member of the firm. The sole question, therefore, for the consideration of the court is, does the testimony show that McCann was *in fact* a member of the firm of O. S. Rider and Co. after the first day of June, 1871? If it does, the judgment must be affirmed. If not, the judgment must be reversed.

McCann testifies that the partnership ceased on the

first day of June, 1871, he having on that day sold his interest therein to his partner, O. S. Rider, for the sum of $5,000, and that he received a note therefor, signed O. S. Rider and Co., which note he endorsed and had discounted at the Nebraska City National Bank. And that the note of O. S. Rider and Co., for $5,000, held by the bank, was received by him from Rider on the sale of his interest in the firm, and was not given by the firm while he was a member thereof.

W. W. Bell, who was vice-president of the Nebraska City National Bank in the year 1871, testifies that the plaintiff was at that time president of the bank, and that between the first day of August, 1871, and the first day of January, 1872, he (the plaintiff in error) told him that he was a member of the firm of O. S. Rider and Co. And that *after* August 1st, 1871, the bank discounted two notes for O. S. Rider and Co., one for $5,000 and one for $925, the plaintiff in error signing O. S. Rider & Co.'s name to the notes and presenting them himself for discount. He also testifies that after August 1st, 1871, the plaintiff in error told him that he had $5,000 in the firm of O. S. Rider and Co., and also about January or Febrnary, 1872, plaintiff in error told him that O. S. Rider and Co. owed him (plaintiff) $1,000 for his share of the profits for the year's business.

Mary H. Rider testifies that she was the wife of O. S. Rider; that she was in the store of O. S. Rider & Co. from 1867 to 1872, and saw the books and helped tend the store, and that she had no knowledge of the dissolution of the firm in 1871.

J. W. Latham testifies that in 1872 the plaintiff in error told him that he had a (business) house in Shenandoah, Iowa, and that witness might perhaps make some arrangements with them (to sell plows); he did not know how they were stocked up.

George L. Worley, cashier of the Nebraska City Na-

tional Bank, produced the book in which the discounts of the bank were entered, from which it appears that the bank discounted the notes of O. S. Rider and Company heretofore referred to on the fourteenth day of August, 1871. There is other testimony tending to prove the existence of the partnership, to which it is unnecessary to refer. The plaintiff in error endeavored to explain several of these transactions, so as to make it appear that he was not a member of the firm after the first day of June, 1871. The question of the existence of the partnership is purely one of fact, and was properly submitted to the jury. The question of the credibility of the witnesses is alone for the jury to determine. The rule is well settled that the verdict of a jury, where the evidence is conflicting, will not be set aside on the ground that it is against the weight of testimony, unless it is clearly so. But in this case there is a clear preponderance of testimony in favor of the verdict.

The instructions asked by plaintiff's counsel were not applicable to the testimony, and were properly refused. As to the declarations of Rider, that the plaintiff in error was a member of the firm of Rider & Co., it is sufficient to say that where the existence of a partnership is denied, and there is no evidence to establish its existence, the statement of a party claiming to be a partner binds no one but himself. *Converse v. Shambaugh*, 4 Neb., 376. But this rule has no application where there is testimony establishing the existence of the partnership.

From a careful examination of the testimony it is apparent that the verdict is fully sustained by the evidence. It is also apparent that no error, prejudicial to the plaintiff in error, has occurred on the trial of this cause. The judgment must therefore be affirmed.

In affirming the judgment we place no reliance whatever on the fact that, if the firm was dissolved, as

claimed by McCann, on the first day of June, 1871, no notice of the dissolution was given or brought to the knowledge of the defendants in error, as they have entirely failed to make a case that would entitle them to recover on that ground alone.

JUDGMENT AFFIRMED.

SIMON REINEMAN, APPELLEE, v. THE COVINGTON, COLUMBUS AND BLACK HILLS RAILROAD COMPANY, AND OTHERS, APPELLANTS.

1. **Constitutional Law:** AID TO RAILROAD COMPANIES: LEGISLATIVE DISCRETION. Until the adoption of the constitution of 1875, the whole matter of municipal aid to works of internal improvement was within the sole control of the legislature, and subject to no restraint other than such as that body saw fit to impose.

2. ———. Section 2 of article XII of the constitution is to be taken as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness in aid of railroads and other internal improvements. It fixes a boundary beyond which the legislature cannot go, but within which its authority is still supreme.

3. ———. The act of February 15th, 1869, as amended March 3d, 1870, and February 17th, 1875, enabling counties, cities, and precincts to issue bonds to aid works of internal improvement, in force at the adoption of the new constitution, is not in conflict with section 2, article XII, of that instrument, and is still in full force.

4. ———. As the law stands there is no warrant for creating a county indebtedness, in aid of internal improvements, exceeding in the aggregate ten per cent of the assessed value of the taxable property within the county. And even this must have been authorized by at least two-thirds of all the votes cast on the proposition to extend such aid.

5. ———. Where a county votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever.

THIS case came here upon appeal on part of defendants from a decree rendered by VALENTINE, J., in the district court for Cuming county. The cause was heard upon a demurrer to the petition, demurrer overruled, and injunction, to restrain issuance of bonds, made perpetual.

Joy & Wright, *James Britton*, and *O. P. Mason*, for appellant.

J. B. Barnes, for appellee, with whom was *John M. Thurston*, for Union Pacific Railroad, intervening by leave of court.

LAKE, J.

This is an appeal from the district court for Cuming county. The action was brought to obtain an injunction restraining the board of county commissioners of Wayne county from issuing certain bonds voted by the electors of the last named county to aid in the construction of a railroad by the defendant company, into and through that county. These bonds were voted at an election held since the adoption of our present constitution, and they amount to more than ten per cent., being in fact nearly fifteen per cent. of the assessed value of the taxable property within the county when the election took place. And the petition shows that when said bonds were voted: "There was no indebtedness of the said county or any of the subdivisions thereof for the construction of railroads or other works of internal improvement."

The principal questions presented for our consideration, and the only ones which we shall determine, call for a construction of Sec. 2, Art. XII, of the constitution, which declares that: "No city, county, town, precinct, municipality, or other subdivision of this state, shall ever make donations to any railroad or other work

of internal improvement, unless a proposition so to do shall have been first submitted to the qualified electors thereof at an election by authority of law; *provided*, that such donations of a county, with the donations of such subdivisions in the aggregate shall not exceed ten per cent of the assessed valuation of such county; *provided, further*, that any city or county may, by a two-thirds vote, increase such indebtedness five per cent in addition to such ten per cent."

It will not be claimed that, in the absence of any law either statutory or constitutional, the electors of a county or municipality could impose an indebtedness of this sort that would be binding upon the inhabitants thereof. Very clearly they could not. Neither will it be denied we think, that, in the absence of all constitutional restriction, the legislature could, by a suitable enactment, authorize such aid in any amount which the people might see fit to vote. Indeed, until the adoption of our present constitution this whole matter of municipal aid to works of internal improvement was within the sole control of the state legislature, and subject to no restraint other than such as that body in its wisdom saw fit to impose. This being so, the section of the constitution above quoted must be considered as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness to aid in the construction of railroads and other works of internal improvement. It fixes a boundary beyond which the legislature cannot go, but within which its authority is still supreme. The constitution does not, of its own force and independently of the legislature, assume to authorize the people to vote such aid, but, on the contrary, the necessity of legislative permission and direction is expressly recognized. It in plain terms declares that no such donation shall be made unless a proposition to do so shall be first submitted to the quali-

fied electors of the district, "at an election by authority of law." The words, "*authority of law*," can refer only to an act of the legislature—the law-making power under the constitution—duly passed and approved.

At the time of the adoption of our present constitution the act of February 15th, 1869, as amended March 3d, 1870 (Gen. Stat., 448), and again February 17th, 1875 (Laws 1875, p. 87), enabling counties, cities, and precincts to issue bonds to aid in the construction of works of internal improvement, was in full force. By the first section of this act the total aid that could be afforded was limited to ten per cent of the assessed value of all the taxable property in such county or city. And by the amendment of February 17th, 1875, a majority of two-thirds of all the votes cast upon the proposition to extend the aid was necessary to its validity. This law is in no particular in conflict with the section of the constitution under consideration. It is clearly within the limits there fixed for the exercise of legislative discretion, and must be given full force and effect. We conclude therefore that, until the legislature shall by suitable act change the existing statutory law so as to authorize it, there is no warrant for creating a county indebtedness in aid of internal improvements, exceeding in the aggregate ten per cent of the assessed value of the taxable property within the county furnishing such aid. And further, that by the amendment of February 17th, 1875, such aid must have been authorized by at least two-thirds of all the votes cast on the proposition to extend such aid.

It was urged in argument with much plausibility by counsel for the defendant that, in addition to the act of 1869 as amended, no further legislation was necessary to enable a county to extend its aid to the full constitutional limit, viz: fifteen per cent of the assessed value of its taxable property. But this view can be sustained

only on the theory that the constitution of its own force invests counties with some inherent power entirely beyond the control of the legislature, which we regard as wholly untenable. As before shown, this constitutional provision is essentially restrictive in its operation, but, within the boundaries which it sets, the whole matter is left to the legislative authority, which, by the constitution itself (Sec. 1, Art. III), is vested in the senate and house of representatives.

It was further urged that even if it should be held that the proposition as submitted to the electors was in excess of the amount authorized to be voted, still to the amount of at least ten per cent of the valuation it was valid, and to that extent the contract between the county and the railroad company should be upheld. In support of this proposition we are referred to several authorities, particularly the case of *Leavitt v. Palmer*, 3 N. Y., 19, which hold to the well established doctrine, that where a contract contains distinct provisions, some of which are legal and others illegal, the former, under certain circumstances, will be upheld, although the latter are declared void. 1 Parsons on Contracts, 380. But the case before us is clearly not within this rule. The proposition submitted to the electors was an entirety, and indivisible. It exceeded the statutory limit, and was therefore wholly unauthorized. The election was simply a void act, conferring no authority whatever upon the board of county commissioners to issue the bonds of the county in any amount whatever.

In the view which we take of the case it becomes unnecessary to determine whether, under the constitution, even if the legislature had authorized it, the whole amount of the fifteen per cent of the valuation can be donated to a single enterprise and be voted at one election, and therefore we abstain from the expression of an opinion upon that question. But it may not be entirely

out of place to suggest that we have not as yet been able to discover how it is possible to increase an indebtedness which as yet has no existence.

The judgment of the court below, being in accord with the views of this court, is affirmed, and the injunction heretofore granted is made perpetual.

JUDGMENT ACCORDINGLY.

H. W. CURTIS & CO., PLAINTIFFS IN ERROR, v. M. B. CUTLER, DEFENDANT IN ERROR.

1. **Pleading:** REPLEVIN: AVERMENTS OF PETITION. The general averments in a petition in replevin that the plaintiff "has a special property in the goods, that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law.

2. ———: ———: EVIDENCE. An objection to the admission of any evidence on the ground that the petition does not state a cause of action, may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. The objection is in the nature of demurrer *ore tenus* to the petition, and if it is totally defective, it is error to admit any evidence under such pleading.

3. ———: ———: DEFECTIVE PETITION: JUDGMENT. If a party proceeds to trial on such defective petition, which states no cause of action, he cannot, after verdict, and motion to set aside the same, take judgment on such verdict by then filing a petition setting out a cause of action.

ERROR to the district court of Saunders county.

It was an action in replevin brought by M. B. Cutler, sheriff of Cass county, Nebraska, the defendant in error, to recover the possession of specific personal property, under section 182 of civil code. Trial had before GASLIN, J., and a jury. Verdict for Cutler, upon which judgment was rendered.

M. H. Sessions, for plaintiff in error.

The petition does not state a cause of action. *Turner v. Roby*, 3 N. Y., 193. *Cornell v. Barnes*, 7 Hill, 35. *Loomis v. Wheeler*, 18 Wis., 524. The defect was not waived by answering, and the court erred in permitting evidence to be introduced under the same against the objection of the plaintiff in error. *Scofield v. Whitlegee*, 49 N. Y., 359. *Garner v. McCollough*, 48 Mo., 318. *Saulsbury v. Alexander*, 50 Mo., 142. *Smith v. Weage*, 21 Wis., 440–42. *Hays v. Lewis*, 17 Wis., 210. *Armstrong v. Gibson*, 31 Wis., 66. *Antisdel v. R. R. Co.*, 26 Wis., 145. The petition stating no cause of action, and the plaintiff in error objecting to any evidence being received for that reason, the objection should have been sustained, and the action dismissed. *Brewer v. Otoe County*, 1 Neb., 384. *Eaton v. Bartscherer*, 5 Neb., 469. *Harris v. Harris*, 10 Wis., 468.

George S. Smith, for defendant in error.

That there is sufficient alleged to state a cause of action in an action for the recovery of the possession of personal property, I think is clear under the authorities. *McCraw v. Welch*, 2 Colorado, 284. *Oaks v. Hyatt*, 10 Ohio, 344. *Grey v. Earl*, 13 Iowa, 188. *Mindin v. Elsas*, 36 N. Y., 66. *Simons v. Lyons*, 55 N. Y., 671. *Levin v. Russell*, 42 N. Y., 251. Where the intent of the pleader clearly appears from the pleading it can only be attacked by motion; demurrer will not lie. *Burr v. Boyer*, 2 Neb., 266. *Olcott v. Carroll*, 39 N. Y., 436. If demurrer will not lie, the objections urged by the plaintiff are in the nature of a demurrer and are not well taken.

GANTT, CH. J.

At the commencement of the trial the plaintiffs in

error, who were defendants in the court below, "objected to the introduction of any evidence, upon the grounds that under the pleadings in the case, the defendant in error, who was plaintiff below, was not entitled to recover." In other words, the grounds of objection are substantially, that the petition states no cause of action. The objection was overruled, but in the progress of the trial, the defendant in error, by leave of court, filed an amended petition, to which the same objections were made to the admission of any evidence, and overruled.

In *Rothe v. Rothe*, 31 Wis., 572, it is said such an objection to the admission of evidence "is in the nature of a demurrer *ore tenus* to the complaint, and upon such demurrer, as upon any other, the court must determine from the facts alleged what the cause of action stated, or intended to be, is, and whether such statement is sufficient." *Garner v. McCullough*, 48 Mo., 318. The original petition does not state one essential fact which is requisite to constitute a cause of action in replevin. The general averments in the amended petition of the defendant in error, that: "he has a special property in the goods and chattels (describing them), and that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law; and it seems clear that the facts pleaded do not support these averments. In this petition it is averred that: "by virtue of *an* execution issuing from the county court of Cass county, issued upon the order of plaintiff in execution upon two judgments rendered in said court in favor of Vallery and Ruffner, and against E. F. Bouton. Plaintiff further says that said judgment and execution has never been satisfied." That is all that is said about this execution, and then proceeds as follows: "And by virtue of two executions directed to the plain-

tiff *and sheriff* of said county, this plaintiff levied upon said goods and chattels *as the property* of E. Bouton."

It is averred that one execution was issued upon two judgments of Vallery and Ruffner, but there is no averment that this execution was levied on the goods in controversy, or upon any property whatever. In respect of the two executions mentioned in the next paragraph of the petition, it is impossible to imagine with any degree of certainty whence they were issued. There is no reference to any thing stated in the preceding paragraph of the petition, and there is no allegation that they were issued upon the judgments of any court whatever, and no direct averment that the goods levied *were the property* of E. Bouton. In all these respects the petition is fatally defective. It is said that the essential facts must be stated in unequivocal language, and must not be left to be inferred; and that the language of a pleading, if even doubtful, is to be construed most strongly against the pleader. *Moore v. Besse*, 30 Cal., 570. The objection that the petition does not state facts sufficient to constitute a cause of action, may be taken by way of objection to the evidence at any time during the progress of the trial, and it is not waived by answer or failure to demur. *Smith v. Weage*, 21 Wis., 442. *Armstrong v. Gibson*, 31 *Ibid*, 67. *Smith v. Whitney*, 22 *Ibid*, 438.

But after verdict and a motion to vacate the same and for a new trial, the defendant in error moved the court for leave to file an amended petition, which was granted. This petition sets out a cause of action; but we are of opinion that, under the circumstances of this case, this petition filed at this late period cannot avail the defendant anything. It is not a case in which a defective petition had been filed, or in which there is a variance between the proofs and the pleadings. "It is well settled that nothing will be presumed to have been proved, even after verdict, except what is alleged, or necessarily

implied from what is alleged, and that where the pleadings contain no allegations of facts showing a cause of action, it will not be cured by verdict." *Harris v. Harris*, 10 Wis., 468. In such case, in law there is no issue of fact to be tried, there is no material averment of facts showing a cause of action, and nothing can be presumed to have been proved in such a case. The pretended pleading is, in effect, nothing more than a paper filed, containing the names of certain persons. It is conceded that our statute of amendments, in furtherance of justice, should be liberally construed when such amendments are consistent with the rights of the parties interested. And though it has been said that the discretion of the court to allow amendments is generally presumed to have been properly exercised, still a revising court will always regard such discretion a legal discretion, and will carefully look into the circumstances and extent of its exercise, for unless such discretion be cautiously and prudently exercised the amendments may result, not in the furtherance of justice, but in a wrong to the opposite party. *Doty v. Rigour*, 9 Ohio St., 533.

In the case at bar, both the original and amended petitions were totally defective. Neither of them would sustain a verdict or judgment in favor of defendant in error, and he could claim no right under them; therefore, the overruling of the objections taken by plaintiffs in error to admission of any evidence was error.

They had a right to rely on these objections, because there was no cause of action set out in the petition; and as said in 20 Wis., 242, "it is obvious that this case is not within the provisions of the code respecting amendments of the petition in case of a variance. That applies only when there is a cause of action set out in the petition."

The code provides that the petition "must contain a statement of the facts constituting the cause of action,

in ordinary and concise language, and without repetition." This is imperative, and if a party will proceed to trial without such petition, and especially against the objections of the adverse party, he cannot, after verdict and a motion to set aside the same, take judgment upon such verdict by then filing a petition setting out a cause of action.

Again, the evidence as shown by the record does not sustain the judgment even upon the petition filed after verdict. It is averred in this petition that the defendant in error seized and levied upon the property in controversy by virtue of two executions, issued upon two separate judgments recovered in the county court of Cass county. The judgment rendered in this case is for the full amount of these two judgments, but the record clearly shows that there was no evidence whatever as to one of these judgments. Therefore, if the petition filed after verdict could be considered and taken as an amended petition in the case, still the verdict and judgment are not sustained by the evidence, and must be set aside. The judgment of the court below is reversed and the cause remanded, and upon payment of costs accrued after the commencement of the trial the defendant in error may file the proper petition and proceed to the trial of the cause.

JUDGMENT ACCORDINGLY.

WARREN CLOUGH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice:** BILL OF EXCEPTIONS. Arguments of counsel on questions raised during the trial, and the remarks of the court in deciding them, serve no useful purpose in a bill of exceptions, and should be omitted.

2. ———: SUPPRESSION OF DEPOSITION: EXCEPTION. When a deposition taken on behalf of the defendant in a criminal case as to his good character is suppressed, and no exception taken, the correctness of the ruling cannot be questioned on error in the supreme court.

3. ———: ———: ———. The taking and preserving of exceptions in criminal cases are governed by the rules established in such matters in civil cases.

4. **Jury:** IRREGULARITIES IN IMPANELING. Mere irregularities in the impaneling of the jury, not excepted to at the time, are waived, and cannot afterward be taken advantage of.

5. ———: ———. Five of the original panel of twenty-four jurors having been excused for cause, thereupon the selection of the trial jury was proceeded with without first filling the places of those excused. *Held*, proper practice.

6. **Meeting and Adjournment of Court:** PRESUMPTION. The record shows that on the 31st of January the court adjourned until the following morning at 9 o'clock. There was no formal entry, *in the record of the case*, of the opening of the court on the 1st day of February, but it did appear that on "Friday, February 2d, 1877, court met at nine o'clock A.M., *pursuant to adjournment.*" It was objected to the record that it showed there was a failure of the court to meet according to the adjournment of the 31st of January, and that consequently the term must be considered as having lapsed. *Held*, that by the entry of February 2d, reciting that the court convened on that day, "*pursuant to adjournment*," it was sufficiently shown that the court must have been in session on the first day of February. *Held further*, that to make such objection available it must be shown, *affirmatively*, that there was a failure of the court to meet, or that continuance in legal session will be presumed so long as business is transacted as of that term, up to the time appointed for the next regular term.

7. **Evidence:** ADMISSION OF IMMATERIAL EVIDENCE: WHEN GROUND FOR NEW TRIAL. To make the admission of immaterial testimony ground for a new trial, it must at least have tended to prejudice the accused.

8. ———: CONDUCT AND APPEARANCE OF PRISONER: EVIDENCE AGAINST HIM. The conduct and appearance of the prisoner about the time of the discovery of the homicide with which he is charged, as well as his declarations concerning it, are admissible in evidence against him.

9. ———: BUSINESS AND SOCIAL RELATIONS BETWEEN THE PRISONER AND THE DECEASED—EVIDENCE. The theory of the prosecution being that the homicide was committed by the prisoner to enable him to possess himself of his brother's property, the business and social relations subsisting between them not only just about the time of the murder, but also for a reasonable time before, are competent evidence.

10. ———: PAYMENT OF MONEY BY PRISONER. And where it is shown that the deceased was possessed, just before his death, of a considerable sum of money, it is competent for the prosecution to prove payments of money by the prisoner just before, as well as after, the homicide was committed.

11. ———: PAYMENTS OF MONEY TO PUBLIC OFFICER: PROOF OF MEMORANDUM FROM RECORDS. When a public officer is called to testify as to payments of money to him in his official capacity by the prisoner, it is proper practice to permit him to refresh his recollection from extracts which he has taken from his own official records, without producing the original. Nor does the fact that the statute permits certified copies from such records to be given in evidence preclude the proof of such payments by the oral testimony of any witness who saw them made.

12. ———: ORDER OF PROOF. The order in which the evidence for the prosecution shall be introduced is within the discretion of the judge presiding at the trial.

13. ———: COMPARISON OF BOOT WITH FOOT-PRINT: OPINION OF WITNESS NOT COMPETENT: EXCEPTION NECESSARY. It is not competent for a witness testifying of a comparison made between one of the prisoner's boots and a bloody foot-print found near the place where the homicide was committed, to give his opinion as to whether that boot made the track; but where a witness expresses such opinion and no objection is made until after verdict, it furnishes no ground for a new trial.

14. ———: ———. The general rule that, in proving a comparison between a boot of the prisoner and a track claimed by the prosecution to have been made by him at the time the murder was committed, it must be shown that such comparison and measurements were made before the boot was placed upon the track, has no application where the imprint is such that no change could be effected in its appearance by placing the boot upon it.

15. **Witness**: COMPETENCY OF WITNESS AS TO DECLARATIONS MADE BY PRISONER. It is not necessary to the competency of a witness called to testify as to what he had heard the prisoner

say, that he should have heard all he said on that occasion; if what he heard be sufficient to carry an intelligible idea respecting the commission of the offense, it may be given in evidence against him.

16. ———: STATEMENTS MUST BE VOLUNTARY: MUST NOT BE UNDER OATH. The statements of a prisoner to be competent evidence must have been voluntarily made. If made under the obligations of an oath they are not voluntary as a general rule. But when the person, although he be subsequently charged with the offense, appears voluntarily, and gives his testimony before any accusation has been made against him, his statements, although under oath, are admissible.

17. **Practice:** CROSS-EXAMINATION: NEW MATTER. If a party on the cross-examination of a witness examine him as to a matter not alluded to in chief, he thereby makes the witness his own, and, *on this point*, should not be permitted to cross-examine him.

18. ———: NOT ERROR TO PERMIT THE PROSECUTOR TO RE-OPEN CASE. It is not error to permit the prosecutor to re-open his case, and introduce further evidence in chief, even after the examination of witnesses for the defense has commenced.

19. ———: VERDICT: SIGNATURE OF FOREMAN. The foreman of the jury not having affixed his official character to his signature when the verdict was brought into court, it was not error to permit him to do so in open court and in the presence of the jury before they were discharged.

20. ———: INSTRUCTIONS NEED NOT BE REPEATED: REASON FOR REFUSAL NEED NOT BE GIVEN. When instructions are requested which, although expressed in language somewhat different, are substantially the same as those already given, it is not error to refuse them. Nor is it error, under our system of instructing juries, for the court to fail to give the reason for such refusal.

21. ———: SUFFICIENT PROOF. It is not error for the court, in speaking of the legal presumption of innocence, to say to the jury that, unless this presumption is overthrown by "*sufficient evidence*," the defendant must be acquitted. The use of the term, "sufficient evidence," could not have led the jury to understand that they were at liberty to convict on a mere preponderance of evidence, especially when, in a subsequent part of the charge, they were told that "the proof must be such as to satisfy them beyond a reasonable doubt" of the existence of all the facts necessary to constitute his guilt.

22. ———: MOTIVE TO COMMIT THE CRIME: ABSENCE OF PROOF OF. When the evidence fails to show some motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury should consider, together with all the other evidence, in making up their verdict. But it is not error for the court to refuse to charge the jury that the absence of such motive "ought to operate *strongly*" in favor of the accused, this being a matter for the jury alone to determine.

23. ———: JURORS: COMPETENCY OF: EXPRESSIONS OF OPINION. Where a juror, on his *voire dire* examination, in answer to questions put to him by the district attorney, stated that he did not think he had formed or expressed an opinion as to the prisoner's guilt, but at the same time admitted that he had "talked with the neighbors about the case," and that he had "explained to some (of his neighbors) since it occurred," who did not know about it; and the juror was accepted without examination, or objection, on the part of the prisoner, it makes a case for the application of the rule, that if a prisoner neglect to avail himself, before the trial, of any of the means which the law provides for ascertaining whether a juror is prejudiced, he will not be entitled to a new trial on that ground.

24. ———: ———. Before a motion for a new trial can be properly granted on the ground of a previous expression of opinion by a juror, unfavorable to the accused, it must appear by the affidavits of both the prisoner and his counsel that neither of them had any knowledge before the verdict was rendered of the expression of such opinion.

THIS was an indictment against the plaintiff in error, Warren Clough, for the murder of his brother, Nathan Clough, at Seward, Seward county, on the first day of May, A.D. 1876. The cause was taken, upon a change of venue, and tried in the district court for York county, before POST, J., at a term of court held in January and February, 1877. The jury returned a verdict of guilty, and the plaintiff in error was sentenced to be hanged in York county, on the thirteenth day of July, A.D. 1877. He thereupon sued out this writ of error. The record in the case is very voluminous, and it is impracticable to give even a condensed statement of the testimony, either

of the chain of circumstances tending to show the guilt of the prisoner, or the matters set up in defense. Nor is this necessary to an understanding of the points passed upon by the court. The judgment of the court below was affirmed by this court, and execution of the sentence fixed to take place on Friday, June 7, 1878. The sentence was afterwards commuted by the governor of the state to imprisonment for life.

Norval Bros., *O. P. Mason*, and *J. R. Webster*, for plaintiff in error.

1. It is error to require defendant to challenge until twelve competent jurors are in the box. It is so held in both civil and criminal cases to be error. *Taylor v. W. P. R. R.*, 45 Cal., 323. *State v. DeRocha*, 20 La. An., 356. U. S. Digest, 1 Series, page 390, Sec. 185, 186. *State v. McCanon*, 51 Mo., 27. *Morgan v. State*, 20 La. An., 442. *People v. Scoggins*, 37 Cal., 676.

2. It was error to overrule the cross interrogatory to the witness, Lee Weldon. (See p. 340.) *People v. Strong*, 30 Cal., 151, 158–9. *Chambers v. State*, 26 Ala., 59, 63. *Com. v. Goddard*, 14 Gray, 402, 404. *Chambers v. Allison*, 10 Mich., 460, 477, and 33 Mich., 419. *Long v. State*, 22 Ga., 40. *Rhodes v. Com.*, 48 Pa. St., 396, 400, 401. *People v. Navis*, 3 Cal., 106. The moving of the bed to the barn was a fact. The deceased going to the barn to sleep was a fact. They were proved, and brought into the case by the prosecution, and every fact connected with these facts, within the knowledge of the witness, was a proper subject for cross-examination. It is a general rule that the declarations of parties at the time of a transaction are usually received in evidence as a part of the *res gestae*. *Ogden v. Peters*, 15 Barbour, 560. *Davis v. Phillips*, 63 N. Car., 207. *Stauffer v. Young*, 39 Penn. St., 455. *Chaney v. State*, 31 Ala., 342.

3. There is error in giving to the jury the 8th instruction and the first instruction numbered 25 (of which number there are two), for these instructions clearly allow the jury to convict on the mere preponderance of testimony; and the error is not corrected by other parts of the instructions given on the same point, though they should be correct, for ambiguous instructions, by which the jury may be misled, and from which conclusions prejudicial to the prisoner may be drawn, is error. *Almer v. People*, 76 Ill., 150. *Caw v. State*, 3 Neb., 357, 370.

4. The twenty-second instruction given is error, for it assumes that the comparison of the boot and footprint had been made as the law requires; whereas, the evidence shows the comparison was made by placing the boot on the footprint; and the jury should have been instructed to exclude the evidence from their consideration. Wells' Cir. Ev., 104. And is further error because it gave undue prominence to this evidence. *Rutherford v. Morns*, 77 Ill., 425. *Frame v. Badger*, 79 Ill., 441, 446. *Myer v. Midland Pacific R. R.*, 2 Neb., 338.

5. After its adjournment, made on Wednesday, the thirty-first day of January, to Thursday, the first of February, at 9 A.M., the court did not meet pursuant to its adjournment. The term then being held dissolved, the court had no jurisdiction to meet February 2d, or to receive a verdict. The jury had no authority to consider the cause, to find, make, sign, or file a verdict. *Wight v. Walbaum*, 39 Ill., 554. *People v. Sanchez*, 24 Cal., 17. *State v. Roberts*, 8 Nev., 239. *People v. Brodwell*, 2 Cowen, 445. *Thomas v. Fogarty*, 19 Cal., 664. It cannot be presumed that there was a meeting and adjournment of the court. Nothing can be presumed but what appears on the face of the record. *Dyson v. State*, 26 Miss., 362, 383. *Dodge v. State*, 4 Neb., 220, 223.

6. The court erred in refusing to consider the supplementary motion for a new trial. *Henrie v. The State*, 41 Tex., 573. And while the court should not allow a second motion for a new trial for the same cause or causes, but only for a cause which the party, using due diligence, had failed to discover until his original motion was determined, a second, and even a third, motion may properly be allowed. *White v. Perkins*, 16 Ind., 358, 360. *Henrie v. State*, 41 Tex., 573.

George H. Roberts, Attorney-General, *M. B. Reese*, District Attorney, and *George W. Lowley*, for the State.

1. As to the examination of Lee Weldon, nothing was testified to by him in his examination in chief which could be construed into showing any effort or statement on the part of the defendant or his wife, trying to induce Nathan Clough to sleep in the barn. Therefore the question proposed was not proper cross-examination. Also any statements or expostulations made by the defendant's wife would be inadmissible. And proof of any objections, statements, or expostulations made by defendant, would only be proving his own statements in his own defense. The question in the form it was presented was certainly objectionable, and the court did not err in sustaining the objection. The mere fact or Nathan sleeping in the barn never has been claimed as a criminative circumstance. But that defendant formed the purpose to kill that afternoon or evening on learning that Nathan had changed his manner of keeping his property, and that he had been living with his wife when in Iowa. When a conversation is given in evidence, the other party has a right to have all that was said on the same subject, but nothing else, even if in the same conversation. 52 Ind., p. 124. 1 Am. Law Reg. (N. S.), p. 47.

2. In the absence of a bill of exceptions showing that the court did not meet upon Thursday, and the assigning the same for a new trial, the court must presume that it did meet, and adjourned till Friday, which was the case. *Casper v. The State*, 27 O. S., 578. *Bond v. The State*, 23 O. S., 349. *Smith v. The State*, 4 Neb., 278. *Fillion v. The State*, 5 Neb., 351.

LAKE, J.

This is a proceeding in error, brought to reverse the judgment of the district court for York county, and before proceeding to consider the matters alleged to be erroneous I wish to say a word relative to the record of the case, as made up and submitted for our examination. It consists of a bundle of closely written manuscript covering over *eleven hundred* pages, and being at least double the quantity actually necessary or proper for a full and complete presentation of the questions brought here for review. For instance, there is page on page taken up with the arguments of the respective counsel on the numerous questions constantly raised during the trial as to the admissibility of testimony, and also with the remarks of the court in assigning reasons for the rulings thereon, all of which serve no useful purpose, but tend materially to encumber and obscure the record, and to increase the expenses of a trial far beyond what is legitimate.

In reporting the testimony of a trial care should be taken to give the questions and answers *verbatim*, and when an objection is made it should be briefly noted, together with the decision of the court thereon. For example, if, on the examination of a witness for the prosecution, a question be objected to by the defendant's counsel as being leading, or irrelevant, all that is necessary is to note at the end of the question: "Ob-

jected to by the defendant because it is leading," or: "because it is irrelevant," as the objection may be, followed by: "Objection sustained," or, "Objection overruled;" and if an exception be taken to the ruling, to note the fact. And the same course should be pursued with respect to any other objection that may be urged upon the attention of the court during the trial.

It not unfrequently happens that quite lengthy arguments are made by counsel on questions thus raised, and in deciding them the judge may see fit to give elaborate reasons for his decisions, but neither of these has any business whatever in the record, nor should the stenographer be permitted to encumber his report with them, when it can only result in augmenting his compensation, with nothing valuable given in return.

I have been led to make these remarks, not alone because of the unsightly appearance of the record in this particular case, but also because of the very frequent carelessness and inattention that seems to characterize the making up of records for this court, and in the hope that hereafter we shall be spared the task of being compelled to rummage as in a "waste-basket," in order to discover those matters which have a legitimate bearing upon the questions to be decided.

In the consideration of the alleged errors it will be most convenient to take them up in the order observed in their assignment; and the first to be noticed is that relating to the suppression of the deposition of A. W. McDonald, taken on behalf the prisoner, as to his good character while living in Iowa. As to the ruling of the court in suppressing this deposition, no exception seems to have been taken at the time it was made; it must therefore be regarded as having been acquiesced in, and its correctness cannot now be questioned. By Sec. 482 of the criminal code it is provided that the taking and preserving of exceptions shall be governed "by the rules

established in such matters in civil cases." And by Sec. 308 of the code of civil procedure it is declared, that: "The party objecting must except at the time the decision is made," etc.

The second and third assignments, relating to the mode of impaneling the jury, are substantially the same, and may be considered together. The substance of these objections is, that when five of the original panel of twenty-four jurors had been excused for cause, the court did not require their places to be filled before proceeding further in the selection of the jury to try the case. The short answer to this objection is the same as given to the one just disposed of, viz: That no exception was taken at the time, and even if the course pursued were irregular, the irregularity was waived, and could not afterwards be taken advantage of. We desire to add, however, that the method adopted in the selection of the jury conformed to the prevailing practice in this state, and has our entire approval. Until the original panel were completely exhausted, the court could not have known that there would be any necessity for a further call, as it can never be known in advance to what extent the parties will exercise their privilege of challenge.

The fourth, fifth, and sixth assignments all pertain to the same subject, and may be disposed of together. The record shows that on the conclusion of the arguments in the case, on the thirty-first day of January, the jury were instructed by the judge, and sent out in charge of a sworn bailiff to consider of their verdict, and thereupon the court adjourned until nine o'clock on the following morning. The next step in this case, as shown by the record, was taken on the second of February, when the jury, having agreed, came into court with their verdict, and delivered it in the presence of the prisoner and his counsel. It is now objected, that inasmuch as the

record of this case does not show affirmatively that the court met on the *first* day of February, according to its order of adjournment on the day previous, and again adjourned to February 2d, the day the verdict was received, the term must be held to have lapsed, and the authority of the court to proceed further with the case to have ended. This is a very technical objection, having nothing substantial to rest upon. Referring to the record, however, we find that on this point it speaks in the following unequivocal language: "Friday, February 2d, 1877, court met at 9 o'clock A.M., pursuant to adjournment." So that there must have been a session of court on the preceding day according to the adjournment of the thirty-first of January, or this entry is false, which we cannot presume. The probability is, that inasmuch as there was nothing done in this particular case, in open court, the jury being still out, it was thought by the clerk to be quite unnecessary to encumber this record with the orders opening and adjourning the court on that day. To make an objection of this sort available, it should be shown affirmatively that there was a failure of the court to meet on the day to which it stood adjourned, and that its subsequent meeting was not in pursuance of an authorized adjournment. Unless this be done, its legal continuance will be presumed, so long as the court continues to transact business as of that term, even to the time appointed by law for the next regular term to be held.

The seventh assignment consists of no less than eighteen sub-divisions, and relates exclusively to alleged erroneous admission of testimony at various stages of the trial. We have examined the record as to each of these objections, but in this opinion shall notice particularly those only in which counsel for the prisoner seemed to place some confidence, as being good ground for reversal of the judgment.

The first in order of the testimony objected to is that given by R. S. Norval, as to where Nathan Clough said he had obtained a package of money, containing a thousand dollars, handed by him to witness on the twenty-seventh of April, on the occasion of his loaning to one Lyons the sum of one hundred and fifty dollars. On this point the testimony of Mr. Norval was as follows:

Q. You may state to the jury what you know about Nate (the deceased) drawing $1,000 from the bank, and the time?

A. On the Thursday before the murder was committed Nathan Clough desired me to loan some money, or rather, I spoke to him about a party, a Mr. Lyons, who was in town, who desired some money, and I told him I guessed I could get it from Mr. Clough; that he had some money. I saw Nathan Clough in the post-office, and I went with him from the post-office down to his barn to see his horse, and Mr. Lyons remained in the post-office until I came back. I spoke to him about the money and Nathan Clough then went in the direction of the bank, or to the hotel, from the corner where Redfield's store is, and he came back with $1,000 in money.

Q. What time in the day was that?

A. That was, perhaps, in the middle of the afternoon.

Q. Did you loan some money?

A. I loaned $150 to Mr. Lyons for the deceased, on six months time. The mortgage I either delivered to Mr. McKillop, the administrator, or to Mr. Lyons when paid off.

Q. You may state to the jury what Nathan said about the $1,000 when he brought it into your office?

Objection by defendant's counsel. This is Thursday, and he now asks what Nathan said about the $1,000 that he brought into his office. Objection overruled and exception entered.

A. Well, as I stated, he brought the $1,000, and handed the whole package to me. It was all in one package, and by making the change myself I managed to get out $150 to consummate the loan that I had made.

Q. Where did you say the money had come from?

Objection by defense. Objection overruled and exception entered.

A. I understood that the money came from the bank. The State Bank of Nebraska, at Seward; Mr. Jones' bank.

As to the testimony we have quoted, it will be noticed that not a single valid reason was given for the several objections made. This fact of itself is a sufficient ground for upholding the ruling of the court in its admission. *Horbach v. Miller*, 4 Neb., 31. But further, even conceding that, according to the rules of evidence, the testimony as to what Nathan said in the absence of the defendant ought not to have been admitted, still it is very clear that its admission could have worked no possible prejudice, for the reason that it was established beyond all question, by other testimony, especially by that of C. W. Barkley, the cashier of the bank, on his cross examination by the prisoner's counsel, that the deceased did draw this $1,000 from the bank on the twenty-seventh of April, the same day the $150 loan to Lyons was made, and on a certificate of deposit that had been issued to the prisoner, and which was indorsed by him so as to enable the deceased to draw the money on the very day it was paid. The exclusion of this testimony of the witness Norval, as to the declarations of the deceased, would therefore still leave the fact which it tended to prove clearly established by other incontrovertible evidence, and to which no objection was made. Where such is the case, the error is without prejudice, and is no ground for setting aside the verdict. It is

claimed under this head also, that there was error in the admission of portions of the testimony of the witnesses Hall, Thomas, Nihardt, and Mrs. Clough, particularly referred to in the brief of counsel for the plaintiff in error. In addition to the fact that the record discloses no ground of objection, in consequence of which it would in any event be impossible to say that the court was in error, we see nothing in the testimony itself of which the prisoner could have reasonably complained, and we think it was properly admitted.

A witness named Newton, called on behalf of the state, having testified that on the morning after the murder was committed he saw the prisoner, and noticed that he had "*a peculiar look, as I have many times before,*" was then asked this further question:

Q. You stated to the jury that you noticed a peculiar look at that time, as you had at other times. Now state to the jury the circumstances under which you saw that peculiar look at those other times?

Objection by defense, as leading, irrelevant, and incompetent. Objection overruled and exception entered.

A. I noticed while living with Mr. Clough whenever there was anything troubled him, he had a different look from what he did at other times. If he had any difficulty with any one, his manner,—his appearance, was altogether different from what it was at other times. I suppose it would be with most anybody, too.

It does not seem to us that there is anything in this testimony at all prejudicial to the prisoner. The witness noticed that he had "a peculiar look," but this he had observed "many times before," especially whenever he had a "difficulty with any one." But of what this peculiarity consisted the witness in his direct testimony does not tell us, nor but partially on his cross examination. It would have been entirely proper for the prosecution to have shown by this witness, if he knew, just

what the conduct and appearance of the prisoner were at the time referred to, for these, like the declarations of a person accused of crime, are competent evidence against him on the trial.

This witness was also asked to relate a conversation he had with the prisoner, concerning the property of the deceased, some three years before the murder was committed. This was objected to on the part of the defendant, not on the ground that his declarations on this subject were irrelevant, or immaterial, but simply because they were made so long previous to the homicide.

The object of the testimony thus called for, as stated by counsel for the state, was to show that the prisoner then controlled the property of the deceased, and that it was the purpose of the prosecution to show that he had continued to hold and control it up to about the time his brother was killed, when certain arrangements were entered upon by which the deceased was depriving him of that control. The theory of the prosecution being that the prisoner committed the murder in order to possess himself of his brother's effects, we think the question was proper, especially so in view of the answer which followed. The witness answered: "Mr. Clough said to me that he had got Nathan's property in his hands, and that if he ever lived with his wife again he would be d——d if he should ever have a cent of it."

The case being one of circumstantial evidence entirely, it was very proper to show both the business and social relations subsisting between these brothers, not only just about the time of the alleged murder, but also for a reasonable time before. In respect to this sort of testimony it may be said, that it would be exceedingly difficult, if not absolutely impossible, to set a limit as to the time within which it must have occurred, inasmuch as whatever took place between them, having a direct tendency to show a motive on the part of the prisoner

to commit the crime charged, is certainly competent for the consideration of the jury in determining the question of his guilt.

As to the testimony of the witness Leese, respecting his footings of some figures found on a card in the pocket-book of the deceased, we fail to see wherein it was relevant, or valuable for any purpose connected with the trial. It showed merely that these figures probably referred to the amounts of a number of promissory notes belonging to the deceased, and which were also in the book when found. While we fail to discover how this testimony could have benefited the prosecution, we are equally at a loss to see wherein it could, in the least degree, have prejudiced the prisoner.

The testimony of the witness Herrick, who was the deputy treasurer of Seward county, as to the amount of taxes paid by the defendant a few days before the murder, was objected to on the ground that it was "incompetent, irrelevant, and immaterial." The reason urged upon the attention of the court for this objection was, that it was a transaction occurring *before* the homicide, admitting, at the same time, that payments of money made *after* the homicide would be competent evidence. The objection was overruled, and as we think rightly; and thereupon the witness testified to the payment by the prisoner of something over two hundred dollars on his tax account.

This testimony was certainly admissible. The theory of the prosecution was that the deceased was killed for his property, and especially for the obtaining of the money that he was then supposed to have in his possession; and the design of this evidence was to show that the money expended by the prisoner just about that time, together with what was found upon him, greatly exceeded all that he honestly possessed.

After this witness had testified fully to the payment

of these taxes, and had been subjected to a cross examination of great length, covering over three pages of the record, a motion was made by the prisoner's counsel to strike out the testimony and take it from the jury altogether, for the reason that the witness had refreshed his recollection by reference to a memorandum, or transcript, which he had copied from the county tax record. But upon the witness swearing that he had a distinct recollection of the transaction, as much so as if it had taken place "but yesterday," the court refused the motion, and this is alleged as ground for reversal. In this there was no error. Even conceding that if made at the proper time the objection would have been valid, still by not making it when the testimony was first offered, and permitting it to go to the jury, it came too late. Besides, we think it was proper practice to permit the treasurer to refresh his recollection from extracts which he had taken from his own official record, without producing the original in court. *Howland v. Sheriff of Queen's Co.*, 5 Sandf., 219.

It is true that, under our statute relating to evidence, a duly certified copy from the "treasurer's cash book" might have been used to prove these payments (Sec. 408, Tit. 10, Rev. St.), but this would not preclude the state from proving them by the oral testimony of any witness who saw them made.

An objection was made to the testimony of the two witnesses, Bailey and Johns, concerning a pair of blood-stained pantaloons introduced in evidence, on the ground that they had not then been identified as the ones worn by the prisoner. It is not pretended that they were not fully identified before the close of the testimony by other witnesses. Indeed, the testimony, especially that of the witness Leese, shows that their identification was complete. The question raised was one of the order in which the testimony should be produced, and was

peculiarly within the discretion of the judge presiding at the trial.

It is claimed also that the court erred in the admission of the testimony of the witness Carnes as to his examination of a bloody foot-print upon a piece of oil cloth that was found lying beside the bed on which the deceased was murdered, and his comparison of this track with the prisoner's boot. The witness was asked: "Did you compare that boot with the track?" Answer: "I did, sir." Question. "State to the jury how it compared with the track?" It was objected to this question that the witness should state the *manner* "in which he made the comparison and not his conclusion." This objection was overruled, but, as the witness did not answer, it presents no question for this court to review. Thereupon this question was put, which it will be noticed conformed strictly to the suggestion just made by the prisoner's counsel: "State to the jury how you compared it with the track?" And there being no objection the witness answered: "I had a piece of oil-cloth before me with the imprint upon it, and upon taking the boot —it was a peg boot—upon examination I found that the heel had nails protruding from it; they were not regular, but protruding from the heel, the leather having been worn off faster than the iron; and by placing this upon the nails of the heel, and bringing them down where the nails struck, it covered the imprint, *and the probability seemed to be that that boot made the track.* I don't think I could say, and I don't think anybody could say, but a similar boot made the track."

That portion of this answer which we have italicised was very clearly incompetent, but there was no motion made to exclude it, nor was the attention of the court in any way called to it until after verdict. This testimony falls within the general rule of evidence that the opinions of witnesses, except in the case of experts called to testify

upon questions of science, or skill, and the like, are not admissible. The witness having detailed the mode of his examination and comparison, this was all he could properly do. Whether that particular boot-heel made the imprint described, was for the jury to determine from all the facts and circumstances developed, uninfluenced by any opinion which the witness himself may have formed. But, the court below not having been required to pass upon the admissibility of this testimony at the time of its production before the jury, there is nothing in the record showing that any error was committed with respect to it.

A witness named Osborne was called on behalf of the state to testify, among other things, of a conversation that took place a few days after the murder, between the widow of the deceased and the prisoner, and having stated that he "could not hear all the conversation," it was objected that he should not be permitted, for this reason, to give in evidence that which he actually heard. This objection was very properly overruled. It implied that in no case should a witness be permitted to testify of a conversation between the prisoner and another person unless he happen to have heard the whole of it. This clearly is not the law. If what the prisoner is heard to say in such a conversation be sufficient to convey an intelligible idea respecting the commission of the offense with which he is charged, it may always be given in evidence against him. To this rule, as applied to voluntary statements, we know of no exception.

It is also urged as error, that evidence was admitted as to certain declarations made by the defendant before the coroner's jury. This was objected to on the ground that they were "not the voluntary declarations of the prisoner," and that he could not be compelled to "produce evidence against himself," etc.

It would be a sufficient answer to this objection, that

the record does not show that the prisoner was under oath when these statements were made. When not made under the obligations of an oath, his statements are taken as having been voluntarily made and are admissible against him. 1 Phillips on Ev., 4th Am. Ed., 523, et seq. But the rule which the prisoner's counsel seeks to have applied undoubtedly governs in case of declarations made on such examination by a person under arrest or charged with the crime, and also under oath. But when the person, although he be subsequently charged with the offense, appears voluntarily, and gives testimony, before any accusation has been made against him, his statements are admissible in evidence against him on the trial of an indictment for the crime. *The People v. Hendrickson*, 1 Parker Crim. Repts., 406. *The People v. Thayers*, Id. 595. *Case of Broughton*, 7 Iredell, 96.

The next assignment in order relates to the exclusion of an interrogatory propounded to the witness Lee Weldon on his cross-examination as to certain declarations claimed to have been made by the prisoner and his wife to the deceased, relative to his first going to the barn to sleep. It appears from the record that this witness had testified in chief of the deceased going to the barn, where he was murdered, to sleep, as follows:

Q. When was it that you said Nate slept in the barn?

A. The Friday night before the murder.

Q. Do you know when that bed was taken up there?

A. I think the bed had been there and that the clothes had been taken up that day.

Q. Friday?

A. Yes, sir.

On the strength of this direct testimony the following cross-examination took place:

Q. You say that on the Friday previous Nathan Clough had moved this bed out to the barn to sleep?

A. Yes, sir.

Q. Now state to the jury at whose instance he took that bed and went to the barn to sleep?

A. I think it was his own.

Q. State if it is not the fact, and if you don't know it to be the fact, that both Warren Clough and Warren's wife expostulated with and protested against Nathan going to that barn to sleep?

This question was objected to by counsel for the state, "on the ground that the statements of Warren Clough, and his wife, are not admissible in his favor." The court sustained the objection, and this is alleged as error.

We think the court ruled correctly. There was nothing stated in the direct examination as to why the deceased went to the barn to sleep. The simple fact that he went there to sleep, and the time when, were all. There was nothing that tended to show that he was induced to go there by anything either said, or done, by the prisoner or his wife. Besides, by going beyond the strict limit of a cross-examination by the question preceding this one, the defense had proved that the deceased went to the barn to sleep at his own instance. In this he made the witness his own, and on this point should not be permitted to cross-examine him.

The governing rule on this point is: "That a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination; and that, if he wishes to examine him as to other matters, he must do so by making the witness his own, and by calling him as such in the subsequent progress of the cause." 1 Greenleaf on Ev., Sec. 445.

It is further complained, and assigned as error, that after the testimony for the state had closed, and the defendant had introduced the testimony of a number of witnesses, the prosecutor was permitted to open his case

and introduce further testimony. On this point the record shows, that in consequence of sickness, Luke Agur, a witness for the prosecution, was unable to be present until after the close of the examination of the other witnesses for the state, and, on motion, leave was given to examine him afterwards upon giving to the defendant a written notice of the points upon which he was expected to testify. The notice was accordingly given, and when the witness was subsequently called his examination was confined strictly to the points named.

In this we see nothing to complain of. It is a practice well supported by authorities, and we think that the court exercised its discretion in the matter with marked caution, by requiring the notice of what the witness would testify to, so that the prisoner should not be placed at a disadvantage. In criminal as well as in civil cases it is within the discretion of the court to receive further evidence on the part of the prosecution, even after the summing up has been commenced. But this discretion should be exercised with the utmost caution. *Kalle v. The People*, 4 Parker Crim. Repts., 591.

The record further shows that the verdict, as presented by the jury, although signed by all of the individual jurors, was not signed by any one of them as "foreman." By direction of the judge this omission was thereupon at once supplied by the foreman, in the presence and by the consent of all the other jurors, without returning to the jury room. And this is assigned as error. There was no necessity for sending the jury out again to cure this technical defect. Indeed, we think the verdict was good as first presented. It was signed by each one of the jurors personally, and that was sufficient to show that they had all agreed to it, which is all that the law requires.

Another ground upon which error is alleged is: "That

the court refused to give to the jury every instruction requested by the defendant." On this point it was not seriously questioned that the substance of the instructions requested on behalf of the prisoner was fairly included in the general charge, prepared by the judge on his own motion, and as given to the jury. But it is contended that, it "is not enough that a proper instruction asked by the prisoner has been *substantially* given," * * * * * that his counsel "have the right to draw and request instructions, and to insist that, if correct, they shall be given, though the court may include the same matters in his general charge."

The supreme court of California, speaking on this subject, say: "If upon the examination of the instructions given we see that all, in substance, which the defendant asked for, and was entitled to, was fully and fairly submitted to the jury, we cannot presume that he was injured by the refusal of the court to reiterate the same thing, even though submitted in a different form." *The People v. Strong*, 30 Cal., 151. And following what we conceive to be a sound rule of practice, this court held in the case of *Curry v. The State*, 5 Neb., 412, in substance, that an instruction need not be repeated, although expressed in language somewhat different from that used by the court in its charge already given. See also on this point: *State v. Volmer*, 6 Kan., 371. *State v. Schlagel*, 19 Iowa, 169.

But, it is urged, that if the court is at liberty to refuse an instruction merely because it has been once given, the refusal must be placed strictly on that ground; and so it was held in the case of *The People v. Hurley*, 8 Cal., 390, and also in one or two other cases cited by the defendant's counsel. The reason given by the supreme court of California for the enforcement of this rule is that: "Unless this is done in the presence of the jury they may be misled by the refusal."

Undoubtedly where the practice prevails both to request, and give instructions to the jury orally, this would be a very safe, and we doubt not, salutary rule of practice. It would certainly leave no ground for the jury erroneously to infer, merely from the rejection of an instruction which states the law correctly, that the court dissents from the proposition therein contained, when it is in fact refused for no other reason than to avoid needless repetition. And further, it would seem to be but respectful and just to counsel requesting such an instruction to state the reason why it is refused.

But, under the practice which now very generally prevails in this state, and that was evidently contemplated by the passage of the act of February 25th, 1875, we do not think that the non-observance of this rule can be regarded as any cause for complaint even, much less for setting aside the verdict of a jury. By section three of this act (Laws 1875, p. 77) it is provided that: "The court must read over all the instructions which it intends to give, and none others, to the jury, and must announce them as given, and shall announce as refused, without reading to the jury, all those which are refused, and must write the words 'given,' or 'refused,' as the case may be, on the margin of each instruction." And by section one it is provided that "all instructions asked shall be in writing," so that if the statute is observed it is hardly probable that the jury can know what disposition the court makes of instructions requested by counsel on either side of the case.

Of the instructions which it is complained that the court refused to give, it is only necessary to say that we have examined each one of them very carefully, and find that they are all very fully and fairly covered by the charge as given to the jury, so far at least as they state the law correctly. As to the *fourth* instruction refused we think it erroneous. It was in these words: "If the

evidence fails to show any apparent motive on the part of the accused to commit the crime charged, it ought to operate *strongly* as a circumstance in favor of the accused." It would not have been proper for the court to have charged the jury as matter of law what effect the failure to show a motive to commit the crime should have. The court had no right to say whether it should operate "strongly" or otherwise; but, rather, that it was a circumstance in favor of his innocence which the jury should take into the account, and consider, together with all the other facts and circumstances, in making up their verdict. And this the court in effect charged.

Of the instructions given, no complaint is made in the brief, except to the eighth, twenty-second, and twenty-fifth. The objection raised to the first of these instructions is, that in speaking of the effect of the legal presumption of innocence the court said: "Unless this presumption is overthrown by *sufficient* evidence the defendant must be acquitted." Implying, as is claimed, that the jury were at liberty to convict on a mere preponderance of evidence. But this is not a fair construction of the language when taken in connection with another portion of the charge, wherein the jury are told what amount of evidence may be regarded as sufficient. Toward the close of the charge this language is used: "And as the defendant's guilt is only established by sufficient proof of several material particulars, the proof must satisfy the jury *beyond a reasonable doubt* of the existence of such facts necessary to constitute guilt, or the defendant must be acquitted." And in other portions of the charge similar language is used, so that it must have been very firmly impressed upon the minds of the jury that before they could rightfully convict the prisoner of the crime charged against him, they must be satisfied to a moral certainty of his guilt, from a consideration of all the evidence produced before them on the trial.

The objection made to the twenty-fifth instruction is the same, and as to it nothing additional need be said.

The twenty-second instruction relates to the comparison between the foot-print and boot, made and testified to by the witnesses Carnes and Agur. It was in these words: "If you believe, from the evidence, that the foot-print which has been described by the witnesses Carnes, Agur, and others, as found by the bed of the deceased the morning on which the murder was discovered—I say if you believe that such track was made at the time of the murder, then the question, who made this track, becomes of the highest importance as a means to assist you in your deliberations.

"And in determining on the evidence which has been given on this subject, you should inquire from the evidence whether one of the persons who went to the barn on the morning of the discovery to see the dead body, or for other lawful purposes, might not have made the track. Also, whether the defendant might not have made the track at the time he first went into the room on the morning of the discovery.

"If you determine that it could not have been so made, then the care, accuracy, and honesty of the comparison of the boot with the track is of the greatest importance. And as a means of guarding against mistake, the law requires that the boot or shoe which the prosecution claims made the impression should be compared with the foot-mark before the boot is placed on the track. Otherwise the track might be fashioned so as to fit the boot at the time of making the comparison. But if, after giving the defendant the benefit of all doubts and precautions upon this question, you believe that the prisoner's boot, when carefully and correctly compared with the foot-print, corresponds with such track both in size and shape, this would be a circumstance for you to consider. And if you should find that there were impres-

sions of nails in the portion of the track made by the heel of the boot which, on comparison, exactly correspond with the nails found in the heel of defendant's boot, this would be a circumstance the weight of which you can readily comprehend."

The only fault that we can see in this instruction is found in the third paragraph. If the track had been made in dust, or other substance easily imprinted, then what is said as to the legal effect of placing the boot on the track, before making the comparison, would have been applicable and proper. But the testimony shows that the track was evidently made by a boot, or shoe, which had just before been stepped in blood, of which there was a pool on the floor near the head of the bed; and that a portion of the blood sticking to the sole, together with the heel nails, composed the track in question, and was left upon the hard surface of a piece of oil-cloth, the blood having become perfectly dry, and the imprints of the nails being plainly seen by the witnesses, and evidently requiring considerable pressure, in addition to the mere weight of the boot, to have made them. Under these circumstances, when taken in connection with the fact that there was testimony tending to show that the boot may have been placed on the track before any other comparison was made, we think this portion of the instruction was calculated to prejudice the prosecution by possibly leading the jury, without a sufficient reason, to reject the testimony respecting the track altogether. We think the instruction, therefore, more favorable to the prisoner than he could of right have demanded, and that in the giving of it he has not the slightest cause for complaint.

It only remains now for us to dispose of the questions raised as to the alleged bias of the two jurors, Finley C. Ferguson, and J. F. Conway, for which it is claimed the verdict ought to have been set aside. The objection

made to the juror Ferguson was included in the first motion for a new trial, and was supported by the affidavits of Nelson White, H. B. Gue, and Levi Richardson, in which they each swear that in May, 1876, very soon after the murder was committed, Ferguson had said in their presence that he knew the prisoner, that he was a "bad" or "hard" man, and that "he was guilty of the murder," as was stated in the affidavit of Gue, or that "he believed he was guilty," as was stated by the two other affiants. There was also produced the affidavit of R. S. Norval, one of the attorneys for the prisoner, that neither he, nor his counsel, knew said juror had formed or expressed this opinion until "after the jury had retired to consult on their verdict."

On the part of the state the counter-affidavit of the juror Ferguson was produced, supported in several particulars by that of his wife. Ferguson in his affidavit completely contradicts in every particular the material statements of White, Gue, and Richardson; and even White himself comes forward with a second affidavit wherein he contradicts nearly every statement which he first made, and declares that in his first affidavit "he intended to testify that he *thought* he had heard the said Finley C. Ferguson express opinions on the question of the guilt or innocence of the said defendant Warren Clough, but that this affiant did not remember at the time he made the said affidavit what these opinions of the said Finley C. Ferguson were, but that this affiant's impressions are that said Ferguson expressed a doubt as to the defendant's guilt."

After a careful examination of these several affidavits we are satisfied that Ferguson was a competent and unbiased juror, and that the motion to set aside the verdict on account of the declarations imputed to him was properly overruled.

The matter respecting the juror Conway was brought

to the notice of the court by a second, or supplementary motion for a new trial, after the one first filed had been overruled. This, too, was supported by several affidavits showing that on several occasions during the summer preceding the trial, Conway had stated that he had formed an opinion as to the guilt of the prisoner, and that he believed him to be guilty of the murder of his brother. The district attorney moved the court to strike this motion and affidavits from the files for the reason that they were filed after one motion for a new trial had already been made and overruled. The court sustained this motion, and we think improperly. A prisoner has the right to bring newly discovered matter, going to the disqualification of a juror, to the attention of the court at any time before the judgment is finally rendered on the verdict, notwithstanding a prior motion based on other causes may have been overruled, provided there has been no want of the exercise of due diligence. *Henrie v. The State*, 41 Tex., 573. *White v. Perkins*, 16 Ind., 360.

But the court having made this summary disposition of this supplemental motion, necessitates an examination of the record for the purpose of seeing whether it were not well taken, precisely the same as if it had been overruled.

Turning to the examination of the juror Conway when called to the jury-box, we find that the only questions put to him were by the district attorney. In answer to the question whether he had "formed or expressed an opinion as to the guilt or innocence of the defendant," he said: "No, I don't believe I ever have." He was also asked whether he had "ever talked with the neighbors about the case?" To this he answered: "Yes, sir. I have explained to some since it occurred." Question. "Persons who knew or claimed to know anything about it?" Answer. "No, sir." He further stated

that he had no bias or prejudice "against the defendant." From the answers given to these questions it was clearly shown that the juror had talked and "explained" about the case, to those of his neighbors who were unacquainted with the facts; and it did not seem to be clear from the answer given that he had not both formed and expressed an opinion as to the prisoner's guilt. We think at least that there was sufficient disclosed to have led a vigilant defense to make a still further examination as to the character of his explanations to his neighbors, with the view of ascertaining whether he might not have expressed some sort of opinion, conditional or otherwise, as to the defendant's guilt. The law has provided the means of thoroughly testing the fairness of every person called to serve as a juror, and it seems to us that in view of the admissions made by this juror, and the total failure of the defendant's counsel to make a further and thorough examination as to his declarations, in order to ascertain whether or not they amounted to the expression of an opinion, he is not in a situation now to make this complaint. If a prisoner neglect to avail himself before the trial of any of the means which the law provides for ascertaining whether the juror is prejudiced, he will not be entitled to a new trial on that ground. *Meyer v. The State*, 19 Ark., 156. *Callin v. The State*, 20 Ib., 36. *Parks v. The State*, 4 Ohio St., 234.

But there is still another sufficient reason why the objection to these jurors cannot be permitted to prevail. Before a motion for a new trial can be properly granted on the ground that a juror has expressed an opinion unfavorable to the prisoner, "it must appear by the affidavit, of *both the prisoner and his counsel*, that neither of them had knowledge before the verdict of the declarations made by the juror." *Anderson v. The State*, 14 Geo., 709. *Parks v. The State*, cited above. As to the

juror Ferguson, several of the defendant's attorneys of record made no affidavit, and, as before shown, that made by R. S. Norval, Esq., shows that he knew of the facts relied upon before the jury had brought in their verdict. As to the juror Conway, the prisoner and several of his counsel made the requisite affidavits, but two of them, Messrs. Whedon and Bates, did not. Therefore the motions based upon the alleged bias of these two jurors cannot be sustained.

After a careful review of the record we are satisfied that the prisoner has had a fair trial, and the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

WARREN CLOUGH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law:** PRACTICE: EXCEPTION TO ILLEGAL TESTIMONY NECESSARY. When the defendant in a criminal trial permits illegal testimony to go to the jury without objection, its illegality is thereby waived, and a new trial will not be granted because of its admission.

2. ——: DISCRETION IN GRANTING NEW TRIAL. The granting of a new trial, in a criminal case, is within the exclusive discretion of the trial court; and if that court, on application duly made, refuse to act upon it, it will be compelled to do so, unless such action could advantage the prisoner only by overriding a well established rule of criminal procedure.

3. ——: EFFECT OF STRIKING PAPERS FROM THE FILES. When papers are stricken from the files they cease to be a part of the case for any purpose, unless brought into the record by order of the court, which may be done by bill of exceptions.

THIS was an application for a rehearing of the preceding case, made by J. R. WEBSTER, one of the counsel

for plaintiff in error. The application was made upon the following motion:

And now comes the said Warren Clough, plaintiff in error, and moves the court here to grant a rehearing of the above entitled cause for the reasons, among others:

First. That defendant, in a capital case, ought not to be prejudiced by failure to object, or to except to the overruling of objection to the admission of incompetent or inadmissible evidence at the trial.

Second. It is against the law and practice of criminal causes to allow the prosecution to prove admissions of the accused made long antecedent, to-wit: three years before the alleged crime, tending to show a motive not existing at the time the crime was committed.

Third. It is not for the court of review to pass upon the sufficiency of a motion for a new trial, if such motion is taken at proper time. The accused has the right to have the court of trial pass upon the matters presented, and exercise its discretion, and determine from the circumstances of the trial its sufficiency.

Fourth. The charge of the court to the jury, if not clearly erroneous, was yet vague, uncertain, and tending to confuse and mislead the jury, and under the authority of this court in the case of *Caw v. The State*, it is against the law and precedent to hold that one part of instructions, erroneous or vague, is cured by reference to other parts of the instructions to the jury.

Fifth. It is against law and precedent that the court will presume facts not shown by the record to exist.

LAKE, J.

This is an application for a rehearing. The points included in the motion are five, but they present no question not already considered in our previous examination of the case, and, with perhaps one or two excep

tions, are sufficiently discussed in our opinion already filed, affirming the judgment.

The first point made by the motion is, in substance, that the prisoner is not estopped, even after verdict, from complaining of the admission of incompetent or irrelevant testimony on the trial, by a failure to object thereto. In addition to what we have heretofore said on this subject it may not be out of place to add that we are not aware of any rule of practice existing at the present time, when a prisoner on his trial is guaranteed the benefit of counsel to conduct his defense, even at the public expense if need be, which will sustain the position here taken. In Graham and Waterman on New Trials, 655, it is said: "It is an obvious principle of justice, that a party shall at least endeavor to help himself before he asks the aid of the court. In other words, that he shall use reasonable diligence in his own behalf; and that if he voluntarily relinquishes any of his rights, or tacitly gives them up by neglecting, at the proper time, to assert them, he is without just claim for redress. If he chooses to submit his case to the jury upon illegal evidence, or with no evidence at all, it is his own concern, and he cannot afterward complain." And in the *State v. Gordan*, 1 Rhode Island, 179, the court, remarking upon this subject, say: "When evidence has been left to the jury without objection, which, if objected to, might have been found inadmissible, the court will not grant a new trial upon objections to such testimony made after verdict." And also in *Stone v. The State*, 4 Humph., 27, in which there was a conviction for murder, it was held that: "Where illegal testimony is suffered to go to the jury without objection its illegality is waived, and a new trial will not be granted. The extension of proof so far as to establish guilt not being objected to, cannot, upon any principle of legal administration of justice, be regarded as error. If it

had been objected to, it might not have been pressed, and if pressed, might have been excluded by the court. It will never do to permit a prisoner to hear illegal testimony, and then assign it as an error, after having heard it admitted without objection, for advantage will always be taken of an indiscreet prosecution by such permission." And such is clearly the rule respecting the admission of incompetent or irrelevant testimony in both civil and criminal trials. Nor is it in conflict with *Thompson v. The People*, 4 Neb., 524, where we held an erroneous instruction, *prejudicial to the accused*, good ground for reversal, notwithstanding no exception was taken. In that case the matter complained of was the sole act of the court, operating directly, and with much influence, upon the jury in respect to a vital point in the issue; while here the court was merely passive, making no ruling whatever as to the testimony, simply because no question as to its admissibility was raised. If objections to the admission of testimony could be reserved by the prisoner until after verdict, and then be urged with like result as if made at the time it was offered, it would be very seldom indeed that a verdict of conviction could be sustained.

The second point relates to the declarations of the prisoner, concerning the property of the deceased then held by him, made some three years before the murder. This point was very fully discussed during the argument of the case. It is not suggested that any additional light could be afforded by a re-argument, and in addition to this fact we are entirely satisfied that those declarations were properly admitted.

By the third point it is assumed that, as to the supplemental motion for a new trial which the court below struck from the files, this court has no right to determine whether it was well taken or not; that the granting of that sort of motion rests in the sole discretion of the

trial court. It is true that if the district court had entertained the motion, and granted a new trial, such action, even if clearly erroneous, would not have been subject to reversal here; and it is also true that had the motion in such case been denied, this court has the power, and if the ends of justice demanded, would have exercised it by ordering a new trial to be had. So, too, if it were properly brought to the attention of this court that the trial court had refused the exercise of a discretion, which, by any possibility, could advantage the prisoner, without overriding a well established rule of procedure, we would feel bound to remand the case for its exercise by that court.

Here, however, we have brought to our notice, not by a properly executed bill of exceptions made by order of the court a part of the record, but quite irregularly, by copies of papers which the clerk of that court certifies were not entertained, and, for a reason, whether valid or not, stricken from the files, the facts respecting the supplemental motion for a new trial, upon which it is claimed that we ought to require that court to act. It was urged upon the argument of the case by counsel for the state that this whole matter, not being of record, could not properly be considered by this court. And this is doubtless so. When papers are stricken from the files of a case, they cease to be a part of it for any purpose whatever, unless brought into the record by order of the court. Until so restored to a place in the case, which may be done by bill of exceptions, they are, in law, of no more value than waste paper. Although we acknowledge to the fullest extent the force of this objection, we preferred to place our decision on a ground which would show that, even if counsel for the prisoner had taken the trouble of preparing a bill of exceptions showing the action of the court on this supplemental matter, still, inasmuch as *all* of the attorneys of record

for the prisoner had not shown a want of knowledge of the previous expression of opinion by the juror Conway, there was an insuperable legal objection to setting the verdict aside on that ground. It is urged, however, that the fact of Mr. Whedon's name appearing in the record as one of the prisoner's attorneys ought not to be regarded, because it was stated in argument, and not denied by the state's counsel, that he was absent, and took no part in the trial. But even if all this be true as to Mr. Whedon, still it appears, in the same manner, that Mr. Bates, another attorney of record for the prisoner, who made no affidavit of want of knowledge of such expression of opinion, was present, and took part in the selection of the trial jury, having been employed for that particular duty because of his residence in and general acquaintance with the people of that county. As to Mr. Bates, we think the rule to which we have referred applies with peculiar force, for, of the whole number of the defendant's attorneys, he, probably, was the best informed as to the qualifications of the persons called to serve as jurors.

The only remaining points are the fourth, which refers again to the charge of the court to the jury; and the fifth, which concerns our presumption in favor of the continuance of the court in legal session, in the absence of an affirmative showing to the contrary. These have already been fully considered and treated of in our former opinion, and it would be superfluous to bestow further time upon them.

For these reasons the motion for a rehearing is denied.

MOTION DENIED.

THE STATE OF NEBRASKA, APPELLEE, v. THE SIOUX CITY AND PACIFIC RAILROAD COMPANY, WILLIAM F. MANNING, JOHN I. BLAIR, MOSES TAYLOR, JOHN B. ALLEY, AND WILLIAM F. WELD, APPELLANTS.

1. **State Grant of Lands to Railroad Company.** Where a railroad company has received a grant of land from the state, upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. The unprofitableness of operating the road furnishes no excuse whatever for a failure to comply with the conditions of the grant.

2. ———: DUTY OF THE COMPANY. A railroad company in accepting a grant from the state, thereby enters into a contract with the state, to build and maintain its line, and operate the same, and the state may enforce the contract by mandamus or other appropriate proceeding.

3. **Action to Quiet Title to Real Estate.** Independently of the statute to maintain an action to quiet title, the plaintiff must, *first*, have been in possession for some considerable time, and it must appear that his rights are contested by numerous parties; or, *second*, the plaintiff must have established his right by numerous trials at law, and is nevertheless in danger of further litigation by parties who controvert that right.

4. ———: WHO MAY BRING. A party not in actual possession, in order to maintain an action to quiet title to real estate, must have the legal title to the same.

5. **Grants:** PATENT BY GOVERNOR OF THE STATE. A patent issued by the governor in pursuance of an express grant, is not void upon its face, and passes the legal title to the property therein granted. It may be impeached for fraud, or set aside for other sufficient cause, but cannot be assailed collaterally.

THIS was an appeal from a decree rendered in favor of plaintiff by POST, J., sitting in the district court for Dodge county.

The case was to quiet title to certain lands, to have declared null, and to cancel of record a certain patent executed by David Butler, governor of plaintiff, Decem-

ber 2d, 1869, granting to the Sioux City and Pacific Railroad Company certain lands in Dodge county, under and by virtue of the act of the legislature, entitled "An act to donate seventy-five sections of the public lands of the state to the Northern Nebraska Air Line Railroad Company," under consolidation of that company with the railway company defendant. Prayer as above indicated, and for other, further, or different relief. The defendants impleaded with the railway company are its grantees of portions of the lands.

The record brought to this court is very voluminous, and a statement of the facts sufficient to an understanding of the points decided, beyond that expressed in the opinion, is not deemed necessary.

J. M. Woolworth and *E. Wakeley*, for appellants.

I. The act of June 20, 1867, makes a present grant of the lands to the Northern Nebraska Air Line Railroad Company upon conditions subsequent:

1. If this question were to be determined upon the terms of the first section of the act it is not open to discussion. Those terms import a present grant. Omitting the descriptive words as immaterial to the inquiry, they are as follows: "Seventy-five sections of the public lands * * * be, and the same is hereby appropriated and donated to the Northern Nebraska Air Line Railroad Company." *Rutherford v. Green's heirs*, 2 Wheat., 196. *Strong v. Lehmer*, 10 Ohio St., 93. *Hannibal v. Moore*, 37 Mo., 338. *Foley v. Harrison*, 15 How., 447. *Doll v. Meador*, 16 Cal., 296. *Branch v. Mitchell*, 24 Ark., 431. *Johnson v. Ballou*, 28 Mich., 379. *Busch v. Donohue*, 31 Ill., 481. *Railroad Co. v. Smith*, 9 Wall., 95. *Veeder v. Guppy*, 3 Wis., 502. *Little v. Watson*, 32 Me., 214.

2. But it is insisted that other clauses qualify these terms of present grant, and their true meaning and

effect is to be ascertained from a survey of the whole act. It devolves upon the plaintiff to point out where and in what words these terms are so qualified as to convert them from their natural and obvious meaning into terms simply conferring an authority to convey upon a subsequent event. *Johnson v. Ballou*, 28 Mich., 377, 380. *Schulenberg v. Harriman*, 21 Wall., 44, 62.

3. And the terms of section five of the act clearly imply a present grant. That section provides that if the road be not commenced within a limited period, and be not completed within another limited period, "*the grant shall be void*," "*and this grant is made upon the condition*," *etc.*, "*and if this grant is accepted by the company*," *etc.*

4. The fact that patents were to be issued does not have the effect to qualify the terms of the grant. *Langdeau v. Hanes*, 21 Wall., 521. *Thorndike v. Richards*, 13 Maine, 430. *Central Pacific Co. v. Dyer*, 1 Sawyer, 641. *McShane v. Railroad*, 22 Wall., 444.

II. This action in equity cannot be maintained, because it is brought to enforce a forfeiture of the conditions subsequent. No rule of equity jurisprudence is better settled than that "courts of equity will never aid in the diverting of an estate for the breach of a covenant on condition subsequent." 2 Story's Eq. Jur., Sec. 1319. *Horsburgh v. Baker*, 1 Peters, 232, 236. *Livingston v. Thompkins*, 4 John Ch., 413. 4 Kent's Comm., 123–8. *Warner v. Bennet*, 31 Conn., 468–478. *Livingston v. Stickles*, 8 Paige, 398.

III. It was not competent for the attorney general to declare the forfeiture. That power was vested in the legislature alone, which had made the grant and annexed the condition. Until the declaration of forfeiture by the proper authority, a suit to enforce it cannot be main-

tained. *Schulenburg v. Harriman*, 2 Dill., 398 S. C. on Appeal, 21 Wall., 63.

IV. This action was premature. The grant was made June 20, 1867, and gave seven years to build the road, which was to June 20, 1874. The action was brought May 21, 1874.

V. The case alleged in the pleadings and insisted upon at the bar on behalf of the state is that the patents are void on their face—not voidable by the state at its pleasure, but absolutely void; not to be shown to be void by extraneous matter, but appearing to be void upon a simple inspection. If this be the correct view, the remedy was at law, and not in equity. *Sherman v. Buick*, 93 U. S., 209. *Patterson v. Tatum*, 3 Sawy., 164. *Stoddard v. Chambers*, 2 How., 284. *Bissell v. Penrose*, 8 Id., 317.

George H. Roberts, Attorney General, *J. R. Webster*, and *T. M. Marquett*, for the State.

THIS action is not to enforce a forfeiture, but to have decreed null a patent issued improperly and without authority, which is and ever was incapable of vesting an estate, but under which the defendants set up a claim of ownership of the plaintiff's lands. If the patent was issued before the grantee was entitled thereto, or was issued to an improper party, the plaintiff has an interest in obtaining its cancellation. Then, if the grantee can show itself entitled at any time within the term limited, it may present its proofs, and demand and enforce its rights. And for answer to the appellant's fifth point, we say the proceeding is statutory—it is evident the defendants *claim* an interest in these lands adverse to the plaintiff. The Sioux City and Pacific Railroad

Company claims to have, and has what purports to be, a patent of the state conveying its title to the company, and the other defendants claim title to some of these lands through the patent by grant from the company. The case exactly falls within the provisions of section one, page 882, General Statutes, of the act of February 24, 1873, and is therefore properly brought.

I. The act was not a grant *in presenti*, but upon conditions precedent. The conditions in a public grant in aid of a private party or private enterprise, naming anything to be done as a condition, are always held to be conditions precedent, some using the expression that the public reserves the remedy in its own hand. *Douglas Co. v. U. P. R. R.*, 5 Kan., 615. *State v. Kirkwood*, 14 Iowa, 162, 168. *Des Moines v. Polk Co.*, 10 Iowa, 1. *Cedar Rapids v. Woodbury*, 12 Iowa, 537. 29 Iowa, 247. *R. R. Co. v. Prescott*, 16 Wall, 604. *U. P. R. R. Co. v. McShane*, 22 Wall, 444, 462–3. *Rice v. R. R. Co.*, 1 Black, 359. *White v. B. & M. R. R. Co.*, 5 Neb., 383–95.

II. It is to be observed that the grant was to the grantee company to aid in the construction of its line of road, to aid a road between fixed and named *termini;* and upon the consideration of a continuing and perpetual obligation relative to the transportation of the freight of the state.

1. No road was completed from De Soto to Fremont. There was no legal compliance with the condition for the construction of a road between those *termini*, as is conclusively shown by the proofs and as is admitted by the pleadings. Two fragmentary lines or reaches, over which by connections and transfers communication can be effected, do not constitute a *line of road*, especially when one is a mere adjunct to the line over which traffic

passes without reaching or passing through one of the named *termini.* Why the donor named and fixed the *termini* is not to be inquired. It is sufficient that it did so. The two reaches did not make the line aided, and was no compliance with the condition of the construction of a road from De Soto to Fremont. *Carlisle v. T. H. & Ind. R. R. Co.*, 6 Ind., 316, 18–19. *Marsh v. Fulton Co.*, 10 Wall., 676, 683. *St. Joe & D. C. R. R. v. Commissioners*, 10 Kan., 579.

2. The state gave these lands to one company named, to aid the construction of a definite line of road, upon a continuing construction named. Under cover of consolidation proceedings another company used the lands to aid other purposes, for the carrying out of which it was already possessed of ample and surplus means.

3. The consolidation and obtaining of the grant was a diversion of the grant from its purpose and a fraud upon the state. Instead of getting an additional road by its aid, it got none by its aid, and none between the *termini* named. There was no compliance legal or equitable.

MAXWELL, J.

In the year 1864 the Sioux City and Pacific Railroad Company was incorporated under the laws of Iowa, for the purpose of constructing, maintaining, and operating a railroad from Sioux City, Iowa, to such point on the Union Pacific Railroad as might thereafter be selected. The time at which the company commenced the construction of the road does not appear in the record, nor does it appear from what point the construction was commenced and prosecuted.

In the year 1867 the legislature of this state passed an act, section one of which provides: "That seventy-five sections of the public lands granted and donated to this

state by the United States, for the purpose of internal improvement, as provided in the eighth section of the act of Congress of the fourth of September, 1841, be, and the same is hereby, appropriated and donated to the Northern Nebraska Air Line Railroad Company for the purpose of aiding in the construction of the road of said company, which said railroad is to commence at De Soto, in Washington county, and terminate at Fremont, in Dodge county."

Section two provides that: "The governor, secretary of state, and auditor shall select and set apart for the use of said railroad company seventy-five sections of land," etc.

Section three provides that: "The lands selected shall not be otherwise disposed of than is provided" in the act.

Section four provides: "Whenever a section of ten miles shall be completed on said railroad the company shall be entitled to receive from the state, patents for twenty sections of land selected as aforesaid; and on the completion of each subsequent section of ten miles, patents shall be issued to said company for a like quantity of land selected as aforesaid, and on completion of the said road patents shall be issued for the remainder of the seventy-five sections of land not patented as aforesaid."

Section five provides: "The said road shall be commenced within three years, and be completed within seven years from the passage of this act, otherwise this grant to be void. And this grant is made upon the condition that the said company shall never charge or receive any sum whatever for any freight transported over the said road for this state. And if this grant is accepted by the said company it shall be with the condition hereinafter expressed and limited."

Section six provides: "This act may be amended or

repealed at any future session of the legislature, held previous to the delivery of the lands to said railroad company."

The act was approved June 20, 1867.

On the seventh day of June, 1867, the "Northern Nebraska Air Line Railroad Company" was organized under the general laws of the state, and adopted its articles of association, most of the members of the company being residents of De Soto. The articles were duly recorded in Washington and Dodge counties, and in the office of the secretary of state, and were published in a newspaper in the city of Omaha, in December of that year. At a meeting of the association held in the city of Omaha, on the twenty-second day of June, 1867, John S. Bowen was elected president, Henry P. Beebe vice-president, Jesse T. Davis secretary, and James S. Stewart treasurer. No election of officers appears to have taken place in the fall of 1867. No money was paid by the stockholders at the time of the organization of the company, nor until about a year thereafter.

It appears that the members of the Air Line Company were endeavoring for at least a year after the organization of the company, to induce those engaged in the construction of railroads, or some railroad company, to accept the grant and construct the road. John S. Bowen, president of the company at that time, testifies as follows: "Those of us who resided in Washington county during the interval from June, 1867, to September, 1868, were engaged in making inquiries by correspondence and otherwise to obtain knowledge of a party or parties who would build the road. I engaged myself in correspondence with railroad men in Iowa and elsewhere. The president of the Pennsylvania Railroad was among them. So far as I knew the proposition to corporate with the Sioux City and Pacific came from us. It was not made by me. As soon as I heard of it, as presi-

dent of the Air Line Road, I ordered a meeting of the incorporators and invited John I. Blair and W. W. Walker to meet with us * * * The meeting was held in May, 1868, I was present and presided at the meeting."

On cross-examination he testified: "When I heard a rumor that the Sioux City and Pacific Railroad Company might be induced to build our road, I called the meeting of the company to which I have before alluded and invited Blair and Walker to attend." None of this testimony is denied.

The following is a copy of the proceedings of the meeting referred to by Judge Bowen:

"DE SOTO, May 4, 1868.

"The incorporators of the North Nebraska Air Line Railroad Company met at the office of said company in De Soto, in pursuance of a call made by the president and secretary. Present, John S. Bowen president, J. T. Davis secretary, and T. P. Kennard, D. C. Slader, J. A. Unthank, Thomas Gibson, and T. P. Kennard with proxies in writing for D. Butler, Henry P. Beebe, Thomas J. Majors, and E. S. Dundy, said proxies authorizing him to cast their votes in said meeting.

"The president called the meeting to order, and there being a quorum present upon a call of the roll, the minutes of the previous meeting were read and approved. The object of the meeting being stated in the call to be as follows: To take into consideration the propositions made by John I. Blair, W. W. Walker, Oakes Ames, and members of the Sioux City and Pacific Railroad Company, to take said North Nebraska Air Line Railroad franchise and land grant made to said road by the state legislature of the state of Nebraska, passed on the twentieth day of June, 1867, the said parties agreeing to build said road by the first day of July, 1869, and they fully complying with all laws of the

state of Nebraska under which said franchise and land grant were obtained by said company. After due consideration of the said proposition T. P. Kennard offered the following resolution: '*Resolved*, That we, the incorporators of the North Nebraska Air Line Railroad Company, wishing to facilitate the building of said road, hereby agree and bind ourselves and each member of said incorporation to assign within a reasonable time all their rights, title, and interest in and to said railroad franchise and land grant, to the said John I. Blair, W. W. Walker, Oakes Ames, and members of the Sioux City and Pacific Railroad Company. Said assignment to be placed in the hands of the auditor of the state of Nebraska, to be delivered to said parties if said railroad be completed by the first day of July, 1869, and upon the said parties complying with all the provisions of law under and by which said franchise and land grant were obtained.' The resolution, on motion of D. C. Slader, was adopted, the vote being unanimous."

"At a meeting of the stockholders of the North Nebraska Air Line Railroad Company, held at De Soto on the seventh day of September, 1868, the following named persons subscribed to the capital stock of the company, shares being $100 each:

John I. Blair, 750 shares	$75,000
Oakes Ames, 500 shares	50,000
Charles E. Walker, 100 shares	10,000
Charles E. Vail, 100 shares	10,000
George Douglas, 100 shares	10,000
Maurice Brown, 100 shares	10,000
T. P. Kennard, 1 share	100
J. E. Davis, 1 share	100
W. W. Walker, 348 shares	34,800"

All of the subscribers except Davis and Kennard were stockholders of the Sioux City and Pacific Railroad. The terms of the subscription were, one-tenth of the

amount subscribed at the time of making the subscription, and the residue to be paid as required by the board of directors. An opportunity appears to have been given residents of the state to subscribe for stock, but from some cause, with the exception of Davis and Kennard, none availed themselves of the opportunity.

At this meeting a board of directors was elected and a resolution passed to open negotiations with the Sioux City and Pacific Railroad Company for a consolidation.

On the ninth day of September, 1868, officers of the corporation were elected for the ensuing year.

On the fifteenth day of September of that year the officers of the two companies entered into an agreement for the consolidation of the two companies, which was afterwards ratified by the stockholders. It is shown by the testimony that $80,000 was paid on subscriptions to stock of the North Nebraska Air Line Railroad Company.

The grading was completed from the Missouri river to Fremont and the track laid about the twenty-second of February, 1869, and most of the grading on the line from Blair to De Soto was done in the winter of 1868 and 1869, and the track laid during the following summer. In regard to the character of this road L. Burnett, chief engineer of the S. C. & P. R. R., testified as follows: "Oak and pine ties were used on this branch road; about one-third hard wood and two-thirds soft. Pine is not as good as oak, but is used on most roads in this vicinity. There were 2,640 ties to the mile, which is the usual maximum number. Weight of iron was forty-five pounds to the yard, the same as that now in use on the Chicago and Northwestern. This was part of a lot of iron bought for the Chicago and Northwestern Company. At that time forty-five pound iron was in general use in the construction of western roads. The iron was in ordinary condition. It had been used about eight

months before on ordinary traffic. It was sufficient in quantity for the use of a road. It is in use now along the Sioux City and Pacific both in main and side tracks. The Omaha and Northwestern had no difficulty to my knowledge in operating the road. There were none but ordinary repairs put upon it."

As to the location of a line west from De Soto, he testified as follows: "I am, or was in 1868, familiar with the character of the country for a few miles west of De Soto. I run or surveyed two or three lines up what is known as Mill creek, which is the nearest point to De Soto where a line could be built at all. In my opinion the most feasible and practicable route for a railroad from De Soto to Fremont was from De Soto to Blair, and from Blair west on the line where the Sioux City and Pacific Road now runs. It was not practicable to run a line directly west from De Soto at all."

John S. Bowen testified that: "The surveys were made immediately after that May meeting in 1868. In my judgment the most practical route was the one on which the road was built from De Soto to Fremont. The country immediately west of De Soto is exceedingly rough and hilly, and impracticable for a road with ordinary grades. The route *via* Mill creek was considered and found to be impracticable on account of its exceeding crookedness. It is my opinion that the route adopted by way of Blair was the only possible one * * * * The location of the road from De Soto to Blair, as it was afterwards built, was approved by us and the other incorporators as far as I know. With the resident corporators of the county I was in frequent consultation. I had no doubt from repeated conversations with Unthank, Kennard, Slader, and Davis, that they approved it, as I heard no dissent."

In May, 1868, the town of De Soto contained about three hundred and fifty inhabitants. The town of Blair

was laid out and became the county seat of Washington county in March, 1869. Jesse T. Davis testified that "in September, 1868, there must have been three hundred and fifty inhabitants in De Soto. Since that time it has gradually run down until there are probably not more than thirty people there now. The main business men of De Soto moved to Blair when it was started, and went into business, and also many of the inhabitants." He also testified: "It is my impression that if the road had crossed at De Soto, and had been constructed by its present route, the result would have been substantially the same, and both towns would have been almost as they are now."

C. H. Williard, station agent at Blair, testified that: "The company never ran regular trains over the road from Blair to De Soto; they went down to De Soto to get wood or grain when requested, but never carried passengers over that part of the road. The Omaha and Northwestern Railroad Company completed their road to De Soto in the winter of 1871 and 1872, and they used the Sioux City branch to De Soto."

In December, 1869, the governor and secretary of state issued a patent to the Sioux City and Pacific Railroad Company for the lands in controversy. The patent contains the following recitals:

"*Whereas*, by an act of the legislature of the state of Nebraska, approved on the twentieth day of June, A.D. 1867, seventy-five sections of the public lands granted to the state by the United States for the purpose of internal improvements, as provided in the eighth section of the act of congress of September 4, 1841, were appropriated and donated to the Northern Nebraska Air Line Railroad Company to aid in the construction of its road from De Soto, in Washington county, to Fremont, in Dodge county; and,

"*Whereas*, the said Northern Nebraska Air Line Rail-

road Company has become consolidated with the Sioux City and Pacific Railroad Company, the said consolidated company into which the said Northern Nebraska Air Line Railroad Company by such consolidation has been merged, being known and described as the Sioux City and Pacific Railroad Company, of which consolidation of the two said companies the proper evidence has been filed in the office of the secretary of state, and now remains of record therein; and,

"*Whereas*, the whole line of said railroad from De Soto to Fremont has been completed by the Northern Nebraska Air Line Railroad Company so as to entitle it to receive patents from the state for the said seventy-five sections of land under the act of the legislature aforesaid, and no part of said land having been patented before the completion of the entire line; and,

"*Whereas*, the governor, secretary of state, and auditor have selected and set apart for the use of said railroad company, and to aid in the construction of said railroad, seventy-five sections of said land inuring to the state under the act of congress," etc.

On the twenty-first day of May, 1874, the attorney general commenced an action against the defendants in the district court of Dodge county, to quiet the title to certain lands, and to have declared null, and to cancel of record, the patent above referred to.

The petition alleges that: "The said lands were thereupon by the governor of the state of Nebraska without authority, and illegally, deceived by the false representations of said Sioux City and Pacific Railroad Company, or purposely entering into the fraudulent plans and devices thereof, by letters patent pretended to be conveyed to said company defendant, which letters patent have been by it filed for record and appear of record at pages 225-27, book "G" of the record of deeds of said county of Dodge, and said company have ever

since claimed and assumed to own and hold said lands by virtue thereof, and plaintiff has reason to believe that the other defendants herein named set up and claim an estate in and to some portion of said real estate adverse to that of the plaintiff, claiming under and through the pretended title of the said Sioux City and Pacific Railroad Company. But the plaintiff claims and avers that the said letters patent are, and at and from the date thereof were, of no force or effect; of which all of the said defendants, as well as the Sioux City and Pacific Railroad Company, were bound to take due notice."

The defendants severally answered the petition of the plaintiff, setting up various defenses. The testimony was taken by depositions. On the hearing of the cause a decree was rendered in favor of the plaintiff. The cause is brought into this court by appeal.

Was the grant to the North Nebraska Air Line Railroad Company a grant *in præsenti?*

In *Rutherford v. Greene's heirs*, 2 Wheat, 198, the terms of the grant were: "Be it enacted that 25,000 acres of land shall be allotted for and given to Major General Nathaniel Greene." The court held this to be an absolute donation, not of any specific land, but of 25,000 acres when they shall have been allotted.

In *Veeder v. Guffy*, 3 Wis., 502, the grant was in the following words: "That there be and hereby is granted to the state of Wisconsin on the admission of such state into the union, for the purpose of improving the navigation of the Fox and Wisconsin rivers, * * * a quantity of land equal to one-half of three sections in width, on each side of the said Fox river and the lakes through which it passes," etc. It was held that "the location of the lands was fixed by the grant, and established as the alternate sections on each side of the Fox river. The quantity then became definite and the location sufficiently certain for the purpose of legislation, for

it required only the ministerial acts of selection, approval, and survey, to render the specific parcels which would fall to the state or the United States certain and definite."

In *Doll v. Meador*, 16 Cal., 315, it was held that the words, "there shall be and hereby is granted," operated to vest the specific quantity of land granted, although the selection and location were to be made afterwards.

In *Strong v. Lehmer*, 10 Ohio State, 98, the grant was as follows: "That there be and are hereby granted to the state of Ohio, 500,000 acres of land owned by the United States within said state, to be selected as hereinafter directed," etc. It was held that these words constitute a present grant, and only require an identification of the lands granted. To the same effect: *Johnson v. Ballou*, 28 Mich., 379. *Branch v. Mitchell*, 24 Ark., 431. *Little v. Watson*, 32 Me., 214. *Sneed v. Ward*, 5 Dana (Ky.), 187. *Allison v. Halfacre*, 11 Iowa, 450.

In *French v. Fyan*, 93 U. S., 170, the court say: "This court has decided more than once that the swamp land act was a grant *in præsenti*, by which the title to those lands passed at once to the state in which they lay, except as admitted after its passage. The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp lands under that act, relates back and gives certainty to the title of the date of the grant." See also *Van Valkenburgh v. McCloud*, 21 Cal., 330.

In *Schulenburg v. Harriman*, 21 Wall, 63, it is held that unless there are clauses in a statute restraining the operation of words of present grant, these must be taken in their natural sense to import an immediate transfer of title, although subsequent proceedings may be required to give precision to that title and attach it to specific tracts. It was also held that the right to restore the reserved rights of the grantor in case of a public

grant, must be asserted by judicial proceedings authorized by law, or by legislative assertion of ownership of the property for breach of the condition.

In a grant or conveyance the words, "give, bargain, sell, or convey," cover almost any form of conveyance, whether at common law or under the statute of uses. Nor does the use of the wrong tense, as "has given and granted," instead of "do" or "does give and grant," make any difference. *Pierson v. Armstrong*, 1 Iowa, 282. 2 Washburn on Real Property, 378.

In the case at bar the language of the act is that: "Seventy-five sections of the public lands * * * be and the same is hereby *appropriated* and *donated*." The word "appropriate" means to set apart for, or assign to, a particular person or use in exclusion of all others. (Law) To alienate. Webster's Dict., 68.

The word "donate" means to give, generally for a specific object; to bestow freely; to grant. Id., 404.

These are clearly words making a grant *in præsenti* for the purpose specified, the work to be completed within the period prescribed by the act. No case has been referred to by the appellee, holding that these words do not create a present grant, and I think no such case can be found.

In *Koenig v. The O. & N. W. R. R. Co.*, 3 Neb., 382, it was held that a grant from the state, accepted by a railroad company, was in the nature of a contract, and within the letter and spirit of the constitution.

There is nothing in the record to show that the Sioux City Company in the absence of this grant of land, intended to run their road by way of Blair to Fremont, while it is clearly shown that in consequence of this grant, the road was constructed from De Soto to Blair, which all the testimony shows to have been the most feasible and practical route. A continuous line was thus secured between Fremont and De Soto. There is

not a particle of testimony tending to show that this arrangement was not entered into in good faith, and the fact that men like Judges Bowen and Davis, original incorporators in the North Nebraska Company, were satisfied with the arrangement, shows that they regarded it as having been entered into in good faith, and within the scope and spirit of the act. The location of the town of Blair caused the abandonment of the town of De Soto; the town site of Blair being much more eligible than that of De Soto, and its advantages for business, superior. But this furnishes no excuse to the railroad company for ceasing to operate its road or for taking up its track from Blair to De Soto. The conditions of the grant were that the road should be built and operated from De Soto to Fremont, and the fact that the operation of the road is unprofitable furnishes no excuse whatever for the failure to comply with the conditions of the grant, and the state may compel a compliance with the terms of the contract by mandamus or other appropriate remedy. If, as in this case, a portion of the line has become valueless by reason of the location of another line in its immediate vicinity, the legislature undoubtedly may, upon such terms as may be just, grant relief, provided it does not affect vested rights.

The petition in this case, although containing but a single count, was drawn with evident intention of enforcing a forfeiture of the grant, and almost the entire testimony is directed to that point; as it is apparent that the action of forfeiture, having been instituted before seven years had elapsed from the time of the passage of the act making the grant, is premature, and that portion of the case is abandoned by the state. The only ground, therefore, upon which relief is sought or can be granted, if granted at all, is under the statute to quiet title.

Section one of "An act to quiet title to real estate,"

approved February 24, 1873, provides: "That an action may be brought and prosecuted to a final decree, judgment, or order, by any person or persons, whether in *actual* possession or not, claiming title to real estate, against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting the title to said real estate."

Independently of the statute, the powers of a court of equity are only invoked when either many persons assert titles adverse to that of the plaintiff, or when one person has repeatedly asserted his single title by successive legal actions, all of which have failed. In either case the object of the suit is to settle the whole controversy in one action. *Eldridge v. Hill*, 2 Johns. Ch., 281. *Tenham v. Hebrert*, 2 Atk., 483. Willard's Eq., 323.

In order to maintain the action the plaintiff must, *first*, have been in possession for some considerable time, and it must appear that his rights are contested by numerous parties, either in the same or upon distinct rights; or, *second*, the plaintiff must have established his right by repeated trials at law, and is nevertheless in danger of further litigation by parties who controvert that right. Willard's Eq., 323.

In *Thomas v. White*, 2 Ohio State, 548, it was held that under the statute the plaintiff must have both the *legal title* and possession, to maintain a bill *quia timet*. See also *Harvey v. Jones & Eaton*, 1 Disney, 65.

A party in possession having the legal title, may institute an action under the statute to quiet that title against a pretended claim. The right to file the bill depends on the existence of a legal title superior to any in the claim of the defendant. *Douglass v. Scott*, 5 Ohio, 194.

In *Collins v. Collins*, 19 Ohio State, 468, it was held that a party in possession could not maintain an action

against persons claiming a remainder therein, contingent upon the death of the plaintiff without issue.

Section 557 of the Ohio code is as follows: "An action may be brought by any person in possession by himself or tenant of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

Whatever the rule may be as to a party in actual possession, it is clear that a party not in possession must possess the legal title, in order to maintain the action.

Section fourteen, article three, of the constitution of 1867, provided that: "All grants and commissions shall be issued in the name and by the authority of the state of Nebraska, sealed with the great seal, signed by the governor, and countersigned by the secretary of state." A patent thus issued in pursuance of an express grant, is not void upon its face, and passes the legal title. It may be impeached for fraud, or set aside for other sufficient cause, but cannot be assailed collaterally. The plaintiff cannot obtain indirectly what cannot be done directly. If an action to secure a forfeiture of the grant is premature, then the facts set forth in the petition and proved on the trial do not in this form of proceeding authorize the interference of the court. There is no allegation in the petition that the company is insolvent, or anything to show that the state will suffer by waiting until the period of seven years had elapsed from the time of making the grant. The defendant, unless relieved by the legislature, must conform to the terms and conditions of the grant, and the entire line must be kept in running order and operated. But as proceedings to quiet title cannot be maintained upon the facts stated in the petition, and proved on the trial, the judgment of the district court is reversed and the case dismissed without prejudice.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, EX REL. LEOPOLD HAHN, v. H. W. HARDY, MAYOR OF THE CITY OF LINCOLN, AND OTHERS.

1. **City Ordinances.** The fact that certain provisions of a city ordinance are void, does not authorize the court to declare void those provisions which relate to the proper subject matter of the ordinance, when they are distinct and separate from those which are void and useless. In such case those provisions which are valid must stand as the law, while the others must be treated as inoperative and of no effect.

2. ——: PUBLICATION OF. When one week's publication of a city ordinance is required, one publication of such ordinance fills the requirements of the law.

3. **Liquor Selling.** It is the province of the legislature to regulate the sale of malt, spirituous, and vinous liquors, and to fix the price of a license to sell the same; and the remedy for a reduction of the price so limited and prescribed by legislative authority, is by application to the legislature itself and not to the courts.

ORIGINAL application for mandamus.

C. O. Whedon and *Harwood & Ames*, for relator.

Lamb, Billingsley & Lambertson, and *Galey & Abbott*, for the respondents.

GANTT, CH. J.

This is an application for a writ of mandamus to be directed to the proper authorities of the city of Lincoln, naming them, to compel them to issue to the relator a license to sell malt, spirituous and vinous liquors, for one year, within the incorporated limits of said city, upon payment of three hundred and twenty-five dollars therefor. It seems that in June, 1871, the city council by ordinance fixed the price of such license at $325; and that

on the thirtieth of July, 1877, the city council passed an ordinance fixing the price of the license at one thousand dollars, and repealed all ordinances inconsistent with this last one. The city authorities demanded of the relator the payment of one thousand dollars for the license, under the ordinance of 1877; but the relator tendered the payment of the $325 for the same, under the ordinance of 1871, and submits that the ordinance of 1877 is void, for the alleged reason that the same was not published as required by law for the period of one week, within one month after the same purports to have been passed; that it is inconsistent with and repugnant to the laws of this state, and was passed without any authority in law, and that it is unreasonable and prohibitory, and in effect prohibits the transaction of a lawful business, and therefore the only ordinance now in force is that of 1871.

The power of the city authorities to grant and issue a license for the sale of malt, spirituous, and vinous liquors, is derived solely from chapter 29, part III, of the Revised Statutes, of 1866 (Gen. Stat., 851), and not from the "Act to incorporate cities of the second class and to define their powers." All the powers and duties which by this chapter devolve upon the county commissioners, shall belong to and be exercised by the proper authorities of the city, within the incorporated limits thereof; and they are empowered to pass the necessary ordinance, decree, or order to carry out the intent of the chapter—that is, to determine what municipal officer shall receive the petition, file the bond and receipt, and issue the license as in section five hundred and seventy-two required. This chapter also provides: "That incorporated cities and towns may require such additional sum to be paid for license under this chapter as to them may seem best, not to exceed one thousand dollars." The main question presented for consideration

is, whether the ordinance of 1877 contains provisions, not dependent on others, but complete in themselves and capable of being executed in carrying out the intent of chapter 29 aforesaid.

This ordinance provides that the applicant shall file his petition with the city clerk; that he shall at the same time file with the city clerk his bond in the sum of five thousand dollars, with two good and sufficient sureties, to be approved by the council; that before such license shall be delivered the applicant shall pay into the city treasury the sum of one thousand dollars, and take the treasurer's receipt for the same in duplicate and file the same with the clerk; that whenever the petition for a license has been granted and the required bond approved by the council, and the treasurer's receipt has been filed with the city clerk, the said clerk shall issue to such applicant a license for the sale, for the term of one year, in some particular place or building in said city, to be described in said license, of malt, spirituous and vinous liquors.

These provisions are distinct and independent in themselves, and they contain all that is necessary to be provided by ordinance, together with the powers conferred and duties enjoined by the statute, to constitute a complete system, which in all respects is amply operative in carrying out the intent of the license law. Hence all other provisions of the ordinance may be stricken out as void; and unquestionably most of them are void, but this fact does not authorize the court to declare void those provisions which relate to the proper subject matter of the ordinance, when they are distinct and separable from those which are void and useless.

It is said, in the construction of a statute, that: "The forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others. Whether certain parts of a statute

must be adjudged void because of their association with such as are void, must depend upon a consideration of the object of the law, and in what manner and to what extent the unconstitutional portion affects the others, for it would be inconsistent with constitutional law to adjudge enactments void, because they are associated in the same act, but not dependent on others which are unconstitutional. The constitutional and unconstitutional provisions may be contained in the same section, and yet be distinct and separable, so that the first may stand though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance." Cooley Const. Lim., 176, 177.

It is admitted there was one publication of the ordinance in a newspaper published within the time required. This publication fills the requirement of the law. It is, however, alleged that the ordinance is unreasonable and prohibitory. It is said that "the popular understanding of the word license undoubtedly is a permission to do something which without the license would not be allowable * * this is the legal meaning"; or, as in *Chilvers v. People*, 11 Mich., 43, it is to confer a right that does not exist without a license.

In *Burch v. Savannah*, 42 Geo., 596, 598, it is said that: "The license fee for retailing liquors is in no proper sense a tax. Its object is not to raise revenue. It has for many years been thought that this business was one dangerous to the public peace and public morals, and it has been the uniform practice of the country to subject it to regulation, require license from some public functionary before it is engaged in, and to prescribe as a crime the pursuit of it without a license. The license is part of the public regulations of the country, and the fee is intended rather to prevent the indiscrimi-

nate opening of such establishments than to raise the revenue by taxation." Such being the nature and character of the business, under the law, it is the province of the legislature to regulate it, and to fix the price of the license at such sum as that body may deem best calculated to restrain its dangerous consequences "to the public peace and public morals." The price fixed by the ordinance is within the limits prescribed by the statute, and the remedy for a reduction of this price is by application to the legislature of the state and not to the courts.

The writ of mandamus must be denied.

JUDGMENT ACCORDINGLY.

WILLIAM O. ELLIS AND OTHERS, APPELLANTS, v. PETER J. KARL AND OTHERS, APPELLEES.

1. **Judges of District Courts:** JURISDICTION OF AT CHAMBERS. The judges of the several district courts, as such, have no inherent authority at chambers whatever; but only such as the statutes give to them.

2. **When a Judge May Grant an Injunction Out of His Own District.** A district judge may grant a temporary order of injunction in an action out of his own district, but he can do so only when the office of judge in such district is vacant, or where it is shown that the judge thereof is absent or from some cause is unable to act.

3. **Re-Location of County Seat:** JURISDICTION OF COUNTY COMMISSIONERS IN. The act of 1875, for the re-location of county seats, gives to the board of county commissioners exclusive authority to receive petitions for that purpose, and also, incidentally, to determine whether the signatures to such petitions are genuine, and of persons authorized to sign them. And when, in the exercise of this jurisdiction, the commissioners receive a petition for the re-location of a county seat, and judge it to be

in all respects sufficient, and call an election accordingly, no objection being interposed either to the petition or to the action of the commissioners until after the election has been held and the result declared, it is too late to question the sufficiency of the petition; and an injunction to restrain the removal of the county offices to the new county seat, on the ground that such petition did not conform to the requirements of the law, will not be granted.

4. ——: ——. The proper place to raise questions concerning the sufficiency of a petition for the re-location of a county seat is before the commissioners themselves; and if no objection be made there, the party complaining not being prevented from so doing, equity will not interfere to prevent a removal, conformably with the result of the election, because of defects in the petition.

5. **Election on Question of Re-Location:** NOTICE OF. In ordering an election on the question of the re-location of a county seat, thirty days notice is required. But even if the notice be for a less time than this, a court of equity will not, for this reason alone, declare the election void at the suit of a party who participated therein, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given.

ACTION in equity. Heard in the district court for Saline county, upon demurrer to the petition, before WEAVER, J., who sustained the same and entered judgment dismissing the case. Plaintiffs appeal.

M. H. Sessions, *Lamb*, *Billingsley & Lambertson*, *James Laird*, and *E. E. Brown*, for appellants.

I. It is contended that the commissioners having found and decided that the petition was sufficient, that such finding is conclusive. This proposition is not sustained by the authorities. *Botton v. Jacks*, 6 Robert (N. Y.), 166. *Browne v. Mayor of N. Y.*, 3 Hun., 385. *Stone v. Miller*, 62 Barb., 430, 42. *Sheldon v. Newton*, 3 O. S., 499. Supposing they had found that a petition had been filed or signed, when in fact none had, would that be conclusive? We apprehend not. When the proceedings of inferior tribunals set forth the facts

necessary to give jurisdiction, they may be disproved and the proceedings avoided by parol evidence. *Clarke v. Holmes*, 1 Douglas, Mich., 390. *Denning v. Corwin*, 11 Wend., 648. *Borden v. Fitch*, 15 Johns., 121. *Harrington v. The People*, 6 Barb., 607. *People v. Cassell*, 5 Hill., 164. *Walker v. Mozeley*, 5 Denio, 102. *Cooper v. Sunderland*, 3 Iowa, 126.

II. There was no waiver of notice in this case. Neither could there be. There is an important distinction to be observed between general and special elections. The time, place, and manner of holding the former being fixed by law, the electors must take notice of them, and as to such elections the statutory requirements of giving notice by public proclamation may be and are regarded as directory only. But in the case of special elections, where no time is fixed by law for the holding of the same, and is to be determined by the officers calling the same, the statute becomes mandatory, and public notice must be given of the same for the length of time required by the statute. In the case of *The People, ex rel Darnell, v. Hamilton County*, 3 Neb., 244, it was held to be "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 elections." Neither is there an estoppel in the case. The election was irregular for want of notice. "Majorities go for nothing at an irregular election; they are not even regarded as majorities, for it is the right of orderly citizens to stay away from such elections, and if every voter votes it has no effect." *Commonwealth v. Baxter*, 35 Pa. St., 263. *State v. Albin*, 44 Mo., 346. *People, ex rel. v. Rosborough*, 14 Cal., 181. Dillon on Corporations, 1st Ed., § 136. *People v. Porter*, 6 Cal., 27. *People, ex rel. v. Weller*, 11 Cal., 49. *Wendel v. Durbin*, 26 Wis., 390–2.

In reply to the point first made by the defendants that "the plaintiffs have not shown such an interest in the matter in controversy as will enable them to maintain the action," we say the same is not well taken in principle, neither is it sustained by the weight of authority. Dill. on Incorporations, 1st Ed., Secs. 731, 732, 733, 734, 736. *Collins v. Ripley*, 8 Ia., 131. *Rice v. Smith*, 9 Ia., 578. *New London v. Brainard*, 22 Conn., 552. *Scofield v. School Dist.*, 27 Conn., 499. *Ferret v. Sharm*, 34 Conn., 105. *Mayer & Co. v. Porter*, 18 Md., 285, 301. *Mayer v. Groshan*, 30 Md., 436. *Mayer v. Gill*, 31 Md., 375, 392. *Merrill v. Plainfield*, 45 N. H., 126. *Douglas v. Mayer*, 18 Cal., 644. *Coms. of Clay Co. v. Markle*, 46 Ind., 97, 103. 14 Kan., 381. Id., 18. 4 Neb., 413. *Colburn v. Mayer, &c.*, A. L. R., March No., 1878, p. 191. Also see notes 1 and 2 on page 172, of remedies and remedial rights, where there is a full collection of all the authorities upon the question.

Hastings & McGintie, and *Mason & Whedon*, for appellees.

The plaintiffs have not shown such an interest in the matter in controversy as will enable them to maintain the action. The plaintiff must have a vested right, either legal or equitable, which may be greatly, if not irreparably affected by the act sought to be restrained. *Doolittle v. Supervisors*, 18 N. Y., 155. *Roosevelt v. Draper*, 23 N. Y., 318. *The Corporation v. Mapes*, 6 Johns. Ch., 45. *Craft v. Jackson County*, 5 Kan., 518.

The statute providing for the re-location of county seats, laws of 1875, page 159, invested the board of county commissioners with authority to receive the petition of those who were desirous of re-locating the county seat, and to pass upon the sufficiency of the petition, and whether the requisite number of electors had signed the same, and if the plaintiffs were aggrieved by the de-

cision of the board they must resort to some one of the methods pointed out by the statute to review the decision, and cannot attack it collaterally. Broom's Legal Maxims, 4th edition, 325. *State v. Snelson*, 16 Ind., 29. *Baker v. Supervisors*, 40 Ia., 226. *Clark v. Dayton*, 6 Neb., 192. *Brown v. Otoe Co.*, 6 Neb., 111. *Com. of Knox Co., Ind., v. Aspinwall*, 21 Harvard, 530. *Ryan v. Varga*, 37 Iowa, 78. *West v. Whittaker*, 37 Iowa, 598. 12 Wheaton, 19.

LAKE, J.

This is an appeal from the district court for Saline county. The action was brought in that court against the defendants, the county officers of that county, to enjoin them from removing their respective offices from Pleasant Hill, the former county seat, to Wilbur, the place to which it had been declared removed by a vote of the county.

The conclusion at which we have arrived makes it really unnecessary to notice but the single question raised by the demurrer of whether the petition states a cause of action; but, inasmuch as an important question of practice respecting the power of the several judges of the district courts to grant injunctions, in cases brought in each other's districts, is properly raised, we have thought it best not to overlook it.

Saline county, the one in which the action was brought, is in the *first* judicial district, and is presided over by the Hon. A. J. Weaver, judge. The record shows that when the petition was about to be filed it was presented to Judge Pound of the second district, who, without any showing of inability on the part of Judge Weaver to act, allowed a temporary injunction as prayed. The controling statute on this subject is Sec. 55, page 261, Gen. Statutes, which provides that: "Whenever a vacancy shall occur in the office of dis-

trict judge, in any district in this state, or whenever it shall appear by affidavit to the satisfaction of any district judge in the state that the judge of any other district is unable to act, on account of sickness, interest, or absence from the district, or from any other cause, the judge to whom application may be made, shall have power to make any order," etc., "which the judge of such district could make or do," etc.

Under the constitution, the judges of the district courts, as such, have no inherent judicial authority at chambers whatever. Sec. 23, Art. VI, provides that: "The several judges of the courts of record shall have such jurisdiction at chambers as may be provided by law." By Sec. 252 of the code of civil procedure, it is enacted that: "The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, by the supreme court or any judge thereof, the district court *or any judge thereof*," etc. This is one of the provisions "*by law*," contemplated by the section of the constitution just quoted.

It is contended by plaintiffs' counsel that this section is quite comprehensive enough to authorize any district judge to grant temporary injunctions throughout the state, no matter whether the judge of the court in which the action is brought be absent from his district, or otherwise incapacitated to act or not. But, even independently of section 55, from which we have quoted above, we do not think that the language here employed warrants this construction. The words, "*the* district court, or any judge thereof," clearly refer alone to the particular court in which the action is brought, and to the judge having for the time being jurisdiction within that district. Ordinarily this would be the judge of that judicial district, and, but for section 55, it could be no other. The jurisdiction, however, which this latter section confers, is conditional only, not general. It can be

properly exercised in a district where the office of judge is vacant, or when it is shown that the judge of a district is absent, or from any other cause unable to act if applied to. But if the judge of one district assume to act in a cause pending in another, where no such disability or absence exists, such act would be unauthorized and void; and so we find the act of Judge Pound, in granting the temporary injunction in this case, to have been. The two sections of the statutes from which we quote are not in conflict with each other, and must be considered together, and given effect in the determination of this branch of the case. Judge Weaver was clearly right in holding that this preliminary injunction had been granted without jurisdiction.

But, does the petition state a good course of action? This is the principal question in the case. The substantial points made by the pleader, and now relied on, are two: *First.* That in ordering the first election the commissioners acted without jurisdiction. *Second.* That said election, as well as the succeeding ones, was void for the reason that notices thereof were not given for the length of time which the statute requires.

The alleged want of jurisdiction is based upon the fact that although the petition for re-location as presented to the board of commissioners contained the names of persons purporting to be electors "equal in numbers to three-fifths of all the votes cast in said county at the last general election," yet the fact was, "that a large number of the names attached to said petition were the names of fictitious persons, and forged names, and the names of non-residents," etc., so that, counting only the genuine legal signatures, there were considerably less than the requisite number to authorize the calling of an election.

Section one of the act of February 24, 1875, providing for the re-location of county seats, gives to county com-

missioners full authority to receive petitions for that purpose, and also, incidentally, to determine whether the signatures to such petitions are genuine, and of persons who are "resident electors of said county." Neither the courts, nor any other officer or person, have any original jurisdiction in the decision of these questions. And it appears that, in the exercise of the jurisdiction thus conferred, the commissioners received the petition for re-location, and adjudging it in all respects sufficient, made and entered of record this order: "Whereas on the twentieth day of August, 1877, was presented by Samuel Windrom to the board of county commissioners of Saline county a petition calling for a re-location of the county seat, which said petition was signed in manner required by law by citizens of said county in number more than three-fifths of the votes cast at the last general election." Thereupon, at the same time, they ordered in due form the calling of the first election on this question, to be held on the fourth of September, 1877.

It does not appear that either the genuineness or the sufficiency of the petition was questioned before the commissioners, but it is alleged that all of the defects complained of were fully known to them when they made the order for the election. And it is further alleged that the plaintiffs were wholly ignorant concerning them until more than twenty days had elapsed after the decision had been made, which seems to be thought a sufficient excuse for not moving earlier in this attack upon the action of the board.

We are of the opinion that under this statute the proper place to have raised these questions concerning the petition was before the commissioners themselves, and that having failed to make the objections there, and no sufficient reason for the failure being shown, the plaintiffs are in no situation to ask the aid of a court of equity; especially so, when they have rested apparently

content until three elections, in which they participated, and took the chances of a favorable issue, have been held, and the result finally declared. The fact that the plaintiffs "*did not know*" of the matters complained of in time to have availed themselves of their legal remedy is entitled to no weight, nor is it a sufficient reason for a resort to the extraordinary remedy here sought. If they "did not know," they were at least in a situation in which, by the exercise of common observation, they might have known what the petition contained. Ignorance of this sort, which, if not willful, is at least voluntary, is not a valid excuse for the failure to resort to the ordinary legal remedy, nor can it be made available to give them a standing in a court of equity. It is one of the most valuable maxims of the law, that: "*The acquiescence of a party who might take advantage of an error obviates it.*"

The point made upon the notices may be quickly disposed of. We are of the opinion that the statute requires thirty days notice to be given of such election. It is provided in the first section of the act in question that: "Notice of the time and the places of holding said election shall be given in the same manner * * * * as is provided by law relating to general election for county purposes." And by Sec. 3 of the general election law it is made the duty of the several county commissioners, "at least thirty days previous to any general election," to cause notice thereof to be given by three written or printed notices "posted up in each election precinct." Taking these two provisions of the law together we do not see how any other construction than the one contended for by the plaintiffs, and which we give, could be adopted without doing violence to the intention of the legislature, very plainly expressed.

But, notwithstanding the failure to give the full statutory notice, we do not think that the plaintiffs are in a

situation to complain for the want of it. The only purpose which the notice could serve was that the question to be voted upon might be brought to the attention of each elector, and an opportunity afforded him to attend the election and express his opinion concerning it through the ballot box. Such being the purpose of the notice, it seems but just to require a party who bases his claim to equitable relief on the failure to give it, to show that for the want of it he has sustained the injury which he seeks to have redressed. The plaintiffs do not allege that they failed to take part in the election, and for want of such allegation it may be inferred that they did participate therein. In this particular, therefore, the additional notice could have been of no use. But, perhaps we ought not to omit to mention that the petition does contain general averments to the effect that a large number of voters in the county failed to receive any notice whatever of the election, and that even those who did receive it did not have time to inform themselves upon the question to be voted on, by reason of which "the election was carried in favor of re-locating the county seat." But in all this the petition is merely conjectural and argumentative. There is not a single fact stated from which the court could say that any different result would have been obtained by giving the full statutory notice. Not a single person is named who was kept away from the polls, nor is it shown that even one additional vote against the proposed re-location could have been secured by a longer notice. Besides, we are of the opinion that, by participating in these elections, the plaintiffs, in equity, are estopped from now questioning their entire regularity so far as the notice is concerned. It would certainly be most inequitable, and productive of much mischief, to permit them to do so in the manner here attempted.

JUDGMENT AFFIRMED.

SAMUEL C. COLT, PLAINTIFF IN ERROR, v. HENRY DUBOIS, AND OTHERS, DEFENDANTS IN ERROR.

1. **Judgments:** LIEN OF. All judgments rendered during a term of the district court, in actions commenced prior thereto, are liens on all the lands of the debtor *within* the county from the first day of such term; and all lands of the debtor *without* the county shall be bound for the satisfaction of a judgment against him from the time they shall be seized in execution.

2. ———: ———. The lien attaches to all lands and tenements of the debtor in the county where the judgment is rendered, whether held by him at the time of its rendition, or subsequently acquired.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Cobb & Marquett, for plaintiff in error.

At common law, a judgment created no lien in the real estate of defendant. *Shrew v. Jones*, 2 McLean, 78. The Coppock judgment comes within no provision of the statute except that of "all other lands," etc., shall be bound from the time "when they shall be seized in execution." In relation to the Coppock judgment, these lands were after acquired lands, because Martin's title thereto was acquired after the first day of the term, to which day the lien of the judgment relates. A judgment has relation to the first day of the term at which it is rendered (*ergo*, it does not relate to any other day of the term). *Clements v. Berry*, 11 Howard, 408. *Farley v. Lee*, 5 Dev. & B. (N. C.), 169. *Doe v. Bank of Cleveland*, 3 McLean, 140. After acquired lands are not bound by a judgment until execution and levy. *Filley & Hopkins v. Duncan*, 1 Neb., 134. *Roads v. Symmes*, 1 Ohio, 281–313. *Urbana Bank v. Baldwin*, 3 Ohio, 65. *Stiles v. Murphy*, 4 Ohio, 92. To hold any other theory would be to give that plaintiff, who uses the greatest

diligence in obtaining judgment, the least protection. The slothful plaintiff would have two chances over his diligent competitors. 1st. His lien would be equal in respect to property owned by the defendant on the first day of the term, and his mere want of diligence would give him a prior and exclusive lien upon the property of the defendant acquired during the term, so that hereafter, instead of each plaintiff striving to get his judgment early in the term, there would be a slothful emulation among plaintiffs as to who could be the least diligent, and the last day of the term would be the favorite of all, and the maxim: "The law favors the diligent creditor," would be reversed.

Lamb, Billingsley, & Lambertson, for defendant in error.

GANTT, CH. J.

This suit was brought in the court below by Henry DuBois to foreclose a mortgage, executed and delivered to him by defendant O. J. Martin, and the mortgage was filed for record on the thirteenth of March, 1875. The plaintiff in error and several other parties were defendants; but the only matter now in controversy is between the plaintiff in error and defendant J. W. Hartley. This controversy arises upon the following facts: On the eighteenth of October, 1872, defendant O. J. Martin acquired title to the north half of the south-west quarter, and the south-east quarter of the south-west quarter, and the south-west quarter of the south-east quarter of section twenty-eight, in township twelve north, of range six east, in Lancaster county. In August, 1872, Isaiah Coppock commenced an action against O. J. Martin, in the district court of said county, and on the thirtieth of October, 1872, at a regular term of said court,

which was begun on the first day of the same month, he recovered a judgment against said defendant Martin in said action. Afterwards Coppock assigned this judgment to defendant J. W. Hartley, who thereby became the legal owner of the same. On the second of November, 1874, O. J. Martin and Ann, his wife, executed and delivered to S. C. Colt, plaintiff in error, a mortgage on all the above described lands. The plaintiff complains that, under these facts, the court below erred in deciding that the Coppock judgment, assigned to Hartley, had priority of lien over his mortgage.

It is insisted that the judgment, in this case, has relation to the first day of the term at which it was rendered, and as all the lands described were subsequently acquired by defendant, O. J. Martin, the judgment created no lien upon any of these lands, though the title was acquired before the rendition of the judgment; and therefore the plaintiff's mortgage has priority of lien over the judgment.

The rule will not be questioned that, under our statute relative to judgment liens, all judgments rendered during the term, in actions commenced prior thereto, are liens on all the lands of the debtor within the county from the first day of the term. This interpretation is given to the statute in the case of *Miller v. Finn*, 1 Neb., 294; and it places all such judgments, entered at the same term, upon equality in regard to liens, and thereby does equal justice to creditors whose judgments are necessarily entered on different days of the terms.

Section 476 of the code provides that "the lands, tenements, goods, and chattels, not exempt by law, shall be subject to the payment of debts," and may be taken in execution and sold.

Section 474 provides that executions may be directed to different counties at the same time, and section 477 declares that "the lands and tenements of the debtor

within the county where the judgment is entered shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered; but judgments by confession, and judgments rendered at the same term at which the action is commenced, shall bind such lands only from the day on which such judgments are rendered. All other lands, as well as goods and chattels of the debtor, shall be bound from the time that they shall be seized in execution."

In construing these sections together, it seems clear that the words "all other lands" must necessarily refer to lands *without* "the county where the judgment is rendered"; and under section 474 executions may be directed to the counties in which such lands are situated, and they "shall be bound from the time they shall be seized in execution."

A judgment does not create a specific lien upon any particular lands of the judgment debtor. It, at most, creates a general lien upon all his estate in the county in which the judgment is rendered. But the judgment creditor acquires no interest in the land itself by his lien. As was said in the case of *Brace v. Duchess of Marlborough*, 2 P. Wm., 491, the lien is neither a *jus in re*, nor *jus ad rem*, and amounts only to a security against subsequent purchasers and incumbrances. 4 Kent Com., 437. It confers only the right to levy on the land to the exclusion of other adverse interests subsequent to the rendition of the judgment, and this right applies to all the lands and tenements of the debtor in the county where the judgment is entered, whether held by him at the time of the rendition, or subsequently acquired.

In *Filley & Hopkins v. Duncan*, 1 Neb., 134, CROUNSE, J., in delivering the opinion of the court says, that the lien of a judgment does not attach to lands acquired after its rendition, so as to affect *bona fide* pur-

chasers. That question was not before the court. It appears from the statement of facts in that case that in July, 1859, one Bell, being in possession of certain real estate, and holding the legal title to an undivided half thereof, and a contract of purchase for the other half, sold the same to Mrs. Duncan, and gave her a bond to convey the same to her as soon as he obtained a deed authorizing him to do so. Mrs. D. immediately took possession, and in October of that year paid nearly the entire amount of purchase money. In May, 1860, Bell executed and delivered to Mrs. D. a deed for the premises. In December, 1859, certain judgments were recovered against Bell in the district court, under which the undivided half of the lands in controversy was sold. The action was brought to have the sheriff's deed executed in pursuance of such judicial sale declared void.

In *Calhoun v. Snyder*, 6 Binney, 135, it was held that the lien of a judgment did not attach to lands in which the judgment debtor had *no interest* at the time of its rendition. Afterwards it was held in that state that if, at the time of the rendition of the judgment, the debtor had entered into a binding contract for the purchase of land and afterwards acquired the legal title, the lien attached and took precedence of a judgment entered against the debtor immediately after he had acquired the legal title to the same. *Stephen's Appeal*, 8 W. & S., 186. Freeman on Judgments, 367.

In *Roads v. Symmes*, 1 Ohio, 314, the case of *Calhoun v. Snyder* is cited with approval, and followed.

In *Stiles et al. v. Murphy*, 4 Id., 98, the court, in referring to *Roads v. Symmes*, say: "That decision may have been an innovation upon established principles of law—it may have been a departure from true policy under the circumstances in which we are placed—but it would be a more dangerous innovation, and a wider departure from true policy *now* to disturb it."

It is undoubtedly true, that where a rule of construction, upon which titles to real estate depend, has been adopted, it may lead to great inconveniences, if not injustice, to change it. But as the question presented by this case has never before been submitted to this court, we deem it best to disregard the *dictum* in the case of *Filley v. Duncan*, and lay down what we deem to be the correct rule, subjecting land acquired subsequently to the rendition of a judgment to its payment. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1878.

PRESENT:
HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" GEORGE B. LAKE, } JUDGES.
" AMASA COBB, }

CHARLES HALL, PLAINTIFF IN ERROR, v. TIMOTHY VANIER, DEFENDANT IN ERROR.

1. **A Final Judgment** is one that disposes of the merits of the case.
2. ———. Z. V. commenced an action against H. and others, upon an award. Afterwards, upon it being made to appear to the court that Z. V. had assigned to T. V. his interest in the action, an order of substitution was made. T. V. then dismissed the action without prejudice, and commenced an action on the award in his own name. *Held*, that the order of substitution was not a final order or judgment, and not conclusive.

THIS was a re-hearing of the case reported in 6 Neb., 85.

W. J. Connell and *John I. Redick*, for plaintiffs in error.

E. Wakeley, for defendant in error.

MAXWELL, CH. J.

This case was argued and submitted to the court last year, and an opinion filed, which is reported in 6 Neb., 85. Afterwards, upon an affidavit being filed that there was an agreement between the attorneys for the respective parties not to submit the case at the term at which it was submitted, and a decision rendered, a re-hearing was granted.

It appears from the record that Z. Vanier brought an action in the district court of Douglas county against the plaintiff in error, upon the award in question, and before the trial of the cause Timothy Vanier was substituted as plaintiff, who then dismissed the action without prejudice. The defendant in error afterwards brought an action on the award in his own name. The attorney for the defendant in error insists that the order substituting Timothy Vanier for Z. Vanier in the first action is a final judgment, and is conclusive upon the question of the assignment. A final judgment is one that disposes of the case, either by dismissing it before a hearing is had upon the merits, or after trial, by rendering judgment either in favor of the plaintiff or defendant. But no judgment or order which does not determine the rights of the parties in the cause, and preclude further inquiry as to their rights in the premises, is a final judgment. The order in question was not therefore a final determination, and is not conclusive.

The other questions presented on the argument of the case were fully considered in the former opinion. And after due consideration we see no reason for reversing our judgment in that case. The judgment heretofore rendered in this court, reversing the judgment of the court below, is therefore affirmed.

JUDGMENT ACCORDINGLY.

JAMES G. CHAPMAN, PLAINTIFF IN ERROR, v. RICHARD KIMBALL, DEFENDANT IN ERROR.

1. **Conveyance:** COVENANTS: INCUMBRANCE. An incumbrance, within the meaning of the covenant against them, is said to be every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee.

2. ——: ——: ——. Where a covenant is broken at the time of the conveyance, it does not run with the land. The obligation is merely personal, and is limited to the parties to the covnant, and confers no right of action on subsequent purchasers of the estate.

3. ——: ——: ——: STATUTE OF LIMITATIONS. A covenant against incumbrances is a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once, if an incumbrance existed at the time of the conveyance.

4. **The Statute of Limitations** is a wise and beneficial law, and does not raise a presumption of payment, but is intended to be a statute of repose.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

The opinion states the case.

John D. Howe and *John Carrigan*, for plaintiff in error.

The covenant against incumbrances is a personal one and is broken as soon as made. 3 Wash. on Real Prop., 390, 421. "If there be an incumbrance, the covenant, being *in præsenti*, is broken as soon as made." Id. 391. *Cathcart v. Bowman*, 5 Penn. State, 317. *Clark v. Swift*, 3 Met., 392. *Prescott v. Trueman*, 4 Mass., 627. *Thayer v. Clemence*, 22 Pick., 490. *Wyman v. Ballard*, 12 Mass., 304. *Tufts v. Adams*, 8 Pick., 547. Rawle

on Covenants, 111, 114. *Pillsbury v. Mitchell*, 5 Wis., 17. *Eaton v. Lyman*, 30 Wis., 41. *Funk v. Cresswell*, 5 Iowa, 62. *Andrews v. Davison*, 17 New Hamp., 416. *Long v. Moler*, 5 Ohio State, 272. *Fletcher v. Button*, 4 N. Y., 396.

The covenant of warranty relates *solely to the title*, as it was at the time the conveyance was made * * and merely binds the grantor to protect the grantee against a lawful and better *title* existing before or at the date of the grant. *Wade v. Comstock*, 11 Ohio St., 71. *Mills v. Rice*, 3 Neb., 76, and citations of counsel. *Nesbitt v. Campbell*, 5 Neb., 429. Hence that covenant cannot aid him. Where there is a special covenant against incumbrances, and a general covenant of warranty, an incumbrance excepted out of the former is not within the latter. *Chew's Appeal*, 45 Pa. St., 229. *Bricker v. Bricker*, 11 Ohio St., 247. The law in this country as to the covenant against existing incumbrances not running with the land, may be considered settled. *Whitmore v. Dinsmore*, 6 Cush., 124. *Porter v. Noyes*, 2 Maine, 22. *Townsend v. Weld*, 8 Mass., 146. *Harlow v. Thomas*, 15 Pick., 68, 1 Greenl. Ev., sec. 281. 2 Stark. Ev., 549. *Dunn v. White*, 1 Ala., 945. *Bean v. Mayo*, 5 Maine, 94. *Hubbard v. Norton*, 10 Cow., 431.

Charles H. Brown and *John M. Thurston*, for defendant in error.

There is a considerable question under the authorities whether or not covenant against incumbrance runs with the land, and as to whether it is broken as soon as made. To this point are all of the authorities cited by counsel for plaintiff in error. Be this so or not, the action upon such technical breach is only for nominal damages, a

barren, fruitless, abortive action, or unfruitful bearing,—but Dead Sea apples. If the covenant is broken when made, it is true a party may sue upon the breach, but he cannot recover the *actual damages*, consisting of the amount of the incumbrance, until he has been compelled to pay it off to protect his land against its foreclosure. And carrying out this theory, it has been held that a party has two causes of action—one on technical breach of covenant, for nominal damages; the other upon *substantial* breach, when compelled to pay off the incumbrance, for real substantial damages. And an action for first is not a bar to one for second. The party's cause of action for substantial damages certainly does not arise until he has paid off the incumbrance, until he has suffered the injury, and the statute does not and cannot begin to run until that time. 2 Hillard on Prop., chapter LXXXVII, sec. 57. *Donnel v. Thompson*, 10 Maine, 160. *Sprague v. Baker*, 17 Mass., 586. *Frink v. Bellis*, 33 Ind., 135. *Eaton v. Lyman*, 30 Wis., 41. *Meclem v. Blake*, 22 Wis., 495. *Dickson v. Desire's Adm'r.*, 23 Mo., 193. We submit, then, that the authorities cited by plaintiff in error to the effect that the covenant does not run with the land, and that there is a technical breach of it as soon as it is made, do not affect the question of the running of the statute of limitation; that a cause of action for substantial damages arises when the incumbrance is paid off by the grantee and not before, and only then does the statute commence to run.

MAXWELL, CH. J.

On the nineteenth day of October, 1862, the plaintiff in error sold and conveyed to the defendant in error, the south-east quarter of the south-west quarter, and the south-west quarter of the south-east quarter, and the north-east quarter of the south-west quarter, and the south-east quarter of the north-west quarter of section

twenty-two, in township thirteen north, of range thirteen east of the sixth principal meridian, for the sum of $1350.00, which sum was paid at the time of the execution of the deed.

The deed contains the following covenants: "And I do hereby covenant with the said Richard Kimball, that I am lawfully seized of said premises, that they are free from incumbrance, that I have good right and lawful authority to sell and convey the same; and I do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever."

The defendant in error took possession of said premises immediately after execution of the deed, and retained possession of the same until the sixth day of July, 1869, when he sold and conveyed the same to Catherine Miller, and in the deed conveying said premises, covenanted that they were free from incumbrances.

In November, 1872, Catherine Miller paid the taxes due on said premises for the years 1859 and 1860, amounting in the aggregate to the sum of $103.23, and in July, 1874, she brought suit for said taxes against the defendant in error in the district court of Douglas county, and recovered the amount of said claim, which the defendant has since paid.

It also appears that the defendant in error notified the plaintiff in error verbally, of the pendency of the suit. Afterwards the defendant in error brought an action in the district court of Douglas county to recover the amount of said judgment. The plaintiff in error pleaded the statute of limitations. On the trial of the cause judgment was rendered in favor of the defendant in error, and against the plaintiff in error, for the amount of said judgment. The cause is brought into this court by petition in error.

The principal question arising in this case is the character of a covenant against incumbrances.

An incumbrance within the meaning of the covenant against them, is said to be every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee by the conveyance. *Prescott v. Trueman*, 4 Mass., 627. *Cary v. Daniels*, 8 Met., 482. 3 Wash. on Real Property, 460.

The covenant against incumbrances is in the present tense, "*that said premises are free from incumbrance.*" If the taxes in question actually existed as a lien against the land in question, at the time of the conveyance, the covenant was broken at that time, and a cause of action at once accrued in favor of the covenantee for his damages. 3 Washburn on Real Property, (4 Ed.), 449. *Morrison v. Underwood*, 20 N. H., 369. *Pillsbury v. Mitchell*, 5 Wis., 17.

In *Foot v. Burnet*, 10 Ohio, 333, a different conclusion was reached. The court say: "If the first grantee continues in possession of the land while his title remains undisturbed, and conveys to a subsequent grantee, in whose time an outstanding incumbrance is enforced against the land, justice requires that this subsequent grantee should have the benefit of the covenant against incumbrances to indemnify himself." No case is cited by the court in support of its position except that of *Backus v. McCoy*, 3 Ohio, 211. In that case the court say: "If the grantor, at the time of executing the conveyance, was in possession of the land, either as disseizor or under color of title, it cannot be said that he was not seized of an estate in the premises. *When the grantor is not seized, either in deed or in law, at the time of conveying*, the covenant of seizin must be broken at the moment of executing the deed containing it, and becomes thereby a mere chose in action, *and no longer annexed to, or passing with the land.*" To the same effect, see also *Devore v. Sunderland*, 17 Ohio, 60.

Where a covenant is broken at the time of the execu-

tion of the deed, it does not run with the land. The obligation is merely personal, and is limited to the parties of the covenant, and confers no right of action on subsequent purchasers of the estate. *Collier v. Gamble*, 10 Mo., 467. *Mosely v. Hunter*, 13 Id., 322. *Carter v. Denman*, 3 Zab., 260. *Mitchell v. Pillsbury*, 5 Wis., 407. *Swalsey v. Brooks*, 30 Vt., 692. *Richardson v. Door*, 5 Vt., 9. *Young v. Raincock*, 7 C. B., 310. *Beddoe's Ex. v. Wadsworth*, 21 Wend., 120. *M'Cartney v. Leggett*, 3 Hill, 134. *Whitney v. Dinsmore*, 6 Cush., 128. 1 Smith's Leading cases, 200.

The contract is a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once upon the breach of the covenant.

In *Mayberry v. Willoughby*, 5 Neb., 370, it is said that "the statute is a wise and beneficial law, and should not be viewed in an unfavorable light; and it is now generally conceded that it is not to be construed as merely raising a presumption of payment, but that in its operation it is intended to be emphatically a statute of repose. * * * * If the creditor by his own fault and laches permits the statutes to attach, whatever may be the nature of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him."

As the statute of limitations had run against the claim, the action was barred. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SIMMONS HARDWARE COMPANY, PLAINTIFF IN ERROR, v. JOHN T. BROKAW, DEFENDANT IN ERROR.

Mortgage: RIGHTS OF SENIOR AND JUNIOR MORTGAGEES. A senior mortgagee recovered a judgment on his note in an action at law, and attached a sufficient amount of personal property to satisfy his debt, which property was afterwards taken from him in action of replevin, not being the property of the judgment debtor. No execution was issued on the judgment. In an action by a junior mortgagee to foreclose a mortgage in which the senior mortgagee was made defendant: *Held.* 1. That the provisions of the statute requiring the return of an execution unsatisfied, before proceedings in foreclosure could be maintained, were for the benefit of the debtor. 2 That unless a lien was acquired upon another fund by virtue of the judgment, the mere failure of the senior mortgagee to cause an execution to be issued on his judgment will not divest him of his lien on the mortgaged premises.

ERROR to the district court for Adams county. Tried below before GASLIN, J. The case is stated in the opinion.

Ash & Scofield, for plaintiff in error.

1. The defendant, John T. Brokaw, waived his mortgage security by bringing action on the promissory note secured by said mortgage, obtaining judgment thereon and failing to have an execution issued on the same, and returned unsatisfied in whole or in part, and showing that said defendant has no property whereof to satisfy such execution, except the mortgaged premises. Gen. Statutes, Neb., page 656, Sec. 851. 1 Washburn on Real Property, 586. *Cooper v. Bresler*, 9 Mich., 534. *Dennis v. Hemmingway*, Wal. Mich. Chancery, 386.

2. The defendant brought suit upon the promissory note secured by his said mortgage, obtained an order of attachment in said case, levied upon a sufficient amount

of personal property to pay the mortgage, debt and the judgment record of the county court, in which said suit was brought, fails to show what disposition was made of said attached property. These facts are in law a payment of said defendant's claim. *Farmers & Mechanics Bank v. Kingsbury*, 2 Doug. Mich. Reports, 379. *Ford v. Skinner*, 4 Ohio, 378. *Corning v. Hoover*, 4 McLean, 133. *Smith v. Hughes*, 24 Ill., 270. *Tronary v. Cheever*, 48 Ill., 28. *Cass v. Littleton*, 3 Ohio, 223. *Green v. Burke*, 23 Wend., 28.

2. The seizure of Jacob T. Lansing's personal property by attachment in said suit, in which defendant, John T. Brokaw, commenced in said county court, on his said promissory note, secured by said mortgage, created a lien upon said personal property for more than the amount of said defendant's claim, which could only be destroyed by a dissolution of the attachment. Gen. Statutes, Neb., page 559, Sec. 212. Drake on Attachments, Sec. 224. *Franklin Bank v. Batchelder*, 23 Maine, 60. *Davenport v. Tilton*, 10 Met., 320. *Kittredge v. Warren*, 14 New Hamp., 509. *Kittredge v. Emerson*, 17 New Hamp., 227. *Baffun v. Seavers*, 16 New Hamp., 160. *Wells v. Brander*, 10 Smeeds & Marshall, 348. *Downer v. Brackett*, 21 Vermont, 599. *Houghton v. Gastus*, 5 Iowa, 505.

Mason & Whedon (with whom were *A. H. Bowen* and *James H. Laird*), for defendant in error.

The record in this case shows there was not, and never has been, any actual payment or satisfaction of the mortgage debt due Brokaw, and nothing short of actual payment or satisfaction will satisfy a mortgage. *Hollister v. Dillon*, 4 Ohio State, 199. *Wells v. Wilson*, 3 Ohio, 426. *Patterson v. Johnston*, 7 Ohio, 225. *Pomeroy v. Rich*, 16 Pick., 22. 3 Allen, 520. 11 American Law

Register, 576. It is true Brokaw commenced suit, and attached property, but the record shows the attached property was taken from the sheriff by replevin at the suit of J. T. Holmes, and that the property so attached was found to be the property of Holmes, and nothing was realized on the debt. If without fault of the plaintiff the levy on personal property becomes unavailing, it is not a satisfaction of the judgment. *Cass v. Bainter*, 3 Ohio, 223. *Ford v. Skinner*, 4 Ohio, 378.

MAXWELL, CH. J.

On the twenty-fifth day of August, 1874, Jacob T. Lansing and wife executed and delivered to the plaintiff in error a mortgage upon lot eight, in block twenty-six, in the town of Hastings, to secure the payment of the sum of $1,216.95, which mortgage was filed for record at *eleven* o'clock A.M. of said day. On the same day Lansing and wife executed and delivered to Paren England a mortgage on the same premises, to secure the payment of a promissory note for the sum of $350, which mortgage was filed for record at *ten* o'clock A.M. of the day upon which it was executed.

On the twenty-ninth day of April, 1875, England assigned his note and mortgage to the defendant in error.

On the second day of December, 1875, the defendant in error commenced an action at law on the note, and attached a sufficient amount of personal property to satisfy his claim. This property so attached, was afterwards taken by one J. T. Holmes by a writ of replevin, and on the trial of the cause, the right of property and right of possession of said property were found to be in said Holmes. Judgment was rendered on the note in question in favor of the defendant in error, but no part of the same has been paid.

In May, 1876, the plaintiff in error commenced an ac-

tion to foreclose the mortgage first above referred to in the district court of Adams county, and Lansing and wife and Brokaw were made defendants. The plaintiff in its petition alleges that "said defendant, Jacob T. Lansing, is insolvent and not able to pay the difference between the value of said mortgaged property and the debt secured by the same." This allegation is not denied in the answer. On the trial of the cause a decree was rendered in favor of the defendant for the amount of his note and mortgage, and also that his lien was prior to that of the plaintiff. The plaintiff brings the cause to this court by petition in error.

Section 851 of the code provides that: "If it appear that any judgment has been obtained in a suit at law for the money demanded by such petition, or any part thereof, no proceeding shall be had in such case, unless to an execution against the property of the defendant in said judgment, the sheriff or other proper officer shall have returned that the execution is unsatisfied in whole or in part, and that the defendant has no property whereof to satisfy such execution except the mortgaged premises."

In *Gregory v. Hartley*, 6 Neb., 362, this court say: "If an action has been commenced on the note, the petition must show either that the action has not proceeded to judgment; or, if a judgment has been obtained, then, that an execution against the property of the defendant (other than the mortgaged premises) has been returned unsatisfied in whole or in part, and the plaintiff's remedy is exhausted." We adhere to the decision in that case as a correct exposition of the law. In the case at bar, however, the contest is entirely between lienholders. The prior mortgagee files a petition to foreclose its mortgage, making the senior mortgagee a defendant, and alleging that the maker of the notes is insolvent, and that the senior mortgagee has obtained

a judgment at law on his note, and upon that ground alone seeks to divest him of his lien.

In *Rudolf v. McDonald*, 6 Neb., 166, this court say: "The grounds upon which subsequent attaching creditors may interfere as against a former, even before judgment, are very few indeed." The same rule applies in this case. The statute was made for the protection of the debtor. If it had been alleged in the petition, and proved on the trial, that the defendant in error had a lien by virtue of his judgment on another fund for the same debt, on which the junior mortgagee had no claim, the defendant in error would be required to exhaust such fund before proceeding to subject the mortgaged property to the payment of his claim; but nothing of the kind is claimed. The failure of the defendant in error to issue an execution on his judgment did not divest him of his lien, and the plaintiff in error, in its petition, by alleging the insolvency of the debtor, shows that nothing could have been collected even if an execution had been issued. The judgment of the district court is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

FRANK D. SOVEREIGN, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Constitutional Law: AMENDING STATUTES. Section 83 of the criminal code prohibits any person from killing or injuring, except upon lands owned by such person, certain designated birds. Section 85 prohibits the use of any other gun than the common shoulder gun for the destruction of certain water fowl. Section 86 prohibits any person from killing, ensnaring or trapping wild grouse between the first day of April and the first day of August of each year, or to kill any wild turkey or quail

between the first day of February and the first day of September. In 1877 an act was passed to prohibit the killing of any wild bird within the state, except water fowl, snipes, waders, and woodcocks. *Held*, 1, that the act was amendatory of sections 83, 85 and 86 of the criminal code, and under the provisions of section 11, article III, of the constitution, which provides that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed," the act was void. *Smails v. White*, 4 Neb., 353, adhered to.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

James E. Philpott and B. E. B. Kennedy, for plaintiff in error.

The act is in effect an amendment to sections 83, 85, and 86 of the criminal code, and the new act does not contain the entire sections amended, nor does it repeal them, unless it is by implication of law. The evils guarded against by these salutary and wise provisions of the constitution are too obvious to require argument to either explain or vindicate them. Whether it was wise or discreet to pass an act, with so little to recommend it to public favor, or of so questionable consistency as to meet with common disfavor, and quite as common violations of it with entire impunity (except in the instance of the case at bar), is a question which this court will not and cannot deal with. It is a question of legislative discretion or will, a prerogative wholly confided to that branch of the government. Still, our admiration for the prudent exercise of that right is quickened by the fact that its exercise in Nebraska in this instance is, in one respect at least, diametrically opposite to its exercise in the adjoining state of Colorado. In this state the hawk in question is sought to be protected in the interest of agriculture, while in Col-

orado a bounty is awarded for its destruction for precisely the same reason. In Colorado the voracious hawk that fares sumptuously every day upon delicate prairie chickens and luscious quails is interdicted and treated as an outlawed felon. In Nebraska he is enshrined as the emblem of legislative forecast and virtue, and henceforth is to feast upon locust and wild honey.

J. C. Crawford, on behalf of the defendant in error, for himself and all others who favor the protection of birds, filed the following brief:

The act does not profess to be, nor is it amendatory of any other act, but is a complete act in itself. That an act complete in itself may so operate on prior acts as to materially change or modify them without being within the mischief designed to be remedied by, or repugnant to, this provision of the constitution, is doubtless true. *Smails v. White*, 4 Neb., 357. But the attorneys for plaintiff seem to doubt the tenability of the position taken by them as to the constitutionality of the "bird law" and go outside of the record to say that there is little to recommend the act, and that it is inconsistent and meets with common disfavor, and is violated with impunity. So little to recommend it, indeed! At a time when the air was swarming, and the earth was astir with insects, which in fact would have destroyed the finest crop ever grown in our state, if they themselves had not been destroyed. So gloomy did the prospect of successfully raising a crop seem about the time of the passage of the act complained of, that many farmers let their land lay idle rather than risk the putting out of a crop, and yet counsel says there was little to recommend the passage of the act. The preservation of these insect destroyers is of no consequence, according to counsel's notion. There never was, and there probably never will be, a time when the vicious will see anything to

recommend the penal laws enacted for the preservation of life and property, and it is evident that the plaintiff in error is no exception to the general rule; happily, these form but a small portion of the citizens of our state, and the assertion that the bird law meets with common disfavor, is only an assertion, and is without foundation in fact.

MAXWELL, J.

The plaintiff in error shot a hawk in Lancaster county on the twenty-first day of June, 1877. On the same day he was arrested for the offense, and pleaded guilty to the charge, and was fined five dollars and costs, and to be committed to the county jail until the same were paid. He made application to the district court for his discharge upon *habeas corpus*. The court held the fine and imprisonment lawful, and remanded the prisoner. The cause is brought into this court by petition in error.

Section one of the act approved February 19, 1877, "to prohibit the taking, wounding, or killing of wild birds of any kind, at any time, within the state of Nebraska, and providing penalties for the violation of the act," provides: "That from and after the first day of June, A.D. 1877, it shall be unlawful for any person to take, wound, or kill any wild bird within the state at any season of the year, or to take or destroy any wild bird's eggs or nest at any time. *Provided*, that this act shall not apply to water fowls, jacksnipes, sandsnipes, waders, and woodcocks."

Section 11, Art. III, of the constitution provides that: "No law shall be amended unless the new act contains the section, or sections, so amended, and the section, or sections, so amended, shall be repealed." The evident object of this provision is to avoid the serious embarrassments which would arise in regard to conflicting

rights, claims, and remedies, if statutes, amendatory in their character, could be passed as independent acts, no change being made in the statute amended, except so far as it may be in conflict with the amendatory act. This, if permitted, would introduce endless confusion and uncertainty into the law. To avoid the possibility of such legislation, the people by this constitutional provision have taken from the legislature the power to so amend a statute. The constitutional provision requires that in all cases, the law as amended shall be given in full, with such reference to the old law as will clearly show for what the new law is substituted.

In *Smails v. White*, 4 Neb., 357, it was held that an act *complete in itself* may so operate on prior acts as to materially change or modify them, without being within the mischief designed to be remedied by, or repugnant to, the provisions of the constitution. "But where the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition, and is void."

We adhere to that decision. And the case at bar clearly falls within the rule laid down in that case. The act in question is as clearly amendatory of sections 83, 85, and 86 of the criminal code as if apt words had been used for the express purpose of amending said sections. The act therefore is void. Sections 83, 84, 85, and 86 of the criminal code, as amended in 1875 (Laws, 1875, p. 18), not being repealed by the act of February, 19, 1877, are still in full force. The judgment of the district court is reversed, and the plaintiff discharged.

JUDGMENT ACCORDINGLY.

JOHN S. GREGORY AND J. H. MCMURTRY, PLAINTIFFS IN ERROR, V. CHARLES CAMERON, DEFENDANT IN ERROR.

1. **Stay of Execution in Probate Court.** A judgment was rendered in the probate court of Lancaster county for over one hundred dollars. *Held*, that execution thereon could have been legally stayed only by complying with section 481 of the code of civil procedure.

2. ———: MERE UNDERTAKING BY SURETIES ALONE NOT SUFFICIENT. The requirement of the statute that the defendant "shall enter into a bond, with one or more sufficient sureties," etc., is not answered by giving a mere undertaking, *executed by sureties alone.*

3. ———: ———. The acceptance of such an instrument by the probate judge, *the plaintiff not being a party to it*, was a void act, and neither prevented the immediate enforcement of the judgment by execution, nor bound the sureties to its payment.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

The opinion states the case.

Brown & Marshall, for plaintiffs in error.

The pretended stay-bonds were not stay-bonds at all, certainly not such as required by statute, and being purely statutory bonds, were nullities unless made in strict conformity to the statute directing the same. These pretended stay-bonds were executed before the law of 1875, amending the law of stay-bonds, was approved, and are therefore governed by section 481 of the civil code. The instruments claimed to be stay-bonds, under the above cited statute, fail to be such. First. Because the defendant does not join in the instrument as required, and there is therefore no principal. Second. There is no *condition* or *penalty* recited therein upon which payment shall be made. Third. The instruments do not run to the plaintiff, they do not even run to any

person at all, and there is therefore *no obligee* named. Fourth. The instruments are nowhere approved by the judge or clerk of the court, as required by law.

"Where a bond is made to a city, when it should be a county, it is a nullity." *Sexton v. Kelley*, 3 Neb., 104. A stay-bond which is a statutory bond must conform substantially to the requirements of the statute in respect to its penalty, condition, form, and number of sureties. *Cutler v. Roberts*, *ante* p. 4.

A stay of execution being a privilege in derogation of the common law rights of the plaintiff, the party claiming the privilege must bring himself within the statute granting it. *Erie City Bank v. Compton*, 27 Pa. St., 195. *Cameron v. Sandwich Mfg. Co.*, 6 Neb., 444. *Dickey v. Alley*, 4 Dev., Law, 43. *Byers v. The State*, 20 Ind., 47. *Benedict v. Bray*, 20 Cal., 251.

Lamb, Billingsley & Lambertson, for defendant in error.

No brief on file.

LAKE, J.

The defendant in error was surety for Thomas J. Cantlon on a promissory note given to the Lancaster County Bank, on which judgment was duly rendered by the probate court for $191.16 and costs.

Within the time allowed by law, and for the purpose of staying execution, the plaintiffs in error appeared before the probate judge and entered into an undertaking, as follows: "In pursuance of the statute in such case made and provided, J. H. McMurtry and J. S. Gregory, for the purpose of staying the above judgment, do hereby promise and undertake to pay the above judgment, interest, and costs, and the costs that may accrue.

"(Signed) J. H. McMurtry,
John S. Gregory."

Thereupon a stay was had for the statutory time, at the expiration of which, an execution was issued, and the judgment collected in full from the defendant in error as surety on the note, who then brought his action to recover the amount from the plaintiffs in error as sureties for stay of execution, and recovered the judgment now in controversy. It is the case of an original surety, who, having discharged his liability to the creditor by paying the debt, now seeks to reimburse himself out of the subsequent sureties for stay of execution. And he claims this right under the equitable doctrine of substitution, by which he may stand in the shoes of the creditor, and, by an enforcement of the judgment which he has paid, reimburse himself for the loss sustained.

In his petition, the defendant in error, after a recital of the facts showing the standing of the parties with respect to the original suit, and to each other, alleges that the stay was entered at the sole request of Cantlon, the principal debtor, who then had considerable property, both real and personal, in his own name, so that, but for the stay granted as aforesaid, the judgment would have been collected out of the same; and that a part of said property or real estate was by him conveyed to the said McMurtry at the time, upon consideration in whole or in part that they should so become bound for the payment of said judgment; which real estate the said defendant still owns and holds under said conveyance. And it is further charged "that during the period of stay of the said execution the said Cantlon became and still is utterly insolvent, and has become a non-resident of the state of Nebraska, and has no property therein."

By their amended answer the plaintiffs in error admitted the execution of the note, the recovery of judgment thereon, and its payment by the defendant in error. They also admitted the insolvency of Cantlon, but denied that he was solvent when the judgment was ren-

dered. And they denied all the other allegations of the petition by which the charge that they were sureties in a bond for stay of execution was put in issue.

The case being tried to the court, without a jury, there was a special finding of facts, "that the defendants, John S. Gregory and J. H. McMurtry, became sureties for stay of execution on said judgment at the sole request of Robert J. Cantlon, who was the principal judgment debtor therein, as alleged in said petition." Upon these facts alone, there being no finding as to Cantlon's solvency, nor as to whether the plaintiffs in error were indemnified for becoming sureties, as alleged in the petition, the court found as its conclusion of law, "that, in equity, the plaintiff was entitled to be subrogated to all the rights of the judgment creditor," and to recover from the plaintiffs in error the full amount which he had paid in satisfaction of the judgment, together with interest and costs; and so the judgment was rendered.

Such is the case as made by the record, and it presents two questions: *First.* Whether the plaintiffs in error, by executing the instrument on which the stay of execution was granted, became bound to pay the judgment? and, *secondly*, whether, if such liability were incurred, the original surety on paying the judgment could require them to make good to him the amount paid? From the view we take of the first question, that is decisive of the case, and we shall therefore consider it alone, leaving the second, concerning which there is some conflict in the authorities, until a necessity for its decision shall arise.

At the time this stay was entered the only authority for staying executions on the judgments of probate courts was found in Sec. 17 of "An act concerning the organization, powers, and jurisdiction of probate courts," passed March 3, 1873. This section provides that: "Any party against whom a judgment is rendered, on

all sums exceeding one hundred dollars, may have a stay of execution in like manner as upon judgments rendered in the district court, and upon the same conditions, and upon all sums of one hundred dollars and under, the same as provided for in actions before justices of the peace." This judgment exceeded one hundred dollars, and therefore fell within the operation of the first clause of the section, which required the same steps to be taken to procure a stay of execution as if the judgment had been rendered by the district court. And inasmuch as judgments of probate courts are not liens upon the debtor's real estate, this judgment was governed by Sec. 481 of the code of civil procedure, which provides that: "Executions or orders of sale, as the case may be, shall be stayed for the period of one year, whenever the defendant, within twenty days after the rendition thereof, shall enter into a bond to the plaintiff, with one or more sufficient sureties, residents of the county, to be approved by the clerk of such court, conditioned for the payment of the amount of such judgment or decree, together with the interest and costs that may accrue."

The instrument given in evidence on the trial, and on which the stay was allowed by the probate judge, fell far short of answering the requirements of the statute. It was not a bond executed by the defendants to the plaintiff in the judgment, but it was merely an undertaking to pay the judgment, interest and costs, executed by sureties alone. Had the judgment creditor been a party to this undertaking by agreeing to accept it as the consideration for delaying execution for some definite time, the transaction, although not amounting to a statutory stay, could very likely have been upheld and enforced as a common law contract. The enforcement of a statutory stay does not depend upon the assent of the judgment creditor; but, to entitle a party to it, he must at least conform substantially to the requirements of the

law authorizing it. *Howard v. Brown*, 21 Me., 385. *Erie City Bank v. Compton*, 27 Penn. St., 105. *Cutler et al. v. Roberts*, *ante* p. 4. *Pelham et al. v. Grigg*, 4 Ark., 141. This instrument not being such as the judge was authorized to take, it furnished no real protection to Cantlon, inasmuch as the creditor could have required the immediate enforcement of his judgment by execution, notwithstanding this formal entry of a stay by the judge. Mutuality of obligation, one of the great essentials in contracts generally, is here wholly wanting. The record shows that when this instrument was offered in evidence, in support of the petition, it was duly objected to by the plaintiffs in error on the ground of immateriality; the objection was overruled and an exception taken. In this we think there was error.

The judgment of the court below is reversed, and the cause remanded.

REVERSED.

M. F. MCWILLIAMS ET AL., PLAINTIFFS IN ERROR, v. O. S. BRIDGES, DEFENDANT IN ERROR.

1. **Homestead Claim on Public Lands:** SALE OF, TOGETHER WITH IMPROVEMENTS, A GOOD CONSIDERATION FOR A PROMISSORY NOTE. The sale and surrender of a homestead claim upon the public lands, together with improvements made thereon, although conveying no interest in the land itself as against the government, is a good consideration for a promissory note; the improvements being subjects of legitimate bargain and sale.

2. **Promissory Note:** HOLDER BY A TRANSFER WITHOUT CONSIDERATION MAY SUE. The single fact that a promissory note payable to bearer, was transferred to the plaintiff without consideration, or solely to enable him to bring suit upon and collect it, constitutes no defense to the action.

ERROR to the district court for Lancaster county. It was an action upon a promissory note given by McWilliams, as principal, and Patten, as surety, to one Ira D. Bishop, and by him assigned to Bridges. The cause was tried before POUND, J., who rendered judgment in favor of Bridges, and McWilliams, the defendant there, brought the cause up by petition in error.

M. H. Sessions, for plaintiff in error.

The case shows that Daniel A. Bishop never had a homestead entry, neither was he ever a resident of this state. It is, however, claimed that Daniel A Bishop was the owner of a homestead entry by reason of having purchased the homestead entry of one Slade; and the agreement, that the said Bishop should relinquish and abandon his right to his entry upon said land by homestead entry or pre-emption, so that McWilliams could enter the same, entered into and made a large part of the consideration of the note, is fully established by the pleadings and proofs in the case. Such a consideration is against the policy of the law, and cannot be sustained. *Dawson v. Merrille*, 2 Neb., 119. *Dawson v. Merrille*, 3 Neb., 461. *Myers v. Croft*, 2 Neb., 481. This action, being founded upon a contract which is entire, and a part of the consideration being illegal, is void, and incapable of confirmation. 1st Par. on Con., 456. *Bank v. Stegal*, 41 Miss., 142. *Bank v. King*, 44 N. Y., 87. 1st Par. on Bills, 217. The note in suit being given to Ira D. Bishop for a pretended homestead entry of Daniel A. Bishop, and improvements thereon, not made by Daniel A. Bishop or the payee of the note, constituted no consideration for the same to the payee or his assigns. *Messinger v. Miller*, 2 Pinney, Wis., 60. *Smith v. Ware*, 13 Johns., 357. *Waters v. Miller*, 1 Dall., 396. *Bank v. Rice*, 107 Mass., 37. Daniel A. Bishop being

the real owner of the note in suit, Ira D. Bishop only held the same as the agent of Daniel A. Bishop. Ira D. Bishop could not sell and transfer the same and give good title, for the reason that he was not the owner, and had no title to convey. He could not, as the agent of Daniel A. Bishop, sell and transfer said note and thereby convey title to the same, for the death of Daniel A. Bishop was in law a revocation of his agency, and all his acts in relation to said note subsequent to his death are void. 2 Vol. Kent Com., 828. *Peries v. Aycinena*, 3 Watts & S., 79. *Johnson v. Johnson*, Wright, O., 594. *Hunt v. Rousmanier*, 8 Wheat., 174, 201. Ira D. Bishop having no interest in this note, his assignee, Bridges, has none, and the real party in interest not being known in the record, the judgment cannot stand. *Carpenter v. Miles*, 17 B. Monroe, 98. *Holladay v. Davis*, 5 Oregon, 40. *Hunter v. Field*, 20 Ohio, 340.

N. C. Abbott, for defendant in error.

1. The relinquishment and abandonment of the right acquired to "homestead" or "pre-empt" public lands and deliver possession thereof to another with the improvements thereon is a good consideration for a promise. *Spry v. Sleppy*, 15 Iowa, 409. *Snow v. Flanning*, 10 Iowa, 318. *Moore v. McIntosh*, 6 Kan., 39. *Clark v. Shultz*, 4 Mo., 235. *Johnson v. Lewis*, 10 Mo., 153. *Burns v. Hayden*, 24 Mo., 215. *Stubblefield v. Branson*, 20 Mo., 301. The sale and transfer of improvements upon public land, as shown by the pleadings and evidence in this case, constitutes a good consideration for the note in suit. Gen. Stat., 409.

2. It is shown that Daniel A. Bishop was in possession of the land mentioned. He certainly had *some* right there, of which it would, at least, cause trouble to deprive him, and McWilliams was evidently of that opin-

ion when he executed the note in question, and that interest, right, or claim was a valuable one to secure. As a matter of law, being in possession, he did have such a right or claim as he could perfect, as against every one. *Moore v. McIntosh*, 6 Kan., 39.

LAKE, J.

The evidence shows that the consideration for giving the promissory note in question, was the sale and surrender by Daniel A. Bishop of his unperfected homestead claim upon the public lands, together with the improvements thereon, consisting of a small dwelling house, or shanty, about twenty-five acres of breaking, and a lot of forest trees.

Previous to the purchase, McWilliams went upon the land, examined it, as he himself swears, and knew perfectly well the condition of the property he was purchasing. Indeed, it is not even alleged that any deception was practiced either by Bishop, or by his brother who negotiated the sale. The trade seems to have been a fair one as to all concerned in it. McWilliams got just what he stipulated to receive, and we see no reason why he should not be compelled to do as he agreed.

It is true that, as to the land itself, the legal title to which was still in the United States, the contract could confer no right whatever upon McWilliams which the law would respect. *Dawson v. Merrille*, 3 Neb., 458. But the improvements made on the land were subjects of legitimate bargain and sale, being declared such by an express enactment of our legislature, chapter 30, Gen. Statutes, 409, the first section of which provides that: "All contracts, promises, assumpsits, or undertakings, either written or verbal, which shall be made hereafter in good faith and without fraud, collusion, or circumvention, for sale, purchase, or payment of improvements

made on the lands owned by the government of the United States shall be deemed valid in law or equity, and may be sued for and recovered as in other contracts."

Holding as we do that these improvements, either alone, or together with the abandonment of the land to McWilliams, were a good and valid consideration for the promissory note, there only remains for consideration the single question of the right of the defendant in error to bring action upon it, on which some reliance seems to be placed by counsel as ground for reversal. But on this point we see no difficulty. That Bridges was the lawful bearer of the note from the payee named therein was not denied by the answer; it was merely alleged "that he gave to said Bishop no value or consideration whatever for the assigning and delivery of said note to him * * * and that he took the assignment and delivery for the express purpose of bringing suit upon the same in his own name with the understanding and agreement * * * that if he recovers upon said note and collects the same, then in that case he is to pay something to said Bishop for said note; but if he does not recover, then he is to pay nothing to said Bishop for the same."

Had the principal defense, the want of a valid consideration for the note, been sustained, these facts would have become important as showing that Bridges was not entitled to the protection which the law affords to an innocent holder for value of negotiable paper. But that defense failing, they become wholly immaterial, for the reason that, under the facts of this case, the consideration for which Bishop saw fit to dispose of his interest in the note was a matter in which the makers could have no possible interest, and entirely within his own discretion.

JUDGMENT AFFIRMED.

W. A. BROWN, APPELLANT, v. W. H. H. WATERS, AND GEORGE NORTH, APPELLEES.

1. **Fraud:** RESCISSION OF CONTRACT. To entitle a party to rescind a contract for the sale of chattels on the ground of fraud he must offer to return the property received by him and demand a rescission within a reasonable time after the discovery of the fraud.

2. ———: ———. If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own he cannot recover back from the seller the money paid for it.

3. ———: ———. In this case there having been a delay of from five to six months after discovering the fraud, and no offer to restore the property or to account for its use, equity will not lend its aid by decreeing a rescission of the contract, but will leave the plaintiff to the ordinary modes of redress which the law affords.

APPEAL from the district court for Otoe county.

It was a suit in equity, the plaintiff, Brown, alleging fraud on the part of Waters in the sale of certain personal property, and praying that certain notes and mortgages given in payment of said property be canceled, and that said defendants, Waters and North, to whom it was alleged the notes of plaintiff to defendants were sold and assigned before due, be enjoined from prosecuting any suit brought on said mortgages or the notes secured thereby. The cause was referred to George W. Covell to take proofs and find the facts. January 12, 1876, Brown moved for an order confirming the referee's report and asking for a decree as prayed for in plaintiff's petition. At the March, A.D. 1877, term of the district court, the motion to confirm report of referee and render decree as prayed, was by said court overruled in part and sustained as to a part thereof by confirming the re-

port and finding of the referee; but the said court refused to order a decree thereon, for the reason that the facts stated in the report and finding of said referee did not entitle the said plaintiff to the relief prayed for in said plaintiff's petition, nor to any relief whatever. And on the 21st day of March, A.D. 1877, it was by said court ordered and decreed that the petition of plaintiff be dismissed at his costs. He appeals.

C. W. Seymour and *S. H. Calhoun*, for appellant.

1. Where a party represents as true that which he knows to be false, and makes the representation in such a way, or under such circumstances as to induce a reasonable man to believe that it is true and is meant to be acted on, and the person to whom the representations have been made, believing it to be true, acts upon the faith of it, and by so acting sustains damage, there is fraud to support an action of deceit at law and to be ground for the decision of the transaction in equity. *Evans v. Bicknell*, 6 Vesey, 174. *Donelson v. Young*, Meigs, 155. No precise limit of time can be stated within which the interposition of the court must be sought. What is a reasonable time cannot well be defined so as to establish any general rule, and must in a great measure depend upon the exercise of a sound discretion of the court under all the circumstances of each particular case. *Gresley v. Mousley*, 4 DeGex & Jones, 78. *Hawley v. Cramer*, 4 Cow., 717. *Hallet v. Collins*, 10 How., 174. *King v. Morford*, Saxton, 274. *Nelson v. Carrington*, 4 Munf., 332.

2. If the thing sold differs in substance from what the purchaser was led by the vendor to believe he was buying, there is no contract. *Gomperty v. Bartlett*, 2 Ellis & Blackburn, 849. *Gurney v. Wormersley*, 4 Id., 133.

3. If the contract is affirmed by the vendee after the discovery of the fraud it merely extinguishes his right to rescind; his other remedies remain unimpaired. *Peck v. Brewer*, 48 Ill., 55. *Whitney v. Allaire*, 4 Denio, 554. *Weimer v. Clement*, 37 Penn. State, 147. *Herrin v. Libbey*, 36 Maine, 350.

Mason & Whedon and *M. L. Hayward*, for appellees.

The plaintiff sets forth in his bill of complaint that the notes of plaintiff to defendant were sold, assigned, and transferred before due, and that the purchaser, North, had due and legal notice of all equities existing between the parties. This being the case, any defense could be pleaded in an action at law upon the notes in the hands of the purchaser, North, and the complainant having a free and adequate remedy at law, a court of equity will not take jurisdiction. *Redmond v. Dickenson*, 9 N. J. L., 507. *Bonebright v. Pease*, 3 Mich., 318. *Foster v. Swasey*, 2 Woodb. and M., 217. *Coowbe v. Meade*, 2 Cranch C. Ct., 547. *Drew v. Haynes*, 8 Ala., 438. *Field v. Jones*, 10 Ga., 229. *Koockogey v. Flewellen*, 23 Id., 608. *Ross v. Buchanan*, 13 Ill., 55. *Kyle v. Frost*, 29 Ind., 382. *Clausen v. Lafrenz*, 4 Greene, 224. *Smith v. Short*, 11 Ia., 523. *Clayton v. Cally*, 4 Md., 26. *Kimball v. Grafton*, 20 N. H., 347. *Burnham v. Kempton*, 44 Id., 78. *Wheeler v. Taylor*, 9 Ind., 225. *Patterson v. Lane*, 35 Pa. St., 275. *Gallager v. Fayette*, 38 Id., 102. Nor will legal proceedings be enjoined on grounds of which the person aggrieved may avail himself in defense of the action at law. *New York v. America*, 11 Paige, 384. *Branchamp v. Putnam*, 34 Ill., 378. *Fullen v. Caldwell*, 6 Allen, 503. *Chambers v. Gaba*, 26 Ga., 167. *Gibson v. Moore*, 22 Tex., 611. *Hood v. New York*, 23 Conn., 609.

LAKE, J.

This is an appeal from Otoe county. The main question for consideration is whether upon the facts found by the referee under the pleadings the district court was right in denying the relief prayed.

This case was commenced on the second of December, 1872, and in effect its object was the rescission of a contract made on the twenty-first of May of that year, by which the defendant Waters sold and transferred to the plaintiff, and one Roberts, what was known as the Chronicle printing establishment, including the press, types, subscription list, etc., for the agreed price of six thousand dollars. Of this sum five thousand dollars were made payable in five equal installments, at six, twelve, eighteen, twenty-four, and thirty months respectively, and promissory notes given accordingly, secured by mortgages upon the property in question, and certain lots in Nebraska City. For the balance the purchasers assumed and subsequently paid certain claims then existing against the establishment for which Waters was liable.

In addition to these facts, about which there was no dispute, the referee found from testimony taken before him, that in making the sale Waters was guilty of many false and fraudulent representations respecting the condition of the property, especially as to the press, the number of subscribers, and the advertisements then in the paper, by which the purchasers were probably induced to pay a much larger price than they otherwise would, and considerably more than the property was worth. And it is right here, upon this question of fraud on the part of Waters, and the conduct of the parties on discovering it, that the whole equity of the case hinges.

In the petition it is not stated at what time the imposition was first discovered, which we regard as a very

serious omission. But on this point the referee finds that Brown and Roberts ascertained the true condition of the property "a short time after they purchased the *Chronicle* outfit and took possession of the same." And this must have been so from the very necessities of the case. But the referee did not find, nor was there any testimony to prove, that the purchasers, on discovering the fraud, took any steps, or in any way sought to rescind the contract. On the contrary, the referee does find that they kept the property, using it as their own, until the fifteenth of July, when Roberts sold out his interest to Brown, who continued to hold and use it without complaint, so far as is shown, until the last of November, when, the first note falling due, and not being paid, Waters took possession of it by an order of replevin under the authority of his mortgage. Up to this time no complaint appears to have been made of any fraud or imposition on the part of Waters in making the sale. Under these circumstances, was the plaintiff in a situation entitling him to a rescission of the contract?

It seems to be well settled that to entitle a party to rescind a contract for the sale of chattels on the ground of fraud he must offer to return the property received by him and demand a rescission within a reasonable time after the discovery of the fraud. *Herrin v. Libbey*, 36 Me., 350. *Masson v. Bovet*, 7 Denio, 69. *Lindsley v. Ferguson*, 49 N. Y., 623. 2 Parsons on Contracts, 279. *Willoughby v. Moulton*, 47 N. H., 205. *Campbell v. Fleming*, 1 Ad. & Ell., 40.

In the case last cited it was considered that: "If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own he cannot recover back the money from the seller."

And it has been held that where there is no testi-

mony tending to show that so long a period was necessary, a delay of two months and a half after discovering the fraud was beyond a reasonable time. *Kingsley v. Wallis*, 14 Me., 57. Here, however, we have not only a delay of from five to six months, and in the meantime a sale by one of the parties to the purchase of his interest to the other, but the further fact that at no time has the offer been made either to restore the property or to account for its use during the six months it was so held. We do not think that a case can be found where, under such circumstances, a court of equity has decreed the rescission of a contract.

Under these circumstances equity will not lend its aid, but the plaintiff must rely upon the ordinary modes of redress which the law affords, either by resisting the collection of the notes, or by bringing an action for the recovery of the damages occasioned by the fraud.

JUDGMENT AFFIRMED.

HUGH MORGAN AND OTHERS, PLAINTIFFS IN ERROR, V. CHARLES D. BOGUE, DEFENDANT IN ERROR.

1. **Fraudulent Assignment of Goods:** JURISDICTION OF EQUITY IN CASES OF. It is clearly within the scope of equity cognizance to interfere at the suit of a creditor who has caused execution to be levied upon goods fraudulently assigned by his debtor, and to set the assignment aside as an impediment to the proper enforcement of his just legal rights.

2. **Continued Possession of Goods by Assignor Evidence of Fraud.** The continued possession of goods, assigned by the execution debtor up to the time of their being seized in execution, in the absence of a showing of good faith in him who claims under the assignment, is conclusive evidence that the assignment was fraudulent, and the statute (section 11, chapter 25, Gen. Statutes) requires the courts so to declare.

3. **Surplus of Goods Assigned may be Reserved to Assignor.** The deed of assignment contained a provision for a return to the assignor of the surplus, if any remained, of the assigned property after satisfying the claims of the creditor for whose benefit it was made. *Held*, that this reservation, being merely incidental to the primary object of the assignment, would not render it fraudulent under sec. 7, ch. 25, Gen. Statutes.

4. **Pleading:** THE LAWFUL "INTENT" MUST BE CHARGED UNDER SEC. 17, CH. 25, GEN. STATUTES. In stating a cause of action under sec. 17, ch. 25, Gen. Statutes, it is necessary to allege that the assignment was made "*with the intent*" either to hinder, delay, or to defraud the plaintiff.

ERROR to the district court for Douglas county. The action was brought by Bogue, against Morgan, Greene, and Millard, to set aside an assignment made by Morgan to Greene for the use of Millard of certain personal property therein described. The cause was heard upon a demurrer to the petition, before SAVAGE, J.; demurrer overruled and defendants standing on their demurrer, a judgment was rendered, declaring the assignment fraudulent and void as to Bogue. The cause was brought up by the defendants below upon a petition in error.

C. J. Greene and E. Wakeley, for plaintiffs in error.

The case of *Goodrich v. Downs*, 6 Hill, 438, is relied upon by the defendant in error (plaintiff below) to sustain the theory that the assignment is void because it contains a provision for the return of the surplus remaining after the satisfaction of the trusts therein mentioned, and the costs and expenses therewith connected to the grantor. But in a later important and well considered case, the decision in *Goodrich v. Downs*, so far as it relates to the question under consideration, was expressly overruled. *Curtis v. Leavitt*, 15 N. Y., 9. The deed in question, as appears both from the allegations of the said petition and upon face of the instru-

ment itself, was executed in good faith, and for the honest purpose of securing to the said Joseph H. Millard the payment of a *bona fide* indebtedness. Such was the real and primary object of the conveyance, and the reservations therein expressed for the use of the grantor are merely incidental to the principal object, and even had there been no reservation expressed in the deed, they would, as a matter of law, have resulted to the benefit of the grantor. This doctrine is fully and ably supported in *Curtis v. Leavitt*. See also *Ely, Clapp & Co. v. Hair & Co.*, 16 B. Mon., 230. *Rhen v. McElrath*, 6 Watts, 151. *Hindman v. Dill & Co.*, 11 Ala. *Austin v. Johnson*, 7 Humph. R., 191. *St. John v. Camp*, 17 Conn., 221. *Collomb v. Caldwell*, 16 N. Y., 484. *Richards v. Levin*, 16 Mo., 596. *Johnson v. McAllister's Assignee*, 30 Mo., 327.

George E. Pritchett, for defendant in error.

I. The assignment was void upon its face, because in violation of section 7 of chap. 25 Gen. Statutes. *Goodrichs v. Downs*, 6 Hill, 438. *Barney v. Griffen*, 2 N. Y., 365. *Suydam v. Martin*, Wright's R., 698. *Pierson v. Manning*, 2 Mich., 445. And because in violation of section of section 17, same chapter. *Geover v. Wakeman*, 11 Wend., 202. *Hart v. Crane*, 7 Paige, Ch. 37. *Lester v. Pollock*, 3 Robt., 692. *Dana v. Lull*, 17 Vt., 390. *Montgomery v. Kirksey*, 26 Ala., 172. The transfer under the assignment was conclusively fraudulent as to creditors, because there was not an immediate delivery to the assignee Greene, followed by an actual and continued change of possession. Section 11 Chapter 24, General Statutes. *Randall v. Parker*, 3 Sandford, Superior Ct., 69.

II. The question presented by the record is simply a question of pleading. If the facts stated in the petition

constitute a cause of action, the judgment must be affirmed. The facts alleged in the petition present a case of legal or constructive fraud as against defendant in error, a fraud in law and not a case of fraud in fact. Fraud in law is a conclusion of law drawn from facts stated or proved. In this case, from facts stated as by the demurrer, the facts alleged in the petition are admitted to be true. 1 Story Eq. Juris., Sec. 258, Id., Sec. 349. Story Eq. Pleadings, Sec. 251, a. Under the code, facts must be stated and not conclusions of law. 2 Van Santford's Pleadings, page 174 and note. When facts are set forth in a pleading from which, if proved, the court must infer fraud, it is not necessary to charge fraud specially. *Mussina v. Goldthwaite*, 34 Texas, 125.

LAKE, J.

The questions presented in this case are raised by a general demurrer to the petition.

That the relief demanded by the defendant in error is within the scope of equity cognizance is clear. Being a creditor of Morgan, and having recovered a judgment on his demand, to satisfy which he had caused the property in question to be seized in execution, he was in a situation to question the good faith of the assignment to Greene, and if it were found to be fraudulent to have it set aside as an impediment to the enforcement of his just legal rights. *Buck v. Sherman et al.*, 2 Mich., 176. *Beardsley Scythe Company v. Foster*, 36 N. Y., 561. 2 Story Eq. Jur., Sec. 700.

By the demurrer to the petition all facts properly pleaded stand admitted. Thus it appears that Morgan, a short time prior to the rendition of the judgment in favor of the defendant in error, being at the time insolvent, made an assignment of all his personal effects to Greene, for the benefit of Millard, another of Morgan's creditors,

whose claim was partially secured by a mortgage upon real estate, on which a decree of foreclosure had been entered more than a year before, but in which nothing further had been done. And it is further admitted that at the time of its assignment to Greene the property in question was in the possession of Morgan, where it remained, subject to his use and control, until taken in execution, at the instance of the defendant in error. The statutory presumption of fraud arising from this possession by the assignor is in no way rebutted. The fact that Millard, for whose benefit the assignment was ostensibly made, was a creditor of Morgan, although an important factor, is not enough to establish what the statute requires in such cases, that unless the person claiming under the assignment shall make it appear "that the same was made in good faith, and without any intent to defraud, etc.," such possession by the assignor "shall be conclusive evidence of fraud." Sec. 11, Chap. 25, Gen. Statutes. *Brunswick v. McClay*, ante p. 137. The petition shows the continual possession of the property by the assignor up to the time of the levy of the execution, which, in the absence of a showing of good faith in him who claims under the assignment, is enough to require the courts to hold the deed absolutely void as against the execution creditor.

It is contended further for the defendant in error that the assignment is obnoxious also to the seventh section of said chapter, because of the provision for a return to the assignor of the surplus, if any remained, of the property after satisfying Millard's demand; and several cases were cited which support this view, notably among them being that of *Goodrich v. Downs*, 6 Hill, 438, and *Barney v. Griffin et al.*, 2 N. Y., 365. But we think that both reason and the better authorities are the other way, and that this section of the statute has no application to an assignment not primarily for the use of the as-

signor, and when the reservation is partial and merely incidental. *Curtis et al. v. Leavitt*, 15 N. Y., 9. *Huber v. Waterman et al.*, 33 Penn. St., 414. *Richards et al. v. Levin*, 16 Mo., 596. *Johnson v. McAllister's Assignee*, 30 Id., 327. That it should ever have been considered that a clause, merely in terms stipulating for that which, if it had been omitted, the law would have implied and required to be done, was an insuperable badge of fraud, seems quite unaccountable, and the cases which so hold are not satisfactory.

And finally, it is claimed that the assignment should be held void, also under the facts alleged in the petition as being in violation of section seventeen of the aforesaid chapter of the statutes, which among other things declares that every assignment of goods, etc., "made with the intent to hinder, delay, or defraud creditors or persons of their lawful rights, damages," etc., "as against the persons so hindered, delayed, or defrauded, shall be void." But this claim is not tenable for want of the very material averment in stating a cause of action under this section, that the assignment was made "with the *intent*" either to hinder, delay, or to defraud the defendant in error. To an assignment made without such intent this section has no application whatever.

On the sole ground, therefore, of the conclusive, because unanswered, statutory presumption of fraud arising from the continued possession of the goods by the assignor, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

JAMES WRIGHT, PLAINTIFF IN ERROR, v. GREENWOOD WAREHOUSE CO., DEFENDANT IN ERROR.

1. **Practice:** OBJECTIONS TO TESTIMONY: GROUNDS OF OBJECTION SHOULD BE STATED. In order to make an objection to testimony available it is necessary that the grounds of the objection be stated; otherwise it is impossible for the reviewing court to know whether the court below was in fault or not.

2. ———: PRESUMPTION WHERE GROUND OF OBJECTION IS NOT STATED. And even where it is apparent that a valid objection to testimony could have been made, still the court is not at liberty to assume that this was the one relied on; in the absence of an affirmative showing to the contrary all presumptions are favorable to the court whose judgment is under review.

3. **Conversion of Goods:** DEMAND. In an action to recover damages for the conversion of goods, the only purpose of a demand is to establish the fact of conversion. Where a wrongful conversion is established by other testimony, a demand need not be shown.

4. ———: CONSIGNMENT OF GOODS: BILL OF LADING: ASSIGNMENT OF. F. & K. purchased a quantity of flaxseed under an arrangement with S. & E. that they would advance the necessary funds to pay for it, for shipment to W. & L., at Chicago, Ill. When F. & K. had purchased the seed, they applied to S. & E. for the money, which was refused; whereupon they shipped the seed in their own names to W. & L., drew upon the consignees for the money, and assigned both the bill of lading and draft to the Greenwood Warehouse Company in payment for money advanced to enable them to pay for the seed. In an action by the latter against W. & L. to recover damages for the conversion of the flaxseed—*Held*, that although the seed was purchased by F. & K. under said arrangement, still as it was their property they had the right to ship it to their own credit, and to impose such terms upon the consignees as they saw fit. It was also held that by said assignment of the bill of lading and draft the entire interest of F. & K. in the shipment passed to the Warehouse Company; and that the consignees having accepted the seed, and refused payment, were liable for its full market value.

ERROR to the district court for Lancaster county. It was an action against Wright and Lawther, brought by

the Greenwood Warehouse Company to recover the value of certain flax seed, alleged to have been converted by them. No service was had upon Lawther. The Company had judgment below, before POUND, J., and Wright, the defendant there, brought the cause here upon a petition in error.

Mason & Whedon, for plaintiff in error.

The court below found that Wright and Lawther received the flaxseed, but as no demand for the same was alleged or proved before suit commenced, the plaintiff cannot recover. *Powers v. Bassfield*, 19 How. Pr., 309. *Yeager v. Wallace*, 57 Penn. State, 365. *Stowe v. Livingston*, 6 Johnson, 44. *Carleton v. Lovejoy*, 54 Me., 445. *Hardy v. Keeler*, 56 Ill., 152. *Witherspoon v. Blewett*, 47 Miss., 570.

Cobb & Marquett, for defendant in error.

The flax by order of plaintiff was received and draft not paid, but sent back to bank. The defendant in error paid the bank and had bills of lading assigned to it; it then had the right to the flaxseed, and had an interest in the same to the amount of money paid on said flaxseed. *Stollenwreck v. Thatcher*, 115 Mass., 224–230. *Marine Bank of Chicago v. Wright*, 48 N. Y., 1. Wright & Laughter had no right to the flaxseed until they paid draft, or money, due on same. *Newcomb v. Boston & Lowell R. R. Co.*, 115 Mass., 230. *Seymore v. Newton*, 105 Mass., 272. *National Bank v. Merchant Bank*, 91 U. S., 92. The lien of defendant in error on the flaxseed for the money advanced can only be removed by payment of the money. *Heffman v. Bank*, 12 Wallace, 190. Wright, the plaintiff in error, having caused Wright & Laughter to convert said flaxseed to their use

without paying for it, became liable for the amount. 2 Hillard on Torts, 312. *Judson v. Cook*, 11 Barb., 642. Pomeroy on Remedies, 328, Sec. 281.

LAKE, J.

There is some conflict in the testimony, but nothing at all serious as to the controlling facts of the case. It is clear from the evidence that Farmer & Knowles purchased the flaxseed in question with the understanding that Smith & Eaton would advance the money to pay for it, for shipment to Wright & Lawther at Chicago, Illinois. However, after the seed had been purchased, and was ready for shipment, Farmer & Knowles went to Smith & Eaton for the money but could not get it. Thereupon they shipped the seed, and drew for the price directly upon Wright & Lawther, who accepted the consignment, but refused to honor the draft. Farmer & Knowles had the right to pursue this course, for, having purchased and paid for the flaxseed, it was their property until they relinquished their title to another. And as an incident of their ownership Farmer & Knowles had the undoubted right to impose just such terms upon Wright & Lawther, the consignees, as the condition upon which they could have the seed, as they saw fit. And the consignees were at full liberty to reject it, if those terms were not satisfactory to them. But having received and converted the seed to their own use, at the same time ignoring the terms imposed, they are liable in damages for its full value.

To enable Farmer & Knowles to purchase and pay for this flaxseed as it was being brought into market, the Greenwood Warehouse Company, the defendant in error, advanced to them the necessary funds, and as security for such advance took Farmer & Knowles' draft upon Wright & Lawther, together with an assignment of the

bill of lading for the seed. By this assignment the entire interest of the consignors in the shipment passed to the defendant in error.

There are several errors assigned, but we shall notice those only to which counsel have referred in their brief. The first point which seems to be relied on is that the finding and judgment is not supported by the evidence. This objection is not well taken. Although, as before observed, the testimony is somewhat conflicting, still we are of the opinion that it is ample to justify the conclusion reached by the learned judge who presided in the court below.

The second objection relates to the admission of "the bills of lading over the objections of the plaintiff in error." What these objections were we are not advised, the record on this subject only showing that when the bills of lading were offered in evidence, "Whedon objected," and "the court received the evidence subject to the objection and exception." We have frequently held that in order to make an objection to testimony available, it is necessary that the ground of the objection be stated. Where this is not done it is impossible for us to ascertain whether the court below was in fault or not. And even if it were apparent that a valid objection to the testimony in question could have been made, still we are not at liberty to assume that this was the one actually interposed. In the absence of an affirmative showing to the contrary, all presumptions are favorable to the court whose judgment is under review.

The third point is, that inasmuch as no demand for the flaxseed "was alleged, or proved, before suit commenced, the plaintiff cannot recover." Under the facts of this case no demand was necessary. The only purpose of a demand in an action of this kind is to show a conversion of the goods. Here the wrongful conversion of the flaxseed is clearly shown by other testimony,

especially by that of the witness Cobb, who called upon the defendant for the express purpose of obtaining a settlement of the matter. To this witness, who was acting for the defendant in error, they acknowledged the receipt of the seed, but refused to account for it on the alleged ground that "they did not know Farmer & Knowles and the Greenwood Company in that transaction," and had already paid John Eaton for it. And by the fourth point of plaintiff's brief our attention is called to Eaton's testimony, in which he states that Farmer & Knowles purchased the seed for him, and that he had sold and received his pay for it. As we have before remarked there is no doubt that there was an understanding when Farmer & Knowles made the purchase that Smith & Eaton would pay for it, and had they done so the shipment would doubtless have been made on their account, and the bills of lading delivered accordingly. But Farmer & Knowles were under no obligations to part with the control of their own property until they were paid for it. That they did not do so is established by the undisputed fact that they did not deliver the bills of lading to Smith & Eaton, nor to Eaton, but, as honest men, turned them over to the warehouse company, which had furnished the money by which they were enabled to make their purchases. A careful examination of the case leaves us in no doubt that by the judgment of the district court substantial justice has been done, and it must be affirmed

JUDGMENT AFFIRMED.

ALBERT G. MCCORMICK, APPELLANT, v. JOSIAH S. MCCORMICK, ANNA M. G. MCCORMICK, JESSE H. LACEY, CATHARINE T. LACEY, AND OTHERS, APPELLEES.

1. **Partnership.** A portion of the members of a firm, with the consent of all, had largely overdrawn their account, by which, together with a large amount of bad and uncollectible debts held by the firm, it became insolvent. In an action for an account by a member who had not drawn his full share; *Held*, that he was not entitled to interest upon what was due at each annual rest, from the time the capital stock was so far impaired that money had to be borrowed to take its place.

2. ———. Where all the members of a firm drew out of the business, from time to time, for several years, such sums as they saw fit, there being a tacit agreement among the members that this might be done, and the sums thus drawn out being properly charged on the books of the firm, such books being open to the inspection of all the members, and there being no misrepresentation; *Held*, that the firm had no lien upon the money thus drawn out, it having been drawn with their consent.

THIS was an appeal from a decree rendered by SAVAGE, J., in the district court for Douglas county. The substantial facts in the case appear in the opinion.

John D. Howe and *Carrigan & Osborn*, for appellant.

I. The law of partnership gives the plaintiff peculiar rights; and he has also the additional rights and equities of one standing in a relation of trust and confidence.

A partner has a lien, a specific lien on the present and future property of the firm, for his share of the capital stock, and funds, and for all money advanced by him for the use of the firm, and also for all debts due the firm for money abstracted by another partner from such stock and funds beyond his share. Such sums may be followed by virtue of the lien: and the partner may subject

any other property into which the firm money may have been converted. Story on Part., Sec. 97 and citation. Coll. on Part. (4 ed.), Secs. 125, 117, 135, and notes. This "lien," indeed, results from his undivided ownership. And the "highest good faith" must prevail among copartners. Parsons on Part., p. 233 *et seq.* The petition sets out a case much like that in 4 Bosw., *infra.* See generally upon the subject of the trust rights of a partner in property purchased with firm money—and what constitutes fraud in law upon a copartner's rights. *Wade v. Rusher*, 4 Bosw., 537. *Newman v. Cordell*, 43 Barb., 457. *Brooks v. Martin*, 2 Wall., 70. *Pomeroy v. Benton*, 14 Am. Law Reg. N. S., 308. 2 Story's Eq., Secs. 976, 977, 1197. *Comstock v. Buchanan*, 57 Barb., 127. *Sumner v. Hampson*, 8 Ohio, 365. See generally on questions of trust: 2 Story's Eq. Jur., Sec. 1201 *et seq.* Hill on Trustees. *McCartney v. Bostwick*, 32 N. Y., 53. *Averill v. Loucks*, 6 Barb., 19.

It follows from this partner's lien, or ownership, that all property ever acquired by a firm remains its property until severed from the joint estate with the consent of all the partners. Herein it devolves upon the defendants to show that they derived title to the funds withdrawn by the consent of the plaintiff, if he was upon an equal footing with them:—his ownership must be shown to have been divested; but if they were entrusted with the joint assets and the management of the firm by the plaintiff, they must make it appear that they acquired title to the funds they withdrew from the trust estate through a legal and honest course of dealing, and pursuant to a faithful discharge of their trust. If there was fraud; if there was an incapacity to contract on the part of the plaintiff; if there was the trust relation; if the minds of the parties did not meet; there was no consent. See what is deemed consent, 1 Story's Eq. Jur., Secs. 222, 223; Pars. on Part., 278, 282. When with-

drawals are entered on the books, where parties are on a footing of equality and had actual knowledge of the entries, the books constitute evidence of consent; but it is easily repelled.

II. The plaintiff entrusted the whole management of the firm to his three copartners. His story in a nutshell is: I came into an old established firm; I ventured, or, rather, my father for me, ventured my all in it; my brothers and relations constituted the other members; the firm did a large business; I trusted the other members entirely; on the strength of that trust I left my fortune in the firm; in six years I drew out $6,000, while those whom I trusted drew out $173,000—all there was in the firm, ruining it and me. They got my all. The total capital was some $80,000—the profits $100,000. Yet Jesse and Josiah have drawn their capital and share of the profits and over $30,000 besides; in that is over $17,000 of my money. Story says there are cases which strike one at first sight in such a way as to induce the belief that fraud and wrong have been done. This is such a case.

If it be not true, as John and Albert swear, that he trusted all to the rest; and he stood by, *acting for himself, relying upon himself*, leaving all of his capital and profits in the firm, seeing it drawn out by his copartners for every extravagance, while he lived closely and economically,—seeing himself and his family impoverished, then we have here a moral phenomenon! If, as all the great features of the case show, he did "trust all to the rest," then he had no consent to give; he had loaned it to the other members. What Albert was among these men and in this firm is shown by the proofs. See generally: 1 Story's Eq. Jur., Secs. 307, 302, 308, 311, 315, 321, 322, 323. Hill on Trustees, *145, *162, and n. 2. When one trusts with a blind and credulous trust,

"there is no consent, or negligence, or laches." Willard's Eq. J., p. 170, 175, 189. 9 Paige, 241. 4 Cow., 717. There was collusion, in the legal sense, between the three parties, John, Jesse, and Josiah. It is shown by their acts; they exhausted the firm, each knowing what the other was doing, what the probable effect would be, and what the cost would be to him who trusted and relied on them. 1 Green. Ev., Sec. 93. 17 Ohio St., 505.

G. W. Ambrose, for defendants, J. L. and Anna G. McCormick.

I. In order to subject the property of the wife, *bona fide* hers, either by purchase or gift, it must be proven that she was cognizant of the fraud charged, and enabled the husband, by the expenditure of the money upon her property, to perpetrate the wrongs complained of. The only testimony on the subject is that of Mrs. McCormick, placed upon the witness stand by plaintiff. She denies any knowledge of the source of her husband's money, except that she knew he had large transactions outside of the firm, and supposed the money came from that source. She denies any collusion with her husband or any knowledge of the standing of the firm, or her husband's standing therein. This is the plaintiff's testimony. By it he is bound.

II. It is sought to subject the property of an innocent person, one without fraud on her part, to the payment of a partner's equitable lien upon assets traced into the property. This is the position of plaintiff. It is a very familiar rule that one standing by, and seeing his property dealt with in a manner inconsistent with his rights, and makes no objection, cannot afterwards have relief. His silence is acquiescence, and estopps him. Perry on Trusts, ss. 870. *Graham v. Brinkhead Rail-*

way, 2 M. & G., 146. *Duke of Leeds v. Amherst*, 2 Phillips, 123. *Stafford v. Stafford*, 1 DeGex & Jones, 202. *Stoughton v. Lynch*, 2 Johns. Ch., 217. *Sullivan v. Portland*, 4 Otto, 806.

III. The books disclosed truly the date and the amount of money expended. By the books, his own account—entered by his own hand, a partner is bound. They are *his* books, and he is estopped from either disputing, or shielding himself by his plea of ignorance of what they contained. He says he could have found out, if he had looked at the books, but he had no curiosity. The books of a partnership are to speak their language, and to record their transactions, and there is an understanding that the books are to be appealed to, to tell the true situation of the business. To admit them as true, is but effectuating their agreement and using their own criterion and test to ascertain the truth. The ordinary presumption is that all partners have access to their books, and know the entries which they contain, and the only thing that can rebut this presumption is residence at a distance, or a course of dealing precluding access. Such is the universal language of the books. 1 Philips, Evidence, 448. *Simons v. Kirtley*, 1 Monroe, 80. *Reno v. Crane*, 2 Blackf., 217. *Foster v. Andrews*, 2 Penrose & Watts, 160. *Woodward v. Winship*, 12 Pick., 430, 436. *Richardson v. Wyatt*, 2 Dessau., 471. *Rihenhard v. Hovey*, 13 Ohio, 303. *Cameron v. Watson*, 10 Rich. Eq., 92. *Heartt v. Corning*, 3 Paige, 572.

E. Wakeley (for defendants Jesse H. Lacey, Catherine T. Lacey, and legal representatives of Sarah J. Miser, a sister of Mrs. Lacey, who died after the commencement of the action, and against whom it was revived), argued the cause upon the facts alone.

MAXWELL, CH. J.

On or about the fifteenth day of March, 1865, the plaintiff and defendants Josiah and John McCormick, and Jesse H. Lacey, entered into partnership as wholesale grocers, in the city of Omaha, under the name and style of John McCormick and Co. The plaintiff paid into the concern, as a part of the capital stock, the sum of $7,768.92, Josiah S. McCormick the sum of $1,560.-70, Jesse H. Lacey $19,194.91, and John McCormick the sum of $55,343.17. The partnership was to continue as long as mutually agreeable to the parties. The profits of the firm were to be divided as follows: The plaintiff, one-sixth, Josiah S. McCormick, one-sixth, Jesse H. Lacey, one-third, and John McCormick, one-third. The firm continued in business until about the first of March, 1871. The profits of the firm amounted to at least $100,-000, and the bad and uncollectible debts amounted to about $50,000. The firm was heavily in debt, and a large amount of assets were by mutual consent left in the hands of John McCormick for the payment of the debts. It is claimed by the plaintiff that after the application of these assets to the payment of the firm debts, there was still a considerable deficiency, which was made up by him and John McCormick.

In the year 1866, Lacey purchased lots 6, 7, and 8, in block 47, in the city of Omaha, and took the title thereto in the name of his wife; and during the years 1867 and 1868 he built upon lots 6 and 7 a large brick house, at a cost of about $30,000, the money to pay for the same being drawn out of the concern and regularly entered on the books of the firm. He also drew out other considerable sums, all of which were duly charged to him on the firm books. It is also clearly shown from the testimony, that all of the members of the firm, including the plaintiff, drew out of the firm such sums as

they saw fit, the sums so drawn being charged to them on the books of the firm. It also appears that all the members of the firm, except the plaintiff, largely overdrew their account.

In the years 1867 and 1868, Josiah S. McCormick erected a costly residence upon a lot owned by his wife in the city of Omaha, the money to pay for the erection of said dwelling-house being drawn out of the firm, and regularly entered on the firm books.

In the year 1874, the plaintiff commenced an action against the defendants in the district court of Douglas county, praying for an accounting, and that it be decreed that Catherine T. Lacey holds the title to lots 6 and 7 above described, with the improvements thereon, in trust for the use and benefit of said firm, and that they be sold and the proceeds applied as may be just and proper. Also, that Anna M. G. McCormick be declared to hold the residence erected by Josiah S. McCormick, in trust for said firm, and that the same may be sold and the proceeds properly applied. The defendants answered the petition of the plaintiff. In October, 1877, the case was tried and judgment rendered dismissing the petition as to Anna M. G. McCormick, Catherine T. Lacey, and the heirs of Sarah J. Miser. The plaintiff appeals to this court. The court found that the plaintiff is entitled to receive from John McCormick the sum of $6,237.46, from J. S. McCormick the sum of $7,568.66, from J. H. Lacey $2,959.38; and that John McCormick is entitled to receive from J. S. McCormick the sum of $15,137.31, and from J. H. Lacey the sum of $5,918.73. The sums found due by the court below appear to be in conformity to the testimony.

The plaintiff claims he is entitled to interest upon what was due at each annual rest, from the time the capital stock was so far impaired that money had to be borrowed to take its place. This might be proper in

some cases, but not in this. It is apparent in this case that the deficiency arises from the very large amount of bad and uncollectible debts held by the firm, amounting to about $50,000. It is evident that but for these debts the firm would have been able to have met all its obligations. The firm was doing a large amount of business, evidently selling considerable quantities of goods on credit. The amounts due the firm appear to have been considered as assets, without considering the probabilities of collecting the same, and I think the testimony clearly shows that there was no intention on the part of Lacey and J. S. McCormick to cripple, much less to bankrupt, the firm. The only question, therefore, for this court to consider, is whether the court below erred in dismissing the case as to Catherine T. Lacey, Anna M. G. McCormick, and the heirs of Sarah J. Miser, it being claimed that Sarah J. Miser acquired the title to lot 8, in block 47, from Mrs. Lacey, without consideration, and in fraud of creditors and the rights of plaintiff.

Each partner while acting within the scope of the partnership business, is deemed to be the authorized agent of the firm, and his contract, while so engaged, will be held to be the contract of every member of the firm. This power to bind the firm and to dispose of the partnership property, is sometimes regarded as arising from the agency growing out of the relations of partners, and sometimes from the community of interest by which each partner owns the whole in common with the others, but has no exclusive property therein. It probably rests on both foundations. 1 Parsons on Contracts, 175. But if a partner steps outside of the scope of the partnership business, and attempts to transfer the copartnership property to himself, he acts beyond the scope of his authority, and will not bind the members of the firm, as one member of a firm cannot become the

owner of the property of the firm without the consent and against the wishes of the other members thereof. And if a partner who exclusively superintends the business and accounts of the concern should, by concealment of the true state of the accounts and business, purchase the shares of his partners, for an inadequate price, by means of such concealment, the purchase will be held void. 1 Story's Eq. Juris., Sec. 220.

In the case at bar each partner drew out of the firm such sums as he saw fit, and there seems to have been a tacit agreement among the members that this might be done, no objections being interposed by any one. The sums so drawn out were properly charged to the person drawing the same on the books of the firm, and these books were open to the inspection of all the members. The plaintiff knew that Lacey and J. S. McCormick were erecting costly houses, and that the money to construct the same was being drawn out of the firm, yet he made no objection whatever; and this failure to object on his part, under the circumstances of this case, must be construed as a consent to such use of the partnership funds. And partnership funds being thus used with the tacit consent of the partners, ceased—at least so far as the partners are concerned—to be charged with the lien of the partnership.

It is claimed that the plaintiff attended to selling goods, and that he knew nothing about the books of the firm, of the condition of its accounts, and that he relied entirely upon his partners. It is a sufficient answer to this plea to say that he appears to be a man of ordinary intelligence, that no misrepresentations were made to him, and that if he did not know the actual condition of the affairs of the firm it was his own fault, as he had the means of knowledge at hand. It is apparent, however, from the testimony, that all the members of the firm, up to and including the year 1869, supposed that they were

doing a large and prosperous business, and no one seems to have thought that the large sums thus drawn out by the partners would cripple the firm or cause its insolvency. The lien of the partnership being gone, it follows that the plaintiff can have no relief in this form of action, whatever his rights may be as a creditor. The judgment of the district court is

AFFIRMED.

FREDERICK RENARD, APPELLANT, v. JAMES J. BROWN AND LEWIS BROWN, APPELLEES.

1. **Mortgagor:** RENTS AND PROFITS OF MORTGAGED PREMISES. A mortgagor is not liable for rents and profits while he is in possession of the mortgaged premises, and his grantee will take his title and be protected to the same extent as the mortgagor. Where the equity of redemption is sold upon execution the purchaser takes the title of the mortgagor, subject to the incumbrance.

2. **Judicial Sale:** FORECLOSURE OF MORTGAGE: RIGHTS OF PURCHASER. The purchaser, under a decree of foreclosure, acquires by his deed all the interest of the mortgagor in and to the mortgaged property. And where a senior mortgagee becomes the purchaser and acquires the legal title to the premises he is not liable to account to a junior mortgagee for the rents and profits, unless it is made to appear to the court that the security is insufficient and a receiver has been appointed.

3. ——: ——: REDEMPTION BY JUNIOR INCUMBRANCER. The right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrances, not to redeem the land. *The owner of the fee redeems the land itself.* The junior incumbrancer is not entitled to the estate, but an assignment of the securities.

APPEAL by plaintiff from the district court of Washington county. Tried below before SAVAGE, J. The opinion states the case.

Carrigan & Osborn, for appellant.

No brief on file.

Brown & Thurston, and *William O. Bartholomew*, for appellees.

All the authorities agree that the junior mortgagee is not affected by sale under a foreclosure to which he was not a party; that as to him it stands as if no such sale had been made, and that he may redeem by paying the amount of the incumbrance. 4 Kent, 185. 2 Hilliard on Mort., 131, *et seq.* *Gage v. Brewster*, 31 N. Y., 218 *Hassellman v. McKernan*, 50 Ind., 444. *Parker v. Child*, 25 N. J. Eq., 41. *Hodgen v. Guttery*, 58 Ill., 431. *Gower v. Winchester*, 33 Iowa, 303. The purchaser takes only the right of the first mortgage and the mortgagor's right to redeem, leaving the land subject to the second mortgage. 2 Hilliard on Mortgages, 158. 2 Washburne on Real Prop., 224. *Vanderkemp v. Shelton*, 11 Paige, 28.

A senior mortgagee who has taken possession of the premises under a sale in foreclosure will, on redemption by a junior mortgagee who was not a party to the foreclosure, be required to account for the rents and profits accruing during the time which he held the same in possession. *Ten Eyck v. Casad and Rowley*, 15 Iowa, 524. He will be allowed for necessary repairs, but not for improvements. 1 Hilliard on Mortgages, 452. Necessary repairs are those strictly necessary to continue the property in the condition in which it was received, and not to extend or improve it. *Quinn v. Brittain*, Hoffman's R., 353.

MAXWELL, CH. J.

On the twenty-seventh day of November, 1867, Evalin Purchase executed and delivered to the plaintiff a mortgage upon the east half of the south-east quarter, and the north-west quarter of the south-east quarter of section thirty-four, in township seventeen north, range — east of

the sixth principal meridian, to secure the payment of a certain promissory note for the sum of $600, due in one year from date, with interest at 12 per cent., which mortgage was duly recorded.

On the twenty-seventh day of December, 1870, Purchase and wife, executed and delivered to the defendants a mortgage on the above described premises to secure the payment of two promissory notes amounting in the aggregate to the sum of $1,007.63, said notes being due respectively in nine and twelve months from date.

On the twenty-seventh day of April, 1872, the plaintiff commenced an action in the district court of Washington county to foreclose his mortgage, Purchase alone being made defendant.

At the June term (1872) of said court, a decree of foreclosure was rendered in favor of said plaintiff, the amount found due being $708. On the eighth day of September, 1873, an order of sale under said decree was issued out of said court, and on the twentieth day of October, 1873, the premises in question were sold under said order and decree to the plaintiff for the sum of $1,000. A report of said sale being made to the court, the sale was confirmed and a deed for said premises made to the purchaser, who immediately thereafter took possession, and has remained in peaceable possession thereof until the present time.

On the twenty-fifth day of April, 1874, the plaintiff commenced an action in said court against said defendants to quiet the title to said real estate, alleging the facts above set forth, and that the defendants *claimed* and *received* the surplus money arising from the sale of said premises to plaintiff, amounting to the sum of $106, and alleging that they had received divers other sums of money on said claim, and praying that the cloud on plaintiff's title to said land from said mortgage to defendants might be removed. The defendants answered

the petition of the plaintiff, testimony was taken, and in May, 1877, a decree was rendered in the cause, that said defendants should redeem said premises on or before the twenty-seventh day of February, 1878, or be forever barred; *but providing*, that if said defendants should, on or before said day, deposit with the clerk of the court the sum of $492.34 for the use of the plaintiff, the premises should be redeemed from said sale, and *all interest, right, and title of said plaintiff in and to the same or any part thereof should at once cease* and determine.

In its finding the court credited the plaintiff with the sum of $708, with interest at the rate of 12 per cent per annum, and with $125 for repairs on said premises; also with $106.82, proceeds of the sale paid to the defendants, and charged him with the *rental* value of said premises while he was in possession. The court found the amount due the defendants to be the sum of $1,781.46. The plaintiff appeals to this court.

It is well settled that the interest of the mortgagee before foreclosure is a mere chattel interest and personal assets, and goes to the executor and not to the heir. *Taylor v. Grover*, 2 Vern, 367. *Awdley v. Awdley*, Id., 103. *Demarest v. Wynkoop*, 3 Johns., Ch. 135. *Kyger v. Ryley*, 2 Neb., 25. And where the mortgagee takes possession of the mortgaged premises *before foreclosure* he will be accountable for the actual receipts of the net rents and profits. 1 Vern, 44. 1 Eq. Cas. Abr., 328. *Robertson v. Campbell*, 2 Call, 421. *Ballinger v. Worley*, 1 Bibb, 195. *Van Buren v. Olmstead*, 5 Paige, 1. 4 Kent's Com., 166. As he holds the estate with duties and obligations similar in some respects to those of a trustee, therefore he will not be permitted to make profits out of property which he holds merely for indemnity. *Holdridge v. Gillespie*, 2 Johns., Ch. 30. 4 Kent's Com., 167.

But the mortgagor is not required to account for rents

and profits while he is in possession. *Colman v. Duke of St. Albans*, 3 Ves., 25. *Ex parte Wilson*, 2 V. B., 252. He is the owner of the land and the mortgage is a mere security for the debt. The land thus mortgaged descends to his heirs as real estate, and may be devised as such. And it may be sold on execution against the mortgagor. *Waters v. Stewart*, Cai. Cas. in error, 47. *Hitchcock v. Harrington*, 6 Johns., 290. *Collins v. Torry*, 7 Id., 278. *Denton v. Nanny*, 8 Barb., 618. *Coles v. Coles*, 15 Johns., 319. *Webb v. Hoselton*, 4 Neb., 318. *Kyger v. Ryley*, 2 Neb., 28. Willard's Eq., 433.

As the mortgagor is not liable for rents and profits while in possession, he may sell and convey the mortgaged property, and his grantee will take his title, and will be protected to the same extent as the mortgagor. And the equity of redemption may be sold upon execution, and the purchaser will take the title of the mortgagor subject to the incumbrances. 1 Green, Ch. 348. *Crow v. Tinsley*, 6 Dana, 402. *Lloyd v. Lee*, 45 Ill., 277. *Dunbar v. Starkey*, 19 N. H., 160.

Where a decree of foreclosure has been obtained, a special execution may issue for the sale of the mortgaged premises. After a sale has been made and confirmed and a deed executed and delivered to the purchaser he takes all the interest of the mortgagor in the property. Our statute provides that such deed "shall vest in the purchaser the same estate that would have vested in the mortgagees if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor or mortgagee, and shall be an entire bar against each of them and all parties to the suit in which the decree for such sale was made, and against the heirs respectively and all persons claiming under such heirs." General Statutes, 656.

In this case the plaintiff was not in possession of the premises as mortgagee, but as owner of the fee, and as

such is not liable to account to a junior mortgagee. There is no claim by the defendants that the security is insufficient, nor has any application been made for the appointment of a receiver. The court, therefore, erred in charging the plaintiff with the rental value of the premises.

The defendants claim the right to redeem the land and not the mortgage of the plaintiff. The rule is well settled, that the rights of those incumbrancers who were not made parties to the suit are not affected by the decree. *Draper v. Clarendon*, 2 Vern., 517. *Godfrey v. Chadwell*, Id., 601. *Haines v. Beach*, 3 Johns. Ch., 464. *Miller v. Finn*, 1 Neb., 301. But the right to redeem is not to secure a conveyance of the land, but to redeem a senior incumbrance, and the party redeeming is entitled, not to a conveyance of the premises, but to an assignment of the security. *Pardee v. Van Anken*, 3 Barb., 537. *Miller v. Finn, supra.*

The purchaser of land at a judicial sale is protected in his title, subject only to the payment of the incumbrances upon it. If a party holding a junior mortgage may redeem the land, by simply redeeming the mortgage security, then he is placed in a much more favorable situation than the purchaser of the equity of redemption. His incumbrance may be of the most trifling character, yet if he may redeem the land he may obtain for a trifling sum property many times the value of his incumbrances. But such is not the law. The right of redemption is said to be a correspondent right to that of foreclosure, and a junior mortgagee may insist upon a redemption of the *senior mortgage*, in order to the due enforcement of his claims in the land. When he does redeem he becomes substituted to the rights and interests of the original mortgagee in the land. Story's Eq., Sec. 1023.

"The owner of the *fee* of the equity of redemption re-

deems the *land itself*, and the decree in such case directs the mortgagee to convey all his right and title to the premises to the redeeming party. * * The owner of a junior incumbrance redeems not the *premises*, strictly speaking, but the *senior incumbrance;* and then he is entitled not to a *conveyance* of the *premises*, but to an *assignment* of the *security*." *Pardee v. Van Anken*, 3 Barb., 537.

In *Fell v. Brown*, 2 Bro., 276, a bill was filed by the second against the first mortgagee to redeem. The court held that the natural decree was that the second mortgagee redeem the first mortgagee, and that the *mortgagor* redeem him or stand foreclosed, strict foreclosure at that time being the usual mode of proceeding in a court of equity in proceedings to foreclose a mortgage.

In the case of the *Bank v. Peter*, 13 Peters, 125, the court say: "Where a junior mortgagee, to save his lien, is obliged to satisfy prior mortgages on the estate, he stands as the assignee of such mortgages, and may claim the benefits under the lien that could have been claimed by the assignor."

In *Burnet v. Denniston*, 5 Johns. Ch., 35, it was held that a subsequent judgment or mortgage creditor could redeem from a senior mortgagee, by paying the amount due on the mortgage. In that case the senior mortgagee, before foreclosure, had refused to receive the amount due on the senior mortgage, and had sought to obtain the equity of redemption through foreclosure by advertisement, which was held to be void, and the parties holding the junior mortgage were also the owners of the equity of redemption.

It is clear that the right of the defendants in the case at bar, is to redeem the senior incumbrance, and not the land. The court therefore erred in decreeing a conveyance of the land to the defendant. The premises in question is the primary fund out of which these incum-

brances must be paid in the order of their priority. The decree of the district court is reversed. As the plaintiff is the owner of the equity of redemption, he may, if he so elect, pay the amount due the defendants on their mortgage within ninety days from this date; if he fail to pay said sum at that time the sheriff of Washington county is hereby directed to sell said premises in the manner prescribed by law, and out of the proceeds pay, *first*, the plaintiff $1,000 with interest at ten per cent from the date of his purchase in 1874, and also $125 for necessary repairs; *second*, the remainder of said sum to be applied in payment of defendants' mortgage, interest and costs, and in case the sum realized is more than sufficient to pay said claim, the overplus to be paid to the plaintiff.

DECREE ACCORDINGLY.

MARY D. PARRAT, APPELLEE, v. JOHN D. NELIGH AND OTHERS, APPELLANTS.

1. **Judicial Sale.** In a sale made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree directs the sale of the property and the application of the proceeds to the payment of the debt, and is a sufficient warrant of authority to the officer to sell as directed in the decree.

2. ——:. NOTICE OF SALE. Where an officer has caused public notice of the time and place of a sale of real estate to be given, for at least thirty days before the day of sale, by advertisement in some newspaper *printed in the county*, it is unnecessary to post notices of the time and place of sale.

3. **Practice:** CONFIRMATION OF SALE. In an equity cause, as in an action at law, if a party desires to oppose the confirmation of a sale of real estate, he must file a motion in the district court, setting forth the grounds upon which he seeks to set the sale aside. If the motion is overruled he may then appeal to the supreme court.

THIS was an appeal from an order made by VALENTINE, J., confirming a sale of certain real estate under a decree of the court.

Crawford & McLaughlin, for appellant, cited civil code, sections 493, 497, 510. Freeman on Executions, § 286. Rorer on Judicial Sales, § 677. *Harrison v. Rapp*, 2 Blackf., 1. *Tyler v. Wilkinson*, 27 Ind., 450.

R. F. Stevenson, for appellee, cited *Rector v. Rotton*, 3 Neb., 177. *Koehler v. Ball*, 2 Kan., 161. *White Crow v. White Wing*, 3 Kan., 276. Before the appellants can insist upon the setting aside of the order confirming the sale in the above entitled cause, it is their duty to pay back to the purchaser of the premises the purchase money, together with interest and costs. *Strong v. Catton*, 1 Wis., 428.

MAXWELL, CH. J.

On the thirteenth day of June, 1877, an order of sale, returnable on the *first day of the next term of court*, was issued out of the clerk's office of the district court of Cuming county, requiring the sheriff of said county to appraise, advertise, and sell according to law, certain real estate therein described, to satisfy a judgment recovered in said court against said defendants. The sheriff, after twice offering said property for sale, and being unable to sell the same for want of bidders, caused said property to be re-appraised, and after due notice as required by law, on the twelfth day of November, 1877, sold a portion of said real estate, and made due report of his proceedings in the premises to the court.

On the tenth day of December, 1877, the sale was confirmed, and deeds ordered to be made to the purchasers. The defendants appeal to this court.

It is claimed by the defendants that the order of sale is void: *First.* Because there is no decree or judg-

ment. *Second.* Because the order of sale was not made returnable within the time required by law. *Third.* That the sale is void, because made after the time allowed by law for the return of the writ; also, because notices of sale were not posted up as required by law, and because the property was not sold for two-thirds of the appraised value.

If there was no decree or judgment, the purchasers would acquire no title whatever from the sale. The purchasers make no objections to the title acquired, and the presumption is that the order of sale was properly issued.

As to the second objection, the statute requires all real estate sold upon execution, or order of sale, to be appraised, and provides that it shall not be sold for less than two-thirds of the appraised value. The distinction, therefore, between sales upon execution and those denominated judicial sales, is to a great extent abrogated. This distinction, however, still remains, that the sheriff in making a sale under an execution, acts as the ministerial officer of the law, and not as the organ of the court, the court neither ordering out the execution or directing a sale of the debtor's property. But in sales made under the authority of a decree, the court is the vendor, the commissioner making the sale being the mere agent of the court.

The decree directs the sale of the property and the application of the proceeds to payment of the debt. As was said in *Rector v. Rotton et al.*, 3 Neb., 177: "By its judgment the court simply enforces a contract of sale voluntarily made with 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." We think that case states the law correctly, and we adhere to the decision there made.

As to the objection that notices were not posted up, it is sufficient to say that where the officer has caused public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in some newspaper printed *in the county*, it is unnecessary to post notices of the time and place of sale. Civil Code, Sec. 497.

In regard to the objection that the property did not sell for two-thirds of the appraised value, this, if true, would require the sale to be set aside. But it is apparent from an inspection of the record that each lot sold for more than two-thirds of the appraised value.

No exceptions were taken in the court below, and, so far as the record discloses, no attempt was made to call the attention of the court to the alleged errors. An equity cause may be appealed to this court, and will be heard *de novo* upon the testimony, but this does not excuse a party from excepting to an erroneous ruling of the court in the admission or rejection of testimony, or in the proceedings in the cause. A final judgment need not be excepted to, but a ruling claimed to be erroneous must be excepted to at the time it is made.

In an equity cause, as in an action at law, if a party desires to oppose the confirmation of a sale, he must file a motion setting forth the grounds upon which he seeks to set the sale aside, and if the motion is overruled he may appeal to this court.

JUDGMENT AFFIRMED.

GEORGE W. DORSEY, APPELLANT, v. ROBERT T. HALL AND OTHERS, APPELLEES.

1. **Pleading.** Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his cause of action, the defendant may move to have the petition made definite and certain, but cannot strike out such matter as redundant and irrelevant.

2. **Trusts.** Where a contract is made for the sale of real estate, equity considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor.

3. ———. And the trust in such cases attaches to the land and binds the heirs of the vendor. And a subsequent purchaser from either the vendor or vendee, with notice, becomes subject to the same equities as the party would be from whom he purchased.

4. ———: VENDOR AND VENDEE. Where a vendor in pursuance of the contract has conveyed certain real estate to the assignee of the vendee it is questionable if a mere judgment creditor or a purchaser, with notice, can question the validity of the trust created by the contract of sale.

5. **Judgment.** A judgment upon real estate is subject to all prior equities, legal or equitable.

6. **Mortgages.** Every kind of property, real or personal, which is capable of absolute sale, may be mortgaged.

THIS case came up from Cuming county. Heard there upon a demurrer to the petition before VALENTINE, J.; demurrer sustained and cause dismissed. Plaintiff appeals.

Uriah Bruner and *R. F. Stevenson*, for appellant.

I. Paragraph 10 in plaintiff's petition was improperly struck out, for the facts stated therein are essential to the plaintiff's title to entitle him to maintain his action and obtain relief. No facts are properly in issue

unless charged in the petition, and no relief can be granted for matters not charged therein, although they may be apparent in other parts thereof. Such statement of facts is necessary to apprise the defendant what the suggestions and allegations are, against which he is to prepare his defense. Story Eq. Pl., 257. Cooper Eq. Pl., 5, 7. *Crocket v. Lee*, 7 Wheat., 522, 525. *Jackson v. Ashton*, 11 Peters, 220. *James v. McKernon*, 6 Johns., 564. *Piper v. Douglas*, 3 Gratt., 371.

II. James Gallen, by and with the advice and consent of Winyall, bought all of Hall's interest in the partnership of Messrs. Hall and Winyall, including in said purchase his said interest to the said city lots, which said city lots were owned by the said partnership of Hall and Winyall as partnership property for the uses and purposes of said firm, and on which they carried on the livery business. *Fowler v. Bailey*, 14 Wis., 125. Gallen could in no event have obtained a deed from Neligh for his said interest to said lots, except by recognizing Hall's ownership thereto and by purchase from him as aforesaid: for Neligh was bound as trustee to deed to the parties that Messrs. Hall and Winyall, the *cestui que trusts*, directed, and for their interest, and a conveyance not executed in accordance with the terms of said trust would have been utterly void, so far as obtaining title thereto for the grantee himself. 2 Spence's Eq. Jur., 310. 2 Lead. C. Eq., 108. Story Eq. Ju., 1257, 1268. Gallen having obtained his deed by reason of this bargain with Hall, will be estopped from claiming said title by purchase or otherwise from Neligh. A purchaser cannot set up an outstanding title against the vendor in *bar* of a proceeding by the latter to compel payment of the purchase money. Bigelow on Estop., 2d Ed., 382, 383, and note 2. A purchaser from a trustee, with notice of the trust, stands in the place of his

vendor and is as much a trustee as he was. 2 Lead. Cas. Eq., 1108. *Galloway v. Finley*, 12 Peters, 264, 205. *Bush v. Marshall*, 6 How., 284, 291.

Crawford & McLaughlin, for appellees.

No brief on file.

MAXWELL, CH. J.

On the first day of May, 1877, the plaintiff commenced an action in the district court of Cuming county to foreclose a certain mortgage executed by Robert Hall, Kate H. Hall, his wife, and David H. Winyall and Lina D. Winyall, his wife, to Thomas Wilson, on the fourth day of October, 1875, upon the north west quarter of section fourteen, in township twenty-three, range five east; and also upon parts of lots 13, 14, 15, 16, and 17, in block thirty, in the city of West Point, to secure the payment of the sum of $1,950, according to the tenor of three promissory notes accompanying said mortgage, the last of which notes, calling for the sum of $1,200, was due and payable on the first day of April, 1877, which note was duly assigned by the said Wilson to the plaintiff, who brought this action thereon.

The petition alleges that in the year 1873 John D. Neligh sold to Thomas Wilson lots 13, 14, 15, 16, and 17, in block 30, in the city of West Point, and that in pursuance of said contract of purchase said Wilson on or about the first day of September, 1873, took possession of said lots and erected thereon a large livery and feed stable; that under the contract Neligh was to hold the legal title to said premises in trust for said Wilson, until said Wilson or his assigns should request a deed for said premises. It is also alleged that on the first day of October, 1875, Wilson sold the premises in question to Robert Hall and David H. Winyall, and took the mort-

gage in question from said parties, said Neligh still continuing to hold the legal title to said lots.

On the twenty-sixth day of August, 1876, Hall sold his interest in said premises to James Gallen, who had actual notice of the existence of the mortgage; and on the same day Neligh and wife, *in pursuance of the contract with Wilson*, executed and delivered to Winyall and Gallen a warranty deed for said premises.

The petition further alleges that on the sixteenth day of December, 1876, Gallen and wife conveyed the undivided half of said premises to one George Gallen, with a view to defraud Hall and Wilson out of their just rights, and that on the nineteenth day of February, 1877, the said George Gallen conveyed by deed the undivided half of said premises to the wife of James Gallen.

It is also alleged that certain defendants recovered judgments against Neligh after the first day of September, 1873.

The tenth paragraph of the petition was stricken out on motion of the defendants as being redundant and irrelevant. The paragraph is as follows: "That said Robert T. Hall and David H. Winyall were the owners of said lots 13, 14, 15, 16, and 17, in the city of West Point, on the fourth day of October, 1876, as fully as if the legal title thereto had been in their names. And as such owners had the right to and were legally entitled to convey the same to the said Thomas Wilson by mortgage deed at that time and incumber the same in all respects as if they held the legal title in their names; and that the said James Gallen and his assigns, the said George Gallen and Katie Gallen, have and hold the same subject to and with full knowledge of said mortgage."

It is difficult to perceive upon what grounds the motion was sustained. If it is urged that the averments are mere conclusions of law, still where a legal deduction

or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his action, the proper motion is to make definite and certain and not to strike out. As the defendants deny the validity of the mortgage, the plaintiff properly sets forth in his petition the authority of the mortgagors to execute the same. The court therefore erred in sustaining the motion.

After the motion, striking out the tenth paragraph of the petition, had been sustained, the defendants demurred to the petition upon the ground that it stated no cause of action. The demurrer was sustained and the cause dismissed. The case is brought into this court by appeal.

In support of the judgment of the court below it was urged by defendant's counsel on the argument of the case that the trust created by the contract between Wilson and Neligh was absolutely void, and that therefore the plaintiff acquired no lien by his mortgage, and therefore the petition stated no cause of action. The petition, however, includes the north-west quarter of section fourteen, township twenty-three north, of range five east, which is not in dispute, and upon which, if the facts stated in the petition are true, the plaintiff is entitled to a decree of foreclosure. This disposes of the case, but inasmuch as the question of the validity of the mortgage upon the lots heretofore described will again come before the district court, we have thought it best to review that branch of the case.

It is a well established principle of equity that where a contract is made for the sale of real estate, it considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor. *Malin v. Malin*, 1 Wend., 625. *Champion v. Brown*, 6 Johns., Ch. 402. *Watson v. Le Row*, 6 Barb., 484. Willard's Eq., 610. And the trust in

such case attaches to the land and binds the heirs of the vendor. *Seton v. Slade*, 7 Vesey, 264. *Swartwout v. Burr*, 1 Barb., 495. *Sutphen v. Fowler*, 9 Paige, 280. And a subsequent purchaser from either the vendor or vendee, with notice, becomes subject to the same equities as the party would be from whom he purchased. *Trinnere v. Bayne*, 9 Ves., 209. *Mackreth v. Symmons*, 15 Ves., 329. *Pollenfax v. Moore*, 1 Atk., 573. *Green v. Smith*, 1 Atk., 572. *Davie v. Beardsham*, 1 Ch. Cas., 38. *Champion v. Brown*, 6 Johns., Ch. 403. *Seaman v. Van Rensselaer*, 10 Barb., 83. Story's Eq., 789.

In the absence of a contract, therefore, if the allegations of the petition are true, Neligh became a trustee for Wilson, or his assigns, of the lots in question. He has admitted the validity of the trust by carrying the same into effect, and it may be questionable if any of these defendants are in a position to deny its validity. The conveyance to James Gallen was made *in pursuance of the terms of the agreement*, and after the execution and recording of the mortgage. As to the judgment creditors, it is well settled in this court that the lien of a judgment upon real estate is subject to all prior liens, either legal or equitable. *Metz v. State Bank*, ante p. 165. *Colt v. Du Bois*, ante p. 391. If, therefore, there was an actual sale of the lots in question to Wilson, although the legal title remained in Neligh at the time the judgments were recovered, yet the lien attached only to the unpaid purchase money, if any. *Filley & Hopkins v. Duncan*, 1 Neb., 134. *Uhl v. May*, 5 Neb., 157.

As to the authority to mortgage the property in question, it is sufficient to say that all kinds of property, real or personal, which are capable of absolute sale, may be mortgaged. 2 Story's Eq. Jur., Sec. 1021. 4 Kent's Com., 144. 1 Powell on Mortgages, 17–23. 2 Bouvier's Dict., 198.

As Hall and Winyall were in possession of the lots in question as owners thereof, at the time of the execution of the mortgage, they had unquestionable authority to execute the same, and if there is a defect in the description of the lots it may be corrected to conform to the actual intention of the parties. *Galway, Semple & Co. v. Malchow*, ante p. 285.

For the errors herein referred to the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

RUSSELL & CO., PLAINTIFFS IN ERROR, v. W. WOHLER AND W. THIES, DEFENDANTS IN ERROR.

Warranty: CONTRACT: RESCISSION. Where a reaper is sold and warranted to do good work, and that if it fails in this respect it shall be replaced by another, or be taken back and the money or notes be returned, and it worked badly and was returned to and accepted by the agent of the manufacturers, the failure of the manufacturers, after notice of the fact, to put the machine in good working order, or to replace it with a good one, must be taken as a full acquiescence on their part in the act of their agent; and such return of the machine to and acceptance of the same by the agent, under the circumstances, constitutes a rescission of the sale contract, and entitles the purchaser to a return of the money or notes given for the same.

ERROR to the district court for Cuming county. Tried below before VALENTINE, J.

The action was originally brought in the probate court, to recover on a promissory note of $60. Plaintiffs had judgment there, and defendants appealed to the district court. In the district court the defendants set up a counter-claim for $350. The jury returned a verdict for defendants, and judgment was rendered against

the plaintiffs for costs. They brought the cause here upon a petition in error.

Uriah Bruner, for plaintiffs in error, contended, *inter alia:* Parol testimony is not admissible to prove the contents of a written instrument unless the original is lost or in the hands of the adverse party, and he has been notified to produce the same. Gen. Statutes, 591. 1 Greenlf. Ev., 87, 88. The whole of what has been said at the time and relating to the same subject matter must be given in evidence—the whole of an admission must be offered together—and the rules of evidence are well established, that if a party offers a letter purporting to be an answer written to the adverse party, the adverse party must be notified before the trial to produce said letters, or the former will not be permitted to offer the same, if objected to. 1 Greenlf. Ev., 201 and foot note. Best Ev., 520. An agency cannot be proven by the mere statement of the alleged agent, unless it is part of the *res gestæ.* Fenlon's alleged agency cannot be shown by himself, because he has not shown himself competent to testify to the fact, or that his alleged appointment was not in writing. 2 Greenlf. Ev., 63. *Whiteside v. Margard*, 51 Ill., 507.

Crawford & McLaughlin, for defendants in error.

No brief on file.

GANTT, CH. J.

This action was brought by plaintiffs in error against defendants upon a note given by them for a "Russell" reaper and mower in 1873. A large amount of immaterial testimony was introduced on the trial; but it is only necessary to refer to the following facts in the case.

James Fenlon, of Council Bluffs, was the general

agent for the plaintiffs in Nebraska, and he appointed C. F. Mewis and Brother, at Wisner, Nebraska, to sell machines. The agents, Mewis and Brother, sold a machine to the defendants, for which the note in suit was given in part payment. It worked badly and frequently broke down. One of these agents was present on the second day the defendants tried to use it, and he attended several times afterwards, endeavoring to put the machine in working order, but he failed to succeed, and after a few days trial, without success, he told the defendants to return the machine. They did return it, and it was accepted by the agents, who then loaned to the defendants a Johnson harvester to cut their grain that season. The machine was warranted, but W. Wohler, one of the defendants, testifies that the warranty given to defendants was burnt; and August Mewis, one of the agents, testifies that the warranty was printed in a pamphlet of Russell & Co., and that the machine was warranted to do good work, and if it failed in this respect it should be replaced by another, or be taken back and the money or notes be refunded. He further testified that by letter he corresponded with Russell & Co. and James Fenlon in regard to the machine the defendants returned, and received replies from them, and that Russell & Co., in their reply, stated they would send a man from their shop to put the machine in order, but did not do so.

The plaintiffs' counsel objected to this parol evidence in respect to these letters. The proofs, however, show that these letters were produced by the agent as a witness in the case of *Russell & Co. v. Higgondon* before the probate court, and were left in that court, and that he never saw them afterwards. E. N. Sweet, the probate judge at the time, also testifies that Mewis produced the letters as a witness in that trial, and that they were not returned to him. Sweet further says that he has examined the files in the case of *Russell & Co. v.*

Higgondon, and could not find the letters. Under the rule laid down in *Minor v. Tillotson*, 7 Peters, 101, this was sufficient proof to let in the secondary evidence.

We think that, under the circumstances shown by the facts in this case, the failure of the plaintiffs to put the reaper in good working order, or to replace it with a good machine, must be taken as a full acquiescence on their part in the acts of their agents; and that the return of the machine by the defendants, and its acceptance by the agents, was a rescission of the sale to the defendants, and thereupon they became entitled to the return of their notes. And as this conclusion is decisive of the case, it is unnecessary to discuss other questions raised upon the argument.

The judgment of the court below must be

AFFIRMED.

STATE OF NEBRASKA, EX REL. LAWRENCE FOSSLER, v. J. R. WEBSTER, COUNTY JUDGE.

1. **Naturalization of Aliens.** A court without any clerk, distinct from the judge of such court, is not a court "having a clerk" within the meaning of section 2165 of the Revised Statutes of the United States, providing for the naturalization of aliens, and such court is not competent to naturalize aliens.

2. **County Courts:** APPOINTMENT OF CLERKS. The act passed February 15, 1877, by the legislature of Nebraska, does not confer any authority, either express or implied, for the appointment of a clerk for the county judge.

ORIGINAL application for mandamus.

G. M. Lambertson, for the relator.

1. The county court is a court of record and, except in real actions, has a general jurisdiction, but limited.

The county court has a seal, as the 20th section of the probate act requires all writs to be sealed, which is all the statutory requirement for the district court to have a seal. (Civil Code, § 64.)

2. The only remaining requirement is, that only such courts of record as have a clerk are vested with the power to act in matters of naturalization. Upon this requirement we say: *First.* That the appointment of a clerk is a power incident to and inherent in a court of record as such, if there is no statute making provision for his appointment or election otherwise, and the failure of the legislature to provide the compensation does not deprive the court of power to make such appointment. *Second.* It is shown by the application that under the act of 1877, page 215, the county commissioners may authorize the employment of assistance, and that in Lancaster county they have authorized the employment of a clerk in the county court. *Third.* It is further shown that, pursuant to its general powers in that behalf, and the special authority of the commissioners under the act of 1877, the court has appointed a clerk, who is acting as such officer.

3. The court therefore has jurisdiction in matters of naturalization. *Ex parte Gladhill*, 8 Met., 168, 171. *Dale v. Irwin*, 78 Ill., 170, 183. *People v. McGowan*, 77 Ill., 644, 647, 652. *People v. Pease*, 30 Barbour, 588, 600, 605. *In re Smith* (opinion by Judge McLean) cited 30 Barb., 603; and 77 Ill., 657. *State v. Whittemore*, 50 New Hamp., 245. *In re Martin Conner*, 39 Cal., 98. *Ex parte Burkhardt*, 16 Texas, 471. *Robbins v. Durell*, 1 Idaho, 50.

E. E. Brown, for the respondent.

No brief on file.

GANTT, CH. J.

This is a motion for a peremptory writ of mandamus, to be directed to the defendant, county judge of Lancaster county, "commanding him to allow the making and filing the declaration of intention of the relator to become a citizen of the United States." The question in the case is, whether the county court is competent to receive an alien's preliminary declaration to become a citizen.

Section 2165 of the Revised Statutes of the United States provides that an alien who desires to become a citizen of the United States "shall declare on oath before a circuit or district judge of the United States, or a district or supreme court of the territories, or a court of record of any of the states, having common law jurisdiction and a seal and a clerk," etc. Under this law the essential requisites to confer jurisdiction in such case upon a state court are, that it must have common law jurisdiction, a seal, and a clerk.

It may be conceded that the county courts of our state have common law jurisdiction to some extent, and a seal; but has it a subordinate officer known in law as the clerk of a court, and within the meaning of the act of congress? Several authorities were referred to by counsel of the relator in support of the motion, but in each of those cases the only question raised and discussed seemed to be whether the court had common law jurisdiction in the sense in which the term is employed in the act of congress, and no point seems to have been made in reference to a clerk of the court.

In *Ex parte Conner*, 39 Cal., 98, it appears that the "county courts are courts of record, having seals and clerks," and the only question in the case was "whether they have common law jurisdiction in the sense in which that term is employed in the act of congress."

In *People v. McGowan*, 77 Ill., 647, it appears that the court in which the declaration was filed was "a court of record having a seal and a clerk, and was given all the powers, was to perform all the duties, and be subject to the restrictions of courts of record as such, according to the provisions of the laws of the state."

But in *Ex parte Gladhill*, 8 Met., 171, which seemed to be most relied on by relator's counsel, SHAW, C. J., remarked that "it might be urged that the act of con gress intended to limit the power to a court having a separate recording officer whose act should authenticate its doings, and that the signature of a separate officer might add something to the credit due to an authenticated transcript. On the other hand it might be urged with some plausibility that if the judge is specially vested by law with the clerical authority, the court has a clerk within the letter and equity of the statute." These remarks are in the nature of suggestions in the case, and cannot be said to be even *dicta*, and therefore cannot have any force as authority. But the judge further says, that in that case "the doubt is removed by the act of 1838, which provides that the justice of the police court should have a clerk, who shall be sworn * * * who is a separate and independent officer."

But in the *State v. Whittemore*, 50 N. H., 251, the question raised in the case at bar was directly involved, and in this case it was held that a court without any clerk, distinct from the judge of such court, is not a court "having a clerk" within the meaning of the act of congress, and that such court is not competent under the act of congress to naturalize aliens. SMITH, J., who delivered the opinion of the court, cites the case of Michael Cregg, 2 Curtis, C. C. R., 98, which is to the same effect, and was decided by Judges Curtis and Sprague in the United States circuit court for the district of Massachusetts in October, 1854.

Judge Curtis, in his opinion in the latter case, says that a court "in which the justice was the recording officer was not a court having a clerk within the meaning of the act of congress. Certainly it does not come within the terms of that act, which clearly imply that there may be courts of record having a seal and common law jurisdiction, but no clerk, and that such courts are not included by the act. * * * When the act speaks of courts of record it speaks of courts whose proceedings are duly recorded by authorized persons; and where it says 'having a clerk,' it superadds the requirement that those proceedings shall be recorded by one of those officers. Unless the act be so construed, the requirement of a clerk would have no meaning. The act would have the same construction as if it were stricken out, because the words 'court of record' would convey with them the necessity of having the proceedings recorded by some one by authority of law. Nor do we consider it a vain and useless precaution to confine the power to naturalize aliens to courts in which one of those officers is found."

It was, however, contended by relator's counsel that under the act of February 15, 1877, the county commissioners of Lancaster county were authorized to and did furnish the county judge with a clerk or assistant. This act is entitled "an act to regulate the fees of county judges, county clerks, sheriffs, and county treasurers." It provides that where the fees of each county judge and county clerk shall in the aggregate exceed fifteen hundred dollars, and when the fees of each sheriff and county treasurer shall exceed two thousand dollars per year, such officers shall pay such excess into the treasury of the county in which they hold their respective offices; and then follows a provision which enables the county commissioners, under certain circumstances, to furnish the county treasurer with nec-

essary clerks or assistants, the sheriff with necessary jail guard and one deputy, and the county clerk with one deputy; and by a second proviso, that, under certain other circumstances, these officers may have "assistants or deputies" if the "county commissioners shall, upon application, have found the same to be necessary," but nowhere in this act is there any authority given, either express or implied, for the appointment of a clerk for the county judge. And as no authority is given for the appointment of a clerk for the county judge, it is not necessary to express any opinion upon the question whether, under the provision of the constitution, which declares that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title" —that portion of the act authorizing the appointment of clerks, deputies, and assistants can have any force under the title of the act, which is restricted to the regulation of the fees of the several officers therein named.

In our opinion the county court has no jurisdiction over applications for naturalization of aliens, and therefore the writ of mandamus must be

DENIED.

M. K. CLENDENNING ET AL., PLAINTIFFS IN ERROR, V. CRAWFORD & MCLAUGHLIN, DEFENDANTS IN ERROR.

Appeals from Justices of the Peace. The statute specially provides that a judgment given in the absence of a party, sued and served with process in a justice's court, may be set aside, and a trial had in which the defendant can set up all his defenses; and in such case an appeal will not lie to the district court until after the proper motion shall have been made to set aside such judgment.

ERROR to the district court for Cuming county. Tried below before VALENTINE, J.

R. F. Stevenson, for plaintiff in error, cited *Wood v. O'Ferral*, 19 Ohio State, 427.

Crawford & McLaughlin, pro se, cited *Ruddick v. Vail*, 7 Iowa, 44. *Brayton v. County of Delaware*, 16 Iowa, 44. *Trullenger v. Todd*, 5 Oregon, 36. *Long v. Sharp*, Id., 438. *Garnet v. Rodger*, 52 Missouri, 41. *Sample v. Gilbert*, 46 Ind., 444.

GANTT, CH. J.

The defendants in error sued the plaintiffs in a justice's court on account for professional services, etc. They were served with process, and failed to appear at the return day of the summons; the cause was tried and judgment was given in conformity with the bill of particulars and the proofs. The plaintiffs in error appealed to the district court, and on motion the appeal was dismissed. The only question in the case is, whether an appeal from the judgment of a justice of the peace will lie to the district court in a case where the defendant disregards the process and fails to appear at the return day of the summons.

Section 1006 of the civil code provides, that "in all cases, *not otherwise provided for by law*, either party may appeal from the final judgment of any justice of the peace to the district court of the county where the judgment was rendered." But section 1001 specially provides, that "when a judgment shall have been rendered against a defendant in his absence, the same may be set aside upon the following conditions:

"*First.* That his motion be made within ten days after such judgment was entered.

"*Second.* That he pay or confess judgment for the costs awarded against him.

"*Third.* That he notify in writing the opposite party, his agent, or attorney, or cause the same to be done, of the *opening of such judgment*, and of the time and place

of trial, at least five days before the time, if the party reside in the county, and if he is not a resident of the county, by leaving a written notice thereof at the office of the justice ten days before the trial." Hence, where judgment is given in the absence of the party sued and served with process, it is "specially provided" that, upon certain conditions, the judgment may be set aside and a trial had in which he can set up all his defenses. This statutory provision gives the party a complete remedy, in such case, in the justice's court, and does not deny him the right of an appeal after he shall have made his defense to the action in that court.

It seems clearly to be the legislative intent that actions in justice's courts must be tried upon the merits of both the claim of the one party and the defense of the other, before an appeal shall be taken to the district court; and this rule seems to be reasonable and just, for where the law establishes the court in which a party shall bring his action, the adverse party should not be allowed to disregard the process of such court, and then select the forum of his own choice in which the cause shall be first tried upon the merits of the case. If such a practice were permitted, it would defeat the main object for which the justice's courts were established, namely, the trial and disposal of causes or controversies with the least possible expense to the parties, where the amount involved does not exceed one hundred dollars. In the following cases it has been held that if a party is duly summoned and fails to appear and set up his defense, an appeal will not lie to the district court. *Brayton v. County of Delaware*, 16 Iowa, 441. *Trullenger v. Todd*, 5 Oregon, 36. *Long v. Sharp*, 5 Id., 438. See *Garnet v. Rodgers*, 52 Mo., 145. *Sample v. Gilbert*, 46 Ind., 444.

The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

C. E. LEWIS, PLAINTIFF IN ERROR, v. J. WATRUS, DEFENDANT IN ERROR.

1. **Judgment in Probate Court.** In the probate court a "judgment decreed in favor of plaintiff in the sum of, principal $174.70, interest 85 cents, judgment $175.55," and costs $9.30, is a final determination of the rights of the parties in the action, and though untechnical in form, is sufficient as the entry of a judgment.

2. **Practice:** APPEALS TO DISTRICT COURT. If the district court has no jurisdiction of an appeal case, it is error to render a final judgment, or judgment for costs; and when the district court has jurisdiction in such case, and a jury has been called, and the evidence of the parties has been given to the jury, it is error to discharge the jury and to render a final judgment by the court in such case.

ERROR to the district court for Fillmore county. Tried below before WEAVER, J.

Brown & Marshall, for plaintiff in error.

I. The judgment rendered in the court below was a good and valid judgment. The statement in the docket that judgment was rendered in favor of the plaintiff, there being but one defendant, sufficiently shows that judgment was rendered against the defendant. *Aldrich v. Maitland*, 4 Mich., 205 *Fish v. Everson*, 44 N. Y., 367. *Story v. Kimball*, 6 Verm., 541. *Little v. Bidwell*, 27 Texas, 688. *Finnagan v. Manchester*, 12 Iowa, 521. *Leggett v. Wall*, 2 A. K. Marsh, 149. *Brooks v. Ratcliffe*, 11 Iredell, N. C., 321. Freeman on Judgments, Secs. 46 to 55.

II. This same motion had once been made and overruled two years before the motion in question was filed. The defendant had treated the judgment entered, as a valid judgment, by taking an appeal and filing a bond,

in which he recites that a judgment had been rendered by which he felt aggrieved, etc. By this recital the defendant is estopped from saying now that there was no judgment. To hold otherwise might enable the defendant, as in this case, to perpetuate a great fraud. The plaintiff obtained a judgment. The defendant recognized it as such and appealed from it, thus arresting proceedings until the defendant removes all his property out of the state, then dismisses the appeal, and leaves the plaintiff without remedy. We think it is not the intention of the law to assist parties in perpetrating frauds of this kind. Again, this was an action to recover more than $100, and an appeal and trial *de novo*, and the court had jurisdiction, even if there had been no judgment in the court below, as the action could have been originally commenced in the district court.

III. If there was no judgment in the court below, and it was absolutely essential that there be one, the district court should have sent the cause back to the lower court, with orders to the lower court to complete the judgment. In any view it was error to dismiss the case, and charge the costs to the plaintiff.

No appearance for defendant in error.

GANTT, CH. J.

This action was originally commenced in the probate court, upon a promissory note not negotiable. On the seventh of June, 1873, defendant filed an appeal bond, and on the thirtieth of January, 1874, he filed his transcript and appeal in the district court. At the May term (1874) the case was continued, and at the May term (1875) defendant filed his motion to strike the papers from the files, on the ground that no judgment was rendered in the case in the probate court. This motion

was overruled and the defendant filed his answer, and afterwards he filed an amended answer. At the June term (1876), upon affidavit of defendant, the cause was continued, and at the June term (1877) a jury was impaneled in the case and the parties proceeded with the trial of the cause; but after each party had introduced all his testimony the defendant then filed another motion to dismiss the appeal for want of jurisdiction, on the ground that there was no judgment to appeal from. The jury was discharged, the appeal was dismissed; and the court rendered judgment, as follows: "It is therefore considered and adjudged that this cause of action be and the same is hereby dismissed, and that the defendant, John Watrus, go hence without day and have and recover of the plaintiff the costs of this action taxed at ——."

We think the court erred in dismissing the appeal, and also in rendering a final judgment on the merits of the case and for costs in favor of the defendant. The code defines "a judgment to be the final determination of the rights of the parties in an action"—§ 428. The judgment rendered by the probate court is very informal, but it is "a judgment decreed in favor of plaintiff in the sum of, principal, $174.70; interest, 85 cents. Judgment, $175.55," and costs, $9.30. Though the language is untechnical, still it seems pretty clearly to be a "final determination of the rights of the parties to the action."

Freeman on Judg., § 47, says in respect of a judgment in these inferior courts that "if it corresponds with the definition of a judgment as established by the code, if it appears to have been intended by some competent tribunal as the determination of the rights of the parties to an action, and shows in intelligent language the relief granted, its claim to confidence will not be lessened by want of technical form nor by the absence of language

commonly deemed especially appropriate to formal judicial records;" and in § 57 the words "I give judgment" was held good, and the language, "whereupon the court orders that plaintiff pay the costs of suit, and that execution issue therefor, in a record showing the trial by a jury and a verdict for the defendant, though not in technical language, was held sufficient to constitute a valid judgment;" and the author quotes from *Taylor v. Runyan*, 3 Clarke, 474, this language of the court: "We would not hesitate to enforce a judgment because 'decreed' or 'resolved' was used instead of considered."

In *Minkhart v. Hankler*, 19 Ill., 47, it is said that "no judgment will be reversed for the use of inappropriate or untechnical words." Freeman on Judg., § 55.

In *Fish v. Emerson*, 44 N. Y., 376, the judgment was in form substantially as the one in the case at bar, and was held sufficient as the entry of a judgment.

Again, if the court had jurisdiction of the case then it erred in discharging the jury and in rendering a final judgment on the merits of the case; and if the court had no jurisdiction of the case then it had no power to render a final judgment, or judgment for costs. *Burke v. Jackson*, 22 Ohio St., 268. Hence, in any view in which the case may be considered, there is error in the record, and the judgment of the court below must be reversed, the appeal must be reinstated, and the case be proceeded with to trial.

JUDGMENT ACCORDINGLY.

OMAHA HORSE RAILWAY COMPANY, PLAINTIFF IN ERROR, v. MARY J. DOOLITTLE, DEFENDANT IN ERROR.

1. **Negligence.** Where the carelessness of the plaintiff, as well as that of the defendant, operates *directly* to produce the injury complained of, the plaintiff is not entitled to recover; but in cases of mutual negligence the plaintiff is entitled to recover, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence.

2. **Married Women.** A married woman may, while married, maintain an action in her own name for any matter in relation to her separate estate or business, or for injuries to her person.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J. The opinion states the facts of the case.

George E. Pritchett, for plaintiff in error.

I. Negligence cannot be presumed, but must be proved. Shearman & Redfield on Negligence, Sec. 12. To get out of a car while in motion is negligence. *Lucas v. Taunton R. R. Co.*, 6 Gray, 64. Riding on the platform is negligence. *Higgins v. N. Y., etc., R. R. Co.*, 2 Bosw., 132. There are no degrees in negligence; for, whether it be great or small, if it can be seen that in any measure without it the injury would not have happened, there can be no recovery. *Baxter v. 2d Ave. R. R. Co.*, 3 Robt., 510; 4 Robt., 377. 1 Sweeney, 208; 36 N. Y., 135. Where an injury has been sustained, and both parties are in fault in respect to it, and no design is imputable to the defendant, the true test of his liability is, could the injury have been avoided by ordinary care on the plaintiff's part? If it could, he must bear it; he cannot avail himself of the other party's negligence. *Brooks v. B. & N. F. R. Co.*, 25 Barb., 600. Where there is no conflict as to the facts, the question

as to whether there was negligence is a question of law for the court. *Solomon v. Central Park, &c., R. R.*, 1 Sweeny, 298. *Gonzales v. N. Y. & H. R. R.*, 38 N. Y., 440. *Thrings v. Central Park R. Co.*, 7 Robt., 616. *Lewis v. Baltimore & Ohio R. R.*, 13 Am. L. Register, 284.

Redick & Connell, for defendant in error, cited: *Poulin v. Broadway and 7th Avenue Railroad Co.*, 61 N. Y., 621. *Mulhado v. B. C. R. R. C.*, 30 N. Y., 370. *Nichols v. Sixth Avenue R. R. Co.*, 38 N. Y., 131. *Keating v. N. Y. C. R. R. Co.*, 49 N. Y., 673. *Colt v. Sixth Avenue R. R. Co.*, 49 N. Y., 671.

MAXWELL, CH. J.

The plaintiff in error is a corporation operating a horse railway for the transportation of passengers in the city of Omaha. The defendant in error brought an action in the district court of Douglas county against the plaintiff herein, to recover damages for personal injuries claimed to have been sustained by her, while a passenger on one of plaintiff's cars, on the night of November 17, 1875, through the negligence of the driver. On the trial of the cause a verdict was rendered in favor of the defendant in error for the sum of $4,950. A motion for a new trial having been overruled, judgment was rendered in favor of the defendant herein for the amount of the verdict. The plaintiff in error brings the cause into this court by petition in error.

The errors relied upon are: *First.* That the evidence fails to show negligence on the part of the plaintiff, or its agent, the driver of the car. *Second.* That the defendant was guilty of contributory negligence. *Third.* That the court erred in refusing to give certain instructions to the jury. *Fourth.* That the damages are exces-

sive, and not warranted by the testimony. *Fifth.* That the defendant was erroneously permitted to maintain the action in her own name.

It appears from the testimony that the night of November 17, 1875, was very dark; that the defendant entered the car near the north end of the track, and requested the driver to stop at the *west* crossing of Seventeenth street and Capital avenue. She also stated to Shelby, a passenger in the car, that she wished to leave the car at the place heretofore designated, and he promised to ring the bell at the proper place for the car to stop. The defendant sat in the forward end of the car, and about the time that it reached the point designated she again requested the driver to stop the car at the west crossing; at this time Shelby rang the bell. She immediately went to the rear end of the car and stood at the door, or went out upon the step, waiting for the car to stop. The car came to a full stop for a moment, about twelve feet east of the west crossing, and as the defendant was in the act of stepping off, suddenly started forward, throwing the defendant violently against the step of the car, fracturing two of her ribs and inflicting serious and permanent injuries on her.

There is some conflict in the testimony, and the defendant is clearly mistaken in stating that at the time she requested the driver to stop, she saw the light from the east side of the basement of the Presbyterian church. But this mistake could only affect her credibility before the jury, and is not claimed to have been willful misrepresentation.

Mr. Shelby, called as a witness for the defendant, testifies that he must have rung the bell forty or fifty feet west of the west crossing.

The driver of the car states in his testimony that at the time the bell rang he was very near the *west* crossing, and was too near to attempt to stop there, and was

making for the next crossing. He also stated that he could stop the car on that grade in ten or twelve feet.

It appears that the grade at this point is about one hundred and fifty feet to the mile, and the plaintiff's theory is, that the driver did not attempt to stop the car at the west crossing; but being unable after receiving the signal to stop there, he was passing on to the east crossing before stopping, and that the temporary stoppage near the west crossing was caused by the brakes catching the wheels, and was not caused by the driver endeavoring to stop the car. This defense, if fully established, would exonerate the plaintiff from liability. But the question, whether the car stopped at the point designated or not, is purely one of fact, and, there being a conflict of testimony on that point, was for the jury alone to determine. It is somewhat remarkable, however, if the plaintiff's theory be true, that no attempt was made to stop the car as requested, and no satisfactory reason given for the failure to do so. After a careful examination of the testimony it is apparent that there is a clear preponderance of testimony showing that the car was stopped for the purpose of permitting the defendant to alight from the same; and the preponderance of testimony upon that point disposes of the second objection raised by the plaintiff.

The plaintiff asked the court to give the following instruction, which was refused, and which is assigned for error: "If the jury believe that plaintiff got up from her seat in the car while it was in motion, and walked to the door and out upon the step of the car while it was in motion, and before it had been stopped by the driver, such act is negligent on her part, and she cannot recover in this action, no matter how negligent the driver was, unless he acted willfully."

In support of this instruction we are referred, among other cases, to that of the *P., F. W. & Ch. Railway Co.*

v. Krichbaum's administrator, 24 Ohio State, 119, in which it was held that, where the carelessness of the plaintiff, as well as that of the defendant, operated directly to produce the injury complained of, the plaintiff has no right to recover.

In the case of the *C. C. & C. R. R. Co. v. Crawford*, 24 Ohio State, 638, the court, after stating what ordinary prudence requires of a person before attempting to cross a known railroad track, say: "The rule, as above stated, does not preclude a recovery in all cases where the injured party omits to employ his senses to discover and avoid injury, even though the omission may be regarded as negligent; but only in those cases where the omission *contributes* to the injury."

The defendant's negligence is of no consequence, if it did not contribute to bring upon her the injury of which she complains. *Savage v. Com. Ex. Ins. Co.*, 36 N. Y., 655. *Morrison v. Gen. St. Nov. Co.*, 8 Exch., 733. *Norris v. Litchfield*, 35 N. H., 271. *Alger v. Lowell*, 3 Allen, 402. *Churchill v. Rosebeck*, 15 Conn., 369.

The law is thus stated by an able court: "Although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover." *C. C. & C. R. R. Co. v. Crawford*, 24 Ohio State, 688. *Timmons v. Central Ohio R. R. Co.*, 6 Ohio State, 105.

This in our view is a correct exposition of the law. The injured party is not guilty of contributory negligence where he could not, by the exercise of due care, have avoided the consequences of another's carelessness. The instruction asked by the plaintiff *assumes* that the defendant was guilty of contributory negligence, even if the act had not in the slightest degree contributed to the accident. The instruction was therefore properly refused.

The first instruction asked by the plaintiff had already

been given by the court, and it was not error to refuse to repeat it.

It is claimed that the damages are excessive. Since the case has been pending in this court the defendant has filed a remititur for the sum of fifty dollars, for the amount of the physician's account, for his services in waiting upon the defendant. But one physician was called as an expert, and he by the defendant, to testify to the character of the defendant's injuries. If these injuries were not regarded as being permanent in their nature it is somewhat remarkable that on the trial of the cause in the city of Omaha, with a number of skillful physicians at hand, none were called by the plaintiff to show the character of the injuries. The verdict, although for a greater sum than would have been allowed by the court, is not so disproportionate to the character of the injuries proved as to authorize the interference of the court to set it aside on the ground that it is excessive.

It is claimed that the defendant being a married woman cannot maintain the action in her own name. Section three of the act relating to the rights of married women, approved March 1, 1871, provides: "That a woman may, while married, sue and be sued in the same manner as if she were unmarried." It is said that this simply gives her a right of action in reference to her separate estate, and does not extend to injuries to her person. We cannot give so narrow a construction to the law. A wife may maintain an action in her own name, in all matters relating to her separate estate. If carrying on any trade or business she may maintain an action for her personal earnings, or the proceeds of her business, and she may maintain an action for an injury to her person. In *Pope v. Hooper*, 6 Neb., 187, it is held that the act of 1871 wholly removed the common law disability of married women.

After a careful examination of the entire case we find no error to justify a reversal of the judgment. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

BURLINGTON AND MISSOURI RIVER RAILROAD COMPANY, APPELLEE, v. THE BOARD OF COUNTY COMMISSIONERS OF YORK COUNTY ET AL., APPELLANTS.

1. **Taxes:** LEVY OF. The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended by levying a sum in excess of that authorized by law, such excess may affect titles acquired by a sale of the property for such illegal tax. But this will not excuse a party praying for an injunction from tendering the amount of taxes justly due from him.

2. ——: INJUNCTION. If a portion of a tax is legal and a portion illegal, if the legal can be separated from the illegal, an injunction will not be granted to restrain the collection of the entire tax.

3. ——: CONSTRUCTION OF STATUTE: SCHOOL TAXES. The act approved February 19, 1875, to amend section 31 and other sections of the school law, limits the amount of school district taxes for all purposes to twenty-five mills on the dollar on the assessed valuation of the property of a school district.

4. **Pleading:** PETITION. Where there is an omission to state a material fact in a petition, one necessary to show a cause of action, the presumption is that it does not exist.

5. **Land Road Tax.** Where a land road tax of $4.00 per quarter section for the year 1875 was levied before the constitution took effect—*Held*, that such taxes were valid, being expressly excepted from the provisions of the constitution.

APPEAL from a decree rendered in the district court for York county, enjoining the collection of taxes to pay interest on county bonds, and taxes to pay school

bonds issued by several districts of the county, all of which were levied on lands belonging to plaintiff. The court below made the injunction perpetual, and defendants appealed.

Edward Bates, for appellant.

I. If in this levy to pay interest on bonded indebtedness, there should be found some excess, this will not vitiate the whole tax—the good can be separated from the bad by computation. *Frazer v. Seibern*, 16 O. St., 615. *Obryne v. Mayor Savannah*, 41 Ga., 331. *O'Kane v. Treat*, 25 Ill., 458. *Brisco v. Allison*, 43 Ill., 291. *City of Ottawa v. Barney*, 10 Kan., 270. *State v. Allen*, 43 Ill., 456. *Allen v. Peoria R. R. Co.*, 44 Ill., 85. *People v. Nichols*, 49 Ill., 517. *Colman v. Anderson*, 10 Mass., 104. *State v. McClurg*, 3 Dutch., 253. *Swinney v. Beard*, 71 Ill., 27, 92. *Jones v. Seward Co.*, 5 Neb., 561.

II. Irregularities do not vitiate taxes in courts of equity. *City of Lawrence v. Killam*, 11 Kan., 499. *Mix v. People*, 72 Ill., 241. *Swiney v. Beard*, 71 Ill., 27. Cooley on Taxation, 219, 220. *State v. Allen*, 43 Ill., 456. *Kansas Pacific Railway v. Russell*, 8 Kan., 558.

III. There is a radical distinction between this action brought to enjoin a tax and a case at law brought by ejectment, where the land of a citizen has been sold for tax. In this, he who "asks equity must do equity." But at law, where a party is divested of his property, it must be by "due process," and a strict compliance with all the provisions of the law—is a prerequisite. Also, after a sale, where there is an illegal excess after the land is sold, it is too late to separate the good tax from the bad. *Frazer v. Seiburn*, 16 Ohio St., 545.

T. M. Marquett, for appellee.

I. There can be no implied power to levy taxes. Those who levy taxes must show a law expressly empowering them to levy the same. *State v. Shortridge*, 56 Mo., 126 and 130.

1. The power to levy taxes must be clearly and expressly given. *Carrollton Co. v. United States*, 18 Wallace, 71. Cooley on Taxation, 244, 253, note 2. *May v. Cincinnati*, 1 Ohio State, 268.

2. There must be distinct legislative authority for every tax that is levied. *Norris v. Russell*, 5 Cal., 250.

3. The act of 1875, page 169, makes it the duty of the auditor to determine just what taxes were due on registered bonds, and the clerk could only levy taxes for that amount.

II. The county commissioners have no power to levy a tax for registered bonds when the auditor has made the proper certificate as to the amount to be levied to pay interest on same. For the reasons,

1. That the act of 1875, which is repugnant to the act which empowers the county commissioners to levy taxes for registered bonds, repeals the same. *Wilson v. O. & M. R. R. Co.*, 64 Ill., 542, 578. *Somerset Road*, 74 Penn. St., 63. *People v. Van Nort*, 64 Barb., 205.

2. The certificate of the auditor in reference to registered county bonds is jurisdictional. *Matteson v. The Town of Rosendale*, 37 Wis., 254. Blackwell on Tax Titles, 185. *Wall v. Trumbull*, 16 Mich., 234. 33 Mich., 126–203. 50 N. Y., 502. 17 Mich., 437. 41 Iowa, 153.

3. A tax must be levied by the officers designated by law. Cooley on Taxation, 216–217. *Munson v. Miller*, 66 Ill., 383. *Darby v. Gun*, 50 Ill., 428. Blackwell on Tax Titles. *Flach v. Hughes*, 67 Ill., 384–387.

III. The only tax that the commissioners had a right to levy to pay interest on bonds was for the $4,400. Funding bonds being thus limited, they in violation of law assumed that the bonded indebtedness of the county was $138,000, and levied a tax to pay interest on the same of $15,069.54, when they had only power to levy a tax to pay interest on $4,400. There is no law for this levy. *Cumberland County v. Webster*, 53 Ill., 141. For the sake of argument admit that the county commissioners had a right to put a levy of $4,400; the blending of this lawful tax with the unlawful levy of $11,009, makes the whole levy void. *Edwards v. Taliafero*, 34 Mich., 15. *Freeland v. Hastings*, 10 Allen, 589. Cooley on Taxation, 295. *Ferton v. Feller*, 33 Mich., 199. To hold otherwise would be to let the court levy a tax.

MAXWELL, CH. J.

This cause is brought here on appeal from the decree of the district court of York county.

The first ground of complaint set forth in the plaintiff's petition is in respect of the following action of the board of county commissioners, namely: "The board upon examination finds the indebtedness of York county as follows: Bonded indebtedness, $138,000. * * * And the board thereupon levied the following sinking fund taxes, to-wit: To pay interest on bonded indebtedness, fourteen mills on the dollar."

The plaintiff, after stating at an unnecessary length the facts and history of the action of the board in regard to the levy of the tax, complains that the levy of fourteen mills, so made by the board, to pay interest on bonded indebtedness of the county was without any authority of law whatever, and submits that the same is void.

It is admitted that of the $138,000 bonded debt for which the levy of fourteen mill tax was levied, forty seven thousand dollars was never issued, and to that extent there was no bonded debt of the county, and the levy was void.

It is further admitted that forty-seven thousand dollars of the remainder consists of bonds issued to the Midland Pacific R. R. Co., and that these bonds were registered in the office of the state auditor as provided and required by the act of February 25, 1875; and the evidence shows that in compliance with the requirements of the statute, on the 14th of June, 1875, the state auditor certified to the county clerk the amount of sinking fund and interest necessary for the next succeeding year to pay interest upon said bonds.

The important question now is: Has the board of county commissioners authority to levy the tax to pay the interest upon and to create a sinking fund for the redemption of bonds, so registered in the office of the state auditor?

Cooley in his work on Taxation (256), says: "It is a familiar rule that in the execution of the power to tax, the municipalities must confine themselves closely within the power conferred," and "that the provisions of the statute must be strictly pursued." See the large number of authorities he refers to. The proposition will not be controverted, that it is absolutely essential to valid taxation that the taxing officers must be able to show legislative authority for every levy of taxes. Cooley Const. Lim., 517–518. *Clark v. Davenport*, 14 Iowa, 494. *Burlington v. Kellar*, 18 Iowa, 59. *Mays v. Cincinnati*, 1 Ohio St., 273. Cooley on Taxation, 244.

Now, the fourth section of the act of February 25, 1875, requires the state auditor annually to ascertain the necessary amount for sinking fund and interest upon all bonds registered in his office, and to "certify the amount

thereof to the clerk of the county in which such bonds were issued, specifically setting forth the amount thus due and to become due for such year." And the fifth section of the act provides that "the clerk and recorder of any county, upon receiving such certified statement from the auditor of state, shall ascertain from the assessment roll of the county the amount of taxable property in such county, and what percentage is required to be levied thereon to pay said amount, and to create a sinking fund in compliance with the certificate of the said auditor, and when so ascertained shall levy such percentage upon the taxable property of such county, and place the same upon the tax roll of the county in a separate column or columns designating the purpose for which said taxes are levied, and the said taxes shall be collected by the county treasurer in the same manner that other taxes are collected." Laws, 1875, p. 170.

These provisions are jurisdictional and mandatory, and therefore, under the act, the authority to ascertain the amount of interest to be paid and to create a sinking fund to redeem registered bonds, is vested alone in the state auditor, and he must certify the amount to the proper county clerk; and the county clerk is authorized to ascertain what percentage is necessary to be levied on the taxable property of the county for the purposes aforesaid, and he is required to extend the tax so levied on the tax roll in separate columns, to be collected in the same manner that other taxes are collected. And, for aught that appears in the record of this case, the clerk may have ascertained the necessary percentage and levied the same on the taxable property of the county, and extended the tax on the tax roll as required by the law. The record is silent in this respect.

It is, however, clear that the board of county commissioners has no legislative authority whatever to levy taxes for interest on bonds registered in the office of the

state auditor. The exercise of the taxing power the legislature has given to other municipal officers; and it is not the province of this court to change the law, and transfer this taxing power to the board of county commissioners when by legislative authority it is exclusively placed in the hands of other officers. And it will not be urged that the court can exercise the taxing power, ascertain and fix the rate, and levy the tax to pay the interest upon such registered bonds; for, if the court was to attempt the exercise of such taxing power, it must necessarily include the exercise of legislative functions in order to confer upon the court the authority to exercise the power. But in *Turner v. Althaus*, 6 Neb., 73, it is said in respect of the taxation of property that if the court "attempts to classify this property into such as shall be taxable, and such as shall not, it assumes the exercise of legislative power, which belongs exclusively to the legislative department of the government.

But as the petition does not allege that the clerk did not levy the taxes in question, the presumption is that he did his duty and that the taxes were properly levied. Of the bonds in question, $44,000 were issued under the authority of a special act of the legislature, approved February 24, 1873, to fund the indebtedness of York county. Various objections are made to these bonds, but the testimony fails to show their invalidity.

It is admitted that the second installment of bonds voted to the Midland Pacific Railroad Company by said county, amounting to the sum of $47,000, is void; the company not having completed the road to the town of York within the time prescribed. This leaves $91,000 of valid bonds issued by the county.

Does the levy of fourteen mills, to apply on bonds, based on an indebtedness of $138,000, vitiate the entire tax levied for bonds, or will the plaintiff be required to

pay that portion of the tax which is legal, as a condition upon which relief will be granted?

In *Frazer et al. v. Seibern et al.*, 16 Ohio State, 617, the plaintiffs were shareholders in the First National Bank of Cincinnati, whose shares in the bank had been assessed as personal property, no deduction being made for United States bonds held by the bank, or for real estate, which was taxed against the bank itself. The court held as a condition of granting relief by injunction, that the plaintiffs should first pay to the treasurer of Hamilton county such sum as might lawfully have been assessed against the plaintiffs, or their bank, and if the parties could not agree upon the sum due, proceedings be adopted to ascertain it by the court.

In *Briscoe v. Allison*, 43 Ill., 391, the county commissioners on the twenty-eighth of January, 1865, passed resolutions offering bounties to volunteers. Afterwards, on the seventh of February, the legislature passed an act authorizing the several counties in the state to pay bounties to persons enlisting in the military service of the United States. Bounties were paid in county orders to six or eight persons who enlisted *after* the adoption of the resolutions in January and *before* the passage of the law, and about one hundred enlisted after the passage of the law. On a bill being filed to enjoin the collection of the tax, it was held that if the court "can, under the bill, ascertain the proportion that the illegal bears to the legal bonds, it could thereby be determined what portion of this tax would be illegal, and, when ascertained, the portion of the tax necessary, and which would go to pay those illegally issued bonds, should be restrained and the remainder collected." And see also: *Palmer v. Napoleon*, 16 Mich., 176. *Hersey v. Milwaukee Co.*, 16 Wis., 185. *Mills v. Johnson*, 17 Id., 598. *Mills v. Charleton*, 29 Id., 400. *Dean v. Borchsenius*, 30 Id., 236. *O'Kane v. Treat*, 25 Ill., 557.

Morrison v. Hershire, 32 Iowa, 271. *Corbin v. Woodbine*, 33 Id., 297. *Shelton v. Dunn*, 6 Kans., 128. *Lawrence v. Killam*, 11 Id., 499. Cooley on Taxation, 537.

It is claimed by the plaintiff, that the amount levied, being in excess of the power to levy given to the county commissioners, is therefore entirely void. The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended, by levying a sum in excess of that authorized by law, the effect may be to affect titles acquired by a sale for such illegal tax. But where a party comes into a court of equity, asking to be relieved from the payment of taxes on the ground of their being illegal, he must do equity by offering to pay the amount justly due from him, and upon this condition alone will relief be granted. *Hallenbeck v. Hahn*, 2 Neb., 426, and cases cited. The tax levied for the $91,000 in bonds is therefore held to be valid and legal, and a *pro rata* reduction will therefore be made in the assessment of fourteen mills, so levied for the purpose of being applied on said bonds. The judgment of the district court upon the first count in the petition is reversed, and the injunction heretofore granted is dissolved as to the $91,000 in bonds and is made perpetual against the $47,000 in bonds not delivered to the Midland Pacific Railroad Company.

As to the second cause of action the petition alleges that the county commissioners made a levy "to discharge bonded indebtedness of school districts." This count consists of twenty-five paragraphs, substantially alike, except as to the numbers of the districts and the amount of the levy. The first paragraph is as follows: "In school district No. 3, thirty-five mills on the dollar valuation, and the amount charged against the lands of plaintiff by virtue of said levy is $202."

Section thirty of "An act to establish a system of public instruction for the state of Nebraska," approved

February 15, 1869 (Gen. Stat., 966), provides that: "Any school district shall have power and authority to borrow money to pay for the sites for school houses, and to erect buildings thereon, and to furnish the same, by a vote of a majority of the qualified voters of said district present at any annual meeting, or special meeting." The proviso limits the amount of the debt at any one time, for money thus borrowed, to five thousand dollars.

Section thirty-one authorizes a school district at any annual or special meeting to impose a tax not exceeding ten mills on the dollar valuation, for the purpose of building a school house.

Section thirty-two provides that: "The qualified voters, when assembled at any annual or special meeting, may, from time to time, impose such tax as may be necessary to pay teachers, to keep their school-houses in repair, and to provide the necessary appendages, *and to pay and discharge any debts or liabilities of the district lawfully incurred*," etc.

Section fifty-five requires the school board, between the first and third Mondays of June of each year, to deliver to the county clerk of each county, in which any part of the district is situated, a report in writing under their hands, of all the taxes *voted* by the district during the preceding year," etc.

In 1875 section thirty-one was amended as follows: "Any school district may, at any annual or special meeting, impose a tax on the taxable property of the district in any amount not exceeding *twenty-five mills* on the dollar on the assessed valuation of the property of the district, and each tax, when voted, shall be reported by the district board to the county clerk, and levied and collected as other taxes voted by the district." Laws, 1875, p. 116.

The evident object of the amendment is to limit the amount of school district taxes raised for all purposes to

twenty-five mills on the dollar on the assessed valuation. The effect of such legislation upon vested rights does not arise in the case. *Prima facie*, the statute fixing a limit to taxation is obligatory upon the officers authorized to levy taxes, and they have no authority to transcend its limits. It is said the legislative department makes, the executive executes, and the judiciary construes the laws. Cooley on Taxation, and cases cited in note 2. And the legislature in every instance must prescribe the rule under which taxes may be levied, and grant the authority to levy the same.

On the twenty-seventh of February, 1873, an act was passed entitled "An act to provide for the registration of precinct or township and school district bonds." Gen. Stat., 883. This act makes it the duty of all precinct, or township, and school district boards and officers, to furnish to county clerks of their respective counties, a statement of the bonds heretofore issued by their respective precincts, townships, and school districts, and not already paid, the date of each bond, when, where, and to whom payable, the amount, and the rate of interest, which bonds shall be registered by the county clerk, etc.

In 1875 an act was passed to amend this act by requiring county commissioners to levy the necessary taxes to meet the accruing interest upon such bonds, and to provide a sinking fund. Laws 1875, p. 185. It is claimed by the plaintiff that the power thus conferred upon county commissioners is unauthorized, the title of the act merely providing for the registration of bonds. Even if such was the case, which we do not decide, there is no allegation in the petition that the taxes referred to, at least to the extent of twenty-five mills on the dollar valuation, were not properly levied.

As was said in the case of the *B. & M. R. R. v. Lancaster Co.*, 4 Neb., 307: "Where there is an omission to

state a material fact, one necessary to show a cause of action, the presumption against the pleader is that it does not exist."

The judgment heretofore rendered enjoining the entire tax, is reversed, and the injunction is dissolved as to the tax of twenty-five mills on the dollar on the assessed valuation, and is made perpetual against the levy in excess of that sum.

The third cause of action set forth in the petition is for an injunction against the land road tax of $4 per quarter section for the year 1875. Most of the questions involved were considered in the case of the *B. & M. R. R. v. Lancaster Co.*, 4 Neb., 203, and we regard the decision in that case as a correct exposition of the law. The taxes in question were levied before the constitution of 1875 took effect, and are not affected by its provisions, being expressly excepted therefrom by section two of the schedule. The tax was properly levied and should not be enjoined. Judgment will be entered in this court in conformity with this opinion.

JUDGMENT ACCORDINGLY.

ROBERT E. FARMER, APPELLEE, v. THOMAS W. VOLLENTINE AND OTHERS, APPELLANTS.

1. **Practice on Appeal:** FINDINGS OF FACTS: EVIDENCE. On appeal, if the evidence be not wholly preserved, and brought into the record, the decision of questions of fact will not be disturbed. And this is the rule whether the trial below be to the court, to a referee, or to a jury.

2. **Specific Performance:** WHEN EQUITY WILL COMPEL. A court of equity has jurisdiction to compel the proper application of a specific fund, devoted to a particular use, whenever it becomes necessary to do so in order to prevent a great or irreparable injury, or to avoid a multiplicity of suits.

THIS was an appeal from the district court of Lancaster county.

The facts are stated in the opinion, but it may be added that after the note, therein mentioned as given by the plaintiff to Welton, became due, it remaining unpaid, an action was brought by Welton to foreclose the mortgage given by plaintiff to secure the same, and also to procure a personal judgment against the plaintiff in case the premises failed to bring enough to satisfy the debt, which action was prosecuted to judgment and the premises sold; and after applying all of the moneys realized for the sale of said premises properly applicable thereto, there still remained due something over $600, for which amount a personal judgment was taken against the plaintiff. About the time this judgment was taken, the defendants, Vollentine, Tidball & Haine, commenced an action against Armstrong, and a judgment of foreclosure was taken against him, but before the land was sold Armstrong came in and paid the full amount of the Welton debt into court. The plaintiff requested the defendants, Vollentine, Tidball & Haine, to apply so much of the money paid by Armstrong as was necessary to the payment of the Welton judgment. This the defendants refused to do, and the plaintiff brought this action to compel them to make the application.

Plaintiff had judgment below, and defendants appeal.

T. M. Marquett, for appellants.

It was the duty of the plaintiff to pay off the Welton mortgage and make good his covenants of warranty, and the mere fact that the defendants took collateral security does not alter or make less his duty to do so. *Fisher v. Fisher*, 98 Mass., 303. 25 Mich., 393. *Brant v. Ayler*, 49 Ind., 453. The evidence nowhere shows

such an agreement, and an agreement for defendants. No man can profit by his own wrong. It was plaintiff's duty to pay off the Welton mortgage, and make good his covenant; failing to do this and allowing the lands covenanted to be sold and sheriff's deed made, he, plaintiff, becomes indebted to defendants on his covenant in in the sum of $2,800 and interest. *Candrey v. Coit*, 44 N. Y., 382. *Nicholls v. Alexander*, 28 Wis., 118. Defendants never agreed to pay off the Welton mortgage, and never agreed to apply their money realized out of Armstrong mortgage to pay it off, and they never released plaintiff from his covenant. *Emerson v. Bailies*, 19 Pick, 55. An agreement by the defendant to pay the debt of plaintiff must be in writing. *Mallory v. Gillett*, 21 N. Y., 412. *Corkin v. Collins*, 16 Mich., 478. *Huggsett v. Ellis*, 17 Mich., 351. Parson on Contracts, 189, 217.

Brown & Marshall, for appellee.

An injunction may be granted to prevent the improper diversion of a specific fund out of which, by agreement between the parties, upon a sufficient consideration, payment of a particular debt or demand is to be made. High on Injunctions, Sec. 699. *Ashe v. Johnson's Admr.*, 2 Jones' Eq., 149. *Stucker v. Yoder*, 33 Iowa, 177.

LAKE, J.

This case is brought here by appeal from Lancaster county. The case below was tried to a referee, by whom all the issues, both of fact and of law, were determined. It does not appear that all of the evidence on which the referee based his findings of fact is included in the record; indeed, it is apparent from his report of the testimony taken before him that it is not all here. One

item in particular, shown to be absent, is a letter written to the plaintiff by the defendants, and which was admitted against their objection. Where the evidence is not wholly preserved, and brought into the record, the decision of questions of fact will not be disturbed. And this rule is the same whether the trial below were to the court, to a jury, or to a referee. We must presume, therefore, that all of the facts reported by the referee were well supported by the evidence upon which he acted.

It appears from the referee's report that, on the twenty-first of August, 1871, the plaintiff sold, and by the usual warranty deed conveyed, to the defendants, Vollentine, Tidball, and Haine, a parcel of land on which there was then a mortgage previously given by him to one Welton as security for a promissory note for eleven hundred and forty dollars and sixty-three cents, together with a small amount of interest. To make good his warranty against this incumbrance, the plaintiff at the same time gave to his grantees a mortgage upon other land which he then owned. Thus matters stood for a few days when the plaintiff arranged to sell a stock of goods to the firm of Parker & Armstrong, and for which he was to take, in part payment, Armstrong's obligation, secured by mortgage, to pay off and secure him harmless from the Welton debt. At the request of Vollentine, Tidball & Haine, and in consideration of their agreement "to save the said Farmer harmless from all liability on account of said mortgage and note executed by said Farmer to Welton," the Armstrong obligation was given directly to them, they at the same time formally releasing Farmer from his warranty by surrendering and cancelling the mortgage which he had previously given as an indemnity against Welton's claim. The mortgage given by Armstrong as security for the due performance of his engagement, contained this pro-

vision, viz.: "If the said James J. Armstrong, his heirs, executors, or administrators, shall pay, or cause to be paid, to A. Welton, his heirs, executors, or assigns, the amount of one certain promissory note for eleven hundred forty-four dollars and twenty-five cents, given by one R. E. Farmer to the said A. Welton, and secured by a mortgage on the north half of the north-east quarter, and the east half of the north-west quarter of section three, in town eleven north, of range eight east of of the sixth principal meridian, being in Lancaster county, Nebraska, then these presents to be void, otherwise to remain in full force."

By this arrangement Vollentine, Tidball, and Haine were not only given the means by Farmer with which to remove this incumbrance, and thus made good his warranty of title, but, in consideration thereof, they undertook to protect him as against his personal liability to Welton under his mortgage. To the extent of affording this protection to Farmer, the means thus placed in their hands virtually became a trust fund, which they were not at liberty to divert from the particular object for which they received it to the prejudice of Farmer. They could, it is true, if they saw fit, allow their own lands to be sacrificed by the foreclosure of the Welton mortgage, but equity will not permit them to visit the loss thus occasioned finally upon Farmer. And as to the authority of the court to compel the proper application of this fund there can be no doubt. It is clearly within the jurisdiction of a court of equity to interfere and prevent an improper diversion of a specific fund devoted to a particular use, whenever such interference becomes necessary to prevent a great or irreparable injury, or to avoid a multiplicity of suits. In this case we think the jurisdiction of the court clearly sustainable on the latter ground alone.

JUDGMENT AFFIRMED.

PROCEEDINGS IN THE SUPREME COURT

IN REFERENCE TO THE DEATH OF

HON. DANIEL GANTT,

LATE CHIEF JUSTICE OF SAID COURT.

Hon. DANIEL GANTT, chief justice of the supreme court, died at his residence in Nebraska City on Wednesday, May 29, 1878, at 9:30 o'clock P.M.

Judge Gantt was born in Perry county, Penn., June 29, 1814. He came to Nebraska in 1857, and commenced the practice of his profession at Omaha. He held the office of United States district attorney in 1862, under an appointment of President Lincoln. In 1864, he was a member of the house of representatives in the territorial legislature. He removed to Nebraska City in 1868. In 1872, he was elected judge of the first judicial district, and commenced his duties as such, January 16, 1873. By the provisions of the constitution then in force he also sat as associate justice in the supreme court. In 1875, he was elected one of the judges of the supreme court, under the provisions of the present constitution, and his labors as district judge ceased from that time. In January, 1878, by virtue of the constitution, he took his seat as chief justice, which position he held at the time of his death.

Immediately upon the opening of the special term of the court, held July 19, 1878, Hon. T. M. MARQUETT, a

member of the bar, appointed by the State Bar Association for that purpose, arose and presented the following:

The Hon. Chief Justice DANIEL GANTT having been suddenly smitten down in our midst by the hand of death, the members of the Bar Association of the state, for the purpose of paying the last honors to the deceased, desire formally to express their sorrow for the great loss which has so suddenly befallen the court, the profession, and the state together, with their estimate of the man who for near a quarter of a century has been with us as lawyer and judge, and who had not failed to attain the highest judicial honors of our state, commanding the greatest confidence of the community, and the affections of a large circle of friends, by a blameless and honorable life. In memory of our departed brother we make this record of our sense of his merits and of our great loss.

Therefore be it resolved by the State Bar Association:

1. That we deeply deplore the removal, from his sphere of usefulness and honor, of our distinguished brother Daniel Gantt, by the hand of death, regarding the event as a calamity to our profession, to the interests, social and public, of the community in which he lived, to the state and to the country.

2. That we entertain great satisfaction and pride in the memory of his attainments as a lawyer and an able judge.

3. That among the many traits that ennobled his character as lawyer and judge, we recognize, among others, his simple manners, unswerving integrity, analytical powers, clear perception of principles, and rare facility in the statement and exposition of causes, always accompanied and guarded by the highest sense of judicial honor, purity, integrity, and independence.

4. That we sympathize with the family of the deceased in their affliction, conscious always that their best consolation consists in the greatness of their loss; in the history of a life well spent; and the hopes that spring from the grave of an upright man.

Resolved, That we respectfully request that these resolutions be spread upon the records of this court.

Mr. MARQUETT addressed the court as follows:

May it please the court:—I have been commissioned by my brethren of the bar to publicly announce a fact of which we are painfully and personally cognizant.

On the twenty-ninth day of May, 1878, Chief Justice Daniel Gantt died. He had lived in our midst for over twenty years, and during all that time, by a blameless life, he made many friends—but few enemies. A few days before his death I heard him say, in answer to the inquiry of another whether he did not think a recent decision of his would not in certain quarters elicit opposion: "I care not for that, for I think I founded my decision upon correct principles." To my mind this was the highest exhibition of manhood. This alone places him on a higher plane, which few men ever reach, in an atmosphere purer than men usually breath. The "old man" would rather be right than popular.

But Daniel Gantt's eulogy is not to be pronounced by me. His best eulogy is found in the records of this court, and in his decisions, many of which are master productions. His was not the mind to find justice in an isolated case where justice appeared, but which was in reality a whitened sepulchre, and when once established as a precedent would lead to a long course of injustice. His mind dived deep and sought for golden lodes of truth far reaching, opening up long pathways in which the future jurist might walk and find justice.

He was my friend for twenty years without shade of differing. But he is dead. The familiar form and face, which in this place we were wont to see before us, nas passed away. Full of years, full of power, and with ripened intellect he has descended to the tomb.

Webster, on whom it was said that his "massive mind brightened all beneath the sun," when standing over the grave of Story, was heard to say: "The great aim of mankind is *justice*." Judging our dead brother by this

high standard, we this day point to the record and say—he aimed to do justice to his fellow men.

Yet how little there is of human life. For our dead brother to-day we make this record. The truths he uttered, the justice he proclaimed still live; all else of Daniel Gantt is dead.

George H. Roberts, Attorney General of the state, spoke as follows:

May it please the court:—We are to-day face to face with the equalities of life. To be born and, alas! to die, is the common heirship of all. From the cradle to the tomb—how short the journey, how swift the pace. We are here to-day, sorrowful in heart and with tear-dimmed eyes, to scatter wreaths of forget-me-nots upon the grave of our dead. Others here have known the late chief justice longer, and more intimately than I, but no one appreciated more fully *his kindness*, his innate nobility of soul, his gentleness, his charity, his worth. To the younger members of the bar he was at once an elder brother, counsellor, and friend. Here a word of caution, or reproof, so gently given that it left no sting behind; and again, words of encouragement and cheer—so dear and highly prized by those struggling in the rear ranks for place and recognition at the front. But he is dead. The mortal part of him will soon be dust; the dross of him will soon be forgotten; but the pure bright gold of his heart and mind will abide forever, written with a pen of steel upon the foundations of the jurisprudence of a great young commonwealth. We mourn that the sun of his life should have set when scarce beyond meridian, with many of its golden possibilities unfulfilled. We bow to the beauty of his worth as lawyer, friend, and man; but we weep not for him, for—

> "The Thracians wisely gave
> Tears to the birth couch, glory to the grave."

E. WAKELEY made the following remarks:

May it please your honors:—Twice in the history of Nebraska, the chief justice of the supreme court has been taken by death from the active performance of judicial duties.

Augustus Hall, chief justice of the territorial supreme court, died early in the year 1861. To-day we take formal note of the recent death of your honored associate Chief Justice Gantt.

Others have spoken of the events of his life, and of his characteristics as a man and a judge. It is not needful that I should dwell on these in detail; but my respect for the private, the professional, and the judicial character of Judge Gantt prompts me to add a few words.

He was a conspicuously upright citizen, and a just, conscientious man. In his profession, without claim to brilliancy of genius, or eloquence of advocacy, and over modest in the estimate of his own powers, he had learning, industry, patience, solidity of judgment, and never-questioned integrity. These are aids which litigants learn to value and rely on, when sometimes, more captivating qualities have charmed the court, but lost the cause.

On the bench he had never failing courtesy, equanimity, fairness, and love of justice, without ever an alloy of partiality, resentment or asperity. The opinions he has left here testify to his clearness of judgment, his research, his apprehension of legal principles, and his aptitude in applying them to the facts of the cause.

His elevation to this judgment seat was a well won reward, and fitting close of a long and loyal professional service. It gave him the opportunity which an honorable ambition may well covet, to leave on record some evidence of legal culture and of juridical attainments, for students of the future to look at.

His capacity of usefulness was not exhausted; but he

had achieved the substantial triumphs of life in an unsullied character, and high rank in his calling; in the honors of the state, and the trust of its people. Few among his brethren will have done more when the end of life shall come.

George W. Ambrose spoke as follows:

May it please the court:—On coming to this state in the spring of 1867, among the first to bid me welcome, and with kind words and friendly advice assure me that there was place in this new state for those who were willing to labor and to wait, was Daniel Gantt. He was then in the practice of his profession. In those days he was all kindness, and ever ready to aid in any way that he could in guiding the practitioner from the intricacies of the common law to the simpler form of code pleading. Through the twelve years of acquaintance with him, he was ever the same; gentleness, kindness, and uprightness marking every step of his life, either in the profession, or in the more exalted station of judge.

He died with his harness on. In the midst of his labors the messenger came. His blameless life, his position, the love of family and friends, his laudable ambition to do his duty in this place, to which he had been twice called by the people of the state which he so much loved—nothing could stay the dread decree. It came, certain, final. The mystery of death has been solved by him, and could he again come in at that door, and take his accustomed seat upon that bench, is there any doubt of the message he would bring? If he has been permitted to pass in review the ages of the past, would he tell us that mere personal success, or pride of opinion, or power, are of any worth? Or would it be that a life unguided by passion or prejudice, controlled only by truth and Him who is truth, is the better part, both here and hereafter.

In his life there is a lesson to those who would be guided by the higher law of the human heart. The musical chords of his heart, whose vibrations were so tender and so touching in the evening of life, had not been broken or changed in the rough conflicts through which he had passed. His was a life of earnest work, and the Reports of this state speak his loudest praise. His death, like his life, was peaceful and quiet, and seemed to echo the words of the aged poetess, who wrote:

> "Life we've been so long together,
> Through pleasant and through cloudy weather;
> 'Tis hard to part when friends are dear,
> Perhaps 'twill cost a sigh, a tear;
> Then steal away, give little warning,
> Choose thine own time;
> Say not good night, but in some brighter clime
> Bid me good morning."

W. H. Morris said:

May it please the court:—I cannot allow this occasion to pass without asking permission to gather a few shells, washed on the shore of memory by the waves of remembrance, and to place on file a few words, as a tribute of respect to the memory of him who was so able a judge, so wise a counsellor, and so kind a friend.

The eloquent words of Hon. T. M. Marquett have in a marked degree recalled to our minds the late chief justice as he appeared to the world, an embodiment of those great qualities which constitute a lawyer and a judge; but, sirs, my duties brought me in close contact with the late chief justice during the time he presided over the first judicial district of this state, affording me large opportunities of looking beneath the judicial ermine, and I then learned that the stern, inflexible judge was also the unselfish, humane, and warm-hearted man, ever ready to encourage the desponding with kind words and timely counsel. He was very careful to rule without undue harshness, and always avoided hurting

the professional pride of young attorneys; and in this regard it was his custom, no matter how well settled the question, to reserve his rulings on points presented, until the next day; thus, as he expressed it, allowing the attorney to think, that if he did not succeed, he had at least raised a question of importance and difficulty in the mind of the court, and the adverse ruling came more as friendly advice than as the harsh decision of a court. It was this kind and considerate bearing toward members of the bar, particularly in the western portion of his district, where attorneys for the most part were young men, and in a very great degree deprived of the privileges of a good library, that so endeared Chief Justice Gantt to the western portion of the state; and many an attorney will remember the encouraging words and good counsel of our late chief justice, and in the silent chambers of his heart pay to his memory that golden tribute, which springs from a heart watered by a pure regard for personal worth.

The late Chief Justice Gantt was a great sufferer; he bore his misfortune without a murmur. Well do I remember during the trial of an important criminal case, attacked with the troublesome and painful asthma, he sat on the bench the entire warm June day, not able to leave his seat, and with difficulty reaching his hotel at evening —only then to be unable to obtain rest, but obliged to remain sitting all the night, in agony; and without a ripple of irritation or complaining he appeared the next day in court, the same kind, affable, and equitable judge.

Ripe in years, full of legal knowledge, and honored by our state, he has lain him down to rest; and now that his heart has ceased its beatings, that his eyes are closed forever, and that that tongue, so often freighted with kind words, is hushed in death, his monument will be—the work performed as a member of the supreme court, which will ever remain of record to bespeak his ability, energy, and fidelity.

MAXWELL, CHIEF JUSTICE.

In October, 1872, Judge Gantt and myself were elected judges of this court. Judge Lake, who was re-elected judge at that time, had held that position from the time of the admission of the state. As the judges at that time were also judges of the district courts, nearly the entire business before the supreme court consisted of cases decided by one of the three judges named. During this time a considerable number of cases were brought up for review from Judge Gantt's district. He at no time manifested the slightest anxiety about the conclusions to be reached by the court in a case appealed from his decision. During the time that he acted as one of the judges of the district court his labors were constant and unremitting, and frequently burdensome. But notwithstanding this, every case that came before him in this court received patient, careful examination; and, throughout his career as judge, he seemed to be actuated by but one motive, namely, to ascertain what the law was upon any question presented, and having arrived at a conclusion in that regard, he fearlessly declared it. His success as a lawyer and judge was largely due—as it must be in all cases of real success in the legal profession—to a thorough mastery of legal principles, untiring industry, and unswerving integrity. He possessed a warm and generous heart, full of sympathy and kindness. I have never known him to speak an unkind word or do an unkind act. By his death the bench, bar, and people of the state have sustained a great loss; but he has built for himself an enduring monument in the legal history of the state, in his clear and exhaustive opinions, the foundation upon which the jurisprudence of our young state is to be reared, and coming generations will reap the benefits of his labors.

With the full concurrence of the members of the court, the resolutions submitted on the part of the Bar Association will be spread upon the record.

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1. **County Board:** JURISDICTION IN LOCATING PUBLIC ROADS. In an application to the board of county commissioners to establish a new public road, the posting of four notices in the manner required by the statute, and the presentation of a petition to the board for such road, signed by at least ten land holders, residents of the county, are essential prerequisites which must be complied with before the board can acquire any jurisdiction over the subject matter of the location and opening of such new road. *Doody v. Vaughn*..... 38

2. ———: POWERS. The board of county commissioners have no power to review, vacate, or set aside its former adjudications. *Kemerer v. The State*..... 130

3. ———: AUDITING COMPENSATION OF PUBLIC OFFICERS. Where the compensation for services rendered for the county is definitely fixed by law, the audit of the same and drawing a warrant therefor, by the board, are merely ministerial duties unattended with the exercise of any official discretion, and therefore, in such case, the board cannot make such compensation any greater nor any less than that fixed by the law. *Id*..... 130

4. **Taxes:** EQUALIZATION: POWERS OF COUNTY BOARD. The county commissioners, acting as a board of equalization, cannot raise the assessment on property without giving no-

tice to the owner; and if they do so increase the assessment of property without notice, they act without jurisdiction of the person or subject matter, and their proceedings are void, and of no effect. *South Platte Land Co. v. Buffalo County* 253

5. **County Aid** to works of internal improvement. As the law stands there is no warrant for creating a county indebtedness, in aid of internal improvements, exceeding in the aggregate ten per cent of the assessed value of the taxable property within the county. And even this must have been authorized by at least two-thirds of all the votes cast on the proposition to extend such aid. *Reineman v. C. C. & B. H. R. R.* 310

6. ———. Where a county votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, conferring no authority on the county commissioners to issue the bonds of the county in any amount whatever. *Id.* 310

7. **Taxation:** EXEMPTION: TIMBER ACT: CONSTITUTIONAL LAW. The legislative act of February 12, 1869, entitled an "Act to encourage the growth of timber and fruit trees," is repugnant to the constitution of 1875, and is therefore inoperative; and all deductions made under it from the assessments of lands for each acre planted and cultivated with forest and fruit trees, are made without authority of law; they are mere nullities, and must be so treated by the county commissioners in levying the necessary taxes for the current year. *U. P. R. R. v. Saunders County* 228

8. **Re-Location of County Seat:** JURISDICTION OF COUNTY COMMISSIONERS. The act of 1875, for the re-location of county seats, gives to the board of county commissioners exclusive authority to receive petitions for that purpose, and also, incidentally, to determine whether the signatures to such petitions are genuine, and of persons authorized to sign them. And when, in the exercise of this jurisdiction, the commissioners receive a petition for the re-location of a county seat, and judge it to be in all respects sufficient, and call an election accordingly, no objection being interposed either to the petition or to the action of the commissioners until after the election has been held and the result declared, it is too late to question the sufficiency of the petition; and an injunction to restrain the removal of the county offices to the new county seat, on the ground that such petition did

not conform to the requirements of the law, will not be granted. *Ellis v. Karl*..... 381

9. ———: ———. The proper place to raise questions concerning the sufficiency of a petition for the re-location of a county seat is before the commissioners themselves; and if no objection be made there, the party complaining not being prevented from so doing, equity will not interfere to prevent a removal, conformably with the result of the election, because of defects in the petition. *Id*..... 382

10. ———: ELECTION. In ordering an election on the question of the re-location of a county seat, thirty days notice is required. But even if the notice be for a less time than this, a court of equity will not, for this reason alone, declare the election void at the suit of a party who participated therein, especially where it is not shown that a different result would probably have been obtained if the full statutory notice had been given. *Id*..... 382

COUNTY BONDS.

See COUNTIES, 5, 6.

COUNTY COURTS.

1. **Naturalization of Aliens.** A court without any clerk, distinct from the judge of such court, is not a court "having a clerk" within the meaning of section 2165 of the Revised Statutes of the United States, providing for the naturalization of aliens, and such court is not competent to naturalize aliens. *State, ex rel. Fossler, v. Webster*..... 469

2. **Appointment of Clerks.** The act passed February 15, 1877, by the legislature of Nebraska, does not confer any authority, either expressed or implied, for the appointment of a clerk for the county judge. *Id*..... 469

COUNTY SEAT.

See COUNTIES, 8, 9, 10.

COUNTY TREASURER.

See TAXES, 5.

COURTS.

See COUNTY COURT. JURISDICTION. PRACTICE.

COVENANTS.

See CONVEYANCE.

CRIMINAL LAW.

See PRACTICE IN CRIMINAL CASES.

DAMAGES.

1. **Replevin:** EVIDENCE. Where in an action of replevin tried to the court without a jury it was found that the use of the property while held by the plaintiff was worth $519, and that during the same time the property had depreciated in value $216, but neither of these items have been *allowed as damages*, and the testimony not having been preserved: *Held*, that there was no means of ascertaining whether they ought to have been allowed as damages or not, but that the inference to be drawn from the fact that the court below did not allow them is, that the evidence did not warrant it. *Frey v. Drahos* 194

2. ———: ———. If the property of a judgment debtor, in his possession or under his control, be seized by a sheriff in execution, and afterwards replevied from him by one having no interest therein, the true measure of the officer's damages is its value, together with interest from the time it was taken. But in such case the defendant should not have damages for the detention or use of the property in addition to its value, for this would be compensating him twice for the same injury. *Id.* 194

3. ———: ———. But where the property is levied on, not in the possession of the judgment debtor, but in the possession of the plaintiff, who is holding it under a purchase made in good faith, but from a person having no authority to sell it, the debtor laying no claim whatever to it, the propriety of permitting the officer, in addition to the full amount due on his executions, to recover also for the benefit of the debtor, may well be doubted. *Id.* 194

4. ———: ———. It is the duty of the court, upon finding the defendant entitled to property replevied from him, to pro-

ceed to assess adequate damages in his favor. The "right of possession only" carries with it the right to have at least nominal damages, independent of proof of actual loss sustained. But the failure to assess damages can be corrected only by motion for a new trial, and the preservation of all the evidence bearing on the question. *Id*..... 194

See BANKS. CONVERSION. INSURANCE. NEGLIGENCE. RAILROADS. REPLEVIN.

DEBTOR AND CREDITOR.

See ASSIGNMENTS. PRINCIPAL AND SURETY.

DEEDS.

1. **Mistake in Grantee's Name.** A mistake or abbreviation in the name of a grantee in a deed does not necessarily invalidate the deed, but such mistake or abbreviation may be explained and made certain and definite by extrinsic evidence. *Aultman v. Richardson*..... 1

2. ———. The *habendum* in a deed cannot divest the estate vested by the grant in the deed; and when it is repugnant to the grant, it must be treated as of no validity or effect. *Id.* 1

3. **Acknowledgment.** The function of an acknowledgment is twofold—to authorize the deed to be given in evidence without further proof of its execution, and to entitle it to be recorded. The acknowledgement is no part of the deed itself. *Burbank v. Ellis*..... 157

4. ———: CERTIFICATE. A certificate of acknowledgment is sufficient if it shows that the requirements of the statute have been complied with in substance. *Id*..... 157

5. ———: ———. A certificate which shows that: "On the twenty-ninth day of September, 1862, personally appeared before me, David Dorrington, mayor of Falls City," etc.: *Held*, a sufficient statement of the identity of the grantor. *Id*..... 157

6. **Unrecorded Conveyance.** JUDGMENT LIEN. To defeat a prior unrecorded deed or mortgage, it is not enough for one to show merely that he is a judgment creditor of the grantor, but in addition to this it must appear that his claim or lien is evidenced by some instrument "*required to be re-*

corded," and it must also be filed for record before such prior conveyance. *Galway, Semple & Co. v. Malchow*..... 285

See MORTGAGES.

DEMURRER.

See PLEADING, 8.

DIVORCE AND ALIMONY.

1. **Conflicting Testimony.** In a case brought to the supreme court on appeal, where no question of law is involved, and the testimony is conflicting and pretty evenly balanced, the finding of the court below will not be disturbed. *Callahan v. Callahan*..... 38

2. ——. In order to justify a reversal of the finding of the court below, on a question of fact, such finding must be shown to be clearly wrong. *Id*..... 38

3. **Alimony.** A reasonable allowance of alimony, during the pendency of an action for divorce brought into the supreme court upon appeal, will be made. *Id*..... 38

ELECTIONS.

See COUNTIES, 8, 9, 10.

EMINENT DOMAIN.

See RAILROADS, 4. ROADS AND BRIDGES.

EQUITY.

Fraudulent Assignment: JURISDICTION OF EQUITY IN CASES OF. It is clearly within the scope of equity cognizance to interfere at the suit of a creditor who has caused execution to be levied upon goods fraudulently assigned by his debtor, and to set the assignment aside as an impediment to the proper enforcement of his just legal rights. *Morgan v. Bogue*..... 429

See APPEAL, 3, 5. INJUNCTION, 2, 3, 4. JUDGMENT, 1. JURISDICTION.

ERROR.

1. **County Courts:** JUDGMENT: ERROR. Error will lie upon a judgment or final order of the county court which affects a substantial right and in effect determines the action, or which affects a substantial right in a special proceeding, or upon a summary application in an action after judgment, when the same appears on the record of the county court. *Rudolf v. Winters* 125

2. **Practice:** INSTRUCTIONS TO JURY: EXCEPTION. Where the record does not show that any exception was taken to the charge of the court to the jury, no foundation is laid for a review of the instructions in the supreme court. *Scofield v. Brown* 221

3. ———: TESTIMONY: PETITION IN ERROR: MOTION FOR A NEW TRIAL. To entitle a party to a review of the ruling of the court below on the admission or rejection of testimony, it is necessary that the alleged error should be specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below. *Id* 221

4. ———: NEWLY DISCOVERED EVIDENCE. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative to that which had already been produced. *Id* 221

ESTOPPEL.

1. **By Acts in Pais.** Generally, whether acts or admissions of a party shall operate by way of estoppel or not, must depend upon the circumstances of each case, and therefore there can be no fixed and settled rules of general application to regulate estoppel *in pais*, as in technical estoppels. *Campbell v. Nesbit* 300

2. **Banks:** CONTRACT BY OFFICERS: ESTOPPEL. O., the president of a bank, informed one R. that they were about to reorganize the bank, and that if he would act as director thereof, and his firm would give the bank all their business as they had done before, and use their influence in its behalf, that they would give him ten shares of the stock. R. accepted the proposition, and was elected and served as a director, and the firm of which he was a member continued to do business with the bank. *Held*, 1st, that the agreement was a sufficient consideration to entitle R. to the ten shares

of stock. 2d. That the president professing to act for the bank in the transaction, and the bank receiving the benefits derived from the contract, thereby ratified his action. *Rich v. State National Bank*..... 201

EVIDENCE.

1. **Parol Testimony** is not admissible to prove the surrender of leased premises. Under the statute of frauds such surrender can only be done by some note or memorandum in writing, subscribed by the party surrendering the same. *Kittle v. St. John*..... 73

2. ———. When the parties have reduced their contract to writing, the law presumes that all previous and contemporaneous negotiations and conversations leading to the contract are merged in it, and cannot be varied by parol testimony. *Hamilton v. Thrall*..... 210

3. **An Objection** to the admission of evidence, on the ground that the petition does not state a cause of action, may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. *Curtis v. Cutler*.... 315

4. **Partnership.** Where the existence of a partnership is denied, and there is no evidence to establish its existence, the statement of a party claiming to be a partner binds no one but himself; but this rule has no application where there is testimony establishing the existence of the partnership. *Converse v. Shambaugh*, 6 Neb., 376. *McCann v. McDonald*..... 305

See DEEDS, 1. PRACTICE IN CRIMINAL CASES, 6—13, 20, 21.

EXCEPTIONS.

See PRACTICE, 16, 18, 21, 29, 32.

EXECUTION.

1. **Sale.** Where there is no prohibition in the statute, a sheriff, who has levied an execution upon real or personal property of the debtor before the return day of the writ, may sell such property after the return day thereof. And this rule applies to an order of sale. *Johnson v. Bemis*..... 224

2. ——: PRACTICE: MOTION TO SET ASIDE SALE. A motion to set aside a sale, or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be considered. *Id*..... 225

3. ——: ——: ——. An affidavit in support of a motion to set aside an order confirming a sale, which alleges that the attorney for the plaintiff before the sale promised to purchase the premises "at the full amount called for in the decree, unless the same were purchased by some one else at a higher bid," there being no allegation that any one desiring to purchase the premises was thereby deceived, or prevented from bidding, or that the premises could be sold for a higher price than that already bid, is not sufficient to authorize the court in setting aside the sale. *Id*..... 225

4. **Stay of Execution.** A judgment was rendered in the probate court of Lancaster county for over one hundred dollars. *Held*, that execution thereon could have been legally stayed only by complying with section 481 of the code of civil procedure. *Gregory v. Cameron*..... 414

5. ——: MERE UNDERTAKING BY SURETIES ALONE NOT SUFFICIENT. The requirement of the statute that the defendant "shall enter into a bond, with one or more sufficient sureties," etc., is not answered by giving a mere undertaking, *executed by sureties alone*. *Id*..... 414

6. ——: ——. The acceptance of such an instrument by the probate judge, *the plaintiff not being a party to it*, was a void act, and neither prevented the immediate enforcement of the judgment by execution, nor bound the sureties to its payment. *Id*..... 414

See MORTGAGE, 8.

EXEMPTIONS.

1. **Partnership Property.** Section 521 of the code of civil procedure, which provides that: "All heads of families who have neither lands, town lots, nor houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property," applies only to individual debtors, and exempts only individual property. *Wise v. Frey*..... 134

2. ——. The property of a partnership is not exempt from execution for the satisfaction of a judgment against the partnership. And where, upon the levy of such an execution upon the goods of a firm, its members undertook to divide them in severalty between themselves with the view of enabling each one to claim and hold his share exempt: *Held*, that by the levy a valid lien was acquired which it is not in the power of the firm, either by sale, or a division between its members, to destroy or prejudice. *Id*..... 134

3. **Of Personal Property.** When the head of a family resides upon lands owned by him as a homestead, he cannot receive the benefit of the exemptions provided by section 521 of the code. *Axtell v. Warden*..... 182

4. ——: HOMESTEAD. It is matter of no consequence whether the lands so occupied by him as a homestead have been entered under the homestead or pre-emption laws of congress, or under the act permitting purchase of lands, known as "offered lands." *Id*..... 182

See TAXES, 10.

FINDINGS.

See PRACTICE, 18.

FORECLOSURE.

See MORTGAGE, 8, 11

FRAUD.

1. **Chattel Mortgage:** POSSESSION OF PROPERTY BY THE MORTGAGOR: PRESUMPTION OF FRAUD FROM. In a controversy between the mortgagee and creditors of the mortgagor concerning mortgaged property found in possession of the latter, evidence showing that the mortgage "was made in good faith, and without intent to defraud such creditors," is imperatively required to overcome the legal presumption of fraud arising from such possession. *Brunswick & Co. v. McClay*..... 137

2. ——: ——: ——. In order to prevent such presumption of fraud in favor of creditors of the mortgagor, and the necessity of proof by the mortgagee of good faith in the exe-

cution of the mortgage to overcome it, an actual and continued change of possession of the mortgaged property is required. *Id*..... 137

3. ——: ——: ——. And where the mortgaged property, consisting of two billiard tables, kept by the mortgagor, a saloon keeper, in his saloon, for the use of his customers, was permitted to remain in his possession, although placed nominally in the charge of his bar-tender, and used in the business of the mortgagor: *Held*, that there was no such "actual and continued change of possession" as the statute requires to prevent the presumption of fraud as to creditors of the mortgagor. *Id*..... 137

4. **Rescission of Contract.** To entitle a party to rescind a contract for the sale of chattels on the ground of fraud he must offer to return the property received by him and demand a rescission within a reasonable time after the discovery of the fraud. *Brown v. Waters*..... 424

5. ——. If a party be induced to purchase an article by fraudulent misrepresentations of the seller respecting it, and after discovering the fraud continue to deal with the article as his own, he cannot recover back from the seller the money paid for it. *Id*..... 424

6. ——. In this case there having been a delay of from five to six months after discovering the fraud, and no offer to restore the property or to account for its use, equity will not lend its aid by decreeing a rescission of the contract, but will leave the plaintiff to the ordinary modes of redress which the law affords. *Id*..... 424

7. ——: ASSIGNMENT: EVIDENCE. The continued possession of goods, assigned by the execution debtor up to the time of their being seized in execution, in the absence of a showing of good faith in him who claims under the assignment, is conclusive evidence that the assignment was fraudulent, and the statute (section 11, chapter 25, Gen. Statutes) requires the court so to declare. *Morgan v. Bogue*..... 429

8. ——. The deed of assignment contained a provision for a return to the assignor of the surplus, if any remained, of the assigned property after satisfying the claims of the creditor for whose benefit it was made. *Held*, that this reservation, being merely incidental to the primary object of the assignment, would not render it fraudulent under sec. 7, ch. 25, Gen. Statutes. *Id*..... 430

9. ——: CONDITIONS. A debtor cannot, when a debt is due, avoid the obligation of immediate payment, nor can he, without the consent of the creditor, extend the period of credit. Therefore, if an assignment contains a provision, from which it appears that the debtor, at the time of its execution, intended to prevent the immediate application of his property to the payment of his debts, it will render the instrument void on its face. *McCleery v. Allen*..... 21

10. ——: ——. Where an assignment contained a provision authorizing the assignee "to dispose of the same in any manner whatsoever as freely and lawfully as the assignor could do himself, which the said party of the second part, trustee as aforesaid, may deem advisable to do, tending in his opinion to convert the same into money, for the benefit of all interested": *Held*, that this authorized a sale on credit, and rendered the instrument void on its face. *Id*..... 21

See PLEADING, 14.

GARNISHMENT.

See ATTACHMENT, 2.

GRANTS.

A **Patent** issued by the governor in pursuance of an express grant, is not void upon its face, and passes the legal title to the property therein granted. It may be impeached for fraud, or set aside for other sufficient cause, but cannot be assailed collaterally. *State v. S C. & P. R. R*..... 357

See DEEDS, 2. RAILROADS.

HIGHWAY.

See ROADS AND BRIDGES.

HOMESTEAD.

1. **Exemption.** When the head of a family resides upon lands owned by him as a homestead, he cannot receive the benefit of the exemptions provided by section 521 of the code. *Axtell v. Warden*..... 182

2. ———: HOMESTEAD. It is matter of no consequence whether the lands so occupied by him as a homestead have been entered under the homestead or pre-emption laws of congress, or under the act permitting purchase of lands, known as "offered lands." *Id*..... 182

3. ———: HOMESTEAD ON PUBLIC LANDS OF THE UNITED STATES. When a person has entered lands under the homestead act of congress, and has resided upon and cultivated the same over five years, and in all respects has complied with the requirements of the law, he is the real owner of such lands; the United States holds the legal title simply as trustee for such owner, without any interest in such lands, except a mere special interest for the amount of unpaid fees. *Id*..... 182

HOMICIDE.

See PRACTICE IN CRIMINAL CASES.

HUSBAND AND WIFE.

See MARRIED WOMEN.

INCUMBRANCE.

See CONVEYANCE. MORTGAGE, 8, 11.

INDORSER.

See BANKS. NEGOTIABLE INSTRUMENTS.

INJUNCTION.

1. **Granting.** A district judge may grant a temporary order of injunction in an action out of his own district, but he can do so only when the office of judge in such district is vacant, or where it is shown that the judge thereof is absent or from some cause is unable to act. *Ellis v. Karl*..... 381

2. **To Restrain Collection of Taxes.** The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended by levying a sum in excess of that authorized by law, such excess may affect titles acquired by a sale of property for such illegal

tax. But this will not excuse a party praying for an injunction from tendering the amount of taxes justly due from him. *B. & M. R. R. v. York County* 487

3. ——: ——. If a portion of a tax is legal and a portion illegal, if the legal can be separated from the illegal, an injunction will not be granted to restrain the collection of the entire tax. *Id.* 487

4. ——: ——. Courts of equity will enjoin the collection of an erroneous or illegal tax, when the enforcement of the assessment would lead to a multiplicity of suits, or produce irreparable injury, or cast a cloud on title to real estate, or when the assessment on the face of the proceedings is valid, and requires extrinsic evidence to show it is invalid, or when the officers transcend their authority. *South Platte Land Co. v. Buffalo County* 253

See ATTORNEYS. NEGOTIABLE INSTRUMENTS.

INSURANCE.

Life Insurance: DEFAULT IN PAYMENT: PAID UP POLICY: MEASURE OF DAMAGES. A life insurance policy provided that a certain part of each premium be allowed as a loan or credit, and as a debt against the policy until paid or cancelled by profits or otherwise, and further provided that after a certain time, and after full annual payments of premiums during this time, upon default and surrender of the policy by the insured, the company should issue to him a new paid-up policy for an equitable amount, subject to the outstanding loans or credits: *Held*, that upon a breach of the covenant to issue such new paid-up policy by the company, the measure of damages, after full payment of all premiums accrued before such default, is the fair cash value of the new paid-up policy at the time of the breach of contract, with interest thereon. *Union Central Life Insurance Co. v. McHugh* 66

INTERNAL IMPROVEMENTS.

See CONSTITUTIONAL LAW, 1—5. TAXES, 18.

INTEREST.

1. **How Computed.** Interest on a judgment or debt due is computed up to the time of the first payment, and the pay-

ment so made is first applied to discharge the interest, and afterwards, if there is a surplus, it is applied upon the principal, and so *toties quoties*, taking care that the principal thus reduced shall not at any time be suffered to accumulate by the accruing interest. *Davis v. Neligh*..... 78

2. **Building and Saving Associations.** Persons associated and incorporated under section 123, and subsequent sections of chapter XXV of the Revised Statutes of 1866, for the transaction of lawful business, have no authority as a corporation to charge and receive interest on loans made by them to exceed the maximum rate allowed by law; and all loan contracts made by such corporation for interest in excess of the rate fixed by law, are affected with the vice of usury. *Lincoln B. & S. Ass'n. v. Graham*..... 178

INTOXICATING LIQUORS.

See LIQUOR SELLING.

JUDGMENTS.

1. **Lien of Judgments.** A judgment is not a specific lien on the real estate of the judgment debtor. It is merely a general lien thereon, and is subject to all prior liens, either legal or equitable. The lien merely confers the right to levy on the real estate of the judgment debtor, to the exclusion of other adverse interests subsequent to the judgment. *Metz v. The State Bank of Brownville*..... 165
See also *Dorsey v. Hall*..... 460

2. **Practice:** ENTERING JUDGMENT. In addition to the general index provided for by statute, in which the names of the parties to an action, both direct and inverse, shall be entered, the judgment record must also contain the names of the judgment debtor and the judgment creditor, arranged alphabetically. *Id*..... 165

3. ——: MUST BE INDEXED. A judgment which is valid as soon as rendered does not become a lien upon real estate as against a subsequent purchaser, without notice, until properly indexed. And a purchaser need not search for judgment liens further than to examine the proper index. *Id*.. 165

4. ——: NOTICE. A subsequent purchaser, however, is affected with such notice as the index entries afford; and if

they are of such a character as would induce a cautious and prudent man to make an examination of the title, he must make such investigation; and in case of his failure to do so, he cannot plead ignorance of such facts as an examination of the record would have disclosed. *Id.* 165

5. ——: ——. In 1874, a judgment was recovered in the probate court of Richardson county against H., and in February, 1875, a transcript thereof was filed in the office of the clerk of the district court, but the name of the *judgment debtor* was not entered in the general index under the letter H., nor were the names of the judgment debtor and judgment creditor arranged alphabetically in the judgment record. H., at the time the transcript was filed, owned certain real estate in the county, which he afterwards sold and conveyed to M., who had no actual notice of the filing of the transcript. In an action by M. to enjoin a sale of the premises on an execution issued on the judgment: *Held*, that the lien of the judgment did not attach to the land so as to affect the purchase. *Id.* 165

6. ——: ——. *Quære.* Whether the entry of a judgment against defendants, in the firm name alone, creates a lien on real estate. *Id.* 165

7. **In Actions in Replevin.** *Frey v. Drahos* 194
Hooker v. Hammill 231

8. **Final Judgment.** The recitals in the record were as follows: "This cause coming on to be heard on the demurrer to the plaintiff's petition heretofore filed, the court, after hearing the argument of counsel thereon, and after due consideration, sustained said demurrer and rendered judgment for the defendant, and against the plaintiff, for the costs of this action taxed at $11.20": *Held*, not a judgment, but a mere recital that one had been rendered for costs. *Miller v. B. & M. R. R. Co* 227

9. **Revival of.** The revival of a judgment is but a continuation of the original action. Where it is sought to revive an action upon the ground that the cause has abated by reason of the *death of the defendant*, the only questions at issue upon such motion are: *First*, the death of the defendant; *Second*, the substitution of the administrator and heirs of the estate. In that proceeding, if the cause of action survive, the court has no authority to inquire into the merits of the case. *Gillette v. Morrison* 263

10. ———. The right to revive an action is not dependent on the discretion of the court or judge making the order, but, under the conditions and within the time limited by statute, is a matter of right. *Id*..... 263

11. ———. An action pending against a deceased person at the time of his death, may, if the cause of action survive, be prosecuted to final judgment; and the executor, administrator, or heir may be admitted to defend the same. *Id*..... 263

12. **Unrecorded Conveyance:** JUDGMENT LIEN. To defeat a prior unrecorded deed or mortgage, it is not enough for one to show merely that he is a judgment creditor of the grantor, but in addition to this it must appear that his claim or lien is evidenced by some instrument "*required to be recorded*," and it must also be filed for record before such prior conveyance. *Galway, Semple & Co. v. Malchow*..... 285

13. ———: PRIORITY OF LIEN. Where land intended to be included in a mortgage is omitted by mistake, and a judgment is subsequently recovered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. *Id*..... 285

14. **Lien of Judgment.** The lien of a judgment does not exceed the actual interest which the judgment debtor had in the land at the time it was rendered; and it is subject to every equity existing against the debtor at the time of its rendition. *Bennett v. Fooks & Moffitt*, 1 Neb., 465, overruled. *Id*..... 285

15. **Replevin.** While a judgment in favor of the defendant for a return of the property, which fails to award at least nominal damages, is for that reason technically defective, still if it conform in this respect to the finding of fact which is not questioned by motion for a new trial, the judgment will not be reversed on that ground. *Frey v. Drahos*. 195

16. **When Lien Attaches.** All judgments rendered during a term of the district court, in actions commenced prior thereto, are liens on all the lands of the debtor *within* the county from the first day of such term; and all lands of the debtor *without* the county shall be bound for the satisfaction of a judgment against him from the time they shall be seized in execution. *Colt v. DuBois*..... 391

17. ———: AFTER ACQUIRED LANDS. The lien attaches to all lands and tenements of the debtor in the county where the

judgment is rendered, whether held by him at the time of its rendition or subsequently acquired. *Id.* 391

18. **A Final Judgment** is one that disposes of the merits of the case. *Hall v. Vanier* 397

19. ———. Z. V. commenced an action against H. and others, upon an award. Afterwards, upon it being made to appear to the court that Z. V. had assigned to T. V. his interest in the action, an order of substitution was made. T. V. then dismissed the action without prejudice, and commenced an action on the award in his own name: *Held*, that the order of substitution was not a final order or judgment, and not conclusive. *Id.* 397

20. **Form.** In the probate court a "judgment decreed in favor of plaintiff in the sum of—principal $174.70, interest 85 cents, judgment $175.55," and costs $9.30, is a final determination of the rights of the parties in the action, and though untechnical in form, is sufficient as the entry of a judgment. *Lewis v. Watrus* 477

21. **Replevin.** In replevin where judgment is rendered in favor of the defendant, ordinarily he is entitled to damages for the decrease in value of the property, with interest on its entire value. If the property cannot be returned the defendant is entitled to the value of the property at the time the same was taken, with interest thereon to the time of trial. *Moore v. Kepner* 291

JUDICIAL SALE.

1. **Foreclosure of Mortgage:** RIGHTS OF PURCHASER. The purchaser, under a decree of foreclosure, acquires by his deed all the interest of the mortgagor in and to the mortgaged property. And where a senior mortgagee becomes the purchaser and acquires the legal title to the premises, he is not liable to account to a junior mortgagee for the rents and profits, unless it is made to appear to the court that the security is insufficient and a receiver has been appointed. *Renard v. Brown* 449

2. ———: REDEMPTION BY JUNIOR INCUMBRANCER. The right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrances, not to redeem the land. *The owner of the fee redeems the land itself.* The junior incumbrancer is not entitled to the estate, but an assignment of the securities. *Id.* 449

3. **Decree.** In a sale made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree directs the sale of the property and the application of the proceeds to the payment of the debt, and is a sufficient warrant of authority to the officer to sell as directed in the decree. *Parrat v. Neligh*..... 456

4. ———: NOTICE OF SALE. Where an officer has caused public notice of the time and place of a sale of real estate to be given, for at least thirty days before the day of sale, by advertisement in some newspaper *printed in the county*, it is unnecessary to post notices of the time and place of sale. *Id*..... 456

5. **Practice:** CONFIRMATION OF SALE. In an equity cause, as in an action at law, if a party desires to oppose the confirmation of a sale of real estate, he must file a motion in the district court, setting forth the grounds upon which he seeks to set the sale aside. If the motion is overruled he may then appeal to the supreme court. *Id*..... 456

JURISDICTION.

Judges of District Courts: JURISDICTION OF AT CHAMBERS. The judges of the several district courts, as such, have no inherent authority at chambers whatever, but only such as the statutes give to them. *Ellis v. Karl*..... 381

See APPEAL, 3. STATE AND STATE OFFICERS, 5. TAXES, 11.

JURORS.

See PRACTICE IN CRIMINAL CASES, 3, 4, 22, 23.

JUSTICES OF THE PEACE.

See APPEALS, 4, 5.

LANDLORD AND TENANT.

1. **Lease.** When, by the terms of a lease of real estate for five years, the lessee may terminate the lease at the end of either year, upon giving to the lessor six days written notice, such written notice must be served on the lessor, as required by the contract. *Kittle v. St. John*.....

2. ——: EVIDENCE. Parol testimony is not admissible to prove the surrender of leased premises. Under the statute of frauds, such surrender can only be done by some note or memorandum in writing, subscribed by the party surrendering the same. *Id*..... 73

LANDS.

See MORTGAGE. PUBLIC LANDS.

LIEN.

1. **Mortgage and Judgment:** PRIORITY OF LIEN. Where land intended to be included in a mortgage is omitted by mistake, and a judgment is subsequently recovered against the mortgagor, the lien of the judgment creditor is subject to the equity of the mortgage. *Galway, Semple & Co. v. Malchow*..... 285

2. ——: ——. The lien of a judgment does not exceed the actual interest which the judgment debtor had in the land at the time it was rendered; and it is subject to every equity existing against the debtor at the time of its rendition. *Bennett v. Fooks & Moffitt*, 1 Neb., 465, overruled. *Id*..... 285

See PARTNERSHIP, 6.

LIMITATION OF ACTIONS.

1. **The Statute of Limitations** is a wise and beneficial law, and does not raise a presumption of payment, but is intended to be a statute of repose. *Chapman v. Kimball*..... 399

2. **Covenant Against Incumbrances.** The statute of limitations commences to run at once upon a covenant against incumbrances, if the incumbrance existed at the time of the conveyance. *Id*..... 399

LIQUOR SELLING.

Regulation. It is the province of the legislature to regulate the sale of malt, spirituous, and vinous liquors, and to fix the price of a license to sell the same; and the remedy for a reduction of the price so limited and prescribed by legislative authority, is by application to the legislature itself and not to the courts. *State, ex rel. Hahn, v. Hardy*..... 377

MANDAMUS.

1. **The Application for a Writ of Mandamus** must show a prior demand and refusal, and must set forth facts which clearly impose upon the respondent a duty which the law enjoins upon him as resulting from an office, trust, or station. *Kemerer v. The State*..... 130

2. ———. If the relator sets up in his application a claim, the payment of which is not allowed by law, it is a fatal objection to a mandamus. *Id*..... 130

MARRIED WOMEN.

Action by. A married woman may, while married, maintain an action in her own name for any matter in relation to her separate estate or business, or for injuries to her person. *Omaha Horse Railway Co. v. Doolittle*..... 481

MORTGAGES.

1. **Chattel Mortgage:** POSSESSION OF PROPERTY BY THE MORTGAGOR: PRESUMPTION OF FRAUD FROM. In a controversy between the mortgagee and creditors of the mortgagor concerning mortgaged property found in possession of the latter, evidence showing that the mortgage "was made in good faith, and without intent to defraud such creditors," is imperatively required to overcome the legal presumption of fraud arising from such possession. *Brunswick v. McClay*.. 137

2. ———: ———: ———. In order to prevent such presumption of fraud in favor of creditors of the mortgagor, and the necessity of proof by the mortgagee of good faith in the execution of the mortgage to overcome it, an actual and continued change of possession of the mortgaged property is required. *Id*..... 137

3. ———: ———: ———. And where the mortgaged property, consisting of two billiard tables, kept by the mortgagor, a saloon keeper, in his saloon, for the use of his customers, was permitted to remain in his possession, although placed nominally in the charge of his bar-tender, and used in the business of the mortgagor: *Held*, that there was no such "actual and continued change of possession" as the statute requires to prevent the presumption of fraud as to creditors of the mortgagor. *Id*..... 137

4. ——: EXECUTION AND ACKNOWLEDGMENT. The several sections of chapter 43 of the Revised Statutes of 1866, in relation to the execution and acknowledgment of deeds, mortgages, *and other instruments in writing required to be recorded*, are to be construed together, and apply to and include chattel mortgages. *Hooker v. Hammill*..... 231

5. **Recording Act:** MORTGAGE: NOTICE. Under our recording act the record of a mortgage is notice only as to the lands actually described therein. As to lands omitted from the description by mistake it will be treated the same as if it were unrecorded. *Galway, Semple & Co. v. Malchow*..... 285

6. **As to Priority** of the lien of an unrecorded mortgage over that of a judgment. See *Id*..... 285

7. **Attachment.** The attachment of a note and mortgage debt is in effect a seizure of the same, and in law is regarded as an assignment to the attaching creditor of such note and mortgage, and gives such creditor the same right to enforce the payment of the money from the garnishee as the debtor himself previously had. *Campbell v. Nesbit*..... 300

8. **Senior and Junior Mortgagees.** A senior mortgagee recovered a judgment on his note in an action at law, and attached a sufficient amount of personal property to satisfy his debt, which property was afterwards taken from him in action of replevin, not being the property of the judgment debtor. No execution was issued on the judgment. In an action by a junior mortgagee to foreclose a mortgage in which the senior mortgagee was made defendant: *Held*, 1. That the provisions of the statute requiring the return of an execution unsatisfied, before proceedings in foreclosure could be maintained, were for the benefit of the debtor. 2. That unless a lien was acquired upon another fund by virtue of the judgment, the mere failure of the senior mortgagee to cause an execution to be issued on his judgment will not divest him of his lien on the mortgaged premises. *Simmons Hardware Co. v. Brokaw*..... 405

9. **Mortgagor:** RENTS AND PROFITS OF MORTGAGED PREMISES A mortgagor is not liable for rents and profits while he is in possession of the mortgaged premises, and his grantee will take his title and be protected to the same extent as the mortgagor. Where the equity of redemption is sold upon execution the purchaser takes the title of the mortgagor, subject to the incumbrance. *Renard v. Brown*.. 449

10. **Sale:** FORECLOSURE OF MORTGAGE: RIGHTS OF PURCHASER. The purchaser, under a decree of foreclosure, acquires by his deed all the interest of the mortgagor in and to the mortgaged property. And where a senior mortgagee becomes the purchaser and acquires the legal title to the premises he is not liable to account to a junior mortgagee for the rents and profits, unless it is made to appear to the court that the security is insufficient and a receiver has been appointed. *Id*..... 449

11. ——: ——: REDEMPTION BY JUNIOR INCUMBRANCER. The right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrances, not to redeem the land. *The owner of the fee redeems the land itself.* The junior incumbrancer is not entitled to the estate, but an assignment of the securities. *Id*..... 449

12. **What May be Mortgaged.** Every kind of property, real or personal, which is capable of absolute sale, may be mortgaged. *Dorsey v. Hall*..... 460

MUNICIPAL BONDS.

See CITIES OF THE SECOND CLASS. CONSTITUTIONAL LAW. COUNTIES. TAXES, 13.

MUNICIPAL CORPORATIONS.

See CITIES OF THE FIRST CLASS. CITIES OF THE SECOND CLASS. CONSTITUTIONAL LAW. COUNTIES.

MURDER.

See PRACTICE IN CRIMINAL CASES.

NEGLIGENCE.

Where the carelessness of the plaintiff, as well as that of the defendant, operates *directly* to produce the injury complained of, the plaintiff is not entitled to recover; but in cases of mutual negligence the plaintiff is entitled to recover unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. *Omaha Horse Railway Co. v. Doolittle*..... 481

NEGOTIABLE INSTRUMENTS.

1. **Promissory Note:** EXTENSION OF TIME OF PAYMENT. An agreement by the indorsee of a promissory note for a definite extension of the time of payment, in consideration of an agreement by the maker to pay a greater rate of interest than that provided for in the note, is binding upon them, and if made without the consent of the indorser will release him from all liability thereon. *Kittle v. Wilson*. 76

2. ———: HOW EXTENSION OF PAYMENT TO BE AVAILED OF. This defense is a legal one, and should be made by the indorser in the action against him on the note; but if he neglect to do so and suffer judgment to go against him, he cannot afterwards make it available as a ground for enjoining the enforcement of such judgment. *Id*..... 76

3. ———: SET-OFF. Any set-off to a promissory note which would have been good between the original parties, may be pleaded against an indorsee who acquires it after maturity. He takes it subject to any right of set-off which the maker had against any prior holder. *Davis v. Neligh*..... 78

4. ———: ———. T., the owner of a promissory note, had it drawn payable to K., or order. T. retained possession of the note until after it became due, and received from the maker thereof the full amount due thereon. Afterwards he delivered the note to K. It did not appear that K. paid any consideration whatever for the same. K. indorsed the note and delivered it to C. E. T., the wife of T., who assigned the same for a valuable consideration to D. In an action on the note: *Held*, that the note was subject to the set-off from the maker of the note to T. *Id*..... 78

5. ———. When an overdue note is assigned, the assignee takes it subject to all equities existing between the maker and the payee. In an action on the note, the maker may show that it was obtained by fraud, or without consideration, or that before he received notice of the assignment he had paid it. *Id*..... 84

6. ———: SET-OFF. The maker may also set-off any liquidated demand which he held against the payee at the time of the assignment, but claims subsequently acquired, even though they had their origin in previous transactions, are not the subject of set-off. *Id*..... 84

7. **Homestead Claim:** SALE OF, TOGETHER WITH IMPROVEMENTS, A GOOD CONSIDERATION FOR A PROMISSORY NOTE.

The sale and surrender of a homestead claim upon the public lands, together with improvements made thereon, although conveying no interest in the land itself as against the government, is a good consideration for a promissory note; the improvements being subjects of legitimate bargain and sale. *McWilliams v. Bridges*..... 419

8. **Promissory Note:** HOLDER BY A TRANSFER WITHOUT CONSIDERATION MAY SUE. The single fact that a promissory note payable to bearer, was transferred to the plaintiff without consideration, or solely to enable him to bring suit upon and collect it, constitutes no defense to the action. *Id*..... 419

NEW TRIAL.

1. **Newly Discovered Evidence.** In a petition for a new trial, under section 318 of the civil code, on the ground of newly discovered evidence, it is not sufficient to allege that the plaintiff "has learned, since the term of the court and the trial," certain matters constituting the grounds for a new trial; the allegations must be affirmatively stated, and not upon information. *Axtell v. Warden*..... 186

2. ———. In such case, the law requires the moving party to show that he has exercised reasonable diligence to discover and produce such evidence at the trial; and his failure to do so deprives him of all claim to a new trial. *Id*..... 186

3. ———. The petition is liable to demurrer, if it does not state facts sufficient to entitle him to a new trial, when they are admitted to be true. *Id*..... 186

4. ———. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative to that which had already been produced. *Scofield v. Brown*.. 221

See PRACTICE IN CRIMINAL CASES, 2, 3.

NOTES AND BILLS.

See NEGOTIABLE INSTRUMENTS.

NOTICE.

See JUDGMENT, 4, 5.

OFFICERS.

1. **When Their Powers Cease.** As a general rule, where the term of a particular officer is fixed by statute, his power ceases with the expiration of that term, unless there is a provision that he shall hold his office until his successor is elected and qualified. But where the practice has been for officers to hold over until their successors are elected and qualified, their acts are valid. *The State, ex rel. Carter, v. Board*..... 42

2. ———: HOLDING BY APPOINTMENT. An appointment, unlimited as to its term, continues in force until revoked, or the authority by which it was made ceases to exist. *Id*... 42

3. ———: AUTHORITY CEASES WHEN APPOINTING POWER IS ABOLISHED. The death or removal of members of a particular board who are vested with the appointing power, their places being filled with others, does not annul appointments already made, because the board continues to exist, with full power to make or revoke appointments. But upon the abolition of the board, without a saving clause as to its appointments, the authority of those persons who merely hold office during its pleasure ceases. *Id*..... 42

PARTIES.

1. **Joinder.** At common law the general rule is, that all parties must join and be joined by their names in an action; and such is the general import of our code which provides that the precipe and petition must contain the *names* of the *parties* to an action, and their *names*, both direct and inverse, shall be entered in the index. *B. & M. R. R. v. Dick & Son*..... 242

2. ———: PARTNERSHIPS. But it is specially provided by statute that when persons use initial letters or contractions of their christian names to bills of exchange, etc., they may be designated by such initials or contractions of the christian name; and that companies not incorporated, and partnerships formed for the purpose of carrying on any trade or business, or for holding any species of property in this state, may sue and be sued in the name assumed by them. *Id*... 242

3. ———: ———: CONSTRUCTION OF STATUTE. These special provisions, being exceptions to the general rule, must be construed strictly, and the exact mode of procedure prescribed by them must be closely pursued. *Id*..... 243

PARTNERSHIP.

1. **Practice.** M. and S. were sued as surviving partners of the firm of R. & Co. No service was had upon S. Upon the trial of the cause, testimony was introduced tending to prove that M. was a member of the firm at the time of the death of R., but it appeared that S. was not a member at that time: *Held*, that the evidence against M. was sufficient to sustain the allegations of the petition, and that the failure to connect S. with the firm would not prevent a recovery against M. *McCann v. McDonald*..... 305

2. ———: EVIDENCE. Where the existence of a partnership is denied, and there is no evidence to establish its existence, the statement of a party claiming to be a partner binds no one but himself; but this rule has no application where there is testimony establishing the existence of the partnership. *Converse v. Shambaugh*, 6 Neb., 376. *Id*... 305

3. **Partnership Property:** EXEMPTION FROM EXECUTION: CONSTRUCTION OF STATUTE. Section 521, of the code of civil procedure, which provides that: "All heads of families who have neither lands, town lots, or houses subject to exemption as a homestead, under the laws of this state, shall have exempt from forced sale on execution the sum of five hundred dollars in personal property," applies only to individual debtors, and exempts only individual property. *Wise v. Frey*..... 134

4. ———: ———: ———. The property of a partnership is not exempt from execution for the satisfaction of a judgment against the partnership. And where, upon the levy of such an execution upon the goods of a firm, its members undertook to divide them in severalty between themselves with the view of enabling each one to claim and hold his share exempt: *Held*, that by the levy a valid lien was acquired which it is not in the power of the firm, either by sale, or a division between its members, to destroy or prejudice. *Id*..... 134

5. **Settlement:** INTEREST. A portion of the members of a firm, with the consent of all, had largely overdrawn their account, by which, together with a large amount of bad and uncollectible debts held by the firm, it became insolvent. In an action for an account by a member who had not drawn his full share: *Held*, that he was not entitled to interest upon what was due at each annual rest, from the time

the capital stock was so far impaired that money had to be borrowed to take its place. *McCormick v. McCormick*..... 440

6. ———. Where all the members of a firm drew out of the business, from time to time, for several years, such sums as they saw fit, there being a tacit agreement among the members that this might be done, and the sums thus drawn out being properly charged on the books of the firm, such books being open to the inspection of all the members, and there being no misrepresentation: *Held*, that the firm had no lien upon the money thus drawn out, it having been drawn with their consent. *Id*..... 440

See PLEADING, 10, 11, 12.

PAYMENT.

L. **Brought an Action** against M. for money paid by him as surety. M. in his answer pleaded payment by the conveyance of certain real estate. The testimony showed that M. had conveyed real estate to L. to enable him to sell and convey the same, and apply the proceeds on the amount due from the defendant. It also appeared that L. had failed to sell the real estate. *Held*, the proof failed to show payment. *Lea v. McLennan*..... 143

See NEGOTIABLE INSTRUMENTS. PRINCIPAL AND SURETY, 3.

PERFORMANCE.

See SPECIFIC PERFORMANCE.

PERSONAL PROPERTY.

See MORTGAGES.

PETITION.

See PLEADING, 1, 7, 8, 11, 13—16.

PLEADING.

1. **Petition.** Where a defendant interposes a denial to a petition, the only question in issue is the truth of the facts stated in the petition. *B. & M. R. R. v. Lancaster County*.. 33

2. ———: NEW MATTER IN DEFENSE. All new matter constituting a defense must be pleaded. *Id*..... 33

3. **Amendments.** Where a suitor has been deprived of a substantial right, by the refusal of the district court to permit an amendment of a pleading, the supreme court, in a proper case, will grant him relief. The application to amend, however, should be made before the cause is dismissed. The better practice is, to make the order conditional, that, in case of failure to amend in time, and on the terms prescribed, the action be dismissed. *Wilson v. Macklin*..... 50

4. **Replevin:** AFFIDAVIT. Filing an affidavit in an action of replevin is a proceeding. The term *proceeding* is used in the code of civil procedure to distinguish all other steps taken in an action from those embraced in the word *pleading* *Id*..... 50

5. **Amendments:** USURY. If a plea of usury is defective in its statement of facts, yet if testimony is introduced without objection, showing the existence of a contract for illegal interest, the court after verdict will permit the answer to be amended to conform to the facts proved. *Keim & Co. v. Avery*..... 54

6. ———: ANSWER. A party may be permitted to answer, upon such terms as to the payment of costs as may be prescribed by the court, at any time before judgment is rendered, and where it is apparent that he has a meritorious defense, the court must permit the answer to be filed. *Blair v. West Point Mnf'g. Co*..... 147

7. **New Trial.** In a petition for a new trial, under section 318 of the civil code, on the ground of newly discovered evidence, it is not sufficient to allege that the plaintiff "has learned, since the term of the court and the trial," certain matters constituting the grounds for a new trial; the allegations must be affirmatively stated, and upon information. In such case, the law requires the moving party to show that he has exercised reasonable diligence to discover and produce such evidence at the trial; and his failure to do so deprives him of all claim to a new trial. *Axtell v. Warden*. 186

8. ———. The petition is liable to demurrer, if it does not state facts sufficient to entitle him to a new trial, when they are admitted to be true. *Id*..... 186

9. **In Chancery and Under the Code.** Under the former chancery practice whenever any ground of defense was apparent from the bill itself, either from the matter contained in it, or from defects in its frame, or the case made by it, the proper mode of taking advantage of it was by demurrer. But under the code, if a pleading is correct in *substance* but not in *form*, the remedy is by a motion to have it made more definite and certain. *Farrar & Wheeler v. Triplet*.... 237

10. **Joinder of Parties.** At common law the general rule is, that all parties must join and be joined by their names in an action; and such is the general import of our code, which provides that the precipe and petition must contain the *names* of the *parties* to an action, and their *names*, both direct and inverse, shall be entered in the index. *B. & M. R. R. v. Dick & Son*..... 242

11. ———: PARTNERSHIPS. But it is specially provided by statute that when persons use initial letters or contractions of their christian names to bills of exchange, etc., they may be designated by such initials or contractions of the christian name; and that companies not incorporated, and partnerships formed for the purpose of carrying on any trade or business, or for holding any species of property in this state, may sue and be sued in the name assumed by them. *Id*..... 242

12. ———: ———: CONSTRUCTION OF STATUTE. These special provisions, being exceptions to the general rule, must be construed strictly, and the exact mode of procedure prescribed by them must be closely pursued. *Id*..... 243

13. **In Actions of Replevin.** *Wilson v. Macklin*..... 50

14. **Fraud.** In stating a cause of action under sec. 17, ch. 25, Gen. Statutes, it is necessary to allege that the assignment was made "*with the intent*" either to hinder, delay, or to defraud the plaintiff. *Morgan v. Bogue*..... 429

15. **Averments of Petition.** Where there is an omission to state a material fact in a petition, one necessary to show a cause of action, the presumption is that it does not exist. *B. & M. R. R. v. York County*..... 487

16. ———. Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his cause of action, the defendant may move to have the petition made

definite and certain, but cannot strike out such matter as redundant and irrelevant. *Dorsey v. Hall*..... 460

17. **Replevin:** ANSWER. In an action of replevin the defendant answered "that he does not unlawfully detain the said goods and chattels of the said plaintiff," etc.: *Held*, that the answer put in issue the plaintiff's right of property and right of possession. *Moore v. Kepner*..... 291

18. ——: ——. Under the code, the gist of the action is the unlawful detention of the property. *Id*..... 291

19. ——: AVERMENTS OF PETITION. The general averments in a petition in replevin that the plaintiff "has a special property in the goods, that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law. *Curtis & Co. v. Cutler*..... 315

20. **Evidence.** An objection to the admission of any evidence on the ground that the petition does not state a cause of action, may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. The objection is in the nature of demurrer *ore tenus* to the petition, and if it is totally defective, it is error to admit any evidence under such pleading. *Id*..... 315

21. ——: DEFECTIVE PETITION: JUDGMENT. If a party proceeds to trial on such defective petition, which states no cause of action, he cannot, after verdict, and motion to set aside the same, take judgment on such verdict by then filing a petition setting out a cause of action. *Id*..... 315

PRACTICE.

1. **An Appeal** lies to the district court, from a judgment of a justice of the peace, in action of replevin tried by a jury, without regard to the amount in controversy. *Edwards v. Schutt*..... 18

2. **Replevin:** AFFIDAVIT. Filing an affidavit in an action of replevin is a proceeding. The term *proceeding* is used in the code of civil procedure to distinguish all other steps taken in an action from those embraced in the word *pleading*. *Wilson v. Macklin*..... 50

3. ——: ——. In replevin, the statute requires the affiant

to swear that the goods and chattels claimed were not taken in execution on any order or judgment against the plaintiff. The affiant is not to determine the validity of the judgment, and cannot in *that* proceeding question its correctness. *Id.* 50

4. ——: ——. When the affidavit is defective, it is the duty of the court, even after a motion to dismiss on that ground is filed, to permit it to be amended. *Id.*..... 50

5. **Rights of Suitor:** AMENDMENT OF PLEADINGS. If a suitor has been deprived of a substantial right, by the refusal of the court to permit an amendment, the supreme court, in a proper case, will grant him relief. *Id.*..... 50

6. ——: ——. The application to amend, however, should be made before the cause is dismissed. The better practice is, to make the order conditional, that, in case of failure to amend in time, and on the terms prescribed, the action be dismissed. *Id.*..... 50

7. **Verdict.** Where a verdict is defective in form merely, the court may direct the jury to amend it, or it may be amended by the court, with the consent of the jury, before they are discharged. *Davis v. Neligh*..... 78

8. **Witnesses.** The cross-examination of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must make the witness his own, and call him as such. *Id.* 84

9 ——. But where a witness has related a portion of what took place at a particular time or place, or a part of a particular transaction, he may be cross-examined as to matters showing the *entire transaction*. *Id.*..... 84

10 **County Courts:** JUDGMENT: ERROR. Error will lie upon a judgment or final order of the county court which affects a substantial right and in effect determines the action, or which affects a substantial right in a special proceeding, or upon a summary application in an action after judgment, when the same appears on the record of the county court. *Rudolf v. Winters*..... 125

11 **Assignment of Error.** On a proceeding in error, when the assignment is "that the finding of the said court is against the law and the evidence," and no specific error of

law is pointed out in the motion for a new trial, and the judgment being clearly warranted, by the finding of all the issues in favor of the defendant, the only question raised is simply whether the verdict of the court, upon the facts, is supported by the evidence. *Brunswick v. McClay*..... 137

12. **Verdict.** Where there is sufficient testimony to warrant a jury in finding verdict, it will not be set aside as being contrary to the evidence simply because, in the opinion of the court, a preponderance of the testimony is against it, it being exclusively the province of the jury to weigh the evidence, and judge of the credibility of the witnesses. But the rule has no application where there is an entire failure of proof. *Lea v. McLennan*..... 143
See also *Cook v. Powell*..... 284
McCann v. McDonald..... 385

13. **Service on Defendant.** Before service by publication, or personal service of the summons out of the state, can be made, an affidavit must be filed with the clerk of the court, setting forth that service of the summons cannot be made in the state on the defendant or defendants to be served, and that the case is one of those mentioned in section 77 of the civil code. *Blair v. West Point Mnf'g. Co*..... 146

14. ———: AFFIDAVIT. An affidavit should show on its face that it was taken within the officer's jurisdiction. *Id.* ... 147

15. **Power of District Court,** in applications for removal of a cause to the United States circuit court. *Id*..... 147

16. **New Trial:** ERROR: EXCEPTIONS. When errors of law and irregularities occuring at the trial are the grounds on which a new trial is moved, in order to entitle a party to a review of the decision of the court on the motion an exception is necessary. *Lowrie v. France*..... 191

17. ——— : ERRORS MUST BE SPECIFICALLY POINTED OUT. In proceedings in error, if the petition below set forth a good cause of action, in a matter within the jurisdiction of the court, in order to obtain a review of the judgment, the particular ground upon which it is claimed to be erroneous must be specifically pointed out; otherwise it will be presumed that the judgment is right. *Id*..... 191

18. ———: SPECIAL FINDING: WAIVER OF. Where the court is requested under the statute to state its findings of fact

and of law separately, and omits to do so, if no exception be taken, this will be considered as a waiver of the demand, and an acquiescence in a general finding upon the issues. *Id.* 191

19. ——: ——: PRESUMPTION. In a proceeding in error every presumption must be in favor of the correctness of the judgment of the court below. It is only "for errors appearing on the record" that the judgment of a district court can be properly reversed. *Frey v. Drahos* 194

20. **Damages** in actions of replevin. *Frey v. Drahos* 194

21. **Instructions to Jury:** EXCEPTION. Where the record does not show that any exception was taken to the charge of the court to the jury, no foundation is laid for a review of the instructions in the supreme court. *Scofield v. Brown*... 221

22. **Testimony:** PETITION IN ERROR: MOTION FOR A NEW TRIAL. To entitle a party to a review of the ruling of the court below on the admission or rejection of testimony it is necessary that the alleged error should be specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below. *Id.* 221

23. **Motion to Set Aside Sale.** A motion to set aside a sale or order confirming a sale of real estate, should point out specifically the errors complained of. General objections are too indefinite to be certified. An affidavit in support of a motion to set aside an order confirming a sale, which alleges that the attorney for the plaintiff before the sale promised to purchase the premises "at the full amount called for in the decree, unless the same were purchased by some one else at a higher bid," there being no allegation that any one desiring to purchase the premises was thereby deceived, or prevented from bidding, or that the premises could be sold for a higher price than that already bid, is not sufficient to authorize the court in setting aside the sale. *Johnson v. Bemis* 225

24. **Final Judgment.** Where a demurrer to a petition is sustained in the court below, to authorize a review of the case by the supreme court, there must be a final judgment dismissing the case. *Miller v. B. & M. R. R. Co.* 227
See also *Normand v. Otoe County* 261

25. **Demurrer to Answer.** If a good defense is defectively stated in an answer, and a demurrer thereto on that ground

is overruled, the party demurring, in order to avail himself of his exception taken to the ruling of the court thereon, must rest on his demurrer. If he reply he thereby waives his exception. But this rule has no application where the facts stated in the answer of themselves constitute no defense. *Pottinger v. Garrison*, 3 Neb., 133, distinguished. *Farrar & Wheeler v. Triplett*..... 237

26. **Revival of Judgment** and of actions. See *Gillette v. Morrison*..... 267

27. **Verdict.** The verdict of a jury, where the evidence is conflicting, will not be set aside on the ground that it is against the weight of the testimony, unless it is clearly so. *McCann v. McDonald*..... 305

28. **Witnesses.** The question of the credibility of the witnesses is alone for the jury to determine. *Id*..... 305

29. **Bill of Exceptions.** Arguments of counsel on questions raised during the trial, and the remarks of the court in deciding them, serve no useful purpose in a bill of exceptions, and should be omitted. *Clough v. The State*..... 320

30. **Evidence.** An objection to the admission of any evidence on the ground that the petition does not state a cause of action, may be taken at any time during the progress of the the trial, and is not waived by answer or failure to demur. The objection is in the nature of a demurrer *ore tenus* to the petition, and if it is totally defective, it is error to admit any evidence under such pleading. *Curtis v. Cutler*..... 315

31. **Defective Petition:** JUDGMENT. If a party proceeds to trial on such defective petition, which states no cause of action, he cannot, after verdict, and motion to set aside the same, take judgment on such verdict by then filing a petition setting out a cause of action. *Id*..... 315

32. **Objections to Testimony.** In order to make an objection to testimony available it is necessary that the grounds of the objection be stated; otherwise it is impossible for the court reviewing to know whether the court below was in fault or not. *Wright v. Greenwood Warehouse Company*.... 435

33. ———: PRESUMPTION WHERE GROUND OF OBJECTION IS NOT STATED. And even where it is apparent that a valid objection to testimony could have been made, still the court is not at liberty to assume that this was the one relied on;

in the absence of an affirmative showing to the contrary, all presumptions are favorable to the court whose judgment is under review. *Id*..... 435

84. **Judicial Sale.** In a sale made under the authority of a decree in equity, the court is the vendor, and the commissioner making the sale is the mere agent of the court. The decree directs the sale of the property and the application of the proceeds to the payment of the debt, and is a sufficient warrant of authority to the officer to sell as directed in the decree. *Parrat v. Neligh*..... 456

85. ——: NOTICE OF SALE. Where an officer has caused public notice of the time and place of a sale of real estate to be given, for at least thirty days before the day of sale, by advertisement in some newspaper *printed in the county*, it is unnecessary to post notices of the time and place of sale. *Id*..... 456

86. ——: CONFIRMATION OF SALE. In an equity cause, as in an action at law, if a party desires to oppose the confirmation of a sale of real estate, he must file a motion in the district court, setting forth the grounds upon which he seeks to set the sale aside. If the motion is overruled he may then appeal to the supreme court. *Id*..... 456

87. **Petition.** Where a legal deduction or conclusion of law contains a fact constituting a cause of action, or one which is essential to enable the plaintiff to maintain his cause of action, the defendant may move to have the petition made definite and certain, but cannot strike out such matter as redundant and irrelevant. *Dorsey v. Hall*..... 460

88. **Appeals.** The statute specially provides that a judgment given in the absence of a party, sued and served with process in a justice's court, may be set aside, and a trial had in which the defendant can set up all his defenses; and in such case an appeal will not lie to the district court until after the proper motion shall have been made to set aside such judgment. *Clendenning v. Crawford*..... 474

89. ——: FINDINGS OF FACTS: EVIDENCE. On appeal, if the evidence be not wholly preserved, and brought into the record, the decision of questions of fact will not be disturbed. And this is the rule whether the trial below be to the court, to a referee, or to a jury. *Farmer v. Vollentine*.. 498

40. **Partnership:** PRACTICE. M. and S. were sued as surviving partners of the firm of R. & Co. No service was had upon S. Upon the trial of the cause, testimony was introduced tending to prove that M. was a member of the firm at the time of the death of R, but it appeared that S was not a member at that time. *Held*, that the evidence against M. was sufficient to sustain the allegations of the petition, and that the failure to connect S. with the firm would not prevent a recovery against M. *McCann v. McDonald*..... 305

41. **Equity Jurisdiction:** APPEAL. Where a party has been prevented from complying with the legal requisites to obtain an appeal, by the default or absence of the justice or judge of the court in which the cause is pending, and not by any default or laches on his part, the appeal may be taken and perfected after the expiration of the time limited by statute, and such appeal must be treated in the appellate court as though it had been taken within the time prescribed by law. *Dobson v. Dobson*..... 296

42. **Mandamus.** The application for a writ of mandamus must show a prior demand and refusal, and must set forth facts which clearly impose upon the respondent a duty which the laws enjoin upon as resulting from an office, trust, or station. *Kemerer v. The State*..... 130

43. ———. If the relator sets up in his application a claim, the payment of which is not allowed by law, it is a fatal objection to a mandamus: *Id*..... 130

PRACTICE IN CRIMINAL CASES.

1. **Suppression of Deposition:** EXCEPTION. When a deposition taken on behalf of the defendant in a criminal case as to his good character is suppressed, and no exception taken, the correctness of the ruling cannot be questioned on error in the supreme court. *Clough v. The State*. 321

2. ———: ———. The taking and preserving of exceptions in criminal cases are governed by the rules established in such matters in civil cases. *Id*..... 321

3. **Jury:** IRREGULARITIES IN IMPANELING. Mere irregularities in the impaneling of the jury, not excepted to at the time, are waived, and cannot afterward be taken advantage of. *Id*..... 321

4. ———: ———. Five of the original panel of twenty-four jurors having been excused for cause, thereupon the selection of the trial jury was proceeded with without first filling the places of those excused. *Held*, proper practice. *Id* 321

5. **Meeting and Adjournment of Court:** PRESUMPTION. The record showed that on the 31st of January the court adjourned until the following morning at 9 o'clock. There was no formal entry, *in the record of the case*, of the opening of the court on the 1st day of February, but it did appear that on "Friday, February 2d, 1877, court met at 9 o'clock A.M., *pursuant to adjournment*." It was objected to the record that it showed there was a failure of the court to meet according to the adjournment of the 31st of January, and that consequently the term must be considered as having lapsed. *Held*, that by the entry of February 2d, reciting that the court convened on that day, "*pursuant to adjournment*," it was sufficiently shown that the court must have been in session on the first day of February. *Held further*, that to make such objection available it must be shown, *affirmatively*, that there was a failure of the court to meet, or its continuance in legal session will be presumed so long as business is transacted as of that term, up to the time appointed for the next regular term. *Id*..... 321

6. **Evidence:** ADMISSION OF IMMATERIAL EVIDENCE: WHEN GROUND FOR NEW TRIAL. To make the admission of immaterial testimony ground for a new trial, it must at least have tended to prejudice the accused. *Id*..... 321

7. ———: CONDUCT AND APPEARANCE OF PRISONER. EVIDENCE AGAINST HIM. The conduct and appearance of the prisoner about the time of the discovery of the homicide with which he is charged, as well as his declarations concerning it, are admissible in evidence against him. *Id*.... 321

8. ———: BUSINESS AND SOCIAL RELATIONS BETWEEN THE PRISONER AND THE DECEASED—EVIDENCE. The theory of the prosecution being that the homicide was committed by the prisoner to enable him to possess himself of his brother's property, the business and social relations subsisting between them, not only just about the time of the murder, but also for a reasonable time before, are competent evidence. *Id*..... 322

9. ———: PAYMENT OF MONEY BY PRISONER. And where it is shown that the deceased was possessed, just before his

death, of a considerable sum of money, it is competent for the prosecution to prove payments of money by the prisoner just before, as well as after, the homicide was committed. *Id.* 322

10. ———: PAYMENTS OF MONEY TO PUBLIC OFFICER: PROOF OF MEMORANDUM FROM RECORDS. When a public officer is called to testify as to payments of money to him in his official capacity by the prisoner, it is proper practice to permit him to refresh his recollection from extracts which he has taken from his own official records, without producing the original. Nor does the fact that the statute permits certified copies from such records to be given in evidence preclude the proof of such payments by the oral testimony of any witness who saw them made. *Id.* 322

11. ———: ORDER OF PROOF. The order in which the evidence for the prosecution shall be introduced is within the discretion of the judge presiding at the trial. *Id.* 322

12. ———: COMPARISON OF BOOT WITH FOOT-PRINT: OPINION OF WITNESS NOT COMPETENT: EXCEPTION NECESSARY. It is not competent for a witness, testifying of a comparison made between one of the prisoner's boots and a bloody foot-print found near the place where the homicide was committed, to give his opinion as to whether that boot made the track; but where a witness expresses such opinion and no objection is made until after verdict, it furnishes no ground for a new trial. *Id.* 322

13. ———: ———. The general rule that, in proving a comparison between a boot of the prisoner and a track claimed by the prosecution to have been made by him at the time the murder was committed, it must be shown that such comparison and measurements were made before the boot was placed upon the track, has no application where the imprint is such that no change could be effected in its appearance by placing the boot upon it. *Id.* 322

14. Witness: COMPETENCY OF WITNESS AS TO DECLARATIONS MADE BY PRISONER. It is not necessary to the competency of a witness called to testify as to what he had heard the prisoner say, that he should have heard all he said on that occasion; if what he heard be sufficient to carry an intelligible idea respecting the commission of the offense, it may be given in evidence against him. *Id.* 323

15. ———: STATEMENTS MUST BE VOLUNTARY: MUST NOT BE UNDER OATH. The statements of a prisoner, to be competent evidence, must have been voluntarily made. If made under the obligations of an oath they are not voluntary as a general rule. But when the person, although he be subsequently charged with the offense, appears voluntarily, and gives his testimony before any accusation has been made against him, his statements, although under oath, are admissible. *Id*..... 323

16. ———: CROSS-EXAMINATION: NEW MATTER. If a party on cross-examination of a witness examine him as to a matter not alluded to in chief, he thereby makes the witness his own, and, *on this point*, should not be permitted to cross-examine him. *Id*..... 323

17. ———: NOT ERROR TO PERMIT THE PROSECUTOR TO REOPEN CASE. It is not error to permit the prosecutor to reopen his case, and introduce further evidence in chief, even after the examination of witnesses for the defense has commenced. *Id*..... 323

18. **Verdict:** SIGNATURE OF FOREMAN. The foreman of the jury not having affixed his official character to his signature when the verdict was brought into court, it was not error to permit him to do so in open court and in the presence of the jury before they were discharged. *Id*..... 323

19. **Instructions:** REASON FOR REFUSAL NEED NOT BE GIVEN. When instructions are requested which, although expressed in language somewhat different, are substantially the same as those already given, it is not error to refuse them. Nor is it error, under our system of instructing juries, for the court to fail to give the reason for such refusal. *Id*..... 323

20. ———: SUFFICIENT PROOF. It is not error for the court, in speaking of the legal presumption of innocence, to say to the jury that, unless this presumption is overthrown by "*sufficient evidence*," the defendant must be acquitted. The use of the term, "sufficient evidence," could not have led the jury to understand that they were at liberty to convict on a mere preponderance of evidence, especially when, in a subsequent part of the charge, they were told that "the proof must be such as to satisfy them beyond a reasonable doubt" of the existence of all the facts necessary to constitute his guilt. *Id*..... 323

21. **Evidence:** MOTIVE TO COMMIT THE CRIME. ABSENCE OF PROOF OF. When the evidence fails to show some motive on the part of the accused to commit the crime charged, this is a circumstance in favor of his innocence which the jury should consider, together with all the other evidence, in making up their verdict. But it is not error for the court to refuse to charge the jury that the absence of such motive "ought to operate *strongly*" in favor of the accused, this being a matter for the jury alone to determine. *Id.*... 324

22. **Jurors:** EXPRESSIONS OF OPINION. Where a juror, on his *voire dire* examination, in answer to questions put to him by the district attorney, stated that he did not think that he had formed or expressed an opinion as to the prisoner's guilt, but at the same time admitted that he had "talked with the neighbors about the case," and that he had "explained to some (of his neighbors) since it occurred," who did not know about it; and the juror was accepted without examination, or objection, on the part of the prisoner, it makes a case for the application of the rule, that if a prisoner neglect to avail himself, before the trial, of any of the means which the law provides for ascertaining whether a juror is prejudiced, he will not be entitled to a new trial on that ground. *Id*..... 324

23. ——: ——. Before a motion for a new trial can be properly granted on the ground of a previous expression of opinion by a juror, unfavorable to the accused, it must appear by the affidavits of both the prisoner and his counsel that neither of them had any knowledge before the verdict was rendered of the expression of such opinion. *Id*..... 324

24. **Evidence:** EXCEPTIONS. When the defendant in a criminal trial permits illegal testimony to go to the jury without objection, its illegality is thereby waived, and a new trial will not be granted because of its admission. *Id*..... 351

25. **New Trial.** The granting of a new trial, in a criminal case, is within the exclusive discretion of the trial court; and if that court, on application duly made, refuse to act upon it, it will be compelled to do so, unless such action could advantage the prisoner only by overriding a well established rule of criminal procedure. *Id*..... 351

26. **Striking Papers from the Files.** When papers are stricken from the files they cease to be a part of the case for any purpose, unless brought into the record by order of the court, which may be done by bill of exceptions. *Id*..... 351

PRACTICE IN SUPREME COURT.

1. **Dismissal of Actions.** Where judgment was rendered May 17th, 1877, and a petition in error was filed in the supreme court, December 13th, 1877. *Held*, on a motion to dismiss for want of jurisdiction, that the motion must be sustained. *French v. English*..... 124

2. ———. Cases may arise where it would be proper to set up the limitation by answer; but where it appears on the face of the papers that they were not filed within the time prescribed by the statute, the defect may be taken advantage of by motion. *Id*..... 124

3. **Argument of Causes.** Ordinarily where cases pending in the supreme court are reached in their regular order on the docket, they will not be passed to the foot of the docket or continued, except by consent of both parties. *Rich v. State National Bank*..... 202

4. ———: AGREEMENTS OF ATTORNEYS. Written agreements of attorneys, or those entered into by them in open court, in regard to the disposition of cases, will be enforced; but oral agreements, entered into out of court, will not be recognized or considered. *Id*..... 202

5. **Assignment of Error.** On a proceeding in error, when the assignment is "that the finding of the said court is against the law and the evidence," and no specific error of law is pointed out in the motion for a new trial, and the judgment being clearly warranted, by the finding of all the issues in favor of the defendants, the only question raised is simply whether the verdict of the court, upon the facts, is supported by the evidence. *Brunswick & Co. v. McClay*... 137

6. ———: ERRORS MUST BE SPECIFICALLY POINTED OUT. In proceedings in error, if the petition below set forth a good cause of action, in a matter within the jurisdiction of the court, in order to obtain a review of the judgment, the particular ground upon which it is claimed to be erroneous must be specifically pointed out; otherwise it will be presumed that the judgment is right. *Lowrie v. France*..... 191

7. **Presumption.** In a proceeding in error every presumption must be in favor of the correctness of the judgment of the court below. It is only "for errors appearing on the record" that the judgment of a district court can be properly reversed. *Frey v. Drahos*..... 194

PRECINCT BONDS.

See TAXES, 13.

PRE-EMPTION.

See PUBLIC LANDS.

PRINCIPAL AND AGENT.

See BANKS.

PRINCIPAL AND SURETY.

1. **The Surety on a Replevin Bond,** as such, cannot maintain an action of replevin against one wrongfully dispossessing his principal of the property. *Jimmerson v. Green*.... 26

2. **Usury:** SURETY MAY PLEAD. A surety may plead as a defense to a promissory note, that the usurious interest was agreed upon by the parties at the time of the execution of the note. *Keim & Co. v. Avery*..... 54

3. **Payment of Debt by Surety.** L. brought an action against M. for money paid by him as surety. M. in answer pleaded payment by the conveyance of certain real estate. The testimony showed that M. had conveyed real estate to L. to enable him to sell and convey the same, and apply the proceeds on the amount due from the defendant. It also appeared that L. had failed to sell the real estate. *Held*, the proof failed to show payment. *Lea v. McLenan*..... 143

4. **Surety on Replevin Bond.** As a rule sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity to defend; but this rule has no application where a surety has signed an undertaking for one of the parties in an action of replevin. In such case by becoming surety he submits to the jurisdiction of the court and is concluded by the judgment. *Moore v. Kepner*..... 291

5. **Bond:** CONDITIONS. A bond which is perfect on its face, apparently duly executed by all whose names appear therein, which purports to be signed and delivered by the several obligors, and is actually delivered by the principal without stipulation, reservation, or condition, cannot be avoided

by the sureties upon the ground that they signed it upon the condition that it should not be delivered unless it should be signed by other persons, who did not sign the same, if the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution. *Cutler v. Roberts* 4

6. ——: ——: LIABILITY OF SURETY. Where a bond contains in the obligatory part the names of several persons as sureties, if a part sign the same with an understanding, and on the condition that it is not to be delivered to the obligee until it is signed by all whose names appear in the obligatory part thereof as sureties, it will not be valid as to those that do sign until the condition is complied with. *Id.* 5

7. ——: ——: ——. If there is anything on the face of the bond, or in the attending circumstances, to apprise the obligee that the bond has been delivered by the sureties to the obligor, to be delivered to the obligee only upon certain conditions which have not been complied with, the sureties may plead the failure to comply with the conditions as a defense in an action on the bond. *Id.* 5

PROBATE COURT.

See COUNTY COURT. JUDGMENT, 20.

PROMISSORY NOTES.

See BANKS. NEGOTIABLE INSTRUMENTS.

PUBLIC LANDS OF UNITED STATES.

1. **Pre-emption.** Where it is sought to deprive a party of his right to pre-empt lands belonging to the United States, upon the ground that he is disqualified, by reason of a former filing upon entered lands, from availing himself of the benefits of the act of September 4, 1841, the burden of proof is on the party asserting such disqualification, and he must establish, by clear and satisfactory evidence, the fact that the party seeking to pre-empt has previously filed his declaratory statement upon lands subject at the time to private entry. *Stark v. Baldwin* 114

2. **Grant to B. & M. R. R.** Lands within the B. & M. R. R. grant are not subject to private entry, and in regard to

settlement and entry under the homestead and pre-emption laws are to be regarded as unoffered lands. *Id*..... 114

3. **Priority of Settlement.** Other things being equal, priority of settlement determines the rights of parties in cases arising under the homestead and pre-emption laws. *Id*.... 114

4. ———. Where the party making the prior settlement has in all respects complied with the law, he is entitled to the lands without regard to anything which a party making a later settlement thereon may have done. *Id*..... 114

5. **Homestead.** When a person has entered lands under the homestead act of congress, and has resided upon and cultivated the same over five years, and in all respects has complied with the requirements of the law, he is the real owner of such lands; the United States holds the legal title simply as trustee for such owner, without any interest in such lands, except a mere special interest for the amount of unpaid fees. *Axtell v. Warden*..... 182

6. **As to Grant** to railroad companies, see *St. Joe & Denver R. R. v. Baldwin*..... 247

PUBLIC POLICY.

1. **Contract Against.** A contract to operate in grain options, to be adjusted according to the differences in the market value thereof, is a contract for a gambling transaction which the law will not tolerate. It is *contra bonos mores*, and against public policy. *Rudolf v. Winters*..... 126

2. ———. Whenever a claim is bottomed on an immoral or illegal transaction, no right whatever can be founded upon such contract which the law will sanction or the courts maintain. *Id*..... 126

PURCHASER.

See JUDICIAL SALE. MORTGAGE.

RAILROADS.

1. **Taxation:** RAILROAD PROPERTY. It is the duty of the proper officers of a railroad company, whose road is situated in more than one county, to list under oath, for assess-

ment and taxation, the road bed, superstructure, right of way, rolling stock, side tracks, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation, and transmit the same to the state auditor, on or before the first day of March in each year. *B. & M. R. R. v. Lancaster County*..... 33

2. ——: ——. All other property of a railroad company is to be assessed by the assessor of the city, ward, or precinct in which it is situated, in the same manner as is provided for the assessment of real estate, but land used for necessary side tracks is not subject to such assessment. *Id*..... 33

3. **Side Tracks and Depot Grounds.** While lands taken and appropriated for right of way and side tracks, otherwise than by consent of the owner, cannot exceed two hundred feet in width, yet this does not prevent the company from purchasing, with the consent of the owner, all the land they may require for side tracks and depot grounds. *Id*..... 33

4. **Government Grant:** RIGHT OF WAY. In the year 1869, B. purchased from the United States the south-east quarter of the south-east quarter and the north-west quarter of the south-east quarter of section eleven in township one, range three, in Jefferson county, Neb. In July, 1866, congress passed an act granting to the state of Kansas, for the use and benefit of the St. Joe & Denver R. R. Co., every alternate odd section of land for a distance of ten miles on each side of the track, and providing that, if, when the line or route was definitely fixed, the United States had sold any section so granted or any part thereof, or that the right of pre-emption or homestead settlement had attached to the same, or they had been reserved by the United States, that other lands might be selected in lieu thereof. The act also granted the right of way to said company across the public lands. In 1871 the plaintiff located its line through the above described lands. B. took the necessary steps under the statutes of the state for the assessment of damages, and judgment was rendered in his favor for the sum of $200. *Held*, that B. was entitled to compensation for the right of way. *St. Joe & Denver R. R. v. Baldwin*..... 247

5. ——: ——. Such lands were subject to entry and settlement, until the plaintiff had filed maps of its line, designating the route, with the secretary of the interior, and the lands had been withdrawn from market, under the provisions of section four of the act. *Id*..... 247

6. **Constitutional Law:** AID TO RAILROAD COMPANIES: LEGISLATIVE DISCRETION. Until the adoption of the constitution of 1875, the whole matter of municipal aid to works of internal improvement was within the sole control of the legislature, and subject to no restraint other than such as that body saw fit to impose. *Reineman v. C. C. & B. H. R. R. Co*..... 310

7. ———. Section 2 of article XII of the constitution is to be taken as restrictive only upon the exercise of legislative discretion in the authorization of county and municipal indebtedness in aid of railroads and other internal improvements. It fixes a boundary beyond which the legislature cannot go, but within which its authority is still supreme. *Id*..... 310

8. ———. The act of February 15th, 1869, as amended March 3d, 1870, and February 17th, 1875, enabling counties, cities, and precincts to issue bonds to aid works of internal improvement, in force at the adoption of the new constitution, is not in conflict with section 2, article XII, of that instrument, and is still in full force. *Id*..... 310

9. **Where a County** votes aid to a railroad company in excess of the amount authorized by law, it is simply a void act, and confers no authority upon the county commissioners to issue the bonds of the county in any amount whatever. *Id*..... 310

10. **State Grant.** Where a railroad company has received a grant of land from the state, upon condition that it would build a railroad from one town to another, it has no authority whatever afterwards to abandon any portion of such line and take up and remove the track. The unprofitableness of operating the road furnishes no excuse whatever for a failure to comply with the conditions of the grant. *State v. S. C. & P. R. R. Co*..... 357

11. ———: DUTY OF COMPANY. A railroad company in accepting a grant from the state, thereby enters into a contract with the state to build and maintain its line, and operate the same, and the state may enforce the contract by mandamus or other appropriate proceeding. *Id*..... 357

REAL ESTATE.

See ACTION, 5, 6. MORTGAGE. VENDOR AND VENDEE.

REGISTRATION.

See JUDGMENT, 12.

REMOVAL OF CAUSE TO UNITED STATES CIRCUIT COURT.

1. **Petition.** Where a petition for the removal of a cause from the state court to the circuit court of the United States, in connection with the pleadings, fails to show that the cause is removable, it is not error for the court to deny the application. *Blair v. West Point Mnf'g. Co*..... 147

2. ———: JURISDICTION. In cases arising under the constitution, laws, and treaties of the United States, the *subject matter* gives the jurisdiction without regard to the citizenship of the parties. But when questions of that character are not involved, it is the citizenship of the parties alone that confers the jurisdiction, and it must appear on the face of the record that the citizenship of the parties supports the jurisdiction. *Id*..... 147

3. ———: ———. Where a petition is filed to remove a cause on the ground that it is between the citizens of different states, and the facts stated in the petition are denied by answer, the court has authority to examine the grounds upon which it is sought to oust it of jurisdiction, and it is the proper tribunal to make the examination. *Id*..... 147

4. ———: ———. The authority of congress to impose duties on the state courts, or otherwise to act directly upon them, may well be questioned. *Id*..... 147

5. ———: ———. In cases where jurisdiction can only be acquired by reason of the parties being citizens of different states, the circuit court cannot entertain jurisdiction if it appears that the action is between citizens of the same state; such judgment would be void. *Id*..... 147

6. ———: POWER OF DISTRICT COURT. Where an application to remove a cause is in proper form, and the facts are such as bring the case within the provisions of the law for the removal of causes, it is the duty of the district court to proceed no further in the case, and should it do so the supreme court will correct the error and order the cause certified to the circuit court. *Id*..... 147

RENTS AND PROFITS.

See MORTGAGE, 9.

REPLEVIN.

1. **Appeals.** In an action of replevin commenced before a justice of the peace, and tried by a jury, an appeal may be taken from the judgment of the justice without regard to the amount in controversy. *Edwards v. Schutt*..... 18

2. **Interest of Plaintiff.** To maintain this action the plaintiff must show such an interest as entitles him to the immediate possession of the property claimed. *Jimmerson v. Green*..... 26

3. ———. The surety on the undertaking given by the plaintiff, as such, has no legal interest in the property replevied; nor can he maintain an action of replevin against one wrongfully dispossessing such plaintiff of the property. *Id.* 26

4. **Affidavit in Replevin.** Its requisites. *Wilson v. Macklin.* 50

5. **Damages:** EVIDENCE. Where in an action of replevin tried to the court without a jury it was found that the use of the property while held by the plaintiff was worth $519, and that during the same time the property had depreciated in value $218, but neither of these items having been *allowed as damages*, and the testimony not having been preserved: *Held*, that there was no means of ascertaining whether they ought to have been allowed as damages or not, but that the inference to be drawn from the fact that the court below did not allow them is, that the evidence did not warrant it. *Frey v. Drahos*..... 194

6. ———: ———. If the property of a judgment debtor, in his possession or under his control, be seized by a sheriff in execution, and afterwards replevied from him by one having no interest therein, the true measure of the officer's damages is its value together with interest from the time it was taken. But in such case the defendant should not have damages for the detention or use of the property in addition to its value, for this would be compensating him twice for the same injury. *Id.*..... 194

7. ———: ———. But where the property is levied on, not in the possession of the judgment debtor, but in the possession

of the plaintiff, who is holding it under a purchase made in good faith, but from a person having no authority to sell it, the debtor laying no claim whatever to it, the propriety of permitting the officer, in addition to the full amount due on his executions, to recover also for the benefit of the debtor may well be doubted. *Id*..... 194

8. ———: ———. It is the duty of the court, upon finding the defendant entitled to property replevied from him, to proceed to assess adequate damages in his favor. The "right of possession only" carries with it the right to have at least nominal damages, independent of proof of any actual loss sustained. But the failure to assess damages can be corrected only by motion for a new trial, and the preservation of all the evidence bearing on the question. *Id* 194

9. ———: ———. While a judgment in favor of the defendant for a return of the property, which fails to award at least nominal damages, is for that reason technically defective, still if it conform in this respect to the finding of fact which is not questioned by motion for a new trial, the judgment will not be reversed on that ground. *Id*..... 195

10. **Judgment in Replevin.** In replevin, where a verdict is returned in favor of the defendant, the judgment must be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding the property and costs of suit. *Hooker v. Hammill*..... 231

11. ———: DAMAGES. As elements of damage, the jury may consider the decrease in value of the property from the time of the replevin, with interest on its entire value. *Id* 231

12. **Answer.** In an action of replevin, the defendant answered "that he does not unlawfully detain the said goods and chattels of the said plaintiff," etc.: *Held*, that the answer put in issue the plaintiff's right of property and right of possession. *Moore v. Kepner*..... 291

13. ———. Under the code, the gist of the action is the unlawful detention of the property. *Id*..... 291

14. **Surety on Replevin Bond.** As a rule sureties upon bonds and contracts are entitled to notice of the pendency of an action upon such obligations, and they will not be concluded by the judgment unless they have had an opportunity

to defend; but this rule has no application where a surety has signed an undertaking for one of the parties in an action of replevin. In such case by becoming surety he submits to the jurisdiction of the court and is concluded by the judgment. *Id*..... 291

15. **Judgment.** In replevin where judgment is rendered in favor of the defendant, ordinarily he is entitled to damages for the decrease in value of the property, with interest on its entire value. If the property cannot be returned the defendant is entitled to the value of the property at the time the same was taken, with interest thereon to the time of trial. *Id*..... 291

16. **Pleading:** AVERMENTS OF PETITION. The general averments in a petition in replevin that the plaintiff "has a special property in the goods, that he is entitled to the immediate possession thereof, and that they are wrongfully and unjustly detained from him," are mere propositions of law. *Curtis v. Cutler*..... 315

RESCISSION.

See CONTRACTS, 5, 6, 7. WARRANTY.

REVENUE.

See TAXES.

REVIVOR.

1. **Judgment:** REVIVAL OF. The revival of a judgment is but a continuation of the original action. Where it is sought to revive an action upon the ground that the cause has abated by reason of the *death of the defendant*, the only questions at issue upon such motion are: *First*, the death of the defendant; *Second*, the substitution of the administrator and heirs of the estate. In that proceeding, if the cause of action survive, the court has no authority to inquire into the merits of the case. *Gillette v. Morrison*..... 263

2. ———: ———. The right to revive an action is not dependent on the discretion of the court or judge making the order, but, under the conditions and within the time limited by statute, is a matter of right. *Id*..... 263

8. ——: ——. An action pending against a deceased person at the time of his death, may, if the cause of action survive, be prosecuted to final judgment; and the executor, administrator, or heir may be admitted to defend the same. *Id.* 268

RIGHT OF WAY.

See RAILROADS, 4.

ROADS AND BRIDGES.

1. **County Commissioners:** JURISDICTION IN LOCATING PUBLIC ROADS. In an application to the board of county commissioners to establish a new public road, the posting of four notices in the manner required by the statute, and the presentation of a petition to the board for such road, signed by at least ten landholders, residents of the county, are essential prerequisites which must be complied with before the board can acquire any jurisdiction over the subject matter of the location and opening of such new road. *Doody v. Vaughn* 26

2. **Precinct Bonds.** Under the act of February 15, 1869, enabling counties, cities, and precincts to issue bonds in aid of internal improvements, precincts may issue such bonds to aid in the construction of bridges for public use, and when such bonds are issued in conformity with the provisions of the law, they are valid, and the collection of taxes, levied on the property of the precinct to pay the interest thereon, may be legally enforced. *South Platte Land Co. v. Buffalo County* 25

SALE.

See JUDICIAL SALE. EXECUTION. TAXES, 3, 4.

SCHOOLS.

See CITIES OF THE FIRST CLASS. CITIES OF THE SECOND CLASS.

SET-OFF.

1. **Promissory Note:** SET-OFF. Any set-off to a promissory note which would have been good between the original par-

ties, may be pleaded against an indorsee who acquires it after maturity. He takes it subject to any right of set off which the maker had against any prior holder. *Davis v. Neligh*..... 78

2. ———: ———. T., the owner of a promissory note, had it drawn payable to K., or order. T. retained possession of the note until after it became due, and received from the maker thereof the full amount due thereon. Afterwards he delivered the note to K. It did not appear that K. paid any consideration whatever for the same. K. indorsed the note and delivered it to C. E. T., the wife of T., who assigned the same for a valuable consideration to D. In an action on the note: *Held*, that the note was subject to the set-off from the maker of the note to T. *Id*..... 78

SHERIFF.

Execution Sale. Where there is no prohibition in the statute, a sheriff, who has levied an execution upon real or personal property of the debtor before the return day of the writ, may sell such property after the return day thereof. And this rule applies to an order of sale. *Johnson v. Bemis*. 224

See JUDICIAL SALE.

SPECIFIC PERFORMANCE.

Jurisdiction in Equity. A court of equity has jurisdiction to compel the proper application of a specific fund, devoted to a particular use, whenever it becomes necessary to do so in order to prevent a great or irreparable injury, or to avoid a multiplicity of suits. *Farmer v. Vollentine*..... 498

STATE AND STATE OFFICERS.

1. **Actions Against State.** Section 1 of the act approved February 14, 1877, entitled "An act to provide in what courts the state may sue and be sued," covers all the various claims and demands on which the state may be sued. *State v. Stout*..... 89

2. ———. The sixth section of the act does not enlarge the classes of claims upon which actions can be brought, but it simply designates those on which actions *may* be brought in the district court of the county in which the capital of the state is located. *Id* 89

3. ———: ON WHAT CLAIMS THE STATE MAY BE SUED. The state can be sued only on claims that have been first presented to the auditor of public accounts for adjustment, and which have been in whole or in part rejected. *Id*..... 89

4. ———: WHAT CLAIMS MAY BE AUDITED. The auditor is authorized to audit and adjust only such claims as are "*provided for by law*." In case of those not so provided for, he is required to make report "to the next legislative assembly," together with such recommendation as he "may deem just." *Id*..... 89

5. ———: JURISDICTION: HOW ACQUIRED. By the act approved February 17, 1877, "To provide for the adjustment of claims against the state treasury," etc., the right to bring an original action against the state is denied, and the only mode by which the courts can acquire jurisdiction in such cases is by an appeal, as provided in section 2 of said act. *Id*..... 89
Bradford v. State..... 109

6. ———: ———: ———. The state cannot be sued on claims for supplies furnished on its credit, by original action. The only mode by which the courts can acquire jurisdiction in such cases is by appeal from the decision of the auditor and secretary of state. *Owen & Oakley v. The State*. 108

7. ———: EMPLOYMENT OF ATTORNEY FOR THE STATE NOT VALID WHEN THERE IS NO LAW AUTHORIZING IT. The claim on which the action was brought was for the recovery for services performed by the plaintiffs as attorneys in an action against the state, under an employment by the attorney general, by which they were to have a fee of ten thousand dollars, contingent upon a judgment being finally recovered favorable to the state, which was obtained: *Held*, that there was no law authorizing the employment, and, if actually made, was void, and all services performed under it gratuitous, imposing no legal obligation on the state to pay for them. *Bradford v. The State*..... 109

8. ———: ———. If, in view of the services rendered, there be a moral obligation to pay for them, this is a consideration that may be addressed to the legislature, but which neither the auditor nor the courts can recognize. *Id*..... 109

STATUTES.

1. **Commission to Revise:** LIMITATION OF ITS POWERS. The commissioners appointed to revise the general laws of the state, under the act of February 16th, 1877, are limited in the performance of their duties to the first day of January, 1878. *State v. Garber*..... 14

2. ———: ———. After the time limited the members of the commission could perform no acts under the law, nor are they entitled to receive from the state any compensation for any services performed ostensibly under its provisions. *Id.* 14

3. **An Expository Statute,** which is substantially in the nature of a mandate to the courts to construe and apply a former law, not according to judicial, but according to legislative judgment, is inoperative, and cannot control the courts in interpreting the law and declaring what it is. *Lincoln B. & S. Ass'n. v. Graham*..... 178

4. ———. The making of statutory laws, and their exposition and application to cases as they arise, are clearly and distinctly two different functions—the former is allotted by the constitution to the legislature, the latter to the courts. *Id*..... 178

See CITIES OF FIRST AND SECOND CLASS. PLEADING, 9, 10, 11. TAXES, 10.

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STATUTE OF LIMITATION.

See LIMITATION OF ACTIONS

STAY OF EXECUTION.

See EXECUTIONS.

SURETY.

See BONDS, 1, 4. PRINCIPAL AND SURETY.

TAXES.

1. **Railroad Property.** It is the duty of the proper officers of a railroad company, whose road is situated in more than one county, to list under oath, for assessment and taxation, the road bed, superstructure, right of way, rolling stock, side tracks, telegraph lines, furniture and fixtures, and personal property, belonging to such corporation, and transmit the same to the state auditor, on or before the first day of March in each year. *B. & M. R. R. v. Lancaster County*... 33

2. ———. All other property of a railroad company is to be assessed by the assessor of the city, ward, or precinct in which it is situated, in the same manner as is provided for the assessment of real estate, but land used for necessary side tracks is not subject to such assessment. *Id*..... 33

3. **Sale.** Prior to the passage of the act of February 18, 1875, [Laws 1875, p. 96], a sale of lands for taxes, where the owner thereof had sufficient personal property in the county, out of which the taxes could have been made, would be without authority of law. *Richardson County v. Miles*..... 118

4. ———: CONDITIONS OF SALE. The statute is notice to a purchaser at a tax sale of the conditions of the sale, and the treasurer has no authority to impose conditions or to enter into stipulations in regard to the sale, not authorized by law. *Id*..... 118

5. ———: ACTION TO RECOVER PRICE BID AT TAX SALE. The highest bidder at a tax sale may enforce his bid by compelling the treasurer to issue a certificate of sale of the land purchased. And the treasurer, in the name of the county, under the provisions of section 58 of the revenue law, may maintain an action against the highest bidder to recover the amount of his bid. *Id*..... 118

6. ———: PURCHASE MONEY MUST BE PAID. A bidder cannot be permitted to purchase lands at a delinquent tax sale, and

afterwards treat the sale as void, and refuse to pay the purchase money. *Id*..... 116

7. ———: ———. The object of the law is to raise revenue, and at the same time protect, as far as possible, the rights of the owner of the land by inviting competition at the sale. *Id*..... 119

8. ———: RETURN OF LANDS SOLD. Section 59 of the revenue law does not require the treasurer to file the return of lands sold in the clerk's office of his county until the amount bid therefor has been collected and paid. *Id*..... 119

9. **Assessment:** AUTHORITY OF PRECINCT ASSESSOR. Under our statutes, a precinct assessor not only has the authority, but it is his sworn duty, to see to it that all property within his jurisdiction, liable to taxation, is entered on the assessment roll. Nor will the fact of a sworn list having been made by the owner justify the assessor in neglecting to assess property which he knows has been omitted. *Roe v. St. John*..... 139

10. **Exemption:** TIMBER ACT: CONSTITUTIONAL LAW. The legislative act of February 12, 1869, entitled an "Act to encourage the growth of timber and fruit trees," is repugnant to the constitution of 1875, and is therefore inoperative; and all deductions made under it from the assessments of lands for each acre planted and cultivated with forest and fruit trees, are made without authority of law; they are mere nullities, and must be so treated by the county commissioners in levying the necessary taxes for the current year. *U. P. R. R. v. Saunders County*..... 228

11. **Equity Jurisdiction:** COLLECTION OF TAXES. INJUNCTION. Courts of equity will enjoin the collection of an erroneous or illegal tax, when the enforcement of the assessment would lead to a multiplicity of suits, or produce irreparable injury, or cast a cloud on title to real estate, or when the assessment on the face of the proceedings is valid, and requires extrinsic evidence to show it is invalid, or when the officers transcend their authority. *South Platte Land Company v. Buffalo County*..... 253

12. **Equalization:** POWERS OF COUNTY BOARD. The county commissioners, acting as a board of equalization, cannot raise the assessment on property without giving notice to the owner; and if they do so increase the assessment of

property without notice, they act without jurisdiction of the person or subject matter, and their proceedings are void, and of no effect. *Id*..... 253

13. **Precinct Bonds.** Under the act of February 15, 1869, enabling counties, cities, and precincts to issue bonds to aid in the construction of bridges for public use, and when such bonds are issued in conformity with the provisions of the law, they are valid, and the collection of taxes, levied on the property of the precinct to pay the interest thereon, may be legally enforced. *Id*..... 253

14. **In Cities of the First Class.** The "act relative to public schools in cities of the first class," does not confer power on the board of education to impose or levy and collect taxes for school purposes; its power is merely to report to the city council an estimate of the funds required for the ensuing fiscal year, and it is the duty of the city council to levy and collect the necessary amount of taxes for school purposes, the same as other taxes. *State, ex rel. School District, v. Omaha* 267

15. **In Cities of the Second Class:** TAX FOR STREET IMPROVEMENTS. Cities of the second class cannot levy a tax for street improvements to exceed five mills on the dollar for any one year; any tax for street improvements in excess of this amount is illegal and void. *Wheeler v. City of Plattsmouth*..... 270

16. ——: SCHOOL TAXES. Under the act of February 15, 1875, "relating to public schools in cities of the second class," the aggregate of school tax for all school purposes shall in no one year exceed one per cent upon all the taxable property of the district. *Id*..... 270

17. **Levy.** The power to levy a tax must be clearly and distinctly given by law, and if the limits fixed by the statute are transcended by levying a sum in excess of that authorized by law, such excess may affect titles acquired by a sale of the property for such illegal tax. But this will not excuse a party praying for an injunction from tendering the amount of taxes justly due from him. *B. & M. R. R. v. York County*..... 487

18. **Injunction.** If a portion of a tax is legal and a portion illegal, if the legal can be separated from the illegal, an injunction will not be granted to restrain the collection of the entire tax. *Id*..... 487

19. **School Taxes.** The act approved February 19, 1875, to amend section 31 and other sections of the school law, limits the amount of school district taxes for all purposes to twenty-five mills on the dollar on the assessed valuation of the property of a school district. *Id.* 487

20. **Land Road Tax.** Where a land road tax of $4 00 per quarter section for the year 1875 was levied before the constitution took effect—*Held*, that such taxes were valid, being expressly excepted from the provisions of the constitution. *Id.* 487

TOWN SITES.

1. **Towns on Public Lands:** DEED FOR LOTS HOW EXECUTED. Where a town is located on the public lands, the mayor of the town, or if there is no mayor, the chairman of the board of trustees, if the town is incorporated, and if the town is not incorporated the county judge of the county in which the town is situated, is required to execute and deliver to each person who may be legally entitled to the same, a deed in fee simple for the lot or lots of such land as the party demanding the same may be legally entitled to. *Burbank v. Ellis* 156

2. ———: ———. The municipality does not acquire the legal title to the site. It is held by the mayor, chairman of the board of trustees, or judge of the county, in trust for the use of the occupants of the town and those entitled to deeds. *Id.* 157

3. ———: ———. The failure of the mayor to recite in a deed the authority under which the conveyance is made does not invalidate the conveyance. *Id.* 157

4. **Lots:** HOW ADVERTISED FOR SALE. The publication of the notice provided for in section four of the act approved Nov. 4, 1858, is not complete until thirty days *after* the first day of the publication thereof. Lots which remain unconveyed, and are *vacant* and *unoccupied*, are to be advertised and sold after the expiration of six months from the time of the completion of the publication of notice. *Id.* 157

TRUSTS.

1. **Trusts.** Where a trust is created and declared, it must be capable of being executed without conflicting with the laws of the state. *McCleery v. Allen* 21

2. ———. Where a contract is made for the sale of real estate, equity considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor. *Dorsey v. Hall*..... 460

3. ———. And the trust in such cases attaches to the land and binds the heirs of the vendor. And a subsequent purchaser from either the vendor or vendee, with notice, becomes subject to the same equities as the party would be from whom he purchased. *Id*..... 460

4. ———: VENDOR AND VENDEE. Where a vendor in pursuance of the contract has conveyed certain real estate to the assignee of the vendee it is questionable if a mere judgment creditor or a purchaser, with notice, can question the validity of the trust created by the contract of sale. *Id*..... 460

UNITED STATES.

See PUBLIC LANDS. REMOVAL OF CAUSES.

USURY.

1. **Usury.** Where a party contracts to pay 18 per cent interest upon a promissory note at the time of its execution and delivery, the contract will be tainted with usury, although the rate of interest is not expressed in the note. *Keim & Co. v. Avery* 54

2. ———: SURETY MAY PLEAD. A surety may plead as a defense to a promissory note, that usurious interest was agreed upon by the parties at the time of the execution of the note. *Id*..... 54

3. **Amendment of** answer upon a defense of usury after verdict. *Id*..... 54

4. **Loans** made by building associations usurious—when. *Lincoln B. & S. Ass'n v. Graham*..... 173

VENDOR AND VENDEE.

1. **Trusts.** Where a contract is made for the sale of real estate, equity considers the vendor as a trustee of the purchaser for the estate sold, and the purchaser as a trustee of the purchase money for the vendor. *Dorsey v. Hall*..... 460

2. ———. And the trust in such cases attaches to the land and binds the heirs of the vendor. And a subsequent purchaser from either the vendor or vendee, with notice, becomes subject to the same equities as the party would be from whom he purchased. *Id.* 460

3. **Conveyance.** Where a vendor in pursuance of the contract has conveyed certain real estate to the assignee of the vendee it is questionable if a mere judgment creditor or a purchaser, with notice, can question the validity of the trust created by the contract of sale. *Id.* 460

VERDICT.

1. **Practice:** SETTING ASIDE VERDICT. Where there is sufficient testimony to warrant a jury in finding a verdict, it will not be set aside as being contrary to the evidence simply because, in the opinion of the court, a preponderance of the testimony is against it, it being exclusively the province of the jury to weigh the evidence, and judge of the credibility of the witnesses. But the rule has no application where there is an entire failure of proof. *Lea v. McLennan* 143

WARRANTY.

1. **Contract:** RESCISSION. Where a reaper is sold and warranted to do good work, and that if it fails in this respect it shall be replaced by another, or be taken back and the money or notes be returned, and it worked badly and was returned to and accepted by the agent of the manufacturers, the failure of the manufacturers, after notice of the fact, to put the machine in good working order, or to replace it with a good one, must be taken as a full acquiescence on their part in the act of their agent; and such return of the machine to and acceptance of the same by the agent, under the circumstances, constitute a rescission of the sale contract, and entitles the purchaser to a return of the money or notes given for the same. *Russell & Co. v. Wohler* 466

WITNESSES.

1. **The Cross-Examination** of a witness should be restricted to the facts and circumstances drawn out on his direct examination. If it is desired to examine the witness upon other matters, the party desiring such examination must

make the witness his own, and call him as such. *Davis v. Neligh*..... 84

2. ——. But where a witness has related a portion of what took place at a particular time or place, or a part of a particular transaction, he may be cross-examined as to matters showing the *entire transaction*. *Id*..... 84

See PRACTICE, 28. PRACTICE IN CRIMINAL CASES, 14, 15, 16.