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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1878-1879.

VOLUME VIII.

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.

JUDGES

GEORGE B. LAKE,

AMASA COBB.

ATTORNEY GENERAL.

C. J. DILWORTH.

CLERK AND REPORTER.

GUY A. BROWN.

DEPUTY.

HILAND H. WHEELER.

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.
J. B. BARNES, - - -	Sixth District.

PROSECUTING ATTORNEYS.

JAMES P. MAULE, - -	First District.
J. C. WATSON, - -	Second District.
A. N. FERGUSON, - -	Third District.
M. B. REESE, - - -	Fourth District.
T. D. SCOFIELD, - -	Fifth District.
C. C. McNISH, - - -	Sixth District.

SHORT HAND REPORTERS.

P. E. BEARDSLEY, - -	First District.
OSCAR A. MULLON, -	Second District.
JOHN T. BELL, - - -	Third District.
BIRD WAKELEY, - -	Fourth District.
F. M. HOLLOWELL, - -	Fifth District.
EUGENE MOORE, - - -	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.

Acts since 1873 are cited by a reference to the Session Laws of the years in which they were passed.

This volume contains a report of all decisions handed down prior to the July Term, 1879, not previously reported.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

OCTOBER TERM, 1878.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" GEORGE B. LAKE, } JUDGES.
" AMASA COBB, }

DAVID CONCHMAN, PLAINTIFF IN ERROR, v. SAMUEL M. WRIGHT, DEFENDANT IN ERROR.

1. **Agreements.** A verbal agreement to give and accept security upon personal property is valid between the parties, although of no validity as against creditors and subsequent purchasers in good faith.

ERROR from Washington county district court. Tried below before SAVAGE, J.

Davis & Tucker and *E. F. Smythe*, for plaintiff in error.

The cause of demurrer is for the reason that the complaint did not state facts sufficient to constitute any

cause of action against the defendant. By the demurrer the defendant admits that the facts and allegations in the petition are true. This brings us square to the argument of the proposition whether a verbal promise or pledge of indemnity, made by a person who receives benefit therefrom, can be enforced by a person who, upon the promise of such indemnity, has been induced to become responsible for the promisor, and has been compelled to pay money. We think the authorities are plain upon this point, and fully sustain us in the assertion that such promises of indemnity (and especially where the promisor has been benefited thereby) can be sustained and the promisor compelled to comply. *Garner v. Hudgins*, 46 Mo., 399. *Harrison v. Sawtel*, 10 Johns., 242. 1 Hilliard on Torts, Sec. 8. *Anthony v. Herman*, 14 Kan., 494. *Grant v. Pendery*, 15 Kan., 236. *Harrison v. Simpson*, 17 Kan., 508.

Ballard & Walton and *Carrigan & Osborn*, for defendant in error.

In an action of replevin, under the code, it must appear that the plaintiff was, at the commencement of the action, the *owner* of the property, or had such special property or interest therein—stating the facts in relation thereto—as to entitle him to the immediate possession of the same. Code, Sections 182 and 1034. The petition in this case shows that he had neither. The petition shows that he was *not* the owner. If it were contended that the transaction amounted to a sale to Conchman, it was void, as there was no delivery, and the consideration exceeded fifty dollars. General Statutes, page 393, Section 9.

It is also apparent on the face of the petition that the plaintiff had no mortgage upon the property. A verbal mortgage is unknown to our laws; and if such verbal

mortgage could be created, it would be void, unless there was a delivery and a continuous possession of the chattel in the mortgagee. It has been repeatedly decided by this court—and all recent decisions are to the same effect—that a chattel mortgage is a sale, which transfers the legal title to the mortgagee, and consequently would be void, if the consideration exceeded fifty dollars. General Statutes, page 393, Sec. 9. The authorities cited by plaintiff in error have no application to the case whatever. They all arose under that section of the statute of frauds regulating the liability of a party on his verbal promise to answer for the debt or default of another, and affirm what has been accepted as the law, at least since the case of *Leonard v. Vredenburg*, reported in 8th Johnson, Ch. Rep. page 29, and are to the effect that if the promise is original, and a consideration moves to the promisor, he is bound, because, while paying the debt of another, he is at the same time subserving some interest of his own. *Leonard v. Vredenburg*, 8 John., Ch. 29. *Mallory v. Gillett*, 21 N. Y., 412.

MAXWELL, CH. J.

This is an action of replevin. The plaintiff filed a motion in the court below to strike out certain parts of the petition, which was sustained, to which the plaintiff excepted. The defendant then filed a general demurrer to the petition, which was sustained by the court, to which the plaintiff excepted. The court then proceeded to assess the defendant's damages, and rendered judgment against the plaintiff for a return of the property, or in case of failure to return the same, a judgment for the sum of $101 and costs. The cause is brought into this court by petition in error.

The petition alleges that the plaintiff is entitled to

the immediate possession of certain personal property on which he claims to have a lien, by virtue of a verbal agreement with the defendant that the property should be held by the plaintiff as security for the payment of a certain promissory note, executed by the defendant with the plaintiff as security, which note the plaintiff was compelled to pay. The petition also alleges that the defendant wrongfully detains the property in question, and "that said property was not taken in execution on any order or judgment against plaintiff, or for the payment of any tax, fine, or assessment assessed against him, or by virtue of an order of delivery issued in replevin under and by the laws providing for replevin, of the state of Nebraska, or by any mesne or final process against the plaintiff."

The petition states sufficient to entitle the plaintiff to recover.

As between the parties to the transaction, a chattel mortgage need not be in writing. A verbal agreement to give and accept security is valid between the parties, although of no validity as against creditors and *bona fide* purchasers. It follows that the court erred in sustaining the demurrer.

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

REVERSED AND REMANDED.

M. H. SESSIONS AND ELIJAH J. CURSON, PLAINTIFFS IN ERROR, V. JOHN IRWIN AND JANE Y. IRWIN, DEFENDANTS IN ERROR.

1. **Judicial Sale:** APPRAISEMENT OF PROPERTY. Appraisers selected by a sheriff to appraise real estate levied upon by him, act judicially in making the appraisement. And it is their duty to ascertain the actual amount due upon liens and incumbrances upon such real estate.

2. ———: ———. And they must *specifically enumerate* the liens and incumbrances which they find subsisting against such real estate.

3. ———: TAX DEEDS. Tax deeds are not liens or incumbrances within meaning of the statute. A party claiming under such deeds holds adversely, and must rely upon his title.

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

J. R. Webster and *L. C. Burr*, for plaintiff in error.

No exception was taken at the time the order of confirmation was made, deed was executed same day and filed by the purchaser, Curson, for record. Curson had no notice of the motion filed by defendants to open the confirmation. This was error. *Williams v. Cummins*, 4 J. J. Marsh, 637. *Eckstine v. Calderwood*, 34 Cal., 658. *Lysen v. Bremer*, 13 Iowa, 461. *Osborn v. Cloud*, 21 Iowa, 238. *Cline v. Green*, 1 Blackf., 53. *Sears v.*

NOTE.—Under the same appraisement law it is not error for the sheriff to neglect to take steps to ascertain what liens, prior to the order of the sale, there were upon the land, it not being shown that any such liens in fact existed. *La Flume v. Jones*, 5 Neb., 256. Where the oath of the appraisers was to appraise the property, instead of the "interest" of the judgment debtor therein, it is not an error for which the sale should be set aside. *Id.*—REP.

Low, 2 Gil., Ill., 281. *Jewett v. Marshall*, 3 A. K. Marsh, 153. *Lime v. Hamilton*, 34 N. J. L., 305. *Good v. Combs*, 13 Texas, 34. The court has no power subsequent to confirmation and issue of a deed, upon motion to set the sale aside *on any ground, fraud or otherwise*, and divest the purchaser of his title. *State Bank v. Noland*, 8 English's Ark., 299. Nor can the court after confirmation, and before deed, set the sale aside upon motion, except for misconduct of the purchaser at the sale, and in this case no misconduct of the purchaser is pretended. *Coffin v. Corneth*, 1 Baldw., 194. The proper remedy after confirmation can only be by bill in chancery. *McMinn v. Phipp*, 3 Sneed, 196. *Gridley v. Duncan*, 3 S. & M., 456. *Harrall v. Word*, 54 Ga., 650. Or, in a proper case, the application should be by appellate proceedings if confirmation was erroneous. *Dixley v. Lansing*, 5 Am. L. Reg. N. S., p. 127. In no case after confirmation is motion the proper remedy. *Reeves v. Skennett*, 13 O. St., 574. *Pierce v. Kneeland*, 9 Wis., 23.

The purchaser's right to a deed is absolute upon an order of confirmation; "up to that time" objection may be made, or cause shown, by the other parties interested, *but not after*, except by error or appellate proceedings. *Phillips v Dawley*, 1 Neb., 320, 321.

No appearance for defendants in error.

MAXWELL, CH. J.

In May, 1877, Milan H. Sessions recovered a judgment against the defendants for the sum of $350, and costs taxed at $41.38. An execution was issued on the judgment in June of that year, which was levied upon the north-east quarter of the south-east quarter, of section twenty-four, in township ten north, of range six east of the sixth principal meridian, in Lancaster

county. The interest of the defendants in said real estate was appraised at the sum of the ten dollars, and was purchased by Curson for the sum of $30. The sale was reported to the court, and on the second day of October, 1877, an order made to show cause by the ninth day of that month why the sale should not be confirmed. On the tenth day of October, 1877, no objection on the part of the defendants having been made to the confirmation of the sale, it was confirmed, and a deed for the premises executed by the sheriff to the purchaser. On the next day the defendants filed a motion to set the confirmation and sale aside. The motion appears to have been sustained, but no formal order was entered on the records of the court until March, 1878, when an order was entered on the records vacating the order of confirmation and setting the sale aside, to which the plaintiff excepted, and now brings the cause into this court by petition in error.

In appraising the property, the appraisers fixed the value at $2,200, and found as prior incumbrances as follows:

Taxes as per county treasurer's certificate.....$.....
Tax deeds as per county clerk's certificate..... .....
Mechanic's lien as per county clerk's certificate..... .....
Prior judgments as per district court clerk's certificate..... .....

Total incumbrances.....$.....

The interest of the defendants was valued at ten dollars.

The certificate of the county clerk shows a tax deed to N. C. Brock for said premises dated June 12, 1877, also tax deed to Brock dated December 15, 1871.

It also appears from a certificate of the county treasurer that certain taxes were due upon the premises in question.

The act passed in 1875 "for the more equitable appraisement of real property under judicial sale," pro-

vides: "That for the purpose of appraisement the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied on the amount of all liens and incumbrances for taxes or otherwise, prior to the lien of the judgment under which the execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the persons or corporations against whom or which the execution is levied." Laws, 1875, p. 60.

Section 3 of the act provides that: "It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, upon application of the sheriff in writing, holding such execution, to certify to said sheriff under their respective hands and official seals, the amount and character of all liens existing against the lands and tenements levied upon, and which are prior to the lien of such levy, as the said liens appear of record in their respective offices.

An "incumbrance" is defined to be "any right to, or interest in, land which may subsist in third persons, to the diminution in value of the estate of the tenant, but consistent with the passing of the fee." 2 Greenleaf Ev., § 242. 1 Bouvier Law Dict., 596. *Scott v. Twiss*, 4 Neb., 133.

A "lien" is defined to be "a hold or claim which one person has upon the property of another as a security for some debt or charge. 2 Bouvier's Law Dict., 47.

The object of an appraisement law is to prevent a sale of the debtor's real property at a sum altogether disproportionate to its real value. Contracts are made with reference to this provision of the statute, and the

creditor is aware at the time an obligation is incurred, that if he is compelled to invoke the aid of the court to enforce his demand against the debtor, that the interest of the debtor in the real estate levied upon must bring at least two-thirds of its appraised value. And the inconvenience and delay to which the creditor may be subjected in consequence of such appraisement are but slight compared with the injuries which might be sustained by the debtor in the sacrifice of his property in the absence of an appraisement law. The appraisers are to appraise the interest of the debtor at "its real value in money." How is this to be done? In making the appraisement, the appraisers act judicially. The certificates furnished by the county clerk, clerk of the district court, and the county treasurer are not conclusive evidence of the facts which they purport to establish. A mortgage upon the lands in question may appear unsatisfied upon the record, yet the entire amount due thereon may have been paid. So in regard to other liens and incumbrances. It is the duty of the appraisers to endeavor to ascertain the *actual amount due* upon such liens and incumbrances, and they must *specifically enumerate* the liens and incumbrances which they find subsisting.

Tax deeds are not liens or incumbrances within the meaning of the statute. A party claiming title under a tax deed holds adversely, and for the time being, at least, must rely upon his title.

The statute provides that in cases where there has been a valid assessment, if the title fails the holder may have a lien upon the real estate, but this is a mere possibility, and cannot be considered by the appraisers, as the validity of a tax deed must be determined by a court and not by appraisers.

In the case at bar the property was appraised at $2,000. No liens or incumbrances are found by the ap-

praisers to exist against the land. The property therefore should have sold for at least two-thirds of its appraised value. As it failed to sell for that sum the court did its duty by setting the sale and confirmation aside. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

A. L. HEARD, ET AL., PLAINTIFFS IN ERROR, v. DUBUQUE COUNTY BANK, DEFENDANT IN ERROR.

1. **Promissory Note:** ATTORNEY'S FEE. A promissory note, in form otherwise negotiable, is not rendered non-negotiable by reason of containing a clause in these words, "and if suit is brought to enforce collection I will pay reasonable attorney's fees."

2. ———: ———. Nor is such note rendered non-negotiable by reason of its containing a recital in these words, "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note."

3. ———: INDORSEMENT. A promissory note had the following written on the back of it: "For value received I hereby guarantee payment of the within note and waive presentation, protest, and notice," signed by the payee. *Held*, that it operated as a transfer of the note, or as an endorsement with an enlarged liability.

4. **Errors not assigned in motion for new trial, waived.** Objection was made that the court erred in rejecting certain proper testimony offered on the trial by the plaintiffs in error, but this objection was not made in the motion for a new trial. *Held*, that the errors, if any, were thereby waived.

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

Saxon & Snell, for plaintiffs in error, cited *Austin v. Burns*, 16 Barb., 643. Edwards on Bills, 136. *Samstag v. Conley*, 64 Mo., 476. *Bank of Trenton v. Gay*, 63 Mo., 33. 1 Parsons on Notes and Bills, 37. 2 Id., 117. *Nicholson v. Bank*, 3 S. L. R., 953. *Woods v. North*, 84 Penn. State, 407.

Slocumb & Hambel, for defendant in error, cited *Sperry v. Horr*, 32 Iowa, 184. *Stoneman v. Pyle*, 35 Ind., 103. *Gaar v. Louisville Banking Company*, 11 Bush., 180. *Dietrich v. Baylir*, 23 La. Ann., 767. *Zimmerman v. Anderson*, 67 Penn. State, 421. *Robinson v. Lair*, 31 Iowa, 9. *Arnold v. Rock River Co.*, 5 Duer, 207. *Dinsmore v. Duncan*, 57 N. Y., 573. *White v. Smith*, 77 Ill., 351. *Kirk v. Dodge County Mutual Insurance Co.*, 39 Wis., 138. *Collins v. Bradbury*, 64 Me., 37. *Daugherty v. Perry*, 38 Ind., 15.

COBB, J.

Suit was brought in the court below by the defendant in error against the plaintiff in error on a promissory note in these words:

"$60. Beatrice, Neb., July 19, 1876.

"For value received, on or before the first day of January, 1878, I, the subscriber, of P. O. Fairbury, county of Jefferson, state of Nebraska, severally promise to pay to the order of V. J. Williams & Co. Sixty dollars at the office of Bank in Fairbury, with interest at 10 per cent per annum from date until paid, and if suit is brought to enforce collection I will pay reasonable attorneys' fees. * * * * The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, owner-

ship, or possession does not pass from the said McDonald & Co., until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure even before the maturity of the note.

"A. L. HEARD.
"S. H. HEARD.
"M. E. HEARD."

The note was indorsed as follows:

"For value received, I hereby guarantee payment of the within note and waive presentation, protest, and notice. V. J. WILLIAMS & Co."

A trial was had to a jury and judgment for the plaintiff. To reverse which the cause is now brought to this court on error.

Plaintiffs in error present three points:

1. That the note sued on is rendered non-negotiable by reason of its containing a clause providing for the payment of attorney fees in case of suit being brought to enforce collection.

2. That the character of said note as a negotiable instrument is destroyed by reason of its containing a recital of the conditions upon which a certain Ohio reaper and mower was sold and purchased, and providing that the title, ownership, or possession thereof does not pass from McDonald & Co. until said note is paid in full, etc., said McDonald & Co. not being parties to said note.

3. That the said note never was in fact negotiated. The guaranty written upon the back thereof not amounting to an indorsement so as to transfer the title.

On the first point, while there is some conflict of authorities, yet there is a clear preponderance of authority, as well as of reason, against this objection to the

note. It is not objected that this instrument does not contain all of the requisites of a negotiable note, but that it contains too much.

We do not think that the amount of money represented by a note or bill is made any the less certain by reason of its containing a stipulation that if it is not paid at maturity the maker will pay a part of the expenses of its collection. Such a stipulation adds to the value of paper, has a tendency to lower the rate of discount on it, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit. The stipulation to pay attorney fees is harmless, to say the least, while the note is undishonored and entitled to pass as commercial paper. It is only when it has become dishonored by its maker, and ceases to have any standing in the commercial world, that this provision becomes operative.

Looking to the spirit, as well as the letter, of a time-honored definition, certainly "a courier without luggage" is none the less efficient for all purposes by reason of having something about him with which to pay his reckoning.

Under the provisions of our statute, when attorney fees are allowed by the court they do not become a part of the judgment proper, but a part of the costs, and it is expressly provided that such allowance shall be made in all cases wherein the mortgage or other written instrument, upon which the action is brought, shall in express terms provide for the allowance of an attorney's fee; and it must have been the intention of the Legislature that such written instrument, if containing words of negotiability, should still retain that character, notwithstanding the clause allowing an attorney's fee. General Statutes, 98. *Seaton v. Scovill*, 18 Kansas, 433. *Sperry v. Horr*, 32 Iowa, 184. *Hubbard v. Harrison*, 38

Ind., 323. *Stoneman v. Pyle*, 35 Ind., 103. *Johnson v. Crossland*, 34 Ind., 334. *Dietrich v. Bayhi*, 23 La. An., 767. *Gaar v. Louisville B. Co.*, 11 Bush, 180. Contra —*Bank of Trenton v. Gay*, 63 Mo., 33.

On the second point, none of the numerous authorities cited seem to be in point. The law seems to be well settled that although it may appear on the face of the note that its payment is secured by collaterals in personal property or mortgage of real property, yet if otherwise in proper form it is nevertheless negotiable. *Arnold v. R. R. V. U. R. R. Co. et al.*, 5 Duer., 207, and cases there cited. *Collins v. Bradbury*, 64 Maine, 37, and cases there cited.

But it is urged that the case at bar is distinguishable from all these cases in this, that the sole consideration for the giving of the note by the plaintiffs in error was the sale of a certain Ohio reaper and mower, and that when it appears on the face of the note that neither title, ownership, or possession of said Ohio reaper and mower passed from the said McDonald & Co. until said note and interest should be paid in full, that the same was notice to defendant in error and all the world that the said note was without consideration, etc. Were the premises true the conclusion would be pressing, but an examination of the note will fail to disclose that the sale of an Ohio reaper and mower was the sole or any part of the consideration for the giving of the note. The most that can be claimed is that these words in the note were enough to put a person about to receive the note, in the course of business, upon his enquiry, and following the New York decisions, we do not deem it sufficient evidence of warranty of the quality of the machine by the vendor to the vendee.

In *Magee v. Badger*, 34 N. Y., 247, Porter, J., says: "He, the purchaser, is not bound at his peril to be upon

the alert for circumstances which might probably excite the suspicions of wary vigilance. He does not owe the party, who puts negotiable paper afloat, the duty of active inquiry to avert the imputation of bad faith." *White v. Vermont & M. R. R. Co.*, 21 Howard, 575. *Gelpcke v. City of Dubuque*, 1 Wall., 175, and cases there cited. *Collins v. Bradbury*, 64 Maine, 37. *Mabie v. Johnson*, 15 N. Y. Supreme Ct. Rpts., 309.

On the third point, we find some conflict of authorities, but we adopt the law and the language of Day, C. J., in *Robinson v. Lain*, 31 Iowa, 9: "We confess ourselves unable to give effect to the contract of guaranty of payment and waiver of demand, and notice, if the payees still intend to retain the title. The writing simply constitutes an indorsement with an enlarged liability." See *Crosby v. Roub*, 16 Wis., 616. *Hance v. Miller*, 21 Ills., 636. *Crenshaw v. Jackson*, 6 Georgia, 509. *Myrick v. Hasey*, 27 Maine, 9. *Partridge v. Davis*, 20 Vt., 499. Contra—*Tuttle v. Bartholomew*, 12 Met., 452. *Taylor v. Binney*, 7 Mass., 479. *Blakely v. Grant*, 6 Mass., 386. *True v. Fuller*, 21 Pick., 140. *Upham v. Prince*, 12 Mass., 14.

On the trial in the court below the plaintiffs in error called a witness to prove the consideration for which the note sued on was given, also to prove certain alleged representations of warranty made by V. J. Williams & Co. concerning a certain Ohio reaper and mower, at the time of the purchase of the same by the plaintiffs in error, which testimony was ruled out by the court, to which rulings the plaintiffs in error excepted, but failed to embody such exceptions in their motion for a new trial.

This court has repeatedly held that all alleged errors not embraced in a motion for a new trial would be considered waived. *Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 404. *Mills v. Miller*, 2 Id., 317. *Wells, Fargo*

& Co. v. Preston, 3 Id., 444. *Cropsey v. Wiggenhorn*, Id., 108.

The judgment must be affirmed.

JUDGMENT AFFIRMED.

G. B. SCOFIELD, ET AL., PLAINTIFFS IN ERROR, V. THE STATE NATIONAL BANK OF LINCOLN, NEBRASKA, DEFENDANT IN ERROR.

1. **Practice:** ERROR: FINAL ORDER. An order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action.

ERROR from Otoe county district court. Motion to dismiss cause.

E. F. Warren, for the motion.

G. B. Scofield, contra.

LAKE, J.

This is a motion filed by the defendant in error to dismiss the case on the ground that the order complained of is not reviewable in this court until after the final disposition of the case in which it was made by the district court.

The order in question was made by the judge of the court below in vacation, dissolving a temporary injunction allowed by the county judge in an action brought by the plaintiff in error to set aside a certain decree of foreclosure, and to perpetually enjoin the sale of the mortgaged premises thereunder. Without awaiting

the final judgment of the court in the action, the plaintiff now seeks, by proceedings in error, to have this order of the district judge reversed.

Section 581 of the code of civil procedure declares what kinds of orders are "final," and therefore subject to review by petition in error. It declares that: "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title." Gen. Stat., 628.

Now it is very clear that an order dissolving a temporary injunction does not fall within either of the three classes of orders here mentioned. It is not within the *first*, for although it may have affected "a substantial right" of the plaintiff, it did not in effect determine the action and prevent a judgment. The case is still pending and undetermined in the district court, and it is possible for the plaintiff to obtain by the final judgment all the relief which he asks or to which he may be entitled. Nor is it within either the *second* or the *third*, for it was neither "made in a special proceeding," nor "upon a summary application after judgment."

This question was under consideration in this court in the case of *Smith v. Sahler*, 1 Neb., 310, where it is held that an order of this description is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action. See also *Mills v. Miller*, 2 Neb., 299, and *Miller v. The B. & M. R. R. Co.*, 7 Neb. 227.

MOTION SUSTAINED.

JULIUS NORMAND ET. AL., APPELLANTS, v. THE BOARD OF COUNTY COMMISSIONERS OF OTOE COUNTY, APPELLEES.

1. **Injunction.** Where public officers are proceeding under a claim or color of right to impair either private or public rights, an injunction may be granted to restrain them.

2. ———: WHO MAY MAINTAIN. Tax payers of the proper county may maintain an action for themselves and all other tax payers of the county; to restrain the county commissioners from an illegal exercise of their powers to the injury of such tax payers.

3. ———: RELIEF GRANTED. To entitle a party to such relief, it must appear that his rights will be greatly or irreparably affected by the acts sought to be restrained, and the right must be clear and the remedy at law inadequate.

APPEAL from Otoe county. Tried below before POUND, J. The facts appear in the opinion.

S. H. Calhoun and *Covell & Ransom*, for appellant, cited *Minturn v. Larue*, 23 How., 436. *Bradford v. The State*, 7 Neb., 109. *Inhabitants of Greenville v. Seymour*, 22 New Jersey Equity, 458. *Lawson v. Schnellen*, 33 Wis., 288.

Mason & Whedon, for appellees, cited *Camp v. Matheson*, 30 Georgia, 170. *Whitlesey v. Hartford*, 23 Conn., 421. *Finley v. Thayer*, 42 Ill., 350. *Laughlin v. The President*, 6 Ind., 223. *Thibodeaux v. Wright*, 3 La. An., 130. *Arnold v. Klepper*, 24 Mo., 273. *Rogers v. Michigan R. R. Co.*, 28 Barb., 539. *Winnipisiogee Lake Co. v. Worster*, 29 N. H., 433.

MAXWELL, CH. J.

The plaintiffs complain of the said defendants, because "on or about the 9th day of February, 1877, at Nebraska City, the county seat of said Otoe County, in

the State of Nebraska, the defendants, conspiring and confederating together to wrong, harass, annoy, and vex the said plaintiffs, did enter into an agreement, whereby the said board of county commissioners of Otoe county were to begin in the district court of the second judicial district of the state of Nebraska, sitting in and for Otoe county, a civil suit against these plaintiffs and certain others, pretending to claim from said plaintiffs the sum of three thousand nine hundred and sixty-five dollars and thirty-five cents, together with interest thereon from the sixth day of April, A.D. 1874, at the rate of ten per cent per annum; and the said O. P. Mason, who then was and still is an attorney at law, regularly admitted and practicing in said court, was to act as the attorney for the said board of county commissioners, in and about the conducting and prosecuting the said suit, and the collection of the judgment, if any was obtained, against the plantiffs; that the said board of county commissioners of Otoe county were to pay all the costs of said suit, and were to pay the said Mason twenty per centum of all the moneys he should collect from these plaintiffs, which money would include the costs advanced.

That the said board of commissioners and the said Mason well knew at the time they made said agreement that their pretended claims had been examined into by the board of county commissioners of said Otoe county, and had been deemed worthless and invalid as against these plaintiffs, that said pretended claim was founded on the act of James Thorn in his capacity as treasurer of said county of Otoe in depositing in the banking house of J. A. Ware, then a banker doing business in Nebraska City in said Otoe county, certain funds which were in his custody as such treasurer, and which said bank subsequently failed, and paid to its creditors only about thirty-seven per centum of

their debts, such failure having occurred after the term of office of the said James Thorn as such treasurer had expired, and after his successor in office had taken possession thereof and had entered upon the discharge of his duties therein, and that the board of county commissioners of said Otoe county had been paid by the assignees of said bank the dividend realized from the assets thereof, and that the said James Thorn was not liable to said board of county commissioners in any sum whatever, nor were any of these plaintiffs, all of whom were bondsmen of the said James Thorn as such treasurer, liable to the said board of county commissioners of said Otoe county. Plantiffs further represent that they are and each of them is a resident in and tax payer of said Otoe county, that the price agreed upon by and between said defendants to be paid said Mason for his services as attorney in said cause is extravagant and exorbitant and is a waste of public money, and that said contract and agreement made and entered into by and between the said defendants in pursuance of and in accordance with their said illegal and void contract and agreement, and of said conspiracy to harass, vex, and annoy these plaintiffs, did on the 17th day of April, 1877, commence in the district court of the second judicial district of the State of Nebraska, sitting in and for Otoe county, the civil suit in which the said board of county commissioners of Otoe county are plaintiffs, and these plaintiffs, together with James W. Conger, J. A. Ware, John H. Croxton, and J. B. Bennett, all of whom, together with these plaintiffs, were defendants, to recover the said sum of money so as aforesaid pretended to be due from the said defendants in said action, and are still prosecuting said suit under and in accordance with the said illegal contract.

Plaintiffs further represent that if the said suit is

allowed to progress under the said illegal contract they will be put to great trouble and expense and annoyance in and about the defense thereof, and that said suit will result in an unlawful waste of the public moneys of said Otoe county, whether the same shall be finally decided in favor of the plaintiffs or the defendants therein, wherefore plaintiffs pray for an injunction restraining said defendants from proceeding in said cause, and for a decree declaring said contract null and void, etc.

The defendant demurred to the petition upon the ground that the facts stated therein did not constitute a cause of action. The demurrer was sustained and the cause dismissed. It is brought into this court by appeal.

The rule is well settled, that where public officers are proceeding under a claim and color of right to impair either public or private rights, or where their proceedings will result in great injury to private citizens without any corresponding advantage to the public, or to prevent a multiplicity of suits, an injunction will be granted. High on Injunctions, § 796. *Green v. Green* 34 Ill., 320. *Mohawk, etc., v. Artcher*, 6 Paige, 83. *Johnson v. Hahn*, 4 Neb., 149.

That tax payers of the proper county may maintain an action for themselves and all other tax payers of the county, to restrain the county commissioners from an illegal exercise of their powers to the injury of such tax payers, there is no question; but to entitle a party to such relief, it should appear that his rights will be greatly or irreparably affected by the acts sought to be prevented. *City of New York v. Mapes*, 6 Johns. Chy., 46. And an injunction will only be granted where the right is clear and the remedy at law inadequate. *Coffee v. Brunton*, 5 McLean, 257. *Smith v. Cummins*, 1 Fish, 152.

The plaintiffs in this action are defendants in an ac-

tion on the official bond of James Thorn, a former treasurer of Otoe county, this suit being brought to enjoin the prosecution of that action, upon the ground that the price agreed to be paid Mason is extravagrant, and exorbitant, and a waste of public money, and that the contract with him is illegal and void. The injuries which the plaintiffs allege they will sustain as *tax payers*, by reason of the prosecution of the action, are entirely insufficient to authorize the granting of an injunction. To authorize the interference of the court, the injury must be great or irreparable, and as the petition entirely fails to show such threatened injury, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. JOHN H. RUSTMEYER ET AL., V. EUGENE MOORE.

Court Reporters: FEES. A person convicted of felony can require from the court reporter a copy of the testimony taken at the trial only at his own expense. And the reporter, if he so choose, may require his fees therefor to be paid in advance. The fact of the prisoner being without the means of making payment does not change the rule.

ORIGINAL application for mandamus.

W. A. Marlow, for the relator.

No appearance on the part of the respondent.

LAKE, J.

This is an application for a writ of mandamus to compel the defendant, who is the official stenographic

reporter for the sixth judicial district, to furnish from his short-hand report a copy of the testimony taken on the trial, in which the relators were convicted of murder in the second degree and sentenced to the penitentiary for the term of ten years, to the end that they may thus be enabled to prepare a bill of exceptions, and prosecute proceedings in this court.

The information, after setting forth the facts of the indictment, trial, conviction, and sentence of the relators, alleges in substance that they have requested of the defendant a long hand copy of said testimony, which he refuses to furnish, except upon the condition of his legal fees therefor first being either paid or secured to him. They further allege that they are wholly without the means themselves of complying with this demand.

It seems to be conceded by counsel for the relators that by the act of February 19th, 1877, providing for stenographic reporters for the district courts, and fixing their compensation, the condition imposed by the defendant is justified. And that it is so, there can be no doubt. Section 5 of this act declares that: "It shall be the duty of such reporter to furnish, on application of the district attorney or any party to a suit in which a stenographic record of proceedings has been made, a long hand copy of the proceedings so recorded, or any part thereof, for which he shall be entitled to receive, in addition to his salary, a fee of ten cents per hundred words, to be paid by the party requesting the same, except where such copy is required by the district attorney on the part of the state, in which case the reporter shall be paid by the county upon the certificate of the judge presiding." Laws 1877, p. 159.

It is sought, however, to avoid the force of that clause of this section which requires payment of the fees by the party requiring such copy, on the sole ground that,

being without the pecuniary means of making payment, they are, by this exaction, practically deprived of all benefits intended to be secured to them by Section 23, Art. 1, of the constitution of this state, which declares that: "The writ of error shall be a writ of right in all cases of felony." Wherefore it is contended that a transcript of the testimony should be furnished to them at the public expense.

But this position cannot be upheld. There is no conflict between this statute and the constitution in this particular, for while by the latter, one convicted of a felony is entitled to a writ of error as a matter of right, there is nothing in that instrument by which the duty of aiding him, either with money or counsel, in making application for it, is imposed upon the public.

It follows, therefore, that while a person convicted of a felony may require from the court reporter a long hand copy of the testimony taken at the trial, he can do so only at his own expense. And the reporter, if he so choose, may require his fees therefor to be paid in advance, and the fact of the prisoner being without the means of making payment will not change this rule.

WRIT DENIED.

BENJAMIN C. KEMP, PLAINTIFF IN ERROR, V. HENRY KLAUS, DEFENDANT IN ERROR.

1. **Promissory Note:** ATTORNEY FEE CLAUSE. A note in form negotiable is not rendered non-negotiable by reason of containing a stipulation providing for the payment of an attorney's fee in case of judgment thereon.

2. ———: ———. The following words in such note to-wit: "and also authorize any attorney of record to go into court and confess judgment," was properly rejected as surplusage.

ERROR from Lancaster county district court. Tried below before POUND, J.

L. C. Burr, for plaintiff in error, cited same cases as those by plaintiff in *Heard v. Dubuque Bank*, ante p. 10, and also 1 Parsons Notes and Bills, 303. *Fralick v. Norton*, 2 Mich., 130. *Ayrey v. Fearnside*, 4 M. & W., 169. *Coolidge v. Ruggels*, 15 Mass., 387.

Our statute says all promissory notes drawn for any sum or sums of money certain, shall be negotiable. We hold that the words "and an attorney's fee to be fixed by the court," is not for a sum, or sums certain. Gen. Stat., 426.

The warrant or power of attorney to confess judgment in this instrument destroys its negotiability. First American Leading Cases, 363. *Overton v. Tyler*, 3 Penn. State, 346. *Sweeny v. Thickstun*, 77 Id., 131.

Kennard & Scott, for defendant in error.

A note containing the following clause: "And we further agree if the above note is not paid at maturity, if suit is brought, to pay $10.00 in addition as an attorney's fee," was held negotiable, and its amount absolutely certain. *Houghton v. Francis*, 29 Ill., 244. *Nickerson v. Sheldon*, 33 Ill., 372. *Dietrich v. L. Bayhi*, 23 La., 767, and *Seaton v. Scoville*, 18 Kan., 433. With respect to the power to confess judgment and the waiver of appraisement laws, or homestead exemptions, etc., as well as the stipulation to pay collection or attorney's fees, the general rule, that the note must purport to be *only for the payment of money*, is subject to the qualification, that if the superadded agreement do not impair the certainty of the promise to pay the certain amount named, but only facilitates the means of collection, it does not in any degree destroy the negotia-

bility of the instrument. 1 Daniels on Negotiable Instruments, Sec. 59. 2 Par. N. and B., 147. *Zimmerman v. Anderson*, 67 Penn. St., 421. *Osborne v. Hawley*, 19 Ohio, 130. *Marsden v. Soper*, 11 O. S., 503. *Cushman v. Welsh*, 19 O. S., 536.

COBB, J.

This action was originally brought in the county court of Lancaster county on an instrument of which the following is a copy:

"Bennett, Lancaster county, Nebraska,
"June 21st, 1877.

"$150.00.

"On or before six months after date, we promise to pay to the order of James Kearns or bearer One Hundred and fifty dollars at the First National Bank, Lincoln, Neb., value received with interest at the rate of ten per cent per year from date and an attorney's fee to be fixed by the court if judgment is recovered on this note.

"This note is given with the express understanding and agreement that all benefits to be derived under and by virtue of any homestead exemption and stay of execution laws now in force or hereafter to be passed, are hereby expressly waived, that being the condition on which the debt hereby secured is contracted and also authorize any attorney of record to go into court and confess judgment.

"(Signed) B. C. Kemp.
"(Witness) "B. M. Kemp.
"C. B. Todd."

No payment on the back thereof, and the following is all the endorsements: "James Kearns."

Henry Klaus filed the ordinary petition on a negotiable promissory note. B. M. Kemp answered that she

was the wife of B. C. Kemp, etc. The county court discharged her from any liability on said instrument. Benjamin C. Kemp set up fraud, and a set-off thereto, and the county court gave judgment in favor of Henry Klaus in the sum of $100.00 and interest $6.53—$106.53, at the same time finding the facts in the case, from which judgment the said Klaus took the case by petition in error to the district court of Lancaster county, Benjamin C. Kemp filing his cross petition in error, and the court there found the law directly opposite the conclusions of law by county court, and gave judgment on March 13, 1878, for $160.62, $16.00 attorney's fees and $26.86 costs, from which judgment of the district court Benjamin C. Kemp brings the case here.

Two points are made by plaintiff's counsel against the negotiability of the note.

1. That the same was not negotiable for the reason that it contained a clause providing for the payment of an attorney's fee in case of a judgment being recovered on the note. And

2. That the said note is rendered non-negotiable by the clause therein which is in these words: "and also authorize any attorney of record to go into court and confess judgment."

This court has at the present term, in the case of *Heard et al. v. Dubuque County Bank*, held that the negotiability of a note was not destroyed by reason of its containing a clause providing for the payment of an attorney's fee in case of suit being brought thereon.

As to the second point, without examining the question as to whether a cognovit in due form contained in the body of a note otherwise negotiable would have the effect to destroy its negotiability, we are of the opinion that the words quoted in the note in the case at bar confer no authority to the holder to enter up judgment thereon without suit and notice, and they therefore

might properly have been, and probably were, considered by the district court as mere surplusage.

It follows therefore that the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. LOUIS HELMER, v. JAMES MCCONNEL.

1. **License Moneys arising in Cities:** TO WHAT FUND THEY BELONG: CONSTITUTIONAL LAW. Under the law as it stood prior to the adoption of our present constitution, all moneys arising from licenses granted by cities to sell intoxicating liquors belonged to the common school fund of the proper county. But under the operation of Sec. 5, Art. VIII, of that instrument, this rule is changed, and such moneys now belong exclusively to the common school fund of the cities, respectively, in which they are collected.
2. **Construction of Constitution.** In construing a section of the constitution, effect must, if possible, be given to every portion of it.

ORIGINAL application for mandamus.

Galey & Abbott and *Kennard & Scott*, for the relator.

The language of the constitution is so explicit we can hardly conceive how there could be any misconception or disagreement as to its application, that all moneys arising under *a general* LAW, whether derived from fine, penalty, or license, shall go to the county fund, and that *all moneys* arising under and by virtue of any city *ordinance passed within the scope of the city's power*, and not *repugnant to any general law*, shall go into the common school fund of such city.

We think there is no other construction safe, and no

other conclusion can be reached, when we take the natural signification of the language, in the grammatical arrangement in which the framers of the constitution have placed it. With this construction there is no absurdity, and no contradiction between the different parts of the section. The plain meaning on the face of the instrument is the one alone which we are at liberty to say was intended to be conveyed, and in such case there is no room for construction, and neither legislation nor courts have a right to add to or take away from that meaning. *Newell v. The People*, 7 N. Y., 97. *Denn v. Reid*, 10 Peters, 524.

It seems to us the only question remaining to be considered is, was this money collected under and by virtue of a general state law, or was it collected under and by virtue of a proper city ordinance? It is true the city authorities have attempted to meet this view of the case by passing what purports to be a city ordinance to regulate and provide for the licensing of the sale of malt, spirituous, and vinous liquors, which, being in conflict with the statute and the constitution, is unquestionably null and void; and this money has been collected, not by virtue of this or any other ordinance, but by virtue of the general statute; is held by the respondent city treasurer in trust for the county treasurer, and should have been paid over on demand for "the use of the common school fund" of the county. *State, ex rel Hahn, v. Hardy*, 6 Neb., 377.

T. M. Marquett, for the respondent.

1. By our laws the granting of a license to sell malt, spirituous, or vinous liquors is made a "police regulation" of the city of Lincoln; this is admitted by the relator.

2. Section 5, of Art. VIII, of the constitution puts a

limitation upon the legislature as to where the money arising from any fine, penalty, and license money, by virtue of the police regulation of the state, shall go.

3. Whenever the police regulation of the state in reference to a fine, penalty, or license money, is entrusted to a city for it to regulate, the money arising therefrom goes into the city treasury for the benefit of the city schools. As a corollary to this proposition it follows, that inasmuch as the police regulation of the dramshop is entrusted to the city—all of its direct burdens being placed upon the city—the money arising from said license should belong to the city.

4. And this comports with the genius of our institutions: "That whenever any matter as a police regulation is entrusted to any subdivision of the state, that subdivision assumes the burdens of, and is entitled to the benefits that arise from, such regulations."

5. The meaning of the words "all such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivision where the same accrues," is that a fine imposed and collected by a city officer accrues in the subdivision of the state known as the city. License money determined and imposed by an ordinance of the city, and regulated and collected by city authorities, accrues in the city. You can give no other meaning to the words.

6. The constitutional provision found in Sec. 5, of Art. VIII, can have no reference to a license *tax*, as the money for a license tax, or any other tax, imposed by the city, for the reason that a tax imposed by the city could not go into the county treasury.

7. Section 5, of Art. VIII, is a nullity, or it has reference to the license money proper as we are now considering.

LAKE, J.

This is an application for an alternative writ of mandamus to compel the defendant, who is the treasurer of the city of Lincoln, to pay over to the relator, who is the treasurer of Lancaster county, certain moneys now in his hands, and which were received by him on account of certain licenses granted by the corporate authorities of said city to certain persons to sell malt, spirituous, and vinous liquors. It is claimed by the relator that the money in question belongs to the common school fund of the county in which the city is situated, of which fund he is the lawful custodian, while the respondent contends that it is a part of the common school fund of the city, and therefore rightfully held by him.

Under the law as it was prior to the adoption of our present constitution, all moneys coming from this source did belong to the school fund of the particular county within which they were collected, and the proper county treasurer was empowered to demand and receive the same from the city. *The City of Tecumseh v. Phillips*, 5 Neb., 305. *White v. The City of Lincoln*, Id., 505. And there has been no change by the legislature of the statutes under which these cases were decided, and the rule just stated laid down.

But it is claimed by the respondent that, under the operation of Sec. 5, Art. VIII, of our present constitution, this rule has been changed, and that now these moneys belong exclusively to the common school fund of the cities respectively in which they arise. And whether this be so or not is the sole question to be decided at this time. The provision of the constitution referred to is the following:

"SEC. 5. All fines, penalties, and license moneys arising under the general laws of the state, shall belong

and be paid over to the counties respectively where the same may be levied or imposed; and all fines, penalties, and license moneys arising under the rules, by-laws, or ordinances of cities, villages, towns, precincts, or other municipal subdivisions less than a county, shall belong and be paid over to the same respectively. All such fines, penalties, and license moneys shall be appropriated exclusively to the use and support of common schools in the respective subdivisions where the same may accrue."

It is contended on the part of the relator that inasmuch as all of the powers of the municipal authorities over the subject of licensing the sale of malt, spirituous, and vinous liquors, are given by the general license law of the state, the funds arising from the exercise of those powers are necessarily embraced within the first clause of this section, and must go into the school fund of the county.

But we cannot adopt this construction. It is only in a technical sense that such moneys can be said to have arisen under a general law of the state; and the same may be said, in a like sense, of every one of the powers confided to the municipal subdivisions of the state. To hold that this money belongs to the county simply because its primary cause, or source, is traceable to a general statute, would leave nothing whatever for the next succeeding clause to operate upon. That such would be the necessary result there can be no doubt whatever, for it is impossible to conceive of a single power which one of these municipal subdivisions can lawfully exercise that is not given either by the general incorporation act under which cities are organized, or by some other general law of the state. A construction having this effect would certainly do violence to the plain intent and spirit of this constitutional provision, and totally ignore that familiar canon of construc-

tion which requires effect to be given, if possible, to every portion of the section. Potter's Dwarris, 144. *People, ex rel. v. Gosper*, 3 Neb., 310.

In distinguishing the "fines, penalties, and license moneys arising under the general laws of the state," from those "arising under the rules, by-laws, or ordinances, of cities, villages," etc., it is evident to us that reference was had, not to the primary source of the power, but to the immediate authority by which the fine or penalty is imposed, or the license granted.

By section 345 of the act, "To license and regulate the sale of liquors," the sale of "malt, spirituous, or vinous liquors, or any intoxicating drink," without first obtaining a license to do so, is prohibited, and made a highly penal offense. But, as this court has held in the case of *Phillips v. The City of Tecumseh*, 5 Neb., 312, such license can be granted within the limits of an incorporated town or city only by the proper authorities thereof, and under such rules and regulations as they may provide. And by another general act, under which the city of Lincoln was incorporated, authority is given to "prohibit and suppress tippling shops" altogether. Gen. Stat., 144.

From this it will be seen that, independently of the action of the corporate authorities of the city of Lincoln, by ordinances duly passed, not a single dollar of the money in controversy could have been imposed, or collected. We must hold, therefore, that it falls within the second clause of the section, and belongs to the common school fund of the city, of which the defendant is the lawful custodian.

WRIT DENIED.

CREDIT FONCIER OF AMERICA, PLAINTIFF IN ERROR V. SAMUEL E. ROGERS, DEFENDANT IN ERROR.

1. **Practice.** Exceptions which are not properly a matter of record, must be preserved in writing, and properly certified by the presiding judge in order to be considered by the supreme court. And affidavits in support of, or in opposition to, any proceeding in the court below, must be embodied in a bill of exceptions.

2. ———: STIPULATION OF ATTORNEYS. A stipulation of the attorneys in the cause, stating that the record is a correct transcript of the proceedings, may be sufficient to justify the judge in the court below in signing the bill as presented, but forms no basis for the supreme court to consider the matters embodied in the bill of exceptions.

ERROR from the district court for Douglas county. Upon a trial of the cause in that court a verdict in favor of the plaintiff for $2,847.50, was returned into court, and defendant moved to set the same aside and for a new trial. The motion was not passed upon by the court, and no judgment had been rendered on the verdict, when defendant moved to dismiss the cause and for an order setting aside the verdict, basing the motion upon a stipulation signed by the president of the plaintiff and the attorney for the defendant, dismissing the action and cancelling any verdict or judgment that might have been rendered therein. The right to dismiss the action was denied by the attorneys for plaintiff in writing, for the reason that they had an attorney's lien thereon duly filed in the action, and that they were also owners of the claim sued on, and that any attempt to dismiss the action was a fraud on their rights, etc. Affidavits pro and con, were read at the hearing of the motion to dismiss, and judgment was rendered sustaining the motion and dismissing the action at costs of the plaintiff. To reverse this judg-

ment the cause was brought into this court by petition in error, the record being made up of these several motions and the affidavits accompanying them, with the stipulation set forth in the opinion, but without any bill of exceptions signed by the judge before whom the proceedings were had. The defendant contended that this court had no jurisdiction of the cause and moved to dismiss it.

George W. Ambrose, for the motion.

Redick & Connell, contra.

MAXWELL, CH. J.

The attorneys in this case entered into the following stipulation:

"It is hereby stipulated that the foregoing is the record of the proceedings in said cause in said court, upon the motion to dismiss said cause, and shows truly all the proceedings therein, and contains all the evidence before said court on said motion. It is further agreed that said record may be filed in the supreme court, a certified transcript of the same being waived."

Credit Foncier of America, by Redick & Connell, attorneys.

G. W. Ambrose, attorney for defendant.

This stipulation is appended to what purports to be a bill of exceptions, but the so-called bill of exceptions contains no certificate of the judge, nor is any cause assigned why such certificate has not been obtained. The defendant now moves to quash the bill of exceptions, upon the ground that it is not signed by the judge of the district court, and therefore the record confers no jurisdiction on the supreme court.

The act to amend sections 308 and 311 of the code of civil procedure, approved February 15, 1877, laws of

1877, p. 11, requires the bill of exceptions to be signed by the judge that tried the cause, with a certificate to the effect that the same is allowed. In case of the death of the judge after the exceptions are taken, and before the bill is signed, it is the duty of the clerk of the court to settle and sign the bill. In all cases where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exceptions to writing, and they must be certified in the manner required by the statute before this court has any authority to examine them. And this rule includes affidavits either in support of, or in opposition to, any proceeding in the court below. Affidavits not properly being a part of the record, can only be made such by being embodied in a bill of exceptions. *Ray v. Mason*, 6 Neb., 101. The stipulation of the attorneys in the case might have been sufficient to justify the judge of the court below in signing the bill as presented, but forms no basis for this court to consider the matters embraced in the bill. The motion to quash is therefore sustained and the case is dismissed out of this court.

JUDGMENT ACCORDINGLY.

LANCASTER COUNTY, PLAINTIFF IN ERROR, V. JOSEPH S. HOAGLAND, DEFENDANT IN ERROR.

1. **Fees of Sheriff for boarding prisoner.** Under the act of 1877, to amend Section 5, of Chapter 19, of the Revised Statutes, authority is given the county commissioners to fix the compensation of the sheriff for boarding prisoners at such sum as they may deem just and proper, not exceeding seventy-five cents per day, nor more than three dollars per week when the prisoners are confined more than one week.

ERROR from the district court of Lancaster county. The facts appear in the opinion.

Brown & Marshall, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, CH. J.

This case was appealed to the district court, from a decision of the board of county commissioners of Lancaster county, allowing the defendant only fifty cents per day for boarding prisoners in the county jail, he having presented a bill to the said commissioners claiming at the rate of seventy cents per day, for boarding said prisoners. Judgment in the district court was given in favor of the appellant and the county brought the cause here by petition in error.

The question presented involves the construction of the several acts of the legislature in regard to the fees of sheriff.

Section 5, chapter 19, of the Revised Statutes of 1866, provides that the sheriff shall be paid "for boarding prisoners per day not exceeding seventy-five cents."

In 1869, section 11, chapter 29, Revised Statutes, was amended to read as follows: "That the sheriffs and jailors of the several counties, who have the custody of the *state* prisoners confined in the jails of such counties, shall receive for boarding such prisoners the sum of seventy-five cents per day." Laws 1869, p. 171. As this amendment is restricted to *state* prisoners, it has no application to the case at bar.

In 1871 an act was passed amending section 5, chapter 19, Revised Statutes, but no change appears to have been made in the clause for boarding prisoners. Laws 1871, p. 108.

In 1875, an act was passed to amend section 5 of

chapter 22, Revised Statutes of Nebraska, entitled "Fees." While there is a mistake in the *number* of the chapter, the amendments were clearly intended to apply to section 5, chapter 19, of the Revised Statutes, and the sheriff is allowed "for boarding prisoners per day, not exceeding seventy-five cents." Laws 1875, p. 80.

In 1877, section 5, chapter 19, of the Revised Statutes was again amended, and the sheriff was allowed "for boarding prisoners per day, not exceeding seventy-five cents, nor more than three dollars per week when the prisoners are confined more than one week." Laws 1877, p. 42.

In 1873, an act was passed to amend section 11, chapter 29, of the Revised Statutes, and providing that: "The sheriff or jailor of the same counties, who have the custody of the state or other prisoners confined in the jails of such counties, shall receive for boarding such prisoners the sum of seventy cents per day," General Statutes, p. 454. This act is clearly amendatory of section 11, chapter 29 of the Revised Statutes, but has no provision repealing the original section. It is therefore void under the rule laid down in *Smails v. White*, 4 Neb., 356. *Sovereign v. The State of Nebraska*, 7 Neb., 409.

It is clear from an examination of the several acts herein referred to in relation to sheriff fees that section 5, chapter 19, of the Revised Statutes, although modified by the act of 1875, had not been entirely repealed prior to the passage of the act of 1877. Such being the case the act of 1877 is now in full force, and authorizes the county commissioners to fix the compensation of the sheriff for boarding prisoners at such sum as they may deem just, not exceeding seventy-five cents per day, nor more than three dollars per week when the prisoners are confined more than one week

This being the case, the district court erred in rendering judgment for the defendant. The judgment of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

WILLIAM W. WILSON AND R. O. PHILLIPS, PLAINTIFFS IN ERROR, V. R. O. BURNEY, DEFENDANT IN ERROR.

1. **Practice:** RETURN OF SHERIFF: GARNISHMENT. Return of a sheriff to an execution that "he cannot find any chattel property belonging to the within named defendants whereon to levy this writ," is sufficient to authorize proceedings in garnishment under section 244 of the code.

2. **Garnishment.** Where a garnishee has been properly served with process, and has appeared and answered, and an order has been made by the court requiring him to pay a certain sum owing by him to the debtor into court, from which order no appeal is taken, such order cannot be attacked collaterally.

3. **Principal and Surety:** RIGHTS OF SURETY. A surety is entitled to all the securities held by the creditor against the principal debtor, and to stand in his shoes, and it makes no difference that the security is in the form of an order upon garnishees to pay money into court.

ERROR from the district court of Lancaster county. The opinion states the case.

Mason & Whedon, for plaintiff in error.

1. The payment of the judgment by the defendant in error, who was one of the parties thereto, extinguished it, and his only remedy was by action against Taylor. *Bank of Saline county v. Abbott*, 3 Denio, 181. *Ontario Bank v. Walker*, 1 Hill, 652. *Preston v. Stallworth*, 37 Ala., 402. *White v. Brown*, 5 Dutch, 307.

Briley v. Sugg, 1 Dev. & B. N. C. Eq., 366. *Wyman v. Davenport*, 9 Mass., 138. *Harbeck v. Vanderbilt*, 20 N. Y., 335.

2. The assignment of the judgment by Humphrey Bros. was in writing, and assigned the judgment only. See assignment in record. And being in writing its terms could not be changed or enlarged by parol testimony. 2 Phillips on Evidence, p. 540, and cases in note. *Frost v. Blanchard*, 97 Mass., 155. *Dudley v. Vose*, 114 Mass., 34. *Galpin v. Atwater*, 29 Conn., 93. *Howard v. Thomas*, 12 O. S., 201. *Johnson v. Pierce*, 16 O. S., 472. Wharton on Evidence, Sec. 921. *Osborne v. Hendrickson*, 7 Cal., 282. The court below admitted evidence to prove that the cause of action sued on was included in the assignment of the judgment. This evidence was objected to and objection overruled. The defendant then moved to strike out this evidence, which motion was overruled. The ruling of the court in this, under the authorities cited, was erroneous, and should be reversed.

3. The answer in garnishment shows, as does the evidence of the witness Wilson, that at the date of service of summons in garnishment the plaintiffs in error were not indebted to Taylor. Peck had presented an order which was accepted, and the verbal acceptance was good. Chitty on Bills, p. 236. *Ward v. Allen*, 2 Metc., 53. *Bank v. Woodruff*, 34 Vermont, 89.

N. C. Abbott, for defendant in error.

1. The payment of a judgment by a surety therein named, with an assignment to him, does not extinguish the same. *Dempsey v. Bush*, 18 Ohio State, 376. *Coffee v. Tevis*, 17 Cal., 239. *Mathews v. Aikin*, 1 N. Y., 595. *Eno v. Crooke*, 10 N. Y., 60. 2 Bouvier, "Subrogation." 1 Leading Cases in Equity, 148, 149, 150, and cases there cited.

2. The assignment of the judgment carried with it all the rights of original creditors, including the order in garnishment. An order in garnishment is in the nature of a lien upon the property or money in the garnishee's hands. In *Board of Education v. Scoville*, 13 Kan., 29, the court says: "The garnishment lien attaches when the garnishee is served with notice, and continues until the attachment is dissolved or the plaintiff's claim is satisfied." See also, Gen. Stat. of Neb., Sec. 212, p. 559.

MAXWELL, CH. J.

On the seventh day of April, 1876, Humphrey Brothers commenced an action before a justice of the peace against Horace Taylor, E. A. Berry, and the defendant, and on the thirteenth of that month recovered judgment against Taylor as principal, and Berry and Burney as sureties, for the sum of $69.16 and costs of suit. On the same day an execution was issued on said judgment and returned by the sheriff: "I hereby certify that I cannot find any chattel property belonging to the within named defendants whereon to levy this writ."

On the same day the plaintiff filed an affidavit setting forth that they had good reason to believe "that the firm of Wilson & Phillips were indebted to the defendant, Horace Taylor, in a certain sum of money subject to application on the judgment."

Summons was thereupon issued requiring said garnishees to appear and answer under oath touching their indebtedness to Horace Taylor. On the next day one of the garnishees appeared and the examination was continued until the twenty-second of that month. At the time fixed by the adjournment, Wilson appeared and filed an answer and was examined. The justice

thereupon made the following order: "Whereupon it is ordered by me that the said garnishee, Phillips and Wilson, pay into this court the sum of $85.00, or so much thereof as will satisfy the above judgment and costs of suit in full, and that they be released from obligation to the defendant in that amount." Phillips and Wilson did not appeal from this order, and failed to pay the money into court.

On the twelfth day of October, 1876, an execution was issued on the original judgment, and the amount due thereon was paid by the defendant herein as surety for Taylor. The surety took an assignment of the judgment to himself, and brought an action against the plaintiffs herein as garnishees. On the trial of the cause judgment was rendered in his favor, to reverse which the cause is brought into this court by petition in error.

The proceedings in this case were instituted under section 244 of the code of civil procedure. The return of the sheriff shows that there was no property of the defendant's in the original action upon which to levy. For the purposes of this action, the return of the officer upon the execution is conclusive. *Jones v. Green et al.*, 1 Wallace, 331. Service in the proceedings in garnishment was had upon the plaintiffs. Wilson answered, denying substantially being indebted to Taylor, but his answers to the interrogatories as to his indebtedness to Taylor are of a very unsatisfactory character, and justified the court in finding that the plaintiffs were indebted as claimed, and in making the order requiring the payment into court. But as no appeal was taken by the plaintiffs in that case from the order of the justice, it must be held as conclusive and cannot be enquired into in this proceeding.

The only remaining question to be considered is, whether the surety is entitled to the securities held by

the creditor. The principle is well settled that upon the payment of the debt by the surety, he is entitled to the securities held by the creditor against the principal debtor, and to stand in his shoes, and it can make no difference that the security is in the form of an order upon garnishees to pay money into court. It follows that the defendant, being entitled to be subrogated to the creditor's rights in the premises, the judgment of the court below must be affirmed.

JUDGMENT AFFIRMED.

JAMES DAVIS, PLAINTIFF IN ERROR, v. CHRISTOPHER LONDGREEN, DEFENDANT IN ERROR.

Surface Water. The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury.

2. ———: RIGHT INCIDENT TO OWNERSHIP OF LAND. The owner of land has the absolute, inherent right to occupy and use it for such lawful purpose as he sees fit, unmolested by the unlawful discharge of surface water thereon by another.

3. ———: INJUNCTION THE PROPER REMEDY, WHEN. If the injury inflicted by the unlawful discharge of surface water upon the land of another be serious, and in its nature permanent, or such as would continue to operate in all future time, an injunction is a proper, and the only adequate, remedy. And the mere

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NOTE.—The same principle holds good as between municipal corporations and individual owners of land. If a city desires to acquire the right to turn a stream of water upon private premises, to the injury of the owner, it can only do so by an exercise of the right of eminent domain. *Nevins v. City of Peoria*, 41 Ill., 502. *Semble*, the fact that the artificial channel does not extend entirely to the other party's land will not affect the question. *Pettigrew v. Evansville*, 25 Wis., 223. See also *Town of Union v. Durkes*, 38 New Jersey Law, 21. *Flagg v. Worcester*, 13 Gray, 601. *Gannon v. Hargadon*, 10 Allen, 106.—REP.

delay in applying for this remedy until his right is actually invaded will not operate to deprive the plaintiff of its benefits, nor relieve the defendant from the effects of his unlawful acts.

4. ———: GROUND OF EQUITABLE RELIEF IN SUCH CASES. In such cases equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief.

ERROR from the district court for Dodge county. Heard upon demurrer to the petition before POST J. Demurrer sustained. Cause brought up by petition in error.

W. A. Marlow, for plaintiff in error, cited *Pettigrew v. The Village of Evansville*, et al., 25 Wis., 223. *Butler v. Peck*, 10 Ohio St., 334. *Tootle v. Clifton*, 22 Ohio St., 247-253. High on Injunctions, Sec. 498, 500-510. Washburn on Easements, 353, et seq. *Kauffiman v. Griesmer*, 26 Penn. St., 407. *Martin v. Riddle*, Id., 415. *Martin v. Jett*, 12 Louisiana, 501. *Ewell v. Greenwood*, 26 Iowa, 377. *Blane v. Klumpke*, 29 Cal., 156. *Weimer v. Lowery*, 11 Cal., 104. *Foot v. Bronson*, 4 Lans, 47.

Marshall & Sterrett, for defendant in error, cited *Enfield v. Conn. River*, 7 Conn., 50. *Edwards v. Allonez Mining Co.*, 6 Cent. Law Journal, 188. *Laney v. Jasper*, 39 Ill., 46. *McCord v. Iker*, 12 Ohio, 387.

LAKE, J.

The only question in this case is whether the facts stated in the petition constitute a cause of action, the judgment sought being a mandatory injunction to abate what is claimed to be a private nuisance.

The plaintiff, as the petition shows, is the owner in fee and occupier of the north half of the north-east quarter, and the defendant of the north half of the north-west quarter, of sec. 14, town 18, range 7, in

Dodge county. On the defendant's land there is a natural pond covering about five acres, which is the reservoir for the surface water from one hundred acres of low land surrounding it. Before the wrong complained of, there was no outlet to this pond, and the water accumulating therein was carried away only by evaporation and percolation.

As matter of complaint it is alleged: "That on or about the fifteenth day of June, 1877, the defendant dug a ditch from said pond across the land so owned by him to the land so as aforesaid owned by the plaintiff, which said ditch drains all the water from said pond into the land of plaintiff." * * * * "That by reason of the same the said water drained from said pond through said ditch spreads over and into several acres of plaintiff's cultivated land and renders the same not cultivatable and unfit for use."

It is further alleged that the water so thrown upon plaintiff's land has commenced to cut a water-course diagonally across it for the distance of about fifty rods, and that the natural result from said ditch "is to cause all the water accumulating in said pond after each rain, and in the spring season, to flow over, into, and across the said land of plaintiff, thereby rendering the same wholly unfit for tillage, and to cut said water-course across plaintiff's land of greater depth and width each time said pond is drained."

It is not questioned by the defendant that these facts are ample to entitle the plaintiff to a judgment for damages. But it is contended that they are not sufficient to establish the existence of a private nuisance abatable by the mandatory process of the court. In support of this position it is urged, 1st, that "the injury complained of is complete and fully accomplished," and, 2d, that the plaintiff "has a full and adequate remedy at law," either of which being establish-

ed, it would follow that the demurrer was rightly sustained.

But we are of the opinion that neither of these objections should prevail. They imply for the language quoted from the petition a meaning much too circumscribed. Fairly construed, the petition certainly shows an incomplete, continuing injury to the rights of the plaintiff as owner in fee of the land flooded by the water from the defendant's ditch. One specific and seemingly well grounded charge of future and continuing injury, is that which shows a tendency in the water to cut for itself a channel some fifty rods in length across the plaintiff's land, and which must necessarily become deeper and wider with each succeeding flow of water. The full extent of the actual future damages, depending, as they must, upon so many contingencies, are not susceptible of an accurate present estimation. During a year of drouth they would be only nominal, while in one of numerous and excessive rain-falls they might be very great.

Now it is certain that the plaintiff has the absolute right to occupy and use his land for such lawful purpose as he sees fit, unencumbered by the periodical floodings complained of. And this is one of those *substantial rights* incident to the property itself, to protect which, an injunction will always be granted. The ordinary remedy by an action, or a succession of actions, for the recovery of damages, would be wholly inadequate to afford that complete redress for the injuries complained of, to which the plaintiff is entitled. A correct test for determining whether an injunction is the appropriate remedy was given, we think, by the supreme court of Wisconsin, in *Pettigrew v. Evansville*, 25 Wis., 223, wherein the threatened nuisance was essentially the same as that committed by the defendant here. After having held that the petition stated a case

suitable for equitable cognizance, and on a motion for a rehearing, in which it was urged that the proceeding by injunction could not be upheld, the court, by Dixon, Ch. J., said: "This depends altogether upon the nature of the injury. If it be permanent, or such as will continue to operate in all future time, then the proceeding can be sustained; but if it be only temporary, or such as will cease when the waters of the pond are once drawn off, then it cannot." And a rehearing was denied. Applying that test to the facts of the case now under consideration, there can be no doubt that the plaintiff was clearly entitled to the relief which he prayed. *Webber v. Gage*, 39 N. H., 182.

But counsel for the defendant have endeavored to distinguish this case, in principle, from that of *Pettigrew v. Evansville*, above cited. It is claimed that there are two points of difference. 1st, That in the Wisconsin case the proceedings for the injunction were commenced before the completion of the ditch; and 2d, That in the latter case the threatened damage reached almost the whole of the plaintiff's land, while here only a few acres in one corner of the farm are affected. These we regard as finely drawn distinctions without any substantial difference whatever. We are not aware of any rule by which the mere delay of the plaintiff in the assertion of his right, until it was actually invaded, will operate either to deprive him of it, or to relieve the defendant in any degree from the effect of his unlawful encroachment thereon. And as to the right affected by the alleged nuisance, the law admits of no distinction in its mode of redress, whether it pertain to fifty acres, or only to five acres of the plaintiff's land. It is the nature of the injury, together with the fact of its constant repetition, or continuation, rather than the magnitude of the damage inflicted, which form the basis of this mode of redress.

For these reasons the judgment of the court below is reversed, and the cause remanded for further proceedings.

REVERSED.

B. ROSA, APPELLANT, v. WILLIAM E. DOGGETT ET AL., APPELLEES.

1. **Attorney's Fees.** No attorney fees can be allowed except in cases where a judgment has been recovered, and only in cases where the instrument upon which the action is brought in express terms provides for their allowance. And in no case can such fee be recovered unless it is allowed by the court.

2. ———: USURY. In the year 1875 judgments to the amount of about $1,600 were recovered against R., who filed stay of execution. Upon the expiration of the stay, R. obtained an extension of the time of payment from June until September, upon paying the plaintiff's attorney, with the plaintiff's assent, $140 as an attorney's fee, in addition to 10 per cent interest. Upon a petition for an injunction being filed, it was held that the fee paid to the plaintiff's attorney was usurious and must be applied *pro tanto* upon the judgments.

APPEAL from Washington county.

Davis & Tucker, for appellant, cited Gen. Stat., p. 98. *Richards v. Kountze*, 4 Neb., 200. *Philo v. Butterfield*, 3 Neb., 256. *Cheney v. Woodruff*, 6 Neb., 151. *Jenness v. Cutler*, 12 Kan., 500, 512.

No appearance for appellee.

MAXWELL, CH. J.

In the year 1875, the defendants recovered four judgments in the county court of Washington county against the plaintiff, each for the sum of $354.20 and

costs. The plaintiff herein filed bonds for the stay of execution, which were duly approved by the judge of said court.

In June, 1876, soon after the expiration of the stay of execution, the defendants herein caused executions to issue on said judgments, which executions were placed in the hands of the sheriff of Washington county. At this time the plaintiff herein applied to the defendants for an extension of the time of payment until the month of September following, whereupon the defendants wrote to their attorney as follows: * *. "We know you have him cornered and that the money *must* come or somebody must suffer, but if our certainty of enforcing payment is not lessened, and we can get attorney's fees, and costs, and 10 per cent interest up to September 15th, as a business transaction, apart from favor to one who does not deserve it, we should extend. Therefore, conditionally, we should agree to extend. Therefore, conditionally, we have agreed to remit, the conditions being that through you we must be assured that we can extend with safety, lose no hold upon the sureties, and that attorney's fees, all costs, and 10 per cent interest on judgments, etc., be paid by Rosa." *

* This letter being delivered to the attorney of the defendants he made a positive agreement in writing to extend the time of payment of the judgments until September following, upon the plaintiff obtaining the written consent of the sureties to that effect, and paying him an attorney's fee of $140.00, and certain costs to the sheriff amounting to $42.00. The plaintiff herein then paid said fee and costs, and the time of payment was extended as agreed. Various payments were made upon the judgments during the winter of 1876, and in May, 1877, the plaintiff and the attorney of the defendants made a computation of the amount remaining due and unpaid, and fixed upon the sum of $300.00 as the

amount then due. Afterwards the plaintiff paid $200.00 on said judgments.

On the eighth day of December, 1877, the defendants caused an execution for the sum of $107.92 to be issued on said judgments, and the sheriff being about to levy upon the goods and chattels of the plaintiff, he obtained a temporary order of injunction against said defendants, upon a petition alleging that said judgments were fully paid off and satisfied. The defendants answered the plaintiff's petition, and on the trial of the cause the court found the issues in favor of the defendants and dismissed the cause. The case is brought into this court by appeal.

The plaintiff claims that the $140.00 paid to the attorney of the defendants, not being paid in pursuance of an express agreement in the original obligations, nor in pursuance of an order of the court based upon such agreement, must be treated as a device for obtaining a greater rate of interest than is authorized by the statute.

Section one, of chapter 34, Gen. Statutes, provides that "any rate of interest which may be agreed upon, not exceeding twelve dollars per year upon one hundred dollars, shall be valid upon any loan or forbearance of money, goods, or things in action." Section 5 provides that "if a greater rate of interest than is hereinbefore allowed 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."

The act to provide for the allowance and recovery of attorney's fees in certain actions, approved February 18, 1873, provides "that in all actions brought for the

foreclosure of a mortgage, or upon a written instrument for the payment of money only, there shall be allowed to the plaintiff, upon a recovery of judgment by him, a sum, *to be fixed by the court*, in addition to the judgment, not exceeding ten per cent of the recovery, as an attorney's fee, in all cases where the mortgage or other written instrument upon which the action is brought shall, in express terms, provide for the allowance of an attorney's fee." Gen. Stat., 98.

Under the provisions of this statute no attorney's fee can be allowed except in cases where a judgment has been recovered, and only in cases where the instrument upon which the action is brought, in express terms, provides for its allowance. And in no case can such fee be recovered unless it is allowed by the court. It has been held by this court that attorney fees are in the nature of costs and are to be taxed as such. *Rich v. Stretch*, 4 Neb., 189. *Heard v. Dubuque County Bank*, ante p. 10.

No attorney fees having been allowed by the court, defendants herein and their attorneys are not in a position to claim such fees.

In the case of *Toole v. Stevens*, 4 Leigh., 581, S. and N. being indebted to the F. and M. bank, and the bank having recovered judgments against them for the debts, and the debtors then applying to the bank for indulgence, the bank agreed to give them further time upon their agreeing to give real estate security for the debt, and in addition, to pay the costs of suit, and the commissions of the attorney of the bank for securing the debts. Upon a bill for an injunction being filed, it was held that the *commissions* to the attorney were usurious.

In *Richards v. Kountze*, 4 Neb., 205, it is held that it makes no difference whether the usurious interest is expressed in terms in the instrument given for the payment of the debt secured by the loan, or is taken as a

bonus, or is secured by any other corrupt agreement, device, or shift, at the time of the contract. It is also held that if money is paid as a premium upon a loan, or as usurious interest on a debt, the money so paid is considered as a payment *pro tanto* upon the original debt.

We adhere to the decision in that case, and although the payment of the attorney's fee does not taint the original transaction with the vice of usury, it must be regarded as a payment *pro tanto* upon the judgments.

The judgment of the district court is reversed, and as it will be necessary to take additional testimony before a final judgment is rendered, the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED.

H. H. PETTIT, APPELLANT, V. JOHN BLACK, APPELLEE.

1. **Void Tax Sale:** INTEREST. When in a proper proceeding in court the sale of lands for taxes shall be declared void, the owner of such lands will be allowed a reasonable time, to be named in the decree, in which to pay such taxes, with interest at one per cent per month.
2. **Subrogation.** Where it appears that the purchaser has paid the amount bid at such *void* sale into the county treasury, and the county has retained it for a number of years, the purchaser will be subrogated to the rights of the county in the lien for said taxes and interest on the lands sold.
3. **Jurisdiction.** When an action is commenced by the owner of lands for the purpose of having a tax deed declared void, the court will, when prayed for in the answer, retain jurisdiction for the purpose of foreclosing and enforcing the lien of the defendant for the taxes and interest.

APPEAL from Cass county.

Sam. M. Chapman, for plaintiff.

I. The authority for the treasurer to sell plaintiff's real estate for these years, and these whole proceedings, if we are correct in our conclusions, must be based on the sale of 1871, made in September, 1872. Now what are the facts as disclosed by the testimony of the case? Briefly recapitulated they are:

1. There is *no assessment* for the year 1871, and consequently no power to levy a tax.

2. There never was any attempt made by the treasurer to collect from the personal property of plaintiff for any of these delinquent taxes, although this real estate was placed upon his books in the name of plaintiff together with his return of personal property for each of the years 1869, 1870, and 1871, and was a matter of record immediately under the eye of that officer.

3. There was no advertisement of the plaintiff's real estate, such as in any event would authorize the treasurer to sell.

4. No return of lands sold for taxes of 1871, as the law imperatively requires, was ever made by the county treasurer to the county clerk, nor was there a copy or pretended copy of such a sale filed in the treasurer's office.

5. The deeds of defendant show that the treasurer and the purchaser (both) openly disregarded the law in the sale and pretended purchase of this real estate, in the following particulars: The land was not offered in the "smallest governmental subdivisions;" nor bid in in that manner, but on the contrary it was bid in in bulk with other and separate and distinct parcels of real estate, for a gross sum, and in support of this see certificates describing only a portion of the real estate in controversy (and all that were in the county clerk's office) which fully corroborate the deeds in this respect, showing the sale was made in total disregard of law.

6. The deeds were never executed as the law re-

quires, but were, years after the county clerk (whose duty it was to attest them) was dead, attempted to be "cured" by the defendant and a third party, and the records of the county changed and altered.

7. The tax certificates do not describe anything. The pretended descriptions contained therein are so absolutely meaningless and vague that a careful officer should have at once refused to issue a deed upon them.

II. Is defendant entitled to a lien *in this action*, for the amount of purchase money and subsequent tax? We contend he cannot obtain such relief in this action on the following grounds:

1. There has been no assessment of plaintiff's land for the year 1871, nor has the defendant acquired any title. In order to create a lien there must have been a tax assessed and a title acquired at a treasurer's sale. *Morril v. Taylor*, 6 Neb., 236.

2. Assuming sec. 7 of the act of June 6, 1871, to be a valid enactment, this court has held that the action to foreclose a tax lien in the nature of a mortgage foreclosure cannot be maintained until there is a failure of the title acquired by the purchaser under the law. *Peet v. O'Brien*, 5 Neb., 360. In this case the court says: "The payment of tax money required to be made by section 104 must be construed as applying to cases in which the treasurer had authority to sell, and not to cases in which he, without any authority of law, made the sale." If the treasurer disregards the plain letter of the law, and made no attempt, and fails to make the tax out of the delinquent's personal property, the sale is absolutely void, and the want of power to sell exists just as positively as though an assessment and levy had never been made. *Johnson v. Hahn*, 4 Neb., 139.

George W. Covell, for defendant.

I. In order that the allegation as to personal property might be of any avail to plaintiff, he should have alleged that at the time the taxes became payable on this land, and subsequently until the date of the sale thereof, he "had and owned sufficient personal property, out of which the taxes could have been made by distress and sale," which allegation so made, must have been sustained by the proofs, "and to be made available, the fact must have been specially pleaded." *Peet v. O'Brien*, 5 Neb., 362. No such allegation was made, nor were any such facts specially pleaded, and therefore no testimony tending to show that plaintiff was the owner of any amount of personal property in the years 1869, 1870, aud 1871, was admissible, and none should have been received, and such as was offered for that purpose should have been excluded by the court, on the exceptions taken by defendant.

II. Plaintiff brings this suit to quiet title in himself, and cancel the tax deeds held by defendant on the land in controversy, without complying in any respect whatever, or offering so to do, with that provision of the statute which says: "In no event shall a decree or judgment be rendered against the purchaser, until the claimant shall have paid over to the county treasurer, for the use of the purchaser, in case judgment be rendered against him, the amount necessary to redeem the land at that date, at the same rates as are provided by law where land is redeemed within two years from the date of sale." Section 104, 7th subdivision, pages 932 and 933, General Statutes of Nebraska. He suffered eight years after the taxes became delinquent, and four years after the sale, to pass without asserting any right. During all of the eight years he paid no taxes, performed no duties which he owed to the public, suffered the defendant to pay the taxes levied from

year to year, and now, when it may be presumed the land has increased in value, he seeks the cancellation of the tax deeds, without even offering to redeem or to refund the taxes which the purchaser at the sale, and subsequently, has paid. In this attempt he cannot succeed. *Callahan v. Hurley*, 4 Central Law Journal, No. 12, for March 23d, 1877, pages 272, 273, and 274, decided in U. S. Supreme Court, at October term, 1876. See also the case of *Phelps v. Meade*, 41 Iowa, 470, and the cases therein cited. See also sec. 6, page 936, General Statutes of Nebraska, in connection with these cases. We think, therefore, that the plaintiff, on due examination of all the evidence offered by him, has utterly failed to make out his case, and that his action for quieting title and cancellation of the tax deeds, must necessarily fail.

III. But if this court should hold that this need not be done by this plaintiff in this cause, still the defendant is entitled, if the court should declare that his title acquired at the treasurer's sale had failed, to a lien on the real estate in controversy for the full amount of the purchase money, together with interest thereon from the date of such purchase, at the rate of forty per cent per annum, until the same is fully paid, and also to a lien thereon for all subsequent taxes paid by him on the same, together with interest thereon from the time of such payment at the same rate. (See section 7, act of June 6th, 1871, page 936, General Statutes.) He is entitled under this statute to the enforcement of this lien against said land in the manner of the foreclosure of mortgages. We contend that he is entitled to the foreclosure of this lien *in this action* if his title shall be declared to have failed. A court of equity, in order to avoid multiplicity of actions, has the undoubted right to permit all questions and all issues

arising in any action tried before it, to be settled in the same action, and it would be contrary to the usual course pursued by courts of equity, to deny the enforcement of this lien in this action, even though the statute may not expressly declare that it may be done in the same action. Should the defendant's title be declared to have failed, his right to an action to enforce the lien of the tax immediately thereupon accrues, and what principle of equity will prohibit him from having it enforced in the same action, in the manner directed by law for the foreclosure of mortgages? To refuse it would be to my mind clearly inequitable and unjust.

COBB, J.

H. H. Pettit sued John Black in the district court of Cass county in an action *quia timet* for the purpose of clearing off and having declared void certain tax deeds made by the treasurer of Cass county to the said John Black, conveying to him certain real estate of the said plaintiff, situate in Cass county. Plaintiff in his petition sets up the title and possession of the lands in himself; charges fraud and confederation against the defendant, the county treasurer, and others in the sale and conveyance of the lands; charges that the said sale and conveyance were void on account of certain alleged irregularities, and particularly that during all of the years 1870, 1871, and 1872, the years in which the taxes for which said lands were sold became delinquent, the said plaintiff resided on the said lands with his family, and owned and had in his possession on said real estate sufficient personal property out of which the said treasurer could have made said taxes by seizure and sale, but that said treasurer made no attempt or effort to collect said taxes out of said personal property.

The defendant by his answer denied the ownership

of plaintiff in the real estate, denied that said plaintiff was the owner or possessor of personal property out of which the said taxes could have been collected by seizure and sale; denied all confederation and illegality in said sale or conveyance, and affirmatively set up each succeeding necessary step from the listing of said lands for taxes to the recording of the treasurer's deeds; and also set up that he had paid the taxes on said lands for all subsequent years, to-wit: 1872, 3, 4, 5, and 6; and while he claimed the title to said real estate by virtue of the said sale and conveyance, he also claimed and prayed the court to decree, in case his said title to said real estate, acquired at said treasurer's sale, and the deeds made in pursuance thereof, should fail and be adjudged by the court to be invalid, that his lien for the purchase money and subsequent taxes paid on said lands, with the interest thereon at the rate of forty per centum per annum from the respective dates when paid until the same is fully paid as provided by law, be foreclosed in this cause against said land, etc.

The district court found the undivided one-third and no more of the said real estate to be in the plaintiff. That at the time the taxes for the several years, for which said premises were sold, became payable, and subsequently until the date of sale, the plaintiff owned and had in his possession on the said premises, in said county, sufficient personal property out of which the said taxes could have been made by distress and sale or personal property, but that no attempt was made, etc., and entered a decree cancelling and setting aside the said tax deeds of the defendant as to the undivided one-third part of the said premises and no more. From which decree the cause is brought to this court by appeal.

Several questions are raised by the testimony touching the title to the real estate in question, which we do

not deem it necessary to pass upon. The proof shows that the plaintiff had been in possession of said premises for a period of fifteen years next before the commencement of this suit, and the only question of general title which could be raised is between the plaintiff and his wife. While she does not join in this action as a party plaintiff, she will be presumed to have acquiesced in the same as being brought for her benefit as well as that of her husband. The title of the plaintiff is good to the whole of said real estate as against the defendant, and for the purposes of this action.

The lands were sold for the taxes of 1869, 1870, and 1871, but were sold for the taxes of all these years at the same time, to-wit: September 6, 1872; hence the sales all come under the provisions of the act of June 6, 1871 (Gen. Stat., sec. 50, p. 916). Under the provisions of that act it was the duty of the county treasurer, before advertising or selling the real estate, to have seized the personal property of the plaintiff, and made said tax out of it by sale, and his power to proceed against the land itself was dependent upon his having first exhausted a reasonable effort to find personal property, if plaintiff possessed any in the county. The proof is ample that during all the time, from the date of listing the property for the tax of 1869 to the day of sale, the plaintiff owned and had in his possession on the said premises an abundance of personal property out of which the taxes could have been made by distress and sale, and that no attempt or effort in that direction was made by the county treasurer. Following the well considered case of *Johnson v. Hahn*, 4 Neb., 139, we are obliged to hold the sale of the real estate in question void.

The defendant's answer, or the greater part of it, is in the nature of a cross bill for foreclosure of his lien upon said real estate for the money paid at the said

sale, and for subsequent taxes, claiming interest on each sum at forty per cent per annum.

The act of June 6, 1871, provides that: "Whenever the title acquired by a purchaser of real estate at treasurer's sale shall fail, the purchaser at such sale, or his heirs or assigns, shall have a lien on the real estate so purchased for the full amount of such purchase money, together with interest thereon from the date of such purchase at the rate of forty per cent per annum until the same is fully paid, and such purchaser, his heirs, or assigns, may pay all taxes lawfully assessed on such real estate after such purchase, and when the said title shall fail, may have a lien for all such taxes, together with interest thereon from the time of payment at the rate aforesaid," etc. [Gen. Stat., Sec. (118), p. 936.]

By virtue of the assessment and levy of the taxes the county had a lien upon the land therefor; the taxes became delinquent and commenced to draw interest at the rate of one per cent per month on the first day of May of the year following that on which the said taxes were levied respectively.

The statute provides that upon the sale of such lands for such taxes at the time and in the manner, and after giving the notice provided therein, the purchaser shall receive a certificate entitling him to a deed for such lands at the expiration of two years from the date of such sale unless the same be sooner redeemed, etc., and also provides that the owner or occupants of any land sold for taxes, or any other person, may redeem the same at any time within two years after the day of such sale by paying the county treasurer, for the use of such purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest thereon at the rate of forty per cent per annum from the date of purchase, together with all other taxes subsequently paid, etc. (Gen. Stat., Sec. 64, p. 922.)

It will be seen that very important consequences are attached to the proceeding called a sale. It immediately raises the rate of interest from twelve to forty per centum per annum. This is a pretty serious consequence to be wrought by the lapse of a few moments time, and the almost silent act of sale by the county treasurer. The law nowhere ascribes this consequence to the mere lapse of time; but if for any reason there is no sale, as is sometimes the case for years, the rate of interest remains one per cent per month.

In this case there is evidence that the county treasurer went through the forms of a sale of these lands, but that he did so in the absence of certain conditions precedent which, according to the decisions of this court in the case above referred to, were not only necessary to the validity of such sale, but the absence of which render such sale absolutely void. In other words, render such proceedings, no sale. The legal definition of the word *void* according to *Webster* is, "of no legal force or effect whatsoever; null and incapable of confirmation or ratification." Pettit was no party to these proceedings. To him they have no existence; to him his lands stand assessed for taxes, taxes levied upon them delinquent and drawing interest at the rate of one per cent per month.

As between John Black and the county of Cass, the case is different. The county was possessed of a lien upon the lands of Pettit for taxes; the county treasurer, acting in a capacity quite analogous to that of agent of the county, sold the lands to Black. Now while this sale was inoperative to pass even an inchoate title to the lands, yet, together with the receipt and retention of the money from Black, it was sufficient as the foundation for the ratification by the county of the sale and transfer of its lien for these taxes to him. It will be presumed that the county treasurer paid the money re-

ceived from Black into the county treasury, and that the county, having retained the same for several years, has ratified the acts of her officer in respect to the same. Black will therefore be subrogated to all the rights of the county in the premises. And while we are not called upon in this case to express any opinion as to whether he has any claims on the county for the difference between twelve and forty per cent interest on the money paid by him, yet it must be obvious that no reason or principle stands in the way of Pettit redeeming his land by paying the taxes and interest thereon at the same rate as before these void proceedings.

In the case of *Peet v. O'Brien*, 5 Nebraska, 360, this court held that "the title acquired by a purchaser at tax sale might be said to fail when it should be pronounced invalid by the judgment or decree of a court of competent jurisdiction over the subject matter, and that an action to foreclose such lien cannot be maintained until the expiration of the time limited by law to redeem nor until there is a failure of the title acquired by the purchaser under the law. Until both these events occur the court has no jurisdiction in an action of foreclosure." But in this case the action having been brought by Pettit for the purpose of having the tax deeds declared null and void and the cloud which they cast on his title removed, and the court having taken jurisdiction of the case for that purpose, will, upon familiar principles of equity practice, retain it for the purpose of foreclosing and enforcing the lien on the lands for the taxes and interest and of administering full justice between the parties as to all matters embraced in or necessarily connected with the case.

The decree of the district court will be reversed and a decree entered in this court in conformity with this opinion.

DECREE ACCORDINGLY.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. CHRISTIAN L. KEIM AND HENRY GRABLE, DEFENDANTS IN ERROR.

Loan or Deposit of Public Money. The petition states that the plaintiff deposited two thousand dollars with the defendants, who were bankers, etc., for safe keeping, to be delivered up on demand; that it was afterwards demanded and payment refused. *Held*, on demurrer, that an unauthorized or unratified loan or deposit of public money constitutes no cause of action in the name of the state.

ERROR from Lancaster county.

George H. Roberts, *Attorney General*, and *Lamb, Billingsley & Lambertson*, for plaintiff in error.

Two points were especially relied on in the court below.

1. That the petition does not show that the state is the real party in interest.

2. That the petition does not show that the money was deposited pursuant to any law or authority.

Upon the first point we say: The defendants are not in a position on this demurrer to contest this point. The allegation of the petition is that *the state* deposited it under an agreement that it should be delivered up on demand. And that demand had been made for it. There is not anything on the face of the petition to show any illegality in the deposit of the money. Illegality will not be presumed. It being a matter in which the state was interested the state had a right to sue. Laws, 1877, p. 24, sec. 16. *People v. Fairchilds*, 15 N. Y. Supreme Court, 334. *State v. Dubuclet*, 27 La. Ann., 29. And if the moneys were state moneys or public moneys and were illegally deposited there, would the condition of the defendants be any better?

A public officer or board cannot, in their own names or officially, maintain an action for public moneys even in cases where they are entitled to its possession and control unless specially authorized by statute. *Regents v. McConnell*, 6 Neb., 425. *Commissioners v. Perry*, 5 Ohio, 56. *Hunter v. Commissioners*, 10 Ohio State, 515. *State v. Grant*, 7 Blackf., 73. *State v. Wright*, 8 Blackf., 65. While if the defendants wrongfully became possessed of the money the state may recover it in its own name. *McCann v. The State*, 4 Neb., 324.

Upon the second point we urge that under our statutes all public moneys retain the character of public moneys into whosesoever hands they come that has notice of their character. By section 2, article IV, all public moneys are to be received and kept by the state treasurer, but in what vault, safe, or place, or where, is not specified; and he is to disburse the public moneys on warrants, etc., drawn on the treasury—he is liable to a penalty for not paying when the money is in the state treasury—and "all money" may be counted by a committee of the legislature, etc. Still further, by chapter 45, he is said to be merely "intrusted" with it. So also by section 124, pages 749 and 750 of the code of criminal procedure, the stamp of the ownership of the state is fixed on all public moneys in the several officers' hands, and in the hands of all other persons to whom they come with notice of their character. And the refusal of any such officer or person, whether in office or out of office, to pay any draft, order, or warrant, which may be drawn upon him by the proper officer for any public money in his hands, no matter in what capacity the same may have been received or may be held by him, renders the party liable. Now the state could only deposit the money by or through some of its officers. If the deposit was rightful, the state rightfully can recover the same. If the deposit was wrongful, the state

can recover the money under the authority of *McCann v. The State* cited above.

Schoenheit & Thomas, for defendant in error.

The state of Nebraska has committed the care, custody, and control of all money belong to it, to the state treasurer, who is required to give bond for the faithful performance of his duties. Gen. Stat., pp. 99, 100, 480, 1016. The treasurer is not, like a trustee or an agent, the mere bailee or custodian of the money in his hands. The money which he receives becomes his own money, and he is liable absolutely for it to the state on his official bond. He is held to almost, if not quite, the same degree of liability as if he were an insurer of the safety of the money. *Shelton v. State*, 53 Ind., 331. *Perley v. Muskegon*, 32 Mich., 132, and authorities there cited. The petition in the case at bar alleges a deposit by the state payable on demand, a subsequent demand and refusal, and then asks for judgment for the money with interest. We contend that this is not an allegation of a special deposit, but of a loan of the money, and that the prayer for interest shows that to be the fact. *State v. Buttle's Ex'r*, 3 Ohio St., 309. *Perley v. Muskegon*, 32 Mich., 132. If the treasurer has deposited or loaned any of the state money, he must recover it in his own name and not in that of the state. If the money cannot be collected, the loss must fall upon the treasurer and not upon the state. This action is evidently for the benefit of the treasurer and to release him and his sureties from all liability on his official bond. We think no advantage can be derived for them by alleging that the deposit or loan was made by the state and not by the treasurer. As the treasurer has all the money in his custody, it is impossible for the state to loan or deposit any part of

it without the intervention of the treasurer. If the state itself deposited the money in question as alleged, it could have done so only by an act of its legislature, giving authority to the treasurer to make the deposit. Certainly none of the state officers, nor all of them combined, could have given such authority. The legislature itself could have given such authority in no other mode than by general law, and if the treasurer made the loan or deposit without authority, the state could have ratified his unauthorized act only by its legislature and by general law. In deciding the demurrer in the case at bar, this court will take judicial notice of all general laws, and of the fact that no law has ever been passed authorizing the loan or deposit in question, or ratifying the same after it was made, or authorizing the institution of this action.

COBB, J.

The state, by the attorney general and other attorneys, brought this action against the defendants for two thousand dollars, which it is alleged in the petition it deposited with the defendants, who were copartners in the business of banking at the city of Falls City, in the state of Nebraska, under the style and firm name of C. L. Keim & Co., for safe keeping, to be delivered to the said plaintiff on demand. That the same was afterwards demanded and payment thereof refused, etc.

Keim, one of the defendants, demurred to the petition, and assigned, with other grounds of demurrer, that the said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against the said defendant. The district court sustained the demurrer and rendered judgment for the defendant. No service of process was had on the defendant Grable.

By article IV of the General Statutes, p. 1016, it is made the duty of the state treasurer to reside and keep his office at the seat of government; to receive and keep all moneys of the state, not expressly required to be received and kept by some other person. By section 124 of chapter LVIII, of the same statutes, p. 749, all investments or loans of the state money are prohibited. The depositing of the $2,000 in the bank of the defendants was a loan in its legal effect. *Commercial Bank of Albany v. Hughes*, 17 Wend., 100. *Southern Loan Co. v. Morris*, 2 Barr, 175.

The state could not have made this loan in point of fact without the intervention of some officer or agent. No officer or agent of the state could make such loan or deposit without a violation of the law above referred to, which violation would render such officer or agent both personally and officially liable to the state for the money so loaned or deposited, while no such unauthorized act would bind the state. The reverse of this proposition must be equally true, that the state would thereby acquire no right of action except as against its officer or agent on his official bond, or for a violation of law, or in a proper case against parties who might be guilty of a conspiracy with such officer or agent to unlawfully obtain possession of the public money by means of such loan or deposit.

It is true that although such loaning or depositing of the public money was unauthorized and contrary to the spirit and policy of our government, yet after it was done in point of fact it could be ratified by the state. But such ratification could, under our constitution, only be by public law, and this court will take judicial notice of any such law or the absence thereof.

The transaction set forth in the plaintiff's petition not being originally binding on the state and not having been assumed or ratified by it, constitutes no cause of

action on the part of the state against the defendants.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

GEORGE W. BOYER, PLAINTIFF IN ERROR, v. WILLIAM BARR, DEFENDANT IN ERROR.

Punitive, Exemplary, or Vindictive Damages. In a civil action in the nature of *trespass vi et armis* for an assault and battery, an amount of damages equal to the full compensation of the plaintiff for the injury sustained by him cannot be increased by the addition of a fine for the punishment of the defendant.

ERROR from the Lancaster county district court.

Hunter & Sawyer, for plaintiff in error.

1. Where the civil action is based upon acts which constitute a crime under the laws of the state, no punitive damages can be allowed in the civil action. *Austin v. Wilson*, 4 Cush., 273. *Fay v. Parker*, 53 N. H., 342. *Tabor v. Hutson*, 5 Ind., 322. *Nolsaman v. Ricket*, 18 Ind., 350. *Humphries v. Johnson*, 20 Ind., 190. *Cherry v. McCall*, 23 Ga., 193. *Southwick v. Ward*, 7 Jones (N. C.), 64. *Freese v. Trip*, 70 Ill., 496. *Albrecht v. Walker*, 73 Ill., 69.

2. Punitive damages assessed in a civil action are said to be allowed "when malice mingles in the controversy," not as compensation to the plaintiff, but as "an example to deter others." These grounds are identical. The same facts that prove the crime are also relied upon as ground for punitive damages. Scholastic men may draw distinctions, but nature has made no difference. More than one punishment for the same

offense is prohibited by sec. 12, art. I, of constitution of Nebraska; also by the common law. 4 Bl. Com., 335. *United States v. Gilbert*, cited in Vol. 1, Arch. Crim. Plead. and Prac., 339.

3. Punitive damages can be regarded only as fines or penalties, and under sec. 5, art. VIII, constitution of Nebraska, they must be held as an inviolate trust as a part of the school fund. *Atchison & Nebraska R. R. Co. v. Baty*, 6 Neb., 37, and cases there cited. *Steele v. State*, 5 Blackf. (Ind.), 110.

Lamb, Billingsley, & Lambertson, for defendant in error.

Exemplary damages, or damages beyond compensation for the injury done, are recoverable in an action for assault and battery, especially when the injury is attended with circumstances of aggravation, or when malice and oppression appear. A previous conviction and fine for an assault and battery is no bar to the recovery of exemplary damages in a civil action for the same assault and battery. *Wiley v. Keokuk*, 6 Kan., 94. *Ward v. Ward*, 41 Iowa, 686. *Cook v. Ellis*, 6 Hill, 466. *Roberts v. Mason*, 10 Ohio State, 277. Sedgwick on Damages, 6th Ed., page 569. *Fry v. Bennett*, 4 Duer, 247. *Smithwith v. Ward*, 7 Jones L. R. (N. C.), 64. *Johnston v. Crawford*, Phillips L. R. (N. C.), 342. *Hadley v. Watson*, 45 Vermont, 289. *Hendrickson v. Kingsbury*, 21 Iowa, 379. Field on Damages, sec. 89, page 105. *Mc Williams v. Bragg*, 3 Wis., 424. *Birchard v. Booth*, 4 Wis., 67. *Malone v. Murphy*, 2 Kan., 261. *Chiles v. Drake*, 2 Met. (Ky.), 146. 3 Johns., 64. 14 Johns., 352. 4 Seld., 462. Opinion of Chief Justice Ryan, Central Law Journal, Vol. 7, No. 11, page 208.

COBB, J.

This was an action of trespass for an assault and battery, brought by the defendant in error against the plaintiff in error, originally in the county court, and carried to the district court of Lancaster county by appeal, where there was a trial to a jury and a verdict and judgment for two hundred dollars in favor of the plaintiff below, and brought to this court by petition in error on exceptions to the charge of the judge.

The following instructions were given at the request of defendant in error, and excepted to by plaintiff in error:

1. The defendant admits that he committed the assault and battery charged upon the plaintiff. Your verdict should therefore be for the plaintiff.

2. In assessing the amount of damages which the plaintiff should recover, if you find that the defendant acted deliberately and maliciously, you should recompense the plaintiff for—*First*, His mental suffering, the insult effected and the sense of degradation felt by the plaintiff; *Second*, You should also give compensation for the pains suffered by the plaintiff consequent on the beating; *Third*, You should also take into account the place where the defendant beat the plaintiff, whether it was a public place; the injury to the plaintiff's social standing. The fact that Mr. Boyer has been fined by Justice Taylor for the assault and battery complained of in this action will not bar a recovery for damages in this action. In addition to compensating plaintiff for injury actually committed, you may assess other damages as of a punitive or exemplary character.

It appears from the pleadings certified in the record that before the commencement of said action, the plaintiff in error was arrested and taken before a justice of the peace and fined for the said assault and battery, and

that he paid the fine; the *bona fides* of which proceeding was however denied by the defendant in error.

The only question presented to this court is upon the second instruction and the last paragraph of it, upon which the plaintiff in error makes the point that where the civil action is based upon acts which constitute a crime, under the laws of the state punishable by fine or imprisonment, no punitive or exemplary damages can be allowed in the civil action.

Whatever views this court may arrive at upon this question, it will be a hopeless task to endeavor to reconcile them either with the adjudicated cases, or the conclusions of eminent text writers of either this country or England, for so far as we have been able to examine them they are pretty evenly divided both in numbers and weight of authority.

Some of the courts express regret at being compelled by force of precedent to hold in favor of allowing punitive damages in similar cases, while, were it a new question, their judgment would condemn it.

In a late case the supreme court of Wisconsin, through Chief Justice Ryan, uses the following language in a case exactly in point: "The argument and consideration of this case have gone to confirm the present members of this court in their disapprobation of the rule of exemplary damages, which they have inherited. But they fear to complicate the difficulties and incongruities of the rule by the exception urged, and do not feel at liberty to change or modify the rule at so late a day against the general authority elsewhere. As suggested in *Bass v. Railway Co.*, if a change should now be made it lies with the legislature rather than the court to abrogate or modify a rule running through the entire body of the reports of the state. As was once well observed, courts cannot be always inquiring into the original justice or wisdom of rules

long established and accepted." *Brown v. Swineford*, Central Law Journal, Vol. 7, No. 11, p. 208.

Mr. Justice Foster in his exhaustive opinion in *Fay v. Parker*, 53 N. H., 342, says, speaking of punitive damages: "Now why all this unnecessary trouble, confusion, and perplexity, when the course of procedure should be plain, straight, and uninterrupted? The true rule, simple and just, is to keep the civil and the criminal process and practice distinct and separate. Let the criminal law deal with the criminal, and administer punishment for the legitimate purpose and end of punishment, namely, the reformation of the offender and the safety of the people. Let the individual whose rights are infringed and who has suffered injury go to the civil courts and there obtain full and ample reparation and compensation; but let him not thus obtain the 'fruits' to which he is not entitled and which belong to others. Why longer tolerate a false doctrine which in practical exemplification deprives a defendant of his constitutional right of indictment or complaint on oath, before being called into court—deprives him of the right of meeting the witnesses against him face to face —deprives him of the right of not being compelled to testify against himself—deprives him of the right of being acquitted unless the proof of his offense is established beyond all reasonable doubt—deprives him of the right of not being punished twice for the same offense? Punitive damages destroy every constitutional safeguard within their reach. And what is to be gained by this annihilation and obliteration of fundamental law? The sole object in its practical results seems to be to give a plaintiff something which he does not claim in his declaration. If justice to the plaintiff required the destruction of the constitution there would be some pretext for wishing the constitution were destroyed. But why demolish the plainest guaranties of

that instrument and explode the very foundation upon which constitutional guaranties are based, for no other purpose than to perpetuate false theories and develop unwholesome fruits? Undoubtedly this pernicious doctrine 'has become so fixed in the law,' to repeat the language of Mr. Justice Campbell, of Michigan, 'that it may be *difficult* to get rid of it. But it is the business of courts to deal with difficulties; and this heresy should be taken in hand without favor, firmly and fearlessly.' It was once said 'If thy right eye offend thee pluck it out * * and if thy right hand offend thee cut it off,' wherefore not reluctantly should we apply the knife to this deformity, concerning which every true member of the sound and healthy body of the law may well exclaim, 'I have no need of thee.'"

To this court the question of punitive, vindictive, or exemplary damages is *tabula raza*, it now being presented for the first time. And being thus called upon to lay the foundation for future adjudications on this subject in this state, we are warned to avoid a line of construction which seems to have been the fruitful source of so much difficulty otherwhere, and to follow those precedents and authorities which are the most satisfactory to our judgment, and which do not seem to have led to any embarrassing complications in their administration.

Mr. Justice Metcalf says "whether exemplary, vindictive, or punitive damages—that is damages beyond a compensation or satisfaction for the plaintiff's injury —can ever be legally awarded as an example to deter others from committing a similar injury, or as a punishment of the defendant for his malignity or wanton violation of social duty in committing the injury which is the subject of the suit, is a question upon which we are not now required nor disposed to express an opinion. The arguments and the authorities on both sides of this question are to be found in 2 Greenl. on Evi-

dence, tit. Damages, and Sedgwick on Damages, 39, *et seq.* If such damages are ever recoverable we are clearly of the opinion that they cannot be recovered in an action for an injury which is also punishable by indictment, as libel and assault and battery. If they could be, the defendant might be punished twice for the same act." *Austin v. Wilson*, 4 Cushing, 273.

The supreme court of Indiana say: "Taber was liable to indictment for the assault and battery charged in this action and damages could not therefore be given beyond a compensation for the plaintiff's injury. He was not, it is true, confined to the proof of actual pecuniary loss; the jury might have taken into consideration every circumstance of the act which injuriously affected the plaintiff, not only in his property, but in his person, his peace of mind—in short, in his individual happiness. But we think the jury had no right, as charged by the circuit court, to give such additional damages as would tend to prevent such conduct, and give peace and security to private rights and the community in general." *Taber v. Hutson*, 5 Ind., 322.

The late venerable Sidney Breese, in an action brought by a woman against a brewer for damages for selling her husband beer on Sunday and making him drunk, uses the following language: "Again this court held in *Freese v. Tripp*, supra, that damages could not be awarded by way of punishment of the seller, as the law has provided for that by indictment, to be followed by fine and imprisonment. 'Vengeance is mine,' saith the law. * * * If appellant's conduct was in violation of law and outraged the public, the public have their remedy by indictment, and punishment of the guilty will assuredly follow. Can the law be said to be vindicated by putting money in the pockets of an individual under the claim of a real or fancied wrong done by another?" *Albrecht v. Walker*, 73 Ill., 69.

Approving as this court does of the law as laid down in the above cases, we cannot approve of the latter clause of the second charge given by the district judge on the trial of this cause, and for that reason there must be a new trial.

REVERSED AND REMANDED.

MOSES U. PAYNE, PLAINTIFF IN ERROR, v. CLINTON BRIGGS AND JOHN I. REDICK, DEFENDANTS IN ERROR.

1. **Pleading:** REPLY. A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true.
2. **Depositions:** VENUE. The certificate of the officer taking a deposition ought to show on its face the county and state or country where the same is taken, as well as the state or country from which the officer derived his official character.
3. ———: QUÆRE. Whether it is proper to take depositions in the office of one of the parties or of his attorney, or before an officer who is also the clerk or student of such party or attorney?

ERROR from the district court for Otoe county. The case is stated in the opinion. Payne was defendant below and, judgment being rendered against him, brought the cause up by petition in error.

George W. Covell, for plaintiff in error.

E. F. Warren, for defendant in error.

COBB, J.

The plaintiffs in their petition allege that on the first day of August, 1872, the defendant was indebted to them in the sum of nine hundred and fifty dollars bal-

ance of contract price for the work, care, diligence, and attendance of the plaintiffs, by the said plaintiffs before that time performed and bestowed as the attorneys and solicitors of and for the said defendant, and at the defendant's special instance and request, in and about prosecuting and defending certain interests of the defendant against one Jasper A. Ware, in the bankruptcy court of the United States for the state of Nebraska, and performing other business as such attorneys and solicitors for the said defendant, and at his request, and the advice and counsel by the said plaintiffs as such attorneys to and for the said defendant, and about his business at his like request—which services, as aforesaid rendered and performed, were of the value of one thousand dollars; that the said defendant promised and agreed to pay said plaintiffs for and on account of their services in the business of defendant's claim against the said Ware as aforesaid, in the year 1872, the said sum of one thousand dollars. That the said sum is due and unpaid, except the sum of fifty dollars," etc.

To which the defendant made answer, and set up three defenses. His first defense consists almost entirely of negative matter, in which he denies all of the material allegations of the petition. In his second defense he alleges "that on the 25th day of May, 1872, he employed plaintiffs as his attorneys and solicitors to represent and prosecute his entire claim, amounting at that time to the sum of about twenty to thirty thousand dollars against one Jasper A. Ware, in the bankruptcy court of the United States for the district of Nebraska; that in and by the terms of such employment this defendant was to pay plaintiffs, and did pay them, fifty dollars in cash in full settlement and payment for all their services in case the creditors of Jasper A. Ware, including this defendant as well as

those who had at that time commenced proceedings in bankruptcy against J. A. Ware, which were then pending, should discontinue such proceedings and take their several claims against Ware out of bankruptcy by consenting to and accepting an assignment of all the real estate and personal property belonging to J. A. Ware, from said Ware and Ellen H. Ware, his wife, to John H. Tomlin and Russell McComas as assignees and trustees of and for said Ware and his several creditors, which said assignment was at that time in contemplation. That in case such assignment was not made and such discontinuance had thereunder, the said payment of fifty dollars was to be considered a retainer fee for the services of said plaintiffs as attorneys and solicitors of the said defendant, in the matter of the bankruptcy of J. A. Ware, and that in such case the said plaintiffs agreed to represent and prosecute to final conclusion the entire claims of this defendant in said bankruptcy court, until settled in that court, for the additional sum of nine hundred and fifty dollars. That in truth and in fact such assignment was, on or about the nineteenth day of August, 1872, made to the said John H. Tomlin and R. H. McComas by the said Jasper A. Ware and Ellen H. Ware his wife, and accepted by this defendant and the petitioners in bankruptcy as well as other creditors of said Ware not petitioning, and this defendant, after said trust was accepted and acted upon by the said assignees, discontinued his proceedings in bankruptcy by directing his said attorneys to dismiss his said petition against the said Jasper A. Ware. That in truth and in fact no services whatever were performed by said plaintiffs for this defendant, except filing his petition in bankruptcy against Jasper A. Ware, and dismissing the same by this defendant's direction as aforesaid, and that the said fifty dollars in cash was to be compensation in full

for all the services rendered in that matter by plaintiffs for defendant, and was paid by defendant as such compensation in full for all services rendered by plaintiffs for defendant in the matter of the bankruptcy of J. A. Ware. That plaintiffs did or performed no services whatever for defendant as attorneys and solicitors except such as were contracted to be performed by them for the said sum of fifty dollars as payment in full. Defendant further avers that no other or different contract than the one hereinbefore set forth was made by and between plaintiffs and defendant, and that plaintiffs did not perform any services for him other than those that were to be performed by them under the first clause of the contract hereinbefore set forth, and that they have been paid in full by this defendant for such services."

To this answer no reply was made. To be sure there is a reply copied in the transcript, but in the certificate of the clerk he states that it never was filed in this cause, but was found among the papers after the same was disposed of, and was put into the transcript at the request of the attorney for the defendant in error.

Hence the matters set up in the answer must for the purposes of this case be considered as admitted by the plaintiffs in the court below. *Dillon v. Russell and Holmes*, 5 Neb., 488. *Williams v. Evans*, 6 Neb., 216.

It was therefore error in the court to find the issues for plaintiffs when upon the face of the pleadings they stand admitted in favor of the defendant.

Before the trial in the district court, the defendant moved to suppress the deposition of John I. Redick taken by the plaintiffs, for the reasons stated in said motion—insufficiency and informality of the certificate, want of venue in the certificate, etc. Defendant also filed exceptions to the introduction and reading of said deposition for reasons therein stated; which motion and

exceptions were overruled by the court and the deposition allowed to be read on the trial.

The deposition was defective in that it contained no venue. The certificate of the officer fails to show in what state or country it was taken, or from what state or country he received his official authority to take it. A correct test is—Is the certificate such that upon an indictment of the witness for false swearing the deposition itself could be introduced as evidence without further authentication? In this case, without resorting to the notice, we cannot tell what state courts would have jurisdiction of such an indictment, and we nowhere find that Mr. J. Willis French certifies himself to be a notary public of the state of Colorado, where by the notice the deposition was to have been taken.

This court cannot resist the inclination in this connection to express its disapprobation of a practice which seems to exist to some extent, of taking depositions of witnesses in the office of the attorney taking the same and sometimes before a notary who is also the clerk or student of such attorney. In many of the states such practice is prohibited by statute. But in the absence of a statute it is so manifestly unfair and so liable to lead to abuse, that if it does not of itself render a deposition thus taken inadmissible, it might when taken in connection with other circumstances. The deposition in this case was taken, as appears by the notice, in the office of one of the plaintiffs, and although the point is not raised in the exceptions, if it had been made it would have added somewhat to the points raised, which were of themselves sufficient to have excluded the deposition.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

MARY D. WALRATH, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Indictment for Murder:** PROOF. To justify a conviction under an indictment for murder, it must be proved either that the accused personally committed the deed, or else was present at its commission, aiding and abetting therein, or, in other words, was a principal in the *first* or *second* degree.

2. ———: ———. But facts showing that the prisoner was accessory only, whether before or after the fact, will not warrant a conviction under an indictment for murder.

3. **Admissions of Prisoner.** When the prosecutor depends upon the admissions of the prisoner to establish guilt, if they be reconcilable, and none are disproved, they must be taken all together.

4. **Principal in felony:** PRESENCE AT ITS COMMISSION. Evidence merely showing the accused to have been present at the commission of the felony, without more, is not sufficient to make him a principal therein.

5. **Error:** EVIDENCE: MOTION FOR NEW TRIAL. When the error complained of concerns the admission or rejection of testimony on the trial, the record must show that the alleged error was specifically assigned in the motion for a new trial. And it is not enough merely to allege—"For errors in the ruling of the court in allowing evidence objected and excepted to by the defendant."

6. ———: IMPROPER CONDUCT OF COUNSEL. If it be assigned for error that "the prosecuting attorneys improperly conducted themselves in the argument of the case to the jury," to the prejudice of the prisoner, the record must show that the particular matter complained of was brought to the attention of the court below, and was made one of the grounds of complaint in the motion for a new trial.

NOTE.—By statute, in various states, the common law rule requiring a prior conviction of the principal has been relaxed, and an accessory may be indicted or tried without averring or proving such conviction. *People v. Bearss*, 10 Cal., 68. 3 Greenleaf Ev., § 46.

By the Ohio Crimes Act, from which section one of the Nebraska Criminal Code of 1873 is taken, aiding, abetting, and procuring a crime to be committed is made a substantive, independent offense, not in any way dependent for its punishment on the conviction of the principal offender. *Noland v. The State*, 19 Ohio, 131.—REP.

7. **Instructions to jury.** Instructions to the jury must be based upon and be applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.

8. **Confessions:** FACTS BROUGHT TO LIGHT BY. Any circumstance tending to establish the prisoner's guilt may be *proved*, although it was brought to light by an admission of the prisoner, inadmissible, *per se*, as having been obtained by improper influence.

9. **Separation of jury.** The court may, even in a capital case, permit the jury to separate during the adjournments of court, up to the final submission of the case to them. But when permitted to separate they should be admonished by the court as to their duty.

ERROR from the district court of Cheyenne county. The facts appear in the opinion.

Heist, Ballou, Hinman, & Neville, for plaintiff in error, cited *Milton v. The State*, 6 Neb., 145. *Spurgeon v. Clemmons*, Id., 307. *Palmer v. The People*, 4 Neb., 76. *Commonwealth v. Webster*, 5 Cush., 295. *Rainer v. State*, 33 Ga., 571. *People v. Campbell*, 40 Cal., 129. *Woods v. The State*, 43 Miss., 364. Gen. Stat. Neb., 830. *People v. Phillips*, 42 N. Y., 200.

George H. Roberts, Attorney General, for the state.

No brief filed.

LAKE, J.

The plaintiff in error was indicted jointly with one Harry Dubois for the crime of murder in the *first* degree, in shooting to death Charles Phillips. On a separate trial she was convicted of murder in the *second* degree, and sentenced to the penitentiary for the term of ten years. She now brings the case here, alleging several errors as grounds for a reversal of the judgment.

The first error assigned is that the verdict is not sustained by the evidence. We have carefully examined the evidence as preserved by the bill of exceptions, and are clearly of opinion that this objection to the verdict is well taken. We find a total want of evidence to show that the prisoner either committed, or was present, aiding or abetting in the commission of the crime. The utmost that the evidence tends to establish against her is, that knowing of its commission by Dubois, she concealed the fact, and also harbored and protected him from prosecution. But this, if fully established, would only make her an accessory after the fact, a crime not charged by the indictment, and for which she was not on trial. The testimony may also have shown that Dubois had previously threatened to take the life of the deceased, in her presence.

To have justified a conviction under this indictment it was necessary for the prosecution to prove, either that the prisoner herself gave the fatal wound, or else was present, aiding and abetting in giving it. 2 Broom & Hadley's Com. (Am. Ed.), 353. In other words, she must have been what is known in criminal jurisprudence as a principal, either in the *first* or *second* degree. The theory of the prosecution seems to have been that she was the latter. Principals in the *second degree* are those who did not with their own hands commit the act, but were present aiding and abetting it. 3 Greenleaf on Ev., Sec. 40. 1 Hale P. C., 615. But facts showing the prisoner to have been an accessory only, whether before or after the fact, would not warrant her conviction under an indictment charging her as principal. *State v. Wyckoff*, 31 N. J., 65. *Connaughty v. The State*, 1 Wis., 159. *Hughes v. The State*, 12 Ala., 458. 1 Bish. Crim. Law, Sec. 663.

The only evidence upon which reliance was placed as connecting the prisoner with the homicide, in any

manner, consisted of so called "confessions" made just previous to, and at the time of her arrest. The most of these confessions however, after having been erroneously admitted, were very properly excluded, so far as they could be, from the consideration of the jury on the ground that they were not voluntary. The principal ones not excluded were the following, viz:

William Radcliff, a witness called by the state, in answer to a question by the district attorney, said: "I asked her (the prisoner) where Charley (the deceased) was. She stopped awhile and did not speak for some time; then she said, if she had a friend she had a secret to tell him. Then she said Charley was not a thousand miles from there, and told me that by going down a mile or a mile and a quarter from the ranch I would find where he had been killed."

Q. How did she say you would find the place?

A. Well there was a small clump of trees about a mile from the house, and she said if I would go down there I would find where he had been killed; and if I would uncover that pile of sand that was there I would find blood and then I would see a trail that led to the river.

Q. Did she say how he had been killed?

A. Yes, sir. She did.

Q. Well how was it?

A. She said he had been shot.

Q. Well, go on.

A. She told me if I would go over to the bridge I would find some cartridges that were shot out of a pistol. She told me where he was shot, right here, pointing to her cheek and neck; and she said those who did that ought to be punished.

This witness then went on and narrated how, in accordance with the prisoner's directions thus given, he made search and found the blood, cartridges, and a

trail leading to the river, such as would be made by dragging some object over the ground. And this disclosure led to the discovery of the body of the deceased shortly afterward, in the river a short distance from where this trail struck the water's edge.

On cross-examination the following facts were drawn out from this witness:

Q. Did she not state to you during that conversation that she was afraid of Dubois?

A. Yes, sir. She did.

Q. Did she tell you not to tell Dubois what she had told you?

A. Yes, sir.

Q. Did she state as a reason she had not told this before was fear of Dubois?

A. Yes, sir.

Q. Did she state to you how she had learned these facts?

A. Yes, sir. She did.

Q. How was it?

A. She told me that Dubois told her.

It was also proved that Dubois and Phillips for some months before and at the time of the murder were living with the Walraths, and that Dubois remained there and seemed to be upon very intimate terms with the family up to the time of his arrest.

Also, M. C. Cook, a witness called by the prosecution, testified:

Q. Well, go on and give the particulars of the conversation.

A. She (Mrs. Walrath) told me she had a secret to tell me—that if I would not tell she would tell me. She told me that Charley Phillips was murdered; and told me where he was murdered. She said he was murdered down by some little willow trees; that he

was murdered there, then dragged south and thrown into the river.

Q. How did she say he was killed?

A. She said that he was shot.

Q. Who by and how?

A. She did not say how. She said that he went out without Harry Dubois; she said that Dubois told him that he had a hand in the train robbery at Big Spring station; that he had money hidden there; he told him if he would go out with him that night he would make him wealthy; that he had the money buried. She said they had a fight a few nights before, and that Phillips was afraid of Dubois; that Phillips told he was going out that night, and was afraid of Dubois, and wanted her promise to see to it, that if anything came out wrong, to have it cleared up. She said that when they got down to the place where he was killed, Dubois said to Phillips, "What is that coming down the railroad?" Phillips turned to look, when he was shot twice—once in the cheek as he turned his head to see, and then in the neck.

Q. Did she say what he was shot with?

A. She did not say.

Q. Did she say what arms they took with them from the house?

A. Yes, sir. That Phillips took a Winchester rifle, and Dubois a revolver.

Q. How did he fall?

A. She did not say how he fell, but that he was shot down, and then dragged down, and thrown into the river.

Q. Did she say who shot him?

A. No, sir.

Q. State anything else that was said?

A. She told me that she had heard Harry Dubois say, a day or two before, that he was going to kill

Phillips, but she did not believe he had the sand to do it.

On cross-examination.

Q. Did she state to you that she was afraid of Dubois?

A. She said something about being afraid of him.

Q. Did she not caution you not to tell Dubois until after he was arrested?

A. She said something like that; I don't remember what exactly. She said she was afraid of Dubois, and was afraid to be out, that he would kill her.

Q. Did she tell you how she learned the facts of the killing?

A. No, sir.

Also the witness Radcliff testified for the prosecution as to certain statements of the prisoner as follows:

Q. Now state if she made any statements to you as to where you would find Phillips' clothes that he wore at the time he was killed?

A. Yes, sir, she did.

Q. Where did she say you would find them?

A. Well, I can't say that she told me where they could be found.

Q. Where did she say she directed them to be put?

A. In a slough behind the house.

Q. Mr. Radcliff, did you have any conversation with the defendant in relation to her knowledge of Phillips going to be killed?

A. Yes, sir.

Q. State what the conversation was?

A. She said she knew it was going to happen.

Q. How long had she known it?

A. Ten days or two weeks.

On cross-examination:

Q. When she told you that she knew of this, did she not speak of it in this way, "That Dubois had made threats, but she did not believe he would do it?"

A. I believe some such words as that.

Q. Did she not make use of this remark, "that she told Dubois he had better burn the pants, when he wanted to wash them?" Was not this said, "That she told Dubois that he had better burn the clothes?"

A. Yes, sir, she made the remark.

From this narration of the only testimony on which the jury could possibly have based their finding, the propriety of what we said at the outset as to the failure of the evidence to establish the prisoner's guilt as a principal in the homicide, will be clearly perceived.

It is a settled rule of criminal evidence that, where the prosecutor depends upon the admissions of the prisoner to establish his guilt, if they are reconcilable, and none of them disproved, they must be taken altogether. 1 Greenleaf on Ev., sec. 218. The admission by the defendant of a fact disadvantageous to himself will not be received without receiving at the same time his contemporaneous assertion of a fact favorable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge. Whar. Am. Crim. Law, 188. Therefore her declaration that all the facts which she disclosed concerning the killing of Phillips were communicated to her by Dubois being wholly uncontradicted, and entirely consistent with her other statements, should be taken and given equal credit with them.

Again, it will be noticed that in none of these "confessions" does she represent herself as being an actor, nor is there a syllable of other testimony to show that she was; so that, even if she had omitted the statement that her knowledge of the affair was derived from Dubois, the most that could reasonably be inferred from them is, that she was so near as to have been an eye witness of the transactions which she related. But

mere personal presence at the commission of a felony, without more, is not sufficient to make one a principal. *Connaughty v. The State, Supra. People v. Ah Ping*, 27 Cal., 489.

The second error complained of is, that the court erred in admitting certain testimony against the objection of the prisoner. While the assignment in the petition in error is sufficiently explicit, we find that, in the motion for a new trial, no mention whatever was made of the particular testimony to which objection was made. Not so much even as the name of a single witness whose testimony was deemed inadmissible was given. The assignment in the motion was simply, "for errors in the ruling of the court in allowing evidence objected to by defendant, and excepted to by defendant."

Section 490 of the code of criminal procedure provides for a new trial after a verdict of conviction; and one of the reasons for which it may be had is "error of law occurring during the trial." Section 491 provides that, "The application shall be by motion upon written grounds," etc. The evident intention in requiring the motion to be in writing was to fully apprise the judge to whom it might be addressed of the matters claimed to be erroneous, and on which the party complaining relies for a new trial. This assignment did not do this, for, notwithstanding the motion, the judge could not have known just what evidence was intended to be reached by it without resorting to an oral explanation by counsel. And even if such explanation were given, this court would have no means of knowing that the question presented here was the same as that raised and passed upon in the court below. The proceeding by which this is here is one of review only. Under it the only questions proper for our consideration are those that have been first

ruled on in the court whose record is before us, and the record itself must show the questions to be such. The presumption is that no prejudicial error has been committed, and it is not too much, indeed good practice demands it, to require a party who complains of such errors to point them out so distinctly in his motion for a new trial as to advise the court of just what he relies on. The rule in this particular is the same as in civil cases. Therefore the alleged errors in the admission of evidence will not be considered.

The *third* assignment is, "Because the prosecuting attorneys improperly conducted themselves in the argument of the case, in urging to the jury statements which the court had excluded from the evidence, as a reason why the defendant should be convicted." What we have just said as to the *second* assignment is applicable here. It is not shown that this matter was brought to the attention of the court below, either at the time of the alleged improper conduct, or in the motion for a new trial. Therefore no question is raised for this court to pass upon.

The *fourth* error assigned relates to certain instructions given to the jury on the law of the case. Our attention is called to but two, the first of which was in these words: "To warrant you in finding a verdict of guilty under the indictment herein, you must find from the evidence in the case that the defendant, Mary D. Walrath, either with her own hands and physical agency committed the homicide as charged, or was present when it was done, aiding, abetting, or procuring the same to be done by another. It is not necessary, however, that her presence be a strict, actual, immediate presence, so as to make her an eye witness of the homicide. It is enough if her presence be constructive. If you are satisfied there was a previous understanding or conspiracy entered into between the

defendant and any other person or persons to commit the homicide, and pursuant thereto the defendant took the part agreed upon and assigned her therein by common design, either in watching at proper distance to prevent surprise, or in enticing the deceased away, or took any other part assigned pursuant to prior agreement, and by words, deeds, personal presence, or any overt act contributed thereto, and was so near that she could and did by her personal presence, words, acts, or deeds, carry out the part previously assigned her, you will be warranted in finding her guilty, just the same as you would the person who actually committed the homicide with his own hands. But you must find she was in a situation in which she might by personal presence render assistance in some manner to the commission of the deed, and this, too, by design and agreement with the principal and actual perpetrator prior to the homicide."

This instruction was clearly erroneous, for, as before shown, there was no testimony on which to predicate it. Instructions must be based upon and be applicable to the testimony. *Meredith v. Kennard*, 1 Neb., 312.. *Myer v. M. P. R. R. Co.*, 2 Neb. 319. The jury were given to understand by this instruction that there was evidence before them from which the prisoner's guilt as a principal offender might legally be inferred. In *Parks v. Ross*, 11 How., 362, the court say: "It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact without some evidence legally sufficient to establish it. It is therefore error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred."

By this instruction, however, the jury were in effect

told that there was evidence before them from which they could legally find that a conspiracy had been entered into between the prisoner and some "other person or persons to commit the homicide, and pursuant thereto the defendant took the part agreed upon and assigned her therein." But the record contains no such evidence. Again, the jury were given to understand that there was evidence to show that the prisoner enticed the deceased to the place of the murder, and that she watched "at a proper distance to prevent surprise" while the deed was being committed, yet there was not a syllable of testimony that such was the fact. In these particulars the instruction was erroneous and clearly prejudicial to the prisoner.

The next instruction complained of is the *ninth*. Its language was: "All facts connected with the homicide, discovered and disclosed in consequence of the confessions of the accused, whether obtained by improper inducements or not, and so much of her confessions as distinctly relate to the facts connected with the alleged murder are proper for your consideration, and no more."

This instruction, in addition to being uncalled for by the state of the proofs, had, we think, a strong tendency to mislead the jury, by leaving them to infer that such facts might be established by illegal admissions alone. In connection with this charge they ought to have been told that before they could consider facts thus disclosed they must be clearly proven by testimony other than confessions of the prisoner improperly obtained, and which had been excluded from them. This caution was the more necessary by reason of the questionable practice which had been indulged in, of first admitting these improper admissions against objections, and afterward endeavoring to nullify their effect by formally excluding them from the jury. Any circumstance tend-

ing to show guilt *may be proved*, although it was brought to light by a declaration inadmissible, *per se*, as having been obtained by improper influence. Phillips on Ev. (C. & H. and E. notes), 555, note 158, and cases there cited.

As to the alleged errors concerning the management and conduct of the jury, we find nothing at all prejudicial to the prisoner. The court may, in a capital case even, permit the jury to separate during the adjournments of court up to the time of the final submission of the case to them. But when permitted to separate they should be admonished by the court as to their duty, as directed in section 484 of the criminal code. Gen. Stat., 830.

Several other questions of minor importance were raised, but in which we perceive no ground for complaint. For the errors stated, the judgment must be reversed and a new trial awarded.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX REL. CHARLES T. MITCHELL, V. SCHOOL DISTRICT NUMBER NINE OF YORK COUNTY, ET AL.

1. **Mandamus.** An alternative writ of mandamus must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and omissions in the alternative writ cannot be supplied by the affidavit or application.

2. ——: WHEN GRANTED. A writ of mandamus is granted merely to compel action, and enforce the performance of a pre-existing duty. It creates no new authority, nor confers any powers which did not previously exist. It is never granted in anticipation of an omission of duty, however strong the presumption may be that the persons against whom the writ is

sought will refuse to perform their duty when the proper time arrives.

3. **School District Bonds.** Where bonds had been issued by a school district while comprising twenty-four sections, and afterwards the district was reduced to four sections; *held*, that the original district, although comprising but four sections, was primarily liable for the payment of the bonds, and that the new districts formed out of such territory were not required to report to the county clerk the amount due on such bonds.

ORIGINAL application for mandamus. An alternative writ was granted at the April Term, A.D. 1878, and the cause being continued to this term, was submitted on the pleadings.

Harwood & Ames, for the relator.

Scott & Giffen, for the respondent.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus against the school district boards of school districts Nos. 9, 42, 49, 57, 65, 70, 77, 78, and 79, of York county, to compel them to report in writing to the county clerk of said county the indebtedness due on certain bonds issued by school district No. 9, while comprising the territory now embraced in the above school districts, and also to require the county clerk of said county to report the same to the county commissioners of said county, and said county commissioners forthwith to levy an amount sufficient to pay said bonds, interest, and costs.

The rule is well settled that an alternative writ must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and on the hearing, omissions in the alternative writ cannot be supplied by the affidavit, or application on which it

was allowed. *McKenzie v. Ruth*, 22 O. S., 371. *Canal Trustees v. The People*, 12 Ill., 254. *People v. Supervisors of Westchester*, 15 Barb., 607. High on Ex Remedies, sec. 537.

A writ of mandamus is granted merely to compel action and enforce the performance of a pre-existing duty. It creates no new authority, nor confers any powers which did not previously exist. It is therefore in no sense a creative remedy. High on Ex Rem., sec. 7. Its object is not to supersede legal remedies, but rather to supply the want of them. To entitle the relator to the writ it must appear that he has a clear legal right to the performance of the act or duty on the part of the respondent, and that the law affords no other adequate remedy. The writ is never granted in anticipation of an omission of duty, however strong the presumption may be, that the persons against whom the writ is sought will refuse to perform their duty when the proper time arrives. To entitle the relator to the writ he must show that the respondent is actually in default in the performance of a legal duty then due at his hands. High on Ex. Rem., s. 12. *State v. Cheney*, 3 Kansas, 88. *Com. of Schools v. Co Com.*, 20 Md., 419.

Let us apply these principles to the case at bar. There is no allegation in the alternative writ that the school board of school district No. 9 are in default, or that they have not made the return required by the statute. School districts No. 42, 49, 57, 65, 70, 77, 78, and 79, having been formed out of territory embraced in school district No. 9, at the time the bonds were issued, it will be presumed, in the absence of an allegation in the writ to the contrary, that the county superintendent of public instruction, at the time of the formation of the new districts, adjusted the liabilities of the districts as between themselves, as required by the

statute. The writ entirely fails to state that the school boards of these new districts have any records under their control from which they can ascertain the indebtedness of school district No. 9 upon said bonds. But even if such an allegation had been made in the writ, still these boards cannot be required to report. School district No. 9 is primarily liable for the debt, and its records show, or at least should show, the actual amount due on said bonds. In certain contingencies, as in the case of *The People, ex rel Owen, v. School District No. 9, of Hamilton county*, not reported, certain bonds were issued when the district comprised sixteen sections. Afterwards, the district was reduced to two sections, apparently for the purpose of defeating the payment of the bonds, it appearing that the amount of property remaining in said district was entirely inadequate for the payment of said bonds and interest. It was held that the entire territory comprising the school district at the time the bonds were issued was liable for their payment, and the rule as laid down in that case is correct. But for ought that appears in the writ in this case, the property in school district No. 9 of York county may be ample in the ordinary course of taxation for the payment of the bonds in question and interest. The county clerk, county commissioners, and county treasurer, do not appear to have failed to perform their duty, consequently no writ can be awarded against them. As the alternative writ fails to state sufficient facts to authorize a peremptory writ, it is denied and the proceedings are dismissed.

JUDGMENT ACCORDINGLY.

LEIGHTON & BROWN AND WILLIAM ALEXANDER, PLAINTIFFS IN ERROR, V. MARTHA E. STUART, DEFENDANT IN ERROR.

1. **Practice in Supreme Court.** On a motion to dismiss a cause out of the supreme court, the *sufficiency* of the assignments of error in the motion for a new trial will not be considered.
2. **Bill of Exceptions.** When a bill of exceptions is properly presented to a judge for his signature within sixty days from the rising of the court, it is no cause for dismissing an action that the bill was signed after the expiration of sixty days from that time.
3. ———. When it does not appear at what time a bill of exceptions was presented to a judge for his signature, it will be presumed to have been presented within the period required by the statute.

MOTION to dismiss.

Brown & Marshall, for the motion.

J. R. Webster and *L. C. Burr*, *contra.*

MAXWELL, CH. J.

The attorneys for the defendant file a motion to dismiss the case out of this court. *First*, Because there is no sufficient motion for a new trial. *Second*, Because the bill of exceptions was not settled and signed within the time required by the statute.

In answer to the first objection it is sufficient to say that the sufficiency of the assignments of error in a motion for a new trial will not be considered on a motion to dismiss.

As to the second ground of objection, it appears from the bill of exceptions that it was settled and signed by the judge on the 14th day of May, 1878, the judgment having been rendered on the 13th day of March

of that year. The statute provides that "the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the rising of the court, and submit the same to the adverse party or his attorney of record, for examination and amendment if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose amendments thereto, and shall return said bill with his proposed amendments to the other party or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill to the judge who heard and tried the case, upon five days notice to the adverse party or his attorney of record, at which time the judge shall settle the bill of exceptions. If no amendments are proposed, or if proposed and allowed, the proposed bill may be presented with the amendments, if any, to the judge for settlement without notice to the adverse party or his attorney of record." Laws 1877, p. 11.

The act requires the bill of exceptions to be presented to the judge for his signature within sixty days from the rising of the court. It is not necessary the bill should be signed within the sixty days; the judge is entitled to a reasonable time to examine the bill before signing the same. In this case it does not appear at what time the bill of exceptions was presented to the judge for his signature, and in the absence of such showing it will be presumed that it was presented within the proper time. The motion to dismiss is therefore overruled, and the cause set down for argument.

MOTION OVERRULED.

STATE OF NEBRASKA, EX REL. GURDON LEONARD, V. SCHOOL DISTRICT NUMBERS THREE AND FOUR IN CLAY COUNTY.

Practice: MANDAMUS. An application for a mandamus, verified upon information and belief, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or an alternative writ. The motion for the writ should be made upon an affidavit setting forth the facts on which it is based. *The State, ex rel. Roberts, v. The Mayor*, 4 Neb., 260, adhered to.

ORIGINAL application for mandamus.

Brown & Marshall, for the relator.

MAXWELL, CH. J.

The application for a mandamus in this case is verified upon information and belief. An application verified in this manner, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or alternative writ.

In the case of *The State, ex rel. Roberts, v. The Mayor*, 4 Neb., 260, it was held that the statute requires the motion for the writ to be made upon an affidavit setting forth the facts upon which it is based, and that an affidavit stating that "the facts stated therein are true as affiant verily believes" is insufficient. And this is the rule at common law. Blackstone says: "This writ is grounded on a suggestion of the oath of the party impaired of his own right and the denial of justice below." 3 Blackstone Com., 111. The reason is evident: the facts are of such a character that they are or should be within the knowledge of the relator. The writ is denied upon this application, but the relator has leave to verify his application in the manner required by the statute.

JUDGMENT ACCORDINGLY.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA,

JANUARY TERM, 1879.

PRESENT:

HON. SAMUEL MAXWELL, CHIEF JUSTICE.
" GEORGE B. LAKE, } JUDGES.
" AMASA COBB, }

FREMONT FERRY AND BRIDGE COMPANY, PLAINTIFF IN ERROR, v. HENRY FUHRMAN, DEFENDANT IN ERROR.

1. **Bridges:** SUBSCRIPTION FOR ERECTION OF. A bridge company having the exclusive right to erect and maintain a toll bridge across the Platte river, for a distance of six miles near the town of Fremont, erected a bridge across the south channel of the river, which was destroyed about the 6th of March, 1876. The company then passed a resolution that in view of their indebtedness, they would not rebuild unless aided by subscriptions. F. subscribed $100. Afterwards, on the 31st of March, 1876, the company changed the location of the bridge about one mile east of its former location, to which F. did not assent. *Held*, that the change being made without his assent he was not liable upon the subscription.
2. ———: ———. Where a corporation or person to whom a subscription runs has incurred obligations on the faith of such subscription, and has complied with the conditions on which it was made, the same may be enforced by suit.

ERROR from the district court of Dodge county. The facts appear in the opinion.

W. A. Marlow, for plaintiff in error.

The law is well settled that where advances have been made on the strength of a subscription, before notice of a withdrawal, a legal liability is incurred, and cannot be avoided, even though the promise to pay be not in writing. General Statutes, 393. *Johnson v. Wabash College*, 2 Indiana, 555. *McAuley v. Billenger*, 20 John., 89. 1 Parsons on Contracts, 453. *Harrison v. Rike*, 10 Indiana, 140. *Pierce v. Ruley*, 5 Indiana, 69. *Ohio Wesleyan Female College v. Love*, 16 Ohio St., 25. *Speery v. Johnson*, 11 Ohio, 452. *Parson v. Smith*, 46 Barb., 235. *McCoomack v. Reese*, 3 Green, Iowa, 591.

N. H. Bell, for defendant in error.

I. If Fuhrman intended a gift of one hundred dollars to the company, then his promise, such as it was, was without consideration, and the principles applicable to gifts *inter vivos* would govern. It is essential to a gift that it goes into effect at once, and completely. If it regards the future it is but a promise, and being a promise without consideration, it cannot be enforced and has no legal validity. 1 Parson Cont., p. 234. It makes no difference whether the offer to give was verbal or written. *Cotten v. Missing*, 1 Madd. Ch., 176. *Lyte v. Perry*, Dyer, 49 a. If Fuhrman's subscription was made and received as a gift, plaintiff cannot afterwards by alleging and proving some remote and speculative benefit received by the donor, recover on the subscription as a promise founded upon a consideration.

II. The right to build a bridge anywhere within a six mile limit, as given to the plaintiff by its charter,

does not prevent the company restricting itself to a given point within these limits, by contract with an individual, as the argument by counsel for plaintiff would seem to imply. As to effect of change of location, etc., on stock subscribers, see *Carlile v. T. H. Richmond R. R.*, 6 Ind., 316. *Macedon & Bristol Pl. R. Co. v. Lapham*, 18 Barb., 312. *Worcester Med. Inst. v. Bigelow*, 6 Gray, 498. *Manheim Plank R. Co. v. Arndt*, 41 Penn. State, 317. We conclude, then, that plaintiff never had cause of action against defendant, as stated in the petition, and that the testimony, although conflicting, establishes the fact that such contract as there was never was performed on the part of plaintiff.

MAXWELL, CH. J.

From the facts admitted in the pleadings, it appears that the plaintiff obtained a charter from the territorial legislature, by which it acquired the exclusive right to erect and maintain a wagon bridge across the Platte river, between certain designated points, extending along the river a distance of about six miles near the town of Fremont, in Dodge county; that after said charter was granted, Fremont precinct voted bonds to the amount of $50,000 for the purpose of erecting a wagon bridge within the boundaries named in said charter, and thereafter erected a wagon bridge across both the channels of said river, apparently with the consent of the plaintiff. Afterwards the bridge across the south channel of the river was destroyed, and was replaced by the plaintiff, and the tolls collected for crossing the bridge owned by the precinct, and that owned by the plaintiff, were divided with the precinct.

In March, 1876, the plaintiff's bridge across the south channel was destroyed, whereupon a meeting of the stockholders was held, at which the following resolution was adopted:

"*Resolved*, That in view of the indebtedness of the Ferry and Bridge Company, they will not build another bridge unless aided by donations from citizens."

Beneath this resolution the defendant signed his name as follows: "Henry Fuhrman 100."

The answer of the defendant admits he promised one hundred dollars to rebuild the bridge, but insists that after said promise was made the plaintiff removed its bridge to a point about one mile east of the former site, and then erected a bridge across the entire river and increased the rates of toll, etc. The case was tried to a jury in the court below, who found in favor of the defendant. Judgment having been rendered in favor of the defendant the plaintiff brings the cause into this court by petition in error. The errors assigned are:

First. That the verdict of the jury is not supported by the evidence and is contrary to law.

Second. That the court erred in overruling the motion for a new trial.

Third. That the verdict should have been in favor of the plaintiff and against the defendant.

Fourth. That the judgment should have been in favor of the plaintiff and against the defendant.

No exceptions are presented by the record. The only question to be considered is, whether there is sufficient testimony to sustain the verdict.

It appears that Fuhrman and Wilson were appointed a committee to solicit donations for the bridge and called upon a number of persons for that purpose. Mr. May testifies that at the time Fuhrman signed the resolution there was nothing said as to the location of the bridge. Mr. Shed testified, "I objected to giving anything because I thought they had spent enough on that bridge down there. I don't know who said it, whether Mr. Fuhrman or Wilson, but one of them said the bridge was to be built down here on this street at An-

derson's place." Mr. Wilson testified that Mr. Fuhrman said (to Mr. Shed), "We are going to move the bridge down where Anderson's is." Mr. Pilsbury testified, "As near as I can remember the parties (Fuhrman and Wilson) said they did not care where the bridge was built, so they could get over into Saunders county." It also appears from the testimony that the subscription of the defendant was made about the 6th of March, 1876, and that the resolution relocating the bridge was passed on the 31st of March of that year.

The defendant, called as a witness on his own behalf, denies positively that he stated to Shed and Pilsbury that the bridge was to be built at or near the Anderson bridge; but says that he stated to them that the bridge was to be replaced. As neither Mr. Pilsbury nor Mr. Shed testify positively upon that point, but merely state the facts to the best of their recollection, Fuhrman's testimony is at least of equal weight with theirs. It also appears from the testimony that lumber was ordered by an agent of the plaintiff from Nye, Colson & Co. to rebuild the bridge at the former site. A clear preponderance of the testimony shows that at the time the defendant signed the resolution promising to pay the sum of one hundred dollars, the intention of the plaintiff was to rebuild the bridge upon the site of the one destroyed. So far as appears no action had been taken by the board of directors at the time the defendant made the subscription, nor was any proposition pending before them from which it might be inferred that the location was to be changed.

While there is some conflict in the authorities, the clear weight of authority seems to sustain the rule, that where several promise to contribute to a common object, desired by all, the promise of each is a good consideration for the promise of the others and can be enforced by suit, when the corporation or person to

whom the subscription runs has incurred obligations on the faith of such subscriptions, and has complied with the conditions upon which they were made. But a party may impose a condition upon his subscription. If the promise was to pay one hundred dollars to rebuild the bridge at the place occupied by the former one, he would not be liable if the bridge was removed to another point without his consent, particularly if the distance was as great as in this instance. This question was submitted to the jury, and a finding had in conformity to the clear preponderance of the testimony. Had the company not selected a location and built a bridge prior to the time the plaintiff subscribed the paper in question, the position of the plaintiff would be tenable, but having selected a location, in the absence of any affirmative action on the part of the plaintiff, the presumption would be that the bridge would be rebuilt on the former site. This is not a case where an unqualified promise was made to contribute for a bridge at any point within the six miles. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

JOHN B. DE NAYER, PLAINTIFF IN ERROR, V. STATE NATIONAL BANK, DEFENDANT IN ERROR.

Negotiable Instruments: LIABILITY OF INDORSER. One C. being indebted to D. drew a draft upon C. D. G., of St. Louis, for the amount of the debt, payable in thirty days from date, and delivered the draft to D., who placed the same in a bank for collection. Before the maturity of the draft D. was notified that it had been paid and drew out a portion of the money. C., who was insolvent, upon being notified of the payment of the draft, called at the bank before the maturity of the draft, and ex-

pressed surprise at its payment before maturity, and stated to the officers of the bank that he was anxious to protect the draft, and that if it was not paid that "he had some money which he intended to keep for the protection of the draft;" he was informed that it had been paid. Afterwards it was discovered that the draft had not been paid. *Held*, that as D. had lost no rights against C., in consequence of the mistake, that the bank was entitled to recover.

ERROR from Lancaster county district court. The facts appear in the opinion.

M. H. Sessions, for plaintiff in error.

It is admitted that when a bank pays out money through mistake that it can, under ordinary circumstances, recover the same back. It is however contended, that when the party receiving the money has no means of knowing whether the bank has made a mistake or not in paying the money, and receives the money in good faith, relying wholly upon the action of the officers of the bank, that if the party so receiving the money is in any way damnified or injured by the mistake, the bank would be estopped from setting up its mistake to the injury of the party receiving the same, and that as between the parties in such a case he who makes the mistake must suffer the consequences of the same. *Mead's Receiver, etc., v. Bank*, 25 N. Y., 143. *The Irving Bank v. Wetherald*, 36 N. Y., 335. It appears that DeNayer has failed to receive the money from Childs by the mistake of the bank, and that is enough to have entitled DeNayer to a verdict in the court below. Morse on Banks and Banking, 83, 288. *Salem Bank v. Gloucester Bank*, 17 Mass., 24 to 28. *Gloucester Bank v. Salem Bank*, 17 Mass., 41. *Andrews v. Suffolk Bank*, 12 Gray, 461. *Levy v. Bank*, 4 Dall., 223. *Levy v. Bank*, 1 Binney, 27.

Brown, Marshall & Brown, for defendant in error.

I. The principle that money paid through mistake of facts can, under ordinary circumstances, be recovered, is too well established to require a citation of authorities for its support, and it is admitted by the attorney for the plaintiff in error in his brief. The ground on which this principle rests is, that money paid through misapprehension of facts, without any consideration therefor, in equity and good conscience, belongs to the party who paid it, and cannot be retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties. It follows, therefore, that the fact that the party paying had the means of knowledge at his command, does not affect his right to recover. *Appleton Bank v. McGilvray*, 4 Gray, 518–522. *Lawrence v. Am. Nat. Bank*, 54 N. Y., 432. *Kelly v. Solari*, 9 Mees & Wels, 54–58. *Kingston Bank v. Eltinge*, 40 (1 Hand) N. Y., 391. *Nat. Bank of Commerce v. Nat. Mc'h's Bank Association*, 55 N. Y., 213. 2 Smith Lead. Cas. (Marg.), 403, and cases there cited.

II. The only remaining ground upon which it can be claimed that there is error in the proceedings in the court below is that the defendant in error is estopped, under the circumstances of the case, from setting up that the money was paid to DeNayer in the honest belief that the draft had been accepted and paid. But before a party is estopped from disproving his declarations or admissions, it must appear that the party to whom they were made has acted on them, and that he would be injured by their denial. Herman on Estoppel, p. 337, 338, *et seq.* *Delzell v. Odell*, 3 Hill, 215. *The Welland Canal Co. v. Hathaway*, 8 Wend., 480. *Ryder v. Commonwealth Ins. Co.*, 52 Barb., 447. Accordingly the bank can recover of DeNayer, unless his power to enforce collection of Childs, or to secure him-

self from loss, has been diminished in consequence of the mistake of the bank. *The Union Nat. Bank v. Sixth Nat. Bank*, 43 (4 Hand.) N. Y., 452. *The Nat. Bank of Commerce v. Nat. Mch's Bank Association*, 55 N. Y., 211. Morse on Banks and Banking, p. 288. *Appleton Bank v. McGilvray*, 4 Gray, 518–523. *Irving Bank v. Wetherald*, 36 N. Y., 335. *Tybout v. Thompson*, 2 Browne (Pa.), 27. There is nothing whatever in the record which shows that DeNayer has in any way been injured, or his ability to collect the debt of Childs in any respect impaired, in consequence of the mistake of the bank.

MAXWELL, CH. J.

On the sixteenth day of December, 1875, one E. P. Childs being indebted to the plaintiff herein in the sum of $170.00, drew a draft upon C. D. G., of St. Louis, for that amount, payable in thirty days from date, and delivered the draft so made by him to the plaintiff, who on the same day delivered said draft to the State National Bank for collection.

On or about the seventh day of January, 1876, the plaintiff was informed by Owen, the president of the bank, that the draft had been accepted and paid. The plaintiff thereupon drew out of the bank of defendant the sum of $105.00, and on the twelfth and fifteenth days of that month the balance of said draft.

On or about the tenth day of January, 1876, and apparently after the payment of the $105.00 to the plaintiff, Childs, who was then insolvent, called at the bank and made inquiry in regard to the draft, and was informed that it had been accepted and paid, at which he expressed some surprise that it should have been paid before maturity. He states in his testimony that he was anxious to protect the draft and had the money

at that time to pay it in case of its non-acceptance or non-payment, and so notified Owen. On the nineteenth of January, 1876, the draft was returned unpaid, and notice of its non-payment given to the plaintiff and Childs.

In an action by the bank to recover the amount paid to De Nayer on said draft, he answered, setting up the inquiry and offer of Childs, above set forth, as a defense. The court below directed the jury to find in favor of the bank. A verdict having been rendered in favor of the bank for $170.00, with interest from January nineteen, 1876, judgment was rendered thereon, to review which the defendant brings the cause into this court by petition in error.

The only question for our consideration is, does the matter pleaded and proved by the plaintiff in error constitute a defense to the action?

In *Piper v. Gilmore*, 3 Am., Law Reg., N. S. 584, certain notes payable to A. were by him deposited with B., as security for his indebtedness to B. C., being anxious to collect a claim held by him against A., made inquiry of B. as to the notes, without informing him of the purpose of the inquiry. B. replied that the notes belonged to A. The money due on the notes was taken by C. in an attachment at the time of its payment. It was held that these facts did not constitute an estoppel *in pais* to prevent B. from claiming the money due him upon the notes.

The rule is well settled that a statement, to become binding upon the party making it, must be made to a party seeking information for the protection of his rights, and he must have acted upon it before it will become conclusive upon the party making it. Had the plaintiff in error, in consequence of the mistake of the bank, released sureties upon the obligation, or had he been induced to change his relations to Childs, so that

the claim would be lost in consequence thereof, as between two innocent parties the bank would be required to sustain the loss. But nothing of the kind is pleaded or attempted to be proved. As it is clear that the plaintiff has lost no right, nor been induced to change his condition in consequence of the mistake of the bank, the testimony offered by him constitutes no defense to the action, and the court therefore did not err in directing a verdict for the bank. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

AULTMAN AND TAYLOR COMPANY AND JOHN STABLER, PLAINTIFF IN ERROR, V. EMANUEL STEINAN, DEFENDANT IN ERROR.

1. **Practice:** SERVICE OF SUMMONS. A summons must be served by delivering a copy to the defendant personally, or by leaving a copy at his usual place of residence. Service by leaving a copy at his place of business is not sufficient.

2. ———: APPEARANCE OF DEFENDANT. Where a defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person, he must restrict his motion to the single question of jurisdiction.

3. ———: ———: UNDERTAKING IN REPLEVIN. A party cannot object to defects in an undertaking in replevin by a special appearance, nor to defects in the affidavit; nor because the plaintiff's ownership and right of possession are denied.

4. ———: REPLEVIN: SERVICE OF ORDER. It is the duty of an officer to whom an order of delivery is directed, to serve a copy of the same on the defendant, and if he fail to do so he will be liable for all damages which the defendant may sustain in consequence of such neglect. But the failure to serve such copy is not jurisdictional.

5. **Fraud.** A contract obtained by fraud is not void; it is merely voidable; and the rights of intervening innocent parties will be protected. *Homan v. Laboo*, 2 Neb., 291, adhered to.

6. **Costs.** A party innocently in possession of property cannot be subjected to costs unless a demand is made for the property, but where the defendant pleads property in himself, no demand is necessary. *Homan v. Laboo*, 1 Neb., 210, adhered to.

ERROR from the district court for Adams county.

It was an action of replevin brought by Steinan for the recovery of the possession of a threshing machine and the horse power connected therewith. The property had been sold by Aultman, Taylor & Co. to one Peter Deiken, a resident of Adams county, for the sum of $710, and notes of Deiken taken in payment thereof. While the same was in his possession, Deiken executed and delivered to Steinan two promissory notes for the sum of $146, and to secure the payment thereof gave a chattel mortgage upon the property. Deiken not paying the notes to Aultman & Taylor, their agent took possession of the property. Whereupon Steinan brought this suit in replevin, claiming title thereto by virtue of a condition in the mortgage that in case "the said Peter Deiken should attempt to dispose of or remove the said goods and chattels from said county, then it shall be lawful for said mortgagee or his assigns to take possession thereof wherever found, and sell the same at auction," etc. The Aultman & Taylor Company set up that their sale of the property to Deiken had been made by them, placing reliance upon a statement signed by him, that he was the owner of real estate, over and above all exemptions of the value of $1,600, and of personal property, over and above all exemptions of the value $800; that such statement was false and fraudulent, and when they ascertained the same they rescinded the contract of sale and took possession of the property, etc. Judgment below for plaintiff Steinan, and defendants come here by petition in error. Further facts appear in the opinion.

Ash & Scofield, for plaintiff in error, cited Gen. Stat., sec. 180, p. 553. Id., secs. 182, 190, 191, 192, 193, pp. 552, 554. *Mercer v. James*, 6 Neb., 412. *Williams v. West*, 2 Ohio State, 82. *Black v. Winterstein*, 6 Neb., 224. Laws of Neb., 1875, p. 9. *Rost v. French*, 13 Wend., 570. *McCurdy v. Brown*, 1 Duer, 101. *Collins v. Evans*, 15 Pick., 63. *Dunham v. Wyckoff*, 3 Wend., 280. *Purves v. Moltz*, 32 How., Pr., 478. *Smith v. Phelps*, 7 Wis., 211. *Ronge v. Dawson*, 9 Wis., 246.

J. M. Abbott, for defendant in error, cited *Butler v. Kaulbach*, 8 Kan., 668. *M. K. & T. Railway Co. v. Crone*, 9 Kan., 496. *Brookosver v. Esterly*, 12 Kan., 151. 2 Parsons Contracts, pp. 779–781. *Masson v. Bovet*, 1 Denio, 69. Bump on Fraudulent Conveyances, 484.

MAXWELL, CH. J.

This is an action of replevin. The plaintiffs in error were defendants in the court below. The attorneys for Stabler appeared in the court below as they state in their motion, "for the sole purpose of objecting to the jurisdiction of the court over the person of the said John Stabler, and over the subject matter of the suit, and for no other purpose whatever," and moved to quash the order of delivery and dismiss the suit.

First. Because the affidavit was defective.

Second. Because the affidavit does not show that the amount secured by the mortgage was due.

Third. That the affidavit does not show that the mortgagor had broken any of the essential conditions of the mortgage.

Fourth. Because the affidavit does not show that Stabler was the agent of Aultman, Taylor & Co., or held a joint possession of the property with them.

Fifth. Replevin does not lie against a corporation.

Sixth. The undertaking is defective, etc.

Seventh. The return does not show that the summons was personally served on Stabler, or that he was agent of Aultman, Taylor & Co.

Eighth. The court had not acquired jurisdiction of the subject matter of the action because the order of delivery was not properly executed, etc.

The return is as follows: "Served the within summons on John Stabler, Aultman, Taylor & Co., not found in the county of Adams and State of Nebraska, by delivering a true and certified copy of the original summons to John Stabler, by leave the same at his place of business." The return is vague and indefinite, but I think a fair construction of it to be, that the officer left a certified copy of the summons at Stabler's place of business.

Section 69 of the Code provides that "the service shall be by delivering a copy of the summons to the defendant personally, or by leaving one at his usual *place of residence*, at any time before the return day." Gen. Stat., 534. These requirements of the statute are imperative. The officer has no discretion in the premises. The defendant must be personally served, or a copy left at his usual place of residence, where there is no appearance, in order to give the court jurisdiction.

Had the motion, therefore, been limited to the single object of quashing the writ, it should have been sustained. But a party cannot appear specially, because the undertaking is defective—the statute points out the remedy for such defect; nor because the affidavit fails to allege the debt secured by a mortgage is due; nor because the plaintiff's ownership and right to the possession of the property is denied; nor because a copy of the order of delivery was not served upon the defendant. It is the duty of the officer to serve a copy

of the order of delivery upon the defendant, and if he fails to do so, and damages ensue in consequence thereof, as by a failure to except to sureties on the undertaking, the officer would be liable for such injuries. But the order is not jurisdictional, as the statute provides that in certain contingencies the action may proceed as one for damages. The defendant having made a general appearance, thereby waived all irregularities in the service of the summons. The motion to dismiss was therefore properly overruled.

Among other defenses the defendants in the court below alleged in their answer that "the said Peter Deiken was not, at the time of making such false and fraudulent pretenses and representations, the owner in fee simple in his own name of one hundred and sixty acres of land in the county of Adams, in the state of Nebraska, worth at the time, over and above what was exempt by law from execution for homestead and other purposes, the sum of $1,600.00. And whereas, in truth and in fact, the said Peter Deiken was not, at the time of making such false and fraudulent pretenses and representations, the owner in his own name of personal property not exempt from execution nor encumbered by chattel mortgage or otherwise, which was at that time worth, over and above all incumbrances, the sum of $800.00."

There is no distinct allegation that Deiken did not own the property of which he professed to be the owner. We are told that the real estate is not of the value of $1,600.00, and that the personal property is not worth $800.00; but this is mere matter of opinion. This court has already decided that it is not enough to allege that a party, by false and fraudulent representations, induced another to enter into a contract, but the party must state the particular and precise circumstances which constitute the alleged fraud. *Arnold v.*

Baker, 6 Neb. 135. *Clark v. Dayton*, Id. 192. But had the matter been properly pleaded, it would have constituted no defense as against the plaintiff in the court below. It is clearly shown that the defendants in the court below sold and delivered the machine to Deiken, taking his notes for the same, and while thus held, the mortgage in question was executed to Steinan to secure a *bona fide* debt, contracted apparently on the faith of said security. It is true the statute provides for the punishment, by fine or imprisonment in the county jail, of any person obtaining goods by false pretenses. But the contract is not void, it is merely voidable upon the discovery of the fraud; but intervening rights of innocent parties without notice are protected. The plaintiffs in error, having voluntarily parted with the title and possession of the property, cannot be permitted, after a considerable lapse of time, to re-assert such title and possession to defeat the rights of a *bona fide* lienholder. *Homan v. Laboo*, 2 Neb. 291.

It is claimed that no demand was made for the property, and that the plaintiffs in error, having peaceably obtained possession of the same, therefore they could not be subjected to costs without such demand. Such is undoubtedly the law, and it was so held in *Homan v. Laboo*, 1 Neb. 210. The testimony, however, clearly shows that a demand was made for the property before the action was instituted. But no demand is necessary when the defendant, as in this case, pleads property in himself. *Homan v. Laboo*, *supra*.

After a careful examination of the record it is apparent that justice has been done. Steinan, although entitled to the possession of the property, for the purpose of enforcing his lien, is not the owner of the property to the exclusion of other lien holders. It is his duty to sell the property in the manner required by law, and any surplus over the amount of his claim

should be paid to such junior lien holders, or to the owner of the machine. The judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

SMITH AND CRITTENDEN, PLAINTIFFS IN ERROR, v. GEORGE W. STEELE, DEFENDANT IN ERROR.

1. **Corporation:** LIABILITIES OF STOCKHOLDERS. Where the president and a majority of the board of directors of a corporation fail to make and publish the notice required by the statute, of all the existing debts of the corporation, the stockholders will be jointly and severally liable for all debts contracted by such corporation, while the officers are thus in default.

2. ———: RIGHTS OF STOCKHOLDERS. One or more of the stockholders of a corporation may compel its officers, by mandamus, to make and publish the statement required by the statute.

ERROR from the district court of Butler county.

Whitmoyer, Gerrard & Post, for plaintiff in error, cited *White v. Blum*, 4 Neb., 555. *Wright v. Field*, 7 Ind., 376. *Marion Township Draining Company v. Norris*, 37 Ind., 424. *Shaffer v. Moriarty*, 46 Ind., 9. *Bogardus v. Rosendale Manufacturing Company*, 7 N. Y., 147. Granting that it was necessary to first ascertain the exact amount justly due. The petition alleges that the sum of $1,565.50 and interest is justly due, which allegation is admitted by the demurrer. Moreover, the record shows that at the time the demurrer was sustained, the amount due had been determined by the judgment of the district court. Admit, too, that it was necessary to exhaust the property of the Alexis Mercantile Association before execution could be levied on the

property of the stockholders. The court could have controlled its own process, and had ample power to protect the defendant in error, by directing that no execution should be levied upon his property until the corporate property, if any, had been first exhausted. *Marion Township Draining Company v. Norris*, and *Shaffer v. Moriarty*, cited above, are exactly in point here. There is still another controlling consideration in this case. Under the statute, and the case made by the petition, the stockholders of the Alexis Mercantile Association, as against creditors of the association, are liable as ordinary copartners. The law regards the stockholders in such a case as members of an ordinary copartnership, and will not recognize their claim to the rights of stockholders in ordinary corporations. The authorities are abundant and conclusive on this point. Angel and Ames, on Corporations, sections 611 and 624, also note to 611. *Middleton Bank v. Magil*, 15 Conn., 28. *Clark v. Terry*, 30 Maine, 148. *Allen v. Sewall*, 2 Wend., 327. *Moss v. Oakley*, 2 Hill, 269. *Corring v. McCullough*, 2 Denio, 77. *Morgan v. New York Railway Company*, 10 Paige, 290. *Fiske v. Keesdille Manufacturing Company*, 10 Paige, 592.

E. R. Dean, for the defendant in error.

Section 136 of chapter on "Corporations," Gen. Stat. 200, is repealed by operation of section 4, Art. XI., of the constitution, entitled, "Miscellaneous corporations." A right of action founded on a statute is terminated by the repeal of the statute. *Bennet v. Hargus*, 1 Neb., 419. See also *Johnson v. Halm*, 4 Neb., 146. 11 Humphrey (Tenn.), 1. The statute making stockholders liable for the corporate debts, on failing to perform a statutory duty, is to be regarded as a penalty. *Craw v. Easterly*, 4 Lansing (N. Y.), 513.

The repeal of a statute imposing a penalty, before the rendering of a judgment for the recovery thereof, takes away the plaintiff's right of action. *Eaton v. Graham*, 11 Ill., 619. A statute making stockholders liable for corporation debts must be strictly construed. *Middletown Bank v. Russ*, 3 Conn.. 135. *Gray v. Coffin*, 9 Cush. (Mass.), 192.

MAXWELL, CH. J.

The plaintiff commenced an action, in the district court of Butler county, against the "Alexis Mercantile Association," and its stockholders, to recover the sum of $1,565.50, upon an account for goods sold and delivered. The petition alleges that the Alexis Mercantile Association has failed to publish the notice required by the statute, showing its existing debts, etc. The defendant, being one of the stockholders, demurred to the petition, on the ground that the facts stated therein did not constitute a cause of action against him. The demurrer was sustained. The plaintiffs bring the cause into this court by petition in error.

The only question for the determination of the court is, the proper construction of section 136 of chapter 11 of the General Statutes, p. 200, entitled "Corporations," which provides that "every corporation hereafter created shall give notice annually, in some newspaper printed in the county or counties in which the business is transacted, and in case there is no newspaper printed therein, then in the nearest paper in the state, of the amount of all the existing debts of the corporation, which notice shall be signed by the president and a majority of the directors; and if any corporation shall fail to do so, all the stockholders of the corporation shall be jointly and severally liable for all debts of the corporation then existing, and for all that

shall be contracted before such notice is given;" and section 4, Art. XI of the constitution, entitled "Miscellaneous Corporations," which provides that: "In all cases of claims against corporations and joint stock associations the exact amount justly due shall be first ascertained, and after the corporate property shall have been exhausted, the original subscribers thereof shall be individually liable to the extent of their unpaid subscription, and the liability for the unpaid subscription shall follow the stock."

This section limits the liability of members of a corporation so long as there is a substantial compliance with the law governing its organization. But a corporation is a mere creature of the statute, and being such, it possesses only those properties and powers which the charter of its creation confers upon it. And where the charter—which is the general law in most cases in this state—contains provisions or conditions for the protection of the public against the evils of corrupt and irresponsible organizations, which are not inconsistent with the organic law of the state, they enter into and become a part of the charter, and must be complied with.

That the legislature has authority to impose such conditions upon the members of a corporation in case of the failure of their officers to comply with the provisions of the statute, there is no question. But such liability can only attach to debts contracted during the time the officers are in default in publishing the notice required. And this seems to have been the rule adopted in New York under a somewhat similar statute. Section 12 of chapter 40 of the session laws of 1848 of that state provide that: "If any of said (manufacturing) companies shall fail to make and publish such statement, all the trustees of the company shall be jointly and severally liable for all the debts of the com-

pany *then existing*, and for all that shall be contracted before such report shall be made."

In *Boughton v. Otis*, 29 Barb., 196, it was held that this penalty was imposed on those only who were guilty of the neglect of duty.

In *Garrison v. Howe*, 17 N. Y., 458, it was held that to make the trustees liable the debt must have been contracted during a default, and that the trustees were not personally liable for a debt contracted before the time fixed by law for the publication of the first report.

These cases, in our view, state the law correctly. In case of the failure of the officers of a corporation to make out and publish the report required by the statute, in the time and manner required, one or more of the stockholders may compel the performance of such duty by mandamus. If they fail to compel such compliance with the law they must submit to the penalty. The petition alleges that the goods were purchased after the officers of the corporation had failed to publish the notice required. The demurrer, therefore, should have been overruled. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

EUGENIUS WILHELM, APPELLEE, v. B. J. RUSSELL, APPELLANT.

1. **Taxes:** PERSONALTY LIABLE FOR. In 1877 W. filed a petition in the district court praying for the cancellation of certain tax certificates, and alleging "that the plaintiff has the legal title, and is in peaceable possession," etc., of certain real estate. The tax was levied in 1873, and a sale took place in 1875, while W. was in possession and had an abundance of personal property in the county to satisfy the tax. On the trial, testimony was introduced showing W. to have been the owner and in possession of the land for a number of years prior to 1873. *Held*, that the petition stated facts sufficient after judgment to sustain the same.

2. ———: PERSONALTY MUST BE FIRST RESORTED TO. The statute makes it the duty of the county treasurer to collect the delinquent taxes as far as possible out of personal property, and the land itself can only be resorted to when the personal property is exhausted. The law imposes this duty on the treasurer, and he cannot evade it. A sale of the land for taxes, while there is sufficient personal property of the delinquent in the county out of which to make the tax, is absolutely void.

This was an appeal from the district court of Otoe county. The facts appear in the opinion.

R. B. Kiddoo, for appellant, citing the case of *Peet v. O'Brien*, 5 Neb., 360, contended that the fact of ownership of personal property at the time the tax became delinquent must be pleaded, and that it had not been pleaded in this case. The plaintiff must allege some fact or facts which, if admitted by demurrer or otherwise, would justify the court in decreeing the sale void. But the allegation that the plaintiff is the owner of the land, and that at the time the taxes be-

NOTE. By act of 1877, Laws 1877, p. 43, section 50 of the revenue act of 1869 was amended by leaving out the provision requiring the county treasurer to levy on personal property for the satisfaction of taxes due on real estate.—REP.

came delinquent, and at the time of sale and ever since, plaintiff had personal property out of which the taxes could have been made, would not be sufficient, if admitted, to justify decreeing the sale void, for the very simple and obvious reason that unless the plaintiff was the owner of the land at the time the taxes were assessed and levied, and at the time they became delinquent, the treasurer was not legally bound, nor was it his duty to make the taxes out of the personal property of the plaintiff. Section 50 of the revenue law, General Statutes, 916, requires the treasurer to make the tax by distress and sale of the personal property of the delinquent, and no one can be a delinquent as to taxes on land unless he is under legal obligation to pay such taxes, resulting from ownership at the time the tax is assessed and becomes delinquent. The allegation that the plaintiff owned the land at the time that the taxes were made a charge thereon, and at the time they became delinquent, is just as essential as the allegation that he had personal property in the county, out of which the taxes could have been made. The one can no more be dispensed with than the other. A decree should therefore be rendered declaring the tax sale legal and valid, for the reason that the only ground upon which the plaintiff relies, and upon which he has offered evidence, is insufficiently alleged.

J. C. Watson, for appellee.

MAXWELL, CH. J.

The plaintiff is the owner and in possession of the north half of section 25, in township 8, range 13, in Otoe county. On the sixteenth day of November, 1875, the land in question was sold by the treasurer of Otoe county to the defendant for the taxes of 1873, and certificates of purchase issued to said purchaser.

In August, 1877, the plaintiff commenced this action in the district court of Otoe county, praying that said tax certificates may be declared null and void, etc.

The defendant filed a cross petition alleging that he purchased said lands for the delinquent taxes of 1873, amounting to the sum of $288.18, and that he paid the taxes due thereon for the year 1874, amounting to the sum of $144.34, and also for the year 1875, amounting to the sum of $138.00. The defendant prays for a decree, declaring said tax sale legal and valid, but in case the court is of the opinion that said sale is invalid that he may be adjudged to have a lien upon said land for said taxes, etc. A decree was rendered in the court below in favor of the plaintiff, but refusing the defendant any relief. The defendant appeals to this court.

The principal questions involved in this case have already been determined in the case of *Pettit v. Black*, *ante page* 52, and it is unnecessary to review them here. The petition alleges that the plaintiff has the legal title, and is in the peaceable possession, etc., there being no allegation that the plaintiff was the owner and in possession of said land at the time the same was assessed and the taxes were levied. Deeds, however, were introduced by the plaintiff showing title in him since 1864–5. The only objection made by the defendant being that such deeds were "irrelevant and immaterial." The plaintiff also testified, without objection, that he had been in actual possession of the land for seven or eight years.

This court has decided in a number of instances that objections to testimony must be specifically pointed out, otherwise if the testimony is admissible for any purpose, the objection will be unavailing. *Morgan v. Larsh*, 1 Neb. 363; *Pyle v. Warren*, 2 Id., 248; *Tecumseh Town Site Case*, 3 Id., 279; *Michel v. Ware*, 3 Id., 235; *Horbach v. Miller*, 4 Id., 48.

The defect in the petition is one of form merely, and not of substance, and the petition is sufficient to sustain the judgment.

It clearly appears that at the time these taxes were assessed and levied and became delinquent, Wilhelm had several thousand dollars in personal property in Otoe county, and that no attempt was made to collect these taxes. Section 50 of the revenue law requires the treasurer to proceed as soon after the first of May as practicable, and make the delinquent tax out of the personal property of the delinquent, if such property can be found; and this provision shall apply to taxes assessed on real estate, and remaining unpaid, as to delinquent taxes assessed on personal property. [Gen. Stat., 916.]

As is said in *Johnson v. Hahn*, 4 Neb. 147, "the express purpose of the statute is, and it seems to be the universal rule of law, unless changed by positive statutes, that if coercive measures become necessary, they shall in the first instance be directed to the personal property, and the real estate on which the tax is imposed shall not be resorted to until the personal property is first exhausted."

This rule is clearly applicable in this case. The law imposes a duty upon the treasurer which he cannot evade. He must collect the tax out of the personal property of the delinquent if a sufficient amount can be found in the county. As the treasurer entirely failed in this case in the performance of his duty in that regard, the sale of the land is absolutely void; but as the property seems to have been properly assessed, and the taxes legally imposed, the appellant is entitled to be subrogated to the rights of the county in the taxes in question. The case will therefore be referred to the clerk of the district court to ascertain the actual amount paid by the appellant in the payment of said

taxes, together with the actual amount of interest due thereon at twelve per cent, and report the same to the court within sixty days, the plaintiff to pay said taxes and interest within six months from this date, or that said premises or such portion as may be necessary, be sold to pay the same. The costs to be paid by the plaintiff and defendant in equal portions. The cause is remanded, with instructions to the district court to enter a decree in conformity with this opinion.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL. L. J. ABBOTT, AND OTHERS, V. THE BOARD OF COUNTY COMMISSIONERS OF DODGE COUNTY.

Constitutional Law: MUNICIPAL CORPORATIONS. The constitution of a state not being a grant, but a restriction upon the power of the legislature, therefore a provision in the constitution, that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefited," merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited, upon other municipal corporations than those designated. *The State, ex rel., v. Lancaster County*, 4 Neb., 540, adhered to.

THIS was an application for a peremptory writ of mandamus commanding the defendants to lay out and establish a ditch or drain for the purpose of draining certain lands described in the application, in accordance with the authority vested in the defendants by the provisions of an act entitled "An act to drain marsh or swamp lands," approved March 3, 1873. Gen. Stat., 1057.

W. A. Marlow, for the relator, cited Cooley on Taxation, 16. *French v. Teschemaker*, 24 Cal., 518. *Duncombe v. Prindle*, 12 Iowa, 1. *The Iowa Homestead Company v. Webster County*, 21 Iowa, 221. *Roosevelt v. Godard*, 52 Barb., 533. *Bigelow v. West Wisconsin Railway*, 27 Wis., 479. *Emory v. S. F. Gas Co.*, 28 Cal., 346. *Scovill v. The City of Cleveland*, 1 Ohio St., 126. *Hill v. Higdon*, 5 Ohio St., 243. Dillon on Municipal Corporation, Sec. 599, and authorities there cited. *Hurford v. City of Omaha*, 4 Neb., 344. Cooley on Taxation, 416, and authorities there cited.

Marshall & Sterett, for the respondents, cited the various sections of the constitution of Illinois upon the subject, comparing them with the provisions of the constitution of Nebraska, and the following: *People v. Marshal*, 1 Gilm., 672. *Howard v. St. Clair Drain Co.*, 51 Ill., 133. Sedgwick Const. Law, 2d Ed., 200, note a. Cooley Const. Lim., 58. *Updike v. Wright*, 81 Ill., 53.

MAXWELL, CH. J.

The only question for our consideration is the proper construction to be given to section 6, article IX, of the constitution of 1875, which is as follows: "The legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of the property benefited. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

The fifth section of article IX of the constitution of 1848, of Illinois, provided that "the corporate authori-

ties of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

In *Harward et al v. St. Clair Drain Co.*, 51 Ill., 130, a suit in equity was instituted to restrain the collection of certain taxes or assessments levied by certain commissioners appointed under the provisions of "an act to provide for the constructing of a levee from Prairie Dupont village, in St. Clair county, to Harrisonville, in Monroe county." It was held that the section was designed to prevent the delegation of the taxing powers to any person or persons other than the corporate authorities of the municipality to be taxed. It was also held that it was "a just inference that the purpose of the section was to define the class of persons to whom the right of taxation might be granted, and the purposes for which it might be exercised, and when the legislature seeks to grant it to any other than corporate authorities, or for corporate purposes, it transgresses the limit of its power."

It was suggested that the legislature could authorize drainage commissioners to be elected by the people of the several counties, with power to determine each year the sum to be expended in the construction of levees, and to assess such sum as a tax upon the lands to be benefited thereby to the extent of the benefits conferred. To the same effect is *Hessler v. The Drainage Commissioners*, 53 Id., 105. *Gage v. Graham*, 57 Id., 144. *Board of Directors v. Houston*, 71 Id., 318.

Section 9, of article IX, of the constitution of 1870, of Illinois, provides that "the general assembly may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments or by special taxation of contiguous prop-

erty or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

In *Updike v. Wright*, 81 Ill., 53, it was held that "the clause in the present constitution, like that in the constitution of 1848, must be construed as a limitation on the power of the legislature. Giving it that construction, the general assembly can only vest cities, towns, and villages with power to make local improvements by special assessments or special taxation upon contiguous property benefited by such improvements. By necessary implication it is inhibited from conferring that power upon other municipal corporations or upon private corporations."

It appears from the statement of facts in that case, that the commissioners had undertaken to construct a levee costing thousands of dollars, at a certain point on the Wabash river, not in connection with a system of drainage, but as a principal work. The court say: "But it is nowhere intimated in the statute the owners or occupants of land may undertake, under the provisions of this law, the building and maintenance of an immense levee on the borders of a river, not connected with any system of drainage by ditches. Neither the constitution nor the statute contemplates any such work." It is clear from the statement of facts, that the only question before the court was the authority to construct the levee. The decision, therefore, upon matters not involved in the case cannot be considered as an adjudication.

Is the power of the legislature limited by implication, upon the principle *expressio unius est exclusio alterius?* An examination of the constitutions of other

states and the adjudication of their courts thereon may throw some light upon this question.

Section 11, Art. I, of the constitution of Michigan, provides that: "The board of supervisors of each organized county may provide for laying out highways, constructing bridges, and organizing townships, under such limitations and restrictions as shall be prescribed by law." It was held that the section is not by its terms exclusive, and does not preclude the legislature from conferring power over this subject on the *township* highway commissioners. *The People v. Highway Com.*, 15 Mich., 351. *The People v. Ingham Co.*, 20 Id. 95.

Section 22, Art I, of the constitution of 1857 of Iowa, provides that: "Foreigners who are or may hereafter become *residents of this state* shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens." In 1858 an act was passed extending the rights in respect to the possession, enjoyment, and descent of property to others than those named in the constitution. Under this statute a non-resident alien acquired title to certain real estate in 1859, and conveyed the same to the plaintiff in 1864. It was held that the section referred to contained no restriction on the power of the legislature to confer the same or other rights on non-resident foreigners. *Purcell v. Smith*, 21 Iowa, 540.

In the case of *State v. Tait*, 22 Iowa, 140, it was held that the state, in a criminal trial before a justice of the peace, had a right to appeal to the district court, as well as the defendant, notwithstanding the provisions of section 11, Art. I, of the constitution, giving "to the defendant the right of appeal;" that this provision was not by implication a denial of the right to the state.

The constitution of Arkansas provides that: "All

property shall be taxed according to its value, etc. * * * The general assembly shall have power to tax merchants, bankers, peddlers, and privileges in such manner as may be prescribed by law." It was held that this provision did not prohibit the legislature from authorizing counties and incorporated towns to impose a tax upon billiard tables, ten pin alleys, taverns, groceries, and the like for municipal purposes, and as a police regulation for the preservation of good order. *Wash. v. The State*, 13 Ark., 752. Dillon on Mun Cor., sec. 592.

The second section of Art. XII, of the constitution of Ohio, provides that " laws shall be passed taxing, by a uniform rule, all moneys, etc., and also all real and personal property, according to its true value in money." By the sixth section of Art. XIII, the legislature are required to " provide for the organization of cities and incorporated villages by general laws, and to restrict their power of taxation, *assessment*, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." It was held that legislation authorizing cities and villages to levy special assessments, for the purpose of improving streets, upon real estate peculiarly and specially benefited, and in proportion to such benefit, was not repugnant to any provision of the constitution. See also, *Zanesville v. Richards*, 5 Ohio State, 589. *Baker v. Cincinnati*, 11 Id., 534. *Bank v. Hines*, 3 Id., 1.

The constitution of California contains provisions that: " All property in the state shall be taxed in proportion to its value," and that " taxation shall be equal and uniform throughout the state," and confers the power of taxation and assessment on municipal corporations. Under an act of the legislature, providing that the expense of street improvements shall be assessed on property fronting on the street in propor-

tion to its frontage, it was held not to violate the provisions of the constitution. *Burnett v. Sacramento*, 12 Cal., 76. *People v. Burr*, 13 Id., 343. *Emory v. Gas Co.*, 28 Id., 345. *Emery v. Bradford*, 29 Id., 75. *Walsh v. Mathews*, 29 Id., 123. *Taylor v. Palmer*, 31 Id., 240. *Crosby v. Lyon*, 37 Id., 242. *Chambers v. Satterlee*, 40 Id., 497.

The constitution of Indiana declares that "the general assembly shall provide by law for a uniform and equal rate of assessment and taxation, and shall prescribe such rules and regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes, as may be specifically exempted by law." There is also a provision prohibiting the passage of local or special laws for the assessment and collection of taxes for state, county, township, or road purposes. It was held that these provisions do not prohibit an assessment upon property specially benefited by the improvement of a street, or other local improvements. *Goodrich v. Turnpike Co.*, 26 Ind., 119. *Bright v. McCullough*, 27 Id., 223. *Palmer v. Stumph*, 29 Id., 329.

The constitution of Massachusetts requires the general court "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of and persons resident and estates lying within said commonwealth." It was held that this provision was not violated by authorizing a town, in which the state agricultural college was located, to raise a tax and pay an exceptional portion of the expense. *Merrick v. Amherst*, 12 Allen, 500. Nor does it prohibit local, street or drain assessments being imposed on the property benefited. The court say: "We see no reason for construing the provisions in the constitution, giving to the legislature the power of im-

posing proportional and reasonable assessments, rates, and taxes, as an inhibition on the levy of a tax for local purposes of a public nature, upon those who will reap the benefit on their estates of a proposed expenditure of money." *Dorgan v. Boston*, 12 Allen, 223.

The constitution of Minnesota provides that "all taxes to be raised in this state shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equal and uniform throughout the state." It was held that a special assessment on lands in proportion to the benefits received from the construction of a public road could not be made. *Stinson v. Smith*, 8 Minn., 366. Subsequently the constitution was amended authorizing such assessments.

The constitution of Mississippi provides that "taxation shall be equal and uniform throughout the state. All property shall be taxed in proportion to its value, to be ascertained as directed by law." It was held that this provision did not prohibit the legislature from imposing a tax on a particular district for a local improvement, or from authorizing a municipal corporation from assessing the expense of a street improvement on the lots fronting on the street. *Williams v. Cammack*, 27 Miss., 209.

The constitution of Missouri requires "all property subject to taxation to be taxed in proportion to its value." It was held that this provision did not prohibit assessments for street improvements on the basis of benefits conferred. *Garrett v. St. Louis*, 25 Mo., 505. *Uhrig v. St. Louis*, 44 Id., 458.

The provision in the constitution of Oregon that "all taxation shall be equal and uniform," was held not to preclude the improvements of streets by special assessments on the property benefited. *King v. Portland*, 2 Oregon, 146.

The constitution of Wisconsin provides that "the rule of taxation shall be uniform," and that "it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages, and to restrain their power of taxation and assessment." It was held that special assessments on the basis of benefits may be sustained under the latter provision. *Weeks v. Milwaukee*, 10 Wis., 242. *Lumsden v. Cross*, Id., 282. Cooley on Taxation, 444.

Section 4, Article VIII, of the constitution of 1867 of this state, provided that the "legislature shall provide for the organization of cities and incorporated villages by general law; and restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent the abuse of such power." In *Hurford v. The City of Omaha*, 4 Neb., 336, it was held that a statute authorizing a city to grade and improve streets, one-half of the expense to be paid by assessment on lots abutting thereon, was constitutional. The court say: "The question is not simply whether the theory of special assessments is sound in principle, or inequitable and unjust in its operation, but whether the legislature has power under the constitution to establish such a system. Special assessments are said by an eminent jurist to be 'a peculiar species' of taxation, standing apart from the general burdens imposed for state and municipal purposes, and governed by principles that do not apply generally.'" Cooley on Taxation, 416.

In *Wright v. Boston*, 9 Cush., 233, 241, the court say: "All these municipal taxes for the improvement of streets rest for their final reason upon the enhancement of private properties."

In *Philadelphia v. Tryon*, 35 Penn. St., 401, Mr. Justice Woodward says: "Local impositions for grading, pav-

ing, sewerage and the like, have been many times sustained by this court, and are, in the long run, perfectly fair, for they enter into and enhance the value of the property assessed." See also *People v. Mayor of Brooklyn*, 4 New York, 419. *Brewster v. Syracuse*, 19 Id., 116. *Howell v. Buffalo*, 37 Id., 267. *Litchfield v. Vernon*, 41 Id., 123. *Commonwealth v. Woods*, 44 Pa. St., 113. *Wray v. Mayor*, 46 Id., 365. *Greensburg v. Young*, 53 Id., 280. *Stroud v. Philadelphia*, 61 Id., 255.

In *Hammett v. Philadelphia*, 8 Am. Law Reg., N. S., 422, the court say: "Local assessments can only be constitutional when imposed to pay for local improvements, clearly confining special benefits on the property assessed, and to the extent of those benefits." This is undoubtedly the law in this state under our present constitution, the statute pointing out the mode of levying the expense in proportion to the benefits which the estates respectively receive from the proposed improvement. The constitution, by authorizing the legislature to vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by special taxation of property benefited, thereby limits the power of the legislature. In the absence of such a restriction the rule of apportionment would be left entirely to the legislature.

In the case of the *B. & M. R. R. Co. v. Lancaster County*, 4 Neb., 304, in speaking of the specific road tax of $4.00 per quarter section, the court say: "This apportionment is according to no just rule; it is arbitrary and operates oppressively; it imposes like burdens upon all lands, whether they be worth three or three hundred dollars per acre. * * * Hopeless indeed would be the task to show that such legislation is founded upon any fair or equitable principle whatever. These are considerations which, under the con-

stitution in force, when the taxes complained of were levied, could only be properly addressed to the legislature. It was for that body, not the courts, to determine what the rule of apportionment should be." And in the absence of constitutional restrictions, the legislature would have power to determine the rule of apportionment in assessments for local improvements. Under our present constitution assessments for local improvements in cities, towns, and villages, can only be made in proportion to the benefits received. As to the mode of ascertaining such benefits, it would be improper to determine in this case, as the question does not arise.

The authority of the legislature to vest cities, towns, and villages with power to make local improvements by special taxation of property benefited, is not a grant of power. The authority already existed, and the constitution merely prescribes the rule by which taxes shall be apportioned. How then can it be claimed that the enumeration of cities, towns, and villages, excludes all other municipal corporations? If the constitution was a grant of power, the rule contended for would be correct. But not being a grant of power, and the legislature possessing authority, in the absence of an inhibition in the constitution to pass the act in question, it is not obnoxious to section 6, article IX, of the constitution. And this is the rule laid down in the case of the *State v. Lancaster County*, 4 Neb., 540, where it is said: "The constitution of a state, according to the rule which seems to be well settled, is not regarded as a grant but rather as a restriction of legislative power; and so in an inquiry as to whether a statute is constitutional, it is for those who question its validity to show that it is prohibited." In that case it was held that the taxing power of the legislature was not limited, in the absence of positive restrictions in

the constitution, to the objects and classes of business enumerated in that instrument. We adhere to that decision, and it is decisive in this case.

The precise question involved in this case has never, so far as we are advised, been before the supreme court of Illinois. And, while we entertain great respect for that able court, we cannot follow its decisions upon a question that apparently was not very fully considered, and so far as appears was not properly before the court.

To the extent of requiring the county commissioners of Dodge County to act in the premises a peremptory writ will be awarded.

JUDGMENT ACCORDINGLY.

CHRISTOPHER LYNAM ET AL., PLAINTIFFS IN ERROR, V. JOHN MCMILLAN, DEFENDANT IN ERROR.

1. **Practice:** ASSIGNMENT OF ERROR. An assignment of error in these words, "Because the court erred in admitting testimony in said case upon the trial of the same offered by the plaintiff," or "Because the court erred in rejecting evidence offered by the defendants upon the trial of the cause," is too indefinite to be considered.

2. ———: ASSIGNMENT IN MOTION FOR NEW TRIAL. To lay the foundation for a review by the supreme court of questions raised and decided on the trial in the court below, it is necessary that the particular errors relied on be first assigned in the motion for a new trial.

ERROR from Saunders county district court. It was an action brought by McMillan against Lynam and Miley, for malicious prosecution, in causing said McMillan to be arrested upon a warrant issued by a justice of the peace, charging him with the crime of bur-

glary. There was a trial by a jury and verdict in McMillan's favor for $275. Motion for a new trial overruled. Exceptions. Cause brought up upon petition in error. Further facts appear in the opinion.

M. H. Sessions, for plaintiff in error.

Chapman & Sprague, for defendant in error.

LAKE, J.

The purport of the first two errors is that the verdict was not warranted by the evidence and the law of the case. From a very careful examination of the record, however, I am entirely satisfied that the conclusion reached by the jury was right and should be upheld.

By the testimony of the plaintiffs themselves, especially that given by Lynam, it is evident that they had no reason to, nor did they believe that, in forcing his way into the store-room, McMillan had any criminal design. Indeed, when what he did in this regard is taken together with all the attendant circumstances, with the manner in which Lynam obtained possession of the room, the removal of the lock of which McMillan had the key, and supplying its place with another, it is evident that they anticipated an attempt would be made by him to regain the possession of which he had been illegally deprived. It seems quite plain that the criminal prosecution was resorted to as a means to coerce McMillan to submit to a deprivation of his property against his will.

It is conceded that by the agreement of sale, as a part of the consideration for McMillan's interest in the goods, Lynam and his associate were to pay him two hundred dollars in money. But when the contract was signed and the money should have been paid, Lynam tendered him only seventy-five dollars in money, and

for the residue a paper pertaining in some way, but just how is not clear, to two judgments against McMillan which Lynam had that day purchased, or in some way got control of. McMillan at once, and very decidedly, refused to accept this tender, and demanded the $200 in money, which not being produced, he declared his refusal to deliver possession of the goods, or of the keys to the store-room, which he then had, and called upon persons present to witness that he did so refuse.

It is further shown that notwithstanding this failure to complete the purchase, Lynam very shortly afterwards, and during the same evening, by the aid of Miley, obtained a forcible and unlawful possession of the store, where they were at the time of the alleged burglarious entry by McMillan. It is very clear that in endeavoring to enter the store McMillan was lawfully engaged, and it is equally clear that the plaintiffs in error knew this to be so when they caused him to be arrested and prosecuted for a felonious offense.

Pursuing the order observed by counsel in his brief, the next objections to be noticed are those relating to the admission and the rejection of testimony. The assignments of error on these points, following substantially the language used in the motion for a new trial, are: "6th. Because the court erred in admitting testimony in said case upon the trial of the same offered by the plaintiff to go to the jury, which said testimony was objected to by the defendants at the time of the introduction of the same, and the ruling of the court then and there excepted to." "7th. Because the court erred in rejecting evidence offered by the defendants upon the trial of the cause."

As assignments of error, either here or in a motion for a new trial, these are too indefinite. They do not apprise the court of the particular testimony concern-

ing which the alleged errors occurred. The rule of practice heretofore announced by this court requires a specific designation of the particular errors relied on to be made in the motion for a new trial. *Midland Pacific R. R. Co. v. McCartney*, 1 Neb., 398. *Mills v. Miller*, 2 Neb., 299. *Cropsey v. Wiggenhorn*, 3 Neb., 108. *Hull v. Miller*, 6 Neb., 128. Unless this requirement is observed no foundation is laid for a review of questions raised and decided on the trial below.

The supreme court of Indiana, under a code of procedure quite like our own on the subject of new trials, have very frequently passed upon this precise question.

In *Meek v. Keene*, 47 Ind., 77, one of the grounds assigned in the motion for a new trial was: "That the court erred in the ruling on the admission and rejection of evidence at the trial of said cause; which rulings were at the time excepted to by plaintiff." This was held to be "too vague, uncertain, and indefinite, in not pointing out what evidence was improperly admitted or rejected." To the same effect are a large number of cases decided by that court, among which are *Rogers v. Rogers et ux*, 46 Ind., 1. *Tucker v. Call*, 45 Ind., 31. *Musselman v. Musselman*, 44 Ind., 106. *Burdge v. Lewis*, 43 Ind., 349.

The only remaining errors complained of relate either to the instructions given to the jury, or to those requested and refused. And here we find the same indefinite mode of assignment practiced. The petition in error, following the language of the motion for a new trial, alleges: "3d. Because the court erred in giving the instructions to the jury asked for by the plaintiff upon the trial of said cause, which were excepted to by the defendants at the time of giving the same." "4th. Because the court erred in giving instructions to the jury upon its own motion upon the trial of said cause, which said instructions so given

were excepted to at the time of giving the same." "5th. Because the court erred in refusing to give instructions to the jury upon the trial of said cause asked for by the defendants, which said refusal to give said instructions was excepted to at the time of said refusal."

In *Horn et al v. Williams*, 23 Ind., 37, the assignments in the motion for a new trial were: "1st. The court erred in giving over the defendant's objection, and exception, the charges to the jury." "2d. The court erred in refusing to give charges moved by the defendants." Of these the court said: "These causes have also been assigned for error; but they are not available for the reason that they do not point out with any degree of certainty the specific errors relied on." See also on this point, *Morley v. Noblett*, 42 Ind., 85. *Han et al. v. Carroll*, 17 Id., 442. *Robinson v. Hadley*, 14 Id., 417. *Barnard v. Graham*, Id., 322. *Nave v. Nave et al.*, 12 Id., 1. And this is a wholesome rule of practice, and it is due to the trial court that it be strictly enforced, especially where, as in this case, exceptions are taken indiscriminately to all the instructions, even when there was not a shadow of cause for complaint, and even to such as were exceedingly favorable to the plaintiffs in error.

Referring to the record we find that of the instructions not requested by the plaintiffs in error nine were excepted to by them. But in their brief only a single one, that on the question of probable cause, is now claimed to have been erroneous. And this is the only designation which we have of the one upon which reliance has at any time been placed either here or in the court below. But how can we know that this is the instruction urged upon the attention of the court below on the hearing of the motion for a new trial? As to errors committed during the trial of a cause it is the

province of this court to review those only which are distinctly pointed out and brought to the attention of the court below in the motion for a new trial.

As to the several instructions refused, what we have just said is equally applicable. The errors relied on are first specified in the brief of counsel, when they ought to have been distinctly pointed out in the motion for a new trial, and again in the petition in error. It is a very easy task to do this under a practice which requires all instructions to be in writing, and numbered.

JUDGMENT AFFIRMED.

THE BURLINGTON AND MISSOURI RIVER RAILROAD IN NEBRASKA, PLAINTIFF IN ERROR, V. JAMES H. HARRIS, DEFENDANT IN ERROR.

1. **Practice:** ASSIGNMENT OF ERROR. Assignments of error respecting the admission or the rejection of evidence, or the instructions to the jury, must be specific or they will not be considered. And it must also appear that the errors complained of in these particulars were particularly referred to and brought to the attention of the court below in the motion for a new trial.
2. ———: ESTOPPEL: PLEADING. If an estoppel be relied on as a defense to an action, in order to be availing it must be plead.

ERROR from the district court for Lancaster county.

T. M. Marquett, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

LAKE, J.

The action in the district court was to recover the price of a span of horses purchased by the defendant

from the plaintiff. In his answer the defendant admitted the sale of horses to him as alleged in the petition, but, as a defense to a recovery and set-off, set up that they were taken by him in part payment of an account which he had against the plaintiff for sundry moneys advanced by him while in its employ, and on which he claimed a judgment for a balance remaining unsatisfied.

The plaintiff in general terms replied that the defendant had been paid in full for all moneys so advanced by him, but when or how is not stated. Upon this issue there was a trial resulting in a verdict for the defendant, on which judgment was duly entered.

The errors assigned are: "1st. That the said court erred in the instructions given to the jury on the trial of said action." "2d. That the said court erred in refusing to give said instructions, which the plaintiff prayed the said court to give." "3d. That said court erred in admitting the evidence of said James H. Harris, and other witnesses, to which the said plaintiff objected." "4th. That the said court erred in ruling out the evidence offered by the said Burlington & Missouri River Railroad Company in Nebraska, and to which plaintiff objected." "5th. That the said judgment was given for the said James H. Harris when it ought to have been given for the Burlington & Missouri River Railroad Company in Nebraska, according to the law of the land."

The first four of these assignments are bad for indefiniteness, and fall clearly within the rule so frequently announced by this court. *Lynam v. McMillan* and *McCormick v. Keith*, decided at this term. But even if we were at liberty under our rule of practice in this respect to consider the instructions given and refused, we should feel bound to declare that there was no error in respect to them. As to those given it is

not seriously contended that they lay down the law incorrectly, and they do not. While those that were refused were evidently predicated upon the idea that the defendant was estopped by his conduct from denying that certain payments were made by the plaintiff as expressed in the vouchers, although proved to have been made by the defendant himself. But the doctrine of estoppel has no application to the case under the pleadings. If an estoppel be relied on as a defense to an action it must be plead, or it will not avail the party. *Wilson v. Butler*, 33 Eng. Com. Law, 956. *Philadelphia, Wilmington & Baltimore R. R. Co. v. Howard*, 13 How. (U. S.), 307.

The fifth assignment is merely formal, and has no merit. It has nothing to rest upon. By it our attention is challenged to the entire record in order to ascertain if there be not some radical objection to the judgment. No such objection has been pointed out by counsel, nor have we been able to discover any. If the defendant made good his answer by the evidence, he was certainly entitled to recover. The jury found in his favor, and it is not claimed that the verdict is unsupported by the evidence. The judgment follows the verdict, and we see no objection to sustaining it.

JUDGMENT AFFIRMED.

C. H. McCORMICK ET AL., PLAINTIFFS IN ERROR, v. JOHN KEITH, DEFENDANT IN ERROR.

1. **Practice:** ERROR: MOTION FOR NEW TRIAL. In order to make errors committed by the court below on the trial, in ruling upon the evidence, or in giving the law to the jury, ground for reversing the judgment, the record must show that they were clearly pointed out to the court below in the motion for a new trial.

2. Agent: HIS AUTHORITY IN COLLECTING DEBTS. An agent for the collection of a debt cannot lawfully accept in discharge thereof his own individual obligation to the debtor, unless authorized to do so by his principal.

3. ——: ——. And even if the agent be specially empowered to compromise, and accept personal property in satisfaction of money demands, this will not authorize him to extinguish a debt due the principal by setting off against it his own debt.

ERROR from the district court for Dodge county. The facts are sufficiently stated in the opinion.

W. A. Marlow, for plaintiffs in error.

Marshal & Sterett, for defendant in error.

LAKE, J.

Of the several errors assigned, only a single one, the fifth, will be considered. By this one it is averred that: "The verdict of the jury is not supported by the evidence, and is contrary to the law of the case." Those assignments relating to the rulings of the judge on the admission of evidence, and to the instructions to the jury, wholly fail to distinguish the particular testimony or instructions on which reliance is placed as ground of error. And this want of particularity characterized the motion for a new trial also. The record must show that the particular testimony admitted or rejected, and the particular instructions given or refused, and concerning which errors are claimed to have been committed, were clearly pointed out to the court below in the motion for a new trial, or they will not be considered by this court. And this rule applies and must be observed as to every error alleged to have been committed by the trial court in ruling upon evidence, or in giving the law of the case to the jury in order to make them grounds for reversing the judg-

ment. See *Lynam v. McMillan*, *ante* p. 135, and cases there cited.

The action was brought to recover the amount called for by two promissory notes given by the defendant for a reaper sold to him by H. C. Addis, the plaintiff's general agent for this state. The defense was payment and satisfaction by labor performed for and credits owing to the defendant from said Addis personally, and which were received and accepted by said H. C. Addis * * * in full satisfaction and payment of said notes.

The only testimony to sustain this defense was that of the defendant himself, which, however, was totally contradicted by that of Addis on the question of payment. But taking the testimony of the defendant as if it stood alone, and as entitled to full credit, does it constitute a defense to these notes? Laying aside the testimony of Addis altogether, all that is proved is, that in several business transactions between the defendant and Addis personally—not as the plaintiff's agent—Addis became indebted to the defendant in a sum about equal to that of these notes, and in consideration of such indebtedness, acknowledged satisfaction of the notes, which, however, were not then in his possession, and gave to the defendant a receipt showing full payment, but which receipt he now claims is lost. The chief part of this indebtedness arose out of the sale of a building belonging to the defendant to the City of Omaha, and for which Addis received and retained the sum of one hundred and twenty-five dollars. In the sale of this building, however, Addis was the agent of the defendant, and acted under his express direction; the plaintiffs had nothing whatever to do with it. In short, the defendant's testimony, if taken as literally true, shows that whatever amount was due to him in consequence of his several transactions with

Addis, was purely a personal indebtedness, and created no sort of obligation against the plaintiffs. There is no testimony to show—indeed it was not claimed—that Addis paid to the plaintiffs or in any way accounted to them for the amount of his personal liability to the defendant. Neither is it pretended that the plaintiffs ever agreed or in any way assented to the substitution of Addis, their agent, in place of the defendant as their debtor. They held these two notes which called for money only, and, for aught that appears, relied alone upon the obligations which they evidenced for the recovery of the amount due them as the price of the reaper.

Thus in the most favorable view of the case for the defendant, we have presented the simple question whether a general agent for the collection of a debt can lawfully accept in discharge thereof his own obligation to the debtor. No authority has been cited, nor is it probable that one can be found, to sustain such a proposition. The general rule applicable to a case like this is, that the agent, in the absence of authority from his principal, either express or implied, can accept only money in discharge of the debt. And doubtless, feeling the force of this rule, there was an attempt made to prove that Addis had authority, when in his judgment the interests of his principals required it, to compromise, and accept personal property in payment and satisfaction of money demands. And it is probable that on several occasions he had done so in the settlement of what he considered "doubtful claims." But conceding that he had authority to do this much, it would by no means follow that he could extinguish a debt due to his principals by setting off against it his own debt. The authority proved was to accept property in payment of a money debt; the authority claimed is to satisfy the debt by receiving

nothing. The defendant cannot satisfy these notes in this way. As was said in *Todd v. Reid*, 6 Eng. Com. Law, 455, "It was but an attempt to pay the debt of one person with the money of another." This the law will not tolerate. See also *Greenwood v. Burns*, 50 Mo., 52. *Farrer, et al., v. Triplett*, 7 Neb., 237. For these reasons the judgment of the court below is reversed and a new trial awarded.

REVERSED AND REMANDED.

JOHN ROESINK, ET AL., PLAINTIFFS IN ERROR, V. HENRY C. BARNETT, ET AL., DEFENDANTS IN ERROR.

1. **Practice:** WITHIN WHAT TIME PROCEEDINGS IN ERROR MUST BE COMMENCED. By the act of the legislature, approved February 15th, 1877 [Laws, 1877, p. 14], entitled, "An act to amend section one of an act entitled, 'An act to amend section five hundred and ninety-two of the code of civil procedure, approved February 24th, 1875,'" one year is given from the rendition of the judgment, or the making of the final order complained of, within which to commence proceedings in error thereon. And this act applies to all judgments or final orders entered after it took effect.

2. **Appeals from Judgments of Justices of the Peace:** FILING TRANSCRIPT IN APPELLATE COURT. The judgment in question was rendered by a justice of the peace on the 14th of April, 1877. The statute in force at this time regulating appeals in such cases required the transcript from the justice's docket to be filed in the appellate court by the second day of the next succeeding term. [Gen. Stat., 686]. Before the transcript was filed, and on the first day of June following, the act approved February 19th, 1877, entitled "An act to amend section one thousand and eight, etc., of the code of civil procedure," took effect, by which the transcript was required to be filed within thirty days from the rendition of the judgment. *Held*, that this statute was inapplicable to the appeal in question, and that it was properly perfected under the law as it stood

when the judgment was rendered. *Held further*, that even if this act were applicable, still as section 1011 of the code had not been changed, a failure to file the transcript, unless continued beyond the second day of the next succeeding term, could not prejudice an appeal otherwise regularly taken.

ERROR from the district court for Douglas county. The case is stated in the opinion.

E. F. Smythe, for plaintiff in error.

Albert Swartzlander, for defendant in error.

LAKE, J.

Two questions are raised on this record. 1st. Whether the proceedings in error were commenced within the time limited by the statute. 2nd. Whether the district court erred in dismissing the appeal from the judgment of the justice of the peace.

Counsel for the defendants in error submit that the petition in error ought to have been filed within six months from the time of making the order complained of, as provided by the act amendatory of section five hundred and ninety-two of the code of civil procedure, approved February 24, 1875. Laws 1875, p. 40.

It is a mistake, however, to suppose that this act of 1875 applies to the order in question. The appeal was dismissed at the June term of the district court, at which time the act of February 15, 1877, by which said section had been again amended so as to give one year within which to prosecute proceedings in error, was in force. Laws 1877, p. 14. This objection was most likely made inadvertently, and under the impression that the act of 1875, above referred to, was still in force.

Did the court err in ordering a dismissal of the appeal? The record shows that the appeal was dismissed

for the sole reason that the transcript was not filed in the appellate court "within thirty days next following the rendition of the judgment." This order was evidently made under the supposition that the act of February 19, 1877, amendatory of section 1,008 of the code of civil procedure, was applicable. Laws 1877, p. 15. By force of section 24, Art. 3 of the constitution, this act could not have taken effect at all "until three calendar months after the 15th of February, the day of the adjournment of the session at which it passed." But, under the act approved February 21, 1873, "concerning the enacting and repealing of statutes," this act being silent on the subject, it did not take effect until the first day of June next after its passage. Gen. Stat., 1,056. Now, the judgment of the justice of the peace was rendered on the 14th day of April, 1877, and the thirty days given by this amendatory statute within which to file the transcript in the district court had fully expired, and, if it were held to be applicable, the effect of the statute would be to deprive the plaintiffs in error of all means for obtaining a review of the judgment against them. It was clear, therefore, that by analogy to the rule adopted in the construction of statutes limiting the time for commencing actions, that they shall not be made to take effect on existing claims without allowing a reasonable time for parties to bring actions upon them before they are absolutely barred by the new enactment, the statute of 1877 was inapplicable, and that the appeal was properly perfected under the law as it stood when the judgment was rendered.

And in addition to this, it may not be out of place to suggest, that even if the act of 1877 were applicable, still the motion to dismiss the appeal could not have been properly sustained. It is true that by this act an appellant is restricted to thirty days within

which to procure a transcript and deliver it to the clerk of the court to which the appeal is taken. But it will be noticed that section 1,011 of the original act regulating appeals, and which still governs in their dismissal, was not changed. Gen. Stat., 687. By this section, to authorize the dismissal of an appeal because of delay in filing the transcript in the appellate court, such delay must extend beyond "the second day of the term of said court next after such appeal" was taken. Therefore, by construing section 1,008, as amended, together with section 1,011, as we must necessarily do, it is apparent that the former, to the extent at least of its requirement as to the time of filing the transcript in the appellate court, is simply directory, and that a failure to comply with its provisions in this particular, unless continued beyond the second day of the next succeeding term, cannot prejudice an appeal otherwise regularly taken. For these reasons the judgment of the court below is reversed, and the cause remanded, with instructions to reinstate the appeal.

REVERSED AND REMANDED.

GEORGE P. BEMIS, PLAINTIFF IN ERROR, v. SAMUEL E. ROGERS, DEFENDANT IN ERROR.

Practice: PROCEEDINGS IN ERROR: WHEN DEEMED "COMMENCED." A proceeding in error is not to be deemed "commenced" within the meaning of section 592 of the code of civil procedure, when personal service can be obtained, until a summons is issued which shall be duly served, as the statute directs.

ERROR from the district court for Douglas county.

Motion to dismiss petition in error.

George W. Ambrose, for the motion.

Redick & Connell, contra.

LAKE, J.

A motion is interposed by the defendant in error to dismiss this case on the ground that it was not commenced within the time allowed by law for instituting proceedings in error for the reversal of judgments.

The statute in force on the 24th of November, when the judgment in question was rendered, and under which these proceedings were commenced, provides that: "No proceedings for reversing, vacating, or modifying judgments or final orders, shall be commenced unless within one year after the rendition of the judgment, or making of the final order complained of," etc. Session laws 1877, page 14.

The code of civil procedure, section 584, provides: "The proceedings to obtain such reversal, vacation, or modification, shall be by petition, to be entitled 'petition in error,' filed in a court having power to make such reversal, vacation, or modification, setting forth the errors complained of, and thereupon a summons shall issue and be served, or publication made. as in the commencement of an action." Gen. Stat., 628.

The petition in error was duly filed in this court on the 20th of November, 1878, and a summons duly issued. But this summons was not served, nor has it ever been returned. Nothing more was done until January 10th, 1879, when an *alias* summons was issued and service duly accepted by the attorney of record of the defendant in error.

In support of the motion to dismiss, it is claimed that a proceeding in error is not to be deemed "*commenced*," within the meaning of the statute, when per-

sonal service can be obtained, until a summons is issued, which shall be duly served as the statute directs. And so it was held by the supreme court of Ohio in *Robinson v. Orr, et al.*, 16 Ohio St., 284, under a statute of which ours is a copy. In that case the court say: "In all suits or proceedings of an adversary character, the court can acquire no jurisdiction of the case for the purposes of trial or judgment until the party defendant is brought before it. And so long as the plaintiff neglects to have process issued, or any other steps taken with a view of bringing in the defendant, and thus giving jurisdiction to the court, his action or suit cannot properly be said to have been commenced, or to be pending."

This is a clear statement of the law applicable generally to the commencement of actions, and we think that a proper construction of the statutes above referred to requires its observance in the commencement of proceedings in error.

MOTION SUSTAINED.

ANDREW J. CROPSEY AND OTHERS, PLAINTIFFS IN ERROR, v. JULIA A. AVERILL, DEFENDANT IN ERROR.

1. **Conversion of Negotiable Securities:** DAMAGES. In an action to recover damages for the wrongful conversion of a negotiable promissory note and mortgage, it being conceded in the petition that at the time of conversion they were legally held by the defendant as security for certain advances of money to the plaintiff's son, and there being no allegation that such advances had been paid or in any way satisfied—*held*, that the utmost extent of liability, if any, was the value of the securities, less the amount due on such advances, together with interest from the time of conversion.

2. **Evidence:** OPINION OF WITNESS: OWNERSHIP. The fact of the plaintiff's ownership of negotiable securities being in issue,

it was not competent for her to testify, against objection, that she "was the owner" thereof. This was a conclusion of law to be established by proof of facts necessary to show ownership, and not by the opinion of witnesses.

8. ———: ESTOPPEL. The plaintiff, the payee of a negotiable promissory note, having formally indorsed it to her son, who afterwards pledged it to the defendant—who had no knowledge of the purpose for which the indorsement was made—as security for a loan of money, will not be permitted to contradict, or limit the legal effect of such indorsement, by showing the real purpose for which it was made.

4. **Practice:** CROSS-EXAMINATION OF WITNESS: REFERENCE TO FORMER DEPOSITION. It is not proper, on cross-examination of a witness, for counsel, in order to contradict him, to read from what purports to be a deposition previously given by him, and then to ask him whether he had so testified. The correct rule in such case is first to prove the deposition to be his, and then to read it as part of the evidence in the case. After this has been done the witness may be cross-examined as to any supposed discrepancies between his testimony in court and the deposition.

5. **Irrelevant Testimony.** If irrelevant testimony, which has a tendency to mislead the jury, be admitted, it is good ground for a reversal of the judgment.

6. **Instructions to Jury.** Instructions to the jury should have particular reference to the evidence upon which they are to pass. And it is error to so instruct as to leave them at liberty to infer a fact of which there is no proof.

7. **Practice:** LIMITING THE TIME OF COUNSEL IN ARGUMENT. If the court limit counsel in the time to be occupied in argument, and no objection is made to the order at the time, and before the case is finally submitted to the jury, it is too late afterwards to complain.

8. **Misconduct of Counsel:** GROUND OF ERROR. One ground of error assigned was the misconduct of the opposing counsel in their argument to the jury, prejudicial to the plaintiff in error. But it was not shown by the record they were called to order, nor that the court was requested to confine them within the bounds of legitimate discussion. *Held*, that while the offense complained of, if properly presented, would be good ground for a reversal of the judgment, still, as the record does not show any ruling by the court below respecting it, there is no question for this court to review.

ERROR from the district court of Lancaster county. The facts appear in the opinion.

Lamb, Billingsley and Lambertson, for plaintiff in error, cited Wharton on Agency, sections 71 and 72. Story on Agency, sec. 244. *Wedderspoon v. Rogers*, 32 Cal., 571. *Poorman v. Mills & Co.*, 35 Cal., 119. *White v. Brown*, 14 How. Pr., 282. *Witherspoon v. Van Dolar*, 15 How. Pr., 266. Starkie on Evidence, sec. 32. *Deshon v. Merchants Ins. Co.*, 11 Met., 209. *Miller v. Parker*, 2 Met. (Ky.), 616. *Stanton v. Miller*, 58 N. Y., 203. Proffat on Jury Trials, sec. 254. *People v. Keenan*, 13 Cal., 581. *Hunt v. The State*, 49 Georgia, 255. *Loyd v. H. & St. Jo. R. R.*, 53 Mo. 514. *Tucker v. Henniker*, 41 N. H., 317.

D. G. Hull (with whom was *T. M. Marquett*) for defendant in error.

LAKE, J.

The action below was for the recovery of the value of a promissory note and mortgage for the payment of one thousand dollars, by one Imhoff, to the defendant in error, alleged to have been wrongfully converted by the plaintiffs in error. The petition, after setting forth the execution and delivery of these instruments to the defendant in error, states, in substance, that on the 4th day of June, 1874, she deposited them with the plaintiffs in error, who were then engaged in the business of bankers under the firm name of the Lancaster County Bank, as collateral security for a loan of three hundred dollars made by said bank to her son, F. W. Averill. That afterwards, on the 13th day of August, 1874, she again pledged these securities to said bank for a further loan to her son of two hundred dollars. That afterwards, on or about the 10th day of

October, 1874, she offered to pay to the bank, out of moneys which she then had on deposit therein, the full amount due on account of the said loans to her son, and at the same time demanded a return to her of the Imhoff note and mortgage. It is further alleged that said note and mortgage were of the value of one thousand dollars.

The answer sets out with a general denial of all the facts stated in the petition "except that these defendants were partners doing business under the name and style of the Lancaster County Bank." This is followed by the averment that said note and mortgage were brought to said bank by F. W. Averill, and by him deposited as security for the money advanced to him, and in his own name. That when so deposited in said bank said note bore the genuine indorsement in blank of Julia A. Averill, the immediate payee. And that F. W. Averill claimed to be the real owner of the same.

For a further answer it was alleged that afterwards, on the 7th day of August, F. W. Averill, together with one J. H. McMurtry, made an arrangement or agreement, whereby said note and mortgage were to remain in said bank, in escrow, until said McMurtry should deliver to the bank for said F. W. Averill a deed to section one, town nineteen, range eleven, and also deposit to his credit the sum of $360.00, whereupon said bank was to deliver said note and mortgage to said McMurtry. That pursuant to this arrangement the deed was delivered, and the deposit of money made by McMurtry, whereupon the bank handed the note and mortgage over to him as F. W. Averill had directed. To this answer the reply presented a general denial of all the material averments.

Thus were there presented the following questions of fact to be determined by the jury:

First. Was Mrs. Averill the owner of the note and mortgage at the time they were delivered to the bank as security for the advances made thereon to her son?

Second. It being conceded that said note and mortgage, by whomsoever owned at the time of their delivery, were lawfully held by the bank as security for such advances, if Mrs. Averill were the owner, did she entitle herself to have them returned to her by tendering to the bank the amount then due on such advances?

Third. If Mrs. Averill established her right to recover, the measure of damages being the value of the securities, what was their value?

On these issues a general verdict was found in favor of the defendant in error, and her damages assessed at $1,368.75, the full amount called for by the terms of the note, for which judgment was rendered.

Numerous errors are assigned as ground for the reversal of this judgment. But in our examination of the record we have confined ourselves to those on which counsel seemed mainly to rely in their argument at the bar. Pursuing this course, the first point to be noticed is that which relates to the alleged insufficiency of the evidence to sustain the verdict.

As before observed, the petition concedes that the note and mortgage were legally held by the bank as security for certain advances made to F. W. Averill, the only dispute on this point being as to the person by whom they were negotiated to the bank. Now there is no allegation in the petition that these advances to F. W. Averill have been paid, or in any way satisfied; nor, indeed, is there any issue on this point made. This being so, it is manifest that the utmost extent to which the plaintiffs in error could be liable, if at all, is the value of the securities, less the amount due on those advances, together with interest from the

time of conversion. This is the proper rule of damages in this sort of action. *Ripley v. Davis*, 15 Mich., 75. *Clement v. Brown*, 30 Ill., 43. *Crumler v. Oaks*, 38 Vt., 566. *Yates v. Muller*, 24 Ind., 277. *Robinson v. Burrows*, 48 Me., 186. *McCormick v. Penn. Cent. R. R. Co.*, 49 N. Y., 303. It follows, therefore, that in this particular the verdict cannot be sustained. Having conceded that the Imhoff note and mortgage were rightfully held by the bank as security for loans of money made to her son, in order to recover in this action it was incumbent on Mrs. Averill to allege and prove, either a payment, or discharge of the indebtedness so created.

Another error complained of was, in permitting Mrs. Averill to testify that she was the owner of the Imhoff note, against the objection of the plaintiffs. This of course was a mere conclusion of law, to be established by proof of facts necessary to show ownership, and not by the expressed opinion of the witness. *Wedderspoon v. Rogers*, 32 Cal., 569. In view of the fact that not a syllable of legitimate evidence is in the record to show that her claim of ownership was made known to the officers of the bank prior to the alleged conversion, this testimony must have operated strongly to the prejudice of the plaintiffs in error, and is good ground for a new trial.

By Mrs. Averill's testimony, as well as by that of other witnesses, it is shown that at the time the Imhoff note was pledged to the bank, she had already indorsed it to her son. And by her own showing there was nothing either said or done at that time to indicate that F. W. Averill was not the real owner of the note, as the indorsement on the back of it indicated. She says, in substance, that in company with her son, she went to the bank and requested a loan of money to him on that security, and it was granted. That was

all. Not a word was uttered from which the officers of the bank would have been justified in the inference that Mrs. Averill had, or even claimed, the least interest therein. In this state of the proofs she was permitted, against objection, to testify as to when and for what purpose she made the indorsement, thereby contradicting its legal import, and showing herself still the real owner. This testimony was clearly irrelevant and should have been kept from the jury. The officers of the bank, under the circumstances, were not bound to look beyond the indorsement; and as that showed F. W. Averill to be the legal owner, they were at liberty so to treat him until advised to the contrary. *Derharn v. Merchants Ins. Co.*, 11 Met. (Mass.), 199.

Another of the assigned errors is, that on the cross-examination of the witness Hartley, counsel was permitted, against objection, to read from a deposition previously given by the witness, and then to ask him whether he had so testified, without first submitting the deposition to him for inspection. The correct rule of practice in such cases seems to be that where a letter or a deposition signed by the witness is used to contradict him, it must be regularly proved and read as part of the evidence by the cross-examining counsel. After it has been thus proved and read, the witness may be cross-examined as to any supposed discrepancies between his testimony in court and his deposition. 2 Phillips on Evidence, 962, 969. 1 Greenleaf on Evidence, sec. 463, *et seq.* But notwithstanding this rule was violated in the cross-examination referred to, it is evident that no injury could have resulted therefrom. At most it was error without prejudice, for which a judgment will not be disturbed. *King v. Kinney*, 4 Hammond, 81. *Dillon v. Russell*, 5 Neb., 484.

An objection was also interposed to the cross-examination of this witness, as to whether the bank did not

require an indemnifying bond upon the delivery of the Imhoff note and mortgage to McMurtry on the order of F. W. Averill. This objection was well taken. This examination not only had no relation to what had been called out in chief, but the facts elicited were wholly irrelevant to the issues upon which the jury were to decide. But this error was cured by the failure of counsel to stand by their exception. Instead of doing so, they proceeded to re-examine this witness as to the same matter, and actually gave the bond in evidence themselves. This must be taken as a waiver of the former exception.

As to the testimony of the witness Ames, this was wholly irrelevant; so, too, was the transcript of a suit wherein a judgment had been recovered against F. W. Averill, by Groff & Ames, upon a promissory note answering the description of one of those for which the Imhoff note was held as security. Not only was this testimony irrelevant, but, we think it had a strong tendency to mislead the jury, and is therefore good ground for a reversal of the judgment.

In the first instruction to the jury they were told that, "if you further find that said defendants had actual notice that said note was still the property of plaintiff, and you further find that plaintiff was the owner of said note, and that with such notice the defendants surrendered or gave said note to other persons than the plaintiff, at the request of McMurtry, you will find for the plaintiff." As before suggested, there was nothing in what was either said or done by Mrs. Averill, which came to the knowledge of the bank officers, from which they could have inferred that she still retained an interest in the Imhoff note. There was, indeed, no evidence to rebut the presumption arising from her indorsement that it belonged to her son. And the officers of the bank swear positively

that they had no knowledge whatever that the note was hers, or that she claimed it, until after its delivery to McMurtry by order of the indorsee.

Again, there was no competent testimony before the jury that she was in fact the owner of the note. It is true she swore she was "the owner," but this was a mere conclusion of law, and improperly admitted against the objection that it was incompetent. This instruction was erroneous, because it left the jury at liberty to infer that there was evidence from which they could rightfully find that Mrs. Averill was the owner of the securities, and that the officers of the bank were aware of her ownership. *Meredith v. Kennard*, 1 Neb., 312. *Meyer v. The Midland Pacific R. R. Co.*, 2 Neb., 319. The second and third instructions are liable to the same objection.

The alleged error of the court in limiting the argument of counsel to the jury "to one hour and ten minutes, while allowing to the opposing counsel two hours," cannot be sustained. It does not appear that any complaint was made to the court when the order was announced, nor at any time during the trial, of the insufficiency of the time allowed for a full and satisfactory discussion of the evidence before the jury. Neither does it appear that an exception was taken to the action of the court in this particular. The first notification of dissatisfaction which the court had was in the motion for a new trial. This was too late to complain. If the order were actually prejudicial to the party thus limited, the court should have been so advised before the close of the argument, and then, if the limitation were enforced, an exception should have been taken and preserved by bill of exceptions. This is the only way in which a question of this sort can be preserved for re-examination in this court.

And what we have just said of the limitation of the

argument to the jury is entirely applicable to the objection that counsel were permitted to comment on facts not in evidence, and "to travel outside the record for abusive epithets with which to stigmatize defendants, and excite the prejudice of the jury." If what is charged to have been said by counsel be true, it was certainly a very wide departure from the rules of forensic discussion, cannot be too severely censured, and if properly presented would be good ground for the reversal of the judgment. But it is not shown that the offending counsel was called to order by his adversary, nor that the court was requested to confine counsel within the bounds of legitimate discussion. In fact there is nothing in the record to show to this court, in a legitimate way, that the offense was committed. To have raised a question on this point for this court to decide there needed to be an adverse ruling of the court below, and an exception thereto, and these should have been made a part of the record by a proper bill of exceptions.

For the errors herein stated, the judgment of the court below is reversed and a new trial awarded.

REVERSED AND REMANDED.

THE CITY OF HASTINGS, PLAINTIFF IN ERROR, V. WILLIAM B. THORNE, DEFENDANT IN ERROR.

1. **License Moneys:** WHERE THEY BELONG. Under Sec. 5, Art. VIII of the Constitution of 1875, all moneys arising from licenses granted in cities of the second class for the sale of malt, spirituous, and vinous liquors, belong exclusively to the common school fund of the cities respectively in which they are collected.

2. ———: CONSTITUTIONAL LAW. The act of the legislature, entitled "An act to legalize the collecting or receiving and expending moneys collected or received by virtue of any levy made by any city of the second class, or incorporated town, upon dram shops, liquor dealers, or saloons, for a license tax, or a license for the sale of malt, spirituous, or vinous liquors, or intoxicating drink, in cities of the second class, or incorporated towns," [Laws 1877, p. 171], being repugnant to Sec. 5, Art. VIII of the Constitution, is void.

ERROR from the district court for Adams county.

Ash & Scofield, for plaintiff in error.

LAKE, J.

This record shows that a great deal of illegal testimony was admitted on the trial against objection, duly made by the plaintiff in error. Of what this consisted will be apparent from what we shall hereafter say, without now particularizing.

The action in the court below was brought by the defendant in error to recover from the plaintiff in error certain moneys alleged to have been received on account of licenses issued by the corporate authorities for the sale of malt, spirituous, and vinous liquors, within the city of Hastings. The claim to a recovery of these moneys was based upon the *third* clause of sec. 572 of the Criminal Code, and the former decisions of this court, to the effect that all such moneys belonged to the common school fund of the particular county in which they were collected, of which the county treasurer is the lawful custodian. *City of Tecumseh v. Phillips*, 5 Neb., 305. *The State, ex rel. Noonan, v. The Mayor, etc., of Lincoln*, 6 Neb., 12.

We have already decided during this term of the court in the case of the *State, ex rel. Helmer, v. McConnel*, *ante* page 28, that under the operation of Sec.

5, Art. VIII of our new constitution, this rule is no longer operative, and that all moneys arising from this source since that instrument took effect, belong exclusively to the common school fund of the cities, respectively, in which they are collected. This decision does not depend upon legislative action for its support, but rests upon the fundamental law, beyond which it is unnecessary to look for guidance. This being so it is apparent that the claim for moneys received by the city for licenses, issued after the first day of November, 1875, the day on which the constitution went into operation, is unfounded, and that all of the testimony in respect thereto was wholly immaterial, and ought to have been excluded.

But with this constitutional rule in view how stands the case? Of all the moneys sued for, the evidence very clearly shows—in fact it is undisputed—that there was collected prior to the first day of November, 1875, only the sum of $367.50. Now whatever we may hold as to the effect of the act of the legislature, "Approved, February 19, 1877," purporting to legalize the use and expenditure of these moneys by cities of the second class, this sum was all that the county treasurer was entitled to receive. All that was collected after that date belonged exclusively to the city for the support of its own public schools.

But the testimony further shows—and of this there is no dispute—that before the bringing of the suit there was paid to the county treasurer on account of the license moneys collected by the city of Hastings, the aggregate of $550.00, or $173.50 more than he was entitled to. The finding of the court below therefore ought to have been in favor of the city, and not being so, was clearly against the evidence and the law of the case.

As we have already shown, the constitution, Sec. 5,

Art. VIII, of its own force, determines the use to which such moneys shall be devoted. With this provision of the organic law in view, can the act of the legislature of February 19th, 1877, Laws 1877, p. 171, by which it is contended that the use of these moneys by the city of Hastings was legalized, be sustained? The first section provides: "That in all cases in which cities of the second class, or incorporated towns, have collected or received, and expended for the use and benefit of such cities or towns, either in works of internal improvement, school purposes or otherwise, moneys collected or received as a levy for a license tax levied or required to be paid by said cities or towns as a license tax levied on dram shops, saloons, or liquor dealers, for the sale of malt, spirituous, and vinous liquors, or any intoxicating drink, such expenditures are hereby declared to be legal and valid, and the same is hereby ratified and confirmed, and such cities or towns are hereby released and discharged from any and all liability whatsoever by reason of having so collected or received and expended said moneys as aforesaid; hereby including all money so collected, received, and expended by the said cities or towns in internal improvements or otherwise for the benefit of said cities or towns."

The scope and evident effect of this section, if it be operative, are, to validate any previous disposition of such license moneys, if made for the benefit of such city or town, no matter what it might have been, while the only disposition permitted by the constitution is, "*to the support of common schools*," within the particular municipal subdivision in which the money is raised. Had the legislature the power to do this? Most clearly not. That body can legalize no act which they could not have authorized before it was done. In other words, they cannot validate that which the constitution either in express terms or by necessary impli-

cation prohibits. Cooley's Constitutional Limitation, 381. *May v. Holdridge*, 23 Wis., 93. *Hepburn v. Curts*, 7 Watts, 300.

Such being the character of this legislation, there can be no doubt whatever of its repugnance to the constitution, and it becomes our duty, therefore, to pronounce it a void act.

The judgment must be reversed, and the cause remanded to the court below for a new trial.

REVERSED AND REMANDED.

WILLIAM M. SMITH ET AL., PLAINTIFFS IN ERROR, V. JOHN B. SILVIS, DEFENDANT IN ERROR.

1. **Finding: Judgment.** A judgment must conform to the finding. Finding against A. and B. will not sustain a judgment against A. and C.
2. **Issues.** The issues properly presented by the pleadings must be decided either by finding by the court or verdict of a jury, before judgment can be rendered against the defendant.
3. **Default.** A defendant in default for want of an answer should be *defaulted*, and the same entered on the journal before judgment is rendered against him.

NOTE. Where the record of a judgment shows that all of the defendants have been notified of the pendency of the action, as required by law, the finding will be conclusive that notice was duly given, until the contrary is clearly established. *Singleton v. Boyle*, 4 Neb., 414. If the finding be vague, uncertain, or indefinite, it will not maintain a judgment. *Sprick v. Washington County*, 3 Neb., 255. An application to open a default is addressed to the sound discretion of the court, and the appellate court will not interfere unless there is a clear abuse of that discretion. *Orr v. Seaton*, 1 Neb., 106. A party in default may be permitted to answer, at any time before judgment is rendered, and the court must permit the answer to be filed where it is apparent that there is a meritorious defense to the action. *Blair v. West Point Manufacturing Co.*, 7 Neb., 156—REP.

ERROR from the district court for Adams county. It was an action on a promissory note for $700, given by William L. Smith & Co., dated June 15, 1874. Judgment having been rendered against him, Smith brought the cause up by petition in error. Further facts appear in the opinion.

Ash & Scofield, for plaintiffs in error.

The summons should contain in itself a complete notice of the suit, and unless issued against a firm, in the firm name, it should contain the full christian and surnames of each defendant named in the petition, and when more than one defendant is sued it should be definite and certain as to the number of the defendants. Gen. Statutes Neb., 533, section 64, 527, section 24. *Franklin v. Talmadge*, 5 Johns., 84. Wade on Law of Notices, sec. 1152, 491. *Bendy v. Boyce*, 37 Tex., 443. *Anderson v. Brown*, 16 Tex., 554. *Battle v. Eddy*, 31 Tex., 368. *Portwood v. Wilburn*, 33 Tex., 713.

The service of the summons is fatally defective, for the following reasons. 1st, The officer's return does not show that it was served by a copy left at the usual place of the business of said firm within the county of Adams, with one of the members of said firm, or clerk or general agent thereof. Gen. Statutes Nebraska, 527, sec. 26. 2d, The officer's return is vague, indefinite, and uncertain. It does not show which one of the five defendants named in the petition of John B. Silvis the service was made upon; the words *et al.* in said return mean *and others*, and cannot be regarded as surplusage, and they render the whole return indefinite, uncertain, and void. *Gamble v. Warner & Wife*, 16 Ohio, 372.

The defendants in the court below who had appeared in the case, viz., Charles Wells and George Wells, were ready for trial on the 15th day of February, and

the plaintiff in the court below made a motion to continue the case until the 18th, which motion was opposed by defendants, and plaintiff supported his motion by affidavit. Whereupon the court adjourned the case and rendered judgment against all the defendants for ten dollars, when he should have rendered judgment against the plaintiff. This was a grave error, for which the judgment should be reversed. Laws of Neb., 1875, 63, sec. 1. *Smith v. Lewis*, 20 Wis., 369.

B. F. Smith, for defendant in error.

COBB, J.

The summons in this cause is against "William L. Smith *et al.*" The petition is entitled John B. Silvis, plaintiff, vs. William L. Smith, Charles Wells, George Wells, and Leroy S. Winters, partners doing business under the firm name of William L. Smith & Co., and H. P. Handy, defendants. In the stating part of the petition all of the above named persons except Handy are named and charged to have been partners at the time of the execution and delivery of the note sued on. That they made and delivered the note in their firm name to Handy, who afterwards, and before maturity, waived protest and endorsed the note to Dorr and Heffleman, who endorsed the same without recourse to the plaintiff, &c.

The only service endorsed on the summons is as follows: "State of Nebraska, county of Adams, ss. I hereby certify that on the 6th day of June, 1877, I served the within writ of summons on the within named W. L. Smith *et al.* by delivering *him* personally a true and certified copy of the original summons with all the endorsements thereon as required by law." Signed by the sheriff.

Charles Wells and George Wells appeared and put in

an answer in the nature of a plea in abatement, denying the partnership and also denying the making of the note. No reply of any kind was made to this answer.

William L. Smith made a special appearance for the purpose alone of questioning the jurisdiction of the court, and moved for a dismissal of the suit as to him for insufficient service and other reasons. His motion was overruled. He made no further or other appearance in the case nor does his default appear to have been entered.

On the fifteenth of February the plaintiff filed an affidavit and motion for continuance until the eighteenth of the same month, on account of the absence of a material witness on his part, which motion the court allowed on the condition of the payment of ten dollars costs *by the defendants.* The act of Feb. 25, 1875, authorizes the court in proper cases to impose the payment of a sum not exceeding ten dollars, together with the costs of the term, as the terms upon which the trial may be postponed, but the money is to be paid by the party asking the postponement to the adverse party. Laws 1875, p. 63.

This record finally contains the following finding and judgment: "And now on this day this cause come on to be heard before the court upon pleadings and proof in said cause contained, and the court after hearing the evidence doth find that there is due the said plaintiff from the said defendants, William L. Smith and *George Wells*, on the note in said plaintiff's petition described, the sum of nine hundred and forty-five dollars. It is further considered and adjudged by the court now here that the said plaintiff have and recover of and from the said defendants, William L. Smith and *Charles Wells*, the said sum of nine hundred and forty-five dollars, the sum as aforesaid found due, together with his costs, taxed at $——."

There is no bill of exceptions in this case, so we cannot tell what the testimony was. It is probable that there was evidence proving that one of the Wellses was a partner of William L. Smith & Co., but which one of them we cannot learn from this record, the finding being against *George* and the judgment against *Charles*, and as there was no finding against Charles Wells the judgment as to him must be reversed.

As to William L. Smith, if he was ever in court, which is doubtful, he has a right to know who his partner is.

The question of partnership was fairly presented by the answer of the Wellses and it was error in the court to dispose of the case as was done without a finding on that point. *Mason v. Embree*, 5 Ohio Repts., 276. *Headley v. Ruley*, 6 Ohio Repts., 524. It was also error to render judgment against Smith without first defaulting him for want of an answer.

For these reasons the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

SCHOOL DISTRICT NO. 16, IN STANTON COUNTY, APPELLEE, V. THE STATE BANK OF NEBRASKA, APPELLANT.

Sale on Pledge by Banker or Broker.—Where school district bonds, intrusted to a bank for sale on account of such district, are sold or pledged by the bank on its own account to an innocent holder, for value, such sale or pledge will bind the district. *Held*, however, upon the facts in this case, that the defendant had acquired no property in the bonds, either general or special, and that the school district was not estopped from bringing an action to compel their surrender.

THIS was an appeal by defendant from a decree rendered against it in the district court for Douglas county,

directing said defendant to deliver up certain school district bonds issued by the plaintiff, and placed in the hands of R. G. King & Co., bankers at Stanton, Neb., and by them delivered to defendant.

John D. Howe for appellant.

These bonds are negotiable and subject to the law of commercial paper. Had King stolen the bonds, inasmuch as they on their face necessarily show title in the holder, he could have transferred a good title to an innocent purchaser. *Welch v. Sage*, 47 N. Y., 143. *Murray v. Lardner*, 2 Wall., 118, 121. *Dinsmore v. Duncan*, 57 N. Y., 577. *Colson v. Arnot*, 57 N. Y., 268. *Cent. L. J.* April 6, 1877, p. 315. *California v. Wells*, 15 Cal., 336. *Spencer v. Holmes*, 102 Mass., 503. *Smith v. County*, 54 Missouri, 58. The district claims that it left the bonds with King for sale. Southard claims they were left with *him*, though his letter enclosing them to the bank is signed R. G. King & Co. King was the only person in the concern. Every one of the witnesses tells a different story on this point. Even if true that King & Co. took them as agents to sell, the district, on the general principles of the law of agency and estoppel, is concluded from claiming that the appellant should lose by the act of King & Co., though strictly unauthorized as between the principal and agent. The district chose its own agent; it invested him with the legal title and apparent ownership of the bonds. It cannot disclaim his acts after he has been allowed to go into the market and to show to the world that he was the owner of the bonds, as against parties who have honestly dealt with him believing him to be the owner of them. If any loss ensue it must be borne by the district, because, if one of two innocent persons must suffer, it must be the one whose fault led to the loss. In short, the district

is estopped from saying that King was not the owner as to innocent parties dealing with him, or that King could not have done what the owner could have done with the property. 1 Pars. Cont., 39, 44. Story's Agency, §§ 127, 133, 73, 224. *James v. Pohlman*, 15 Am. L. Reg. (N. S.), 316. *Reynolds v. Kenyon*, 5 Am. L. Reg. (N. S.), 181. *Doubleday v. Kress*, 11 Am. L. Reg. (N. S.), 123. *Dows v. Greene*, 16 Barb., 72. *Lyell v. Sanbourn*, 2 Mich., 109.

R. F. Stevenson and *Carrigan & Osborn*, for appellee.

If King was the agent of the school district, he still had no power to surrender or pledge the property of his principal in payment of his own debts, and the rule is the same when applied to negotiable security as to any other species of property. We concede that if the securities were negotiable and sold to an innocent purchaser for value, or deposited with an innocent party to secure *future* advancements, the principles of the law merchant would apply, but the purchaser must be innocent, *absolutely* the purchase must be for value, or the hypothecation based on a valid agreement for future advance. There is no agreement on the part of the bank to advance King & Co. money on the strength of the deposit of the bonds. The bonds were not pledged as collateral security by King, or any person acting for him. King could not contract in relation to the bonds on the 24th of September, being in utter ignorance of the real ownership.

COBB, J.

The testimony in this case is considerably conflicting, both as to the manner in which the school district bonds came into the hands of R. G. King & Co. and the purpose for which they were placed in the State

Bank of Nebraska. But it appears with sufficient clearness that they were placed in the hands of R. G. King & Co., who were then local bankers in that section of country, for the purpose of being sold on account of the school district, and any disposition which King & Co. made of the bonds will be binding upon the school district. But did they make any disposition of them whereby the State Bank acquired a property in them, either general or special? The court below found that they never did, and upon a careful examination of the testimony we think the finding correct. The bank of R. G. King & Co. were (generally) indebted to the State Bank of Nebraska, and were in the habit of putting up collaterals with said State Bank, from time to time, to secure such indebtedness, and had some collaterals in the said bank for that purpose when, on the 16th of September, 1873—King himself being absent—his clerk received the bonds in question from the school district and sent them to the State Bank at Omaha, by mail. With them he sent a letter of transmittal, which, so far as it related to the bonds, was in the following words: "We enclose two Stanton County S. D. bonds, $600 in all; have sent for county clerk's certificate, and will forward as soon as I receive it. What is the best you can do with them?"

At this time King was not at home, having passed through Omaha four days before on his way to St. Louis. His business at St. Louis was to get money with which to pay his balance to the State Bank, and as he passed through Omaha he informed the bank of his object and hopes in regard to getting money at St. Louis; also that he had instructed Southard (his clerk), whom he had left in charge of his business at West Point, to send to the State Bank additional collaterals. Now when the bank received these bonds, with the letter of transmittal, had they, the officers of

the bank, the right to consider them sent to be held by the bank as collateral security in pursuance of the said instruction from King to Southard, and did they as a matter of fact so understand it? We are obliged to answer both questions in the negative. The language of the inquiry contained in the letter of transmittal, "What is the best you can do with them," forbids any such construction. The cashier of the bank, when asked on the witness stand the meaning of these words, answered: "He would want me to give him a rate, whether eighty-five cents, or whatever we agreed on, it would go to his credit." Nothing about collateral here. If further evidence, that the bank officers did not at the time understand that these bonds were sent to them by King & Co. to be held as collateral was wanting, it is to be found in the letter which they wrote on the 19th (three days after), as testified to by the cashier, as follows: "I wrote him" (Southard, King's clerk, then at the bank at West Point) "that 'Mr. King had told me he would send collaterals,' and asked him, '*why he did not send them?*'" Would he have used this language if he had received the considerable sum of six hundred dollars less than three days before, which he had not acknowledged? We think not. Again, if evidence was wanting to prove that Southard did not send the bonds to the State Bank, to be held as collateral security for King & Co's overdrafts, it is found in the letter which he wrote in reply to the above letter, dated September 22, before the return of King from St. Louis, in which he says, "I have never received any notice to send collaterals." If the defendant's theory of this case were correct, would he have used this language? Would he not rather have said, "I have already sent you S. D. bonds to the amount of six hundred dollars. Why don't you acknowledge their receipt?"

The only remaining question is, did King upon his

return from St. Louis change the character of this transaction so as to give the State Bank a special property in these bonds? King swears positively that he did not, and we have examined the testimony of each of the officers of the bank in vain for any positive assertion that he did. King called at the bank upon his return from St. Louis, having failed to get funds there, and had an interview with the officers of the bank about the state of his account. Certain collaterals of his which the bank held were looked over by him and the officers of the bank, and the witnesses say that they were all considered and spoken of as collaterals. The cashier in his testimony says: "We showed him collaterals we had on hand, and then we showed him these bonds. He wished us to buy them, but we told him we could not, that we had no market for them."

Q. What did he say with reference to your holding them as collateral?

A. We held them as collateral for his account to pay his checks with.

If King said anything at this interview, which amounted to the placing of these bonds as a collateral security for his account, or advances either past or future, the evidence fails to show it, and finally, as if to render it impossible for us to believe that the bank officers, either before or immediately after this interview with King, considered that these bonds had been pledged to the bank as collateral security, we have a copy of a letter written by the cashier to R. G. King & Co., dated September 24, and written, as the cashier testifies, after the interview with Mr. King at the bank, in which he says: "I note contents of yours of the 16th in reregard to S. D. bonds and warrants. We are not buying warrants just at present, *and do not want the S. D. bonds.*"

The decree of the district court is affirmed.

DECREE AFFIRMED.

C. W. DERBY AND IDA H. DERBY, PLAINTIFFS IN ERROR, v. PETER WEYRICH, DEFENDANT IN ERROR.

Exempt Property. Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation.

ERROR from the district court for Butler county. The facts appear in the opinion.

E. R. Dean, for plaintiff in error, cited Bump on Fraudulent Conveyances, 242. *Monroe v. May*, 9 Kan., 466. *Robb v. McBride*, 28 Iowa, 386. *Cook v. Blaine*, 37 Ala., 350. *Brewer v. Granger*, 45 Ala., 580. *Morris v. Tennent*, 56 Ga., 577. *Fogg v. Fogg*, 40 N. H., 285.

Whitmoyer, Gerrard & Post, for defendant in error, cited *Bowker v. Collins*, 4 Neb., 494. *State Bank v. Carson*, Id., 498. *Charles v. Lambertson*, 1 Iowa, 439. *Christy v. Dye*, 14 Iowa, 438. *Elston v. Robinson*, 23 Iowa, 208.

COBB, J.

The defendant in error brought an action in the nature of a creditor's bill against the plaintiffs in error. In his petition he alleges that in March, 1877, Weyrich & Company, of which he is the sole member, recovered judgment against C. W. Derby in the county court of Butler county, for $231.76, with costs of suit and attorneys' fees. That on the sixth day of April following execution issued—was returned: "No property found." That afterward a transcript of said judgment was filed in the office of the clerk of the district court of said county, and the case docketed in said office August 13, 1877. That on the seventeenth day

of said month an execution was issued on said judgment out of said clerk's office to the sheriff of said county, and afterwards also returned—"No property found." That the said C. W. Derby is now and has, ever since the date of said judgment, been insolvent. That said judgment remains wholly unsatisfied. That on the ninth day of April, 1877, the defendant, C. W. Derby, purchased from W. B. Rochon a certain eighty acre tract of land situated in said county, and caused the deed of conveyance to be made in the name of Ida H. Derby, his wife and co-defendant, who now holds the apparent title to the same. That the said deed was made to the said Ida without consideration, but the consideration was wholly paid by the said C. W. Derby, and was so made to the said Ida H. for the purpose of wronging and defrauding the said petitioners, etc., with prayer that said real estate might be decreed to be subject to the said judgment, etc. The defendants answered, denying that the deed mentioned in the petition was made to the defendant, Ida H., without consideration or for the purpose of defrauding the said plaintiff, etc.; and alleging "that the consideration paid by the said C. W. Derby for the land described, etc., consisted wholly and entirely of property that could not be sold on execution to pay the debts of the said C. W. Derby. That all of said property was exempt from seizure and sale for the satisfaction of the said C. W. Derby's debts, or any part thereof, and that the said lands described in the plaintiff's petition was purchased for the express purpose of making the same a homestead for the said C. W. Derby and his family, and that the same is all the land that the said C. W. Derby and Ida H. Derby, or either of them, owned or had at that time, or have since owned or now own."

To this answer the plaintiff put in a general demur-

rer, which was sustained by the court, and the defendants refusing to plead further, their default was entered, and, after an *ex parte* trial, judgment was entered for the plaintiff, in accordance with the prayer of his petition. From this judgment the defendants bring the cause to this court by petition in error.

By his demurrer the defendant in error admits that the consideration paid by C. W. Derby for the land consisted wholly and entirely of property that could not be sold on execution to pay the debts of the said C. W. Derby, and that all of said property was exempt from seizure and sale for the satisfaction of the said C. W. Derby's debts. This exempt property being traded by C. W. Derby to Rochon for the land, and the title to the land taken in the name of Ida H. Derby, leaves the situation of the parties, in respect to the transaction, about the same as though C. W. Derby had transferred the exempt property to Ida H. Derby without any consideration, he being at the time indebted to the defendant in error and insolvent. In such case would a court of equity follow the property into the hands of C. W. Derby's grantee and subject it to the payment of his debts, which it was not subject to while in his hands?

Story says: "The English doctrine upon this subject, after various discussions, has at length settled down in favor of the former proposition, namely, that in order to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts. The reasoning by which this doctrine is established is, in substance, that the statute of 13th Elizabeth did not intend to enlarge the remedies of creditors, or to subject any property to execution which was not already in law or equity subject to the rights of credi-

tors. That a voluntary conveyance of property not so subject could not be injurious to the creditors, nor within the purview of the statute, because it would not withdraw any fund from their power which the law had not already withdrawn from it. And that would be a strange anomaly to declare that to be a fraud upon creditors which in no respect varied their rights or remedies. Hence it has been decided that a voluntary settlement of stocks, or of choses in action, or of copyhold, or of any other property not liable to execution, is good, whatever may be the state and condition of the party as to debts." Story's Equity, § 367. See English authorities there cited.

Bump, in his work on Fraudulent Conveyances, says: "Property which is exempt by a positive statute from liability for the owner's debts is not susceptible of a fraudulent alienation, and consequently is not within the statute. The creditors cannot be said to be creditors as to that particular property so as to make a transfer of it matter of concern to them. The debtor as to that property may be considered as without creditors, and he has the right to dispose of it as though he had no creditors. He may sell it and purchase another piece of property with the proceeds and have the latter conveyed to his wife." Bump on Fraudulent Conveyances, 242, and see numerous cases there cited.

The right of the defendant in error to have the land sold and applied to the payment of his debt, if he have any, must be founded upon his right to the fund with which it was purchased. As he had no right to the fund, it having been placed beyond his reach by the law, he has no right to disturb the possession of the land in the hands of Ida H. Derby.

The above views rendering it necessary that the judgment of the district court sustaining the demurrer

be reversed, it is not deemed necessary to examine the other question raised and discussed in the brief of counsel.

REVERSED AND REMANDED.

ROBERT CLEGG, PLAINTIFF IN ERROR, V. SCHOOL DISTRICT NO. 56 OF RICHARDSON COUNTY, DEFENDANT IN ERROR.

Constitutional Law. The act of February 2, 1875, entitled "An act authorizing school district No. 56 of Richardson county to issue bonds for the purpose of erecting a school building, procuring a site therefor, and setting aside funds to pay the same" [Laws, 1875, p. 281], being repugnant to Sec. 1, of Art. VIII of the constitution of 1866, is void.

ERROR from the district court for Richardson county.

R. Clegg, pro se.

George P. Uhl, for defendant in error.

COBB, J.

This action was brought for the contents of a coupon or interest warrant, cut from one of the bonds issued and sold by the defendant, school district No. 56, in Richardson county, under the provisions of an act of the legislature, approved February 2, 1875, entitled "An act authorizing school district No. 56, of Richardson county, to issue bonds for the purpose of erecting a school building, procuring a site therefor, and setting aside funds to pay the same." Laws, 1875, p. 281.

The defendant by answer set up several grounds of defense, to which the plaintiff demurred. The district court overruled the demurrer and rendered judgment

in favor of the defendant. The plaintiff brings the case to this court by petition in error. The points are presented by stipulation.

The first and principal one and the only one which it is deemed necessary to pass upon is as to the constitutionality of the said act of the legislature under which the said bonds and coupon were issued. Sec. 1, of Art. VIII of the constitution then in force, is as follows: "The legislature shall pass no special act conferring corporate powers."

It cannot be doubted that the act in question is a special act. It relates exclusively to school district No. 56, in Richardson county. None of its provisions apply, or are intended to apply to any other district or sub livision of the state, or the people thereof. It was published only as a special law.

It is equally clear that the powers intended to be conferred by said act—that of issuing bonds, to be binding upon, and the principal and interest thereof to be paid by the said district—are corporate powers within the meaning of the said section of the constitution.

It was evidently the intention of the framers of the constitution to put an end to an universally admitted and then growing evil, that of local and special legislation, in all cases where the beneficial results of such legislation could be reached by general laws, and they thereby adopted a policy which it is the duty of this court to uphold.

The said act of February 2, 1875, being clearly repugnant to the above quoted provision of the constitution, conferred no power on the district to issue bonds. Their issue by it was *ultra vires*, and the coupon sued on is void.

The record in this case does not contain the data necessary to enable this court to determine whether the said district was or was not authorized to issue the

said bonds under the provisions of either of the two general acts approved February 25, 1875. [Laws 1875, p. 118]. And as the plaintiff alleges in his petition that the coupon sued on was issued under and by virtue of the act of February 2, the provisions of neither of the first named acts are considered. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JONAS HEDMAN, ET AL., PLAINTIFFS IN ERROR, V. LA FAYETTE ANDERSON, DEFENDANT IN ERROR.

Evidence. A paper writing, by which a county treasurer sought to appoint I. W. E. a special deputy treasurer to collect certain taxes by distress due to Platte county, Nebraska, from the personal property of the estate of L. W. P., deceased, when offered in evidence to justify such taking in an action of replevin, was properly rejected.

ERROR from the district court of Platte county. The facts appear in the opinion.

Millett & Son, for plaintiff in error.

1. The objection of defendant as to the regularity of the appointment of Early as deputy treasurer of plaintiff Kummer, and that the decease of Platt made the distress after his death for taxes delinquent in his life-time void, have been settled by the judgment of this court in this case. *Hedman v. Anderson*, 6 Neb., 392. Those questions were then in the record of this case, and are now *res adjudicata*. *Headley v. Chaliss*, 15 Kan., 602, and cases cited in the opinion on page 606. *Washington Bridge Co. v. Stewart*, 3 Howard, 413. Wells res adjudicata and stare decisis, pp. 569–570.

2. The defendant in error is not in a position to question the legality of the appointment of Early as deputy treasurer and the validity of the distress for the non-payment of these taxes. Such questions could only be raised by Platt, or his legal representatives, in a direct proceeding other than an action in replevin. Gen. Stat., 1873, p. 552, sec. 182. How is it possible that the defendant can attack the appointment of this officer, and the validity of this distress against Platt collaterally, when it would be impossible for Platt or his representatives to raise those questions if he or they had instituted a like action under our statute? *Wilson v. Macklin*, 7 Neb., 50. A suit in replevin raises no question as to the validity of process. *Westenberger v. Wheaton*, 8 Kan., 169. As to the parties who can attack the validity of process—Freeman on Executions, sections 75 and 339. *People v. Albany*, 7 Wend., 485. 2 Abbott, U. S. Cir. Rep., 100.

3. The right to distrain personal property for the non-payment of taxes assessed against and due and delinquent from a party in his life-time does not abate by reason of the death of the delinquent tax-payer. Gen. Stat., 1893, p. 916, sec. 49. There is no provision in this statute, express or implied, making any such exception. The treasurer had ample authority under sections 37, 49, and 52 of said chapter to make such distress. The warrant of the commissioners for these taxes, levied 1873–4–5, was duly attached to the duplicate tax lists as required by section 37.

4. Grant that these taxes for those years had the force and effect of judgments against Platt in his life-time, still, under sections 37 and 49 of the revenue law, there was a continuing authority for the treasurer to collect them, and such authority could only cease on payment. A levy made after the death of the judgment debtor, under an execution issuing in his life-

time is, at most, voidable in a direct proceeding only, such as a motion to quash. Freeman on Executions, sec. 37. *Mariner v. Coon*, 16 Wis., 466. *Jones v. Davis*, 24 Wis., 229.

The defendant chiefly relies upon the case of *Wilson v. Shearer*, 9 Met., 504. That was an action of trover by the administrator of the party on whom the tax was assessed against the collector. The court held that the defendant was liable under a local statute, providing two remedies in case of the death of any person taxed, viz: 1st. By action in the name of the collector. 2d. By payment out of the estate of the deceased party.

There being no such statutory provisions in this state, the plaintiffs contend that that case does not apply to the one at bar.

E. Wakeley, for defendant in error.

It is self-evident that when a man dies he ceases to have title to property. He may indeed have so borne himself that, on his death bed, he can

> "Read his title clear
> To mansions in the skies,"

but title to his lands, his goods, his possessions, goes to his heirs, his devisees, his legatees, his executors or his administrators. In this case such title as Platt had to the property in controversy, whether an absolute ownership or an equity of redemption, went to his executors. Whether it vested in them only from the date of their appointment, or by relation from Platt's death (Williams Ex., part second, book 1st, p. 629) is immaterial, because the property was seized some time after their appointment and qualification, and entering upon their trust. Keeping the mortgage out of view for the present, could the property be lawfully then seized

for taxes due from Platt when he died? Leaving out of question subsisting liens I submit, as a proposition without exception, that property, or interests in property, going into the hands of an administrator or executor, cannot be subjected to debts or liabilities of the deceased by legal process, or compulsory measures, without express legal provision therefor. There is no sanction in our law for levy and sale of personal property for taxes after the death of the owner. Gen. Stat., 325. See also *Jewett v. Smith*, 12 Mass., 309. *Wilson v. Shearer*, 9 Met., 504. Distress for taxes is a special statutory proceeding. It was not known at common law. It is a harsh, summary, and stringent remedy, and cannot be enforced beyond its terms even against the living. Much less can it reach by implication to the dead. From its nature it must be either valid, or wholly void, when it has its inception and whole operation after the death of the defendant.

COBB, J.

Lester W. Platt being the owner of a considerable amount of personal property, shortly before his death mortgaged it to LaFayette Anderson to secure two thousand dollars, which he had borrowed from Anderson about a year before, and for which he had at the time given him his note without security. Platt at the same time made a will in which the said Anderson was named as one of his executors. He soon afterwards died. At the time of his death, Platt was owing the county several hundred dollars for delinquent taxes. Anderson took possession of the estate of Platt, personal as well as real, presumably as executor, but although he proceeded to prove up his claim of two thousand dollars and interest against the estate, he advertised the personal property for sale under the

chattel mortgage. About this time the county treasurer appointed a special deputy to collect the taxes which Platt owed the county at the time of his death. Thereupon said deputy seized certain horses, mules, and ponies for the said taxes, and placed them in the hands of Jonas Hedman (who lived convenient to the Platt farm), for safe keeping, pending their advertisement and sale for the said taxes, and thereupon Anderson brought this suit and replevied the said property. Upon his own motion and application, Vincent Kummer, the county treasurer, was made a party defendant with Jonas Hedman in the court below.

Upon the trial the district judge ruled out certain testimony offered by the defendants, and directed a verdict for the plaintiff, which rulings are assigned for error and the cause brought to this court on petition in error.

According to the holding of this court in *School District No. 2 of Merrick County v. Jacob Shoemaker*, 5 Neb., 36, and *John A. Creighton, admr., etc., v. J. L. Newton et al.*, Id., 100, as well as the Ohio cases, *Ferrell v. Humphrey*, 12 Ohio Repts., 113, and *Oaks v. Wyatt*, 10 Ohio Repts., 344 (with the correctness of which the writer of this opinion is not entirely satisfied), it was competent for the defendants, under the issue presented, to prove any special matter that would amount to a defense either in whole or in part. There was no error, however, in the courts ruling out the appointment of the special deputy treasurer, because it shows on its face to be a special deputation "to collect taxes by distress due to Platte county, Nebraska, from the personal property of the estate of Lester W. Platt, deceased." Testimony which had been admitted on the part of defendants showed that the taxes referred to were due from Platt in his lifetime, and testimony introduced by the plaintiff and received without objec-

tion, showed that Platt was dead sometime before the date of the paper offered. The county treasurer had no authority to distrain the property of the estate for the purpose of collecting these taxes, and of course could convey no such authority to a deputy. There being no proof before the court justifying the taking—as there could have been none—it was not error in the court to direct a finding for the plaintiff.

The assessment and collection of taxes are matters resting exclusively on statutory and constitutional regulations. The statute makes taxes on real property a perpetual lien thereupon, commencing on the first day of March of the current year, etc. Gen. Stat., 917. Neither the taxes upon real or personal property are anywhere made a lien on personal property. Upon the death of the owner of personal property it immediately descends to his personal representatives, to be applied by them in the manner provided by the statute as applicable to the circumstances of each case. Where the estate is solvent of course all of the debts of the deceased are required to be paid, but where it is insolvent the law prescribes the order in which they shall be paid. In such cases, after making certain specified provisions for the widow and infant children of the deceased, the statute provides the distribution of the assets in the following order:

1. The necessary funeral expenses.
2. The expenses of the last sickness.
3. Debts having a priority by the laws of the United States.
4. Debts due to other creditors. [Gen. Stat., 325.]

A claim of the municipal government upon the deceased for delinquent taxes could only come in under the fourth class, and a county treasurer could not be permitted to disturb the order of distribution prescribed by statute by seizing property for the purpose

of giving the county a preference among the creditors of a deceased which the law making power has seen proper not to give.

JUDGMENT AFFIRMED.

ISAAC M. NORTON, PLAINTIFF IN ERROR, v. NELSON L. THATCHER AND WILLIAM F. MCCULLOUGH, DEFENDANTS IN ERROR.

1. **Partnership:** ACTS OF PARTNER. A partner binds the firm of which he is a partner necessarily only when he uses the name of the firm and acts within the scope of his authority.

2. ———: ———. McC., a member of a firm, entered into the following contract: "Recd. of W. F. McC. $20, for which sum I, N. L. T., agree to give the said W. F. McC. any profits that I may have on a lot of 5350 pounds of wool over and above costs and freight. And I, W. F. McC., agree to pay any loss that may be made in sale of wool under $1,328.75 and freight. (Signed) N. L. T. W. F. McC." There was a loss of $398.02 on the sale of the wool. McC. was in partnership with N. in the grain business, but concealed the written contract, as also did T. N. was informed that the only risk was the $20, and was not aware of the character of the contract until after the sale of the wool. *Held*, without proof of prior authority to purchase the wool, or knowledge of the contract and its terms, N. could not be held liable, the contract not having been made for the firm.

ERROR from the district court for Adams county. The opinion states the case.

Batty & Nelson, for plaintiff in error.

I. Where there is no joint purchase or joint incurring of debt, but a purchase by one to whom alone credit is given, a subsequent joint interest in the property purchased and in the business and profits depend-

ing upon it, carries no liability for the original debt. Parsons on Contracts, 172. Story on Partnership, 248, sec. 134. *Sylvester v. Smith*, 9 Mass., 119–121. *Lloyd v. Freshfield*, 2 C. & P., 325. Story on Sales, sec. 122. This principle is further illustrated by many cases. *Siffkin v. Walker*, 2 Camp., 308. *Emly v. Lye*, 15 East, 7. *Green v. Tanner*, 8 Met., 411.

II. An indebtedness count can not be used, under the code, where the action is really brought to recover upon a special contract, unless such indebtedness count does substantially contain the terms of the special contract. Swan's Pleading and Precedents, 57. The code requires the petition to contain the facts as they actually exist. General Statutes, 539, sec. 92.

III. To maintain assumpsit for goods sold and delivered against two defendants, the plaintiff must show a joint original promise by the defendants. *Fuller v. Miller*, 57 Me., 168. 1 Chitty Pleadings, 346. And cannot under such count (as is sought to be done in this case) show that one of the defendants was not originally liable, but became so, if at all, by some subsequent action of said defendant. Id.

IV. The contract must be stated correctly, and if the evidence differ from the statement the whole foundation of the action fails, because the contract is entire in its nature, and must be proved as laid. 1 Chitty Pleadings, 305.

Ash & Scofield, for defendants in error.

I. It is conceded that the plaintiff in error, Isaac M. Norton, and William F. McCullough were general partners, engaged in the business of buying and selling wheat, wool, and other produce, at the time the contract

was made for the purchase of the wool in question, and the act of McCullough in making this contract is the act of the firm, and binds the plaintiff in error. 3 Kent's Com., 12 Ed., 41, and cases cited.

II. McCullough swears that the wool was purchased on account of the firm, and through his testimony shows that he said something about taking it on his individual account if plaintiff objected to the transaction. Yet the testimony of all the witnesses shows that the $20 paid on the purchase were company funds; that the transaction was put upon the company's books, and the plaintiff assumed control of the property as company property and directed the sale of the wool, all the time acknowledging it to be company property. These acts estop him from saying it was not a company matter.

III. Plaintiff complains in his testimony that he is not liable to defendant, for the reason that his partner did not explain to him that the firm was to share the loss on the wool, if any. This is a matter between the partners, and if of any importance can not affect third parties.

IV. In this case there is no material variance between the pleadings and proofs. *Hogg v. Zanesville Canal Co.*, 5 Ohio, 410. *Moore v. Gano*, 12 Ohio, 300. *Hoffman v. Gordon*, 15 Ohio St., 211.

MAXWELL, CH. J.

On the twenty-seventh day of April, 1878, N. L. Thatcher filed a petition, of which the following is a copy, in the district court of Adams county:

"Nelson L. Thatcher v. Isaac M. Norton and William F. McCullough, late doing business under the firm name of Norton & McCullough, defendants. The

plaintiff states that on or about the sixth day of July, 1877, the said defendants, Isaac M. Norton and William F. McCullough, were indebted to the said plaintiff in the sum of three hundred and ninety-eight dollars and two cents, as balance due on account for a certain lot of wool, by the said plaintiff before that time sold and delivered to the said defendants at said defendants' special instance and request, which said sum of money the plaintiff avers was then due and payable, and yet said defendants, though often requested, have not paid said sum of money nor any part thereof. Wherefore the said plaintiff prays judgment, etc."

The defendants answered separately, denying the indebtedness; McCullough also alleged in his answer that said wool was sold to the firm of Norton & McCullough, to be accounted for to the plaintiff as soon as the wool should be sold by the said Norton & McCullough; that before said wool was sold the firm of Norton & McCullough dissolved partnership, and that plaintiff agreed with him (McCullough) that he would not hold him responsible, but would look to Norton, who was then conducting the business in his own name. The plaintiff in his reply denied "each and every allegation of new matter contained in the answer." Upon the trial of the cause, judgment was rendered in favor of Thatcher for the sum of $398, and costs, against the defendants jointly. Norton brings the cause into this court by petition in error. The only error assigned is that the finding of the court—a jury having been waived by the parties in controversy—is contrary to law and against the weight of the evidence.

During the progress of the trial the following contract was read in evidence:

"HASTINGS, July 6, 1877.

"Received of W. F. McCullough twenty dollars ($20) for which sum I, N. L. Thatcher, agree to give the

said W. F. McCullough any profits that I may have on a lot of 5,350 pounds of wool over and above costs and freight; and I, W. F. McCullough, agree to pay any loss that may be made in sale of wool under $1,328.75, and freight.

"(Signed) "N. L. THATCHER,
"WM. F. McCULLOUGH."

It appears from the testimony that Norton and McCullough were in partnership in the grain business at the time this contract was entered into, although the exact scope of the partnership business nowhere clearly appears. Norton was absent in Chicago at the time the contract was made, and it appears that McCullough told Thatcher at the time that "if Norton did not want to take an interest he need not." Upon the return of Norton from Chicago, he testifies that McCullough informed him that "there was only $20 at stake, he gave that for the chance of the profits." He also testifies that he said nothing about making up the losses. McCullough testifies that on Norton's return he informed him of the contract, but as it is apparent that he said nothing to Norton about the written contract his statement may well be doubted. The wool was sold on the twenty-first of December, 1877, for the sum of $1,188.09, the charges and commissions being $196.81. After the sale of the wool, an attempt appears to have been made to collect the balance from Norton, when he applied to Thatcher for information about the matter, and was then informed for the first time about the written contract. It is claimed that Norton and McCullough being in partnership, therefore Norton is bound by this contract.

The principle is well settled that the acts or contracts of one partner with reference to the partnership business and affairs, are to be deemed the acts and

contracts of all. *Converse v. Shambaugh*, 4 Neb., 378; *Mayberry v. Willoughby*, 5 Id., 368.

But a partner binds the firm, necessarily, only when he uses the name of the firm (Parsons on Partnership, 95), and when he acts within the scope of his authority. In this case it is shown beyond question that the contract was entered into by McCullough in his own name, he at the time stating to Thatcher that Norton need not be a party to the transaction unless he desired, consequently the sale was not made to the firm. Neither does the petition allege that the wool was sold to these parties as partners. In the title of the case it is said, "late doing business under the firm name of Norton & McCullough," but this is a mere description of the persons. There is no allegation in the petition that this contract was made by the firm, or that such a firm was in existence at the time it was entered into. But it is sought to hold Norton liable upon the ground that he subsequently ratified the act of his co-partner. In order to prove a subsequent ratification there must be evidence of previous knowledge, on the part of the party ratifying, of all the material facts. When such facts are shown a subsequent ratification is equivalent to original authority. In this case the evidence clearly shows that the written contract was concealed from Norton, both by McCullough and Thatcher, until after the sale of the wool. The clear weight of testimony shows that this was not a partnership transaction, and fails to show that Norton had notice of the terms of the contract, without which there could be no ratification. For these reasons the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

DANIEL FREEMAN, PLAINTIFF IN ERROR, V. MICHAEL LYNCH, HIRAM P. WEBB, AND OTHERS, DEFENDANTS IN ERROR.

1. **Taxes**: PERSONAL PROPERTY. In the year 1857 the town of B. was located on the public lands, and surveyed and platted, the site being entered in 1859. The proprietors of the town reserved a block for a court house, but did not convey it to the county, and no county buildings were erected thereon. In 1871 F. erected a building on the block and occupied the same with his family until 1874, when, during the temporary absence of F. and his family, the county treasurer levied upon the buildings for delinquent taxes on *other* real estate of F., and moved the building into the street and sold it. Held, 1st, that the building was not personal property; 2d, that had it been it could not be moved before the sale.

2. ———: ———. It is not the policy of the law to separate houses occupied by families from the realty, and treat such houses as personal property for the purpose of collecting taxes.

3. **Real Property.** WHEN HOUSES BECOME PART OF. When it is evident that houses were intended as permanent annexations to the freehold, they become a part of the realty, and pass with a conveyance of it, and that without regard to the character of the foundations on which they stand.

ERROR from the district court for Gage county. The case is stated in the opinion.

O. P. Mason and *L. W. Colby*, for plaintiff in error.

The defendants, county commissioners, claim the property as the property of Gage county, and under the pleadings the burden was on them to show that fact, but no evidence was introduced which would show a dedication of the block to the public. A dedication of a block to public uses can only be made by the owner of the property. *Hoole v. Attorney General*, 22 Ala., 190. *Mayor v. Franklin*, 12 Ga., 239. The evi-

dence fails to show who were the proprietors who dedicated this block to the public. True, the act of 1873 declares the dedication to be valid and ratifies the same, and declared that the title to the land is vested in Gage county. But no dedication had ever been made, and there was nothing to ratify.

Lamb, Billingsley & Lambertson, for defendants in error.

A dedication is the act of devoting or giving property for some proper object in such a manner as to conclude the owner. It may be by parol, and may be presumed from lapse of time. *Sims v. County Com. Otoe Co.*, 6 Neb., 129. A highway may be established by dedication of land by the owner to the public for that purpose. *Noyes v. Ward*, 19 Conn., 253–4. The same principle will apply to squares as to streets. *City of Cincinnati v. Lessees of White*, 6 Peters, 431. That the tract of land in controversy was dedicated to the public was recognized by the legislature of 1873, and the dedication ratified and confirmed under the provisions of section 3 of an act entitled "An act to quiet the title to certain portions of the city of Beatrice," which act was introduced in evidence. The evidence nowhere shows that plaintiff had any right or title to the tract in controversy. A statute describing the mode in which a highway or blocks may be laid out or dedicated to the public does not abridge the common law and right which previously existed to dedicate a right of way. The statute provides the way in which the land may be taken for highways without or against the owners' consent. *Noyes v. Ward*, 19 Conn., 257. It is not necessary that the land so dedicated should be used for the statutory limitation of time—a much shorter time is sufficient—on the principle that the owner has pursued

a line of conduct to lead others to adopt a particular course. 1 Greenleaf Evidence, 107, note 192. *Noyes v. Ward*, 19 Conn., 265. *Brown v. Wheeler*, 17 Conn., 345. *Roe v. Jerome*, 18 Conn., 138. If the dedication be unequivocal it may take place immediately. Angel on Highways, 142.

MAXWELL, CH. J.

In the year 1857 the town of Beatrice was located on the public lands, and surveyed and platted. The site was entered in the year 1859, and the proprietors of the town reserved from sale, with the intention of dedicating to the county, a block on which to erect a court house. This block is not designated by number on the plat of the town, but is marked with a pair of scales, and appears to have been known as "Court House Square." No conveyance appears to have been made to the county of the block in question, and the county has not erected a court house or any other building thereon.

In the year 1871, the plaintiff erected a dwelling house twenty-eight feet in length and fourteen feet in width on the block in question, and moved into the same with his family. In August, 1874, while the plantiff and his family were temporarily absent from home, the defendant, Lynch, who was deputy county treasurer, levied upon the house and outbuildings of the plaintiff upon the block in question, and thereupon removed the house into the street, the plaintiff's household goods being in the house at the time, and sold the house upon the street for certain delinquent taxes upon *other real estate* of the plaintiff. The county commissioners appear to have paid the expenses of removing the house, and immediately erected a fence around the block in question.

The plaintiff brought an action in the district court of Gage county against the defendants for the damages sustained by him. On the trial of the cause the jury returned a verdict for the defendants, upon which judgment was rendered. The cause is brought into this court by petition in error.

Was the house in controversy attached to the realty, or was it personal property? The term "fixtures" is always applied to articles of a personal nature which have been affixed to land. It is a very ancient maxim of the common law, that whatever is annexed to the realty thereby becomes a part of it, and partakes of its properties and incidents.

In *Elwes v. Mawe*, 3 East, 38, the court say: "Questions respecting the right to what are ordinarily called fixtures principally arise between three classes of persons: 1st, "Between different descriptions of representatives of the same owner of the inheritance, viz: between his heir and executor." In this case the rule obtains with the utmost rigor in favor of the inheritance and against the right to disannex therefrom, and to consider as personal property anything which has been affixed thereto. 2d. "Between the executors of a tenant for life and the remainderman, or reversioner," in which case the law is more favorably construed than between the heir and executor. "The third case, and that in which the greatest latitude and indulgence has always been allowed to have any particular articles considered as personal chattels as against the claimant in respect of freehold or inheritance, is the case between landlord and tenant."

The term "fixture", although always applied to personal property affixed to land, has acquired by the contradictory decisions of the courts a vague and ambiguous meaning. All the cases seem to agree that trade fixtures may be removed. It has been held that the

rolls in an iron mill, though lying loose in the mill, were fixtures. *Vorhis v. Freeman*, 2 Watts & Serg., 116. *Hill v. Sewald*, 53 Penn. St., 271. And a steam engine and boiler, engines and frame, designed to be used by such engine. *Sparks v. The State Bank*, 7 Blackf., 469. *Winslow v. Merchants Ins. Co.*, 4 Met., 306. *Sands v. Pfeiffer*, 10 Cal., 258. *Walmsley v. Milne*, 7 C. B. N. S., 115. *Voorhees v. McGinnis*, 48 N. Y., 285. *Pierce v. George*, 108 Mass., 82. Wash on R. P., 24. A dye-kettle set in brick. *Noble v. Bosnorth*, 19 Pick., 314. The mill wheel and gearing of a factory necessary to operate it. 1 Wash. on R. P., 25. *Powell v. Monson*, 3 Mason, 459. *Buckley v. Buckley*, 11 Barb., 43.

In the case of *Van Ness v. Pacard*, 2 Peters, 148, a tenant erected on leased premises a wooden dwelling-house, two stories high, with a shed of one story, having a cellar of stone or brick foundation, and a brick chimney for his business as dairyman, and the residence of his family. It was held that he might remove the house.

In *Smith v. Benson*, 1 Hill, 176, a building used as a grocery and dwelling-house was held to be personal property by force of an agreement that the tenant should have the right to remove it.

In *Dame v. Dame*, 38 N. H., 429, a dwelling-house and barn were erected upon the land of another, under an agreement that the builder might remove them when he saw fit. It was held that they remained the property of the builder.

In *Reid v. Kirk*, 12 Rich., 54, where a dwelling-house was erected on the land of another, with no agreement as to its removal, and was occupied rent free by the builder for thirty years, it was held that the builder had no right to remove it.

In *Powell v. McAshan*, 28 Mo., 70, it was held that

an agreement that the tenant might remove buildings, sheds, and other temporary houses and structures which he might erect, did not authorize him to remove improvements, the removal of which would cause material injury to the landlord.

In *Humphreys v. Newman*, 51 Me., 50, where the husband had erected a dwelling-house and outbuildings on his wife's land, it was held that they must be regarded as real estate, and were not liable for a debt of the husband incurred *after* their erection.

In *Keogh v. Daniel*, 12 Wis., 163, it was held that the tenant might, in the absence of any restrictions in the lease, remove his improvements, a general custom to that effect having prevailed in Milwaukee at the date of the lease, and for several years before.

In *Powers v. Dennison*, 30 Vt., 752, a house was erected upon the land of another under a verbal agreement that it might be removed at any time on three months' notice. Subsequently the owner of the land mortgaged it, and the mortgage having been foreclosed, the premises were sold to the plaintiff. It was held that the house was a fixture and a part of the freehold, and passed to the purchaser under the mortgage.

In *Fuller v. Tabor*, 39 Me., 519, where a house was erected upon land without the knowledge or consent of the owner of the land, but subsequently the owner of the land consented that it might remain there, it was held that the subsequent assent was equivalent to a prior agreement, and related back to the time the house was erected upon the land, and it remained the personal property of the builder.

Many other cases might be cited to the same effect. It will readily be seen that the cases cannot be reconciled with each other, and that no uniform rule can be drawn from these adjudications. Many of the early cases hold that it is necessary, in order to constitute a

fixture, that the article should be let into or united with the land, or to substances previously connected therewith. Amos and Ferrard on Fixtures, 2. And in some of the cases, this seems to have been the only criterion by which the question was determined. But this doctrine furnishes no criterion of uniform application, as will readily be seen from an examination of the authorities.

In *Wagner v. C. & T. R. Co.*, 22 Ohio State, 563, it was held that stone piers built by a railroad company as a part of its railroad, on lands over which it had acquired the right of way for its road, do not, though firmly imbedded in the earth, become the property of the owner of the land as a part of the realty; and on the purpose of completing the railroad being abandoned, the company might remove such structures as personal property, although the earth had been excavated and the piers built upon the rock.

In *Corwin v. Cowan*, 12 Ohio State, 629, it was held that the stone and other materials out of which certain locks in the Warren county canal had been constructed, did not revert to the owners of the freehold with the abandonment of the canal. See also the case of *N. C. R. v. Canton Co.*, 30 Md., 355.

In *Buckland v. Butterfield*, 2 Brod. & Bingh., 54, it was held that a conservatory for pleasure, not trade, which had been erected by the tenant, could not be removed. A large number of cases hold that as between landlord and tenant, fixtures must be removed during the term. An examination of the cases will show the want of a settled, unvarying standard by which it can be determined what constitutes a fixture.

The supreme court of Ohio, in *Teaff v. Hewitt*, 1 Ohio State, 529, say: "The following requisites will be found the safest criterion of a fixture:

"1st. Actual annexation to the realty, or something appurtenant thereto.

"2d. Appropriation to the use or purpose of that part of the realty with which it is connected.

"3d. The intention of the party making the annexation to make the article a permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made." These rules seem to furnish a test by which the essential qualities of a fixture, in most cases, can be determined, and make the *intention* of the party making the annexation the material inquiry. And this intention is to be gathered from the nature of the article affixed, the relation and situation of the party making the annexation, and the structure and mode of annexation.

Parties by contract may make such arrangements as to the removal of fixtures as they see fit. In its correct sense, the term "fixtures" includes such things only of a personal character as have been annexed to the realty, and which may be afterwards severed or removed by the party who united them, or his personal representatives, against the will of the owner of the freehold. Broom's Legal Maxims, 419, and cases cited. The term is often used, however, to designate those articles which are not by law removable when once attached to the freehold, as well as those which are severable therefrom. It is well settled by the clear weight of authority in this country, that houses or other structures of a permanent character erected on the land of another, under an agreement, express or implied, that they are to remain the personal property of the builder, do not attach to and become annexed to the realty. *Prince v. Case*, 10 Conn., 375. *Curtis v. Hoyt*,

19 Id., 154. *Smith v. Benson*, 1 Hill, 176. *Doty v. Gorham*, 5 Pick., 487. *Dame v. Dame*, 38 N. H., 429. *Goff v. O'Connor*, 16 Ill., 421. *Fuller v. Tabor*, 39 Me., 519. *White's Appeal*, 10 Barr., 252. *Coleman v. Lewis*, 3 Pa. St., 291. 2 Am. L. C., 288. And the builder may remove the property at the expiration of his agreement. In the absence of any agreement, express or implied, or evidence of intention, everything which is annexed to the freehold becomes a part of the realty, and cannot be severed from it and reinvested with the character of personal property except by the owner of the land. *Reid v. Keith*, 12 Rich., 54. *Powell v. The M. Man. Co.*, 3, Mason, 459. *Stillman v. Hamer*, 7 How. (Miss.), 421. *Winslow v. Merchants Ins. Co.*, 4 Met., 306. *King v. Johnson*, 7 Gray, 239. *Voorheis v. Freeman*, 2 W. & S., 116. *Mc Intosh v. Trotter*, 3 M. & W., 134. Hence the maxim *Quicquid plantator solo solo cedit.* This presumption, however, may be rebutted by proof of the manner of the annexation, or the circumstances attending it.

In the case at bar, the plaintiff appears to have entered upon the land in question, claiming as owner thereof. He had remained in possession for so long a period that he could not be evicted by proceedings under the act for forcible entry and detention of real property. The rule therefore as to fixtures would be the same as between vendor and vendee, as the rule is the same between the owner and purchaser at an execution sale, or between vendor and purchaser. *Farrar v. Chauffetete*, 5 Denio, 527. In a sale of this real estate, upon execution, would the buildings pass with the land? And there can be no doubt but they would. They could not, therefore, be treated as personal property. But even if the buildings had been personal property the most that the treasurer could have done would have been to have sold them where

they stood. The buildings could not be separated by him from the possession of the premises and sold. He had no authority whatever to remove the buildings before selling them, and he was a trespasser in doing so. But, so far as this record discloses, this house was not personal property, and could not be sold in the manner attempted in this case. It is not the policy of the law to separate houses occupied by families from the realty, and treat said houses as personal property for the purpose of collecting taxes, simply because they are not placed upon a brick or rock foundation. Such houses, where it is evident that they are intended as permanent annexations to the freehold, become a part of the realty, and pass with a conveyance of it, and that, too, without regard to the character of the foundations. It is evident in this case that the real object was not to collect the delinquent tax, but to obtain possession of the premises. No attempt was made to sell the furniture or other movable property of the plaintiff for the purpose of collecting such tax, but the house, as soon as it was levied upon, was moved upon the street before being sold, apparently for the purpose of giving the county possession of the block. It may fairly be questioned whether Gage county has any title to the block in question. A dedication was made by the town authorities for a particular purpose, but, so far as appears, the county has not applied it to that purpose. That a dedication can be made by parol there is doubt, but it certainly is necessary in some way to prove an acceptance on the part of the public. But the question of title cannot be tried in this action; the plaintiff was peaceably in possession of the premises, and could not be divested of such possession in the manner attempted in this case. The act passed by the legislature in 1873, Special Laws 1873, p. 63,

could not affect vested rights, and does not appear to have any application to this case.

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

REVERSED AND REMANDED.

R. C. MULHOLLAN, PLAINTIFF IN ERROR, v. LEMUEL A. SCOGGIN, DEFENDANT IN ERROR.

1. **Practice**: OPENING DEFAULT. Where a default has been regularly entered against a defendant, personally served with summons, it is largely within the discretion of the court to say whether he shall be permitted to come in afterwards and make defense; and unless it be made to appear that there has been an abuse of discretion by the court below, in this particular, this court will not interfere.

2. ———: ———. When judgment on default has been entered against a defendant, and which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and in addition thereto, that he has a meritorious defense either in whole or in part to the action. Unless he do so he can have no standing in the supreme court on the question of his right to answer.

3. ———: ANSWER: WAIVER. Taking leave to answer is a waiver of all objections to the manner in which the previous orders of the court as to the itemization of the account sued on has been performed—no exception to such performance having been taken.

4. ———: EXHIBITS. If an exhibit to a pleading be objectionable the proper practice is to bring it to the attention of the court by motion.

ERROR from the Lancaster county district court, being brought there by appeal from justice's court. Scoggin obtained judgment by default. Mulhollan moved to set aside default and judgment. Motion denied, and he brought the cause up by petition in error.

L. C. Burr, for plaintiff in error, contended that defendant in error not having complied with orders of the court requiring him to attach exhibits to the petition, that Mulhollan would have until the next regular answer day to file answer. Gen. Stat., 546, Sec. 142. Rules of court No. 20 and 21. *Horn v. Queen*, 5 Neb., 108. Defendant may refuse to answer until plaintiff complies with orders of court. *Davis v. Hunt*, 2 Bailey, 416. *Mulholand v. Van Fine*, 8 Cow., 132. The order of court stayed proceedings. *Roosevelt v. Gardiner*, 2 Cow., 463. Default will be set aside where proceedings are irregular. *Depeyster v. Warne*, 2 Caines Reports, 45.

A. L. Palmer, for defendant in error, cited *Harrison v. Kramer*, 3 Iowa, 543. *Thatcher v. Haun et. al.*, 12 Iowa, 303. *State v. Elgin et. al.*, 11 Iowa, 216. *King v. Kinney*, 8 Iowa, 521. *Kreisinger v. The Community*, 16 Iowa, 586. *McNulty v. Everett*, 17 Iowa, 581. *Robinson v. Wheeler*, 51 N. H., 384.

LAKE, J.

There is no error shown in this record. The grounds upon which the judgment is sought to be reversed are:

First. The refusal of the court to set aside the judgment and default entered against the plaintiff in error, to enable him to file his answer to the petition.

Second. Because of alleged irregularities in previous orders of the court relative to itemizing the account on which the action was brought.

The record shows that the default was regularly entered three days after the time taken by the plaintiff in error to file his answer. Being thus in default, it was largely within the discretion of the court to say whether the party should be permitted afterwards to come in and make a defense; and unless it be made to appear

that there has been an abuse of discretion by the court below in this particular, this court will not interfere.

Where a judgment has been taken against a party on default, and which he desires to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and in addition, that he has a meritorious defense in whole or in part to the action. Unless he do this he can have no standing in this court on the question of his right to answer. But here nothing of this kind was done. The motion to set aside the default was based solely on the ground that the time for filing the answer had not fully elapsed when the default was entered. This claim the record shows was unfounded. On the 22nd of February the order was made requiring the answer to be filed on the following Monday, the 25th. The default was not taken until the 28th of the same month. And in addition to this, there was no showing of a meritorious defense.

As to the second point, all that need be said is, that taking leave to answer was a waiver of all objections to the manner in which the previous orders requiring the itemization of the account had been performed, no exception having been taken. If an exhibit to a pleading be objectionable, the proper practice is to bring it to the attention of the court by motion. If this be not done the objection will be waived.

JUDGMENT AFFIRMED.

PATRICK J. GRANT, PLAINTIFF IN ERROR, V. ANDREW J. CROPSEY ET. AL., DEFENDANTS IN ERROR.

1. **Estoppel.** It is a firmly established rule that, when one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

2. ———: DECLARATIONS BY BANK CASHIER. And the above rule is not changed as to the declarations of the cashier of a bank respecting the payment of a note held by the bank, made to an indorser, and on which the cashier is also an indorser. As between the bank and the indorser to whom such declarations are made, if a loss has been occasioned thereby the former must bear it.

3. **Practice:** JURY TRIAL: DIRECTING A VERDICT. If there be any testimony before the jury, by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him. And the converse of this is also true.

ERROR from the district court for Lancaster county. The facts are fully set forth in the opinion.

T. M. Marquett, for plaintiff in error.

1. Declarations of a cashier made in the course of business of the bank, and pertinent thereto, are admissible against the bank. *Merchants Bank v. Rudolf*, 5 Neb., 540. *Drew v. Kimball*, 43 N. H., 282. *Claflin v. Farmers Bank*, 35 Barb., 540.

2. The court erred in ruling out the evidence, and in striking out a portion of the petition showing what was represented by the cashier at the time the note was given, this evidence would have shown *fraud*. *Munson v. Nichols*, 62 Ill., 111. This evidence would at least go to show that the surety had a right to be-

lieve what the cashier told him about the payment of the note. *Robertson v. Nicholson*, 34 Mich., 129.

2. The bank, in ratifying the act of its cashier in reference to the execution and delivery of said note, ratified all his acts and are bound by them.

Brown & Marshall, for defendant in error.

1. The bank was not bound by the statements alleged to have been made to Grant by his co-security, F. E. Atwood, because at the time such statements were alleged to have been made, Atwood's interest was adverse and hostile to the interests of the bank, and Grant knew that fact, and therefore had no right to rely on the alleged statements of Atwood. Atwood's interest being adverse to the interest of the bank, and Grant, having knowledge of that fact, had no right to rely on Atwood's representations, and under such circumstances Atwood's representations could not bind the bank, because Atwood was representing his own interests in his statements to his co-surety, and not the interests of the bank. Story on Agency, Sec. 210, p. 262. Morse on Banks and Banking, pp, 39, 40, and 186. *Stone v. Hayes*, 3 Denio, 575. *Ritt v. Wash. Fire Ins. Co.*, 41 Barb., 353. *McDonald v. Lord*, 26 How. Pr., 404. *The Bank of U. S. v. Dunn*, 6 Peters, 51.

The fact that the only money Grant held and parted with to Schutt and Polly was a trust fund which he held as one of the trustees of the Roman Catholic Church, would preclude Grant from retaining that fund or setting it off against a personal claim of his own. Grant was only one of the board of trustees, and even if sole trustee could not retain or set off his personal claim against a demand on a trust fund, for they were not mutual and in the same right. Therefore, in parting with the trust fund, Grant parted with no right or

values out of which he could have indemnified himself on the note. He was not damaged because he could not avail himself in this way out of a trust fund. Waterman on Set-off, Sec. 133, *et sequitur;* particularly Secs. 173 and 174. Smith's Leading cases, vol. 2, p. 306, and cases there cited. *Prewett v. Marsh*, 1 Stewart & Porter (Ala.), 17. *Irwin v. Harris*, 6 Iredell (N. C.) Eq., 215.

3. Grant not having been damaged by any representations alleged to have been made by F. E. Atwood, the teller of the bank, to Grant, his co-security on the note, the bank was not estopped from denying that the note had been paid. Hermann's Law of Estoppel, sec. 323, *et sequitur*. *The Welland Canal Co. v. Hathaway*, 8 Wend., 480; 18 Wend., 843. *Dezell v. Odell*, 3 Hill (N. Y.), 222.

4. As there was no testimony which tended to establish the fact that Grant ever had in his possession or under his control any money or values which he could have applied toward the payment of the note, or to indemnify himself as surety thereon, the court did not err in refusing to give the instructions asked for by the defendant Grant. Wait's (N. Y.) Practice, vol. 3, p. 181, and cases there cited. *Besson v. Southard*, 10 N. Y., 236. *Herring v. Hoppock*, 15 N. Y., 409–412. *Matthewson v. Burr*, 6 Neb., 312.

LAKE, J.

This was an action on a promissory note executed to the Lancaster County Bank for a loan of money by Schutt & Polly as principals, and F. E. Atwood and Patrick J. Grant as accommodation makers. In this transaction with the bank, Atwood acted also on behalf of the bank, he being at the time its acting cashier.

Service of summons was had upon Grant alone, who in his answer set up as his second defense, in substance,

that some time after the note matured, having in his hands and under his control sufficient money belonging to Schutt & Polly, who were then and still are insolvent, with which to pay the note and save himself harmless against loss, he went to the bank and enquired of the cashier about the condition of the note, stating the fact of his having the money of Schutt & Polly within his control, and was there told that it was fully paid. That believing this statement to be true, and acting upon it, he paid over to Schutt & Polly the money which he so held, and out of which he would have secured himself but for the information so given him by the cashier of the bank. That these facts, if true, make a complete defense to the action, must be conceded. The rule has been long and firmly established, that where one by his words or conduct wilfully causes another to believe in a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Pickard v. Sears*, 33 Eng. Com. Law Repts., 257. *Davis v. Handy*, 37 N. H., 65. *Merchants Bank v. Rudolf, et al.*, 5 Neb., 527.

On the trial to a jury, Grant testified that after the note matured, he went to the bank during business hours for the purpose of ascertaining whether it were paid, and was told by the cashier that it was fully "satisfied", and that "he would destroy it." It is true that he also swore, that on one occasion the cashier told him that "*it would be satisfied*," so there is some doubt as to just what the cashier did say. This, however, was a matter for the jury to settle. That Grant had under his control at this time money enough to have secured himself, and which he afterwards paid over to Schutt & Polly, was fully established. And it was conceded that the latter were insolvent, as alleged by

Grant in his answer. Such being the defense, and this the testimony to support it, was the court justified in directing the jury to return a verdict against the defendant? This is the main question for our decision.

On this point the law doubtless is, that if there be any testimony before the jury by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him. And the converse of this is true. In *Hendrick v. Lindsay*, 3 Otto, 143, on a question analogous to this, it was held that in the absence of any testimony whatever to contradict or vary the case as made by the plaintiff, it is not error, when the legal effect of the plaintiff's evidence warrants a verdict for him, to so direct the jury. And this rule now obtains very generally. *Improvement Co. v. Munson*, 14 Wall., 442. *Demyer v. Souzer*, 6 Wend., 436. *Cutler v. Hurlbut*, 29 Wis., 152.

But in order to avoid the effect of this rule, it was urged with much earnestness that inasmuch as Atwood, the cashier, was one of the makers of the note, having an interest "adverse and hostile to the interest of the bank," the latter was not bound by his statements concerning its payment. This, at first blush, may seem somewhat plausible, but on reflection it will be seen that although Atwood was a co-maker he could have no possible interest in the release of Grant, when its only effect would be to throw the whole burden of paying the note upon himself. His statements, although having the effect, under the circumstances, of releasing Grant, could by no possibility benefit himself in the least degree. The note would still be unpaid, his liability thereon would continue, but the right to demand contribution would be gone. We think that on this question the interests of the bank and of Atwood were identical.

But even if their interests were really hostile, we fail to see any good reason for relieving the bank from the loss, if any loss has been caused by the falsehood of its cashier. The bank directors knew, or were bound to know, of the discounting of this note, and who were the makers. They permitted the cashier to stand in the double attitude of joint debtor and agent for the collection of the debt. The knowledge of the directors as to his attitude and "interest" was at least equal to that of Grant, and having this knowledge, if they continued him in a service whereby he could and did falsely make the statements imputed to him, occasioning a loss, there is certainly no good reason for saying that Grant, rather than the bank, shall bear it. We are of opinion that the ordinary rule is not varied by the circumstances of this case, and that the loss should be borne by the bank, if the allegations of the answer in this regard are proven.

It was also contended that even if the bank were held to be bound by Atwood's statements, still Grant could not escape liability, inasmuch as the money which he parted with belonged to the Roman Catholic Church, and having been placed in his hands as trustee for the purpose of paying Schutt & Polly for repairs done by them on the parochial house, could not be set off against a personal claim of his own, consequently he had suffered no damage whatever. But conceding all that is claimed as to the character of this fund, and Grant's connection with it, and even if he had no authority from Schutt & Polly to so apply it, still by resorting to legal measures he most certainly could have made it available as an indemnity against loss in consequence of having signed said note.

We are of opinion, therefore, that there was testimony which ought to have been submitted to the jury, under proper instructions, and that in holding other-

wise and dictating the verdict, there was error. The judgment is reversed, and a new trial awarded.

REVERSED AND REMANDED.

COBB, J., having been of counsel in this case, did not sit.

DAVID DORRINGTON AND AUGUST J. FALKSEN, PLAINTIFFS IN ERROR, V. PHILIP J. MEYER AND JOHN H. MEYER, DEFENDANTS IN ERROR.

1. **Pleading:** ACTION UPON WRITTEN INSTRUMENTS. In bringing an action upon a deed or other instrument, consisting of several distinct parts, the plaintiff is required to set out in his petition only so much of the instrument as is necessary to show his right of action. He should, however, attach a copy of the instruments sued on to his petition, and if none be attached he may be compelled to do so.

2. ——: ——: JUDGMENT. A petition alleged that "an undertaking was entered into as provided by law, and that said undertaking was lost or mislaid;" *held*, sufficient after judgment to show that the undertaking was in writing and would sustain the judgment.

3. **Sureties on Replevin Bond.** The sureties on the undertaking in an action of replevin have a right to object to the form of the judgment on the undertaking, and to require the same to be rendered for a return of the property or the value thereof in case a return cannot be had, but if they fail to do so, and a judgment for the value of the property alone is rendered, they will be bound by the judgment.

ERROR from the district court of Richardson county. The opinion states the case.

Isham Reavis and *Schoenheit & Thomas*, for plaintiffs in error.

1. A party is required to make out a case by his pleadings, and not leave it to conjecture or inference. And where the language of a pleading is doubtful in its meaning, the most unfavorable construction must

be adopted against the pleader, as he is presumed to state his case most strongly in his own favor. *Lemon v. Stevenson*, 36 Ill., 49. *Spear v. Downing*, 34 Barb., 522. 1 Chitty Plead., 256, 674. There can be no presumption that facts were given in evidence which were not admissible under the pleadings. *Comstock v. Hollon*, 2 Mich., 355.

2. By failing to demur or answer the defendants did not waive the objection that the petition does not state facts sufficient to show a cause of action. *Curtis & Co. v. Cutler*, 7 Neb., 315. *Martin v. Freeman*, 17 Ohio St., 323.

3. A judgment by default, not objected to below, will be reversed on error where the complaint shows no substantial cause of action. *Childress v. Mann*, 33 Ala., 206. *Gervais v. Willoughby*, 1 Minn., 45. *Dryden v. Dryden*, 9 Pick., 546. *Hudson v. Breeding*, 7 Ark., 445. *Hallock v. Jaudin*, 34 Cal., 167.

4. Whatever is good ground for arresting a judgment is good ground for reversing it. *Wood v. Hustis*, 17 Wis., 416.

George P. Uhl, for defendant in error, cited Chitty's Pleading, 237, 371. *Clapp v. Schutt*, 44 Barb., 9. *Jones County v. Sales*, 25 Iowa, 25. Gould's Pleading, 117, sec. 43. *Lash v. Christie*, 4 Neb., 262. *Kohlman v. Wright*, 6 Cal., 230. *Mather v. Butler County*, 16 Iowa, 59. *Hunter v. Sherman*, 2 Scam., 539. *Peck v. Wilson*, 22 Ill., 205. *Gray v. Coan*, 23 Iowa, 344. *Allen v. Patterson*, 7 New York, 480. *Tutshorn v. Hull*, 30 Wis., 162. *Shank v. Teeple*, 33 Iowa, 189. *Nathan v. Lewis*, 1 Hand, 239.

MAXWELL, CH. J.

On the fifteenth day of December, 1877, the defendants in error commenced an action in the district court

of Richardson county to recover the sum of six hundred and eighteen dollars and seventy-six cents, upon a replevin bond given in 1872 by one Roy as principal, and the plaintiffs in error as sureties. Dorrington, one of the sureties, demurred to the petition upon the ground that the facts stated therein did not constitute a cause of action against him. The demurrer was overruled, to which he excepted. The plaintiffs in the court below then asked and obtained leave of the court to file an amended petition. The amended petition was filed on the twenty-fifth day of April, 1878, and was not verified. In September, 1878, judgment by default was entered against Roy and his sureties, for the sum of $761.80. No motion was made in the court below to set aside the default, or correct the judgment. The sureties bring the cause into this court by petition in error.

In the case of *Mulhollan v. Scoggin*, decided at the present term of this court, it was held that where a judgment and default have been entered against a defendant which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and in addition thereto, that he has a meritorious defense either in whole or in part to the action. And unless he do so, he can have no standing in the supreme court on the question of his right to answer.

In *Cropsey v. Wiggenhorn*, 3 Neb., 108, it was held that to entitle a party to a review of any alleged errors transpiring upon the trial of the cause, a motion for a new trial must be made, distinctly setting forth the errors complained of. As the plaintiffs in error made no attempt to set aside or correct the judgment in the court below, they cannot raise such objections for the first time in this court.

Objection is made that the amended petition is not verified. It is now well settled in this court that the

want of a verification is not jurisdictional. *Johnson v. Jones*, 2 Neb., 126. *Hull v. Miller*, 4 Id., 503. Where a petition is not verified, or where the verification is defective, if objection is made by the proper motion, it is the duty of the court to require the pleading to be verified as required by law. But this defect may be waived, and will be deemed waived, where no objection is made until after the rendition of the judgment. It is claimed that the facts stated in the petition are not sufficient to constitute a cause of action. Much stress is laid upon the fact that it is not alleged that the undertaking was *written*, nor that Dorrington and Falksen entered into a contract. The petition alleges: "That thereupon the said George Roy entered into an undertaking to these plaintiffs in the sum of $1,325.00, as provided by law, with the above named defendants, David Dorrington and August J. Falksen, as his sureties, which said undertaking was conditioned as providedby law, viz.: that said George Roy should prosecute his said action and pay all costs and damages which might be awarded against him," etc.

In bringing an action upon a deed or other instrument, consisting of several distinct parts, the plaintiff is required to set out in his petition only so much of the instrument as is necessary to show his right of action. He should, however, attach a copy of the instrument sued on to his petition, and if he fail to do so, he will be compelled on motion to attach such instrument as an exhibit.

The statement of the condition of the bond is sufficient. It was executed in 1872, before the amendment of the statute requiring the bond to contain a condition for a return of the property to the defendant, in case judgment for a return of such property is rendered against the plaintiff. Sufficient also appears

in the petition to show that the instrument sued on was in writing.

It is alleged that the undertaking was entered into as provided by law, and that said undertaking is lost or mislaid. This is sufficient, after judgment, to sustain the judgment. Objection is made that the judgment in the action of replevin was for damages alone, and not in the alternative for a return of the property or its value, but that objection cannot be considered in this case. The sureties had the right to appear and object to the form of the judgment in the action of replevin, and have the same rendered in conformity to the statute; having failed to do so, they are concluded by it. Upon a careful examination of the entire record justice appears to have been done in the premises. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE STATE, EX. REL. IRA P. CONGER, V. DONALD MACCUAIG, COUNTY CLERK OTOE COUNTY.

1. **Construction of Statutes.** Where statutes, or parts of the same statute, are so repugnant to each other that both cannot be executed, the latter is always deemed a repeal of the earlier.

2. **County Warrants: BY WHOM TO BE DRAWN.** A county clerk has no authority to draw warrants upon the county treasury. Such warrants must be drawn by the chairman of the board of county commissioners, be countersigned by the county clerk, and be sealed with the county seal.

3. ——: ——. Section one of chapter two, General Statutes, to the extent that it authorized county clerks to draw warrants upon the county treasury, was repealed by implication by the "act concerning counties and county officers," passed February 27, 1873.

ORIGINAL application for mandamus.

Frank P. Ireland and *A. P. Grout*, for relator.

George W. Covell, for respondent.

LAKE, J.

This is an application for a peremptory writ of mandamus to compel the defendant to draw a warrant upon the county treasury of Otoe county for the sum of three hundred fifty-five dollars and thirty-five cents in favor of the relator, for the use and benefit of the Otoe county agricultural association, of which he is president, as is provided in section one, chapter two, of the General Statutes—p. 76.

The application is supported by an affidavit showing the existence of all the facts necessary to bring the relator within the purview of said section, and to entitle him to draw from the county treasury the funds which he seeks.

The important question raised, and the only one that need be noticed, is, whether, under the law as it now stands, money can be drawn from the county treasury on the warrant of the county clerk.

If the section before mentioned were the only statute to be consulted, there could be no doubt as to the authority of the clerk to draw the warrant as demanded, nor of that of the treasurer to pay it. This section, as we now find it, was enacted by way of amendment to a former section on the same subject, and took effect February 15, 1869. But the legislature afterwards, in an act concerning counties and county officers, which took effect September 1, 1873, provided that: "All warrants on the treasurer for money to be paid out of the county treasury" shall be signed by the chairman

of the board of county commissioners, and that they "shall be countersigned by the clerk, and sealed with the county seal." Sec. 23, chap. 13, Gen. Stat., 236. By the three next succeeding sections of this chapter the issue of warrants is limited to the amount of tax levied for the current year, and all overdrafts are chargeable, not against the county, but against the commissioners making the same, from whom they "may be collected by civil action." Between these several sections and the one first above referred to there is a clear and irreconcilable conflict, and under the rule heretofore observed by this court in the construction of statutes, the latest enactment must prevail—it being the latest expression of the legislative will on that subject.

In *White v. Blum*, 4 Neb., 555, this court, adopting the language of the supreme court of Pennsylvania in the case of *Brown v. Commissioners*, 21 Penn. St., 37, said: "Where the statutes are so flatly repugnant that both cannot be executed, and we are obliged to choose between them, the latter is always deemed a repeal of the earlier. This rule applies with equal force to absolute and irreconcilable conflict between different sections, or parts of the same statute. The last words stand, and the others which cannot stand with them go to the ground."

While it is true that the act of 1873, just referred to, does not in express language purport to repeal, or in any respect change the section passed in 1869, yet to the extent that they are irreconcilable it has that effect by implication. The later enactment is a complete law of itself, and provides the mode by which alone money can be drawn from a county treasury. Its effect under the rule of construction just mentioned was to annul all former conflicting statutes relating to that subject. *Smails v. White*, 4 Neb., 353. *Sovereign v.*

The State, 7 Neb., 409. Such being the condition of the several statutes bearing upon this question, we must hold that a county clerk has no authority to draw warrants upon the county treasury, and for this reason the writ of mandamus is denied.

WRIT DENIED.

THE STATE OF NEBRASKA, PLAINTIFF IN ERROR, V. THE LANCASTER COUNTY BANK, DEFENDANT IN ERROR.

1. **Action against State.** No action can be maintained on claims against the state which have not been presented to the auditor for adjustment. *The State v. Stout*, 7 Neb., 89, adhered to.

2. ———: AUTHORITY OF ATTORNEY GENERAL. Where the petition fails to state a cause of action against the state, the assent of the attorney general to a judgment thereon will not aid the judgment.

ERROR from the district court for Lancaster county.

T. M. Marquett, for plaintiff in error.

Lamb, Billingsley & Lambertson, for the defendant in error.

MAXWELL, J.

The judgment in this case is as follows: "It is therefore considered by the court (the defendant, by its attorney general, consenting thereto), that the said plaintiff, the Lancaster County Bank, have and recover from said defendant, the state of Nebraska, the said sum of five thousand and sixty-seven and fifteen one-hundredths dollars debt, and thirty-two and forty-seven one-hundredths dollars costs, and that said judg-

ment draw interest at the rate of ten per cent from date."

The state, by T. M. Marquett, its special attorney, brings the case into this court by petition in error.

The errors assigned are, that the facts set forth in the petition are not sufficient to constitute a cause of action, and that judgment was given for the Lancaster county Bank, when it should have been given for the state. The claims upon which this suit is brought have not been presented to the auditor for adjustment. The case, therefore, comes within the rule laid down in *The State v. Stout*, 7 Neb., 89, and no action can be maintained thereon. The judgment derives no additional force from the assent of the attorney general. Unless the petition sets forth a cause of action, such assent will not aid the judgment. As an action cannot be maintained on these claims, the judgment of the district court is reversed, and the cause dismissed.

JUDGMENT ACCORDINGLY.

FRANK C. MILLER, PLAINTIFF IN ERROR, V. THE PRESIDENT, MANAGERS, AND COMPANY OF THE BURLINGTON & MISSOURI RIVER RAILROAD IN NEBRASKA, DEFENDANTS IN ERROR.

Corporations. A corporation is liable the same as a natural person for the tortious acts of its servants or agents in the course of their employment. But to make a corporation liable for such acts they must be committed in the course of the agent's employment, or connected with the transaction of the business of the corporation.

ERROR from the district court for Fillmore county. The opinion states the case.

W. P. Conner, for plaintiff in error, cited *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y., 30. *Phil. & Balt. R. R. Co. v. Quigley*, 21 How., 209. *Frankfort Bank v. Johnson*, 24 Me., 490. *Thayer v. Boston*, 19 Pick., 511. *Goodspeed v. East Haddam Bank*, 22 Conn., 541. *Moore v. Fitchburg R. R.*, 5 Gray, Mass., 465. *Maynard v. Fireman's Fund Ins. Co.*, 34 Cal., 48. *Coleman v. N. Y. & N. H. R. R. Co.*, 106 Mass., 160. *Penn. R. R. Co. v. Vandiver*, 42 Penn. St., 365. *Kline v. Cent. Pac. R. R. Co.*, 39 Cal., 587. *Vance v. Erie R. R. Co.*, 3 Vroom, 330, 334. *Merrill v. Tauff Manufacturing Co.*, 10 Conn., 384. *Jeffersonville R. R. Co. v. Rogers*, 28 Ind., 1. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo., 315. Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *Merchants Bank v. State Bank*, 10 Wall., 604. *Booth v. Farmers and Mechanics Bank*, 50 N. Y., 396. *Indianapolis & C. R. W. Co. v. Anthony*, 43 Ind., 183. *Jeffersonville R. R. Co. v. Rogers*, 38 Ind., 116. It is a general doctrine of law that the principal is held liable to third persons in a civil suit for the frauds, torts, negligence, &c., of his agent in the course of his employment, although the principal did *not* authorize or justify said acts. In all such cases the rule *respondeat superior* applies. *The Atlantic & Great Western R. W. Co. v. Dunn*, 19 Ohio St., 162. *Little Miama R. R. Co. v. Welmore*, 19 Ohio St., 110.

T. M. Marquett, for defendant in error.

First. A corporation acts alone through its agents. The meaning of the petition therefore is, that the company authorized Nat Brown *to make* the information upon which plaintiff was arrested. The act was not and could not be done in the course of the business of the company. 1st, The servant cannot be au-

thorized by the master to do that which the master himself, being present, would not be authorized to do. *Mail v. Lord*, 39 N. Y., 381. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo., 315. 2nd, Neither a person nor a corporation can authorize another person to make the oath or information necessary to the arrest of a person on the charge of committing a crime. 3rd, The board of directors is the active body who alone can act for the company, and while it may be claimed that while acting for the company they may be guilty of slander, yet they have no power to procure a false affidavit to be made, in order to have a person arrested.

Second. The stockholders of a corporation only constitute their directors and other officers their agents in their corporate capacity, to bind them in such matters as come within the powers granted by their charter. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo., 324. 2 Hilliard on Torts, 391, 343. *Eastern R. R. Co. v. Broom*, 6 Railway Cases, 361. And this is in accordance with the principle universally adopted by text writers, and by judicial decisions, to-wit: To make the master liable for the malicious act of a servant, it must be done by the servant in the course of his employment. *Clark v. C. & N. W. R. R. Co.*, 36 Wis., 657. *Ramsden v. B. & A. R. R. Co.*, 104 Mass., 117. *Passenger R. R. Co. v. Young*, 21 Ohio St., 518.

MAXWELL, CH. J.

The petition alleges that "the defendant, on the tenth day of December, 1874, did, by one Nat. Brown, the then lawfully constituted and legally authorized agent of this defendant, acting with the assent and knowledge and under and in accordance with the instructions of this defendant, go before one B. F. Smith, he, the said B. F. Smith, being then a probate judge in

and for the county of Adams, in the state of Nebraska, and then and there before the said B. F. Smith, probate judge as aforesaid, falsely and maliciously, and without any reasonable or probable cause whatever, charged the said plaintiff with the crime of burglary, in the manner and words following, to-wit:

"State of Nebraska, county of Adams. The complaint and information of N. Brown, of said county, made before me, Benjamin F. Smith, probate judge in and for said county, on the 10th day of December, 1874, who, being first duly sworn, on oath says: that the crime of burglary has been committed in the county of Adams, and that Darius Monroe, Jr., and F. C. Miller committed the same, as he verily believes.

"(Signed) "N. BROWN.

"Subscribed and sworn to before me this 10th day of December, 1874. B. F. SMITH, *Probate Judge.*"

The petition also alleges that upon this information being filed, the probate judge issued a warrant under which the plaintiff was arrested and taken before the probate judge for examination, and in default of bail was committed to jail to await the action of the grand jury. The petition also alleges that the defendant, "contriving and maliciously intending to injure the plaintiff in his good name and credit, and to bring him into public scandal and disgrace, and to cause it to be believed that this plaintiff had been guilty of the crime of burglary, did, at the regular term of the district court, held in the county of Adams, and state of Nebraska, on the third Monday in the month of May, 1875, go before the grand jury of said county, then and there duly impaneled and sworn to enquire of crimes within and for said county of Adams, and then and there wrongfully and unjustly, falsely and maliciously, and without any reasonable or probable cause whatever therefor, prosecute and cause to be prosecuted

the said plaintiff before said grand jury, for the purpose of procuring an indictment against the said plaintiff for the crime of burglary, and caused plaintiff to be brought before the said regular term of the district court as aforesaid."

It is also alleged that the grand jury refused to find a bill of indictment, the plaintiff being discharged, and that the prosecution had terminated. The plaintiff claims damages in the sum of $25,000. The defendant demurred to the petition on the ground that the facts stated therein did not constitute a cause of action. The demurrer was sustained, and the cause dismissed. The plaintiff brings the cause into this court by petition in error.

A corporation is liable the same as a natural person, for the tortious acts of its servants or agents, in the course of their employment. But to make the corporation liable for the tortious acts of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. The officers themselves are mere agents of the corporation, and their powers are necessarily limited within the scope of the purposes of the corporation. The stockholders, however, by electing officers, assume the risk of the faithful or unfaithful management of the corporation, and cases may arise when, if one of two innocent persons is to suffer, the one who has created the power and selected the persons to enforce it must sustain the loss; but that principle can have no application in this case. But when an injury is committed by an employee of a corporation wilfully, and of his own malice, and not in the course of his employment, the corporation is not bound by his acts. And the same rule applies to the officers of a corporation in that regard as to its other agents. *Goodspeed v. The East Haddam*

Bank, 22 Conn., 541. *Brokaw v. N. J. B. & Co.*, 3 Vroom, 331. *Gillett v. Mo. Valley R. R. Co.*, 55 Mo., 315.

The petition in this case entirely fails to state that the parties charged were acting within the scope of their employment, or that the offense charged was committed in connection with the transaction of the business of the corporation. The demurrer was therefore properly sustained. The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JOSHUA H. BUEL, JR., ASSIGNEE OF JOSHUA H. BUEL, SR., APPELLANT, V. JOHN L. FARWELL, TREAS. IMP., ET AL., APPELLEES.

Mortgage Foreclosure: DISTRIBUTION OF PROCEEDS OF SALE. J. H. B. held a second mortgage on certain real estate owned by J. E. S. The S. S. I. held a prior and first mortgage on the same property executed by the same mortgagor. Other parties held judgments against J. E. S., all subsequent to the mortgage of J. H. B. J. H. B. commenced suit in the district court to foreclose his mortgage, making the S. S. I., as well as J. E. S. and wife, and the several judgment creditors defendants, and alleging that their several claims and liens were junior and subject to the lien of his mortgage. The S. S. I. appeared and answered setting up its mortgage and claiming it to be the first and prior lien. The court found and declared the mortgage of the S. S. I. to be the first and prior lien, and rendered the usual decree of foreclosure. Upon sale of the mortgaged premises by the sheriff they brought less than the amount found due the S. S. I. by the court. From an order directing such proceeds to be paid to the S. S. I., J. H. B. appealed; *held*, that it was the land itself and not the equity of redemption that was sold by the sheriff, and that all right, title, and lien of each of the parties who were before the court in and to the lands, passed to the purchaser by virtue of the sheriff's deed.

APPEAL from Otoe county district court. The case is stated in the opinion.

George W. Covell and C. W. Seymour for appellant.

I. A person who bids off property at a foreclosure sale becomes a *quasi* party to the foreclosure suit, so as to subject himself to the jurisdiction of the court; and on proper application in the action, the court will make an order to compel him to pay in the amount of his bid. *Ogelvie v. Richardson; Atkinson v. Richardson*, 14 Wis., 157–8. *Deadrick v. Watkins*, 8 Humph., 520. The fact that a person who bid off property in his own name at such a sale was bidding for another, will not relieve him from the obligation of his contract. (Idem.) Where property was sold on a decree of foreclosure, subject to the payment of a prior mortgage, and the person by whom it was bid off afterwards on the same day purchased it at a foreclosure sale under such prior mortgage, and acquired a good title at such sale, he will not be relieved from his bid at the first sale on the ground that the court in that case had failed to obtain jurisdiction over one of the mortgagors and other parties defendant. (Idem.)

II. One who purchases under a judgment of foreclosure thereby submits himself to the jurisdiction of the court; and he may be compelled, on motion, to comply with the conditions of sale. *Cazet v. Hubbell*, *Putnam v. Medbury*, *Hamilton v. Medbury*, *Sawyer v. Hubbell*, 36 N. Y., 677. By becoming the purchaser, the bidder, though not named as a party in the action, submitted himself to the jurisdiction of the court in the foreclosure suit; and the appropriate remedy, to compel him to pay over the surplus money, is by motion in that suit. *Requa v. Rea*, 2 Paige, 339.

Brasher v. Cortlandt, 2 Johns Ch., 505. *Casamajor v. Strode*, 1 Simons & Stuart, 381. *Lansdown v. Elderton*, 14 Vesey, 512.

III. A purchaser under a decree of court at a master's sale may be compelled to complete the purchase; and the court, where the conditions of the sale give no alternative to the purchaser, will exercise its discretion, under the circumstances of the case, in coercing the purchaser by an attachment. *Executors of Brasher v. Cortlandt*, 2 Johns, Ch., 505. In the matter of Yates, 6 Jones Esq. (N. C.), 211.

IV. Purchasers at judicial sales must take notice of the titles for which they bid. A purchaser cannot avoid his bid at a sheriff's sale, by showing a defective title in the judgment debtor. *Dean v. Morris*, 4 G. Greene, 312. 4 McLean, 607. 3 Scam., 502. 4 Scam., 486. 1 Gilman, 220. 8 Blackf., 432. 2 Carter, Ind., 526.

V. The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it or to resell the property, and hold him liable for the loss and the additional expenses. *Miller v. Collyer*, 1 Am. Law Reg, N. S., 572.

VI. The rule of *caveat emptor* applies in all its rigor to purchasers at judicial sales; such a purchaser takes the property subject to every lien, either by judgment or levy, that could be asserted against the creditor upon whose judgment the land was sold. *Benham v. Corwin*, 2 Ohio State, 36. *Creps v. Baird*, 3 Ohio State, 277. *Vattier v. Lytle*, 6 Ohio Rep., 482.

Purchaser of land at sheriff's sale takes the title, as held by the debtor, subject to prior existing liens.

Riddle v. Bryan, 5 Ohio, 49. *Smith v. Painter*, 5 Sergt. & Rawle, 225.

VII. In making a sale under execution or order of sale the sheriff or other public officer professes to sell only the interest or estate of the judgment debtor in the premises. The law implies no warranty. The rule of *caveat emptor* applies. Let the buyer beware of the title for which he bids. *Hammersmith v. Espy*, 19 Ia., 444. *Ritter v. Henshaw*, 7 Ia., 97. *Avant v. Reed*, 2 Stew., 488. *Phillips v. Johnson*, 14 B. Mon. (Ky.), 172. 3 Pick, 316. Reed's Appeal, 13 Penn. St., 476. *Rockwell v. Allen*, 3 McLean, 357. *Lang v. Waring*, 25 Ala., 625. *Coyne v. Souther*, 61 Penn. St., 457.

M. L. Hayward, for appellee.

I. That a party who bids at a judicial sale becomes a party to the suit, that he can be compelled to pay his bid, and that the rule of *caveat emptor* to a certain extent applies to him need no authorities to prove. But the purchaser in this case having by order of the court paid the money into the court, having taken the deed given him by the court through its officers, and he not being before this court and no attempt being made to affect him, we are unable to see how that law applies in this argument.

II. The proposition that at an execution sale the purchaser only takes the interest of the defendant—the judgment debtor, is too well known to need any authorities, but as this was not a sale made by a sheriff on an execution, but a sale made by a court of equity on a decree in equity of real property, especially by the court in its decree ordered to be sold, we are unable to see why such cases are quoted here. See *Gowan v. Jones*, 10 S. and M., 164. *Griffith v. Fowler*, 18 Vt., 394.

III. The case was brought by Buel to foreclose a mortgage on property in Otoe county, given him by John E. Shepherd and wife. The allegations of plaintiff's petition, as far as this appellee is concerned, were as follows: "That such defendant has or claims to have a lien or interest by virtue of mortgage, judgment, or other lien, in or on said real estate." The prayer of such petition prays, "That said defendants may be brought into court and compelled to set up their interest in said premises, if any they have." Then after praying for an accounting, plaintiff prays, "That the equity of redemption, and any and all other right, title and interest, which the defendants have in said premises, be foreclosed and forever barred, that said land be ordered sold to pay amount due and for equitable relief." All defendants who were brought in under this prayer, are bound by a general decree, and are precluded from setting up any title derived from the mortgagor. *Holcomb v. Holcomb*, 2 Barb., 20. *Fithian v. Monks*, 43 Mo., 502. *Clapworth v. Dressler*, 2 Beasley (N. J. Ch.), 62. Under such a prayer, the priority of respective liens, held by all persons made parties to the suit, is a proper question to be determined in a foreclosure suit. And if the decree disposes of the question of precedence between two mortgages, it is final upon that point, though the bill did not ask for such decision nor for general relief. Freeman on Judgments, 303. *Board v. M. P. R. R. Co.*, 24 Wis., 123.

IV. The court will see that proceeds of sale are so applied as to protect all equities of all parties in interest. *Brown v. Stewart*, 1 Md. Ch., 87. *Aster v. Miller*, 2 Page, 68. Rorer on Sales, sec. 210. In this case, this appellee and other lien-holders appeared as commanded and set up their interest in the property, and all of them asked the protection of the court and equitable relief. The court having brought them into the

suit, and having jurisdiction of the parties and the subject matter, was bound to make such a decree as would protect them all. And we believe this is true, where no answer is filed, if the court can, in any manner, ascertain the rights and interests of all parties. *Tootle v. White*, 4 Neb., 403. *Shellenbarger v. Biser*, 5 Neb., 200. *McArthur v. Franklin*, 15 O. S., 509. *Raymond v. Holhorn*, 23 Wis., 57.

V. Judgments which are prior liens to the mortgage will be first paid off out of proceeds of sale of premises. *Bell v. Brown*, 3 H. & J., 484.

VI. If there are conflicting claimants to proceeds of sale, their rights should be settled before sale, so that they can bid intelligently. *Snyder v. Stafford*, 11 Paige, 71.

VII. If any adverse right of any party be set up and litigated the decree is binding on him. *Lee v. Kingsbury*, 13 Texas, 68. Freeman on Judgments, page 329. *Swift v. Eaton*, 5 Conn., 531. *Weed v. Beebe*, 21 Vt., 494. *Wood v. Oakley*, 11 Paige Ch., 400.

COBB, J.

This is an appeal from the order of the district court directing that certain moneys bid and paid into court by John L. Farwell for certain mortgaged premises be applied on the decree in this case in favor of John L. Farwell, treasurer of the Sullivan Savings Institution of Claremont, New Hampshire.

Upon looking into the record we find among the names of parties defendant "The Sullivan Savings Institution of Claremont, New Hampshire," as well as "John L. Farwell, treasurer of the Sullivan Savings Institution of Claremont, New Hampshire," and others, besides the two principal defendants who executed the

note and mortgage sued on; and as to the defendants other than the Shepherds, the principal defendants, it is alleged in the petition that they "and each and every one of them have, or claim to have, a lien or interest by virtue of mortgages, judgments, or other liens in or on said real estate described in said mortgage, but the plaintiff alleges that whatever lien or interest the said defendants just above described may have in said premises the same are junior and inferior to the lien of the plaintiff's aforesaid mortgage."

The defendant, John L. Farwell, appeared and answered on behalf of the Sullivan Savings Institution, setting up a note given by the said John E. Shepherd, also a mortgage executed by said John E. Shepherd and Malissa, his wife, to the said John L. Farwell as treasurer of the Sullivan Savings Institution, upon lots A, C, I, L, J, H, E, D, and B, in Clifton Lawn; also, the S.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of section 32, town 9, range 14; also, five acres in S.W. corner of N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of section 32, township 9, range 14, with other lands, all being in Otoe county, etc.; that there was then due to the said Sullivan Savings Institution on the said note the sum of $4,000, and that the said mortgage constituted a lien upon said real estate prior to the lien of the plaintiff in said action; also setting up that the said defendant then had an action pending in the said court for the foreclosure of said mortgage, in which action the plaintiff in this action is a defendant, and had appeared and answered, and prayed that plaintiff be prevented and restrained from interfering with the land in said defendant's mortgage described, and be not allowed to sell the same, but that any lien thereon that plaintiff might have might be foreclosed and barred in the suit in the said court wherein the said defendant was plaintiff, and John E. Shepherd, this plaintiff, and others, are defendants, and for general relief.

The cause was tried to the court, who rendered his judgment, in which he found and settled the priorities of the liens of the several parties, and among other things he found that "there is now justly due and owing to the defendant, John L. Farwell, as treasurer of the Sullivan Savings Institution of Claremont, New Hampshire, on the note mentioned and set forth in his answer herein, including interest thereon at the rate of twelve per cent per annum up to the 19th day of March, 1877, the sum of four thousand seven hundred and nine dollars and thirty-three cents, and that he ought to recover said sum, together with interest thereon at the rate of twelve per cent per annum from the said 19th day of March, 1877."

And the court further found "that the said sum of four thousand seven hundred and nine dollars and thirty-three cents so found due defendant John L. Farwell, treasurer of the Sullivan Savings Institution of Claremont, New Hampshire, together with interest thereon as aforesaid, is secured by a prior mortgage on a portion of the premises described in plaintiff's mortgage herein, to-wit: All of lots A, C, I, L, H, E, D, and B, as designated on the recorded plat of Clifton Lawn; also the south-west quarter of the south-east quarter of section No. 32, in township 9, range 14; also five acres in the south-west corner of the north-west quarter of the south-east quarter of section 32, in township 9, range 14—all in Otoe county, Nebraska, as well as other real estate described in said Farwell's answer herein, but not included in plaintiff's mortgage."

And in which said judgment it was, among other things, adjudged that * * * * "the remaining of the mortgaged premises herein described, and on which the claim of the defendant John L. Farwell as treasurer of the Sullivan Savings Institution, of Claremont, New Hampshire, is declared to be the first lien, and

hereinbefore described, be sold and the proceeds arising from said sale said sheriff shall bring into court and pay the same over to the clerk thereof to abide the further order of the court in the premises."

An order of appraisement and sale was afterwards issued on the said judgment to the sheriff of said county. The last above described parcels of real estate were appraised and certain tax liens deducted from the value thereof, but the Farwell mortgage was not so deducted or mentioned. The property was sold, and the sheriff in his return of such sale states that he "did at the time and place mentioned in the notice of sale offer and sell the said lands and tenements above specified, to-wit: The south-west quarter section 32, township 9 north, of range 14 east of sixth principal meridian, at three hundred and forty dollars; also lot A in Clifton Lawn at sixty-seven dollars; also lot C in Clifton Lawn at one hundred and thirty-four dollars; also lots I, L, J, H, D, and B in Clifton Lawn, at one hundred and sixty-seven dollars each, making a total of twelve hundred and three dollars * * * to John L. Farwell, who bid, by his agent Julian Metcalf, for the sum of fifteen hundred and forty-three dollars, he being the highest, last, and best bidder therefor, and said sums being not less than two-thirds of the appraised value thereof, after deducting the liens and incumbrances shown by the certificates made by the officers requested to make the same by statute, and the same being not less than two-thirds of the interest of the defendants John E. and Malissa Shepherd in said lands, and after making said sale to John L. Farwell I demanded of him, through his attorney of record M. L. Hayward, and of him through his agent Julian Metcalf, each at two several times, that he pay into my hands, to be paid to the clerk of this court by me, the said sum of fifteen hundred and forty-three dollars, the purchase money of

said tracts of land as aforesaid, in accordance with the decree of court and order of sale in this cause, which he and they refused to do, and that he paid no money to me except thirty dollars and eighty cents paid me by Julian Metcalf, his agent, to be applied by me towards the payment of my costs on sale of said tracts of land."

Afterwards the appellant (assignee of the original plaintiff) came into the court below and filed his motion to "compel the aforesaid John L. Farwell to pay over to Frank M. Farber, as late sheriff of the county of Otoe, in the state of Nebraska, for the use and to the use and benefit of him the said assignee of said finding and decree, the sum of fifteen hundred and twelve dollars and twenty cents, which sum is a balance due from him as bidder for and purchaser at sheriff's sale of the right, title, and interest of John E. Shepherd and Malissa Shepherd, his wife, in and to" (describing the property as hereinbefore) "made by said Frank M. Farber, as late sheriff of Otoe county, Nebraska, under an order of sale in this cause, the interest of which John E. Shepherd and Malissa Shepherd, his wife, in and to said lands was struck off to said John L. Farwell by said late sheriff, Frank M. Farber, at the sum of $1,543.00, who bid the same by his agent, Julian Metcalf, which said agent paid on said bid to said late sheriff the sum of $30.80, and refused to pay the balance of his said bid therefor."

The motion, after argument and consideration by the court, was sustained "to the extent that John L. Farwell is ordered to pay the amount of his bid at said sheriff's sale herein into court, to be applied on the decree in this case in favor of John L. Farwell treasurer of the Sullivan Savings Institution, of Claremont, New Hampshire." To this the appellant excepted, and brings the matter to this court by appeal.

The question here presented is, whether the money bid upon and paid for the property on which Farwell, as treasurer of the Sullivan Savings Institution, held the first and superior lien, belonged to him or to the plaintiff whose lien was second and inferior. And behind that is the question, what was sold by the sheriff, and what title passed to the purchaser by the sheriff's deed. The plaintiff could have foreclosed his mortgage without noticing the prior mortgage of the Sullivan Savings Institution, in which case all rights under the latter named mortgage would have been undisturbed by the proceeding, and the purchaser at the sheriff's sale would only have taken the equity of redemption as to the same. But by making the first and prior mortgagee a party to the suit the plaintiff procured a decree and sale under which, as to both mortgages and all other lien holders legally in court, the land itself was sold—not only the equity of redemption as to both mortgages, but all the title which the mortgagors had, and the inchoate title of the other lien holders. Otherwise, why were they made parties to the suit and the priorities of their several liens adjudicated upon by the court and settled in the decree? Chancellor Walworth in the leading case of *Vanderkemp v. Shelton*, 11 Paige's Chancery, 36 (of opinion), speaking of the peculiar equities of that case, says: "The case is entirely different when the several incumbrancers, having liens upon the equity of redemption, are all made parties to the foreclosure suit, so as to give to the purchaser under the decree a perfect title, discharged of all equity of redemption in their favor. In that case the legal presumption is that the purchaser gives the full value of the property; and the whole proceeds of the sale are applied to the payment of the incumbrances in the order of their priorities."

There are cases which hold that when a junior mort-

gagee seeks to foreclose as against the holder of a prior mortgage, the latter may suffer default, and standing upon his legal rights, will be unaffected by a decree and sale. That is not this case. The appellant brought his action to foreclose a junior mortgage, and makes all other lien holders, both prior and subsequent, parties defendant. The Sullivan Savings Institution appeared and answered, setting up its mortgage and claiming priority. The court tried the case and made a finding and decree. The said judgment—following the usual form—provides "that if the said John E. Shepherd fails for the space of twenty days from the date of said decree to pay," etc., "an order issue," etc., "to appraise, advertise, and sell the hereinbefore mortgaged premises," etc., not anybody's interest in the land, but the land itself. The notice of sale follows the decree. The several parcels of real estate are advertised by their proper description. They were each struck off at a price not less than two-thirds of their appraised value respectively, less taxes due thereon, which were duly certified under the statute, and no question is made as to the adequacy of the prices at which either parcel was sold.

It is apparent therefore that it was the land, and not merely the equity of redemption, that was sold, and all of the interest, right, title, and lien of each of the parties to the action who was legally served or who appeared in the case, passed to the purchaser by the sheriff's deed. And it necessarily follows that as to the parcels of land in question, the Sullivan Savings Institution, being the holder of the prior mortgage, was entitled to be paid the amount found due on its mortgage out of the proceeds of such sale, to the extent thereof. The order of the district court must therefore be affirmed.

ORDER AFFIRMED.

GEO. W. BEMIS, PLAINTIFF IN ERROR, v. JOSEPH W. GANNETT, DEFENDANT IN ERROR.

Action on Injunction Bond. The ground of the injunction cannot be inquired into in a suit upon the injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued, and after such determination by a final disposition of the case, and not before, does an action lie on the bond.

ERROR from the district court of Douglas county.

Redick & Connell, for plaintiff in error.

We contend that this action could be maintained, even if the case of *Wren v. Bemis* had already been decided in favor of Wren, for under the facts set forth in the petition, Bemis was entitled to possession without reference to who held the legal title. Freeman on Executions, sec. 475. *Wetherbee v. Dunn*, 36 Cal., 157. *Luse v. Clark*, 34 Cal., 664. *Mayne v. Jones*, 34 Cal., 483.

George W. Ambrose, for defendant in error, cited High on Injunctions, sec. 981. *Gray v. Viers*, 33 Md., 159. *Sherman v. N. Y. Mills*, 11 How. Pr., 269. *Hicks v. Southwick*, 12 How. Pr., 170. *Dunkin v. Lawrence*, 1 Barb., 447. Gannett was a surety, and is liable only according to the express terms of the bond. *Hall v. Williamson*, 9 Ohio St., 17.

COBB, J.

This is an action on an injunction bond executed by the defendant in error in the case of *Hattie C. Wren v. George P. Bemis*, plaintiff in error. It appears upon the face of the petition that the said action was, at the commencement of this action, still pending and undetermined in the court below, but that the temporary injunc-

tion upon which said bond had been executed had been dissolved upon a showing upon affidavits. The defendant in error demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action, and for a defect of parties plaintiff. The court sustained the demurrer and rendered a final judgment thereon, to reverse which the plaintiff brings the case to this court on petition in error.

It is conceded that upon the authorities and upon general principles an action cannot be maintained upon an injunction bond until the final determination of the suit in which such bond is given, but the plaintiff in error makes the point that the petition states a case which is admitted by the demurrer, and which shows that the plaintiff in said action cannot possibly recover, and that hence he is not obliged to wait until that suit is finally determined before suing for his damages sustained by reason of the issuance of said injunction.

It may be conceded that in this case the defendant, by interposing a general demurrer to the plaintiff's petition, admits all the facts therein which are well pleaded, yet in the original case which is now pending in the court below the same facts, if set up in an answer to the petition therein, may be denied and disproved, and that case decided in favor of the plaintiff therein, and her injunction reinstated and made perpetual. This court has not nor can it have—for the purposes of this case—the record in the original suit before it. Indeed it may be that no issue in that case has been made, and if it has it may be materially changed by amendments before the trial and final determination, and even if it were possible for this court to look into the merits of such original case, for the purposes of this case, it would be obviously improper for it to do so. For the purpose of fixing the liability of the parties to the bond the court below alone has the right to

look into the merits of the suit in which it was given, and until it does so and renders final judgment thereon, or until the case is finally determined in some manner known to the law, no action can be maintained on the bond. See *Dowling v. Polack*, 18 Cal., 626. The judgment must be affirmed.

JUDGMENT AFFIRMED.

CHARLES T. TREGO ET AL., PLAINTIFFS IN ERROR, V. THOMAS W. LOWREY ET ALS., DEFENDANTS IN ERROR.

1. **Pleading:** ADMISSIONS OF RECORD: BILL OF EXCHANGE: INDORSER: ACCEPTANCE. Lincoln, a member of the firm of L. & L., drew a draft at sixty days' sight on the firm of T. & S., and indorsed it with the name of his firm. The draft was then discounted by the plaintiff for the benefit of the firm indorsing it, and then forwarded to the drawers, and by them accepted. Action against the individuals composing the two firms on the draft; T. & L., the acceptors, answered, admitting their liability to the plaintiff, but, as against the indorsers, alleged the acceptance was an accommodation merely, and for their benefit, and prayed that it be so certified in the judgment. Lincoln was not summoned, nor did he answer. Lowrey answered, denying his liability on the ground of the unauthorized use of the firm name by Lincoln in the indorsement, and in reply to the answer of T. & S. denied that they were accommodation acceptors for L. & L., but that the acceptance was for Lincoln alone, and for value. At the trial Lowrey stipulated for judgment against himself according to the prayer of the petition. *Held*, that this was a virtual admission of the validity of the indorsement, and of his liability under it, and left but the single question of principal and surety between the defendants to be tried. *Held, further*, that on this question, the verdict being against the clear weight of the evidence, a new trial should be granted.

2. **Acceptance of Draft:** PRESUMPTION. The legal presumption arising from the acceptance of a draft is that the acceptor

has funds of the drawer in his hands with which to pay it at maturity. But as between the acceptor and the drawer, indorser, or other holder, for whose accommodation the acceptance was given, this presumption may be rebutted, and the true relation of the parties to each other shown.

ERROR from the district court for Lancaster county. The action there was brought by the State National Bank against the plaintiffs in error and defendants in error, upon a draft drawn by Lincoln, one of the defendants in error, upon the plaintiffs in error, endorsed by Lowrey, Lincoln & Co., and cashed by the bank. Upon the issues submitted to the jury, they found that "Charles T. Trego and Thomas P. Smith are principals, and Thomas W. Lowrey and W. C. Lincoln are surety for the firm of Trego & Smith." Judgment in favor of the bank and against Trego & Smith as principals, and Thomas W. Lowrey surety, Lincoln not being summoned. Motion for new trial overruled. Exceptions. Cause brought up by petition in error.

Mason & Whedon, for plaintiffs in error.

The only issue for trial was between Trego & Smith and Thomas W. Lowrey, and this issue is not found by the jury, but the verdict of the jury does negative a fact admitted by the pleadings. This the jury could not do. *Watts v. Greenlee*, 2 Dev. N. C. L., 87.

The verdict does not respond to the issue, and is bad, and no judgment should have been rendered on it. *Moody v. Kaner*, 7 Port., Ala., 218. *Patterson v. United States*, 2 Wheat., 221. *Barnett v. Watson*, 1 Wash., Va., 272. *Garland v. Davis*, 4 How., 131. *Kilbourn v. Wattrous*, Kirby, Conn., 424. *Wood v. McGuire*, 17 Ga., 361. *Groves v. Bailey*, 24 Miss., 588. *Parker v. Moore*, 1 Mo., 495. *Brockway v. Kinney*, 2 Johns, N. Y., 210. *Vines v. Brownrigg*, 2 Dev. N. C. L., 537.

Kesler v. Zimmerschitte, 1 Texas, 50. *Hardy v. DeLeon*, 5 Texas, 211. *Hall v. York*, 16 Texas, 18. *Ronge v. Dawson*, 9 Wis., 246.

The verdict must respond to the issue. In this case the verdict found facts not put in issue by the pleadings, and it was so far nugatory; and notwithstanding this, the court rendered judgment upon these facts against the admissions of William C. Lincoln. *United States v. Stereoscopic Shields*, Sprague, 465. *Jenkins v. Parkhall*, 25 Ind., 473.

The general rule is that the verdict must comprehend the whole issue or issues submitted to the jury in the particular case; otherwise the judgment founded on it will be reversed. *Middleton v. Quigley*, 12 N. J. L. (7 Hals.), 352. *Brown v. Chase*, 4 Mass., 436. *Holmes v. Wood*, 6 Mass., 1.

In this suit it was admitted that William C. Lincoln was the principal in the draft or bill of exchange upon which this suit is brought, and that Trego & Smith were accommodation indorsers. This is shown by the record. The pleadings exhibit this state of facts, and William C. Lincoln swears to the same, and there is nothing in the record or the evidence to show or establish a different state of facts; and yet the verdict of the jury finds that William C. Lincoln, as well as Lowrey, were only sureties for Trego & Smith on the draft in question. Such a verdict cannot stand, and the judgment entered thereon is erroneous.

T. M. Marquett and *James E. Philpott*, for defendants in error.

On the opening of the case on trial, Philpott, of counsel for Lowrey, said: "The firm of Lincoln & Lowrey make no defense against the plaintiffs' claim, however much defense we have;" and Mason, of counsel

for the defendants, Trego & Smith, said: "We don't claim that the defense of Trego & Smith constitute any defense against the bank."

Of the issues joined at the trial of this cause the only issues tried were those joined by the pleadings of Trego & Smith and the pleadings of Thomas W. Lowrey, and the issues so joined are made up of a number of facts therein affirmed and denied, making the actual issue tried and submitted to the jury, stating it in the language of Lowrey's reply to Trego & Smith,—"He denies that the said Trego & Smith are only accommodation indorsers on said draft, and he alleges they are principals on the same." And to this issue the verdict is responsive, and judgment properly rendered upon it. It did not appear on the trial, nor does the record disclose it as a fact, that Lowrey stipulated for a judgment in favor of the plaintiff and against himself. The counsel for all the defendants having said in open court that they made no defense as against the plaintiffs' petition, and it being one of the issues tried whether Trego & Smith were principals and Lowrey & Lincoln surety for said Trego & Smith, it was properly found by the jury as by them stated in their verdict. It matters not that William C. Lincoln made default, having fraudulently endorsed the draft; it was in keeping with his whole prior transaction with Trego & Smith, that he should not only make "default," but also swear that Trego & Smith were "accommodation acceptors for himself and Lowrey," a legal conclusion which the jury by their verdict did not find sustained by the facts. Counsel for Trego & Smith cite authority to sustain their position, that the jury cannot by their verdict negative a fact admitted by the pleadings. Having done so, can they cite the facts admitted which the verdict negatives? They also cite a number of authorities to the effect that a verdict which does not respond to the

issue is bad. Can they cite the issue, or issues, tried to the jury to which the verdict does not respond? The attack thus made on the verdict will not be sustained by Lincoln's default. Lincoln's testimony that Trego & Smith are accommodation acceptors, and counsel's statement that Lowrey stipulated for a judgment in favor of the plaintiff, and especially so when Lincoln's testimony is impeached by many witnesses and counsel's statement, is not sustained by the record.

If the verdict did find that William C. Lincoln is but surety to Trego & Smith, that would not render the judgment void, that Thomas W. Lowrey is only surety. For a judgment may be void as to one who does not appear (as Lincoln in this case), and good as to him who does appear. *Mercer v. James*, 6 Neb., page 410.

LAKE, J.

The action in the court below was brought on a draft drawn by William C. Lincoln and indorsed by the firm of Lowrey, Lincoln & Co., of which the said Lincoln and Lowrey were members. Thereupon the draft was discounted by the State National Bank—the plaintiff below—and afterwards forwarded to Trego & Smith, the drawees, by whom it was duly accepted.

The action was against the individual members of the respective firms by which the draft was indorsed, and accepted, and, with the exception of Lincoln, they were all served with summons, and answered the petition. The plaintiffs in error admitted all the material allegations of the petition, but, as against their co-defendants, Lowrey and Lincoln, alleged that their acceptance was as an accommodation merely, for which they had received no valuable consideration whatever, and prayed that, in the judgment to be rendered, Lowrey and Lincoln be held as principals, and they as

sureties merely. Lowrey in his answer denied the authority of Lincoln, by whom the indorsement of the draft was made, to use the firm name for that purpose.

But, notwithstanding Lowrey had thus denied the authority of his co-partners to so use the firm name, when the case was called for trial he conceded his liability under it to the bank, and stipulated for judgment against himself according to the prayer of the petition. This done, the only remaining question in issue was that of principal and surety between Trego and Smith and Lowrey, Lincoln & Co.; in other words, whether Trego & Smith accepted the draft without consideration, and as an accommodation simply to Lowrey, Lincoln & Co.

Owing to the indefiniteness of assignment, the only one of the alleged errors to be considered is that which alleges the verdict to be against the evidence and the law of the case. Although there was but this single and very simple question to be settled, the trial was allowed to take a very wide range indeed, resulting in a most voluminous record of evidence, the greater part of which is entirely immaterial.

The legal presumption arising from the unexplained acceptance of a draft doubtless is, that the acceptor has funds of the drawer with which to pay it at maturity. But, as between the acceptor and the drawer and indorsers for whose accommodation the acceptance was given, this presumption may be rebutted, and the exact relation of the parties to each other shown. Mr. Story, in his work on Bills of Exchange, sec. 253, 3d Ed., says: "So where a bill is accepted for the mere accommodation of the drawer or other holder it is obvious that such person can have no claim upon the acceptor under the acceptance; for as between them no value exists, or has passed."

Now the record shows very clearly that the accept-

ance in question was for the benefit of Lowrey and Lincoln, and for which Trego and Smith received no value whatever. Both Trego and Smith, as well as Lincoln, the drawer of the draft, swear positively and unequivocally, that the acceptance was given merely as an accommodation, and in pursuance of an arrangement made a few days before, whereby they had agreed to aid Lowrey and Lincoln in certain wheat transactions by accepting drafts for them, for from two to six thousand dollars, on sixty days time, and for which Lowrey and Lincoln were to provide means of payment. Indeed, it is conceded that this draft was discounted by the bank on the indorsement of Lowrey and Lincoln, and the proceeds placed to their credit, before it was forwarded to Trego & Smith for their acceptance.

And as to the fact that Lowrey and Lincoln furnished no means to Trego and Smith with which to pay the draft there is no dispute. Trego, Smith and Lincoln all swear that not a dollar was furnished for that purpose. And even Lowrey himself, in his oral examination on the witness stand, substantially admitted this to be so by conceding that Trego & Smith had no money then in their hands belonging to Lowrey and Lincoln, *and that all transactions between the two firms had been settled.*

The verdict, so far as it relates to the question of principal and surety—the only matter in dispute—is clearly against the evidence, and for that reason alone must be set aside, and a new trial awarded.

REVERSED AND REMANDED.

COBB, J. did not sit in this case, having been of counsel.

MERCHANTS BANK, PLAINTIFF IN ERROR, V. STEWART McCONIGA ET AL., DEFENDANTS IN ERROR.

Trust Estate: DECLARATIONS OF TRUSTEE CONCERNING: COMPETENCY OF. In support of an alleged conveyance of real estate by one Lincoln and wife "to George P. Eaton, as cashier, agent, and trustee of said bank and in trust for said bank," the defendants offered in evidence a deed from said Lincoln to George P. Eaton, not as "cashier, agent, and trustee", but in his individual capacity, and for aught that appeared for his own individual use and benefit. The deed was admitted in evidence against objection by the bank on the ground of incompetency. *Held*, error. *Held, also*, that the oral declarations of Eaton, made subsequently to the conveyance, were incompetent as evidence against both Lincoln and the bank to establish the character of the alleged trust.

ACTION in the district court for Lancaster county upon two promissory notes, one being for $2,000 and one for $3,000, executed by S. McConiga, Wm. C. Lincoln, W. F. Chapin, and McConiga & Lincoln. The defense to the action is set forth in the opinion. Upon the issues presented the jury returned a verdict for the defendants, and the plaintiff brought the cause up by a petition in error.

T. M. Marquett, for plaintiff in error.

It is not pretended that George P. Eaton had any authority from the board of directors to secure this mill property in payment and release McConiga. *Merchants Bank v. Rudolf*, 5 Neb., 536. Nothing short of payment or an appropriation of property to payment would release the defendant. *Hodge v. Bank*, 22 Gratt., 51. *Olney v. Chadsy*, 7 Rhode Island, 224. *U. S. v. City Bank*, 21 Howard, 358. *Peninsular Bank v. Hanmer*, 14 Mich., 208. Daniels on Negotiable Notes, 297. *Banks v. Haskell*, 51 N. H., 116.

James E. Philpott and *Brown, Marshall & Brown*, for defendants in error.

1. When one of two co-partners purchases the interest of the other in the partnership property, and assumes and agrees to pay the partnership debts, as to such debts the former becomes, in equity, the principal debtor, and the latter a surety, and this relationship a firm creditor, having notice of the agreement, is bound to observe. *Colgrove v. Tallman*, 67 N. Y., 95. *Frow, Jacobs & Co.'s Estate*, 73 Pa. St., 459. Brandt on Suretyship and Guaranty, Secs. 261–262.

2. If, under such circumstances, the creditor parts with any securities, or any property or fund, which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of the value of such securities. The securities which the creditor is entitled to apply in discharge of his debt he is bound to apply, or to hold them as trustee, ready to be applied for the benefit of the surety. *Cullum v. Emanuel*, 1 Ala., 23. Brandt on Suretyship and Guaranty, Sec. 261. 2 Vol. Daniel on Negotiable Instruments, 289–290.

3. If the conveyance by Lincoln had been made directly to the bank instead of George P. Eaton, its cashier, it would not, in the light of the foregoing authorities, be seriously contended that McConiga is not entitled to a credit on these notes to the amount of the property conveyed. This property, instead of being conveyed to the bank, was conveyed to its cashier, who is the executive officer of the bank, through whom and by whom the whole monied operation of the bank, in paying or receiving debts, or discharging or transferring securities, is conducted. *Flickner v. Bank of the U. S.*, 8 Wheat., 300–361. Angell and Ames on Corporations, Sec. 299.

4. The question as to whether George P. Eaton, in receiving and transferring this property was acting in his individual capacity or as cashier and agent of the bank, is a question of fact for the jury, and upon this question, as upon all others properly submitted to them, their finding will not be reversed if there is any evidence to support it. *Caldwell v. Mohawk Valley Bank*, 64 Barb., 333. *Thompson v. Bell*, 10 Exch., 10. 1 Vol. Fisher's Digest, 582. *Blackburn v. Ostrander*, 5 Neb., 219. *The A. & N. R. R. Co. v. Washburn*, 5 Neb., 117. Morse on Banks and Banking, 680.

LAKE, J.

In the consideration of this case I shall confine myself mainly to two points made in the motion for a new trial, viz.: 1st. That the court erred in the admission of certain evidence to the jury; and, 2d, that the verdict was not warranted by the evidence.

The action against the defendants below was brought upon two promissory notes signed by all the defendants as principals. It was answered, however, by the defendant Chapin, and it seems to be conceded, that he was in truth only a surety for the other defendants, which fact was well understood by the plaintiff. McConiga answered, in substance, that notwithstanding he was a principal on the notes, an arrangement had been made between him and his co-maker, Lincoln, soon after they were given, by which the latter had agreed, for a valuable consideration, to pay them and save him harmless therefrom, which arrangement was well known by the plaintiff. And both Chapin and McConiga urge as a defense, that with a full knowledge of their relationship to the notes, the bank accepted a conveyance of certain real estate from Lincoln to its cashier, George P. Eaton, as security for their payment, and that by reason of the bank having misapplied such

security to their injury they were released from all liability thereon. The following quotation from one of the answers will show clearly the character of this defense: "That on the 15th day of April, A.D. 1874, the said Lincoln was seized in fee simple of the following estate situate in the city of Lincoln, county of Lancaster, and state of Nebraska, to-wit: lots one, two, three, four, five, and six, in block one hundred and fifteen. That said property at the said date, and ever since, was and now is worth the sum of sixteen thousand dollars, and that on the said date, to-wit: the 15th day of April, 1874, the said Lincoln and Nora Lincoln, his wife, by their deed in fee simple, duly executed and delivered, conveyed to the said George P. Eaton, as cashier, agent, and trustee of said bank, and in trust for said bank, the above described property. That said conveyance of said lots was made by the said Lincoln, as aforesaid, to the said George P. Eaton, as aforesaid, as a security to said bank for the payment to said bank of the said notes, in pursuance of the said agreement between said Lincoln and McConiga, and that the said property so conveyed was of sufficient value to pay said notes in full, and a great deal more." This is followed by a definite charge of misapplication of this security by the bank by a conveyance of the property to one Charles T. Trego.

The reply, in addition to taking issue upon this answer, sets up the third section of chapter twenty-five of the General Statutes in bar. By this section it is enacted that "no estate or interest in land, other than for leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, or surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting,

assigning, surrendering, or declaring the same." Gen. Stat., 392.

It has been observed that by the allegations of the answer an absolute conveyance of the lands in question to "George P. Eaton, *as cashier, agent, and trustee*" of the bank, is charged; and, in addition, substantially, that the conveyance was as a special security for the payment of the notes in controversy. If all this were true an express trust was thereby created by Lincoln himself, and which the bank was bound to execute. To maintain the issues on their part the defendants offered in evidence a deed of said lands from Lincoln and wife to George P. Eaton, not "as cashier, agent, and trustee of said bank," nor, so far as disclosed by the instrument, as a security for the payment of these notes, but to him in his individual capacity, and for his own use and benefit. An objection to the admission of this deed was made on the ground of incompetency. This objection was overruled, and, as we think, erroneously. Most clearly this deed was not the character of instrument described in the defendant's answer, nor did it tend to prove the conveyance which the defendants had alleged. And perhaps it should be stated further that this objection to this deed was not obviated by the production of any other written instrument showing that Eaton took the land in the capacity charged, or that the purpose of Lincoln in making the conveyance was to secure the payment of the notes in question. The sole support of the allegations of the answers as to the purpose for which Lincoln made the conveyance, relied on by the defendants, consisted of certain oral declarations said to have been afterwards made to them by Eaton. Clearly, the trust could not be established in this manner. Its character, if one were in fact created, was fixed by the agreement and understanding between Lincoln and Eaton at the time

of making the conveyance, and not by Eaton's subsequent oral declarations as to the purpose for which he held the land, by which declarations neither Lincoln nor the bank could be bound. Several other deeds which were wholly incompetent were erroneously admitted in evidence, against objections, but it is unnecessary to refer particularly to them in this opinion.

That the verdict was not warranted by the evidence is perhaps sufficiently apparent from what has already been said. As before shown, the defendants relied solely upon Eaton's oral declarations made subsequently to the sale, to establish the alleged trust; not as against Eaton himself, but as against Lincoln, the grantor, on the one hand, and the bank, of which Eaton was cashier, on the other. Besides the testimony as to these declarations, there was not a particle of evidence to show that the conveyance of the property to Eaton was intended as a security for the payment of the notes in controversy. And as to these declarations, not only were they wholly incompetent under the statute of frauds to establish the trust, but they were likewise incompetent under the ordinary rules of evidence to bind either Lincoln or the bank. As to the former, it cannot be seriously claimed that he could be bound by what Eaton might have said of the sale in his absence, and to which he had in nowise assented. And as to the latter, the declarations not being within the scope of his authority either as cashier or trustee of the bank, they were not binding upon it, and ought to have been kept from the jury.

For these reasons the judgment of the court below is reversed, and the cause remanded for a new trial.

REVERSED AND REMANDED.

COBB, J., having been of counsel in the court below, did not sit.

THE NEBRASKA RAILWAY COMPANY, PLAINTIFF IN ERROR, v. HENRY C. LETT, DEFENDANT IN ERROR.

1. **Partnership:** RAILROAD CORPORATION: OFFICERS. L. was president of the B., Ft. K. & P. R. R. Co. from 1869 to October, 1875, and in 1871 became a member of a construction company to complete the road, the construction company to take all the assets, assume the debts, and pay all claims and expenses of the corporation. In 1875 the B., Ft. K. & P. R. R. Co. was merged in the Nebraska Railway Co. In an action by L. against the latter company for the *value* of services performed by him as president of the B., Ft. K. & P. R. R. Co. from 1871 to 1875, in procuring the right of way and promoting the interests of the corporation, *held*, that he could not recover, he as a member of the construction company having assumed to pay for such services.

2. ———. The two leading features of the contract of partnership are a common interest in the stock of the company, and a personal responsibility for the partnership contracts.

3. ———: LIABILITY OF PARTNERS. Each individual member of a partnership is answerable *in solido* for the whole amount of the partnership debts, without regard to the proportion of his interest, or the nature of the contract between him and his co-partners.

ERROR from the district court for Lancaster county. The case is stated in the opinion.

O. P. Mason, for plaintiff in error.

1. The court erred in its instruction to the jury and in not instructing the jury as to the legal effects of the construction contract, as requested by plaintiff in error. *Beatty v. Gates*, 4 Ind., 154. *Myer v. Midland P. R. R.*, 2 Neb., 339. *Arctic Fire Ins. Co. v. Austin*, 69 N. Y., 470. The testimony shows that there is nothing to be done or that could be done as president after the road was turned over to the construction company, more than four years prior to filing of petition, except what was done pursuant to the terms of said contract, and

by the terms thereof without compensation from the railroad company. The testimony also shows that whatever services were rendered or supplies furnished by plaintiff, aside from those done as president or director, were done for the sole benefit of the plaintiff's firm, and by him as a member thereof.

Plaintiff being a member of the construction company was bound by the provisions of the construction contract, including the performance of services, the payment therefor, and the assumption of indebtedness of the railroad company. Parsons on Contracts, 145. *Converse v. Shambaugh*, 4 Neb., 378. *Voorhees v. Jones*, 5 Dutch., 270. And any evidence varying or contradicting the terms of the construction contract were inadmissible. *Smith v. Moynihan*, 44 Cal., 55, and cases cited. *Reynolds v. Magness*, 2 Ired. (N. C.), 30. *N. O. Etc. R. R. v. Pressley*, 45 Miss., 66.

2. By the terms of the construction contract, all indebtedness of the railroad company was assumed by the construction company, and plaintiff being a party to the contract assented to the novation, and thereby released the railroad company, and the indebtedness to the railroad company was extinguished. *Butterfield v. Hartshorn*, 7 N. H., 348. *Cuxon v. Chadley*, 3 Barn. and Cress., 591.

3. When the construction company settled with the railroad company, and surrendered the contract, the plaintiff was bound by the settlement. *Noyes v. N. H. R. R.*, 40 Conn., 1. *Pierson v. Hooker*, 3 Johns., 68. Story on Partnership, §115 and cases cited. 1 Parsons on Contracts, 26, and cases cited. Moreover, by the terms of the contract, the firm of which he was a member, with his assent, received payment, and plaintiff's remedy, if he did not receive his share, was against the firm. *Noyes v. R. R. Co.*, *Supra.*

4. Whatever agreement plaintiff had with the rail-

road company to perform the same service to be performed by the construction company was merged in the construction contract. *Howard v. W. & S. R. R.*, 1 Gill., 311. *Munford v. Wilson*, 15 Mo., 540. *Miller v. Miller*, 4 Pa. St., 320. Chitty on Contracts, 9.

Lamb, Billingsley & Lambertson, for defendant in error.

In answer to the first point made by plaintiff in error, that nothing was done or could be done by Mr. Lett, as president, after the road was turned over to the construction company, we say:

1. That the construction contract did not wipe out the railroad, but left it in existence with a board of directors, a president, and superintendent.

2. The construction contract was not altogether one-sided, by the terms of which Converse, McCann & Co. were to do everything and the railroad company nothing; but the contract imposed upon the railroad company important duties, which required the existence and labors of a president and board of directors.

3. Hence we say that Mr. Lett, as president, either by the terms of the construction contract, or outside of the contract, performed services for the railroad company which neither Converse, McCann & Co., or he as a member of Converse, McCann & Co., was bound to perform. Mr. Lett's services as president of the railroad company were of such a character as forbid him rendering them under an employment or pay from Converse, McCann & Co., who were building this road by contract, and having everything turned over to them. Public policy, the rights of the state, the public, the corporation, and each individual stockholder, forbid such an arrangement.

The *contract* is for seventy-five miles of road in two

years. There must be two parties at least to every *contract.* Who was to act for the railroad? Corporations can do business only through agents. [Gen. Stat., 185, sec. 80.]

4. Sections 135, 136, and 137 [Gen. Stat., 200], and all that portion of the law relating to railroads, grant unusual privileges and powers, and confer important and responsible duties upon such corporations, both during the period of construction and after the roads are completed, and the statute and the law have attached grave consequences to the corporation, and to the stockholders as well, in case of non-performance of these duties, and the corporation cannot absolve itself from these duties without consent of the state; and with these considerations in view we come to the consideration of the construction contract:

(*a*). Mr. Lett, as president, procured rights-of-way, depot grounds, gravel beds, and stone quarries. The president attended to the issuing of bonds, stocks, and the execution of mortgages, "and did all other acts in the construction of road and location of line."

(*b*). The railroad company was to procure subsidies, donations, subscriptions, and lands, and turn them over to the construction company.

(*c*). It must have officers to inspect the work and see if the construction company complied with its part of the contract. There were many stockholders in the railroad company not in the construction company. Nemaha county had $60,000 worth of stock in the railroad company, and no interest in the construction company. Hence the officers of the railroad company were necessary to the protection of those stockholders unrepresented in the construction company.

(*d*). The above mentioned services could only be performed by the railroad company; and inasmuch as the state had granted the railroad company an impor-

tant franchise, also 20,000 acres of land, and Nemaha county had granted bonds to a large amount conditioned on the completion of the road, the railroad company were bound to employ officers to carry out the purposes of its creation.

5. The question whether these services were rendered to the railroad company or to Converse, McCann & Co., or whether any services were rendered by Mr. Lett other than those which the construction company were to perform, were put directly in issue by the pleadings, and under the instructions of the court the issue upon this point was found by the jury in favor of the defendant in error.

MAXWELL, CH. J.

On the thirteenth day of December, 1875, the Brownville, Fort Kearney & Pacific Railway Company and the Midland Pacific Railway Company were consolidated, the new company taking the name of the Nebraska Railway Company. In November, 1877, the defendant commenced an action against the Nebraska Railway Company for the *value* of services rendered by him as president of the Brownville, Fort Kearney & Pacific Railway Company from September 18, 1871, to October 13, 1875, in securing the right of way for and in aiding in the construction of said B., Ft. K. & P. R. R. The defendant recovered a judgment in the court below for the sum of $7,500. The cause is brought into this court by petition in error. On the trial of the cause the following articles of agreement were introduced in evidence.

"Articles of agreement made and concluded this 18th day of September, 1871, by and between Ben: E. Smith and William Dennison of Columbus, state of Ohio, and J. N. Converse of Union City, state of Indi-

ana, and such others as may hereafter be associated with them of the first part, and the Brownville, Fort Kearney and Pacific Railroad Company, a company organized under the laws of the state of Nebraska, party of the second part, *Witnesseth:* That the said party of the first part for and in consideration of the covenants and agreements hereinafter mentioned, do for themselves, their heirs, executors, administrators and assigns, covenant, promise, and agree to and with the said party of the second part, their successors and assigns, by these presents, that they the said party of the first part shall and will take and accept the road bed of the party of the second part in its present unfinished condition, being partly graded, and together with all the ties which they may have purchased; said road extending from Brownville, Nebraska, westward to the west line of Gage county, and that they will within two years from the date of these presents, complete the grading, tieing, bridging, ironing, and equipment of said Brownville, Fort Kearney and Pacific Railroad to the west line of Gage county, Nebraska, a distance of about seventy-five miles, and will furnish all the rails, chairs, fishplates, spikes, and other materials that may be necessary to construct a railroad of narrow or three feet guage, or a railroad of the ordinary guage of four feet eight and one-half inches, at the option of the party of the first part.

"If the said party of the first part concludes to construct a narrow gauge road, then the iron rails shall weigh not less than thirty-two pounds to the lineal yard, and if the same be of the ordinary gauge the rails shall weigh not less than forty-five pounds to the lineal yard. That the party of the first part *shall secure and pay for all rights of way* hereafter to be obtained, also for the engraving or printing of all stocks or bonds, and the stamping and recording of the mortgage given

to secure the same. The party of the first part further agrees to furnish all the necessary locomotives, box cars, passenger and freight cars, which equipments in rolling stock shall not be less than $1,000 per mile in value, and such equipments to correspond with the gauge which may be adopted by said party of the first part. Said party of the first part do further promise and agree to build all necessary sidings, switches, and frogs (said sidings to measure same as main track), engine houses, passenger and freight depots, repair shops, water tanks, etc., and to pay to the said party of the second part, or on its behalf, all of the indebtedness of the same of every nature which has been incurred in grading and constructing said railroad, provided said indebtedness shall not exceed the sum of $50,000. And said party of the first part further agrees to iron and equip ten miles of said road from Brownville westward on or before the first day of December, 1871. It is further understood that the party of the first part shall not be required to construct said road beyond the distance of ten miles faster than they may be able to sell the first mortgage bonds hereinafter referred to at not less than seventy cents on the dollar with accrued interest, unless they may prefer so to do. In consideration whereof the said party of the second part does hereby promise and agree to exercise their authority, so far as their official acts may be necessary, in securing the right of way, depot grounds, gravel beds, stone quarries, etc., the issuing of stocks, bonds, and mortgages as the party of the first part may from time to time direct, provided *the party of the first part shall pay all expenses* necessary for the same. Said party of the second part shall do and perform all other official acts necessary in the location and construction of the line of said road as the party of the first part shall direct. Said party of the second part for them-

selves, their successors and assigns, do further promise and agree to issue to the said party of the first part the stock of said company to an amount equal to the sum of $20,000 per mile, and deposit the same with G. Moody, Esq., of Columbus, Ohio, as trustee, to be by him delivered to the party of the first part as soon as ten miles of iron has been laid and rolling stock put on same, as heretofore specified in this agreement, on said Brownville, Fort Kearney & Pacific Railroad: *Provided*, That the stock issued or to be issued to Brownville precinct to the amount of one hundred thousand dollars, and sixty thousand dollars to be issued to the city of Brownville, and the amounts of stock necessary to be issued to *bona fide* subscribers to the capital stock of said company, and which has been or may hereafter be paid up in full, shall be and are hereby excepted out of the amount to be so deposited with said trustee; and no more stock shall be issued by said company except by consent and request of the party of the first part. Said party of the second part do further agree to execute and deliver to the said party of the first part "first mortgage bonds" of the said party of the second part to the amount of twelve thousand dollars per mile on said railroad for a distance of seventy-five miles: *Provided*, That if said party of the first part shall determine to build said road of the ordinary, or four feet eight and one-half inch guage, the said party of the second part shall issue and deliver to said party of the first part first mortgage bonds on said road to the amount of twenty thousand dollars per mile, which bonds shall be secured by a mortgage upon the road bed, rolling stock, franchises, etc., of said railroad, and shall be payable in gold coin of the United States, in not less than twenty years, and shall be at seven per cent interest per annum, payable in like coin semi-annually; principal payable in New York

City and at other places, as said party of the first part may direct; said bonds to be prepared and executed as the party of the first part may direct, and delivered to the trustee named in said bonds, to be by him delivered to said party of the first part from time to time as they may require in the construction of said railroad. Said party of the second part do further agree that they may deliver to said party of the first part fifty-two thousand dollars of "Brownville precinct bonds," now in New York, on their payment of the amount due Johnson & Brown on same, which is a part of the indebtedness of said party of the second part heretofore referred to, and they also agree to deliver to said party of the first part the further sum of thirty thousand dollars in like bonds now in the possession of the said party of the second part. Said party of the second part do further promise and agree to and with the party of the first part to set over, transfer, assign, and deliver to the said party of the first part all donations, subscriptions, or subsidies of every character, either of money, lands, or property that may have been heretofore or which shall hereafter be obtained by said party of the second part, as fast as they shall come in possession of the same, except sixty thousand dollars voted by the city of Brownville to said company, and such bonds and money as have already been paid in and expended on said railroad and in connection therewith; said party of the first part to have the free use of the road and equipments until the completion of this contract. Said party of the first part agree to pay the indebtedness of the company, not exceeding fifty thousand dollars, within sixty days from the date of these presents; and upon the delivery to the said party of the first part of the precinct bonds of Brownville precinct, heretofore referred to, said party of the second part agree to pay all other indebtedness over and above fifty thousand

dollars, if any such there be, within ten days from the date of these presents. It is expressly understood that under this agreement the party of the second part turn over and are to turn over to the party of the first part all the property owned and assets acquired or to be acquired by said company, with the exceptions hereinbefore stated, and that the company may perform such official duties as may be necessary for a board of directors, and *that all expenses or outlay required shall be borne by the party of the first part: Provided*, that the board of directors shall receive no compensation for taking any official action where the same is attended with no expense. It is expressly stipulated and guaranteed by the party of the second part, that the fifty-two thousand dollars of bonds with Johnson & Brown, of New York, cannot be sold for less than fifty-seven cents on the dollar, with interest at eight per cent on their face from February 28, 1871, and that said bonds can be redeemed at any time by the payment of twenty-six thousand dollars, with interest at the rate of eight per cent per annum from February 28, 1871, and that said sum of twenty-six thousand dollars need not be paid until said bonds are sold. That the remaining indebtedness does not exceed twenty-two thousand dollars."

This contract is signed by Smith, Dennison, and Converse, for the party of the first part, and by the Brownville, Fort Kearney & Pacific Railroad Company, by its attorney in fact, whose action was fully ratified by the board of directors of said corporation on the 20th day of September, 1871.

The plaintiff in error set up the foregoing contract in its answer as a defense to the action, and alleged that the defendant in error was a member of the construction company, parties of the first part in the above instrument, and as such had agreed to pay all expenses incurred by said corporation in procuring the right of

way, or other exercise of its corporate power. The defendant in error (plaintiff in the court below) in his reply "denies that he became subject to or liable for the execution of said construction contract made with Converse, McCann & Co., in any manner, except for such a liability as might arise incidently by reason of his being a member of said co-partnership, or firm of Converse, McCann & Co., like any other member of said firm. That said firm was composed of ten other persons besides this plaintiff, all jointly liable with this plaintiff to said Brownville, Fort Kearney & Pacific Railroad Company for the performance of the said construction contract, and this plaintiff denies that any of the services rendered by this plaintiff to said Brownville, Fort Kearney & Pacific Railroad Company, and sued for in this action, or that any of the moneys by this plaintiff advanced to the said Brownville, Fort Kearney & Pacific Railroad Company, sued for in this action, were rendered or advanced as a member of the firm of Converse, McCann & Co.—said construction company—or were rendered or advanced to the said firm of Converse, McCann & Co., or were any of them in any way embraced or included within the terms or provisions of the said construction contract, or even referred to therein," etc.

Turning to the petition we find the cause of action set forth as follows: "That from the 18th day of September, 1871, until October 12, 1875, inclusive, he was the president of the said Brownville, Fort Kearney & Pacific Railroad Company, and that during said time he devoted his whole time to promoting the interests of said company in procuring the right of way and in all things aiding the construction and management of said railroad company, and that said services so rendered by plaintiff were reasonably worth the sum of three thousand dollars for each and every year," etc.

We have in this agreement:

First. A promise by the construction company—of which Lett was a member—to pay to the party of the second part, or on its behalf, all of the indebtedness of the same of every nature incurred in grading and constructing the railroad, not to exceed the sum of fifty thousand dollars.

Second. The corporation was to secure the necessary right of way, depot grounds, gravel beds, stone quarries, etc., and was to issue stocks, bonds, and mortgages from time to time as directed by the construction company. The construction company to pay all necessary expenses of the same.

Third. The corporation was to turn over to the construction company all the property owned, and assets acquired or to be acquired, with certain exceptions specifically designated, and the corporation was required to perform such official acts as were necessary to be performed by a board of directors, all expenses and outlay to be borne by the construction company.

We are told that there is no proof that Mr. Lett was in the employment of Converse, McCann & Co. But it was unnecessary to prove an employment. It is admitted that he was a member of the firm, and as a member of such firm had agreed to pay for all services rendered by him as president of the corporation.

The two leading features of the contract of partnership are, a common interest in the stock of the company, and a personal responsibility for the partnership engagements. 3 Kent Com., 24. Each individual member of a partnership is answerable *in solido* for the whole amount of the debts, without reference to the proportion of his interest, or the nature of the stipulation between him and his associates. Id. 32.

It is clear that no services were rendered by Lett as president of the corporation, which he as a member of

the construction company was not required to pay for. The court therefore should have instructed the jury to find for the defendant. While it is clear that Lett cannot maintain an action against the defendant in the court below, for the services set forth in the petition, it is apparent from the testimony that he rendered valuable services to the construction company while he was a member thereof, for which it is possible he may have a claim against his former partners. It is unnecessary to review the various errors assigned, as his liability as a partner is decisive of the case. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN E. SHEPHERD, APPELLEE, v. I. P. MATHIS ET AL., APPELLANTS.

COBB, J.

The only question presented by the record in this case is identical with that decided by this court in the cases of *Pettit v. Black*, *ante* p. 52, and *Russell v. Wilhelm*, *ante* p. 120. The judgment of the district court will therefore be reversed and the cause remanded for further proceedings in accordance with the views of this court as expressed in the cases above referred to.

REVERSED AND REMANDED.

J. L. Mitchell, for Shepherd.

E. F. Warren, for Mathis.

JOHN A. GOODLETT, APPELLEE, V. SELDEN N. MERRIAM, APPELLANT.

COBB, J.

It is claimed by counsel for appellant, and conceded by counsel for appellee, that the question involved in this case is identical with that decided by the court in the cases of *Pettit v. Black*, and *Russell v. Wilhelm*, at the October term. The judgment of the district court will therefore be reversed, and the cause remanded for further proceedings in accordance with the views expressed in the cases above referred to.

REVERSED AND REMANDED.

J. C. Watson, for Goodlett.

E. F. Warren, for Merriam.

STEPHEN HALE, APPELLEE, V. FLORA G. CHRISTY AND OTHERS, APPELLANTS.

1. **Practice:** EVIDENCE ON APPEAL: HOW AUTHENTICATED. In the absence of a stipulation waiving it, the certificate of the judge presiding at the trial as to what the testimony was is essential in its authentication for the supreme court.

2. **Foreclosure of Mortgage:** TIME FOR BRINGING ACTION. An action for the foreclosure of a mortgage upon real estate may be brought at any time within ten years after the action accrued. [MAXWELL, CH. J., dissenting.]

3. **Married Women:** THEIR POWER TO CONVEY REAL ESTATE: OTHER CONTRACTS. Under Secs. 42 and 43, Ch. 61, General Statutes, a married woman may sell and convey real estate, or any interest she may have therein, the same as if she were

single. As to her other contracts she is liable only to the extent that they are made with reference to, and on the faith and credit of, her separate estate.

APPEAL from the Otoe county district court. The case is stated in the opinion.

S. H. Calhoun, for appellant.

1. The note of a married woman given during coverture (except to improve her separate estate) is absolutely void, such note cannot be recovered on even after death of husband. *Thomas v. Passage*, 54 Ind., 106. *Kantrowitz v. Prather*, 31 Ind., 92. *Sharpe v. Clifford*, 44 Ind., 346.

2. A woman may while married sue and be sued in the same manner as if she were unmarried, * * * but the rule must be observed that all such contracts of a *feme covert* must be with reference to and upon the faith and credit of her separate estate. *Davis v. First National Bank of Cheyenne*, 5 Neb., 242. *Yale v. Dederer*, 18 N. Y., 265, 22 N. Y., 450. *Corn Exchange v. Babcock*, 42 N. Y., 450.

M. L. Hayward, for appellee.

1. This is not an action against Mrs. Christy to obtain a personal judgment against her on her note. It is simply an action to foreclose and have sold her interest in certain real estate mortgaged by herself and husband to secure the payment of a note signed by both. As no personal judgment is prayed against her and none ordered by the court in its decree, we respectfully submit that for the purposes of this action it is wholly immaterial whether or not a married woman can be sued upon her note. Suppose we admit that the debt was and is the husband's debt, and that she never signed the note—even then we can have sold her inter-

est in the real estate which she has mortgaged to secure this debt. It is immaterial whose debt it is. It is the debt she gave the mortgage to secure. Now suppose we admit that the note was barred as to Mrs. Christy, or that she could not give a note, or that she never signed the note (it is admitted that she signed the mortgage to secure this debt, which she claims was and is the husband's debt), is not her interest in the mortgaged land held so long as the debt is alive against the husband? When a mortgage is made to pay a debt the lien attaches until debt is paid. *Green v. Hart*, 1 Johns, 580. *Davis v. Maynard*, 9 Mass., 242. *Pomeroy v. Rice*, 16 Pick, 22. *Dana v. Binney*, 7 Vt., 493. *Fowler v. Bush*, 21 Pick, 230. *Pond v. Clarke*, 14 Conn., 334. *Cleveland v. Harrison*, 15 Wis., 676.

2. The records of this cause show that Edward W Terry held a mortgage on the land in controversy, given for purchase money by Emil J. G. Christy prior to plaintiff's mortgage. A suit was brought by Terry to foreclose his mortgage. In this suit plaintiff herein, Hale, and Mrs. Christy were made parties, but no service of any summons was ever made on Mrs. Christy. At the sale of the mortgaged premises, made by virtue of the decree in that cause, Hale purchased the land and took and has ever since been in possession of the land. At that sale Hale acquired all the interest in the land of Edward W. Terry, the first mortgagee, and Emil J. G. Christy. *Childs v. Childs*, 10 Ohio State, 339. *Stark v. Brown*, 12 Wis., 572. *Moore v. Card*, 14 Wis., 213. He is then a second mortgagee in possession, holding all the rights of the husband who owned the land, and of the prior mortgagee whose mortgage was for purchase money of the land. What rights has Mrs. Christy left in the land? Clearly her only right is to redeem the land by paying the amount paid by Hale to Terry and the amount due on the second

mortgage. *Bradley v. Snider*, 14 Ill., 266. *Brown v. Lapham*, 3 Cush., 552. *Taylor v. Porter*, 7 Mass., 355. *McArthur v. Franklin*, 16 O. S., 204. *Downer v. Wilson*, 33 Vt., 1. *Rands v. Kendall*, 15 O., 676. *Green v. Dixon*, 9 Wis., 532. *Gillette v. Eaton*, 6 Wis., 30. *Tallman v. Ely*, 6 Wis., 244. She cannot bring an action at law for her dower, but can only file a bill in equity to redeem. It cannot be contended that in a bill in equity, filed to redeem premises from a mortgagee in possession, holding the interest of the husband who owned the land, and of a prior mortgagee under a mortgage given for purchase money, a widow could plead the statute of limitations. *Balch v. Onion*, 4 Cush., 559. *Pratt v. Huggins*, 29 Barb., 277. *Johnson v. Candage*, 31 Maine, 28. *Newton v. Gray*, 4 Gray, 46. If wife could redeem we can foreclose such right. *Benedict v. Gilman*, 4 Paige, 58.

LAKE, J.

This case comes here by appeal of one of the defendants, and the first question to be decided is raised by a motion to strike from the record what purports to be the evidence taken on the trial in the court below, on the ground of its not being properly authenticated, the judge presiding at the trial not having certified it to be such. Motion sustained for the following reasons: Section *two* of the act providing for appeals in equity actions, "approved March 3, 1873" [Gen. Stat., 716], provides that "when the proofs and testimony are taken orally before the court on the hearing of the cause, the same shall be reduced to writing in form similar to bills of exception, and be allowed by the judge hearing the cause as in cases at law." This requirement was not observed in this case. Neither is there any agreement between counsel as to what the

evidence before the court was. What purports to be a record of the evidence, and certified by the court reporter to be such, is copied into the record by the clerk of the district court; this is all we have. In the absence of a stipulation waiving it, the certificate of the judge presiding at the trial, as to what the testimony was, is essential. The statute recognizes no other mode of authentication in this sort of cases.

The evidence being thus disposed of and out of the way, the only other questions to be considered are such as are properly raised upon the pleadings and judgment.

The action was in the ordinary form for the foreclosure of a mortgage upon real estate. The mortgage was given by the defendants as security for the payment of their joint note for $567.00, due in one year from date. The note and mortgage both bear date of May 1, 1869. The action was commenced on the 27th of January, 1877, and one of the defenses interposed by Flora E. Christy was the statute of limitations, in that it was not commenced within five years after the maturity of the note. This was not a good answer. By section six of the code of civil procedure, as it was when the action accrued and still is, ten years is the time given for the commencement of foreclosure suits upon mortgages. [Gen. Stat., 525.] But even if five years were the limitation to be applied, still, as it is alleged in the reply that during two years of the time subsequent to the maturity of the note the defendant had her residence out of, and was in fact absent from, this state, if it were necessary in order to support the finding of the district court it would be presumed, in the absence of a showing to the contrary, that this allegation was made good by the proofs on the trial.

As to the fact that Flora E. Christy was a married woman when she executed this mortgage, it may be

answered that it is not certain from the pleadings just what her interest in the premises was. Perhaps the inference would be reasonable that it was only a contingent dower interest. But whatever her interest may have been she had the clear right to convey it in the manner charged. Section 42, chapter 61, Gen. Stats., provides that "any real estate belonging to a married woman may be managed, controlled, leased, devised, or conveyed by her by deed, or by will, in the same manner and with like effect as if she were single." And the next section, that "to convey her right of dower she must execute a deed with, or without, her husband." These sections were in force when this mortgage was executed, and are still the law of this state. Under them the power of a married woman to sell and convey her real estate, or any interest which she may have therein, is full and perfect. Under the common law, even, the mortgage would be good, her husband having joined with her in its execution. 2 Kent's Com., 150; 1 Hilliard on Mortgages, sec. 9, ch. 1. Under the statute it is good, and would have been had she executed it alone.

It is urged by counsel for Mrs. Christy that owing to her coverture she incurred no personal liability by signing said note. This, no doubt, is true, and the finding of the court below that she was liable cannot be upheld. Even under the very liberal provisions of our more recent legislation respecting the rights of married women, this court has already held that to bind her the contract must be made with reference to and upon the faith and credit of her separate estate. *Davis v. The Bank of Cheyenne*, 5 Neb., 242. She was not liable on the note.

But while the finding of the court that Mrs. Christy is indebted on the note cannot be upheld, inasmuch as the decree does not go to the extent of adjudging that

she shall pay it, no injury was done. The decree is not that she pay the amount so found to be due on the note, but that in "case the said defendants fail for the space of twenty days," etc., to pay the amount so found to be due, that an order of sale issue to the sheriff to sell her interest in said premises, and that the proceeds be applied to the payment of the costs, and whatever may then be due of the mortgage debt. Even if there should be a balance of the mortgage debt remaining unsatisfied after exhausting the mortgaged premises, it not being a case in which such balance is recoverable at law as against Mrs. Christy, no execution could be lawfully issued against any other of her property.

MAXWELL, CH. J., dissenting.

Section six of the code referred to in the opinion reads as follows: "An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages."

It will be perceived that the subject matter of the section is the *title* or *possession* of real property. The clause in relation to mortgages seems to have been intended to apply to cases where, through void proceedings in foreclosure, or otherwise, the mortgagee has obtained possession of the mortgaged premises. In such case the mortgagor must file his bill to redeem within ten years or be barred. See 4 Kent's Com., 187. And this construction is supported by sections nine and ten.

Section nine provides: "Civil actions, *other than for the recovery of real property*, can only be brought within the following periods, after the cause of action shall have accrued."

Section ten provides: "Within five years an action

upon a specialty, or any agreement, contract, or *promise in writing*, or foreign judgment."

It will not be denied that under these provisions an action on the note will be barred in five years, and the uniform holding of this court has been that the note is the debt, the mortgage a mere incident. *Kyger v. Ryley*, 2 Neb., 28. *Richards v. Kountze*, 4 Id., 208. *Webb v. Hoselton*, Id., 317.

In some of the states, where the common law doctrine as to mortgages still obtains, it is held that even after the note is barred the mortgagee may proceed in equity upon his mortgage and foreclose it. *Belknap v. Gleason*, 11 Conn., 160. *Allen v. Everly*, 24 Ohio State, 97. But in *Kyger v. Ryley supra*, this court expressly held that such was not the law in this state. Section seventeen of the code, while saving the rights of certain parties under disability, provides that "the absence from the state, death, or disability of a non-resident, save the cases mentioned in this section (infancy, a married woman, insane, or imprisoned), shall not operate to extend the period within which actions *in rem.* shall be commenced by and against such non-resident, or his representatives." This proviso is not in the Ohio code, from which ours was copied, and was added to the section in the revison of 1866.

In *Peters v. Dunnells*, 5 Neb., 460, and *Rector v. Rotton*, 3 Neb., 177, it was held that the foreclosure of a mortgage was a proceeding *in rem.*, and in the former case it was held that the action to subject the mortgaged property to the payment of the debt must be commenced within five years. For these reasons I cannot give my assent to the opinion of the majority of the court, so far as it applies to the time within which actions of foreclosure must be brought.

DECREE AFFIRMED.

GEORGE P. UHL, PLAINTIFF IN ERROR, v. JAMES W. ROBISON ET. AL., DEFENDANTS IN ERROR.

1. **Motion for New Trial:** ASSIGNMENT OF GROUNDS FOR. An assignment of error in a motion for a new trial in these words, "Because the court erred in excluding proper evidence from the jury, offered by the defendant, to which ruling of the court the defendant at the time excepted," is too indefinite to lay the foundation for proceedings in error.

2. **Instructions to Jury.** An instruction which leaves the jury at liberty to disregard a material fact in a case, either admitted or established by the evidence, is erroneous.

3. ———: ———. And it is error to give an instruction which implies that there is evidence from which the jury may find a fact of which there is no evidence before them.

4. ———: ———. It is not error to refuse an instruction requested, although correct as a legal proposition, if it be not applicable to the evidence on which the jury are to pass.

5. **Sale of Goods:** DELIVERY OF POSSESSION. The seller of a threshing machine resided and was in Buffalo, New York. The machine was in Nebraska, under the care and control of the purchasers, who were his general agents for the sale of such machines. *Held*, That the sale was complete as between the parties to it just as soon as the seller was notified by the purchasers of their acceptance of his offer to sell, without a formal delivery of possession. *Held further*, That the sale, being complete as to the parties to it, was conclusive as to all others, unless shown to have been fraudulent.

This case came up from Richardson county. It was an action of replevin brought by the plaintiff in error against the defendants in error, for the recovery of a threshing machine which had been purchased by Uhl at execution sale. The case came before this court at the October term, 1877, on exceptions by Robison and Maus, to the refusal of the district court to give certain instructions to the jury on the trial there. The judgment was reversed and cause remanded, the case being

reported in 6 Neb., 328. Upon the second trial below Uhl requested the court to give the following instructions to the jury:

1. The court instructs the jury on behalf of the defendant that if they believe from the evidence that the plaintiffs are the agents of James Brayley, and that the property in controversy was bid off on an execution sale on a judgment wherein James Brayley was himself the judgment creditor, and in a matter in which they were themselves agents for said James Brayley, and acting as agents at the time of such execution sale, and that the property was bid off in the name of James Brayley, that said James Brayley thereby became the owner of said property absolutely, and that the same was then subject to levy and sale upon any execution issued upon a judgment against said James Brayley.

2. The jury are further instructed that any property in the hands of a third person as bailee is under the control of the owner of the same, unless specially leased to such third person, or left or placed in the care of such third person, to abide conditions specially agreed to by the owner; and that in the event of a sale or transfer of such property it is the duty of such owner and of the purchaser to notify such third person of such sale, and to whom it was sold, and that in the absence of such notice, and without a change of possession, such sale is presumed to be fraudulent and void as to the creditors and subsequent purchasers in good faith of such original owner, and that unless the plaintiff has proven to your satisfaction that the sale as claimed by these plaintiffs from James Brayley to these plaintiffs was made in good faith and without intent to defraud the creditors of said James Brayley, and that the same was made before the levy of the execution under which the defendant claims the property, then

the jury should find for the defendant and assess his damages.

3. The court further instructs the jury that a sale of personal property, without a delivery of the same by the seller to a purchaser, is *prima facie* fraudulent and void, and it devolves upon the party attempting to maintain such a sale to prove to the satisfaction of the jury that such sale was made in good faith; and if the purchaser fails to prove to the satisfaction of the jury that such sale was made in good faith, for a valuable consideration, and without intent to defraud the creditors of the seller, the sale will be presumed to be fraudulent and void as to the creditors of such seller, and the jury should disregard such sale.

5. The court further instructs the jury that if they believe from the evidence that the plaintiffs were the agents of James Brayley, and that the defendant was a judgment creditor of said James Brayley, and if they further believe from the evidence and the circumstances as shown by the evidence that the sale of the property in controversy as claimed by the plaintiffs was a sham and a fraud, intended to foil and thwart the efforts of the defendant in trying to collect his judgment from said James Brayley, and that such sale as claimed by the plaintiffs was not in good faith, but that the same was only a sham and a fraud, then your verdict should be for the defendant for such damages as he has sustained by reason of taking the property under the writ of replevin in this cause.

7. The court further instructs the jury that if they believe from the evidence that the defendant had a legal and valid judgment against James Brayley, and that the defendant obtained such judgment upon a debt due and owing to the defendant from said James Brayley for services as an attorney in the matter wherein these plaintiffs were agents for said James Brayley, and

had full knowledge of said matter, and if the jury further believe from the evidence that these plaintiffs had full knowledge of the fact that the judgment of this defendant against said James Brayley was unsatisfied and unreversed, then the court instructs the jury that these plaintiffs are chargeable with full notice that all the personal property of said James Brayley in Richardson county, Nebraska, was liable to be seized and sold upon an execution to satisfy said judgment.

8. The court further instructs the jury that they may, for the purpose of determining whether the transaction by which the plaintiffs claim to have bought the property in dispute from James Brayley was in good faith or fraudulent, take into consideration all the circumstances connected with the affair as shown by the evidence—such as that the defendant's judgment was founded upon a debt in a matter in which these plaintiffs were agents for said James Brayley, and of which they had full knowledge; the garnishee proceeding, and the actions of the garnishee in sending away the notes of said Brayley after the same had been duly garnisheed, and the subsequent proceedings therein—and compare all these transactions by which these plaintiffs claim to have bought the property in dispute from said Brayley, and if from all the circumstances the jury should believe that the transactions by which these plaintiffs claim to have bought the property in dispute were fraudulent and intended to defraud the creditors of said Brayley, then the jury should find for the defendant and assess his damages.

The court refused to give these instructions, and upon the issues presented the jury returned a verdict in favor of the plaintiffs below, upon which judgment was duly entered. Uhl took exceptions and brought the cause up by petition in error.

George P. Uhl, pro se, cited General Statutes, 393, sec. 11. *Whitney v. Bennette*, 3 Wisconsin, 621. *Bond v. Seymour*, 2 Pinney, 105. *Smith v. Welch*, 10 Wis., 91. *Grant v. Lewis*, 14 Wis., 487. *Mayer v. Webster*, 18 Wis., 393. *Carter v. Willard*, 19 Pick., 1. *Burge v. Cone*, 6 Allen, 412.

E. W. Thomas and *Clarence Gillespie*, for defendants in error.

This is the second time this case has been before this court, and the decision as reported in 6 Nebraska Reports is not only decisive, but it is exhaustive of the entire case. And the last three paragraphs on page 333 of that report cuts it clean, and leaves not a hinge or hook for this plaintiff in error to hang a legal doubt on. The instructions asked for by Robison & Maus, and given by the court, are the exact instructions substantially quoted with approbation by this court in the said review of this case in 6 Nebraska Reports, page 328, is the law in this case. Sec. 20 and 21, page 395, General Statutes of Nebraska. Hillard on Sales, pages 101 and 102. 2 Kent, 12th ed., page 492 and note.

LAKE, J.

We shall consider only those questions noticed by the plaintiff in error in his brief.

The first and second points relied on relate to the exclusion of certain evidence from the jury. Owing, however, to the fact that these matters were not properly presented to the court below in the motion for a new trial, no foundation was laid for their review here. Referring to the motion for a new trial we find the assignment to have been "Because the court erred in excluding proper evidence from the jury, offered by the defendant, to which ruling of the court the defendant at the time excepted." Such an assignment is too

indefinite to be regarded. It wholly fails to bring to the attention of the court the particular testimony referred to as having been erroneously excluded. We have ruled so frequently on this sort of assignment, and the proper practice must be so generally and well understood, that a reference to the decisions would seem to be unnecessary.

The next error assigned is on the several instructions given to the jury, numbered from one to seven inclusive. Without particularly referring to these instructions here, we will say that, after a careful examination of each of them, we fail to discover any just ground for complaint. So far as they go, they undoubtedly state the law of the case correctly.

The next assignment is, that the court refused to give certain instructions to the jury requested by the plaintiff in error. The instructions so excluded we have examined with this result. The first one totally ignores the sale of the machine by Brayley to the defendants in error, of which fact the proof was conclusive. By this instruction, had it been given, the jury would have been told, in effect, that notwithstanding such sale the machine was subject to the execution against the property of Brayley under which the plaintiff in error claimed title to it. Such being the scope of the instruction, it would have been error to have given it, and it was properly refused. An instruction which leaves the jury at liberty to disregard a material fact in a case, either admitted or established by the evidence, is erroneous. The second and third of these requests, abstractly considered, were probably correct legal propositions, but they were not applicable to the evidence before the jury, and would have had a strong tendency to mislead them. And the same is true of the fourth proposition, which was simply the *eleventh* section of the statute of frauds copied entire.

In the case of *Robison v. Uhl*, 6 Neb., 328, where the evidence in all respects was substantially the same as we have here, it was held that, in view of the situation of the parties with respect to the property sold, and the other circumstances of the case, a formal delivery of possession was unnecessary to complete the sale, and that the want of it was of no significance whatever. The record shows conclusively that Brayley, from whom Robison and Maus purchased the machine, lived in Buffalo, New York, and that the machine was here in Nebraska, under the care and control of the latter as the general agents of the former at the time the sale was made. Under these circumstances we hold that the sale was complete as between the parties to it just as soon as the seller was notified by the purchasers of their acceptance of his offer to sell. And we further hold that, being a completed sale as between the parties to it, it concluded not only them, but every other person, unless shown to have been fraudulent. *Lake v. Morris*, 30 Conn., 201.

The *fifth*, *seventh*, and *eighth* of the instructions refused were wholly unwarranted by the evidence. They imply that there was some evidence from which the jury could infer that Robison and Maus were fraudulent purchasers of the property in controversy, when in fact there was none at all. We have read the testimony carefully, and fail to discover anything to justify such an inference. These instructions, therefore, were properly refused.

The only point remaining to be noticed is the alleged error of the court in changing the *fourth* instruction requested by the plaintiff in error. We have already shown that as presented to the court this instruction was inapplicable to the facts of the case. In lieu of this request, however, the jury were charged that if they were "satisfied from the evidence that the sale

* * * was a fraudulent transaction * *
* * * and that the machine in controversy was the property of James Brayley at the time of the levy under which the defendants purchased," they should find in his favor. While this instruction as given was a correct statement of the law on the supposition of there being evidence from which fraud could be inferred, yet, there being no such evidence, it was more favorable to the plaintiff in error than he was entitled to. *He* had no cause to complain.

On a careful examination of the record on all the points made by the plaintiff in error, we are satisfied that no error was committed for which he is entitled to a new trial.

JUDGMENT AFFIRMED.

C. L. LAMB, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF STANTON COUNTY, DEFENDANTS IN ERROR.

County Clerk: TAX LIST AND DUPLICATE. The latter clause of § 3 of an act entitled "An act to amend sections 1, etc.," approved February 19, 1877, is in these words: "The county clerk shall receive for making out the tax list and duplicate thereof, the sum of four cents each for every description of lots and lands, and extension thereof, upon such tax list and duplicate, including footings and recapitulation." *Held*, that the word *each* as it occurs in the said subdivision refers to the "descriptions of lots and lands," and not to the "tax-list and duplicate thereof."

THE plaintiff in error was county clerk of Stanton county, and as such made out the tax-list and duplicate thereof for that county for the year 1877. His claim for such services based upon the act of 1877,

Laws 1877, p. 46, and amounting to $188.88, was presented to the county commissioners, who allowed him $84.96, and refused to pay the balance of $103.92, "on the ground that the clerk was not entitled under the law to pay for the descriptions on the duplicate." Lamb appealed to the district court, who affirmed the decision of the commissioners, whereupon he brought the case up by petition in error.

John A. Eberhardt, for plaintiff in error.

E. P. Weatherby, for defendant in error.

COBB, J.

From the bill of exceptions and transcript in this case it would be difficult to tell exactly what was decided in the court below, but we are relieved of that difficulty by the stipulation filed in the case. The following is a copy of so much of said stipulation as is deemed necessary to a proper understanding of the question decided.

"4th. That the said district court of Stanton county, Neb., adjudged that the plaintiff should have and recover from the defendant, under the third section of page 46 of the laws of Nebraska of 1877, the sum of four cents each for every description of real estate upon the tax list of Stanton county, Nebraska. That said plaintiff should not recover four cents for each description upon the original tax list and in addition thereto four cents for each description upon the duplicate tax list of said county, and that said plaintiff could not recover additional compensation upon description of personal property, either upon the original tax list or duplicate tax list, nor recapitulation and footings of same; nor recapitulation and footings of real estate either upon the original or duplicate tax list of said county."

As explained by the stipulation the judgment is clearly right, and it is difficult to see how there could be a difference of opinion upon the meaning of the section in question. There is no such thing required or contemplated by the said section as a description of personal property. Figures denoting its assessed value set opposite the name of the person or corporation taxed is all that is required in regard to personalty. These figures may represent choses in action, stocks in incorporated companies, or live stock; hence no fee is allowed for a description which is not required to be made, and which is never made (in the tax list) in point of fact. The word *each* in the section refers to the "descriptions of lots and lands", and not to the "tax list and duplicate thereof." In other words, the clerk is required to make out the tax list and a duplicate complete as specified in the first three subdivisions of the section, and including extensions, footings, and recapitulation—whatever that may be—and will be entitled to receive four times as many cents as there are city or village lots and separate descriptions of lands contained in the tax list.

JUDGMENT AFFIRMED.

JOHN LITTLE AND HOBART WILLIAMS, PLAINTIFFS IN ERROR, V. CHARLES D. WOODWORTH, DEFENDANT IN ERROR.

Warranty. There is no particular form of words necessary in order to constitute a warranty of soundness of a chattel. If the vendor in the sale of a horse upon being asked by the purchaser

NOTE.—The authorities upon the subject of implied warranty in the sale of chattels are collated in a very valuable note, appended by the editor to the case of *Emerson v. Brigham*, 6 American Decisions, 109.—REP.

whether the horse is "all right," asserts that the horse is "all right," such assertion may be sufficient evidence of a warranty against the blindness or other unsoundness of the horse.

ERROR from the district court for Douglas county. The opinion states the case.

George W. Ambrose, for plaintiff in error.

John D. Howe, for defendant in error.

1. The charge on the subject of warranty is liable to no objection. *Morrill v. Wallace*, 9 N. H., 115. *Hahn v. Doolittle*, 18 Wis., 196. *Randall v. Thornton*, 43 Me., 226. *Smith v. Justice*, 13 Wis., 600. *Frey v. Vanderhoof*, 15 Wis., 397. *Boothby v. Scales*, 27 Wis., 627. *Wilbur v. Cartright*, 44 Barb., 536. *Willard v. Merritt*, 45 Barb., 295. *Beals v. Olmstead*, 24 Vt., 115. *Henshaw v. Robbins*, 9 Metc., 83. *Warren v. Van Pelt*, 4 E. D. Smith, 205.

2. The charges on the subject of fraudulent representations were sound. *Jones v. Edwards*, 1 Neb., 170. Kerr on Fraud 74, and note (1), 75 and note (2), 53–57. *Pickard v. McCormick*, 11 Mich., 78. *Frensel v. Miller*, 37 Ind., 1. *Moor v. Baines*, 116 Mass., 396. *Clark v. French*, 5 Neb., 552. *Phipps v. Buckman*, 30 Pa. St., 402. *Taylor v. Fleet*, 1 Barb., 471. *Bigler v. Flickingers*, 55 Pa. St., 279.

3. The charge that was refused was clearly objectionable. 1 Parsons Cont., 439. *Birdseye v. Frost*, 24 Barb., 367. *Chatfield v. Frost*, 3 S. C., 357. *Bigler v. Flickingers*, 55 Pa. St., 279. *Harris v. Mullins*, 32 Ga., 704. *Overby v. Lightby*, 27 Ind., 27. *Bondurant v. Crawford*, 22 Ia., 40. *Longshore v. Jack & Co.*, 30 Ia., 298.

COBB, J.

Action for breach of warranty in sale of a horse by plaintiffs in error to defendant in error. On the trial in the district court the judge, at the request of defendant in error, gave the following instructions in charge to the jury:

3. If during the negotiation for the sale of the horse the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty.

4. But in case you should be of opinion that the plaintiff has not made out a warranty by a preponderance of evidence, then, in the second place, you are to enquire whether the plaintiff can recover by reason of fraudulent representations; even if there was no warranty the defendants will be liable to the plaintiff if they represented the horse to be sound, and the plaintiff, ignorant of his unsoundness, and relying on such representations, was induced by them to make the purchase, provided that such representations were false and the defendant knew them to be so.

5. But it should be borne in mind that in order to give a purchaser a right of action for fraudulent representations the representations must have been relied upon by the plaintiff and must have been an inducement to the purchase. If the purchaser knows of the defects afterwards claimed to have been the subject of the false representations, or if he resorts to other means of knowledge open to him and chooses to judge for himself in the matter, and relies upon such other means of knowledge, and not upon the representations made, the defendants cannot be made liable.

The court also refused to give the following instruction prayed for by the plaintiffs in error: "Warranty does not extend to such defects as are patent and visible to the purchaser, and if you believe from the testimony that the plaintiff had knowledge of the defects in the eyes of this horse or could have discovered them by inspection, he cannot recover in this case, although you shall believe from testimony that there was an express warranty as to soundness on the part of the defendants."

It is well settled that no particular form or set of words are necessary to constitute a warranty of the character or soundness of chattels, but that any form of words, whereby a vendor, pending a negotiation, makes affirmation or assertion that his article of traffic is possessed of a particular character for the purpose of inducing a purchase, when such affirmation or assertion is relied upon by the purchaser, will constitute a warranty. Some cases make a distinction between affirmation and mere assertion, but in the sense in which the words are used in this connection there is no difference. Again, many cases make a distinction between the assertion of a fact and the expression of an opinion. Whether certain words would be regarded as the affirmation of a fact or the expression of an opinion would often depend upon the nature of the article commended. Words which might amount to a warranty of soundness of a horse might be regarded as a mere expression of opinion when applied to the merits of a patent washing machine.

We see no objection to the first instruction given, as it very fairly expresses the law of the case as we understand it. As to the second instruction (numbered 4), while it was scarcely applicable to the evidence in the case, yet as it expresses only correct law and could not have misled the jury, the giving of it is not sufficient

cause for disturbing the judgment; and so of the other instruction given.

There was no error in the court's refusal to give the instruction prayed for by plaintiffs in error. The defendant in error was no judge of horses or of diseases of horses. He had heard that there was something wrong with one of the horse's eyes. He made inquiry of the other party and was told that "the horse must have got a straw in it." He received the same reply from the former owner of the horse as well as from others. They all agreed in ascribing that whatever was the matter with the horse's eye came from the trivial cause of his having got a straw in it. The defendant in error was engaged as a clerk, his duties requiring his regular attendance, and hence allowing him no opportunity to make enquiries as to the horse's condition; he was dealing with a responsible firm, whose guaranty or whose word was perfectly good. Under these circumstances he had the right to rely upon their warranty that the horse was "all right."

We have treated this case as though there was no conflict in the testimony, the verdict of the jury who are the sole judges between conflicting testimony having settled that.

The judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX REL. E. S. REED AND OTHERS, v. B. S. RAMSEY AND OTHERS, COUNTY COMMISSIONERS OF CASS COUNTY.

County Seat: MANDAMUS. At a special election held in the several precincts of Cass county on the fourteenth day of May, 1878, for the purpose of relocating the county seat of said county, the returns made to the county clerk were canvassed by him and two disinterested freeholders, etc., of said county, summoned by him for that purpose. From which canvass and the return thereof, filed in the county clerk's office, it appears that there were 2,597 votes cast at said election, that 1,061 votes were for Plattsmouth (the present county seat), that 1,538 votes were for places other than Plattsmouth. Relation for peremptory mandamus against the defendants requiring them to call a second election for the relocation of said county seat on the ground that 150 illegal votes were cast at said election in Plattsmouth; that as all of the votes cast in Plattsmouth were against relocation, except 18; that deducting 132 votes from all those cast against relocation would leave more than three-fifths of all the votes cast at said election in favor of relocation, and that no one place had received a majority of three-fifths. *Held*, 1. That it was not the duty of the board of county commissioners to canvass the vote in such cases. 2. That no power was given by the statute to the canvassers to reject or throw out votes for the reason that persons not resident electors had voted at such election. 3. That mandamus would not lie against the county commissioners, they not being in default.

ORIGINAL application for mandamus.

J. L. Webster and *T. B. Stevenson*, for relators.

Sam M. Chapman, for respondent.

COBB, J.

An alternative writ of mandamus was issued to the respondents, who constitute the board of county commissioners of Cass county, reciting that prior to the

fourteenth day of May, 1878, petitions were presented to them, the said board of county commissioners, signed by resident electors of said county equal in number to three-fifths of all the votes cast at the last general election held in said county previous thereto, which said petitions were in conformity in all respects with the law, and which requested them, the said board of commissioners, to call a special election in said county for the purpose of submitting to the qualified electors thereof the question of the relocation of the county seat of said county; that in pursuance thereof a special election was held the fourteenth day of May, 1878, in said county; that the votes cast at said election were duly canvassed by the board of commissioners; that according to said canvass 2,597 votes were cast at said election, of which number 1,059 were for the town of Plattsmouth, which was then the county seat of said county, and that 1,538 votes were cast for relocating said county seat at places other than said Plattsmouth, to-wit:

In favor of	Weeping Water	1391
"	Weeping Water Falls	6
"	Louisville	64
"	Rock Bluffs	36
"	South Bend	21
"	Cass Center	4
"	Sec. 24, Town 11, Range 11	11
"	Sec. 23, Town 11, Range 11	3
"	For relocation	1
"	Against relocation	2

That according to said canvass there were cast at said special election in Plattsmouth 655 votes, of which votes 637 were in favor of Plattsmouth and 17 votes were in favor of Weeping Water, and one vote in favor of Rock Bluffs as such county seat; that of the votes so cast 150 were illegal, being cast by persons who

were not resident electors of said county of Cass; that whereas all the votes cast in said Plattsmouth were in favor of Plattsmouth, except 17 for Weeping Water and one for Rock Bluffs, therefore at least 132 of said illegal votes were in favor of said Plattsmouth; that deducting said 132 votes from the whole number of votes cast in said county in favor of Plattsmouth and said 18 votes from the whole number of votes cast for places other than Plattsmouth, it appears that three-fifths of all the votes cast at said election by resident voters were in favor of places other than Plattsmouth, where said county seat then was and now is located; that therefore it becomes the duty of them, the said board of county commissioners, to immediately call a special election for a second vote on the question of re-locating said county seat as provided by law, yet that upon demand made in that behalf setting forth in writing the illegal votes as aforesaid, they, the said board of county commissioners, refused and still refuse so to do, etc.

The defendants, the county commissioners, returned the alternative writ and made answer thereto, admitting the facts stated in the alternative writ, also the holding of the election for the re-location of the county seat of Cass county; that said election was held at the time stated in the said writ, and that the whole number of votes cast at said election was 2,597, but averring that at said election said city of Plattsmouth received 1,061 votes, which were cast for said city of Plattsmouth and against the relocation of said county seat; that immediately after said election, and on the 18th day of May, 1878, John D. Tutt, county clerk of said county, together with T. W. Woodford and Isaac Wiles, disinterested freeholders and resident electors of said county, met together pursuant to the call of said county clerk, as a board of canvassers in and for said Cass

county, and proceeded to canvass and did canvass all of the votes cast at said special election. And in pursuance of said canvass, officially proved and published the result of said vote, and returned the same to the office of the county clerk in and for Cass county, Nebraska, where the same was duly filed and became a part of the records of said county. A copy of the tabular statement and certificate of said canvassers is attached to the said answer, and averred to be a true statement of the vote cast at said election for the several points therein named, and that the same is correct in every particular. Said answer admits the demand made on the said board on the 9th day of September, 1878, by the relators, with others, demanding of said board that it immediately call a second election for the re-location of said county seat, which was denied by the said board. For a fourth defense the said answer further denies that the said board of county commissioners canvassed the vote cast at said special election, and denies that there were any illegal votes cast at the said election, and they deny that they have any power or authority under the law to order a second election, or do otherwise than follow the result of said official canvass and the result thereof as declared by the board of canvassers, but that by the plain and direct terms of law they are forbidden to call such second election, etc.

And for a fifth defense they say that the said alternative writ does not state facts and ground sufficient to constitute a cause of action against these defendants and in favor of said plaintiffs.

The plaintiff filed a motion to strike out the said fourth and fifth defenses in the said answer, for the reason that the same constitute no defense, and that the same do not state facts sufficient to prevent the issuing of a peremptory writ.

The act of February 25, 1875 (Laws, 1875, p. 159), makes no provision for the canvassing of the votes cast for the relocation of a county seat. If such omission is not fatal to the administration of said law, then it must be that the duty of canvassing such vote devolves upon the county clerk and two disinterested electors of the county to be chosen by the clerk for that purpose, as provided by section 17, chapter 20, General Statutes, for canvassing the votes cast at general elections for state and county officers, etc., and no duty in respect thereto is devolved upon the county commissioners, except to act upon the result as the same should be officially declared. It appears as well from the plaintiff's own showing as from the answer of the defendants that their action upon the said result has been in accordance with their plain duty as prescribed by law. They had no control over the canvass or the result, and the statute provides that: "If at either of the elections in this act provided for more than two-fifths of the votes cast shall be in favor of the place where the county seat is then located, the question of relocation thereof shall not be again submitted for the space of two years from the date of said election." Laws, 1875, p. 161.

When the statute speaks of votes it of course means legal votes; but all votes cast and received at an election are presumed to be legal until their illegality is proved in some manner provided by law. Provision is made for contesting the election of persons who may be declared elected to a seat in the senate or house of representatives, or to a state or county office. Whether by following such provisions as near as the same are applicable to an election of this kind the plaintiffs could have so changed the result as to have made it the duty of the county commissioners to call a second election, we do not feel

called upon to decide in disposing of this motion, but it seems very clear that while the result of the canvass remains undisturbed the defendants have no further duty to perform growing out of said special election or the petitions upon which it was called. This would not be different even if the board of county commissioners had canvassed the vote and it had been their duty to do so, as seems to have been thought by the plaintiff. The law nowhere gives the canvassers the right to throw out or reject votes for the reason that they have been cast by persons not legal voters, nor have they any means of ascertaining who were illegal voters or what ballots were cast by them. A standard authority on matters of this character says: "An important feature of the writ of mandamus and one which distinguishes it from many other remedial writs is that it is used merely to compel action and coerce the performance of a pre-existing duty. In no case does it have the effect of creating any new authority or of conferring powers which did not previously exist, its proper function being to set in motion and to compel action with reference to previously existing and clearly defined duties. It is therefore in no sense a creative remedy, and is only used to compel persons to act where it is their plain duty to act without its agency. And it follows necessarily that the writ will not go to command the performance of an act which would be unlawful in the absence of the writ." High on Ex. Leg. Remedies, § 7, p. 10; see also Illinois cases there cited.

Will it be seriously urged that, with the canvass of the said vote standing on the records of Cass county uncontested and unreversed, it is a plain or even a doubtful duty resting on the said board of county commissioners to call said second election? Would it not on the other hand be a clear violation of duty and of

law, and would it not be doing exactly what the law prohibits being done, until after the expiration of two years from the first election?

The difficulty in this case seems to be that nobody has refused to discharge any official duty incumbent upon him under any law, and nobody has violated the law except these illegal voters, if any such there be, and they cannot be reached by mandamus. It has been suggested that it be referred to a referee to take testimony as to the alleged illegal voters and report the same to this court. If that could be done under some appropriate legal proceeding, and a sufficient number of illegal votes proved to change the result, and that evidence and conclusion brought to the attention of the said board of commissioners, and they should refuse to act thereon, then it is possible that mandamus would lie against them. But this court cannot presume that they would refuse to act in such case. "Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act, and since there can be no omission before the time has arrived for the performance of the duty, the writ will not issue before that time." "In other words the relator must show that the respondent is actually in default in the performance of a legal duty *then* due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed, nor does the law contemplate such a degree of diligence as the performance of a duty not yet due." High on Ex. Leg. Rem., sec. 12, p. 14. See cases there cited.

Let it be supposed that by proceedings in the nature of a contest or some other appropriate proceedings it be decided by some proper tribunal that one hundred and fifty of the votes cast at said election at the polls in Plattsmouth were cast by persons not resident electors of Cass county, as stated in said alternative writ, and such decision of such tribunal be brought to the attention of said board of county commissioners on the 10th day of December, 1878, then what would be the status of the case? It might be that if the said board should refuse or fail to call said second election within a reasonable time after that day that they would be in default. But it could not be that they had been in default ever since the 9th day of September.

The issues in the case must be made upon the facts, rights, and duties of the parties as they existed at the time of the commencement of the suit, or at the latest at the time that they are actually joined; and it is apparent, if the foregoing views are correct, that the issue presented by the alternative writ, tried in view of the duties of the respondents as they existed at the date of its issuance, or at this time, would have to be decided in favor of the respondents.

JUDGMENT ACCORDINGLY.

JOHN KOUNTZ, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Practice in Criminal Cases. Proceedings in error in a criminal case must be instituted in the supreme court within one year after the rendition of the judgment.

MOTION to dismiss proceedings in error.

The Attorney General, and *Frank Martin*, for the motion.

Isham Reavis, contra.

MAXWELL, CH. J.

At the March term, 1877, of the district court of Richardson county the plaintiff in error was convicted of murder in the second degree, and on the seventh day of April of that year was sentenced to imprisonment in the penitentiary for the period of twenty-five years. On the 19th day of April, 1878, he obtained a writ of error and filed a transcript of the proceedings in the case in this court, and assigns various errors therein. The attorney general now moves to dismiss the proceedings in error because they were not commenced within the period prescribed by law.

At common law, bills of exceptions were not allowed in cases of felony and treason, because until the present century a judgment of conviction in such cases in England could not be reviewed. Therefore, there are no precedents at common law to which our attention has been called wherein the question of time was a material inquiry.

Section five hundred and eight of the Criminal Code provides that: "In criminal cases not punishable with

death, after final judgment, writs of error may, on good cause shown, be allowed on the application of the defendant, by the supreme court, or any judge thereof in vacation, *as in civil cases;* and in criminal cases punishable with death, writs of error may be allowed on application by said court when in open session, or by any judge thereof in vacation." Gen. Stat., 834.

In 1875 an act was passed amending section five hundred and ninety-five of the code of civil procedure so as to require proceedings in error to be instituted in six months after the rendition of the judgment or final order. Laws 1875, p. 40.

In 1877 the time was extended to one year. Laws 1877, p. 14.

Do these provisions of the code apply to criminal cases? We think they do. We are aware that the supreme court of Ohio in *Blackburn v. The State*, 22 Ohio State, 583, held that they did not apply. No reason is given, and the case does not appear to have been very fully considered. In this state a writ of error is a writ of right in both civil and criminal cases. And the practice in both classes of cases is assimilated as far as possible. It is evident that the language of the section referred to includes also the *time* within which proceedings in error may be instituted. And every presumption of innocence in favor of the accused supports this construction. In addition to the protection which the common law throws around the accused, he is entitled to counsel to make his defense, and if unable to employ the same the court will appoint. He is entitled to a bill of exceptions, and after calling the attention of the court below to the errors complained of, may have the entire case reviewed on error in the supreme court. When may he do this? Can he wait until the material witnesses for the state are dead or have gone beyond the reach of process—let that time be five, ten, or

twenty years, then prosecute proceedings in error? We do not think so.

If the party convicted is innocent of the offense with which he is charged—that is, if the testimony fails to establish his guilt with that degree of certainty required by the law—if error has occurred during the progress of the trial by which he has been prejudiced, the case should be reversed and a new trial awarded. There is nothing that the law abhors like the conviction of an innocent person. For this reason, among others, criminal cases take precedence in the hearing of causes, in order that the party, if innocent, may be discharged. But it is the duty of the state, while protecting as far possible the innocent, to punish the guilty. In no other way can life and property be rendered secure. In most cases of actual guilt, if proceedings in error are prosecuted within the period required by law, and the case is reversed, the witnesses on the part of the state are at hand to testify in the case. But in many if not most cases, in even five years many of the material witnesses could not be found. The case may have been one of great atrocity, and the guilt of the party undoubted, yet upon a reversal of the case, as the witnesses against him can not be found, he must be turned loose to commit other depredations upon society. The law was framed for the protection of the innocent and of society, not to offer a means of escape for the guilty, and a party must prosecute proceedings in error within the period required by the statute or be barred. This rule, however, cannot apply to cases where the court had no jurisdiction, or where no offense is charged in the indictment, as in such cases there is an absolute want of authority. The motion to dismiss proceedings in error is sustained.

JUDGMENT ACCORDINGLY.

STATE BANK OF NEBRASKA, APPELLEE, V. JOHN H. GREEN, APPELLANT.

1. **Practice:** FINAL ORDER. An order confirming a sale of real estate made by a judge of the district court in vacation, is a final order, from which an appeal will lie to the supreme court.

2. ———: MOTION TO DISMISS. On a mere motion to dismiss the appeal, the court will not examine the record to see whether it contains all the proceedings of the court below. If, however, on the submission of the cause, the court finds the record so defective that the questions presented cannot be reviewed, it will make such order in the premises as may be just and proper.

3. **Appeal to Supreme Court.** The right to appeal in equity cases is regulated entirely by statute. No notice is necessary by the appellant on taking the appeal other than that derived from filing the supersedeas bond. The appellant has six months from the date of the rendition of the judgment, order, or decree, in which to file the transcript in the supreme court.

4. **Practice:** EXECUTION. Where a proper supersedeas bond is filed and approved, no execution can issue on the judgment until the bond is set aside, modified, or the appellant fails to perfect his appeal.

5. ———: APPEAL: SUPERSEDEAS BOND. Upon the confirmation of the sale of certain real estate under a decree of foreclosure, and an order awarding execution for the deficiency amounting to $9,944.33, the court fixed the supersedeas bond at $2,000. *Held*, that the case came within the provisions of the third subdivision of the third section of the act in relation to appeals in actions in equity, and that the amount of the bond was discretionary with the court.

6. ———: ———: WAIVER OF SUPERSEDEAS BOND BY ATTORNEY. While a supersedeas bond for an appeal duly approved was on file in the district court, the appellee's attorney requested the clerk to issue execution on the judgment, to which request the appellant's attorneys signed the following waiver: "We hereby consent to the above request being complied with by the clerk of said court." *Held*, that their general employment as attorneys gave them no authority to sign such waiver, and the burden of proof was on them to show they had special authority to sign it.

THIS was an appeal by defendant from an order confirming the sale of real estate in the district court of Washington county, upon a motion to dismiss which the following opinion was filed.

MAXWELL, CH. J.

Certain real estate of the defendant was sold at judicial sale and the sale confirmed in vacation. The defendant appeals to this court. The plaintiff moves to dismiss the appeal upon the grounds:—

First—That the order is not appealable, not having been made by the district court.

Second—Because the transcript does not contain nor purport to contain all the pleadings, proceedings, and testimony.

That an order confirming a sale is a final order will not be denied. This is admitted by the attorney for the appellee. But it is claimed that the sale having been confirmed by the judge in vacation, it does not therefore come within the provisions of the statute, which provides that "either party may appeal from the judgment or decree rendered, or final order made by the district court." Gen. Stat., 716.

The act approved Feb. 25, 1875, amending section four hundred and ninety-eight of the code, after providing for a confirmation by the court, further provides "that the judge of any district court may confirm any such sale at any time after such officer has made his return, on motion and ten days' notice to the adverse party or his attorney of record, if made in vacation." It is also provided that the judge confirming the sale shall cause the order to be entered on the journal. Laws 1875, p. 38.

Section twenty-three, article VI of the constitution, provides that "the several judges of the courts of record

shall have such jurisdiction at chambers as may be provided by law."

In sales under a decree, the court is the vendor and the sheriff or commissioner making the sale a mere instrument (*Frasher v. Ingham*, 4 Neb., 537), but no title passes by the sale until it is confirmed, and the same rule applies to sales upon execution. The confirmation when made becomes the act of the court whether made in vacation or in open court. That the legislature has authority to confer such power upon judges in vacation there is no question. The order of confirmation, although made by the judge in vacation, was entered upon the journal of the court and became a part of its records, and until reversed is the final judgment of the court, from which an appeal will lie.

As to the second objection, it is sufficient to say that the causes assigned are not sufficient of themselves to authorize the court to dismiss the appeal. If it should appear upon an examination of the record that it was so defective that the questions presented cannot be reviewed, the court will take such action as may be proper in the premises. The motion to dismiss the appeal is overruled.

JUDGMENT ACCORDINGLY.

LAKE, J., dissented.

The cause then came on to be heard, was argued by counsel and submitted to the court.

Woolworth & Munger, for appellant Green.

Green swears in his affidavit that he never gave any authority or consent to said Redick & Connell, or either of them, or to any other person or persons, to waive the right which he had acquired by reason of the giv-

ing of the supersedeas bond in this case, or to consent to the issue of any execution under said order whatever, and that he never knew of the execution having been issued, or consent of Redick & Connell having been given, until his property had been levied upon and advertised for sale under the same. The only attempt made to rebut this testimony of Green is by the affidavit of Redick, who says that he and his partner, Connell, were the attorneys for Green, and had authority to sign the written consent for execution to issue. How their authority was acquired, he does not say. No pretense is made that Green gave express authority; and so far as Green's statement goes—that he never gave such consent in any manner, or even knew that the execution had issued, or the written consent of Redick & Connell had been given until after the levy and advertisement of his property—it remains uncontradicted and must be accepted as an admitted fact. It is true that Redick says that this consent was given upon consideration that time should be given Green in which to buy back or redeem the mortgaged premises before sold, but such an arrangement is not brought home to the knowledge of Green, and his want of knowledge of any such arrangement is fully shown in his (Green's) affidavit.

It is very evident that all the authority Redick & Connell possessed was such as an attorney possesses under and by virtue of his general retainer.

That an attorney may make a valid stipulation as to any matter of practice or procedure, we admit. But we do most emphatically deny that an attorney possesses the power and authority, by stipulation or otherwise, *in a direct attempt so to do*, to waive, relinquish, or surrender the very right which he is employed to protect and secure. That a substantial right may sometimes be lost by a stipulation regarding a matter

of *practice* entered into without due consideration, or a proper understanding as to its effect, we concede; but we venture the assertion that no case can be found in which it has been held that the general authority of an attorney permits him to knowingly and wilfully, without the knowledge and consent of his client, surrender to the enemy the sacred right entrusted to his protection and guardianship. *Wilson v. Jennings*, 3 Ohio State, 328. *Card v. Walbridge*, 18 Ohio, 411. *Kellogg v. Gilbert*, 10 Johns., 220. *Stuck v. Reese*, 15 Iowa, 122. *Chilton v. Wilford*, 2 Wis., 1.

George E. Pritchett, for appellee, The State Bank.

1. The supersedeas bond was not such as is required by law. The order awarding execution directed the payment of nearly $10,000, and the appellant attempted to supersede and prevent its execution by giving a bond for $2,000 The mortgaged property had been sold. Green had no other property in Washington county. All the property he then had was in Douglas county, heavily incumbered, and about to be still more incumbered by judgment rendered in suits brought against him by his attorney in this case and others; and yet the attempt was made to prevent the appellee in this case from taking out execution and securing a lien upon the property in Douglas county, by giving a bond in the sum of $2,000. Argument is not needed to show that the law authorized no such procedure.

2. But the force and effect of the supersedeas bond was waived by the consent of Redick & Connell, attorneys for Green, that the execution for March 1, 1878, be issued.

While it may be true that their mere retainer as attorneys for Green, did not give them authority to make the waiver, yet I claim that they had express

authority. Such is the fact, as shown by the record. It is true Green swears they had none; but Redick, by his affidavit, not only swears to the fact of their being attorneys for Green, giving them the authority conferred by their employment, but supplements the statement by the fact that they did have such authority. The waiver, or consent that execution issue, was made pursuant to an agreement between the parties, by which Green was to have the right to redeem the mortgaged property within seventy days at the price for which it had been sold.

MAXWELL, CH. J.

In April, 1874, the appellant executed and delivered to John I. Redick three promissory notes each for the sum of $8,333.33, payable in one, two and three years, with interest at 10 per cent, and to secure the payment of the same executed a mortgage upon certain real estate in Washington county. It is alleged in the petition that the first note was paid. The second note was indorsed by Redick and transferred to the appellee before maturity. Upon the maturity of the note it was protested for non-payment and notice given to Redick.

In April, 1876, an action of foreclosure for the amount due on the second note was instituted in the district court of Washington county—Green, Redick, and the Omaha National Bank being made defendants; and at the November term, 1876, of said court, a decree for the sum of $10,509.24 and costs, and attorneys' fees, was taken against Green and Redick, the Omaha National Bank being permitted to withdraw its claim without prejudice.

A sale of the mortgaged property was had under said decree, which sale was confirmed on the sixth day

of December, 1877, and an order made that the plaintiff have execution for the deficiency against Green and Redick for the sum of $9,944.73. It was further ordered that in case Green within forty-eight hours executed an undertaking to the plaintiff in the sum of $3,000.00, to pay the plaintiff $2,000.00 in sixty days, that in case of the payment of the money within that time he should have a re-conveyance of the property. The defendant (appellant) excepted to the order, and the supersedeas bond was fixed by the court at $2,000.00. On the next day Green executed a supersedeas bond for the sum of $2,000.00, with sureties, which was approved by the clerk of the court. The following was attached to the bond: "I am satisfied that Fred. King is good surety on any bond to the amount of $2,000.00.

"(Signed), G. E. PRITCHETT."

No motion was made to set aside or amend the bond, but on or about the first day of March, 1878, the following was filed in the district court of Washington county:

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"To the clerk of said court: Please issue an execution directed to the sheriff of Douglas county for the deficiency in the above case, being deficiency found due by the order confirming the sale herein," which was signed by the plaintiff's attorney, to which was appended the following: "We hereto consent to the above request being complied with by the clerk of said court," which was signed by Green's attorneys.

Upon this request and waiver being filed with the clerk of the district court of Washington county, an execution for the sum of $9944.73 deficiency was issued to the sheriff of Douglas county, and levied upon certain real estate of Green, but for want of time to adver-

tise, it was returned without a sale having been made. Several orders of sale were issued and returned after said levy without a sale being had. But on the seventh day of October, 1878, said real estate was sold under said levy, upon an order of sale, and the sale was confirmed on the sixth of the following November. Green resisted the confirmation of the sale and "asked to have the execution heretofore issued in said cause and the order of sale upon which said real estate was sold each set aside for the reason that at the time of the issue of said writs there was on file in said cause a good and sufficient supersedeas bond as provided by law." From the order confirming the sale the defendant Green appeals to this court.

The appellee contends that the supersedeas bond did not stay the execution. First—Because no appeal was taken. Second—Because the bond was not such as is required by the law. Section one of the act "to provide for appeals in actions in equity" (Gen. Stat., 716), provides that "the party appealing shall, within six months after the date of the rendition of the judgment or decree, or the making of the final order, procure from the clerk of the district court, and file in the office of the clerk of the supreme court, a certified transcript of the proceedings had in the district court, etc.

Section three provides that "No appeal in any case in equity, now pending and undetermined, or which shall hereafter be brought, shall operate as a supersedeas, unless the appellant or appellants shall, within twenty days next after the rendition of the judgment or decree, or the making of such final order, execute to the adverse party a bond, with one or more sureties, as follows:

"*First.* When the judgment or decree is for the payment of money the bond must be in double the amount of the judgment.

"*Second.* Where the judgment or decree directs the execution of a conveyance the bond shall be in such sum as may be prescribed by the district court or a judge in vacation.

"*Third.* When the judgment or decree directs the sale or delivery of possession of real estate the bond to be in such sum as the court or the judge thereof in vacation shall prescribe."

Section four provides: "Before any bond executed as aforesaid shall operate as a supersedeas, the execution of the same, and the sufficiency of the sureties therein, must be approved by the clerk of the court in which the judgment or decree was rendered or final order was made."

The right of review by appeal was unknown to the common law. It was borrowed from the civil law and incorporated into the chancery practice of England It is regulated entirely by statute in this state. The statute requires the appellant, in order to stay the operation of the judgment, to file a proper bond, approved by the clerk, within twenty days from the time of the rendition of the judgment, order, or decree. Upon the bond being filed and approved, the power of the court below to proceed in the case is suspended until the bond is set aside, modified, or the appellant fails to perfect his appeal within the time required by the statute. The filing of the bond is a proceeding in the case and is notice to the adverse party. In addition to this, rule VIII of this court provides for notice to the appellee when the case is docketed in the supreme court. No other notice is required under our statute, although in some of the states, under their peculiar statutory provisions, notice must be given, and it was formerly so in this state under section six hundred and seventy-five of the code as it then existed. See *Redgrave v. Baptist*

Church, 1 Neb., 345. But that provision has since been repealed.

The appellant has six months in which to file his transcript in the supreme court after the date of the rendition of the judgment, order, or decree. *Glore v. Hare*, 4 Neb., 131. *Tootle v. White*, Id., 406. The appellee waived the service of notice as required by rule VIII, and is not in a condition to complain of the failure to be served with notice. The first objection of the appellee, therefore, is not well taken.

The amount of the bond was evidently fixed by the court under the provisions of the third subdivision of section three, as the effect of the confirmation of the sale would be to divest the defendant of the possession of the real estate in question. This being the case, the appeal in that case was taken from the order confirming the sale. The amount of deficiency is contingent altogether upon the amount realized from the sale of the real estate. If, therefore, the order confirming the sale should be reversed, no order of execution for the deficiency could be made until a re-sale of the premises, as the amount could not be ascertained. This evidently was the view taken by the court below, and we think it correct. If any particular objection existed against the bond it should have been made in the first instance in the court below, but the bond apparently is sufficient in form and amount, and it cannot be treated as void. The second objection, therefore, is overruled.

But it is claimed that the force and effect of the supersedeas bond was waived by the consent of the attorneys for Green. Our statute provides that an attorney has power:

First—To execute in the name of his client a bond for an appeal, certiorari, writ of error, or any other paper necessary and proper for the prosecution of a suit already commenced.

Second—To bind his client by his agreement in respect to any proceeding within the scope of his proper duties and powers; but no evidence of any such agreement is receivable, except the statement of the attorney himself, his written agreement signed and filed with the clerk, or an entry thereof upon the records of the court.

Third—To receive money claimed by his client in an action or proceeding during the pendency thereof or afterwards, unless he has been previously discharged by his client, etc. [Gen. Stat., 95.]

An attorney has general authority from his client in all matters which may reasonably be expected to arise during the progress of a case. He may make agreements as to continuances, evidence, and the conduct of the trial, because from the nature of the case he must be permitted to use his skill and judgment in the management of the case. And if in such matters he enters into any agreement within the scope of his authority, his client is bound thereby, even though contrary to his interest. *McCann v. McLennan*, 3 Neb., 29. *Palmer v. The People*, 4 Id., 76. *Rich v. State National Bank*, 7 Id., 201.

But an attorney, by virtue of this general authority, cannot authorize an execution to issue against the property of his client while a proper supersedeas bond is on file to provide for an appeal. This is admitted by the attorney for the appellee, but it is claimed the attorneys for Green had special authority from him for that purpose. Green denies positively any such authority, and the burden of proof is on the attorneys to show that such authority existed. No written authority has been shown, and the mere oath of one of the attorneys as to such authority is not sufficient to overcome the positive denial under oath of Green. It follows that Green, having given the necessary bond for an

appeal, the power of the district court to issue execution on the judgment was for the time being suspended, and the clerk had no authority to issue the execution and orders of sale. The court therefore erred in confirming the sale. The judgment of the district court is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

JAMES H. CATRON, PLAINTIFF IN ERROR, v. JOHN E. SHEPHERD, DEFENDANT IN ERROR.

1. **Partnership:** PURCHASE BY PARTNER OF CLAIM AGAINST ANOTHER. C. and S. were in partnership in the business of fattening cattle, C. conducting the sales and receiving the money. About the sixth of April, 1875, C. having a considerable amount of partnership funds in his hands, and being about to sell all the stock owned by the partnership, purchased a claim against S. for about twenty-five cents on the dollar, and in his settlement with S. sought to apply it against the amount of partnership funds in his hands due S., at its face value. In an action on the claim, *Held*, that C. could recover no more than he had paid for the claim.

2. ———: ———. When property is purchased with partnership funds it inures to the benefit of the partnership.

3. ———: ———. Each partner is a principal, and also is agent for every other member of the firm, and a purchase made by one partner with the funds of another inures to the benefit of such partner, and cannot be applied by the agent to his own personal profit.

4. **Practice:** INTRODUCING TESTIMONY WITHOUT OBJECTION. Where testimony is introduced without objection, error will not lie upon the ground that the testimony was improperly admitted.

5. ———: ———: AMENDMENT OF PLEADINGS. Where testimony is introduced without objection tending to prove a different issue from that made in the pleadings, the court, after the trial, may permit the pleadings to be amended to conform to the facts proved.

ERROR from the district court for Otoe county. The facts are fully set forth in the opinion.

J. L. Mitchell, for plaintiff in error.

The word "defense" as used in the code, secs. 99, 100, must include partial as well as complete defenses, and the defendant should be prohibited from giving in evidence any new matter, either as a complete or partial defense, unless such matter had been set up in the answer. The court can only adjudicate upon the case made by the pleadings. *School District v. Shoemaker*, 5 Neb., 36. *Clark v. O. & S. W. R. R.*, 5 Neb., 314. *A. & N. R. R. v. Washburn*, 5 Neb., 117. *Peet v. O'Brien*, 5 Neb., 360. *Danforth v. Smith*, 23 Vermont, 247. *English v. Foxall*, 2 Peters, 595. *Chalmers v. Chalmers*, 6 H. & J., 29.

The issue upon which this case was tried was plainly and clearly defined. The answer was by way of confession and avoidance. The execution and assignment of the contract sued on was admitted as well as the amount due thereon. The affirmative allegation set up for the purpose of avoiding the liability was that plaintiff acquired and paid for said contract with defendant's money. Under well-settled principles of law if the defendant failed to sustain this affirmative defense the plaintiff would be entitled to recover the amount claimed in his petition. No evidence offered by defendant could properly be admitted or heard by the court which did not tend to establish his said defense. No other defense could be tried or passed upon by the court. See authorities above cited. The finding of the court which is to be treated in every respect as a verdict and special finding of a jury, negatived the only defense pleaded.

Suppose this case having been tried by a jury, a gen-

eral verdict had been returned that plaintiff was entitled to recover only $4,318, with a special finding that plaintiff did not purchase said contract with the defendant's but with his own money, and the motion for judgment had been filed in this case, what would have been the duty of the court, the general verdict and the special finding being inconsistent? Sec. 294, chap. 57, General Statutes of Nebraska. The matters set up in avoidance had been negatived—removed the confession and only that remained, and plaintiff was entitled to judgment as if no new matter had been pleaded.

A party will not be permitted to amend by setting up a new cause of action or a new and different defense—especially after verdict or trial. *Thompson v. Phelan*, 2 Foster (N. H.), 339. *French v. Gerrish*, 2 Foster (N. H.), 97. *Lawrence v. Langley*, 14 N. H., 70. *Newell v. Hussey*, 18 Maine, 249. *Walter v. Bennett*, 16 N. Y., 250. *Belknap v. Sealey*, 14 N. Y., 147. *Woodruff v. Dickie*, 31 How. Pr., 164. *Butler v. Livermore*, 52 Barb. 570. Apply the law of these causes to the one at the bar. The claim of defense set up by way of amendment after trial, by order of the court, was not only a new and different one from the one upon which the case was tried, but it was inconsistent with it and contradictory of it. The one upon which the case was tried sounded in tort the conversion of defendant's money; the new one is based on a contract or agreement set out in said amendment. Are these not different defenses, such as our statute requires should be separately stated and numbered? The one is not only in tort the other on contract, but one is a complete, the other only a partial defense. The new matter in the original answer was stated in one count, which contained only one defense. How was it possible for plaintiff to expect from the reading of that answer that he would be called upon to try any such defense as is

set up in the amendment? He had a right to presume—and the law will sustain and protect him in presuming—that he would be called upon to meet the defense upon which defendant had chosen to stand in his answer, and no other. He was not prepared—and was not required to be prepared—to try the defense set up in the amendment. And it is submitted to this court, whether he shall be concluded by the amendment so ordered and made, or the finding of the court upon it, without even the semblance of a trial thereon.

S. H. Calhoun, for defendant in error.

Catron, by purchasing this claim against Shepherd, after or about the time of closing up of the partnership affairs, and in view of a settlement thereof, and knowing that on such a settlement he would have to pay to Shepherd a large sum of money, and further knowing of the advantageous offer made by Pierce to Shepherd to compromise the claim on which this suit is based—through, and by means of the effort made by Shepherd to have him (Catron) furnish the money necessary to enable Shepherd to accept and act upon said offer—became thereby the trustee of a *constructive trust* in favor of Shepherd. Perry on Trusts, secs. 168, 169, 170, 209 and 210, and the authorities therein cited. Under all the circumstances, the purchase by Catron was a diversion of the partnership funds to the payment of Catron's own debt (to Shepherd) and was a fraud upon Shepherd, and Catron holds said purchase with all the advantages gained thereby in trust for Shepherd. *Viles v. Bangs*, 36 Wis., 131. *Rogers v. Batchelor*, 12 Peters, 221. *Dob v. Halsey*, 16 Johns., 34. *Gram v. Caldwell*, 5 Cow., 489. *Sauntry v. Dunlap*, 12 Wis., 364. *Homer v. Woods*, 11 Cush., 62. *Greeley v. Wyeth*, 10 N. H., 15. *Caldwell v. Scott*, 54 N. H., 414. Perry on Trusts,

sec. 127, and cases therein cited. Colyer on Partnership, secs. 181, 182. 1 Story's Equity, secs. 468, 623, 321, 322, 323. *Stoughton v. Lynch*, 1 John's Ch., 470. *Kelly v. Greenleaf*, 3 Story, C. C., 93–101. *Farnam v. Brooks*, 9 Pick., 212. Parson on Partnership (2d ed.), 242.

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On the tenth day of October, 1872, the defendant purchased of A. N. Pierce, of Texas, eleven hundred and six head of cattle for the sum of $20,362, the money to be paid in installments as provided in a written contract executed by the parties at that time. The plaintiff was appointed agent by Pierce to collect and receipt for the payments. Various payments were made by the defendant upon the contract up to the twenty-sixth day of June, 1874, when there remained due and unpaid about the sum of $3,000.00 This sum the defendant appears to have been unable to pay, and Pierce offered to take one thousand dollars for the claim if Shepherd could pay within a certain time.

O. P. Mason, with whom the claim was left, testifies as follows: "It was not paid at the time, and Pierce instructed me to sell for $500.00 and attorneys' fees, and I notified Shepherd and Catron. I left the papers in my office, and afterwards it was sold to Catron. Catron appeared to be assisting Shepherd in getting as favorable a compromise as possible out of Pierce, and it was a long time afterwards that Catron bought the claim." This testimony is not denied.

In August, 1874, the plaintiff and defendant entered into the following contract: "This is to certify that I the undersigned have agreed with James H. Catron to furnish on my farm in Wayne county, Iowa, and Apinnoose county, Iowa, feed lots, all my pastures, from

the first of September through the fall and winter for $200.00, about ninety acres of corn at seven dollars per acre. Also, some four hundred dollars in money, or this amount in corn, making over twelve hundred dollars. Also, what tame grass hay at $4.00 per ton, to be fed into James H. Catron's cattle. Upon these conditions, that this feed lot and money is to go in as so much money, entitling the undersigned to half the profit or loss in these cattle at a previous fixed valuation, with interest at fixed rate as in Nebraska. The said Catron to furnish money to feed and buy what hogs he may deem expedient. The said Catron holding all right and title in all above mentioned property. The undersigned is given authority to go and buy corn to feed these cattle and hogs, taking a receipt for all moneys paid out, and to return any balance in his hands to the said Catron. Is to receive a fair compensation for actual services in buying corn and attending cattle, Catron's time per day to offset Shepherd's time per day.

"(Signed), JOHN E. SHEPHERD."

This contract appears to have been made to take the place of another that had existed between the parties for some time. In January, March, and April, 1875, the plaintiff sold the stock and retained the entire proceeds, amounting to a very large sum; the profits due the defendant exceeded the sum of $1,900. On or about the sixth day of April, 1875, Catron, being about to leave for Iowa to ship and sell the last lot of stock, purchased of Mason and Lehman, the attorneys for Pierce, the account due from Shepherd to Pierce for the sum of $500, and he claims to have paid one Hicklin $500 in addition, though for what particular purpose is not clear. This account Catron appears to have sought to turn in at its face in his settlement with Shepherd. The defendant offered to take the account

in settlement at the sum the plaintiff had paid for it. This the plaintiff refused and instituted this action on the account to recover the sum of $3,737.55 and interest and costs. The cause was submitted to the court without the intervention of a jury, and the court "doth find that the plaintiff and defendant were partners engaged in the business of feeding and selling cattle and hogs; that the plaintiff made all sales and received the proceeds thereof, and while he had a considerable amount of partnership funds in his hands, and while the partnership affairs were unsettled, he purchased with his own money the claim sued on in this action; that while they were such partners, plaintiff purchased said claim at defendant's request, under an agreement that the amount paid, together with interest thereon at the rate of twelve per cent per annum, should be charged and allowed by the defendant in the final settlement between them; and that plaintiff paid for said claim the sum of $1,000 on the sixth day of April, 1875; and there is now due plaintiff from defendant thereon the sum of $1,318."

The plaintiff filed a motion for a new trial, which was overruled by the court, and judgment rendered on the finding. The plaintiff brings the cause into this court by petition in error. A number of errors are assigned that, in the conclusion we have reached, it is unnecessary to notice in detail.

The rule is well settled that the authority of a partner to dispose of the partnership funds extends only to the business of the partnership itself; and any disposition of those funds by any partner beyond such purpose is in excess of his authority as a partner, and a misappropriation of the funds for which the partner is responsible to the partnership. *Rodgers v. Batchelor*, 12 Pet., 230. *Dob v. Halsey*, 16 Johns., 34. *Gram v. Cadwell*, 5 Cowin, 489. *Homer v. Wood*, 11 Cush., 62.

Purdy v. Powers, 6 Barr, 492. *Greelcy v. Wyeth*, 10 N. H., 15. *Sauntry v. Dunlap*, 12 Wis., 364. *Viles v. Bangs*, 36 Ind., 136.

Let us apply this principle to the case at bar. Here, during the existence of the partnership, and while one of the partners was holding a large surplus of profits in his hands belonging to his copartner, he purchases a claim against his copartner for a little more than twenty-five cents on the dollar of its face value, and seeks to set it up against his copartner for the entire sum due on the face of the contract. We are told that the court has found that this claim was paid for with funds belonging to the plaintiff, and not with partnership funds. This finding must be considered with reference to the other finding that the purchase was made by the plaintiff "while he had a considerable amount of partnership funds in his hands, and while the partnership affairs were unsettled;" and also with reference to the testimony, which shows he sought to bring this debt due on the contract in to satisfy the amount due from him to his copartner. Can it make any difference whether he took the money to pay for this claim out of a different drawer from that in which the partnership funds were kept, so long as he was keeping the entire partnership funds as his own? In his view of the case this was his own money; and that is all he swears to. He nowhere testifies that the money to pay for this claim was not derived from the partnership. Where a transaction is carried on with partnership funds it inures to the benefit of the partnership. No partner has a right to use the partnership stock or funds for his own private benefit. The law of partnership is but a branch of the law of principal and agent. Each partner is a principal, and each is an agent for every other partner; and, within the scope of the partnership, all are bound by the con-

tract of one. Partners owe to each other the most perfect good faith, reasonable diligence, and the exercise of their best judgment and discretion. Profits made by an agent inure to the benefit of his principal. Story on Agency, s. 210, and cases cited. And why should not the same rule obtain in cases of partnership, particularly where the partner is holding back the proportion of funds due his copartner? In such a case it is safe to assume that the purchase was made with funds belonging to his copartner, it being sought to apply the claim in satisfaction of the amount due.

Upon the termination of the partnership, the parties are entitled to an accounting. This has been had between the parties in this case, and a large sum found due the defendant. This fund the plaintiff holds in trust for the defendant's use; and, while holding such fund, he cannot be permitted to profit at the expense of the defendant by retaining it. In the absence of a contract therefor, the plaintiff could not recover the face of the contract. But the court finds that the plaintiff agreed to purchase the claim for the defenddant; and all the testimony tends to support this finding. The defendant testifies that he entered into such an agreement. Mason testifies that the plaintiff "appeared to be assisting the defendant in getting as favorable a compromise as possible out of Pierce." And the plaintiff does not deny this testimony. He states, "I was Mr. Shepherd's friend at that time, and I told Mr. Pierce, and he said he would talk the matter over before another account came in from Texas." On his re-direct examination, he testifies that he never had any conversation with Shepherd after the time testified to by Judge Mason. Can it be that these negotiations of the plaintiff with Pierce, under the guise of friendship for the defendant, were simply to reduce the price of the claim to as low a sum as possible, to

enable him to profit by it? We must reject this conclusion, and accept the testimony showing that the transaction was for the benefit of the defendant.

This being the case, the record fails to disclose any reason why he should not adhere to his contract. The pretext that the parties quarreled about the sum of $175.00 is too trivial to admit of consideration.

The court erred in adding the amount of $500.00 paid to Hicklin, who seems to have had no interest in the claim but a mere right to purchase it, which had not been perfected.

It is claimed by the plaintiff that the court erred in admitting the testimony of the defendant tending to prove the agreement mentioned in the finding of the court, and also in permitting the defendant to amend his answer to conform to the facts proved. In answer to the first objection it is sufficient to say that no objection was made by the plaintiff to the testimony of the defendant upon that point. After the plaintiff had testified without objection, that the plaintiff was going to help him "get it (the claim) along in February," objection was made to his testimony as to the price; but that was not material, and could not have prejudiced the plaintiff. Besides, Mason and the plaintiff both testify without objection as to the price. The rule is well settled in this court that where testimony is admitted without objection, error cannot be predicated thereon, and a party objecting to the admission of testimony must assign the reasons for the objections. *Morgan v. Larsh*, 1 Neb., 367. Tecumseh Town Site case, 3 Id., 279. *Pyle v. Warren*, 2 Id., 248. *Horbach v. Miller*, 4 Id., 48. *Michel v. Ware*, 3 Id., 235.

The objection to the amendment of the answer is not well taken. In *Curtis v. Cutler*, 7 Neb., 317, the petition did not state a cause of action, and the defendant objected to the introduction of any testimony on

that ground. During the progress of the trial the court permitted an amendment of the petition. The defendant objected to the introduction of testimony under the amended petition, upon the ground that it did not state a cause of action. The court overruled the objection and admitted the testimony, and on the conclusion of the trial permitted the plaintiff to file an amended petition, to conform to the facts proved. This the court held could not be done. But this rule has no application where testimony is admitted without objection. In such case, the court may order the pleadings amended to conform to the facts proved. In the case at bar, nearly all the objectionable testimony was admitted without objection on the part of the plaintiff, and much of it introduced by the plaintiff himself. Under these circumstances the court did not err in permitting an amended answer to be filed, and the amendment should have included affirmative relief to the defendant for the amount due him, the testimony being before the court.

The affidavits in support of the motion for a new trial are merely cumulative, and fail to show that the plaintiff was taken by surprise by the amendment of the answer, or that he has been injured in the least. It is clear that there is no error in the record of which the plaintiff can complain. The judgment of the district court is affirmed with costs, and as the bill of exceptions shows that the defendant soon after the settlement, offered to allow the plaintiff the amount he had paid for the claim, which he refused, he cannot now recover costs in the court below.

JUDGMENT ACCORDINGLY.

THE FIRST NATIONAL BANK OF OMAHA, APPELLANT, V. W. R. BARTLETT AND OTHERS, APPELLEES.

1. **Practice:** BILL OF EXCEPTIONS. The statute allows a party excepting fifteen days from the rising of the court, in which to prepare and submit to the adverse party a bill of exceptions. If longer time is desired, the court may extend the time not exceeding forty days from the rising of the court. Within ten days from the expiration of the time fixed by statute, or the order of the court for preparing the bill and submitting it to the adverse party, it must be returned to the party seeking the bill, with the proposed amendments, if any. And the party excepting has ten days after the expiration of the time fixed by law for the return of the bill to him in which to present the bill to the judge for his approval and signature.

2. **Husband and Wife:** DEALINGS BETWEEN THEM. In 1866, the wife of B. placed $5,000, in his hands, to invest in real estate for her, until such time as they could select a suitable location for a home. The money was invested by B., and in 1869 he purchased lots for a residence for which he paid $2.000. In 1874 he erected a residence on the lots in question, costing about $8,000, he at the time being insolvent. *Held*, 1. That the contract of B. with his wife could be enforced in equity; 2. That as no profits were proved to have accrued from the investments, none could be allowed the wife as against creditors of her husband; 3. That mere general allegations of profits realized are not sufficient, as against creditors of the husband, in the absence of any data from which the state of the account can be ascertained.

3. ———: ———. Transactions between husband and wife in regard to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must clearly appear that such transfers were made in good faith and for value.

4. ———: EVIDENCE. In a contest between a wife and the creditors of her husband in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof.

ERROR from the District Court for Douglas county. Upon motion to quash bill of exceptions, *George W. Ambrose*, for defendants, appellees, cited—*Muller v.*

Ehlers, 1 Otto, 249. *Hill v. Bassett*, 27 Ohio St., 597. *Sherlock v. Bank*, 53 Ind., 73. *Logansport Gas Light Co. v. Davidson*, 51 Ind., 472. *Higgins v. Malroney*, 50 Cal., 444. *Nixon v. Phelps*, 29 Vt., 198. *Justice v. Harrington*, 6 Ga., 578.

MAXWELL, CH. J.

This is an appeal from a decree of the district court of Douglas county. The decree was rendered on the ninth day of February, 1878, the term of court closing on the thirteenth of the following April. On the last day of the term, the following order was made in the cause: "On motion of plaintiff, it is hereby ordered that it have twenty days in which to prepare a bill of exceptions herein." On the twentieth day of April of that year, the bill of exceptions was submitted by plaintiffs to the attorney for the defendant, and returned on the same day. On the seventeenth day of the following May, the bill was presented to the judge of the district court for his signature, and was signed by him on that day—"the defendant's counsel insisting that the time within which the bill could have been signed has expired and for that reason protesting against its being signed, and excepting thereto." The defendant's attorney now moves to quash the bill of exceptions on that ground. The act to amend sections 308 and 311 of the code of civil procedure, approved February 15, 1877, provides that the party excepting must reduce his exceptions to writing within fifteen days, or in such time as the court may direct, not exceeding forty days from the rising of the court, and submit the same to the adverse party or his attorney of record for examination and amendment, if desired. Such draft must contain all the exceptions taken upon which the party relies. Within ten days after such submission the adverse party may propose

amendments thereto, and shall return said bill, with his proposed amendments, to the other party, or his attorney of record. The bill and proposed amendments must, within ten days thereafter, be presented by the party seeking the settlement of the bill, to the judge who heard or tried the case, upon five days' notice to the adverse party or his attorney of record, at which time the judge shall settle the bill of exceptions. If no amendments are proposed, or if proposed and allowed, the proposed bill may be presented with the amendments, if any, to the judge for settlement, without notice to the adverse party or his attorney of record.

The party excepting has fifteen days from the rising of the court in which to reduce his exceptions to writing, and submit the same to the adverse party without an order of the court. If he desires a longer period of time in which to prepare and submit the same to the adverse party, the court may extend the time not to exceed forty days from the rising of the court. In such case, the bill must be submitted to the adverse party within the period prescribed in the order. The adverse party then has ten days in which to propose amendments, and return the bill to the party excepting. The party seeking the settlement of the bill has ten days after the time limited for the return of the bill to him, with the proposed amendments, in which to present the same to the judge for his signature, making sixty days in all from the rising of the court. But where a shorter period is fixed upon, when the bill must be prepared and presented to the adverse party for examination and amendment, the twenty days within which the bill must be signed by the judge dates from that period, and cannot be extended beyond.

Let us apply these rules to the case at bar. On the thirteenth day of April, the order granting twenty days

in which to prepare the bill of exceptions was made; that order would expire on the third day of May. Twenty days thereafter, in which to present the amended bill to the judge for his signature, would expire on the twenty-third day of May, or six days after the bill was signed. The fact that the bill was presented to the adverse party for his approval in seven days after the order was made cannot deprive the plaintiff of a substantial right. The design of the law evidently is to allow a fixed period for the presentation of a bill to the adverse party for the proposal of amendments, and for presenting the amended bill to the judge for his approval and signature, being analogous, in that regard, to the return and answer day of a summons. The motion must therefore be overruled.

JUDGMENT ACCORDINGLY.

THE cause coming on to be heard, *Woolworth & Munger*, for appellant, contended:

The deed from Bartlett to Mrs. B. was void at law, because they were husband and wife. *Aultman v. Obermeyer*, 6 Neb., 260. *Glidden v. Taylor*, 16 Ohio State, 509. *Besson v. Eveland*, 26 N. J. Eq., 468. Under the circumstances in this case, and the allegations of the answer, the deed cannot be supported in a court of equity, and the estate will be charged with the judgment.

1. In order to the validity as against creditors of a deed from husband to wife, it must be made upon a valuable consideration. That is wanting here. The money of Mrs. Bartlett became the property of her husband when it was placed in his hands by her, and could not therefore afterward form a valuable consideration for the conveyance. *Chase v. Palmer*, 25 Me., 341. *Pierce v. Thompson*, 17 Pick., 391. *Searing v.*

Searing, 9 Paige, 283-287. *Read v. Livingston*, 3 Johns. Ch., 481. 2 Story's Eq. Jur., sec. 1402, 1403. Bump on Fraud. Conv., 304.

2. Mrs. Bartlett, by permitting her husband to invest her money in his name and deal with it as his, acquiring thereby a credit to which he could not be entitled unless he were the owner of it, and suffering him to continue his dealings with it as his own for eight years—even then withholding his deed to her from the records until this and larger debts had been contracted by him, has divested herself of all right to a settlement. *Briggs v. Mitchell*, 60 Barb, 288, 317. *Besson v. Eveland*, 26 N. J., ch. 468, 471. *Glidden v. Taylor*, 16 Ohio St., 509, 519. *Gloon v. Alcott*, 11 Mich., 470. *Kelley v. Drew*, 12 Allen, 107. *Humes v. Schruggs*, 94 U. S., 22, 28. *Fox v. Meyer*, 54 N. Y., 125, 131. *Dunn v. Sargent*, 101 Mass., 336. *Carton v. Rideout*, 1 McN. & G., 599. *Gardner v. Gardner*, 1 Giffard, 126.

3. The deed bears date May 28, 1874, but was not recorded until February 4, 1875. Meanwhile, and shortly after the date of the deed, namely, June 10, 1874, this debt was contracted. The concealment of the deed, especially when considered in connection with the other facts, shows a fraudulent purpose which avoids it as to creditors intermediate its date and record. *Sands v. Ailbreth*, 2 Johns. Ch., 35, 48. *Bank of U. S. v. Houseman*, 6 Paige, 526, 538. *Coaty v. Gerlach*, 44 Penn. St., 43, 46. *Hood v. Brown*, 2 Ohio, 267. *Bank v. Gourdin*, Speer's Ch., 439. Bump on Fraud. Conv., 82. *Savage v. Murphy*, 34 N. Y., 308. *Case v. Phelps*, 39 Ind., 164.

George W. Ambrose, for appellees.

1. This case may be viewed, and the decree upheld, under various aspects, and the rules of courts of equity

as to resulting trusts, debtor and creditor, or contracts between husband and wife as to separate estate of the wife being applied, will do complete justice between these parties; or the court, finding the fee in the wife, will apply the doctrine that the improvements attached thereto; or even if in the opinion of the court the deed to the wife was in fraud of creditors, still if the property was a homestead creditors are not in a situation to complain. If a trustee purchase lands with trust funds, taking the conveyance in his own name, in equity the land is held as a resulting trust for the benefit of the person beneficially interested. *Platt v. Oliver*, 2 McLean, 313. The rule is, that the acts done by the trustee are presumed to be not for the benefit of the trustee, but for that of the *cestui que trust.* 4 Kent, sec. 61. When such trust fund has been converted into another species of property, and its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust*, and these general doctrines are not limited to trustees, technically so called, but extend to all other persons in a fiduciary relation to the party, whatever that relation may be. 2 Story Eq. Juris., 1380. Perry on Trusts, sec. 666, 124. *Eviston v. Tappen*, 5 Johns. Ch., 497.

2. A court of equity will aid and effectuate an agreement between husband and wife, if made manifest, although the agreement may have been void at law. Especially so, when the fund sought to be divested arose from the industry of the wife, under an agreement such as here disclosed. 2 Story Eq. Juris., sec. 1372. *Wood v. Warden*, 20 Ohio, 518. *Marshall v. Marshall*, 2 Bush (Ky.), 415. *Totten v. McManus*, 5 Ind., 407. *Resor v. Resor*, 9 Ind., 347. *Barnett v. Goings*, 8 Blackf. (Ind.), 284. *Garlick v. Strong*, 3 Paige (Chy.), 440. *Walker v. Walker*, 9 Wal., 743. *Keller v. Keller*, 45 Md., 269. *Wicks v. Clarke*, 3 Ed. Ch., 60.

3. The fact that the husband has managed the separate estate of the wife is no evidence of bad faith or intention to reduce the estate to his possession. *Knapp v. Smith*, 27 N. Y., 277. *Caswell v. Hill*, 47 N. H., 407. It is undisputed that Mrs. B. knew nothing of her husband's debts, but was steadily insisting upon the fulfillment of a contract, and the securing to her in a permanent form the results of her hard labor. If any fraud was intended by him, certainly she was not a party to it. Both must have been parties to the fraud in order to affect her. *Tootle v. Dunn*, 6 Neb., 93. *Hedman v. Anderson*, 6 Neb., 392. *Gridley v. Bingham*, 51 Ill., 153. *Snow v. Paine*, 114 Mass., 520. The mere non-record of the deed is no evidence of fraud. *Morris v. Ziegler*, 71 Pa. St., 450. *Galway v. Malchow*, 7 Neb., 285.

MAXWELL, CH. J.

In August, 1866, Wallace R. Bartlett came to Omaha, bringing with him about $1,000 in money. In the latter part of that year his wife came, bringing with her about $5,000 of her own money. This money was delivered to the husband under an agreement that he was to invest it in real estate for her benefit until such time as they could determine on a suitable location for a home. In 1869, Bartlett, in connection with seven others, purchased forty acres of land adjoining the city of Omaha, for the sum of $16,000, the deed being made to Bartlett, who conveyed to each of his co-purchasers the portion of the tract to which he was entitled. This tract of land was laid off into an addition to the city of Omaha, known as Bartlett's addition, and lots 3 and 14, costing $2,000, were selected as a site for the family residence, the legal title at that time being in Bartlett. Of the purchase money one thousand dollars was

derived from the sale of real estate held by the wife in her own name, and the second thousand appears to have been derived from the sale of property purchased with the wife's money, but the title to which had been taken in the name of the husband. In May, 1874, Bartlett made a quit-claim deed for the property in question directly to his wife, but the deed was not recorded until February, 1875. About the time of the execution of the deed in question, Bartlett commenced the erection of a residence on one of the lots in question, costing with the improvements about $8,000. In August of that year, he, with his family, moved into the house, although it was not fully completed until the next spring. At the February term, 1876, of the district court of Douglas county, the plaintiff recovered a judgment against Bartlett, Watson B. Smith, and Joel T. Griffin for the sum of $2,326, with interest at twelve per cent per annum, and $81.25 attorneys' fees. An execution having been returned unsatisfied, the plaintiff instituted proceedings by a creditor's bill against Bartlett and wife, alleging that the funds expended in the erection of the house were the funds of Bartlett, and that Sarah F. Bartlett, his wife, had no interest therein whatever. And that "during the period of expenditure the said Wallace R. Bartlett was insolvent and unable to pay his debts as they matured; and he so expended the said sum upon the said property, the title whereof was in his said wife, for the purpose of placing it beyond the reach of his creditors, etc.," and praying for a sale of the premises, etc. The defendants answered the petition of the plaintiff, alleging that the original indebtedness upon which the judgment was recovered was incurred on the tenth day of June, 1874, Bartlett being merely surety on the note; that the note was renewed a number of times, the last renewal being the fifteenth day of March, 1875. The

answer also alleges that the money expended in purchasing the lots in question belonged to Sarah F. Bartlett, and that lots 3 and 4 in block 251, in the city of Omaha, which had been occupied as a home for the family for a time, were sold in the spring of 1874 for the sum of $3,160, and the proceeds applied in improvements upon the lots in question, "together with other moneys belonging to the defendant, Sarah F. Bartlett." On the trial of the cause in the court below, a decree was rendered in favor of Mrs. Bartlett for the sum of $7,000, and declaring the same a lien upon the premises, subject to a prior mortgage, and subjecting the remainder of the property to the payment of plaintiff's judgment. The plaintiff appeals to this court.

Where it is clearly shown that a husband has his wife's money, holding it in trust for her, and the proof is clear that it is a *bona fide* transaction, she may become his creditor. *Monteith v. Bax*, 4 Neb., 176. *Aultman v. Obermeyer*, 6 Id., 260. And a wife may appoint her husband her agent to manage her separate property, and will be bound by his acts when within the scope of his authority. *McMurtry v. Brown*, 6 Neb., 377.

In the case at bar, the money was placed in the husband's hands by the wife for the express purpose of investing it in real estate for her, until such time as a suitable location for a home could be selected. This contract, when the funds were her separate property, in equity she had a right to make, even before the passage of the act of 1871 in relation to the rights of married women, notwithstanding the rule of the common law that her personal estate, when reduced to possession by the husband, becomes his personal property, because it is a rule of equity that if a husband, after marriage, contract with his wife that she shall separately possess and enjoy her separate estate, the contract will be upheld in equity. Story's Equity Juris., sec.

1372, and cases cited. This is not a case where the wife loaned money belonging to her separate estate to her husband upon his promising to repay it, but where she constitutes her husband her agent to invest the money until such time as a suitable location for a home could be found. Were these investments productive of profit—if so, to what an amount? We are not informed. The proof shows that the property purchased from Redick, which, with the building, cost $4,000, was sold several months afterwards for the same, thereby realizing no profit whatever.

Also that the property purchased from McCracken for $4,500, was afterwards sold at a considerable loss. Under these circumstances, in the absence of testimony showing the purchases and sales, it will not be presumed that the investments were productive of profit. It is true Bartlett in his testimony swears that $7,000 of his wife's money was put into the house, but fails satisfactorily to explain from what sources the money was derived, while it is apparent from his testimony that her funds were mingled with his, and no separate account kept of matters pertaining to her separate estate, Bartlett's testimony upon that point being: "I retained her funds and kept them invested in a line of succession until we concluded to invest in a homestead, and kept them as distinct as I could in the way I was doing business." From other portions of his testimony it is apparent that no distinct account was kept. The burden of proof is on these defendants to show the amount of profits received from these investments. And mere allegations as to profits cannot be received where better evidence is at hand, namely the transactions upon which profits are claimed to have been made.

Transactions between husband and wife in relation to the transfer of property from him to her, by reason

of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must be clearly established that such transactions were made in good faith. *Aultman v. Obermeyer*, 6 Neb., 264. The reason is, that there is such a community of interest between husband and wife, that such transfers are often resorted to for the purpose of withdrawing the debtor's property from the reach of his creditors and preserving it for his own use. Therefore, in a contest between the wife and the creditors of her husband, there is a presumption against her which she must overcome by affirmative proof. *Seitz v. Mitchell*, 4 Otto, 583. The insolvency of Bartlett appears to have been caused by misfortune rather than by his own fault. But his property, even if it had been given to his wife during this period, would be liable for his debts. The decree of the court below will therefore be modified so as to give Sarah F. Bartlett a lien on the house and lots in question for the sum of $5,300, in place of $7,000, and in all other respects the decree of the court below is affirmed.

JUDGMENT ACCORDINGLY.

THE FIRST NATIONAL BANK OF OMAHA, PLAINTIFF IN ERROR, V. WALLACE R. BARTLETT, AND OTHERS, DEFENDANTS IN ERROR.

1. **Husband and Wife:** CREDITOR'S BILL AGAINST. Upon a creditor's bill being filed against B. and wife to subject certain real estate held by the wife in her own name to the payment of a judgment against the husband, B. and wife answered, alleging that said real estate was purchased with funds belonging to the separate estate of the wife: *Held*, that it constituted a good defense to the action.

2. **Practice:** ERROR. This being a proceeding in error, if the decree in favor of the wife was taken for too large a sum, the plaintiff should have filed a motion in the court below to correct it.

ERROR from the district court for Douglas county. The facts appear in the opinion.

Woolworth & Munger, for plaintiff in error.

George W. Ambrose, for defendant in error.

MAXWELL, CH. J.

This is a proceeding in error to reverse a judgment of the district court of Douglas county upon a creditor's bill filed by the plaintiff against Bartlett and wife, to subject certain real estate held in the wife's name to the payment of a judgment against Bartlett. The court rendered judgment in favor of the wife for $7,000, and declared the same a lien upon the property in question, subject to a prior mortgage held by Lucretia R. Steele. The errors assigned are:

1st. "That the facts set forth in the answer of Wallace R. Bartlett and Sarah F. Bartlett are insufficient to constitute a defense to said action, and to base the amount of the lien found due Sarah F. Bartlett by said judgment and decree."

2d. "That the court erred in decreeing that the lien of the defendant Lucretia R. Steele be first paid."

The answer, among other things, alleges in substance that the lots were purchased and the house erected with money of the wife, and states particularly from what source a portion of the money was derived. This being the case, it constitutes a defense to the plaintiff's cause of action, as the separate property of the wife is not liable for the husband's debts.

This being a proceeding in error, if the decree is for too large a sum the plaintiff should have filed a mo-

tion in the court below to correct it. The ruling of the court upon the motion could then have been reviewed. This has been the uniform practice of the court in proceedings of this kind.

As to the second assignment of error, it is sufficient to say, that the plaintiff's petition alleges that such a mortgage was executed on lot three on the seventh day of July, 1871, to secure the sum of $1,650, and that the same has been assigned to Lucretia R. Steele. There is therefore no error in the record of which the plaintiff can complain.

JUDGMENT AFFIRMED.

PETER E. ILER, TRUSTEE, APPELLANT, v. S. B. COLSON AND OTHERS, APPELLEES.

Pleadings: INJUNCTION TO RESTRAIN EXECUTION OF TAX DEED AT SUIT OF PURCHASER AT SUBSEQUENT JUDICIAL SALE: WHAT MUST BE ALLEGED. Action by the purchaser of real estate, under a foreclosure sale to enjoin the execution of a tax deed about to be made by the county treasurer, in pursuance of a sale for taxes made prior to plaintiff's purchase, on the sole ground that the mortgagors "were seized and possessed of personal property sufficient to pay the taxes due on said land." *Held*, 1st, That even if the plaintiff could raise this question, there being no allegation to the effect that the personal property was within the jurisdiction of the treasurer, this was a fatal defect in the petition; 2d, That the plaintiff, being a purchaser at judicial sale, he took the land subject to the unpaid taxes and assessments, and whether the tax sale was valid or not, the taxes themselves, in either event, were a legal incumbrance, subject to which the plaintiff took his title, and that he was entitled to the equitable interference of the court only on condition that he offers to do equity, by tendering or offering to pay the full amount of taxes justly due.

APPEAL from the district court of Dodge county.

Carrigan & Osborn, for appellant.

It is the universal rule of law, that where coercive measures become necessary for the collection of the revenues, they shall be first directed to personalty, and the real estate on which the tax is imposed shall not be resorted to until the personal property is exhausted; and the duties of the officers in the collection of the revenue being prescribed in direct and positive terms, all other modes are excluded. *Sioux City and Pacific R. R. Co. v. Washington Co.*, 3 Neb., 24. *Thacker v. Powell*, 6 Wheaton, 125. The above cases were cited with approval. *Johnson v. Hahn*, 4 Neb., 139. It may be contended that this case falls within the case of *Peet v. O'Brien*, 5 Neb., 369, where the case of *Johnson v. Hahn*, above quoted, was cited with approval, but asserts that the mortgagee took only the title of the mortgagor. Admit that, and still one of the incidents of that title was freedom from interference by the revenue officer; but the case of *Hallenbeck v. Hahn* intimates, in very strong language, that the mortgagee would be protected where the mortgagor would not, for the reason that the mortgagor owes a duty to the commonwealth, which should be discharged before he could claim the interference of a court of equity. No such personal obligation rests on the mortgagee, and he for that reason would stand in a better attitude before an equitable tribunal.

W. A. Marlow, for appellees.

The plaintiff purchased this property under the decree of the court. He made the purchase subject to all liens existing against the land at that time. *Hibbard & Spencer v. Weil & Kahn*, 5 Neb., 41. *Vaughn v. Clark & French*, 5 Neb., 258.

The court says in *Peet v. O'Brien*, 5 Neb., 361, "That a mortgagee must protect his mortgage security by the discharge of all taxes lawfully assessed upon the land." This the plaintiff failed to do. It certainly will not be claimed that the property was not subject to taxation. It is said in the petition that it was illegally assessed, in what manner we don't know. When Bowmans failed to pay the taxes on this property it was the duty of the plaintiff to do so, if he desired to protect his security. Bowmans might complain if they were in a position to do so. The plaintiff asks to perpetually enjoin the treasurer from giving a deed to Tower, and that the board of county commissioners be required to pay the taxes on said property. The purchaser at tax sale loses his lien on the land as soon as the right to redeem has expired. The owner of the property enjoining the delivery of the deed must deposit with the treasurer the amount paid by the purchaser, and interest, before he can have any standing in court. This has not been done. Sec. 106, Session Laws of 1869, 215. *Peet v. O'Brien*, 5 Neb., 360. *Gillet v. Webster*, 15 Ohio, 623.

LAKE, J.

Does the petition state a cause of action? This is the question we are called upon to decide. The district court held, on demurrer, that it did not, from which judgment the plaintiff brought the case to this court by appeal. The object of the petition is to enjoin the treasurer of Dodge county from executing the usual tax deed to the purchaser of certain lands sold for delinquent taxes.

It is shown by the petition that the plaintiff purchased the lands in question under a decree of foreclosure, entered at the October term of the district court, 1871, on a mortgage executed to himself and

others by William G. and James L. Bowman, on the seventh day of November, 1870. The date of the purchase, under the foreclosure sale, is not given, but it is evident that it was some time after the treasurer had advertised and sold the premises for the taxes delinquent thereon for the years 1869 and 1870, and which had not been paid. This sale by the treasurer was made on the first day of November, 1871.

The plaintiff asks that this tax sale be declared void, and the treasurer enjoined from executing a deed to the purchaser, for the sole reason that the mortgagors had personal property out of which the taxes might have been collected had the treasurer done his duty under the law. The allegation of the petition on this point is as follows: "And your petitioner further shows that during the said years, and after the first day of May of each year, and particularly after the first day of May, 1871, the said William G. Bowman and James L. Bowman, the parties against whom the tax was charged, were seized and possessed of personal property sufficient to pay the taxes due on said land."

As will be apparent on a moment's reflection, this allegation is wholly inadequate to avoid the tax sale, even if the plaintiff were in a situation to entitle him to the benefit of the fact on which he relies. The utmost that it establishes is, that at some time after the first day of May, in the years 1870 and 1871, and while the taxes in question were delinquent, the mortgagors had personal property sufficient to pay them. But there is a total want of allegation to show that on the first day of November, 1871, when the tax sale took place, or at the time of bringing this action, those parties were possessed of any personal property whatever. But this is not all. It is not shown that any of the personal estate said to have been owned by the mortgagors, and out of which the plaintiff contends the

taxes ought to have been collected, was at any time within Dodge county, and where it could have been seized by the treasurer. Indeed, for aught that is alleged, the Bowmans, and all of their personalty, may have been in some other state, and entirely beyond the reach of our laws. In these particulars this petition is fatally defective, and would be so even if the plaintiff held the same relation to these tax proceedings as the Bowmans would have done had they continued to be the owners of the land.

When the aid of a court of equity is sought as against a sale of land for taxes, on the ground of failure to collect them out of personal property, the plaintiff must place himself in an attitude to do such equity as may be adjudged proper, as a condition precedent to the relief granted. It is not enough to allege simply that by doing his duty the treasurer might have made the collection, without resorting to a sale of realty; but, in addition to this, the plaintiff must either show sufficient of personalty subject to seizure to satisfy the tax in case the sale is set aside, or in lieu thereof offer to pay the full amount justly due for the tax, penalty, and interest.

But there is still another and more radical objection to this petition, one which challenges the right of the plaintiff to any relief as against this tax sale, except upon a conditional offer to pay the full amount of the taxes, penalty, and interest due thereon.

It is true the petition charges the taxes against the land to be void, but this is merely a conclusion of the pleader, having no support whatever in any allegation of fact. It is evident that no reliance was placed upon this conclusion, inasmuch as no mention is made of it in the appellant's brief. Regarding the taxes therefore as valid, what is the attitude of the plaintiff as to the sale of the premises to satisfy them?

As we have before shown, the plaintiff purchased subsequent to the sale for these taxes. Being a purchaser at judicial sale, he took the land subject to whatever valid incumbrances rested upon it at the time of his purchase, on account of unpaid taxes or assessments. *Vaughn v. Clark*, 5 Neb., 238. And whether the treasurer's sale was valid or not, the levy being valid, the taxes were, in either event, a legal incumbrance on the land, subject to which the plaintiff took his title. If he desires the equitable interference of the court, as against this sale, he can have it only on condition that he first offers to do equity by tendering, or offering to pay, the full amount of taxes justly due. *Hellenbeck v. Hahn*, 2 Neb., 377.

JUDGMENT AFFIRMED.

WILLIAM KLEFFEL, PLAINTIFF IN ERROR, v. FRANK W. BULLOCK, DEFENDANT IN ERROR.

1. **Practice**: OFFER TO CONFESS JUDGMENT: IT NEED NOT BE RENEWED ON APPEAL. An offer to confess judgment, duly made in the court where the action is brought, under sec. 1004 of the code of civil procedure, need not be renewed in the appellate court in order to make it available to the party making it on final judgment.

2. **Infancy**: DISABILITIES OF. By the legislation in this state, all the disabilities of infancy, as they exist by the common law, are fully recognised.

3. ———: INFANT NOT LIABLE TO A JUDGMENT FOR COSTS. In this state, the action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor.

4. ———: ———. Nor is he liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if, on reaching his majority, at the first opportunity he disclaims all benefit from the proceeding, and refuses to proceed further.

ERROR from the district court of Dodge county. The facts are given in the opinion.

E. F. Gray and W. A. Marlow, for plaintiff in error.

The proceedings in the case were not nullities, and the defendant in error having invoked the jurisdiction of the court, concealing the fact of his minority until after verdict, could not then avoid the consequence of refusing the offer of judgment. The irregularity was caused by the act and concealment of the defendant in error himself; it was his own wrong that he begun his action, appearing by attorney, instead of by guardian or next friend; and he might have asked for and obtained leave to amend, by having a guardian or next friend appointed at any time before or after verdict, and, if thought necessary, the court might compel such amendment. *Bartlett v. Batts*, 14 Ga., 539. *Bixter v. Taylor*, 3 B. Mon (Ky.), 362. *Fitch v. Fitch*, 18 Wend., 513. *Fish v. Ferris*, 3 E. D. Smith, 567. *Rutter v. Packhoffer*, 9 Bosw., 638. *Wolford v. Oakley*, 43 Pow. Pr., 118.

But the appearance of the defendant in error, after his alleged majority, we think avoided the necessity for the amendment, if, indeed, any such necessity ever existed.

And we submit that the question of the minority of defendant in error, suggested at the time and in the manner it was, should not have been entertained at all by the court where an infant plaintiff appears by attorney, and not by guardian or next friend. It is too late after verdict for either party to move to set aside the proceedings; in such case, neither party is entitled to a non-suit or dismissal of the action. *Adthorp v. Backus*, Kirby's (Coun.) R., 407. *Bartlett v. Batts*, 14 Ga., 539. *Fellows & Hawes v. Nevers*, 18 Wend., 563. *Schemer-*

horn v. Jenkins, 7 Johnson, 373. *Smith v. Van Houten*, 4 Halst. (N. J.), 381. *Drago v. Moses*, 1 Spear (S. C.), 212. *Blood v. Harrington*, 8 Pick, 552. *Bernecker v. Miller*, 44 Mo., 102. *King v. King*, 37 Ga., 205.

J. W. Perkins and Marshall & Sterett, for defendant in error.

No costs were recoverable by the plaintiff or defendant at common law. Jacob's Law Dictionary; title, Costs. 2d Institutes, 288. Costs are therefore a matter of statutory regulation and creation. Our statute evidently intends to bind the guardian or next friend for costs in an action commenced by an infant, and not to bind the infant. Gen Stat., 529, sec. 37. The statute seems imperative that the action of an infant must be brought by a guardian or next friend. Gen. Stat., 529, sec. 36. For aught that appears in this record, the defendant, at the time of this litigation, knew of the infancy of the plaintiff, and that he was seeking to take advantage of his youth and inexperience by involving him in a large bill of costs; and for that reason he did not want a guardian or next friend to protect the interests of the infant plaintiff. The law knows no difference between infants of tender age and of mature years. *Morgan v. Thorne*, 7 M. & W., 400. Tyler's Infancy, 197. An infant plaintiff or complainant is not liable for costs, but the prochein amy is. Tyler's Infancy, 207 and 208. *Sprawle v. Botts*, 5 J. J. Marsh, 162. *Warrington v. Crane*, 1 American Leading Cases, 267. Judgment against an infant without the appointment of a guardian *ad litem* is erroneous. 1 American Leading Cases, 265 and 249. It is a maxim of the law that no laches or neglect is imputable to an infant *durante minoritate*, because he is not supposed to be cognisant of his rights, nor capable of enforcing them. Tyler's In-

fancy, 159. 5 Bacon's Abridgment, 110 (9). The fact that one dealing with an infant supposed him to be of full age, or that the infant represented himself to be of age, or that the infant was in business and in the habit of contracting for himself, will make no difference in the infant's liability on his contract. It will not be enforced against his will. 1 American Leading Cases, 307. Tyler's Infancy, 57. Now in regard to the argument of plaintiff in error, we have to say that Bullock, in ignorance of his disability of infancy, commenced this action. In the absence of proof, we think this would be the presumption in favor of the infant. At the first opportunity, after coming of age, he disclaims all benefit of the verdict, and resists a judgment for costs. For this purpose only he puts in a special appearance, and did not submit himself to the jurisdiction of the court below, as appears from the record in the case. This case was, no doubt, irregularly commenced, no guardian or next friend having appeared or been appointed for the infant plaintiff. At common law this irregularity might perhaps have been cured by the appointment of such guardian or next friend, on motion of either party before the termination of the suit. We are not prepared to admit that such appointment could be made under our statute. If, however, the defendant allows the case to proceed to verdict without moving for such appointment, he cannot after verdict take advantage of such irregularity.

LAKE, J.

The defendant in error commenced an action in the county court for Dodge county against the plaintiff in error, to recover on an account for goods furnished and labor performed, a balance claimed to be due of sixty-six dollars and ninety cents. Immediately upon

being summoned, the plaintiff in error offered to confess a judgment for the sum of forty dollars, together with the costs then accrued, as provided in sec. 1004 of the code of civil procedure, by which it is enacted that: "If the defendant, at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he cannot recover costs accrued after the offer; but costs must be adjudged against him. But the offer, and failure to accept it, cannot be given in evidence to affect the recovery otherwise than as to costs as above provided." The recovery being less than this offer, the defendant in error had judgment in his favor for the amount of the verdict and costs before the filing of the offer, but against him for all costs made subsequently to that time.

From this judgment the defendant in error appealed to the district court, when the verdict in his favor was for a still smaller amount. Thereupon, on the second day of April, 1878, he filed a motion for judgment on the verdict, and for his costs, notwithstanding the said offer to confess, and at the same time proved to the court the fact, then for the first time brought to its attention, that he was still a minor, and would not attain his majority until the sixth day of September of that year. On the seventh of October, while this motion was still pending, and before any further step had been taken in the case, the defendant in error, by special appearance, disclaimed all right to the verdict or benefit under it, and insisted "on his minority, as a bar to any judgment against him for any costs in this case." Acting upon this disclaimer, and the unquestioned minority of the defendant in error, as stated,

the court dismissed the case generally, and, against the demand of the plaintiff in error, refused to render judgment in his favor for costs. This refusal is the ground of the alleged error, and to correct which the case is brought to this court.

The first question to be disposed of is one of practice, raised by defendant in error in his brief. He contends that, in order to make an offer to confess judgment under the statute available to the party making it on appeal, the offer must be renewed in the appellate court. We cannot so hold. The offer, once properly entered, becomes a part of the record of the case, and, if not withdrawn, is just as available on final judgment in the appellate court as it could have been in the court where made had no appeal been taken.

The next and main question presented by the record is much more difficult, and altogether novel in this court. By our legislation, all the disabilities of infants, as they exist at common law, are fully recognised. Indeed, we are not aware of any statute in this state modifying them in any respect whatever. Accordingly, we find that section thirty-six of the code of civil procedure provides that: "The action of an infant must be brought by his guardian or next friend." And even when brought by his next friend, if it be discovered that the action is not for the infant's benefit, the court, on its own motion, may dismiss it. Our practice in this respect seems to be based upon the unquestionable presumption of law that, until a person arrives at full age, no matter what his mental attainments and experience in life may be, he has not sufficient capacity to decide for himself whether the action would probably benefit him, or whether, under all the circumstances, it ought to be brought.

Observing still further the common law respecting

suits by infants, our code, section thirty-seven, provides that: "The guardian or next friend is liable for the costs of the action brought by him," thus implying very clearly that even although the infant has had the benefit of the judgment of a person of mature years as to the propriety of bringing the action, yet if it result disastrously to him, he shall not be liable to a judgment for costs. Indeed, one of the chief objects in requiring a next friend seems to be, as was said in *Heft et al. v. McGill et al.*, 3 Penn. State, 256, "to supply the want of capacity in the infant, to afford in his own person a party on the record responsible for costs." And we find that, independently of statutory regulation, the rule seems to be that no judgment for costs can be rendered against an infant plaintiff. *Bouche v. Ryan*, 3 Blackf., 472. *Sproule v. Botts*, 5 J. J. Marshall, 162. But in Massachusetts, under a peculiar statute, it is held that an infant plaintiff, and not his *prochein amy*, is liable to judgment for costs. In one case, Wilde, J., remarked: "The defendants claim costs against the *prochein amy*, on the grounds that the plaintiff, being an infant, is not liable therefor; and this claim seems to be supported by the English practice. But our practice seems to be different, and is conformable to our statutes regulating the recovery of costs." In that state, in order to make the *prochein amy* liable for costs, he must indorse the writ therefor. *Smith v. Floyd*, 1 Pick., 275. *Crandall v. Slaid and wife*, 11 Metc., 288. We have no statute similar to that of Massachusetts; but, as before shown, our entire legislation seems to harmonize completely with the practice under the common law, both in England and in this country.

Now it would seem to be a reasonable conclusion, from what we have already shown, that had judgment been rendered against the defendant in error while he

was still a minor, it would have been erroneous. If an infant plaintiff, who has had the advice of a guardian or next friend as to the propriety of commencing his action, cannot be required to pay costs when defeated, upon what principle can he be adjudged to pay them when he has been so indiscreet as to proceed without such aid, relying alone upon his own immature judgment in the matter? We know of none.

It may seem a hardship on the plaintiff in error to be put to the expense of defending against what was proven to be an unjust demand, without recourse finally against the claimant. But this result he could have successfully guarded against by pleading the infancy of the plaintiff in the action in abatement at the outset, by which he would either have brought into the case a responsible "next friend" who would have been liable for costs, or obtained a dismissal of the action without further trouble or expense.

It only remains now to inquire whether, by reason of the defendant in error having arrived at his majority before the termination of the action, a judgment against him for costs would have been proper.

From analogy to the cases of the ratification of the voidable acts of infants after becoming of full age, we think it clear that if, after reaching his majority, he had either assented to judgment on the verdict or taken a single step in the further prosecution of the action, all the privileges of infancy would thereby have been fully waived, and he would have been bound by the action of the court. But the record shows that, at the very first opportunity after he reached the age of twenty-one years, he disclaimed all benefit from what had been done in the case, and in the most unequivocal manner denied the jurisdiction of the court to proceed further. Our opinion is that a judgment against the defendant in error, under these circu-

stances, would be equally as erroneous as if it had been rendered while he was yet an infant.

JUDGMENT AFFIRMED.

LEMUEL A. HUFFMAN, PLAINTIFF IN ERROR, V. AUGUST KOPPELKOM AND OTHERS, PLAINTIFFS IN ERROR.

1. **Sheriff's Official Bond:** IRREGULARITIES IN, DO NOT VITIATE. The official bond of a sheriff is not void by reason of its being given to the state, instead of the proper county, as obligee. This is but an irregularity which in nowise affects the liability of the sheriff or his sureties, in an action thereon for damage occasioned by official misconduct.

2. ———: FOR WHAT ACTS OF SHERIFF HIS SURETIES ARE LIABLE. The sureties on such bond are liable for acts of the sheriff done *virtute officii*, but not for acts done *colore officii*.

3. **Pleadings:** PETITION: DEMURRER. Where, in an action on such bond, the petition, by suitable averments, shows affirmatively that the act complained of was done by the sheriff while in the performance of an official duty, it is not subject to demurrer because of an additional averment that it was done "under color of his said office." These latter words are but a conclusion not warranted by the facts stated, and will be rejected as surplusage.

ACTION on an official bond of the defendant in error, sheriff for Dodge county, to recover for a personal injury. Demurrer to the petition heard and sustained by the district court of Dodge county, and cause removed here by petition in error.

Marshall & Sterett, for plaintiff in error.

1. That an officer is liable for his acts done *colore officii* we think is settled by the following authorities: *Kane v. U. P. R. R.*, 5 Neb., 107–8. *People v. Schuyler*, 4 Com., 173. *Ohio v. Jennings*, 4 Ohio S., 419.

2. A sheriff and his sureties are liable on his official bond for trespasses committed by him in attempting to discharge his duty as an officer. *Charles v. Haskins*, 11 Iowa, 329. *People v. Schuyler*, 4 Com., 173.

3. Although the bond in question may be defective as a statutory bond, it is good as a common law bond; and if good as a common law bond, it is sufficient to maintain this action. A bond not good as a statutory bond, being voluntarily given, but not against the policy of the law, is good as a common law bond. *Lane v. Casey*, 1 Metc. (Ky.), 410. *Rowlet v. Eubank*, 1 Bush., 477. *Gathwright v. Galloway Co.*, 10 Mo., 663. *Richardson v. People*, 85 Ill., 495. *Coons v. People*, 76 Ill., 383. *People v. Johr*, 22 Mich., 461. *Supervisors v. Coffenbury*, 1 Mich., 355. *Archer v. Heart*, 5 Florida, 234. *Howard v. Brown*, 21 Maine, 385. *State v. Bowman*, 10 Ohio, 445. *Clausor v. Charleton*, 11 Chicago L. News, 68. *Teevis v. Randall*, 6 Cal., 632. A bond is not void because it does not in all respects conform to the statute under which it was taken. It is absolutely void only when the statute declares it void.

W. A. Gray, W. A. Marlow, and E. F. Gray, for defendants in error.

1. That the conditions of an official bond are to be strictly construed, and that obligors are liable only when a case is brought within the very terms and scope of their undertaking, is a rule of law so often passed upon, and so clearly established, as to no longer be a subject for argument. *People v. Spraker*, 18 Johns. (N. Y.), 389. *Miller v. Stewart*, 9 Wheaton, 681. *Legett v. Humphrey*, 21 How., 76. *Scott v. State*, 46 Ind., 203.

2. The only official duty of the defendant, Koppel-

kom, that is shown in the petition was that of arresting the escaped prisoner Charles Clark, or executing a writ of *mittimus* according to law. Could the wrongful and unlawful seizing and laying hold of and shooting the plaintiff be called a breach of either of these duties? Was it a breach of defendant's duty to arrest Clark? or was it an unlawful execution of the writ? or was it any execution at all of the writ? We think it was not, and we find that our thoughts on the subject agree with the opinions of the counsel for the plaintiff, as they are to be gathered from the petition. It is not stated anywhere in the petition that defendant acted under the authority or by virtue of any legal process, but, on the contrary, it is stated that "he claimed to so act;" that he made the arrest "under color of his office;" and that "he had no manner of right or authority of law to arrest, lay hold of, shoot, or in any way interfere with or injure the plaintiff." If these allegations show anything, they show that the act complained of was not an official act, but a mere personal trespass, and it cannot be contended that the sureties are liable for mere personal trespasses of the principal in an official bond.

3. The true distinction is between an act done *colore officii* and *virtute officii*. In the former case the sheriff is not protected by the statute, where the act is of such a nature that his office gives him no authority to do it; but where in doing an act within the limits of his authority, he exercises that authority improperly, or abuses the confidence which the law reposes in him—to such cases the statute extends. *Griffith v. Walker*, 1 Wils., 336. *Seeley v. Birdsall*, 15 Johns., 267. An action of trespass will not lie for an act committed in an official capacity. An act done under color of office is a mere personal trespass, the sureties on the official bond not being liable. *Morris v. Van-*

boast, 19 Wend., 283. *State v. Mann*, 21 Wis., 693. *Gerber v. Ackley*, 37 Wis., 43. *Ex-parte Reed*, 4 Hill, 572. *State v. Conover*, 28 N. J. Law, 224. *Sample v. Davis*, 4 G. Greene., 117. *Schloss v. White*, 16 Cal., 66. *State v. Brown*, 11 Ired., 141. *Holt v. McLean*, 75 N. C., 347. *Governor v. Perrine*, 23 Ala., 807.

LAKE, J.

The action below was brought against the principal and sureties in the official bond of August Koppelkom, sheriff of Dodge county. A general demurrer to the petition was sustained, and the case is brought to this court for review by petition in error. In support of the demurrer it is urged:

First. That no action can be maintained upon this bond, for the reason that the obligee named therein is the State of Nebraska when it should have been Dodge county. "All bonds by county and precinct officers shall be given to the county in which said officers are elected respectively." Sec. 5, chap. 6, Gen. Stat. But this objection cannot be sustained. The obligee in an official bond is not necessarily, nor usually, the party interested therein in actions upon it. The bond being really for the use and benefit of whoever is injured in consequence of the unfaithful performance of duty by the officer, the obligee is really but a nominal party. And whatever may be the name of this nominal party, the action, under our practice, must be in the name of the real party in interest, although not mentioned in the bond.

As a protection to parties interested in official securities, it is wisely provided in section ten of the same chapter of the statutes, that: "No official bond shall be rendered void by reason of any informality or irregularity in its execution, etc." We are of the opinion

that the mistake in this bond of naming the state, instead of the county as the obligee, falls within the operation of this provision of the law, and is cured by it.

Second. The second objection to this petition, and the one most relied on in this argument is, that an action can be maintained on an official bond only for injuries done *virtute officii*, and not for acts done *colore officii* merely. And so we believe the law to be according to the best authorities. But, admitting the law to be as claimed by counsel for the defendants, still we think the petition states a cause of action. It is true that by one allegation the pleader says the act complained of was done by the sheriff "under color of his said office," but on examination of the petition we find facts alleged which show most positively that it was done *virtute officii.* The petition, after reciting that one Charles Clark had been lawfully committed to the jail of Dodge county, of which the said Koppelkom, as such sheriff, was the jailor, and that while so in custody, and held by a mittimus in due form of law, the said Clark had escaped, and was then at large, subject to arrest by said sheriff, proceeds as follows; "And the plaintiff further avers that the said Koppelkom, being sheriff as aforesaid, and having then and there the said writ of mittimus as aforesaid, did not execute said writ according to law, but on the contrary thereof, to-wit.: On the seventh day of July, 1878, at and within the said county of Dodge, as such sheriff, acting under said writ of mittimus and under color of his said office, did carelessly, unfaithfully, forcibly, and wrongfully, and unlawfully and violently seize, arrest, and lay hold of the said plaintiff, and did then and there shoot, wound, bruise, and break the left leg of the said plaintiff," etc.

From this quotation it will be seen that the words,

"*and under color of his said office*," are not warranted from the facts distinctly alleged, and may be rejected as surplusage. We are of the opinion that the facts alleged constitute a cause of action. The judgment is therefore reversed, the demurrer overruled, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JOHN A. CREIGHTON, ADMINISTRATOR OF THE ESTATE OF EDWARD CREIGHTON, DECEASED, PLAINTIFF IN ERROR, V. MURPHY, NEAL, & CO., DEFENDANTS IN ERROR.

Estates of Decedents: FOREIGN JUDGMENT. In 1874 M. commenced an action in Iowa against C., who appeared and filed an answer denying all the facts stated in the petition. Soon afterwards C. died, having his domicile in Nebraska. J. A. C. was appointed administrator in this state, and on his application was appointed administrator in Iowa, and appeared and answered in the action. Judgment was rendered against him as administrator; which was filed in Nebraska as a claim against the estate, and was allowed. *Held*, that the judgment was final and conclusive, and a charge upon the estate.

ERROR from the district court for Douglas county. The opinion states the case.

Woolworth & Munger, for plaintiff in error.

I. At the common law a partnership debt cannot be collected from the estate of a deceased partner, unless the survivor is shown to be insolvent.

1. The assets of a partnership must be applied to pay partnership debts, and the estate of an individual member thereof must be applied to pay his debts. Partnership debts cannot share in the estate of the

member until all his personal debts have been paid, and his personal debts cannot share in the partnership assets until all its debts have been paid. *Filley v. Phelps*, 18 Conn., 294. *United States v. Hack*, 8 Peters, 275. *Murril v. Neil*, 8 How., 414.

2. The death of a partner invests the survivors with the exclusive right of possession and management of the whole partnership property, free from any interference therewith by his representatives. Having the assets, and being charged with the administration, their duty is to pay the partnership debts to the full extent of the means placed by the law in their hands.

3. Accordingly, actions for the recovery of partnership debts can only be maintained against the survivors; no proceeding for the purpose can be maintained against the representatives of the deceased partner, at least not until the remedies against the survivors have been exhausted, or have been shown to be unavailing. *Lange v. Keppele*, 1 Binn., 123. *Wilder v. Keeler*, 3 Paige, 167. *Sturges v. Beach*, 1 Conn., 507. *Alsop v. Mather*, 8 Ib., 554. *Voorhees v. Child's Executor*, 17 N. Y., 354. *Pope v. Cole*, 55 Ib., 124. *Hubble v. Perrin*, 3 Ohio, 287. *The Trustees, etc., v. Lawrence*, 11 Paige, 80. *S. C. on Appeal*, 2 Denio, 577. *Troy, &c., Factory v. Winslow*, 11 Blatch., 513. *Bloodgood v. Bruen*, 8 N. Y., 362. *Van Reimsdyke v. Kane*, 1 Gal., 371.

II. This rule of the common law has not been changed by the statute of Nebraska. The provision of the statute invoked in this behalf, in support of the decisions of the county and district courts, is not applicable to partnership contracts; and if it were, does not justify an allowance of the claim and order for its payment. A partnership debt does not arise on a joint contract in the sense in which those terms are used in the statute. Parsons on Part., sec. 356.

John D. Howe (*Mayne & Key* and *Sapp & Lyman* with him), for defendants in error.

I. The amended answer sets up nothing but what should have been pleaded and relied on in the original case. If the decedent, or the administrator, had any confidence in the matters now alleged herein, they should have insisted on them before judgment. It is now too late. The administrator was in privity in law with the decedent, and the judgment has the same effect as it would have had had E. Creighton survived the final judgment, and it had been rendered against him. (See 45 Ia., 179, where this case is reported, also case at p. 149.) And the judgment of a sister state is protected by peculiar sanctions. U. S. Const., art. IV., sec. 1. Act of Cong., 26th of May, 1790. *Stacy v. Thrasher*, 6 How. U. S., 44. *Dykes v. Woodhouse*, 3 Rand., 287. 3 Wash. C., C. 17. 16 Curtis, 596. *O'Hagen v. O'Hagen*, 14 Ia., 267–8, 16 Mass. 71. 1 Pet., 692.

II. The position of plaintiff in error—that actions for the recovery of partnership debts can only be maintained against the survivors—is unsound. Nor is it necessary to show that the survivors have been pursued to insolvency. Even the cases that he cites in support of his main proposition show that insolvency of the survivors may be shown at law. 17 N. Y., 354. 55 N. Y., 124. It is true that the rule relied on by counsel is supported by eminent authority. Where the question is an open one, it is difficult, not to say impossible, to see why it should be held to. A line of thoroughly reasoned cases holds the contrary rule. *Camp v. Grant*, 21 Conn., 41. Coll. on Part., secs. 584, 580, 623, 337 to 347, 68 to 76. Story's Part., sec. 379 n. secs., 363, 362, 377. *Allen v. Wells*, 22 Pi[illegible],

452–3–4. *Ex parte* Hayden, 1 Bro. C. C., 454. 17 Ves., 207. *Sparhawk v. Russell*, 10 Metc., 305, 307. 7 Smedes & M., 280. *Wilkinson v. Henderson*, 1 Myl. & Keene, 582–3. *Lammersley v. Lambert*, 2 J. Ch., 508–511. 3 Kent Com., 64 (4th ed.) *Belknap v. Abbott*, 11 Ohio, 411. *Belle v. Newman*, 5 Serg. & R., 78. *Findly v. Hosmer*, 2 Conn., 352.

MAXWELL, CH. J.

On the twenty-fifth day of January, 1874, the defendants in error commenced an action in the district court of Pottawattomie county, Iowa, against Edward Creighton to recover the sum of $2,800.23, with interest and costs. The action was founded on a breach of contract, the contract having been made in 1871 between the defendants in error and The Far West Freight Company, a copartnership of which Edward Creighton was a member. Personal service in Iowa was had upon Creighton, and in August, 1874, he filed an answer to the petition in said cause, denying all of the facts stated therein. On or about the fifth day of November, 1874, Edward Creighton died, being at that time a resident of this state. On the tenth day of that month the plaintiff was appointed special administrator of the estate, and on the twentieth day of March, 1875, he was appointed administrator of said estate by the probate court of Douglas county. On the sixteenth day of December, 1874, the plaintiff applied to the circuit court of Pottawattomie county, Iowa, asking to be appointed administrator of said estate, alleging as ground therefor the pendency of the above action. He was appointed such administrator, and on the eighteenth day of November, 1875, filed an answer denying the facts stated in the petition, and also denying the jurisdiction of the court. The district court sustained its jurisdiction,

which judgment was affirmed by the supreme court of that state. Final judgment was rendered against said plaintiff, administrator of said estate, in November, 1877, for the sum of $2,678.73, and costs, and said administrator was directed to pay the judgment, interest, and costs, out of the assets of the estate. A transcript of the judgment being filed in the county court of Douglas county was allowed as a claim against said estate. The plaintiff appealed to the district court of Douglas county. As cause why the claim should not be allowed, the plaintiff filed the following answer: "The Far West Freight Company was a copartnership doing business in this state and the territories west thereof, whereof the said intestate and Charles M. Ellias and James F. Aglar were the members. The said partnership was formed and commenced its business on or about the fifteenth day of December, 1869, and existed undissolved at the death of the said intestate, having large and valuable assets over and above its debts and liabilities, all of which, at the death of the said intestate, came to the hands of the said survivors, and have been administered by them as surviving partners of said co-partnership, and they, as such surviving partners, still have the same in their hands ready to be applied to the payment of the said debts; that the estate of the intestate remains unsettled in the county court of this county, its debts not yet all paid, and its assets not yet all collected; that during the life of the said intestate, an accounting was had between him and his said partners to a certain day, whereby it was ascertained and agreed that after the payment of all the debts of the said partnership, a large sum, to-wit, $3,000 and over, was justly coming to said intestate from said partnership after the payment of its debts; and the said survivors of the said intestate promised and agreed to pay all of said debts, and also

said sum so coming to said intestate, all of which matters were well known to the said claimants before they commenced the action in which they recovered the judgment aforesaid; that the claims whereon the said action and judgment were grounded accrued to the said claimants in the course of their dealing with the said partnership, and are justly chargeable against the assets thereof, and against the said survivors, and no proceedings in that behalf have been had by the said claimants; that they have asserted the said claims against the said estate of the said claimants, and not against the said survivors, in pursuance of an understanding and agreement with the said survivors in that behalf, in order thereby unduly and fraudulently to extort the said moneys from the said estate, and relieve the survivors and the said partnership assets thereof, or drive this defendant to protracted, exhaustive, and uncertain litigation." 2d. "The Union Pacific Railroad Company, whose principal office and place of business is in the city of Omaha, in said county, is justly indebted to said copartnership in a large sum of money, more than sufficient to answer the claims herein alleged." 3d. "The said administrator has heretofore, and more than two years ago, advertised for claims against said estate, and the time in that behalf has long since elapsed."

To this answer the defendants in error filed a general demurrer, which was sustained by the court, and the claim allowed, to which the plaintiff excepted, and brings the cause into this court by petition in error.

In the conclusion we have reached from our examination of the case, the only question necessary to be determined is, whether the judgment rendered in the district court of Pottawatomie county, Iowa, and affirmed by the supreme court of that state, is final and conclusive, and a charge upon the estate.

It is well settled that a grant of letters of administration in one state or country does not confer authority upon the administrator to collect the assets of the intestate in another state or country, because his power is limited to the jurisdiction from whence he derives his authority. The authority to administer upon assets found in another jurisdiction must be determined by the law of the place where they are situated. Story on Conflict of Laws, Sec. 514.

The reason is, that persons domiciled and dying in one country are often deeply indebted to foreign creditors living in another country where there are personal assets of the deceased. To permit the administrator to withdraw the assets from the foreign country without the payment of the debts would compel creditors to seek their remedy in the domicile of the principal administrator, which in many cases would be attended with serious inconvenience and expense. Id., 512. Hence no suit can be brought by or against an administrator in his official capacity in the courts of any other country than that from which he derives his authority. In the absence of statutory provisions to the contrary, if he desire to maintain or defend a suit in another state or country, letters of administration must be taken out in the state or country where the suit is to be brought or defended. Where different administrations are granted in different states or countries, that is deemed the principal administration which is granted in the domicile of the deceased, and any other administration which is granted in any other state or country is treated as ancillary merely, and is generally subordinate to the principal administration. Story Conf. Laws, Sec. 518.

The reason is, the final distribution of the effects of the deceased among the heirs and distributees is to be determined by the law of his domicile. Id.

It is said that where administrations are granted to different persons in different states they are so far independent of each other that a judgment against one will furnish no right of action against the other, to affect assets received by the latter by virtue of his own administration, because there is said to be no privity between him and the other administrator. *Stacy v. Thrasher*, 6 How., 44. *Brodie v. Beckley*, 2 Rawle, 431. *McLean v. Meek*, 18 How., 16.

The rule as to co-executors is different, because they derive the same privities from the same estate from the same will. *Goodale v. Tucker*, 13 How., 469.

The distinction between the powers of executors and administrators is more technical than real. The law of the domicile of the testator or intestate governs the title and distribution of all his personal estate wherever it is situated, and the mere fact that one derives his power to pay debts and make distribution of the estate from the will, and the other from the law, places them substantially in the same position. But whatever the rule may be as to judgments recovered against ancillary administrators upon claims filed *after* the death of the intestate, it cannot affect this case. Here an action was commenced against Edward Creighton in his lifetime, and personal service was had on him, and he appeared and filed an answer to the petition, denying the facts stated therein. He died before the trial, but the cause of action survived. Had the court not authority, upon the appointment of an administrator and the revivor of the action, to proceed with the case and render judgment? We think it had. The court had acquired jurisdiction and the death of the defendant did not oust it of that jurisdiction. The court therefore had authority to revive the action against the administrator and to hear and determine the rights of the parties, and such judgment is conclusive as to the matters in issue.

To require a plaintiff who has established his claim after a tedious and expensive litigation in Iowa to go through the same process in this state, would impose a burden upon him not required by the law.

The facts stated in the answer may be available in an action by the administrator against the surviving members of the partnership, but constitute no defense to this claim.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

EMMA J. SPAUN, PLAINTIFF IN ERROR, V. SAMUEL D. MERCER, DEFENDANT IN ERROR.

Husband and Wife: MEDICAL SERVICES: LIABILITY OF HUSBAND. For medical services bestowed upon the husband himself, or upon his wife and children, by whomsoever the attendance of the physician may have been requested, the husband, and not the wife, is ordinarily liable. Especially is this so where the credit was in the first instance given to the husband, and where there was no special agreement on the part of the wife to bind her separate estate.

ERROR from the district court for Douglas county. Judgment against plaintiff in error who was defendant below. The facts appear in the opinion.

George E. Pritchett, for plaintiff in error.

The judgment should be reversed, because the plaintiff in error was a married woman, and the services rendered to her and her children were necessaries, for which her husband was alone liable. Medical attendance and medicines are necessaries. Tyler on Infancy

and Coverture, page 357, and cases there cited. There can be no implied contract on the part of a married woman to pay for necessaries furnished to her, for the husband alone is liable for them. *Main v. Stephens*, 4 E. D. Smith, 86. And if the wife contract for necessaries, the law presumes the wife to be the agent of the husband. Tyler on Infancy and Coverture, page 334, and cases there cited. This is the rule of the common law, and has not been changed by the statute. The statute of 1871 has not limited the liability of a husband for necessaries furnished his family, nor created a liability on the part of the wife therefor. The statute only permits a married woman to make a contract in reference to her separate property. *Davis v. First Nat. Bank*, 5 Neb., 244. It may be claimed by the other side that plaintiff in error made an express promise to pay this account after the services were rendered. It is true Dr. Mercer says so and Mrs. Spaun denies it; but if she did so, the promise was without consideration and void, because it was a verbal promise to pay somebody else's debt, and because it was the promise of a married woman not in reference to her separate estate. *Watkins v. Halstead*, 2 Sand. Sup. Ct., 311. *Smith v. Allen*, 1 Lansing, 101. *Manchester v. Sahler*, 47 Barb., 155. *Kidd v. Conway*, 65 Barb., 158. *Chappin v. Harmon*, 24 La. Annual, 327.

John C. Cowin, for defendant in error.

LAKE, J.

The proceedings to be reviewed in this case were had in an action on an account for medical services, furnished by the defendant in error to various members of the family of one Jacob S. Spaun, who was at the time the husband of the plaintiff in error.

As to the facts of the case there is no material controversy. That the services were rendered was admitted on the trial. In the manner of the employment there was nothing at all unusual. Dr. Mercer was the family physician, and had been such for a considerable time before this particular account commenced. Some of the services sued for were in doctoring the husband, some the wife, and some the children; and they were requested indiscriminately by Spaun himself, his wife, his children, and his servants. It is not alleged, nor is it even pretended, that these services were given on the credit of the wife, or on any agreement that they were to be a charge upon her separate estate. Under these circumstances, it is clear that they constituted a valid debt against Jacob S. Spaun, and against him alone. They are classed under the head of "necessaries," for which the wife is not ordinarily liable.

And we think it is quite evident from the manner of entering the charges in his books of account, that it was Dr. Mercer's understanding that the services were chargeable to the husband alone, and that he must look to him for his pay. It appears that the several items were originally entered against J. S. Spaun, the husband, and that afterwards "Mrs." was prefixed, so as to make the heading read "Mrs. J. S. Spaun, Dr. etc." But while the original heading was entirely appropriate for the charges entered thereunder, as will be seen from the following items taken from the account, the changed one very clearly is not so. For instance:

May 18, one office call—	wife	$1.00
" 19, " "	baby	1.00
" 21, one visit,	wife	2.00
" 23, three visits,	wife	6.00
July 1, one visit,	child	2.00
" 3, "	self	2.00
" 11, "	self	2.00

There are many other items in the account of like import, but these are sufficient to show that Dr. Mercer regarded the husband as his debtor for the services, as he in fact was, and that the change in the name was the result of an afterthought, it may be, when the prospect of collecting it from that individual had become not the most flattering. At all events, the credit having been given to Jacob S. Spaun, it was his debt, and the plaintiff in error not having specially pledged her own individual property to pay it, she is not liable. *Davis v. The First National Bank of Cheyenne*, 5 Neb., 242.

This being a case wherein it is proper for this court to render such judgment as the court below ought to have rendered, the judgment of the district court is reversed, and the action dismissed at the costs of the defendant in error.

JUDGMENT ACCORDINGLY.

MONELL & LASHLEY, PLAINTIFFS IN ERROR, v. NANCY A. TERWILLIGER, DEFENDANT IN ERROR.

1. **Practice:** APPEALS FROM JUSTICES OF THE PEACE TO THE DISTRICT COURT: UNDERTAKING. By section 1007 of the code of civil procedure, the undertaking required, in case of an appeal from the judgment of a justice of the peace to the district court, must be given within ten days from the rendition of the judgment, and this time is to be computed according to the rule of section 895 of the same code, which excludes the first day and includes the last; and if the last day falls on Sunday, this is to be excluded also. In other words, if the tenth day falls on Sunday, the undertaking may be filed on the next succeeding Monday.

2. ———: ———: FILING OF TRANSCRIPT IN THE DISTRICT COURT: DISMISSAL OF APPEAL. The neglect to file a trans-

cript in the district court, in case of an appeal from the judgment of a justice of the peace, within the thirty days given by sec. 1008, as amended February 19th, 1877, is no ground for a dismissal of the appeal, unless continued beyond the second day of the next succeeding term.

ERROR from the district court for Lancaster county.

Lamb, Billingsley & Lambertson, for plaintiff in error, cited *Carothers v. Wheeler*, 1 Oregon, 194. *Paine v. Mason*, 7 Ohio State, 206. *Cock v. Bunn*, 6 Johns., 326. Code, sec. 892. Gen. Stat., 662.

L. C. Burr, for defendant in error.

The plaintiffs in error did not file their appeal bond *within ten days* as provided by section 1007, nor *transcript within thirty days next following*, and plaintiff in error cannot file appeal undertaking *after ten days* under section 895, page 662, general statutes. The section just named does not apply to appeal from justice courts, but proceedings in the higher courts, and the general statute on time will not be considered when the particular statute is known. *Paine v. Mason*, 7 Ohio Stat., 206. *Ex parte* Dodge, 7 Cowen, 146. *Alderman v. Phelps*, 15 Mass., 224. *Burr v. Lewis*, 6 Texas, 76. *Moot v. Parkhurst*, 2 Hill (and note A), 372. One is a *statute time*, and section 895 relates to court rules and practice. Is the first day excluded and last day included on a summons, execution, order of attachment, etc., etc.? We think the order of district court dismissing appeal should be affirmed.

LAKE, J.

This is a proceeding in error to reverse the judgment of the district court for Lancaster county dismissing an appeal taken from a judgment of a justice of

the peace. The grounds of the dismissal were—*First.* That the undertaking required by sec. 1007 of the code of civil procedure was not given within the time limited by the statute. *Second.* That the transcript was not filed in the district court within thirty days from the rendition of the judgment appealed from.

Section 895 of the code of civil procedure is as follows: "The time within which an act is to be done as herein provided shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." This section is one of the miscellaneous provisions of the code, and is applicable as well to proceedings before justices of the peace and other inferior courts as to courts of record.

It appears that the judgment of the justice of the peace was rendered on the sixteenth day of August, 1878, and that the undertaking in appeal was given and duly approved on the twenty-sixth of the same month. Excluding the day on which the judgment was entered as directed by the aforesaid section, we find the undertaking was given on the tenth day thereafter, and therefore within the statutory time. But the full scope of this statutory rule for computing time is more especially noticeable when applied to the second point, in counting up the thirty days given by section 1008 of the code of civil procedure, as amended by the act of February 19th, 1877, within which to file the transcript in the district court. Laws 1877, p. 15. By excluding the sixteenth of August, the day on which the judgment was rendered, thirty days, as ordinarily counted, would carry us forward only to the fifteenth day of September, but as this was a Sunday that year it must be excluded from the count, and the following Monday, the sixteenth, the day on which it was actually filed, included to make the full statutory period of time.

But on this last point we will add, that even if the

transcript had not been filed within the statutory thirty days, still as the neglect to file it was not continued beyond the second day of the next succeeding term of the district court, it worked no forfeiture of the appellants' rights. This we have already held during the present term in the case of *Roesink v. Barnett, ante* p. 146, wherein the question was squarely presented.

The judgment of the district court in dismissing the appeal is therefore reversed, and the appeal reinstated.

JUDGMENT ACCORDINGLY.

CHARLES ROBERTS, APPELLEE, v. E. P. SWEARINGEN, APPELLANT.

1. **Deed:** DELIVERY. A deed takes effect only from the time of delivery. The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption.

2. ———: ———: SPECIFIC PERFORMANCE. R. and S. agreed to exchange certain real estate, the deeds to be executed and placed in the hands of C., to be delivered upon the execution of a mortgage by S. R. commenced a suit against S. for specific performance, and while the action was pending, C., who was R.'s attorney, permitted S. to take the deed without the execution of the mortgage, and R., after obtaining a decree, waived certain rights under the same, having obtained judgments against S. *Held*, That the weight of testimony showed an absolute delivery of the deed to S.; *held*, also, that the payments being past due, the district court is directed to ascertain the amount due, and render a decree of foreclosure and sale.

3. **Practice:** SETTING ASIDE FINDING OR VERDICT. Where the finding or verdict is clearly wrong, it should be set aside. In no other way can the rights of parties be protected.

APPEAL by defendant from a decree rendered against him in the Polk county district court. The facts are set forth in the opinion.

Millet & Son, for appellant.

1. The petition does not state facts sufficient to constitute a cause of action. The facts which constitute the alleged fraud must be particularly set forth. *Arnold v. Baker*, 6 Neb., 134. The petition is also defective in that behalf, because it fails to state that Swearingen made any false and fraudulent representations upon which Roberts, or his attorney, Cooper, *relied*, by which Cooper was induced to part with the possession of said deed, or was misled in any manner whatever. Maxwell's Nebraska Digest, title, Fraud. *Kent v. Snyder*, 30 Cal., 666. 1 Story's Eq. Juris. (12th ed.), secs. 191 and 197.

2. The *gravamen* of the issue in this case is the alleged fraud of Swearingen in obtaining possession of the deed on the seventeenth day of March, 1875.

a. The record of the judgment and proceedings from the circuit court in Iowa, in the suit between these same parties, commenced by Roberts on the twenty-third day of October, 1874, long before the alleged fraud in this action took place, is wholly irrelevant to the issue, and incompetent to prove fraud on the part of the appellant.

b. Conceding here, for the sake of argument, that said record may be relevant to the issue, yet it fails to establish the alleged fraud, or squint that way, but on the other hand, rebuts all presumption of fraud, as the two petitions of Roberts, in that record, show that he (appellee) has the lands of Swearingen mentioned in the contract between them, and that said Roberts has fully complied with the terms of the above contract, and has conveyed the lands in question to Swearingen.

c. The whole evidence, documentary and oral, fails to show the alleged fraud, and fraud is never presumed, but must be proven. 1 Story's Eq. Juris., sec. 190.

3. If Roberts had desired to rescind this contract on the ground of fraud, and reclaim this land, he should have returned, or offered to return, to Swearingen all property he had received from him thereunder, which he has utterly failed and refused to do. *Brown v. Waters*, 7 Neb., 424. *Grant v. Law*, 29 Wis., 99. *Massen v. Bovet*, 1 Denio, 70.

4. The case in Iowa, embracing this entire subject matter, having been begun long before this action, the sixth defense in Swearingen's answer is *res adjudicata*, is a complete bar to Roberts's right to recover herein. *Bigelow v. Winsor*, 1 Gray, 290. Freeman on Judgments (2d edition), secs. 249 and 252.

5. Roberts cannot use that judgment as an estoppel against Swearingen in this suit, because there was no such issue in the Iowa case as the fraud here attempted to be alleged. Freeman on Judgments (2d edition), secs. 252 and 256. *Murphy v. Farwell*, 9. Wis., 109.

Higgins & Crites, for appellee.

1. No objection was taken on the trial below to the introduction of evidence under the petition; hence, if it were insufficient, still if the court finds from all the pleadings in the case, or from the evidence, that Roberts has a cause of action, Swearingen's objection cannot here be permitted to prevail. But the petition itself is not defective. The petition states facts merely, from which it fully appears that Cooper *did* rely on Swearingen's statements, *i. e.* that he wanted to show the deed to his attorney for his opinion, and that Cooper let him have it for that purpose and for no other purpose. Swearingen's fraud had its inception after he obtained possession of the deed for this temporary object; and by relation, tainted with fraud, his acts and representations in obtaining it. His fraud consisted in

his *retaining and recording the deed* without the consent of Roberts or Cooper, and without having entitled himself to it by a tender of the mortgage named in the contract. He could only lawfully be in possession of it by a full compliance with the contract, or with the consent of Roberts. Equity often presumes fraud from the circumstances and relations of the parties where none is alleged or proven, and will afford a remedy where none exists at law. *Jackson v. King*, 4 Cowen, 220. 1 Story's Equity Jurisprudence, Sec. 190, 190a.

2. The record offered in evidence conclusively established the fact, notwithstanding Roberts' allegation of his full compliance with the contract and conveyance of the Polk county lands, that he had not then, to-wit, October 11, 1876, fully complied with the contract, by failing to tender to Swearingen a deed of these Polk county lands; and further, that Swearingen had not then executed the mortgage in question. These facts being actually and necessarily in issue in that action, this adjudication and decree as to those facts is conclusive and binding upon both of the parties. Freeman on Judgments, Sec's 248, 249, 256, 257. *Davis v. Talcot*, 12 N. Y., 184.

3. This action is not for a rescission of the contract on the part of Roberts, but to deprive Swearingen of an undue and fraudulently obtained advantage over Roberts, he not being entitled thereto under the contract or otherwise. No right or title of Swearingen is affected which is not derived through the deed in question. *Beeson v. Conly*, 19 Mich., 103. Freeman on Judgments, Sec. 257.

4. All equities existing in favor of either of the parties prior to the date of the Iowa decree are fully merged therein; and the same, being unreversed, constitutes a full adjudication thereof, conclusive on both of said parties; and by necessary implication, as effect-

ually wipes out the legal existence of the deed in question, as if the same had never been written. 30 Iowa, 432. Freeman on Judgments, Sec. 329. 13 Iowa, 539. The deed in question has never been delivered. *Berry v. Anderson*, 22 Ind., 36. *Everts v. Agnes*, 4 Wis., 343, and notes, and 6 Wis., 453. 30 Wis., 55. 4 O. S., 182, 194. Washburn on Real Prop., 3 Ed., Vol. 3, 262. 13 N. J. Eq., 455. 40 Iowa, 402. 2 Gilman (Ill.), 564 to 566 inclusive. See same as to presumptions, 568. As to ratifying delivery of deed, see 22 Ill., 388. No title passes without performance. *Dyson v. Bradshaw*, 23 Cal., 535.

MAXWELL, CH. J.

On the fourth day of August, 1874, the plaintiff entered into a contract with the defendant to give a bond for a deed to the defendant for the following described real estate, to-wit: The east half of south-east quarter and east half of north-east quarter of section 22, town 16, range 1, in the county of Polk and state of Nebraska, "and the party of the first part (the plaintiff) also agrees to give to the party of the second part a good and sufficient warranty deed to the above described tract of land when the party of the second part shall have fully complied with his undertakings and covenants, hereinafter mentioned, upon his part. The party of the first part also further agrees to relinquish his timber claim on the following described land, viz: north-west quarter of north-east quarter of section 22, town 16, range 1, in the aforesaid county and state, unto the party of the second part. The party of the first part also agrees to let all his household and kitchen furniture, and all nursery stock on said place, and four head of cattle, and one lumber wagon, and all farming utensils on said place go with said place to the party of

the second part as part of the consideration to be received for it from the second party as hereinafter mentioned and without additional charge or expense to him. The party of the second part upon his part agrees to receive said place on the terms as above set forth, and to make payments as follows in full consideration for the same, to-wit: Warranty deed to lots four, five, and six in block six, in Red Oak Junction, Iowa; warranty deed to north half of south-west quarter section 24, town 75, range 34, in Cass county, Iowa; warranty deed to north end of east half north-west quarter of section 9, town 63, containing thirty acres in Clark county, Mo.; warranty deed to north-east quarter of north-west quarter of section 24, town 72, range 39, in Montgomery county, Iowa, all which deeds, except the last one, to be made at this date and deposited with J. C. Cooper, of Red Oak, until they are to be delivered, in compliance with the terms of his agreement, but the last deed not to be made until the first day of January, 1875, but the possession of all property to be delivered at the same time. The party of the second part also agrees to make the following additional payments, $300 June 1st, 1875, $600 Dec. 1st, 1875, $566 Dec. 1st, 1876, $566 Dec. 1st, 1877, $568 Dec. 1st, 1878, and with ten per cent interest payable annually. He also agrees to secure the payment of the aforesaid several sums by mortgage on the land sold to him by the party of the first part. It is agreed and understood that the party of the first part is to execute the deed aforesaid at the time the party of the second part is to execute the aforesaid mortgage to secure the payments of the said notes. The party of the first part agrees to give possession of the said place by the fifteenth of Sept., 1874, or sooner if desired, and so soon as possession is given, all papers except this are to be delivered."

The plaintiff executed a deed for the lands in Polk county, and delivered the same to one Cooper, to be delivered to the defendant upon the performance of the conditions of the contract, and the defendant executed deeds to the plaintiff conveying all the lands and lots he had contracted to convey to plaintiff, except the tract of land in Montgomery county, Iowa. In March, 1875, the defendant obtained possession of the deed in question from Cooper without executing a conveyance of the lands in Montgomery county, or a mortgage on the lands in Polk county, in this state, as required by the contract, and soon thereafter filed the deed for record in the office of the recorder of deeds of Polk county.

In May, 1876, the plaintiff filed a petition in the district court of Polk county, praying: "That the said deed may be delivered up and canceled, and held for nought," and for general relief. The petition alleges that said deed now appears of record in the office of the register of deeds of said county: "And the said defendant hath ever since failed and refused to execute said deed to said plaintiff hereinbefore referred to, and hath ever since failed and refused to execute and deliver said mortgage to this plaintiff, though requested so to do, and hath wholly failed and refused to keep and perform the agreements by him to be kept and performed."

On the trial of the case in the court below, a decree was rendered canceling and setting aside the deed in question. The defendant appeals to this court.

It appears from the bill of exceptions that the plaintiff, to maintain the issues on his part, introduced in evidence the pleadings and a decree in a cause between the same parties upon this contract in the circuit court of Montgomery county, Iowa. Two actions were instituted by the plaintiff against the defendant in that

court, the first on the twenty-third day of October, 1874, and the second on the twentieth day of January, 1875. Both actions were founded upon this contract, and upon motion were consolidated, and the cause tried and judgment rendered on the eleventh day of October, 1876. In that case the court finds: "That plaintiff has failed to tender to defendant a deed for the Polk county, Nebraska, lands as hereinbefore described," and on that ground the costs of the action were taxed against the plaintiff. The court also finds the equities of the case, except as to tender of the deed, with the plaintiff, and rendered a decree that the defendant shall execute a good and sufficient warranty deed to the plaintiff, conveying the north-east quarter of section 24, town 72 north, of range 39 west of the fifth principal meridian in Montgomery county, Iowa; and in case of his failure to do so, the clerk of the court should execute and deliver such deed. The court also directed the defendant to execute a mortgage to the plaintiff upon the lands in Polk county, Nebraska, to secure the payment of the sum of $300.00, due June 1, 1875; $600.00 due December 1, 1875; $566.00 due December 1, 1876; $566.00 due December 1, 1877; and $568.00 due December 1, 1878; with interest payable annually at ten per cent, upon the delivery of the mortgage to the clerk of the court, the plaintiff to execute and deliver to the defendant a good and sufficient warranty deed for the lands in Polk county.

On the tenth day of February, 1877, the plaintiff filed in the office of the clerk of the circuit court of Montgomery county a waiver of a part of the decree as follows: * * "To-wit.: $300.00 June 1, 1875; $600.00 December 1, 1875; and the interest due on said payments, on all interest on said payments mentioned in said decree up to August 4, 1875, for the reason that plaintiff has obtained judgments against the defendant

for all sums of interest due to August 4, 1875, and the said June and December payments as well," etc.

That a deed takes effect only from the time of its delivery is too well settled to need the citation of authorities; but delivery may be proved by a variety of circumstances; and the possession of the deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and throws the burden of proof on him who disputes this presumption. How stand the facts in this case? The defendant testifies that the deed was delivered to him without qualification or condition. The petition alleges that the defendant has failed and refused to execute the mortgage to the plaintiff although *requested to do so.* By the waiver filed by the plaintiff in the circuit court of Montgomery county, Iowa, it appears that prior to the tenth day of February, 1877, the plaintiff had recovered judgments against the defendant for about one-half of the sums claimed to be due, and that therefore he waived including the sums in the mortgage. It is also shown that at the time Cooper delivered the deed in question to the defendant, the plaintiff had two actions pending against the defendant for the specific performance of the contract in question, and that Cooper was the plaintiff's attorney. It is evident that the delivery of the deed would materially strengthen his case. It is also shown that the plaintiff obtained a decree for the conveyance to him of the land in Montgomery county, Iowa.

In *Porter v. Case*, 4 Greenleaf 20, it was held that bringing an action to recover the purchase-money was evidence of the delivery of the deed. That, certainly, is a material circumstance in this case, and, taken in connection with the other testimony, shows that the intention was to deliver the deed to the defendant.

To offset this testimony we have the testimony of

Mr. Cooper, that he let the defendant have the deed simply for the purpose of submitting it to his attorney. This, under the circumstances, is not sufficient. The question of the delivery by Cooper was not in issue in the circuit court in Iowa. It is true the contract set out in the petition contemplates the execution and delivery of the deed at the time of the execution of the mortgage—the acts to be simultaneous; yet the plaintiff could waive that provision—as indeed he has done—to the extent that certain payments need not be included in the mortgage. There is no allegation or claim either in the pleadings or proof that the defendant is insolvent; but we are left to infer from the recovery of the judgments that he is amply able to satisfy all demands against him. The finding of the court, therefore, as to the non-delivery of the deed, is against the clear weight of evidence, and must be set aside.

The plaintiff contends that the findings of fact will not be disturbed where there is any evidence to sustain them. The rule is well settled in this court that the findings of a court, when substituted for a jury, are entitled to the same weight as the verdict of the latter, and a mere difference of opinion between the court and jury will not warrant the court in setting the verdict aside. But where the verdict or finding is clearly wrong it should be set aside. In no other way can the rights of parties be protected. And such has been the uniform holding in this court, from our organization as a state.

As to the decree of the circuit court of Montgomery county, Iowa, while it could not operate directly upon lands beyond the limits of that state, it fixed the relative rights of the parties under the contract, and the defendant having a deed for the land in controversy, the plaintiff is entitled to a mortgage upon the same for the amount remaining due and unpaid; and as it

appears from the record that the payments are all past due, the judgment is reversed, and the cause is remanded to the district court, with directions to ascertain the amount remaining due and unpaid, and render a decree directing the land, as in proceedings in foreclosure, to be sold to satisfy the same.

DECREE ACCORDINGLY.

E. MARY GREGORY, PLAINTIFF IN ERROR, V. CHARLES O. WHEDON AND OTHERS, DEFENDANTS IN ERROR.

1. **Chattel Mortgage.** A chattel mortgage of a stock of goods in a store, with power to the mortgagor to sell in the ordinary course of trade, although fraudulent and void as to creditors and subsequent purchasers in good faith, is valid between the parties to it.

2. ——: RECORD: VENDEE. And a vendee who purchases the entire stock of goods, with the intent to hinder and delay creditors, cannot hold such goods against the mortgage, although it was not recorded until after the pretended purchase.

ERROR from the district court for Lancaster county. The facts of the case are stated in the opinion.

Hunter & Sawyer, for plaintiff in error.

The mortgage in question was void:

First. Because it was not filed till October 21, 1876, while E. Mary Gregory purchased and took possession October 4, 1876.

Second. Because it purports to cover a stock of goods sold and replenished, and gives mortgagors right of possession and power to sell in the usual course of business, and does not even require the mortgagors to account for the proceeds of sales.

Third. Because it purports to cover "all goods to be hereafter purchased by us (the mortgagors) during the time this chattel mortgage remains in force," without regard to the character or place of storage of such goods. *Tallon v. Ellison*, 3 Neb., 73. *Williams v. Evans*, 6 Neb., 219. *McCleery v. Allen*, 7 Neb., 21. Herman on Chattel Mortgages, sec. 101. *Edgell v. Hart*, 3 Barb., 380. *Robinson v. Elliott*, 22 Wall., 513. *Place v. Langworthy*, 13 Wis., 629. *Steinart v. Duester*, 23 Wis., 136. *Horton v. Williams*, 21 Minn., 187.

At law a mortgage of property, not then in existence, or not belonging to the mortgagor, but to be acquired *in futuro*, is void as to that property. Herman on Chattel Mortgages, sec. 46, p. 89. *Bellows v. Wells*, 36 Vt., 599. *Head v. Goodwin*, 37 Me., 181. *Pierce v. Emery*, 32 N. H., 484. *Otis v. Sill*, 8 Barb., 102. *Hamilton v. Rogers*, 8 Md., 301. *Pettis v. Kellogg*, 7 Cush., 456.

Mason & Whedon, for defendants in error.

1. Hastings and E. Mary Gregory were either joint purchasers or partners in the purchase of these goods, and in either event notice to one was notice to the other, and both Hastings and Gregory, jr., had notice of the fraudulent intent of J. D. Minshall & Co., and of their purpose to hinder, delay, and defraud purchasers. *Chapel v. Washburn*, 11 Ind., 303. 1st Greenl. Evidence, sec. 174, and authorities there cited. *Parker v. The State*, 8 Blackford, 292. Wharton's Law Evidence, sec. 1192.

2. In this case the husband of E. Mary Gregory purchased the stock of goods, with Hastings. Hastings & Gregory had actual notice of the fraudulent intent of J. D. Minshall & Co., and paid no money or property, and took the conveyance to E. Mary Gregory & Hast-

ings, for the purpose of defrauding creditors; and this sale cannot prevail over the mortgage, especially under the circumstances. *Guthrie v. Gardner*, 19 Wend., 414. *Snyder v. Sponable*, 1 Hill, 571.

3. The sale by J. D. Minshall & Co. to E. Mary Gregory was fraudulent and void, and the jury so found.

The mortgage of J. D. Minshall & Co. to Dodd, Brown & Co., was good between the parties to it, even before record, and after Dodd, Brown & Co. took possession of the stock under the mortgage, the same was validated as to creditors. *Brown v. Webb*, 20 Ohio, 389. *Moody v. Wright*, 13 Metc., 17. *Mitchell v Winslow*, 3 Story, 630. *Farmers' Loan Co. v. Commercial Bank*, 11 Wis., 207. *Titus v. Mabee*, 25 Ill., 257. *Chapin v. Cram*, 40 Me., 561. *Gay v. Bidwell*, 7 Mich., 519.

MAXWELL, CH. J.

In May, 1876, J. D. Minshall & Co., being indebted to Dodd, Brown & Co. in the sum of $1800.00, executed and delivered to said firm certain promissory notes; and to secure the payment of the same, executed and delivered to said Dodd, Brown & Co., a chattel mortgage on the stock of goods in their store in the city of Lincoln. The mortgage contained the following provisions: "It being the intent hereof to include all goods of every known description, owned and kept by us in said store, and fully and particularly described and mentioned in memoranda of our invoice of said stock taken by us on January 5, 1876; and also, all goods purchased by us and placed in and among said stock since said date, as well as all goods to be hereafter purchased by us during the time this chattel mortgage remains in force. And it is express-

ly agreed by and between the parties to this instrument, that we, the mortgagors herein, are to continue in possession of said goods, and continue to sell off said goods in the regular course of business until a breach of the conditions hereinafter mentioned—that is to say, so long as we pay said notes at maturity as they respectively fall due; but in case we attempt to dispose of said goods in any other way than the usual course of trade, and in case also that we shall fail or refuse to pay either of said notes at maturity, then and in either case it shall be lawful and right for said Dodd, Brown & Co., their agent or attorney, or the sheriff of Lancaster county, Nebraska, to take immediate possession of said goods," etc. The mortgage was properly signed and acknowledged, but was not recorded until the twenty-first day of October, 1876.

On the fourth day of October, 1876, Minshall & Co. sold their entire stock of goods, book accounts, shelving, counters, fixtures, and furniture to the plaintiff herein and one Enoch Hastings, a clerk, for an alleged consideration of $4000.00, Hastings and the plaintiff each giving their notes for $2000.00. Afterwards the notes appear to have been taken up and bonds substituted in their stead, conditioned that Hastings & Gregory should pay the debts of J. D. Minshall & Co., amounting to about $4500.00. Gregory & Hastings divided the goods in question, Hastings taking his portion away from Lincoln to another point in the state.

On the twenty-first day of October, 1876, Dodd, Brown & Co. recorded their mortgage, and immediately thereafter took possession of the goods in question, remaining in the store of J. D. Minshall & Co. The plaintiff brought an action of replevin to recover possession of the goods. Upon the trial of the case, the jury returned a verdict for the defendants, upon which

judgment was rendered. The plaintiff brings the cause into this court by petition in error.

A number of errors are assigned that we do not deem it necessary to notice. The principal question involved in the case is the validity of the mortgage, given by J. D. Minshall & Co. to Dodd, Brown & Co., under which the goods were taken.

In *Tallon v. Ellison*, 3 Neb., 63, it was held that a mortgage of a stock of goods, where the mortgagor continues in possession and is selling the same in the usual course of trade, is void as against creditors of the mortgagor and subsequent purchasers in good faith. See also *Hedman v. Anderson*, 6 Neb., 392. The reason is that the object of a chattel mortgage is to give the mortgagee a specific lien upon the property mortgaged, for the security of the mortgage debt, and this cannot be had if the mortgagor has leave to sell the goods for his own benefit. But a mortgage void as to creditors and subsequent purchasers in good faith, may be of full force and effect as between the parties. It is their contract, and as between themselves may be enforced. In this respect it is like a deed made for the purpose of defrauding creditors, which is valid as between the parties to the same and those claiming under them, though void as to creditors. *Tremper v. Barton*, 18 Ohio, 418. *Brown v. Webb*, 20 Ind., 389. This mortgage was therefore valid between the parties.

Was the plaintiff a subsequent purchaser in good faith? In order to constitute a person a *bona fide* purchaser, he must have parted with something that is valuable, upon the faith of his purchase, before he had notice of any prior right or equity. The plaintiff paid nothing for the goods in question. A note was given which was afterwards surrendered, and obligations in the nature of bonds taken to secure the payment of

the debts. But even had the plaintiff paid a full consideration for the goods, she would not be entitled on the testimony to recover. John S. Gregory, sr., was a member of the firm of J. D. Minshall & Co. John S. Gregory, jr., is a son of John S. Gregory, sr., and the husband and agent of the plaintiff, and had knowledge of the debts owing by J. D. Minshall & Co. His own testimony is not of a very satisfactory character, but sufficient appears to show that he knew of the debts at the time of the pretended purchase, and that he was anxious to obtain an extension of time for their payment in order to help his father out of difficulty. This may have been commendable had he paid his father's debts, but the law will not permit him to take the property of the firm, of which his father was a member, and require the creditors to wait until such times as suit his convenience before paying their claims.

In *McCleery v. Allen*, 7 Neb., 21, this court held that 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. In that case an assignment was declared invalid, because it contained provisions permitting the assignee to dispose of the property "in any manner whatsoever." The law will not permit a party to purchase the property of another with the intent to hinder and delay creditors in the collection of their just dues, and as it is clear that that was the object of the pretended purchase in this instance, no title passed to the plaintiff as against such creditors. This disposes of the case. The judgment of the district court is clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

THE POLO MANUFACTURING COMPANY, PLAINTIFF IN ERROR, v. WILLIAM PARR AND WILLIAM WENDTE, DEFENDANTS IN ERROR.

Promissory Note: CONDITIONS. P. & W. executed and delivered a note for the sum of $142.50 to the Polo Manuf. Co. for a Polo harvester. On the back of the note was the following memorandum: "This note to be paid in wheat at ninety-five cents per bushel." *Held*, that the memorandum was a part of the note.

ERROR from the district court for Dixon county.

J. B. Barnes, for plaintiff in error.

1. The verdict of the jury is not sustained by sufficient evidence, and is against the weight of testimony given in this cause. The defendants plead payment, which is denied by the plaintiff. The burden of proof is on the defendants, and they must prove by a clear preponderance of evidence the fact of the payment of said note, either to the plaintiff or to an agent of said plaintiff, duly authorized by plaintiff to receive payment thereof, in satisfaction of the same. 2 Parsons on Notes and Bills, 209 and 210, note f. *Yates v. Freckleton*, 2 Doug., 622. *Solomon v. Dawes*, 1 Esp., 83. *Sawyer v. Cutting*, 23 Vt., 486. *Benjamin v. Benjamin*, 15 Conn., 347. Chitty on Bills, page 444, sec. 393.

2. Payment to a wrongful possessor of a promissory note, payable to the order of the payee, and not endorsed, does not discharge the payor. *Rumsey v. Schmitz*, 14 Kan., 542.

Vanatta & Son and *Ed. T. Healey*, for defendants in error.

The rule of law is well settled that if a person is held out to third persons, or to the public at large by

the principal, as having a general authority to act for him in a particular business, the principal is bound by his acts. Story on Agency, sec. 127, p. 135, and notes on pp. 136 and 137; sec. 131, p. 139; sec. 133, p. 141. *The City of Davenport v. Peoria Ins. Co.*, 17 Ia., 276. *Whiting Cashier v. Western Stage Co.*, 20 Ia., 554. *Farwell & Co. v. Howard & Co.*, 26 Ia., 381. Parsons on Notes and Bills, vol. 1, pp. 100 and 101.

MAXWELL, CH. J.

The plaintiff brought an action in the district court of Dixon county against the defendants, upon the following obligation:

"$142.50

"PONCA, Neb., July 17, 1875.

"For value received in one Polo harvester, No. 118, we, the subscribers of the town of Ponca, county of Dixon, and state of Nebraska, promise to pay the Polo Manufacturing Co. or order $142.50, in Elk Point, D. T., on the first day of January, 1876, with interest at the rate of ten per cent per annum until paid, and if paid when due a deduction of ten per cent per annum. It is also stipulated that should suit be commenced to enforce the collection of this note, the holder thereof shall be allowed an attorney's fee of five per cent upon the amount due. And in consideration of credit given, I hereby waive all exemptions given by statute, and agree that execution may levy upon property so exempt. The express condition of the purchase and sale of the said Polo harvester is such that the ownership and right of property does not pass from Polo Manuf. Co. until this note and interest are paid in full. And the said Polo Manuf. Co. have full power to declare this note and interest due, and to take possession of said property at any time the Polo Manuf. Co. may

deem itself insecure, even before the maturity of the note. For the purpose of obtaining credit, we certify that we own in our own names 320 homestead acres of land, in towns 30 and 31, range 5 east, county of Dixon, state of Nebraska, with 100 acres improved, worth at a fair valuation, $1200.00. It is not encumbered by mortgage or otherwise, except the amount of $—, and that the title is perfect in all respects. We own $800.00 worth of personal property over all incumbrances, except the incumbrance on land, if any.

(Signed) "WM. his + mark. PARR, "Witness: E. H. JONES.
"HERMAN WENDTE."

On the back of the note were the following endorsements:

"This note to be paid in wheat at ninety-five cents per bushel;"

"For value received we guarantee the payment of the within note, and waive protest, demand, and notice of non-payment.

(Signed) "LAIRD & KING."

The bill of exceptions contains the following stipulation: "It is hereby stipulated and agreed that on the trial of this cause, and on the opening of the same to the jury and before the introduction of testimony, it was admitted by the counsel for plaintiff in said opening of said cause, that on the twenty-ninth day of December, 1875, the defendants delivered to Laird & King, at Elk Point, Dakota Territory, enough wheat at the rate of ninety-five cents per bushel to amount to the sum due on the note in question in this suit.

(Signed) "J. B. BARNES,
"Attorney for Plaintiff."

On the trial of the cause a verdict was rendered for

the defendants, upon which judgment was rendered dismissing the same. The cause is brought into this court by petition in error.

The errors assigned are: That the court erred in its instructions to the jury, etc. That the court erred in admitting the evidence of the defendants, etc. That the court erred in overruling the motion for a new trial, etc.

The wheat in payment of the note was delivered to Laird & King, and the only question to be determined is, their authority to receive it, the note at the time being in the possession of the plaintiff. That Laird & King were the authorized agents of the plaintiff to receive payment of the note in wheat is shown by a clear preponderance of the testimony, notwithstanding the denial of the officers of the company.

Exceptions were taken by the plaintiff to all the instructions given by the court to the jury, but our attention is particularly called to the fourth instruction, which is as follows:

"In consideration of this subject you can take into consideration the fact that the note in question was indorsed as being payable in wheat at Elk Point, D. T., but silent as to whom payable; also, all statements made by plaintiffs in their depositions and letters written by them about the time of the payment of the wheat, with reference to the agency of these gentlemen, Messrs. Laird & King."

It is particularly urged that the memorandum on the back of the note, that it was payable in wheat, was no part of the contract, and should not have been considered.

In the case of *Hartley v. Wilkinson*, 4 Camp., 127, a note absolute on its face had this condition written on the back: "This note is given on condition that if any dispute should arise between Lady Wray and D.

Hartley respecting the sale of the within-mentioned fir, then the note to be void." *Held*, a part of the note. Also, where there was indorsed on the back of the note that it was "to be taken for security for all balances as J. M. may happen to owe T. L. & Co., not extending further than the within-named £200, but this note to be in force for six months, and no money to be called for sooner in any case." *Lusk v. Lancashire*, 2 Camp., 205.

So where there was endorsed on the back of the note: "The within note is given for securing certain floating advances." *Cholmeley v. Darley*, 14 M & W., 344. And when an endorsement was made that payment was not to be expected until a mill was sold. *Blake v. Coleman*, 22 Wis., 416. Daniel on N. Inst., sec. 151. 2 Parsons on Notes and Bills, 542.

The rule results from the principle that the construction of the note is to be gathered from the whole of it, as well from the words on the back as those on the face. Therefore, a memorandum upon the back of a note, made by agreement of the parties before signing, will bind all the parties to it. The instruction, therefore, is not erroneous. From a careful examination of the entire record it is clear that there is no error of which the plaintiff can complain; and it is apparent that justice has been done in rendering judgment for the defendants. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

The plaintiff's attorney makes application to file a motion for a re-argument of the case upon certain enumerated grounds, none of which are sufficient to justify the court in granting a re-argument. The case has been fully and carefully considered, and we see no reason for changing our decision. The application to file the motion must therefore be denied.

A. C. TOMER, PLAINTIFF IN ERROR, V. HARVEY B. DENSMORE, DEFENDANT IN ERROR.

1. **Motion for new Trial.** An assignment of error in a motion for a new trial, in these words: "Irregularity in the proceedings of the court," is too indefinite to be of any avail. *Lowrie v. France*, 7 Neb., 192, adhered to.

2. **Practice:** EXCEPTIONS. Objections and exceptions should present distinctly and specifically the ruling objected to.

3. ———: MOTION FOR A NEW TRIAL. A motion for a new trial is not a matter of form merely, but is designed as a means of correcting errors; and vague, indefinite, or general objections will not, as a rule, be considered. But where the errors complained of are apparent from the record, and it is clear that the attention of the trial court was challenged by the motion to them under general assignments, they will be considered.

4. ———: DISCRETION OF COURT: EVIDENCE. It is not an abuse of discretion for the trial court to permit the parties, in furtherance of justice, to offer additional evidence in support of the cause of action or defense, after a case has been submitted to the jury, provided the party offering such evidence does not thereby obtain an undue advantage.

5. ———: NEW TRIAL: NEWLY DISCOVERED EVIDENCE. It is not sufficient to allege in an affidavit for a new trial, on the ground of newly-discovered evidence, that the party could not, with reasonable diligence, procure such testimony before the trial. The affidavit must state what particular efforts the party has made to procure such testimony. *Heady v. Fishburn*, 3 Neb., 266, adhered to.

6. ———: ———: CONVERSION OF GOODS. Where, on the trial of a cause for the conversion of goods, the plaintiff failed to prove the value of the same until the case had been submitted to the jury, the court restricted the defendant to testimony as to the value of the goods, and thereby prevented him from introducing testimony to prove that the plaintiff was not the owner of the same—*Held*, that this was such surprise as warranted the court in granting a new trial.

7. **Opinion of juror.** Where a juror informed one of the parties to a suit, before the case was submitted to the jury, that he had formed and expressed an opinion as to the merits of the case, and the party failed to call the attention of the court to

the matter, or challenge the juror—*Held*, after verdict, the party could not object to the juror on the ground that he had formed and expressed an opinion.

ERROR from Stanton county district court, the facts appearing in the opinion.

E. P. Weatherby and *W. M. Robertson*, for plaintiff in error.

It is a good cause for granting a new trial that the party has been surprised by evidence. *Sandford Manuf. Co. v. Higgins*, 14 N. H., 441.

When a party or his counsel is taken by surprise on a material point or circumstance which could not have been anticipated, and when want of skill, care, or attention cannot be justly imputed, and injustice has been done, a new trial should be granted. *Door v. Watson*, 28 Miss., 383. *Patterson v. Ely*, 19 Cal., 28. Motions for a new trial on the ground of surprise are addressed to the sound discretion of the court, but when the court refuses the new trial in a case in which surprise is clearly shown, resulting from no fault of the appellant, and he has been injured thereby, the supreme court will reverse the judgment below. *Todd v. State*, 25 Ind., 212. *Clark v. Diggs*, 6 Iredell (N. C.), 159. Where, after the close of the plaintiff's evidence, the defendant asked, and the court gave, an instruction to the jury which dispensed with evidence on his part, and after plaintiff closed his argument the court gave a different instruction, it was held that the defendant should have been permitted to introduce his evidence, and when he did not that it was error not to grant a new trial. *Moreland v. McDermott*, 10 Mo., 605. If by any reasonable cause a party has been unable to present the merits of his case to the jury, a new trial should be granted to him. *Jones v. Freeman*, 1 G. Greene, 134.

Crawford & McLaughlin, for defendant in error.

MAXWELL, CH. J.

In October, 1877, the defendant in error commenced an action in the district court of Stanton county against the plaintiff herein, to recover damages for the wrongful conversion of certain goods alleged to have been owned by the defendant in error. The plaintiff in error answered the petition of the defendant in error denying that he (the defendant in error) was the owner of said goods; and alleging that said goods came into his possession as assignee in bankruptcy, in the matter of Densmore & Hepper, bankrupts.

On the trial of the cause the jury returned a verdict in favor of the defendant in error for the sum of $1375.81, upon which judgment was rendered. The plaintiff in error filed a motion for a new trial, assigning as grounds therefor:

1st. Irregularity in the proceedings of the court.

2d. Irregularity in the proceedings of the jury.

3d. Abuse of discretion by the court in allowing the plaintiff to prove the value of the goods in controversy, or the damages sustained, after the evidence of both parties had been given to the jury, and the argument for the defense closed.

4th. Misconduct of the jury.

5th. Misconduct of the prevailing party.

6th. Excessive damages appearing to have been given, under the influence of passion or prejudice.

7th. That the verdict is not sustained by sufficient evidence.

8th. That the verdict is contrary to law.

9th. On account of newly discovered evidence material to the defendant, which he could not, with reasonable diligence, have discovered and produced at the trial.

10th. On account of accident occurring at the trial of the cause, which ordinary prudence could not have guarded against.

11th. On account of surprise, which ordinary prudence could not have guarded against.

12th. On account of the incompetency of one of the jurors who tried the case.

13th. On account of error of law occurring at the trial, and excepted to by the defendant.

Attached to the motion is the affidavit of the plaintiff in error, that one of the jurors informed him during the progress of the trial that he (the juror) had formed and expressed an opinion in the case, and was not a competent juror. Also that he was taken by surprise by the court re-opening the case, and permiting the defendant in error to prove the value of the goods. Also, the affidavit of E. P. Weatherby, one of the attorneys for plaintiff in error, stating in substance that the defendant in error failed to prove the value of the goods claimed to be converted by the plaintiff in error until after the conclusion of the arguments to the jury, and that in consequence of such omission, which would be fatal to the defendant's case, he had failed to introduce testimony showing that the defendant in error was not the owner of the goods in question, and that the court, in granting the defendant in error leave to prove the value of the goods, restricted the plaintiff in error to testimony in regard to the value, and would not permit him to show that the defendant in error was not the owner of the goods. These affidavits are not denied.

The alleged errors will be taken up in the order of their assignment.

The first error assigned—"Irregularity in the proceedings of the court"—is too general to be of any avail. The motion should point out the irregularity

complained of so as to challenge the attention of the judge before whom the case was tried to the act or acts complained of. *McCartney v. M. P. R. R.*, 1 Neb., 404. *Wells, Fargo & Co. v. Preston*, 3 Neb., 447. *Cropsey v. Wiggenhorn*, 3 Neb., 177. *Creighton v. Newton*, 5 Neb., 100. *Gibson v. Arnold*, 5 Neb., 186. *Hosford v. Stone*, 6 Neb., 378. *Fox v. Meacham*, 6 Neb., 530. *Brunswick v. McClay*, 7 Neb., 137. *Lowrie v. France*, 7 Neb., 192.

In *Lowrie v. France*, *supra*, the assignment was as follows: "Irregularities in the proceedings of the court by which defendants were prevented from having a fair trial." It was held that this assignment was too indefinite to be of any avail, and the reason is that exceptions and objections should present distinctly and specifically the ruling objected to, and not be a mere drag net to enable counsel on a subsequent critical examination to raise points under the objections, which were not thought of or suggested at the time the motion for new trial was heard and determined. A motion for new trial is not a matter of form merely, but is designed as a means of correcting errors which the ablest judge may commit in the hurry of a trial. Proceedings in error are designed to review only particular points of law specially pointed out in the record, and vague, indefinite, or general exceptions will not, as a rule, be considered. Where, however, the errors complained of are apparent from the record, and it is clear that the attention of the trial court was challenged by the motion to the objections complained of, under general assignments of error, they will be considered by this court; but as no error is apparent under this assignment it must be disregarded.

And the same is true of the second assignment.

There was no abuse of discretion in receiving evidence as to the value of the goods after the case had been given to the jury. The court, in furtherance of justice,

may permit such evidence to be given. Care, however, should be exercised by the court in the admission of such evidence, to see that the rights of the parties are protected. No error appears therefore in the third assignment.

The fourth and fifth assignments may be considered together and are open to the same objections as the first and second.

The sixth assignment is not sustained by the record, and the same may be said of the seventh and eighth.

As to the ninth assignment, the affidavit as to newly discovered evidence is entirely insufficient even if the evidence is admissible. It nowhere appears what efforts the plaintiff used prior to the trial to discover this testimony. The rule as to what an affidavit asking for a new trial, on the ground of newly discovered evidence, must contain, is laid down in the case of *Heady v. Fishburn*, 3 Neb., 266, to which we adhere. It is not enough for a party to state in his affidavit that he could not with reasonable diligence procure the testimony; that is a conclusion; he must state what particular efforts he has made to discover the testimony.

The tenth assignment is too general in its terms to be considered, there being nothing in the record to indicate the nature of the accident.

The eleventh assignment is sustained by affidavits showing the nature of the surprise, that it consisted in permitting the defendant in error, after the argument of the case to the jury, to prove the value of the property taken; and confined the plaintiff's proof to a rebuttal of the testimony as to value, the plaintiff in error having witnesses present to prove that the defendant in error was not the owner of the goods. This was material testimony, which should have been submitted to the jury. Until the defendant in error had proved the value of the goods, or their

value had been established in some manner, he could not recover, and the plaintiff in error had a right to rely upon such failure to prove value as a defense. The court has authority in furtherance of justice, even after a case is submitted to the jury, to permit the parties to offer additional testimony in support of the cause of action or defense. But it is the duty of the court in admitting such testimony to see that the party offering it does not thereby obtain an undue advantage. Otherwise, testimony might be wilfully withheld by a party until the case was submitted to the jury, with the view of excluding proper testimony on the other side. As the affidavits are not denied, the facts stated therein must be taken as true, and are sufficient to cause a a reversal of the case.

As to twelfth assignment of error the affidavit states: "That one of the jurors who tried the case, came to this affiant on the morning of the first day of May, just before the cause had been finally submitted to the jury, and informed this affiant that when he was called upon the jury he did not know who Harvey B. Densmore was, and that he supposed he was a competent juror, but that when he found out who Harvey B. Densmore was he then found that he knew all about the case, and that he had formed and expressed his opinion freely before the trial as to the merits of the case, and that he was incompetent to sit as a juror in the cause."

This is not sufficient. The plaintiff, upon being informed by the juror that he had formed and expressed an opinion in regard to the case, should have called the attention of the court to the fact, and objected to the juror sitting in the case. He could not wait until after verdict, and take the chance of a finding in his favor before calling the attention of the court to the incompetency of the juror. *Palmer v. The People*, 4

Neb., 75. The facts stated in the affidavit in relation to the incompetency of the juror are clearly insufficient to authorize a new trial.

The thirteenth assignment is general in its terms, and as we find nothing in the record supporting the assignment, it must be disregarded. On the ground of surprise alone the judgment of the district court is reversed, and the cause remanded for a new trial.

JUDGMENT ACCORDINGLY.

The defendant in error asks leave to file a motion for a rehearing upon certain grounds, but one of which we deem necessary to notice, viz.: That the motion for a new trial does not point out specifically in what the surprise consisted. It does appear from the affidavits attached to the motion, and in support of it, that the surprise consisted in refusing to permit the plaintiff in error to prove that the defendant in error did not own the goods in controversy, but confined the proof to the value of the goods.

It is clear that injustice was done by this ruling of the court. The testimony should have been received and submitted to the jury. We see no cause for reversing our former decision. The application for leave to file a motion for a rehearing is therefore denied.

EDWARD BERKLEY, APPELLANT, V. W. J. LAMB AND OTHERS, APPELLEES.

Judicial Sale: PRACTICE: FINAL ORDER. In July, 1873, L. & B. recovered a judgment against W. for the sum of $450.00, in the probate court of Lancaster county, a transcript of which was filed in the office of the clerk of the district court on the nineteenth day of November, of that year. L. & B. assigned the judgment to Boyd, who assigned to Brush. On the fifteenth day of January, 1874, W. purchased lot 10, in block 103, in the city of Lincoln, and at the same time executed and delivered to his wife a quit claim deed for the lot in question. In March following W. and wife conveyed the lot in question to Berkley. In 1875, an execution issued on the judgment under which the lot in question was sold. Berkley and wife moved to set the sale aside upon the ground that the judgment *was not a lien* upon the lot, which motion was sustained, no appeal being taken. *Held*, Upon a petition being filed by the purchaser to enjoin a sale of the premises under a second execution, that the decision setting aside the sale was final and conclusive.

THIS was an appeal from the district court of Lancaster county, and the facts are set forth in the opinion.

Mason & Whedon, for appellant.

1. It is respectfully submitted that under our statute a judgment is not a lien upon after acquired property. *Roads v. Symmes*, 1 Ohio, 313. *Lessee of Phelps v. Butler*, 2 Ohio, 224. Sec. 477 General Statutes, page 605. The statute declares the lands and tenements of the debtor shall be bound for the satisfaction of any judgment against such debtor from the first day of the term at which judgment shall be rendered, except as to judgments by confession or judgments rendered at the same term at which the action is commenced, and they shall bind such lands only from the day on which such judgments were rendered, and all other lands of the debtor shall be bound from the day they shall be

seized in execution. The term "all other lands" must include after acquired lands.

2. The rule of construction, that where the legislature adopt the statute of another state they adopt with it the judicial interpretation of the highest tribunal of such state, is invoked, and it is respectfully submitted that the law of this state, as made by the legislature thereof, is that a judgment is not a lien upon after acquired lands aliened by the debtor before levied upon. *Elmendorf v. Ferry Co.*, 10 Wheat, 153. *Smith v. Cowdry*, 1 Howard, 38. *Bemis v. Becky*, 1 Kan., 226. *Harrington v. Smith*, 28 Wis., 43.

3. The judgment and determination of the court in setting aside the sale of this property was final, and remains unreversed and unmodified; and if the owner of this judgment was aggrieved by that order he should have appealed from the same or taken the same up on error. The judgment is conclusive of the title of the parties against whom it is rendered whenever the title has been the subject matter of the suit and has been adjudicated. *Shirley v. Fearne*, 33 Miss., 666. *Danaher v. Prentiss*, 22 Wis., 316. *Executors of Tate v. Hunter*, 3 Strobhart, Esq., 139.

H. H. Blodgett, for appellees.

1. By the common law of England lands purchased by debtor after judgment, but aliened before levy of execution, were bound by the lien. *Colt v. Dubois*, 7 Neb., 391. Freeman on Judgments, 367. *Ridge v. Prather*, 1 Blackf., Ind., 401. *Trustees v. Watson*, 8 Eng., Ark., 74. 4 W. Va., 605. 4 Kent, 435–436. 15 Johns, 464. 2nd Sneed, 665. 1st Minn., *Steel v. Taylor*, 274. 3 Har & McH——, 449. 4 Peters U. S. R., 136. Argument in 13 Eng. Ark., 74. Sudgen on Vendors, vol. 2, 103.

In *Stiles v. Murphy*, 4 Ohio, 98, the court, comment-

ing on *Roades v. Symmes*, 1 Ohio, 313, regretted that such a rule of law had ever been established in the state of Ohio. And says Freeman on Judgments, 367, "It is clearly repudiated in favor of the common law doctrine that the lien attaches to after acquired lands."

2. Another point relied on by plaintiff is that upon motion for confirmation of sale heretofore had, the court refused to confirm the sale, and that said motion is a trial of the rights of property in litigation, and ultimately determines the rights of the parties by the court refusing to confirm the sale. But this is not the law. Rorer on Judicial Sales, 55. Freeman on Executions, 311, and cases there cited. It must necessarily follow, as the court refused to confirm the sale, that the purchaser at the sale would be entitled to his money back, and the case would stand in *statu quo* as if nothing had been done. Such is the rule of law established in Kansas and Ohio, under a statute same as our own. *Kahler v. Ball*, 2 Kan., 160, and cases there cited in Ohio sustaining the same. *Challas v. Wise & Crookham*, 2 Kan., 276. Freeman on Executions, 311. Nothing can be inquired into except the irregularity of the proceedings of the sheriff. 2d Kan., supra. Freeman on Executions, 311.

MAXWELL, CH. J.

In July, 1873, Lamb & Billingsley recovered a judgment against L. B. Wilkinson for the sum of $450.00 in the probate court of Lancaster county, a transcript of which judgment was duly filed in the office of the clerk of the district court of that county, on the nineteenth day of November of that year. On the same day Lamb & Billingsley sold and assigned said judgment to S. M. Boyd, who, on the sixteenth day of December, 1873, assigned the same to Martin H. Brush,

one of the defendants. On the fifteenth day of January, 1874, Boyd and wife conveyed to Wilkinson lot 10, in block 103, in the city of Lincoln, and at the same time Wilkinson executed and delivered to his wife a quit claim deed for the lot in question, both deeds being filed for record at the same time. On the twenty-eighth of the following March, Wilkinson and wife conveyed the premises in question to the plaintiff. In July, 1875, an execution was issued on the judgment above set forth, and levied on the lot in controversy, which was sold under said execution. In November, 1875, the plaintiff and L. B. Wilkinson filed objections to the confirmation of the sale as follows:

LAMB & BILLINGSLEY,
v.
L. B. WILKINSON.

And now comes the defendant and Edward Berkley, and file their exceptions to the confirmation of the sale heretofore had in this case:

That said plaintiffs, Lamb and Billingsley, recovered the judgment upon which the execution is issued on the tenth day of July, 1873. That upon the nineteenth day of November, 1873, a transcript of said judgment was filed with the county clerk of said county. That afterwards and on the fifteenth day of January, 1874, the real estate described in the return as lot ten, in block 103, was conveyed to the defendant L. B. Wilkinson. That on the day last aforesaid, said Wilkinson sold and conveyed said lot to Mary Wilkinson, and on the twenty-eighth of March, 1874, Mary Wilkinson conveyed said lot to the said Edward Berkley, by deed of general warranty, and on the thirtieth of March, 1874, L. B. Wilkinson conveyed by quit claim deed all interest which he had in said premises to said Berkley. That said deeds from Mary Wilkinson and from the defendant, L. B. Wilkinson, were both

filed for record on the thirtieth day of March, 1874, at 4:20 P.M., in the office of the county clerk of said county, and duly recorded, as will more fully appear in the deed records of said county, reference thereto being had.

That the execution under which said lot ten was taken was issued on the twenty-seventh day of July, 1875, and was the first execution issued out of this court on said judgment, and that the same was not levied on said lot ten until the twenty-seventh day of July, 1875.

That at that time, said Berkley was the owner of said lot, and is now the owner thereof, and for proof of these facts, reference is had to the records of this court. The said Berkley asks that said sale be set aside, as a confirmation thereof will tend to throw a cloud upon his title.

MASON & WHEDON,
For defendant and Edward Berkley.

In May, 1876, a motion for the confirmation of the sale and the exceptions above set forth came on for hearing and were argued by counsel for the respective parties, and submitted to the court.

In September, 1876, the court rendered a judgment sustaining said exceptions and setting aside said sale, which order and judgment still remain in full force.

In 1878, Brush caused an execution to issue on said judgment, which was levied on the lot in question, and a sale of the same being about to take place under said levy, the plaintiff filed a petition in the district court of Lancaster county setting forth the above facts, and prayed for an injunction to restrain the sale. The defendants answered the petition of the plaintiff, alleging that at the time of the conveyance of lot ten, in block 103, in the city of Lincoln, by L. B. Wilkinson

to Mary Wilkinson, they were husband and wife, and that the conveyance was made in this state, and was made to place the property out of the reach of the creditors of L. B. Wilkinson, and that said conveyance was without consideration, and was not made at the same time as the conveyance from Boyd and wife to L. B. Wilkinson. The defendants also deny that the judgment or final order setting aside the sale still remains in full force. The plaintiff in his reply admits that Mary Wilkinson was the wife of L. B. Wilkinson at the time of the execution of the deed, and that the entry on motion docket, as set forth in the answer, is true, and denies all other allegations of new matter. On the trial of the cause the plaintiff introduced the motion docket to show that the exceptions to the sale had been sustained. The defendants offered no evidence. The court found the issues in favor of the defendants and dismissed the cause. The plaintiff appeals to this court.

It will be observed that the only ground upon which it was sought to set aside the sale in question, was that the judgment was *not a lien* upon the premises, and that a sale thereof would create a cloud on the title of the purchaser. Is the decision of the court upon this motion final and conclusive between the parties, no appeal being taken?

In *Mayer v. Wick*, 15 Ohio State, 522, the court say: "The question whether, under all the circumstances, the contract of sale ought to be rescinded has already been adjudicated. A motion was made by Mayer to rescind the contract—to set aside the sale—and that motion was heard and decided. The powers of the court hearing the motion were plenary over the subject matter, extending to all equitable as well as legal grounds for setting the sale aside. The parties having omitted to take measures for a review of that de-

cision upon error, or otherwise to impeach it by direct proceedings, are concluded by the decision."

In *Paulett v. Peabody*, 3 Neb., 198, the court say: "The statute, it is true, points out very clearly certain steps which must be taken by the officer charged with the duty of making the sale, not one of which can be omitted, and in respect to which the court is given no discretion; but this enumeration on the part of the sheriff is not to be considered a limitation or restriction upon the authority of the court, to see to it that in all other respects the proceedings are properly conducted, and the sale fairly made, so that neither the parties to the suit nor the sale shall be defrauded."

That an order confirming or setting aside a sale is a final order will not be denied, and under our code may be reviewed by appeal or petition in error, the mode of reviewing the case being dependent on the character of the action. If a sale is set aside for a mere irregularity in making the sale, or from a failure to comply with the requirements of the statute, such order setting aside the sale will not prevent the land being again offered under the judgment. Where, however, a sale is set aside upon the ground, raised distinctly in the motion, that the judgment was not a lien upon the land, and that no title will pass by the sale, such order, unless reversed, becomes final and conclusive upon the parties.

In the case at bar, the very ground upon which the sale was set aside was, that the judgment was not a lien upon the lot in controversy. Can the plaintiff in execution disregard the order of the court and immediately offer the property again for sale? No one will contend that he can do so. As there were no special findings on the motion, the exact ground upon which the motion was sustained is not apparent, although it is reasonable to infer that the court found that L. B.

Wilkinson was not, in fact, the owner of the lot in question, but that said real estate was paid for and owned by Mary Wilkinson, his wife.

In the case of *Colt v. Dubois*, 7 Neb., 391, it was held that the lien of a judgment attaches to all the 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. We adhere to that decision, but the lien of the judgment attaches only to the interest of the debtor in the land. *Filley & Hopkins v. Duncan*, 1 Neb., 145. *Uhl v. May*, 5 Neb., 157. *Galway, Semple & Co. v. Malchow*, 7 Neb., 285. And the lien can attach to no greater interest than that owned by the debtor. It is claimed that the deed from Wilkinson to his wife is void. At law such a deed is void, but equity will sustain it when made upon a sufficient consideration, or in pursuance of a valid antenuptial agreement. *Aultman, Taylor & Co. v. Obermyer*, 6 Neb., 260. *First Nat'l Bank v. Bartlett*, *ante* p. 319. But as these questions were properly before the court in the former proceeding they cannot be enquired into in this. The validity of the lien of the judgment having been in issue in the proceeding to set aside the sale, the decision thereon is final and conclusive, no appeal being taken. The judgment of the district court is reversed and the injunction made perpetual.

LAKE, J., dissented.

COBB, J.

While I agree with the chief justice that the judgment of the district court ought to be reversed, for the reasons stated by him, yet, in my opinion, there is other and far graver error in the record, by reason of which the judgment should not stand.

The title to the lot in question was acquired by Wil-

kinson after the judgment had been filed and docketed in the district court, and passed out of him by conveyance duly executed and recorded before the same was levied upon. We have, therefore, fairly presented the important question: Does a judgment, entered and docketed in the district court, constitute a lien upon real estate situated in the county, and afterwards acquired by the judgment debtor, before levy of an execution issued upon such judgment?

Section 477 of the code of civil procedure is in the following words: "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 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 they shall be seized in execution." The meaning of this section, as applicable to the question now under consideration, has been construed by this court in the case of *Colt v. Dubois*, 7 Neb., 391; but I am unable to agree in the conclusion there arrived at by the court.

The object of the section is to prescribe the times when judgments in the several classes of cases should attach to or become liens upon property, and for that purpose the framers of the section divided the subject into three classes.

The first, or general class, includes those cases where the action shall have been brought according to law and the regular practice of the court, and where the debtor has lands in the county. In that case the lien attaches as of the first day of the term, without regard to the particular day of the term upon which the

judgment may be actually rendered. The second class embraces those cases where, no suit having been commenced before the first day of the term, yet by means of a suit commenced on or after the first day of the term, or by the voluntary appearance and confession of a party without suit, a judgment is entered. In this class the judgment becomes a lien upon and binds such lands only from the day on which such judgments are rendered.

And for the purpose of providing for all cases not falling within either the first or second classes, they provided a third class, to-wit: "All other lands, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."

It is not my purpose to take exception to the construction placed upon this latter clause of the section in the case above referred to, in so far as it goes. I agree that the words "other lands" refer to the lands of the debtor without the county; but I also think they have a broader application, and embrace exactly what the words imply in their ordinary signification, to-wit: all other lands—all lands not falling within the meaning of the first or second class of words as above divided.

Now then, do after acquired lands fall within the first or second classes? Obviously not in the very nature of the case. A judgment against A. cannot become a lien from the first day of a term commencing January 1st, 1878, upon land then owned by B., but which he conveyed to A. January 1st, 1879. If not, then such lands as may be conveyed by B. to A., after the rendition of such judgment, are lands other than those upon which such judgment against A. can become a lien from the first day of such term (or from the day on which judgments are rendered), and fall within the meaning of the words, "all other lands," etc. And

bearing in mind the manifest object of the section, to fix and settle the time when every species of property of the debtor, of whatever kind and however situated, should be bound by the judgment, can there be any doubt but that the legislature used these broad and comprehensive terms for the very purpose of including after acquired lands?

I think this the plain and natural construction of the section, and the one which it has received in at least three states, and by three generations. It is a literal copy of the statute of Ohio passed June 6, 1795, and which I think was copied from the Pennsylvania statute, although I have not the earlier statutes of that state at hand. The supreme court of Ohio, as early as 1824, construed this statute, and approving *Calhoun v. Snyder*, 6 Binney, 145 (not in the state library), states the law as settled, as well in Ohio as in Pennsylvania, that a judgment lien did not attach to after acquired lands until execution levied. *Roads v. Symmes*, 1 Ohio, 281–313. The law of these cases has been followed, both in Ohio and Pennsylvania; and while it has been questioned and discussed, I am not aware of its having been successfully assailed.

It is a part of the history of our state, which will not be questioned, that our legislation has in great part been patterned after that of the great central state of Ohio, as was very natural and proper, that state having contributed by emigration a large portion of our pioneer population, many of whom took an important part in framing our laws. Our codes, both civil and criminal, are in great part copies of the codes of Ohio, and the section in question is a literal copy of the corresponding section of its code.

Judge Dixon, in the case of *Draper v. Emerson*, uses the following language in laying down a rule of law which I think obtains universally: "It is a settled

rule in the construction of statutes that where a statute has received a judicial construction in another state, and is then adopted, it is taken with the construction which has been so given to it. Such is the presumed intention of the legislature." 22d Wis. Rep., 147.

This statute had been construed first in Pennsylvania, and again in Ohio. With knowledge of that, our legislature, in framing its code of procedure, selected this very provision, and adopted it as a part of our judicial policy in preference to the provisions of the statutes of the other states, presumably because they were satisfied with this law as it had been construed and administered in the parent state.

I purposely refer to the above mentioned section of the statute as the source of all liens by virtue of judgments rendered in the district courts of this state, for I do not think it will be seriously contended that such judgments create any lien, before execution levied, by virtue of the common law. While I say this, I am aware that many cases can be found in which courts speak of the common law as regulating the liens of judgments, etc. But it may be said truthfully, that the words "common law" have often been used very loosely, as well by courts as by text writers, and have often been pressed into the service as authority for any proposition for which the writer is wanting in statutory enactment. By the common law, only goods, chattels, and profits of lands could be taken on execution. *Johnson v. Hahn*, 4 Neb., 139–144, and authorities there cited. 2 Roll, Abr., 475. 2 Bac., Abr., 686.

Mr. Justice Daniel, of the supreme court of the United States, says: "Thus we find it laid down by compilers and by commentators upon the law of England, that the lien of judgments upon lands in that country was created by the statute *de mercatoribus*, also styled the statute of Acton Burnell, 11th of Ed. I, and

by statute of Westminster 2d, 13th Ed. I, cap. 18," etc. *Snead v. McCoull*, 12 How., 414.

Blackstone informs us that the municipal law of England may with sufficient propriety be divided into two kinds: the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law. 1 Black. Com., sec. 3.

Accordingly, while we have to some extent adopted the common law of England as the law of this state, we have not adopted the *lex scripta* or statute law of that country. Section 1, chapter 10, General Statutes, p. 159. Therefore, as I view it, we must look alone to our statute as we have borrowed it from the state of Ohio, together with whatever construction it had received there as well as here, for our understanding of the law of judgment liens. While it may be doubted whether the construction of this law necessarily arose in the case of *Filley and Hopkins v. Duncan*, 1 Neb., 134, yet it cannot be denied but that it was proper to be considered by the court in that case, or that it was considered and squarely decided. I think it equally true, that that decision met the approval of the bar and people of the state. All real estate transactions in the state for a period of ten years have been made in view of it as the settled law of the land; and I think it unfortunate that its authority should have been impaired. In view of this question, as in many others, it does not matter so much how the law is settled, just so it is settled on a permanent basis; and believing as I do that the above views must ultimately prevail in this state, I would like to see this court return to them at the first opportunity.

JUDGMENT REVERSED.

GEORGE J. ST. LOUIS, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Practice:** ERROR: INCOMPETENT EVIDENCE. If a witness for the prosecution in answer to a proper question give immaterial testimony prejudicial to the prisoner, which on objection is promptly excluded from the consideration of the jury, this is not ground for reversing the judgment.

2. ———: INCOMPETENT QUESTION. Neither is the mere asking of a question calling for incompetent evidence, but not answered, any ground of error.

3. **Evidence:** MOTIVE TO COMMIT CRIME. On the trial of a husband for the murder of his wife, evidence of his improper devotion to, and criminal intercourse with, another woman, both before and immediately after the commission of the alleged offense, is admissible as tending to show a motive to commit the crime.

4. **Petit Juror:** QUALIFICATION. If a juror on his *voir dire* examination, in a case depending upon circumstantial evidence, answer that his convictions are such as would preclude him from returning a verdict of guilty, where the punishment would be death, it is good ground of challenge for cause on the part of the state.

5. ———: ———. On a trial for murder in the first degree the state is entitled to a jury who can conscientiously, if the evidence warrant it, return a verdict which will subject the offender to the extreme penalty of the law.

6. **Separation of Jury in a Capital Case.** By section 484 of the criminal code, the jury may, even in a capital case, in the discretion of the presiding judge, be permitted to separate during the trial up to the time the case is finally submitted to them.

7. ———. And in case of such separation of the jury, in the absence of an affirmative showing in the record to the contrary, it will be presumed that the required admonition by the court as to their duty while separated was given.

8. **New Trial:** NEWLY DISCOVERED EVIDENCE. It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely.

9. ———: ———. In an application for a new trial on this ground, the statute expressly requires the applicant to show that the newly discovered evidence could not with reasonable diligence have been discovered and produced at the trial.

10. **Evidence:** CERTAINTY OF PROOF IN CRIMINAL TRIALS. To warrant a verdict of guilty in a criminal case it is not required that the jury be convinced of the prisoner's guilt "*beyond*" a moral certainty, but it is enough if they are convinced of his guilt *to* a moral certainty.

11. **Weight of Evidence.** It is not error to charge the jury that "absolute, unequivocal, mathematical certainty of proof is not required" on a criminal trial.

12. ———. It is not error to charge the jury in effect that in determining the weight of evidence upon any given point in the case, they are not required to give equal weight to the testimony of each witness, but only such weight as, under all the circumstances, they believe him entitled to.

13. ———: TESTIMONY OF PRISONER. The interest which a witness has in the result of a trial may always be shown as affecting the value of his testimony; and it is not error for the court, in referring to the testimony of the prisoner given in his own behalf, to tell the jury that they were "at liberty to consider the great interest which he has in the result."

14. **Instructions:** HOW CONSIDERED. The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case.

15. ———: INSTRUCTIONS MUST BE APPLICABLE TO THE EVIDENCE. It is not error to refuse an instruction, although correct as an abstract proposition, which is not applicable to the evidence before the jury. Neither is it error to refuse instructions where others of substantially the same import have been given.

PLAINTIFF in error was indicted at the October term, A.D. 1877, of the district court for Dodge county, for the murder of his wife by poison on the thirtieth day of May previous. He was put upon trial there on the fifth day of February, 1878, but the jury did not agree upon a verdict and were discharged. The cause was then taken upon change of venue to Saunders county,

where a trial was had in April, 1878, a verdict of murder in the first degree returned against the plaintiff in error, and the date of execution of the sentence of death fixed for September 20, 1878. Having sued out this writ of error, the execution of the sentence was suspended, until upon the affirmation of the judgment below, Friday, April 18, 1879, was fixed by this court as the date for the execution of said sentence.

The record brought here, is very voluminous, consisting of over fifteen hundred pages of manuscript, and it would not be practicable to state even its substance. There is, in the opinion, a review and summary of the testimony, as well as comments upon exceptions to instructions given to the jury, upon the trial below, sufficient to an understanding of the points passed upon and decided by this court.

E. F. Gray and *W. A. Gray*, for plaintiff in error.

1. The district attorney should have been confined to the inquiry as to whether the juror's opinions were such as to preclude him from finding the accused guilty of an offense punishable with death. *State v. Arnold*, 12 Iowa, 479. *Com. v. Buzzell*, 16 Pick, 153. One of these jurors might have conscientious convictions, "under some circumstances, on the circumstance of evidence alone." What good intelligent man might not? The other "would want to be well satisfied," would want to be "perfectly satisfied." Have we a right to hang men without the jury being well satisfied—perfectly satisfied—of the guilt of such men? I especially call the attention of the court to the fact that neither of these jurors answered, nor was there any evidence at all to the effect that "his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death," as required by

the third subdivision of section 468 of the criminal code. A juror is not subject to this challenge until his answers shall have brought him within the statute. His opinions must be such as to preclude him from finding the accused guilty of an offense punishable with death. *Commonwealth v. Webster*, 5 Cush., 295. *People v. Wilson*, 3 Parker Crim. R., 199. *Atkins v. State*, 16 Ark., 568. *People v. Steward*, 7 Cal., 140. *State v. Arnold*, 12 Iowa, 479.

2. There were some eight days consumed in the trial before the jury, and during this time there were eight several adjournments of the court over-night, and one over Sunday, and for aught that appears in the record the jury were not put in the charge of a sworn officer during these adjournments, nor were they admonished by the court as required by section 484 of the criminal code. The supreme court cannot, by intendment, supply any material proceeding which is entirely omitted, and these proceedings are fatally erroneous. *Jones v. State*, 2 Blackford, 475. *Finke v. Hall*, 8 Johnson, 437. *Beekman v. Wright*, 11 Johnson, 442. *Dodge v. People*, 4 Neb., 220. *Burley v. State*, 1 Neb., 385 (opinion of Mason, C. J., on page 301).

3. The evidence of Mrs. Ryan was discovered after the trial and verdict, and it could not have been discovered with reasonable diligence before; and under the fifth subdivision of section 490 of the criminal code it was error to refuse a new trial for this reason. *Gardner v. Mitchell*, 6 Pick., 116. *Baker v. French*, 18 Verm., 460. *Waller v. Graves*, 20 Conn., 305. *Cochran v. Ammon*, 16 Ill., 316.

4. The court erred in giving its instruction numbered 23. *Breen v. The People*, 4 Park., Crim. R., 380. *Com. v. Webster*, 5 Cush., 320. And in its instruction numbered 29, when the proof is equivocal, the jury should not convict. There must be unequivocal cer-

tainty of the defendant's guilt to warrant a conviction. *Caw v. The People*, 3 Neb., 357. *U. S. v. Douglass*, 2 Blatchford, 207. *U. S. v. Martin*, 2 McLean, 256.

5. It is error for the judge to intimate to the jury that a material witness for the accused has great interest in the result of the action. *Lellgett v. Markham*, 57 Ga., 13.

M. B. Reese, district attorney, and *W. A. Marlow* for the State.

1. Conscientious scruples entertained by a person against capital punishment, if so great as to affect his verdict in cases where the evidence is circumstantial, is sufficient reason to sustain a challenge for cause, even though such conscientious scruples would have no effect upon his verdict in a case where the evidence was direct. This was so decided by the court in *Gates v. People*, 14 Ill., 433.

2. The whole scope of the case shows ample evidence to sustain the verdict. The symptoms and post mortem appearances are consistent with arsenical poisoning, and the finding of the arsenic by Prof. Haines, in large quantities, some of it in an absolved condition, some in its free state, and some glued down to the inner coatings of the stomach by an exudation of coagulated lymph, showing vital action of the blood. The motive, opportunity of the accused, and subsequent conduct all show clearly his guilt.

3. Instruction No. 23, given by the court on its own motion, is a correct definition of a reasonable doubt, and when taken in connection with the instruction which followed (No. 24) is a clear, concise and distinct definition, and defines reasonable doubt in such a plain and comprehensive manner as would convey to the mind of any competent juror its true meaning. Instruction 29, taken as a whole, is a true exposition

of the law on this subject. Instruction 36 was certainly favorable to the accused, as the only evidence to which the instruction could at all apply was to the testimony of the physicians, who, by the cross-examination of counsel for the accused, showed that they were on unfriendly terms with accused; and this instruction was in effect saying to the jury that position contended for by counsel for accused, that full credence should not necessarily be given to such testimony, to be correct; there was no other testimony to which it could at all have any reference, and hence instead of being injurious to accused, was for his benefit. Instruction 63 was correct, even standing alone; but when taken in connection with all the others, is a true explanation to the jurors of their duty, and in no way could tend even to confuse their minds regarding their duty, in giving the accused the benefit of any reasonable doubt. Instruction 52, 57, 58, and all the other instructions complained of, we do not think subject to the objections interposed.

LAKE, J.

No foundation was laid either in the original or the supplemental motion for a new trial for reviewing any question decided by the district court upon the admission or rejection of evidence. Nevertheless, in view of the great importance of the case, we have carefully examined the record as to the several rulings complained of in these particulars, and fail to discover any just cause for complaint on the part of the prisoner.

In this connection we will refer to certain items specially mentioned in the brief of counsel as being prejudicial to the prisoner. The first is the answer of Dr. Crabbs, the coroner, to a question put to him by the district attorney as to what notice he had of the

death of Mrs. St. Louis before holding the inquest, in which he said: "I received notice by petition with twenty-eight signers." We do not see how this answer of itself could have been in the least prejudicial. But, admitting its immateriality, as claimed on behalf of the prisoner at the time, it was promptly excluded from the jury, as was also the petition itself when subsequently offered in evidence on behalf of the prosecution.

Complaint is also made of the testimony of the witness Kief, who was called by the state, which tends very strongly to show improper if not even criminal intercourse between the prisoner and a Mrs. Bloomer, who then resided in Fremont. This testimony was clearly admissible, and, taken in connection with that of other witnesses, and especially when viewed in the light of the vile and lascivious letter written to this woman by the prisoner himself while incarcerated under suspicion of having poisoned his wife, furnishes a pretty reliable clew to the motive by which he may have been actuated in the commission of the crime. As tending to show a motive in the commission of the offense charged, it was proper evidence for the consideration of the jury.

Again, it being disclosed by the cross-examination of Dr. Abbott, one of the state's witnesses, that, professionally, he was not on friendly terms with the prisoner, on his re-examination he was asked by the district attorney whether the sole reason of such unfriendliness to the prisoner were not the fact, "that he has pretended by a forged diploma to be a graduate of a medical college, which you afterwards found to be false." Although this question was not answered, an objection to it on the ground of incompetency having been sustained, still it is urged that the mere asking of it was so well calculated to prejudice the minds of

the jury against the prisoner that a new trial should be granted. That the question was clearly incompetent there can be no doubt, and a prompt rebuke of the attorney propounding it would not have been out of place. But to hold the question a sufficient reason for a reversal of the judgment, even had it been specially urged in the motion for a new trial, would be going farther in favoring one on trial for crime than any court has yet gone, and, moreover, would be most unreasonable. We cannot so hold.

The record shows that R. L. Roberts and C. J. Whipple were called to serve as trial jurors in the case, and that, on the challenge of the district attorney, they were both rejected on the ground of incompetency. Their rejection is now assigned for error.

Roberts was first interrogated, and showing himself duly qualified to serve as a juror in all other respects, this question was put to him by the district attorney, "I will ask you the question again, whether or not in a case depending upon circumstantial evidence your convictions are such as would preclude you from returning a verdict of guilty, if the punishment would be death?"

Answer. "Yes, sir, it would."

And in response to two other questions of similar import substantially the same answers were made.

This examination clearly established the disqualification of the juror to sit in the case. His conscientious convictions would have prevented him from agreeing to a verdict of guilty, although the evidence, under the law, were such as to absolutely require him to do so. On a trial for murder, as in all other trials, both parties to the suit are entitled to a jury composed of fair-minded, conscientious men. And their conscientiousness should be directed to the support of the laws, and not to their overthrow. The state, on such trial, is

entitled to a jury who can conscientiously, if the evidence warrants it, return a verdict which will subject the offender to the extreme penalty of the law. And what we have said as to the rejection of this juror will apply as well to that of Whipple. He showed by his examination that he was conscientiously opposed to the complete enforcement of the law applicable to the case in which he was called, and it would have been sheer folly to have permitted him to remain on the panel.

The second point urged in argument is, that during the several adjournments of the court from day to day, while the trial was in progress, the jury were not kept in charge of a sworn officer, nor admonished as to their duty while separated, as the statute directs. That this matter was not noticed in the motion for a new trial would be a sufficient reason for our refusal to consider it. We will say, however, that while it is the usual and perhaps the better practice in most capital cases thus to keep the jury together, there is no provision of our criminal code requiring it to be done. On the contrary, section 484 expressly provides for such separations up to the time when the case is finally submitted; and whether they shall be permitted or not in any given case is left to the discretion of the presiding judge. But even if separations were not permissible, there is nothing before us to show that any occurred. Separations of the jury, and the admonition required when they are permitted, are not necessarily a part of the record of a case, nor can they properly become so except some question be raised respecting them in the trial court, and preserved by bill of exceptions, showing affirmatively the act or omission complained of; the rule in such cases being, that whenever the facts stated are consistent with the duty of the court, and nothing is shown to establish a contrary

theory, the presumption will be that the court acted properly. *Fillion v. The State*, 5 Neb., 351.

The next matter urged upon our attention, as ground for a new trial, is the alleged newly discovered testimony of Catharine Ryan, which it is claimed would contradict an important witness called by the state, and support the prisoner in his testimony as to a somewhat material circumstance. Mrs. Elwood, the wife of one of the attending physicians, assisted in caring for Mrs. St. Louis most of the time during the last two days of her sickness. She testified that on the afternoon of the day preceding her death, Mrs. St. Louis requested the prisoner "to give her something to prevent the vomiting and retching coming back." To this request she says the prisoner answered, "Yes, Mary ,I have a powder prepared for you, I prepared it while you were asleep, and will give it to you now." That thereupon he stepped to a sewing machine standing in an adjoining room, picked up a glass of water and spoon, and gave his wife a powder, at the same time giving witness to understand that it was magnesia. In his testimony the prisoner, while admitting the giving of a powder at the time stated by Mrs. Elwood, declared he did not get it from the sewing machine, but from a paper of magnesia standing on a cupboard shelf in the kitchen. From the affidavit of Mrs. Ryan it appears she would swear substantially that at the time in question she was at work in the kitchen, washing dishes. That the prisoner took a spoon from the spoon-holder, went to the cupboard in the kitchen and filled it from a paper of magnesia which she had noticed standing on the shelf for several days. That after giving the magnesia to his wife he returned the spoon to her to be washed.

It might be a sufficient answer to this proposed testimony, to say that it would be cumulative merely. In

such case the general rule is that a new trial will not be granted on account of it. *Loeffner v. The State*, 10 Ohio State, 598. *Scofield v. Brown*, 7 Neb., 221. It would be but a repetition, in substance, of what St. Louis has himself testified to already, and in addition to this fact, we do not think its production could possibly change the result. But, aside from all this, it is not shown that the least diligence was exercised before the trial in ascertaining what Mrs. Ryan would swear to, with the view of calling her as a witness. The prisoner must have known what Mrs. Elwood would say on this point, for she had testified against him on a former trial of the case. He knew also that Mrs. Ryan was in his house at the time referred to, and it would seem that common diligence would have prompted an enquiry of her as to whether she had heard or seen anything while there that could possibly advantage him. Furthermore, the statute authorizing new trials on this ground expressly requires the applicant to show that the newly discovered evidence "could not, with reasonable diligence, have been discovered and produced at the trial." Section 490 criminal code. *Fillion v. The State*, 5 Neb., 351. *Heady v. Fishburn*, 3 Neb., 263.

We will next refer to such of the instructions to the jury as seem to be relied on as ground of error. It is contended that the prisoner was prejudiced by the explanation given of the term "reasonable doubt," as embodied in the twenty-third instruction, in these words: "A reasonable doubt is one which exists in the mind of a reasonable man after giving due weight to all the evidences, and such as leaves the mind in a condition in which it is not honestly satisfied, and not convinced beyond a moral certainty of the guilt of the accused." While this definition is, we think, open to criticism, it is certainly very far from being prejudicial

to the prisoner. By it the jury were, in effect, given to understand that before they could legally convict the accused they must be satisfied *beyond* a moral certainty of his guilt. This was exacting a higher degree of certainty in the proof of guilt than the law requires. It is enough to warrant a verdict of guilty if the jury are convinced *to* a moral certainty of the truth of the charge. This instruction therefore was more favorable to the prisoner than in strictness it ought to have been, and he has no reason to complain.

The twenty-ninth instruction was also excepted to. It was in these words: "Absolute, unequivocal, positive certainty is not required in any case. Mere speculation or contingent doubt may be found in connection with almost all human affairs. Absolute, unequivocal, mathematical certainty is rarely attainable, and this would be a degree of perfection not required of the jury by the laws." Perhaps there is a greater and more dangerous display of adjectives indulged in here than was necessary, or even advisable, but we do not think there is any reason to suppose that the jury were at all misled thereby, especially when taken in connection with other portions of the charge, in which the degree of proof necessary to a conviction was specially and carefully commented on. And as to the use of the word unequivocal, to which exception is particularly taken, we can see no objection to it in this connection. The object of the instruction, taken in connection with several others of similar import, evidently was to impress the minds of the jury with the impropriety of indulging in unreasonable, captious doubts, as is not unfrequently done, in order to escape the legitimate effect of morally satisfactory evidence. The proof of guilt may not be unequivocally certain, and still be morally satisfactory and convincing, which is all that the law requires.

Error is charged in the thirty-sixth instruction, where the jury were told that, "In determining upon the weight of evidence upon any point in the case" they were "not required to give equal weight to the testimony of each witness." There was no error in this. Taken together with what immediately follows in the same instruction, it was but the statement of a fundamental principle in the law of evidence, that only such degree of credit should be accorded to each individual witness as, under all the circumstances, the jury believe him entitled to.

The fifty-second instruction, or paragraph of the instructions, is objected to. Referring to the theory of the prisoner's counsel, that if arsenic were found in the viscera of the deceased it had been put there after death, the judge said: "But on the contrary, if you believe such proposition to be in conflict with the evidence of the case, you would be justified in disregarding the same and in removing such theory from further consideration." In deciding upon the propriety of this instruction it must be borne in mind that in this immediate connection the jury were told that, "If the evidence on this point creates a reasonable doubt in your minds of the guilt of the defendant" he "would be entitled to the benefit of such doubt." And that if they were "not satisfied beyond a reasonable doubt that the deceased died from the effect of arsenical poison they must acquit the defendant." We see nothing here at all prejudicial to the prisoner or of which he has the least reason to complain, and the charge of error is entirely unfounded.

In the sixty-third instruction the jury were told, in substance, that if they found the indictment "fully proven" it was their duty to convict the prisoner. Fault is found with the words *fully proven.* It is contended that their effect was to take "from the jury the

essential legal qualification of reasonable doubt, and was calculated to mislead them." We regard this criticism as entirely unwarranted. The jury were told time and again what amount of evidence was necessary to justify a conviction. What was necessary in order to *fully prove* the offense charged was so frequently and so pointedly presented to their minds by the court that they could not possibly have understood these words as relieving them from the duty of requiring the proof of all the material allegations of the indictment, beyond a reasonable doubt, before returning a verdict of guilty. The true meaning and effect of a charge to a jury cannot be ascertained by selecting a sentence here and a line or a word there, and looking to them alone, but all that is said on each particular subject or branch of the case must be looked to in order to reach a just conclusion respecting it.

It is insisted that by another instruction the court in effect told "the jury they should not credit the testimony of the defendant given in his own behalf." This is an unjust criticism of the charge. In commenting on the right of the jury to determine the degree of credit to be given to the several witnesses, they were told that while by the law of this state the accused was a competent witness for himself, still they were not required to accept his testimony as being absolutely true; and that in determining the degree of credit it was entitled to, they were "at liberty to consider the *great interest* which he has in the result." This was all very proper. The interest which any witness has in the result of the trial may always be shown as affecting the value of his testimony. That the prisoner, whose life was at stake, was vitally interested in the trial, cannot be questioned; and it was not error for the court to state as much to the jury. Not only were the jury, as told by the court, "at liberty to consider"

this interest, but it was their duty to do so in determining the credit to be given to the prisoner's testimony.

There are several other objections made to the instructions, in the brief of counsel, but they are generally in the nature of technical criticisms of detached sentences rather than a fair discussion of the whole charge taken together, which we have already remarked is not the proper mode of examination. There is, however, a general complaint of unfairness to the prisoner, and that a large portion of the charge is "improperly argumentative," and containing an "exhortation to convict." As to all this we will only say that we have read and re-read the entire charge, noticing particularly the passages to which our attention was specially directed by counsel, and believe it presents the law of the case very fully and fairly to the minds of the jury, and in as favorable a light to the prisoner as in reason could be asked.

As to the several instructions, requested on behalf of the prisoner, with the exception of the eleventh, which was wholly inapplicable to the testimony, they were but a repetition, in substance, of what were given in the general charge prepared by the court. It was not error therefore to refuse them. *Clough v. The State*, 7 Neb., 320.

Finally, it is urged that the verdict is unsupported by the evidence. On this point we have bestowed much time and reflection with the view of ascertaining whether any other reasonable conclusion than that of the prisoner's guilt could possibly be reached. An extended discussion of the evidence, voluminous as it is, would not be in place here, but we will notice, very briefly, some of the more marked features of the case, which we think the testimony clearly establishes.

The first reliable account that we have of the last

sickness of Mrs. St. Louis commences some eight days before her death, when Dr. Borglum was called to treat her. It is conceded that whatever medicines she took before this time were prescribed by her husband, the prisoner, who had treated her for several days. It is very clearly shown, that from the time Dr. Borglum was called, up to her death, the deceased had many of the more prominent symptoms usually present in cases of arsenical poisoning. She had "cold and clammy extremities," an "intense burning pain through the chest," a peculiar "hacking cough," most violent "vomiting and retching," and at times "excessive thirst." In the language of the deceased herself to one of the witnesses who called to see her, she "drank a great deal, and wanted to drink all the time." In addition to these marked peculiarities, the case was so entirely uncontrollable by the use of the usual remedies resorted to, where these symptoms are the result of natural diseases, as evidently to astonish and confound the two physicians then in charge of the case. Especially was this so from the time when the prisoner administered the powder which he claimed was magnesia.

We have also a post mortem examination, conducted in the most prudent manner—the removal of the stomach, the liver, and the duodenum—and a subsequent analysis by a most able and accomplished chemist and toxicologist, Professor Haines, of the Rush medical college, Chicago, resulting in the discovery, in these organs alone, of over nine grains of white arsenic, of which over six grains were in the stomach and duodenum, to say nothing of the quantity that must necessarily have become absorbed and carried by the blood into other parts of the system. That this quantity of arsenic was found in these organs, that it was administered to Mrs. St. Louis during life, and that it was sufficient to and did cause her death, are propositions

too well established to admit of any doubt whatever. But did the prisoner administer it? That is the vital question. The jury by their verdict have said that he did, and they said it on what we conceive to be ample evidence to justify that conclusion. There has not been even a suggestion that the deceased took this arsenic of her own volition. Her evident desire to live, and her beseechment of her husband and the other physicians for something to alleviate the terrible "retching" and the intense "burning pain," from which she was suffering, together with her whole conduct, as exhibited by the evidence, forbid such a suspicion even. It is shown, too, that the only persons who were in a situation to have enabled them to give the poison were Dr. Borglum, Dr. Elwood, Mrs. Elwood, and the prisoner. Drs. Borglum and Elwood both give a clear and doubtless truthful statement of their prescriptions and treatment while they had charge of the case. Mrs. Elwood was also on the stand as a witness. She was a warm personal friend of the deceased, staying with her and kindly ministering to her wants most of the time during the last two days of her suffering. There is not a breath of suspicion attaching to either of these persons.

It is certain that each one of them did all that was possible to alleviate her distress and restore her to health. And it is through the watchful care of Mrs. Elwood that the administration of a powder—which had not been prescribed by either of the physicians then entrusted with the conduct of the case—by the prisoner was detected. Dr. Elwood coming in shortly after this powder had been given was so astonished at the changed condition of his patient, whom but a short time before he says he left apparently better, that he remarked to his wife, who was in attendance, "What have you been giving her?" Mrs. Elwood answered, "I haven't been giving her anything except what you

left." But afterwards, from information from his wife, Dr. Elwood said to the prisoner, "Doctor, you gave her a powder while I was gone." To which he answered, "Yes, I gave her a powder of magnesia. She was begging me to give her something, and I gave her that, thinking it would be as harmless a thing as I could give her until you came back." From this time the patient grew rapidly worse, suffering from that intense burning pain in the stomach of which she complained, until the next day, when she died.

The giving of this powder by the prisoner, under the circumstances, together with the violent effects which it at once produced, we regard as very strong evidence against him. Dr. Elwood was right there in the town at the time, and had special charge of the treatment to be pursued. He had stepped out of the house but a short time before "to go up town," leaving medicines of his own prescription to be given while he was gone. He was expected back every moment, according to the prisoner's own statement to his wife, when he gave this powder, which he had prepared "while she was asleep." This evidently was the fatal dose. The two grains and over of pure white arsenic found still undissolved in the stomach of the deceased confirms this belief.

In addition to this we have strongly criminating evidence in the conduct of the prisoner soon after his arrest for this crime. In the letter written by him to Mrs. Bloomer, before alluded to, filling some five pages of legal cap, not a single sentence is to be found that would be expected from a kind and affectionate husband unjustly charged with the murder of his wife. Much of it is devoted to foul allusions respecting his intercourse with other women before referred to. The bribery of the magistrate, before whom his examination was to take place, is therein distinctly suggested

as a means for securing an acquittal. And, alluding probably to the fact that arsenic had been discovered in the viscera by the analysis, he said: "The mere finding of arsenic is no proof of guilt against me, because they can't prove that I gave it, and I can prove that she didn't die of poisoning." But in all of this long letter there is not one single expression of sorrow for the excruciating suffering and untimely death of his wife, nor a single manifestation of regret for the great loss to himself and his children.

But we will pursue this subject no further. We are satisfied the prisoner has had a fair trial. We find in the record no error prejudicial to him. There is ample evidence to justify a verdict of guilty, which the jury, on their oaths, have found, and when we have said this our duty is discharged.

JUDGMENT AFFIRMED.

PRENTIS D. CHENEY, APPELLANT, v. JOSEPH C. EBERHARDT AND OTHERS, APPELLEES.

1. **Finding of Court on Questions of Fact:** HOW TREATED IN THE SUPREME COURT. In cases tried to the court without a jury, the finding on questions of fact is entitled to the same respect in the supreme court, on appeal, as would be accorded to the verdict of a jury under like circumstances.

2. **Usury:** LOAN BY AGENT. It is a salutary rule, and one that should be rigidly applied in all proper cases, that where one who is intrusted with the business of loaning money exacts for its use, either directly or indirectly, by whatsoever shift, or device, interest in excess of the rate permitted by the statute, the transaction is usurious and will be judged accordingly.

APPEAL from Nemaha county.

J. H. Broady, for plaintiff, appellant.

T. B. Stevenson, for defendants, appellees.

LAKE, J.

The action in the court below was for the foreclosure of a mortgage, and resulted in a general finding of all the equities in favor of the defendant Eberhardt, who alone had answered, and a judgment in pursuance thereof dismissing the case. The plaintiff has brought the case here by appeal.

The defense interposed by the defendant in his answer is, in substance, that the entire consideration of the several notes secured by said mortgage was usurious interest, exacted by the plaintiff in making to him a loan of money. It is alleged, and clearly established by the proofs, that in this transaction while Eberhardt actually obtained only $485.00, he gave in return securities as follows, viz.: One note payable in five years for $500.00, and five interest notes for $50.00 each, payable in one, two, three, four, and five years respectively, and all secured by mortgage on the real estate in question. Also five other notes for $35.00 each, payable in one, two, three, four, and five years respectively, which were likewise secured by a second mortgage on the same premises; thus making the actual cost to the borrower for the money obtained by him something over seventeen per cent per annum for each year of the term which the loan had to run. As to these facts there is no dispute.

It also appears that the $500.00 note and the five $50.00 notes, which were taken nominally to one Byron Murray, have been fully paid, as have also two of the $35.00 notes. The $35.00 notes and mortgage were given directly to the plaintiff, Prentis D. Cheney.

The plaintiff endeavors to maintain the legality of this loan on the theory that he was employed by Eberhardt to negotiate it, and that throughout the entire transaction he acted solely as his agent, and not as the agent of Murray, from whom he claims to have obtained the money, after much effort. The five $35.00 notes, amounting to seven per cent per annum for the whole term of the loan, he claims were given as the agreed compensation he was to receive for obtaining the loan.

It must be admitted that the transaction was so shaped, and hedged about, as to make this claim appear to the superficial observer somewhat plausible; but we think enough is brought to light to show very clearly that, even if the money received by Eberhardt had come from Murray, he had confided the business of loaning it to the judgment and discretion of Cheney, holding him responsible for the safety of its investment. This much we think is plainly inferable from the testimony of Cheney himself. He says: "I gave Murray my personal receipt for the money, binding myself to get from Eberhardt the notes and mortgage on the land, and the abstract of title, as promised in the application, and deliver the same to Murray as soon as possible, or to return the five hundred dollars in case I did not get the notes and security." Again: "I sent the five hundred dollars to Perkins in a bank check, to be handed to Eberhardt when the security was perfected, and abstract of title furnished, as provided in the application." This man Perkins seems to have been the confidential go-between through whom Cheney transacted that part of the business done in Nebraska. Cheney testifies further: "I strongly urged Murray to accept the security and make the loan; and he was thereby convinced that the security was sufficient, and consented to make the loan." * * * "I

sent Murray's papers to him, and did not see them again for three years, except the yearly interest notes, which were sent to me for collection, they having been made payable at my office." And right here a not impertinent inquiry is suggested by this testimony. If Cheney acted solely for Eberhardt as he claims, and not for Murray, why were these yearly interest notes made payable at his office in Illinois, and several hundred miles from Murray's place of abode? If he were indeed the agent alone of Eberhardt, then this man Murray certainly displayed far greater confidence in him than is usually reposed by one business man in the agent of another. On the whole, while the evidence of usury is not quite as conclusive as we found it to be in the case of *Cheney v. Woodruff*, 6 Neb., 151, still we think it ample to support the finding of the court below, which is entitled to the same respect here as would be accorded to the verdict of a jury under like circumstances. *Seymour v. Street*, 5 Neb., 85. *The A. & N. R. R. Co. v. Washburn*, *Id.* 117. We hold it to be a salutary rule, and one that should be rigidly applied in all proper cases, that where one who is intrusted with the business of loaning money exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by the statute, the transaction is usurious, and will be judged accordingly. Such, in effect, has been the holding of this court as often as the question has come before it. *Philo v. Butterfield*, 3 Neb., 256. *Cheney v. White*, 5 Neb., 261. *Cheney v. Woodruff*, 6 Neb. 151.

JUDGMENT AFFIRMED.

MUTUAL HAIL INSURANCE CO. OF WISCONSIN, PLAINTIFF IN ERROR, v. CHARLES H. WILDE, DEFENDANT IN ERROR.

1. **Insurance:** DAMAGES: MODE OF ASSESSMENT: INSTRUCTION. The contract of insurance provided that in case of damage to the property insured the amount thereof should be ascertained by three appraisers, to be appointed by the agent of the company; and "in case the appraisement should be less than a twenty-fifth part" (of the value of the crop) "no claim shall be made by the insured upon the company, and the insured has to pay the expenses of such an appraisement." And it was further agreed that on demand of the agent managing the assessment the necessary costs should be deposited by the insured before the assessment should be made. There was testimony to the effect that security for the costs of an assessment was duly demanded, which the insured refused to give. Thereupon the insurance company requested the court to charge the jury in effect, that if they found such security was demanded the plaintiff must prove that he gave it in order to recover. *Held*, that the instruction, as requested, was right and ought to have been given.

2. ———. Under the above provision as to damages the plaintiff in error requested an instruction that: "If the damage by the hail did not *exceed* one twenty-fifth part of the whole crop," the company was not liable. *Held*, erroneous, and that it was properly refused.

3. ———: INSTRUCTION TENDING TO CONFUSE OR MISLEAD THE JURY, ERRONEOUS. An instruction which is so vague and uncertain that it must tend to confuse or mislead the jury is good ground for the reversal of a judgment.

4. ———: ———. An instruction which erroneously assumes that there is no evidence before the jury upon a material branch of the case ought not to be given. If there be sufficient evidence to support an affirmative finding upon an alleged cause of action, it must be left to the decision of the jury.

ERROR from the district court of Cuming county. The facts are sufficiently stated in the opinion.

Crawford & McLaughlin, for plaintiff in error.

Uriah Bruner and R. F. Stevenson, for defendant in error.

LAKE, J.

The action below was brought on a policy of insurance issued by the plaintiff in error to the defendant in error to recover damages alleged to have resulted from a partial destruction of certain growing crops, covered by said policy, by a hail storm. There was also a second cause of action by which the small sum of four dollars was claimed for the use of a team, etc., in conveying certain persons who were acting as appraisers for the company from place to place in Cuming and Dodge counties. The trial on issues joined resulted in favor of the plaintiff in the action, and the defendant brings the case here by petition in error for the review of several questions decided adversely to him there.

Under the rule of this court as to the particularity required in motions for new trials, in order to lay a foundation for reviewing decisions on the admission or rejection of evidence, several questions raised by the petition in error cannot be considered, and we are confined to a review of certain instructions given to the jury and to others which were refused, of which errors are alleged.

It appears that by this contract of insurance the mode of ascertaining the amount of damage to the crop insured was by an appraisement to be made by three appraisers, to be appointed by an agent of the company. And it was further agreed, that "in case the appraisement should be less than a twenty-fifth part" (of the value of the crop) "no claim shall be made by the insured upon the company, and the insured has to pay the expenses of such an appraisal." It was fur-

ther stipulated, that "on demand of the agent managing the assessment the amount of costs arising from these assessments shall be deposited by the insured individual demanding the assessment before the assessment is accomplished."

As applicable to these particular provisions of the contract it is shown by the record that shortly after the alleged injury one Aug. Weiss, an agent of the company, visited the premises with the view of ascertaining the amount of the loss.

He testifies, that in an interview which he then had with the defendant in error, he said to him that he "had examined the patch on which he claimed damages," and that he "could not discover any damage done by hail." This witness further testifies to the effect that he informed the insured that while he was of the opinion no damage had been done for which the company was liable, still if he would give security for the expenses he could "have the loss adjusted by appraisers;" that to this proposition Wilde replied he "would not do this," but "would rather let it go." The testimony of this witness, except as to the last clause, is entirely uncontradicted.

In view of this evidence this instruction to the jury was requested on behalf of the company: "If you find that the defendant, by its agent, demanded deposit of fees and costs of appraisers, or demanded security therefor before it would order appraisers, then it devolves upon plaintiff to prove that he gave such security, or advanced the fees in order to recover." As requested this was refused, but was given with this proviso added by the court: "*Provided*, that the damage, if any shown, did not exceed one twenty-fifth part of the whole amount of crops insured."

We are of the opinion that there was error both in the refusal to give the instruction in the form requested,

and in giving it with the proviso. The court seems to have been misled by the fact that the insured was ultimately liable for the expenses of the appraisement only in the event of its showing the damage or loss sustained to be less than one twenty-fifth of the entire crop. But this fact has no bearing whatever upon the right of the company to the security, if the agent sees fit to demand it as a condition precedent to the appraisement. Before the extent of the damage can be known, where it is disputed, and, consequently, whether the insured will finally have these expenses to bear, an appraisement must be made, the cost of which falls primarily on the company, whatever the extent of the loss may prove to be. And this provision for security was evidently made in view of the possible contingency by which the company might be entitled to look to the insured for remuneration for this outlay. The plaintiff in error was entitled under the evidence to the instruction as requested, and it ought to have been given.

The plaintiff in error also requested the court to instruct the jury, that: "If the damage by the hail did not exceed one twenty-fifth part of the whole crop on which damage is claimed, then he cannot recover on his first cause of action—that is, more than one twenty-fifth part of the damaged crops must be a total loss before he can recover." This request was rightly refused. As before shown, the provision in the policy was, that in case "*less than a twenty-fifth part*" was destroyed, no claim should be made upon the company. Therefore in order to recover he was only required to show, so far as concerned the extent of the loss, that it reached one twenty-fifth part, or four per cent of the value of the crop damaged. Other instructions of substantially the same import were requested, and properly refused, but still we find that, in the charge

of the court on its own motion, the error thus avoided was actually fallen into, but no exception appears to have been taken.

One of the instructions complained of, and now assigned for error, was as follows: "Were the damages one-eighth, one-half, one-third, or what part, or fraction, or part of the whole amount of crops insured and covered by policy in question were damaged? And when you have determined the fraction of damage, then you are to rate wheat at $12.00 per acre and oats at $9.00 per acre."

What the object of this instruction was, taking it altogether, we do not know. Considered alone, the first clause may have been intended as a suggestion to the jury of the proper mode of inquiry as to the percentage of damage done to the crops. And, inasmuch as it seemed to be conceded that there was some damage, such suggestion would have been proper enough. But when taken in connection with what follows, and viewed with reference to the pleadings and the evidence, it seems to be incomprehensible. Nor is there anything in any other of the instructions that tends to relieve this one of its obscurity. There is nowhere to be found any explanation to the jury of this language, as to what was to be gained by this rating, or how it would aid them in making up their verdict. We think this instruction was well calculated to confuse and mislead the jury, and being so, is good ground for reversing the judgment. *Washington Insurance Co. v. Merchant and Manufacturers' Insurance Co.*, 5 Ohio State, 450.

Another error assigned is the refusal of the court to instruct as requested upon the second cause of action. This instruction was properly refused. It assumed that there was no evidence before the jury from which they would be warranted in finding the company lia-

ble for the services in question. While there may not have been sufficient evidence of an employment by the company, there was abundant proof of the recognition of those services by an agent of the company as well as an agreement to pay for them. The rule is that where there is sufficient evidence to support an affirmative finding upon an alleged cause of action, it must be left to the decision of the jury.

For the errors mentioned the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN MANSFIELD, PLAINTIFF IN ERROR, V. E. MARY GREGORY, AND OTHERS, DEFENDANTS IN ERROR.

1. **Judicial Sale.** G., as agent of M., purchased certain real estate with the money of M., and took the title in his own name. Afterwards G. executed a deed to M. for the real estate in question, which was not recorded for nearly two years. Judgment having been recovered in the district court against G., execution was levied on the real estate in controversy, and it was advertised and sold, and the sale confirmed and a deed made to the purchaser. Two days prior to the sale, M. recorded his deed, and the deed was on record at the time of the sale. *Held*, that the purchaser acquired no title by the sale.

2. ——: PRACTICE. Under section 500 of the code, a sheriff's deed vests in the purchaser the same estate as was vested in the judgment debtor at or after the time the lands became liable to the satisfaction of the judgment. If, therefore, the debtor had no interest in the lands sold, of which the purchaser had notice, he acquires no title by the sale.

ERROR from Lancaster county district court.

Lamb, Billingsley & Lambertson, for plaintiff in error.

No brief on file.

J. R. Webster and Brown & Marshall for defendants in error.

The lien obtained by the levy of an execution or attachment is a specific lien; and for that reason, inasmuch as it indicates that the creditor elects to satisfy from that specific property, and probably for a further reason that the levy is in the nature of a purchase through an officer, being accompanied with cost and expense to the creditor, whenever the matter has been reviewed, it is deemed a lien of higher character than the general lien of a judgment which attaches without act of the creditor, and by mere operation of law. At the time of the levy, it is to be remembered, the deed of plaintiff was not recorded. The record of plaintiff's deed was June 19th, 1876, and the levy was made not later than May 22d, 1876, for sale after thirty days was made June 21st, 1876, so that the levy was made not less than twenty-eight days before record of plaintiff's deed. *Goodwin v. Richardson*, 11 Mass., 469, 475. *McMechan v. Griffing*, 3 Pick., 147, 153. *Flynt v. Arnold*, 2 Met., 619. *Roberts v. Boume*, 23 Me., 165. *Wheaton v. Dyer*, 15 Conn., 311. *Isham v. Bennington & Co.*, 19 Vt., 230, 245, 54. *Slocum v. Catlin*, 22 Vt., 137, 139, 140. *Mayham v. Combs*, 14 Ohio, 428, 431. *Jackson v. Luce*, *ib.*, 51–417. *White v. Denman*, 16 Ohio, 59, 69, Ohio, 533. *Tousley v. Tousley*, 5 Ohio St., 78. *Massey v. Wescott*, 40 Ill., 160. *Dixon v. Lacoste*, 1 S. & M., 70. *Picket v. Banks*, 11 S. & M., 445. *Guerant v. Anderson*, 4 Rand. *Underwood v. Ogden*, 6 B. Mon., 268. *Swigert v. Bank*, 17 B. Mon., 268.

MAXWELL, CH. J.

This is an action to quiet title. The petition alleges that in the year 1869, Allen M. Ghost, as the agent of

the plaintiff, purchased lot fourteen, in block fifty-four, in the city of Lincoln, and paid for the same with money belonging to the plaintiff, but took the deed of conveyance in his own name. The deed was recorded on the seventh day of July, 1874. On the eighth day of January of that year, Ghost conveyed the lot in question to the plaintiff by a deed of general warranty. From some cause which does not clearly appear, this deed was not recorded until the nineteenth day of June, 1876. In November, 1874, Titus Fish, and others, recovered a judgment in the district court of Lancaster county against Allen M. Ghost and J. C. Clark, for the sum of $510.97, on which, prior to the third day of May, 1876, there had been paid about $250.00, but which sum was not credited on the records of the court. On the third day of May, 1876, an execution was issued on the judgment in question for the full amount thereof, and was levied upon certain real estate in section eighteen (no township or range given), belonging to the defendants, which lands were sold on the twenty-first day of June, 1876, to the defendant, for the sum of $347.00; and lot fourteen, in block fifty-four, was sold to the defendant for the sum of $200.00. The petition also alleges that E. Mary Gregory did not pay the sheriff the sums she so bid for the property in question, but that afterwards she procured in a hasty manner a confirmation of the sale of said real estate, and afterwards the sheriff executed a deed to the purchaser for the same. The defendants demurred to the petition, assigning as grounds therefor, that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was sustained, and the cause dismissed. The plaintiff comes to this court upon petition in error.

The rule is well settled in this court that the lien of a judgment attaches only to the actual interest which

the judgment debtor had in the land at the time it was rendered; it is subject to every equity existing against the debtor at the time of its rendition. *Galway v. Malchow*, 7 Neb., 285. *Metz v. The State Bank, Id.*, 165.

As the lien of a judgment creates no interest in the land until after a sale and conveyance thereof, the purchaser is chargeable with any notice, either actual or constructive, which he may have received prior to the sale of any outstanding title.

In the case at bar, the deed of the plaintiff was recorded two days before the sale took place, and was notice to the defendant of the plaintiff's title. The defendants insist that as the plaintiff's deed was not recorded at the time of the levy, the judgment creditor acquired a specific lien upon the property by the levy; that the defendants' rights are acquired under the right of Fish, the judgment creditor, and whatever right he had passed to the purchaser. Upon whose property was this levy made? It will not be contended that it belonged to Ghost. He had no interest in it whatever. Upon what principle, then, when the purchaser has notice, can you take the property of a person not liable for the payment of a debt and apply it in satisfaction thereof? Such a rule, if adopted, would violate every principle of justice, and make the material inquiry upon levying an execution, not the ownership of the property, but the condition of the record. The object of the registry law is to protect purchasers without notice, and parties acquiring specific liens for a valuable consideration, and not to furnish the means by which owners of real estate may be robbed of their property.

Under section 500 of the code of civil procedure, a sheriff's deed vests in the purchaser the same estate as was vested in the judgment debtor at or after the time the lands became liable to the satisfaction of the judg-

ment. As at that time the judgment debtor had no interest in the land in question, and as the purchaser had notice at the time of the purchase of that fact, she acquired no title by the deed of the sheriff to the lot in question. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX REL., F. M. STRATTON, PLAINTIFF IN ERROR, V. R. H. KNAPP, AND OTHERS, DEFENDANTS IN ERROR.

1. **Bill of Exceptions.** When there is no bill of exceptions this court will presume that there was sufficient evidence before the court below to sustain the findings and judgment.
2. **Stipulation.** This rule is not changed, although there was a stipulation in the court below, which is certified with the record, and from which it might be inferred that there was no other evidence before the court.

THIS was an action in the nature of a *quo warranto*, to determine the right of defendants to hold and exercise the duties of the common council of the city of Wahoo, Saunders county. Judgment below was for defendants, and the cause docketed in this court as an appeal. At the present term, under an order of court made in that behalf, the relator was allowed to file an assignment of error, upon which, with the record, the cause was argued and submitted.

John Carrigan, for plaintiff.

M. B. Reese (*W. H. Munger* with him), for defendants.

COBB, J.

The assignment of error which the court allowed the relator to file in lieu of a petition in error, contains but the one general point: "That the court erred in finding for the defendants and entering judgment against the relator on the pleadings and proofs presented to the court." In looking into the record it appears that no other point could have been made, as there was no interlocutory decision or ruling whatever in the case, and the point made cannot be considered by this court, for the reason that, there being no bill of exceptions, this court cannot know upon what evidence or testimony the court made the findings and rendered the judgment. When there is no bill of exceptions this court will presume that the trial court acted upon sufficient evidence to sustain its findings and judgment. There is a stipulation of facts in this case certified up with record which may have been relied upon by the plaintiff in error as taking the place of a bill of exceptions. But in no event could it perform such office, without being duly certified under the hand of the judge trying the cause.

The judgment of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

MATT. MILLER, PLAINTIFF IN ERROR, v. BENJAMIN F. ROLPH, DEFENDANT IN ERROR.

1. **Contested Election.** This court has jurisdiction to correct errors of the district court in administering the law for contesting elections.

2. **Bill of Exceptions.** But when there is no bill of exceptions this court can only notice such errors as appear on the face of the record proper.

ERROR from the district court for Butler county.

Phelps & Grimison, for plaintiff in error.

Horace Garfield and Robberts & Steele, for defendant in error.

COBB, J.

The defendant in error filed a motion to dismiss this case for the following reasons:

1st. There is no sufficient transcript on file in this court.

2nd. The transcript does not show any jurisdiction in the district court.

3rd. The said plaintiff in error did not file his petition in the district court as required by law.

4th. If this cause was ever tried by the board provided for in section 26, of chapter 20, General Statutes of Nebraska, the district court could acquire no jurisdiction by appeal therefrom, because that is not a court recognized by the constitution.

5th. The decision of the district court is final.

This cause came to this court by petition in error; the same party has been plaintiff in all the courts; and although the section of the statutes under which this proceeding was originally brought provides that the

decision of the district court in such cases on appeal shall be final, yet this court would have jurisdiction to correct errors which the district court might make in administering that or any other statute, but the plaintiff in error does not point out any errors in the record which this court can consider. The plaintiff assigns two grounds of error:

1st. That the said judgment and decision of the district court is not sustained by sufficient evidence.

2nd. That the said judgment was given for the said Benjamin F. Rolph, when it ought to have been given for the said Matt. Miller, according to the law of the land.

Now in order that this court should be able to consider either of these grounds it was necessary that the plaintiff preserve the evidence in the district court and bring it here as a part of the record in the case. This he has not done. There being no bill of exceptions, this court can only look into the record proper for errors; and as the plaintiff does not complain of any such, and as all the rulings in the case, except the final decision, were in the plaintiff's favor, we can find no error there.

There is attached to the transcript in this case what purports to be the testimony taken by the board of justices who originally tried the cause, but whether that was the evidence acted upon by the district court we are not informed. We do not think that it could have been except by consent of parties, and we see nothing of any such consent in the record. In the absence of a bill of exceptions, signed by the judge who tried the cause containing the testimony in the case, this court must presume that there was sufficient evidence before the court to sustain the findings and judgment. As this court has jurisdiction of the cause by virtue of the petition in error and transcript, the mo-

tion to dismiss must be overruled. But as we find no error in the record the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JOHN BLACK, PLAINTIFF IN ERROR, V. THE COMMISSIONERS OF SAUNDERS COUNTY, DEFENDANTS IN ERROR.

Board of County Commissioners: ACTION OF, UPON CLAIMS AGAINST THE COUNTY: FORMAL JUDGMENT NOT REQUIRED: APPEAL FROM. While the commissioners, in passing upon claims against the county, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law. It is sufficient if it appear that the claim was duly presented, and that it was allowed or rejected. Great formality in this matter is not required of them. When the record of the proceedings of the board, as kept by the county clerk, shows the proper presentation of the claim, and that they refused to grant it, this is enough to authorize an appeal by the claimant to the district court.

ERROR from the district court for Saunders county.

Woolworth & Munger, for plaintiff in error, cited *Jefferson v. Besley*, 5 Wis., 134. *Warner v. Board of Supervisors*, 19 Wis., 611.

Clinton Briggs for defendant in error.

1. We refer the court to sections 34, 35, 38, and 39 (G. S. 238–239). The last section requires the clerk "to record in a book, etc., *all* proceedings of the board." The aggrieved party may "appeal from the decision" (sec. 34), and the clerk shall make a "complete transcript of the proceedings" (sec. 35). The "decisions and proceedings" of the board must be recorded by the clerk, and he must sign the record and

attest it by the county seal. The proceedings of the board are of great interest to the public, and the provision is a wise one which requires a permanent record to be made. Courts will not encourage laxity in this matter.

2. It does not appear that the board ever acted upon Black's claim—that is, aside from rumor or the clerk's statement. There is no order or decision of the board. A transcript that did not show any order or judgment of the district court, but only a statement of the clerk as to what he thought the action of the court was, would not last long in this court.

LAKE, J.

The question presented by the record in this case is, whether the appeal from the board of county commissioners to the district court was properly taken and perfected. The court below held it was not, and on motion of the defendant, entered an order of dismissal. In this we think there was error.

This action of the district court was most likely taken because of the want of a formal judgment by the county commissioners on the plaintiff's claim, the transcript of their proceedings thereon showing merely that they "refused to grant the claim." But whatever the ground of the dismissal of the appeal may have been, it was clearly in violation of the plaintiff's right to have his cause tried in that court on appeal.

By the second subdivision of section 14, Ch. 13, Gen. Statutes, it is provided that the board of county commissioners at any meeting shall have power "to examine and settle all accounts of the receipts and expenditures of the county, and allow all accounts chargeable against the county," etc. Now while the commissioners, in passing upon claims against the county presented

for their allowance, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law in the determination of actions before them. It is sufficient if it appear from the records, kept by the county clerk, that the claim was duly presented, and that it was allowed or rejected. Great formality in this matter is not to be expected of them, nor is it required. The transcript filed in the district court in this case shows that the plaintiff's claim was duly presented at the July meeting of the board of county commissioners, by petition setting forth in detail the particulars of the demand, "which said petition said board of county commissioners refused to grant." This was equivalent to saying that the claim was disallowed. It was a final disposition of the claim by the board. It was a rejection of the demand.

Section 34, Ch. 13, General Statutes, provides that: "Any person who shall be aggrieved by any decision of the board of commissioners, may appeal from the decision of the board to the district court of the same county," etc., by serving notice and giving bond as therein directed. All of the requirements to entitle the plaintiff to have his case heard in the district court seem to have been complied with, and we are of opinion that his appeal should be re-instated.

REVERSED, AND APPEAL RE-INSTATED.

WILLIAM B. NARACONG, PLAINTIFF IN ERROR, v. Z. H. GRAVES, DEFENDANT IN ERROR.

Practice in County Courts. On the first day of the return term, B demurred to the petition of A. Demurrer sustained. A asked leave to amend his petition *instanter*. Leave granted. Amended petition filed immediately. B withdrew from the court room and did not return. Same day, B, defendant, was defaulted for want of an answer. The next day—second day of the term—trial had in the absence of defendant, B, and judgment for plaintiff, A. *Held*, no error.

ERROR from the district court for Butler county.

Dean & Garfield, for plaintiff in error, cited Gen. Stat., 266, sec. 11. Id., 546, sec. 142. 1 W. L. Monthly, 351.

Robberts & Steele, for defendant in error.

1. The entire subject of amendments, terms upon which they are made, time of answering after filing an amended petition during term, is left to the discretion of the trial court, and the plaintiff in error must show an abuse of that discretion before this court will grant relief. *Mills v. Miller*, 3 Neb., 95. *O'Dea v. Washington Co.*, Id., 122. *Davis v. Wilson*, 11 Kansas, 80. *Gulf Railroad Company v. Owen*, 8 Kansas, 414.

2. The plaintiff in error does not claim to have been surprised by the amendment, nor indeed could he have been, because the amendment did not change the cause of action in the least from that which was set out in the original petition, nor did he make an application for postponement, as he should have done. *Hobson v. Ogden*, 16 Kan., 393. *Higbee v. Ayers & Martin*, 14 Kan., 331.

COBB, J.

This action was commenced in the county court of Butler county. The plaintiff's claim exceeded one hundred dollars. On the first day of the term to which the summons was returnable, the defendant appeared and demurred to the petition. The demurrer was sustained, whereupon plaintiff applied for and obtained leave to amend his petition *instanter*. The amended petition was filed immediately, whereupon the defendant withdrew and failed to appear further in the case in that court. On motion of the plaintiff the case was continued until the following day at 10 o'clock A.M., at which hour the cause was called; plaintiff appeared, defendant failed to appear, or for one hour thereafter, when a trial was had and judgment rendered in favor of the plaintiff. Thereupon the defendant took the cause to the district court on error and from the judgment of the district court affirming said judgment of the county court, and overruling said petition in error, the said defendant below—plaintiff in error—brings the cause to this court by petition in error.

The question presented for the consideration of this court is, whether the amending of his petition by the plaintiff, by leave of the court, had the effect to extend the time for answering on the part of the defendant. Plaintiff in error cites General Statutes, p. 266, § 11, and Ib., p. 546, § 142, the first of which provides that in actions before the county court, where the amount claimed exceeds one hundred dollars, motions and demurrers shall be allowed, and the rule of practice concerning pleading and process in the district court shall be applicable so far as may be to pleadings in the county court; and the second of which comes under the head of mistakes and amendments, and refers clear-

ly to cases of amendment out of term and without leave of the court. Plaintiff in error also cites *Mather v. Gallia Furnace Co.*, 1 Western Law Monthly, 351. This work not being in the library we have not examined the case, but from the note of it in Seney's code it would seem to sustain the point made by plaintiff in error. But such is not the law as we understand it. In case of amended pleadings filed in vacation, either the statute or a rule of court—in this state the statute—fixes the time in which the opposite party may answer or reply to the amended pleading, and notice of such amendment shall be served on the other party, and the time commences to run from the day of serving such notice. But when a party obtains leave of the court to amend his pleadings in open court, no notice of such amendment need be served on the opposite party, and if the opposite party desires time to answer the amended pleading he must apply to the court for it. And in proper cases the cause will be continued even over the term to give sufficient time to answer such amended pleading. Sec. 147, p. 546, General Statutes.

In this case the county court was governed by the laws then in force as to the rule of pleading in the district courts. The parties being in court—the court being in session—it was the duty of the defendant in that court to take notice of the order granting to the plaintiff below leave to amend his pleading; and if upon such amended pleading being filed he desired time in which to answer it, it was his duty to apply for it to the court.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

MARY E. JONES, APPELLEE, V. THE JOHNSON HARVESTER COMPANY, AND J. W. AGLEE, SHERIFF OF WAYNE COUNTY, NEBRASKA, APPELLANTS.

Title. In 1868, A, who resided in Chicago, sent from that place by express to B, at Omaha, $200 in money with which to enter a quarter section of land in Wayne county, Nebraska. B received the money, with it bought agricultural college scrip, located the land in his own name and filled up the blank assignment on the back of the duplicate certificate of location so as to assign said duplicate, and the land therein described, to A. *Held* that A was the equitable owner of the land and that B held but a dry legal title thereto. And *held further*, that the occupation and cultivation of said land from 1869 to 1875 by A, and after that time by the grantee of A by her tenant, was sufficient notice of such equitable title to an execution creditor of B.

APPEAL from Wayne county. The facts of the case are sufficiently stated in the opinion.

Uriah Bruner and James Britton, for appellant.

The mere fact that George J. Jones forwarded by express money to his father is no evidence that his father received the same. Nor can the contents of a letter of instructions accompanying said money, to show what was to be done with said money, be shown, unless it is shown that the same reached its destination and has been lost. 1 Greenleaf Ev., 88.

Nor can the contents of a certificate of location and the assignment thereof be proved unless the original be lost or cannot be obtained after proper effort has been made.

The deed from George J. Jones to Midgley for the purpose of having the same deeded to Mr. Jones's wife, and when done as disclosed by the evidence of Mr. Jones, was deeded to the wife to put it out of the reach of his creditors in case pecuniary misfortune should

overtake him, will be taken to be and is a direct conveyance from husband to wife, and as such is absolutely null and void at law. *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb., 260. And the plaintiff tracing her alleged title and interest to the said premises altogether through this conveyance from her husband, it follows that she can have no standing as plaintiff in this action. George J. Jones can have no legal or equitable title to the said lands, by reason of the alleged assignment of the certificate of location. Neither the contents of said certificate nor the assignment thereof has been shown by competent testimony. Evidence of the highest kind is required to show the transfer of real estate. Parol proof of the contents of a lost deed must be so clear and positive as to leave no reasonable doubt of substance of the parts material to its effect. *Bennett v. Walker*, 23 Ill., 97. Proof of the contents of a lost paper should be the best the party has in his power to produce. *Renner v. Bank of Columbia*, 9 Wheat., 581.

This certificate of location has been traced to the land office at Dakota city and it is in proof that that is the proper place for it. It was therefore necessary to issue a subpœna *duces tecum* to the register of the land office to produce the same or give a certified copy thereof. 1 Best on Ev., 216. 1 Greenleaf Ev., 558. Gen. S., 593, Sec. 409. And unless the said officer should certify that he has made diligent and ineffectual search therefor in his office, no secondary evidence can be offered of the contents thereof. Gen. St., 593, Sec. 410.

The doctrine of resulting trusts from payment of purchase money is acted upon only with great caution, and the circumstances from which such trust is to be raised must be clearly proved. *Farringer v. Ramsay*, 4 Maryland Ch., 33. And the evidence must not only be distinct and credible, but it must preponderate. If not, the presumption is in favor of the party who

has the deed. *Johnson v. Quarles*, 46 Mo., 423. *Nixon's Appeal*, 13. P. F. Smith, 279. *Baker v. Vining*, 30 Maine, 121.

George M. O'Brien and *Edmund M. Bartlett*, attorneys for appellee.

1. Fraud must be established by *clear* and *substantial* evidence. It is not to be inferred, but must be proved, and will not be allowed to be made out from mere conjecture, or loose inference from ambiguous and inconclusive circumstances, which are as consistent with honesty as with falsehood. *Sullivan v. Warren*, 43 How. Pr. R., 188.

Again, fraud is not presumed, but must be distinctly and clearly made out, and cannot be inferred merely from equivocal circumstances, nor on slight evidence; nor is it to be considered as a single fact, but a conclusion drawn from circumstances. And in matters of conveyances these are not void for fraud—because their effect is to hinder, delay, and obstruct creditors—but it must be made with that intent to avoid it as fraudulent. Nor can the actual secret intent of a grantor, however bad, affect a bona fide purchaser without notice. Wells on Questions of Law and Fact, page 237, sec. 278. *Hollister v. Loud*, 2 Mich., 312, and cases cited.

2. It seems idle to argue the question of fraud, because there is no fraudulent circumstance or transaction proved, and every act is consistent with honesty and fair dealing.

3. The question of fraudulent intent is one of fact and not of law; and no conveyance or charge shall be adjudged fraudulent as against creditors or purchasers solely on the ground that it was not founded on a valuable consideration. General Statutes of Nebraska, page 395, sec. 20.

COBB. J.

The pleadings and evidence in this case show with sufficient clearness that on the 24th day of October, 1868, George J. Jones, who was then a resident in Chicago, Illinois, sent by express to his father, William H. Jones, at Omaha, Nebraska, the sum of two hundred dollars in money, for the purpose of buying a quarter section of government land in the northern part of this state, where lands were then open to entry. That said money was received by said William H. Jones, who soon thereafter with said money bought agricultural college scrip, and located it in his own name on a quarter section of land in Wayne county, at the United States land office at Dakota City. That he received therefor a duplicate receipt or certificate of location in the usual form. That he thereupon filled up the blank assignment on the back of said certificate, with an assignment of the same and the land therein described to the said George J. Jones, signed and acknowledged the same, and returned it to the said George J. Jones, at Chicago, by express. That in consequence of this assigned certificate or duplicate not having been returned or sent to the general land office, the patent for said land issued in the name of William H. Jones. That the same was offered to the said George J. Jones, who refused to receive it for the reason that the same did not run in his name; but before discovering the said error he had delivered up to the officers at the said land office the said assigned certificate or duplicate, who retained the same. That afterwards, and sometime in the year 1875, the said George J. Jones received a patent for the said land running to himself, under circumstances which induced him to believe that it was a corrected patent issued to him by the proper authorities, pursu-

ant to the said assignment of the said certificate or duplicate. That he thereupon caused the same to be recorded in the proper county (Wayne), and on or about the same time conveyed the said land to one Charles Midgley, who at the same time conveyed the said land to Mary E. Jones, both of which deeds were duly recorded in said county of Wayne. That said George J. Jones commenced improving said land in April or May, 1869, and continued to cultivate the same, and pay the taxes thereon until the year 1875, since which time it has been improved and occupied by the said Mary E. Jones, either personally or by tenants, and she has paid the taxes thereon.

It further appears that on the 9th day of November, 1875, the Johnson Harvester Company recovered a judgment in the district court of Wayne county against the said William H. Jones for $117.44 and $49 costs; and again on the 12th day of September, 1876, the Johnson Harvester Company recovered another judgment against the said William H. Jones in the county court of Cuming county for $134.80 and $39.75 costs of suit, and duly filed a transcript and docketed the same in said Wayne county. That upon said judgments two executions were issued and placed in the hands of J. W. Aglee, sheriff of Wayne county, who levied upon the said quarter section of land as the property of said William H. Jones, and advertised the same for sale on the 8th day of September, 1877.

Whereupon the said Mary E. Jones commenced her suit in equity against the said William H. Jones, J. W. Aglee, and the Johnson Harvester Company, and obtained a temporary injunction restraining the sale of the said lands, etc.

Upon the trial of said cause the court rendered a final decree that the said William H. Jones convey said land to the plaintiff, or in default of such convey-

ance, the said decree stand as a conveyance thereof, fully discharged of all liens by or on account of said judgments, and that the said injunction be made perpetual, etc.

From said decree the said Johnson Harvester Company and J. W. Aglee appealed to this court.

William H. Jones, in entering the land, acted merely as the messenger of George J. Jones, and he evidently intended that the patent should issue to the latter, which it would have done had not the parties through ignorance of such matters failed to forward the assigned certificate to the general land office. The assigned certificate, though not recorded, was sufficient to convey title—the naked and dry legal title of William H. Jones—to George J. Jones, the equitable owner. All that its recording could have supplied would have been constructive notice to the Johnson Harvester Company. The actual occupancy and cultivation of said lands by the said George J. Jones from 1869 to 1875, and by Mary E. Jones by her tenants after that time, was sufficient constructive notice of the unrecorded conveyance from William H. Jones.

There is no conflicting testimony, and we think the decree clearly right, and it must be affirmed.

DECREE AFFIRMED.

NATIONAL LIFE INSURANCE COMPANY OF THE UNITED STATES OF AMERICA, APPELLANT, V. JENNIE L. ROBINSON, ADMINISTRATRIX OF THE ESTATE OF SETH ROBINSON, DECEASED, APPELLEE.

Suit by Corporation: Effect of a General Denial. Life Insurance Company, a corporation, brought an action to foreclose a mortgage against A, making B, the holder of a subsequent judgment lien against A, a defendant. B, put in an answer consisting of a general denial. *Held*, that such answer did not put in issue the corporate character of the corporation, or its power to sue in said court.

APPEAL from the district court for Lancaster county. The facts appear in the opinion.

M. Montgomery & Son, for appellant.

The whole claim of the defense goes to the *legal capacity* of the plaintiff to sue.

1. Under the code want of legal capacity to sue is one of the six grounds for demurrer, when appearing on the face of the pleading, and when not so appearing the objection must be taken by answer, otherwise it is waived. Code of Civil Procedure, secs. 95, 96. In this case there was neither demurrer nor answer of that purport, hence the question was waived and the defendant was not in a position to raise it on the trial. She assumed the right, however, by virtue of something which she claims to be a general denial; but there was no sufficient denial in the answer to put the plaintiff to proof as to any matter alleged in the petition, because under the code a denial must be absolute, whether special or general. Code of Civil Procedure, sec. 99.

2. If the answer were properly a general denial, it does not cover the question of plaintiff's legal capacity to sue, but is an admission of such capacity. Such a

denial must be construed as applying only to the merits in suits by corporations; and it dispenses with all proof of corporate existence and right to sue. *Phenix Bank v. Curtis*, 14 Conn., 437, and authorities there cited. *Railsback v. Liberty, etc.*, Turnpike Co., 2 Ind., 656. *Jones v. Cincinnati, etc., R. Co.*, 14 Ind., 89. *Hardy v. Merriweather*, Id., 203. *Hubbard v. Chappel*, Id., 601. *The Society for the Propagation, etc., v. the Town of Pawlet*, 4 Peters, 501. *Savage Manuf. Co. v. Armstrong*, 17 Me., 34, and cases there cited. *Carpenter v. Mercantile Bank*, 17 Ind., 255. *Harrison v. Martinville, etc., R. Co.*, 16 Id., 505. *Penobscot Boom Co. v. Lamson*, 16 Me., 224. *Commissioners v. Bright*, 18 Ind., 93. *Putnam Free School v. Fisher*, 30 Me., 523.

Mason & Whedon, for Appellee.

COBB, J.

This action is for the foreclosure of a mortgage executed by Andrew J. Cropsey and wife to the Republic Life Insurance Company, and by said company assigned to the plaintiff. The defendants other than Cropsey and wife are sued as subsequent lien holders upon the mortgaged premises, one only of them–Seth Robinson–answering. His answer, after first denying all knowledge or information as to the plaintiff's cause of action, denies all the facts stated in the petition except as to his lien. Robinson's death was afterwards suggested, and the cause revived in the name of Jennie L. Robinson, administratrix. The cause was referred to a special referee, to find issues of fact and of law.

The referee made his report, in and by which he found as matter of fact that the mortgage described in the petition was duly executed, witnessed, acknowledged, and recorded in the office of the county clerk

of said county long prior to the obtaining of the judgment of said Robinson; and that there is still due and unpaid on said note and mortgage the sum of $825 and interest thereon from the twenty-fifth of July, 1877. That the note was executed and delivered at the date, for the amount, and to mature at the time, and at the rate of interest as set forth in the petition. That the said Republic Insurance Company duly assigned said note to the plaintiff, and also assigned the mortgage to the plaintiff. That at the time of the bringing of this suit, the said note and mortgage were in the possession of the plaintiff. That the privilege of becoming incorporated by said plaintiff was granted by a law of congress passed and approved July 25th, 1868, but that before they in fact could become a corporation, directors must be chosen, capital stock must be subscribed, and an acceptance made of such privileges so granted. Said act of congress empowered such corporation to sue and be sued, plead and be impleaded in the district and circuit court of the United States, in the District of Columbia, and elsewhere. That at the May term, 1877, of said court, Seth Robinson recovered a judgment against said defendant Cropsey for the sum of $75.00, which said judgment is still unpaid. And the referee aforesaid finds the following conclusions of law:

First. That there is due on the judgment of Robinson the sum of $85.50, and that the same is a lien on the lands mentioned in the plaintiff's petition. And that there is due on the note and mortgage of the said plaintiff the sum of $921.25, and that the same is not a lien as against the claim of defendant Robinson on the lands mentioned in the petition, but is a second lien thereon.

Second. That the said plaintiff, if a corporation, is empowered to maintain this action, regardless of the particular manner whereby it became possessed of the

said note and mortgage—possession alone in the case of negotiable paper being sufficient for such purpose.

Third. If said plaintiff is a corporation as aforesaid, it has the lawful right to become a party to negotiable paper for some purposes. It is legally presumed that plaintiff had such right to take by assignment and endorsement the note and mortgage in question.

Fourth. But until said plaintiff accepts said privilege so granted by congress, and perfects its organization thereunder, it is not a legal corporation.

Fifth. Such corporation, when so organized, is empowered to sue only in the circuit and district courts of the United States, either in law or equity, in the District of Columbia and elsewhere. These words are restrictive, and a limitation upon such corporation to sue elsewhere. The power that could grant such privilege had the right to say in what courts it should sue and be sued. It follows therefore that, granting even that plaintiff is legally incorporated, it cannot bring this suit in this court, etc.

The plaintiff duly excepted to the said conclusions of law numbered one, four, and five. The court approved the said referee's report, to which the plaintiff excepted, and thereupon the court rendered a final decree in accordance with the said report, and overruled the plaintiff's motion for a new trial, etc., whereupon the plaintiff appealed to this court.

In this court defendant Robinson by counsel moved the court to dismiss the appeal, for the reason that the record contains no bill of exceptions, and does not show what evidence was received on the trial. The motion was overruled. But there being no bill of exceptions, this court cannot consider any error not appearing on the face of the record proper.

The answer of defendant Robinson did not put in issue the corporate existence of the plaintiff, nor its

power to sue in said court. That could only be done by demurrer, or by special denial in the nature of a plea in abatement. 1 Chitty's Pleadings, 448, and authorities there cited in note 2.

Each fact put in issue by the answer was found by the referee in favor of the plaintiff except that of priority of lien, and his finding on that point contains within itself such manifest error as to render it unnecessary to go out of the record for its proper consideration. The referee finds that the note on which the suit was brought was made, executed, and delivered, etc., and the mortgage made, executed, acknowledged, and delivered and recorded long prior to the obtaining of the judgment of said Robinson. He then proceeds to consider matters not put in issue by the pleadings, and which were not and could not have been referred to him, and upon consideration thereof comes to the conclusion that the Robinson judgment is the first lien, and the mortgage sued on the second lien. The confirmation of the report of the referee by the district court, and the rendition of judgment thereon, were erroneous and must be reversed.

Had the testimony been preserved by a bill of exceptions, so that this court could consider it, a final decree of foreclosure would be here rendered; but as it is, the cause is remanded for further proceedings.

REVERSED AND REMANDED.

FRANCIS LAUSMAN, APPELLANT, v. WENZEL DRAHOS, F. SONNENSCHEIN, AND MARY PARRATT, EXECUTRIX OF THE ESTATE OF WILLIAM PARRATT, DECEASED, APPELLEES.

1. **Mortgage.** If a mortgagor sell portions of the mortgaged premises in different parcels at different times by warranty deed, that which he retains is in equity primarily liable, as against all but the mortgagee, for the whole debt. (Jones on Mortg., sec. 1091-2.)

2. ———. Before a prior mortgagee can be required to shape his action in the collection of his debt, in reference to the subsequent order of alienation he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of the deeds made by the mortgagor subsequent to the mortgage. (41 Ills. Rep., 110.)

3. ———. A subsequent purchaser desiring the prior mortgagee to act with reference to the subsequent order of alienation should give him notice of the facts in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and is given no opportunity there to present his equities, he may file a bill against the mortgagee and the other subsequent purchasers (if any), staying the sale until the respective equities can be adjusted. But he cannot remain passive until the sale has been made and confirmed, and then assert his rights against the mortgagee in view of facts of which the latter had no knowledge.

THIS was an action brought by plaintiff to remove the cloud from her title to lot six in block nineteen in West Point, Cuming county. The petition states in substance that on the seventeenth day of March, 1874, John D. Neligh, at that time the owner of said lot six, sold and conveyed the same by warranty deed to one Mary Wisner; that said plaintiff holds title thereto under said conveyance to said Mary Wisner and through one Anton Merik, her late husband, since deceased; that during his life-time said Anton Merik made valuable and permanent improvements on said lot six, and erected a dwelling house thereon at an

outlay and expenditure of over $800; that prior to the aforesaid conveyance of said lot to said Mary Wisner, the said Neligh mortgaged the same, together with several other tracts of lands, to one Wm. Parratt, to secure a note of $2,030, which said mortgage was also foreclosed on the fifth day of November, 1873, being prior to the aforesaid conveyance to said Mary Wisner; that the said Wm. Parratt having died, the said decree of foreclosure was, on the fifth day of November, 1874, revived in the name of Mary Parratt, executrix, etc., one of the defendants herein; that Mr. Neligh and wife had not alienated, bargained to sell, or conveyed any of the aforesaid mortgaged premises prior to the conveyance of said lot six to Mary Wisner, nor had any of said mortgaged premises been otherwise encumbered by any paramount mortgage, judgment, or other legal or equitable lien prior to or at the time of the aforesaid conveyance to said Mary Wisner; that the plaintiff, since the death of her late husband, married Anton Lausman; that on the first day of October, 1877, said plaintiff leased said lot to the defendant Sonnenschein, who entered into and continued to hold possession thereof until after the fifth day of December, 1877; that the said defendants, Drahos and Sonnenschein, with notice and full knowledge of the plaintiff's title and interest to said lot, intending to defraud the said plaintiff, became the purchasers on the twelfth day of December, 1877, under an order of sale under aforesaid decree of foreclosure, of a pretended interest of the said John D. Neligh thereto, and said sale was, on the fifth day of December, 1877, duly confirmed, and a sheriff's deed executed therefor to said Drahos and Sonnenschein; that the said plaintiff was absent from the state of Nebraska from June, 1876, to January 15, 1878, and she was not notified, and had no knowledge that application would be made for the

confirmation of said sheriff's sale, nor was she advised of said confirmation until a long time afterwards; that all of the aforesaid conveyances, and the will of Anton Merik, were duly recorded and indexed as required by law; that the value of said lot at the time of said sale was, and now is, $1,200; while the value of all the other lands and tenements included in said mortgage, exclusive of all tax lines and incumbrances, was at the time of the said sale, and now is, worth $9,000, being four times more than the amount claimed to be due on said mortgage debt at the time of said sale to the defendants, Drahos and Sonnenschein; that the amount of the judgment under said decree of foreclosure was $2,293.96, with no particular rate of interest mentioned therein; that on the tenth day of March, 1875, an order of sale was issued under said decree, on which $250 was paid, which in consideration of said payment was recalled before the day of sale had arrived; that on the twenty-eighth day of December, 1875, another order of sale was issued, but the same was again recalled by the plaintiff thereto before the day of sale had arrived, at the request of Mr. Neligh, for a supposed consideration unknown to the plaintiff herein; but taking the commission charged by the sheriff in his return of said order of sale as a basis—said commission being $45—it would seem that $2,400 was then paid thereon, nearly as much as was at the time claimed to be due thereon; that on May 3, 1876, Mr. Neligh paid on said judgment the sum of $1,000, which, with the $250 paid on the first aforesaid order of sale, and the $2,400 supposed to have been received on the aforesaid second order of sale, was more than sufficient to discharge the entire mortgage debt; that afterwards, on June 13, 1877, another order of sale for $2,000 was issued, with interest at 12 per cent, and under which said lot was sold to Drahos and

Sonnenschein as aforesaid; that included in said mortgage with said lot six was property that brought in an annual income of $900—a sum sufficient to pay all taxes, insurance, necessary repairs, and leave a balance which *alone* would have been sufficient for the discharge of said judgment before this time; but the plaintiff to said judgment neglected to use due diligence in the enforcement of the collection thereof, or to apply for the appointment of a receiver to take possession of said mortgaged premises, for the purpose of preserving the security therein and of applying the income to the discharge of said mortgage debt; and that by reason of the said several neglects, the said premises have become encumbered with tax liens, and have become less valuable as a security for said mortgage debt.

The defendants demurred to the petition; the demurrer was sustained, and a judgment entered dismissing the case. Plaintiff appeals.

Uriah Bruner and *F. M. Franse*, for appellant, cited *Teaf v. Ross*, 1 Ohio State, 469. Rorer on Judicial Sales, 923. *Harrison v. Andrews*, 18 Kan., 535. *United States v. Duncan*, 4 McLean, 607. *Casler v. Shipman*, 35 N. Y., 533. 1 Jones on Mortgages, 647. *Uhl v. May*, 5 Neb., 161. *Aldrich v. Cooper*, 2 Lead. Cases in Equity, 305. 2 Story's Equity, 1552.

R. F. Stevenson, for appellees.

COBB, J.

The petition shows that the mortgage executed by Neligh to William Parratt was made, the debt which it was given to secure had matured, suit for the purpose of foreclosing the same had been commenced and prosecuted to judgment, and a decree of foreclosure and

final judgment rendered in the case, before the making of the deed by Neligh to Mrs. Wisner, under whom the plaintiff claims title to a part of the mortgaged premises. This being the case she must be treated as a volunteer so far as her interest in the sale and confirmation is concerned, and not entitled to notice of any of such proceedings. It is a well-settled principle that when several parcels of real estate have been mortgaged in one conveyance and the mortgagor afterwards conveys different parcels of such property to as many parties and retains some of such parcels undisposed of, the mortgagee or owner of the mortgage will be compelled to first sell those parcels which the mortgagor has not conveyed, and if the same prove insufficient, then those parcels which have been conveyed in the inverse order of their alienation by the mortgagor.

But in order to do this the ordinary and proper means must be used. It is but seldom that persons buy property incumbered by a mortgage which has been foreclosed, and when they do they should understand that they assume the risk of the property being sold without notice to them, and if there is any circumstance connected with the property, such as that claimed by the appellant, that it is they who have duties to perform in respect to the sale, and that it will not do to lie still until the law has taken its course and the rights of other parties in the premises have become fixed.

Notwithstanding the late day on which the appellant acquired title to the lot in question, had she notified the appellee, Mary Parratt, of her title, and requested that that portion of the mortgaged premises not alienated by Neligh be first sold, she would have been entitled to such request, and had it been refused the law would have enforced it. But it is not alleged that either William Parratt, in his lifetime, or his administratrix had actual notice of the conveyance by Neligh

to Mrs. Wisner. The recording of the deed was not notice to them. See *Matteson v. Thomas et al.*, 41 Ill., 110, and cases there cited. See also *Inglehart v. Crane, et al.*, 42 Ill., 361. Neither was the occupation of said lot 6, in block 19, by Fred Sonnenschein as tenant of the appellant any notice of her rights to either of the Parratts, as they had a right to suppose that Sonnenschein was a tenant of Neligh.

If we are correct in the above views then it will be unnecessary to inquire into the allegations of said petition as to the amount which was paid by Neligh by way of bonus for delaying the sale, etc. In the absence of notice of the rights of appellant the appellee, Parratt, had the right to postpone said sale from time to time at the request of Neligh, and is chargeable with no laches therefor. And it being nowhere stated in the petition that the whole of said mortgage debt had been paid at the time of the sheriff's sale, it follows that the appellee, Parratt, having no notice of the rights of appellant, had the right to sell such parcel of the mortgaged premises as might prove to be the most salable.

The charge of fraud and collusion against Sonnenschein and Drahos is not set out with sufficient comprehensiveness to constitute a cause of action against them.

It follows from these views that the judgment of the district court in sustaining the demurrer to the petition must be affirmed.

JUDGMENT AFFIRMED.

WILLIAM M. HICKLIN ET AL., PLAINTIFFS IN ERROR, v. THE NEBRASKA CITY NATIONAL BANK, DEFENDANT IN ERROR.

1. **Practice:** SUBSTITUTION OF PARTIES DEFENDANT. Section 50 of the code of civil procedure authorizes the court in certain cases and under certain circumstances to substitute the real party in interest as defendant in the *action*. But this authority must be exercised, if at all, before final judgment, for afterwards the court has no power to make such an order.

2. ———: PLEADING: PLAINTIFF'S INTEREST MUST AFFIRMATIVELY APPEAR IN THE PETITION. Where an action is brought on a written instrument by one not a nominal party to it—for example, an undertaking in replevin—in order to maintain the suit his interest therein must be made to appear affirmatively by proper allegations in the petition.

3. **Undertaking in Replevin:** OMISSIONS DO NOT VITIATE WHAT IT ACTUALLY CONTAINS. An undertaking in replevin in which is omitted the provisions to "return the property to the defendant, in case judgment for a return of such property is rendered against him," but containing all the other statutory provisions, cannot for that reason be avoided by the parties signing it, but, so far as it goes, creates a binding obligation and may be enforced against them.

ON the fifteenth day of September, 1874, the Nebraska City National Bank obtained a judgment in the district court of Otoe county against Thomas H. Adams, Wesley Conner, and J. Gordon Conner, and on the twenty-second of October following, caused execution to be issued and levied upon certain personal property in possession of Thomas H. Adams. Adams then brought suit to restrain a sale under the levy, alleging in substance that he was not the owner of the property, but only a mortgagee thereof. The district court dismissed the action, and upon a review of the case here its judgment was affirmed. 4 Neb., 370. Adams then brought an action, gave bond with Hicklin and others

as sureties, and replevied the property from the sheriff. Upon a trial judgment was rendered against him, and *this* action was afterwards brought by the bank—which had been substituted by order of the court as defendant in place of the sheriff—upon the undertaking in replevin. Judgment below in favor of the bank and cause brought up by the sureties upon a petition in error.

G. B. Scofield, and *Stevenson & Hayward*, for plaintiffs in error.

There is no replevin bond sued on this case as required by law. *Sexson v. Kelly*, 3 Neb., 105. Gen. Stat., 553 The court, when the bond was taken, had no jurisdiction of that case. *Garrett v. Woods*, 3 Kan., 231. There is no judgment against the defendant in the replevin suit. The pretended judgment is not such as the statutes of Nebraska require it to be. Gen. Stat., 713. *Hall v. Jeness*, 6 Kan., 357, and cases there cited. *Hooker v. Hammill*, 7 Neb., 231.

E. F. Warren, for defendant in error.

1. In an action upon a replevin bond, the fact that the defendant had commenced his action before a tribunal incompetent to try the matter in dispute is no defense, and the plea, that the title to the property replevied was in him, is bad. *McDermatt v. Isbell*, 4 Cal., 113. *Bates v. Williams*, 43 Ill., 494.

2. It is no defense to the surety in a suit against him on the replevin bond, that an erroneous judgment has been rendered against his principal. In this case the judgment was for the value of the goods, instead of for a return as it should have been. *Mason v. Richards*, 12 Iowa, 73.

3. When a person replevies property, executes an undertaking, and has a delivery of property to him, and the writ of replevin is afterwards quashed as having issued improperly, the plaintiff in replevin and his sureties are liable upon the bond. *Raman v. Shatton*, 2 Bibb (Ky.), 199.

4. Though there be no award of a return of the property, yet if the plaintiff in replevin do not succeed the condition of the bond is broken. *Brown v. Parker*, 5 Blackf., 291. *Gibbs v. Bartlett*, 2 Watts, 29.

LAKE, J.

The bill of exceptions containing the testimony and questions decided during the trial having been quashed on motion of the defendant in error, the main question left for consideration is, whether the petition states facts sufficient to constitute a cause of action. This question was distinctly raised by demurrer in the court below, and there decided in the affirmative.

As shown by the petition, the action was brought on an undertaking executed by the defendants below to Frank M. Farber, as sheriff of Otoe county, in a certain replevin suit, brought before a justice of the peace by Thomas H. Adams against said Farber, to recover the possession of a quantity of personal property held by him under an execution. On the giving of this undertaking the property was delivered to Adams, who disposed of it to his own use.

On the return of the order of replevin, it appearing from the appraisement that the property taken under it was of the value of over one hundred dollars, the justice duly certified the case to the district court as the statute directs, where such proceedings were afterwards had as resulted in a judgment in favor of Farber for $563.10, the value of the goods, and damages,

as returned by a jury, and costs taxed at $38.90. It is not alleged that the defendant in error (plaintiff below) had any interest in the execution under which the sheriff was in possession of this property. After showing the recovery of the judgment by Farber in the replevin case, it is alleged in the petition, "that such proceedings were afterwards had in said cause, that this plaintiff was, by the order and judgment of said court, substituted in the place and stead of the said Frank M. Farber, sheriff as aforesaid, as defendant in said action; and it was by said court ordered that all rights and benefits under said judgment should accrue to this plaintiff, and that execution should issue in the name and for the benefit of this said plaintiff upon said judgment, so as aforesaid recovered by said Farber against the said Thomas H. Adams."

There is thus set out at length the fact, not only of the substitution of a person as party defendant who is not shown to have been at all interested in the matter in controversy, but this after the complete determination of the action by the rendition of a final judgment. Had the court, which is one of general jurisdiction, the power to do this?

Section 50 of the code of civil procedure provides that: "In an action against a sheriff or other officer, for the recovery of property taken under an execution, and replevied by the plaintiff in such action, the court may, upon the application of the defendant, and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the costs being given." It is evident from the language here employed that the sole object of this provision was to relieve the officer from whom property so held by him has been replevied, with the assent of the execution creditor, from the trouble and expense of making a defense to the action, and to place that

matter within the control entirely of the real party in interest.

But where and when is this change of parties to be made? The language of the section is "in an action;" not after a trial has been had, and a final judgment—which is the object and end of an action—has been rendered. "A judgment," says the code (Sec. 428) "is the final determination of the rights of the parties in an action." When the judgment is finally entered the rights of the parties to it are fixed, and the power of the court over it in that action is ended, except for the purposes provided for in other sections of the code. Section 602 confers upon courts the power to vacate or modify their own judgments and orders, and points out specifically how, and for what causes, this power may be exercised. But this section does not empower the court to do what this petition shows was here attempted, viz.: arbitrarily to substitute a stranger to the proceedings as a party defendant in the judgment after its rendition. We are of opinion that the court had not the power it assumed to exercise in this instance, and that the order of substitution conferred no rights whatever upon the defendant in error.

But even if we were to hold otherwise, and that the order of substitution actually conferred all the rights upon the bank which it in terms assumes to confer, still the defendant in error could not maintain its action on the undertaking. The order was, "that all rights and benefits under said judgment," should accrue to said bank, and that execution should issue in its name, and for its "use and benefit." Its rights thus attempted to be fixed were limited to the judgment and execution; as to the undertaking the order was silent. Of course they were no greater, nor less, than they already were without it. This being so, and there being no allegation of an assignment of the undertak-

ing by Farber to the bank, it is not shown that it has such an interest as will support an action at law upon it. The undertaking in question was given to said Farber as sheriff. It was nominally and legally for his benefit as such officer, and without doubt he could have maintained an action upon it. It is true also that if the defendant in error were the real party in interest in the execution under which the sheriff held the goods when they were replevied, it would have an interest—not a legal, but an equitable interest—which the law would protect in a proper action. Section 29 of the code of civil procedure provides that: "Every action must be prosecuted in the name of the real party in interest, except as provided in section 32." Looking, however, to the petition we fail to see that the defendant in error has any interest whatever in the subject of the action, but on the contrary, we do discover that said Farber as sheriff, the person to whom it was given, was, and for aught that is pleaded is still, the real party in interest.

It is also urged on behalf of the plaintiff in error, that in no event can an action be maintained on this instrument for the reason that one important condition of a perfect statutory undertaking in replevin under our law is omitted, viz.: that which requires the plaintiff "to return the property to the defendant in case judgment for a return of such property is rendered against him." But this objection to the undertaking is untenable. Except in this omission it conforms to all the requirements of the statute, and we are of opinion that, so far as it goes, it creates a binding obligation on those who signed it. While the defendant in the replevin suit, for whose benefit the undertaking was required, might have objected to it at the proper time, he did not see fit to do so, but accepted it as a satisfactory security for the property taken. Under it the plaintiff

acquired the possession of the goods, and it would be rank injustice to permit the parties signing it to escape liability simply because it is less severe in its conditions than the defendant, under the statute, might have insisted upon. It is enough to know that reason and the authorities are the other way. *Shaw et al v. Tobias*, 3 N. Y., 188. *Claggett v. Richards*, 45 N. H., 360. *DeBow v. McClary et al.*, 13 *McCord*, 44. *Cady v. Eggleston et al.*, 11 Mass., 282.

For the reason simply that the petition does not state facts sufficient to constitute a cause of action in favor of the defendant in error, the judgment is reversed and the cause remanded to the district court for further proceedings.

REVERSED AND REMANDED.

BELUS LOUNSBURY, APPELLEE, v. JAMES H. CATRON, IMPLEADED, ETC., APPELLANT.

Mortgage Foreclosure: PARAMOUNT TITLE. L. brought his action to foreclose a mortgage executed by McW. Several other persons, including C., were made defendants as subsequent purchasers and incumbrancers. C. answered, claiming to be the absolute owner of the land by paramount title, averred that McW. never had any right or title to the land, and prayed that the mortgage be adjudged null and void and cancelled. The plaintiff replied denying the validity of C.'s title, alleging that it was obtained by fraud, etc. On appeal by C. from a decree of the district court foreclosing the mortgage and declaring the pretended title of C. to be void, and setting aside the several deeds of conveyance under which he claimed title—*Held*, That C. having set up his adverse title—having by pleading as well as by testimony invoked the judgment of the court as to the validity of his title—he cannot now deny the power of the court to pass upon the issue thus presented.

THIS was an appeal by James H. Catron from a decree rendered against him in the district court for Otoe county, wherein he was impleaded with one McWilliams in an action brought by Lounsbury to foreclose a mortgage upon certain property in that county executed and delivered by said McWilliams.

E. F. Warren, for appellant.

1. It is a rule in chancery not affected by the code, that a party must recover according to the case made by his complaint, or not at all; "*secundem allegata*" as well as "*probata.*" No decree can be made in favor of a plaintiff on grounds not stated in his complaint, nor relief granted for matters not charged, although they may be apparent from some part of the pleadings and evidence. *Bank v. Eames*, 1 Keyes, N. Y., 592. *Kelsey v. Western*, 2 N. Y., 500. *Ferguson v. Ferguson*, Id., 360. *Bailey v. Ryder*, 10 N. Y., 363. Story Equity Pleadings, Sec. 257. *Helm v. Cantrell*, 59 Ill., 530. A complainant in equity cannot, upon a prayer for specific relief, obtain a decree for more than he has asked in his bill. *Sims v. Guthrie*, 9 Cranch, 19. *Koehler v. Black River Co.*, 2 Black, 715. *Hall v. Towne*, 45 Ill., 493. *Walters v. Fredericks*, 11 Iowa, 181. *Blake v. Blake*, 13 Id., 40. *Byam v. Cook*, 21 Id., 392. *Wiltenberger v. Morrison*, 39 Mo., 71. *Armitage v. Pulver*, 37 N. Y., 494. *Coleman v. R. R. Co.*, 38 N. Y., 201. *Evans v. Gibson*, 29 Mo., 223. *Ward v. Enders*, 29 Ill., 519. *Brayton v. Jones*, 5 Wis., 117. *English v. Foxall*, 2 Pet., 595. *Boon v. Chiles*, 10 Pet., 211. *Raum v. Reynolds*, 11 Cal., 14. This decree is fatally defective. *Bachman v. Sepulveda*, 39 Cal., 688. *Marshman v. Conklin*, 21 N. J., Eq., 546. Id., 107. Id., 191. *Charpentier v. Brenham*, 59 Cal., 549. *Rogers v. Brooks*, 30 Ark., 612. Under a prayer for general relief, a court of

equity will grant such particular relief as the case stated in the body of the bill will justify. *Canal Co. v. Coal Co.*, 21 Pa. St., 131. *Holmes v. Fresh*, 9 Mo., 201. *Holland v. Anderson*, 38 Mo., 55, and cases cited *supra—Dodge v. Wright*, 48 Ill., 382.

2. This is an action to foreclose a mortgage. The petition did not, nor could it without having a misjoinder of causes of action, contain allegations competent to raise issues of title. In such an action a party whose claim is adverse or paramount to the title of the mortgage cannot be barred as to such title by any decree in such suit. His title cannot be litigated. *Corning v. Smith*, 6 N. Y., 82. *Lewis v. Smith*, 9 N. Y., 502. *Frost v. Koon*, 30 N. Y., 446. *Shellenberger v. Biser*, 5 Neb., 195. *Eagle Fire Co. v. Lent*, 6 Paige, 637. *Strobe v. Downer*, 13 Wis., 10. *Straight v. Harris*, 14 Wis., 509. *Pelton v. Farmer*, 18 Wis., 222. Nor will the fact that the party claiming the adverse title litigates it in the court bar him. It is erroneous and will be reversed; the court should have dismissed the bill as to such party. *Board v. R. R. Co.*, 24 Wis., 121–131, and cases cited *supra*. *Chamberlain v. Lyell*, 3 Mich., 448. Such decree would be no estoppel. *Littlefield v. Crocker*, 30 Me., 192. *Holcomb v. Holcomb*, 2 Barb., 20. *Hill v. Meeker*, 23 Conn., 572. *Mundy v. Vail*, 34 N. J. L., 418.

Albert S. Cole and *M. L. Hayward*, for appellee.

1. The appellant waived his pretended claim of paramount title. 1st, By his answer and cross bill and by therein asking affirmative relief; 2d, By not disclaiming and asking to be dismissed; 3d, By joining in the issue raised by the reply and making no objections to the proceedings; 4th, By not denying any of the averments of the petition which left them to be

taken as true. Waiver is defined to be "the relinquishment or refusal to accept of a right." In practice, it is required of every one to take advantage of his rights at a proper time, and neglecting to do so will be considered as a waiver. Bouvier's Law Dictionary. The proper time to have urged the question of paramount title was in the court below by a proper answer and disclaimer, followed by a request to be dismissed from the action. Had appellant done this he might have had some standing in this court, but as it is he has none. He gave himself away by his answer and proceedings, and is now estopped.

2. The position which appellant assumes in this court is wholly inconsistent with that taken by his answer in the court below. The rule of law is that when one has an election between several inconsistent causes of action he will be confined to that one which he first adopts. Any decisive act of the party, done with knowledge of his rights and of the fact, determines his election and works an estoppel. *Rodemund v. Clark*, 46 N. Y., 354. *Morris v. Rexford*, 18 N. Y., 552. *Sloan v. Hocum*, 29 Mich., 153. *Conahan v. Thompson*, 111 Mass., 270. *Tilley v. Adams*, 108 Mass., 50.

3. We insist that when a party has proceeded in a cause as appellant has in this—presented his whole defense, left the plaintiff's petition undenied, thereby admitting the same to be true, joined in and proceeded to the trial of the issues raised by his answer and plaintiff's reply, to a full hearing and determination of the same without objection, and then at last when he discovers himself coming out at the little end of the horn—he will not be allowed to wiggle and twist and cry out: "My title is paramount and should not have been determined in this foreclosure action." The answer to all this squealing on the part of appellant is: Why did you not disclaim, object, ask to be dismissed, or deny

the petition? The most that can be claimed by the appellant's answer is that it sets up new matter, which is a complete defense to plaintiff's cause of action if true. How such a defense is to be taken and pleaded has been fully considered by this court. *A. & N. R. R. v. Washburn*, 5 Neb., 122.

COBB, J.

Belus Lounsbury commenced his action in the district court of Otoe county to foreclose a mortgage on a certain tract of land in said county executed by William McWilliams. The petition is in the usual form against McWilliams as mortgagor, and several other defendants as subsequent incumbrancers—among the rest James H. Catron, whom the petition alleges "has or pretends to have some claim or interest in said mortgaged premises; but just what said claim is or how he acquired the same this plaintiff is not informed, but avers the fact to be that whatever right, title, interest, or claim the said Catron has is subsequent and subject to the lien of plaintiff's mortgage." Catron appeared and put in an answer, in which he says: "that at the date of said mortgage, to-wit: the second day of December, 1872, the said defendant McWilliams had no right, title, or interest in or to the land described in said mortgage, nor has he since acquired any right, title or interest thereto. That said McWilliams, after the execution of the said pretended mortgage, sold or pretended to sell and convey the said lands to the defendant Christopher J. M. Newman. That afterwards an action was brought in this court by Jacob Blum, the then owner and holder of the title to said land, which defendant, James H. Catron, now owns and holds, wherein Jacob Blum was plaintiff, and the said Christopher J. M. Newman was defendant; that in said action

the said defendant was defeated, and the pretended title which he had acquired from the defendant McWilliams was by this court adjudged null and void, and the said Jacob Blum was adjudged to be the absolute owner of said land, holding the same by good and perfect title, which title is now owned and held by this defendant. The defendant further says, "that he is the absolute owner of said land, that the plaintiff Belus Lounsbury claims an adverse estate or interest therein by virtue of the said pretended mortgage; the said defendant therefore prays that the said mortgage be by this court declared and decreed null and void, and that the same be cancelled and held for nought," and for general relief.

To which answer and the answer of McWilliams, which need not be further noticed, the plaintiff filed his reply, in which he denied each and every allegation of Catron's answer; denied that Catron had any title; alleged that Catron pretends to hold said land by virtue of a deed from one Lehman; that Lehman never had any title, but pretended to have a deed to said lands from Jacob Blum, which deed was never delivered, but executed in blank and deposited as an escrow, etc.; that the pretended deed from Lehman to Catron was not a deed, but only a mortgage; that the judgment mentioned in Catron's answer, whereby Blum recovered the said land from Newman, was the result of a fraudulent conspiracy between Blum, Newman, and others, to defraud the plaintiff, etc.; that all these facts were well known to Catron, and to Lehman before, etc.

Upon the issues presented by these pleadings a large amount of testimony was taken by depositions, and orally before the court to whom the cause was tried, some of which tended to prove the facts set up in plaintiff's reply. Much of the testimony introduced

on the part of the plaintiff was objected to by the appellant on the ground of irrelevancy and incompetency, but none of it on the ground that the court had no right to try the title of appellant in the said action.

The court rendered a decree of foreclosure in favor of the plaintiff, and among other things it was decreed "that the pretended title of the defendant James H. Catron, under and by virtue of the several conveyances hereinbefore mentioned, is void, and said several conveyances are hereby set aside and held for nought, and any cloud upon the title to said land, caused by reason of the record of said deeds, is hereby removed and set aside," etc.

From this decree the defendant Catron appealed to this court.

It may be conceded that, had the appellant not appeared in the case in the district court, or had he appeared and only filed a general disclaimer, the court could not have passed upon the validity of his title—not for the want of jurisdiction in the court, but for the reason that the petition did not contain facts sufficient to constitute a ground for such action on the part of the court. But the appellant put in an answer in which he set up his adverse title, and in effect prayed the court to adjudge it to be the better and only title and to cancel the plaintiff's mortgage, which could only be done after a finding that the title upon which it was based was no title, or at most inferior to the title of the said defendant.

The question here presented is whether the appellant, having elected to assert his claim of paramount title to the land in the court below, and invoke its judgment upon it, and to invalidate the lien of his adversary, and having failed to establish such claim, can now come into this court and claim to have the decree of the district court reversed, on the ground that said

court had no power to pass upon the validity of his title in such proceeding.

The case of *Shellenbarger v. Biser*, 5 Neb., 195, cited and relied upon by counsel on both sides, seems to be directly in point and conclusive of this question. The court, in that case, as a general proposition, denies the right of a plaintiff to make a person claiming adversely to the title of the mortgagor and prior to the execution of the mortgage, a party for the purpose of trying the validity of such adverse claim of title. Yet the opinion proceeds: "But this rule does not exclude one who claims title and also claims to hold a mortgage on the same premises, who submits his claim to the adjudication of the court and asks that in case the court finds his title to the premises invalid, that he may have a decree for the amount due on the mortgage. * * * But the plaintiff joined issue with the defendant, denying the facts stated in his answer, and testimony has been taken by both plaintiff and defendant to establish the truth or falsity of the issue thus raised. It is therefore the duty of the court to consider all of the questions at issue." And the action of this court in that case, though not in form, yet in effect, disposed of the claim of paramount title of the defendant, Biser.

Following that case then, the appellee, having made the appellant in this case a party in ignorance of the nature and extent of his claim to the premises, and the appellant having thereupon set up and pleaded his adverse title, and having submitted evidence to sustain it—having as well by pleading as by testimony invoked the judgment of the court as to the validity of his title, he cannot now be heard to deny the power of the courts to pass upon the merits of the issue thus presented and litigated.

The district court had jurisdiction of the person of

the appellant. It had also jurisdiction of the subject matter, whether the case be considered as it was made by the plaintiff in his petition or as made by the answer and reply; and it matters not that the appellant may have been entitled to have the issue made by his answer and the reply of the appellant tried by a jury. His joining in the trial of the same to the court alone will be deemed a waiver of his right to a jury trial.

The decree of the district court must be affirmed.

DECREE AFFIRMED.

EMILY DREW, APPELLEE, V. HENRY KIRKHAM AND JANE KIRKHAM, APPELLANTS.

1. **Confirmation of Sale of Mortgaged Premises:** PUBLICATION OF NOTICE. The sheriff's return states, "that on the twenty-fourth day of July, A.D. 1877, I caused a notice to be published in the Nebraska Herald, a newspaper printed and of general circulation in said county, that I would offer said real estate for sale at the south door of the court house, in said county, on the twenty-seventh day of August, A.D. 1877, at 11:45 A.M. of said day, etc. *Held*, to be sufficient evidence of publication. *Parrat v. Neligh*, 7 Neb., 456. *Held*, also, that the several officers, in the discharge of their duties as prescribed by section three of the act of 1875, entitled, "An act for the more equitable appraisement of real property under judicial sale," do not exercise judicial powers.

2. **Judicial Sale:** ERROR WITHOUT PREJUDICE. The premises were appraised at $2500, but by reason of the erroneous valuation of certain liens, the defendant's interest therein was only valued at $143.77. The property brought at the sale $1675, which being more than two-thirds of the gross appraisement—*Held*, that the consideration of such erroneous liens by the appraisers was error without prejudice.

APPEAL by defendants from an order of confirmation of the sale of real estate in the district court of Cass

county. The case involves a construction of the act for the more equitable appraisement of real property at judicial sale (Laws 1875, p. 60), the first four sections of which are as follows:

SECTION 1. Whenever, hereafter, execution shall be levied on any lands and tenements, the officer levying the same shall call an inquest of two disinterested freeholders, who shall be residents of the county where the lands taken on execution are situated, and administer to them an oath impartially to appraise the interest of the person, persons, or corporation against whom the execution is levied, in the property so levied upon; and such officer, together with said freeholders, shall appraise said interest at its real value in money, and said appraisement shall be signed by such officer and said freeholders respectively.

SEC. 2. That for the purpose of the appraisement mentioned in the last preceding section, the officer and the freeholders therein named shall deduct from the real value of the lands and tenements levied on the amount of all liens and incumbrances for taxes or otherwise prior to the lien of the judgment under which execution is levied, and to be determined as hereinafter provided, and which liens and incumbrances shall be specifically enumerated, and the sum thereafter remaining shall be the real value of the interest therein of the person, persons, or corporations against whom or which the execution is levied.

SEC. 3. It shall be the duty of the county clerk, the clerk of the district court, and the county treasurer of the county wherein such levy is made, for the purpose of ascertaining the amount of the liens and incumbrances upon the lands and tenements so levied upon, upon application of the sheriff, in writing, holding such execution, to certify to said sheriff under their respective hands and official seals the amount and character of

all liens existing against the lands and tenements levied on, and which are prior to such levy, as the said liens appear of record in their respective offices. For which certificate and the necessary search therefor said officer shall receive a fee of two dollars ($2.00) each, to be paid by the plaintiff in the execution, and taxed as increased costs in the action in which the judgment on which execution was issued was rendered.

SEC. 4. The officer holding such appraisement shall forthwith deposit a copy thereof, including his application to the officers enumerated in section three of this act, and their official certificates as in said section provided, in the office of the clerk of the court from which such execution issued, and shall immediately advertise and sell said real estate, lands, and tenements agreeably to the provisions of this act, but in no case shall he sell any such real estate, lands, or tenements for less than two-thirds the appraised value of the interest of the person, persons, or corporation, against whom the execution was issued, unless it appear from the appraisement under this act that the liens and incumbrances thereon equal or exceed its real value in money.

Willet Pottinger, for appellants.

Sam. M. Chapman, for appellees.

COBB, J.

This is an appeal from an order of the district court confirming the sale of mortgaged premises. The exceptions to the report of said sale contain the following eight points:

I. The appraisement made for the purpose of making said sale was not made according to law.

II. Said appraisement was made far below the actual value of said lands and premises.

III. That the appraisers, in making said appraisement, took in consideration and treated as a lien on said land the very claim or mortgage debt on which this order of sale is made.

IV. That said appraisers only appraised the interest of said defendants in all of said lands at $143.77, when the said land is shown to be worth a larger amount than that sum, to-wit: $2,500.

V. That the appraisers took into consideration and treated as a lien a mortgage made by the defendant to John Fitzgerald, for the sum of $450 and interest, when the said mortgage had been fully satisfied, and was no subsisting lien on the land, and was a subsequent mortgage to the said plaintiff's mortgage on which the sale was made, and the said Fitzgerald mortgage was on record in said county at the time the said plaintiff commenced her said action, and said Fitzgerald should have been made a party to litigate his lien.

VI. That the county clerk, the clerk of the district court, the county treasurer, and appraisers exercised judicial powers in passing on the validity of said liens, which is contrary to the constitution of the state of Nebraska.

VII. That there was no legal notice given of such sale. That from the return of said sale it does not show that the sheriff making said sale 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 said county of Cass.

VIII. That the return of the sheriff does not show that the said sheriff advertised said land by putting an advertisement on the court house door, and in five other public places in the county of Cass, two of which were to be in the precinct where such lands and tenements lie, etc.

The first objection is too general in its terms to entitle it to any consideration.

The second objection cannot be considered for the reason that there was no evidence before the district court, nor is there any before this court, showing or tending to show the value of the said lands.

The third objection shows the sheriff and appraisers in a somewhat ridiculous light. It was manifest misconduct on their part to treat as a lien and deduct from the value of the land the amount of the mortgage, to satisfy which they were about to sell the land. But it seems that the appellant was not prejudiced thereby. The gross value of the lands, as fixed by the appraisers, without deducting anything for liens or incumbrances, was $2,500. The amount for which the land was bid off and sold was $1,675, something over two-thirds of its appraised value. The above equally applies to the fourth and fifth objections, with this in addition as to the fifth objection, that there was nothing before the district court, nor is there anything before this court, in the nature of evidence tending to show that the Fitzgerald mortgage had been paid.

As to objection six, the officers therein mentioned, other than appraisers, do not exercise judicial powers in passing upon the validity of such liens under the act entitled "An act for the more equitable appraisement of real property under judicial sale." Laws, 1875, p. 60. On the contrary, such acts are purely ministerial. The county clerks, clerks of the district courts, and county treasurers are required to report the several liens as they find them of record in their respective offices, and they do not pass on their validity. *Sessions v. Irwin*, ante p. 5.

As this cause was not argued before this court, and the appellant has furnished no brief, we are left somewhat in the dark as to the point sought to be made by

him in his seventh and eighth exceptions. Especially in view of the fact that this court had already, in *Parrat v. Neligh*, 7 Neb., 456, held, "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." And the sheriff states in his return in this case, that "on the twenty-fourth day of July, A.D. 1877, I caused a notice to be published in the *Nebraska Herald*, a newspaper printed and in general circulation in said county, that I would offer said real estate for sale at the south door of the court house, in said county, on the twenty-seventh day of August, A.D. 1877, at 11.45 o'clock A.M. of said day," etc. Giving this language its plain and ordinary meaning, we think it means that the newspaper in which the notice was published was *printed in* Cass county, as well as being of general circulation therein.

Failing to find any error in the record, the order of confirmation is affirmed.

ORDER AFFIRMED.

JAMES R. CANDY, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Constitutional Law:** DISTRICT JUDGES: POWER TO FIX TERMS OF COURT. The power granted by Sec. 26, Art. XVI, of the constitution, is a continuing power, and is not exhausted by user.

2. **District Judges:** POWER TO HOLD COURT FOR EACH OTHER. The power of a district judge to hold court in a district other than that for which he was elected does not depend upon the absence or disability of the proper judge.

3. **Criminal Law:** POWER OF ELECTION. Indictment contained two counts, one for malicious shooting with *intent to kill*, the other for malicious shooting with *intent to wound*. *Held*, that the defendant was not entitled to an order compelling the prosecutor to elect on which count he would proceed.

THIS case was brought up on a writ of error to the Clay county district court, where Candy had been tried and sentenced to imprisonment in the penitentiary for the term of one year.

John Saxon, for plaintiff in error, cited *Ellis v. Karl*, 7 Neb., 381. Gen. Stat., 722. Constitution, Art. I, Sec. 15.

C. J. Dilworth, Attorney General, for defendant in error, cited Gen. Stat., 821, Sec. 435. 2 Wharton's Prec., 2.

COBB. J.

The plaintiff in error was indicted, tried, and convicted for malicious shooting with intent to kill, etc. At the trial he moved to quash the indictment, assigning two grounds therefor: *First.* Because on or about the first day of February, 1876, the Hon. A. J. Weaver, judge of the first judicial district, did appoint and fix the time for the holding of the terms of the district court within and for the county of Clay, and other counties within said district, as provided in Sec. 26, of Art. XVI, of the constitution; by reason of such appointments the said judge exhausted the powers and authority so conferred upon him as aforesaid, and that this term of this said court, being since that time fixed and appointed by said judge at another and different time, is without any authority in law. *Second.*

That Hon. A. J. Weaver, the judge of this court, and of, within, and for the first judicial district as aforesaid, is present within said district able and competent, and qualified to act therein as such, but is not present holding pleas herein in this court; whereupon defendant claims that all proceedings herein are without authority of law, and void. Which motion was overruled by the court, and thereupon the defendant presented his motion for an order requiring the prosecutor to elect upon which count of the indictment he will proceed, etc., which motion was also overruled.

Other points were made by the plaintiff in error, both in his petition in error and in his brief. But he afterwards, by stipulation, abandoned all but the above.

Sec. 26, of Art. XVI, of the constitution, is as follows: "Until otherwise provided by law the judges of the district courts shall fix the time of holding courts in their respective districts."

The counsel for the plaintiff in error contends that the power granted to the district judges by the above provision is limited to a single exercise thereof, and becomes exhausted by user. We cannot agree with him in such construction. The language must be understood as granting a continuing power to be exercised whenever proper occasion may arise at any time, until such power be terminated by the legislature acting upon the matter. Otherwise what meaning can be placed upon the words of limitation "until otherwise provided by law."

Sec. 12, of Art. VI, of the constitution is as follows: "The judges of the district courts may hold courts for each other, and shall do so when required by law."

It will be readily seen, from an examination of this section, that the power of a district judge to hold court in a district other than that for which he was elected does not depend upon the absence or disability of the

proper judge, nor upon any other condition, except the consent or permission of the proper judge, which exception arises from the nature of things, and not from the language of the constitution.

The only case cited by counsel, that of *Ellis v. Karl*, 7 Neb., 381, is not in point. One of the questions in that case was, whether in a case pending in the district court of one of the counties of the first district, a temporary injunction allowed by the judge of the second district, without any showing of the absence or disability of the judge of the first district, was properly allowed. In deciding that question the court construed the provisions of the statutes in relation to the powers of judges at chambers, and referred to Sec. 23, of Art. VI, of the constitution, to show that the judges at chambers possess no inherent judicial powers. No reference is made to the section giving the judges the power to "hold court for each other." It need scarcely be said that had such powers been limited or denied by a previous statute, such statute would be repealed *pro tanto* by the constitutional provision.

The only remaining ground of objection is, that the court overruled the defendant's motion to require the prosecutor to elect upon which count of the indictment he would proceed, etc.

The indictment contains two counts but charges but one offense, to-wit, malicious assault and shooting. One count charges the said malicious assault and shooting to have been with intent to kill, and the other charges it to have been done with intent to wound.

The author of Wharton's Criminal Law states the law on this subject to be settled in this country, that the right of election, *i. e.* the right to require the prosecutor to elect, is "confined to cases where the indictment contains charges which are actually distinct and

grow out of different transactions. The court will not compel the prosecutor to elect upon an indictment charging the prisoner with larceny and receiving stolen goods, etc., where it appears by the indictment that the charges relate to the same transaction modified to meet the proof. In New York the law has been similarly stated, and in cases of felony, where two or more repugnant offenses are contained in the same indictment, it may be quashed or the prosecutor compelled to elect upon which charge he will proceed; but such election will not be required to be made when several counts are inserted in an indictment solely for the purpose of meeting the evidence as it may transpire on the trial, the charges being for substantially the same offense. * * * Whether a court will compel a prosecutor to elect which count to proceed on, rests in the discretion of the court, and cannot be assigned for error." Wharton's American Criminal Law, § 423.

The offenses of maliciously shooting, stabbing, cutting, or shooting at any person with intent to kill, wound, or maim, are provided for in one section of the statute—§ 16 of the criminal code, p. 722, General Statutes. The penalty for each of such offenses is the same.

The only difference between the two counts of the indictment in this case consists in the difference of the intent with which it is alleged the shooting was done. Such intent could only be gathered from the facts and circumstances surrounding the parties at the time, and the prosecutor might well be in doubt as to what might be the effect of the testimony before the trial jury, and we think the law permitted him to frame two counts, so that whether the jury believed the defendant guilty of having maliciously shot the person named in the indictment with intent to kill, or only

with intent to wound, in either case they might find him guilty.

There being no error in the record, the judgment must be affirmed.

JUDGMENT AFFIRMED.

WELLINGTON R. BURT, APPELLEE, v. MATTHEW S. BALDWIN, APPELLANT.

1. **Conflicting Testimony.** Cause tried to the court below. There was much conflicting testimony, some of which had to be rejected as untrue. *Held*, That this court would not disturb the decree, there being evidence to sustain it on each material point.

2. **Landlord and Tenant:** POSSESSION BY TENANT. A owned and occupied a farm of four hundred acres. In 1868, he sold one hundred and sixteen acres of it to B, who afterwards sold to C. July 14, 1874, C conveyed said one hundred and sixteen acres to D, but the deed was not recorded until May 25, 1875. On the fourth of May, 1875, C mortgaged the one hundred and sixteen acres to E. A had continued to occupy the farm and to cultivate the one hundred and sixteen acres as tenant to each successive owner down to and including D, to whom he attorned after he had bargained for the land and before the execution of the deed to him. *Held*, That the open and notorious occupancy of the one hundred and sixteen acres by A was no notice to E of the title of D under his unrecorded deed from C.

APPEAL by defendant Baldwin from a decree rendered against him in the district court for Douglas county. The opinion contains a sufficient statement of the facts in the case.

John L. Webster and *R. E. Gaylord*, for appellant.

1. The possession of land by a tenant is notice of the landlord's title, and is enough to put subsequent

mortgagees or purchasers upon inquiry as to landlord's title. *Dutton v. Warschauer*, 21 Cal., 610–23–29. *Hanley v. Morse*, 32 Me., 287. *Daniels v. Davidson*, 16 Vesey, 249. *Landers v. Bolton*, 26 Cal., 419. Possession is sufficient to put purchaser upon his inquiry as to outstanding title, and it is his own fault if he does not ascertain the extent and character of that title, and whatever is sufficient to put him upon inquiry as to the rights of others is considered legal notice to him of those rights. *Rupert v. Mark*, 15 Ill., 542. The simple independent fact of possession is sufficient to raise a presumption of interest in premises by occupant. *Pell v. McElroy*, 36 Cal., 268.

2. Burt knew of Baldwin's title to all these lands when he accepted the mortgage. The rule of law as laid down in *Tuttle v. Jackson*, 6 Wend., 226–7, that if the subsequent purchaser knows of the unregistered conveyance at the time of his purchase, he cannot protect himself against that conveyance; and whatever is sufficient to make it his duty to inquire as to the rights of others is considered legal notice to him of these rights, is so well settled that it needs no reference to authorities to sustain it; and the evidence in this case, to show that Burt knew or had reasonable cause to believe that Gallagher had previously conveyed this property to Baldwin, is so overwhelming that its simple statement is as clear as a demonstration.

Under the law of our state—sec. 16, p. 875, General Statutes—this mortgage to Burt must have been taken in good faith by him, and without notice of Baldwin's title, and the burden of proving these facts rests upon Burt. *Sanders v. Bolton*, 26 Cal., 393.

Kennedy & Gilbert, for appellee.

1. The general rule of law is that the possession of land is notice to the purchaser of possessor's title.

Constructive notice arising from tenancy does not extend beyond the tenant's title or apply to the title of lessor under whom the tenant holds. 4 Kent. Com., 179. 17 Ves., 293. 14 S. and R., 33. 3 Pick., 149. 8 Greel., 94. 2 Sum., 556. In England the weight of authority inclines on the side of restricting the operation of possession by a tenant to notice of the title of the actual occupant. The possession of a tenant under a lease is notice simply of his tenancy and not of his landlord's title. Wade on Notice, 281. 28 Eng. L. and Ez., 77. 2 Sum., 557. The possession must be unequivocal and easily distinguished from that of the grantor. Wade, 291. *McMechan v. Griffing*, 3 Pick., 149. *Hawes v. Wiswell*, 8 Green, 96. *Claibore v. Holmes*, *Billington v. Welsh*, 5 Binn., 129.

2. Implied notice of a prior unrecorded deed, to avoid a subsequent deed, must be not merely probable, but a necessary and unquestionable inference from the facts proved. Such inference can not in all cases be made from an open, peaceable, and exclusive possession. *McMechan v. Pick.*, 149. *Norcross v. Widgery*, 2 Mass., 507. 4 Kent. Com. 179. *Bellington v. Welsh*, 5 Bin., 139. *Day v. Dunham*, 2 Johns. Ch., 182. *Jolland v. Stanbridge*, 3 Ves., 478. *Hine v. Dodd*, 2 Atk., 287. *Trustee, etc., v. Wheeler*, 59 Barb., 589. *Jackson v. Van-Valkenburg*, 8 Cow., 260. *Eli v. Wilcox*, 20 Wis., 524. 8 N. H., 264.

COBB, J.

This is an action to foreclose a mortgage executed by John Gallagher. Matthew S. Baldwin was made a defendant under the general allegation that "said defendants, Matthew S. Baldwin and C. A. Johnson, have or claim to have some right, title, or interest in or to said premises described in said mortgage, the exact nature of which is to this plaintiff unknown, but

plaintiff alleges that whatever such claims or interests may be, they are all subsequent and subject to the said mortgage lien of this plaintiff.

Matthew S. Baldwin answered denying the material allegations of the plaintiff's petition, and setting up and claiming an adverse, paramount title in himself by virtue of a deed of general warranty executed by the defendant John Gallagher to said Baldwin, on the sixteenth day of July, 1874, at East Saginaw, Michigan, and recorded on the twenty-fifth day of May, 1875. That said deed was for a valuable consideration, to-wit: $14,467.00 actually paid. Said answer also alleges that he, the said Baldwin, went into the actual possession of said lands immediately upon the making of the said deed by the said Gallagher, and had remained ever since in the actual possession thereof. That at the time of the execution of the mortgage set forth in the petition the plaintiff well knew that the said Baldwin was the owner of said lands by virtue of said deed, and that he was in the actual possession thereof.

The mortgage, as stated in the petition and proved at the trial, was dated May 4, 1875, and recorded the eighth of the same month. The deed under which Baldwin claims title to the land was executed July 16, 1874, but not recorded until the twenty-fifth day of May, 1875—after the recording of the mortgage. The testimony of the defendants is directed to three points: *First.* To establish the *bona fides* of his deed, that it was in fact made and delivered before the date of plaintiff's mortgage, and for a good consideration. *Second.* That the plaintiff knew or had notice of it at and before the receipt by him of the mortgage. *Third.* That at and before the making of the mortgage he, Baldwin, was by his tenant in such possession of the lands, or a part of them, as amounted to notice of his title to all the world.

It might be sufficient to say that the district court which tried this cause found all of these points against the appellant Baldwin, and that after a careful examination of the evidence we think it sufficient to sustain such finding as to each point.

It may be stated that an unrecorded deed of land will prevail against a subsequent purchaser or mortgagee with notice. But such deed must be perfect so as to convey title to the grantee. In other words, it must have been executed and delivered. These facts must exist before any person can be charged with notice of them. There is no conflicting evidence as to the execution of the deed by Gallagher on or about the sixteenth day of July, 1874, but the evidence in regard to its delivery is of the most conflicting and unsatisfactory character, and indeed the only satisfactory evidence that it was ever delivered is the fact of its having been filed for record May 25, 1875. The testimony of Baldwin himself negatives the idea that the deed was delivered at the time of its execution and acknowledgment. But he swears that it was delivered to him by mail in the latter part of December, 1874, and in this he is to some extent corroborated by the lady witness. But according to his own statement he immediately sent it back to Saginaw to have a certificate placed upon it. But whether he returned it to the grantor, thus enabling him to exhibit it, in derogation of the idea of its having been delivered, as claimed by the plaintiff, or whether it was sent to other parties who got the certificate attached to it and shortly afterwards remailed it to Baldwin at Chicago, whence it was sent south in pursuit of Baldwin, whom it did not overtake until the latter part of May, 1875, and after the mortgage was recorded, is not clearly proved; and there being a conflict of testimony it was no doubt construed against the party

seeking to establish facts against the record. But admitting, for the purposes of the argument only, that this deed had been duly executed and delivered before the execution of the mortgage by Gallagher and the indorsement of the notes by Burt, had Burt actual notice of the deed, or such notice as would put a man of ordinary prudence upon his inquiry? Burt himself swears that he had no notice. Gallagher swears that he informed Burt before or at the time he made and delivered to him a mortgage for $20,000 on these lands that he had already sold and deeded the land to Baldwin. This testimony must have been wholly rejected and disbelieved by the trial judge, in which we think he was justified in view of the testimony of Horr, which is reasonable, business-like, and undoubtedly true. Gallagher was desirous of obtaining Burt's indorsement for twenty thousand dollars; the security which he had to offer was a mortgage on these lands. Burt having no knowledge as to the title by which Gallagher held this land, Gallagher referred him to Horr "as to the title being in him until recently, and as knowing all about the title." True, we get this from the testimony of Burt himself, but it is so entirely reasonable that we think the trial judge justified in believing it to be true. Now let us look at Mr. Horr's testimony. Mr. Horr had previously owned these lands, had sold them to Gallagher and his brothers, the brothers had conveyed their interests to John Gallagher, and Horr held a mortgage from John Gallagher on the lands. There is no dispute as to this, besides it is shown by the record. Horr says in his testimony: "Mr. Gallagher came to me and informed me that he was negotiating with Burt for Burt's indorsement, and that if he did so he wanted to arrange for the discharge of my mortgage on the property. In two or three days after that Gallagher came in again and told me

he had completed arrangements, and that he had referred Mr. Burt to me to get a description of the property, its value and location, and also as to the title to it. He said that he had stated to Burt that I knew all about it, having looked it up when I took the mortgage." He also stated that very shortly afterwards Mr. Burt came and made inquiry concerning these lands. * * * * * * "He asked about the title, and I stated to him it was in John Gallagher."

James Gamble testifies: "I was in Mr. Burt's office in company with Mr. Gallagher and Mr. Burt on or about the third day of April. They were talking in regard to the Nebraska lands. I was asked by Mr. Gallagher to go with him to Mr. Horr's office and get a discharge of the $5,000 mortgage which Horr held upon these Nebraska lands. I went, accompanied by Mr. Gallagher. He said it was the only incumbrance upon that property, and that by discharging that mortgage it would all be free from incumbrance."

This testimony of Burt, Horr, and Gamble, as to this question of notice, or rather want of notice, is perfectly reasonable and consistent with itself and with the known acts of the parties, but utterly inconsistent with the idea that Gallagher informed Burt that he had conveyed these lands to Baldwin. It is true we have the depositions of three witnesses—Charles J. Miller, Melvin W. Palmer, and Joseph Riedy, as well as the testimony of Warren M. Brown, all testifying to different conversations with Mr. Burt, in which they claim that he used language to the effect that he knew of the sale by Gallagher to Baldwin of the lands in question, at the time he took the mortgage. The trial judge must have disbelieved this testimony, and upon careful examination of the whole testimony we are not prepared to say that in so doing he decided against the weight

of evidence, much less that there is no testimony to sustain him therein.

The only remaining question is whether the possession of the 116-acre tract by Johnson was evidence of Baldwin's title. While considering this point we will regard it as proved that the deed from Gallagher to Baldwin was executed and delivered before the giving of the mortgage by Gallagher to Burt.

Mr. Baldwin in his testimony says that he first saw the lands about the first of July, 1874. L. C. Goodsell, witness for defendant Baldwin, testifies that he came to Nebraska with Baldwin about July 1, 1874, to look at these lands; that Mr. Baldwin examined the lands, placed them in the hands of an agent and rented them. Now this was confessedly before Baldwin had any title. Baldwin says that it was even before the writing of the deed, which was afterwards left with Camp & Brooks, and which it is said afterwards followed Mr. Baldwin and party, making the tour of the southern watering places. It will not be claimed that actual possession either by a party in person, or by his tenant, is constructive evidence of a fact which does not exist. Baldwin cannot in any event be claimed to have been the owner of these lands until the delivery of the deed, which is not claimed to have been before the last days of December. He was not at Omaha after that date until the trial, and there is no pretense that he made any contract of rental to Mr. Johnson by correspondence. If, therefore, Johnson was in the open and notorious possession of these premises at any time prior to the execution of the mortgage, and Burt, being put upon his inquiry by that fact, had gone to him and made inquiry, he would probably have learned that Johnson had attorned to Baldwin in anticipation of a sale and purchase which had never been, and which probably never would be, perfected.

But the most serious objection to the possession of Mr. Johnson as notice of the title of Baldwin is that it had no definite commencement. In his late work on the law of notice, p. 130, § 302, Mr. Wade quotes with approval the opinion of the supreme court of Mississippi in the case of *Loughridge v. Bowland*, 52 Miss., 546. The author uses this language: "It has also been decided, where possession by one's lessees or tenants was regarded as sufficient, that their tenancy must commence after acquisition of the title, evidenced by such possession. In other words, where, at the time of the sale, the grantor was in possession by his tenants who afterwards attorned to the grantee, the grantor's deed being unrecorded, this was held insufficient to charge even an attaching creditor of the grantor with notice of such unregistered conveyance."

Mr. Johnson once owned this land himself. He occupied it then as he continued to do after he sold it to Horr, after Horr sold it to Gallagher, and after Gallagher executed this unregistered deed to Baldwin. His continued occupancy could scarcely be evidence of these changes in the title, some of which it is apparent he had no accurate knowledge of himself.

Considering all the testimony before us, we cannot say that there is such a preponderance of testimony against the findings of the district court as would warrant this court in disturbing the decree, but on the contrary that the findings and decree are supported by a preponderance of testimony, and must therefore be affirmed.

DECREE AFFIRMED.

E. ESTABROOK, APPELLANT, V. MARTIN HUGHES ET AL., APPELLEES.

1. **Forfeiture:** FIXTURES. Where a tenant was in possession under a lease which contained a clause in these words, "the said Julien G. B. Handbine is to have the privilege of removing at the end of said term all improvements placed by him on the said premises, only on condition however that the conditions of this lease are fully complied with," and allowed one quarter's rent, which by the terms of said lease was required to be paid quarterly in advance, to be in arrears for thirteen days when the same was tendered and refused—*Held*, That equity would not enforce a forfeiture of the right to remove such improvements.

2. **Pleading:** DEMURRER. *Semble*, that when a party, after an adverse ruling upon his demurrer to a pleading, elects to stand upon it, and brings the same to the supreme court for review, he will be permanently concluded thereby. The cause will not be remanded to the district court with leave to answer to the merits.

THIS was an appeal by plaintiff from a judgment rendered against him in the Douglas county district court. The cause was heard below upon plaintiff's demurrer to the answer of the defendant Hughes, which was overruled and cause dismissed.

E. Estabrook, and *Estabrook & Hall*, for plaintiff.

As there is nothing in the issue relating to estoppel, the court cannot consider it. *Estabrook v. Omaha Hotel Co.*, 5 Neb., 76. *Fryes, ex rel., v. The Lexington & Big Sandy R. R. Co.*, 2 Met. (Ky.), 823-4.

If considered by the court we say an estoppel must be certain, precise, and clear. *Lajoye v. Primm*, 3 Mo., 529. *Rich v. Hotchkiss*, 16 Conn., 409. Must be mutual—both parties must be bound or neither estopped. 3 Grant (Pa.) Cases, 177. 16 Cal., 100. 14 Ib., 279-367. 17 Ib., 401. 1 Johns., 382. Must be acts or

declarations of a person by which he designs to induce another to alter his previous position. 5 Abbott's U. S. Dig., § 713, and authorities cited. See especially Ib., § 733. 32 Vt., 97. Bind only parties and privies. 5 U. S. Dig., 409, and authorities cited. Cannot be taken by inference—must be relied on in pleadings. 5 U. S. (Abbott), § 27-37. A stranger cannot take advantage of a statement made to others. Ib., § 604. Ib., § 711–726 *et seq.* 18 N. Y., 457. 4 Barb., 100. 13 Ib., 137. 2 Grant (Pa.) Cases, 413. 27 Texas, 407. 24 Vt., 143. Nearly all the late decisions on this subject are collated in 5 U. S. Dig. (Abbot's), 409 *et seq.*, to which the attention of the court is respectfully invited.

Stull & Burnham, for appellee.

We believe that the plaintiff is estopped from setting up title to said buildings, or any interest therein, for the following reasons, to-wit.:

1. By the renewal of the lease given in 1869, on October 4, 1871, recognizing up to that time a compliance with all requisitions.

2. That before the purchase and assignment by and to DePuy, he (Estabrook) admitted and stated, in presence of DePuy, that which misled Depuy to purchase the premises and take possession under said lease.

3. That at the time of the acknowledgment of said bill of sale to DePuy, he failed to make known any claim or interest owned by him in the same. 5 Iowa, 415.

4. During the whole of said tenancy by Handbine, DePuy, and Hughes, he (Estabrook) never claimed or pretended to claim any right or rental interest in the value of the buildings in controversy, but only claimed and received rent for the land.

5. That the plaintiff has never asserted any right to enter and assert any right to the said premises, and that he has never by positive act, or otherwise, made known the claim which he now asserts, but has stood by for a period of eight years and more, without in anywise disputing the claim of said tenants to the buildings in controversy, and which at all times have been in their possession and under their control.

6. That in his receipt for rent he has stated that the tenancy of defendant Hughes was under Haudbine's lease. In view of these facts, before set out, as to plaintiff's conduct, acts, and admissions, the doctrine of estoppel supports our position, when we say that plaintiff cannot now assert a claim or interest in the buildings in controversy adverse to the interest claimed by defendant Hughes. We cite the following authorities in support of the above: *Dezell v. Odell*, 3 Hill, 215. *Willard Canal Co. v. Hathaway*, 8 Wend., 483. *Gray v. Allen*, 14 Ohio, 58. *Elwood v. Haztell*, 38 Penn. State, 33. *Armstrong v. Pierson*, 5 Iowa, 325.

COBB, J.

The case as made by the answer as amended, and which, for the purposes of this opinion, are admitted to be true by the demurrer, may be stated in a few words.

On the nineteenth day of October, 1871, the plaintiff was the owner of a certain lot in Omaha. One Haudbine and wife owned certain buildings situated on said lot. On that day a lease was executed between the plaintiff and the said Haudbine, whereby the plaintiff leased to Haudbine the said lot by metes and bounds, for the term of three years from the first day of January then next ensuing, at a certain rent therein speci-

fied, to be paid quarterly in advance, and containing the provision that "the said Julian G. B. Haudbine is to have the privilege of removing, at the end of said term, all improvements placed by him on said premises only on condition that the conditions of this lease are fully complied with." The amendment to the answer contains an averment that the improvements meant and intended in the above clause were the buildings then erected on the said lot, and owned by the said Haudbine.

On the twentieth of September, 1872, Desire Haudbine, wife of the said lessee, with the knowledge and consent and acquiescence of the plaintiff, sold and conveyed the said buildings to one Depuy, and on the twenty-ninth day of September, 1873, the said Depuy, with the knowledge and consent of plaintiff, sold and conveyed the said buildings, and assigned the said lease to the defendant Hughes.

It seems that after the defendant Hughes became the occupant of said premises, he did not usually, if ever, pay the rent with punctuality, but that the same was always afterwards received by said plaintiff, and all want of punctuality in that respect was from time to time waived by the said plaintiff; that said rent was paid in full up to the fourth day of July, 1876, when, on the twelfth day of that month, the plaintiff notified the defendant Hughes to quit the said premises; that four days thereafter the defendant tendered to the plaintiff one month's rent, which was refused; that within five days thereafter defendant tendered to the plaintiff $28.50, three months' rent in advance, from the said fourth day of July, 1876, which was also refused; that one object for offering such payments on the part of the said defendant was to retain possession of the premises until he could remove the buildings therefrom, and the chief object of this

action was to enjoin the defendant from removing said buildings.

After examining all of the authorities cited by plaintiff I think that he is estopped to deny the right of defendant Hughes to remove the buildings, upon the facts admitted by the demurrer. In coming to this conclusion, I do not find it necessary to deny the position taken by the plaintiff, to the effect that where a tenant, having the right to remove fixtures erected by him on the demised premises, accepts a new lease of such premises without reservation or mention of any claim to such fixtures, and enters upon a new term thereunder, the right of removal is lost, notwithstanding his actual possession has been continuous. In the case at bar I think there was but one term. The time which Hughes occupied the premises, after the expiration of the term of three years from the fourth of January, 1872, was a tenancy from quarter to quarter—not properly speaking a term, and such holding will be presumed to be under and subject to the terms of the previous lease. See Ewell on Fixtures, 177, and notes.

Up to the fourth of January, 1875, the holder of the Haudbine lease had, according to its terms, the right to remove the buildings on condition that such holder complied with the terms of the lease, and it is alleged in the answer that he did so comply with such terms, under the tenancy from year to year, or from quarter to quarter, after the termination of the three years term up to the fourth day of July, 1876, to which time he alleges in his answer that the rent was duly paid. It is true, that under the terms of the lease, a payment of $28.50 for one quarter's rent in advance became due on the fourth day of July, 1876, which was not paid or tendered until after the service of the notice to quit. But this rent was tendered to the plaintiff

almost immediately upon receiving the notice to quit, by the defendant.

The law does not favor forfeitures as between landlord and tenant even of the term, and I think they should be less favored where the subject of the forfeiture is valuable property owned by the tenant. "Where a tenant has forfeited his lease, by a breach of the covenant for the payment of the rent, courts both of law and equity consider the clause of re-entry (or forfeiture) to be mainly inserted for the landlord's security, and will interfere in the tenant's behalf, although all the formalities of a common law demand may have been complied with, upon his satisfying the rent due, and making compensation for any damages which the landlord may have sustained in consequence of this omission. And in general a court of equity will relieve the tenant from a forfeiture when the breach has been accidental, or when it has been incurred by neglecting to pay a sum of money, the interest upon which may be calculated with certainty, and the landlord thereby compensated for the inconvenience he may have sustained by the tenant's withholding payment." See Taylor's Landlord and Tenant, sec. 495, and authorities there cited. And again: "But courts of equity are only closed against a tenant where the forfeiture is incurred by his willful and culpable neglect to fulfill the terms of his covenant, and not in cases where the omission has been occasioned by inevitable accident. And the general rule to be applied to all such cases seems to be that courts of equity will relieve where the omission and consequent forfeiture are the result of mistake or accident, and the injury and inconvenience arising from it is capable of compensation." Ibid, sec. 496.

The pleadings in this case show no damages or inconvenience to the plaintiff other than the withholding

of one quarter's rent for a period of less than half a month. It is scarcely necessary to say that, unless compelled by an unbending rule of law, a court of equity would not enforce the forfeiture of property of considerable value under such circumstances. Therefore, viewing the law applicable to the case, as I do, it follows that the judgment of the district court overruling the demurrer is correct and ought to be affirmed.

After the decision in this case was announced the plaintiff requested the court to remand the case to the district court with leave to him to answer to the merits. Such course would be contrary to the established practice of this court. The general rule is, that when a party, after an adverse ruling upon his demurrer to a pleading, elects to stand upon it, and brings the case to this court for review, he will be permanently concluded thereby.

JUDGMENT AFFIRMED.

WILLIAM GUTHMAN, PLAINTIFF IN ERROR, V. ANDREW KEARN, DEFENDANT IN ERROR.

1. **Tender.** In May, 1876, K. entered into a contract with G. to herd 22 head of cattle during the season of grazing, for twenty-five cents per head per month. In September of that year G. was garnisheed for $20 in an action pending against K.; soon thereafter K. notified G. to take his stock away or he would not be responsible for them. At the time designated G. went to the residence of K. and informed him that he had been garnisheed for $20, but would pay the balance due. K. refused to deliver the stock without payment in full, including the amount garnisheed. *Held*—1. That the question, whether K. by his conduct had waived the production of the money, should have been submitted to the jury. 2. That an offer by K. to receive the amount due after an action of replevin had been commenced, would not defeat the action.

2. ———: WAIVER. Ordinarily, to make a valid tender, the money should be actually produced, but if the creditor dispense with its production, or do any thing which is equivalent thereto, and the debtor has the money at the time, and is ready to produce it, the production of the money will be deemed waived.

ERROR from the district court for Cass county. The case is stated in the opinion.

Sam. M. Chapman, for plaintiff in error.

1. The law is not so unreasonable as to require a tender or demand when it appears from defendant's conduct that it would be useless, and an absolute refusal to do the act for which the money is to be paid waives a tender. *Vaupel v. Woodward*, 2 Sand., Chan. Rep., 143. *Beacham v. Eckford's Ex.*, 2 Sand., Chan. Rep., 131. *Stone v. Sprague*, 20 Barb., 509. *Richie v. Huntington*, 7 Kan., 249. *Corbitt v. Alvord*, 15 Wis., 186. *Bicket v. White*, 1 Cin. Sup. Ct., 170. *Isham v. Greenham*, 1 Handy, *361. *Borden v. Borden*, 5 Mass., 74.

2. The payment of charges by Guthman, could not be made a *condition precedent* to the accounting and offer of delivery of the stock by Kearn. They must be simultaneous acts. *Isham v. Greenham*, 1 Handy, *361. *Christie v. Lewis*, 2 B. & B., 410. *Hammond v. Gillman*, 14 Conn., 479. *Tote v. Week*, 8 Taunt., 280 and 302.

3. If a tender and settlement be avoided by a defendant he cannot aftewards object that no tender was made. *Gilmore v. Holt*, 4 Pick, 258. *Southworth v. Smith*, 7 Cush., 391. *Wheeler v. Knaggs*, 8 Ohio, 169. Fry on Specific Perfm., Sec. 619. *Isham v. Greenham*, 1 Handy, Ohio, *361.

Willet Pottinger, for defendant in error.

To make a tender, the person tendering must actually produce the money—the exact amount—and offer

the same to the other party. And in no way can the above requirements be waived unless the person making the tender has the exact amount of money which he wishes to tender and offers to produce it, and the other party expressly tells him he need not present it, for he will not take or receive it. None of the above requirements were complied with. *Bakeman v. Pooler*, 15 Wend., 637. *Hornby v. Cramer*, 12 How. Pr., 490. To make a tender good it must not be coupled with any condition whatever. The person making the tender cannot even demand a receipt or any thing that might prejudice the party's right. All he can require of the other party is for him to take or receive the money so tendered. This wise provision, adopted in the law of tender, is for the purpose that the party to whom the tender is made can take it freely, without any prejudice to any further rights that he might have in the matter over and above the tender so made. In the case at bar, the proposition made by the plaintiff to the defendant was that the defendant should give up the cattle when this balance was paid; and on this condition would plaintiff pay and none other. *Wood v. Hitchkock*, 20 Wend., 47. To keep a tender good, the person making the tender must be prepared to pay the tender money ever afterwards; and if after tender made, the party to whom tendered should at any time demand the tendered money and the other party fails to pay the same, then the tender fails from the beginning. *Kortright v. Cady*, 23 Barb., 490.

MAXWELL, CH. J.

In May, 1876, the defendant entered into a contract with plaintiff to herd twenty head of plaintiff's cattle during the season of 1876 for the sum of twenty-five cents per head per month. In September of that year

one Leuchitwise commenced an action in the county court of Cass county against the defendant, and proceedings in garnishment were had against the plaintiff in this cause for the sum of $20.

In October, 1876, the plaintiff instituted an action of replevin against the defendant to recover possession of the cattle in controversy. The defendant answered the petition of the plaintiff, alleging that there was due him for keeping said stock the sum of $29.20, no part of which had been paid; and that the defendant had a lien upon said stock for said charges. No objection seems to be made by the defendant to the $20 which the plaintiff claims to have paid for the defendant under the proceedings in garnishment, and the only matter in dispute is in regard to the tender of the sum due from the plaintiff to the defendant in excess of the $20 garnisheed. On the trial of the cause the court instructed the jury as follows:

"You are instructed that plaintiff cannot maintain this action, having made no tender of amount due defendant on the contract price for herding the cattle in controversy, and you will find for the defendant, and assess his damages at such sum as you shall find due him for such herding, and also damages for the wrongful detention of said cattle by plaintiff, which, under the evidence, can only be nominal." Plaintiff excepted to the instruction given, and requested certain instructions, which were refused. The jury returned a verdict for the defendant for the sum of $8.12, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The "act to provide for liens upon live stock for their keeping," approved February 18, 1867, provides, "that hereafter when any person shall procure, contract with, or hire any other person to feed and take care of any kind of live stock, it shall be unlawful for

him to gain possession of the same by writ of replevin, or other legal process, until he has paid or tendered the contract price, or a reasonable compensation for taking care of the same." Gen. Stat., 91. The instruction given by the court is predicated on the assumption that there was no tender by plaintiff of the amount due for herding. It seems to be conceded that the $20 for which the plaintiff was garnisheed was thus applied. As to the balance due, the testimony of the plaintiff is as follows: "We offered him the money to pay all over the garnishee, but he said he would not let us have them without paying every cent, garnishee and all."

Snyder testifies: "We got notice from Mr. Kearn to take our stock from the herd, and to settle our herding bill, for he would not be responsible for our stock after such day. We went right over for our cattle, but we could not get them. We did not want to pay twice, for it was partly garnisheed. We asked Mr. Kearn if we could get the cattle, and he said not without we paid all; then he afterwards said he did not know, he would see the herder."

Mr. Metzger testifies: "Well, we went there and tried to get the cattle, and we told him we would pay the money over the garnishment. I said I did not know what to do, but he would not let us have the cattle, and we could not take them. We calculated to pay over the garnishment." And this testimony is not denied by the defendant. He testifies: "Mr. Guthman said, the time he came for his stock, he had some thirty head that he brought. That as quick as he came he talked about replevying out some twenty head—only his stock; the others belonged to his brother or brother-in-law. The stock he talked of replevying he would settle for, it being $29.12, and the other stock was $20. On the other part of the stock he said a steer was missing," etc.

Ordinarily to make a valid tender the money should be actually produced; but if the creditor dispense with such production, or do anything which is equivalent thereto, and the debtor have the money at the time, or is ready to produce it, there is no necessity for producing the money. 2 Greenleaf Ev., § 603. *Wheeler v. Kruggs*, 8 Ohio, 173. *Behaly v. Hatch*, Walker (Miss.), 369. *Breed v. Hurd*, 6 Pick, 356.

In *Wheeler v. Kruggs*, *supra*, one Wellman went to the house of the defendant with ten thousand dollars in current bank notes, and informed him that he had the money and demanded the fulfillment of the agreement; he told the defendant there was sufficient time and he would obtain the specie for him if he required it. The defendant replied that he would accept bank notes as soon as specie, but he would take neither, nor would he ratify the sale. It was held that this was a sufficient tender.

In the case at bar the defendant claimed the sum of $20, for which the plaintiff had been garnisheed, and apparently refused to surrender the cattle without such payment. This, so far as the testimony discloses, he had no right to do. If there was a *bona fide* offer on the part of the plaintiff to pay the balance, amounting to about the sum of $8, to the defendant, and the defendant refused to receive it, claiming the whole amount, including that for which the plaintiff had been garnisheed, it is sufficient to justify a jury in finding that the defendant waived the production of the money. 2 M. & S., 86. *Sells v. Hoare*, 12 Eng. C. L., 35. And that question should have been submitted to the jury. The fact that the defendant offered to accept $8.12 balance after the action of replevin was instituted can make no difference as to the plaintiff's right to maintain the action. The defendant is entitled to be paid the balance remaining unpaid, but if, after tender of the amount

due, he refused to permit the plaintiff to take his cattle away he is liable for costs. As the court refused to submit the questions of fact to the jury the judgment is reversed and the cause remanded for a new trial.

JUDGMENT ACCORDINGLY.

ELMER S. DUNDY, APPELLANT, V. THE BOARD OF COUNTY COMMISSIONERS OF RICHARDSON COUNTY, APPELLEE.

1. **Taxation**: RAISING ASSESSMENT. When the assessment in one district is relatively higher or lower than that of another, the county commissioners, sitting as a board of equalization, may add to or take from the entire assessment of any particular district without notice to the individual tax payers. *South Platte Land Co. v. Buffalo County*, 7 Neb., 253, distinguished. But they cannot do so without evidence and by a mere arbitrary exercise of power. [COBB, J., dissenting.]

2. ———: ASSESSING IMPROVEMENTS. The statute requires the value of improvements upon land to be added to the value of the land in making the assessment, and not assessed separately; but where it is clear, either from the record or extrinsic evidence, that such separate assessment of improvements was intended as a separate item of the value of the real estate, a tax assessed thereon will be a valid lien upon the real estate.

3. ———: LAND ROAD TAX. The land road tax of four dollars per quarter section was repealed by the constitution of 1875.

4. **Constitutional Law**: SPECIAL LEGISLATION: BONDS. The act approved February 14, 1873, "to authorize Falls City precinct to issue bonds to aid in the construction of a court house for Richardson county" is in conflict with section one, Art. VIII, of the constitution of 1867, and bonds issued thereunder are void.

5. **Bonds**: AUTHORITY OF COUNTIES AND PRECINCTS. Counties and precincts have no authority to issue bonds unless authorized to do so by express statute.

6. **Taxation: ASSESSMENT OF LAND NOT CONTIGUOUS.** Tracts of land not contiguous should be assessed separately, and a failure to do so would render a tax deed based thereon invalid; but where a party seeks to enjoin the collection of a tax upon that ground, he must set forth such facts in his petition as show the collection of the tax to be unjust and inequitable.

THIS was an appeal by plaintiff from a decree rendered in the district court for Richardson county, WEAVER, J., presiding. The cause was tried upon the pleadings and an agreed statement of facts, and having been heard here on the last day of the present term, was by stipulation of the parties submitted to the court, and the decision thereon filed and decree entered in vacation, April 22, 1879.

The agreed statement of facts is as follows:

It is hereby stipulated and agreed by and between the parties hereto, that this cause shall be fully submitted to and decided by the court on the pleadings filed herein, and the following statement of facts, admitted to be true, either party reserving the right to appeal to the supreme court for the purpose of reviewing or correcting such decree as may be rendered by the district court.

It is admitted that said plaintiff was at the time of bringing this suit, and for four years previous thereto, and yet is, the owner in fee of all the land described in plaintiff's bill, except the undivided fourth part of the piece described as lot six, and at the time the suit was brought, and taxes were levied, the said undivided fourth part of said lot belonged to J. E. Burbank, and that the assessor who assessed the same valued and assessed the lands at the sums stated in the bill for the years 1876 and 1877, and that the quantity of the land is correctly stated. That the said lands are described by their well known and recognized legal subdivis-

ions, and have been so recognized in and by the assessments for several years last past.

That for the year 1877 the assessor made an assessment against the plaintiff's land, described as a part of section No. eleven, town one, range No. sixteen, as shown in said bill, a copy of which is hereto attached, showing the present condition of said assessment as appears by the assessment roll.

That the county commissioners, as a board of equalization, met on the sixteenth of April, 1877, and on the twenty-seventh day of the same month the said board of equalization added to the assessed value of all of said lands the further sum of twenty-two per cent, and added that amount to the taxable value of said lands, as stated in plaintiff's bill, and that the plaintiff had no notice whatever of any such intention on the part of said board until after such assessment was raised. That the said order, so made by said board, remains matter of record and unrevoked.

That the said lands were assessed for the year 1876, at the prices and sums stated in the bill, and that on the seventeenth of April, 1876, the commissioners met as a board of equalization, and on the twenty-first day of the same month the said board made an order directing eighteen per cent to be added to the said assessment, which was done, which is matter of record, and remains unreversed and unrevoked, and the taxes were levied on all of said land, including the eighteen per cent so added as aforesaid as stated in said bill, no notice of which was given to plaintiff, nor of any intention so to do.

That on the —— day of July, 1876, the county commissioners levied taxes on said lands, including the raised assessments, at the rate stated in the bill, and that the taxes were made out and placed in the hands of the treasurer for collection, and that the treasurer

has been seeking to collect the same as stated in the bill.

That the taxes levied on said land for the year 1876 are correct as stated in the bill.

That the plat hereto attached, showing location and description of land described in the bill, is correct.

That the assessments complained of have in no respect been corrected, and the taxes levied thereon will be enforced unless the treasurer of said county shall be restrained from proceeding therefor.

That the assessor for 1877 assessed the improvements on land of said plaintiff in section No. eleven, and on the other improved lands in said precinct, a part of which is shown by the copy of one page of the assessment roll hereto attached, and that after the said roll was returned into the clerk's office, and there filed, the said commissioners erased from the roll all the assessments on such improvements, except in the three instances stated in the bill, and that no change has since been made thereon.

That lots two and five, in section twenty-three, town one, are not contiguous, but are assessed together.

That lots five and six, section twenty-two, were assessed and taxed together, for the year 1876, and for the sum named as stated in the bill.

That lots two and five, section twenty-three, are not contiguous, but are assessed and taxed together for the amount, and as stated in the bill.

Isham Reavis (*John L. Webster* with him) for appellant, cited *South Platte Land Co. v. Buffalo County*, 7 Neb., 253. *Hamlin v. Meadville*, 6 Neb., 235.

Frank Martin, for appellee.

1. We may safely admit that where the board proceeds as a board of revisory assessors to change indi-

vidual valuations, they should give the individual some notice, in order that he may be present and protect his interests. We think our statute gives the board—*First.* The general powers of ordinary boards of equalization, viz.: The power to equalize the whole assessment of the county by raising or lowering different political or general geographical portions or subdivisions of the county so as to make them as near equal as may be. And, *Second.* In addition to such ordinary and general powers it gives the board other special powers in regard to individual cases. We contend that the two powers are distinct and independent, and governed by entirely different rules. The board, in the two cases reported, were acting under their special powers, but in this case were acting under their general powers, and sought to do what the law authorized them to do, viz.: increase the valuation a certain per cent on one portion of the county, and decrease a certain per cent on another. For that general purpose the statute is notice to all the world of the time and place of the meeting of the board, and all persons are bound to take notice of it. *Nixon v. Ruple*, 30 N. J. Law, 60. *Hambleton v. Dempsey & Co.*, 20 Ohio, 168. *Kelley v. Carson & Richardson*, 8 Wis., 182.

2. In regard to the court house bond tax, we say the complainant is estopped from questioning the validity of the law under which they were issued. *Ferguson, etc., v. Landrom, etc.*, 5 Bush, Ky., 241. Cooley on Taxation, 573, and cases there cited.

MAXWELL, CH. J.

On the second day of July, 1877, the plaintiff filed a petition in the district court of Richardson county, alleging that he is the owner in fee of 60 acres in the south-east quarter of section eleven, town one, and

range sixteen, which in the year 1877 was assessed at the sum of $900. That he is also the owner of the undivided three-fourths of lot six, in section twenty-two, town one, and range sixteen, containing about 30 acres, which in that year was assessed at $180; that he is also the owner of lot five, in section twenty-two, town one, range sixteen, containing 32.42 acres which was assessed at the sum of $280. That he is also the owner of lot two, section twenty-three, town one, range sixteen. That he is also the owner of lot five, section twenty-three, town one, range sixteen, containing 25 acres, lots two and five being assessed together at the sum of $444. That he is also the owner of lot one, in section twenty-four, town one, range sixteen, containing about 31 acres, assessed at the sum of $186. That he is also the owner of the north half of the north-east quarter of section thirty-two, in town one, range sixteen, containing 80 acres, assessed at $452. That all of the above described lands, except the first, are legal subdivisions as made by the government surveys.

The petition also alleges "that after the assessment of said lands had been made by the assessor of said precinct for the year 1877, the assessment roll was duly returned to the county clerk's office of said county, where the same now remains as a part of the records of said county; that the assessor of the said precinct, or the board of county commissioners, or one of them, or some other person by their direction * * undertook to value and assess the improvements on the lands first above described, and assessed the same separately, and detached from the land, at the sum of $1500, which now stands upon the assessment roll against the plaintiff."

The petition also alleges that afterwards the county commissioners caused the assessment for improvements to be stricken from the assessment roll, excepting upon

the plaintiff's land and lands owned by Charles Steele and one Shack, and that no other assessments of improvements were made upon any lands in the county, although there were many and valuable improvements on the cultivated lands throughout all portions of the county.

The petition also alleges that on the sixteenth day of April, 1877, the county commissioners of said county met as a board of equalization and continued their sessions until the twenty-seventh of that month, when they "unlawfully and wrongfully added 22 per cent, and ordered 22 per cent to be added to the assessment and ascertained valuation of the land before described, and also on all the real estate outside of 'city property' in said Falls City precinct; that the said assessment so made and returned by the assessor was raised and increased by the said commissioners at the rate of 22 per cent in violation of law, without their having *any sort* of lawful evidence before them on which to base their action, and totally irrespective of the assessment so made or the real cash value or market value of the land in said precinct."

It is admitted in the agreed statement of facts that this increase was made without notice. Substantially the same facts are alleged as to the assessment of the lands in question for the year 1876. The board of equalization increasing the assessment in that year 18 per cent.

For the year 1876 the following taxes were levied on said lands:

State general tax	4	mills.
" sinking "	1	"
" school "	1	"
" university tax	$\frac{1}{4}$	"
" penitentiary tax	1	"
" bond tax	$1\frac{1}{10}$	"

COUNTY TAX:

Insane tax	½ mills
County general tax	6 "
County sinking "	½ "
County bridge tax	5 "
Railroad tax	5 "

Land road tax, $4 per quarter section.

Court house precinct tax	3½ mills.
Falls City precinct special tax	1 7 "

It is alleged that these taxes were levied upon the lands heretofore described by the county commissioners in the year 1876, and are a cloud upon the title of plaintiff to the same, and that the treasurer of the county is about to proceed to collect said taxes. The petition also alleges that the county commissioners of said county, unless restrained, will levy said illegal taxes upon said lands for the year 1877, etc.

The plaintiff states that "he is ready and willing at all times to pay the lawful taxes on said land," etc. The plaintiff prays for an injunction to restrain the commissioners from levying a tax on the improvements heretofore mentioned, and from levying a tax on the 22 per cent valuation added in 1877; also restraining the collection of the land road tax of $4 per quarter section, the court house tax, the insane tax, and the special railroad tax, and also to restrain the collection of the tax on lots five and six, in section twenty-two, and two and five, in section twenty-three, and for general relief. The defendants filed an answer to the petition, which it is unnecessary to notice, as they afterwards, by their attorney, signed an agreed statement of facts admitting the material allegations of the petition to be true.

On the trial of the case the court found that "the proceedings of the county commissioners at their sessions in April, 1876 and 1877 respectively, acting as a

board of equalization of said Richardson county * * in raising the assessments on the lands of said plaintiff * * * acted without notice to the plaintiff and consequently without jurisdiction of the plaintiff or the subject matter." The court also found that the land road tax, the precinct railroad tax, and the county insane tax were levied without authority of law and are void. The court also found that the assessments on lots five and six, in section twenty-two, town one, range sixteen, are void, and the injunction made perpetual as to these taxes, and as to all other taxes in the petition the bill was dismissed. The plaintiff appeals to this court.

In the case of the *South Platte Land Co. v. Buffalo county*, 7 Neb., 253, this court held that a court 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 its invalidity, or when officers transcend their authority. In that case, it was held that county commissioners, acting as a board of equalization, cannot raise the assessment of 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. That was a case where the board of equalization without notice raised the assessment of the property of an individual, without increasing in like proportion the assessment of contiguous lands. That such an act is void there can be no question, as no such absolute power has been given to the board. The rule, however, is different where it is clearly made to appear to the board that the assessment in one district is relatively higher

or lower than that of another. In such cases they may hear testimony upon the question of relative values and add to or take from the entire assessment of any particular district, but they cannot do this, as in the case at bar, "without their having any sort of lawful evidence before them on which to base their action." They cannot, by a mere arbitrary exercise of power, without cause add to the assessed valuation of a particular district. The decree of the court below as to the amount added to the assessments of the plaintiff by the board of equalization, is therefore affirmed.

As to the tax on improvements, section twenty-four of the revenue law [Gen. Stat. p. 904], provides that: "On or before the second Monday in April, annually, the several precinct assessors shall make out and deliver to the county clerk an assessment roll consisting of the following items, to-wit:

"*First.* A list of all the taxable lands in such precinct in numerical order, beginning with the lowest numbered section, in the lowest numbered township, in the lowest numbered range in the precinct, and ending with the highest numbered section, township, and range, with the number of acres in each tract set opposite the same, in a column provided for that purpose, and the assessed value thereof in another column, and the name of the owner or person listing the same in another column, with the column of acres and values footed up. Such list to be as near as practicable in the following form:

"Return of taxable lands in ..... precinct, in ..... county, Nebraska, as assessed for the year 18.....

Part of Sec.	Section.	Twp.	Range.	Acres.	Value.	Ownr's Name"

It is clear from this, that the improvements upon land must be added to the value thereof, and the whole assessed as real estate. Where, however, it is apparent, either from the record or extrinsic evidence, that the improvements, although assessed separately, were in fact an assessment upon the real estate as a separate item, the tax will be valid and binding and a lien upon the real estate. But in this case, so far as appears, the tax was entirely unauthorized and a mere arbitrary exercise of power on the part of the taxing officers. The decree dismissing the petition as to this tax is therefore reversed.

The land road tax was repealed by the constitution of 1875 and the levy of the same was therefore void. The decree enjoining the collection of the same is therefore affirmed.

The tax described as the "insane tax" was levied without authority of law and is void. The decree as to that is therefore affirmed.

The court house tax was levied for the payment of bonds issued under a special act of the legislature, approved February 14, 1873, "to authorize Falls City precinct to issue bonds to aid in the construction of a court house for Richardson county." Special Laws, for 1873, p. 80. Have such bonds any validity under our constitution? Section 1, Art. VIII of the constitution of 1867, prohibited the legislature from passing any special act conferring corporate powers. This being the case, the act in question conferred no authority whatever to issue the bonds in question, and they are absolutely void in whosesoever hands they may be. *Clegg v. School District, ante* p. 178.

Counties and their subdivisions are mere governing agencies charged with certain objects of necessary local administration. They have no authority to issue bonds unless it is conferred by law, and the purchaser of such

bonds must look to it to see that the municipality issuing the same had authority to do so. The mere recital of such authority in the bonds, if it did not actually exist, adds nothing to their validity. And this applies to the precinct bonds which were issued without submitting the question to the people and without authority. The court therefore erred in dismissing the action as to these bonds. The judgment of the district court is therefore reversed as to the tax levied for these bonds and the injunction as to said tax made perpetual.

It appears that lots five and six in section twenty-two, and lots two and five in section twenty-three, town one, range sixteen, were assessed together, and it is insisted that in consequence thereof the tax levied against the same is void. Under our statute, where lands belonging to the same person are contiguous, it is not necessary to list them in the smallest governmental subdivisions. Section six of revenue law [Gen. Stat., 898] provides that "the list of each person shall contain, *first*, his lands by township, range, and section, and any division or part of a section lying in the county in which the list is required," etc.

Where lands belonging to the same person are contiguous they may be listed in such governmental subdivisions as may be convenient, unless the difference in value of the smaller subdivisions requires a separate assessment. But where the tracts are not contiguous they should be assessed separately, and a failure to do so would render a tax deed based thereon invalid, because it is a title derived from a naked power to sell land, and the conditions, upon which the power to sell may be exercised, must be substantially complied with. But when a party seeks to enjoin the collection of a tax upon real estate, he must set forth such facts in his petition as will show the collection of the tax to be

unjust and inequitable. Nothing of the kind is alleged or proved, nor is it claimed that the aggregate assessments are too large. The lands assessed together being in the same sections, and apparently wild lands, it is reasonable to infer that they are about of equal value per acre, and that the plaintiff is not injured by the assessment. The judgment of the court below declaring the assessment void is therefore reversed.

A decree will be entered in this court in conformity with this opinion, the plaintiff to have the relief herein granted upon the payment of the amount of taxes justly due upon said real estate.

DECREE ACCORDINGLY.

COBB, J., dissented from that portion of the opinion covered by the latter clause of the first point in the syllabus, stating that in his view of the matter the commissioners could raise and lower the valuation of entire precincts, as might be necessary for a proper equalization, without notice to any parties or hearing evidence upon the question of relative values, but according to their own judgment.

MARION E. FORBES, ADMINISTRATRIX OF THE ESTATE OF PETER FORBES, DECEASED, PLAINTIFF IN ERROR, V. WILLIAM F. SWEESY AND OTHERS, DEFENDANTS IN ERROR.

Estate by Curtesy: LEASE. In the year 1872 the wife of H. owning certain real estate in her own right, leased the same for the period of five years, and soon thereafter died. F. having recovered judgment against the husband, levied upon the husband's estate by curtesy in the demised premises, and sold the same upon execution during the existence of the lease, F. becoming the purchaser. The sale was confirmed, a deed made

to F., who thereupon brought an action of ejectment against the lessees. *Held*, that the plaintiff has no right to the possession of the premises until after the expiration of the lease.

ERROR from the district court of Douglas county. The opinion states the case.

John L. Webster and *George W. Doane*, for plaintiff in error.

1. The law has become substantially settled that while the married women's acts excluded the husband during her life from control or of interference with his wife's separate, real, and personal estate, and give to her alone the power of disposition by deed or will, yet they left the husband the right of curtesy in her real property which remained undisposed of and unbequeathed at her death. Schouler on Domestic Relations, p. 196. *Hatfield v. Sneden*, 54 N. Y., 280. *Cole v. Van Riper*, 44 Ill., 58. The better opinion and the weight of authority is, that these acts, although inconsistent with the estate by curtesy initiate, do not defeat the husband's curtesy at the death of the wife. *Porch v. Tries*, 3 C. E. Green, 208.

2. No reported case is cited by defendants, nor do we believe any can be found, where a lease operates to defeat curtesy. A lease for years is not a disposition of the title to the property, but is simply granting the use of it to the lessee for a period of time. It is not an alienation of the land as spoken of in the authorities. The title to the land still remains in the wife. In such case and in the case at bar the wife died seized in her right of an estate of inheritance in the land, and this gives the curtesy to her husband. The authorities as cited by plaintiff and defendants in their briefs go only to the extent that curtesy initiate may be defeated by an alienation of the land, but if the

land is not alienated at her death, curtesy consummate attaches.

E. Wakeley and *John D. Howe*, for defendants in error.

When counsel admit that the curtesy existed in the wife's real property, "which remained undisposed of and unbequeathed at her death," they concede that the position of the court below is sound. To say that a married woman cannot make a lease that shall survive her is to say that she cannot convey her property, or devise it, and that her power of disposition is no power at all. No one could take her lease with safety for a term of twenty-four hours; and since the husband cannot use or dispose of it, her real estate is divested of its present value. It can be of no value till she is dead! And this is reform and progress in the direction of the disenthrallment of a married woman's estate with a vengeance. And she cannot make a devise of property that shall have any effect after her death! Truly, she would seem to have no valuable interest in her real estate, whether she be "dead or alive." It would seem that she might plow and sow, but could reap only the whirlwind. *Matter of Winne*, 2 Lans, 21. *Ransom v. Nichols*, 22 N. Y., 110. *Barnes v. Underwood*, 47 N. Y., 351. *Pool v. Blakie*, 53 Ill., 495. *Staples v. Brown*, 13 Allen, 64.

MAXWELL, CH. J.

On the twenty-first day of January, 1876, Peter Forbes filed his petition in the district court of Douglas county, alleging "that on the —— day of July, 1875, he became and ever since has remained, the owner of the legal estate for the life of one Milan Hunt as tenant by the curtesy, and which estate still con-

tinues and is undetermined, in the following lands and tenements, to-wit: The east forty-four feet of lot one, in block one hundred and eighteen, in the city of Omaha, in the county of Douglas, and state of Nebraska, and is entitled to the possession of the same, and that said defendants unlawfully keep him out of the possession thereof," etc. The petition also alleges that the defendants have received the rents and profits for the said real estate since July, 1875, amounting to the sum of $750. The plaintiff prays judgment for the possession of said real estate, and for the recovery of said sum of $750.

The defendants answered the petition, alleging that "on or about the twentieth day of September, 1872, said defendants, Sweesy and Culbertson, entered into possession of said property under a lease in writing of about that date, made, executed, and delivered in due form of law by Elizabeth Hunt, the then owner of the fee simple of said real estate, but now deceased, whereby said premises were leased and demised to the said Sweesy and Culbertson for the term of five years next after that date; that on or about the first day of May, 1873, and before the commencement of this suit, said Sweesy and Culbertson leased and demised said premises to Tyler for the remainder of said term of five years, and that Tyler entered into possession of said premises under said leasing, and has ever since remained in possession thereof thereunder."

During the pendency of the action in the district court the plaintiff died, and the cause was revived in the name of Marion E. Forbes as administratrix.

In September, 1878, the case was submitted to the court without the intervention of a jury, and the court found "that the defendants, at the time of the commencement of this action, had possession of the real estate described in the petition, under and by virtue of

a lease thereof for the term of five years from and after the twenty-first day of September, A.D. 1872, executed on that day by one Elizabeth Hunt, then the wife of one Milan Hunt. That said Elizabeth Hunt was thus seized in fee thereof by conveyance to her in the state of Nebraska, on or about August 9th, 1865, and March 9th, 1866, while she was the wife of said Milan Hunt. That there were living children of said Milan and Elizabeth Hunt, born of their marriage. That said Elizabeth Hunt died after executing said lease, and before the levy of the executions hereinafter named, and before the commencement of this action, leaving said Milan Hunt surviving her. That on the twentieth day of March, 1873, a judgment was rendered in the district court for Douglas county, in favor of Geo. W. Forbes, and against Milan Hunt, for $7,655; that an execution was issued upon said judgment, which was duly levied by the sheriff of said county of Douglas, on the eighteenth day of May, 1875, on the interest of said Milan Hunt as tenant by the curtesy in the lands and tenements described in the petition; that on the twenty-sixth day of June, 1875, the said interest so levied upon was duly sold by said sheriff under execution to the plaintiff's intestate, Peter Forbes, which sale was at the June term of said court, 1875, duly confirmed by said court, and a deed ordered to be made to the said Peter Forbes for said interest so sold by said sheriff, which was done accordingly before the commencement of this suit, and that the said Peter Forbes became thereby vested with whatever interest the said Milan Hunt had in said property as tenant by the curtesy, to which finding the defendant excepts; and the court finds, as a conclusion of law, that said Milan Hunt did not become seized of or entitled to an estate by curtesy or otherwise, or any interest in the said real estate for or during the unexpired portion of

the said term for which the same was leased; and that said levy, sale, confirmation, and deed vested in the said Peter Forbes no right or interest in said real estate for or during the said portion of such term, and that the defendants are entitled to judgment: to which said findings, as conclusions of law, the said plaintiff by his attorneys then and there duly excepted."

The plaintiff filed a motion for a new trial, which was overruled and judgment rendered on the finding. The plaintiff brings the cause into this court by petition in error.

The only question to be considered is—did the sale, confirmation, and deed vest in the plaintiff any right in the premises in question during the existence of the lease?

An estate by curtesy at common law is defined to be that estate to which a husband is entitled upon the death of his wife, in the lands and tenements of which she was seized in possession, in fee simple or in fee tail during the coverture; provided they have had issue born alive and possibly capable of inheriting her estate. 4 Kent Com., 28. Four things are requisite at common law to an estate by the curtesy, viz.: marriage, actual seizin of the wife, issue, and death of the wife. The husband's estate was initiate on issue born, and consummate on the death of his wife.

Our statute provides: "When any man and his wife shall be seized in her right of any estate of inheritance in lands the husband shall, on the death of his wife, hold the lands for his life as tenant thereof by curtesy; *Provided*, That if the wife, at her death, shall have issue by a former husband to whom the estate might descend, such issue shall take the same, discharged from the right of the surviving husband to hold the same as tenant by curtesy." Gen. Stat., 280.

Section two of the act "relating to the rights of

married women," approved March 1, 1871, provides that: "A married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same, in same manner, to the same extent, and with like effect, as a married man may in relation to his real and personal property." Does this statute abrogate tenancy by the curtesy? At common law the husband was entitled to the possession and use of his wife's property, whether personal or real, so long as the marriage relation continued. The interests held by him in her estates of inheritance were treated as freehold estates in him, because in case of the birth of children he would continue to hold during life, and in any event during coverture. The husband and wife were both parties to the grant creating the estate, the wife as tenant in fee, and the husband as tenant during coverture or life.

The wife was classed with infants and persons of unsound mind, in regard to her capacity to enter into contracts. 2 Blackstone Com., 292. Not that she was less capable of contracting by reason of her marriage, but by the common law the wife, so far as control of her property was concerned, was but little better than a slave; the husband acquired her personal property, the rents and profits of her estate, the custody of her person, and the right to her services. She possessed nothing, and could possess nothing, independently of her husband. The law therefore deprived her of the capacity of contracting, because she had nothing in relation to which she could contract, consequently her contracts in relation to leasing or conveying her estate were absolutely void, and the only mode in which she could join in the sale, settlement, or incumbrance of her estate was by the proceeding by fine and common recovery. 2 Blackstone

Com , 355. But the husband alone could make no conveyance nor incumbrance of his wife's estate that would survive him. And upon the death of his wife, if she died without issue born alive, his right to her estate terminated. But as soon as a child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis*, did homage to the lord, and was called tenant by the curtesy *initiate;* and this estate, being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant. 2 Blackstone Com., 127.

But to entitle the husband to an estate by the curtesy the wife must have been seized in fact as well as in deed, and not merely a seizin in law. This seems to have grown out of the practice of livery of seizin and, as is said by the supreme court of the United States in *Davis v. Mason*, 1 Peters, 503, as livery of seizin has become unnecessary, so actual seizin of the wife should be abandoned. But in the case at bar, the wife was in actual possession of the premises by her tenants, the defendants in this action.

In this state, under our statute, issue by the wife is not necessary to complete the right to an estate by curtesy. But the husband's rights during coverture to the use, care, or control of his wife's separate estate have entirely ceased to exist. She may exercise the same control over her estate after as before marriage; and she may, by a conveyance of her estate, entirely defeat his right to an estate by curtesy. So if she lease her estate or any portion of it, his right to an estate by the curtesy in the portion leased is suspended during the existence of the lease, and he takes her estate subject to the contracts which she has made during her life-time in relation to the same. Where, however, she dies without having made any disposition of

her property during her life-time, the rights of her husband to an estate by the curtesy are not affected by the statute. But as the wife had leased the premises in question for a term of years the right of the husband to the possession thereof remained in abeyance during that time. And as the plaintiff claims the legal estate of the husband, under the sale upon execution, confirmation thereof, and deed, he takes no greater rights than those possessed by the husband, and is not entitled to the possession of the premises until after the expiration of the lease. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

CHARLES WINELAND, APPELLANT, V. ANDREW COCHRAN, APPELLEE.

Practice: TRIAL TERM OF COURT. A cause was tried at the November, 1877, term of the district court, and taken under advisement, and a final decree rendered at the March, 1877, term of said court, and the bill of exceptions was signed on the fourth day of May thereafter; *Held*, on a motion to quash the bill of exceptions, that the trial term continued until a decision was rendered.

MOTION to quash bill of exceptions, and dismiss the cause.

J. H. Broady and *W. T. Rogers*, for the motion.

E. W. Thomas and *T. L. Shick*, *contra*.

MAXWELL, CH. J.

This is an appeal from a decree of the district court of Nemaha county. The cause was tried at the No-

vember, 1877, term of said court, and taken under advisement, and a final decree rendered at the March, 1878, term, and the bill of exceptions was signed on the fourth day of May, 1878. The appellees now move to quash the bill of exceptions because not reduced to writing and signed during the term at which the trial was had, or within forty days thereafter.

In actions at law, where a trial is had and a verdict rendered in the case, it has been held that exceptions must be reduced to writing and signed during the term at which the trial is had, even though a motion for a new trial be made and continued to the next term. The reason is, that there is a finding in the case, and the party objecting to that finding must take the necessary steps to preserve his exceptions in case the motion for a new trial is overruled. But these reasons do not apply in cases where no decision is made at the term at which the trial was had. In such case the trial may be said to continue until a decision is rendered. And a party ought not to be subjected to the expense of reducing his exceptions to writing, and having them signed by the judge, until a decision is made by verdict or the finding of the court, as otherwise it might subject him to needless expense. The bill having been properly signed, the motion to quash is overruled.

MOTION OVERRULED.

MATTHEWSON T. PATRICK, PLAINTIFF IN ERROR, v. DAVID W. LEACH, DEFENDANT IN ERROR.

1. **Warranty.** To constitute a warranty, it is not necessary that the word "warrant" should be used. It is sufficient if the language used by the vendor amounts to an undertaking that the goods were as represented.

2. ———. A mere expression of opinion or belief, a bare affirmation, not intended or understood as a representation of the quality or character of goods, does not amount to a warranty.

3. **Fraud:** DAMAGES. In an action for damages on the ground of fraud, the degree of proof required to establish the fraud is merely a clear preponderance of the evidence.

4 **Warranty:** FRAUD: DAMAGES. In an action for damages on the grounds of warranty and fraud the jury returned a verdict for $18,323.43 for the plaintiff. The testimony being all before the court, and it being clear that the plaintiff was entitled to recover, but that the damages were excessive, thereupon the court, upon a careful computation, found there was due the plaintiff the sum of $2,500. The judgment was thereupon affirmed upon condition that the plaintiff remit from the judgment the sum of $5,823.43, otherwise that the judgment be reversed.

ERROR from the district court for Douglas county. The opinion states the case.

George W. Doane and *J. M. Woolworth*, for plaintiff in error.

1. To direct a jury simply that "any distinct assertion or affirmation of quality intended to cause the sale and operative thereto, implies a warranty," without more definite explanation of the nature of the assertion or affirmation, is too broad. And the mischief was not counteracted by the previous general statement on the point of "naked praise." *Hart v. Wright*, 17 Wend., 267. *Salisbury v. Stainer*, 19 Ib., 159. *Byrne v. Jansen*, 50 Cal., 624. *Jackson v. Witherell*, 7 S. & R., 480. *Mc-*

Farlan v. Newman, 9 Watts, 56. *Tewkesbury v. Bennett*, 31 Iowa, 83. *Hopkins v. Tanqueray*, 15 C. B., 130. *Hyatt v. Boyle*, 5 Gill. & J., 110.

2. So, too, the proof failed to establish a warranty, because, although there may have been assertions and affirmations of quality, made with the intention of inducing the sale and operative thereto, it did not appear that Leach understood the language used as a warranty and relied upon it as such. Whether he did or not was a question which should have been submitted to the jury, but which was by the force of the instructions withdrawn from their consideration. There is a wide difference between a representation, however positive, made with the intention of and operative in inducing the sale, and a statement upon which entire reliance is placed, which alone constitutes a warranty. *Oneida Manufacturing Society v. Lawrence*, 4 Cow., 440. *Hawkins v. Pemberton*, 57 N. Y., 198. *Baker v. Henderson*, 24 Wis., 509. *Ender v. Scott*, 11 Ill., 35. *Humphreys v. Comline*, 8 Blackf., 516. *House v. Fort*, 4 Ib., 293. *McGrew v. Forsythe*, 31 Iowa, 179.

3. The proof showed incontestably that Patrick offered Leach the fullest opportunity to examine the goods, and charged him to act upon his own judgment. The charge ignored that element of the case, and was, for that reason, erroneous. *Hargous v. Stone*, 5 N. Y., 73. *Whittaker v. Eastwick*, 75 Pa. St., 228. *Carnochan v. Gould*, 1 Bailey, 179. *Wood v. Ashe*, 1 Strob., 407.

4. The charge on the subject of fraud was erroneous. The charge did not properly direct the jury in respect of that license which the law allows to a seller in commending his property and thereby inducing the sale. This was the more prejudicial because in the instructions on the other branch of the case this had, to a degree—although to an insufficient degree—been done; and also, and especially, because, without sub-

mitting to the jury the question of the nature of the commendations, it attributed to some expressions an effect which was not justified by the law. *Davis v. Meeker*, 5 Johns, 354. *Pickard v. McCormick*, 11 Mich., 78. *Bishop v. Small*, 63 Me., 12. *Frensel v. Miller*, 37 Ind., 1. *Marsh v. Falker*, 40 N. Y., 562. *Hubbel v. Meigs*, 55 Ib., 480. *Hargous v. Stone*, 5 Ib., 73. *Andrews v. Stone*, 6 Cow., 354.

J. C. Cowin and *John D. Howe*, for defendant in error.

I. Upon the subject of warranty we submit the following points and authorities:

1. It is enough if the words actually used import an undertaking on the part of the owner that the chattel is what it is represented to be; or equivalent to such undertaking. 1 Parsons Cont., 580. *Osgood v. Lewis*, 2 Harr. & G., 495. *Hilman v. Wilcox*, 30 Me., 170. *Otto v. Alderson*, 10 Sm. & M., 476. *McGreggor v. Penn.*, 9 Yerg, 74. *Beals v. Omstead*, 24 Vt., 115. *Chandler v. Lopers*, 1 Sm. Lead. C., 76. Such effect is to be given to the language of a warranty, or representation, as the parties would fairly understand it to mean, not on the secret intention of the vendor. *Smith v. Justice*, 13 Wis., 600. *Wilbur v. Cartwright*, 44 Barb., 536. *Willard v. Merritt*, 75 Barb., 295. *Hahn v. Doolittle*, 18 Wis., 196.

2. Even the party might not have supposed that he was making a warranty, but intended to make an assertion, or affirmation, which the other should receive as a fact; or intended to utter what was equivalent to a promise, and not to express an opinion or belief about the matter; such assertion or affirmation, or promise, that the fact existed, amounts to a warranty as to that fact. *Morrill v. Wallace*, 9 N. H., 115, and numerous

citations. *Henshaw v. Robbins*, 9 Metc., 83. *Randall v. Thornton*, 43 Me., 226. *Lamene v. Gregg*, 1 Met. (Ky.), 446. *Warren v. Van Pelt*, 43 E. D. Smith, 205.

II. On the subject of fraudulent representations, we submit the following memoranda and citations:

1. Such representations may be by acts, or deeds, or by artifices to mislead; or even a nod, or a wink, or a shake of the head, or a smile. The defects in articles must not be concealed by artifice, or by throwing the purchaser off his guard. Kerr on Fraud, etc., 92 and note 81, 98. 1 Parsons on Contracts, 578, 580, 462, 464. *Walters v. Morgan*, 3 D. F. & J., 727. *Hough v. Richardson*, 3 Story, 690, 732. *Clark v. Tennant*, 5 Neb., 552.

2. The man who has by misrepresentation misled another "cannot be heard to say that he might have known the truth by proper inquiry, but must, in order to rely on the defense that he knew the representation to be untrue, be able to establish the fact upon incontestible evidence and beyond the possibility of a doubt." *Boyce v. Grundy*, 3 Pet., 210. *Young v. Harris*, 2 Ala., 108. *Connersville v. Wadligh*, 7 Blackf., 102. *Anderson v. Burnett*, 5 How., 165. Kerr on Fraud, 79.

MAXWELL, CH. J.

On the twenty-sixth day of February, 1875, David W. Leach filed a petition in the district court of Douglas county, against Matthewson T. Patrick, wherein he alleges that on the eighteenth day of December, 1872, Patrick sold to him a large stock of hardware which was stored in a building in the city of Omaha; that Patrick presented to him an inventory of said goods and represented to him that they were first-class goods, and of the best quality, and that the stock was selected by an expert, employed by himself for that purpose, out of a stock in New York City, of $200,000; that

the stock was selected for the purpose of establishing in Omaha a general hardware business—wholesale and retail; and that the prices affixed to said goods in said inventory were the lowest wholesale market prices in the city of New York; that he represented to him that he paid said expert for making said selection 2½ per cent of the amount of the purchase, amounting to $656.75; that he paid $144 for packing, $150 for cartage, $250 for boxes and casks, and $1,460 freight; that Patrick took him to the building where the goods were stored and showed him a large number of boxes and casks which he stated to him contained the goods in question; that the boxes and casks, with one exception, were closed up and had the appearance of being new, and newly packed; that defendant stated to him that he would not open them, as he had another trade in view in case he and the plaintiff failed to agree on terms, but that the goods were as he had represented them to be, and he guaranteed and warranted the goods to be as represented; that the plaintiff was not acquainted with the hardware business, but, relying entirely upon the representations of the defendant and upon his guaranty and warranty, and upon the inventory, and without making any inspection for himself, he purchased the stock of goods described in the inventory, and paid the defendant therefor as follows:

Sum total of inventory	$26,232.75
E. M. Allen, hardware expert	656.75
6 packers, 8 days, at $3 per day	144.00
50 cart loads	150.00
Boxes and casks	250.00
Freight	1,460.00
	$28,893.50

Less the sum of $420 for goods withheld by Patrick. The plaintiff also alleges that the representations made

to him by the defendant were false and fraudulent; that said goods were not first-class goods, but were of a very inferior and worthless quality, all of which the defendant well knew at the time he made the representations aforesaid, and that said representations were so made for the purpose of cheating and defrauding the plaintiff; that the entire stock of said goods was not reasonably worth more than $3,000; the plaintiff therefore asks judgment for the sum of $26,000 and interest.

The defendant in his answer admits the purchase by the plaintiff of the goods in question, admits that the goods were not first-class goods, admits the nominal payment of the sum of $22,345, but specifically denies all the other allegations of the petition. The defendant alleges that the stock was sold nominally at a very high price, and was paid for in land at a nominal valuation of $22,345, but which was in fact worth but $12,775, and the plaintiff's notes for $....., the plaintiff being insolvent. The defendant also pleads a settlement of all matters in difference between the plaintiff and defendant, on the seventh day of April, 1875, and the payment to plaintiff of the sum of $1,750. The defendant also pleads as a counter claim the payment of various sums amounting to $1,009.24.

The defendant by leave of court also filed a supplemental answer claiming the further sum of $1,331 as set-off. On the trial of the cause the jury returned a verdict in favor of the plaintiff for the sum of $18,323.43. The defendant filed a motion for a new trial, assigning as grounds therefor,

First. The admission of incompetent testimony.

Second. Exclusion of competent testimony.

Third. Erroneous instructions.

Fourth. Refusal of the court to give certain instructions.

Fifth. The verdict was against the law and the instructions of the court.

Sixth. The verdict was not sustained by the evidence.

Seventh. The verdict was for an excessive sum, and rendered under the influence of prejudice.

The motion for a new trial was overruled, and a judgment rendered on the verdict. The defendant brings the cause into this court by petition in error.

The principal errors relied upon by the plaintiff in error are, that the proof fails to establish a warranty, and that the court erred in its instructions upon the questions of warranty and fraud, and that the damages are excessive.

The court instructed the jury that "any distinct assertion or affirmation of quality made by Mr. Patrick during the negotiations, intended to cause the sale of goods to Mr. Leach, and which was operative in carrying it out, will be regarded as implying or constituting a warranty. The word warrant need not be used. It is sufficient if the language used by Mr. Patrick amounted to an undertaking that the goods were as represented."

The plaintiff, while admitting that the principle enunciated in the instruction is correct, claims that it was inapplicable to the facts in the case, and did not submit the true question to the jury. The objection is evidently predicated on the theory that there was no warranty of the goods in question. This was a question for the jury under the testimony, and the court had previously instructed the jury that: "If there was no warranty nor fraud, then the plaintiff, no matter how unfortunate his speculations may have turned out to be, cannot expect to be indemnified by the action of the jury." The court also instructed the jury, that: "What the law calls naked praise, or simple commend-

ation, a mere expression of opinion or belief, a bare affirmation not intended or understood as a warranty as to the quality or character of the goods, or what could be done with them, or where there was a market for them, or their value, does not amount to a warranty. The question to be answered in determining whether any particular representation was a warranty, or a mere expression of opinion or belief is, What was the understanding or intention of the parties? And it is alone for you to determine whether the language which you shall find from the evidence to have been used in the case was intended by the parties to have the effect of warranty, or to be merely the expression of an opinion."

These instructions were applicable to the testimony, and we think state the law correctly. *Little v. Woodworth*, *ante* p. 281. It is unnecessary to review the instructions as to fraud in detail. The rule laid down in *Clark v. Tennant*, 5 Neb., 549, we regard as a correct statement of the law, it being held that in order to avoid a sale on the ground of fraudulent misrepresentations, they must be of matter material to the contract, and by which the purchaser was misled and deceived, and but for which the contract would not have been made. The instructions in this case on the question of fraud do not violate this rule. There is therefore no error in the instructions.

The attorneys for Patrick requested the court to instruct the jury that they "will not be justified in finding that Patrick was guilty of fraud, unless the evidence on that subject shall satisfy their minds thoroughly. Evidence which might satisfy them in any ordinary action of debt is not sufficient. But the evidence which produces in the minds of the jury a clear, distinct, and positive conviction, in which they rest in confidence that they are right, will alone be sufficient

to justify the jury in finding Patrick guilty of the alleged frauds," which instruction the court refused to give, to which the plaintiff excepted.

The instruction is exceedingly vague and calculated to mislead the jury, and was properly refused. The rule is well settled that fraud is never presumed, but must be clearly proved. But the degree of proof required in an action for damages is merely a clear preponderance of the testimony establishing the fraud. In a civil action the law does not require the jury to be satisfied beyond a reasonable doubt, as in criminal cases. The court therefore did not err in its refusal to give the instruction.

It is claimed that the court erred in refusing to exclude the testimony relating to Morrow from the jury. This testimony was properly submitted to the jury to be given such weight as they deemed it entitled to. If Morrow was merely acting as a "decoy" in the interest of the plaintiff, and with his knowledge, to induce Leach to purchase the goods in question, under the pretense that he might be a competitor, or at least a purchaser, it was proper testimony to submit to the jury, as tending to establish the charge of fraud. The damages awarded by the jury, however, are clearly excessive. It is clear that the goods were sold at a very high price and were paid for in property at an estimated value far above its real cash value, but as it is clear from the testimony that the plaintiff in the court below is entitled to recover in the action, we have carefully considered the testimony in the case, which is too voluminous to be embodied in this decision, and find that there was due from Patrick to Leach at the time of the trial of the action the sum of twelve thousand five hundred dollars. The defendant Leach, therefore, has leave to remit from the judgment, the sum of five thousand eight hundred and twenty-three dollars

and forty-three cents, within thirty days from the ninth day of April, 1879, and upon condition that said remittitur is filed as above provided, the judgment of the district court is affirmed. In case of the failure of the defendant to remit from the judgment the sum specified above within the time designated, the judgment is reversed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

On the fifth day of May, 1879, the attorneys for Leach filed a remittitur for the sum of $5,823.43, and thereupon a mandate was issued to the court below to carry the judgment into effect.

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2. **Trespass vi et Armis.** In a civil action in the nature of *trespass vi et armis* for an assault and battery, an amount of damages equal to the full compensation of the plaintiff for the injury sustained by him cannot be increased by the addition of a fine for the punishment of the defendant. *Boyer v. Barr* 68

3. **Subscriptions.** Where a corporation or person to whom a subscription runs has incurred obligations on the faith of such subscription, and has complied with the conditions on which it was made, the same may be enforced by suit. *Fremont Ferry and Bridge Co. v. Fuhrman*..... 99

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1. **Judgments of Justices of the Peace;** FILING TRANSCRIPT IN APPELLATE COURT. The judgment in question was rendered by a justice of the peace on the 14th of April, 1877. The statute in force at that time regulating appeals in such cases required the transcript from the justice's docket to be filed in the appellate court by the second day of the next succeeding term. [Gen. Stat., 686]. Before the transcript was filed, and on the first day of June following, the act approved February 19th, 1877, entitled "An act to amend section one thousand and eight, etc., of the code of civil procedure," took effect, by which the transcript was required to be filed within thirty days from the rendition of the judgment. *Held*, that this statute was inapplicable to the appeal in question, and that it was properly perfected under the law as it stood when the judgment was rendered. *Held further*, that even if this act were applicable, still as section 1011 of the code had not been changed, a failure to file the transcript, unless continued beyond the second day of the next succeeding term, could not prejudice an appeal otherwise regularly taken. *Roesink v. Barnett* 146
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2. **Motion to Dismiss.** On a mere motion to dismiss an appeal, the court will not examine the record to see whether it contains all the proceedings of the court below. If, however, on the submission of the cause, the court finds the record so defective that the questions presented cannot be reviewed, it will make such order in the premises as may be just and proper. *State Bank v. Green*..... 297

3. **Appeal to Supreme Court.** The right to appeal in equity cases is regulated entirely by statute. No notice is necessary by the appellant on taking the appeal other than that derived from filing the supersedeas bond. The appellant has six months from the date of the rendition of the judgment, order, or decree, in which to file the transcript in the supreme court. *Id*..... 297

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2. **Allowance of Attorney Fees.** No attorney fees can be allowed except in cases where a judgment has been recovered, and only in cases where the instrument upon which the action is brought in express terms provides for their allowance. And in no case can such fee be recovered unless it is allowed by the court. *Rosa v. Doggett* 48

3. ———: USURY. In the year 1875 judgments to the amount of about $1,600 were recovered against R., who filed stay of execution. Upon the expiration of the stay, R. obtained an extension of the time of payment from June until September, upon paying the plaintiff's attorney, with the plaintiff's assent, $140 as an attorney's fee, in addition to 10 per cent interest. Upon a petition for an injunction being filed, it was held that the fee paid to the plaintiff's attorney was usurious and must be applied *pro tanto* upon the judgments. *Id* 48

4. **Practice:** LIMITING THE TIME OF COUNSEL IN ARGUMENT. If the court limit counsel in the time to be occupied in argument, and no objection is made to the order at the time, and before the case is finally submitted to the jury, it is too late afterwards to complain. *Cropsey v. Averill* 152

5. **Misconduct of Counsel.** See *Cropsey v. Averill* 152

6. **Waiver.** While a supersedeas bond for an appeal duly approved was on file in the district court, the appellee's attorney requested the clerk to issue execution on the judgment, to which request the appellant's attorneys signed the following waiver: "We hereby consent to the above request being complied with by the clerk of said court." *Held*, that their general employment as attorneys gave them no authority to sign such waiver, and the burden of proof was on them to show they had special authority to sign it. *State Bank v. Green* 297

See NEGOTIABLE INSTRUMENTS, 1. PRACTICE, 4, 57. PRACTICE IN CRIMINAL CASES, 2.

BANKS AND BANKING.

1. **School District Bonds:** SALE. Where school district bonds, entrusted to a bank for sale on account of such district, are sold or pledged by the bank on its own account to an innocent holder, for value, such sale or pledge will bind the district. *Held*, however, upon the facts in this case, that the defendant had acquired no property in the bonds, either general or special, and that the school district was not estopped from bringing an action to compel their surrender. *School District v. State Bank* 168

2. **Estoppel:** DECLARATIONS BY BANK CASHIER. The general rule as to estoppel by acts in pais is not changed as to the declarations of the cashier of a bank respecting the payment of a note held by the bank, made to an indorser, and on which the cashier is also an indorser. As between the bank and the indorser to whom such declarations are made, if a loss has been occasioned thereby the former must bear it. *Grant v. Cropsey* 205

3. **Trust Estate:** DECLARATIONS OF TRUSTEE CONCERNING: COMPETENCY OF. In support of an alleged conveyance of real estate by one Lincoln and wife "to George P. Eaton, as cashier, agent, and trustee of said bank and in trust for said bank," the defendants offered in evidence a deed from said Lincoln to George P. Eaton, not as "cashier, agent, and trustee," but in his individual capacity, and for aught that appeared for his own individual use and benefit. The deed was admitted in evidence against objection by the bank on the ground of incompetency. *Held*, error. *Held, also*, that the oral declarations of Eaton, made subsequently to the conveyance, were incompetent as evidence against both Lincoln and the bank to establish the character of the alleged trust. *Merchants Bank v. McConiga* 245

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1. **Construction of Constitution.** In construing a section of the constitution, effect must, if possible, be given to every portion of it. *State, ex rel Helmer, v. McConnel*..... 28

2. **Municipal Corporations.** The constitution of a state not being a grant, but a restriction upon the power of the legislature, therefore a provision in the constitution, that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefited," merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited, upon other municipal corporations than those designated. *The State, ex rel. Abbot, v. Dodge County*..... 124

3. **School Fund.** The act of the legislature, entitled "An act to legalize the collecting or receiving and expending moneys collected or received by virtue of any levy made by any city of the second class, or incorporated town, upon dram shops, liquor dealers, or saloons, for a license tax, or a license for the sale of malt, spirituous, or vinous liquors, or intoxicating drink, in cities of the second class or incorporated towns" [Laws 1877, p. 171], being repugnant to Sec. 5, Art. VIII, of the constitution, is void. *City of Hastings v. Thorne* 161

4. **Special Legislation:** SCHOOL DISTRICT BONDS. The act of February 2, 1875, entitled "An act authorizing school district No. 56 of Richardson county to issue bonds for the

purpose of erecting a school building, procuring a site therefor, and setting aside funds to pay the same" [Laws 1875, p. 281], being repugnant to Sec. 1, Art. VIII, of the constitution of 1866, which declares that "the legislature shall pass no special act conferring corporate powers," is void. *Clegg v. School District* 178

5. **District Judges:** POWER TO FIX TERMS OF COURT. The power granted by Sec. 26, Art. XVI, of the constitution, is a continuing power, and is not exhausted by user. *Candy v. The State* 482

6. **Special Legislation:** BONDS. The act approved February 14, 1873, "to authorize Falls City precinct to issue bonds to aid in the construction of a court house for Richardson county," is in conflict with section one, Art. VIII, of the constitution of 1867, and bonds issued thereunder are void. *Dundy v. Richardson County* 508

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1. **Judicial Sale:** APPRAISEMENT OF PROPERTY. Contracts are made with reference to the statutory provisions concerning the appraisement of real property offered at judicial sale. *Sessions v. Irwin* 8

2. **Fraud.** A contract obtained by fraud is not void; it is merely voidable; and the rights of intervening innocent parties will be protected. *Human v. Laboo*, 2 Neb., 291, adhered to. *Aultman & Taylor Co. v. Steinan* 109

3. **Ratification:** EVIDENCE. In order to prove a subsequent ratification of a contract there must be evidence of previous knowledge of all the material facts on the part of the party ratifying; when such facts are shown, a subsequent ratification is equivalent to original authority. *Norton v. Thatcher* 191

4. **Sale of Goods:** DELIVERY OF POSSESSION. The seller of a threshing machine resided and was in Buffalo, New York. The machine was in Nebraska, under the care and

control of the purchasers, who were his general agents for the sale of such machines. *Held*, That the sale was complete as between the parties to it just as soon as the seller was notified by the purchasers of their acceptance of his offer to sell, without a formal delivery of possession. *He'd further*, That the sale being complete as to the parties to it, was conclusive as to all others, unless shown to have been fraudulent. *Uhl v. Robison* 272

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1. **Bridges:** SUBSCRIPTION FOR ERECTION OF. A bridge company having the exclusive right to erect and maintain a toll bridge across the Platte river, for a distance of six miles, near the town of Fremont, erected a bridge across the south channel of the river, which was destroyed about the sixth of March, 1876. The company then passed a resolution that in view of their indebtedness, they would not rebuild unless aided by subscriptions. F. subscribed $100. Afterwards, on the thirty-first of March, 1876, the company changed the location of the bridge about one mile east of its former location, to which F. did not assent. *Held*, that the change being made without his assent he was not liable upon the subscription. *Fremont Ferry and Bridge Co. v. Fuhrman* 99

2. ———: ———. Where a corporation or person to whom a subscription runs has incurred obligations on the faith of such subscription, and has complied with the conditions on which it was made, the same may be enforced by suit. *Id.* 99

3 **Liabilities of Stockholders.** Where the president and a majority of the board of directors of a corporation fail to make and publish the notice required by the statute, of all

the existing debts of the corporation, the stockholders will be jointly and severally liable for all debts contracted by such corporation, while the officers are thus in default. *Smith & Crittenden v. Steele* 115

4. **Rights of Stockholders.** One or more of the stockholders of a corporation may compel its officers, by mandamus, to make and publish the statement required by the statute. *Id.* 115

5. **Liability for Acts of Servants.** A corporation is liable the same as a natural person for the tortious acts of its servants or agents in the course of their employment. But to make a corporation liable for such acts they must be committed in the course of the agent's employment, or connected with the transaction of the business of the corporation. *Miller v. B. & M. R. R. Co.* 219

6. **Pleading:** EFFECT OF A GENERAL DENIAL. Life insurance company, a corporation, brought an action to foreclose a mortgage against A, making B, the holder of a subsequent judgment lien against A, a defendant. B put in an answer consisting of a general denial. *Held*, that such answer did not put in issue the corporate character of the corporation, or its power to sue in said court. *National Life Ins. Co. v. Robinson* 452

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1. **Attorney's Fees** are in the nature of costs, and should, when allowed, be taxed as such. *Rosa v. Doggett* 51

2. **A party** innocently in possession of property cannot be subjected to costs unless a demand is made for the property, but where the defendant pleads property in himself, no demand is necessary. *Homan v. Laboo*, 1 Neb., 210, adhered to. *Aultman & Taylor Co. v. Steinan* 109

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COUNTIES.

1. **County Warrants:** BY WHOM TO BE DRAWN. A county clerk has no authority to draw warrants upon the county treasury. Such warrants must be drawn by the chairman of the board of county commissioners, be countersigned by the county clerk, and be sealed with the county seal. *State, ex rel. Conger, v. Maccuaig* 216

2. ———: ———. Section one, of chapter two, General Statutes, to the extent that it authorized county clerks to draw warrants upon the county treasury, was repealed by implication by the "act concerning counties and county officers," passed February 27, 1873. *Id.* 215

3 **County Clerk:** TAX LIST AND DUPLICATE. The latter clause of Sec. 3, of an act entitled "An act to amend sections 1," etc., approved February 19, 1877, is in these words: "The county clerk shall receive for making out the tax list and duplicate thereof the sum of four cents each for every description of lots and lands, and extension thereof, upon such tax list and duplicate, including footings and recapitulation." *Held*, that the word *each* as it occurs in the said subdivision refers to the "descriptions of lots and lands," and not to the "tax-list and duplicate thereof." *Lamb v. Stanton County* 279

4. **County Seat:** MANDAMUS. At a special election held in the several precincts of Cass county on the fourteenth day of May, 1878, for the purpose of relocating the county seat of said county, the returns made to the county clerk were canvassed by him and two disinterested freeholders, etc., of said county, summoned by him for that purpose. From which canvass and the return thereof, filed in the county clerk's office, it appears that there were 2,597 votes cast at said election, that 1,061 votes were for Plattsmouth (the present county seat), that 1,538 votes were for places other than Plattsmouth. Relation for peremptory mandamus against the defendants requiring them to call a second election for the relocation of said county seat on the ground that 150 illegal votes were cast at said election in Plattsmouth; that as all of the votes cast in Plattsmouth were against relocation, except 18; that deducting 132 votes from all those cast against relocation would leave more than three-fifths of all the votes cast at said election in favor of relocation, and that no one place had received a majority of three-fifths. *Held*, 1. That it was not the duty of the board of county commissioners to canvass the vote in such cases. 2. That no power was given by the statute to the canvassers to reject or throw out votes for the reason that persons not resident electors had voted at such election. 3. That mandamus would not lie against the county commissioners, they not being in default. *State, ex rel. Reed, v. Ramsey* 286

5. **Claims Against County:** APPEAL. While the commissioners, in passing upon claims against the county, act judicially, it is not essential or even proper for them to enter a formal judgment after the manner of courts of law. It is sufficient if it appear that the claim was duly presented, and that it was allowed or rejected. Great formality in this matter is not required of them. When the record of the proceedings of the board, as kept by the county clerk, shows the proper presentation of the claim, and that they refused to grant it, this is enough to authorize an appeal by the claimant to the district court. *Black v. Saunders County* 440

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Practice. On the first day of the return term, B demurred to the petition of A. Demurrer sustained. A asked leave to amend his petition *instanter*. Leave granted. Amended petition filed immediately. B withdrew from the court room and did not return. Same day, B, defendant, was defaulted for want of an answer. The next day—second day of the term—trial had in the absence of defendant, B, and judgment for plaintiff, A. *Held*, no error. *Naracong v. Graves* 443

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1. **Writ of Error.** CONSTITUTIONAL LAW. The provisions of the constitution, Sec. 23, Art. I, that a "writ of error shall be a writ of right in all cases of felony," does not impose the burden of procuring such writ upon the public; and a person convicted of that crime can only obtain a transcript of the testimony at his own expense. *The State, ex rel. Rustmeyer, v. Moore* 23

2. **Indictment for Murder:** PROOF. To justify a conviction under an indictment for murder, it must be proved either that the accused personally committed the deed, or else was present at its commission, aiding and abetting therein, or, in other words, was a principal in the *first* or *second* degree. *Walrath v. The State* 80

3. ———: ———. But facts showing that the prisoner was accessory only, whether before or after the fact, will not warrant a conviction under an indictment for murder. *Id* 80

4. **Admissions of Prisoner.** When the prosecutor depends upon the admissions of the prisoner to establish guilt, if they be reconcilable, and none are disproved, they must be taken all together. *Id* 80

5. **Principal in Felony:** PRESENCE AT ITS COMMISSION. Evidence merely showing the accused to have been present at the commission of the felony, without more, is not sufficient to make him a principal therein. *Id* 80

6. **Confessions:** FACTS BROUGHT TO LIGHT BY. Any circumstance tending to establish the prisoner's guilt may be *proved*, although it was brought to light by an admission of the prisoner, inadmissible, *per se*, as having been obtained by improper influence. *Id* 81

7. **Evidence:** MOTIVE TO COMMIT CRIME. On the trial of a husband for the murder of his wife, evidence of his improper devotion to, and criminal intercourse with, another woman, both before and immediately after the commission of the alleged offense, is admissible as tending to show a motive to commit the crime. *St. Louis v. The State* 405

8. **New Trial:** NEWLY DISCOVERED EVIDENCE. It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely. *Id.* 405

9. ——: ——. In an application for a new trial on this ground, the statute expressly requires the applicant to show that the newly discovered evidence could not with reasonable diligence have been discovered and produced at the trial. *Id.* 406

10. **Evidence.** To warrant a verdict of guilty in a criminal case it is not required that the jury be convinced of the prisoner's guilt "*beyond*" a moral certainty, but it is enough if they are convinced of his guilt *to* a moral certainty. *Id* 406

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See ESTATES BY CURTESY.

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1. **Punitive, Vindictive, or Exemplary Damages.** In a civil action in the nature of *trespass vi et armis* for an assault and battery, an amount of damages equal to the full compensation of the plaintiff for the injury sustained by him cannot be increased by the addition of a fine for the punishment of the defendant. *Boyer v. Barr* 68

2. **Conversion of Negotiable Securities.** In an action to recover damages for the wrongful conversion of a negotiable promissory note and mortgage, it being conceded in the petition that at the time of conversion they were legally held by the defendant as security for certain advances of money to the plaintiff's son, and there being no allegation that such advances had been paid or in any way satisfied—*held*, that the utmost extent of liability, if any, was the value of the securities, less the amount due on such advances, together with interest from the time of conversion. *Cropsey v. Averill* 151

3. **Fraud:** DAMAGES. In an action for damages on the grounds of warranty and fraud the jury returned a verdict

for $18,323.43 for the plaintiff. The testimony being all before the court, and it being clear that the plaintiff was entitled to recover, but that the damages were excessive, thereupon the court, upon a careful computation, found there was due the plaintiff the sum of $12,500. The judgment was thereupon affirmed upon condition that the plaintiff remit from the judgment the sum of $5,823.43, otherwise that the judgment be reversed. *Patrick v. Leach*..... 530

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1. **Foreign Judgment.** In 1874, M. commenced an action in Iowa against C., who appeared and filed an answer denying all the facts stated in the petition. Soon afterwards C. died, having his domicile in Nebraska. J. A. C. was appointed administrator in this state, and on his application was appointed administrator in Iowa, and appeared and answered in the action. Judgment was rendered against him as administrator; which was filed in Nebraska as a claim against the estate, and was allowed. *Held*, that the judgment was final and conclusive, and a charge upon the estate. *Creighton v. Murphy, Neal & Co*..... 849

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1. **Venue.** The certificate of the officer taking a deposition ought to show on its face the county and state or country where the same is taken, as well as the state or country from which the officer derived his official character. *Payne v. Briggs*..... 75

2. ———: QUÆRE. Whether it is proper to take depositions in the office of one of the parties or of his attorney, or before an officer who is also the clerk or student of such party or attorney? *Id* 75

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1. **Constitutional Law.** The power granted to district judges by Sec. 26, Art. XVI, of the Constitution, is a continuing power, and is not exhausted by user. *Candy v. The State*..... 482

2. **District Judges:** POWER TO HOLD COURT FOR EACH OTHER. The power of a district judge to hold court in a district, other than that for which he was elected, does not depend upon the absence or disability of the proper judge. *Id*..... 482

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1. **Surface Water.** The owner of a natural pond or reservoir wherein the surface water from the surrounding land accumulates, and from which it has no means of escape except by evaporation or percolation, cannot lawfully, by means of a ditch, discharge such water upon the land of his neighbor, to his injury. *Davis v. Londgreen* 43

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3. ———: INJUNCTION THE PROPER REMEDY, WHEN. If the injury inflicted by the unlawful discharge of surface water upon the land of another be serious, and in its nature permanent, or such as would continue to operate in all future time, an injunction is a proper, and the only adequate remedy. And the mere delay in applying for this remedy until his right is actually invaded will not operate to deprive the plaintiff of its benefits, nor relieve the defendant from the effects of his unlawful acts. *Id* 43

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1. **As to time** for commencing proceedings in error in supreme court—see *Roesink v. Barnett*, 146. *Kountz v. The State*.... 294

2 **When** deemed commenced. *Bemis v. Rogers*..... 149

3. **Irrelevant Testimony.** If irrelevant testimony, which has a tendency to mislead the jury, be admitted, it is good ground for the reversal of a judgment. *Cropsey v. Averill* 152

4 **Misconduct of Counsel.** One ground of error assigned was the misconduct of the opposing counsel in their argument to the jury, prejudicial to the plaintiff in error. But it was not shown by the record they were called to order, nor that the court was requested to confine them within the bounds of legitimate discussion. *Held*, that while the offense complained of, if properly presented, would be good ground for a reversal of the judgment, still, as the record does not show any ruling by the court below respecting it, there is no question for this court to review. *Id*..... 152

5. **Directing a Verdict.** If there be any testimony before the jury, by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him. And the converse of this is also true. *Grant v. Cropsey*.... 205

6. **Introducing Testimony without Objection.** Where testimony is introduced without objection, error will not lie upon the ground that the testimony was improperly admitted. *Catron v. Shepherd*..... 308

7 **Final Order.** Error will not lie from an order dissolving a temporary injunction. *Scofield v. State National Bank*... 16

See CRIMINAL LAW. HUSBAND AND WIFE. JUDICIAL SALE, 8.

ESTATES BY CURTESY.

1. **Lease.** In the year 1872 the wife of H., owning certain real estate in her own right, leased the same for the period of five years, and soon thereafter died. F. having recovered judgment against the husband levied upon the husband's estate by curtesy in the demised premises, and sold the same upon execution during the existence of the lease, F. becoming the purchaser. The sale was confirmed, a deed made to F., who thereupon brought an action of ejectment against the lessees. *Held*, that the plaintiff had no right to the possession of the premises until after the expiration of the lease. *Forbes v. Sweesy*..... 520

ESTATES OF DECEDENTS.

See DECEDENTS. TAXES, 11.

ESTOPPEL.

1. **Pleading.** To be availing as a defense, an estoppel must be pleaded. *B. & M. R. R. v. Harris*..... 140

2. **Negotiable Instruments.** The plaintiff, the payee of a negotiable promissory note, having formally indorsed it to her son, who afterwards pledged it to the defendant—who had no knowledge of the purpose for which the indorsement was made—as security for a loan of money, will not be permitted to contradict, or limit the legal effect of such indorsement, by showing the real purpose for which it was made. *Crapsey v. Averill*..... 152

8. **By matter in pais.** It is a firmly established rule, that when one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own

previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. *Grant v. Cropsey*..... 205

4. **Declarations by Bank Cashier.** And the above rule is not changed as to the declarations of the cashier of a bank respecting the payment of a note held by the bank, made to an indorser, and on which the cashier is also an indorser. As between the bank and the indorser to whom such declarations are made, if a loss has been occasioned thereby, the former must bear it. *Id.*..... 205

See MORTGAGE, 9. PLEADING, 8.

EVIDENCE.

1. **Indictment for Murder:** PROOF. To justify a conviction under an indictment for murder, it must be proved either that the accused personally committed the deed, or else was present at its commission, aiding and abetting therein, or, in other words, was a principal in the *first* or *second* degree. *Walrath v. The State*..... 80

2. ———: ———. But facts showing that the prisoner was accessory only, whether before or after the fact, will not warrant a conviction under an indictment for murder. *Id.* 80

3. **Admissions of Prisoner.** When the prosecutor depends upon the admissions of the prisoner to establish guilt, if they be reconcilable, and none are disproved, they must be taken all together. *Id.*..... 80

4. **Principal in Felony:** PRESENCE AT ITS COMMISSION. Evidence merely showing the accused to have been present at the commission of the felony, without more, is not sufficient to make him a principal therein. *Id.*..... 80

5. **Confessions:** FACTS BROUGHT TO LIGHT BY. Any circumstance tending to establish the prisoner's guilt may be *proved*, although it was brought to light by an admission of the prisoner, inadmissible, *per se*, as having been obtained by improper influence. *Id.*..... 81

6. **Negotiable Instruments:** OPINION OF WITNESS: OWNERSHIP. The fact of the plaintiff's ownership of negotiable securities being in issue, it was not competent for her to testify, against objection, that she "was the owner"

thereof. This was a conclusion of law to be established by proof of facts necessary to show ownership, and not by the opinion of witnesses. *Cropsey v. Averill*..... 151

7. **Collecting Taxes:** SPECIAL DEPUTATION BY COUNTY TREASURER. A paper writing, by which a county treasurer sought to appoint I. W. E. a special deputy treasurer to collect certain taxes by distress due to Platte county, Nebraska, from the personal property of the estate of L. W. P., deceased, when offered in evidence to justify such taking in an action of replevin, was properly rejected. *Hedman v. Anderson*..... 180

4. **Trust Estate:** DECLARATIONS OF TRUSTEE CONCERNING: COMPETENCY OF. In support of an alleged conveyance of real estate by one Lincoln and wife "to George P. Eaton, as cashier, agent, and trustee of said bank and in trust for said bank," the defendants offered in evidence a deed from said Lincoln to George P. Eaton, not as "cashier, agent, and trustee," but in his individual capacity, and for aught that appeared, for his own individual use and benefit. The deed was admitted in evidence against objection by the bank on the ground of incompetency. *Held*, error. *Held, also*, that the oral declarations of Eaton, made subsequently to the conveyance, were incompetent as evidence against both Lincoln and the bank to establish the character of the alleged trust. *Merchants Bank v. McConiga*..... 245

6. **Discretion of Court:** EVIDENCE. It is not an abuse of discretion for the trial court to permit the parties, in furtherance of justice, to offer additional evidence in support of the cause of action or defense after a case has been submitted to the jury, provided the party offering such evidence does not thereby obtain an undue advantage. *Tomer v. Densmore*..... 384

10. **Motive to commit Crime.** On the trial of a husband for the murder of his wife, evidence of his improper devotion to, and criminal intercourse with, another woman, both before and immediately after the commission of the alleged offense, is admissible as tending to show a motive to commit the crime. *St. Louis v. The State*..... 405

11. **Certainty of Proof in Criminal Trials.** To warrant a verdict of guilty in a criminal case it is not required that the jury be convinced of the prisoner's guilt "*beyond*" a moral certainty, but it is enough if they are convinced of his guilt *to* a moral certainty. Id..... 406

12. **Weight of Evidence.** It is not error to charge the jury that "absolute, unequivocal, mathematical certainty of proof is not required" on a criminal trial. *Id.* 406

13. ———. It is not error to charge the jury in effect that in determining the weight of evidence upon any given point in the case, they are not required to give equal weight to the testimony of each witness, but only such weight as, under all the circumstances, they believe him entitled to. *Id.* 406

14. ———: TESTIMONY OF PRISONER. The interest which a witness has in the result of a trial may always be shown as affecting the value of his testimony; and it is not error for the court, in referring to the testimony of the prisoner given in his own behalf, to tell the jury that they were "at liberty to consider the great interest which he has in the result." *Id* 406

15. **Instructions.** An instruction which erroneously assumes that there is no evidence before the jury upon a material branch of the case ought not to be given. If there be sufficient evidence to support an affirmative finding upon an alleged cause of action, it must be left to the decision of the jury. *Mutual Hail Insurance Co. v. Wilde* 427

16. **Fraud:** DAMAGES. In an action for damages on the ground of fraud, the degree of proof required to establish the fraud is merely a clear preponderance of the evidence. *Patrick v. Leach* 530

See HUSBAND AND WIFE, 3.

EXCEPTIONS.

1. **Bill of Exceptions.** Exceptions which are not properly a matter of record, must be preserved in writing, and properly certified by the presiding judge, in order to be considered by the supreme court. And affidavits in support of, or in opposition to, any proceedings in the court below, must be embodied in a bill of exceptions. *Credit Foncier of America v. Rogers* 34

2 ———: STIPULATION OF ATTORNEYS. A stipulation of the attorneys in the cause, stating that the record is a correct transcript of the proceedings, may be sufficient to justify the judge in the court below in signing the bill as pre-

sented, but forms no basis for the supreme court to consider the matters embodied in the bill of exceptions. *Id*..... 84
See also *The State v. Knapp*..... 436

8. **When Judge may Sign.** When a bill of exceptions is properly presented to a judge for his signature within sixty days from the rising of the court, it is no cause for dismissing an action that the bill was signed after the expiration of sixty days from that time. *Leighton & Brown v. Stuart* 96

4. ———. When it does not appear at what time a bill of exceptions was presented to a judge for his signature, it will be presumed to have been presented within the period required by the statute. *Id*..... 96

5. **Bill must be presented** for signature—when. *First National Bank v. Bartlett*..... 319

6. **Should** present distinctly and specifically the ruling objected to. *Tomer v. Densmore*..... 384

See PRACTICE, 56, 62.

EXECUTION.

1. **Judicial Sale:** APPRAISEMENT OF PROPERTY. Appraisers selected by a sheriff to appraise real estate levied upon by him, act judicially in making the appraisement. And it is their duty to ascertain the actual amount due upon liens and incumbrances upon such real estate. *Sessions v. Irwin* 5

2, ———: ———. And they must *specifically enumerate* the liens and incumbrances which they find subsisting against such real estate. *Id*..... 5

3. ———: TAX DEEDS. Tax deeds are not liens or incumbrances within the meaning of the statute. A party claiming under such deeds holds adversely, and must rely upon his title. *Id*..... 5

See GARNISHMENT. JUDICIAL SALE, 4, 5, 7.

EXECUTORS.

See DECEDENTS.

EXEMPTIONS.

Fraudulent Alienation of Property. Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation. *Derby v. Weyrich*.. 174

FEES.

See NEGOTIABLE INSTRUMENTS, 1. SHERIFF. SHORT HAND REPORTER.

FINAL ORDER.

See PRACTICE, 2, 42.

FINDING.

See PRACTICE, 28, 29.

FIXTURES.

See LANDLORD AND TENANT. REAL PROPERTY.

FORECLOSURE.

See JURISDICTION. MORTGAGE.

FORFEITURE.

See LANDLORD AND TENANT.

FRAUD.

1. **Void Contract.** A contract obtained by fraud is not void; it is merely voidable, and the rights of intervening innocent parties will be protected. *Homan v. Laboo*, 2 Neb., 291, adhered to. *Aultman & Taylor Co. v. Steinan*..... 109

2. **Exempt Property.** Property which is exempt by law from liability for the owner's debts is not susceptible of a fraudulent alienation. *Derby v. Weyrich* 174

See DAMAGES, 3. EVIDENCE, 16. MORTGAGE, 4, 5.

GARNISHMENT.

1. **Execution:** RETURN OF SHERIFF. Return of a sheriff to an execution that "he cannot find any chattel property belonging to the within named defendants whereon to levy this writ," is sufficient to authorize proceedings in garnishment under section 244 of the code. *Wilson v. Burney*..... 89

2. **Res Adjudicata.** Where a garnishee has been properly served with process, and has appeared and answered, and an order has been made by the court requiring him to pay a certain sum owing by him to the debtor into court, from which order no appeal is taken, such order cannot be attacked collaterally. *Id*..... 89

See PAYMENT, 2.

GUARANTY.

See NEGOTIABLE INSTRUMENTS, 3.

GUARDIAN.

See INFANCY.

HOMICIDE.

See CRIMINAL LAW. PRACTICE IN CRIMINAL CASES.

HUSBAND AND WIFE.

1. **Transactions between them.** In 1866, the wife of B. placed $5,000 in his hands, to invest in real estate for her, until such time as they could select a suitable location for a home. The money was invested by B., and in 1869 he purchased lots for a residence for which he paid $2,000. In 1874 he erected a residence on the lots in question, costing about $8,000, he at the time being insolvent. *Held*, 1. That the contract of B. with his wife could be enforced in equity; 2. That as no profits were proved to have accrued from the investments, none could be allowed the wife as against creditors of her husband; 3. That mere general allegations of profits realized are not sufficient, as against creditors of the husband, in the absence of any data from which the state of the account can be ascertained. *First National Bank v. Bartlett*..... 319

2. ——: ——. Transactions between husband and wife in regard to the transfer of property from him to her, by reason of which creditors are prevented from collecting their just dues, will be scrutinized very closely, and it must clearly appear that such transfers were made in good faith and for value. *Id.*.. 319

3. **Evidence.** In a contest between a wife and the creditors of her husband in regard to property transferred to her by him, there is a presumption against her which she must overcome by affirmative proof. *Id.*..... 319

4. **Pleading:** CREDITOR'S BILL. Upon a creditor's bill being filed against B. and wife to subject certain real estate held by the wife in her own name to the payment of a judgment against the husband, B. and wife answered, alleging that said real estate was purchased with funds belonging to the separate estate of the wife: *Held*, that it constituted a good defense to the action. *Id.*..... 329

5. **Practice:** ERROR. This being a proceeding in error, if the decree in favor of the wife was taken for too large a sum, the plaintiff should have filed a motion in the court below to correct it. *Id.*..... 330

6. **Medical Services:** LIABILITY OF HUSBAND. For medical services bestowed upon the husband himself, or upon his wife and children, by whomsoever the attendance of the physician may have been requested, the husband, and not the wife, is ordinarily liable. Especially is this so where the credit was in the first instance given to the husband, and where there was no special agreement on the part of the wife to bind her separate estate. *Spaun v. Mercer*..... 357

See ESTATES BY CURTESY. MARRIED WOMEN.

INDICTMENT.

See CRIMINAL LAW. PRACTICE IN CRIMINAL CASES, 16.

INDORSER.

See NEGOTIABLE INSTRUMENTS, 3.

INFANCY.

1. **Disabilities.** By the legislation in this state, all the disabilities of infancy, as they exist by the common law, are fully recognized. *Kleffel v. Bullock*..... 336

2. ———: COSTS. In this state, the action of an infant must be brought by his guardian or next friend, who alone is liable for the costs. The infant is not liable to a judgment therefor. *Id*..... 336

3. ———: ———. Nor is he liable to a judgment for costs after arriving at full age, in an action brought without a guardian or next friend, but not terminated during infancy, if, on reaching his majority, at the first opportunity he disclaim all benefit from the proceeding, and refuse to proceed further. *Id*..... 336

INJUNCTION.

1. **Public Officers.** Where public officers are proceeding under a claim or color of right to impair either private or public rights, an injunction may be granted to restrain them. *Normand v. Otoe County*..... 18

2. **Who may Maintain.** Tax payers of the proper county may maintain an action for themselves, and all other tax payers of the county, to restrain the county commissioners from an illegal exercise of their powers to the injury of such tax payers. *Id*..... 18

3. ———: RELIEF GRANTED. To entitle a party to such relief, it must appear that his rights will be greatly or irreparably affected by the acts sought to be restrained, and the right must be clear and the remedy at law inadequate. *Id.* 18

4. **Surface Water:** DRAINAGE. If the injury inflicted by the unlawful discharge of surface water upon the land of another be serious, and in its nature permanent, or such as would continue to operate in all future time, an injunction is a proper, and the only adequate, remedy. And the mere delay in applying for this remedy until his right is actually invaded will not operate to deprive the plaintiff of its benefits, nor relieve the defendant from the effects of his unlawful acts. *Davis v. Longgreen*..... 43

5. ———: GROUND OF EQUITABLE RELIEF IN SUCH CASES. In such cases equity looks to the nature of the injury inflicted, together with the fact of its constant repetition, or continuation, rather than to the magnitude of the damage inflicted, as the ground of affording relief. *Id.*..... 44

6. **Action on Injunction Bond.** The ground of the injunction cannot be inquired into in a suit upon the injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued, and after such determination by a final disposition of the case, and not before, does an action lie on the bond. *Bemis v. Gannett*.....236

See PLEADING, 9. PRACTICE, 2, 8.

INSTRUCTIONS TO JURY.

1. **How Considered.** The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case. *St. Louis v. The State*..... 406

2. ———: INSTRUCTIONS MUST BE APPLICABLE TO THE EVIDENCE. It is not error to refuse an instruction, although correct as an abstract proposition, which is not applicable to the evidence before the jury. Neither is it error to refuse instructions where others of substantially the same import have been given. *Id.*..... 406

3. ———: ———. An instruction which is so vague and uncertain that it must tend to confuse or mislead the jury is good ground for the reversal of a judgment. *Mutual Hail Insurance Co. v. Wilde*..... 427

4 ———: ———. An instruction which erroneously assumes that there is no evidence before the jury upon a material branch of the case ought not to be given. If there be sufficient evidence to support an affirmative finding upon an alleged cause of action, it must be left to the decision of the jury. *Id.*..... 427

INSURANCE.

1. **Damages: MODE OF ASSESSMENT: INSTRUCTION.** The contract of insurance provided that in case of damage to the property insured the amount thereof should be ascertained

by three appraisers, to be appointed by the agent of the company; and "in case the appraisement should be less than a twenty-fifth part" (of the value of the crop) "no claim shall be made by the insured upon the company, and the insured has to pay the expenses of such an appraisement." And it was further agreed that on demand of the agent managing the assessment, the necessary costs should be deposited by the insured before the assessment should be made. There was testimony to the effect that security for the costs of an assessment was duly demanded, which the insured refused to give. Thereupon the insurance company requested the court to charge the jury in effect, that if they found such security was demanded, the plaintiff must prove that he gave it in order to recover. *Held*, that the instruction, as requested, was right and ought to have been given. *Mutual Hail Insurance Co. v. Wilde*..... 427

2. ———. Under the above provision as to damages the insurance company requested an instruction that: "If the damage by the hail did not *exceed* one twenty-fifth part of the whole crop," the company was not liable. *Held*, erroneous, and that it was properly refused. *Id*..... 427

INTEREST.

See TAXES, 4. USURY.

INTOXICATING LIQUORS.

See LIQUOR SELLING.

ISSUES.

See PRACTICE, 28.

JUDGMENT.

1. **Finding.** A judgment must conform to the finding. Finding against A and B will not sustain a judgment against A and C. *Smith v. Silvis*..... 164

2. **Issues.** The issues properly presented by the pleadings must be decided either by a finding by the court or the verdict of a jury, before judgment can be rendered against the defendant. *Id*..... 164

3. **Default.** A defendant in default for want of an answer should be *defaulted*, and the same entered on the journal before judgment is rendered against him. *Id.*..... 164

4. ———: ———. When judgment on default has been entered against a defendant, and which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and in addition thereto, that he has a meritorious defense either in whole or in part to the action. Unless he do so he can have no standing in the supreme court on the question of his right to answer. *Mulhollan v. Scoggin*..... 202

5. **In actions** in replevin. *Dorrington v. Meyer*..... 211

6. **Practice:** OFFER TO CONFESS JUDGMENT: IT NEED NOT BE RENEWED ON APPEAL. An offer to confess judgment, duly made in the court where the action is brought, under sec. 1004 of the code of civil procedure, need not be renewed in the appellate court in order to make it available to the party making it on final judgment. *Kleffel v. Bullock*..... 336

7. **Estates of Decedents:** FOREIGN JUDGMENT. In 1874, M. commenced an action in Iowa against C., who appeared and filed an answer, denying all the facts stated in the petition. Soon afterwards C. died, having his domicile in Nebraska. J. A. C. was appointed administrator in this state, and on his application was appointed administrator in Iowa, and appeared and answered in the action. Judgment was rendered against him as administrator; which was filed in Nebraska as a claim against the estate, and was allowed. *Held*, that the judgment was final and conclusive, and a charge upon the estate. *Creighton v. Murphy, Neal & Co*..... 349

See ATTORNEY GENERAL. JUDICIAL SALE. MORTGAGE. PRACTICE, 42.

JUDICIAL SALE.

1. **Appraisement of Property.** Appraisers selected by a sheriff to appraise real estate levied upon by him, act judicially in making the appraisement. And it is their duty to ascertain the actual amount due upon liens and incumbrances upon such real estate. *Sessions v. Irwin*..... 5

2. ———. And they must *specifically enumerate* the liens and incumbrances which they find subsisting against such real estate. *Id.* 5

3. **Tax Deeds.** Tax deeds are not liens or incumbrances within the meaning of the statute. A party claiming under such deeds holds adversely, and must rely upon his title. *Id.* 5

4. **Practice:** FINAL ORDER. In July, 1873, L. & B. recovered a judgment against W. for the sum of $450, in the probate court of Lancaster county, a transcript of which was filed in the office of the clerk of the district court on the nineteenth day of November, of that year. L. & B. assigned the judgment to Boyd, who assigned to Brush. On the fifteenth day of January, 1874, W. purchased lot 10, in block 103, in the city of Lincoln, and at the same time executed and delivered to his wife a quit claim deed for the lot in question. In March following, W. and wife conveyed the lot in question to Berkley. In 1875, an execution issued on the judgment under which the lot in question was sold. Berkley and wife moved to set the sale aside upon the ground that the judgment *was not a lien* upon the lot, which motion was sustained, no appeal being taken. *Held*, Upon a petition being filed by the purchaser to enjoin a sale of the premises under a second execution, that the decision setting aside the sale was final and conclusive. *Berkley v. Lamb* 892

5. **Title:** UNRECORDED DEED. G., as agent of M., purchased certain real estate with the money of M., and took the title in his own name. Afterwards G. executed a deed to M. for the real estate in question, which was not recorded for nearly two years. Judgment having been recovered in the district court against G., execution was levied on the real estate in controversy, and it was advertised and sold, and the sale confirmed and a deed made to the purchaser. Two days prior to the sale, M. recorded his deed, and the deed was on record at the time of the sale. *Held*, that the purchaser acquired no title by the sale. *Mansfield v. Gregory.* 432

6. ———: PRACTICE. Under section 500 of the code, a sheriff's deed vests in the purchaser the same estate as was vested in the judgment debtor at or after the time the lands became liable to the satisfaction of the judgment. If, therefore, the debtor had no interest in the lands sold, of which the purchaser had notice, he acquires no title by the sale. *Id.* 432

7. **Confirmation of Sale of Mortgaged Premises:** PUBLICATION OF NOTICE. The sheriff's return states "that on the twenty-fourth day of July, A.D. 1877, I caused a notice to be published in the Nebraska *Herald*, a newspaper printed and of general circulation in said county, that I would offer said real estate for sale at the south door of the court house, in said county, on the twenty-seventh day of August, A.D. 1877, at 11:45 A.M. of said day," etc. *Held*, to be sufficient evidence of publication. *Parrat v. Neligh*, 7 Neb., 456. *Held, also*, that the several officers, other than appraisers, in the discharge of their duties as prescribed by section three of the act of 1875, entitled, "An act for the more equitable appraisement of real property under judicial sale," do not exercise judicial powers. *Drew v. Kirkham*..... 477

8. **Error Without Prejudice.** The premises were appraised at $2,500, but by reason of the erroneous valuation of certain liens, the defendant's interest therein was only valued at $143.77. The property brought at the sale $1,675, which being more than two-thirds of the gross appraisement—*Held*, that the consideration of such erroneous liens by the appraisers was error without prejudice. *Id*..... 477

See MORTGAGE. REAL PROPERTY.

JURISDICTION.

1. **Tax Lien.** When an action is commenced by the owner of lands for the purpose of having a tax deed declared void, the court will, when prayed for in the answer, retain jurisdiction for the purpose of foreclosing and enforcing the lien of the defendant for the taxes and interest. *Pettit v. Black* 52

2. **Appearance of Defendant.** Where a defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person, he must restrict his motion to the single question of jurisdiction. *Aultman & Taylor Co. v. Steinan*..... 109

8. **Contested Election.** The supreme court has jurisdiction to correct errors of the district court in administering the law for contesting elections. *Miller v. Rolph*..... 438

See PLEADING, 7. REPLEVIN, 2.

JURY.

1. **Instructions to Jury.** Instructions to the jury must be based upon and applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. *Walrath v. The State* 81
See also *Cropsey v. Averill* 152
Grant v. Cropsey 205
Uhl v. Robison 272

2. **Separation of Jury.** The court may, even in a capital case, permit the jury to separate during the adjournments of court, up to the final submission of the case to them. But when permitted to separate they should be admonished by the court as to their duty. *Id* 81

3. **Opinion of Juror.** Where a juror informed one of the parties to a suit, before the case was submitted to the jury, that he had formed and expressed an opinion as to the merits of the case, and the party failed to call the attention of the court to the matter, or challenge the juror—*Held*, after verdict, the party could not object to the juror on the ground that he had formed and expressed an opinion. *Tomer v. Densmore* 384

4. **Petit Juror:** QUALIFICATION. If a juror on his *voir dire* examination, in a case depending upon circumstantial evidence, answer that his convictions are such as would preclude him from returning a verdict of guilty, where the punishment would be death, it is good ground of challenge for cause on the part of the state. *St. Louis v. The State*... 405

5. ——: ——. On a trial for murder in the first degree the state is entitled to a jury who can conscientiously, if the evidence warrant it, return a verdict which will subject the offender to the extreme penalty of the law. *Id* 405

JUSTICES OF THE PEACE.

See APPEAL. PRACTICE, 15, 58.

LANDLORD AND TENANT.

1. **Possession by Tenant.** A owned and occupied a farm of four hundred acres. In 1868, he sold one hundred and

sixteen acres of it to B, who afterwards sold to C. July 14, 1874, C conveyed said one hundred and sixteen acres to D, but the deed was not recorded until May 25, 1875. On the fourth of May, 1875, C mortgaged the one hundred and sixteen acres to E. A had continued to occupy the farm and to cultivate the one hundred and sixteen acres as tenant to each successive owner down to and including D, to whom he attorned after he had bargained for the land and before the execution of the deed to him. *Held*, That the open and notorious occupancy of the one hundred and sixteen acres by A was no notice to E of the title of D under his unrecorded deed from C. *Burt v. Baldwin*..... 487

2. **Forfeiture:** FIXTURES. Where a tenant was in possession under a lease which contained a clause in these words, "the said Julien G. B. Haudbine is to have the privilege of removing at the end of said term all improvements placed by him on the said premises, only on the condition, however, that the conditions of this lease are fully complied with," and allowed one quarter's rent, which by the terms of said lease was required to be paid quarterly in advance, to be in arrears for thirteen days, when the same was tendered and refused—*Held*, That equity would not enforce a forfeiture of the right to remove such improvements. *Estabrook v. Hughes*..... 496

See ESTATES BY CURTESY.

LEASE.

See ESTATES BY CURTESY. LANDLORD AND TENANT.

LIEN.

See JUDICIAL SALE, 4. MORTGAGE. TAXES, 5, 6.

LIMITATIONS OF ACTIONS.

1. **Proceedings in Error.** By the act of the legislature, approved February 15th, 1877 [Laws, 1877, p. 14], entitled, "An act to amend section one of an act entitled, 'An act to amend section five hundred and ninety-two of the code of civil procedure, approved February 24th, 1875,'" one year is given from the rendition of the judgment, or the making of the final order complained of, within which to commence proceedings in error thereon. And this act applies

to all judgments or final orders entered after it took effect. *Roesink v. Barnett*..... 146

2. ———. WHEN DEEMED "COMMENCED." *Bemis v. Rogers*... 149

3. **Foreclosure of Mortgage.** An action for the foreclosure of a mortgage upon real estate may be brought at any time within ten years after the action accrued. [MAXWELL, CH. J., dissenting.] *Hale v. Christy*..... 264

4. **Criminal Cases.** Proceedings in error in criminal cases must be commenced within one year after the rendition of judgment. *Kountz v. The State*..... 294

LIQUOR SELLING.

1. **License Moneys arising in Cities:** TO WHAT FUND THEY BELONG: CONSTITUTIONAL LAW. Under the law as it stood prior to the adoption of our present constitution, all moneys arising from licenses granted by cities to sell intoxicating liquors belonged to the common school fund of the proper county. But under the operation of Sec. 5, Art. VIII, of that instrument, this rule is changed, and such moneys now belong exclusively to the common school fund of the cities, respectively, in which they are collected. *State, ex rel. Helmer, v. McConnel*..... 28
City of Hastings v. Thorne..... 160

2. **Power to Authorize.** By statute the sale of liquors is prohibited, without first obtaining a license, and within the limits of an incorporated town or city, such license can be granted only by the corporate authorities thereof, under such rules and regulations as they may provide. *Semble*, that in cities of the second class authority is given to "prohibit and suppress tippling shops" altogether. *Id*..... 33

3. ———: CONSTITUTIONAL LAW. The act of the legislature, entitled "An act to legalize the collecting or receiving and expending moneys collected or received by virtue of any levy made by any city of the second class, or incorporated town, upon dram shops, liquor dealers, or saloons, for a license tax, or a license for the sale of malt, spirituous, or vinous liquors, or intoxicating drink, in cities of the second class, or incorporated towns" [Laws 1877, p. 171], being repugnant to Sec. 5, Art. VIII of the Constitution, is void. *City of Hastings v. Thorne*..... 161

MANDAMUS.

1. **Pleading:** ALTERNATIVE WRIT. An alternative writ of mandamus must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and omissions in the alternative writ cannot be supplied by the affidavit or application. *State, ex rel., v. School District*... 92

2. **When Granted.** A writ of mandamus is granted merely to compel action and enforce the performance of a pre-existing duty. It creates no new authority, nor confers any powers which did not previously exist. It is never granted in anticipation of an omission of duty, however strong the presumption may be that the persons against whom the writ is sought will refuse to perform their duty when the proper time arrives. *Id*..... 92

3. **Practice.** An application for a mandamus, verified upon information and belief, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or an alternative writ. The motion for the writ should be made upon an affidavit setting forth the facts on which it is based. *State, ex rel., v. School Districts* 98

4. **Corporations:** RIGHTS OF STOCKHOLDERS. One or more of the stockholders of a corporation may compel its officers, by mandamus, to make and publish the statement required by the statute. *Smith & Crittenden v. Steele*..... 115

See COUNTIES, 3.

MARRIED WOMEN.

1. **Conveyances and Contracts.** Under Secs. 42 and 43, Ch. 61, General Statutes, a married woman may sell and convey real estate, or any interest she may have therein, the same as if she were single. As to her other contracts she is liable only to the extent that they are made with reference to, and on the faith and credit of, her separate estate. *Hale v. Christy*..... 264

See HUSBAND AND WIFE.

MINOR.

See INFANCY.

MISTAKE.

See NEGOTIABLE INSTRUMENTS, 5.

MORTGAGE.

1. **Foreclosure:** DISTRIBUTION OF PROCEEDS OF SALE. J. H. B. held a second mortgage on certain real estate owned by J. E. S. The S. S. I. held a prior and first mortgage on the same property executed by the same mortgagor. Other parties held judgments against J. E. S., all subsequent to the mortgage of J. H. B. J. H. B. commenced suit in the district court to foreclose his mortgage, making the S. S. I., as well as J. E. S. and wife, and the several judgment creditors, defendants, and alleging that their several claims and liens were junior and subject to the lien of his mortgage. The S. S. I. appeared and answered, setting up its mortgage and claiming it to be the first and prior lien. The court found and declared the mortgage of the S. S. I. to be the first and prior lien, and rendered the usual decree of foreclosure. Upon sale of the mortgaged premises by the sheriff they brought less than the amount found due the S. S. I. by the court. From an order directing such proceeds to be paid to the S. S. I., J. H. B. appealed; *held* that it was the land itself and not the equity of redemption that was sold by the sheriff, and that all right, title, and lien of each of the parties who were before the court in and to the lands, passed to the purchaser by virtue of the sheriff's deed. *Buel v. Farwell*..... 224

2. ———: TIME FOR BRINGING ACTION. An action for the foreclosure of a mortgage upon real estate may be brought at any time within ten years after the action accrued. [MAXWELL, CH. J., dissenting.] *Hale v. Christy*..... 264

3. **Chattel Mortgage** between parties to the transaction need not be in writing. A verbal agreement is sufficient, although of no validity as against creditors and *bona fide* purchasers. *Conchman v. Wright*..... 1

4. **Power to Sell.** A chattel mortgage of a stock of goods in a store, with power to the mortgagor to sell in the ordinary course of trade, although fraudulent and void as to creditors and subsequent purchasers in good faith, is valid between the parties to it. *Gregory v. Whedon*..... 373

5. **Record:** VENDEE. And a vendee who purchases the entire stock of goods, with the intent to hinder and delay

creditors, cannot hold such goods against the mortgage, although it was not recorded until after the pretended purchase. *Id.* 373

6. **Sale by Mortgagor.** If a mortgagor sell portions of the mortgaged premises in different parcels at different times by warranty deed, that which he retains is in equity primarily liable, as against all but the mortgagee, for the whole debt. *Lausman v. Drahos.* 457

7. **Foreclosure:** NOTICE. Before a prior mortgagee can be required to shape his action in the collection of his debt, in reference to the subsequent order of alienation, he must have actual notice of what that order is, and not merely the constructive notice derived from the registry of the deeds made by the mortgagor subsequent to the mortgage. *Id.* 457

8. ———: ———: ———. A subsequent purchaser desiring the prior mortgagee to act with reference to the subsequent order of alienation, should give him notice of the facts in proper time, and request him to sell accordingly. If he is not a party to the proceedings for foreclosure, and is given no opportunity there to present his equities, he may file a bill against the mortgagee and the other subsequent purchasers (if any), staying the sale until the respective equities can be adjusted. But he cannot remain passive until the sale has been made and confirmed, and then assert his rights against the mortgagee in view of facts of which the latter had no knowledge. *Id.* 457

9. ———: PARAMOUNT TITLE. L. brought his action to foreclose a mortgage executed by McW. Several other persons, including C., were made defendants as subsequent purchasers and incumbrancers. C. answered, claiming to be the absolute owner of the land by paramount title, averred that McW. never had any right or title to the land, and prayed that the mortgage be adjudged null and void and cancelled. The plaintiff replied, denying the validity of C.'s title, alleging that it was obtained by fraud, etc. On appeal by C. from a decree of the district court foreclosing the mortgage and declaring the pretended title of C. to be void, and setting aside the several deeds of conveyance under which he claimed title—*Held*, That C. having set up his adverse title—having by pleading as well as by testimony invoked the judgment of the court as to the va-

lidity of his title—he cannot now deny the power of the court to pass upon the issue thus presented. *Lounsbury v. Catron*..... 469

See JUDICIAL SALE. REAL PROPERTY.

MUNICIPAL CORPORATIONS.

Constitutional Law: TAXATION. The constitution of a state not being a grant, but a restriction upon the power of the legislature, therefore a provision in the constitution, that "the legislature may vest the corporate authorities of cities, towns, and villages with power to make local improvements by special assessments, or by taxation of property benefited," merely prescribes the rule of apportionment of such special taxes, and does not prohibit the legislature from conferring the power to make local improvements by special assessments or taxation upon property benefited, upon other municipal corporations than those designated. *The State, ex rel., v. Dodge County*..... 124

See BONDS. COUNTIES. CONSTITUTIONAL LAW. SCHOOLS, 1, 3, 4.

MURDER.

See CRIMINAL LAW. PRACTICE IN CRIMINAL CASES.

NEGOTIABLE INSTRUMENTS.

1. **Promissory Note:** ATTORNEY'S FEE. A promissory note, in form otherwise negotiable, is not rendered non-negotiable by reason of containing a clause in these words, "and if suit is brought to enforce collection I will pay reasonable attorney's fees." *Heard v. Dubuque County Bank*..... 10
Kemp v. Klaus..... 24

2. ———: ———. Nor is such note rendered non-negotiable by reason of its containing a recital in these words, "The express condition of the sale and purchase of this Ohio reaper and mower No. — is such that the title, ownership, or possession does not pass from the said McDonald & Co. until this note and interest is paid in full. That the said McDonald & Co. have full power to declare this note due and take possession of said machine at any time they may deem themselves insecure, even before the maturity of the note." *Id*..... 10

8. ———: INDORSEMENT. A promissory note had the following written on the back of it: "For value received I hereby guarantee payment of the within note, and waive presentation, protest, and notice," signed by the payee. *Held*, that it operated as a transfer of the note, or as an indorsement with an enlarged liability. *Id*..... 10

4. ———: SURPLUS WORDS. The following words in a promissory note to-wit: "and also authorize any attorney of record to go into court and confess judgment;" confer no authority on the holder to enter up judgment thereon without suit or notice, and were properly rejected as surplusage. *Kemp v. Klaus*..... 24

5. **Liability of Indorser.** One C., being indebted to D., drew a draft upon C. D. G., of St. Louis, for the amount of the debt, payable in thirty days from date, and delivered the draft to D., who placed the same in a bank for collection. Before the maturity of the draft D. was notified that it had been paid, and drew out a portion of the money. C., who was insolvent, upon being notified of the payment of the draft, called at the bank before the maturity of the draft, and expressed surprise at its payment before maturity, and stated to the officers of the bank that he was anxious to protect the draft, and that if it was not paid that "he had some money which he intended to keep for the protection of the draft;" he was informed that it had been paid. Afterwards it was discovered that the draft had not been paid. *Held*, that as D. had lost no rights against C., in consequence of the mistake, that the bank was entitled to recover. *De Nayer v. State National Bank*..... 105

6. **Conversion of Negotiable Securities:** DAMAGES. In an action to recover damages for the wrongful conversion of a negotiable promissory note and mortgage, it being conceded in the petition that at the time of conversion they were legally held by the defendant as security for certain advances of money to the plaintiff's son, and there being no allegation that such advances had been paid or in any way satisfied—*held*, that the utmost extent of liability, if any, was the value of the securities, less the amount due on such advances, together with interest from the time of conversion. *Cropsey v. Averill*..... 151

7. **Evidence:** OPINION OF WITNESS: OWNERSHIP. The fact of the plaintiff's ownership of negotiable securities being in issue, it was not competent for her to testify, against ob-

jection, that she "was the owner" thereof. This was a conclusion of law to be established by proof of facts necessary to show ownership, and not by the opinion of witnesses. *Id*..... 151

8. **Estoppel.** The plaintiff, the payee of a negotiable promissory note, having formally indorsed it to her son, who afterwards pledged it to the defendant—who had no knowledge of the purpose for which the indorsement was made—as security for a loan of money, will not be permitted to contradict, or limit the legal effect of such indorsement, by showing the real purpose for which it was made. *Id*..... 152

9. **Pleading:** ADMISSIONS OF RECORD: BILL OF EXCHANGE: INDORSER: ACCEPTANCE. Lincoln, a member of the firm of L. & L., drew a draft at sixty days' sight on the firm of T. & S., and indorsed it with the name of his firm. The draft was then discounted by the plaintiff for the benefit of the firm indorsing it, and then forwarded to the drawers, and by them accepted. Action against the individuals composing the two firms on the draft; T. & L., the acceptors, answered, admitting their liability to the plaintiff, but, as against the indorsers, alleged the acceptance was an accommodation merely, and for their benefit, and prayed that it be so certified in the judgment. Lincoln was not summoned, nor did he answer. Lowrey answered, denying his liability on the ground of the unauthorized use of the of the firm name by Lincoln in the indorsement, and in reply to the answer of T. & S. denied that they were accommodation acceptors for L. & L., but that the acceptance was for Lincoln alone, and for value. At the trial Lowrey stipulated for judgment against himself according to the prayer of the petition. *Held*, that this was a virtual admission of the indorsement, and of his liability under it, and left but the single question of principal and surety between the defendants to be tried. *Held*, *further*, that on this question, the verdict being against the clear weight of the evidence, a new trial should be granted. *Trego v. Lowrey*..... 238

10. **Acceptance of Draft:** PRESUMPTION. The legal presumption arising from the acceptance of a draft is that the acceptor has funds of the drawer in his hands with which to pay it at maturity. But as between the acceptor and the drawer, indorser, or other holder, for whose accommodation the acceptance was given, this presumption may be rebutted, and the true relation of the parties to each other shown. *Id*..... 238

11. **Promissory Note:** CONDITIONS. P. & W. executed and delivered a note for the sum of $142.50 to the Polo Manuf. Co. for a Polo harvester. On the back of the note was the following memorandum: "This note to be paid in wheat at ninety-five cents per bushel." *Held*, that the memorandum was a part of the note. *Polo Manufacturing Co. v. Parr* 379

NEW TRIAL.

1. **Error:** EVIDENCE: MOTION FOR NEW TRIAL. When the error complained of concerns the admission or rejection of testimony on the trial, the record must show that the alleged error was specifically assigned in the motion for a new trial. And it is not enough merely to allege—"For errors in the ruling of the court in allowing evidence objected and excepted to by the defendant." *Walrath v. The State* 80

2. ———: IMPROPER CONDUCT OF COUNSEL. If it be assigned for error that "the prosecuting attorneys improperly conducted themselves in the argument of the case to the jury," to the prejudice of the prisoner, the record must show that the particular matter complained of was brought to the attention of the court below, and was made one of the grounds of complaint in the motion for a new trial. *Id*... 80

3. **Newly Discovered Evidence.** It is not sufficient to allege in an affidavit for a new trial, on the ground of newly-discovered evidence, that the party could not, with reasonable diligence, procure such testimony before the trial. The affidavit must state what particular efforts the party has made to procure such testimony. *Tomer v. Densmore* 384

4. ———. It is a general rule, applicable in capital as well as in other cases, that a new trial will not be granted on the ground of newly discovered evidence where such evidence would be cumulative merely. *St. Louis v. The State*..... 405

5. **Surprise:** CONVERSION OF GOODS. Where, on the trial of a cause for the conversion of goods, the plaintiff failed to prove the value of the same until the case had been submitted to the jury, the court restricted the defendant to testimony as to the value of the goods, and thereby prevented him from introducing testimony to prove that the plaintiff

was not the owner of the same—*Held*, that this was such surprise as warranted the court in granting a new trial. *Tomer v. Densmore* 384

NOTICE.

See CORPORATIONS. JUDICIAL SALE, 7. LANDLORD AND TENANT, 1. REAL PROPERTY. SUMMONS.

OFFICERS.

See INJUNCTION.

OFFICIAL BONDS.

See SHERIFF.

PARTIES.

See PRACTICE, 60, 61.

PARTNERSHIP.

1. **Acts of Partner.** A partner binds the firm of which he is a partner necessarily only when he uses the name of the firm and acts within the scope of his authority. *Norton v. Thatcher* 186

2. ———. McC., a member of a firm, entered into the following contract: "Rec'd, of W. F. McC. $20, for which sum I, N. L. T., agree to give the said W. F. McC. any profits that I may have on a lot of 5,350 pounds of wool over and above costs and freight. And I, W. F. McC., agree to pay any loss that may be made in sale of wool under $1,328.75 and freight. (Signed) N. L. T. W. F. McC." There was a loss of $398.02 on the sale of the wool. McC. was in partnership with N. in the grain business, but concealed the written contract, as also did T. N. was informed that the only risk was the $20, and was not aware of the character of the contract until after the sale of the wool. *Held*, without proof of prior authority to purchase the wool, or knowledge of the contract and its terms, N. could not be held liable, the contract not having been made for the firm. *Id.* 186

8. **Railroad Corporation:** OFFICERS. L. was president of the B., Ft K. & P. R. R. Co. from 1869 to October, 1875, and in 1871 became a member of a construction company to complete the road, the construction company to take all the assets, assume the debts, and pay all claims and expenses of the corporation. In 1875 the B., Ft K. & P. R. R. Co. was merged in the Nebraska Railway Co. In an action by L. against the latter company for the *value* of services performed by him as president of the B., Ft K. & P. R. R. Co. from 1871 to 1875, in procuring the right of way and promoting the interest of the corporation, *held*, that he could not recover, he as a member of the construction company having assumed to pay for such services. *Nebraska Railway Co. v. Lett* 251

4. ———. The two leading features of the contract of partnership are a common interest in the stock of the company, and a personal responsibility for the partnership contracts. *Id* 251

5. ———: LIABILITY OF PARTNERS. Each individual member of a partnership is answerable in *solido* for the whole amount of the partnership debts, without regard to the proportion of his interest, or the nature of the contract between him and his co-partners. *Id*..... 251

6. **Purchase by Partner of Claim Against Another.** C. and S. were in partnership in the business of fattening cattle, C. conducting the sales and receiving the money. About the sixth of April, 1875, C. having a considerable amount of the partnership funds in his hands, and being about to sell all the stock owned by the partnership, purchased a claim against S. for about twenty-five cents on the dollar, and in his settlement with S. sought to apply it against the amount of partnership funds in his hands due S., at its face value. In an action on the claim, *held*, that C. could recover no more than he had paid for the claim. *Catron v. Shepherd*..... 308

7. ———. When property is purchased with partnership funds it inures to the benefit of the partnership. *Id*..... 308

8. ———. Each partner is a principal, and also is agent for every other member of the firm, and a purchase made by one partner with the funds of another inures to the benefit of such partner, and cannot be applied by the agent to his own personal profit. *Id* 308

PAYMENT.

1. **Usury:** ATTORNEY'S FEES. The time of payment of a judgment against R. was extended, R. paying plaintiff's attorney a fee of $140 in addition to legal interest. *Held*, usurious, and that the fee was a payment *pro tanto* on the judgment. *Rosa v. Doggett*..... 52

2. **Tender.** In May, 1876, K. entered into a contract with G. to herd 22 head of cattle during the season of grazing, for twenty-five cents per head, per month. In September of that year G. was garnisheed for $20 in an action pending against K.; soon thereafter K. notified G. to take his stock away or he would not be responsible for them. At the time designated G. went to the residence of K. and informed him that he had been garnisheed for $20, but would pay the balance due. K. refused to deliver the stock without payment in full, including the amount garnisheed. *Held*—1. That the question, whether K. by his conduct had waived the production of the money, should have been submitted to the jury. 2. That an offer by K. to receive the amount due after an action of replevin had been commenced, would not defeat the action. *Guthman v. Kearn*.. 502

3. ———: WAIVER. Ordinarily, to make a valid tender, the money should be actually produced, but if the creditor dispense with its production, or do any thing which is equivalent thereto, and the debtor has the money at the time, and is ready to produce it, the production of the money will be deemed waived. *Id*..... 503

PERSONAL PROPERTY.

See MORTGAGE, 3, 4, 5. TAXES, 8, 9, 11, 12.

PETITION.

See PLEADING, 2, 6, 11.

PERFORMANCE.

See REAL PROPERTY, 5.

PLEADING.

1. **Replication.** A reply must be made to all the material allegations of new matter contained in an answer, or they will be taken as true. *Payne v. Briggs*..... 75

2. **Taxes:** PETITION. In 1877 W. filed a petition in the district court praying for the cancellation of certain tax certificates, and alleging "that the plaintiff has the legal title, and is in peaceable possession," etc., of certain real estate. The tax was levied in 1873, and a sale took place in 1875, while W. was in possession and had an abundance of personal property in the county to satisfy the tax. On the trial, testimony was introduced showing W. to have been the owner and in possession of the land for a number of years prior to 1873. *Held*, that the petition stated facts sufficient after judgment to sustain the same. *Wilhelm v. Russell*..... 120

3. **Estoppel:** PLEADING. If an estoppel be relied on as a a defense to an action, in order to be availing it must be plead. *B. & M. R. R. Co. v. Harris*..... 140

4. **Exhibits.** If an exhibit to a pleading be objectionable the proper practice is to bring it to the attention of the court by motion. *Mulhollan v. Scoggin*..... 202

5. **Action upon Written Instruments.** In bringing an action upon a deed or other instrument, consisting of several distinct parts, the plaintiff is required to set out in his petition only so much of the instrument as is necessary to show his right of action. He should, however, attach a copy of the instruments sued on to his petition, and if none be attached he may be compelled to do so. *Dorrington v. Meyer*..... 211

6. ——: JUDGMENT. A petition alleged that "an undertaking was entered into as provided by law, and that said undertaking was lost or mislaid;" *held*, sufficient after judgment to show that the undertaking was in writing and would sustain the judgment. *Id*..... 211

7. **Verification.** The want of verification to a pleading is not jurisdictional. Where a petition is not verified, or where the verification is defective, if objection is made by the proper motion, it is the duty of the court to require the pleading to be verified as required by law. But this defect may be waived, and will be deemed waived, where no objection is made until after the rendition of the judgment. *Id*..... 214

8. **Amendment of Pleadings.** Where testimony is introduced without objection tending to prove a different issue

from that made in the pleadings, the court, after the trial, may permit the pleadings to be amended to conform to the facts proved. *Catron v. Shepherd*..... 308

9. **Tax Deed:** INJUNCTION. Action by the purchaser of real estate, under a foreclosure sale to enjoin the execution of a tax deed about to be made by the county treasurer, in pursuance of a sale for taxes made prior to plaintiff's purchase, on the sole ground that the mortgagors "were seized and possessed of personal property sufficient to pay the taxes due on said land." *Held*, 1st, That even if the plaintiff could raise this question, there being no allegation to the effect that the personal property was within the jurisdiction of the treasurer, this was a fatal defect in the petition; 2d, That the plaintiff, being a purchaser at judicial sale, he took the land subject to the unpaid taxes and assessments, and whether the tax sale was valid or not, the taxes themselves, in either event, were a legal incumbrance, subject to which the plaintiff took his title, and that he was entitled to the equitable interference of the court only on condition that he offers to do equity, by tendering or offering to pay the full amount of taxes justly due. *Iler v. Colson*..... 331

10. **Official Bond:** PETITION. Where, in an action on the official bond of a sheriff, the petition, by suitable averments, shows affirmatively that the act complained of was done by the sheriff while in the performance of an official duty, it is not subject to demurrer because of an additional averment that it was done "under color of his said office." These latter words are but a conclusion not warranted by the facts stated, and will be rejected as surplusage. *Huffman v. Kopplekom*..... 344

11. **Action by Corporation:** ANSWER. In an action by a corporation, B. put in an answer consisting of a general denial. *Held*, that such answer did not put in issue the corporate character of the corporation, or its power to sue in said court. *National Life Ins. Co. v. Robinson*..... 452

12. **Petition.** Plaintiff's interest must affirmatively appear in an action brought on a written instrument by one not a nominal party to it. *Hicklin v. Nebraska City Nat'l Bank.* 463

See MORTGAGE, 1, 2, 8, 9. NEGOTIABLE INSTRUMENTS, 9.

POSSESSION.

See LANDLORD AND TENANT.

PRACTICE.

1. **Motion for New Trial.** Objection was made that the court erred in rejecting certain proper testimony offered on the trial by the plaintiffs in error, but this objection was not made in the motion for a new trial. *Held*, that the errors, if any, were thereby waived. *Heard v. Dubuque County Bank*..... 10

2. **Error:** FINAL ORDER. An order of a judge of a district court dissolving a temporary injunction is not final, but interlocutory merely, and insufficient to support a petition in error before final judgment in the action. *Scofield v. The State National Bank*..... 16

3. **Bill of Exceptions.** Exceptions which are not properly a matter of record must be preserved in writing, and properly certified by the presiding judge, in order to be considered by the supreme court. And affidavits in support of, or in opposition to, any proceeding in the court below, must be embodied in a bill of exceptions. *Credit Foncier of America v. Rogers*..... 34

4. ———: STIPULATION OF ATTORNEYS. A stipulation of the attorneys in the cause, stating that the record is a correct transcript of the proceedings, may be sufficient to justify the judge of the court below in signing the bill as presented, but forms no basis for the supreme court to consider the matters embodied in the bill of exceptions. *Id*..... 34

5. **Return of Sheriff:** GARNISHMENT. Return of a sheriff to an execution, that "he cannot find any chattel property belonging to the within named defendants whereon to levy this writ," is sufficient to authorize proceedings in garnishment under section 244 of code. *Wilson v. Burney*..... 35

6. **Garnishment.** Where a garnishee has been properly served with process, and has appeared and answered, and an order has been made by the court requiring him to pay a certain sum owing by him to the debtor into court, from which order no appeal is taken, such order cannot be attacked collaterally. *Id*..... 35

7. **Attorney's Fees.** No attorney fees can be allowed except in cases where a judgment has been recovered, and only in cases where the instrument upon which the action is brought in express terms provides for their allowance. And in no case can such fee be recovered unless it is allowed by the court. *Rosa v. Doggett*..... 48

8. ———: USURY. In the year 1875 judgments to the amount of about $1,600 were recovered against R., who filed a stay of execution. Upon the expiration of the stay, R. obtained an extension of the time of payment from June until September, upon paying the plaintiff's attorney, with plaintiff's assent, $140 as an attorney's fee, in addition to 10 per cent interest. Upon a petition for an injunction being filed, it was held that the fee paid to the plaintiff's attorney was usurious and must be applied *pro tanto* upon the judgments. *Id.* 48

9. **Depositions:** VENUE. The certificate of the officer taking a deposition ought to show on its face the county and state or country where the same is taken, as well as the state or country from which the officer derived his official character. *Payne v. Briggs* 75

10. ———. Whether it is proper to take depositions in the office of one of the parties or his attorney, or before an officer who is also the clerk or student of such party or attorney—*Quære.* *Id.* 75

11. **Mandamus.** An alternative writ of mandamus must contain a statement of all the facts necessary to justify the order sought for by the proceeding, and omissions in the alternative writ cannot be supplied by the affidavit or application. *State, ex rel., v. School District* 92

12. **Bill of Exceptions.** When a bill of exceptions is properly presented to a judge for his signature within sixty days from the rising of the court, it is no cause for dismissing an action that the bill was signed after the expiration of sixty days from that time. *Leighton & Brown v. Stuart* 96

13. ———. When it does not appear at what time a bill of exceptions was presented to a judge for his signature, it will be presumed to have been presented within the period required by the statute. *Id.*, 95. As to the time within which bill must be presented to the judge for signature—See *First National Bank v. Bartlett* 319

14. **Mandamus.** An application for a mandamus, verified upon information and belief, where there is no appearance on the part of the defendants, is sufficient cause for refusing either a peremptory or an alternative writ. The motion for the writ should be made upon an affidavit setting forth the facts on which it is based. *State, ex rel., v. School Districts* 98

15. **Service of Summons.** A summons must be served by delivering a copy to the defendant personally, or by leaving a copy at his usual place of residence. Service by leaving a copy at his place of business is not sufficient. *Aultman & Taylor Co. v. Steinan* 109

16. **Appearance of Defendant.** Where a defendant appears specially for the purpose of objecting to the jurisdiction of the court over his person, he must restrict his motion to the single question of jurisdiction. *Id.* 109

17. **Replevin:** UNDERTAKING. A party cannot object to defects in an undertaking in replevin by a special appearance, nor to defects in the affidavit; nor because the plaintiff's ownership and right of possession are denied. *Id.* 109

18. ———: SERVICE OF ORDER. It is the duty of an officer, to whom an order of delivery is directed, to serve a copy of the same on the defendant, and if he fail to do so he will be liable for all damages which the defendant may sustain in consequence of such neglect. But the failure to serve such copy is not jurisdictional. *Id.* 109

19. **Costs.** A party innocently in possession of property cannot be subjected to costs unless a demand is made for the property, but where the defendant pleads property in himself, no demand is necessary. *Homan v. Laboo*, 1 Neb., 210, adhered to. *Id.* 110

20. **Assignment of Error.** An assignment of error in these words, "Because the court erred in admitting testimony in said case upon the trial of the same offered by the plaintiff," or "Because the court erred in rejecting evidence offerred by the defendants upon the trial of the cause," is too indefinite to be considered. *Lynam v. McMillan* 134
B. & M. R. R. v. Harris 140
McCormick v. Keith 142
Tomer v. Densmore 384

21. ———: ASSIGNMENT IN MOTION FOR NEW TRIAL. To lay the foundation for a review by the supreme court of questions raised and decided on the trial in the court below, it is necessary that the particular errors relied on be first assigned in the motion for a new trial. *Lynam v. McMillan* 134
McCormick v. Keith 142
B. & M. R. R. v. Harris 140
Tomer v. Densmore 384

22. **Cross-Examination of Witness:** REFERENCE TO FORMER DEPOSITION. It is not proper, on cross-examination of a witness, for counsel, in order to contradict him, to read from what purports to be a deposition previously given by him, and then to ask him whether he had so testified. The correct rule in such case is first to prove the deposition to be his, and then to read it as part of the evidence in the case. After this has been done the witness may be cross-examined as to any supposed discrepancies between his testimony in court and the deposition. *Cropsey v. Averill*..... 152

23. **Irrelevant Testimony.** If irrelevant testimony, which has a tendency to mislead the jury, be admitted, it is good ground for a reversal of the judgment. *Id*..... 152

24. **Instructions to Jury.** Instructions to the jury should have particular reference to the evidence upon which they are to pass. And it is error to so instruct as to leave them at liberty to infer a fact of which there is no proof. *Id*.... 152

25 **Argument of Counsel.** If the court limit counsel in the time to be occupied in argument, and no objection is made to the order at the time, and before the case is finally submitted to the jury, it is too late afterwards to complain. *Id*..... 152

26. **Misconduct of Counsel:** GROUND OF ERROR. One ground of error assigned was the misconduct of the opposing counsel in their argument to the jury, prejudicial to the plaintiff in error. But it was not shown by the record they were called to order, nor that the court was requested to confine them within the bounds of legitimate discussion. *Held*, that while the offense complained of, if properly presented, would be good ground for a reversal of the judgment, still as the record does not show any ruling by the court below respecting it, there is no question for the supreme court to review. *Id*..... 152

27. **Finding: Judgment.** A judgment must conform to the finding. Finding against A. and B. will not sustain a judgment against A. and C. *Smith v. Silvis*..... 164

28. **Issues.** The issues properly presented by the pleadings must be decided either by a finding by the court or the verdict of a jury, before judgment can be rendered against the defendant. *Id*..... 164

29. **Default.** A defendant in default for want of an answer should be *defaulted*, and the same entered on the journal before judgment is rendered against him. *Id.*..... 164

30. ———: OPENING DEFAULT. Where a default has been regularly entered against a defendant, personally served with summons, it is largely within the discretion of the court to say whether he shall be permitted to come in afterwards and make defense; and unless it be made to appear that there has been an abuse of discretion by the court below, in this particular, the supreme court will not interfere. *Mathalian v. Scoggin*..... 202

31. ———: ———. When judgment on default has been entered against a defendant, and which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and in addition thereto that he has a meritorious defense either in whole or in part to the action. Unless he do so he can have no standing in the supreme court on the question of his right to answer. *Id.*..... 202

32. **Answer:** WAIVER. Taking leave to answer is a waiver of all objections to the manner in which the previous orders of the court as to the itemization of the account sued on has been performed—no exception to such performance having been taken. *Id.*..... 202

33. **Exhibits to Pleading.** If an exhibit to a pleading be objectionable the proper practice is to bring it to the attention of the court by motion. *Id.*..... 202

34. **Jury Trial:** DIRECTING A VERDICT. If there be any testimony before the jury, by which a finding in favor of the party on whom rests the burden of proof can be upheld, the court is not at liberty to disregard it, and direct a verdict against him. And the converse of this is also true. *Grant v. Cropsey*..... 205

35. **Petition:** JUDGMENT. A petition alleged that "an undertaking was entered into as provided by law, and that said undertaking was lost or mislaid;" *held*, sufficient after judgment to show that the undertaking was in writing and would sustain the judgment. *Dorrington v. Meyer*..... 211

36 **Sureties on Replevin Bond.** The sureties on the undertaking in an action of replevin have a right to object to

the form of the judgment on the undertaking, and to require the same to be rendered for a return of the property or the value thereof in case a return cannot be had, but if they fail to do so, and a judgment for the value of the property alone is rendered, they will be bound by the judgment. *Id.* 211

37. **Evidence on Appeal:** HOW AUTHENTICATED. In the absence of a stipulation waiving it, the certificate of the judge presiding at the trial as to what the testimony was is essential in its authentication for the supreme court. *Hale v. Christy* 264

38. **Motion for New Trial:** ASSIGNMENT OF GROUNDS FOR. An assignment of error in a motion for a new trial in these words—"Because the court erred in excluding proper evidence from the jury, offered by the defendant, to which ruling of the court the defendant at the time excepted," is too indefinite to lay the foundation for proceedings in error. *Uhl v. Robison* 272
See also, *Tomer v. Densmore* 884

39. **Instructions to Jury.** An instruction which leaves the jury at liberty to disregard a material fact in a case, either admitted or established by the evidence, is erroneous. *Uhl v. Robison* 272

40. ——— : ———. And it is error to give an instruction which implies that there is evidence from which the jury may find a fact of which there is no evidence before them. *Id.* 272

41. ——— : ———. It is not error to refuse an instruction requested, although correct as a legal proposition, if it be not applicable to the evidence on which the jury are to pass. *Id.* 272

42. **Final Order.** An order confirming a sale of real estate made by a judge of the district court in vacation, is a final order, from which an appeal will lie to the supreme court. *State Bank v. Green* 297
See also, *Berkley v. Lamb* 398

43. **Execution.** Where a proper supersedeas bond is filed and approved, no execution can issue on the judgment until the bond is set aside, modified, or the appellant fails to perfect his appeal. *State Bank v. Green* 297

44. **Appeal:** SUPERSEDEAS BOND. Upon the confirmation of the sale of certain real estate under a decree of foreclosure, and an order awarding execution for the deficiency amounting to $9,944,33, the court fixed the supersedeas bond at $2,000. *Held*, that the case came within the provisions of the third subdivision of the third section of the act in relation to appeals in actions in equity, and that the amount of the bond was discretionary with the court. *Id* 297

45 ——: ——: WAIVER OF SUPERSEDEAS BOND BY ATTORNEY. While a supersedeas bond for an appeal duly approved was on file in the district court, the appellee's attorney requested the clerk to issue execution on the judgment, to which request the appellant's attorneys signed the following waiver: "We hereby consent to the above request being complied with by the clerk of said court." *Held*, that their general employment as attorneys gave them no authority to sign such waiver, and the burden of proof was on them to show they had special authority to sign it. *Id.* 297

46 **Error.** Where testimony is introduced without objection, error will not lie upon the ground that the testimony was improperly admitted. *Catron v. Shepherd* 308

47. **Amendment of Pleadings.** Where testimony is introduced without objection tending to prove a different issue from that made in the pleadings, the court, after the trial, may permit the pleadings to be amended to conform to the facts proved. *Id* 308

48. **Offer to Confess Judgment:** NEED NOT BE RENEWED ON APPEAL. An offer to confess judgment, duly made in the court where the action is brought, under sec. 1004 of the code of civil procedure, need not be renewed in the appellate court in order to make it available to the party making it on final judgment. *Kleffel v. Bullock* 336

49. **Exceptions.** Objections and exceptions should present distinctly and specifically the ruling objected to. *Tomer Densmore* 384

50. **Motion for a New Trial.** A motion for a new trial is not a matter of form merely, but is designed as a means of correcting errors; and vague, indefinite, or general objections will not, as a rule, be considered. But where the errors complained of are apparent from the record, and it is clear that the attention of the trial court was challenged

by the motion to them under general assignments, they will be considered. *Id.* 384

51. **Discretion of Court:** EVIDENCE. It is not an abuse of discretion for the trial court to permit the parties, in furtherance of justice, to offer additional evidence in support of the cause of action or defense after a case has been submitted to the jury, provided the party offering such evidence does not thereby obtain an undue advantage. *Id.*... 384

52. **New Trial:** NEWLY DISCOVERED EVIDENCE. It is not sufficient to allege in an affidavit for a new trial, on the ground of newly-discovered evidence, that the party could not, with reasonable diligence, procure such testimony before the trial. The affidavit must state what particular efforts the party has made to procure such testimony. *Heady v. Fishburn*, 3 Neb., 266, adhered to. *Id.* 384

53. ——: CONVERSION OF GOODS. Where, on the trial of a cause for the conversion of goods, the plaintiff failed to prove the value of the same until the case had been submitted to the jury, the court restricted the defendant to testimony as to the value of the goods, and thereby prevented him from introducing testimony to prove that the plaintiff was not the owner of the same—*Held*, that this was such surprise as warranted the court in granting a new trial. *Id.* 384

54. **Opinion of Juror.** Where a juror informed one of the parties to a suit, before the case was submitted to the jury, that he had formed and expressed an opinion as to the merits of the case, and the party failed to call the attention of the court to the matter, or challenge the juror—*Held*, after verdict the party could not object to the juror on the ground that he had formed and expressed an opinion. *Id.* 384

55. **Instructions to Jury.** An instruction which is so vague that it must tend to confuse or mislead the jury is good ground for the reversal of a judgment. *Mutual Hail Insurance Co. v. Wilde*..... 427

56. **Bill of Exceptions.** When there is no bill of exceptions this court will presume that there was sufficient evidence before the court below to sustain the findings and judgment. *The State v. Knapp* 436

57. **Stipulation.** This rule is not changed, although there was a stipulation in the court below, which is certified

with the record, and from which it might be inferred that there was no other evidence before the court. *Id.*..... 436
See also *Credit Foncier of America v. Rogers* 35

58. **Practice in County Courts.** On the first day of the return term, B demurred to the petition of A. Demurrer sustained. A asked leave to amend his petition *instanter*. Leave granted. Amended petition filed immediately. B withdrew from the court room and did not return. Same day, B, defendant, was defaulted for want of an answer. The next day—second day of the term—trial had in the absence of defendant, B, and judgment for plaintiff, A. *Held*, no error. *Naracong v. Graves*..... 443

59. **Setting Aside Finding or Verdict.** Where the finding or verdict is clearly wrong, it should be set aside. In no other way can the rights of parties be protected. *Roberts v. Swearingen*..... 363

60. **Substitution of Parties Defendant.** Section 50 of the code of civil procedure authorizes the court in certain cases and under certain circumstances to substitute the real party in interest as defendant in the action. But this authority must be exercised, if at all, before final judgment, for afterwards the court has no power to make such an order. *Hicklin v. Neb. City Nat. Bank*..... 468

61. ———: PLEADING: PLAINTIFF'S INTEREST MUST AFFIRMATIVELY APPEAR IN THE PETITION. Where an action is brought on a written instrument by one not a nominal party to it—for example, an undertaking in replevin—in order to maintain the suit his interest therein must be made to appear affirmatively by proper allegations in the petition. *Id.*..... 463

62. **Trial Term of Court.** A cause was tried at the November, 1877, term of the district court, and taken under advisement, and a final decree rendered at the March, 1877, term of said court, and the bill of exceptions was signed on the fourth day of May thereafter; *held*, on a motion to quash the bill of exceptions, that the trial term continued until a decision was rendered. *Wineland v. Cochran*..... 528

63. **Fraud:** DAMAGES: EVIDENCE. In an action for damages on the ground of fraud, the degree of proof required is merely a clear preponderance of the evidence. *Patrick v. Leach*..... 530

See APPEAL. JUDICIAL SALE. MANDAMUS. PAYMENT, 2. PLEADING.

PRACTICE IN CRIMINAL CASES.

1. **Error:** EVIDENCE: MOTION FOR NEW TRIAL. When the error complained of concerns the admission or rejection of testimony on the trial, the record must show that the alleged error was specifically assigned in the motion for a new trial. And it is not enough merely to allege—"For errors in the ruling of the court in allowing evidence objected and excepted to by the defendant." *Walrath v. The State*..... 80

2. ———: IMPROPER CONDUCT OF COUNSEL. If it be assigned for error that "the prosecuting attorneys improperly conducted themselves in the argument of the case to the jury" to the prejudice of the prisoner, the record must show that the particular matter complained of was brought to the attention of the court below, and was made one of the grounds of complaint in the motion for a new trial..... 80

3. **Instructions to Jury.** Instructions to the jury must be based upon and be applicable to the evidence; and it is error to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred. *Id* 81

4. **Proceedings in Error** in a criminal case must be instituted in the supreme court within one year after the rendition of the judgment. *Kountz v. The State* 294

5. **Incompetent Evidence.** If a witness for the prosecution, in answer to a proper question, give immaterial testimony prejudicial to the prisoner, which on objection is promptly excluded from the consideration of the jury, this is not ground for reversing the judgment. *St. Louis v. The State*..... 405

6. ———: ———. Neither is the mere asking of a question calling for incompetent evidence, but not answered, any ground of error. *Id* 405

7. **Petit Juror:** QUALIFICATION. If a juror on his *voir dire* examination, in a case depending upon circumstantial evidence, answer that his convictions are such as would preclude him from returning a verdict of guilty, where the punishment would be death, it is good ground of challenge for cause on the part of the state. *Id*..... 405

8. ———: ———. On a trial for murder in the first degree the state is entitled to a jury who can conscientiously, if the evidence warrant it, return a verdict which will subject the offender to the extreme penalty of the law. *Id*..... 405

9. **Separation of Jury.** By section 484 of the criminal code, the jury may, even in a capital case, in the discretion of the presiding judge, be permitted to separate during the trial up to the time the case is finally submitted to them. *Walrath v. The State*, 81. *St. Louis v. The State*..... 405

10. ———. And in case of such separation of the jury, in the absence of an affirmative showing in the record to the contrary, it will be presumed that the required admonition by the court as to their duty while separated was given. *Id*... 405

11. **Weight of Evidence.** It is not error to charge the jury that "absolute, unequivocal, mathematical certainty of proof is not required" on a criminal trial. *Id*..... 406

12. ———. It is not error to charge the jury in effect that in determining the weight of evidence upon any given point in the case, they are not required to give equal weight to the testimony of each witness, but only such weight as, under all the circumstances, they believe him entitled to. *Id.* 406

13. ———: TESTIMONY OF PRISONER. The interest which a witness has in the result of a trial may always be shown as affecting the value of his testimony; and it is not error for the court, in referring to the testimony of the prisoner given in his own behalf, to tell the jury that they were "at liberty to consider the great interest which he has in the result." *Id*..... 406

14. **Instructions:** HOW CONSIDERED. The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said on each particular subject or branch of the case. *Id*..... 406

15. ———: INSTRUCTIONS MUST BE APPLICABLE TO THE EVIDENCE. It is not error to refuse an instruction, although correct as an abstract proposition, which is not applicable to the evidence before the jury. Neither is it error to refuse instructions where others of substantially the same import have been given. *Id*..... 406

16. **An** indictment contained two counts, one for malicious shooting with *intent to kill*, the other for malicious shooting with *intent to wound*. *Held*, that the defendant was not entitled to an order compelling the prosecutor to elect on which count he would proceed. *Candy v. The State* 488

See CRIMINAL LAW.

PRACTICE IN SUPREME COURT.

1. **An order** dissolving a temporary injunction is not a final order subject to review in the supreme court upon a petition in error. *Scofield v. The State National Bank*..... 16

2. **Assignment of Error.** On a motion to dismiss a cause out of the supreme court, the *sufficiency* of the assignments of error in the motion for a new trial will not be considered. *Leighton & Brown v. Stuart*..... 96

3. ———. An assignment of error in these words, "Because the court erred in admitting testimony in said case upon the trial of the same offered by the plaintiff," or "Because the court erred in rejecting evidence offered by the defendants upon the trial of the cause," is too indefinite to be considered. *Lynam v. McMillan*..... 134

4. ———. All assignments must be specific. *B. & M. R. R. v. Harris*..... 140
McCormick v. Keith..... 142

5. ———: ASSIGNMENT IN MOTION FOR NEW TRIAL. To lay the foundation for a review by the supreme court of questions raised and decided on the trial in the court below, it is necessary that the particular errors relied on be first assigned in the motion for a new trial. *Lynam v. McMillan* 134
McCormick v. Keith..... 142

6. **Proceedings in Error.** By the act of the legislature, approved February 15th, 1877 [Laws, 1877, p. 14], entitled, "An act to amend section one of an act entitled, 'An act to amend section five hundred and ninety-two of the code of civil procedure, approved February 24th, 1875,'" one year is given from the rendition of the judgment, or the making of the final order complained of, within which to commence proceedings in error thereon. And this act applies to all judgments or final orders entered after it took effect. *Roesink v. Barnett*..... 146

7. ——: WHEN DEEMED "COMMENCED." A proceeding in error is not to be deemed "commenced," within the meaning of section 592 of the code of civil procedure, when personal service can be obtained, until a summons is issued which shall be duly served, as the statute directs. *Bemis v. Rogers* 149

8. **Evidence on Appeal.** In the absence of a stipulation waiving it, the certificate of the judge presiding at the trial as to what the testimony was is essential in its authentication for the supreme court. *Hale v. Christy* 264

9. **Finding** on questions of fact is entitled to same respect in supreme court on appeal as the verdict of a jury under like circumstances. *Cheney v. Eberhardt* 423

10. **Conflicting Testimony.** Cause tried to the court below. There was much conflicting testimony, some of which had to be rejected as untrue. *Held*, That this court would not disturb the decree, there being evidence to sustain it on each material point. *Burt v. Baldwin* 487

11. **Pleading:** DEMURRER. *Semble*, that when a party, after an adverse ruling upon his demurrer to a pleading, elects to stand upon it, and brings the same to the supreme court for review, he will be permanently concluded thereby. The cause will not be remanded to the district court with leave to answer to the merits. *Estabrook v. Hughes* 496

See APPEAL. PRACTICE, 62.

PRECINCTS.

See BONDS. CONSTITUTIONAL LAW.

PRESUMPTION.

See EVIDENCE. EXCEPTIONS. HUSBAND AND WIFE, 3. NEGOTIABLE INSTRUMENTS, 9.

PRINCIPAL AND AGENT.

1. **Agent:** HIS AUTHORITY IN COLLECTING DEBTS. An agent, for the collection of a debt, cannot lawfully accept in discharge thereof his own individual obligation to the debtor, unless authorized to do so by his principal. *McCormick v. Keith* 143

2. ——: ——. And even if the agent be specially empowered to compromise, and accept personal property in satisfaction of money demands, this will not authorize him to extinguish a debt due the principal by setting off against it his own debt. *Id.* 143

See PARTNERSHIP, 8.

PRINCIPAL AND SURETY.

1. **Rights of Surety.** A surety is entitled to all the securities held by the creditor against the principal debtor, and to stand in his shoes, and it makes no difference that the security is in the form of an order upon garnishees to pay money into court. *Wilson v. Burney* 89

See NEGOTIBALE INSTRUMENTS.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PUBLIC FUNDS.

Loan or Deposit of Public Money. The petition states that the plaintiff deposited two thousand dollars with the defendants, who were bankers, etc., for safe keeping, to be delivered up on demand; that it was afterwards demanded and payment refused. *Held*, on demurrer, that an unauthorized or unratified loan or deposit of public money constitutes no cause of action in the name of the state. *State v. Keim* 63

PURCHASER.

See JUDICIAL SALE. MORTGAGE.

RAILROADS.

1. **Partnership:** RAILROAD CORPORATION: OFFICERS. L. was president of the B., Ft. K. & P. R. R. Co. from 1869 to October, 1875, and in 1871 became a member of a construction company to complete the road, the construction company to take all the assets, assume the debts, and pay

all claims and expenses of the corporation. In 1875 the B., Ft. K. & P. R. R. Co. was merged in the Nebraska Railway Co. In an action by L. against the latter company for the *value* of services performed by him as president of the B., Ft. K. & P. R. R. Co. from 1871 to 1875, in procuring the right of way and promoting the interests of the corporation, *held*, that he could not recover, he as a member of the construction company having assumed to pay for such services. *Nebraska Railway Co. v. Lett*..... 251

2. ———. The two leading features of the contract of partnership are a common interest in the stock of the company, and a personal responsibility for the partnership contracts. *Id*..... 251

3. ———: LIABILITY OF PARTNERS. Each individual member of a partnership is answerable *in solido* for the whole amount of the partnership debts, without regard to the proportion of his interest, or the nature of the contract between him and his co-partners. *Id*..... 251

REAL PROPERTY.

1. **Fixtures.** When it is evident that houses are intended as permanent annexations to the freehold, they become a part of the realty, and pass with a conveyance of it, and that without regard to the character of the foundations on which they stand. *Freeman v. Lynch*..... 192

2. ———: REQUISITES. "1. Actual annexation to the realty, or something appurtenant thereto. 2. Appropriation to the use or purpose of that part of the realty with which it is connected. 3. The intention of the party making the annexation to make the article of permanent accession to the freehold. This intention being inferred from the nature of the articles affixed, the relation and situation of the party making the annexation, the structure and mode of annexation and the purpose or use for which the annexation has been made." These rules seem to furnish a test by which the essential qualities of a fixture, in most cases, can be determined, and make the *intention* of the party making the annexation the material inquiry. And this intention is to be gathered from the nature of the article affixed, the relation and situation of the party making the annexation, and the structure and mode of annexation. *Id*..... 199

3. **Married Women:** POWER TO CONVEY REAL ESTATE. Under Secs. 42 and 43, Ch. 61, General Statutes, a married woman may sell and convey real estate, or any interest she may have therein, the same as if she were single. As to her other contracts she is liable only to the extent that they are made with reference to, and on the faith and credit of, her separate estate. *Hale v. Christy*..... 264

4. **Deed:** DELIVERY. A deed takes effect only from the time of delivery. The possession of a deed by the grantee, in the absence of opposing circumstances, is *prima facie* evidence of delivery, and the burden of proof is on him who disputes this presumption. *Roberts v Swearingen* 363

5. ———: ———: SPECIFIC PERFORMANCE. R. and S. agreed to exchange certain real estate, the deeds to be executed and placed in the hands of C., to be delivered upon the execution of a mortgage by S. R. commenced a suit against S. for specific performance, and while the action was pending, C., who was R.'s attorney, permitted S. to take the deed without the execution of the mortgage, and R., after obtaining a decree, waived certain rights under the same, having obtained judgments against S. *Held*, that the weight of testimony showed an absolute delivery of the deed to S.; *held*, also, that the payments being past due, the district court is directed to ascertain the amount due, and render a decree of foreclosure and sale. *Id* 363

6. **Title by Sheriff's Deed.** Under section 500 of the code, a sheriff's deed vests in the purchaser the same estate as was vested in the judgment debtor at or after the time the lands became liable to the satisfaction of the judgment. If, therefore, the debtor had no interest in the lands sold, of which the purchaser had notice, he acquires no title by the sale. *Mansfield v. Gregory*..... 432

7. **Title:** EQUITY. NOTICE. In 1868, A, who resided in Chicago, sent from that place by express to B, at Omaha, $200 in money with which to enter a quarter section of land in Wayne county, Nebraska. B received the money, with it bought agricultural college scrip, located the land in his own name and filled up the blank assignment on the back of the duplicate certificate of location so as to assign said duplicate, and the land therein described, to A. *Held*, that A was the equitable owner of the land and B held but a dry legal title thereto. And *held further*, that the occupation and cultivation of said land from 1869 to 1875 by

A, and after that time by the grantee of A by her tenant, was sufficient notice of such equitable title to an execution creditor of B. *Jones v. Johnson Harvester Co*..... 446

See JUDICIAL SALE. MORTGAGE.

RECORD.

See MORTGAGE.

REDEMPTION.

Void Tax Sale: INTEREST. When in a proper proceeding in court the sale of lands for taxes shall be declared void, the owner of such lands will be allowed a reasonable time, to be named in the decree, in which to pay such taxes, with interest at one per cent per month. *Pettit v. Black*..... 52

REPLEVIN.

1. **Undertaking.** A party cannot object to defects in an undertaking in replevin by a special appearance, nor to defects in the affidavit; nor because the plaintiff's ownership and right of possession are denied. *Aultman & Taylor Co. v. Steinan* 109

2. **Service of Order.** It is the duty of an officer, to whom an order of delivery is directed, to serve a copy of the same on the defendant, and if he fail to do so he will be liable for all damages which the defendant may sustain in consequence of such neglect. But the failure to serve such copy is not jurisdictional. *Id*..... 109

3. **Undertaking:** OMISSIONS. An undertaking in replevin in which is omitted the provisions to "return the property to the defendant, in case judgment for a return of such property is rendered against him," but containing all the other statutory provisions, cannot for that reason be avoided by the parties signing it, but, so far as it goes, creates a binding obligation, and may be enforced against them. *Hicklin v. Neb. City Nat. Bank* 463

4. **Sureties on Replevin Bond.** The sureties on the undertaking in an action of replevin have a right to object to the form of the judgment on the undertaking, and to re-

quire the same to be rendered for a return of the property, or the value thereof, in case a return cannot be had, but if they fail to do so, and a judgment for the value of the property alone is rendered, they will be bound by the judgment. *Dorrington v. Meyer*..... 211

See PAYMENT, 2.

REPLICATION.

See PLEADING, 1.

RES ADJUDICATA.

See ESTOPPEL. GARNISHMENT, 2. JUDICIAL SALE, 4.

REVENUE.

See TAXES.

ROADS.

See TAXES, 17.

SALE.

Delivery of Possession. The seller of a threshing machine resided and was in Buffalo, New York. The machine was in Nebraska, under the care and control of the purchasers, who were his general agents for the sale of such machines. *Held*, that the sale was complete as between the parties to it just as soon as the seller was notified by the purchasers of their acceptance of his offer to sell, without a formal delivery of possession. *Held further*, that the sale, being complete as to the parties to it, was conclusive as to all others, unless shown to have been fraudulent. *Uhl v. Robison*.... 272

See JUDICIAL SALE. MORTGAGE. TAXES. WARRANTY.

SCHOOLS.

1. **School District Bonds.** Where bonds had been issued by a school district while comprising twenty-four sections, and afterwards the district was reduced to four sections,

held, that the original district, although comprising but four sections, was primarily liable for the payment of the bonds, and that the new districts formed out of such territory were not required to report to the county clerk the amount due on such bonds. *State, ex rel., v. School District* 92

2. ———: SALE BY BANKER. Where school district bonds, intrusted to a bank for sale on account of such district, are sold or pledged by the bank on its own account to an innocent holder, for value, such sale or pledge will bind the district. *Held*, however upon the facts in this case, that the defendant had acquired no property in the bonds, either general or special, and that the school district was not estopped from bringing an action to compel their surrender. *School District v. State Bank*..... 168

3. ———: CONSTITUTIONAL LAW: SPECIAL LEGISLATION. The act of February 2, 1875, entitled "An act authorizing school district No. 56 of Richardson county to issue bonds for the purpose of erecting a school building, procuring a site therefor, and setting aside funds to pay the same" [Laws, 1875, p. 281], being repugnant to Sec. 1, of Art. VIII, of the constitution of 1866, is void. *Clegg v. School District* 178

4. ———: ———: CORPORATE POWERS. The powers conferred upon school districts to issue bonds are "corporate powers" within the meaning of the constitution. *Id*..... 179

SCHOOL FUND.

See LIQUOR SELLING.

SERVICE.

See REPLEVIN, 2. SUMMONS.

SET-OFF.

See PRINCIPAL AND AGENT.

SHERIFF.

1. **Fees for Boarding Prisoner.** Under the act of 1877, to amend Section 5, of Chapter 19, of the Revised Statutes,

authority is given the county commissioners to fix the compensation of the sheriff for boarding prisoners at such sum as they may deem just and proper, not exceeding seventy-five cents per day, nor more than three dollars per week when the prisoners are confined more than one week. *Lancaster County v. Hoagland*..... 36

2. **Official Bond.** The official bond of a sheriff is not void by reason of its being given to the state, instead of the proper county, as obligee. This is but an irregularity which in nowise affects the liability of the sheriff or his sureties, in an action thereon for damage occasioned by official misconduct. *Huffman v. Kopplekom*..... 344

3. ——: SURETIES. The sureties on such bond are liable for acts of the sheriff done *virtute officii*, but not for acts done *colore officii*. *Id*..... 344

4. **Pleading**: PETITION: DEMURRER. Where, in an action on such bond, the petition, by suitable averments, shows affirmatively that the act complained of was done by the sheriff while in the performance of an official duty, it is not subject to demurrer because of an additional averment that it was done "under color of his said office." These latter words are but a conclusion not warranted by the facts stated, and will be rejected as surplusage. *Id*..... 344

See PRACTICE. SUMMONS.

SHORT HAND REPORTERS.

1. **Fees.** A person convicted of felony can require from the court reporter a copy of the testimony taken at the trial only at his own expense. And the reporter, if he so choose, may require his fees therefor to be paid in advance. The fact of the prisoner being without the means of making payment does not change the rule. *State v. Moore*..... 22

SPECIFIC PERFORMANCE.

See REAL PROPERTY, 5.

STATE TREASURER.

See ACTION, 1.

STATUTES.

1. **Time of taking Effect.** Under the constitution, a legislative act passed without an emergency clause cannot take effect until three calendar months after the adjournment of the session at which it passed; but by legislation, if such session adjourn any time before the first day of March, acts silent on the subject do not take effect until the first day of June following. *Roesink v. Barnett*..... 148

2. **Construction of Statutes.** Where statutes, or parts of the same statute, are so repugnant to each other that both cannot be executed, the latter is always deemed a repeal of the earlier. *State, ex rel. Conger, v. Maccuaig*..... 215

8. ———: COUNTY WARRANTS. Section one of chapter two, General Statutes, to the extent that it authorized county clerks to draw warrants upon the county treasury, was repealed by implication by the "act concerning counties and county officers," passed February 27, 1873. *Id*..... 215

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STATUTE OF FRAUDS.

See FRAUD.

STATUTE OF LIMITATION.

See LIMITATION OF ACTIONS.

STIPULATION.

See EXCEPTIONS, 2. PRACTICE, 51.

SUBROGATION.

Void Tax Sale. Where it appears that the purchaser at a void tax sale has paid the amount bid into the county treasury, and the county has retained it for a number of

years, the purchaser will be subrogated to the rights of the county in the lien for said taxes and interest on the lands sold. *Pettit v. Black*..... 52

SUBSCRIPTION.

See CORPORATIONS.

SUMMONS.

Service. A summons must be served by delivering a copy to the defendant personally, or by leaving a copy at his usual place of residence. Service by leaving a copy at his place of business is not sufficient. *Aultman & Taylor Co. v. Steinan*..... 109

SURETY.

See PRINCIPAL AND SURETY. REPLEVIN, 4.

TAXES.

1. **Judicial Sale:** TAX DEEDS. Under the appraisement law of 1875 [Laws, 1875, p. 60], which requires appraisers to enumerate liens and incumbrances upon real estate levied upon by execution, etc., tax deeds should not be included. A party claiming under such deeds holds adversely, and must rely upon his title. *Sessions v. Irwin*..... 5

2. **Injunction.** Tax payers of the proper county may maintain an action for themselves and all other tax payers of the county, to restrain the county commissioners from an illegal exercise of their powers to the injury of such tax payers. *Normand v. Otoe County*..... 18

3. ———: RELIEF GRANTED. To entitle a party to such relief, it must appear that his rights will be greatly or irreparably affected by the acts sought to be restrained, and the right must be clear and the remedy at law inadequate. *Id.* 18

4. **Void Tax Sale:** INTEREST. When in a proper proceeding in court the sale of lands for taxes shall be declared void, the owner of such lands will be allowed a reasonable time, to be named in the decree, in which to pay such taxes, with interest at one per cent per month. *Pettit v. Black*... 52

5. **Subrogation.** Where it appears that the purchaser has paid the amount bid at such *void* sale into the county treasury, and the county has retained it for a number of years, the purchaser will be subrogated to the rights of the county in the lien for said taxes and interest on the lands sold. *Id*..... 52

6. **Jurisdiction.** When an action is commenced by the owner of lands for the purpose of having a tax deed declared void, the court will, when prayed for in the answer, retain jurisdiction for the purpose of foreclosing and enforcing the lien of the defendant for the taxes and interest. *Id*..... 52

7. **Title to Property.** Where, in an action *quia timet* for the purpose of declaring tax deeds void, it appeared that plaintiff had been in possession of the land for fifteen years, and the only question of title which could be raised was between the plaintiff and his wife—*held*, that the title of plaintiff was good as against the grantee in the tax deeds, and for the purposes of the action; *held*, also, that while the wife did not join in the action, she will be presumed to have acquiesced in the same as being brought for her benefit as well as that of her husband. *Pettit v. Black*..... 59

8. **Pleading:** PERSONALTY. In 1877 W. filed a petition in the district court praying for the cancellation of certain tax certificates, and alleging "that the plaintiff has the legal title, and is in peaceable possession," etc., of certain real estate. The tax was levied in 1873, and a sale took place in 1875, while W. was in possession and had an abundance of personal property in the county to satisfy the tax. On the trial, testimony was introduced showing W. to have been the owner and in possession of the land for a number of years prior to 1873. *Held*, that the petition stated facts sufficient after judgment to sustain the same. *Wilhelm v. Russell*..... 120

9. **Collection of Taxes:** PERSONALTY MUST BE FIRST RESORTED TO. The statute makes it the duty of the county treasurer to collect the delinquent taxes as far as possible out of personal property, and the land itself can only be resorted to when the personal property is exhausted. The law imposes this duty on the treasurer, and he cannot evade it. A sale of the land for taxes, while there is sufficient personal property of the delinquent in the county out of which to make the tax, is absolutely void. *Pettit v. Black*, 59
Wilhelm v. Russell..... 120

10. ———: EVIDENCE. A paper writing, by which a county treasurer sought to appoint I. W. E. a special deputy treasurer to collect certain taxes by distress due to Platte county, Nebraska, from the personal property of the estate of L. W. P., deceased, when offered in evidence to justify such taking in an action of replevin, was properly rejected. *Hedman v. Anderson*..... 180

11. ———. The county treasurer has no authority to distrain personal property belonging to the estate of a decedent, for taxes due from the deceased in his life time. *Id*..... 185

12. **Personal Property.** In the year 1857 the town of B. was located on the public lands, and surveyed and platted, the site being entered in 1859. The proprietors of the town reserved a block for a court house, but did not convey it to the county, and no county buildings were erected thereon. In 1871 F. erected a building on the block and occupied the same with his family until 1874, when, during the temporary absence of F. and his family, the county treasurer levied upon the buildings for delinquent taxes on *other* real estate of F., and moved the building into the street and sold it. *Held*, 1st, that the building was not personal property; 2d, that had it been it could not be moved before the sale. *Freeman v. Lynch*..... 192

13. ———. It is not the policy of the law to separate houses occupied by families from the realty, and treat such houses as personal property for the purpose of collecting taxes. *Id.* 192

14. **Tax Deed:** INJUNCTION: PLEADING. Action by the purchaser of real estate, under a foreclosure sale to enjoin the execution of a tax deed about to be made by the county treasurer, in pursuance of a sale for taxes made prior to plaintiff's purchase, on the sole ground that the mortgagors "were seized and possessed of personal property sufficient to pay the taxes due on said land." *Held*, 1st, That even if the plaintiff could raise this question, there being no allegation to the effect that the personal property was within the jurisdiction of the treasurer, this was a fatal defect in the petition; 2d, That the plaintiff, being a purchaser at judicial sale, took the land subject to the unpaid taxes and assessments, and whether the tax sale was valid or not, the taxes themselves, in either event, were a legal incumbrance subject to which the plaintiff took his title, and that he was entitled to the equitable interference of the court only

on condition that he offers to do equity, by tendering or offering to pay the full amount of taxes justly due. *Iler v. Colson*..... 331

15. **Raising Assessment.** When the assessment in one district is relatively higher or lower than that of another, the county commissioners, sitting as a board of equalization, may add to or take from the entire assessment of any particular district without notice to the individual tax payers. *South Platte Land Co. v. Buffalo County*, 7 Neb., 253, distinguished. But they cannot do so without evidence and by a mere arbitrary exercise of power. [COBB, J., dissenting.] *Dundy v. Richardson County*..... 508

16. **Assessing Improvements.** The statute requires the value of improvements upon land to be added to the value of the land in making the assessment, and not assessed separately, but where it is clear, either from the record or extrinsic evidence, that such separate assessment of improvements was intended as a separate item of the value of the real estate, a tax assessed thereon will be a valid lien upon the real estate. *Id*..... 508

17. **Land Road Tax.** The land road tax of four dollars per quarter section was repealed by the constitution of 1875. *Id*..... 509

18. **Assessment of Land not Contiguous.** Tracts of land not contiguous should be assessed separately, and a failure to do so would render a tax deed based thereon invalid; but where a party seeks to enjoin the collection of a tax upon that ground, he must set forth such facts in his petition as show the collection of the tax to be unjust and inequitable. *Id*..... 509

TENANT.

See LANDLORD AND TENANT.

TENDER.

See PAYMENT.

TITLE.

See JUDICIAL SALE. LANDLORD AND TENANT. MORTGAGE.

UNDERTAKING.

See REPLEVIN.

USURY.

General Rule. It is a salutary rule, and one that should be rigidly applied in all proper cases, that where one who is intrusted with the business of loaning money exacts for its use, either directly or indirectly, by whatsoever shift or device, interest in excess of the rate permitted by the statute, the transaction is usurious, and will be judged accordingly. *Cheney v. Eberhardt*..... 428

VENDOR AND VENDEE.

See MORTGAGE. REAL PROPERTY.

VERDICT.

See PRACTICE, 28, 34.

VERIFICATION.

See PLEADING, 7.

WAIVER.

1. **Answer:** WAIVER. Taking leave to answer is a waiver of all objections to the manner in which the previous orders of the court as to the itemization of the account sued on has been performed—no exception to such performance having been taken. *Mulhollan v. Scoggin*..... 201

2. **Verification of Petition.** Where a petition is not verified, or where the verification is defective, such defect will be deemed waived where no objection is made until after judgment. *Dorrington v. Meyer*..... 214

3. **Authority** of attorney to waive supersedeas bond—*State Bank v. Green*..... 297

See PAYMENT, 3. PRACTICE, 1.

WARRANTS.

See COUNTIES.

WARRANTY.

1. **Warranty.** There is no particular form of words necessary in order to constitute a warranty of soundness of a chattel. If the vendor in the sale of a horse upon being asked by the purchaser whether the horse is "all right," asserts that the horse is "all right," such assertion may be sufficient evidence of a warranty against the blindness or other unsoundness of the horse. *Little v. Woodworth* 281

2. ———. To constitute a warranty it is not necessary that the word "warrant" should be used. It is sufficient if the language used by the vendor amounts to an undertaking that the goods were as represented. *Patrick v. Leach*. 530

3. ——— A mere expression of opinion or belief—a bare affirmation, not intended or understood as a representation of the quality or character of goods, does not amount to a warranty. *Id* 530

See DAMAGES, 3.

WITNESS.

Practice: CROSS-EXAMINATION OF WITNESS: REFERENCE TO FORMER DEPOSITION. It is not proper, on cross-examination of a witness, for counsel, in order to contradict him, to read from what purports to be a deposition previously given by him, and then to ask him whether he had so testified. The correct rule in such case is first to prove the deposition to be his, and then to read it as part of the evidence in the case. After this has been done the witness may be cross-examined as to any supposed discrepancies between his testimony in court and the deposition. *Cropsey v. Averill*..... 152