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REPORTS OF CASES

IN THE

SUPREME COURT

OF

NEBRASKA.

1879–1880.

VOLUME IX.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:
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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.

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J. C. WATSON, - - -	Second District.
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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 at the July Term, 1879, and the January Term, 1880, prior to January 22, not previously reported.

The syllabus of each case in this volume was prepared by the judge writing the opinion, in accordance with Rule XIV.

The third point of the syllabus in *Moore v. Kepner*, 7 Neb., 291, corrected in *Lininger v. Raymond*, post p. 40. The rule laid down in *Kittle v. DeLamater*, 3 Neb., 325, as stated in a portion of the fifth point in the syllabus, disapproved in *Smith v. Columbus State Bank*, post p. 31. The dictum of GANTT, J., in *A. & N. R. R. v. Baty*, 6 Neb., 45, overruled in *Graham v. Kibble*, post p. 186.

The following amendments to rules of the supreme court have been made since the publication of the same in volume 5.

AMENDMENT TO RULE I., ADOPTED JANUARY TERM, 1880.

RULE I.

The regular public sessions of this court for the argument of causes will open each day of the term at 8:30 o'clock A.M., and adjourn at 1 o'clock P.M., unless for special reasons the court shall from time to time order. The residue of the day will be devoted by the court to the consideration of matters submitted.

AMENDMENT TO RULE VII., ADOPTED OCTOBER TERM, 1878.

RULE VII.

In all cases brought into the court upon error or by appeal the plaintiff in error or the appellant shall, at least fifteen days prior to the week to which the case shall be entered, furnish to the opposite party or his attorney of record a printed copy of his brief of points and authorities relied on; and within ten days thereafter the defendant in error or appellee shall furnish the plaintiff with a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court, and the others for the reporter; and the party bringing the case into this court shall hold the affirmative.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1879.

PRESENT:

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

STATE SAVINGS BANK OF SAINT JOSEPH, MISSOURI, PLAINTIFF IN ERROR, V. FRANCIS SHAFFER AND ELIAS S. MYERS, DEFENDANTS IN ERROR.

1. **Promissory Notes:** ALTERATION. Where the payee in a note changed it from $217.36 to $208.12 and transferred it before maturity to an innocent purchaser, *held*, that the alteration vitiated the note and there could be no recovery thereon.

NOTE.—An alteration is an act done upon an instrument by which its meaning or language is changed. *Oliver v. Hawley*, 5 Neb., 439. The court should determine whether the alteration is material. It is not a question for the jury. *Id. Palmer v. Largent*, 5 Neb., 223. Where an alteration was made in the date of a note, after the maker had signed it, and without his consent, *held*, that he was discharged from liability thereon. *Brown v. Straw*, 6 Neb., 536.—REP.

2. ———: ———: RECOVERY OF ORIGINAL CONSIDERATION. Where an alteration is made under an honest mistake of right, and not fraudulently and with a view to obtain an improper advantage, a recovery may be had upon the original consideration of the note. And it is the duty of the court, upon payment of costs, to permit the plaintiff to amend his petition setting up the original consideration.

3. ———: ———: ASSIGNMENT. The assignment by the payee of an altered note transfers to the assignee all the rights of the assignor to the original consideration.

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

Clarence Gillespie and *E. W. Thomas*, for plaintiff in error, cited 2 Parsons Notes and Bills, 570, 571. *Kountz v. Kennedy*, 63 Penn. State, 187. *Merrick v. Bowry*, 4 Ohio State, 61, and authorities cited in brief of attorney for defendant, on page 63. *Nevin v. De Grand*, 15 Mass., 436. *Brown v. Straw*, 6 Neb., 536. *Horst v. Wagner*, 43 Iowa, 373. *McRaven v. Crisler*, 53 Miss., 542. *Hervey v. Harvey*, 15 Maine, 357. *Duker v. Franz*, 7 Bush, 273. *Jessup v. Dennison*, 2 Disney, 150. *Wheat v. Arnold*, 36 Geo., 479. It is difficult to see how an alteration favorable to the defendant, without fraud or improper motive, can operate as a satisfaction of the note. It is clear it cannot operate to discharge the precedent indebtedness, and consequently even if the district court was right in holding that plaintiff could not recover on the note as originally made, it certainly erred in not permitting a recovery on the precedent indebtedness. *Vogle v. Ripper*, 34 Ill., 100. *Krame v. Meyer*, 32 Iowa, 566. *Matteson v. Ellsworth*, 33 Wis., 488. The application of plaintiffs to amend, so as to recover on the original consideration, under the most narrow and rigorous view of the case should have been allowed. Gen. Stat., sec. 144,

p. 546. *Johnson v. Johnson*, 11 Mass., 359. *Emerson v. Providence Hat Co.*, 12 Mass., 237.

A. R. Scott, for defendants in error, cited 2 Daniel on Negotiable Instruments, page 376. *Hewins v. Cargill*, 67 Maine, 554. *Wait v. Pomeroy*, 20 Mich., 428. *Fay v. Smith*, 1 Allen, 477. *Lewis v. Schenck*, 18 New Jersey Equity, 459. Plaintiff's remedy is against the party from whom he took the altered note for a return of the consideration given therefor. 2 Daniel Neg. Inst., 343, note 1. To insert a new cause of action is not to amend, and cannot be made an amendment under the code. 1 Nash Pleading and Practice, 303. *Johnson v. Filkington*, 39 Wis., 62. Bliss on Code Pleading, 429, 430. *Commissioners of Delaware County v. Andrews*, 18 Ohio State, 49.

MAXWELL, CH. J.

The defendants are the makers of a promissory note, of which the following is a copy:

"$217.36. FALLS CITY, Neb., Sept. 5, 1877.

"Ninety days after date, we, or either of us, promise to pay C. L. Keim or order two hundred and seventeen $\frac{36}{100}$ dollars for value received, negotiable and payable without defalcation or discount, and interest from maturity until paid at the rate of twelve per cent per annum, and ten per cent attorney's fee if collected by suit. Payable at the Falls City Bank, Falls City, Nebraska.

"FRANCIS SHAFFER.
"ELIAS S. MYERS."

The note was delivered to Keim, who before the maturity thereof, without the consent of the makers, changed the amount of the note from $217.36 to $208.12, and transferred the same by indorsement to the plain-

tiff, who brought an action on the note in the district court of Richardson county. On the trial of the cause the court excluded the note as evidence and refused to permit an amendment of the petition setting up the original consideration of the note. Judgment having been rendered in favor of the defendants, the plaintiff brings the cause into this court by petition in error.

In *Brown v. Straw*, 6 Neb., 536, this court held that the alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. The reason is, that the agreement is not the one into which the defendant entered; its identity is changed and another is substituted without his consent. And the policy of the law is to permit no tampering with written instruments. The note, therefore, having been changed in a material part, without the consent of the makers, is void in whosesoever hands it may afterwards be placed. The court therefore did not err in excluding the note as evidence.

Where, however, an alteration is made under an honest mistake of right, and not fraudulently and with a view to gain an improper advantage, a recovery may be had upon the original consideration of the note.

In *Merrick v. Bowry & Sons*, 4 Ohio State, 60, the supreme court of Ohio held that a recovery upon the original consideration could be had in such cases, and the reasoning of the court, after reviewing the authorities, appears to be unanswerable. To the same effect see also *Matteson v. Ellsworth*, 33 Wis., 488.

Proof of the original consideration could only be given under an amended petition setting up such consideration. Should the court therefore have permitted such amendment?

Section 144 of the code provides, that the court may, in furtherance of justice, permit an amendment

when it does not substantially change the cause of action or defense. Gen. Stat., 546. Does the proposed amendment change the cause of action? We think not. At common law, a plaintiff set up his cause of action in several counts, as for goods sold and delivered, for money had and received, on an account stated, etc., because the power of the court to grant an amendment of the pleadings was exceedingly limited. But if the plaintiff proved his cause of action under any one of the counts in his declaration, he was entitled to recover. The code has abolished the common counts so far as the statement of the cause of action in various forms is concerned, because ample authority is given to the courts to permit amendments in furtherance of justice. But will it be supposed that the legislature did not intend the code to have as broad an application in the amendment of pleadings as the plaintiff had in the statement of his case and proof at common law? No one will contend that such is the case.

As, in this case, it appears that the alteration was not made with fraudulent intent, the amendment sought, as it did not materially change the cause of action, should have been allowed. Such amendments, however, ordinarily should be made upon terms as to payment of costs, as it is the duty of the plaintiff to state his cause of action correctly in the first instance.

As to the right of the plaintiff to recover, as the assignee of Keim, there is no question. Had the note been valid, the plaintiff would have taken the entire legal title to the same, discharged of all equities between the original parties, and the assignment transferred to the plaintiff all the interest of Keim to the original consideration.

The judgment of the district court is reversed and the cause remanded, with instructions to permit an amend-

ment of the petition, setting up the original consideration of the note, upon the payment of all costs, up to the time leave was asked to file the amended petition, except costs of summons and service thereof; the costs in this court to be taxed to the defendants.

JUDGMENT ACCORDINGLY.

JOHN BRAHMSTADT AND HENRY C. KLEINSCHMIDT, A FIRM DOING BUSINESS UNDER THE NAME OF BRAHMSTADT & KLEINSCHMIDT, AND FREDERICK W. LIEDTKE, PLAINTIFFS IN ERROR, V. WILLIAM MCWHIRTER, DEFENDANT IN ERROR.

1. **Assignments.** An assignment for the benefit of creditors, which authorizes the assignee to "sell and dispose of the property, and generally convert the same into money, upon such terms and conditions as in his judgment may appear just and for the interest of all parties interested," is not void upon its face.

2. ———. An assignment for the benefit of all creditors, being as between them just and equitable in its nature, will not be declared void, unless it is clearly so.

3. ———: ASSIGNEE. The clerk of a district court may act as assignee, and his approval of his own bond does not render his acts void. But he may be required at any time to give additional security.

ERROR to York county district court, where the cause was tried before POST, J. The opinion states the case.

France & Sedgwick, for plaintiffs in error, cited *Townsend v. Stearns*, 32 N. Y., 209. *Gay v. Bidwell*, 7 Mich., 519. *Norton v. Kearney*, 10 Wis., 443. *Hoffman v. Mackall*, 5 Ohio St., 124. *Sackett v. Mansfield*, 26 Ill.,

21. *Grover v. Wakeman*, 11 Wend., 187. *Coverdale v. Wilder*, 17 Pick., 181. *Mann v. Witbeck*, 17 Barb., 392. This case does not come within the rule laid down in *McCleery v. Allen*, 7 Neb., 21. In this case, the selling and disposing of the property are left entirely to the discretion of the assignee; but that discretion is to be exercised within legal limits; and the law implies a restriction not inserted in express words, and will not defeat an instrument by inferring that the assignor contemplated an illegal act. *Kellogg v. Stauson*, 11 N. Y., 302. *Nye v. Van Husan*, 6 Mich., 329. *Whipple v. Pope*, 33 Ill., 334. *Higby v. Ayers*, 14 Kas., 331. *Hoffman v. Mackall*, 5 Ohio St., 124. *Whitney v. Krows*, 11 Barb., 198. *Southworth v. Sheldon*, 7 How. Pr., 414. Ang. on Assignments, 209, 215. Burrill on Assignments (2d ed.), 217, 220. The assignment is not void because the assignee was clerk of the district court, and as such clerk filed and approved the bond of himself and sureties. The validity of the assignment does not depend upon the bond of the assignee, and the assignment is valid, even if the assignee should fail to give any bond, as the district court has control of the assignee, and can dismiss him from the trust if he refuse to give a bond as required by law; and to hold this assignment void would be to give the creditors preference, instead of preventing such preference. Session Laws, 1877, page 25. *Heckman v. Messinger*, 49 Pa. St., 465. *Beck v. Parker*, 65 Pa. St., 265. *Price v. Parker*, 11 Ia., 144.

Scott & Giffen, for defendant in error, cited 2 Parsons on Contracts, 505. *Hutchinson v. Lord*, 1 Wis., 349. *Schufeldt v. Abernethy*, 2 Duer, 533. The assignment in this case clearly gives an authority to sell on credit, for it gives the assignee the same powers of disposition over the property as the assignors. A sale is either

for cash or upon credit, and the terms of a sale mean the space of time granted the debtor to discharging his obligation; and in conveyances, the time of paying the consideration. *Le Roy v. Beard*, 8 How., 451. *Hutchinson v. Lord*, 1 Wis., 249. Bov. Dict., title "Terms." The assignment is void also, not simply because the clerk filed and approved the bond of himself and sureties, but because the assignee is clerk of the district court. The two positions of assignee and clerk of the court are so far inconsistent with each other, that it is against the policy of the law that the clerk should act in such capacity; and under the law of 1877 he would frequently have to issue process against himself, and perform many other acts where the two positions would be directly opposite. Laws, 1877, p. 24, secs. 8, 10, 15, and 18.

MAXWELL, CH. J.

The plaintiffs were a firm doing business at York, in this state, and being unable to pay their debts in full, made an assignment for the benefit of their creditors to Frederick W. Liedtke, clerk of the district court of York county. The defendant, who was a creditor of the plaintiffs, commenced an action against them by attachment, in the county court of York county. The county court sustained the attachment, which judgment was affirmed by the district court. The plaintiffs bring the cause into this court by petition in error.

But two questions are involved in the case: *First*, Is the assignment void on its face as to creditors? *Second*, Can the clerk of a district court act as assignee?

The deed of assignment recites that: "Whereas the said co-partnership is justly indebted in sundry considerable sums of money, and has become unable to pay and discharge the same with punctuality or in full,

and the said parties being desirous of making a fair and equitable distribution of all their property and effects among their creditors, now therefore," etc. The assignment also contains this provision: "The said party of the second part (the assignee) shall take possession of all and singular the lands, tenements, and hereditaments, property, judgments, and effects hereby assigned, and sell and dispose of the same, and generally convert the same into money upon such terms and conditions as in his judgment may appear just and for the interest of all parties concerned."

It is claimed that this provision renders the instrument void on its face. It will be perceived that the authority is to convert the property into *money*, not to sell upon credit. The words "terms and conditions," taken by themselves, might imply an authority to sell on credit, but construing the entire instrument, it is clear that no such power was intended.

In *McCleery v. Allen*, 7 Neb., 22, the assignment, after providing for a sale for cash, contained these words: "And to dispose of the same in any manner whatsoever as freely and lawfully as the assignor could do himself, which the said party of the second part, trustee as aforesaid, may deem advisable to do, tending in his opinion to convert the same into money for the benefit of all interested." It was held that this was authority not only to sell on credit, but to exchange the property assigned for notes, bonds, mortgages, or other forms of indebtedness, and the assignment was held to be void on its face. And we adhere to that decision. The reason is, the terms of an assignment cannot extend the time of credit between debtor and creditor. The creditor whose debt is due cannot be compelled by the terms of the assignment to wait until such time as the trustee sees fit before the property is applied to the payment of his debt. And if by its

terms such power is given, the instrument will be void upon its face as tending to "hinder and delay" creditors. That the property cannot be applied at once to the payment of the debts will not invalidate the instrument, if the delay is such as necessarily results from a reasonable exercise of the power given to the trustee, and is not the result of the conditions of the instrument.

In *Keep v. Sanderson*, 2 Wis., 42, and S. C., 12 Id., 391, it was held that a provision similar to the one cited above was authority to sell on credit, and it was void as to creditors.

Those cases were cited in the case of *McCleery v. Allen*, 7 Neb., 24, not as an indorsement of the doctrine, but to show the extent to which the courts of the several states had gone in holding an assignment void on its face. Such words, in our opinion, do not necessarily give the trustee the power to sell on credit, and an assignment for the benefit of all the creditors of a debtor will not be declared void on its face, unless it is clearly so.

In the vicissitudes of business, when a debtor finds that he is unable to pay all his debts and makes an assignment for the benefit of all his creditors, all that the law requires is a faithful application of the property to the payment of the debts without unreasonable delay.

As to the objection that the assignee being clerk of the district court, and could not therefore approve his own bond, it is at most a mere irregularity, and does not render the assignment void on its face. The bond is sufficient in form and amount and is signed by a large number of persons as sureties, and there is no objection made that it is not sufficient. And the trustee may at any time, when thought necessary, be required to give an additional bond.

So far as appears, the trustee was endeavoring faith-

fully to carry out the trust at the time the action was instituted, and being for the benefit of all the creditors of the assignors the assignment is favored in law. The judgment of the district court is reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

JAMES M. ARMSTRONG, APPELLEE, V. DANIEL FREEMAN AND AGNES S. FREEMAN, APPELLANTS.

1. **Practice in Supreme Court:** REVIEW OF QUESTIONS OF FACT. It is a rule of this court that the findings of inferior tribunals upon questions of fact will not be interfered with unless found to be clearly against the weight of evidence. And this rule applies to all cases, whether they come here by petition in error or on appeal.

2. **Usury.** A. being the owner of an undivided half of certain premises, conveyed his interest to F. for the agreed price of $350, for which F. gave his note secured by mortgage on the land. In anticipation of this trade A. arranged with the plaintiff to sell him the note and security for $275 cash in hand. To save the trouble of transferring the note and security, A. requested F. to make them directly to the plaintiff, which was done. In an action against F. to foreclose the mortgage, *held*, that the transaction was not usurious, the evidence showing it to have been a *bona fide* purchase of security, and not a contrivance by the plaintiff to evade the usury laws.

W. H. Ashby and Daniel Freeman were owners in fee simple of a certain lot in the city of Beatrice, Gage

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NOTE.—Cases involving questions of usury decided in this court are *Sands v. Smith*, 1 Neb., 108. *Philo v. Butterfield*, 3 Neb., 259. *Richards v. Kountze*, 4 Neb., 206. *Cheney v. White*, 5 Neb., 261. *Cheney v. Woodruff*, 6 Neb., 151. *Keim & Co. v. Avery*, 7 Neb., 54. *Lincoln B. & S. Assn. v. Graham*, 7 Neb., 173. *Cheney v. Eberhardt*, 8 Neb., 423. *Rosa v. Doggett*, 8 Neb., 48. See also *Wortendyke v. Meehan, post.* Surety on note may plead usury as a defense. *Keim & Co. v. Avery*, 7 Neb., 54.—REP.

county. Ashby conveyed his undivided half to Freeman for an agreed price of $350, and in payment therefor Freeman gave his note, secured by a mortgage on the lot, signed by himself and wife Ashby having arranged with Armstrong to sell him the note and security for $275 cash in hand, had the note and mortgage made directly to Armstrong, who brought suit in the district court to foreclose the same. In their answer to the petition of the plaintiff, the defendants alleged that the said note, with the mortgage to secure the same, was given by the defendants to the plaintiff for the loan of $350, for two years, and that the sum of $75 was reserved by plaintiff, and taken out of said loan of $350 as illegal and usurious interest, and the said note was drawn for the full sum of $350, with 12 per cent interest thereon from the date of said note, and that the amount actually received by defendant on said loan, for which said note was given, was the sum of $275, and no more; that there was due from defendants to plaintiff on said note only the sum of $275, without interest. The plaintiff for a reply denied each and every allegation of defendants' answer. The case was tried to the court, WEAVER, J., and the court found generally for the plaintiff, and that the full amount claimed in plaintiff's petition was due from defendants to plaintiff, and a decree of foreclosure was rendered accordingly, and the plaintiff recovered his costs. To which finding and decree the defendants excepted, and from which they appeal to this court.

Colby & Hazlett, for appellants.

The transfer of interest of Ashby to Freeman in the mortgaged premises could be considered in no other light than as a shift to evade the statute. Such attempted shifts and devices, when they have been brought

before the courts have been universally held to be usurious. *Richards v. Kountze*, 4 Neb., 205. *Cheney v. White*, 5 Neb., 261. *Cheney v. Woodruff*, 6 Neb., 151. *Lowe v. Waller*, 2 Doug., 736. *Ruffin v. Armstrong*, 2 Hawks, 411. *Rose v. Dixon*, 7 Johns., 196. *Seymour v. Strong*, 4 Hill, 255. *Shanks v. Kennedy*, 1 A. K. Marsh., 65. *Schemerhorn v. Tallman*, 14 New York, 93. *Griffin v. New Jersey Oil Co.*, 3 Stockton, 49. *Mitchell v. Preston*, 5 Day, 100. *Pratt v. Adams*, 7 Paige Ch., 615. *Torrey v. Grant*, 10 Smedes & Marshalls' Reports, 89.

The evidence shows that Armstrong was in the money loaning business, and that Freeman, who was represented by Ashby in the transaction, was hard up and wanted to borrow, and the only object he had in the transaction was to obtain the money. Armstrong did nothing in the transaction but advance $275, and take Freeman's note for $350 with 12 per cent interest from date. He made no purchase, sale, trade, barter, or bargain—incurred no risk, and assumed no obligation.

Hardy & Sabin, for appellee.

Was there usury in the note and mortgage? "To constitute usury there must be a loan, or a good consideration for the forbearance of a loan in contemplation by the parties—it must be an original contract." Nebraska Digest, page 272. *Nicholls v. Fearson*, 7 Peters, 103. *McGill v. Ware*, 4 Scam., 24. *Richards v. Kountze*, 4 Neb., 205. In cases cited by defendant in 5 Nebraska, 261, and 6 Nebraska, 151, no such question was considered as is by this case presented. There the plaintiff sent his money to an agent to loan, and the agent exacted and took from the borrower a commission out of the money loaned over and above law-

ful interest. This was properly held to be usury. These cases do not apply to the suit at bar, in which the defendant borrowed no money, nor paid, nor is required to pay, any bonus, and only to pay for the land he bought. We fail to see any authority cited by defendant that tends to show such a state of facts usurious. We deem this largely a question of fact, and that the law of usury is well settled. Usury is a defense in part, and must be proved. The *onus probandi* is upon the party pleading it.

LAKE, J.

The only defense made in the court below was that of usury, and this was not sustained. The propriety of this decree seems to depend solely upon questions of fact, which, although there were no special findings, it is fairly presumable were passed upon by the district court.

It is a rule of this court that the findings of inferior tribunals upon questions purely of fact will not be interfered with, unless found to be clearly against the weight of evidence. And this rule applies to all cases, whether they come here by petition in error or on appeal.

The evidence upon the question of usury is not very conflicting, and we think not only supports the conclusion of the district court, but would hardly warrant any other. By it the following facts appear to be very clearly established:

First. That the defendant Freeman and W. H. Ashby were equal joint owners of the premises upon which the mortgage was subsequently given.

Second. That Ashby being desirous of converting his share into money offered to sell it for $350. Freeman became the purchaser at that price, for which he gave the note and mortgage now in controversy.

Third. That during the negotiations resulting in this sale, Ashby arranged with Armstrong to sell him the note and mortgage, if he obtained them, for $275 cash in hand.

Fourth. At the request of Ashby, and to save the trouble of transferring them, the note and mortgage were made directly to Armstrong, from whom Ashby then received the price which he had agreed to take for them.

These appear to be the material facts brought out by the testimony, and we see nothing in them from which the vice of usury can be legally inferred. There is no testimony to show that the sale of these premises was a mere device to evade the law, or that it was any other than *bona fide.* Ashby fixed upon a price for his interest in the land which, for aught that is shown, was reasonable, and Freeman agreed to give it, executing his note and mortgage therefor. This consideration belonged to Ashby, and he was at liberty to dispose of it as he pleased. He could retain, sell, or give it away. That he chose to sell it at a discount, which he had a perfect right to do, is no concern of Freeman. It is not shown that Armstrong had anything whatever to do with fixing the price which Freeman agreed to give Ashby for the land, or that he took any part in the trade between them.

Under the circumstances of this case we think Armstrong occupies the place of a purchaser of securities in the market, wherein, whatever may be the rate of discount, he cannot be subjected to the penalties against usury so long as he has not participated in any contrivance to evade the statute.

Such being the views of this court the judgment must be affirmed.

JUDGMENT AFFIRMED.

HATTIE MAY, PLAINTIFF IN ERROR, V. JOHN MAY, DEFENDANT IN ERROR.

Husband and Wife: THEIR POWERS TO CONTRACT ONE WITH THE OTHER: THEIR RIGHT TO SUE IN THE COURTS OF THIS STATE FOR THE ENFORCEMENT OF SUCH CONTRACT. J. M. and H. M. are husband and wife and living together in that relation. J. M. made and delivered his promissory note for value in the sum of $1,000, to one K., who endorsed and delivered the same for value to H. M. The said J. M. also made and delivered for value his other promissory note to H. M. for $728.81. Both of said notes were made and delivered and suit brought thereon by H. M. against J. M. while they were married and living together as husband and wife. *Held*, That the said notes were valid and binding contracts in the hands of H. M. against J. M., that suit was properly brought thereon by her in her own name, and that the demurrer of the said H. M. to the answer of J. M. in the district court, setting up the marriage of the parties in the nature of a plea in abatement, should have been sustained.

THIS was an action brought by Hattie May in the district court for Richardson county upon two promissory notes executed by John May, the first for $1,000 to one Kooken, and by him assigned to the plaintiff, and the second for $728.81 directly to the plaintiff. Plaintiff and defendant were husband and wife, and the notes sued on were made and delivered and suit brought thereon while they occupied that relation. The defense set up in the answer was that said plaintiff, Hattie, was the wife of said defendant, John, and to this answer a demurrer was filed, and, upon argument before WEAVER, J., overruled. Plaintiff excepted and brought the cause to this court by petition in error.

Schoenheit & Thomas, for plaintiff in error.

The common law rule has been changed by statute, in Nebraska. With us a marriage does not operate as

a gift to the husband of the wife's property, and he is not responsible for her debts contracted before the marriage. After marriage she continues to own her property and she may sue and be sued in the same manner as if she were not married. All of the reasons of the common law rules having ceased to exist, the rules themselves are no longer operative. Gen. Stat., 465. Laws 1875, 88. Laws 1877, 33. *Webster v. Webter*, 58 Maine, 139. *Going v. Orns*, 8 Kan., 85. *Faddis v. Woolomes*, 10 Kan., 56. *Jones v. Jones*, 19 Iowa, 236. *Logan v. Hill*, Id., 491. *Butler v. Butler*, 8 Cent. Law Jour., 295. *Wilson v. Wilson*, 36 Cal., 447. *Simmons v. Thomas*, 43 Miss., 31. *Wright v. Wright*, 54 New York, 437. Pomeroy on Remedies, sec. 240. See also *Albee v. Cole*, 39 Vermont, 319. *Huber v. Huber*, 10 Ohio, 371.

J. D. Gilman, for defendant in error.

At common law husband and wife could not enter into contracts between themselves, and had no capacity to sue each other at law, and were regarded as one person. This we claim is still the law in this state, notwithstanding the statute enlarging the right of the wife. The rights of the wife are enlarged only as to third parties, and the relationship between husband and wife is not affected or disturbed. *Aultman, Taylor & Co. v. Obermeyer*, 6 Neb., 261. *Fowler v. Trebein*, 16 Ohio State, 493. *Wallingsford v. Allen*, 10 Peters, 583. Reeves Domestic Relations, 89. *Jackson v. Parke*, 10 Cush., 550. Plaintiff must seek her remedy in a court of equity. *Lamaster v. Scofield*, 5 Neb., 148. *Turner v. Althaus*, 6 Neb., 54. It must appear from the record that the notes sued upon were the sole and separate property of plaintiff before marriage, or come to her from the rents or profits of such property, or from some

other source except her husband. This must be shown by the record before she could sue, even with such construction. This does not appear, and so far as the record discloses, she has no separate property, and did not have at the time of the marriage. *Davis v. First National Bank of Cheyenne*, 5 Neb., 242. Perry on Trusts, sec. 32.

COBB, J.

Although there is but one practical question presented by the record in this case, yet it will perhaps be found more convenient, for the purpose of its proper consideration, to divide it into two at the outset.

First. Does the making and delivery of a promissory note by a married man to his wife for a valuable consideration constitute a valid and binding contract?

Second. Can a married woman while living with her husband maintain an action against him on a promissory note made and delivered by him to her since the marriage?

It will be readily conceded that unless we find authority for an affirmative answer to these questions in our statutes they must both be answered in the negative. The sections of our statute applicable to the first branch of our inquiry are as follows:

SECTION 1. The property, real and personal, which any woman in this state may own at the time of her marriage, and the rents, issues, profits, or proceeds thereof, and any real, personal, or mixed property which shall come to her by descent, devise, or bequest, or the gift of any person except her husband, or she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. [Laws 1875, p. 88.]

SEC. 2. A married woman, while the marriage relation exists, may bargain, sell, and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

SEC. 3. A woman may, while married, sue and be sued in the same manner as if she were unmarried.

SEC. 4. Any married woman may carry on trade or business and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor, or services shall be her sole and separate property, and may be used and invested by her in her own name. [Gen. Stat., 465.]

This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may use the language) to her to "bargain, sell, and convey her real and personal property, and enter into any contract in reference to it," to "sue and be sued," to "carry on trade or business and perform any labor or service on her sole and separate account," and to use and invest her earnings in her own name, contracts with her husband are not excepted.

The provisions of the statute of Maine on this subject are as follows:

"SECTION 1. A married woman of any age may own in her own right real and personal estate acquired by descent, gift, or purchase; and may manage, sell, convey, and devise the same by will, without the

joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance; except real estate conveyed to her as security or in payment of a *bona fide* debt actually due from her to her husband. When payment was paid for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase."

"SEC. 2. A woman having property is not deprived of any part of it by her marriage, since the act approved March 22, 1844, was in force; and a husband by marriage, since that time, acquires no right to any property of his wife. * * A married woman may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may in writing revoke the same."

"SEC. 3. She may receive the wages of her personable labor not performed for her own family, maintain action therefor in her own name, and hold them in her own right against her husband or any other person." Revised Statutes of Maine, 1871, p. 491.

Under this statute the case of *Webster v. Webster*, 58 Maine, 139, was commenced and decided. That was an action on a note made and delivered by the defendant to the plaintiff Jan. 22, 1861 (the above statute being then in force), and they being then married (at the date of the note) and living together as husband and wife. At the October term, 1869, they were divorced *a vinculo*. Afterwards she brought the suit on the said note, and had judgment at the superior court. On error to the supreme court it was held, that while for

purely technical reasons she could not have maintained the suit until after the divorce or the termination of the marriage relation in some other way, yet that the giving of the note created a valid contract between the parties, and that the defense of marriage (which was urged and relied upon by plaintiff in error) was purely technical. It continues only while that relation continues, and ceases with its termination. The judgment was affirmed.

The statute of Kansas in relation to the rights of married women is identical with our own. Under its provisions the supreme court of that state has held, in a case where a married woman living with her husband bought a horse from him and paid him for it out of her separate money—how or when acquired by her is not stated—which horse was soon afterwards levied upon by a constable by virtue of an execution against the husband, that she could maintain replevin against the constable for the horse. Thus necessarily holding that the husband and wife, while living together in that relation, were competent to make legal and binding contracts with each other, so as to pass the title of property *ex vi termini*. *Going v. Orns*, 8 Kansas, 85, which case has been followed by later cases in that state.

In the state of Iowa, under a statute somewhat different from ours, though not different in principle, it was held in a case where, during the marriage relation, the husband borrowed money from his wife and gave her his note for it, that the same was a valid and binding contract, and that he being deceased she could maintain suit thereon against his administrator. *Logan v. Hall*, 19 Iowa, 491.

As long ago as 1841 it was held by the supreme court of Ohio that a note given by a husband to his wife for a loan of money by her to him, out of a dower interest received by her from the estate of a former

husband, created a legal obligation which—the maker of the note having deceased—would be enforced against his administrator. *Huber v. Huber's Administrator*, 10 Ohio, 371, which case was followed in 1857 in *Wood v. Warden*, 20 Ohio, 518.

In none of the above mentioned states has the legislature passed any act which in terms changes the common law in regard to the nature and character of the marriage relation or the unity of the persons of husband and wife, and the above cases must of necessity have gone upon the theory that the statutes of the said states respectively defining the rights of women in the marriage relation in respect to the ownership, control, and disposition of property, have in effect done away with the technical unity of husband and wife as formerly existing at common law. At least such is my opinion. So that when our statute says 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 the same manner, to the same extent, and with like effect as a married man may," etc., it means that she may sell the same to, or contract with reference to the same with, anybody who is generally competent to contract, and that the other contracting party will be bound by such contract regardless of whatever relations may exist between them.

I come, therefore, to the conclusion that the plaintiff in error was competent to receive the said note set forth in the first cause of action set out in the petition from the said Josiah Kooken, and the same constitutes a legal cause of action in her hands against the defendant in error. Also that the note made and delivered by the defendant in error to the plaintiff in error, as set forth in the second cause of action in the said petition, is a legal and binding contract between the parties.

We then come to the final and perhaps most important question, can the plaintiff in error maintain this action against the defendant in error in the district court while they are living together as husband and wife?

I have been able to find but one adjudicated case exactly in point— *Wilson v. Wilson*, 36 Cal., 447. In this case, in 1856, the defendant, William Wilson, executed two notes in favor of the plaintiff, Orpha Wilson, one for one thousand dollars and one for thirteen hundred dollars, each payable five years from date. In 1857, before the maturity of the notes, plaintiff and defendant intermarried and were living together as husband and wife at the time of the bringing of the suit. Defendant demurred, relying upon two grounds, *

* * secondly, that the facts do not constitute a cause of action in favor of the wife against the husband. The district court sustained the demurrer, and rendered judgment for defendant. On error to the supreme court the judgment of the district court was reversed. In the opinion of the court, C. J. Sawyer says: "The present policy of the law is to recognize the separate legal and civil existence of the wife, and separate rights of property, and the very recognition by the law of such separate existence and rights at law, as well as in equity, to hold and enjoy separate property, involves a necessity for opening the doors of the judicial tribunals to her in order that the rights guaranteed to her may be protected and enforced."

In the state of New York the commission of appeals some four years ago considered and decided a case quite in point so far as the power of the wife to maintain an action against the husband is concerned. But in that case the note was given before marriage and in consideration of a promise to marry, and the parties had separated before the suit was brought. In the

opinion the commission, by Reynolds, C., say: "The plaintiff therefore has a valid obligation against the defendant, which in some form, either at law or in equity, or in both, she can enforce in the courts. The supreme court in which the action was tried has 'general jurisdiction both in law and equity,' and it had jurisdiction of the persons of both parties to this controversy, and could give judgment according to the very right of the case regardless of form, and in furtherance of the ends of justice might amend pleadings, conform pleadings to facts proved, etc. While it is admitted that the rights of the plaintiff could be enforced by suit in equity, yet it is insisted that this being an action at law it cannot be maintained by a married woman against her husband. It might be asked by what authority the defendant names this an action at law? What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity? * * Certainly the defendant has been deprived of no legal right, and if the form of the pleadings was not agreeable to him it was very easy to have them made to conform to the facts proved by a proper application. If the complaint was not full enough to disclose the case in all its features, it was competent for the defendant to spread the facts out in his answer by way of affirmative defense or otherwise, for all that has any bearing upon the rights of the parties grew out of one and the same transaction. While regard is still to be had in the application of legal or equitable principles, there is not of necessity any difference in the mere form of procedure so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show that the plaintiff is entitled to the relief demanded, and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the action."

But need we look further than to our own statutes for authority upon which to decide this case? Our code provides that: "A woman may while married sue and be sued in the same manner as if she were unmarried." Gen. Stat., 528, Sec. 31. This capacity to sue is not limited, and no person or class of persons is excepted from its effect. If she were unmarried there could be no doubt that she could sue this same man. This statute (as I understand it) plainly provides that she can do the same thing though married to him.

In the fore part of this opinion, I have endeavored to show by authorities that by the receipt and ownership of the two notes in question, the plaintiff in error had two legal and valid causes of action against the defendant. These obligations he fails to pay. It therefore becomes necessary that an action be brought against him to enforce payment.

These notes are her separate property, which we have seen, under the provisions of the statute, "may be used and invested in her own name." But how is she to use or invest the money represented by these choses in action unless she can collect it by suit? Even under the old system of practice, and before the beneficent legislation defining the rights of married women hereinbefore quoted, this could have been done by resorting to the circuity of proceeding in the name of a trustee and a court of equity. But now, not only is the administration of law and equity vested in the one court, but all forms of procedure which heretofore distinguished legal and equitable suits are abolished, and the need of the intervention of a trustee is done away with by the statute which provides that "every action must be prosecuted in the name of the real party in interest." Gen. Stat., 528.

The conclusion is therefore irresistible that the action

at bar was properly brought, and that the district court erred in overruling the demurrer to the answer.

The judgment of the district court is therefore reversed, and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

WILLIAM SEARCH, PLAINTIFF IN ERROR, V. JAMES P. MILLER, DEFENDANT IN ERROR.

1. **Replevin:** VERDICT OF JURY. In replevin, when the property has been delivered to the plaintiff, if the jury find for the defendant, they must also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; if they find either in his favor, they must also find the value of the property, or the value of the possession of the same, and damages for withholding the property. If the verdict is silent upon those points, no judgment can be rendered for any amount whatever.

2. **Negotiable Instruments.** A negotiable promissory note is *prima facie* evidence of a sufficient consideration, but when between the parties to the instrument evidence is introduced by the defendant to rebut this presumption, the plaintiff must satisfy the jury by a preponderance of evidence that there was a consideration.

NOTE.—Property in a replevin suit had not been taken, and the action was being prosecuted for damages. Verdict thus: "We, the jury * * find for the defendant." *Held*, good. *Meredith v. Kennard*, 1 Neb., 315. Jury must assess damages. *School District v. Shoemaker*, 5 Neb., 38. *Black v. Winterstein*, 6 Neb., 224. Jury may be waived and damages assessed by the court. *Baker v. Daily*, 6 Neb., 465. Surety on replevin bond given by a plaintiff cannot maintain an action of replevin against one wrongfully dispossessing such plaintiff of the property. *Jimmerson v. Green*, 7 Neb., 26. See also as to verdicts and judgment in replevin suits. *Mercer v. James*, 6 Neb., 406. *Faulkner v. Myers*, Id., 414. *Frey v. Drahos*, 7 Neb., 194. *Hooker v. Hammill*, Id., 231. *Moore v. Kepner*, Id., 231 *Eiseley v. Malchow*, *post*.—REP.

3. **Evidence:** PREPONDERANCE. In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action.

4. **Replevin:** INSTRUCTIONS TO JURY. The jury should be informed as to which party is in possession of the property at the time of the trial; and they should be instructed by the court as to the proper mode of estimating damages in each particular case.

5. ———: ———. Instructions should be directed to the particular questions at issue, and be confined to those questions.

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

France & Sedgwick, for plaintiff in error.

1. The verdict does not comprehend the whole issue, and should have been set aside. *Warner v. Hunt*, 30 Wis., 200. *Appleton v. Barrett*, 22 Wis., 568. *Child v. Child*, 13 Wis., 17. *Smith v. Phelps*, 7 Wis., 211. *Handy v. Levin*, 5 Ohio, 228, 239, 259. *Boynton v. Page*, 13 Wend., 425. *Bemus v. Beekman*, 3 Wend., 667, 672, 674. *Black v. Winterstein*, 6 Neb., 224. *School District No. 2 v. Shoemaker*, 5 Neb., 36.

2. The court was correct in its instructions to the jury concerning the consideration of the note. *Delano v. Bartlett*, 6 Cush., 364. *Powers v. Russell*, 13 Pick., 69, 76. *Parish v. Stone*, 14 Pick., 198, 201. *Davis v. Jenning*, 1 Met., 221, 224. *Sperry v. Wilcox*, 1 Met., 267. *Commonwealth v. Dana*, 2 Met., 329, 340. *Brown v. King*, 5 Met., 173, 180. *Tourtellot v. Rosebrook*, 11 Met., 460. Story on Promissory Notes, 209 (Note 2.)

Edward Bates, for defendant in error.

1. The court committed no error in rendering judgment on the verdict in this case, inasmuch as the defendant entered a remittitur of the excess of the damages or value of the property. The verdict finds that

the defendant was entitled to the possession of the property at the commencement of this action, and one dollar for the use of the same. This will support a judgment. *Faulkner v. Meyers*, 6 Neb., 414. The verdict is good without the remittitur, as Miller was agent of Roby, the general owner of the property. *Robinson v. Fitch*, 26 Ohio St., 559. *Adams v. Neb. City Nat. Bank*, 4 Neb., 370.

2. The instruction complained of was correct. 2 Parsons on Contracts, 519. *Miner v. Bradley*, 22 Pick., 457. *Baker v. Higgins*, 21 N. Y., 397. *Crosby v. Loop*, 14 Ill., 330. *Bank v. Topping*, 13 Wend., 557.

MAXWELL, CH. J.

The plaintiff instituted an action of replevin before a justice of the peace to recover the possession of a certain wagon, and judgment was rendered in his favor. The defendant appealed to the district court, and on the trial of the cause the jury returned a verdict in his favor, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

The verdict is as follows:

"WILLIAM SEARCH
v.
"JAMES P. MILLER.

"We the jury, duly impaneled and sworn in this case, do find and say, that at the commencement of this suit said defendant did not unlawfully detain said goods and chattels described in said plaintiff's petition, and that said defendant was, at the commencement of this action, entitled to the possession of said property; and that the value of said property was, at the time of the commencement of this suit, $70, and that the use of the same is worth $1.

"W. L. JENNINGS, Foreman."

The plaintiff objects to the verdict on the ground that it does not comprehend the whole issue made by the pleadings, and therefore it should have been set aside.

Section 191 of the code of civil procedure provides that in all cases where the property has been delivered to the plaintiff, where the jury shall find upon the issues joined for the defendant, they shall also find whether the defendant had the right of property or the right of possession only at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant; for which, with costs of suit, the court shall render judgment for the defendant. Gen. Stat., 554.

Section 7 of the act to amend the code, approved February 26, 1873 (Gen. Stat., 713), provides that the judgment in the cases mentioned in sections 190, 191, and 1041, shall be for a return of the property, or the value thereof in case a return cannot be had, *or the value of the possession of the same*, and for damages for withholding said property, and for costs of suit.

The judgment must conform in amount to the finding of the jury, and when the verdict is silent upon that point judgment cannot be rendered for any amount whatever. *Black v. Winterstein*, 6 Neb., 224.

The jury, when they find the right of possession in the defendant, must also find the value of the same, and damages for withholding the property. And if they fail to do so, no judgment for damages, or the value of the possession in case the property is not returned, can be rendered.

In this case the jury find the right of possession in the defendant, but do not find the *value* of such *right*, but proceed to find the *value of the property*. This can only be done where the jury find the right of property

in the defendant. The verdict, therefore, is not responsive to the issue made by the pleadings.

The action was instituted to recover the possession of goods taken under a chattel mortgage, the mortgage being given to secure the payment of a negotiable promissory note for the sum of $50, which the plaintiff claims was given without consideration. On the trial of the cause, the court instructed the jury as follows: "The law presumes that the note was given for a valuable consideration; therefore the burden of proof on this is on the said Search—that is, you must presume that the note was given for a valuable consideration until this presumption is overcome by evidence tending to show that there was no consideration. And, unless there is a clear preponderance of evidence going to impeach such consideration, you must regard the note as being given for a valuable consideration." The plaintiff excepted to the instruction, and now assigns the same for error.

That a negotiable promissory note imports in itself a consideration is undisputed. And such note, being *prima facie* evidence of consideration, may be given in evidence without other proof of consideration, and in the absence of opposing testimony will be sufficient to sustain a judgment founded thereon. But in an action between the parties to the instrument, when evidence has been introduced to rebut this presumption, the burden is upon the plaintiff to satisfy the jury, by a preponderance of evidence, that there was a consideration. *Black River Bank v. Edwards*, 10 Gray, 387. *Delano v. Bartlett*, 6 Cushing, 364. 1 Daniel on Neg. Inst., § 164.

The court also erred in instructing the jury that a "clear preponderance of the evidence was required to impeach the consideration." In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action.

But for the return of the officer there would be nothing in the record to show that the property had been delivered to the plaintiff. In cases of this kind the court should inform the jury as to whom the property had been delivered, and in whose possession it was at the time of the trial, and they should be instructed as to the proper mode of estimating damages in each particular case. The instructions of the court to the jury should, if possible, be brief, be directed to the particular questions at issue, and be confined to those.

For the errors above indicated the judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JAMES G. SMITH, PLAINTIFF IN ERROR, v. THE COLUMBUS STATE BANK, DEFENDANT IN ERROR.

1. **Commercial Paper:** ILLEGAL CONSIDERATION. Suit on note "indorsed and delivered by E. J., payee, to the plaintiff before maturity for value, in due course of trade." Defense that said note was given by defendant to the said E. J., for no other consideration than that the said E. J. would, and his promise that he would, wholly desist from instituting any criminal prosecution against him, the said defendant, for certain felonies which the said E. J. then accused the said defendant with having committed, and for which he threatened to have the said defendant indicted, etc., unless he would give him a note for $1000. *Held*, that the answer constituted no defense.

2. **Kittle v. De Lamater, 3 Neb., 325.** So much of the syllabus of *Kittle v. De Lamater*, 3 Neb., 325, as is in the following words: "or if the note be founded upon an illegal consideration prohibited by some positive statute, no recovery can be had though the indorsee may not be privy to the original transaction"—disapproved.

ERROR to the district court of Platte county. Tried below before POST, J. The action was brought by the Columbus State Bank on a promissory note for $1000 against Smith, the maker, which was indorsed by Johnson, payee, and delivered to said Bank before maturity. The note was dated March 8, 1877, and by its terms became due and payable January 23, 1879. To the second count of Smith's answer the Bank demurred, and the court sustaining the demurrer, trial was had on the issue joined, and judgment rendered against Smith, to reverse which he brought the cause to this court upon a petition in error.

Marlow & Munger, for plaintiff in error.

1. No recovery can be had on the note, because the contract is founded upon an illegal consideration, prohibited by the laws of this state. *Kittle v. DeLamater*, 3 Neb., 325. Gen. Stat., 765, Sec. 177.

The effect of this statute is to prohibit the making of any and all contracts for compounding a criminal offense, for to render a contract valid, there must be two or more parties competent to contract, and a subject matter which is capable of being the subject of a contract. Under this statute there could be no valid contract, because if one of the parties is prohibited from entering into the contract, then there are not two contracting parties, and the subject matter being prohibited, then there was no subject matter to contract in reference to. But it may be said that the act of compounding a criminal offense is not prohibited by this statute, that the statute only inflicts a penalty upon the party receiving any reward or promise of reward for such act. We think, however, the law to be well established, that when a statute inflicts a penalty for doing an act, such act is unlawful, though not in

terms prohibited or declared to be illegal, and any contract, the consideration of which is founded upon the doing of such act, is void. *Griffith v. Wells*, 3 Denio., 226. *Reynolds v. Nichols & Co.*, 12 Iowa, 398. *Guenther v. Dewien*, 11 Iowa, 133. *Dalson v. Hope*, 7 Kansas, 161. *Sedg. on Stat. & Con. Law*, 69, 70, and 71. *Craig v. State of Missouri*, 4 Peters, 409. *Melchoir v. McCarty*, 31 Wis., 552. *Siter v. Sheets*, 7 Ind., 132. *Bloom v. Richards*, 2 Ohio State, 387. *Rossman v. McFarland*, 9 Ohio State, 369.

2. No recovery can be had because the contract was *malum in se.* Chitty on Bills, 94.

That no criminal prosecution had been commenced—that such a prosecution was only threatened, and the note was given to suppress and prevent the institution of a criminal prosecution—does not change the character of the transaction, but the act falls within the rule, which renders the contract void. *Roll v. Raguett*, 4, Ohio, 400. *James v. Roberts*, 18 Ohio, 548. *Raguett v. Roll*, 7 Ohio, 269.

Whitmoyer, Gerrard & Post, for defendant in error.

Illegality of consideration will not affect a note in the hands of a *bona fide* holder unless expressly declared void by statute. Mere prohibition under penalty is not sufficient. 1 Parsons, on N. & B., 279. Story on Promissory Notes, Sec. 192. Edwards on N. & B., star pages 337, 340, 341, *et. seq.* Chitty on Bills (11 American Ed.), star pages 81 and 95. *Bacon v. Lee*, 4 Iowa, 439. *Johns v. Bailey*, 45 Id., 241. *Clark v. Ricker*, 14 N. H., 44. *Quirk v. Thomas*, 6 Mich., 109. *Johnson v. Meeker*, 1 Wis., 378. A careful examination of the cases cited by counsel for plaintiff in error will disclose the fact that in none of them are the rights of a *bona fide* holder involved or discussed.

With due respect for the high character and ability of the author in *Kittle v. DeLamater*, 3 Neb., 325, we submit that the proposition therein laid down is directly in conflict with the rule enunciated by all elementary writers on the subject, and with the doctrine of most, if not all, of the well considered cases in this country and England. Nor could such have been the conclusion reached by the other members of the court, for it appears, page 337, that the judgment of the district court was reversed solely on account of the rejection of evidence tending to show that the holder of the note took it with notice of the matters relied upon as a defense; in other words, was not a *bona fide* holder.

COBB, J.

The only question presented for the consideration of this court in this case is, did the district court err in sustaining the demurrer of the defendant in error to the second count or ground of defense stated in the answer of the plaintiff in error? The petition is in the usual form, setting out a copy of the note, averring that Edward Johnson (the payee) "indorsed and delivered said note to the plaintiff before maturity thereof for value in due course of trade," &c. The count or defense demurred to is as follows: "And for second and further defense, this answering defendant says, that at the time said note was executed, and before it was delivered by this answering defendant to said Edward Johnson, he, the said Edward Johnson, accused this answering defendant with having committed the crime of felonious assault with intent to commit a rape upon the person of Mary Johnson, wife of Edward Johnson, payee in said note mentioned, on the 7th day of December, 1875, in the county of Dodge, state of Nebraska. That said Johnson, at the same

time, further accused this answering defendant with having committed the crime of rape upon the person of said Mary Johnson, on the second day of February, 1876, in the county of Douglas, in the state of Nebraska. That before the said note was executed and delivered to the said Johnson, he, the said Johnson, then threatened, and was about to institute, criminal prosecutions against this answering defendant, and cause a judicial investigation to be made touching said supposed felonies, and threatened this answering defendant that, unless he would give said Johnson his promissory note for the sum of one thousand dollars, he would subject him to undergo an examination before some judicial tribunal for said supposed offenses, and would endeavor to have him indicted and sent to the penitentiary for the same, but at the same time promised and agreed with him that if he would give said promissory note for one thousand dollars he would altogether desist from instituting any criminal prosecution for said supposed offenses; and for no other consideration he did execute and deliver to the said Johnson the note in plaintiff's petition described. Wherefore," &c.

Do the facts stated in this defense constitute a defense to the cause of action stated in the petition?

Edwards, in his work on bills of exchange and promissory notes, states the rule concisely, and, as I think, correctly, as follows: "When a negotiable instrument has passed, in the ordinary course of business, into the hands of a *bona fide* holder, for a valuable consideration, without notice, the general rule is that the defendant cannot avail himself of a defense founded on the illegality of the note or bill in its inception. There are exceptions to this rule: such as the case of a note given upon an usurious consideration, or for money lost by gambling, such notes and securities be-

ing declared by statute to be absolutely void." Edwards on Bills of Exchange and Promissory Notes, 337.

Tested by this rule, it will be readily seen that, while the note was illegal and uncollectible as between the original parties, yet that the answer states no defense to it in the hands of the plaintiff, as it does not deny the averments in the petition, that "the said Johnson indorsed and delivered the said note to the plaintiff before maturity thereof for value in due course of trade." Nor does the said answer bring the case within either of the exceptions named.

It is true that the facts stated would present a complete defense to the note in the hands of the payee. But they constitute no defense against the note in the hands of a *bona fide* holder who has received it for value before maturity, in the due course of business, and without notice of illegality in its inception.

The supreme court of North Carolina states the rule correctly in the following words: "If a statute declares a security void, it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or one claiming under such holder. *Glenn v. The Farmers' Bank of North Carolina*, 70 N. C. Reports, 191. The rule is stated the same, in substance, in New York, *Vallett v. Parker*, 6 Wend., 615, and in Virginia in the well-reasoned case of *Taylor v. Beck*, 3 Rand., 316.

Having carefully considered the case of *Kittle v. De Lamater*, 3 Neb., 325, with the authorities there cited, I cannot agree to the proposition contained in the fifth clause of the syllabus, which is in the following words: "Or if the note be founded upon an il-

legal consideration, prohibited by some positive statute, no recovery can be had, even though the indorsee may not be privy to the original transaction," and which is expressed in the body of the opinion in the following language: "But again, it is contended that the note is good in the hands of the indorsee, though it may not be valid as between the original parties. This is true as a general principle of law, but there are exceptions to this general rule, and these exceptions may be embraced in three classes. * * * * In the second class the indorsee may not be implicated in or privy to the original transaction between the parties; yet there can be no recovery on the notes if the contract was founded on an illegal consideration prohibited by some positive statute, or the performance of which is *malum in se.*"

In my view of the law, in order to prevent a recovery in the case stated in the above exception, the case must come within some statute expressly declaring notes given for such consideration void.

Therefore, as that portion of the answer demurred to did not state a defense to the cause of action set out in the petition, the demurrer was properly sustained by the district court, and its judgment must be affirmed.

JUDGMENT AFFIRMED.

EMILIE SCHAFFRONECK, PLAINTIFF IN ERROR, V. JOSEPH MARTIN, DEFENDANT IN ERROR.

Bill of Exceptions. Under the provisions of the act to amend secs. 308 and 311 of the code [Laws 1877, p. 12] the clerk of the court can settle and sign a bill of exceptions only in case of the death of the judge, and not in case of his resignation.

ERROR from Madison county district court.

J. K. P. McCallum, for plaintiff in error.

W. M. Robertson, for defendant in error.

MAXWELL, CH. J.

On the twenty-second day of January, 1879, the defendant recovered a judgment against the plaintiff for the return of certain goods and chattels, or in case a return cannot be had the value thereof in money. The plaintiff brings the cause into this court by petition in error.

The defendant contends that there is no bill of exceptions. The certificate to what purports to be a bill of exceptions is as follows:

"I, A. J. Thatch, clerk of the district court of Madison county, Nebraska, upon sufficient proof being made to me that Hon. E. K. Valentine, the judge who tried this cause, has resigned his said office as judge, and having examined the foregoing bill of exceptions, I

NOTE.—Prior to the passage of the act of 1877, bills of exceptions should have been settled and signed at the same term at which the trial took place. *Monroe v. Elbert*, 1 Neb., 375. *Heady v. Fishburn*, 3 Neb., 265. *Mewis v. Johnson Harvester Co.*, 5 Neb., 217. As to time when bill must be presented and signed since passage of the act of 1877, see *Leighton & Brown v. Stuart*, 8 Neb., 96. *First National Bank v. Bartlett*, Id., 319. When formal bill of exceptions not required, see *Morrow v. Sullender*, 4 Neb., 375.—REP.

hereby certify the same to be a true copy of all the evidence offered in this cause, with plaintiff's exceptions thereto, and of the instructions of the court given to the jury, and refused by the court, as appear from the official reporter's report of said testimony and the records of this office.

"Witness my hand and official seal this 8th day of March, 1879.

"A. J. THATCH,
"Clerk District Court."

The act to amend sections 308 and 311 of the code of civil procedure, approved February 15, 1877, provides: "In case of the *death* of the judge after the exceptions are taken and before the bill is signed by the court, it shall be the duty of the clerk to settle and sign the bill in the same manner as the judge is by this act required to do." [Laws 1877, p. 11, 12.]

The right to a bill of exceptions is purely statutory. *Taylor v. Tilden*, 3 Neb., 339. *Kellogg v. Huntington*, 4 Id., 96. And no one has authority to sign such bill unless authorized by statute. The statute provides that in case of the death of the judge the clerk may sign the bill, but this does not authorize him to sign it in case of his resignation. The so-called authentication of the bill of exceptions is therefore a nullity. The instructions are, under our statute, a part of the record, but as there is no testimony before the court, we cannot determine whether the court erred in giving or refusing instructions.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JACOB B. LININGER, ASSIGNEE, PLAINTIFF IN ERROR, V. ISAAC M. RAYMOND AND OTHERS, DEFENDANTS IN ERROR.

1. **Assignments.** An assignment for the benefit of creditors of "all the lands, tenements, hereditaments, goods, chattels, property, and choses in action, of every name, nature, and description, wherever the same be" (except such property as is exempt by law from execution), is not void on its face.

2. ———. A provision in an assignment that an assignee may compromise choses in action when he deems it expedient to do so, *held*, to give authority to compromise only doubtful claims.

3. ———. A reservation in an assignment to pay over to the assignor "the rest, residue, and remainder, if any there be after paying said costs, charges, expenses, and debts as aforesaid," does not render an assignment void on its face.

4. ———: PRACTICE. Under the statute the entire proceedings are under the supervision and control of the district court or the judge thereof, and it is the duty of the court or judge, upon proper application, to see that the assignee properly discharges the duties of his trust.

5. **Sureties on Appeal Bond:** JUDGMENT. When, on appeal from a justice of the peace or a county judge to the district court, judgment is rendered against the appellant, it may also be rendered against the surety on the *appeal* bond. But this rule does not apply to an ordinary undertaking in replevin. The third head note of *Moore v. Kepner*, 7 Neb., 291, corrected.

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

James E. Philpott (*Brown, Marshall & Caldwell* with him), for plaintiff in error, cited Bump on Fraudulent Conveyances, 347, 404, 408, 409. *Evans v. Chapin*, 20 How. Pr., 289. *Dow v. Platner*, 16 N. Y., 562. Burrill on Assignments, §§ 96, 134, 228. *Strong v. Carrier*, 17 Conn., 319. *Robins v. Embry*, 1 Smedes & Marshalls' Ch., 207. *Pingree v. Comstock*, 18 Pick., 46.

Mulford v. Shirk, 26 Penn. State, 473. *Derby v. Weyrich*, 8 Neb., 174. *Garnor v. Frederick*, 18 Ind., 507. *Brooks v. Nichols*, 17 Mich., 38. *Smith v. Mitchell*, 12 Mich., 180. *Heckman v. Messinger*, 49 Pa. St., 465. *Bellows v. Partridge*, 19 Barb., 176. *White v. Monsarrat*, 18 B. Monroe, 809. *Price v. De Ford*, 18 Md., 489. *Watkins v. Wallace*, 19 Mich., 57. *Wilt v. Franklin*, 1 Binn., 514. *Finlay v. Dickerson*, 29 Ill., 9. *Whipple v. Pope*, 33 Ill., 334.

Harwood & Ames, for defendant in error.

The instrument offered in evidence as an assignment was properly excluded.

1. Because it was not recorded within the time and in the manner contemplated by statute, and is therefore void. Laws of 1877, p. 26, §§ 1 and 7. Gen. Stat., 248, § 5. *Hooker v. Hammill*, 7 Neb., 234.

2. Because it contains no description of the property assumed to be conveyed. Bump on Fraudulent Conveyances, 347, 349. *Drakeley v. DeForest*, 3 Conn., 273. *Wilt v. Franklin*, 1 Binn., 514. *Burd v. Smith*, 4 Dall., 76. *Crow v. Ruby*, 5 Mo., 484.

3. Because it contains reservations for the benefit of the debtors. *Nichols v. McEwen*, 17 N. Y., 22. *Clark v. Robbins*, 8 Kan., 574.

4. Because it confers upon the assignee authority "to compound for choses in action" (of the assignors), "taking a part for the whole, where the said party of the second part" (the assignors) "*deems it expedient to do so*," and otherwise confers unrestricted authority upon the assignee. *Hutchinson v. Lord*, 1 Wis., 286. *Haines v. Campbell*, 8 Wis., 187.

5. Because the assignment purports to be a joint conveyance by the partnership and the individuals composing it, and it therefore confuses the separate

funds which partnership and individual creditors are each respectively entitled to have applied to the satisfaction of their claims.

MAXWELL, CH. J.

On the 30th day of January, 1878, Crabtree, Travis & Co. made an assignment to the plaintiff for the benefit of creditors, the deed of assignment being recorded on the next day. On the 6th day of February, 1878, the defendants commenced an action against Crabtree, Travis & Co., and attached the property of said parties in the hands of said assignee. A few days thereafter the plaintiff instituted an action of replevin in the district court of Lancaster county, and recovered possession of the goods taken under the attachment. On the trial of the cause, the plaintiff offered in evidence the assignment from Crabtree, Travis & Co. to himself, to which the defendants objected. *First*, Because the instrument is void on its face, as it does not describe any of the property it attempts to assign, or where it is situate. *Second*, It excepts such property as is exempt from execution. *Third*, Because the assignee has the right to compromise choses in action when he deems it expedient. *Fourth*, Because there is a reservation for the benefit of the assignor. *Fifth*, Because the partnership assets are first to be applied to the payment of partnership indebtedness, and individual property to individual indebtedness, etc.

The objections were sustained and the assignment excluded, to which the plaintiff excepted. Judgment having been rendered in favor of the defendants, the plaintiff brings the cause into this court by petition in error.

Is the instrument void on its face because it fails to describe the property?

Section 1 of the act relating to voluntary assign-

ments for the benefit of creditors, approved February 19, 1877 (Laws, 1877, p. 24), provides: "that in every case in which any person shall make a voluntary assignment of his estate, real or personal, or any part thereof, to any person or persons in trust for his creditors, it shall be the duty of the assignee or assignees, within thirty days after the execution thereof, to file in the office of the clerk of the district court in the county in which the assignor shall reside, an inventory of all the estate or effects so assigned, accompanied with an affidavit of such assignees that the same is a full and complete inventory of all such estate and effects, so far as the same has come to their knowledge."

Section 2 provides that "the district court of such county, or judge thereof in vacation, shall, upon application of such assignee or assignees, appoint three disinterested and competent persons to appraise the estate and effects so assigned; and said appraisers, having first taken an oath or affirmation before some person having authority to administer oaths, to discharge their duty with fidelity, shall forthwith proceed to make an appraisement of the estate and effects assigned according to the best of their judgment, and said appraisers shall receive the same compensation as is allowed by law to appraisers of real estate taken upon execution."

Section 3 provides that "the assignee shall give bond with one or more sufficient sureties, to be approved by the clerk of the court, in double the amount of the appraised value of the estate," etc.

The grant in the assignment in this case is as follows: "Now, the said party of the first part (Crabtree, Travis & Co.), and the said James W. Crabtree, George W. Travis, and Matthew W. Crabtree, as said individuals as aforesaid, for and in consideration of the premises and of one dollar in hand to the party of the

first part paid, and the further sum of one dollar to each of the said parties—James W. and Matthew W. Crabtree and the said Travis—paid by the said party of the second part, all of the lands, tenements, hereditaments, chattels, property, and choses in action of every name, nature, and description, wherever the same be (except such property as is exempt by law from execution) ", etc.

In *Pingree v. Comstock*, 18 Pick., 46, a description in an assignment of real estate, as " all the lands, tenements, and hereditaments," was held sufficient, and in *Emerson v. Knower*, 8 Pick., 63, property was described as " quantities of leather and stock, designed for the manufacture of boots and shoes, and also of boots and shoes already made or partly made." It was held sufficient.

In *Strong v. Carrier*, 17 Conn., 319, a deed of assignment conveying all the assignor's estate, real and personal (except such as was by law exempt from execution), without any description of such estate, was held sufficient upon the ground that under the provisions of the statute two months were allowed for making an inventory after the deed was filed for record. To the same effect see also *Clarke v. Mix*, 15 Id., 152.

In *Kellogg v. Slauson*, 15 Barb., S. C., 1 Kernan, 302, property was described as " all and singular the goods and chattels, merchandize, bills, bonds, notes, book accounts, claims and demands, choses in action, books of accounts, judgments, evidences of debt, and property of every name and nature whatever." It was held that the omission of an inventory, or further specifications, was not conclusive evidence of fraud, but a circumstance to be considered by the jury.

In *Brashear v. West*, 7 Peters, 608, the objection that an assignment was in general terms, and that no schedule was annexed, did not invalidate it.

It is clear, under a statute providing for filing a schedule of the property within thirty days from the time of the assignment, that a mere failure to describe the property specifically will not render the assignment void on its face.

As to the objection that the instrument excepts property which is exempt from execution, the court has already held that partnership property is not exempt from the payment of partnership debts. *Wise v. Frey*, 7 Neb., 134. *Tills Case*, 3 Id., 262. And the parties are entitled, out of their individual property, to the exemption allowed by law. There is nothing, therefore, in this objection.

The objection that the assignee has the right to compromise choses in action when he deems it expedient to do so, is a more serious question. If by this it is meant that the assignee may compromise valuable claims for a mere trifle, or for a sum disproportionate to their value, and thus squander the estate, such power would justify a court in declaring it void. But it is obvious that the intention of this provision is simply to give the assignee authority to settle doubtful claims, and is restricted to that class alone. The assignee is required to give a bond, and may be required, at any time when the security is deemed insufficient, to give an additional bond. This bond is for the security of the creditors, and any breach of its conditions, including acts of malfeasance or misfeasance in the disposition of the estate, renders him liable thereon.

The fourth ground of objection is not well taken, as the reservation is merely to pay over to the assignors "the rest, residue, and remainder, if any there be, after paying said costs, charges, expenses, and debts aforesaid." This the assignee would be required to do without such a provision.

The fifth ground of objection is not sustained by the record, the assignment being, after paying the costs and charges, "to distribute and pay the remainder of the proceeds to all the creditors of the said party of the first part," etc. The assignment is not void on its face, and should have been received in evidence. And this is decisive of the case. Where a debtor finds that he is unable to pay all his debts, and makes an assignment of all his property, to be applied to the payment of all his debts, in equal proportions, such an assignment being just and equitable in its nature, is entitled to the favor of courts, and will not be declared fraudulent and void on its face, unless it is clearly so. The assignor cannot make a new contract with his creditors and require them to wait six months or a year, or any other period, for payment after the debt is due. But if the delay is merely the necessary result of being unable to convert the property into money at once, it will not invalidate the instrument. The entire proceeding is under the supervision and control of the district court or the judge thereof, and it is the duty of the court, if the proper application is made, to see that the trustee discharges the duties of his trust faithfully, efficiently, and for the benefit of creditors.

Judgment seems to have been rendered on the replevin bond against the sureties thereon. Section 196 of the code of civil procedure provides that "no suit shall be instituted on an undertaking given under section 186, before an execution, issued on a judgment in favor of the defendant in the action, shall have been returned that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county."

In *Moore v. Kepner*, 7 Neb., 291, it was held that judgment might be rendered against a surety on an

appeal bond in replevin, the case having been appealed from the county court of York county to the district court, where judgment was rendered against the appellant and his surety. This was proper. General Statutes, 257. But it does not apply to an ordinary replevin bond. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES WAKE, PLAINTIFF IN ERROR, v. PATRICK S. GRIFFIN, DEFENDANT IN ERROR.

1. **Fraudulent Sale of Goods:** POSSESSION RETAINED BY SELLER. A sale of goods is void as to a creditor of the seller if there be no change of possession of the things sold until his execution is levied upon them, without proof that it was made in good faith, and without any intent to defraud creditors.
2. ———: ———. The law will not protect a purchaser, even if he pay a valuable consideration, in a sale of goods made for the purpose of putting them beyond the reach of creditors.
3. ———: ———: EVIDENCE. Evidence of the seller being largely indebted at the time of making a sale of goods is material to prove such sale to have been fraudulent as to creditors.
4. ———: ———: SALE BY HUSBAND TO WIFE: CONSIDERATION. In an alleged sale of goods by the husband to his wife, the only consideration was a pretended loan of money by the wife to him, some five or six years before, which he had ever since used in his business and treated as his own. There was no evidence of any agreement or understanding at the time he took the money, nor any recognition by him at any time that he was to repay it. *Held*, that the wife had no legal claim against her husband for the money, nor would she be permitted, through a voluntary sale, nominally in repayment of that money, to appropriate his property to the exclusion of the claims of *bona fide* creditors.

This was an action of replevin. The defendant, who was plaintiff in the court below, claimed the title

and right of possession to the property in question, by virtue of a bill of sale from John C. McMahon to Mary McMahon, his wife, and a sale from Mary McMahon to himself. Plaintiff, as constable, claimed right of possession of said property by virtue of the levies of two executions issued out of the county court in favor of Steele & Johnson against said John C. McMahon and one John C. Wolfe, March 13, 1877. Upon a trial of the cause in the district court of Platte county, POST, J., instructed the jury, *inter alia*, as follows:

1. It can make no difference that McMahon & Wolfe owed other debts at the time McMahon sold the property in controversy to the witness, Mary McMahon, if in fact you find he did so sell said property to said witness. The only question for consideration on that branch of the case is—did John C. McMahon sell said property to said witness in good faith, for consideration? And it can make no difference when the consideration was paid by her, whether at the time of such sale or prior to said time.

2. If McMahon was honestly indebted to his wife in the sum of $800, or any other sum equal to the value of the goods, he would have a perfect legal right to pay her such debt by transferring to her this or any other property, and she would have a perfect legal right to hold, own, use, sell, or trade such property.

The jury returned a verdict in favor of Griffin, and Wake, the defendant there, brought the case into this court upon a petition in error.

Millet & Son, for plaintiff in error.

1. The pretended sale from John C. McMahon to his wife, Mary McMahon, was absolutely void. *Aultman v. Obermeyer*, 6 Neb., 261. *Putnam v. Bicknell*, 18 Wis., 333. *Lord v. Parker*, 3 Allen, 129. *White v. Wager*, 25 N. Y., 328.

2. Mary McMahon, having permitted her husband, John C. McMahon, to use and invest her money in his own name for more than four years, did not stand in the position of a creditor towards her husband. Therefore the pretended sale from him to her, being without consideration, was absolutely void. 2 Perry on Trusts, sec. 678. *Glidden, Murphin & Co. v. Taylor*, 16 Ohio State, 509.

3. The sales from McMahon to his wife, and from her to Griffin, are void for a further reason that there was no change in the possession of the property pretended to be sold. It remained in possession of McMahon, the original owner, up to the time of the levy by the constable (plaintiff in error). Gen. Statutes, 1873, chap. 25, p. 393, sec. 11. The defendant in error failed to prove that there was any change in the possession of the things sold, and the presumption is conclusive that those sales were fraudulent as against the plaintiff. *Brunswick & Co. v. McClay*, 7 Neb., 137.

Whitmoyer, Gerrard & Post, for defendant in error.

The sale from John C. McMahon to his wife is not void on account of the relationship of the parties. The case of *Aultman v. Obermeyer*, 6 Neb., 261, is not in conflict with the rulings of the court in this case. Wells' Separate Property of Married Women, 370–374. *Beard v. Dedolph*, 29 Wis., 141. *Stone v. Gazzam*, 46 Ala., 269. *Barclay v. Plant*, 50 Ala., 509. *Schaffner v. Reuter*, 37 Barb., 49. *Woodworth v. Sweet*, 51 N. Y., 8. *Dwyer v. Keefer*, 51 Ill., 525. 2 Kent Com., 166.

LAKE, J.

The property in controversy remaining in the possession and under the control of John C. McMahon after the pretended sales by him to his wife, and by

her to Patrick S. Griffin, the defendant in error, and until after the execution was levied, and there being, as we think, no sufficient evidence that either of said sales was made in good faith on the part of any of the parties to them, they were clearly void as against the execution creditor.

In principle, the case is not different from *Brunswick v. McClay*, 7 Neb., 137. Indeed, in this case, the statutory presumption of fraud arising from such continued occupation of the property by the seller is not only not dispelled, but is overwhelmingly sustained by the evidence on the trial.

It may be, and probably is, true that Mrs. McMahon, five or six years prior to this transaction, let her husband have the eight hundred dollars, as she claims, but there is not a syllable of testimony to show that there was any agreement or understanding between them that he should ever repay it. And not only this, but aside from the fact that McMahon had and used this money, there is absolutely no evidence tending to show good faith on the part of the McMahons or the defendant in error in respect to said sales. But, even if Mrs. McMahon had loaned the money to her husband, under circumstances that would have made it a good consideration for a *bona fide* transfer by him to her of this property in payment, the law will not permit her to use it successfully, as a shield merely, in the perpetration of a fraud upon his creditors by her husband.

Now, even admitting that McMahon was justly indebted to his wife in a sum of money which he, in good conscience, ought to have paid, what does the evidence show has been done about it? *First.* A sale of this property, consisting of billiard tables and fixtures, to his wife nominally in payment of the debt. *Second.* A sale of the same articles by Mrs. McMahon

to her brother, the defendant in error, who is a farmer living several miles from Columbus, where the tables were then in use, at the nominal price of $1,500, taking his note, secured by mortgage upon the same property, in payment. And *Third.* Since the commencement of this replevin suit a sale of the property by the defendant in error to one Thomas Griffin, a nephew of Mrs. McMahon, nominally for $1600, of which amount $1500 were satisfied by the surrender of the note given by Patrick to his sister as aforesaid, and the residue by the individual note of said Thomas.

Now, with Thomas Griffin, the owner of the tables thus paid for, how stands Mrs. McMahon? With the consideration which she received for the sale to her brother surrendered, what has she left to show for the property received from her husband? And how did Thomas Griffin remunerate her for giving up the $1,500 note? These inquiries are naturally suggested, and they are important.

It is disclosed by McMahon's testimony that at the time of these transactions he was indebted to Thomas Griffin upwards of a thousand dollars, which was secured by a mortgage on his real estate; and it is further shown that these tables, either directly or indirectly, went to pay off said indebtedness, which being done, the mortgaged premises were conveyed to Mrs. McMahon.

The design of this manipulation of the property in controversy is apparent. The scheme is too transparent to deceive any one. The ear-marks of fraud are all over the transaction referred to; and the defendant in error was an active participant in the endeavor to cover up the property, as is shown by the stealthy manner in which he removed and disposed of the tables after knowing the execution was levied upon them.

As before stated, the money forming the pretended

consideration for the sale by McMahon to his wife, she delivered to him several years ago, without, so far as appears, there being any agreement respecting it. During all of these years, McMahon has had this money invested in his business, treating it in all respects precisely as if it were his own means; obtaining credit, doubtless, on the strength of it, but in no way recognizing any obligation as resting upon him to repay it. Under these circumstances, it could not be successfully contended that Mrs. McMahon had any claim upon her husband for the money, which the law recognizes, or would enforce; nor will the law permit her by means of a voluntary sale, nominally in repayment of that money, to appropriate his property to the exclusion of the just claims of *bona fide* creditors.

It is contended also, that the court erred in two of the instructions given to the jury. By one of these instructions—the *first* requested on behalf of the defendant in error—the jury were told in substance, that it was immaterial that McMahon was largely indebted at the time of selling the property to his wife. This was clearly erroneous. The fact of his owing other debts at that time was a circumstance which might account for his evident desire to put his property in other hands, and beyond the reach of legal process. The theory of the defense below doubtless was, that these several sales were mere shams, or if any real transfer took place, that it was the result of a fraudulent conspiracy and device to put the property out of the reach of McMahon's creditors. In this view of the transactions between the McMahons and the two Griffins—and there is strong evidence in the record to justify it—the fact that John C. McMahon was largely indebted was of prime importance, and the jury ought to have been so informed. Not much headway would be made in proving to a jury that a sale of chattels

had been made for the purpose of defrauding creditors without testimony showing the seller to have been indebted at the time of making it.

As to the other instruction complained of, when abstractly considered, we see no objection. If there were any evidence of McMahon being really indebted to his wife at the time, it would have been well enough; but there being no such evidence, it ought not to have been given.

For these reasons the judgment is reversed, and the cause remanded to the court below for a new trial.

REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER 25, OF HALL COUNTY, PLAINTIFF IN ERROR, V. FERDINAND P. COWEE, DEFENDANT IN ERROR.

1. **School District:** APPOINTMENT OF TEACHER: UNEXPIRED TERM. L. was appointed director of a school district, to hold during the unexpired term of S. *Held*, that the appointment, if legally made, entitled him to hold the office during the whole of the unexpired term.

2. ———: ———. Where the director of a school district was appointed to fill a vacancy in November, 1875, and accepted the office, and thereafter performed all the duties pertaining to the same until April, 1877, *held*, in an action on a contract with a qualified teacher, signed by him as director in October, 1876, that the court will not enquire into the strict legality of his appointment. He being a *de facto* officer, the district is bound by his acts.

ERROR to the district court of Hall county. Tried below before POST J. There is a sufficient statement of the facts contained in the opinion.

Thummel & Platte, for plaintiff in error.

The contract sued on is not the contract of the district. It should be in writing and have consent of moderator or treasurer indorsed thereon. Laws 1875, p. 117, sec. 6. It is simply the contract of one Leavitt, and he alone is responsible. It does not bind the district. *People, ex rel. Hunter, v. Peters*, 4 Neb., 254. Under the evidence, we contend that Leavitt never had any right or color of authority to act or enter into contract with the defendant so as to make the district liable, or bind the same. He was not even an officer *de facto*.

Abbott & Caldwell, for defendant in error.

In this case we have a contract made on behalf of a corporation, for the accomplishment of the only object for which that corporation was created, made by officers competent to bind the corporation by such a contract, recorded by those officers as a part of the proceedings of the corporation, the duties to be performed within the building owned by the corporation, and built for the sole benefit of that corporation, a contract honestly made by the defendant in error, and faithfully performed by him so far as laid in his power —and it is respectfully submitted that it is the contract of the corporation, and that the judgment of the court below so holding should be affirmed.

MAXWELL, CH. J.

On the 30th day of December, 1876, the defendant in error recovered a judgment against the plaintiff in the county court of Hall county for the sum of $35.00 and costs, which on appeal to the district court was

affirmed. The plaintiff brings the cause into this court by petition in error.

The right of the defendant in error to recover depends upon the validity of a certain contract dated October 5, 1876, purporting to have been made on behalf of the plaintiff with the defendant, a qualified teacher, to teach the school of said district for the period of four months, commencing on the 20th day of November of that year. Said contract being signed by L. G. Leavitt, director, and approved by James A. Jones, treasurer of said district.

It is claimed that Mr. Leavitt was not director of the district. It appears from the bill of exceptions that in November, 1875, one D. C. Smith was director of this district, and being about to remove therefrom, enquired of Leavitt if he would accept the office of director. Leavitt gave his assent, and was then informed by Smith that he had been appointed. Smith at that time, or soon thereafter, delivered to him the director's record, which contains this entry: "L. G. Leavitt, director, appointed November 16th, 1875; office expires April 1878;" and also his acceptance of the office as follows: "I hereby accept the foregoing office. L. G. Leavitt."

It does not clearly appear from the record by whom the appointment was made, whether by Smith or the moderator and treasurer. Although the moderator testifies that Smith spoke to him about the appointment, and he "told him he didn't know as he had any objections to Mr. Leavitt," Smith had no authority to make the appointment; but if under such an appointment the district permitted Leavitt to act without objection, it will be bound by his acts within the scope of his authority.

The defendant introduced in evidence "the record of the proceedings of the annual meeting of school

district No. 25 for the year 1876, signed L. G. Leavitt, director; also on p. 97 the certificates of the school-tax levied for the year 1876, signed L. G. Leavitt, director; also on pages 110, 111, 112, contracts with teachers, signed L. G. Leavitt, director." And Leavitt testifies that he acted as director of the district from the time of his appointment until April, 1877, and that he took the census of the district twice, certified the amount of taxes to be levied in 1876, made contracts with teachers, drew orders on the treasury, and none of his testimony is denied. In April, 1876, a director was elected, but does not appear to have accepted the office, or discharged any of its duties. A special meeting of the district seems to have been called some time in October or November, 1876. for the purpose of electing a director. The exact date of this meeting does not appear, but it appears to have been after this contract was entered into. If Leavitt's appointment was legally made, which we cannot determine from this record, he would hold during the unexpired term of Mr. Smith, and the attempted election would be a nullity. But whether Leavitt's appointment was strictly legal or not he was acting for the district as director under color of office by that appointment; and as to the public and third parties, he was a *de facto* officer. If the district was dissatisfied with him, proceedings should have been instituted to oust him from the position. It follows that the contract is that of the district, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

REBECCA JONES AND OTHERS, PLAINTIFFS IN ERROR, V. WILLIAM NULL, DEFENDANT IN ERROR.

1. **Mortgage Foreclosure:** ESTATES OF DECEDENTS. A mortgagee, after the death of the mortgagor, may institute and maintain an action to foreclose the mortgage, and cannot be compelled to relinquish his lien, and share in the general assets of the estate.

2. **Judgment on default.** It is error to take judgment against a party failing to answer or demur to the petition without first entering a default; but, if the decree show that such party consented to the sum found due by the court, it will be error without prejudice.

ERROR to Gage county district court. The action there was to foreclose a mortgage executed by Samuel Jones to William Null. Rebecca Jones was the wife, and the other defendants were heirs of Samuel, who had died before the commencement of the action. The case came to this court, upon demurrer to the petition, at the January term, 1877, and is reported 5 Neb., 500. Having been remanded to the district court and tried upon issues joined, a decree was rendered by WEAVER, J., in favor of Null, which Rebecca and the other defendants seek to reverse by their petition in error.

W. H. Ashby, for plaintiff in error.

1. The district court had no jurisdiction of the subject of the action. The probate court has exclusive jurisdiction of the administration of estates. Gen. Stat., 264. All "claims and demands" must be presented and allowed by the probate court. Gen. Stat., 318. The note is the "claim" or "demand," the mortgage a mere incident. *Harp v. Callahan*, 46 Cal., 222. *Pitte v. Shipley*, Id., 154. *Sichel v. Carville*, 42

Id., 505. *Willis v. Farley*, 24 Cal., 490. *Vedder v. Vedder*, 1 Denio, 257. *Ewing v. Griswold*, 43 Vt., 400. *Soule v. Benton*, 44 Vt., 309. *Zachary v. Chambers*, 1 Oregon, 321.

2. Personal estate is first to pay claims against the estate, and must be exhausted before real estate can be taken. Gen. Stat., Chap. 17, §§ 67–72, 201, 248–250. North's Probate Practice, 555. Story's Equity, 571, 587. 7 Bac., Ab., 159. *Lupton v. Lupton*, 2 Johns. Ch., 628. *McKay v. Green*, 3 Id., 56. *Mollan v. Griffith*, 3 Paige, Ch., 404. *State v. Mason*, 21 Ind., 171. *Clarke v. Henshaw*, 30 Ind., 144. *Gould v. Winthrop*, 5 R. I., 319. *Goodburn v. Stevens*, 1 Md., Ch., 420.

Mason & Whedon, for defendant in error.

1. The plaintiffs in error were each properly served with summons, and a failure to enter a default against a person properly served is amendable in court below, and on appeal or error the amendment will be regarded as made. *Shaw v. Binkard*, 10 Ind., 227. *Hull v. Green*, 26 Ind., 388. *Warbritton v. Cameron*, 10 Ind., 302.

2. It was not error to take the decree against all the defendants. *Key v. Robinson*, 8 Ind., 368. *Smith v. Carley*, Id., 451.

MAXWELL, CH. J.

The errors assigned in this case are:

First. That the court had not jurisdiction of the subject of the action.

Second. That the facts set forth in plaintiff's petition are not sufficient to constitute a cause of action.

Third. That the record does not show that any of the parties to the action appeared, personally or by

attorney, on the day of the rendition of the judgment.

Fourth. That it appears from the record that Jane Poole and Sarah Ann Drew were each in default of an answer, and that no default was taken against them.

Fifth. That the amount found due purports to have been so found by consent of the parties, when it appears from the record that a portion of the defendants were infants, and incapable of consenting, etc.

Sixth. That the record shows that the cause was in the hands of a referee to take proofs as to John Jones, and that the cause was still pending under the order of reference at the time of the rendition of the judgment.

Section 227 of chapter 17, Gen. Statutes, provides that "no action shall be commenced against the executor or administrator, except actions to recover the possession of real or personal property, *and actions for relief other than for the recovery of money only*, and such actions as are permitted by this chapter; nor shall any attachment or execution be issued against the estate of the deceased until the expiration of the time limited by the court for the payment of the debts, except in the actions mentioned in this section, and in the cases provided for in section two hundred and seventy-two."

Section 272 provides that "if the giving of notice for the examination and allowance of claims against the estate, before the judge or commissioners, shall in any case be omitted for the period of one year after the granting of letters testamentary, or of administration, no person having any contingent or other lawful claim against a deceased person shall be prevented from prosecuting the same against the executors, administrators, heirs, devisees, or legatees, as the same may be, who shall have received real or personal property from the estate; and in all cases a creditor hav-

ing a lien upon the real or personal estate of the deceased by judgment, execution, or attachment, previous to his death, may proceed to enforce such lien the same as if such death had not occurred."

It will be perceived that actions for relief, other than for the recovery of money only, are excepted from the operations of this act. Does an action for the foreclosure of a mortgage come within this designation? An action for the recovery of money only is one where it is sought to reduce a debt to judgment upon which an execution may issue and be levied upon any property of the defendant not exempt. An action to foreclose a mortgage is brought for the purpose of determining by the judgment of the court the amount due, and subjecting the lands mortgaged to the payment of the same. Such an action is not one for the recovery of money only, and clearly comes within the exceptions named. But were it otherwise, the power of the legislature to divest the lien of a mortgage and *compel* a creditor to release his security for the payment of his debt may well be questioned. If such power exist, the validity of a lien would depend altogether upon the life of the debtor, and the payment of the debt, in case of his death, upon the amount of assets belonging to the estate. A creditor might be compelled, in such case, to receive 10, 20, or whatever per cent might be declared payable out of the estate; or in case the property was exempt, he would receive nothing whatever. Such a law, if in existence, would clearly impair the obligations of contracts, and would be void. But our statute contains no such provision, and was not intended to prevent a party holding a mortgage from bringing an action to foreclose the same. The creditor may, however, if he see fit, file his claim against the estate and share in the general distribution of the assets, but he cannot be compelled to do so.

And the executor or administrator, if he desire to pay off the claims, may have the same presented and allowed against the estate, as provided in sections 224 and 225. There is no error, therefore, in the first objection.

The question of the sufficiency of the petition has already been before this court. *Null v. Jones*, 5 Neb., 500. And we adhere to our decision in that case.

As to the third objection, it nowhere appears in the record that a default was taken against Mary Jane Pool and Sarah Ann Drew. A decree was therefore improperly rendered against them, unless it is shown by the decree itself that they consented to its rendition. The decree is as follows:

"Now on this 8th day of November, A.D. 1877, this cause came on to be heard upon the amended petition filed herein, and the several answers of the defendants filed herein, and the replication of the said plaintiff to said several answers, and by consent and agreement of all the defendants in said cause the amount due upon said note and mortgage mentioned in plaintiff's petition is the sum of $4,300.00 and costs," etc.

It is evident that the defendants above named are not minors; they had filed no answer; but having consented to the amount found due in the decree, they are not in a position to urge the technical objection that no default was taken against them. In such a case the error, if it exist, is without prejudice. The decree also shows that it was rendered upon the pleadings and proofs submitted, the reason being, probably, that a portion of the defendants being minors, were incapable of consenting to a decree.

As to the objection that the guardian *ad litem* appeared for only a portion of the infant defendants, it is sufficient to say that the answer shows that he appeared for all.

As to the objection that the case was in the hands of the referee at the time of rendition of the decree, it is sufficient to say that the case was referred simply to take testimony; and, so far as appears, all the testimony had been taken, and the plaintiffs in error do not complain that they have been prevented from offering or introducing all the testimony they had in the case. It is clear that no error exists of which the plaintiffs in error can complain. The decree of the court below is therefore affirmed.

DECREE AFFIRMED.

JOHN FISK, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law**: ALLEGATIONS OF INDICTMENT. Where there are several counts in an indictment, in the first of which the *time* and *place* are specifically stated, it is sufficient to allege in the subsequent counts that the offense therein described was *then* and *there* committed.

2. ———: SETTING ASIDE VERDICT. When there is not sufficient testimony to sustain a verdict, it will be set aside.

ERROR to the district court of Saline county. Indictment against John Fisk, containing three counts and charging him in substance:

1. Rape on Maud A. Fancy, a woman.
2. Rape on Maud A. Fancy, a female child.
3. Assault with intent to commit a rape on Maud A. Fancy, a female child.

Motion to quash the indictment overruled; trial had before WEAVER, J., and a jury, at April Term, A.D. 1879; verdict of not guilty on first and second counts, and guilty on third count; motion in arrest of judgment

and for a new trial overruled, and prisoner sentenced to two years imprisonment in the penitentiary. He then sued out this writ of error.

Hastings & McGintie, for plaintiff in error.

C. J. Dilworth, Attorney General (with whom was *W. H. Morris*), for the State.

MAXWELL, CH. J.

The plaintiff in error was convicted in the district court of Saline county of an assault with intent to commit a rape, and was sentenced to imprisonment in the penitentiary for the period of two years. The count of the indictment upon which he was convicted is as follows:

"*Third Count*—And the grand jurors aforesaid, upon their oaths aforesaid, in the name and by the authority of the state of Nebraska, do further present, that John Fisk—or about the first day of November, A.D. 1878, in and upon one Maud A. Fancy, then and there being, unlawfully, violently, and feloniously did make an assault with intent then and there, her, the said Maud A. Fancy, unlawfully, forcibly, and against her will, feloniously to ravish and carnally know; she the said Maud A. Fancy, then and there being a female child other than the daughter or sister of him, the said John A. Fisk, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

"JOHN P. MAULE,

"District Attorney."

Time and place must be attached to every material fact averred. The exact time not being material, except where it enters into the nature of the offense. Wharton's Cr. Law, sec. 261, and cases cited.

The *place* where the offense is alleged to have been committed is a material allegation necessary to give the court in that county authority to prosecute the offense. Under section 412 of the criminal code, it is provided that no indictment shall be deemed invalid, nor shall the trial, judgment, or other proceedings be stayed, arrested, or in any manner affected * * * for the want of an allegation of time or place of any material fact, when the *time* and *place* have once been stated in the indictment, etc. Gen. Stat., 816.

This question was before the Supreme Court of Ohio under a similar statute in *Evans v. The State*, 24 Ohio State, 208. The second count of the indictment charged the offense in these words: "The said Samuel B. Evans, on the day and year aforesaid, unlawfully, violently, and in a menacing manner, did assault the said Amelia B. Gilzer, then and there being, and her, the said Amelia Gilzer, then and there did beat, wound, and maltreat, and other wrongs to the said Amelia Gilzer then and there did, contrary to the form of the statute."

The court held that under section 90 of the criminal code, when there are several counts in an indictment, in the first of which the time and place are specifically stated, it is sufficient to allege in the subsequent counts that the offense therein described was *then* and *there* committed.

In the first count of the indictment in this case, it is distinctly alleged that the offense was committed in Saline county, and state of Nebraska. Such being the case, the allegation in the third count *then* and *there* are a sufficient designation of the time and place. The motion to quash the indictment was therefore properly overruled.

A more serious question arises upon the sufficiency of the testimony to sustain the verdict. It appears from the bill of exceptions that the prosecuting witness

had lived in the family of the accused for a period of over six years at the time of the commission of the alleged offense. It also appears that she was eight or nine years of age at the time she came to reside with the family, her exact age being unknown. The offense is alleged to have been committed in September, 1878; that she continued to reside in the home of the accused until January, 1879; that she informed no one, as she testifies, of the alleged assault, until a few days before the finding of the indictment in April, 1879. Her testimony is of a very unsatisfactory character, and even if taken as true, fails to establish the charge. But to offset the testimony we have that of the accused, who denies the commission of the offense; also the testimony of his wife; the testimony of Lizzie Noble, who states that on the 9th of February last, "I told her (the prosecutrix) Mrs. Fisk said nothing to me, and I said I did not want to hear her trouble. She persisted in telling me, and said they abused her. I told her they had taken her as a child, and it probably had been necessary to correct her at times, and told her quite likely she thought she was abused. She said, 'I never thought I was abused until the neighbors told me I was.'" This is not denied.

The testimony of Miss Anna Graham was rejected by the court. The accused offered to prove by this witness that about two weeks before the trial the prosecuting witness said to her, "that she loved Fisk as a father, and he never did anything to her but what a father would do." This certainly was proper testimony tending to impeach the prosecuting witness, and should have been admitted.

In addition we have a large number of witnesses who testify that the character of the accused in the neighborhood in which he resides, for morality and virtue, is good. Several testify that they have never heard

it called in question. This is evidence of good character. *State v. Lee*, 22 Minn., 407. *Matthewson v. Burr*, 6 Neb., 312.

Upon such testimony it is remarkable how a jury could have found a verdict of guilty. It is contended on the part of the state that the jury having passed upon the facts in the case, the verdict is conclusive upon that matter. A court that would shelter itself behind an erroneous verdict, to sustain a judgment that is *clearly wrong*, is unworthy of the name. But a mere difference of opinion between the court and jury is not sufficient to justify the reversal of a case. But where it is clearly wrong it will be set aside, and such has been the uniform holding of this court from its organization. *Seymour v. Street*, 5 Neb., 85. *The A. & N. R. R. Co. v. Washburn*, Id. 117. *Milton v. The State*, 6 Id. 136. *Matthewson v. Burr*, 6 Id. 312. In no other way can the rights of parties be protected. The jury may misconceive the issue, misunderstand the instructions, fail to analyze all the facts, or, in times of excitement, be unconsciously influenced by popular clamor; and unless the court will correct the wrongs, although they may involve loss of life, liberty, or property, they must go unredressed. As the verdict in this case is not sustained by the evidence, and is clearly wrong, the judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

THE A. & N. R. R. COMPANY, PLAINTIFF IN ERROR, V. MAURICE E. JONES, DEFENDANT IN ERROR.

1. **Verdict.** Where there is a substantial support to the verdict by the evidence the finding of the jury will not be disturbed.

2. **Practice:** INSTRUCTIONS TO JURY. It is not error to refuse an instruction, although containing a correct proposition of law, applicable to the case, which has the effect to withdraw material testimony from the consideration of the jury.

ERROR to the district court of Lancaster county.

The action there was brought by Jones against the A. & N. R. R. to recover $327 and interest from the first day of December, 1876, for medical services rendered one Nelson Russell, who was injured on the railroad track by the cars owned and operated by defendant company. Upon a trial had before POUND, J., and a jury, a verdict was rendered in favor of Jones for $128.25, upon which judgment was entered, motion for a new trial being overruled.

The following instructions to the jury, requested on behalf of the defendant below, were refused by the court:

1. Although the defendant did undertake and as-

NOTE.—Verdict will not be set aside on the ground that it is against the weight of evidence, unless it is clearly so, nor where there is a mere difference of opinion between the court or jury, nor where, in the opinion of the court, there is a preponderance against it. *Brown v. Hurst*, 3 Neb., 353. *A. & N. R. R. v. Washburn*, 5 Id., 117. *Young v. Hibbs*, Id., 433. *Kittle v. De Lamater*, 4 Id., 427. *Storms v. Eaton*, 5 Id., 453. See also, *McCune v. Thomas*, 6 Neb., 488. *Hall v. Vanier*, Id., 85. The rule has no application where there is an entire failure of proof. *Lea v. McLennan*, 7 Neb., 143. 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 should not direct a verdict against him. *Grant v. Cropsey*, 8 Neb., 205—REP.

sume to obtain the necessary medical and surgical attendance upon Russell during his illness, caused by the injuries he received on defendant's railroad track, yet this fact alone would not preclude Russell or any one interested in his behalf from employing a physician to attend upon him other than the physician employed by the defendant; and the mere fact that the agent of the defendant—who was authorized to employ medical and surgical aid for Russell on behalf of the defendant—was present at the sick room of Russell and knew of professional services being rendered to Russell by the plaintiff, is no evidence to show that plaintiff was employed at the instance and request of the defendant to render the service he claims to have rendered.

2. The stipulation signed by the parties in this case, and produced in evidence on the trial, is not evidence tending to show that the plaintiff was employed at the instance and request of the defendant to render the service he did render to Russell; and in determining whether or not the plaintiff rendered the services at the instance and request of the defendant, which he claims to have rendered, the jury should exclude this stipulation from their consideration.

3. There is no evidence in this case to show that the plaintiff was ever employed at the instance and request of the defendant to render the services he claims to have rendered to Russell, and the verdict of the jury should therefore be for the defendant.

Galey & Abbott, for plaintiff in error.

1. To take this case out of the statute of frauds, it must be clearly shown that Jones was employed at the *special instance* and *request* of the company. It is not sufficient to show that he appeared and attended said Russell as an interloper, and then seek to charge the

railroad company because he was not expressly prohibited from offering and giving his services to said Russell.

2. It is extremely presumptuous and against all reason and analogy to say that because the plaintiff in error voluntarily undertook to employ medical aid for said Russell, and did so, it would be bound for the services of one whom they never employed or requested to attend. It would be without reason and contrary to law and justice. Were that the law, there would be no limit to such liability. If one interloper was allowed to bind a third party, where would be the protection?

3. It is error, under the facts in this case, to instruct the jury that a contract to pay for services rendered a third person can be made by implication. To bind the company herein it must be clearly shown that the plaintiff below not only was *employed* at the special instance and request of the company, but that he rendered such services on the faith of such employment.

4. The verdict is excessive. Witnesses say services were not worth more than thirty-five dollars.

J. R. Webster and *Burr & Stein*, for defendant in in error.

1. This stipulation, as defendant in error contends, left but two questions to be determined, viz.: The necessity, and the reasonable compensation for the service rendered. Of the necessity for the service rendered, the testimony of C. C. Radmore and Jones, the attending physicians, and the serious nature of the injuries, were evidence that made the necessity a question of fact to be determined by the jury. The railroad company also recognized the necessity, and sent one Dr. Robbins to assist Radmore, but Jones was al-

ready in service, and the company acquiesced. Galey, the agent, being informed, said, "All right."

2. Though the evidence be conflicting, the verdict of the jury will not be disturbed when there is any evidence to sustain the verdict. *Cook v. Powell*, 7 Neb., 285. *Lea v. McLennan*, Id., 146. *McCann v. McDonald*, Id.; 306.

3. A party is liable for service rendered with his assent and acquiescence, though no benefit accrues to him. *Hind v. Holdship*, 2 Watts, 104.

LAKE, J.

That the defendant in error performed the service for which he sued, and that it was worth at least the amount found by the jury, were abundantly proven, although, as to the latter fact, there was some conflict in the evidence.

The stipulation of facts entered into by the parties brought the disputed questions within a very narrow compass. It was in these words: "That the defendant, after the injury of said Russell, undertook and assumed the expense of obtaining for him all necessary medical attendance. That the plaintiff rendered professional service to said Russell, with the knowledge and acquiescence of S. B. Galey, its agent, authorized to employ medical assistance to Russell, and who knew that service was so rendered by plaintiff."

Thus it was established, indisputably—*First*, That immediately after Russell's injury the plaintiff in error "*undertook and assumed*" all the necessary medical aid that his case might require. *Second*, That the defendant in error rendered such service to Russell "with the knowledge and acquiescence" of the agent of the railroad company having the matter in charge. After this, to warrant a recovery there only remained to be

proven the reasonableness of the service bestowed, and its value.

That the service was necessary, under the circumstances, we think was clearly established, not only by the "*acquiescence*" of the agent of the company, but also by abundant oral testimony, especially that of Dr. Radmore, the physician chiefly intrusted with the management of the case by the company, who swore that he requested Dr. Jones to assist him, and that he considered his service "necessary in consequence of the responsibility attached to the case." Also, that Mr. Galey, the agent of the company, told him "to have everything done that could be for the patient," and to "use every effort that could be made to restore him."

Without taking time to refer to other corroborative testimony found in the record, we will merely add, upon this branch of the case, that there is ample evidence to support the verdict, and the district court was clearly right in so holding. Where there is a substantial support to the verdict by the evidence it will be upheld.

It is also assigned for error that the district court refused to give three several instructions asked for by the plaintiff in error. By the first of these instructions, so refused, the court was requested to instruct the jury that the fact that "the agent of the defendant, who was authorized to employ medical and surgical aid for Russell on behalf of the defendant, was present at the sick room of Russell, and knew of professional services being rendered to Russell by the plaintiff, is no evidence to show that the plaintiff was employed at the instance and request of the defendant to render the service he claims to have rendered." Such being a part of the instruction requested, we think the whole was rightly refused, although the residue expressed a correct legal proposition applicable to the evidence.

While the testimony referred to in the above quotation did not of itself prove a direct employment, it was strongly corroborative of other evidence in the case which did tend to prove that there was an understanding between the parties that the service was necessary and that the company would pay for it. To have said, therefore, that the circumstance referred to "*was no evidence*" would have withdrawn from the jury valuable testimony, to which the defendant in error was fairly entitled. The other two instructions refused, although couched in different language, were of precisely the same import, and were properly rejected.

None of the errors complained of were well taken, and the judgment is affirmed.

JUDGMENT AFFIRMED.

HIRAM FINDLEY, PLAINTIFF IN ERROR, V. BENJAMIN BOWERS AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** JUDGMENT: JOURNAL ENTRY. It is within the province of the district court to pronounce such judgment in an action before it as it sees fit, and the approved journal entry thereof is indisputable evidence of what that judgment was.

2. ———: ———: ———. On a motion to confirm a sale of mortgaged premises under a decree formally journalized, it was objected, in substance, that such entry differed materially from the judgment actually pronounced, but the sale was confirmed notwithstanding the objection. *Held*, That by the confirmation the court in effect decided that the journal was correct, and that such decision was not subject to review by the supreme court, although the decree itself would be.

ERROR to the district court for Richardson county. The facts are as follows:

In 1875 Benjamin Bowers commenced an action to foreclose a mortgage made by one Horner to him. Findley had purchased the land from Horner, and he, with Horner, and Liebengood, who held a prior mortgage lien upon the premises, were made defendants. Liebengood had previously obtained a decree on his mortgage (which he held by assignment from Cochran and Taylor), and Horner, the mortgagor, had taken a stay therein for the period allowed by the statute. The records show, under date of March 31, 1877, a receipt from said Liebengood to Horner in full payment of this decree. In the Bowers foreclosure a decree was rendered June 26, 1877, which found plaintiff's mortgage to be the first lien on the premises, and July 12, 1877, the defendant took a stay of order of sale. After the expiration of the stay an order of sale was issued. Findley enjoined the sale, and the injunction being dissolved, he filed a motion for a *nunc pro tunc* order correcting the decree. This motion was sustained, and the decree changed so as to declare the Liebengood mortgage a first lien, and the Bowers mortgage a second lien, and ordering the premises sold, and barring the equity of redemption of the defendants, etc., "saving and excepting any interest attaching by reason of a purchase under the decree of said Liebengood as assignee aforesaid." A sale of the premises having been had under the order, Findley filed exceptions thereto, which were overruled by WEAVER, J., the sale was confirmed, and to reverse the order of confirmation, he brought the cause to this court by petition in error.

Isham Reavis and *E. W. Thomas*, for plaintiff in error.

The change in the amended decree was entirely wrong, unauthorized by law, and must seriously have

affected the bidding at the sale. The journal is that the "equity of redemption of the defendants, etc., shall be foreclosed and forever barred, *saving* and *excepting* any interest attaching by reason of a purchase under the decree of said Liebengood as such assignee as aforesaid in or to the said real estate; and said premises shall be sold," etc. Now, we ask, when did the court order the saving and excepting above mentioned? The exception was an interpolation of the clerk or an attorney, put in without the slightest authority. We presume it will not be claimed that, when the court makes an order *nunc pro tunc* merely to correct a former entry, it has a right to *change* or *modify* the decree which was actually made. But, whether such right exist or not, it is clear that in the case at bar the court declared the *nunc pro tunc* order was made merely to make the journal entry of the decree correspond with the findings of the court as shown in the trial docket. The court certainly did not intend to change or modify the decree which had actually been made, and if it had attempted to do so, its act would have been erroneous. The district court certainly had authority to make the *nunc pro tunc* order, and that order was founded only on the judge's entries. It appears from the order itself that it was not founded upon any other proof of what was done at a previous term. *Heirs of Ludlow v. Johnson*, 3 Ohio, 553. Freeman on Judgments, §§ 56, 68.

Clarence Gillespie and *A. R. Scott* for defendant in error.

The objections to the confirmation do not specifically or in any other way complain of the sale, but only of the decree. *Johnson v. Bemis*, 7 Neb., 225. If land is properly appraised and sold Findley is not

injured. This court has no power to review the sale. Gen. Stat., 546, § 145.

LAKE, J.

The question for decision in this case is whether the sale of the mortgaged premises by the sheriff ought to have been confirmed, notwithstanding the objections made by the plaintiff in error. These objections may be summarized as follows:

First. That the pretended decree, under which the order of sale was issued and the sale made, "was not made or authorized by the court, but the said pretended decree was placed upon the records of this court without authority, and fraudulently, and has not yet been ratified or approved by the court, or signed by the judge thereof."

Second. "The said pretended decree has been materially changed and varied from that which was rendered and ordered by the court." And that "the said sale was made under the said pretended and fraudulently changed decree."

Third. That "this defendant has paid to Liebengood the full amount of the decree owned by him" (a decree previously entered in the same court on a prior mortgage, and recognized in the decree in this case as a paramount lien), "and the defendant is now the assignee and owner of the same."

Such being the substance of the objections to the confirmation, it is seen that no fault whatever is found with the steps taken by the sheriff in making the sale, and we must presume, therefore, that they were regular. The issue really was as to whether the journal entry spoke the truth.

While it was eminently proper, if there were any reasonable ground for believing that the journal had

been thus falsified, to bring the matter to the notice of the distinct court as was here done, we must nevertheless hold that the decision of that court on the question is conclusive upon all the parties. It was within the province of the court to pronounce such judgment as it saw fit, and the approved journal entry thereof is indisputable evidence of what that judgment was. By these objections it was in effect alleged that the journal entry was false; but the answer of the judge, in confirming the sale, with the entry in question before him, was, that it spoke the truth. And this answer is not subject to review here, although the decree itself is.

As to the distribution of the proceeds of the sale, and the rights of the plaintiff in error therein, as a preferred claimant, which were discussed some what at the bar, no question is raised in this record, as it does not appear that any action by the district court has been either taken or requested thereon. If the plaintiff deems himself entitled to any of the money realized from the sale of the property, he should first bring his claim to the attention of that court by proper motion.

JUDGMENT AFFIRMED.

E. F. KELLEY, PLAINTIFF IN ERROR, v. LARS PETERSON, DEFENDANT IN ERROR.

1. **Practice:** PLEADING: STATEMENT OF CAUSE OF ACTION. The petition stated in substance that the defendant contracted with the plaintiff to cut his wheat, when ready to be harvested, for $1.25 per acre; that when the wheat was ripe, the plaintiff notified the defendant of that fact, but the "defendant refused, and neglected to cut plaintiff's wheat, as defendant had agreed

and contracted, whereby said wheat was damaged and wasted," to plaintiff's damage $171.30, for which sum judgment was prayed. *Held*, that this petition stated a good cause of action, and a general demurrer to it was properly overruled.

2.——: ——: ——. Use of the words "as" in the clause—"that said defendant refused and neglected to cut plaintiff's wheat *as* defendant had agreed and contracted,"—commented upon and proper signification given.

ERROR to Howard county district court. Heard there before POST, J., upon a petition in error to the county court of said county, where a demurrer of the defendant to the petition of plaintiff had been overruled, and defendant electing to stand by the demurrer, a judgment was rendered for the full amount claimed. This judgment was affirmed by the district court, and defendant there sought by his proceedings in error here to obtain a reversal of both said judgments.

Abbott & Caldwell, for plaintiff in error.

1. It is clear that the pleader in this petition intends to charge a failure to cut *in the manner agreed;* and it then becomes equally clear that there are not facts sufficient in this petition, as it nowhere states in what manner he agreed to cut, nor shows the court wherein he failed to cut as agreed. In assigning a breach of contract the things agreed to be done must be set out, and a performance plainly negatived. Facts must be stated so the court can see that there has been a breach. *Schenk v. Naylor*, 2 Duer, 675. We do not think it can be seriously urged that the general damages are claimed under this petition, and if they are the petition is fatally defective in that it does not state that the cutting was worth more than the alleged contract price; unless this be stated no injury is shown

and no damage could be recovered. *Doolittle v. McCullough*, 12 Ohio State, 360.

2. Can a party recover as damages, for the breach of a contract to cut grain, the value of the entire crop? We claim that cannot be done, and that the wasting and damage to the grain are not the necessary and logical consequences flowing from the default of the defendant; no injury resulted to the grain from this cause without other causes intervened, and they could not have been in the minds of the contracting parties when the contract was made. 3 Parsons on Contracts, 177 and 178, and Note S., and cases there cited. *Lake v. Damon*, 17 Pick., 288.

3. The petition having failed to allege that the grain claimed to have been wasted or damaged was of any value, it fails to show any injury, and the plaintiff, in order to recover, must show facts not alleged in his petition; and whenever the plaintiff must do this the petition is fatally defective. *Stanley v. Whipple*, 2 McLean, 35.

4. Again, the petition contains no statement showing how the act or default of the defendant caused the injury. Those facts should answer the question: How did the failure of the defendant to cut as agreed waste or damage the grain? *Maxfield v. C., I. & L. R. R.*, 41 Ind., 269. *Cole v. Swanston*, 1 Cal., 51. While all damages, however specially pleaded, must be the *natural* result of the trespass, the only damages which can be recovered under the general allegations, without stating facts which show how they arose, are those which the law presumes from the facts set forth, and these are such only as *necessarily* arise from the acts done or omitted. *Shaw v. Hoffman*, 21 Mich., 151.

Thomas Darnell and *James Lewis*, for defendant in error.

The petition alleges the contract, its terms, and that plaintiff in error violated the obligation of the contract on his part, and that by reason thereof defendant in error's crop of wheat was wasted and destroyed, and that he suffered damage in consequence thereof in the sum of one hundred and seventy-one dollars and thirty cents, which is sufficient to create a legal obligation on the part of plaintiff in error. Nash's Practice, 47. *Lynch v. Murray*, 21 How., Pr., 154. *Houser v. Pearce*, 13 Kan., 104.

The uncertainty of the petition, which is all the plaintiff in error complains of, cannot be reached by demurrer, even if the petition was uncertain and indefinite. The remedy in such cases is by motion and not by demurrer; formal defects cannot be reached by demurrer; it must be done by motion. Vansantvoord's Pleadings, 692. *Prindle v. Caruthers*, 15 N. Y., 425. *Morse v. Gilman*, 16 Wis., 504. *Mills v. Rice*, 3 Neb., 76.

LAKE, J.

Do the facts alleged constitute a cause of action? In overruling the general demurrer to the petition, the county court first, and the district court afterwards by affirming that judgment, answered this question in the affirmative.

The substance of the petition is that Kelley, the defendant in the action, contracted with the plaintiff to cut his crop of wheat, about thirty acres, when ready to be harvested, for the agreed price of one dollar and twenty-five cents per acre. That when said wheat was ripe and ready to be harvested the plaintiff notified the defendant of the fact, but the "defendant refused and neglected to cut plaintiff's wheat as defendant had agreed and contracted, whereby * * * * * *

said wheat was damaged and wasted," to his—the plaintiff's—damage "in the sum of one hundred and seventy-one dollars and thirty cents."

The first and principal criticism of this pleading is in reference to the proper effect to be given to the word "as" in the above quotation. Counsel contend that by giving to this word its proper meaning the allegation is not that "the defendant did not cut the wheat at all," but that the work was not performed "in the manner agreed and contracted;" in other words, was not well done. This, we think, is much too narrow a scope to be given to the allegation. But even if it be not, how could such construction possibly benefit the defendant now? Even if his real failure were only in the manner of performance, still he would be clearly liable for all the loss thereby legitimately occasioned. For instance, suppose he did actually cut the wheat, but in so slovenly a way that, as a necessary result, a considerable part of it was wasted, would he not be liable for the damage? Certainly he would, even if it amounted to the full value of the growing crop.

But, as before suggested, the view taken by counsel of this petition is too narrow, and the construction of the language employed too arbitrary. It was evidently the intention of the pleader to charge upon the defendant a total failure to perform his part of the agreement, and so it would be understood, we doubt not, by ninety-nine out of every one hundred persons of ordinary intelligence, and not inclined to be hypercritical.

Mr. Worcester, in his valuable dictionary, in a note to the word "as," remarks: "*As* sometimes takes the place of a relative pronoun, and is equivalent to who, or which." And this quality may very properly be given to it in the connection in which it is here used.

So understood, the allegation in effect is, "that said defendant refused and neglected to cut plaintiff's wheat," which "defendant had agreed and contracted" to do. And this, doubtless, is the sense in which the pleader used it and intended it should be understood. We consider the allegation sufficient to sustain a judgment for the full value of the crop if, in consequence of any fault of the defendant in the performance of his agreement, the damage reached that amount.

But it is asked by counsel: "Can a party recover as damages, for the breach of a contract to cut grain, the value of the entire crop?" Most certainly he can, if it be shown that the damages amount to so much, and that they are the proximate result of such breach. It is true that the plaintiff, on becoming aware of the fact that the defendant would not cut the grain, was not at liberty to fold his arms and make no effort to save it from destruction. In such case the law imposes upon him the duty of doing all that he reasonably can to avoid loss. But if, notwithstanding his reasonable effort in that behalf, the grain be injured, or totally destroyed, in consequence of not being cut according to the agreement, he has his action to recover the damage resulting therefrom.

The petition sets out the substance of the contract, its performance on the part of the plaintiff, and the refusal of the defendant to perform it on his part. Then follows the allegation that in consequence of the defendant's refusal to cut the wheat it was damaged and wasted to the amount of one hundred and seventy-one dollars and thirty cents, for which sum judgment is prayed. This we regard as clearly sufficient, if true, to create a legal obligation on the part of the defendant to make good the loss. The particulars of the loss, what was done by the plaintiff, after becoming

aware of the failure of the defendant, to save his grain, and all the particulars of the damage, could be shown by the testimony under this complaint. If upon any point the defendant desired for his information a more particular statement, he should have moved for an order upon the plaintiff to make it. In such case a demurrer is not the proper remedy. For these reasons the judgment of the district court, affirming the judgment of the county court, must be affirmed.

JUDGMENT AFFIRMED.

MARY DUNN, APPELLANT, V. WILLIAM REMINGTON, APPELLEE.

1. **Equity Jurisdiction:** FRAUD WITHOUT INJURY. A court of equity will not entertain a petition for relief on the ground of a *fraud*, from which no damage, either present or prospective, can result.

2. **Pleading:** PETITION IN ACTIONS TO RECOVER REAL PROPERTY. In a petition to recover real property, it is not necessary to use the very expressions declared by section 626 of the code of civil procedure to be sufficient in stating the cause of action, but any other language of equivalent import may be employed.

APPEAL from Saline county district court. Heard there on demurrer to the petition, which was sustained and the action dismissed. The opinion contains the substance of the petition and states the case.

M. B. C. True and *E. S. Abbott*, for appellant.

Under the statute there is no action-at-law nor suit in equity, as such. If the facts stated in the petition disclose that the plaintiff is entitled to the relief prayed

for, relief will be granted. Civil Code, §§ 2, 90. *Wilcox v. Saundevs*, 4 Neb., 569. *Turner v. Althaus*, 6 Neb., 55.

W. H. Morris, for appellee.

The distinction between law and equity is preserved, and therefore, when the cause is purely a legal claim and especially one in tort, it must be an action of law, and the case must be determined according to rules of law. In cases at law party is entitled to a jury trial, and in equity cases the hearing is exclusively by the court. *Wilcox v. Saunders*, 4 Neb., 569. When statute says that there shall be but one form of action, form, and not substance, is spoken of. When it is attempted to abolish distinctions between law and equity, we cannot be compelled to abandon familiar and appropriate words.

LAKE, J.

This case evidently was commenced, and has been proceeded with as one suitable for equitable cognizance, and accordingly was brought into this court by appeal. Indeed, the primary relief sought is the cancellation of a certain lease, alleged to have been obtained from the county commissioners, in fraud of the plaintiff's rights, and under which the defendant took possession of and now holds the premises in controversy.

But, whatever the views of the pleader may have been of the character of his suit, the more important inquiry is, do the facts alleged make a cause of action of any kind, either legal or equitable, or both legal and equitable, and over which the court had jurisdiction? A petition cannot be properly measured by the

views of the draftsman as to the sort of relief to which it may entitle the plaintiff.

The material averments of this petition may be briefly stated thus: *First*, In June, 1873, the plaintiff purchased this land from the state of Nebraska, at a sale of unsold school lands lawfully held at the county seat of Saline county, paying at the time one-tenth part of the purchase price, and also an installment of interest on the residue, as required by law, and thereupon took immediate possession, and made valuable improvements thereon. That she has not sold, or in any way disposed of her interest in the land thus acquired. *Second.* That in August, 1874, the defendant, by means of certain fraudulent misrepresentations, procured from the county commissioners of said county a lease of the same land, and thereupon took forcible possession, excluding the plaintiff therefrom, to her damage in the sum of $300.

Now, while it may very clearly appear that this lease was procured by false and fraudulent means, we fail to see wherein legally it can do the least harm to the plaintiff, or why the aid of a court of equity is sought against it. From the plaintiff's own showing, her right to the land existed for more than a year before the lease was given, and her possession was notice to the whole world of the nature and extent of her interest in it. Under the circumstances this lease could not possibly be of any avail, as against the plaintiff, in any proceedings concerning her right to the land. We are of opinion, therefore, that the facts stated do not entitle her to any equitable relief whatever. Fraud without injury, either present or prospective, is no ground for the interference of a court of equity. 1 Story, Eq. Jurisprudence, § 203 (6th ed.)

But is enough alleged to warrant any other relief? In an action to recover real property, besides a proper

description, it is sufficient to allege that the plaintiff has a legal estate therein, is entitled to the possession, and that the defendant unlawfully keeps him out of the possession thereof. Code of Civil Procedure, Sec. 626. The statute certainly does not exact the use by the pleader of the precise words and phraseology there given, but, in effect, it declares that if used they shall be deemed a sufficient statement of a cause of action. Any other words or expressions of equivalent import would doubtless answer just as well.

So we see in this petition that the plaintiff does not say, in the very language of the statute, that she "has a legal estate therein," but she gives a statement of facts, "in ordinary and concise language," concerning the land and her relation to it, from which, if true, it necessarily follows that she has. And the same is true of this pleading as to all the rest of what may be properly termed the statutory requisites of a petition for the recovery of real property. There are also suitable allegations to support a recovery of damages for the use of the premises during the adverse occupancy, if she succeed in her claim for the land.

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX. REL. BOARD OF COMMISSIONERS OF LANCASTER COUNTY, v. R. D. SILVER, COUNTY CLERK.

1. **Officers:** COMPENSATION OF PUBLIC OFFICERS. A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute.

2. ———: COUNTY CLERKS. The compensation allowed county clerks by the act to amend the revenue law, approved February 18, 1877, of four cents for each description of lots and lands upon the tax list and duplicate, is in excess of the limitation of $1,500, and is for extra services.

ORIGINAL application for mandamus. The case is stated in the opinion.

Mason & Whedon, for the relator.

T. M. Marquett, for the respondent.

MAXWELL, CH. J.

The relator obtained an alternative writ of mandamus to compel the defendant to report certain fees received by him as clerk of Lancaster county, including the sum of $400 allowed him as salary under the provisions of section 14, chapter 22, Gen. Stat., 380, and the sum paid him for making out tax lists for the year 1879, as required by the act of 1877. Laws 1877, p. 45.

The defendant answered the writ, alleging that it was not his duty to report to the county commissioners of said county the sum of $667.80 received by him for making out the tax lists. That defendant did employ a competent assistant to aid him in preparing said tax lists, and did pay for preparing the same the sum of $667.80, and twenty dollars more out of his own pocket; that said employment was made with the full assent of said commissioners. The defendant also alleges that he did extra work for said commissioners, such as issuing certificates of indebtedness, calculating interest, which was worth the sum of $561.50; also for work done by him outside of the duties of clerk, made necessary by the mode of dividing the levy of

the different taxes levied by relators for the year 1878; also, extra work for preparing assessors' rolls for the year 1878, worth the sum of $200. Defendant states that he has reported and paid more fees than he is required by law to do.

Section one of the act "to regulate the fees of county judges, county clerks, sheriffs, and county treasurers," approved February 15, 1877 [Laws 1877, p. 215], provides that "every county judge, county clerk, county treasurer, and the sheriff of each county, whose fees shall in the aggregate exceed the sum of $1,500 for each county judge and county clerk, and $2,000 each for sheriffs and county treasurers per year, shall pay such excess into the treasury of the county in which they hold their respective offices; * * * *Provided*, That if the duties of any of the officers above named in any county of this state shall be such as to require one or more assistants or deputies, then such officers may retain an amount necessary to pay for such assistants or deputies, not exceeding the sum of $700 per year—except as above provided in counties having over twenty-five thousand inhabitants—for each of such deputies or assistants, but in no instance shall such officers receive more than the fees by them respectively and actually collected; nor shall any money be retained for deputy service unless the same be actually paid to such deputy for his services. *And provided further*, That neither of the officers above named shall have any deputy or assistants unless the board of county commissioners shall, upon application, have found the same to be necessary; and the board of county commissioners shall in all cases prescribe the number of deputies or assistants, the time for which they shall be employed, and the compensation they are to receive."

Section two requires each of the officers named in

section one to make a report, under oath, to the board of county commissioners, on the first Tuesday of January, April, July, and October of each year, showing the different items of fees received, from whom, at what time, and for what service, and the total amount of fees received by such officer since the last report, and also the amount received for the current year.

Section three of the act to amend the revenue law, approved February 19, 1877 [Laws 1877, p. 45], provides that the county clerk shall make out the tax list immediately after the completion of the levy of the taxes for the current year, containing:

First. A list, in alphabetical order, of all the persons and bodies corporate in whose name any property other than real estate has been listed, with the amount of valuation thereof in a separate column opposite the name, and the total amount of taxes carried out in another column.

Second. A list of all the taxable lands in the county, not including town lots, in numerical order, etc., with the valuation of each tract, and the several species of taxes, and the total of all the taxes carried out in separate columns opposite each tract, etc.

Third. A list of all the city or town lots in such city or town in the county, commencing with the lowest number, etc.

"The county clerk shall receive for making out the tax list and duplicate thereof the sum of four cents each for each and every description of lots and lands, and extension thereof, upon such tax list and duplicate, including footings and recapitulations."

A public officer must discharge the duties pertaining to his office for the compensation allowed by law, and no compensation for extra services can be recovered or allowed unless authorized by statute.

Section 38, chapter 13 [Gen. Stat., 238], provides that

"the county clerk shall keep his office at the county seat; shall attend the sessions of the board of county commissioners; keep the seal, records, and papers of said board; and shall sign the records of the proceedings of the board and attest the same with the county seal."*

Attending the sessions of the board is therefore one of the duties of his office, which, where the fees exceed $1500, he must discharge without extra compensation. As to certificates of indebtedness, it is sufficient to say that we know of no law authorizing county commissioners to issue them, and as to the computation of interest, so far as appears, it appertains to the duties of the office.

The act making an allowance for preparing the duplicate and tax list, being passed after that fixing the salary of clerk, appears to have been intended as compensation for extra labor. The provision for compensation is not in the original act. Gen Stat., 909. The preparation of these lists does not pertain to the ordinary duties of his office; they must be prepared with the utmost care, within a limited period, and that, too, without regard to the amount of labor required to complete them. The duties in their preparation are not of such a character as to require the constant attendance of an assistant; the legislature has therefore fixed a price to be paid as full compensation for the labor required. The rule of law is, that between two inconsistent and irreconcilable acts or sections, the last in time or position prevails. *White v. Blum*, 4 Neb., 555. *Edgar v. Greer*, 8 Clarke, Iowa, 394. *Maddox v. Graham*, 2 Met., Ky., 56. *Powers v. Barney*, 5 Blatch., 202. The defendant, therefore, is not required to report the amount paid out for preparing the tax

*This section re-enacted, Laws 1879, 374, Sec. 73.

list and duplicate, but must report the item of $400, paid him as salary. A peremptory writ is therefore awarded in conformity with this opinion.

JUDGMENT ACCORDINGLY.

JOHN GILBERT AND J. H. ARTIST, PLAINTIFFS IN ERROR, v. J. J. BROWN & BROTHER, DEFENDANTS IN ERROR.

1. **Judgment:** JUDICIAL SALE: RES ADJUDICATA. Judgment was rendered against G and A in the county court in 1874, and stay of execution taken. A transcript was afterwards filed in the district court, and an execution issued and sale of real estate had. On a motion to confirm the sale, objection was made that service of summons in the original case was not made by a party authorized to serve process. *Held*, that it will be presumed after judgment that the party serving process had authority to do so.
2. **Practice:** SERVING PROCESS: CONSTABLE. A constable has no authority to appoint a deputy. But a county judge or justice of the peace may appoint any person specially to serve process issued by him.
3. ———: ———: OFFICER'S RETURN. Where the return of service of summons of an officer fails to show in what county it was served, it will be presumed that the officer summoned the party in the county for which he was elected.

ERROR to Saline county district court. Heard below before WEAVER, J., upon objections to a confirmation of the sale of certain real estate sold under an execution issued upon a judgment rendered in favor of

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NOTE.—Although a summons may be irregularly issued, yet if there be an appearance for any other purpose than to challenge the jurisdiction, the defect will be waived. *Kane v. The People*, 4 Neb., 509. *Cropsey v. Wiggenhorn*, 3 Id., 108. Return of officer cannot be impeached in a collateral proceeding. *Johnson v. Jones*, 2 Neb., 126.—REP.

Brown & Brother and against Gilbert & Artist. Objections overruled and sale confirmed.

Colby & Hazlett, for plaintiffs in error.

Plaintiffs had a right to have the whole proceedings inquired into, and the jurisdiction of the court rendering the judgment examined by the district court. *Buckingham & Co. v. Granville Alexandria Society*, 2 Ohio, 361. *Kochler v. Ball*, 2 Kan., 172. The execution and proceedings thereunder should have been set aside, because the transcript of said judgment does not show that the probate court rendering said judgment had jurisdiction of the persons of the defendants, or of the subject matter of the action. Jurisdiction of limited and inferior tribunals cannot be presumed, but must be shown affirmatively, to confer validity on their acts; hence, when the facts necessary to give such a tribunal jurisdiction do not appear upon the face of its proceedings, and are not proved *aliunde*, the whole will be void and may be set aside as a nullity, when called in question in any judgment or collateral controversy. 1 Smith's Leading Cases, 991, and cases there cited. To sustain a personal judgment the court must have jurisdiction of the person and of the subject matter. Where a party has not been brought into court by due service of summons by a proper officer, and does not of himself come in and waive the necessity of service, the court has no jurisdiction over him, and the judgment against him is a nullity. *Gray v. Hawes*, 8 Cal., 569. *Miami Exporting Co. v. Brown*, 6 Ohio, 535. *Reynolds v. Stansbury*, 20 Ohio, 353. *Cutler v. Wadsworth*, 7 Conn., 9.

J. H. Grimm and *M. B. C. True*, for defendants in error.

1. The original summons is not to be found, but the record shows sufficient to warrant the conclusion that a special constable was appointed to serve the summons. Being specially deputized he is not inappropriately styled in the records deputy constable, for such he is in reality.

2. By the Constitution, Art. VI., Sec. 16, and the Statute, Gen. Stat., p. 263, Sec. 1, county courts are made courts of record, and have original jurisdiction in all civil cases involving less than $500, with some exceptions. When the record shows that the case comes within the jurisdiction of the county court the same presumptions attach to its action as attach to actions in courts of more extensive jurisdiction. *Ex parte Tobias Watkins*, 3 Peters, 205. *Lyon v. Vanatta*, 35 Iowa, 525.

3. Unless the judgment in this case is an absolute nullity, it can make no difference in this proceeding whether or not it is technically correct, nor whether or not defendants have waived irregularities of service and proceedings; the judgment cannot be impeached by this proceeding. The rule is that a voidable, irregular judgment can be attacked only by direct proceedings to set it aside. *Thompson v. Tolmie*, 2 Peters, 163. *Moore v. Robinson*, 6 Ohio State, 302.

MAXWELL, CH. J.

In October, 1874, the defendants in error recovered a judgment against the plaintiffs, in the probate court of Saline county, for the sum of $357.40 and costs. Within a short time after the rendition of the judgment a bond for stay of execution was filed in behalf of the plaintiffs in error, signed by two sureties, but not by the plaintiffs. In March, 1877, an execution was issued on the judgment, and returned unsatisfied.

A transcript of the judgment was thereupon filed in the office of the clerk of the district court, upon which execution was issued and levied upon certain real estate of the plaintiffs in error, which was sold. The plaintiffs in error filed several objections to the sale, which were overruled by the court, and the sale confirmed. They now bring the cause into this court by petition in error.

The principal error relied on is, that the probate court had no jurisdiction of the parties at the time judgment was rendered. This objection, if sustained, would defeat the sale, as it is the duty of a plaintiff, in an action where there is no appearance, to see that the process of the court has been properly served, and that his adversary is in court. *Harshey v. Blackmar*, 20 Iowa, 161. And no valid personal judgment can be rendered by a court without jurisdiction of the person as well as the subject matter.

There is no bill of exceptions accompanying the record. We therefore have no copies of the original papers in the action in the probate court, and must be governed entirely by the transcript of the probate judge in determining the case.

The transcript is as follows:

"J. J. BROWN AND BRO.
v.
JOHN GILBERT AND J. H. ARTIST.

"Bill of particulars filed September 25, 1874. Summons issued on the same day, made returnable according to law, and delivered to George D. Greene, deputy constable, for service. September 28, A.D. 1874, summons returned by deputy constable Greene, indorsed served on the within named defendants, on the 25th day of September, 1874. Cause set for hearing at October term of court," etc. At the close of the transcript, in the taxation of costs, we find the following:

"J. W. Greene, deputy sheriff.....$3.00
"George H. Hastings.....2.50"

A constable has no authority, under the statute, to appoint a deputy, and if the service upon the defendants was made by an unauthorized person it would be void. But county judges, as well as justices of the peace, have authority to depute persons to serve process, and, in the absence of a showing to the contrary, it will be presumed, after judgment, that the person serving the process was lawfully authorized.

It is unnecessary for an officer to certify on his return that service was made in the county in which he is an officer, as such will be the presumption.

A second transcript is attached to the record, seeking to impeach the first; but as it is not a part of the record, nor embodied in a bill of exceptions, it cannot be considered. There is sufficient *prima facie* in the record to show service upon the plaintiffs in error, and as they appeared and filed a bond for stay of execution, the objections made nearly five years after the rendition of the judgment must not be predicated on mere possibility, but it must clearly appear that the court had no jurisdiction. This not being the case, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JOHN K. ROODE, PLAINTIFF IN ERROR, V. JOHN J. DUNBAR, DEFENDANT IN ERROR.

Practice in Supreme Court. The supreme court can review an action at law only by proceedings in error. And where it appears from the record that no exceptions were taken to the ruling of the court below, and no steps taken to call the attention of the court to the alleged errors, they will not be reviewed by this court.

ERROR to Jefferson county district court.

Saxon & Snell, for plaintiffs in error.

Slocumb & Hambel, for defendant in error.

MAXWELL, CH. J.

The plaintiff brought an action in the district court of Jefferson county against the defendant for malicious prosecution. On the trial of the cause the jury found a verdict for the defendant, upon which judgment was rendered dismissing the case. The plaintiff brings the cause into this court by petition in error.

The errors assigned are that the court erred in giving to the jury certain instructions, which are set out at length. No exceptions were taken to the instructions at the time they were given, and no objection on that ground was made in the motion for a new trial. We have been unable to discover a single exception taken by the plaintiff to the ruling of the court during the progress of the trial. An action at law can only be reviewed on error, and the attention of the court

NOTE.—See *Robertson v. Hall*, 2 Neb., 17. *Furnas v. Nemaha County*, 5 Neb., 367. *Morrill v. Taylor*, 6 Neb., 236. *Frey v. Drahos*, 7 Neb., 194. *Horbach v. Miller*, 4 Neb., 43. *Heard v. Dubuque County Bank*, 8 Neb., 10, and cases cited.—REP.

below must have been directed to the alleged errors before they will be considered in this court. A careful reading of the testimony, however, shows that the jury were fully warranted by the evidence in returning a verdict for the defendant. The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

JAMES S. MARSH, PLAINTIFF IN ERROR, V. STEELE, JOHNSON & CO., DEFENDANTS IN ERROR.

Constitutional Law: ATTACHMENT OF PROPERTY OF NON-RESIDENTS. Section 200 of the code of civil procedure, which authorizes an attachment against the property of a non-resident without an undertaking, is not in conflict with any provision of the constitution of the state or of the United States.

ERROR to the district court of Nemaha county. The action there was by Steele, Johnson & Co. against Marsh and McPherson, to recover the amount due on a certain promissory note executed by Marsh to McPherson, and by the latter indorsed to plaintiffs. Upon affidavit of the plaintiffs that Marsh was a non-resident, an order of attachment issued and property of Marsh taken thereunder. Marsh moved to discharge the attachment on the ground that no undertaking had been given. Motion overruled by POUND, J. and exceptions taken.

J. H. Broady, for plaintiff in error.

Sec. 2, Art. IV, of Constitution of the United States, is intended to prevent such invidious discriminations against non-residents as is contained in the statute un-

der consideration. Story on Const., sec. 1800. Cooley Con. Lim., 15, and note 397.

It will not do to meet this question by the assertion that "non-residency" and "citizenship" are not synonymous terms, and that therefore the Nebraska statute does not clash with the federal constitution.

Such an answer is founded on a technicality—a legal fiction invented by some courts to meet certain contingencies arising from the peculiar phraseology of state practice acts. In some instances, although the person has no fixed home, and is, as it were, a "wanderer on the face of the earth," and has no actual or real domicile, it has been deemed necessary by some courts by fiction to locate him an invisible, intangible, and unseen home; but these things are only done to meet certain contingencies, and are supposed to be necessary for such purpose. Such fictions are never allowed to stand in way of substantial justice. Take the case of attaching for non-residency as a good illustration, where the defendant is so living that personal service cannot be obtained upon him in the state, even if his technical domicile is here, and he has property in the state, there must be some holding to permit attachment or there is absolute exemption of all his property in the state from satisfying any of his debts. *Ward v. Maryland*, 12 Wall., 418. *Williams v. Bruffy*, 6 Otto, 176. *Gasstes v. Ballou*, 6 Pet., 761. The federal constitution means that the citizens of other states shall be governed by the same general rule as the citizens of the states. If it can be evaded by putting a very few of our own citizens in the same category with them by simply using a different word to attain practically the same object, the constitution is evaded indirectly, in a way that it can not be directly, which can not be done. The wrongful attachment of the property by an irresponsible plaintiff is very often a practical confiscation of de-

fendant's property without indemnity or any recourse for him; and in all such cases, if not wholly, is at least partially a practical confiscation. What better thing could the above quoted clause of the federal constitution mean than to prevent such consequences as flow from the above statute discriminating in favor of residents and against non-residents? It is a different thing to say non-residency is a cause of attachment. That is all right. That is necessary in order to acquire jurisdiction of the property of non-residents; for if it were not so, placing property out of the state of residency would be to place it absolutely and at all events beyond reach of creditors because no personal judgment could be had. Furthermore, non-residents are too far away for the plaintiff to know the ordinary causes of attachment, as removing or selling property to defraud, etc., and their persons being beyond the jurisdiction of the court, the fact of being so is a good substitute for their personal acts, that constitute cause of attachment. But still he is as much entitled to the indemnity bond, where the attachment is sued out because he is a non-resident, as where it is because he is charged with perpetrating a fraud. The charged perpetrator of a fraud has no stronger claims for security of property and its enjoyment, than the non-resident. On this bond question there is no difference between the resident and the non-resident, either in the circumstances, the nature of things, or the constitution and laws, and said statute comes fairly within the above cited constitutional inhibition. *Paul v. Virginia*, 8 Wall., 180. *Lemmon v. The People*, 20 N. Y., 607. *Slaughter House Cases*, 16 Wall., 118.

Groff & Montgomery, for defendants in error.

Counsel has admitted that the clause of section 198, authorizing an attachment on the ground of non-resi-

dence, is good. Is it not hair-splitting to say that the balance of the statute is not good? Does he not make a distinction where there is no difference? Counsel says that the reason for holding good that part of the statute authorizing an attachment on the ground of non-residence is to give the court jurisdiction of the property of non-residents. If the legislature may go this far who will say that it may not exempt the plaintiff from giving an undertaking for the same purpose? Such an immunity is clearly within the legitimate and constitutional province of state legislation, as we think is clearly established by the following authorities: *Conner v. Elliott*, 18 How., 501. *McCready v. Virginia*, 4 Otto, 391. *Harness v. Green*, 20 Mo., 316. *State v. Medbury*, 3 Rhode Island, 138. *People v. Colman*, 4 Cal., 46. *Insurance Co. v. Morse*, 20 Wall., 445. *Neff v. Pennoyer*, 3 Sawyer (U. S. Cir.), 274. *Chemung Canal Bank v. Lowery*, 3 Otto, 76.

T. L. Schick, on same side.

The term "non-resident" as used in the attachment law is a broader term and includes other classes beside "citizens of other states." A citizen of Nebraska, that is one whose domicile is here, may be a "non-resident" within the meaning of the attachment law. The statute contemplates actual non-residence without regard to domicile. *Haggart v. Morgan*, 5 N. Y., 422. *Frost v. Brisbin*, 19 Wend., 11. *Risewick v. Davis*, 19 Maryland, 82. *Matter of Thompson*, 1 Wend., 43. *Foster v. Hall*, 4 Humph., 346. Drake on Attachments, secs. 58, 59, 65. Is the provision for an attachment bond such a "fundamental right" as "belongs of right to the citizens of all free governments, and which has at all times been enjoyed by the citizens of the several states"? The proposition is its own refutation.

Many of the states at the present time do not provide for a bond. There are numerous instances of the character of the provision in question, the legality of which has never been doubted or is well established. Thus, the right to vote and hold office—G. S., 360, sec. 29; the right of exemption from execution—G. S., 616, sec. 525; the right to take fish in the waters of the state—Cooley Const. Lim., 448; and the requirement of security of costs from a non-resident—*Smith v. Rosseter*, 11 Ill., 119; *Casey v. Houton*, 36 Ill., 234. So the statute of limitations does not run as against a non-resident— *White v. Hight*, 1 Scam., 240; and a non-resident tax-payer cannot restrain the issuance of bonds of the county—McCahon (Kan.), 235. So a non-resident may be denied the remedy by attachment altogether—Drake on Attachments, sec. 11; or be denied it as against a non-resident unless upon affidavit that the defendant has no property in the state where he resides—Alabama code, 1852, title 2, chapter 1. In Pennsylvania attachment may be had against a non-resident as a matter of right without affidavit, while as against residents an affidavit is necessary. Dunlap's Laws, Penn., pp. 740-746; Drake on Attachment, p. 575. So none but resident females are entitled to the provisions of the bastardy act—Laws Neb., 1875, p. 53. A non-resident may be prohibited from hawking and peddling without a license—38 Wis., 424, 439; and a license to sell liquor can be granted to no one but a resident of the state—G. S., 851, sec. 572; and so a county treasurer is authorized to collect fees from non-residents where he may not for the same service from residents—G. S., 382, sec. 20.

MAXWELL, CH. J.

Section 200 of the code of civil procedure provides that " where the ground of attachment is that the de-

fendant is a foreign corporation, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by the attachment, if the order be wrongfully obtained." Gen. Stat., 557.

It is claimed that the provisions of this section are in conflict with sec. 2, article IV, of the constitution of the United States, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Kent says: "The privileges thus conferred are local and necessarily territorial in their nature. The laws and usages of one state cannot be permitted to prescribe qualifications for citizens to be claimed and exercised in other states, in contravention of their local policy."

It was declared in *Corfield v. Coryell*, 4 Wash., C. C., 371, that "the privileges and immunities conceded by the constitution of the United States to citizens in the several states were to be confined to those which were in their nature fundamental, and belonged of right to citizens of all free governments. Such are the rights of protection, of life and liberty, and to acquire and enjoy property, and to pay no higher imposition than other citizens, and to pass through or reside in the state at pleasure, and to enjoy the elective franchise according to the regulations of the laws of the state. But this immunity does not apply to every right, for some may belong exclusively to resident citizens of the state," etc.

Cooley, in his work on Constitutional Limitations, 397, says: "Although the precise meaning of 'privileges and immunities' is not very definitely settled as yet, it appears to be conceded that the constitution secures in each state to the citizens of all other states the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedy for the collection of debts and the enforcement of other personal rights; and the right to be exempt in person and property from taxes or burdens, which the property or persons of citizens of the same state are not subject to. * * * But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon actual residence; such as the right to vote, to have the benefit of the exemption laws, to take fish in the waters of the state, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the state, notwithstanding such process is not admissible against a resident."

The constitutional provision must be confined to those privileges and immunities which are fundamental in their nature—such as the right to acquire and hold property, to institute and maintain actions, the exercise of the elective franchise in conformity to the laws of the state in which it is exercised—and was evidently intended to abolish the common law disabilities of residents of the several states, the states to a certain extent being foreign to each other. This provision was not intended to prohibit distinctions founded on residence, such as the right to hold certain property exempt from execution; the right to fish in the waters of the state; the right to vote, and other rights depending upon residence.

The only objection in this case, and the one on which it is sought to dissolve the attachment, is that "the said order of attachment was issued without any undertaking in attachment, and is null and void, there being no undertaking in attachment."

At common law, if the plaintiff made an affidavit that the cause of action amounted to £10 or upwards, he could have caused the defendant to be arrested, and required him to put in special bail for his appearance in the action. 3 Blackstone Com., 287. Imprisonment for debt was not a satisfaction thereof, but a means to procure it. Imprisonment for debt existed in all the colonies at the time of the Revolution, but the law was repealed or modified in most of the states during the second quarter of the present century. As a consequence, the abolition of imprisonment for debt has led to an enlargement of the remedies acting upon the property of debtors, and the statute authorizes an attachment against the property of a non-resident debtor. Mere temporary absence of a party from the state is not sufficient to justify an attachment under this provision; the party must be a non-resident of the state. The writ is issued to secure the appearance of the defendant, and to retain his property within the jurisdiction of the court, to be applied in satisfaction of its judgment to secure the rights of the creditor, as otherwise the property of the debtor could be withdrawn at any moment, and the creditor compelled to go into another jurisdiction, perhaps at a great distance from his residence, to enforce his rights. These are provisions that apply to all non-resident debtors, whether they reside in the United States or foreign countries, and are in consonance with the rule in the administrations of estates, that "every nation having a right to dispose of all the property actually situated within it, has (as has

often been said) a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests." Story's Conflict of Laws, § 525.

And in relation to the withdrawal of funds it is said: "Persons domiciled and dying in one country are often deeply indebted to foreign creditors living in other countries, where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country without the payment of such debts, and thus leave the creditors to seek their remedy in the domicile of the original executor or administrator, and perhaps there to meet obstructions and irregularities in the enforcement of their own rights from the peculiarities of the local law." Story's Conflict of Laws, § 512.

A plaintiff in attachment is liable in damages if he cause the defendant's property to be attached maliciously and without probable cause; and this liability attaches whether a bond is given or not. But the failure to give a bond when the attachment is against the property of a non-resident is not sufficient ground upon which to base a motion to dissolve the same, and is not in conflict with the constitution of this state or the United States, and was therefore properly overruled. And particularly is this true in the case at bar, where judgment was obtained against the defendant, of which he does not complain, and the order of the court is merely to apply the property to the payment of the debt. The judgment of the district court is clearly right, and is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM ROGGENCAMP, PLAINTIFF IN ERROR, V. ROBERT E. MOORE, DEFENDANT IN ERROR.

1. **Summons:** INDORSEMENT OF THE AMOUNT CLAIMED. It is only in actions for the recovery of money only that the amount for which judgment will be taken, if the defendant fail to appear, need be indorsed on the summons.

2. ———: REPLEVIN IN COUNTY COURT: RETURN OF SUMMONS. In all cases of replevin in county courts, whether the value of the property or the damages claimed be within or beyond the jurisdiction of a justice of the peace, the summons should be made returnable, as in justice courts, not more than twelve days from its date.

3. ———: MERE IRREGULARITIES, WITHOUT PREJUDICE, NOT GROUNDS FOR REVERSING A JUDGMENT. Mere irregularities in a summons, not at all prejudicial to the party, and of which no advantage was sought to be taken in the court issuing it, furnish no sufficient grounds for reversing a judgment.

ERROR to the district court for Lancaster county.

On the 10th day of January, 1878, Moore filed in the county court of Lancaster county, Nebraska, his affidavit and bill of particulars in replevin. The property, the possession of which he sought to recover, was described as two horses, and in the bill of particulars their value was alleged to be one hundred and fifty dollars. He prayed for a return of the property, and also a judgment for two hundred dollars, his damages.

On the same day, January 10th, the county judge issued a summons, which was in the following words:

"THE STATE OF NEBRASKA, Lancaster County. } *The State of Nebraska to the sheriff or any constable of said county, greeting:*

"You are hereby commanded to summon Wm. Roggencamp to appear before me, at my office in Lin-

coln, on the 14th day of January, A.D. 1878, at one o'clock P.M., to answer the complaint of Robert E. Moore for wrongfully detaining the following described personal property of the plaintiff: One bay gelding horse, eight years old, large size, called Frank; and one black or dark brown four-year-old horse of small size, called Charley, not gelded. And you are further commanded immediately to seize and take into your custody, wherever they may be found in said county, the said goods and chattels above mentioned, and deliver the same to the said Robert E. Moore. You will make due return of this writ on the 14th day of January, A.D. 1878. Given under my hand this 10th day of January, A.D. 1878.

"A. G. SCOTT,

[SEAL] "*County Judge.*

Upon this writ the officer made the following return:

"STATE OF NEBRASKA, }
Lancaster County. } ss.

"Rec'd this writ the 10th day of Jan'y, 1878, at 12 o'clock noon. I hereby certify that, after having made diligent search, I cannot find the within described property in my county. On the 10th day of January, 1878, I served the within writ of summons on the within named Wm. Roggencamp, by delivering to him a true and certified copy of the same, with all the endorsements thereon.

"O. S. BRIDGES,

"*Const.*"

On January 11, 1878, the county judge made the following order:

"The value of the property being alleged at more than $100, this cause is, under the statute in such case made and provided, continued to the February term,

A.D. 1878, for inquiry of damages, and transferred to the docket of term cases, book 5, page 242, this 11th day of January, A.D. 1878.

"A. G. SCOTT,

"*County Judge, ad interim.*"

February 4th a default was entered against Roggencamp, and on February 8th a judgment was entered in favor of Moore for $150, and costs taxed at eight dollars and eighty cents.

There was no appearance on the part of Roggencamp until the case was brought to the district court by petition in error, where, upon trial before POUND, J., the judgment of the county court was affirmed. To reverse this judgment of the district court the case is brought here by petition in error.

Mason & Whedon, for plaintiff in error.

D. G. Hull, for defendant in error.

LAKE, J.

Did the district court err in affirming the judgment of the county court? The only alleged errors in the record from the county court were, in substance—*First*, That the defendant in the action was not legally summoned. *Second*, That the amount for which judgment would be taken, if the defendant failed to appear, was not indorsed on the summons. *Third*, That the judgment was not sustained by the evidence, and was contrary to law. Nothing, however, has been claimed here upon the last named point. Inasmuch as the evidence is not before us, it must be presumed to have been ample; and as to the legality of the judgment, that, we suppose, depends upon the strength of the first two objections.

It appears from the bill of particulars, and the affi-

davit for the order of replevin, that the value of the property sought, and also the damages claimed, exceeded the jurisdiction of a justice of the peace; and it is contended that, for this reason, the summons should have been made returnable according to section 8, chapter 14, Gen. Stat. 265, instead of section 9, as was done. There is some plausibility in this assumption, for there really does not seem to be any good reason for making a distinction in the return day of the summons between actions in replevin and those for the recovery of a money judgment only. But the legislature have seen fit to make such distinction, and, accordingly, after enacting in section 8 that, in "*all* civil cases commenced in the county court, wherein the sum claimed exceeds one hundred dollars, the summons shall be 'returnable on the first day of the next term of said court,'" etc., by the very next section declare that, "in *all actions of replevin* the summons shall be in like form, *and be returnable within the like time*, as in similar actions before justices of the peace," etc. Now, in actions of replevin before justices of the peace the summons is returnable, as in other civil actions brought before them, "not more than twelve days from its date." Gen. Stat., 667, Sec. 911. The summons in question conformed to this requirement, being made returnable on the fourth day after it was issued, so that there was no irregularity even in the matter complained of.

The second of the objections is entirely groundless. It is only in actions for the recovery of money only that the amount for which judgment is claimed must be indorsed on the summons.

But even if the law required for the summons just what is contended for by the plaintiff in error, still there would be no sufficient ground for reversing the judgment. At most, the supposed defects would be

only mere irregularities not at all prejudicial to him, nor in any manner impairing the subsequent proceedings, for which a judgment will not be reversed. So long as he elected to disregard the notice to appear and make his defense, if he had any, at the designated time, he is not in an attitude now to complain of what was subsequently regularly done in the case. If he supposed the summons to be defective in these particulars, and desired to test its sufficiency, he should have appeared in that court, and at the very earliest opportunity made his complaint known.

There is no error in this record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

COBB, J., having been of counsel, did not sit.

CHARLES H. BECK, PLAINTIFF IN ERROR, v. WILLIAM DEVEREAUX, DEFENDANT IN ERROR.

1. **Practice:** ACTIONS: INDIVISIBLE DEMAND: PLEA IN BAR. The rule is well settled that an indivisible demand cannot, at the will of the plaintiff, be separated, and collected by several actions.

2. ———: ———: ———: ———. If a plaintiff bring an action for a part only of an entire and indivisible demand, the judgment in that suit may be pleaded as a complete bar to another action for the residue.

3. ———: ———: DISTINCT CAUSES OF ACTION. There is no rule that requires a party to join in one suit several and distinct causes of action, although he may, under certain circumstances, be required to consolidate them.

4. ———: ———: ACCOUNTS PAYABLE MONTHLY. A manufacturer of cigars furnished them to a dealer under an agreement

that the amount of the account for each month was, at the end thereof, to be "*due and payable*," and bills were made out accordingly. *Held*, That the account for each month constituted a separate demand, and that a recovery of judgment upon one was no bar to an action for another.

ERROR to the district court of Lancaster county. The facts were as follows:

The defendant in error was engaged in the business of manufacturer of and dealer in cigars and tobacco in Lincoln, in 1877 and 1878, and the plaintiff in error kept a billiard-room, where he dealt in cigars purchased of defendant. The books of defendant in error show a continuous dealing during the year 1877 and up to February, 1878. By express agreement between the parties bills were made out and due and payable at the end of every month. On the 16th day of February, 1878, defendant in error brought, in the county court of Lancaster county, two suits against the plaintiff in error—one for goods sold and delivered in the month of December, 1877, and one for goods sold in the month of January, 1878. Judgment rendered upon both. The last was fully paid and satisfied, and this case was appealed to the district court. The items mentioned in petition of defendant in error were not included in the bill of particulars filed in the first case, and the bill for goods purchased in December, 1877, was presented to plaintiff in error January 1, 1878, and not paid by him. Upon the trial this was the agreed state of facts upon which it was tried—Beck pleading the former judgment in bar, which plea the court below, by POUND, J., overruled, and entered judgment in favor of Devereaux for the amount claimed.

Stearns & Hull, for plaintiff in error.

1. The dealing being continuous between the parties, the contract was an *entire* one and could not be *separated.* 3 Parsons on Contracts, 620, and authorities cited. *Farrington v. Payne*, 15 Johns, 432. *Smith v. Jones*, 15 Johns., 229. *Willard v. Sperry*, 16 Johns., 121.

2. Parties are not only bound by what is actually determined in a litigated case, but as to all matters which might have been litigated in the case. *Donaher v. Prentiss*, 22 Wis., 311. *Dalton v. Bently*, 15 Ill., 420. *Bates v. Spooner*, 45 Ind., 489. *Hackworth v. Zollar*, 30 Iowa, 433. *Hites v. Irwin*, 13 Ohio St., 283. *Grey v. Dougherty et al.*, 25 Cal., 266. Wells' Res. Adjudicata, 204, 256, sec. 236. *Ewing v. McNairy & Co.*, 20 Ohio St., 322.

3. Accounts all due at time suit is instituted, arising from one continuous contract or dealing, cannot be separated and part collected in different and separate actions. *Guernsey v. Carver*, 8 Wend., 492. *Bendernagle v. Cocks*, 19 Wend., 208. *Colvin v. Corwin*, 15 Wend., 557. *Miller v. Covert*, 1 Wend., 487. Wells' Res. Adjudicata, 247, sec. 292. 3 Parsons on Contracts, 188, cases cited. *Lane v. Cook*, 3 Day, 255. *Avery v. Fitch*, 4 Conn., 362.

4. Suit brought and judgment rendered upon part of an account or claim arising from a continuous dealing or contract works a satisfaction of or bar to the collection of the balance. *Phillips v. Berick*, 16 Johns., 136. *Guernsey v. Carver*, 8 Wend., 492.

Galey & Abbott, for defendant in error.

No brief on file.

LAKE, J.

The rule is doubtless well settled, as contended for by the plaintiff in error, that an indivisible demand

cannot, at the will of the plaintiff, be separated, and collected by several actions. It is against the policy of the law to permit a debtor to be subjected to the expense and annoyance that would necessarily result from such a course. If a plaintiff bring an action for a part only of an entire and indivisible demand, whatever it may be, the judgment in that suit may be pleaded as a complete bar to another action for the residue. *Smith v. Jones*, 15 Johns., 229. *Willard v. Sperry*, 16 Id., 121. *Colvin v. Corwin*, 15 Wend., 557. *Avery v. Fitch*, 4 Conn., 362.

But, as was well said by SPENCER, J., in *Phillips v. Berick*, 16 Johns., 136: "There is no case, or *dictum*, which requires the party to join in one suit several and distinct causes of action." Provision is made in our code of civil procedure, however, whereby the defendant, in several actions "which might have been joined," may require them to be consolidated. Gen. Stat. 547. And that course was open to the plaintiff in error in the county court, but he did not seek to avail himself of it. Undoubtedly that court would have at once ordered such consolidation had a motion to that end been made.

While the defendant in error might very properly have included the entire account for the two months in one action, he was under no legal obligation to do so. It is shown by the stipulation of facts that, "by express agreement between the parties" the amount of the account for cigars sold during each month was, at the end thereof, "*due and payable*," and bills therefor were made out accordingly. Under this arrangement the account for the sales of each month was an independent demand, and, if not paid according to the agreement, would draw interest from the time it fell due. Under these circumstances we think it is very clear that the account for each month may, and

indeed should, be regarded as a separate and distinct cause of action, and that a recovery for the cigars sold in January is no bar to an action for those sold in December. The judgment of the district court was clearly right, and is affirmed.

JUDGMENT AFFIRMED.

MARSHALL W. MERRIMAN, APPELLANT, V. EDWARD B. HYDE, APPELLEE.

1. **Foreclosure of Mortgage:** PARTIES. The nominal holder of the equity of redemption ought to be made a party defendant in an action to foreclose a mortgage. But if for any reason he is not, his interest may be ascertained and foreclosed in a subsequent action.

2. **Mortgage:** THOUGH UNRECORDED, TO BE PREFERRED TO A SUBSEQUENT CONVEYANCE WITHOUT CONSIDERATION. An unrecorded mortgage takes precedence of a subsequent conveyance by the mortgagor without consideration.

APPEAL from the district court of Lancaster county. The petition filed in the action was as follows:

The above named plaintiff complains of the above named defendant for that on and before the 11th day of March, 1872, Thomas H. Hyde, then of Lancaster county, in the state of Nebraska, was the owner, and lawfully possessed of the following described real estate, situate in said county, to-wit:

Lot four in block 86, and lots one and two in block 84, excepting 20 feet off of the south end of said lots one and two, in the city of Lincoln. That on the day and year last aforesaid Thomas H. Hyde, together with Rachel L. Hyde, made and executed their certain promissory note in writing of that date, in and by

which they promised, on or before the first day of June, 1873, to pay to the said plaintiff by the name and description of M. W. Merriman, or order, three hundred and sixty dollars for value received, negotiable and payable without defalcation or discount, at the First National Bank of Lincoln, with interest at the rate of twelve per cent per annum from first day of June until paid, which said note they, the said Thomas H. Hyde and Rachel L. Hyde, then and there for a valuable consideration delivered to the plaintiff, and that for the purpose of securing the payment of the said sum of money, according to the tenure and conditions of the said note, the said Thomas H. Hyde and Rachel L. Hyde then and there made and executed their mortgage in writing of that date, in and by which mortgage they granted, bargained, sold, and mortgaged unto the said plaintiff, his heirs and assignees forever, the said lot four in block 86, and lots one and two in block 84, in Lincoln; but which said deed had a condition there underwritten, by which it was provided that in case the said Thomas H. Hyde, his heirs, executors, administrators, or assignees, should pay to the said Marshall W. Merriman, his executors or administrators, the sum of three hundred and sixty dollars, with interest, on or before the first day of June, 1873, according to the condition of a certain promissory note executed by said Thomas H. Hyde and Rachel L. Hyde in favor of the said Marshall W. Merriman (meaning and intending the same promissory note as hereinbefore referred to and described), then the deed to be void, otherwise to be and remain in full force, virtue, and effect in law. Which said deed or mortgage was duly delivered to the plaintiff, and was afterwards duly recorded. That the said Thomas H. Hyde and Rachel L. Hyde failed to pay the said sum of money according to the condition of the said note and

mortgage, or any part thereof. The plaintiff further alleges that afterwards, to-wit: on the sixth day of December, 1873, the said Thomas H. Hyde made his certain other promissory note in writing, in and by which he promised, on or before the first day of May next after date, to pay to the plaintiff or order four hundred and twenty-nine dollars, with interest at the rate of twelve per cent per annum, and attorney's fees, which said note was secured by a certain other mortgage executed by the said Thomas H. Hyde and Rachel L. Hyde to the plaintiff upon the following described real estate, to-wit:

Twenty feet off of the south end of lots one and two in block 84, lot ten in block 21, in the city of Lincoln. Also, the north-east quarter and the south-west quarter of section 26 in township eleven north, of range six east, which said mortgage was also duly delivered and recorded. That the said Thomas H. Hyde has also failed to pay the sum of money mentioned in note and mortgage, or any part thereof. Plaintiff further saith, that on or about the 11th day of August, 1874, he made and filed in this court his petition and precipe, and thereby commenced an action therein, in which said action this plaintiff was plaintiff, and the said Thomas H. Hyde, Rachel L. Hyde, Edward B. Hyde, Perry Palmer, William D. Johnson, Newell T. Bronson, Jacob Pflug, Martin Pflug, and Matilda R. McConnell were defendants, which said parties, all except the said Thomas H. Hyde and Rachel L. Hyde, were made defendants as subsequent incumbrancers of said real estate or some part thereof. Plaintiff says that he afterwards, and before judgment in said action, under advice of counsel, dismissed his said suit as to the said Edward B. Hyde and Jacob Pflug. But that such proceedings were regularly had in the said action in this court; that at the term of this court, began and

held in the month of, to-wit: on the 14th day of November, 1874, by the consideration and determination of said court, this plaintiff recovered judgment of foreclosure and order of sale in the said action according to law and the practice of this court as against each and every other of the aforesaid defendants in the said action. Plaintiff further alleges that afterward, to-wit: On the 11th day of August, 1876, he caused an order of sale to issue out of and from the office of the clerk of this court upon the said judgment of foreclosure and sale directed to the sheriff of Lancaster county, Nebraska, commanding him to appraise, advertise, and sell the said real estate in said judgment as well as in the said order set forth and described according to law, and make report of his doings thereon on the first day of the next term of this court. That the said sheriff, in obedience to the command of the said order, caused the said real estate to be duly appraised, advertised, and sold according to law, and at such sale, did sell the same at public auction to this plaintiff, he being the highest bidder for the several parcels of said lands and real estate at said sale. That upon said sale being made as aforesaid, the same was by the said sheriff duly reported to the said court, and was by the said court duly and regularly confirmed according to law and the course and practice of this court. That thereupon the said sheriff executed and delivered to the plaintiff a deed of conveyance of, to, and upon the said several parcels of real estate hereinbefore, and in the said judgment and order of sale, duly set forth and described, including said lot four in block 86, in the said city of Lincoln. And so the plaintiff alleges that he claims title to the real estate therein first before described, to-wit: Lot four in block 86, in the said city of Lincoln, in the said county of Lancaster.

The plaintiff further alleges that after the execution

and delivery of the note of the said Thomas H. Hyde and Rachel L. Hyde, hereinbefore stated, and the delivery thereof to this plaintiff, and after the making, execution, and delivery of the mortgage by the said Thomas H. Hyde and Rachel L. Hyde, herein first before stated and described; and while the said Thomas H. Hyde and Rachel L. Hyde were justly indebted to the plaintiff in the sum of three hundred and sixty dollars, and divers other large sums of money which were then past due, but before the said first mentioned mortgage from the said Thomas H. Hyde and Rachel L. Hyde was placed on record in the office of the county clerk in and for said county of Lancaster, said Thomas H. Hyde, without consideration, and with the fraudulent intent and purpose of defrauding this plaintiff out his said security, did, on the 7th day of June, 1873, together with the said Rachel L. Hyde, execute, acknowledge, and deliver to the defendant, Edward B. Hyde, the infant son of him, the said Thomas H. Hyde, a deed of conveyance in due form of law, of and to the said lot four, in block 86, in the city of Lincoln, which said deed was on the same day placed on record in the office of the county clerk in and for said county. That the said defendant, Edward B. Hyde, claims an estate in the said real estate adverse to the plaintiff by, through, and under the said deed of conveyance from the said Thomas H. Hyde and Rachel L. Hyde to him, the said Edward B. Hyde, but which said deed plaintiff avers to be fraudulent and void, and as having been made and delivered without consideration, and for the purpose of defrauding this plaintiff out of the said sum of money and the security therefor as hereinbefore set forth and stated, but which deed now constitutes a cloud upon the title of the plaintiff in and to the said real estate, and greatly depreciates the value and enjoyment thereof.

Plaintiff therefore prays the judgment of this court that the said deed of conveyance from Thomas H. Hyde and Rachel L. Hyde to Edward B. Hyde, bearing date June 7th, 1873, be cancelled, annulled, set aside, and declared void and of none effect, and that plaintiff may have such other and further relief in the premises as may be agreeable to equity and good conscience. Plaintiff further represents to the court that the said Edward B. Hyde, defendant, is an infant under the age of twenty-one years, and plaintiff prays that a guardian for the suit may be appointed for him, the said defendant, according to the form of the statute in such case made and provided.

The defendant answered in substance that plaintiff has not now nor never had any possession of the premises, that defendant had had possession of the same by his tenant, and that plaintiff has a full and complete remedy at law, and secondly, denying each and every allegation of the petition. Upon the trial before POUND, J., the defendant objected to the admission of any testimony by plaintiff on the ground—

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

Second. That it is admitted in the pleadings that defendant is in the possession of the premises of which plaintiff seeks to quiet the title.

Third. That the evidence offered is irrelevant and immaterial.

The objections were sustained and the cause dismissed. Plaintiff appeals.

D. G. Hull, for appellant.

1. This is an action to set aside a fraudulent conveyance, and not an action under the statute to quiet title. *Frakes v. Brown*, 2 Blackf. (Ind.), 295. *Middle-*

ton v. Sinclair, 5 Cranch C. C., 409. *Gerrish v. Mace*, 9 Gray, Mass., 235. *Kimmel v. M'Right*, 2 Pa. St., 38.

2. The deed from Thomas H. and Rachel L. Hyde to their infant son, Edward B. Hyde, being without consideration, is absolutely void. *Hanson v. Buckner*, 4 Dana (Ky.), 251. *Bogard v. Garley*, 12 Miss., 302. *Young v. White*, 25 Miss., 146. *Eddy v. Baldwin*, 32 Mo., 369. *Crumbaugh v. Kugler*, 2 Ohio St., 374. *Mohawk Bank v. Atwater*, 2 Paige, Ch., 54. *Bayard v. Hoffman*, 4 John. Ch., 452. *Brice v. Meyers*, 5 Ohio, 121.

3. The plaintiff has no remedy at law, a fraudulent conveyance can only be set aside in equity. *Mohawk Bank v. Atwater*, 2 Paige Ch., 54.

4. Thomas H. Hyde, being insolvent, could not give his property to his child, nor convey such title as would be good against an unrecorded mortgage. *Gates v. Boomer*, 17 Wis., 455.

A. C. Ricketts, for appellee.

1. The appellant claims title through a mortgage foreclosure sale, and purchase of the premises thereunder. The legal title to the premises at time of bringing the action to foreclose was in the appellee; of this fact the appellant was advised, yet he failed to make the appellee a party to the foreclosure suit. The owner of the legal title was a necessary party, and by the omission to make him a party the appellant acquired no title under his purchase. Nor are the proceedings in the foreclosure suit, and the sheriff's deed in pursuance thereof, admissible as evidence to establish a title. 23 Barb., 88. 3 Ark., 364. 20 Ia., 55 and 158. 15 Ohio St., 509. 11 Cal., 315. 32 Ill., 23. 17 How., 477. 9 Abb. Prac., 61. 23 Cal., 106.

2. A court of equity can only be resorted to when no adequate remedy at law exists. The appellee being in adverse possession, he could have been compelled to defend his title in an action of ejectment. The remedy at law being adequate, a court of equity will not entertain jurisdiction. 16 Wis., 594. 28 Conn., 582. 13 Ill., 201.

LAKE, J.

Does the petition state facts sufficient to constitute a cause of action? Although it may be true, as contended by the defendant, that the object of its framers was ostensibly to quiet the title obtained through the foreclosure sale, still it does not follow because it is inadequate for this purpose that it is not sufficient for some other kind of relief.

The subject matter of this litigation ought to have been included and settled in the foreclosure suit. Indeed, the defendant, who is the son of the mortgagor, was made a party to that action, but for some unaccountable reason there was a voluntary dismissal as to him before the entry of the final decree. However, being the nominal, and perhaps rightful holder of the equity of redemption, by a conveyance obtained prior to the commencement of the foreclosure proceedings, and unaffected by the decree, his interest is necessarily made the subject of an independent suit.

It may be observed, too, that the prayer of this petition is both specific and general. By the former the plaintiff requests the court to quiet his title by adjudging the conveyance from the mortgagor to the defendant fraudulent and void as to him; and by the latter "such further and other relief in the premises as may be agreeable to equity and good conscience."

The petition shows that the mortgage in question,

although executed and delivered in March, 1872, was not recorded until after the delivery of the deed, under which the defendant holds the premises. But, as against this failure to record his mortgage, it is charged that the conveyance to the defendant from his father was without consideration, and while he was still a minor, and that it was with the fraudulent intent, on the part of the grantor at least, to cheat the plaintiff out of his said security.

Now it is very clear that these allegations, if made good by the proofs, furnish good ground for relief as against the defendant, who holds, at best, the mere equity of redemption by his deed from the mortgagor. A grantee under such circumstances could not take any advantage of the failure to record the mortgage, but his interest, whatever it might be, would be subject to it. In such case we apprehend the proper decree would be to fix a reasonable time within which the defendant could redeem, by paying the amount of the mortgage debt, and, in default of such payment, that he be foreclosed of all right, title, and interest in the premises, as against the plaintiff.

The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

COBB, J., having been of counsel, did not sit.

MARY MCCREARY, APPELLEE, V. E. D. PRATT AND OTHERS, APPELLANTS.

Practice: APPEAL NOT ALLOWED AFTER STAY TAKEN. If a stay of the order of sale under a decree of foreclosure be taken, no proceedings on appeal from such decree can afterwards be had. [Laws 1875, p. 50.]

Redick & Connell, for appellant.

George W. Doane, for appellee.

LAKE, J.

This is an appeal from the district court for Douglas county. It appears, by a supplemental transcript from the court below, that execution of the decree complained of was duly stayed by the appellant. Under the statute this step was fatal to any subsequent proceedings by him on appeal.

Section five of the act regulating appeals, approved February 23, 1875, provides: "No proceedings in error or appeal shall be allowed after such stay has been taken," etc. Laws 1875, p. 50. Giving effect to this provision, it follows that the defendant, by availing himself of the statutory stay, has voluntarily deprived himself of the right to have a review of the decree in this court, and his appeal must be dismissed.

APPEAL DISMISSED.

NOTE.—Prior to the passage of the statute cited, a contrary rule prevailed. *White v. Blum*, 4 Neb., 555.—REP.

THE CLEVELAND CO-OPERATIVE STOVE COMPANY, PLAINTIFF IN ERROR, V. RANDOLPH GRIMES, DEFENDANT IN ERROR.

1. **Summons:** INDORSEMENT OF AMOUNT CLAIMED. In all civil actions for the recovery of money only, whether commenced in the district, county, or justice courts, the amount for which judgment will be taken, if the defendant fail to appear, is required to be indorsed on the summons.

2. ——: ——————. Where such indorsement is made a defendant has the right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he choose to make no appearance in the action; and it is error to exceed it.

ERROR to the district court for Lancaster county. Tried below, before POUND, J.

T. M. Marquett, for plaintiff in error.

Harwood & Ames, for defendant in error.

LAKE, J.

By the judgment here complained of, a judgment of the county court, in an action wherein the present plaintiff in error was plaintiff and the defendant in error was defendant, was reversed, and the original case retained for trial in the district court. It appears that, as the statute requires, there was indorsed on the back of the summons an amount for which judgment would be taken "if the defendant failed to appear,"

NOTE.—In an action to recover a balance due after the sale of premises under a mortgage foreclosure, and praying for a vendor's lien, no indorsement on summons is necessary. But if one be made it should advise the defendant of the relief prayed for. *Watson v. McCartney*, 1 Neb., 137. See also *Crowell v. Galloway*, 8 Neb., 215. *Roggencamp v. Moore*, ante p. 105.—REP.

The amount thus stated was $94.37. The defendant made no appearance, and judgment was thereupon rendered against him for $194.37, or one hundred dollars more than the indorsement.

In all civil actions for the recovery of money only, whether commenced in the district, county, or justice courts, it is required that there be indorsed on the summons the amount for which judgment will be taken if the defendant fail to appear. And it is expressly provided that "if the defendant fail to appear judgment shall not be rendered for a larger amount and costs." Code of civil procedure, secs. 64, 910. Gen. Stat., 533, 666.

The provision here quoted is mandatory, and in case of the non-appearance of a defendant thus summoned, no judgment in excess of the amount indorsed on the writ can be lawfully rendered against him. A defendant has the right to rely upon this indorsement as fixing a limit beyond which the court cannot go in rendering judgment, in case he chooses to make no appearance in the action; and it is error to exceed it. *Watson v. McCartney*, 1 Neb., 131. *Crowell v. Galloway*, 3 Neb., 215. The judgment of reversal by the district court was clearly right, and must be affirmed.

JUDGMENT AFFIRMED.

GEORGE COTTRELL, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Bastardy:** PRACTICE AND PROCEEDINGS. Proceedings under the bastardy act of 1875 should be conducted in the name of the prosecuting witness, or, if she refuse to prosecute, in the name of the county; but where proceedings are instituted in the name of the state, without objection on that ground until after judgment, this will be a waiver of the objections, the state being a mere trustee for the real party in interest.

2. ———: ———. The proceeding is in the nature of a civil action to enforce the performance of a civil and moral obligation —the support by a father of his child.

3. **Constitutional Law:** SIGNING BILLS. The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act.

ERROR to the district court of Richardson county. Tried before WEAVER, J. The opinion states the case.

Schoenheit & Thomas, for plaintiff in error.

1. The defendant was prosecuted for the *crime of bastardy*, and the power of the state, wielded by the district attorney, was brought to bear against him. On behalf of the plaintiff in error we say that there

NOTE.—Upon a verdict of guilty in an action of bastardy, the court should adjudge the defendant to be the reputed father of the child. *Aliter*, the order of the court for the support of the child is erroneous. *Spurgeon v. Clemmons*, 6 Neb., 307. ———. A bill originating in the senate was passed by the house with amendments, and returned to the senate, who concurred therein, but the vote on concurrence was not disclosed by the journal. *Held*, that the act was valid. *Hull v. Miller*, 4 Neb., 503. *Commissioners of Leavenworth County v. Higginbotham*, 17 Kan., 74. And see this last case, pp. 75, 76, in support of the third point stated in above syllabus.—REP.

is no such crime as bastardy known to the law. The proceeding under the bastardy act is in no sense a criminal proceeding, but, on the contrary, it is one of a civil nature merely. The object is not to punish the defendant, but only to enforce the discharge of a moral duty. *Carter v. Krise*, 9 Ohio St., 402. *Holmes v. The State*, 2 G. Green, Ia., 501. *Marston v. James*, 11 N. H., 156.

2. We claim that the court erred in permitting the state to prosecute the plaintiff in error as for a crime. He had committed no offense against the state, and the state had no cause of action against him.

3. At common law a father was not bound to support his bastard child. His liability to do so is created entirely by statute. *Perkins v. Mobley*, 4 Ohio St., 668.

4. The act is unconstitutional, having never been signed by the president of the senate. Constitution, 1867, Art. II., sec. 20.

C. J. Dilworth, attorney general, *J. P. Maule*, district attorney, and *W. W. Wardell*, for the defendant in error.

MAXWELL, CH. J.

The plaintiff in error was arrested, tried, and found guilty under the provisions of the bastardy act of 1875. The case is brought into this court by petition in error.

The errors assigned are:

First. That the court erred in treating the case as a criminal case, and in permitting the same to be prosecuted in the name of the state by the district attorney.

Second. Because there is no law in force in the state of Nebraska under which this proceeding could be sustained, and the court erred in not dismissing the case.

Third. Because the "act for the maintenance and support of illegitimate children," approved February 25, 1875, is of no validity, not having been signed by the president of the senate.

Fourth. Because the complaint sets out no cause of action, either civil or criminal, against the plaintiff in error.

Fifth. Because the district court had no jurisdiction.

In *Devinney v. The State*, Wright's Report, 564, the supreme court of Ohio, in a circuit decision, says: "A prosecution in bastardy is only *quasi* criminal, and if brought in the name of the state at all, it should appear to be on the relation of the prosecuting witness. It is more proper to use her name alone." This case seems to have been followed in Ohio under a statute that appears to be similar to our own. An examination of the cases in the reports of that state will show that cases have been prosecuted indiscriminately in the name of the state, or in that of the prosecuting witness or municipality liable for the support of the child. *State v. Smith*, Tappan's R., 143. *State v. Farley*, Wright's Report, 464. *Porter v. The State*, 23 Ohio State, 320. *State v. Morrow*, 2 W. L. M., 308. *State v. Courtney*, 1 Id., 389. *Devinney v. The State*, Wright's Report, 564. In some of these cases, however, the action was upon the recognizance. *Perkins v. Mobley*, 4 Ohio State, 668. *Maxwell v. Campbell*, 8 Id., 265. *Carter v. Krise*, 9 Id., 402. *Musser v. Stewart*, 21 Id., 353. *Roth v. Jacobs*, 21 Id., 646. *Hootman v. Shriner*, 15 Id., 43. *Dailey v. Carson*, 9 Ohio, 149. *Hawes v. Cooksey*, 13 Ohio, 242. It will be seen that a very large proportion of the reported cases have not been prosecuted in the name of the state. And, being essentially a civil action, the better course is to conduct the prosecution in the name of the real party in interest. But in such

a case the state is a mere trustee, and the real party in interest obtains the benefit of the judgment, the object of the action being merely to enforce the discharge of a civil and moral obligation—that of support by a father of his own child. The judgment, therefore, is a bar to another action for that purpose. Had objection been made at the proper time to the form of the action, the court should have caused the real party in interest to be substituted as plaintiff, and the cause then proceeded with in the name of the substituted party, but having failed to do so, the objection is waived.

The second and third assignments of error may be considered together. It is claimed that the "act for the maintenance and support of illegitimate children," approved February 25, 1875 (Laws, 1875, p. 53), is void because not signed by the president of the senate. An inspection of the original act in the office of the secretary of state shows that the act passed the house of representatives, and was duly attested, and was signed by the speaker of the house. The act is also attested by the secretary of the senate, and is approved by the governor, but is not signed by the president of the senate. Does this omission invalidate the act? Section 20, Art. II. of the Constitution of 1867, provides that: "The presiding officer of each house shall sign publicly, in the presence of the house over which he presides, while the same is in session and capable of transacting business, all bills and joint resolutions passed by the legislature." Section 11 provides that: "On the passage of every bill, in either house, the vote shall be taken by yeas and nays, and entered upon the journal; and no law shall be passed in either house without a concurrence of a majority of all the members elected thereto." An examination of the journal of the senate at that session shows that the bill passed the senate by a vote of twelve in favor of and

one against it. The signature of a presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. The vote upon the passage of the bill must be determined from the journals of the respective houses. *Hull v. Miller*, 4 Neb., 503. And where it appears from the journals that a bill has passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same. The act, therefore, is of the same validity as though signed by the presiding officer of the senate.

As to the fourth assignment of error, it is sufficient to say that there is no copy of the complaint set out in the bill of exceptions, and in the absence thereof it will be presumed that it stated facts sufficient to constitute a cause of action.

As to the fifth assignment of error, it is sufficient to say that the district court, on appeal, has jurisdiction in this class of cases, it being expressly conferred by the provisions of the act.

In *Musser v. Stewart*, 21 Ohio State, 353, the supreme court of Ohio say: "The statute is in the nature of a police regulation. Its main object is to furnish maintenance for the child, and indemnity to the public against liability for its support. The act of the putative father is an offense against the peace and good order of society; and the penalty which the law imposes for his transgression is to enforce upon him the duty of making provision for the maintenance of his illegitimate offspring."

The statute does not aim to punish the putative

father, but merely requires him to perform the duty required of every man who becomes the father of a child—to provide for its support. As it is clearly shown by the testimony that the plaintiff in error is the father of the child in question, the judgment of the district court is clearly right and is affirmed.

JUDGMENT AFFIRMED.

ASA S. EDGERLY, PLAINTIFF IN ERROR, v. J. F. GARDNER AND OTHERS, DEFENDANTS IN ERROR.

1. **Partnership:** PATRONS OF HUSBANDRY: STATE AGENT OF STATE GRANGE: MEMBERS OF STATE GRANGE NOT PARTNERS. The plaintiff was a member of the society known as "The Patrons of Husbandry," and the defendants members of the "State Grange" of the same organization. The action was upon an alleged breach of warranty in the sale of a Werner harvester by one McCaig, the state agent of "The Patrons of Husbandry," appointed by the "State Grange." *Held*, That as to members of subordinate "Granges," whose representatives they were, the defendants were not partners, nor liable for the acts of said agent.
2. **Warranty:** RESCISSION OF SALE. In the sale of a "Werner harvester" the warranty was in substance that it was "equally as good" as the "Marsh harvester," and if it were not, the purchaser "could bring it back, and get his money back." *Held*, That in order to rescind the sale, it was not sufficient for the purchaser to show merely that he "wrote" to the seller "that it had proved worthless," and that he "tendered the machine subject to his order," but that in order to do so it was necessary for him to establish that the machine was not equal in its execution to the "Marsh harvester," and that he had returned it to the seller.

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

Lamb, Billingsley & Lambertson, for plaintiff in error.

1. What is the character of the organization known as the Nebraska State Grange of the Patrons of Husbandry? It is difficult to bring it within the true definition of any branch of the law or fix upon it the duties and liabilities incident to any department of the law. The Grange possesses nearly all the characteristics of a corporation, only it is not incorporated. It is a sort of floating partnership, which is not dissolved by the withdrawal or death of a member, as in the ordinary co-partnerships. Instead of being like ordinary co-partnerships, which are ever dying, and being ever renewed, it possesses the attribute of immortality incident to corporations. Such co-partnerships are recognized in the law. *Tyrell v. Washburn*, 6 Allen, 467. *Tenney v. N. E. Protective Union*, 37 Vermont, 64. *Cutler v. Thomas*, 25 Vermont, 73.

2. The objection is made that no recovery can be had on the Painter claim because he was a member of the State Grange. But this rule has no force when a partner is hired to do a certain specific work, for which he is to be paid a specific sum, or what his services are reasonably worth over and above his interest in the profits. He can sue the partnership at once, without resorting to a bill in equity. In this case the state purchasing agent, the executive committee, and the Grange all agreed that he should be paid for his services. He would have as much right to sue the Grange direct as any officer of the Grange who was rendering extra services which it was not his duty to do in common with the other partners. One who is clerk and also in partnership in a particular business with his employer, may, where his duties as clerk and partner are distinct, sue for the salary due him in the former

capacity without resorting to a suit for the settlement of the partnership transactions. *Alexander v. Alexander*, 12 La. Ann., 588. *McCall v. Oliver*, 1 Stew. (Ala.), 510. *McGehee v. Dougherty* 10 Ala., N. S., 863. 10 Ia., 332. 49 Me., 252. 44 N. H., 376. 23 Ark., 466. *Robinson v. Green*, 5 Harr. (Del.), 115. *Gibson v. Moore*, 6 N. H., 578. *Gulick v. Gulick*, 14 N. J. L., 578. *Clark v. Dibble*, 16 Wend., 601. *Koehler v. Brown*, 31 How. Pr. (N. Y.), 235. *Neil v. Greenleaf*, 26 Ohio State, 570.

T. M. Marquett, for defendants in error.

1. The State Grange was a representative body, political in its nature; its members elected by the members of the subordinate Granges empowered to act for the good of all the grangers in the state.

2. Said body met annually, and at its meetings in 1874 it proposed a scheme for the good of all the grangers, which in substance was that an agent should be appointed through whom grangers might obtain their supplies and farming implements cheaper than in any other way. For this purpose the different grangers who were able were to furnish the agent with money.

3. This plan was approved by the grangers throughout the state, and acted upon. The plaintiff, approving of this plan, went to the agent, bought farming implements, and now says that the agent defrauded him, and comes to the sage conclusion that the persons who suggested the plan are liable to him.

4. On the other hand, we claim that the agent was just as much the agent of one granger as he was the agent of another. If the State Grange suggested the plan, the members of the subordinate Granges approved of it, and furnished the money. The agent

acted for all in the order, and one granger who has been defrauded cannot pick out a few other grangers and make them stand good for the fraud or act of a common agent, for if he was the agent of one he was the agent of all the grangers.

5. In dealing with this common agent each granger had to make his own bargain and look out for his own interests.

6. And for the acts of the agent one of the order was no more liable than another.

7. The remedy is against the agent and his sureties or the person who contracted the debt.

8. A party claiming to act as agent must show a responsible principal. *Quigley v. De Haas*, 82 Pa. St., 267. *McCormick v. Bush*, 38 Texas, 314.

Schoenheit & Thomas, on same side.

1. The plaintiff attempts to sustain the liability of defendants on the ground that they were a partnership. We contend that the evidence shows that there was no partnership, but on the contrary that the association was a mere agency. It had none of the elements of a partnership. It had no capital, and no business whereby profit was to be made. There were no profits to be divided and no losses to be borne in common. *Waugh v. Carver*, 2 H. Bla., 246. *Coope v. Eyre*, 1 H. Bla., 37. Gow on Part., 1. 3 Kent's Com., 23. Story on Part., 2, 3, 7, 22, 23. Collyer on Part., B. 1, Ch. 1, Sec. 1, p. 11. *Johnson v. Miller*, 16 Ohio, 431. *Dwinel v. Stone*, 30 Me., 384. *Pomery Salt Co. v. Davis*, 21 Ohio St., 555.

2. It was not the intention of the defendants to form a partnership, but merely an agency. Partnership is the creature of a voluntary contract. If the defendant did not intend to enter into a partnership, then this court, where third persons have not been

misled, will not hold them to be partners. *In re Worcester Corn Ex. Co.*, 19 E. L. and E. Rep., 627.

LAKE, J.

The plaintiff in error brought his suit in the court below upon four causes of action, and recovered upon the last two. Upon the first two there was a verdict and judgment against him, which, because of certain alleged errors, he has brought to this court by petition in error for review.

Of the several errors alleged, the only ones that are in a situation to be examined are those which question the sufficiency of the evidence to sustain the verdict. Those relating to the admission and the rejection of testimony were not properly brought to the attention of the district court in the motion for a new trial, and therefore cannot be considered here.

As constituting the *first* cause of action, a breach of warranty is alleged in the sale of a "Werner harvester" to the plaintiff by one William McCaig, the agent of the defendants. The *second* cause of action is a claim for certain services, rendered by one Painter, as clerk and book-keeper under said McCaig in the business of his agency, which claim had been assigned to the plaintiff. The defendants in error were members of what is known as "The Nebraska State Grange of the Patrons of Husbandry." The action is sought to be maintained against them on the theory that by being members thereof, and unincorporated, they were in legal contemplation partners in whatever business the organization saw fit to engage in. That this would be so as to strangers dealing with this agent without knowledge of the true character and purposes of the association may be true, but is it true as to one in the situation of the plaintiff?

Of the objects and powers of the "State Grange" but very little is disclosed by the record before us. It does, however, appear from the evidence that its membership was composed of delegates sent from the subordinate "granges" located in different portions of the state, and that, ostensibly at least, the work of these delegates was directed to the advancement of the interests of those whom they represented. It also appears that, at the annual meeting of the "State Grange" in December, 1873, the subject of the creation of a state agency, through which members of the subordinate "granges" might advantageously purchase various articles of farm machinery, was considered. On the report of a committee, to whom the subject was referred, the scheme was adopted, and William McCaig duly elected such agent. This agent was required to give a bond to the "master," or chief officer of the association, in the sum of $25,000 for the faithful discharge of the duties of the office. His books and bank account were at all times to "be subject to the inspection of the master, secretary, and executive committee." He was required, also, to "give a full and correct statement of the transactions of his office, annually, to the executive committee." His compensation for services was to be such percentage of "purchases and sales made by him as shall be ordered by the executive committee, not exceeding in the aggregate $1,000." All excess of profits derived from the business of the agency over this sum was to "be placed to the credit of the state grange." There is also testimony to show that the "State Grange" undertook, under certain circumstances, to be responsible for money advanced by the subordinate granges, or their members, "for the purpose of purchasing agricultural implements or supplies." But there is not a syllable of evidence to show that it was within the

contemplation of any one connected with the order of "Grangers" that the members of the "State Grange" should, or did, incur any individual responsibility for the conduct of the state agent. It is evident that, within the order at least, it was understood that for injuries resulting from the faults of this agent his bond to the master of the "grange" furnished the only security for remuneration.

In the creation of this state agency, and in all they did in connection therewith, the defendants, doubtless, acted in the utmost good faith, and with the sole view of benefiting their constituents, of which the plaintiff was one, he being at the time a member of a subordinate "grange." Under these circumstances it seems to us that the plaintiff is not in a situation to complain of the defendant's conduct; and that, even if he have a cause of action against anybody for defects in the harvester in question, it is most certainly not against those whose scheme he availed himself of, and through whose efforts in his behalf he sought to profit.

And these considerations are applicable as well to the second cause of action also, which in the hands of the plaintiff is subject to any defense that could have been made to it in a suit brought thereon by the assignor. This man Painter, by whom the services which form the basis of the claim were rendered, was an active member of the order, served on various committees of the "State Grange," and was thoroughly conversant with all its workings. He certainly had no reason to, nor could he have, supposed that the defendants were personally liable to him therefor.

In addition to what we have already said there is still another sufficient reason why the verdict of the jury upon the first cause of action should not be disturbed. The harvester in question, as the evidence

shows, was recommended by McCaig to be as good as the Marsh harvester. His warranty, to use the language of the plaintiff himself, was: "He," McCaig, "remarked that it was equally good, and in some respects superior," to the Marsh harvester, "and if not, I could bring it back and get my money back. Upon that recommendation, on the 21st of June I purchased a harvester, and paid $150." Such being the terms of the sale, in order to entitle the plaintiff to rescind it he must show that the machine was not equal in its execution to the Marsh harvester, and, in addition to this, that he returned it to the seller. Now, while it is very clearly shown by the testimony that, owing probably to some defect in its construction, this machine could not be made to operate satisfactorily, still we are left in total darkness as to its relative merits in comparison with a Marsh harvester. On this point there is no evidence. Again, when it was ascertained that this machine would not answer the plaintiff's purposes he did not return it, as by the terms of the sale he was required to do if he would rescind it, but simply "wrote to McCaig" that he had tested it, "that it had proved worthless," and that he "tendered the machine subject to his order." Whether McCaig ever received this letter, or whether it was even properly mailed to him, does not appear. However that may be, the condition by which the plaintiff undertook to return the property, in order to rescind the sale, is not satisfied by a written notification to the seller that it is held subject to his order. As was said in *Nichols v. Hail*, 4 Neb., 210: "Where in a contract of warranty there are conditions precedent to be observed and performed by the purchaser, he must show a fair, reasonable compliance with the terms of the contract on his part, or he will not be permitted to enforce it against the warrantor."

We think the verdict is fully supported by the evidence and the law of the case, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

WILLIAM B. DALE, PLAINTIFF IN ERROR, V. WILLIAM B. DODDRIDGE, DEFENDANT IN ERROR.

1. **Performance.** Where an act is to be performed within a certain time, as within three days *after* the service of a notice, the party notified has the whole three days in which to perform the act, and an action instituted on the third day is premature.
2. **Forcible Entry and Detainer.** The judgment of a justice of the peace, or of the district court, in proceedings in forcible entry and detainer, is conclusive in that proceeding on the matters in issue at the time of its rendition, unless such judgment is reversed or modified by proceedings in error. But the judgment is no bar to another action in relation to the title of the premises.

ERROR to the district court for Platte county. Tried below before POST, J. The opinion contains a statement of the facts in the case.

Whitmoyer, Gerrard & Post, for plaintiff in error.

1. The notice to quit was insufficient, and should not have been received in evidence. The date fixed in notice must correspond with termination of the lease; this requirement is imperative. Wade on Notice, §§ 583, 584, 603, 609, 610, et seq. *Waters v. Young*, 11 Rhode Island, 1 (23 American, 409). *Steward v. Harding*, 2 Gray, 335. *Oakes v. Munroe*, 8 Cush., 282. The action mentioned in 1021 is an action proper for possession or title, or both, in a court of competent

jurisdiction. 1 Wait's Actions and Defences, 9. 3d Id., 395. Again, suppose the plaintiff to have been actually ousted under the judgment of the justice, the statute makes no provisions by which he could in turn maintain a suit for the forcible detention of the same property. The doctrine that a party out of possession may harass his adversary by innumerable prosecutions under this act until the defendant is exhausted by litigation, or until through court or jury he at length secures a favorable verdict, is too monstrous to be tolerated. On trial plaintiff in error offered to show by himself as a witness that since said contract of purchase, and while holding under and by virtue of said contract, he had made valuable improvements thereon to the amount of $1,700, and had paid taxes thereon with the full knowledge and consent of the defendant in error, which evidence was rejected by the court and exception duly taken. The ruling cannot be sustained. Admit all that can be said concerning the contract, viz.: that standing alone it would be within the operation of the statute of frauds; second, that plaintiff being in possession as tenant of defendant in error at the time of the purchase, his subsequent possession would be referable to the former tenancy, unless the contrary clearly appear. Valuable and lasting improvements made on the premises under a parol contract of purchase, with the privity of the vendor, is sufficient to satisfy the statute of frauds. *Morelan v. Lemasters*, 4 Blackf., 383. *Stater v. Hill*, 10 Ind., 176. *Galbraith v. Galbraith*, 5 Kan., 402. *Edwards v. Fry*, 9 Id., 417. Held, sufficient in the above cases to warrant a decree for specific performance. Any act may be proved which tends to show that the relation of landlord and tenant does not exist. *Edwards v. Spry*, supra. *Armstrong v. Kattenhorn*, 11 Ohio, 272. Brown on Statute of Frauds, § 478.

Millet & Son, for defendant in error.

1. Dale, on the 6th day of July, 1878, being the tenant at will, or from year to year, of Doddridge, and having neglected and refused to pay rent for premises since March, 1877, this action was well brought. Laws, 1875, pages 43 and 44. Taylor's L. and T., §§ 59 to 63 inclusive.

2. The position of plaintiff in error cannot be maintained—that because these parties entered into a verbal agreement for the purchase of the property in question in March, 1877, while Dale was tenant of Doddridge, which agreement Dale wholly failed and refused to perform, changed the relation of the parties from landlord and tenant to that of vendor and vendee—for the following reason: in order to change the relation of these parties it would be necessary for Dale to show such a verbal contract that a court of equity would enforce, and such state of facts that would amount to a fraud on Doddridge's part in not complying with his part of such agreement. Pomeroy on Contracts, §§ 103 and 106.

3. The alleged contract is indefinite, and Dale, having defaulted in the payment of the purchase money and back rent, would have no standing in a court of equity in an action for specific performance. Pomeroy on Contracts, § 99. *Poland v. O'Connor*, 1 Neb., 50.

MAXWELL, CH. J.

In the year 1874 the defendant leased to the plaintiff lots one and two in block 144, in the city of Columbus, for $15 per month rent. The plaintiff immediately entered into the possession of the premises, and has continued in possession of the same. In March,

1877, the plaintiff entered into a verbal contract with the defendant for the purchase of the premises for the sum of $1,000, to be paid some time thereafter in county warrants. There is some testimony tending to show that the plaintiff was to pay $15 per month rent up to the time of making the payment, although the plaintiff denies that such was the fact. It is clearly shown that the plaintiff made certain improvements on the premises in March, 1877, to be applied on rent in case the sale was not completed. No rent was paid in any other manner after that period. In September, 1878, the defendant in error instituted this action before a justice of the peace, and judgment was rendered against the plaintiff in error. The district court affirmed the judgment of the justice, and the plaintiff in error brings the cause into this court by petition in error.

The attorneys for the defendant in error object to the bill of exceptions because it is alleged that it was not signed during or at the close of the trial. It appears from the docket entry found in the bill of exceptions that "the said jury were thereupon discharged. It is therefore considered by me, at 11:20 o'clock P.M., this 14th day of September, 1878, that the said plaintiff have restitution of the premises described in said complaint, and recover of said defendant the costs of this action as hereinafter taxed. Thereupon the said defendant immediately presented his bill of exceptions, which is duly allowed.

"STEPHEN S. MCALLISTER, *J. P.*"

The certificate to the bill of exceptions is as follows: "Whereupon the court rendered judgment against said defendant on said verdict, to which defendant excepted and still excepts, and tenders this his bill of exceptions, which is accordingly allowed and signed as a true bill.

"Witness my hand this 14th day of September, 1878.

"STEPHEN S. MCALLISTER, *J. P.*"

Afterwards there is a statement to which no signature is appended, saying that the bill was actually signed on the 18th day of September, 1878.

The court must presume the docket entry and the certificate to have been made at the time they purport to be, and even if the supplemental statement had been signed it would be void, as a justice could not thus stultify himself. In deciding this application, it is unnecessary to decide how far the act of 1877 [Laws, 1877, p. 11] in relation to bills of exceptions applies to proceedings before justices of the peace, although probably it has no application.

On the trial of the cause the defendant in error offered in evidence the following notice:

"To W. B. DALE.

"SIR: I wish you to leave the following premises now in your occupation, to-wit: lots numbered one (1) and two (2) in block one hundred and forty-four (144) in the town, now city, of Columbus, and known and designated on the lithographed and recorded plat of said town, now city, situated in Platte county, state of Nebraska. Your compliance with this notice within three days *after* its service will prevent any legal measures being taken by me to obtain possession.

"I am respectfully,

"WILLIAM B. DODDRIDGE.

"By G. C. BARNUM, his agent. Dated Sept. 4, 1878."

On the 7th day of September, 1878, the action was commenced. The plaintiff in error objected to the introduction of the notice on the ground that it was "insufficient." The particular cause of insufficiency is not pointed out, and the notice, so far as we can perceive,

is sufficient in form. A more serious question arises as to the time the action was commenced. The notice is dated the 4th of September, 1878, and appears to have been served on that day, and requires the plaintiff herein to remove from the premises *within three days after its service.* Under such a notice the day of service is excluded, and the computation commences on the 5th, and the tenant is entitled to the 5th, 6th, and 7th days in which to remove from the premises.

In *Wright v. Lepper*, 2 Ohio, 300, the court say: "There can be no question that he who is bound by a condition to do an act *within six months* has the whole period of six months to perform it in, and cannot be called upon by the other party to perform it before the last day." And where an act is required to be done within a certain time after the date, or day of date, the day of the date must be excluded, and the party may perform the act at any time within the limitation. *Farwell v. Rogers*, 4 Cush., 460. *Oatman v. Walker*, 33 Me., 71. *Wiggin v. Peters*, 1 Met., 127. *Ewing v. Bailey*, 4 Scammon, 420. *Windsor v. China*, 4 Greenleaf, 298. The plaintiff was therefore entitled to the whole of the 7th day of September in which to remove from the premises, and no action could be maintained before the expiration of the time fixed in the notice. But the notice is for the protection of the tenant, and may be waived by him, and will be waived if he proceed to trial without objection on that ground, more particularly so where he claims title in himself to the premises.

On the trial of the cause the plaintiff in error offered in evidence a transcript of the proceedings in the case of W. B. Doddridge *v.* W. B. Dale and Caroline E. Dale, in the county court of Platte county, to which the defendant in error objected. The objection was sustained and the evidence excluded, to which the

plaintiff herein excepted. It appears from the transcript offered in evidence that on the 13th day of August, 1878, the defendant in error instituted proceedings against the plaintiff in error and his wife for the forcible detention of the premises described herein. On the 26th day of August, 1878, the cause was tried to the court, and the following judgment rendered: "The court being fully advised in the premises, finds that the cause of action herein accrued more than one year prior to the commencement thereof. It is therefore considered and adjudged by the court here that this action be dismissed, and that the said plaintiff (defendant in error) be adjudged to pay the costs herein, taxed at $6.15 as per margin.

"JOHN G. HIGGINS,
"County Judge."

Section 1021 of the code provides that: "Judgments either before the justice or in the district court, under this chapter, shall not be a bar to any other action brought by either party." Gen. Stat., 689. And in *Myers v. Koenig*, 5 Neb., 422, the court say: "It is expressly provided in the law that the judgment * * shall not be a bar to an after action brought by either party." Do the provisions of section 1021 authorize a plaintiff, upon a judgment being entered against him in proceedings for forcible entry and detainer, to at once institute another action, and so *ad infinitum?* In other words, is the judgment of the justice upon the matters in issue in the case conclusive in that form of proceeding until modified or reversed?

In *Kelly v. Nicholas*, 10 Ohio State, 318, the court say: "The action of forcible entry and detainer was a special statutory remedy provided by 'an act to regulate the action of forcible entry and detainer,' passed February 25, 1831, and subsequent amendments thereto." * * Section 9 of the act provides: "that no

appeal shall be allowed from the judgment of the justice; but that the proceedings of said justices might be removed by *certiorari* into the court of common pleas of the county." On page 326 of the same case the court say: "It is true the proceeding in forcible entry and detainer is not, strictly speaking, a civil action at *law* nor a *suit* in equity, but was doubtless intended to be embraced by the provision of section 605 of the code, as in civil actions given by statute. And, the judgment and proceedings in forcible entry and detainer are clearly within sections 511 and 524 of the code. The subject was there equally subject to review and reversal by the court of common pleas, as if it had been an action at law."

That the judgment of the justice is a final judgment from which error will lie there is no question. And as between the parties in that proceeding as to the matter put in issue, it is final, until modified or reversed, there is no doubt. If a party upon being defeated in an action, could immediately institute another, and upon being defeated in that at once bring another action, and so on, indefinitely, the proceeding would be an expensive farce, determining nothing, and binding no one by the adjudication. But such is not the law. No appeal is allowed, but either party may have the judgment reversed for errors appearing on the record. But the judgment in this proceeding, whether rendered before a justice of the peace or in the district court, is not conclusive as to the title, as it determines only the right to the possession. *Harvie v. Turner*, 46 Mo., 444. Taylor's Landlord and Tenant, § 793. The judgment, therefore, is no bar to any other action in relation to the title to the premises. The court therefore erred in excluding the transcript offered in evidence, it being apparent that the detention complained of is the same as that upon which this action is predicated

The offer to show that the plaintiff had made valuable improvements on the premises to the amount of $1700 was properly excluded, there being no testimony tending to connect the same with the improvements authorized by the agents of the plaintiff in March, 1877, or to show that the defendant herein authorized the same. The testimony as to payment of taxes, however, should have been received if, as claimed, they were paid "with the full knowledge and consent of the plaintiff" (defendant in error). It is unnecessary to pass upon the character of the plaintiff's possession, and for this reason it is unnecessary to review the instruction asked.

For the reasons above assigned the judgment of the district court is reversed, as also the judgment of the justice of the peace, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE STATE OF NEBRASKA, EX. REL. ADOLPH RIESCHICK, v. T. C. CUNNINGHAM.

Attachment: PROCEEDINGS IN ERROR: MANDAMUS. Where an attachment is dissolved the court may fix a time, not exceeding twenty days, in which to file a petition in error in the reviewing court and to give the undertaking required by the statute, during which time the attached property shall be held by the officer having possession of the same. If no undertaking is given within the required period, the officer must deliver the property to the party entitled to the same, and if he refuse to do so he may be compelled by mandamus

Original application for mandamus.

Clarence Gillespie, for relator.

Schoenheit & Thomas, for respondent.

MAXWELL, CH. J.

The relator makes application to this court for a peremptory writ of mandamus, alleging that he is the head of a family, a resident of this state, and actually engaged in the business of agriculture; that he has neither lands, town lots, nor houses subject to exemption as a homestead under the laws of the state; that one Burchardt commenced a suit by attachment against him in the district court of Richardson county, under which proceedings the sum of $386 was paid to the clerk of said court; that afterwards said attachment was dissolved, although a judgment was rendered against the relator for the amount of the debt; that while the action was pending in the district court, the relator filed an inventory therein of the whole of the personal property owned by him, and that thereupon the sheriff of said county caused said property to be appraised as required by law, and that the whole value of said property was appraised at less than $500; that the debt for which said property was taken was not incurred for clerks', laborers', or mechanics' wages, nor for money due and owing by an attorney at law for money or other valuable consideration received by said attorney for any person or persons; that the clerk refused to pay the money received by him under the proceedings in attachment to the relator.

An alternative writ of mandamus was allowed, to which the respondent, who is clerk of the district court, answered, that at the time of the dissolution of the attachment on the 24th day of June, 1879, the court made an order to which the attorney for the relator assented, requiring the clerk to hold the money in question for thirty days, when, if the proceedings in the

attachment were not taken to the supreme court for review, the money was to be paid to the relator; that on or about the 18th day of July, 1879, said cause was docketed in the supreme court, and was still pending and undetermined. It also appears that no undertaking was filed by the plaintiff in error. The act approved February 17, 1873, "to provide for the retention of attached property pending a review on error of an order discharging the attachment," provides: "That when an order discharging an order of attachment is made, and any party affected thereby shall except thereto, the court or judge shall fix the number of days, not to exceed twenty, in which such party may file a petition in error, during which time the property attached shall be held by the sheriff or other officer." The party filing the petition in error, "shall give an undertaking to the adverse party, with surety or sureties, to be approved by the court, in double the amount of the appraised value of the property attached, conditioned to pay such adverse party all damages sustained by such party in consequence of the filing of such petition in error, in the event that said order of attachment shall be discharged by the court as having been unlawfully obtained." Gen. Stat., 715. Under this statute, when an attachment is discharged the court may direct the officer holding the property to retain the same for a period not exceeding twenty days without an undertaking. If the adverse party desire the retention of the property for a longer period, he must file his petition in error and the undertaking required by law. Failing to do so, the officer must surrender the property to the party entitled to the same.

The defendant therefore had no authority to retain the money in question, and a peremptory writ is awarded.

JUDGMENT ACCORDINGLY.

RICHARD BLACO, PLAINTIFF IN ERROR, v. W. D. HALLER, DEFENDANT IN ERROR.

1. **Forcible Entry and Detainer:** COMPLAINT: JURISDICTION. The complaint under the statute for the forcible entry and detention of property merely charged that the defendant entered upon the premises in controversy "with force and violence," and that he had "with force detained the same." *Held*, that it was fatally defective in omitting to charge that such entry and detention were *unlawful*, and conferred no jurisdiction upon the court to issue the summons.

2. **Jurisdiction of County Court.** County courts have jurisdiction of actions for the forcible entry and detention of real property.

ERROR to the district court for Washington county

It was an action of forcible entry and detainer, brought by defendant in error against plaintiff, in the county court of Washington county; finding and judgment for defendant in error. Plaintiff in error prosecuted a petition in error to the district court of Washington county, Nebraska, where the findings and judgment of the county court were affirmed by SAVAGE, J. To reverse the judgment of the district court, this petition is prosecuted in this court.

E. Estabrook, for plaintiff in error.

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

LAKE, J.

The action below was brought under the statute relating to the forcible entry and detention of real property. Numerous errors are assigned, but the only ones well taken concern the complaint, which, in the

opinion of the court, is fatally defective in omitting to charge that the entry and detention complained of were "unlawful."

This action is purely a statutory remedy, and can be resorted to only against those who make "unlawful and forcible entry" into lands or tenements, or against those who, having a lawful and peaceable entry, "unlawfully and by force" hold the same. Code of Civil Procedure, sec. 1019. [Gen. Stat., 688]. It is merely charged in this complaint "that the said Richard Blaco did, on the 1st day of December, 1876, with force and violence enter upon said premises, and has with force detained the same, and deprived your plaintiff of the possession thereof."

Now all that is here charged against the plaintiff in error may have been literally true, and fully established by the evidence, and yet, not being *unlawful*, there was no ground for a recovery in the action. The inference to be drawn from the omission to charge the entry and detention to have been unlawful is, that Blaco was legally entitled to the possession of the premises into which he had "forcibly" intruded himself.

That it is necessary, in view of the peculiar language of the statute, to allege the entry or detention to have been unlawful is too plain, it would seem, to admit of the least question. The controlling words of the statute are "force" and "unlawful." They are to be taken in their ordinary sense. They are not usually understood as being of the same import. The exertion of force may or it may not be unlawful. If a wrong-doer should, during the absence of the owner, take possession of a house, would his forcible ejection therefrom by the latter on his return furnish any ground for a recovery in this form of action? No one would so contend. And yet such act on the part of

the owner of the house could truthfully be made the basis of a charge as grave as that set out in this complaint. In the case supposed the owner of the house might, indeed, have gone so far in his exhibition of force as to render himself liable for an assault and battery, or other breach of the peace, and still that would furnish no ground for an action to take from him the possession of his home thus forcibly regained.

An act may be "unlawful," and no "force," as the word is generally understood, be exerted. So, too, the exertion of "force" may, or it may not, be "unlawful." As before stated, these words are not of the same import, and the use of both is essential to a perfect complaint in this form of action. Neither can be disregarded, and a cause of action be stated. As to the necessity of a valid complaint to give the court jurisdiction there can be no doubt, for section 1023 of the code provides that: "The summons *shall not issue* until the plaintiff shall have filed his complaint in writing with the justice, which shall particularly describe the premises entered upon or detained, and shall set forth either an unlawful and forcible entry and detention or an unlawful and forcible detention after a peaceable or lawful entry of the said premises." Gen. Stat., 689. And there being no such complaint, as the statute provides shall precede the issuing of the summons, the proceeding was unauthorized, and the challenge to the jurisdiction of the court by the plaintiff in error ought for that reason to have been sustained.

The objection strenuously urged upon our attention, that county courts have no jurisdiction of actions for the forcible entry and detention of property, was not well taken. County courts are the successors of our former probate courts, upon which were expressly conferred, by the act of March 3, 1873, concerning probate courts, "the ordinary powers and jurisdiction of

a justice of the peace" in civil cases. Gen. Stat., 263, sec. 2. And justices of the peace are expressly authorized "To try the action for forcible entry and detention, or the detention only, of real property," by the act concerning their general jurisdiction. Code of Civil Procedure, § 905. Gen. Stat., p. 665.

On the sole ground, therefore, of the insufficiency of the complaint, and the consequent want of jurisdiction in the court to proceed with the case, the judgments of both the district and county courts are reversed, and the cause remanded to the county court for further proceedings. Leave is given to the defendant in error to file a new complaint upon payment of costs accrued since filing the original complaint.

REVERSED AND REMANDED.

STEPHEN J. HERMAN, PLAINTIFF IN ERROR, V. JAMES B. EDSON, DEFENDANT IN ERROR.

Promissory Note: CONSIDERATION. An action was brought by the payee on the following note:

"$250. Four months after date for value received I promise to pay S. J. Herman the sum of two hundred and fifty dollars without interest. "J. B. EDSON.

"WILBER, NEB., Sept. 8, 1877."

The note was given pending a county seat election, and as an inducement for the location of the county seat at Wilber, under an agreement that it was not to be collected. The payee, without the privity or request of the maker, paid the amount of the note to the county. *Held*, there was no consideration, and as the payment was voluntary there could be no recovery thereon.

ERROR to the district court for Saline county. Tried below before POUND, J., sitting in that county. The opinion states the case.

Hastings & McGintie, for plaintiff in error.

1. It is urged for the defense that the note is founded upon an illegal consideration, for the reason that it was to aid in the erection of buildings. This cannot be so. Dillon Mun. Cor., Sec. 382, Note 1. *State v. Collins*, 6 Ohio, 126. *Odineal v. Barrit*, 24 Miss., 9. *Bryan v. Dyer*, 28 Ill., 188. *Brimhall v. Van Kampen*, 8 Minn., 13. *State, ex. rel. Park, v. Supervisors*, 24 Wis., 49. *George v. Harris*, 4 N. H., 533. *Steel v. Johnson*, 52 Ind., 197. *Stetson v. Board of Commissioners*, 52 Ind., 213.

2. Such contract is not void for want of mutuality. *Van Renssellaer v. Aikin*, 44 Barb., 547. *Barnes v. Perine*, 12 N. Y., 18. *Kennedy v. Cotton*, 28 Barb., 59. *Springfield v. Harris*, 107 Mass., 532. *Bier & Mann v. Dozier*, 24 Gratt., 16. *Miller v. Ballard*, 46 Ill., 377.

3. A party cannot set up fraud and illegality in a contract when the consideration has really passed and subsequent to the making of such contract, and in no event can he take advantage of his own wrong. *Armstrong v. Toler*, 6 Peters, 298. *Petrie v. Hannay*, 4 Term Reports, 418. *Tenant v. Elliott*, 1 Bos. & Pull., 3. *Tamer v. Russell*, 1 Bos. & Pull., 295. *Smith v. Barstow*, 2 Doug., Mich., 154.

J. R. Webster, for defendant in error.

1. If it should be conceded that a contract was made between Edson and Herman, the contract was not, as contended by plaintiff, for aid in erection of public buildings, but, under pretense of raising a fund to influence a public election upon a matter of general concern, policy, and convenience, and therefore is illegal, as against public policy. *Commissioners of Randolph v. Jones*, Breese, Ill., 237. *Thompson v. Supervisors*, 40 Ill., 379.

2. No contract ever was made between the parties, or any one for them. The plaintiff testifies that defendant never requested him to pay the sum represented by the note. Plaintiff obtained and received the note under representations and pledges that its payment would never be demanded, and afterward paid—if he has paid—the sum of his own motion, and without any request or authority of defendant or his knowledge, so that no element of contract enters into it, and the note is void for want of consideration. *Allen v. Woodward*, 22 N. H., 444. *Bartholomew v. Jackson*, 20 Johns., 28. *University v. McNair*, 2 Ird. Eq., 605. *Bridgewater Academy v. Gilbert*, 2 Pick., 578. *Keep v. Goodrich*, 12 Johns., 397. *Tucker v. Woods*, 12 Johns., 190.

3. There was no assent of the parties. The action being between the original parties—there being no assent to an absolute promise to pay, and the note having been obtained under false pledges—not to present or demand payment, there is no validity to the note. Both parties must have assented to the same subject matter in the same sense, or there is no contract. *Hazard v. N. Eng. Mar. Ins. Co.*, 1 Sum., 218. *Bruce v. Pearson*, 3 Johns., 534. *Armstrong v. McGee*, Add. (Pa)., 261.

MAXWELL, CH. J.

The plaintiff brought an action in the county court of Saline county upon a promissory note, of which the following is a copy:

"$250. Four months after date for value received I promise to pay S. J. Herman the sum of two hundred and fifty dollars ($250) without interest.

"J. B. EDSON.

"WILBER, NEB., Sept. 8, 1877."

Upon the trial of the cause judgment was rendered

in favor of the defendant, which, on appeal to the district court, was affirmed. The plaintiff brings the cause into this court by petition in error.

In the district court the cause was tried to the court without the intervention of a jury, and the court found "that pending an election in Saline county for the relocation of the county seat of said county, Wilber, in said county, being a competing town, one Gund, on the day of the execution of the note sued upon, came to the defendant in Wilber and solicited his note for $250, at the request of other persons, for county seat purposes. The defendant refused to give his note if ever he should have to pay it. Gund assured him he never would have to pay it. Gund represented that other notes by other parties had been given, payable to the plaintiff for the same purpose. The defendant then gave the note in suit, payable to plaintiff, and delivered the same to Gund. Gund thereupon delivered it to the plaintiff, who had other notes of other parties for like purposes, to the amount of about $300. The plaintiff and defendant and Gund were at the time residents of Wilber. On the above-mentioned notes plaintiff collected $750, and claims to have advanced $250, called for by the note in question, some time late in December, 1877, and deposited the same, together with the uncollected notes, with the county treasurer of Saline county. This money, with all moneys similarly obtained, was afterwards deposited with one Henry, a banker at Wilber, subject to the order of the county commissioners of Saline county, for the ostensible purpose of being used to build a court house at Wilber, where the county seat had been located by said election. Neither Gund nor the defendant clearly understood for what purpose the note in question was given, except that the giving of the note was in some way to be used to influence the election for the county seat, and the pay-

ment of the same was not to be demanded. The money that plaintiff advanced was not advanced at the request nor with the knowledge of the defendant, but was advanced at his own instance. That no court-house has ever been erected, and no contract has been made for the erection of a court house at Wilber. There was no other consideration for said note than as above cited."

The court found as a conclusion of law that the note was without consideration, and that the defendant was not liable thereon. The findings of fact of the court are sustained by a clear preponderance of the evidence. Did the court err in its conclusions of law?

If we view the proceeding as an inducement to the voters of Saline county to locate the county seat at Wilber, it is of very doubtful validity. The whole course of our legislation is against every species of bribery or inducement of that nature at elections. What would be thought of a candidate for a public office who should promise the electors $3,000, or any other sum, in case of his election? And does it make any difference that the candidate is a town contending for the county seat, instead of an individual seeking an office? It may be said that the location of a county seat at a particular point will enhance the value of property at that place sufficiently to enable the citizens to offer a bonus as an inducement for its location. But may not a candidate for an office say with equal propriety, that if he secures his election his income will thereby be increased, so that he will pay each voter a specified sum? The cases do not differ in principle, but merely in the mode of compensation. Then, if a candidate for a county seat may offer a bonus of $3,000, why not $30,000, or a still greater sum? The intention of law is, as is said in the case of *The People v. Hamilton Co.*, 3 Neb., 252, to give

each voter of a county an opportunity to express by his ballot his choice for the county seat. And this can only be done where no improper inducements are held out in the nature of a reward for votes. But even if the removal of the county seat to Wilber was a valid transaction, the plaintiff could not recover. The note is not negotiable; it was made under an express agreement that payment would not be required, and the plaintiff, by paying without the request, privity, or consent of the defendant, thereby acquired no right of action against him. It was a mere voluntary payment. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

JOHN BROWN ALIAS JOHN WILLIAM MCELVOY, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Constitutional Law:** DISTRICT COURTS: TERMS. Section 26, Art. XVI of the constitution, authorizes the judges of the district court to fix the time of holding courts in their respective districts. This refers to regular terms. There is no authority under this provision to call special terms of court.

2. **District Courts:** CALLED TERMS. The statute authorizes a judge of a district court, upon request of the county commissioners of a county, to call a special term of court for that county for the transaction of general business, at least twenty days notice thereof to be given. But a judge may, on his own motion, call a special term of court for any county of his district for the trial of criminal offenses therein. And having authority to make the order, the fact that he recites therein the authority as derived from the constitution will not invalidate it.

3. ———: ———: SUMMONING JURIES. A judge in calling a term of court has no authority to order the sheriff to summon a

grand and petit jury. He must direct whether a grand or petit jury shall be summoned. If required, juries must be drawn as for regular terms of court.

4. ———: ———: ———. Objections to the mode of selecting grand jurors must be made by challenge, or by plea in abatement, before the accused pleads to the indictment, or they will be waived.

5. **Murder:** EVIDENCE. Where, on a trial for murder, there is testimony tending to show that the accused acted in self-defense, it must be submitted to the jury to be given such credit as they may think it entitled to. An instruction, therefore, which virtually took that question from them, *Held*, erroneous.

ERROR to the district court of Adams county.

It was an indictment for the murder of one Stultzman, on the eighth day of February, 1879. The defendant was arrested on that day, and on February 10th, GASLIN, J., made an order directing a special term of court to be held commencing February 15th. A grand and petit jury were ordered, indictment returned on that day, and on the day following the defendant was tried, convicted, and sentenced to be hung. His motion for a new trial being overruled, he sued out this writ of error.

Mason & Whedon, for plaintiff in error.

1. In the case at bar the county commissioners did not make application to the judge for a special term, and if they had, still the law was not complied with. Section 51, Gen. Stat., 260, distinctly says that "notice of such special term shall be given at least twenty days previous to the commencement of the same." Instead of this notice being given in this case, the special term was called, plaintiff indicted, tried, convicted, and sentenced to be hung, all within eight days. In the absence of this statute the district judge could not call a

special term of court, and when one is called under the statute its requirements must be complied with. *Smith v. State*, 4 Neb., 285. *Dunn v. State*, 2 Ark., 229. *Seymour v. Judd*, 2 New York, 464. *Jackson v. Wiseburn*, 5 Wend., 136. *Bloom v. Burdict*, 1 Hill, 130. *Burley v. State*, 1 Neb. 385. And if the term of court was held at a time unauthorized by law all its judgments and proceedings are without warrant of law and void. *Orman v. Riley*, 16 Cal., 186. *Bloom v. Burdict*, 1 Hill, 130.

2. It was error for the court to charge the jury in the language of the sixth instruction, "If you find from the evidence and circumstances in the case the accused did the shooting as charged, you have a right to presume therefrom he intended to do it, and imply malice therefrom, as it is a legal presumption he intended to do what he actually did. In law, a rifle, gun, or pistol, loaded with powder and ball and used in its ordinary way, is a deadly weapon, and should you find the accused committed the homicide as alleged, with a rifle, gun, or pistol, you have a right to presume malice therefrom, and it is then incumbent upon the accused, by way of justification, excuse, or otherwise, to remove this legal presumption."

Had the fact of the shooting alone been shown unaccompanied by the circumstances under which it was done, then under the ruling of this court in *Prueit v. The State*, 5 Neb., 384, the crime of murder in the second degree might have been established, and the court should have so instructed the jury. But the plaintiff had testified and detailed the circumstances under which the shooting had taken place, and when this evidence was before the jury, it was error to instruct the jury that if, from the evidence and circumstances, they found the accused did the shooting, they could imply malice therefrom. *Stokes v. The People*, 53 N. Y., 164.

Commonwealth v. Hawkins, 3 Gray, 463. *Commonwealth v. York*, 9 Met., 93. Cooley Const. Lim., 325. *People v. Garbut*, 17 Mich., 9. *Maher v. People*, 10 Mich., 212. *Lamb v. C. & A. R. R. and T. Co.*, 46 N. Y., 279.

3. It was error to charge the jury in the language of the eighteenth instruction: "Again you will bear in mind the homicide for which the defendant has been tried was committed within ten days; that he and his counsel have not burdened this tax-ridden community with long delays, useless delays, and senseless legal quibbles, or applied for continuances; that he has not a plethoric purse to enable him to tardily rob justice of its deserts; that he has availed himself of provisions of our statute, applicable to indigent defendants, and been ably and nobly defended by his counsel, who have taken charge of his case for the pittance allowed by the court. You must not be swayed or influenced in the least by popular prejudice or clamor, but must coolly, calmly, and unimpassionately deliberate upon the case when you return to your room, and render just such a verdict as you think the evidence warrants, irrespective of any feeling or sympathy you may have for the defendant."

It is impossible to discover anything in the record of this case which will warrant this extraordinary charge, and equally impossible to find an authority which will sustain it. *Burke v. Maxwell*, 81 Pa. St., 139. *Framl v. Badger*, 79 Ill., 441. *Williams v. State*, 6 Neb., 335. *Curry v. The State*, 4 Neb., 555. 12 Ohio State, 312. 14 Ga., 135. 27 Ill., 440. 26 Mo., 393. 8 Ga., 178. 11 B. Monroe, 38. 15 Pa. St., 59. 39 Miss., 526, 535, 541.

To these instructions, and others considered in the argument, counsel who tried the case below took no exceptions; but if erroneous, the errors will be noticed here, this being a capital case. *Rakes v. The People*, 2

Neb., 163. *Thompson v. The People*, 4 Neb., 530. *Dodge v. The People*, 4 Neb., 231. 41 Texas, 513. 1 Texas Appeals, 180.

C. J. Dilworth, Attorney General, for the State.

The sixth instruction, we think, states the law correctly upon the question of legal presumption, the object for which said instruction was given.

The case of *Prueit v. The State*, 5 Neb., 384, cited by the plaintiff, states the proposition to be, that where the killing is established and there are no explanatory circumstances proven, then malice is presumed, and the crime is murder in the second degree. But in the action before us the case does not stand upon the fact of the killing alone being proven, but upon the testimony of several witnesses as to the surrounding circumstances, showing the deliberation and premeditation.

Objection is also taken to the eighteenth instruction given by the court. While this instruction is somewhat peculiar, yet we can see nothing that the plaintiff can object to. It tells the jury that they must not be swayed or influenced in the least by popular prejudice or clamor, but must calmly and unimpassionately deliberate upon the case, and render just such a verdict as they think the evidence warrants, irrespective of any feeling or sympathy they may have for the defendant; and there is nothing in the remainder of the instruction which can be construed to prejudice the defendant below.

MAXWELL, CH. J.

The plaintiff in error was convicted of murder in the first degree at a special term of the district court of Adams county, held in February, 1879. He now assigns various errors in the record, which will be considered in their order.

The order calling the special term is as follows:

"Pursuant to the provisions of the constitution of the state of Nebraska, I hereby fix Saturday, February 15th, 1879, at 8 o'clock A.M., as the time for holding a special term of the district court in and for Adams county, 5th judicial district of the state of Nebraska, for the purpose of disposing of any and all business that may properly come before the court. The sheriff of said Adams county is also hereby ordered to summon from the body of the county of Adams sixteen good and lawful men having the qualifications of and to serve as grand jurors. Also twenty-four good and lawful men having the qualifications of and to serve as petit jurors. All to be and appear at the place of holding court in the town of Hastings, in said county of Adams, at 8 o'clock A.M., on said 15th day of February, 1879.

"Witness my hand, at Hastings, in said county of Adams, the 10th day of February, 1879.

"WILLIAM GASLIN, Jr.,
"Judge."

Section 26, Art. XVI of the constitution, provides that "until otherwise provided by law, the judges of the district courts shall fix the time of holding courts in their respective districts." The power thus conferred undoubtedly refers to *regular* terms of court, which had already been fixed by the judge.

A special term of court, for the transaction of all business that may come before it, may be ordered and held by a judge in any county in his judicial district upon the application of the county commissioners. Notice of such special term must be given at least twenty days previous to the commencement of the same. Gen. Stat., 260, Sec. 51. By the provisions of section 18 (page 255, Gen. Stat.), it is provided that "a special term may be ordered and held by the district

judge in any county in his district, for the trial of any criminal offense, if he deem it necessary. In ordering a special term, he shall direct whether a grand or petit jury, or both, shall be summoned." The power to call a special term of court for the trial of criminal offenses is here expressly given, as also the power to *direct* whether a grand or petit jury, or both, shall be summoned. In calling a special term under the provisions of section 18, it should be stated in the order that the term will be held for the trial of criminal offenses. But the failure to do so, will not thereby render the term invalid. And the judge having authority under the statute to call the special term, the fact that he recites in the order that he called said term in pursuance of the provision of the *constitution* will not thereby render the order nugatory, no more than a correct judgment would be affected by superfluous matter which did not affect its validity, so far at least, as the trial of criminal offenses is concerned. The order therefore is sufficient to justify the trial of the plaintiff in error at that term.

The authority of a judge to order the sheriff to summon a grand and petit jury may well be questioned. The statute provides the mode of selecting jurors, and this mode should be adhered to as far as possible. As was well said by this court in the case of *Burley v. The State*, 1 Neb., 397, "the grand jury must be selected in the manner prescribed by the law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes for our guidance."

Section 664 of the code of civil procedure provides that "whenever the proper officers fail to summon a grand or petit jury, or when all the persons summoned as grand or petit jurors do not appear before the district courts, or whenever at any general or special

term, or at any period of a term, for any cause, there is no panel of grand jurors or petit jurors, or the panel is incomplete, said *court* may order the sheriff, deputy sheriff, or coroner to summon without delay good and lawful men having the qualifications of jurors," etc. Gen. Stat., 643.

Section 405 of the criminal code provides that "after the discharge of the grand jury it shall be lawful for the *court*, when it shall be deemed necessary, to order the sheriff to call together a new grand jury from the bystanders or neighboring citizens," etc. Gen. Stat., 815.

This is a power that should be very sparingly exercised by a court. The object of selecting a jury in the manner provided by the statute is to avoid bias, partiality, and favoritism. And it is only in the cases pointed out by the statute that a court can order a grand jury to be summoned by the sheriff. The court may, however, when necessary, order as many talesmen to be summoned as may be necessary to fill the panel with unobjectionable jurors.

But objections to the mode of selecting the jury must be made by challenge or plea in abatement. After the accused has pleaded to the indictment, it is too late to object that the jury were not legally summoned. When a judge of the district court calls a special term of court, and desires a grand or petit jury, it is his duty in the order to direct the summoning of such jury. The jury must then be selected in the same manner as for regular terms of court. But no objections having been made to the manner of selecting the grand and petit juries, the error is therefore waived.

A number of instructions were given by the court, but one of which will be considered:

"6th. If you find from the evidence and circumstances in the case the accused did the shooting as charged,

you have a right to presume therefrom that he intended to do it, and imply malice therefrom, as it is a legal presumption he intended to do what he actually did. In law, a rifle, gun, or pistol, loaded with powder and ball, and used in its ordinary way, is a deadly weapon. And should you find the accused committed the homicide with a rifle, gun, or pistol, you have a right to presume malice therefrom, and it is incumbent on the accused, by way of justification, excuse, or otherwise, to remove this legal presumption."

Had the fact of the shooting alone been proved this instruction would have been correct. But the plaintiff had testified in the case, in substance, that he had acted in self defense. His testimony must be submitted to the jury and given such credence as they may think it entitled to. But this instruction virtually withdrew that question from them, and must have been prejudicial to the accused; and for this reason alone the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

JOHN H. GREEN, PLAINTIFF IN ERROR, v. THE STATE BANK OF NEBRASKA, DEFENDANT IN ERROR.

1. **Judicial Sale:** CONFIRMATION. An order confirming a sale contained this condition: "That said sale be in all things confirmed upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant upon receipt of $2000, within sixty days from this date." *Held*, that the court had no authority to impose such conditions against the defendant's objection.

2. ——: ——. The court may confirm or set aside a sale; but has no authority to change or modify its terms.

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

J. M. Woolworth, for defendant in error.

1. The court, in the exercise of its discretion, could have confirmed the sale, or set it aside. Rorer on Judicial Sales, § 108, and cases cited.

2. But it could not make a contract for the parties other and different from that made when the bid was accepted. This it attempted to do, and the order is therefore erroneous. Rorer, § 108, and cases cited.

George E. Pritchett, for defendant in error.

1. The confirmation of judicial sales is a matter of discretion to be exercised by the court. The matter of confirmation rests peculiarly upon the wise discretion of the court. Rorer on Judicial Sales, §§ 124 and 128.

2. Error will not lie upon what is matter of discretion in a court. *Chaffel v. Soldan*, 5 Mich., 242. *Jenkins v. Brown*, 21 Wend., 454. *Walton v. Walton*, 19 Mo., 667.

MAXWELL, CH. J.

In the case at bar there was a decree of foreclosure and sale of the mortgaged premises. The plaintiff in error (defendant below) filed exceptions to the sale, and moved to set the same aside. The exceptions were overruled and the sale confirmed, to which the plaintiff in error excepted. That portion of the order of confirmation is as follows: "The motion of the plaintiff to confirm the sale made herein coming on to be heard, together with the objections of the defendant

thereto, after hearing counsel for the respective parties and being fully advised in the premises, it is ordered by the court here that the said objections be overruled, and that said sale be in all things confirmed, upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant, John H. Green, upon receipt of $2,000 within sixty days from this date; and the plaintiff now in open court, having offered to comply with said condition, and having filed its written stipulation to that effect, it is ordered that the sale heretofore made by the sheriff of Washington county herein be in all things confirmed," etc.

Has the court authority to confirm a sale conditionally in this manner? The court must either confirm or set aside a sale; it cannot modify it, or impose conditions. In the *Ohio Life Ins. Co. v. Goodin*, 10 Ohio State, 557, the appraisers described a lot as containing thirty feet front, and appraised the value thereof with the improvements at $260 per front foot. After the sale and confirmation thereof it was discovered that the lot was only twenty-seven feet front. The court thereupon entered a supplemental decree, requiring the creditor to refund the amount paid by mistake. It was held that the court could not modify the terms of the sale. To the same effect see *Benz v. Hines*, 3 Kan., 390. *Kinnear v. Lee*, 28 Md., 488. *Davis v. Stewart*, 4 Tex., 223.

In *Paulett v. Peabody*, 3 Neb., 196, the court say: "A very large discretion is necessarily given to the district court in the supervision of sales of real estate under its judgment and decrees. The statute points out very clearly certain steps which must be taken by the officer charged with the duty of making the sale, not one of which can be omitted, and in respect to which the court is given no discretion. But this enumeration of duties on the part of the sheriff is not to be consid-

ered a limitation or restriction upon the authority of the court to see to it that in all other respects the proceedings are properly conducted, and the sale fairly made, so that neither the parties to the suit nor the purchaser at the sale shall be defrauded." The rules thus laid down have been steadily adhered to in this court.

Among the nine grounds of objection to the confirmation of the sale in this case we find this: "For the reason that the appraisement of said real estate is greatly, unreasonably, and unjustly below the real value thereof, and shows collusion on the part of said officers and appraisers." The affidavits in support of the objections were stricken from the files on motion of the defendant in error, so that we are unable to determine whether this specific ground of objection is sustained or not; but from the fact that the court gave the debtor the right to repurchase within a certain time, it is reasonable to infer that but for this condition the sale would have been set aside. It is the duty of the court to see that the sale has been fairly made in all respects, and to protect the rights of the debtor, creditor, and purchaser; but a proposition to an embarrassed debtor to redeem the property described in the order of confirmation against his objection, in most instances, would be entirely unavailing, from the inability of the debtor to comply with its conditions, while it might be used as a pretext for depriving him of his property at a merely nominal sum. As the district court had no authority to impose the conditions referred to in the order of confirmation, the judgment is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

ELLEN YOUNG, PLAINTIFF IN ERROR, V. MORGAN & GALLAGER, DEFENDANTS IN ERROR.

Promissory Notes: ACTION ON FORGED NOTE: DEFENSE. Y., in 1876, signed a note with C. as surety in favor of M. and G., and was notified in March, 1878, of its non-payment. In June of that year an action was instituted by M. and G. on certain notes claimed to have been forged by C., and judgment recovered against Y. for $360 and costs. Y., supposing the action to be on the genuine note, made no defense. *Held*, on demurrer to the petition for an injunction, it being alleged that M. and G. had knowledge of the forgery, that Y. was entitled to relief.

ERROR to the district court for Platte county.

The action there was brought by plaintiff, Young, to restrain the sale of certain real estate, alleged to be her sole and separate property, which had been levied on by the sheriff of said county by virtue of an execution issued under a judgment recovered by Morgan & Gallagher against one Compton and said plaintiff. The defendants demurred to the petition, which was sustained by POST, J., and a judgment entered against the plaintiff for costs, and dismissing the action.

Marlow & Munger, for plaintiff in error.

NOTE.—A court of equity will grant relief against judgments obtained by fraud, surprise, or mistake, or when from any cause manifest injustice has been done. But it must appear that the party seeking the new trial has not been negligent and that he has a defense to the action. *Horn v. Queen*, 4 Neb., 108. S. C., 5 Neb., 472. In an original action in equity to vacate a judgment or decree, if the ground of complaint is not the result of fraud on the part of the plaintiff, or some circumstance beyond the control of the defendant, but is occasioned by the fault, negligence, or want of ordinary diligence on the part of the defendant, he will not be permitted to deny the correctness of the judgment or decree or renew the controversy. *Pope v. Hooper*, 6 Neb., 178.—REP.

The facts alleged in the petition, and admitted to be true, clearly prove it to be against conscience to enforce the payment of the judgment. If this be true the plaintiff is entitled to the relief asked, notwithstanding she failed to defend before judgment. *The Marine Insurance Co. of Alexandria v. Hodgson*, 2 Cranch, U. S., 557. To entitle the plaintiff to be relieved from the payment of the judgment in question, she must have a defense upon the merits. It is admitted that the notes in question are forgeries, never having been signed by her, or by any one authorized to sign the same for her. It is further admitted that she did not owe Morgan & Gallagher the amount of said notes, or any other amount whatever, and never had any dealings with them in any way whatever. Her defense is complete; no recovery can be had against her on the notes.

Now we claim that the plaintiff is entitled to the relief asked without showing any excuse for not making her defense, after service of the summons, and before judgment was entered against her in the county court; the notes in question being forgeries, Morgan & Gallagher did not have a cause of action against her. It would be different if she had signed the notes, and they had been paid, and retained by them, or if she had paid a part of the amount due, but in this case there was nothing due, and never had been from her to them on the notes. In fact she did not owe them a farthing. She had the right to remain away, knowing that she did not owe them a penny. If the presumption was that Morgan & Gallagher would perjure themselves in order to obtain a judgment against her, or that her name would be forged to notes, then the rule would be different. The presumption is the other way, that they would not perjure themselves in order to obtain a judgment against her, and that her name would not be

forged to notes. We admit that she would not be justified in remaining away if Morgan & Gallagher had a cause of action against her, which she might defeat or reduce the amount by making her defense before judgment; in that case she would have to show some special reason why she did not defend before judgment.

Whitmoyer, Gerrard & Post, for defendants in error.

Counsel for plaintiff have not cited any precedent for the relief asked. We believe none can be found. That courts of equity will not relieve a party from the consequences of his own negligence is an elementary principle of equity jurisprudence. He who suffers judgment by default, can claim no more from a court of equity than if the judgment had been on the verdict of a jury after a protracted suit. *Pope v. Hooper*, 6 Neb., 178; *Freeman on Judgments*, 330, 385, 502, *et. seq.* The inflexible rule is that a party seeking relief in equity from a judgment at law must show clearly that the judgment complained of is the result of fraud, accident, or mistake, unmixed with fault or negligence of his own. *Shriker v. Field*, 9 Iowa, 366. *Wright v. King*, Har.'s Chancery, 12. *Mack v. Doty*, Id., 366. Graham and Waterman on New Trials, 560. Wells' Res Adjudicata, and Stare Decisis, 495, 496, 498, 499.

While no fraud or deception by the defendants is charged, the petition shows the grossest *laches* by the plaintiff. She is regularly served with summons, June 20th; judgment is rendered July 25th; yet, in the meantime, she takes no steps to defend, nor even ascertain the character or cause of action. The facts known to her were sufficient to have put any sane person on inquiry. She knows she is sued on two notes, while she had signed but one. Instead of procuring counsel, or even examining the petition, which would have

advised her of date and amount of notes (sections 124 and 129 civil code), she does nothing but consult her co-defendant. So, also, she must have been advised of the amount claimed by the indorsement on the summons. Section 64, civil code.

MAXWELL, CH. J.

This is a petition in error to reverse a judgment of the district court of Platte county dismissing the plaintiff's petition.

The petition alleges in substance that on the 2d day of July, 1878, Morgan and Gallagher recovered a judgment in the county court of Platte county against one John G. Compton and the plaintiff, for the sum of $360, upon two promissory notes purporting to have been signed by said Compton and plaintiff; that her signature to said notes was a forgery; that in 1876 she did sign a note as surety with said Compton in favor of the defendants, and that in March prior to the suit she received a notice from them of its non-payment.

The amount of this note is not stated, nor is it distinctly alleged that the plaintiff supposed the suit to be based upon this note, and so failed to make her defense; but this is fairly to be inferred from the petition.

The petition further alleges that said defendants "as she is informed, and believes, and so charges the fact to be, had good reason to believe, and did believe, that said notes were forgeries."

To authorize the interference of a court of equity in such a case, it must appear that it is against conscience to permit the judgment to be enforced, and also that the plaintiff was prevented from making her defense by accident, mistake, surprise, or by fraud of the adverse party, and that she has not been guilty of neglect in not making her defense.

If the allegations of the petition are true, the plaintiff was not indebted to the defendants except upon the note given in 1876, and was not aware that her name had been signed to the note in question. This being the case, it is clearly against conscience to enforce the judgment.

The question of diligence on the part of the plaintiff however, is not so clear. The allegations of the petitioner upon that point are not as definite as could be desired, and had a motion been made in the court below, requiring the plaintiff to state the facts specifically, it should have been sustained. But sufficient appears to show that the plaintiff supposed the suit to be upon the note given in 1876, and having no defense to that note, she failed to appear. This is a mistake of fact from which a court of equity will grant relief in a proper case, more particularly so when it is alleged that the parties prosecuting the suit were aware that the notes sued on were forgeries. The plaintiff had the right to presume that the note with her genuine signature was the one upon which the suit was instituted, and it was not necessary to suppose that the crime of forgery had been committed by affixing her name to notes of which she had no knowledge. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CHARLES F. EISELEY AND OTHERS, PLAINTIFFS IN ERROR, v. WILLIAM MALCHOW, DEFENDANT IN ERROR.

1. **Statute of Frauds.** The object of the ninth section of our statute of frauds, which is substantially the same as section 17 of the English statute, is not to avoid sales of property, satisfactory to the parties to them, but is merely to enable parties to such contracts, in case of dispute and litigation, to properly protect themselves by insisting upon certain specified modes of proof in order to enforce them.

2. **Practice:** EVIDENCE: UNDERSTANDING OF WITNESS. In proving a sale of chattels, the understanding of one of the parties as to whether the title passed to the purchaser is not competent evidence, especially as against a stranger to the alleged contract. As against the party himself, however, it might be competent.

3. ———: IMMATERIAL EVIDENCE. The admission of immaterial evidence against objection, where the court can clearly see that it could not have prejudiced the party, is not a ground for granting a new trial.

4. ———: INFORMAL VERDICT. A verdict in an action of replevin ought, either in general or specific terms, to pass upon the question of unlawful detention. But even if it do not, in a case where this question is controlled entirely by that of ownership, which is expressly covered by the findings, the judgment will not be reversed on that ground.

ERROR to the district court for Dodge county. The facts are as follows:

In 1873 Levi and Andrew Baker, partners, bought of the firm of Case & Co. a threshing machine, for

NOTE.—The understanding of a witness is not evidence. He must state facts. *Lacey v. Central National Bank*, 4 Neb., 179. Where a witness was asked to give his understanding of the meaning of certain words; *held*, that the form of the question was objectionable, but inasmuch as the answer did not respond directly to the question, but give the facts as they transpired, the error was without prejudice, and must be disregarded. *Goodrich v. McClary*, 8 Neb., 123. See also note to *Search v. Miller*, ante p. 26.—REP.

which they gave their notes, amounting to about $600. These notes came into the possession of William Malchow, who had acted as the agents of Case & Co. in making the sale of the machine to the Bakers. Malchow employed one Reynolds to collect the amount due on the notes, and Reynolds, carrying out that object, entered into an agreement with the Bakers, by which he was to take from them certain property, including the machine in question, and give them a credit of something over $300 on the notes. After this sale Thomas Robinson, a constable, levied on and sold the machine in question under an execution issued upon a judgment rendered in favor of the Wheeler Seeder Co. against Levi Baker and Eiseley & Rink, the latter giving Robinson, the constable, an indemnifying bond for that purpose. After the sale of the machine upon said execution, Malchow commenced an action on the note given by the Bakers, and recovered a judgment against them for $844.27. Subsequently Malchow brought this action against Eiseley & Rink and Robinson, the constable, to recover the value of said machine. At the trial before POST, J., the following instructions were given to the jury:

1. The court instructs the jury that if they believe from the evidence that the machine in question was the property of Levi and Andrew Baker as partners, and that the debt due from said Baker to the plaintiff was a debt upon said partnership to the plaintiff, then such debt would have preference of payment over the individual debts of either of said partners out of the partnership property; that a levy upon partnership property for the satisfaction of the individual debt of either of such partners can only be made on the interest of such partners in the partnership property, and can only attach to the residue of such interest remaining after the partnership debts are paid.

2. The court instructs the jury that if from the evidence in this case they believe that Levi and Andrew Baker were indebted to the plaintiff, and that the plaintiff, through his agent, Wilson Reynolds, agreed to purchase of the said Bakers the threshing machine in question, in connection with other property, for a price to be credited in gross upon notes held by by plaintiff against said Bakers, and if from the evidence the jury further believe that it was the intention of the said Bakers and the plaintiff, by said transaction, to pass the title to the machine in question to the plaintiff, and the plaintiff took possession thereof, then the jury will find the property in the machine to be in the plaintiff, notwithstanding the jury may believe that the price agreed upon was not given on the notes according to the agreement.

A verdict and judgment having been rendered in favor of Malchow, the defendants Eiseley & Rink and Robinson brought the cause here by petition in error.

The ninth section of the statute of frauds, invoked by plaintiffs in error as applicable here, is as follows:

"SEC. 9. Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void, unless—

"*First.* A note or memorandum of such contract be made in writing, and subscribed by the party to be charged thereby; or,

"*Second.* Unless the buyer shall accept and receive part of such goods or the evidences, or some of them, of such things in action; or—

"*Third.* Unless the buyer shall at the time pay some part of the purchase money." Gen. Stat., 393.

Marlow & Munger, for plaintiffs in error.

1. If the contract of sale between Reynolds (acting for Malchow) and Bakers falls within this statute,

then Malchow acquired no title or interest in and to the property, and could not maintain the action against defendants. No memorandum of the contract of sale was made. Reynolds says he gave a receipt for the money; what the contents of the receipt was we are not informed. A simple receipt does not answer the terms of the statute. It is essential that the names of both vendor and vendee appear, the price stipulated, a description of the property, and all the terms of the contract. Browne on Statute of Frauds, Chapter 18. Story on Sales, §§ 265, 266. *Grafton v. Cummings*, Central Law Jour., May 9, 1878. Although Reynolds agreed to credit the $350 on the notes he never did so, and to fulfill the terms of the statute the credit must have actually been made. *Brabin v. Hyde*, 32 N. Y., 523. There was no acceptance and receiving of the goods, or any part thereof, sufficient to take the case out of the statute. Reynolds says that when the suit was brought against the Bakers none of the property had been received, and this suit against the Bakers was brought subsequent to the levy and sale by Robinson. The machine in question was standing on the farm of a third party; in some cases, perhaps, it would amount to a constructive delivery or change of possession, but such is not sufficient to answer the statute. There must be either an actual deliverance and acceptance or a symbolical deliverance and acceptance —some act of the party in addition to mere words. *Shindler v. Houston*, 1 Comstock, 261. Browne on Statute of Frauds, § 318.

2. The court erred in admitting the question to witness Andrew Baker, and his answer thereto. *Goodrich v. McClary*, 3 Neb., 123.

3. The verdict of the jury does not pass upon and dispose of all the material issues of the case. *Rouge v. Dawson*, 9 Wis., 246. The verdict is special. The

jury find the property to the machine to be in plaintiff, and the amount of plaintiff's damages, but they do not find upon the issue as to whether the property was converted by defendants. It may be true, as the jury have said, that the property was plaintiff's, that the plaintiff has sustained damages, but judgment could not properly be rendered against defendants unless defendants had converted the property, and upon this point the verdict is entirely silent.

Marshall & Sterett, for defendants in error.

1. An execution levied upon partnership property for the individual debt of one of the partners must, to make it a good levy, be made upon the interest of such partner in the partnership. The sale must be made of such interest. It will attach only to the interest of such partner remaining after the adjustment of the partnership affairs and the payment of partnership debts. Specific articles of partnership property, or moieties thereof, cannot be sold in such cases. Collyer on Partnership, § 832, p. 574, and note 1.

2. Our statute of frauds being a substantial adoption of the English statute, it is fair to conclude that the construction of the English statute was adopted with it. This section (9) was evidently intended for the benefit of the contracting parties; and if they are willing and do waive the statutory objection, none others could insist on it. The right of objection is personal to them. It is only when, between the parties to the contract, some right under the verbal contract is sought to be enforced that the aid of the statute can be invoked. "One of the most important objects of the statute was to prevent the introduction of loose and indeterminate *proofs* of what ought to be established by solemn written contracts." *Poland v. O'Con-*

nor, 1 Neb., 53. Brown on Frauds, § 135. *McCoy v. Williams*, 1 Gilm., 584.

3. The objection urged against the verdict we think cannot be sustained. *First.* Because it is clear that the jury found the property converted was the plaintiff's, and they assess his damages. *Second.* Because the verdict was amendable under Sections 144 and 145 of the code. Gen. Stat., 546, Sec. 291, p. 574. An objection to the form of a verdict, which might have been remedied by the court which tried the cause (*if it had been made at the time of its rendition*), cannot be taken in the appellate court. *State Bank v. Batty*, 4 Scam., 200. *Schlencker v. Risly*, 3 Scam., 483. *Roach v. Hulings*, 16 Peters, 321.

LAKE, J.

The objection that the evidence is insufficient to support the verdict cannot be sustained. There is really no substantial conflict of testimony, and it shows very clearly, we think, that before the levy of the execution upon it as the property of Levi Baker, to satisfy his individual debt, the machine had been sold by him and his brother Andrew, who owned it in company, to the defendant in error, in part payment of an indebtedness which they had contracted some months before in the purchase of this identical machine. This fact, too, is practically conceded, as the testimony of the witnesses Reynolds and Andrew Baker is really uncontradicted, and which is to the effect that immediately after the sale to the defendant Malchow, and long before the levy was made, the plaintiffs were fully informed of what had been done, and that Malchow was the owner of the machine.

As to the *ninth* section of our statute of frauds, which is substantially the same as the *seventeenth* sec-

tion of the English statute, we do not see that it can have any influence in the decision of the case. Even conceding that this section of the statute might have been invoked at the proper time, as between these parties, it was not done. That time was upon the offer of ordinary parol testimony to prove the sale from the Bakers to Malchow. But no objection to the mode of proof being then made, it is too late afterward to make it. The object of this statute is not to avoid sales of property satisfactory to the parties making them, although made without complying with its formalities, but it is merely to enable parties to such contracts, in case of dispute and litigation, to insist upon certain specified modes of proof in order to enforce them.

It is also alleged for error that the court overruled the objection for incompetency to the *thirtieth* question in the deposition of Andrew Baker, which was as follows: "At the time the machine was sold by you and your brother to Malchow, was it not the understanding between you and your brother that the title to the machine was passed to Malchow; and what you did about it afterwards you so done for Malchow as his agent?" This question was certainly very leading, but no objection was made to it on that ground. And it was also incompetent. It was not proper, in a controversy between these parties, one of them a stranger to the contract, for him to give either his brother's or his own *understanding* of the legal effect of what was done at the time of the alleged sale. As against the witness himself it might have been proper. And did we not clearly see that his answer could not possibly have prejudiced the plaintiffs in error, it would have called for a reversal of the judgment. But the answer given by the witness was really no enlargement of the field of proof, for the fact of the Bakers' intention to transfer all their interest in the machine to Malchow, and

that they did so, had already been proved beyond the reach of doubt, even by an abundance of other competent evidence. In such cases the error, being clearly without prejudice, is not a ground for a new trial.

As to the two instructions complained of we see nothing really objectionable in them, save perhaps that they were not really called for by the state of the proofs. They stated the law correctly, so far as they had any application to the facts before the jury.

But a single question remains, and that concerns the verdict, which was in these words: "We, the jury duly impaneled and sworn to well and truly try the issues joined between the parties in this case, do find the property of the machine in question to be in the plaintiff, and do assess his damages at one hundred and nine dollars."

This verdict is technically deficient in not expressing, either generally or specifically, the finding of the jury upon the question of the alleged unlawful detention of the property. Ordinarily this is done in general terms, as for example: "We find the issues in favor of the plaintiff." But although this omission is a defect, nominally, under the circumstances of this case it could have occasioned no harm. The merits of the entire controversy hinged on the question of ownership, upon which the jury expressly passed. No question concerning the detention of the property, uncontrolled by that of ownership, was raised. That the defendants below wrongfully detained the machine, if Malchow owned it, was clear and undisputed. Therefore, the jury, having found that Malchow was the owner, this entitled him to a judgment for its value at least.

No material error having been pointed out, the judgment must be affirmed.

JUDGMENT AFFIRMED.

JOHN W. GRAHAM, PLAINTIFF IN ERROR, V. JOHN KIBBLE AND D. L. GREINER, DEFENDANTS IN ERROR.

1. **Constitutional Law:** TAKING ILLEGAL FEES. Section 37, chap. 22, Gen. Statutes, which gives to the party injured a right of action for the recovery of *fifty dollars* damages against an officer taking illegal fees, is not unconstitutional.

2. **Practice:** ISSUES OF FACT TRIED TO THE COURT: FINDING, HOW CONSIDERED IN SUPREME COURT. Where issues of fact are tried to the court without a jury, the finding of the court is entitled to the same respect as would be accorded to the verdict of a jury under the same circumstances.

3. ———: SPECIAL FINDING. It was alleged as error that the court refused "to find whether the facts stated in the second count of the answer were true." *Held*, That inasmuch as the special finding, in its necessary effect, completely negatived the facts alleged in the answer, it was equivalent to an affirmative finding that they were untrue and that there was no error.

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

Abbot & Caldwell for plaintiff in error.

Under sec. 37, Gen. Stat., 385, a penalty of fifty dollars is given to the party injured, to be recovered as debts of the same amount are recoverable by law, without reference to the amount of injury or overcharge, whether five cents or fifty dollars, hence there can be not a doubt it is a "penalty," arising under the general laws of the state. It is not intended as a compensation

NOTE.—The *dictum* of GANTT, J., in *A. & N. R. R. Co. v. Baty*, 6 Neb., 45, wherein the act then under consideration was held unconstitutional on the ground that "the penalty or fine is by statute given to party claiming damage"—overruled. On the question set out in the second point of the syllabus, see *Cheney v. Eberhardt*, 8 Neb., 433. *Burt v. Baldwin*, Id., 487.—REP.

for the injury, since the right of the party injured to recover such excess as may have been demanded or taken is nowhere taken away, and his remedy for such injury is full and complete, and the sum of fifty dollars is given in excess of and in addition to full compensation by way of suit to recover for the excess.

If this is a penalty, can it be given to a private individual by statute without violating the constitutional provision above cited? Clearly not. All fines, penalties, and license moneys arising under the general laws of the state are there declared to belong exclusively to the school fund. *A. & N. R. R. Co. v. Baty*, 6 Neb., 37. If our position is true, then it follows that there are not enough facts in the petition, the court should have admitted no evidence, the judgment is contrary to the law of the land, and should have been given for the defendant, now plaintiff in error. Under the third assignment of error we claim that a payment of money, claimed to be due as fees, accompanied by a promise on the part of the person receiving it, that "if not all right he will make it right," does not make the party guilty of the offense until a demand for the excess has been made and the party refuses to return it. *Chenault v. Walker*, 15 Ala., N. S., 605. *Baker & Walling v. Richardson*, 9 Cowen, 77.

Under the fourth assignment of error we were entitled to a finding as to the truth of the matters alleged in the second count of the answer, provided the facts stated therein are a defense, if true. The second count of the answer states substantially that defendant charged and received the sum of one dollar for going to the residence of bondsmen to verify their signatures and qualify them as to their sufficiency, at request of the plaintiffs, and that the sum so charged was reasonable. Evidence was offered and received without objection to prove the above facts. Those facts were a defense,

if true. *Runnells v. Fletcher*, 15 Mass., 525. *Walker v. Ham*, 2 N. H., 238.

John Patterson, for defendant in error.

LAKE, J.

This action was brought in the court below by the defendants in error to recover the statutory forfeiture for taking illegal fees, under section 37, chap. 22, Gen. Statutes, p. 385, which is as follows: "If any officer whatever, whose fees are hereinbefore expressed and limited, shall take greater fees than are so hereinbefore limited and expressed, for any service to be done by him in his office, or if any such officer shall charge or demand and take any of the fees hereinbefore ascertained and limited, when the business for which such fees are chargeable shall not be actually done and performed, such officer shall forfeit and pay to the party injured fifty dollars, to be recovered as debts for the same amount are recoverable at law." The court below, on issue joined, having found in favor of the plaintiffs—the defendants in error, the defendant brings the case to this court by petition in error for review.

In their brief counsel for the plaintiff in error say that they rely on five only of the errors assigned in the petition for a reversal of the judgment. Three of these, the *first*, *second*, and *fifth*, being in substance identical, will be treated together. They go to the sufficiency of the facts alleged to constitute a cause of action.

In support of these three objections it is urged that this section of the statute is wholly inoperative and void by reason of its being hostile to section 5, art. VIII, of the constitution of this state, which is as follows: "All fines, penalties, and license moneys arising under the general laws of this 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."

While the position taken by the counsel in this behalf is plausible, and is enforced by a former decision of this court, we are not now prepared to sustain them in it. On mature reflection, we are not prepared to say, nor do we think it was intended by this provision of the constitution to deprive the legislature of the power to pass statutes like the one in question, whereby a fixed sum in the nature of liquidated damages is given to one who has suffered injury by the wrongful act or oppression of a public officer.

It may be true that such statutory allowance is much in excess of the actual loss sustained or injury done, and therefore, to the extent that it is so in its effect upon the offending officer, is in the nature of a penalty. But the power of the legislature to fix the maximum, or even the exact amount recoverable by a private person sustaining injury, or that shall accrue to the public in case of official delinquency, cannot be successfully questioned. Indeed it has been said by an able law writer in support, or rather in commendation, of such legislation, that "A uniform measure of damages under the same substantial state of facts is desirable, even though the rule therefor be arbitrary." Field's Law of Damages, sec. 17.

This section of the constitution, as we understand it, has no reference whatever to those damages, whether

limited in the amount recoverable or not, which a private person may sustain, but solely to such as, under the law of the land, are given to the public and go into the public treasury. Its object doubtless was to correct what were considered abuses in the disposition of public moneys realized from the several sources therein mentioned, and to insure their proper expenditure in the future. Its evident scope is to give direction to the distribution of particular funds belonging, under the law, to the public at large or to a particular subdivision thereof, and thereby insure an equitable distribution, viz.: to the particular subdivision of the public upon whom rests the chief responsibility and expense of enforcing the criminal laws and police regulations of the people. We are aware that this view of this provision conflicts with an expression in the opinion of this court in *Atchison & Neb. R. R. Co. v. Baty*, 6 Neb., 37. To the extent, however, that it does, the law of that case should be modified.

The third point urged is, that "The finding of the court is contrary to the law and the evidence." As to the finding being against the law, that is disposed of by what we have already said. Is it contrary to the evidence? It is claimed that, inasmuch as there was evidence to the effect that at the time of exacting the illegal fee the officer remarked that "if it is not all right I will make it right," he could not have been guilty of the extortion. All that can be properly claimed for this testimony is that it was some evidence of good faith on the part of the officer in fixing the amount of compensation demanded. For this purpose it was doubtless received and duly considered by the court below. But it was by no means conclusive upon that question. It must be borne in mind that there was much other testimony bearing on the same point, to which that court was required to give due effect.

It appears that there was a serious controversy at the time as to the charge, and an earnest protest by one of the defendants in error against paying the sum demanded, so that the attention of the officer was specially directed to the matter of his legitimate fees, which were not at all difficult of ascertainment under the statutory itemization. It would seem, therefore, if he had been earnestly disposed to keep within the law, that he could not, as he did, have fixed upon double the amount that he was really entitled to receive.

The issues in this case were tried to the court without a jury, and there is some conflict of evidence. In such case the finding of the court upon the facts is entitled to the same respect as would be accorded to the verdict of a jury under the same circumstances. Although it may even be possible, nay probable, that this court, upon the same evidence, would have found differently, this is not a reason for reversing the judgment of that court. This is not the trial court, and upon this question we cannot weigh the evidence as between the parties, but only declare whether there be evidence by which the finding of the court below can be sustained. We think the finding is amply supported by the evidence.

The only remaining objection is, that "The court erred in refusing to find whether the facts stated in the second count of defendant's answer were true." This "count" of the answer alleged "that at the time he delivered said transcript and bond mentioned in said plaintiffs' petition to said plaintiffs, the said plaintiffs paid to this defendant the sum of one dollar and sixty cents; but said defendant alleges that said sum was not demanded as legal fees for said papers, but included pay for his trouble in going a distance of nearly seven miles to ascertain if the sureties on said bond were responsible for the amount named therein, and if the

signatures thereto were the signatures of the persons purporting to have signed the same. And that said defendant did so go and see said bondsmen at the special instance and request of said plaintiffs."

There is no force whatever in this objection. The special finding of the court covered the whole ground of the case, and in effect completely negatived the facts therein alleged in defense of the charge made. The finding in part is: "that said defendant made out and delivered to said plaintiffs a transcript of a certain case lately tried before said defendant as a justice of the peace, and took, filed, and approved a bond for such appeal. And the court do further find that said transcript contained two hundred and fifty-five words. That defendant demanded and received from said plaintiffs for such service the sum of one dollar and sixty cents; that he was entitled by law to charge therefor and for such service the sum of eighty cents and no more." Thus the services, for which the court finds the one dollar and sixty cents were paid, are particularized; there is nothing left to conjecture; it was for the bond and transcript that the charge was made, and the money paid. The finding negatives the answer just as effectively as if it had been quoted into it, and followed by the formal declaration, "this is untrue."

Finding no error in the matters pointed out, the judgment is affirmed.

JUDGMENT AFFIRMED.

JOSEPH BROWN, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

Intoxicating Liquors: DRUGGIST MUST OBTAIN LICENSE TO SELL AT RETAIL. The general law relating to the licensing the sale of intoxicating liquors at retail is general and applies to all persons. No exception is made in favor of those engaged in the sale of drugs and medicines, they being within its operation.

ERROR to the district court for York county.

It was an indictment charging Joseph Brown with having sold to one Cyrus Langworthy one pint of whiskey, without first having obtained a license therefor from the proper authorities.

On the trial before POST, J., it was claimed by the defendant that at or about the time of the selling, the purchaser stated that he wanted the whiskey for medical purposes, and not as a beverage.

This the court held was no defense, and the case is brought to this court to reverse said findings and rulings of the court.

Scott & Giffen, for plaintiff in error.

Although the statutes make no exception where it is sold for medicinal, mechanical, or sacramental purposes, the court should make the exception in the proper cases. *Donnell v. The State*, 2 Ind., 658. *State v. Larrimore*, 19 Missouri, 391. The object of the law regulating the sale of spirituous liquors is to restrain their use within proper bounds when used as a beverage. Even under our statute, which makes the selling without license a misdemeanor, the statute makes a distinction between sales as a beverage and where it is sold for medicinal, sacramental, or mechanical pur-

poses, thus clearly recognizing the distinction which we desire to impress upon the court; for a suit is permitted to be entertained for the recovery of liquor bills where it is sold for medicinal, sacramental, or mechanical purposes, while it is prohibited in all other instances. Gen. Stat., 854, Sec. 580. At common law the sale of liquor is not unlawful; nor is the seller liable for the improper use of the article sold; at all events, not unless he sell it with a knowledge that it is purchased with intent to be applied to such improper use. *Strubble v. Nodwift*, 11 Ind., 64. Now, as the license fee is only required in the exercise of the police power of the state, it seems to us that only where the whiskey is to be used in the manner which would occasion the trouble intended to be guarded against by the state in the exercise of that power can the law be violated by the sale of the whiskey; certainly, where it is to be used for a laudable and necessary purpose, the state should not exercise its police power by requiring a license from one who sells wholly for that purpose; nor punish him if he sell without license when it is made satisfactorily to appear that it was sold to be applied to a legitimate purpose.

C. J. Dilworth, Attorney General, for the State, cited *State v. Downer*, 21 Wis., 227. *State v. Gummer*, 22 Id., 444. *Hoocker v. People*, 9 Central Law Journal, 1.

LAKE, J.

The question brought here by this record for decision is, whether a druggist is within the operation of our general license law; in other words, whether a person engaged in the business of selling drugs and medicines is at liberty to retail intoxicating liquors without first procuring the ordinary license to do so?

The statute by which we must be governed in the

decision of this question after providing for licensing the vending of such liquors at retail, and how and from whom the license may be obtained, further provides as follows: "Any person who shall vend, or retail, or, for the purpose of avoiding the provisions of this chapter, give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drink, without having first complied with the provisions of this chapter and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor," etc. Gen. Stat., 854.

This language is general, and comprehends all persons whomsoever, no matter what their particular calling or business may happen to be. None are exempted from its operation. It applies to him who deals in drugs just as clearly as it does to the keeper of a boarding house, a saloon, a restaurant, or a hotel. The legislature not having signified their intention to make an exception in favor of the defendant's business, the courts certainly cannot do so.

The ruling of the district court having been in conformity with these views, its judgment must be affirmed.

JUDGMENT AFFIRMED.

HENRY ATKINS, PLAINTIFF IN ERROR, v. REBECCA ATKINS, DEFENDANT IN ERROR.

1. **Divorce:** PRACTICE. The affidavit for service by publication in a divorce case is jurisdictional, and unless it conform substantially to the statutory requirements the court will not acquire jurisdiction.

2. ——: ——: JURISDICTION. When it appears that the defendant cannot be served with process in the state, the records in the absence of an appearance must show how jurisdiction was acquired.

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

Marquett & Courtnay, for plaintiff in error.

The motion to open up the judgment and decree under section 82 of the code of civil procedure, is overruled by the court; and the last motion filed is sustained, the court holding that the affidavit for publication of the summons was defective, and that the court thereby had acquired no jurisdiction of the defendant. This amounts to an indirect or collateral attack on the judgment and decree originally rendered. This cannot be allowed by motion, for it gives the plaintiff no "day in court," no opportunity to be heard with evidence, and to cross-examine witnesses, etc. Such an attack must be by original bill in equity. *Clark v. Hotailing*, 1 Neb., 436. *Dorente v. Sullivan*, 7 Cal., 279. *The Bank v. Labitut*, 1 Woods, 11. *Fries v. Fries*, 1 McArthur, 291. *Claypool v. Houston*, 12 Kansas, 324. If the court had no *jurisdiction* the whole proceedings were void, and court had no power to rule the parties to plead or do anything beyond annulling the decree, and that not on motion, but only in a proper case in equity. *Lickens v. McCormick*, 39 Wis., 313. *Durrah v. Watson*, 36 Iowa, 116. The most that can be said is that there was irregularity in the mode of service; but no advantage could be taken of that fact except by appeal or error. *Forbes v. Hyde*, 31 Cal., 342. *Lessee of Fowler v. Whiteman*, 2 Ohio St., 270. *Wright v. Marsh*, 2 G. Green (Iowa), 94. *Stevenson v. Bonesteel*, 30 Iowa, 286. *Shawhan v. Loffer*, 24 Iowa, 218. *Myers v. Davis*, 47 Iowa, 325, and authorities there cited. *Moomey v. Maas*, 22 Iowa, 308. *Ballinger v. Tarbell*, 16 Iowa, 492. *Whitewell v. Barbier*, 7 Cal.,

54. *Beech v. Abbott*, 6 Vt., 586. *Matter v. Clark*, 3 Denio, 167. The record shows that the matter of jurisdiction was considered and determined by the court, and a solemn decree of the court entered upon the record finding the fact of jurisdiction and of legal service of the summons by a proper publication according to law. This forever settles the question of service, excepting on review by appeal or error. Freeman on Judgments, Secs. 130 to 135 inclusive.

J. R. Webster and *J. H. Foxworthy*, for defendant in error.

A court of equity, in case of a divorce obtained by publication and without actual notice, may, and should upon motion, annul its decree and admit defense. *Adams v. Adams*, 51 N. H., 338. *Crouch v. Crouch*, 30 Wis., 667. *Brown v. Brown*, 58 N. Y., 609. *Young v. Young*, 17 Minn., 181. *Allen v. Maclellan*, 12 Penn. St., 329. In cases of constructive service, if the statutory *mode* of vesting jurisdiction is not pursued, the judgment, though pronounced and entered of record, is a nullity, and want of jurisdiction may be availed of at any time before or after judgment however questioned in a direct or collateral proceeding. Wade on Notice, Section 1371. *Knox v. Miller*, 18 Wis., 397. *Webster v. Reed*, 11 How., 437. *Rape v. Heaton*, 9 Wis., 328. *Northrup v. Shepherd*, 23 Wis., 513. *Senichka v. Lowe*, 74 Ill., 274. *Falkner v. Guild*, 10 Wis., 563. *Pollard v. Wagener*, 13 Wis., 569. *Jurgulewiz v. J.*, 24 La. Am., 77. *Borden v. Fitch*, 15 Johns., 141. *Towsley v. McDonald*, 32 Barb., 604. *Riley v. Nichols*, 1 Heisk, 16.

In notice by publication the affidavit for publication of service is jurisdictional, and before jurisdiction can be acquired such affidavit must be filed as brings the cause within the statutory requirements for this form

of constructive service. The affidavit is the foundation of the jurisdiction and the means by which the court by this kind of service obtains jurisdiction. The affidavit must state the probatory facts of residence and of subject matter of the suit, not mere conclusions, or jurisdiction is not obtained. Wade on Notice, §§ 1033, 1035, 1042–3, 1371, 1379. *Claypool v. Houston*, 12 Kan., 324. The suit against an absent party is essentially *ex parte*, and at the least the plaintiff should strictly comply with the rules of procedure before judgment. *McMinn v. Whelan*, 27 Cal., 300. *Edmington v. Allebrook*, 21 Tex., 186. And if it appear by record (as in this case) that the court had never jurisdiction over the person of defendant to dissolve her status of marriage, the judgment will be pronounced a nullity, whether it comes directly or collaterally in question. *Coit v. Haven*, 30 Conn., 190. *Penobs. R. R. Co. v. Weeks*, 52 Me., 456. *Hess v. Cole*, 23 N. J. L., 116. *Mills v. Dickson*, 6 Rich. (S. C.), 487. If the necessary notice has not been given or process has not been served, the court has no authority to act, and all its proceedings are absolutely void. *Goudy v. Hall*, 30 Ill., 109. *Wort v. Finley*, 8 Blackf., 335. *Downs v. Fuller*, 2 Metc. (Mass.), 135. *Outhwite v. Porter*, 13 Mich., 533.

MAXWELL, CH. J.

On the 8th day of August, 1873, the plaintiff filed a petition for a divorce from the defendant in the district court of Lancaster county, and on the same day filed the following affidavit to obtain service by publication:

"STATE OF NEBRASKA, } ss.
Lancaster County, }

"Henry Atkins, being first duly sworn, on oath says: That he is the plaintiff in the above entitled action;

that service of summons cannot be made within this state on the defendant, Rebecca Atkins, on whom service by publication is desired, and that this cause is one mentioned in section No. 77 of title V of the Revised Statutes of Nebraska as amended.

"HENRY ATKINS.

"Subscribed in my presence and sworn to before me this 8th day of August, 1873.

"C. J. GREENE,

"Justice of the Peace."

Upon filing the affidavit the plaintiff caused the following notice to be published:

"*Legal Notice.*

"In the district court, 2d judicial district, held in and for Lancaster county, Nebraska:

"Henry Atkins, Plff.
v.
Rebecca Atkins, Deft.

"To Rebecca Atkins, defendant: You will please take notice that on the 8th day of August, A.D. 1873, the said Henry Atkins, plaintiff, filed in the district court of the 2d judicial district, held in and for Lancaster county, Nebraska, his petition, charging that you have been willfully absent from him for more than two years last past, and praying that the bonds of matrimony now existing between you and him may be dissolved, and that the care and custody of your child, Martha Irene, may be awarded to him, and for such other and further relief as in equity and good conscience he may be entitled to. You are further notified that unless you appear and answer his said petition on or before the third Monday after August 29, his said petition will be taken as true, and the relief prayed for granted.

"HENRY ATKINS," etc.

The first publication of the notice was on the 15th

of August, 1873. On the 6th day of November, 1873, the following decree was entered in the district court.

"Thereupon this cause came on for hearing upon the petition and testimony, and was argued by counsel. On consideration whereof the court does find that due notice of the filing and pendency of this petition was given to the said defendant according to law. And the court doth further find that the said defendant has been willfully absent from the said petitioner more than three years last past prior to the filing of said petition. It is therefore adjudged and decreed that the marriage relation heretofore existing between the said parties be and the same is hereby set aside and wholly annulled, and the said parties wholly released from the obligation of the same; and it is further ordered that the custody, nurture, education, and care of the child, Martha Irene, born to said parties during said marriage, be and the same is hereby given to the said petitioner, and the said defendant is forever enjoined from interfering with or disturbing said petitioner in the custody," etc.

On the 29th of May, 1878, the defendant filed the following motion in said court:

"Henry Atkins
v.
Rebecca Atkins. } Motion.

"And now comes the defendant and moves the court to vacate, open, and set aside the judgment herein rendered on the 6th day of November, A.D. 1873, upon the ground that judgment was rendered without other service than by publication in a newspaper, and during the pendency of the action defendant had no actual notice in time to appear and defend, and applicant now files her answer and affidavit herein as by law required."

The defendant at the time of filing the above motion

also filed an answer to the plaintiff's petition, and an affidavit duly verifying the same.

On the 2d day of June, 1878, the defendant filed a supplemental motion, alleging that the service by publication was not sufficient to give the court jurisdiction, because

First, The affidavit for publication does not show any fact but conclusions of law only; because it does not set forth that the defendant is a non-resident of the state of Nebraska, or had departed therefrom, etc.

Second, Because the cause of action set forth in the affidavit is not one provided for by § 77 of the code.

Third, The notice did not notify the defendant when to appear and answer.

Fourth, Because the defendant could not have been required to answer before the 29th day of September, 1873.

Fifth, Because the notice does not notify the defendant that plaintiff's residence is in Lancaster county.

On the 21st day of June, 1878, the court rendered the following judgment:

"This matter coming on to be determined upon the motion heretofore first filed, to open the judgment herein appearing to have been rendered and entered of record because that service was had by publication within five years next prior to the filing of said motion, and that defendant had no notice of this proceeding prior to the rendition of the decree herein; and also to be determined upon the motion of the defendant as amended and enlarged as subsequently filed; and the court finds the facts to be that the defendant had no notice or actual knowledge of the pending of this suit in time to appear and defend thereto, or yet prior to the 6th day of November, A.D. 1873, the date of decree, but the court further finds as a conclusion of law, that section 82 of the code of civil procedure does not apply

to proceedings of divorce, and that the court has no jurisdiction to open or annul the decree upon that ground. * * The court finds upon the record that there has never been jurisdiction acquired by the court of the subject matter, or the person or marriage status of the defendant, to render such decree, because of the defect of an affidavit for service by publication as well as the insufficient publication notice, and publication of the notice, and that no decree or judgment in any way concluding or affecting the rights of the defendant has been made with any jurisdiction so to do. And that the decree herein entered of record ought not to be or remain of record or held to be valid. And thereupon the motion of the defendant as amended and last filed is sustained, and the decree and judgment herein recorded and entered the 8th day of November, A.D. 1873, is annulled, set aside, and ordered to be cancelled and held for nought."

The plaintiff brings the cause into this court by petition in error, the defendant filing a cross petition in error.

The first question presented is the jurisdiction of the court rendering the decree of divorce.

Section 10 of the chapter on divorce and alimony (Gen. Stat., 346) provides that "a petition for divorce, alimony, and maintenance may be exhibited by a wife in her own name as well as a husband; and in all cases the respondent may answer such petition without oath; and in all cases of divorce, alimony, and maintenance, when personal service cannot be had, service by publication may be made as provided by law in other civil cases under the code of civil procedure."

Section 77 of the code provides in what cases service by publication may be made. Section 78 provides that "before service can be made by publication, an affidavit must be filed that service of a summons can-

not be made within this state on the defendant or defendants to be served by publication, and that the case is one of those mentioned in the preceding section." Section 79 provides that publication must be made for four consecutive weeks. * * It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served *when they are required to answer.*

Section 80 provides that service shall be complete when it shall have been made in the manner and for the time prescribed in the preceding action. (Gen. Stat., 535, 536.)

The cases referred to in Section 77 of the code, where service may be made by publication, relate solely to property.

In *Shields v. Miller*, 9 Kan., 390, the affidavit for publication was as follows: "Andrew Ellison, attorney for plaintiff in the above entitled case, being first duly sworn, deposeth and saith: that on the said 18th of July, 1862, the said Benjamin L. Riggins filed a petition against said Charles P. Bullock and Rowena Bullock, defendants, praying that certain lands situate in said county may be decreed to be sold to satisfy a mortgage given by the said Charles P. Bullock and Rowena Bullock to said Riggins, to secure the payment of a certain sum of money in said note and mortgage mentioned; and the said Andrew Ellison, as attorney and agent for said Riggins, further saith that said Charles P. Bullock and Rowena Bullock have removed from the state of Kansas, and now live in the state of Missouri, as said Andrew Ellison verily believes, and are non-residents of the state of Kansas, and that the service of summons on the said Charles P. Bullock and Rowena Bullock ——— within the state of Kansas," etc. The court held that "the affi-

davit is the foundation upon which jurisdiction is obtained." And that the defect in the affidavit was fatal to the proceedings in foreclosure, and that the judgment could be attacked collaterally.

In *Slocum v. Slocum*, 17 Wis., 150, it was held that an affidavit for the service of summons by publication against a sole defendant, which states "that the action is for an accounting between the parties, and to remove a cloud upon the plaintiff's title to real estate, which the defendant claims to hold under a marshal's sale upon execution, while the plaintiff claims that the execution was fully paid before the sale, does not show that a cause of action exists against the defendant," and was not sufficient to authorize service by publication.

In *Forbes v. Hyde*, 31 Cal., 342, it was held that the existence of a cause of action against the defendant is a jurisdictional fact, which must be made to appear before an order of publication of summons can be made, and if it does not appear by the affidavit, the order is *void*. In that case proceedings in foreclosure were instituted against one Harris and others. Harris being a non-resident of the state, an affidavit was filed by the attorneys for the plaintiff, tending to show that Harris was a non-resident of the state. About four months after filing the affidavit an order of publication was had upon that affidavit, and a decree and sale of the mortgaged premises. In an action of ejectment to recover possession of the premises under the foreclosure it was held that the decree of foreclosure was void.

The rule may be stated thus: If there is a total want of evidence upon a vital point in the affidavit, the court acquires no jurisdiction by publication of the summons; but where there is not an entire omission to state some material fact, but it is insufficiently set forth, the proceedings are merely voidable.

It is strenuously urged by the plaintiff that as the record of the judgment recites due notice of the filing and pendency of the petition according to law, that that finding is conclusive, and cannot be inquired into in this proceeding; that the record imports absolute verity, and cannot be impeached.

In *Starbruck v. Murray*, 5 Wend., 148, Marcy, J., says: "It (the record) imports perfect verity, it is said, and the parties to it cannot be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth a record. If the defendant had not proper notice of and did not appear in the original action, all the state courts, with one exception, agree in opinion that the paper introduced as to him is no record; but if he cannot show, even against the pretended record, that fact, on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense by a process of reasoning that is to my mind little better than sophistry. The plaintiffs in effect declare to the defendant: the paper declared on is a record because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendants put in issue (and the whole current of state court authority shows it to be a proper issue) is the validity of the record. * * Unless a court has jurisdiction it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped by any allegation in that rec-

ord from proving the truth of any plea alleging a want of jurisdiction." This language was cited and approved by the supreme court of the United States in *Harris v. Hardeman*, 14 How., 336. But whatever the rule may be as to judgments, where the mode of service is not set out in the record, it has no application to cases of constructive service. In such cases all the material requirements of the statute must appear on the face of the record to render the judgment valid. *Hallet v. Righters*, 13 How. Pr., 43. *Boyland v. Boyland*, 18 Ill., 552. *Bromfield v. Dyer*, 7 Bush, 505. The reason is that the process of the court cannot lawfully extend beyond the limits of the state into another jurisdiction; therefore, unless the record shows an appearance of the defendant it must show *how* the jurisdiction was acquired.

An action for a divorce is in its nature a proceeding *in rem*. 2 Bishop on Marriage and Divorce, sections 165, 199 *b*, 199 *c*, 755. 2 Smith's Lead. Cas. (6th Ed.), 689. Freeman on Judgments, § 584. The action can only be maintained by a party who has resided in this state at least six months, unless the marriage was solemnized in this state, and the applicant shall have continued to reside therein from the time of the marriage until the time of filing the complaint. The court, in acting in the premises, merely determines the *status* of the parties to the suit. And it is this power that authorizes the court in a proper case upon constructive service, to render a decree against a non-resident who may not have the slightest knowledge of the residence of the plaintiff. How important, then, that the statute be substantially complied with! It is urged that the defendant has entered an appearance in the action by filing an answer. While this is true, it does not breathe life into the decree, and can only affect subsequent proceedings. As there is no error in the judgment of the

court below in holding the affidavit void, the judgment is affirmed.

JUDGMENT AFFIRMED.

THE STATE OF NEBRASKA, EX. REL. ANSON S. BALDWIN, v. JOHN H. MCCOLL.

1. **Statutes.** Section 55 of the act concerning counties, approved March 1, 1879, is a re-enactment of section 9 of the act concerning counties and county officers, approved February 27, 1873, Gen. Stat. 233, and is a continuation of that act.
2. ——: EFFECT OF RE-ENACTMENT. In such case, the effect of the repeal and re-enactment is to continue the uninterrupted operation of the statute. The act approved March 1, 1879, did not therefore vacate the office of county commissioner.

ORIGINAL application for mandamus.

C. J. Dilworth, for the relator.

D. G. Courtnay, for the respondent.

MAXWELL, CH. J.

This is an application for a peremptory writ of mandamus to compel the defendant, who is county clerk of Dawson county, to post notices for the election of three county commissioners for his county at the general election to be held in November.

Section 55 of the act concerning counties, approved March 1, 1879, Laws of 1879, 370, provides that "at the first election held to choose the board of commissioners under this act in any county, the person having the highest number of votes shall continue in office for three years, the next highest two years, and the next highest one year; but if any two or more persons have the same number of votes, their term of office shall be determined by the board of canvassers, and each commissioner elected at the first general election as

herein provided, shall hold his office for three, two, or one years as the case may be, and until his successor is elected and qualified; and each commissioner elected thereafter, in pursuance of the foregoing section, shall hold his office for three years and until his successor is elected and qualified." This section is copied verbatim from the act "concerning counties and county officers," approved February 27, 1873, Gen. Stat., 233, and is merely a re-enactment of the same law. Did the legislature, by the re-enactment of this section, intend to continue its provisions in force without interruption? We think it did. It is urged on the argument that there was an instant of time between the taking effect of the new act and the expiration of the old. But this is not the case. The new statute took effect at the same instant with the repealing statute, and the statute in fact is a mere continuation of the old.

In the case of *Fullerton v. Spring et al.*, 3 Wis. 671, in a similar case the court say: "It is clear that the effect of this repeal and re-enactment was to continue the uninterrupted operation of the statute. Such is believed to be the proper rule of construction in cases where the repealing act re-enacts a provision of the old statute in the same words. There is no change in the law, and the re-enactment of the new is simultaneous with the repeal of the old provision, and both are the same.

In *Wright v. Oakley*, 5 Met., 406, the court say: "In terms the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes which were substituted for them, and were intended to replace them, with such modifications as were intended to be made that revision. There was no moment in which the repealing act stood in force without being replaced by the corresponding provisions of the revised statutes."

It is clear that section 55 is a mere continuation of

the act of 1873, and that the office of county commissioner was not made vacant thereby. It follows that the writ of mandamus must be denied.

WRIT DENIED.

SHAFFER & STUMP, PLAINTIFFS IN ERROR, V. WM. MCK. MADDOX, DEFENDANT IN ERROR.

1. **Practice:** MOTION TO STRIKE OUT COUNTS IN PETITION. The petition stated but one cause of action, but was divided into paragraphs and numbered from one to four inclusive. *Held*, that a motion "to strike out the first, third, and fourth *counts*, for the reason that neither of them contains a cause of action," etc., was properly denied.

2. **Banks:** BANK CHECK: NOTICE. Action on bank check against the drawee. The jury by special verdict found that the drawers had no funds in the bank at the time of the presentation of the check. *Held*, that the drawers were not released from liability on the check by reason of the failure of the holder to notify them of the non-payment of the check by the bank.

3. **Evidence:** PETITION IN ERROR: MOTION FOR NEW TRIAL. To entitle a party to a review of the rulings of the court below on the admission or rejection of testimony, it is necessary that the alleged errors should be specifically pointed out, not only in the petition in error, but also in a motion for a new trial in the court below.

ERROR to the district court for Richardson county. The petition filed in the action is as follows:

The said plaintiff complaining of said defendants for cause, states:

First, That on or about the first day of October, A.D. 1877, the said plaintiff sold and delivered to said defendants, Francis Shaffer and John Stump, co-partners as above, goods and chattels at the said defendants'

special instance and request, for the sum of eighty-seven and ninety-four-one-hundredths dollars ($87.94), no part of which has been paid, and said defendants, Shaffer and Stump, fraudulently representing to said plaintiff that they had funds in the banking house of said C. L. Keim, deft., to pay said sum, fraudulently drew a check on said bank to pay said sum, well knowing that they had no funds in said bank, and that the said check would not be paid by said bank or said defendant, C. L. Keim, on whom the check was drawn, who was the owner and controller of said bank, called the Falls City Bank, combining and conspiring together to swindle and cheat the plaintiff of his said property, made said check. The said check was in words and figures following, to-wit:

"October 1st, 1877. Falls City Bank, pay to William McK. Maddox or bearer eighty-seven and ninety-four-one-hundredths dollars ($87.94).

"SHAFFER & STUMP.

Second, The said check was duly and promptly presented to said defendant, C. L. Keim, on whom the same was drawn, for payment, and said check was not paid, and there were no funds of said Shaffer and Stump in said bank to pay the same, and said C. L. Keim, fraudulently combining with said defendants, Shaffer and Stump, over the objections of this plaintiff, and against the request and desire of this plaintiff, and in furtherance of said fraud first above referred to, took the check and wrote the words "Accepted, C. L. Keim, Oct. 1st, '77," as he said, to become their security only for said sum, and handed the same back to this plaintiff; and said C. L. Keim thereby promised to pay this sum above named to this plaintiff. There was no legal acceptance on said check, and was only as security as averred and in fraud of this plaintiff.

Third, The said defendants, Shaffer and Stump, were duly notified of the non-payment and dishonor of said check, and on divers times after the full and complete notice of the dishonor and non-payment of said check the said Shaffer and Stump did promise and re-obligate themselves to pay to this said plaintiff, for said goods so sold and delivered to them, the said sum of eighty-seven and ninety-four-one-hundredths dollars ($87.94).

Fourth, All of which they have failed to do or cause to be done, and no part of said sum has ever been paid to this plaintiff by any of said defendants or any person for them. And there is now justly due and owing from said defendants to this plaintiff, for said goods and chattels so sold and delivered as above, the said sum of eighty-seven and ninety-four-one-hundredths dollars ($87.94), and interest thereon from October 1st, 1877, at the rate of ten per cent per annum, and for all of which this plaintiff asks judgment against said defendants and for costs.

A demurrer of the defendants to this petition having been overruled, they answered denying their indebtedness, and upon these pleadings and the evidence the cause was tried before WEAVER, J., at the March term, 1878. The jury returned the following verdict:

"We, the jury impaneled and sworn in the above entitled cause, find all the issues in favor of the said plaintiff, William McK. Maddox, and against said defendants, and we find that said plaintiff should recover of said defendants the sum of ninety-one dollars and eighty-nine cents, and so we all say.

"Did the defendants Shaffer and Stump have any money in the bank on which the check in favor of the plaintiff was drawn at the time said check was presented by the said plaintiff, and if so how much? Answer. No.

"Did the defendant, C. L. Keim, sign the check in

question as surety, and did said Keim agree with the plaintiff that his signature should hold him, said Keim, as surety? Answer. Yes."

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

Shaffer & Stump, on the first day of October, 1877, executed and delivered to defendant in error their bank check, and on same day defendant in error presented the same to the Falls City Bank, the drawee, and C. L. Keim, who was then conducting and operating said bank, wrote on the face of check "Accepted, Oct. 7, 1877," and then delivered the same to defendant in error, and took and kept the possession of the same until the suspension of the bank, without notifying said plaintiffs in error that the check was not paid.

We contend that by defendant in error taking the bank's certification of the check and acquiescing in the same until the suspension of the bank, that plaintiffs in error, Shaffer & Stump, were discharged from all liability thereon; the certification or acceptance of the bank operated as a release or payment as to the drawers, and that they were no longer liable on the check. *Smith v. Miller*, 43 N. Y., 176. *Claflin v. Farmer's and Citizen's Bank*, 25 N. Y., 300. *The First National Bank of Jersey City v. Leach*, 52 N. Y., 350. *Essex County Bank v. Bank of Montreal*, 15 American Law Register, 418. Morse on Banking, 282. 2 Daniels on Negotiable Instruments, 529. 2 Parsons on Notes and Bills, 74. Defendant in error, by taking the certification of C. L. Keim, substituted C. L. Keim in the place of plaintiffs in error, Shaffer & Stump, as his debtor. *Meads v. Merchants Bank of Albany*, 25 N. Y., 148. 2 Daniels on Neg. Inst., 526.

It was the duty of the holder to present to the bank for payment, and only for payment, and notify the

drawers of its dishonor to fix their liability. *Dolph v. Rice*, 18 Wis., 397. *Essex County National Bank v. Bank of Montreal*, 15 American Law Reg., 420. 2 Daniel on Neg. Inst., 527, sec. 1604. The holder of a check waives his right to immediate payment by asking for or even accepting the offer of certification by the bank. It follows that the drawers are released. Morse on Banking, 282.

Clarence Gillespie, for defendant in error.

It is fraud in a party to draw a check on a bank in which he has no money. He is not entitled to notice of non-payment. They have no right to have even the check presented. A check is the representative of cash in the bank which the drawer undertakes to assign to the holder of the check. If he has not the cash there, it is obtaining goods under false pretenses to give the check, and at once ship the hogs off, as was done in this case. 2 Dan Neg. Inst., 520. *Fitch v. Redding*, 4 Sandf., 130.

When these plaintiffs bought these hogs they agreed to pay for them, and the giving of a check on the bank that had no funds for the plaintiffs is no payment. A check is not money; it is but the representative of money in bank. 8 Pick., 1. 2 Pick., 204. 11 Metcalf, 44. 4 Johns., 296. Chitty on Bills, 389 and 390 and notes. 5 Ohio St., 13. 11 Ohio St., 29. 14 Kas., 165. 16 Kas., 546.

COBB, J.

The first error assigned is as follows: "The court erred in overruling the motion of defendants below (plaintiffs in error) to strike out the 1st, 3d, and 4th counts of the petition." Upon examination of the

record, I find that it contains but one count or cause of action. True, for some reason not very apparent, the pleader seems to have divided and numbered the same into four paragraphs. But these paragraphs cannot be considered as separate counts (even if such a thing as a "count" exists under the code practice). Neither one of them purports to state a cause of action perfect in itself, and all are necessary to the full statement of the cause of action sought to be pleaded. It is probable that a motion to require this pleading to be made more definite and certain would have been sustained, but the motion made was properly overruled.

The second error assigned is, that the "court erred in overruling the demurrer to the petition," etc. By reference to the demurrer I find that it contains three grounds of demurrer. 1st. "Because there is more than one cause of action stated in said petition which are incongruous, conflicting, and contradictory." 2d. "That said petition does not state facts sufficient to constitute a cause of action against the defendants, Shaffer & Stump." 3d. "Because there is a misjoinder of parties defendant," etc.

As above stated, the petition does not contain but one cause of action. The statement of the sale and delivery by the plaintiff below of goods and chattels to the said Shaffer & Stump, to the amount of $87.94, is only inducement to the after statement of the making and delivery of the check sued on, and to show the consideration for which the check was given, and cannot be considered as the statement of a separate cause of action. As to the second ground, I think that the petition does state facts sufficient to constitute a cause of action against all of the defendants; and as to the 3d, the above view disposes of that objection also.

As to the point that the court erred in admitting illegal testimony offered by the plaintiff below, and

allowing the same to go to the jury over the objections of the plaintiff, as well as the other point, that "the court erred in excluding from the jury proper and legal evidence offered by defendants below to sustain their part of the issues in said cause," it is perhaps sufficient to say that both of said points seem to have been substantially abandoned by the plaintiffs in error.

It has been repeatedly held by this court that "to entitle a party to a review of the ruling of the court below on the admission or rejection of testimony, it is necessary that the alleged error should be specifically pointed out, not only in the petition in error, but also in the motion for a new trial in the court below." *Cropsey v. Wiggenhorn*, 3 Neb., 108. *Gibson v. Arnold*, 5 Neb., 186. *Scofield v. Brown*, 7 Neb., 221. *Lowrie v. France*, Id., 191. *Tomer v. Dinsmore*, 8 Neb., 384, and authorities there cited.

But one error of the above character is pointed out in the motion for a new trial, which is as follows: "That the court in the trial of this cause erred in rejecting the evidence offered by the defendants, Shaffer & Stump, to prove that they were damaged by reason of the said plaintiff neglecting to give notice of the non-payment of the said check before the suspension of the Falls City Bank."

The jury by their special verdict found that the defendants, Shaffer & Stump, had no money in the bank on which the check in favor of plaintiff (below) was drawn at the time said check was presented by the plaintiff. There was evidence to sustain this finding, and it is clear from the evidence that the check was presented for payment at the bank, almost immediately after it was delivered to defendant in error by plaintiffs in error. Under these circumstances plaintiffs in error were not entitled to notice of the non-payment of the check. But if they had had funds in the bank, in

which case the defendant in error would have lost his remedy against them by failing to notify them of the non-payment of the check, even then the nominal and technical damages which they would be considered to have sustained by reason of their not having received notice of the non-payment of the check would only have gone to the extent of relieving them from liability on the check, and would have been a question of law and not of fact. But it would have been sufficient to have said of this point that no foundation for such evidence was laid in the answer of the defendants below. Such testimony was properly rejected.

I have examined the instructions given in charge to the jury at the request of the plaintiff below, as well as those requested by defendants below and refused, the giving and refusing of which respectively are complained of by the plaintiff in error, and find no error in the action of the court below in either of these respects.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

J. H. SMITH AND OTHERS, PLAINTIFFS IN ERROR, V. GREGG, TORIAN & CO., DEFENDANTS IN ERROR.

1. **Undertaking in Injunction.** Action on injunction undertaking. Petition states the cause of action as follows, after setting out the bringing of the injunction suit and giving of the undertaking, which contained the following conditions: * * * "That the said Joseph H. Smith should pay to plaintiffs the damages plaintiffs should sustain by reason of the injunction in said action if it should be finally decided that said injunction ought not to have been granted." * * * "That afterwards, to-wit: * * * it was found by the judge of the

district court of Jefferson county, Nebraska, at chambers, that the petition of said Joseph H. Smith in said injunction action did not contain a statement of facts sufficient to justify the issuance of said injunction, and said injunction was then and there dissolved, and said action of injunction was afterwards dismissed at the cost of said Joseph H. Smith by the district court of said Jefferson county. That by reason of said injunction in said action plaintiffs were damaged in the sum of seventy-five dollars in this, to-wit, for the time and trouble spent by plaintiffs in looking after and in procuring the dissolution of the said injunction and for money laid out and expended for counsel and attorney's fees, and their expenses in and about the procuring of the dissolution of said injunction. That the same is due and unpaid," etc. *Held*, on demurrer, that the facts stated constituted a cause of action.

2. **Partnership:** SUIT BROUGHT IN THE NAME OF A FIRM. Suit in the name of "Hanson Gregg, Albert Torian, and Mason Gregg, late co-partners under the firm name and style of Gregg, Torian & Co., plaintiffs." *Held*, on demurrer, not brought under the provisions of § 24, of chap. 57, Gen. Stat., and that it was not necessary that plaintiffs should state that such partnership "was formed for the purpose of carrying on trade or business, or for the purpose of holding any species of property in this state."

ERROR to the district court for Jefferson county. Heard below before WEAVER, J., on demurrer to the petition; demurrer overruled, and judgment for plaintiff. Defendants below, Smith *et. al.*, brought the case here to reverse said judgment.

Saxon & Snell, for plaintiff in error.

1. The petition contains nowhere an allegation that the condition of the undertaking was broken. It contains no allegation that it has ever been "finally decided" that the injunction "ought not to have been granted." These plaintiffs are liable only according to the express terms of the bond. *Hall v. Williamson's Admis.*, 9 Ohio State, 17. *Dorris v. Carter* (Mo.), Cen. Law Jour., 217.

2. There is no breach of the undertaking alleged in the petition. It ought to assign a breach in the words of the contract either negatively or affirmatively. 2 Wm. Saund., 181. 6 Cranch, 127. 8 Johns., N. Y., 111. 4 Dall., Penn., 436. 5 Johns., N. Y., 168. 7 Johns., N. Y., 376.

3. The judge of the district court had no jurisdiction or power to dissolve the injunction at chambers, that being the only relief prayed for in the injunction case. Gen. Stat., § 263, p. 568. Constitution, § 23, art. VI.

4. The petition showed upon its face a want of capacity to sue. The action is brought in a partnership name, but the petition, although giving the names of the members of the firm, fails to show whether it was a resident or non-resident co-partnership, and contains no allegation as to its being formed for the carrying on of business or holding property in this state. Plaintiff believes this is necessary.

Slocumb & Hambel, for defendants in error.

A motion to dissolve an injunction on the ground of insufficiency in the allegations of the petition operates as a general demurrer, and the injunction must stand or fall on the facts as pleaded. High on Injunctions, 940. Kerr on Injunctions in Equity, 626, 627. And upon the action being dismissed, the injunction falls as a matter of course without further proceedings, whether the injunction was granted on the merits or otherwise, and no motion for its dissolution is necessary. Kerr on Injunctions in Equity, 636. High on Injunctions, § 888. Hence upon any view that can possibly be taken of the injunction suit, the injunction, together with the entire case, is entirely disposed of, and that, too, upon the hypothesis that all that the

plaintiff Smith had stated in his petition was true. And more especially is this so, for as plaintiffs say in their brief, "the injunction was the only relief prayed in the injunction case."

COBB, J.

Two questions are raised by the demurrer in this case. 1st, That there is no breach of the conditions of the undertaking. 2d, That the petition shows on its face want of capacity to sue, the action being brought in a partnership name, and the petition, though giving the names of the members of the firm, contains no allegation as to its having been formed for the purpose of carrying on business, etc., in this state.

The statute gives no form for an undertaking in injunction. Section 255, on page 567, General Statutes, does not purport to give a form, but to point out the substance of the required undertaking. I think that the undertaking, a copy of which is attached to the petition, complies substantially with the provisions of the statute, and that the breach of the conditions thereof as set out in the petition substantially states a cause of action. It is in the following words: "That afterwards, to-wit, on or about the ——— day of February, 1876, it was found by the judge of the district court of Jefferson county, Nebraska, at chambers, that the petition of said Joseph H. Smith in said injunction action did not contain a statement of facts sufficient to justify the issuance of said injunction. And said injunction was then and there dissolved, and said action of injunction was afterwards dismissed, at the cost of the said Joseph H. Smith, by the district court of said Jefferson county. That by reason of said injunction in said action plaintiffs were damaged in the sum of seventy-five dollars in this, to-wit, for the time and trouble spent

by plaintiffs in looking after and in procuring the dissolution of said injunction, and for money paid out and expended for counsel and attorney fees, and their expenses in and about the procuring of the dissolution of the injunction. That the sum of seventy-five dollars is now due and owing from defendants to said plaintiffs, and no part of the same has ever been paid," etc.

Certainly the action of the judge at chambers dissolving the injunction, and afterwards of the court dismissing the suit at the cost of the plaintiffs, taken together, were equivalent to a decision "that the injunction ought not to have been granted."

The plaintiffs in error cite authorities to the effect that they being mere sureties, the extent of their liability is to be measured by the letter of their bond. It is scarcely necessary to quote an array of authorities to sustain this position; if it were, they are abundant. I regard the case at bar as entirely within this rule. The petition sets out the facts in the case, and I think that the court below, in deciding upon the demurrer, drew the proper conclusions, and that in so doing did no violence to the above rule of law.

As to the second point. The plaintiffs are in error in this, that the suit was brought in a partnership name, although certainly not in the sense of § 24, of chap. 57, General Statutes. The suit was brought in the names of Hanson Gregg, Albert Torian, and Mason Gregg, late partners under the firm name and style of Gregg, Torian & Co., plaintiffs, etc. To do this they were not dependent upon the provisions of the statute in question, which provides that "any company or association of persons formed for the purpose of carrying on any trade or business, or for the purpose of holding any species of property in this state, and not incorporated, may sue and be sued by such usual name as such company, partnership, or association may have assumed to

itself or be known by, and it shall not be necessary in such case to set forth in the process or pleadings or to prove at the trial *the names of the persons composing such company.*" In the case at bar the full christian and surnames of all the members of the firm are set out. Hence the objection, that they do not bring themselves within the provisions of the section above quoted, has no force.

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

JUDGMENT AFFIRMED.

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

1. **Power of the Court to Perfect an Informal and Inconclusive Judgment Rendered at the Same Term.** In an action of replevin the defendant filed a general demurrer to the plaintiff's petition. Demurrer sustained by the court. Plaintiff standing on his petition, on December 18, 1877, judgment was rendered in the following words: "It is therefore ordered and adjudged by the court that the plaintiff's said action be and the same is hereby dismissed, and that the defendant have and recover judgment for his costs herein," etc. Afterwards, on the 8th day of February, 1878, the district court having adjourned from the 18th day of December, 1877, to the 4th day of January, 1878, and from the last named day to the said 8th day of February, 1878, and being then in session as of the November term, 1877, the said judgment was by the court modified to read as follows: "It is therefore hereby adjudged and determined by said court that the defendant do have a return of said property, or the value thereof, as found by said court in case a return cannot be had, and that the plaintiff's cause of action against the defendant is hereby dismissed, and that the defendant go hence without day and that he have and recover his costs," etc. *Held*, That the district court had the right in its discretion to make such modification, and that the same, being

a matter of discretion on the part of the district court, is not for that reason subject to review in the supreme court.

2. **Effect of taking Cause to the Supreme Court on error.** At the time of the modification of the judgment, Feb. 8, 1878, there was pending in the supreme court a case on error brought by the plaintiff against the defendant for alleged errors in the said judgment as first rendered. *Held*, That the bringing of such action in error did not oust the district court of jurisdiction to make the said modification of such judgment, pending said action in error in the supreme court.

ERROR to the district court of Cuming county, the case being thus:

In 1877 plaintiff filed a petition in the district court, claiming the ownership and right of possession of certain personal property therein described; at the November term, 1877, defendant filed a general demurrer to said petition, which demurrer was on the 18th day of December argued and sustained by the court, and an order entered accordingly. Afterwards, on the 9th day of January, 1878, a stipulation, signed by the attorneys of both parties, was filed in said cause, by which the journal entry of December 18th was erased, and another entered sustaining the demurrer, dismissing the action, and rendering judgment against the plaintiff for costs. From this judgment defendant prosecuted a petition in error to this court, which was argued at the January term, 1878, and on the 6th day of March, 1878, the judgment of the lower court, sustaining said demurrer and dismissing said action at the costs of plaintiff, was affirmed (7 Neb., 134), and a mandate directing the district court to enforce said judgment was filed in said court on the 9th day of March, 1878. On the 18th day of December the district court was adjourned until January 4, 1878, and on January 4, 1878, the court was adjourned until February 8, 1878. On the

said 8th day of February, 1878, while the action was pending in this court, a second judgment was rendered against said plaintiff for a return of property, etc., and in default thereof a judgment for the sum of $406.45 and costs of suit taxed at $22.53; plaintiff moved to vacate and set aside said second judgment, which was refused by the court, and he brought the cause here upon a petition in error.

R. F. Stevenson, for plaintiff in error.

1. A judgment is the final determination of the rights of parties in an action. Gen. Stat., p. 576, § 428. *State of Kansas v. McArthur*, 5 Kan., 280. A judgment is conclusive when entire. *U. P. Railway Co. v. McCarty*, 8 Kan., 126.

2. The court had no jurisdiction to render a second judgment dismissing said cause of action, and for a return of property, or in default of the return thereof a moneyed judgment for the sum of $406.45, and costs of suit taxed at $22.53, while said action was pending in supreme court upon a former judgment entered in same action. There must be some limit to the court in regard to rendering judgments in one and the same action, and more especially so after an action has been dismissed and fully determined. 22 Wis., 304. 29 Wis., 34. 2 Wis., 507. 25 Wis., 507. 25 Wis., 517. The law regulating judgments in replevin suits in certain cases does not contemplate that a judgment for damages or value of the property may be given long after the dismissing of the case, but at one and the same time. Session Laws, 1875, p. 244.

Crawford & McLaughlin, for defendant in error.

COBB, J.

There can be no doubt of the power or of the duty of the district court upon sustaining the demurrer to

the petition, the plaintiff (in the court below) not asking leave to amend, but electing to stand upon his petition to render judgment in favor of the defendant for the return of the property replevied, and if such return could not be had, then for the value of the property replevied on proof of such value and amount of damages. Such appears to be the provision of the act of February 25, 1875. [Laws, 1875, p. 44.] And this court must presume that there was such proof in the district court, there being nothing to the contrary in either of the bills of exceptions in the case.

It is equally clear that the court ordinarily retains jurisdiction to perfect or modify any of its judgments in accordance with the facts and the law of the case up to the final adjournment of the term.

Nor was this power taken away or suspended by reason of the pendency in this court of a case in error to reverse the judgment of the district court sustaining the demurrer of the defendant on the 18th of December, 1877, the date of the action of the district court complained of. The plaintiff had one year in which to commence his proceedings in error, and by commencing before the final adjournment of the term he took the risk, if risk it was, of having the said judgment modified and perfected pending his proceedings in error. But the form or scope of the said judgment was in no manner involved in the said case in error, and the judgment of this court thereon was equally applicable thereto in its modified as in its original form. See *Wise v. Frey*, 7 Neb., 134.

The power of the district court over its own judgments during the term at which the judgment is rendered is entirely discretionary, and not subject to review by this court. *Smith v. Pinney*, 2 Neb., 139. *Huntington & McIntyre v. Finch & Co.*, 3 Ohio State, 445. *Taylor v. Fitch*, 12 Id., 169.

There being no error in the record, the judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

HENRY WORTENDYKE, APPELLANT, v. JOHN B. MEEHAN AND SAMANTHA C. MEEHAN, APPELLEES.

1. **Promissory Note:** USURY. Where a promissory note secured by mortgage based in part on a usurious consideration is transferred before maturity to a bona fide purchaser for value, without notice, he takes it free from the defense of usury.

2. ———: BONA FIDE PURCHASER: USURY: EVIDENCE. Where usury in the original transaction is proved, the burden of proof is on the plaintiff to show that he is a bona fide purchaser for value, and without notice.

3. ———: ———: ———. In such case it is not sufficient for the plaintiff to show the payment of value, he must also show that he purchased in good faith. A statement by him, that he did not know or have reason to believe there would be a contest over it, is not sufficient to show good faith.

APPEAL by plaintiff from a decree rendered by POST, J., in the district court for York county. The opinion contains facts sufficient to an understanding of the case here.

France & Sedgwick, for appellant.

1. The defense of usury is not available in this case. Gen. Stat., 447. It is not sufficient to declare the note or contract illegal, but it must be absolutely void in order to plead usury against a note or contract in the hands of a *bona fide* assignee. Chitty on Bills, 116. 2 Kent Com., 80. *Conkling v. Underhill*, 3 Scam., Ill., 388. *Hemenway v. Cropsey*, 37 Ill., 357. *Pickaway Co. Bank*

v. Prother, 12 O St., 497. *Gale v. Eastman*, 7 Met., 14. *Young v. Berkley*, 2 N. H., 410. *Fletcher v. Bank of U. S.*, 8 Wheat., 338.

2. When a negotiable instrument has passed, in the ordinary course of business, into the hands of a *bona fide* holder, for a valuable consideration, the general rule is that the defendant cannot avail himself of any defense, except in those cases where the notes and securities are declared by the statute to be absolutely void; and in all other cases it may be laid down as a broad, general principle, that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled the third person to occasion the loss, must sustain it. *Vallett v. Parker*, 6 Wend., 615. *Pickaway Co. Bank v. Prother*, 12 O. St., 514. We respectfully submit that the evidence in this case, taken as a whole, clearly shows the appellant to be a *bona fide* holder, for value. The record shows that the defendants produced no testimony that the plaintiff had any notice that there was usury in the transaction in its inception, nor does the record show that appellant took the note and mortgage under such circumstances as to charge him with receiving them *mala fide*, and we submit that under the pleadings the defendants were bound to begin at the trial and to prove the plaintiff's knowledge of the usury or facts set up in the answer, and that until some evidence is produced tending to show plaintiff's knowledge of the usury or facts set up in the answer, the plaintiff is not at liberty, nor is he required to introduce any evidence at all on that issue. We contend that there is not a scintilla of testimony in the record tending to show plaintiff's knowledge of the usury or of the facts set up in the answer. The plaintiff is presumed to be a *bona fide* holder for value, and makes out a *prima facie* case by producing the note in evidence, and until there is evidence introduced tend-

ing to overcome this presumption, the law will presume the plaintiff to be a *bona fide* holder for value, without notice, and we submit that there is not a syllable of testimony produced by the defendants in this case, or any witness therein, to overcome the presumption and *prima facie* case made by plaintiffs by introducing note and mortgage, and we here call attention of the court to the testimony adduced by defendant.

The onus is upon the party alleging the defense of usury, not only to prove it, but also to establish a usurious intent, and the facts from which such intent is to be deduced. *Thomas v. Murray*, 32 N. Y., 612. *Booth v. Sweezey*, 8 N. Y., 276. *Cutler v. Wright*, 22 N. Y., 472.

When the plaintiff shows that he gave value for the note, to-wit: $425, before due, and that he is the owner of the same, and the circumstances under which he purchased the same, and these circumstances do not disclose suspicion of notice, then he is presumed not to have notice, and he stands in the actual position of a *bona fide* holder, and the very reason given by all the courts and authorities shows that it is not necessary to prove want of notice to give plaintiff the actual position of a *bona fide* holder before due. *Stalker v. McDonald*, 6 Hill, 93. *Swift v. Tyson*, 16 Peters, 15. Story on Promissory Notes, 195.

George W. Lowley (with whom was *Scott & Giffen*), for appellee.

1. Usury is available as a defense to an action on a contract in the hands of a *bona fide* holder. *Bacon v. Lee & Gray*, 4 Iowa, 490. *Burroughs v. Cook*, 17 Iowa, 436. *Brown v. Wilcox*, 15 Iowa, 414.

2. The prohibition of usury cannot be avoided by the substitution of one contract for another, or of a

new note for an old one. When it enters into a transaction either directly or indirectly, it taints every part of it. *Campbell v. McHarg*, 9 Iowa, 354. *Smith v. Cooper*, 9 Iowa, 376. *Garth v. Cooper*, 12 Iowa, 364.

MAXWELL, CH. J.

In September, 1875, one Keckley, through an agent, loaned the defendant the sum of $200 for the period of one year, with interest at the rate of 50 per cent., taking as security an assignment of a land contract. Before the expiration of the year Keckley, through his agent, sold and assigned the debt, with the security, to a resident of York, who, on an agreement to pay $150 as interest or rent, it is uncertain which, agreed to extend the time of payment for one year. In January, 1878, a note, secured by a mortgage, for the sum of $470, with interest at 12 per cent., and due September, 1, 1878, was executed by the defendants to the holder of the claim, who soon thereafter transferred them without recourse to the plaintiff.

In November, 1878, the plaintiff commenced an action of foreclosure in the district court of York county. The defendants answered the petition of the plaintiff, alleging in substance that the original consideration of the note and mortgage was $200, and no more, and that the plaintiff purchased the note and mortgage, with notice that they were given for a usurious loan. The plaintiff in his reply denied the new matter set up in the answer. On the trial of the cause, the court found the issues in favor of the defendants, and rendered a decree of foreclosure against them for the sum of $200, and judgment against the plaintiff for costs. The plaintiff brings the cause into this court by appeal.

That the note is tainted with usury, and that, too,

of the most rapacious character, there is no question. In the determination of the case, therefore, it is necessary to consider but two questions: *First.* Can a plaintiff who is a *bona fide* holder of a negotiable promissory note, purchased for a valuable consideration before maturity, without notice, maintain an action thereon free from the defense of usury? *Second.* Is the plaintiff such *bona fide* holder of the note in question?

The questions are intimately connected, and will be considered together.

Section 5 of the chapter on interest (Gen. Stat., 447) 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," etc.

The court below found generally for the defendants, there being no special finding of facts. The testimony of the plaintiff is of a very unsatisfactory character. After stating of whom he purchased, and when, he testifies: "Nothing was said, nor was there any intimation, that it (the note) would be contested. I am the purchaser and owner of the note and mortgage, the sole owner. * * * I paid about $425 for note and mortgage. The agreement was made about the first of April. He (the person of whom he purchased) had $280 belonging to me. He wanted to sell paper; I wanted to buy. He spoke about this paper; I never had any knowledge or reason to believe, before or after the purchase, of any contest to be had over it. We had a settlement July 4, 1878; there was $140 or $145 in his possession of mine. The mortgage and assignment were not sent to me until about the 15th of April; I

had it until nearly due. No understanding about Mr. France making it good was had; nothing of that kind was understood. I took an account of the insurance, that is, partly. I have never received anything on the note and mortgage." This is his entire testimony, except that portion stating when and of whom he purchased.

Section 31 of the code of civil procedure provides that "in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense now allowed; but this section *shall not apply* to negotiable bonds, promissory notes, or bills of exchange, transferred in good faith and upon good consideration before due."

Section 1791 of the code of Iowa of 1860 (Laws of 1853, chap. 37), sec. 2080 of the revision of 1873, provides that "if it shall be ascertained in any suit, brought on any contract, that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or property, the same shall work a forfeiture of ten cents on the hundred by the year upon the amount of such contract to the school fund of the county in which the suit is brought, and the *plaintiff* shall have judgment for the principal sum without either interest or costs," etc.

In the case of *Callanan v. Shaw*, 24 Iowa, 441, where a note and mortgage were given in 1857, and an action of foreclosure commenced in 1861, and a decree rendered in 1867, it was held that when a party purchased a note upon the representations of the maker, that it was not usurious, and without any knowledge of the usury, the maker could not afterwards set up the defense of usury; but otherwise if the assignee did not rely on the representations or had knowledge of the usury.

In *Dickerman v. Day*, 31 Id., 444, it was held that the defense of usury was not available in an action against the *accommodation* maker of a promissory note by a purchaser in good faith from the payee at a greater discount than legal interest, taken without any knowledge of the character of the paper.

In *Watson v. Hoag*, 40 Id., 142, it was held that the transferee was not a purchaser in good faith, and that the claim of usury was a defense in an action upon the note.

The statute of 12 Anne, chap. 16, enacted that all bonds, contracts, and assurances whatsoever, made for the payment of any principal or money to be lent, whereby usurious interest was taken or received, should be *utterly void.* Under this statute it was held that a note or bill was void for usury, even in the hands of an innocent purchaser. The hardship of this rule led to the passage of the statute of 58 Geo. III, Ch. 93, which provided that such instruments should not be void in the hands of an indorsee for value unless he had notice of the usury. The statute of Anne was adopted by New York in 1787, and continued in force until 1830, when the provisions of the statute of 58 Geo. III were adopted. In 1837 the law of New York was again changed, declaring commercial paper void even in the hands of a *bona fide* holder without notice. The New York decisions and those under similar statutes, therefore, are not applicable in this state. Our statute expressly declares that the contract shall not therefore be void because of usury, but in such case the plaintiff, where suit is brought, shall only recover the principal, and the defendant shall recover costs. Does this provision apply to the case of a *bona fide* purchaser for a valuable consideration of negotiable paper before due, without notice? We think not.

In *Bacon v. Lee*, 4 Clarke (Iowa), 490, it was held that usury may be pleaded in an action on a usurious contract when brought in the name of an indorsee or innocent *bona fide* holder. The decision appears to be predicated upon the peculiar provisions of the statute, which provide that in *no case* where unlawful interest shall be contracted for shall the *plaintiff*, in a suit brought upon the contract, have "judgment for more than the principal sum loaned," and that the *bona fide* assignee of a usurious contract may recover against the *usurer* the full amount of the consideration paid by him for such contract, deducting the amount of the principal sum recovered against the makers. As we have no provision allowing the purchaser of negotiable paper to recover against the usurer in such case, the above decision has no application to the case at bar.

Negotiable paper before maturity is intended, to some extent at least, to represent money. Possession is *prima facie* evidence of ownership where it is payable to bearer, or indorsed in blank. The *bona fide* holder can recover upon the paper, although it came to him from a person who had stolen it from the true owner, provided he took it innocently, in the course of trade, for a valuable consideration and not overdue, and under circumstances of due caution. 3 Kent Com., 78, 79. And he need not account for the possession of it unless suspicion be raised. This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper.

The principle is now well settled that if a note is not declared *void* by statute, mere illegality in its consideration will not affect the rights of a *bona fide* purchaser for value. *Norris v. Langley*, 19 N. Hamp., 423. *State Bank v. Thompson*, 42 Id., 369. *Converse v. Foster*, 32 Vt., 828. *Paton v. Coit*, 5 Mich., 505. *Sistemans v. Field*,

9 Gray, 331. *Smith v. Columbus State Bank*, *ante* p. 31. But when the illegal consideration is proved, the burden of proof is on the plaintiff to show that he is a *bona fide* holder for value, and without notice. In *Paton v. Coit*, 5 Mich., 510, the supreme court of Michigan say the rule is the same as to the burden of proof in case an illegal consideration is shown, as where it is proved that the paper was obtained by fraud and duress, and cite in support of the proposition a large number of cases. And such is undoubtedly the law. And where this is shown he may recover in a proper case, although usury may have entered into the consideration of the obligation. The cases that hold to the contrary appear to give undue weight to decisions under statutes declaring such instruments void. Such decisions have no application to our statute. A *bona fide* purchaser is entitled to protection, and if one of two innocent persons must suffer, he must bear the loss who placed the means in the hands of another to commit the injury. We think it is very clear that the defense of usury is not available against a *bona fide* purchaser of negotiable paper for value before maturity. But the holder, to be entitled to protection, must have acquired the paper in good faith from his predecessor. The mere payment of value will not protect him if he had notice, or the circumstances were sufficient to put him upon inquiry as to the character of the consideration. In this case it is evident that the plaintiff is not a *bona fide* purchaser. He does not deny that he had notice of the original consideration. The attempt to conceal it under the guise of a lease, and his statement that he did not know the matter would be "contested," fall far short of a denial of knowledge of the consideration.

Against all, except *bona fide* purchasers for value without notice, the law as to usury will be fully en-

forced. As the plaintiff has failed to bring himself within the rule as to *bona fide* purchasers, the judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

WILLIAM HURLEY, PLAINTIFF IN ERROR, V. WILLIAM COX AND OTHERS, DEFENDANTS IN ERROR.

Mortgage Foreclosure: STATUTE OF LIMITATIONS. In 1858, C. executed a mortgage, due in one year, upon certain lands in this state. In 1872 an action was instituted to foreclose the same, no payments having been made thereon, and certain parties holding tax deeds on the lands were made defendants, who demurred to the petition. *Held*, 1. That it being apparent from the face of the petition that the debt was barred, the demurrer was properly sustained. 2. That parties holding tax deeds were not proper parties to the proceeding to foreclose; but that, having been made parties, the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of the defendant's title. 3. That the statute of limitations is one of repose, and an action to foreclose a mortgage is barred when the statute has run against the note or debt, under the law as it stood before the amendment to the act of limitations, approved February 12th, 1869.

ERROR to the district court of Burt county. Tried below before MAXWELL, J., in 1874, while sitting as district judge in that county.

NOTE.—It was held in *Kyger v. Ryley*, 2 Neb., 20, *Peters v. Dunnells*, 5 Neb., 460, and *Hurley v. Estes*, 6 Neb., 386, that where the debt is barred by the statute of limitations, no action can be maintained on the mortgage. But under the amendment made in 1869 to section six of the civil code (Gen. Stat., 268), it was held (MAXWELL, CH., J., dissenting), in *Hale v. Christy*, 8 Neb., 264, that an action to foreclose a mortgage could be brought in ten years, although the note had been barred.—REP.

Carrigan & Osborn and John F. Monk for plaintiff in error.

W. Parrish and *C. J. Dilworth* for defendants in error.

MAXWELL, CH. J.

On the 19th day of October, 1872, the plaintiff commenced an action in the district court of Burt county against William Cox and James Ashley to foreclose a mortgage upon certain lands in that county. On the 5th day of June, 1874, an amended petition was filed by the plaintiff bringing in E. D. Canfield as a party defendant. The action is founded upon a mortgage executed by the defendant Cox, in the year 1858, upon certain lands in Burt county, and alleges that no part of the sum due on the mortgage has been paid, and that no proceedings have been had at law for the recovery of the same. The petition also alleges that the defendants, Ashley and Canfield, hold tax deeds upon portions of said lands which are *prima facie* evidence of title, but it is claimed the proceedings upon which they are based are illegal and void, and that said deeds confer no title. The plaintiff prays for a decree of foreclosure and sale of the mortgaged premises, and that the defendants, Ashley and Canfield, may be required to assert their title to said premises, and that it may be declared void, etc. The defendants, Ashley and Canfield, demurred to the petition on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the cause dismissed. The cause is brought into this court by petition in error.

A copy of the note is set out in the petition, from which it appears that it became due on the 23d day of August, 1859, being dated at Omaha, and payable at the office of Cassady and Test, in Council Bluffs, Iowa.

The proviso to section 17 of the code provides that "the absence from the state, death, or disability of a non-resident, save the cases mentioned in the section, 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 case is not within the exception, and this court has held in a number of instances that the foreclosure of a mortgage was a proceeding *in rem*. *Rector v. Rotton*, 3 Neb., 177. *Peters v. Dunnells*, 5 Id., 460. *Hurley v. Estes*, 6 Id., 386. The cases, without an exception so far as I am aware, hold that the note is the debt and the mortgage the mere incident, and such has been the uniform holding of this court. *Kyger v. Ryley*, 2 Neb., 28. *Richards v. Kountze*, 4 Id., 208. *Webb v. Hoselton*, Id., 317. The debt therefore being barred, no action can be maintained on the mortgage.

But it is urged that while the defendant, Cox, could avail himself of the statute of limitations, the defendants, Ashley and Canfield, are not in a position to avail themselves of this plea. It appears from the petition that these defendants have an interest in the land, having tax deeds therefor, that, so far as appears, are regular on their face. And for aught that appears they may have been in possession of the land a sufficient length of time to vest the title in them absolutely. They were not proper parties to the proceeding, but having been made such, they have a right to defend their title. If the debt was barred in five years the lien of the mortgage ceased absolutely at that time. The plaintiff must recover, if at all, by showing that he has a cause of action against the land, not by showing the invalidity of the defendant's title. Possession alone is a good title against one who can show no better. In this state it is unnecessary to plead the statute of limitations where it appears on the face of the petition

that the cause of action was barred at the time the suit was instituted. *Peters v. Dunnells*, 5 Neb., 460. *Hurley v. Estes*, 6 Id., 386. And this is the rule in Ohio, from whence our code was copied. *Sturgis v. Burton*, 8 O. S., 215. *Bissell v. Jaudon*, 16 Id., 498, 504. *Delaware County v. Andrews*, 18 Id., 49. The law of New York, and perhaps some other states, provides that "the objection that the action was not commenced within the time limited can only be taken by answer," but we have no such provision in our statute. A plea of the statute was formerly regarded by the courts as dishonorable and not to be favored. *Willet v. Atherton*, 1 W. Bl., 35. *Perkins v. Burbank*, 2 Mass., 81. And the statute was regarded as one of presumption, which the slightest acknowledgments, such as "Prove your debt and I will pay you," "I am ready to account, but nothing is due you," were sufficient to overcome. At the present time the statute is regarded as one of repose, and proceeds upon the expediency of refusing to enforce a stale claim whether it has been paid or not. As was said by Judge Story: "The object of which is to suppress fraudulent and stale claims from springing up at great distances of time, and surprising the parties or their representatives, when all the proper vouchers and evidence are lost, or the facts have become obscure from the lapse of time, or the defective memory, or death, or removal of witnesses." *Spring v. Grey*, 5 Mason, 523. This is not a case where the defendants purchased subject to a lien, but where they hold independently of it. As the claim of the plaintiff is barred by the statute, the demurrer must be sustained, and the

JUDGMENT AFFIRMED.

HAMDEN A. OLMSTEAD, PLAINTIFF IN ERROR, v. JOHN D. RIVERS, DEFENDANT IN ERROR.

1. **Practice:** ATTACHMENT: DISSOLUTION. The failure of the plaintiff to attach a copy of the instrument on which the action is brought to the petition is not a good ground for dissolving an attachment. Such omission can be taken advantage of *only* by a proper motion, directed against the petition itself, to require a copy to be given.

2. ———: MERITS OF THE ALLEGED INDEBTEDNESS NOT QUESTIONABLE ON MOTION TO DISSOLVE. Where the petition states a good cause of action, the merits of the demand cannot be questioned on a motion to dissolve an attachment issued in the case.

3. ———: ———: UNDERTAKING IN ATTACHMENT. In case of an attachment against a non-resident defendant no undertaking is required. In such case the statute expressly authorizes the order to be issued without giving an undertaking, and this provision invades no constitutional privilege of such defendant.

THIS was a petition in error to reverse an order of the district court, GASLIN, J., presiding, for Adams county, dissolving an attachment issued in the action.

R. A. Batty, for plaintiff in error.

No counsel for defendant in error, but by leave of court *J. H. Broady* filed a brief containing substantially the same argument made by him in *Marsh v. Steele*, *ante* p. 96.

LAKE, J.

The dissolution of the attachment is the only matter alleged for error. The grounds of the motion to dissolve, and which the court sustained, were as follows:

First. That no copy of the bond or instrument on which the action was founded was "attached to the pe-

tition." This omission was not at all prejudicial to the attachment proceedings, which were collateral and merely auxiliary to the action proper. The only object of the attachment was to secure funds with which to satisfy the anticipated judgment if it should be finally obtained. The failure to attach a copy of the instrument sued on can be taken advantage of only by a proper motion directed against the petition itself.

Second. That the order of attachment issued without a bond or undertaking having been executed to the defendant. On this point, while it is not claimed that any of the requirements of our own statutes on the subject have been disregarded, it seems to be thought that, in issuing the order without such undertaking, some fundamental right of the defendant, as guaranteed by the first clause of sec. 2, art. IV, of the federal constitution, has been trampled upon. This clause of the constitution declares that "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

This clause of the constitution has been held by high authority to refer solely to those privileges and immunities which are in their nature fundamental; which belong of right to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several states which compose the federal union. *Corfield v. Coryall*, 4 W. C. C., 380. But it does not embrace privileges conferred by the local laws of a state. *Conner v. Elliott*, 18 How., 591. Such being the nature of the privileges covered by this provision, we fail to see the propriety of an appeal to it as against the rule of our statutes, which makes a distinction between non-resident and other defendants in the matter of attachment bonds. Section 200 of our code of civil procedure provides that "where the ground of the attachment is, that the defendant is a foreign cor-

poration, or a non-resident of the state, the order of attachment may be issued without an undertaking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking, not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by reason of the attachment if the order be wrongfully obtained." Gen. Stat., 557.

It will be noticed that no reference is here made to the matter of permanent abode. It is with non-resident defendants generally, whether they be *citizens* permanently domiciled in the state or not, that the statute deals. If a defendant be actually residing in this state when the attachment issues, even although his permanent legal domicile be elsewhere, he is entitled to the undertaking. It is clear that no constitutional privilege of the defendant has been invaded, and this ground of his motion cannot be sustained. *Marsh v. Steele et al.*, *ante* p. 96.

Third. It is further objected in said motion that the claim on which suit was brought was not due at the commencement of the action. This is mere assertion, with no showing to sustain it. The petition sets forth a good cause of action, and whether it be true or false, cannot be inquired of on a motion to dissolve the attachment. That question can be settled only on the trial of the issues under the pleadings.

Several other objections to the attachment are formally stated in the motion, but, like the one last referred to, they relate exclusively to the ultimate ability of the plaintiff to prove his case, and not to any matter that can properly be included in a motion to dissolve the attachment, and it is unnecessary to notice them further.

Being of opinion that this motion ought not to have been sustained, the order of the district court in that behalf is reversed, and the attachment fully re-instated.

ORDER REVERSED.

JOHN K. OTTENSTEIN, PLAINTIFF IN ERROR, v. JAMES E. ALPAUGH AND OTHERS, DEFENDANTS IN ERROR.

1. **County Clerk:** FOR WHAT ACTS ALONE SURETIES ON HIS OFFICIAL BOND ARE LIABLE. Action against sureties on the official bond of county clerk. The petition alleged that one Alpaugh, who was county clerk, had falsely certified, under the county seal, that a bill in his own favor for five hundred and sixty-four dollars against the county of Lincoln had "*been allowed by the county commissioners*," by which means he was enabled afterwards to sell his pretended claim to the plaintiff, to his injury. *Held*, that inasmuch as there was no law requiring, or even authorizing, such certificate in any case, the making it could in no sense be regarded as relating to official duty, and that the sureties were not liable.

2. ———: ———. Sureties on official bonds are answerable only for such acts of their principals as are done *virtute officii*.

ERROR to Lincoln county district court. Heard there upon demurrer to the petition before GASLIN, J., demurrer sustained, and action dismissed as to defendants, who were sureties on the bond upon which the action was brought.

Hinman & Neville, for plaintiff in error.

If the certificate of indebtedness, authenticated with the seal, is entirely illegal, yet the clerk is bound by law to *keep the seal of the county*, and not use nor permit its use upon any paper or in any manner not

directed by law, and such use forfeits his bond and gives the party injured a right to recover. Gen. Stat., 239, sec. 38. The instrument, or certificate of indebtedness, set forth in the proceedings, is a statement of what purports to have been the action of the board of county commissioners. When it says "said court" it refers to the commissioner's court, and the seal and signature of said clerk is attached to said certificate, as an attestation of the genuineness of the same, when the same was absolutely false, no such action having been taken by said board of county commissioners, and the said bondsmen are liable to the party injured by said clerk's fraudulent acts, representations, and attestations done by color of his said office. See Gen. Stat. above cited, also *Cricket et al. v. The State of Ohio*, 18 Ohio State, p. 9, and particularly p. 23, seems to be conclusive of this point, the only distinction being that in that case the money was obtained from the treasury and in this case from an individual. *Kane v. U. P. R. R. Co.*, 5 Neb., 105. 17 Gratt., Va., 124. 17 Mich., 480. 4 Ohio State, 418. 4 N. Y., 173. 13 Miss., 437.

Lamb, Billingsley & Lambertson, for defendants in error.

1. A party suing at law on a bond, or other written instrument, if he recover at all, recovers according to its terms. *Sexson v. Kelley*, 3 Neb., 104.

2. A county clerk is a ministerial officer, and a ministerial officer can do no valid act, but what he is either expressly or by necessary implication authorized to do. *Vose v. Dean*, 7 Mass., 280. *People v. Collins*, 7 Johns., 549.

3. There is no statutory provision that either expressly or by implication authorizes a county clerk to

sign or countersign certificates of indebtedness of a county.

4. A man who holds the office of clerk may do many things which will render himself personally liable, but for which his sureties are not responsible. The sureties do not bind themselves to protect the public against every act of their principal, nor do they become his sureties that he will commit no torts.

It is a principle, long and well established, that official acts are those which are done by virtue of the office; such as, if properly done, exculpate both the officer and his sureties from responsibility, but which, if neglected or improperly done, render both liable. Brandt on Suretyship and Guaranty, § 451, 453. *State v. Conover*, 28 N. J. L., 230.

5. A distinction is taken by the authorities between an act done *colore officii* and one done *virtute officii*, and in the latter only are the sureties of the officer held liable. *Morris v. Van Voast*, 19 Wend., 283. *Gerber v. Ackley*, 37 Wis., 44. *Coupy v. Henley*, 2 Esp., 240. *Seeley v. Birdsall*, 15 Johns., 267. *Huffman v. Kopplekom*, 8 Neb., 348.

In this case plaintiff, in his amended petition, claims that the act complained of was done by color of his (the clerk's) office, and not that he did it by virtue of his office, and for that reason fails to show a breach of the conditions of Alpaugh's official bond for which the sureties would be liable. *Gerber v. Ackley*, 37 Wis., 44.

LAKE, J.

The condition of the official bond on which the several defendants, who demurred to the petition, were sureties, was that their co-defendant, Alpaugh, should "render a true account of his office," etc., and "faith-

fully and impartially, and without fear, favor, fraud, or oppression, perform all other duties now or hereafter required of his office by law."

This bond is the measure of the obligation which these sureties took upon themselves. It was for the faithful performance by said Alpaugh of all the various and official acts and duties, which he as county clerk might legally be called upon to perform, that they undertook to answer.

And this leads us to the inquiry whether the act complained of, and by which Alpaugh succeeded in defrauding the plaintiff out of several hundred dollars, is covered by his official bond; in other words, whether it was in the line of his official duty.

The gravamen of this complaint is, that as county clerk, and under the county seal which was under his care, Alpaugh falsely certified that a "bill" in his favor for $564 had "been allowed by the county commissioners," by which he was enabled afterwards to sell his pretended claim against the county to the plaintiff, to his injury.

Although this deception and fraud was practiced by Alpaugh under color of his said office, it may be, it can in no sense be regarded as an official act. It was not done *virtute officii*. There was no law requiring or even authorizing such certificate to be made, not even if a just bill against the county had been allowed him by the board of county commissioners, and it was not even *prima facie* evidence of the fact therein asserted. All proceedings of the board of commissioners are recorded in a book kept for that purpose, and it is to this record that resort should be had to ascertain what action they have taken on any matter brought before them.

We believe the law is now well settled that sureties on official bonds are only answerable for such acts of

their principals as relate to official duty, or, as expressed in legal phrase, acts done *virtute officii*. Under this rule, which was recognized and applied in the case of *Huffman v. Kopplekom et al.*, 8 Neb., 344, it is clear that the demurrer to the petition was properly sustained.

JUDGMENT AFFIRMED.

HENRY A. SCHLENCKER, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Homicide:** MALICE. It being shown that the prisoner voluntarily, and without just cause or provocation, shot and killed the deceased, the act being unlawful, malice will be presumed.
2. ———: MURDER IN THE FIRST DEGREE. And in addition to being unlawful and malicious, to make the act of killing murder in the first degree, it is only necessary to establish that it was done with deliberation and premeditation, of which there being some evidence before the jury, their verdict fixing that as the degree of criminality is conclusive on that point.
3. **Questions of Fact to be Settled by the Jury.** In criminal cases all questions of fact are to be settled by the jury, and unless the want of sufficient evidence to support their finding be very clear, it will not be disturbed.
4. **Re-examination of Witnesses.** As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination. But whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge.
5. **Witness:** EXPERT: SUPPOSED CASE. In the examination of an expert witness as to the appearance of the bullet wound of which the deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been.

6. **Practice:** QUESTIONS CONSIDERED BY THE SUPREME COURT. In the supreme court the examination of questions relating to the evidence is confined to such as were distinctly raised and passed upon in the court whose record is under review.

7. **Non-expert Witness:** OPINION OF. The opinion of a witness, not an expert, is competent evidence upon the question of the prisoner's sanity, where such opinion is formed upon facts within the personal knowledge of the witness, and sworn to by him before the jury.

8. **Intoxication no Excuse for Crime.** Voluntary intoxication is no excuse for crime; but on the trial of one charged with murder in the *first* degree, his intoxication may be taken by the jury as a circumstance to show that the act of killing was not deliberate and premeditated.

9. **Insanity:** WHEN IT DOES NOT EXCUSE CRIME. Temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk.

ERROR to the district court of Lancaster county.

The plaintiff in error was indicted at the October Term, 1878, for the murder of Florence Booth, on the 10th day of October. The testimony showed that on that day, Schlencker, while under the influence of liquor, obtained a revolver at a gunsmith's, between twelve o'clock noon and one in the afternoon; went to a house generally known as the "Stone House," kept by one Mollie Hall, between three and four o'clock; was in one of the rooms with Florence Booth and some others for a few minutes, then going up-stairs, preceded by Florence, went into a room at the head of the stairs; requested Florence to lay down with him, which she refused, and "told him to lay down and take a sleep;" he said "something," and she called him "a Dutch son-of-a-bitch;" a shot was then heard, and Florence came down the stairs, saying, "Harry has killed me, he has shot me through the heart;" Schlencker was

heard to say, "My name is Henry Schlencker, I have shot my woman and I will shoot myself;" a shot was heard and then another; Florence died in about three-quarters of an hour after being shot; Schlencker was found on the bed up-stairs, having shot himself. He recovered from the wound, and having been placed on trial before POUND, J., and a jury, was found guilty of murder in the first degree and sentenced to be hung on the 7th day of March, 1879. He sued out this writ of error and obtained a suspension of the sentence. The judgment having been affirmed here, a warrant was issued directing the sheriff to carry the sentence into effect on the 13th day of June, 1879. Having obtained a reprieve from the governor, he applied to this court for a re-hearing, which was granted, the warrant recalled, and further proceedings stayed until the determination of the case on the re-hearing, *post.*

On the trial below several witnesses for the defense testified that on the day of the murder, and for some time previous, the prisoner had acted "strangely;" that he had "no work," "was drinking," "had nothing to eat," "was not in his right mind," "was excited, walked hastily," "acted queer," "tried to run against us," "acted funnier than he ever did before," "looked kind of fierce," "had fits," "was drinking day of tragedy," "looked as if he was dreaming, as if there was something on his mind," etc.

M. C. Keith for the defense also testified that he was "a physician, studied in Dublin, London, Paris, Cincinnati, and in Maine; am in active practice now; examined Schlencker's wound; it was in the left breast above the nipple; probed it to the depth of four to five inches; blood was thin, red, arterial; felt of the corpuscles of the blood; they were in an alcoholic condition; smelt of them; put my nose down, and smelt the blood that was coming.

Q. What would produce such a condition of the blood?

A. Alcohol, or anything containing alcohol.

Q. What use of alcohol would be required to produce that condition of the blood corpuscles?

A. Constant and continued use from three to six months or longer.

Q. Can the condition of a man's brain be told from the condition of the blood.

A. It can to a partial extent.

Q. To what extent, can you tell?

A. Whether a man can be sound mentality from the condition of the blood.

Q. What effect has alcohol on the brain?

A. It first irritates, then deranges, and then disintegrates.

Q. What effect has the constant use of the alcoholic poison four to six months on the blood and constitution of the brain?

A. Constant use would have the effect of causing the disease called dipsomania or oinomania, in which the brain would become diseased—disintegrated—in which the blood would become so deteriorated and the brain so irritated, the man would really have no power over himself, and would be possessed by some single mania. The constitution of the brain might be so deteriorated that the man would be possessed of only one idea. There are three stages of dipsomania—acute, periodic, and chronic.

Q. You may state if the prisoner here was diseased with that disease?

A. I should say he was.

Q. In what degree?

A. I should think chronic.

Q. What effect would it have upon the mentality of a person afflicted with chronic oinomania?

A. He has not more than one single idea, and the mania is almost always homicidal or destructive. His desire is to destroy something—hurt his best friends—he goes for his best friends, those he is fondest of—falls out with his own wife and children. Under that influence he will sell the last thing he has to get liquor; at the time of the frenzy kill his son, or daughter, or wife, or best friend.

Q. You think these acts are the effects and symptoms of the disease?

A. I think so.

Q. Can you tell this by looking at the blood?

A. I can tell a good deal by looking at the blood.

Q. What was the condition of the man on that occasion?

A. He looked as if he were in a stupor either from drink, or had passed through a paroxysm. There was a moist—profusely moist feeling in his hands. Eyes protuberant. Pulse about 76. * * * I should judge the man had just passed a paroxysm of madness.

Q. What was your opinion as to the condition of his his mind when he was going through that paroxysm—as to his sanity or insanity?

A. A person in having this paroxysm generally don't know anything. They don't realize their condition. Their desire is to destroy, and the idea is to get rid of that destructive force that is in them at the time.

Cross examination—

Q. Are you willing to swear if this man at that time was afflicted with the disease of dipsomania or oinomania?

A. I will not so swear. I swear I think he may have had. I should judge he had just passed through a paroxysm of madness, as it might be termed, caused by that disease.

Q. It was a paroxysm of madness from the excessive use of liquor?

A. That is it exactly.

In rebuttal the state called J. A. Carter, a physician, who testified:

Q. Take two teaspoonfuls of blood, and are you enabled to smell alcohol in that blood, where the persons from whom the blood came had been drinking alcohol?

A. I never tried the experiment at all.

Q. Are there any authorities at all which lay it down as a principle that that can be done?

A. In examining a case there is always a great deal of alcohol thrown off by the breath. If examined in the same room where the patient is, it would be a difficult matter to tell whether they were getting the effluvia from the breath or blood.

Q. Are you enabled by an examination of the blood by feeling and smell to ascertain to any extent the condition of the brain?

A. No sir. As I said before, my touch is not educated up to that point. Neither is my smell. There are no standard medical works that lay down that doctrine.

The state also called a number of witnesses who testified to having seen the prisoner at different periods before the homicide and on the same day. "He seemed perfectly sane," "he walked straight enough," "his face looked natural," "he appeared to be all right," "saw him on the witness stand about the last day of September; he was a little excited, but nothing peculiar in his action at all; should say he was sane from his general appearance," etc.

James E. Philpott and *D. G. Courtnay*, for plaintiff in error.

1. It is proper that the jury should take drunkenness into consideration when considering motive and intent of the prisoner. *Caleb Nichols v. The State of Ohio*, 8 Ohio St., 435. *Roberts v. The People*, 19 Mich., 401. *Pirtle v. State*, 9 Hump., 663. *People v. Harris*, 29 Cal., 678. 1 Wharton & Stille's Medical Jur., sec. 215. The instruction given by the court at request of the counsel for the state, that "settled insanity produced immediately by intoxication, etc., but insanity immediately produced by intoxication does not destroy responsibility when the patient, when sane and responsible, made himself voluntarily intoxicated," is error. The instruction as given is not a fair statement of the law, and tended to mislead the jury. *State v. Hundley*, 46 Mo., 414. Medical Jurisprudence of Insanity, sec. 372.

2. The testimony of non-experts should have been excluded. 1 Phil. Ev., 290. 1 Stark Ev., 54, 153. 3 Stark Ev., 1707. *Real v. The People*, 42 N. Y., 270. *Clapp v. Fullerton*, 34 N. Y., 190. *O'Brien v. People*, 36 N. Y., 276. *Dewit v. Barley*, 9 N. Y., 371. *Phillips v. Kingfield*, 19 Maine, 375. *Paige v. Hazard*, 5 Hill, 603. *The People v. Reeld*, 19 Wend., 569. *Giles v. Toole*, 4 Barb., 261. *Smith v. Gugerty*, 4 Barb., 615. 7 Met., 504. 2 Ohio State, 452. 5 Pick., 510. 7 Wend., 72. 17 Wend., 136.

C. J. Dilworth, Attorney General, for the State.

The law upon intoxication and insanity was properly given to the jury by the instructions of the court, and the instructions were as favorable to the accused as the law would permit. *Rex v. Thomas*, 32 Eng. C. L., 889, 890. *Rex v. Meakin*, 32 Id., 622. *Com. v. Hawkins*, 3 Gray, 463, 466. *Nichols v. State*, 8 O. S., 435, 437–8. *People v. Rogers*, 18 N. Y., 9, 18. *Com.*

v. Rogers, 7 Met., 500, 501–506. *State v. Spencer*, 1 Zab., 196, 200–202. *Graham v. Com.*, 16 B. Mon., 587, 594. *People v. Myers*, 20 Cal., 518, 520. *The People v. Robinson*, 2 Parker's Crim. Rep., 235. *Wright v. The People*, 4 Neb., 409.

There was no error in the court refusing to give the instructions asked for by the plaintiff in error, as the court had already fully and properly instructed the jury upon all the points raised by the instructions asked for by the plaintiff in error. *Clough v. The State*, 7 Neb., 323.

LAKE, J.

From a careful reading of the evidence as embodied in the bill of exceptions, we have reached the conclusion that it is sufficient to support the verdict of the jury.

That the prisoner shot and killed the deceased without any just cause or provocation is placed beyond all question. Therefore, if the act of shooting was voluntary, as it must be presumed in law to have been in the absence of proof to the contrary, it was, necessarily, *unlawful*. And, under these circumstances, the act was also malicious, for the rule is that if a man kill another without considerable provocation the law implies malice, for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. 2 Broom & Hadley Com., 484 (Am. Ed.) And in addition to its being unlawful and malicious, to make the act of killing murder in the first degree, it is only necessary to establish that it was done with deliberation and premeditation, of which there was some evidence in the previous acts of the prisoner on the day of the homicide, among which is the important one of borrowing and arming himself with a revolver

from which he fired the fatal shot. As to the sufficiency of the evidence on this, as well as all other branches of the case, that is a matter wholly within the province of the jury to settle. *Palmer v. The People*, 4 Neb., 68. This court has neither the right nor the disposition to usurp the province of the jury, or to interfere with their decisions of questions of fact, unless the want of sufficient evidence to support the finding is very clear. This is all that need be said on this branch of the case, and we will now proceed to examine as to the alleged errors occurring in the admission of testimony, and in the instructions to the jury.

The record shows that on the conclusion of the cross-examination of Dr. Paine, a witness called on the part of the state, he was re-examined by the district attorney as to the extent of the wound upon the body of the deceased, of which he had given a general description in his direct examination. The witness being asked to give the diameter of the wound as nearly as he could, this was objected to on the ground that it was not a proper re-examination of the witness, inasmuch as it did not relate to any matter called out on the cross-examination. The general rule on this subject is, as claimed by counsel for the prisoner, that the re-examination should be limited to the points arising out of the cross-examination. But while this is the rule usually observed by courts, it seems to rest "entirely in the discretion of the judge whether it ought to be strictly enforced or remitted as he may think best for the discovery of truth, and the administration of justice." 2 Phillips on Evidence, 912.

Dr. Gilbert, one of the witnesses for the prosecution, in explaining to the jury the comparative size of a bullet, said to have been taken from the body of the deceased, and the wound of which she died, having testified that "the wound looked smaller than the

ball," was asked by the district attorney to explain why this was so, and "whether that would have been the case had the ball gone through the body—on the other side, how would it have looked?" This was objected to by the prisoner's counsel "as immaterial and incompetent." The object of the question evidently was to have the jury understand that it was not at all remarkable or unusual that in this case the orifice appeared to be considerably smaller than the missile that they were asked to believe produced it. And this testimony was very proper, for it rested upon the prosecutor to convince the jury that the wound in question was made by the identical bullet then exhibited to them. Nor was it at all improper to state a supposed case, and thus show what, under different conditions, the appearance of a wound made by the same agency might or would have been. There is no just ground for complaint in this particular.

Again, it was contended in argument that the court erred in not restricting the cross-examination of the witness Kluetsch, by the district attorney, "to the facts and circumstances drawn out on his direct examination." While the rule governing the cross-examination of witnesses is as claimed by counsel for the prisoner, the record shows that its violation was not the ground of complaint in the court below. The only objections there made were that the testimony was "irrelevant and immaterial." The testimony referred to may have been open to the technical objection made here, but it most certainly was not to those brought to the attention of the trial court. This being a court for the correction of errors, our examination of questions relating to the evidence is confined to such as were distinctly raised and passed upon in the court whose record is under review.

The defense of insanity being interposed, and sev-

eral witnesses having testified of strange conduct on the part of the prisoner shortly before, and on the day of the homicide, a number of witnesses, not experts, however, were examined by the state as to his conduct and appearance in their presence on sundry occasions, both before and shortly after the shooting occurred. The opinions of these witnesses as to the prisoner's mental condition, based upon what they had personally observed, and then detailed to the jury, were admitted in evidence under the objection that they were incompetent evidence. That none but medical experts shall be permitted to give to the jury their opinions, based upon the testimony of other witnesses on the question of insanity, is, we believe, universally held. In this case, however, the witnesses were the neighbors and acquaintances of the prisoner, knew him well, and their opinions were formed from seeing and observing him for several months, almost daily. Opinions formed under these circumstances, although not those of medical men, are, nevertheless, entitled to respectful consideration by courts and juries, and we have seen no satisfactory reason for holding them to be incompetent evidence. We are aware that our conclusion on this point is in conflict with numerous authorities, but it is also sustained by many.

In *Grant v. Thompson*, 4 Conn., 203, Chief Justice Hosmer, in commenting on this sort of evidence, said: "The best testimony the nature of the case admits of ought to be adduced, and on the subject of insanity, in my judgment, it consists in the representation of facts and the impressions which they make." And what impressions are so reliable as those made upon the minds of intelligent persons, who, in addition to being well acquainted with the alleged lunatic, have themselves witnessed the facts supposed to indicate mental derangement? *Clark v. The State*, 12 Ohio,

483. *State v. Klinger*, 46 Mo., 224. *Titlow v. Titlow*, 54 Penna. St., 216.

And while on this branch of the case we desire to add that, although this defense of insanity was probably made in good faith, it does not seem to have anything substantial to rest upon. The evidence falls very far short of establishing its existence. That the prisoner was considerably intoxicated, and his mind somewhat clouded in consequence thereof, are doubtless true. But the fact that he was in a drunken state does not of itself render the act of shooting the deceased any the less criminal, nor is it available as an excuse. If, notwithstanding his intoxication, he were conscious that the act was wrong, he was a responsible agent, and answerable for all the consequences. In charging upon this point the judge told the jury, in substance, that they were at liberty to take the fact of intoxication as a circumstance to show that the act of killing was not deliberate and premeditated. This was right, and suggested to the jury the full extent of the effect that might legitimately be given to it. *People v. Rogers*, 18 N. Y., 9. *People v. Belencia*, 21 Cal., 544.

Several of the instructions given to the jury are also made the basis of alleged errors, but we fail to perceive any just ground for the complaint made in this particular. The instruction most complained of was given at the request of the district attorney, and was in these words: "That *settled* insanity produced by intoxication affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility when the patient, when sane and responsible, made himself voluntarily intoxicated."

In the case of *State v. Hundley*, 46 Mo., 414, it appears that the court had instructed the jury "that if they be-

lieved from the evidence that the defendant was laboring under a temporary frenzy or insanity at the time of the killing of Boyer, which was the immediate result of intoxicating liquors, or narcotics, he was guilty." And in commenting upon this instruction the court said: "This instruction was unobjectionable, for, as we have already seen, temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. But the crime, to be punishable under such circumstances, must take place, and be the immediate result of a fit of intoxication, and while it lasts, and not the result of insanity remotely occasioned by previous bad habits."

The only substantial difference between the law as thus pronounced and the instruction complained of is in the omission from the latter of the qualifying clause limiting responsibility to cases of *temporary* insanity or frenzy. But while, under different circumstances, this omission might have been a serious matter, it certainly was of no consequence under the testimony in this case. There was not a syllable of evidence of the existence of settled insanity. The utmost that was claimed, or that there was the least testimony to establish, was a mere temporary frenzy or condition of irresponsibility on the part of the prisoner. There is, therefore in this matter, no ground for complaint.

Error is also alleged because of the refusal of the court to give several instructions to the jury requested on behalf of the prisoner. By the first of these it was sought to make his voluntary intoxication under certain circumstances a complete excuse for the homicide. There was no error in this refusal, for the court, as we have seen had already charged upon this point, and laid down the law correctly, recognizing the "well known and salutary maxim of our laws, that crimes

committed under the influence of intoxication do not excuse the perpetrator from punishment." Beck's Medical Jurisprudence, vol. 1, page 333. Several others so requested were upon the subject of insanity. These, however, were substantially embodied in those already given by the court of its own motion, and it was unnecessary to repeat them.

In conclusion we think the law of the case, so far as our attention has been called to it, was very fairly given to the jury, and that notwithstanding the errors assigned, and relied upon, the judgment should be affirmed.

JUDGMENT AFFIRMED.

REBECCA JONES AND OTHERS, PLAINTIFFS IN ERROR, v. WILLIAM NULL, DEFENDANT IN ERROR.

1. **Judicial Sale:** APPRAISEMENT: PRACTICE. Where the sheriff causes real estate to be appraised under an order of sale, he should forthwith deposit a copy of the appraisement with the clerk of the district court. He must do so before the sale.

2. ———: RE-SALE OF PROPERTY. Where a purchaser at a judicial sale refuses to comply with his bid, the officer may bring an action for the purchase money, or he may at once re-sell the property, but he cannot wait until the sale is closed, and the bidders have departed, before again offering the property for sale.

3. **Practice:** FINAL JUDGMENT. No exception is necessary to a final order or judgment.

ERROR to the district court for Gage county.

NOTE.—When not necessary to post notices of sale, see *Parrat v. Neligh*, 7 Neb., 456. See also note to case of *Sessions v. Irwin*, 5 Neb., 5.—REP.

Colby & Hazlett (*W. H. Ashby* with them), for plaintiffs in error, cited Laws of Neb., 1875, p. 60. *Mercer v. Doe*, 6 Ind., 80. *La Flume v. Jones*, 5 Neb., 259. *Merritt v. Borden*, 2 Disn., 503.

Mason & Whedon, for defendant in error.

MAXWELL, CH. J.

This is a proceeding to reverse an order of the district court of Gage county confirming a sale of certain real estate in said county. The sheriff's return to the order of sale states that a copy of the appraisement was forthwith deposited with the clerk of the district court of said county. The clerk's filing on the copy, however, shows it to have been filed on the 16th day of March, 1878, the sale having taken place on the 8th of that month.

In *La Flume v. Jones*, 5 Neb., 259, it was held that where the record is silent as to when the appraisement was deposited with the clerk, it will be presumed that the sheriff did his duty, and deposited the copy within the time required by law. It was also held that it must be deposited before the sale. The sheriff should perform the duty enjoined upon him by the statute forthwith, and deposit a copy of the appraisement with the clerk of the court, so that it may be examined by those interested in the property, and by those desiring to purchase. The appraisement of property is one of the reasonable checks provided by the legislature against the oppression of the debtor and the sacrifice of his property. It is the policy of the law to encourage competition at judicial sales, and this can only be done by permitting bidders to examine the title and the amount of incumbrances on the property, as found by the appraisers. The duty of depositing a copy of

the appraisement as required by law is not a matter of mere form, but a substantial right of the debtor, and the sheriff has no authority to sell until this is done.

The return of the sheriff states that he sold a portion of said real estate "to L. W. Colby for the sum of $1,925, and one hour after said sale the said Colby refused to pay the said sum bid by him until the confirmation of sale, and thereupon I resorted to the place of said sale and sold the said land to James M. Armstrong for $1,900," etc. It will scarcely be contended that the sheriff had authority thus to sell. In case of the refusal of a purchaser to comply with his bid, the officer may bring an action for the purchase money, or he may at once re-sell the property; but he cannot wait until the sale is closed and the bidders have departed before again offering the property for sale.

The defendant contends that as the plaintiff failed to except to the order overruling the exceptions and confirming the sale, that therefore no foundation is laid for the reversal of the judgment. No exception is necessary to a final order or judgment. *Morrow v. Sullender*, 4 Neb., 375. *Commercial Bank v. Cunningham*, 12 Ohio State, 402. *Black v. Winterstein*, 6 Neb., 224. The reason is, the court, having had time for mature consideration of the subject, is bound to render a decision according to law, without any exception or objection being made to the decision.

The return states that, "finding no goods or chattels of the said defendants * * whereon to levy, whereupon I, on the 14th day of February, 1878, levied the same on the lands and tenements described," etc. On an order of sale the command is to sell the lands therein described, and there is no authority under such order to levy upon goods and chattels. And no levy upon the lands is necessary. As is said in

Rector v. Rotton, 3 Neb., 177, "by its judgment the court simply enforces a contract of sale voluntarily made by the owner," and the decree of the court operates directly upon the mortgaged premises. That portion of the return, however, may be rejected as surplusage, but it is better to omit it altogether.

The return also states that the officer, in addition to publishing the notice of sale in a newspaper, posted a copy of the same "on the court house door, and in five other public places in said county, two of the said notices being posted up in the precinct where such lands and tenements are situated." There is no law that requires the posting of notices where the advertisement is published in some newspaper printed in the *county* in which the lands to be sold are situate. It is only in cases where no newspaper is printed in the county, and where the advertisement must be published in some newspaper in general circulation therein, that notices are required to be posted up. This matter, however, would not affect the validity of the sale, but merely the question of costs. The judgment of the district court is reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

TRUEMAN H. SHEPPARD, APPELLANT, V. CHARLES T. BOGGS, APPELLEE.

1. **Equity:** JURISDICTION: PARTNERSHIP. Where an action is brought for the dissolution of a partnership and for an accounting, a court of equity, having obtained jurisdiction of the cause, may retain it for the purpose of doing complete justice between the partners, and to avoid a multiplicity of suits.

2. **Partnership:** SALE BY ONE PARTNER TO ANOTHER. When a partnership is dissolved, the good-will is a part of the assets of the firm, and the court may order it sold or disposed of in such manner as may be deemed most advantageous to the partners. And the court may permit a partner to retain it upon payment of the full value thereof to his co-partner.

APPEAL from Lancaster county district court. Tried below before WEAVER, J., sitting in that county. The opinion contains a statement of the case.

Lamb, Billingsley & Lambertson, for appellant.

The referee finds as a fact that "The agencies of responsible and reputable companies having an established business are recognized and treated by insurance agents as valuable property or interest, etc." The parties both treated it as property at the time the defendant sold it to the plaintiff for $900. The measure of value of this property was fixed, and the value of the property itself was found by the referee. No bill of exceptions having been preserved by the defendant this court cannot inquire upon what evidence this finding was made, nor whether upon sufficient or competent evidence. The facts as found must be taken as conclusive. The value of that property—the agencies—the referee finds to have been $901.36; one-half of this, or $450.68, should have been added to the amount of the judgment or decree entered. That the findings of the fact that these agencies were property, and fixing the value of the same, is conclusive here in this proceeding, see *Holden v. M'Makin*, Parsons Select Eq. Cases (Pa.), 284.

In *Case v. Abeel*, 1 Paige Ch., 401, the court required the defendant, a surviving partner, to account for property and good-will of a business twelve years after, although he was guilty of no fraud, but while the contract under which he had held the same was void.

Here the case is stronger; the defendant has excluded the plaintiff from the business and acquired a secret and private advantage while the partnership was subsisting.

The court having obtained jurisdiction in a suit for an accounting between partners, adjudicates the whole matter, notwithstanding any defect in the pleadings, if any there be. *Boyd v. Foot*, 5 Bosw., 110. *Manufacturer's Bank v. Cox*, 2 Hun., 572. *Veazie v. Williams*, 8 How., 149. *Gillett v. Hall*, 13 Conn., 426.

The defendant having obtained the agencies and the books and papers by fraud, and forcibly excluded the plaintiff from them, and reduced them to his own possession, the referee properly found the value of them, and the plaintiff is entitled to judgment as was prayed in the exceptions and motion. *Adams v. Kable*, 5 B. Mon., Ky., 386.

M. H. Sessions, for appellee.

There was no tangible or commercial value in the agencies held; the party holding them had no guarantee of holding them any length of time, neither could the agent sell and transfer the same.

This interest or value, as found by the referee, is too intangible and uncertain to form a basis as to value. It is altogether speculative, and depends upon too many contingencies to be the subject of sale as assets. *Taylor v. Bemis*, 4 Bissell, 406. It is only an estimate of what the profits of the business will be for a year; the plaintiff then asks to have that estimate divided by two, and says that the quotient is the just value of one half of the assets of the concern, and asks to have the defendant charged with the same. The proposition is neither law, justice, nor common sense. It will be conceded that there will be no profits to any one during

the term for which the plaintiff claims this division only through the skill, labor, and industry of the defendant. Now upon what principle or theory can the plaintiff claim one-half of defendant's earnings, and he during the same time remain in idleness? There is no such doctrine in the law. *Gordon v. Bennet*, 7 Wis., 360. *Masterson v. Brooklyn*, 7 Hill, 62. *Wilson v. Martin*, 1 Denio, 602. *Heckscher v. McCrea*, 24 Wen., 304. *Shannon v. Comstock*, 21 Wen., 457. *Bradley v. Denton*, 3 Wis., 557. *Skinner v. Dayton*, 19 Johns., 536.

The amount sought to be recovered by plaintiff is in no sense assets of the firm; and he is practically seeking to recover damages for a breach of contract, as he claims, by reason of the defendant wrongfully putting an end to the partnership. That cannot be done in this action. *Woodcock v. Bennett*, 1 Cow., 755.

MAXWELL, CH. J.

This action is brought into this court by appeal. In the court below the case was referred to a referee, who found in substance that in October, 1875, the plaintiff paid the defendant $900 to be admitted to a half interest in the business of certain insurance companies in the city of Lincoln; that the partnership continued until about the 1st of January, 1877, when the defendant excluded the plaintiff from the business and from access to the books of their agencies, taking them exclusively into his own possession. The referee found a settlement had been made between the parties in October, 1876, and a due bill given by the defendant to the plaintiff for the amount due, which was excluded from consideration. He also found that the commissions on the business of the firm from October 1st, 1876, to December 31st of that year, was the sum of $345.71, and that the expenses were the sum of $31.45,

leaving the net receipts the sum of $314.26. The referee also found that the net premium receipts for the year preceding the dissolution of the agency was the value of the agency, and that such receipts amounted to the sum of $901.36. As a conclusion of law the referee found that the plaintiff was not entitled in this action to an accounting, or to recover on the due bill, and found that there was due the plaintiff the sum of $167.49½. Exceptions to the report were overruled by the district court and judgment rendered on the finding. The finding of facts is not objected to by either party, and none of the testimony is preserved in the record.

The only question to be determined is, the correctness of the conclusions of law of the referee. The petition is an ordinary one for a dissolution of the partnership and an accounting. The answer admits many of the allegations of the petition to be true, and alleges that the defendant has at all times been ready to settle and account with the plaintiff. That a court of equity has authority in such a case to decree an accounting will not be denied, and having obtained jurisdiction for this purpose, it may retain it for the purpose of doing complete justice between the parties, and to prevent a multiplicity of suits. Story's Eq. Juris., § 64, *k*.

When a partnership is dissolved the good-will is a part of the assets of the firm.

In *Willett v. Blanford*, 1 Hare, 253, the V. C. says: "The whole or a substantial part of the trade may consist of good-will, leaving the renewal of contracts with the old connection of the firm unaffected; in such case the good-will is the identical source of profit, which operates both before and after dissolution."

In *Bradbury v. Dickens*, 27 Beavan, 53, the court, on the dissolution of a literary partnership, ordered the right to use the name "Household Words" to be sold

and the proceeds to be distributed with other assets of the firm.

In *Williams v. Wilson*, 4 Sand. Ch., 379, where, on the dissolution of a partnership in a private insane asylum, one of the partners, as in this case, claimed the right to retain the sole possession of the establishment, the court ordered the lease of the premises, together with the good-will, to be sold and the proceeds distributed among the partners.

In *Wedderburn v. Wedderburn*, 22 Beavan, 84, it was held that "the good-will of a trade, although inseparable from the business, is an appreciable part of the assets of a concern, both in fact and in the estimation of a court of equity."

Upon the dissolution of a partnership, a court of equity may order the assets to be sold, or disposed of in such manner as may be deemed most advantageous to the members of the firm, or it may permit a partner to retain them upon full payment to his co-partners of the value of his interest. As the referee has found the value of the agency to be the sum of $901.36, the plaintiff is entitled to one-half of that sum. The referee therefore erred in his conclusions of law, and the court below in confirming his report. The judgment of the court below is reversed, and judgment rendered in this court for the sum of $785.70 against the defendant, with costs of suit and reference.

JUDGMENT ACCORDINGLY.

SAMUEL P. MARTIN, PLAINTIFF IN ERROR, V. LEVI P. GROVER, DEFENDANT IN ERROR.

Powers of County Judge: PRACTICE: COSTS. A county judge has the ordinary powers and jurisdiction of a justice of the peace; and in an action before him, under such jurisdiction, where the plaintiff in his bill of particulars claims the sum of $50, but recovers only $15, he is entitled to costs. *Geere v. Sweet*, 2 Neb., 67. *Beach v. Cramer*, 5 Id., 98. *Ray v. Mason*, 6 Id., 101, approved. [LAKE, J., dissenting.]

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

A. N. Ferguson, for plaintiff in error.

John Q. Goss and *A. M. Robbins*, for defendant in error.

MAXWELL, CH. J.

On the 28th day of July, 1877, the defendant in error commenced an action against the plaintiff in error in the county court of Sarpy county, to recover the sum of $50. On the trial of the cause, he recovered a judgment for the sum of $15 and costs. The plaintiff appealed to the district court, where, on the 18th day of March, 1878, after a considerable amount of costs had been incurred, he offered to confess judgment in favor of the defendant for the sum of $15, which offer was accepted, and judgment was thereupon rendered against the plaintiff herein for $15 and costs amounting to the sum of $—. No motion was made in the court below to re-tax the costs. The plaintiff brings the cause into this court by petition in error.

The only question involved is the taxation of costs to the plaintiff.

Section 621 of the code provides that "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs." Gen. Stat., 636.

In *Geere v. Sweet*, 2 Neb., 76, this question was before this court, and it was held that where, at the commencement of an action, a justice of the peace has jurisdiction, either concurrent or exclusive, and the plaintiff brings his action in any other court, he cannot recover costs.

In *Beach v. Cramer*, 5 Neb., 98, the question was again before the court. In that case the plaintiff brought an action against the defendant in the probate court of Lancaster county to recover the sum of $250, and on the trial of the cause recovered the sum of $20, which judgment, on appeal to the district court, was affirmed. The only question in that case was, whether the increased jurisdiction of the probate court, giving it concurrent jurisdiction with the district court in sums *exceeding* $100 and not exceeding $500, constituted it as to that class of cases a distinct court from that merely exercising the powers and duties of justices of the peace. And it was held that it did—that the design of the law was to abolish not only fictitious issues but fictitious claims; and the case of *Geere v. Sweet* was approved and adhered to.

In *Ray v. Mason*, 6 Neb., 102, *Geere v. Sweet* and *Beach v. Cramer* are cited with approval.

Section 2 of "An act concerning the organization, powers, and jurisdiction of probate courts," approved March 3, 1873, Gen. Stat., 263, provides that: "Probate courts in their respective counties shall have and exercise the *ordinary* powers and jurisdiction of a justice of the peace, and shall have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding $500."

Section 11 provides that: "In actions before said court, where the amount *claimed* exceeds $100, motions and demurrers shall be allowed, and the rules and practice concerning pleadings and process in the district court shall be applicable, so far as may be, to pleadings in the probate court."

Section 8 provides that: "In all civil actions commenced in said courts, wherein the sum exceeds $100, it shall be the duty of the probate judge to issue summons returnable on the first day of the next term of the court, if there be ten days intervening between the issuance of the summons and the first day of the next term," etc.

Section 7 provides for holding a regular term on the first Monday of each calendar month.

Under the new constitution the county courts are the successors of the probate courts. It will be seen that county judges have the *ordinary* powers and jurisdiction of a justice of the peace, and also jurisdiction in courts to be held on the first Monday of each month, for the trial of causes where the sum exceeds $100 but does not exceed $500. It appears from the transcript that the action was commenced on the 28th day of July, 1877, and the summons issued of that date, and made returnable on the 3d day of August of that year. So that there was no attempt made to bring the action under the increased jurisdiction, and the case is one wherein the county judge was exercising the ordinary powers and duties of justices of the peace. The question has already been determined by this court at this term.

In *Blaco v. Haller*, ante p. 149 the court say: "County courts are the successors of our former probate courts, upon which was expressly conferred, by the act of March 3, 1877, concerning probate courts, "*the ordinary powers and jurisdiction* of a justice of the peace in civil cases." This being the case, the action was prop-

erly brought in a court exercising the ordinary powers and jurisdiction of a justice of the peace. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

LAKE, J., dissenting.

My judgment differs so widely from that of the majority of the court, as expressed in the foregoing opinion, that I think it but due to myself briefly to give the reasons for my dissent. This difference of opinion, I may say at the outset, seems to be occasioned chiefly by my inability to comprehend what appears to be clear to my brother judges, that under any circumstances the constitutional and statutory expressions "county courts" and "justices of the peace" are equivalent, and mean precisely the same tribunal.

The clause of the statute applicable to the question before the court is in these words: "If it shall appear that a justice of the peace has jurisdiction of an action, and the same has been brought in any other court, the plaintiff shall not recover costs."

This statute was first construed, if giving effect to language so plain can be called construction, in the case of *Geere v. Sweet*, 2 Neb., 76, which was commenced in the district court, and in which the plaintiff recovered a judgment for $84.58, a sum within the jurisdiction of that court, but of which, under the statute, a justice of the peace also had concurrent jurisdiction; and it was held, on error to this court, that there could be no recovery of costs. In giving the decision of the court, following that of *Brunaugh v. Wooley*, 6 Ohio State, 597, Mason, Ch. J., said: "It seems to me plain that where it appears that at the commencement of the action a justice of the peace has jurisdiction * * * whether concurrent or ex-

clusive, and the plaintiff brings his action *in any other court*, he cannot recover his costs."

Again, in *Beach v. Cramer*, 5 Neb., 98, in which the action was, as here, commenced in the probate (county) court, the same question was again raised, and precisely the same conclusion arrived at. This decision, as embodied in the opinion of MAXWELL, J., fully sustains *Geere v. Sweet*, as will be seen by the following quotation, viz.: "But while the amount claimed in the petition or bill of particulars determines the jurisdiction, yet the court, having acquired jurisdiction of the subject matter and the parties, if the verdict is less than $100, the plaintiff is entitled to judgment thereon, but the court can render no judgment for costs. * * * This question was before this court in *Geere v. Sweet*, 2 Neb., 77, and the decision in that case meets our approval."

And still again in *Ray v. Mason*, 6 Neb., 101, in which the action below was commenced in the probate court to recover the sum of $100 and interest, alleged to be due on a promissory note, and wherein, on appeal to the district court, the plaintiff had judgment in his favor for $3 and his costs, that judgment having been brought here by petition in error, the decision of the court was that no costs were recoverable, and the judgment of the court below was modified accordingly. The views then entertained by this court are found in the opinion of MAXWELL, J., in which is found this language of clear and unmistakable import: "The only error that can be considered in this case is the taxation of costs to the defendant. In this there is error. The rule is well established in this court that if a justice of the peace has jurisdiction of an action, *and it has been brought in any other court*, the plaintiff shall not recover costs."

Now it does seem very clear to my mind that, if

these several decisions speak the law correctly, the judgment now under review, as to the defendant in error's costs, is erroneous. The amount recovered is $15, of which, it cannot be questioned, "a justice of the peace has jurisdiction;" and the action was certainly commenced in "*another court*," viz.: the county court of Sarpy county. That a county court is an entirely distinct tribunal from that of a justice of the peace seems too clear to admit of any argument. The distinction is not in name alone, but it is constitutional—radical. The fact that in some matters county courts have concurrent jurisdiction with justices of the peace is entitled to no weight in the decision of this question, for that could have been urged with equal propriety had the case been commenced in the district court.

The construction given to this statute by the majority of the court is just what might have been expected if, instead of what it is, its language were, if a justice of the peace have jurisdiction, and the action has been brought in any other court, *except one having and exercising concurrent jurisdiction with justices of the peace*, the plaintiff shall not recover his costs. Such being its effect, I am of opinion that the conclusion reached by my brother judges is not only in direct conflict with the prior decisions of this court, as well as of the supreme court of Ohio, on the same question, but does violence to the plain simple words and spirit of the statute above quoted.

Reference is also made in the opinion to the fact that no motion was made in the court below to have the costs re-taxed. But that step was unnecessary to entitle the plaintiff in error to the relief sought. If the costs had been taxed contrary to the judgment there would have been force in this point. The costs, however, were taxed as they only could be under the

judgment; and it has never been held that, in order to entitle a party to have a final judgment reviewed in this court, he must ask the court rendering it to correct the errors complained of. Indeed, it is not necessary even to except. *Black v. Winterstein*, 6 Neb., 224.

For these reasons I am of the opinion that the judgment, as to the costs, ought to be reversed.

KARNA HANSEN, PLAINTIFF IN ERROR, V. GUSTAVE BERGQUIST, DEFENDANT IN ERROR.

1. **Practice in Probate (County) Courts:** SETTING ASIDE JUDGMENT. Where summons was duly issued by the probate court, and served upon a defendant, who appeared and filed a motion to dismiss the action because the petition was not properly verified, which motion, on the third Monday of the month, was sustained, but on the 27th day of the same month, the judgment of dismissal was set aside: *Held*, in the absence of a showing to the contrary, it will be presumed the defendant had notice of the order setting aside the judgment. Such order is voidable, not void.

2. ———: JUDGMENT BY CONFESSION. The provisions of the statute requiring the probate (county) judge to continue all cases undisposed of on the third Monday of each month, does not prevent the court from rendering judgment by confession or hearing and deciding cases by agreement at any time during the month.

3. **Practice:** FINAL ORDER. An order setting aside a judgment dismissing a cause may be reviewed on error.

ERROR to the district court of Dodge county. Heard before POST, J., on motion of defendant to quash an execution issued by the clerk upon a tran-

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NOTE.—It is not necessary that the record of a judgment rendered in the probate (county) court, in cases where the amount in controversy exceeds the jurisdiction of a justice of the peace, should show that a regular term of that court had commenced on the day fixed by statute, and continued from day to day until the rendition of the

script filed in his office of the proceedings and judgment of the county (formerly probate) court of Douglas county. Motion sustained and exceptions taken by plaintiff.

C. Hollenbeck, for plaintiff in error.

1. Where a transcript of a judgment is filed in a different county from where it was rendered, the defendant cannot avail himself of any defense he may have to such judgment by attacking it in the county where the transcript is filed, but must make his defense against the original judgment. *Mellon v. Guthrie*, 51 Penn. State, 116. *Boyd v. Miller*, 52 Penn. State, 431. In all matters within its jurisdiction, the decrees of the probate court are final and conclusive, and can only be impeached for fraud or reversed on error. *Ward v. State*, 40 Miss., 108.

2. The objection, that there was no finding of facts in the probate court, is without force. In courts of inferior jurisdiction matters of form are disregarded. *Lewis v. Watrus*, 7 Neb., 477. Freeman on Judgments, §§ 47, 50, 51, 52, 53.

3. The objection, that the probate court had no jurisdiction to set aside the order made on the 18th day of August, on the 27th of August, we think not well taken. Section (59), of Gen. Stat., entitled "Pro-

judgment. It is sufficient if the record show that the court was in regular session when the judgment was pronounced. *Kelly v. Morse*, 3 Neb., 224. The dismissal of actions in the county courts is governed by rules applicable to cases commenced before justices of the peace. *Banks v. Uhl*, 6 Neb., 145. On the first day of the return term, B demurred to the petition of A; demurrer sustained; amended petition filed immediately; B withdrew from court-room and did not return; same day B defaulted; next day trial had in absence of B, and judgment for A. *Held*, no error. *Naracong v. Graves*, 8 Neb., 413.—REP.

bate Court," provides that any cause, matter, or proceeding, pending therein, may be proceeded in at any time. The defendant having once appeared in said action, notice will be presumed. The probate court being a court of record, it is entitled to all the presumptions in favor of jurisdiction. Freeman on Judgment, §§ 517, 518. *Kelly v. Morse*, 3 Neb., 224. In any event, the act of the probate court in setting aside its judgment against plaintiff could in no way prejudice the defendant. He was never entitled to the judgment of dismissal. *Fritz v. Barnes*, 6 Neb., 435.

4. The order of the court, re-instating said cause, did not in any degree affect the defendant. It simply left the action pending against him, and the final determination of the cause was not had until the defendant had had ample notice, as the record shows.

Marlow & Munger, for defendant in error.

1. If the judgment of the probate court was void, then a motion to quash the execution was a proper remedy. Freeman on Executions, § 73.

2. The execution having been issued out of the district court of Dodge county, the application to quash the writ must be made in that court. Freeman on Executions, § 75.

3. The court had no jurisdiction to set aside the judgment of dismissal without notice having first been served upon defendant of the application (Sec. 604, page 633, Gen. Statutes), and it must affirmatively appear of record that the notice was given. This identical point was decided in *Hettrick v. Wilson*, 12 Ohio State, 136.

4. Before the order setting aside the prior judgment could be made, there must be an adjudication that there was a valid cause of action (Sec. 616, page

635, Gen. Statutes), and the record should show that such adjudication was had before any valid judgment setting aside the former judgment could be rendered. *Hettrick v. Wilson, supra.* Now the adjudication that there was a cause of action shown is an imperative requirement before the court is authorized to vacate the former judgment. And it is a fundamental principle that where certain facts are required to exist, before a court or judicial tribunal can act upon a given matter, that those facts are jurisdictional, and if the court acts in the absence of such facts, the act of the court is without jurisdiction and therefore void. In courts of inferior or limited jurisdiction no presumptions in favor of their jurisdiction exist, but jurisdiction must affirmatively appear of record. *S. C. & P. R. R. v. Washington Co.*, 3 Neb., 41. *Robinson v. Mathwick*, 5 Neb., 255. *Reynolds v. Stansbury & Bursh*, 20 Ohio, 344, was a case involving the same question here presented, whether the giving of the notice would be presumed; the majority of the court held that the superior court of Cincinnati, being a court of general jurisdiction, its jurisdiction would be presumed; but they expressly say, that were the action had in a court of inferior or limited jurisdiction, then all the facts necessary to give jurisdiction must affirmatively appear. And in that case we desire to call especial attention to the very able dissenting opinion of Ranney, Judge, and apply his views to the case at bar.

5. This is not a case where it is sought to attack the judgment in a collateral manner, but the motion to quash is a direct proceeding in the same case, and in all such proceedings evidence *aliunde* of the record is admissible to show want of jurisdiction. There being no bill of exceptions in this case, it is impossible to tell upon what evidence the court acted, and whether the judgment of the court was erroneous or not.

MAXWELL, CH. J.

On the 10th day of March, 1879, the following transcript was filed in the office of the clerk of the district court of Dodge county:

"Karna Hansen,
v. } 1015.
Gustave Bergquist.

"July 6, 1874. Plaintiff, by her attorneys, Beals and Shropshire, filed her bill of particulars, alleging that the defendant is *indebted* to the plaintiff in the sum of $500, costs, expenses, and damages arising from the pregnancy of plaintiff by defendant.

"July 17, 1874. Returned served on the 6th of July, 1874, by delivering of a certified copy of summons to defendant in Douglas county, Nebraska.

"August 3, 1874. Defendant, by his attorneys, Strickland and Webster, filed motion to dismiss for want of proper verification to bill of particulars.

"August 18th. The above motion, having been argued by respective counsel, it is considered and adjudged by me that this case be and hereby is dismissed at the plaintiff's costs, amounting to $3, as taxed in the margin.

"WM. L. PEABODY,
"Probate Judge."

"August 27, 1874. On motion of plaintiff's attorneys the above judgment is hereby set aside, and same day plaintiff filed new petition. Case continued to September term.

"WM. L. PEABODY,
"Probate Judge."

"September 11, 1874. Case called. Defendant having been notified and declining further to appear, on motion of plaintiff's counsel, default is entered

against the defendant for want of an answer, and the case tried by the court.

"Whereupon Karna Hansen and Josephine Bensen were duly sworn and examined as witnesses for the plaintiff, and it is considered and adjudged by me that the plaintiff recover of the defendant $500, her damages, and $5.60, her costs of suit, as taxed in the margin.

"WM. L. PEABODY,
"Probate Judge."

"January 16, 1875. Issued execution.

"July 28, 1875. Execution returned wholly unsatisfied.

"P. STEIN,
"Constable."

"November 2, 1878. Issued second execution, and delivered the same to Constable Rodney Dutcher.

"November 7, 1878. Second execution returned wholly unsatisfied.

"STATE OF NEBRASKA, }
County of Douglas. }

"I do hereby certify the above to be a true, full, and complete transcript of the proceedings of the probate court and the county court for said county in the above entitled action, being No. 1015 in Docket "C," as shown by the entries therein, which docket is in my possession duly certified.

"Witness my hand and the seal of the said county court at Omaha, this November 7th, A.D. 1878.

"WM. O. BARTHOLOMEW,
"County Judge."

On the 10th day of March, 1879, the clerk of the district court of Dodge county issued an execution on the above transcript, which, so far as appears from the record, was not delivered to sheriff, and no levy made under the same.

On the 17th of the same month the defendant filed a motion to quash the execution.

First. Because there was no adjudication by the probate court that there was a valid cause of action before vacating the judgment rendered July 18, 1874.

Second. Because no notice was served on the defendant or his attorneys of the motion to vacate the judgment of dismissal.

Third. Because the court had no jurisdiction of the subject matter of the action.

Fourth and Fifth. Because the probate court had no jurisdiction of the defendant in the action, and had no authority to make the order August 27, 1874.

Sixth. Because there was no finding for the plaintiff upon the issues made by plaintiff's petition.

The court sustained the motion and quashed the execution. The plaintiff brings the cause into this court by petition in error.

As to the first objection urged in the motion, it is sufficient to say that in the motion filed by the defendants to dismiss the action in the probate court no question was raised as to the jurisdiction of the court over the subject matter of the action, nor the sufficiency of the statement of facts, the only ground of the motion being that the petition or bill of particulars was not properly verified. Upon the question of notice the transcript is entirely silent. Unless the application to set aside the judgment and file an amended petition was made while the defendant or his attorneys were present, such proceeding could only be had upon notice. So far as appears, that application may have been made at once upon the motion to dismiss being sustained.

The rule may be stated thus: When jurisdiction of the parties and the subject matter affirmatively appear, every other matter necessary to support the judgment

will on error be presumed, unless it is required by statute to appear of record, or unless it be preliminary and necessary to the right to exercise jurisdiction. *Howell v. Jenkins*, 3 W. L. M., 631.

In *Dodge v. Ruggles*, 36 Iowa, 42, it was held that where the jurisdiction of a justice of the peace is by consent of the parties extended to a case involving a sum greater than $100, it will, in the absence of a showing to the contrary, be presumed that such consent was given before the institution of the suit.

Where jurisdiction is shown, the rule that courts and officers are presumed to act rightly is extended to county and justice courts. In this case summons was duly served upon the defendant, and he appeared without objection on that ground; the action was dismissed upon a technical objection, and in the absence of showing to the contrary it will be presumed that notice of the motion to set aside the judgment of dismissal and re-instate the cause was given, particularly so where the judgment was set aside in a few days after its entry.

Our attention has been called to the case of *Hettrick v. Wilson*, 12 Ohio State, 136. In that case a transcript from a justice of the peace was filed on the 4th of May, 1855, and a rule taken against the defendant in error to file his petition in the case by the next rule day. On the 28th of May of the same year default was entered against the defendant for want of a petition, and on the 29th of June following judgment was entered on the default dismissing the action. On the 5th day of November thereafter the defendant in error filed a motion to set aside the judgment of nonsuit without assigning any reason therefor. On the 8th day of December following he filed an additional motion, assigning various grounds, none of which authorized the court to set aside a judgment of a pre-

vious term on motion. On the 4th day of January, 1856, the court made the following order: "On motion of plaintiff's attorney and good cause shown, it is ordered that the order dismissing this cause, made at the May term, 1855, be set aside, and leave is given to the plaintiff to file a petition, which is accordingly done." The supreme court reversed the judgment upon the grounds that the court had not found that the plaintiff had a valid cause of action, and because a final judgment had been rendered at the May term of the court, by which the defendant was dismissed without day, and at the close of the term, being no longer in court, no further action could be taken in the case prejudicial to his interest without notice to him. In that case the judgment was not treated as a nullity, but reversed on error, it being held that the order vacating the judgment of dismissal was a final order, which could be reviewed on error. And such was the holding of this court in *Banks v. Uhl*, 5 Neb., 240.

Our attention is called to the case of *Reynolds v. Stansbury*, 20 Ohio, 344. In that case judgment was rendered against the defendant in the superior court of Cincinnati, at the January term, 1847, and afterwards, on motion of the defendant, the judgment was set aside at the January term of that court in 1849. The record did not show that the plaintiff had notice of the motion. It was held in substance that notice was necessary to give the court jurisdiction, but that notice would be presumed in favor of a court of general jurisdiction, but the court intimate that a contrary rule obtains in courts of inferior and limited jurisdiction.

The power of a court to set aside a judgment at a term subsequent to that at which it was rendered, without notice, may well be questioned. The power to va-

cate and modify judgments, except in the manner provided in the statute, ceases with the term at which they were rendered. *Smith v. Pinney*, 2 Neb., 145. Had the August term of the county court ceased at the time this order was made? Section 7 of the act concerning the organization, powers, and jurisdiction of probate courts, approved March 3, 1873, Gen. Stat., 263, provides that: "It shall be the duty of the probate judge, in each county, to hold a regular term of the probate court at his office at the county seat, commencing at nine A.M. on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be open, without any formal adjournment thereof, until the third Monday of the same month, when all causes not finally determined shall be continued by such court to the next regular term; but such courts shall be declared to be always open for the filing of papers and issuing of process in civil actions, and for the purpose of entering judgment by confession."

Section 15 provides for setting the causes for trial upon convenient days of the term. If the court may at any time enter judgment by consent, why may it not by agreement hear and determine any matter submitted to it? The statute is merely for the direction of the court. A party cannot be compelled after the *third* Monday in each month to take up a new case and proceed to trial. But with the consent of the parties the court may do so. It has authority, with the consent of the parties, to render judgment at any time during the month. And where, as in this case, there is nothing shown to the contrary, such assent will be presumed.

The objection that there is no finding does not render the judgment void. Taking the entire transcript,

the judgment is not void on its face, although somewhat imperfect. This is decisive of the case. The court therefore erred in sustaining the motion to quash the execution, and its judgment in that respect is reversed.

JUDGMENT REVERSED.

JOSEPH W. HARTLEY, APPELLANT, V. E. MARY GREGORY AND OTHERS, APPELLEES.

1. **Mortgage:** COVENANT AGAINST INCUMBRANCES: PERSONAL JUDGMENT. In a mortgage of real estate to secure the purchase money, there was, among others, a personal covenant to save the mortgagee harmless from a prior mortgage then resting on the premises. The mortgagors further covenanted and agreed that, "If all of said conditions, agreements, and covenants" were left unperformed "for thirty days, then, at the option of the party of the second part, this mortgage may be declared due for the sum of $1100, with ten per cent interest from date." This security having been completely exhausted by a foreclosure of the prior mortgage, and the purchase money still being unpaid, *Held*, That the mortgagors, for this breach of their covenant, were liable to a personal judgment for the $1100, and interest as aforesaid.

2. **Practice:** RES ADJUDICATA. If a defendant rely upon the rule of *res adjudicata* as a defense, he should bring such facts into the record as will show affirmatively that the plaintiffs' relation to the former action was such as to make the judgment therein conclusive of the matter in controversy.

THIS was an action brought in the district court of Lancaster county to foreclose a mortgage executed by E. Mary Gregory and John S. Gregory to Silas Pratt, January 1, 1874, to secure a note of $1100, due Nov. 20, 1876, with 7 per cent interest, given by third parties, and made payable to the order of E. Mary Gregory; and to secure also $100, due Feb. 1, 1874, and of

a sum annually to make up the rate of interest on the $1100 note to ten per cent per annum. The mortgage was given to secure part of the purchase money of lot 3, block 36, in the city of Lincoln, sold by Pratt to the Gregorys. Pratt afterwards sold and assigned to plaintiff, Hartley, who brought the action. A suit between these same parties, concerning the same mortgage, came here upon appeal at the October term, 1877, and is reported 7 Neb., 356. Upon reversal here, plaintiff dismissed that action and brought this, and upon the trial before POUND, J., judgment was rendered in favor of the defendants and dismissing the action. Plaintiff appeals.

Lamb, Billingsley & Lambertson, for appellant.

The validity of a mortgage does not depend upon the description of the debt contained in the deed, nor upon the form of the indebtedness, whether it be by note or bond, or otherwise; it depends rather upon the existence of the debt it is given to secure. 2 Jones on Mortgages, sec. 353. *Hodgdon v. Shannon*, 44 N. H., 572. *Griffin v. Cranston*, 1 Bosw., 281. *Jackson v. Bowen*, 7 Cow., 13. *Farmers' Loan and Trust Co. v. Curtis*, 7 N. Y., 466. *Coutant v. Servoss*, 3 Barb., 128. Although there be no note or bond, and no time is specified for the payment of the mortgage debt, the mortgage, if given to secure a debt that actually exists, is valid, and may be enforced immediately. *Brookings v. White*, 49 Me., 479. *Carnall v. Duval*, 22 Ark., 136.

Harwood & Ames, for appellees.

The Loan Association had a prior lien on these same premises. It foreclosed, and in that action, the Gregorys, Pratt, and this plaintiff were defendants, and the

property was sold for an amount less than that found due the Association. Can the plaintiff now bring an action to *foreclose* his mortgage? We think not. This is the first action of the kind ever commenced in any court.

LAKE, J.

It is not apparent whether the conclusion of the court below was placed upon the alleged insufficiency of the petition to state a cause of action, or upon the want of evidence to establish the truth of the material facts therein set forth. But howsoever this may be, we have not been able to discover any ground on which the judgment can securely stand.

That a cause of action entitling the plaintiff to relief is alleged must be conceded on a moment's reflection. The transaction out of which it grew was between the defendants and one Silas Pratt, who by assignment transferred all of his interest in the subject matter to the plaintiff. The material facts, which are either undenied or abundantly proven, may be briefly stated as follows: On the first of January, 1874, Pratt was the owner of lot three, in block thirty-six, in the city of Lincoln, together with the buildings and appurtenances thereunto belonging, subject, however to a mortgage executed by a former owner of the lot to secure to the Mechanics' Loan and Savings Association the sum of fourteen hundred dollars. Subject to this mortgage, Pratt sold and conveyed the lot to the defendants for twelve hundred dollars, taking in payment a promissory note for eleven hundred dollars against Hector Gawley and Andrew Stevenson, of Monroe county, Michigan, and one hundred dollars payable by the defendants personally, all nominally secured by a mortgage given by them to him upon the premi-

ses so conveyed. In this mortgage are several important provisions which we shall have occasion to refer to more particularly as we proceed.

However, the more fully to comprehend the force of these provisions, and that they may have their proper effect, it should be understood that the only affirmative defense to the petition made by the answer is, that Pratt agreed to and did take the Gawley and Stevenson note at his own risk, and without recourse to the defendants, in full payment and satisfaction of that amount of the agreed price of the lot. That this claim is without the least foundation, and depends on mere assumption, will very clearly appear on an inspection of the evidence. In truth there is nothing whatever in the record to support it.

It appears that this note, which at that time was in the hands of one Johnson, of Monroe, Michigan, with whom it had been left by the defendants for collection, was given in part payment of certain real property which they had sold to the makers, and that it was nominally secured by a *second* or *third* mortgage on that and perhaps other property. It also appears that shortly after the sale of this note to Pratt, the property by which it was secured in Michigan was nearly if not quite exhausted in the payment of prior liens, thus leaving its payment, so far as the makers were concerned, depending alone upon their personal responsibility, which there is much evidence to show was merely that of insolvents.

As events have demonstrated, one of the most important provisions in this mortgage from the Gregorys to Pratt is that wherein it is agreed on their part to pay all liens and incumbrances then on said premises, "when the same fell due, and hold the said party of the second part"—Pratt—"entirely harmless from the same; particular reference being made to a certain

deed of trust, or mortgage, now a lien on said premises, executed by Catherine E. Cullen, to the Mechanics' Loan and Saving Association to secure the sum of fourteen hundred dollars." Had this promise been faithfully kept, together with certain other stipulalations as to taxes and insurance, Pratt, and his assignee, the plaintiff, would have had ample security for the Gawley and Stevenson note, notwithstanding the inadequacy of the Michigan mortgage, and the irresponsibility of the makers. But the promises were not kept; the taxes were not paid; the mortgage to the Mechanics' Loan and Savings Association was not paid off, but, under foreclosure proceedings, was left to eat up the entire property on which it rested. The following recital from this mortgage will show more clearly its scope, and what, in addition to paying off this incumbrance, it was necessary for the defendants to do, in order fully to perform their agreement.

"And the said John S. Gregory and Mary E. Gregory do covenant with the said party of the second part and his assigns to keep the building now standing or hereafter to be erected on the above described premises insured against loss or damage by fire. * * * to the amount of one thousand dollars," for the use of "the said party of the second part, and assigns." * * * "And the said parties of the first part agree to pay all taxes and assessments on said premises, * * * and keep said premises free from all mechanics' liens until said sums are paid." It is further recited that inasmuch as the Gawley and Stevenson note only "draws seven per cent interest, payable semi-annually, said parties of the first part agree to make up the rate of interest on said note to ten per cent per annum, payable to said Pratt semi-annually. This is also given to secure the payment of one hundred dollars, to be paid February 21st, 1874, with ten per cent interest. Said $1100.00

note is payable to Mary E. Gregory or order, which * * * said parties of the first part, shall indorse over to said Pratt on or before February 13th, 1874. If all of said conditions, agreements, and covenants are fully kept and fulfilled, then this mortgage shall be void; but any failure herein for thirty days, then at the option of the said party of the second part, this mortgage may be declared due for the sum of $1100.00 with ten per cent interest from this date," etc.

We think it not amiss to say of these several conditions that, excepting perhaps the payment of the one hundred dollars due February 21st, 1874, not one of them has been performed. Even the $1100 note, as late as the 16th of April, 1878, had not yet been indorsed, but remained in possession of said Johnson, who was then still holding it as the agent of Gregory.

In view of the claim by the defendants, that this mortgage was intended to cover only the equity of redemption under the prior incumbrance, there is another covenant on their part which should not be overlooked, viz.: that they were "well seized of the said premises in *fee simple*, and have good right, full power, and lawful authority to grant, bargain, and sell the same, in manner and form aforesaid, and that the same are free and clear of all liens and incumbrances whatsoever, except as above stated." And this single exception being the mortgage to the Mechanics' Loan and Saving Association, which they had expressly agreed to pay off and save Pratt harmless from, as before shown, this covenant, which cannot be controverted, shows most conclusively that it was the property itself, and not a mere equity of redemption, that was given as security.

It is asserted by counsel for the defendants in their brief that the parties here, plaintiff and defendants, were defendants in the suit foreclosing the prior mort-

gage under which the lot was sold. If the record showed this to be so, it would, of course, be fatal to this equitable proceeding, for, having the opportunity to do it, the plaintiff should have litigated all his claims to the mortgaged property in that action. If Hartley, as the assignee of this mortgage, were indeed a defendant there, the judgment, had it been properly pleaded, would very likely have been conclusive of his rights under it. At all events, his only remedy, even if that had been left to him, would lie in a personal action against the Gregorys to recover the damages occasioned by their failure to protect the security from other incumbrances, as they covenanted in the mortgage to do.

It being conceded that the property covered by the mortgage is completely exhausted by the incumbrance which the defendants covenanted to remove, it follows that the plaintiff is entitled to a personal judgment, in pursuance of a covenant to that effect, for the sum of $1100, and interest thereon from the first day of January, 1874, at the rate of ten per cent per annum, together with his costs to be taxed.

JUDGMENT ACCORDINGLY.

JOSHUA H. BUEL, PLAINTIFF IN ERROR, v. R. H. DICKEY, DEFENDANT IN ERROR.

1. **Executor's Bond:** SUIT ON. An action on the bond of an executor under the Revised Statutes, commenced prior to September 1, 1873, to recover money claimed to be due on a legacy, was properly brought in the name of the probate judge of the proper county. In such action the consent of the probate judge was necessary.

2. ———. It is not a valid objection to such bond that it runs to "the judge of probate" of the proper county, without personally naming him.

3. ———: PROOF OF ASSETS NOT REQUIRED. Where the bond given by the executor, who is also a residuary legatee, is the one provided for by sec. 165 of the Revised Statutes, conditioned "*to pay all the debts and legacies of the testator*," and no fraud or mistake is alleged to vitiate it, the fact of sufficient assets in the hands of the executor will be conclusively presumed, and the want of them cannot be urged to defeat a recovery on such bond.

ERROR to the district court of Otoe county.

The action was on the 28th day of June, 1873, commenced in the name of R. H. Dickey, probate judge of Otoe county, Nebraska, for the use and benefit of Mary E. Davenport, and in name of Mary E. Davenport, widow and legatee of William Davenport, deceased, against Benjamin M. Davenport, executor of the last will and testament of William Davenport, deceased, and Joshua H. Buel as surety of said executor, and one Mary E. Deweese. Pending the suit Mary E. Davenport died, and her death was suggested to the court September 7, 1874, and leave was granted by the court that J. A. Graves, as executor of plaintiff, deceased, be made party plaintiff in this action. An amended petition was then filed in the name of R. H. Dickey, probate judge of Otoe county, Nebraska, for the use and benefit of S. O. Graves in his capacity as executor of the estate of Mary E. Davenport, deceased, and also in the name of S. O. Graves as executor of Mary E. Davenport, deceased, against Benjamin M. Davenport, executor of the last will and testament of William Davenport, and executor of the estate of William Davenport, deceased, and Joshua H. Buel, surety of the said Benjamin M. Davenport, on the official bond of such executor, and Mary E. Deweese, a

legatee named in the last will of William Davenport, deceased, and was prosecuted for the recovery of a judgment against the said executor, and the said surety for the payment of a legacy to Mary E. Davenport of seven thousand dollars, named in the last will of William Davenport, deceased. Judgment for plaintiff, to which Buel, the surety, took exceptions, and brought the cause here for review.

George W. Covell and *C. W. Seymour*, for plaintiff in error.

1. The official bond of B. M. Davenport, as executor of the last will and testament of William Davenport, deceased, did not bind the obligors to pay to R. H. Dickey, as judge of the probate court of Otoe county, Nebraska, and his successor or successors in office, the penalty of the bond, but was drawn to the "judge of the probate court of Otoe county, Nebraska," merely. He was not the trustee of an express trust, because his name was not mentioned in the bond; he was not a person with whom or in whose name a contract was made for the benefit of another; he was not a person expressly authorized by statute to commence an action of this kind; he was not the real party in interest in this action; if he possessed by law, or by provision of statute at any time, the right, authority, or capacity to bring this action, he had, by authorizing Mary E. Davenport to commence and prosecute an action on the official bond of B. M. Davenport, parted with the right or capacity to sue for her use and benefit. Having assigned to her any such supposed right, and authorized her to maintain an action in her own behalf on said bond, he could not thereafter sue in his own name, in his official capacity, for her use and benefit. Gen. Stat., 337, 338.

2. Before any resort can be had to the bond of the executor in the common law courts, or in courts of law, there must have been a citation issued by the probate court of Otoe county, Nebraska, to B. M. Davenport, and the same duly served upon him, to appear before said court and render his account of his executorship, and until this has been done, and he had neglected to render such account, his bond could not have been put in suit by any person interested in the estate, nor would he be liable on his bond for any damage which might accrue to any person interested. Gen. Stat., 332, sec. 285. 3 Redfield on Wills, 94. *Dawes v. Sweet*, 14 Mass., 105. *Newcomb v. Wing*, 3 Pick., 168. *Paine v. Moffit*, 11 Pick., 496. *Dawes v. Head*, 3 Pick., 128. The probate court is the exclusive forum for the settlement in the first instance of all questions affecting faithful administration, and those questions involving that inquiry cannot be drawn into any other tribunal, by means of an action on the administration bond, or in any other mode, unless by appeal from a final decree in that court. *Paine v. Stone*, 10 Pick., 75. *Probate Court v. Vanduzer*, 13 Vt., 135. *Stone v. Peasley*, 28 Vt., 716.

3. Although the bond was conditioned to pay all debts and legacies of William Davenport, the testator, yet, unless it was shown that some assets of the testator came into the hands of B. M. Davenport, as executor of William Davenport, by the evidence offered in chief by the plaintiffs, out of which such debts and legacies could be paid by him, then there was no case made out against the surety on his official bond, and no liability whatever could be fixed upon such surety in the absence of positive testimony to that effect.

4. A bond like this is but the naked promise of the personal representative to pay what the testator has directed by his will to be paid, and "the naked prom-

ise of the personal representative to pay the debts or legacies of the deceased is a mere '*nudum pactum.*'" (Redfield on Wills, 315.)

Thomas B. Stevenson and *M. L. Hayward* (with whom were *Feland & Graves*), for defendant in error.

1. The execution of the bond in this case binds the executor and his sureties absolutely and unconditionally to the payment of all the legacies made in the will; and therefore an inventory, and, as a sequence, all the preliminary steps required by the statute to be taken for the ascertainment of the amount of the estate and the extent of the executor's liability are superfluous, and not required either by the letter or the reason of the statute. For it makes no difference whether the estate be sufficient or not; the executor has estopped himself by this bond from any inquiry into that question, and by his own act prevented those interested from having an opportunity of doing so, if any necessity for it existed; and having assumed the risk, he must bear the burden.

2. The record shows that all the proper steps have been taken at the proper time, that the court competent to act has acted and authorized this action, and that the court competent to render judgment has rendered judgment. On this account, also, no objection can be well taken, for we think the evidence conclusive that the executor had sufficient assets to pay this and the other legacy, in addition to the funeral expenses and the costs of administration.

In support of these propositions we cite *Bigelow v. Bigelow*, 4 Ohio, 138. *Kaster v. Pierson*, 27 Iowa, 90. *Stevens v. Hartly*, 13 Ohio State, 525. *Jones v. Richardson*, 5 Met., 247. *Colwell v. Alger*, 5 Gray, 67. *Fuller v. McEwen*, 17 Ohio State, 288.

LAKE, J.

Observing proper order, the first question to be considered is, whether the action was properly brought in the name of the then probate judge of Otoe county.

As shown by the record, the original petition was filed and summons issued June 28th, 1873. At this time, the bringing of this sort of actions was regulated by certain provisions of the Revised Statutes of 1866, from which we copy—Rev. Stat., p. 122:

"SEC. 314. When it shall appear, on the representation of any person interested in the estate, that the executor or administrator has failed to perform his duty in any other particular than those before specified, the judge of probate may authorize any creditor, next of kin, legatee, or other person aggrieved by such maladministration, to bring an action on the bond."

"SEC. 316. In all suits upon such bonds, the writ and proceedings shall be in the name of the judge of probate; and when the action is brought for the benefit of any particular person as creditor, next of kin, or legatee, as provided in this subdivision, the execution shall express that it is for the use of such creditor, next of kin, or legatee, and in such case the person for whose use the action is brought shall be deemed the plaintiff."

Under these two sections it is manifest that, in order to collect a legacy by action on the bond of an executor, the legatee must be authorized to proceed by the probate judge, and that the suit was properly brought in his name. It is possible, in view of section 643 of the code of civil procedure, that an action by the legatee alone might have been sustained, but it is unnecessary to decide here whether it could or not, it being sufficient to know that this one was properly brought.

The record shows that on the day preceding the commencement of the action, on proper representations, the probate judge made an order as the statute provides, in which it is stated that: "Permission is hereby granted to Mary E. Davenport to bring suit against Benj. M. Davenport, executor of the last will and testament of William Davenport, dec'd, and the surety in the bond of such executor. And the said legatee is authorized to prosecute such bond, and bring suit for the amount due her, being a part of such legacy." The balance due from the executor Dec. 17th, 1870, is found in a previous clause of the order to have been "the sum of six thousand four hundred and ninety-eight and sixty-two-one-hundredths dollars."

The law, it seems, was so changed by the amendatory act of February 25th, 1873, as to require actions of this sort to be brought "in the name of the party authorized to bring the same, or in the name of the guardian of such party;" but, as the amendment did not take effect until September 1st, 1873,* it can have no effect upon the decision of this case, which had then already been commenced. From these considerations it follows that the action was properly commenced in the name of R. H. Dickey, then the probate judge of

* NOTE.—This section, with several others of the chapter of the Revised Statutes of 1866, entitled "Decedents," was amended, as stated in the opinion, February 25, 1873, by an act entitled "An act to amend chapter fourteen, part one, of the revised statutes, entitled 'Decedents,'" the concluding section of which reads: "This act shall take effect and be in force from and after the first day of September, 1873." The amendatory sections alone appear in chap. 17, Gen. Stat., 1873, as by an act providing for the publication of that compilation, the commissioner was directed thus: "The said revision and compilation shall also contain proper notes showing when any chapter or section of the Revised Statutes of 1866 may have been amended or repealed; and where the same has been amended, the *amendatory section only* shall be inserted." Gen. Statutes, 1082.—REP.

Otoe county. The joinder of the legatee in the original, and of her executor in the amended petition, as co-plaintiffs, was unauthorized, but as no objection was made, and it being at most a mere irregularity, without prejudice, it need not be further noticed.

We now come to the consideration of the bond itself. A proper construction of this, we think, practically disposes of all remaining objections to the judgment. This bond, we find, conforms substantially to the requirement of sec. 165, ch. 14, Rev. Stat. (Gen. Stat., sec. 165, p. 307), being in these words:

"Know all men by these presents, that we, B. M. Davenport, of Otoe county, Nebraska, as principal, and Joshua H. Buel, of the same place, as surety, are held and firmly bound unto the judge of the probate court of Otoe county, Nebraska, in the sum of fifteen thousand dollars, good and lawful money of the United States, to be paid to the said probate judge; for which payment well and truly to be made, we do bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated this 30th day of August, A.D. 1879.

"Whereas the above bounden B. M. Davenport has been appointed executor of the last will and testament of William Davenport, deceased. Now the condition of the above obligation is such, that if the said B. M. Davenport shall pay all debts and legacies of the testator, then the above obligation shall be void, otherwise to remain in full force and virtue.

(Signed) "B. M. DAVENPORT,
"J. H. BUEL.

"Attest:
"N. S. HARDING."

It was objected to this bond, and to a recovery thereon—1st. That it "does not comply with the order of the probate court," which was, "that the said

Benjamin M. Davenport give and execute a good and sufficient bond, to be approved by this court, in the sum of fifteen thousand dollars ($15,000) conditioned for the faithful performance of his trust as such executor." And 2d. "Because it was not drawn or made to the person filling the office of probate judge of Otoe county, Nebraska."

To the first of these objections it may be answered, that a bond with a condition in the language of the order was not authorized by any provision of the statute; and the one given, besides being taken and duly approved by the probate judge, was in exact conformity to the requirement of sec. 165 above referred to. As to the second, all that need be said is, that while it is usual in such bonds to insert the name of the person holding the office of judge at the time, the statute does not require it, nor do we perceive wherein the name could be of the slightest importance whatever. That this, at least, is an exceedingly technical objection will be seen by reference to sec. 164 of the act concerning decedents, by which it is provided that "every executor, before he shall enter upon the execution of his trust, shall give bond to the judge of probate in such reasonable sum as he may direct," etc. There was, we think, a substantial compliance with this provision, and that the bond in question is valid.

But it is further contended that to justify a recovery upon the bond, it was necessary to show that assets had come into the executor's hands which he ought to have applied in payment of the legacy. Even if this were so, it is exceedingly doubtful if the judgment could properly be reversed as being unsupported by the evidence. But in our view of the effect of this bond, we are relieved of the duty of weighing the evidence on the question of the amount of assets received. By the plain language and spirit of the contract, the

obligors, in the absence of fraud or mistake, which would vitiate it, could relieve themselves from liability only by showing payment, the bond itself being conclusive evidence of assets with which to meet the debts and legacies of the testator. Whether he would give this form of bond, or the common one prescribed in the preceding section, was entirely discretionary with the executor himself. By electing to give this one, however, he relieved himself of the duty of returning an inventory of the estate, and deprived the court of all control over his management of the property, which, whether much or little, practically became his own to dispose of as he saw fit. The probate court, it is true, could fix a time within which the payment of debts and legacies should be made, and order it done; but beyond this the court could not go, except upon proper application to authorize forcible collection by suit on the bond. In *Jones v. Richardson*, 5 Met., 247, Chief Justice Shaw, speaking of a statute and bond similar to the ones under consideration, said: "The great question in the case is whether the defendant, being residuary legatee, and having given bond, conditioned to pay all the debts and legacies pursuant to the provisions of the Revised Statutes, 663, secs. 3, 4, can object to want of proof of assets; or rather, whether the production of such a bond from the probate office is not conclusive evidence of assets in the hands of the defendant; and we are strongly inclined to the opinion that it is."

And afterwards in *Colwell et al. v. Alger*, 5 Gray, 67, the same learned judge uses this language: "A residuary legatee and executor, who avails himself of the privilege of giving bond conditioned to pay debts and legacies, and thereby exempts himself from the duty of returning an inventory, thereby conclusively admits assets; if he has the slightest doubt that there is suffi-

cient property to pay all debts and legacies he should give bond in common form."

The rule thus clearly stated is doubtless the correct one, and is entirely applicable to the case before us, where the executor, being the residuary legatee, chose to give this form of bond, rather than the one by which he would have been required to make a return under oath of all the property of the testator coming into his hands, and to have accounted to the probate court for the proceeds of the sale thereof.

By both reason and authority we are led to the conclusion that, by a proper construction of the bond in question, it was not necessary to prove assets in the hands of the executor, and consequently that there was no error in this particular. The judgment must be affirmed.

JUDGMENT AFFIRMED.

GREEN & COMPANY, PLAINTIFFS IN ERROR, v. RAYMOND BROTHERS, DEFENDANTS IN ERROR.

1. **Action.** It is only in the exceptional cases of fraud on the part of the debtor, mentioned in sec. 237 of the code of civil procedure, that an action can be properly commenced on a claim before it is due.

2. **Negotiable Instruments:** DAYS OF GRACE. In this state, by statute, all negotiable drafts, whether sight or time, are entitled to three days grace in the time of payment.

3. ———: ACCEPTOR: HIS LIABILITY. The measure of an acceptor's liability is the acceptance itself, construed with reference to the law under which it was given. And where the holder of a draft, payable "ten days after date," took a qualified acceptance extending still further the day of payment, *held*, that the holder of the draft was bound by the terms of such acceptance, and that as between these parties the draft must be

regarded the same as if it had been drawn payable at the time fixed by the acceptance; that such acceptance is entitled to the usual days of grace in the time of payment.

ERROR to the district court of York county. Tried below before POST, J. There is sufficient statement of the case in the opinion.

France & Sedgwick, for plaintiffs in error.

1. The act of accepting a bill of exchange is like the making and delivering of a promissory note; it is the execution of a promissory note, a contract by which the acceptor undertakes to pay the amount mentioned in the bill or in his acceptance to the payee according to the tenor of his acceptance. The mere drawing a bill is no contract with the acceptor. His contract is yet to be made, and when made, the acceptor is to be regarded as the maker of a promissory note running to the payee. Edwards on Bills and Promissory Notes, 405. *Sylvester v. Stapler*, 44 Me., 497. *Myers v. Standart*, 11 Ohio St., 37.

2. An absolute acceptance is an engagement to pay according to the tenor of the bill. And a conditional acceptance is an engagement to pay according to the tenor of the acceptance. Chitty on Bills, 303, 304. Edwards on Bills and Promissory Notes, 419. *Walker v. Atwood*, 11 Mod., 190.

3. If in the payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on the original debt until said bill or note becomes due. *Murray v. Gouverneur*, 2 Johnson's Cases, 438. 1 Espinasse, Rep. 8.

Edward Bates, for defendants in error.

The draft in controversy in this case, upon which suit was brought, was dated January 31st, 1873, for

the sum of $209.87, payable ten days after date; the plaintiffs, by their acceptance, made it payable March 1st, 1878, instead of accepting it according to its tenor and effect. This made the bill due on the 1st day of March, A.D. 1878, without grace, as the three days ran on the bill, according to its tenor and effect, and plaintiff's acceptance of the paper, contrary to the time of payment expressed on the draft, destroyed its negotiability, and it became payable on the 1st of March, the same as demand paper. Chitty on Bills, 9th edition, 286. Gen. Stat., 426.

LAKE, J.

Was the action below prematurely brought? This is the first question, and the principal one, to be answered. It is only in the exceptional cases of fraud on the part of the debtor, mentioned in sec. 237 of the code of civil procedure, Gen. Stat., 564, that an action can be properly commenced on a claim before it is due. This case is not within the exception. It was commenced on the 2d day of March, 1878, to recover upon two alleged causes of action: the *first* for the sum of $55.45, on an account for goods sold and delivered, and the *second* for the sum of $209.87, on a certain draft drawn by the defendants upon the plaintiffs in error, dated January 31, 1878, payable ten days after date to the order of the York Co. Bank, and "accepted payable March 1, 1878."

It appears that, for the account on which the first cause of action was based, a draft had been drawn by Raymond Brothers, and duly accepted by Green & Co. on the 28th of February, 1878, payable to the order of William McWhirter. These drafts both belonged to the drawers thereof, and were resorted to merely as a means of collecting money owing to them from the

drawees for goods sold and delivered. If the drawees were entitled to the usual grace in the time of payment that is accorded to commercial paper generally, then it is clear that the action was prematurely brought, at least as to the larger of these drafts.

By sec. 3, chap. 32, Gen. Stat., 426, it is provided that: "All notes, bonds, or bills made negotiable by this chapter shall be entitled to three days' grace in time of payment," etc. And sec. 1 of the same chapter declares that: "All bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or assigns, shall be negotiable," etc.

The drafts in question are certainly covered by this language. They belong to the class of commercial paper styled inland bills of exchange; they are drawn for "sums of money certain," and are payable to the order of persons named therein.

But it is urged that the larger draft—the one in suit—was shorn of its negotiable character by the qualified terms of acceptance. By this the time of payment was changed from "ten days after date," as drawn, to "March 1, 1878," an extension of some twenty days. This change, however, did not produce the result contended for. The holders of the draft might have refused to receive any other than a general acceptance to pay strictly according to its terms, but having taken this qualified one they are bound by its terms, and must submit to the legal consequences. Story on Bills of Exchange, § 240.

With this sort of acceptance acquiesced in, the draft is, in legal effect, precisely the same as if it had been drawn originally payable on the 1st day of March, 1878, and accepted generally. The measure of the acceptor's liability is the acceptance itself, construed

with reference to the law under which it was given. By this test it seems clear to us that he was entitled to three days' grace from March 1, 1878, in making payment, and consequently that the action as to this draft was prematurely commenced.

As already shown, the first cause of action was on an account for which the smaller draft had been drawn, and duly accepted. This draft, too, was negotiable, and under our statute, as well as by the established doctrine, independently of statute, concerning sight drafts, both in England and in this country, entitled to days of grace in time of payment. Parsons on Notes and Bills, 405, 406. Daniel on Negotiable Instruments, sec. 617. Allowing to this draft the three days of grace, the acceptor was in no default when the suit on the account was commenced. Under these circumstances the question is raised whether Raymond Brothers could maintain an action on the account before the maturity of the acceptance, on offering to surrender it up for cancellation.

This acceptance was an express promise to pay the amount due on the account which it represented. It was a higher evidence of the existing indebtedness, and we think had the effect of suspending the original right of action until it was itself dishonored. The rule applicable here is stated in 2 Parsons on Contracts, 196, where it is illustrated by the case of one taking a promissory note for money due him. "The note is conclusive evidence of an agreement for delay or credit, and no action can be maintained on the original cause of action until the maturity of the note; if, then, the note is not paid, an action may be brought upon the note, or on the original cause of action." This acceptance did not mature until the 3d day of March, and under this rule, the action, having been commenced on the 2d, cannot be maintained. The

judgment must be reversed, and the cause remanded, with direction to dismiss the case without prejudice to a future action.

REVERSED AND REMANDED.

HENRY A. SCHLENCKER, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Laws:** EXCEPTION. In a capital case, the want of an exception will not necessarily deprive the prisoner of his right to a new trial for errors of the court prejudicial to him.
2. ———: INSTRUCTIONS. In the trial of an indictment charging murder in the *first* degree, the statutory distinction in the degrees of criminal homicide must not be lost sight of.
3. ———: DEGREE OF GUILT INFERRED FROM THE FACT OF KILLING ALONE. Where the fact of the killing by means of a deadly weapon is established, without any explanatory circumstances, malice is presumed, and the crime is murder in the second degree.
4. ———: PREMEDITATED MALICE. An instruction that leaves the jury at liberty to presume "premeditated malice" from the fact of "a deliberate intention unlawfully to kill" alone, is erroneous.

THIS was a re-hearing of the case reported ante p. 241, granted upon application of the plaintiff.

O. P. Mason, for plaintiff in error.

The court erred in giving the following instruction to the jury: Sixth instruction—"Every man is presumed to intend and contemplate the ordinary and natural consequences of his own acts. The law presumes deliberate and *premeditated* malice from the deliberate and unnecessary use of a deadly weapon in such manner as naturally tends to destroy human life. The law

presumes a man to be moved and actuated by deliberate and *premeditated* malice, when he deliberately, unlawfully, and unnecessarily uses a deadly weapon on another in such a way as naturally tends to destroy the life of such person." Thus instructing the jury that *deliberate and premeditated* malice was presumed from *deliberate* action alone. Or that deliberation and premeditation were one and the same thing. Or that premeditation is the "unlawful and unnecessary use," etc. For the above language (which ought to be plain) admits of no other meaning in its uncertainty and ambiguity. Malice must be defined to the jury, where malice is one of the ingredients of the crime. *Hodges v. State*, 3 Tex. Ct. of Appeals, 473, and cases cited. And correctly defined. So also when premeditated malice is one of the ingredients of the crime. Premeditation and deliberation are not synonyms. *State v. Wieners*, 66 Mo., 11. The legislature used both words, "deliberate and premeditated." And it is a principle of universal application, too elementary to require citation, that each word in a statute must be given its force and meaning in interpretation.

Jones, J., of Mo., in a review of the Gassert case, says: "To constitute murder in the first degree, these three elements—willfulness, deliberateness, and premeditation, are as necessary as the element of malice" —*i. e.*, there must be premeditated malice as well as deliberate malice. 65 Mo., 352. An unlawful, malicious, willful, and *deliberate* killing is murder in the second degree; but an unlawful, malicious, willful, deliberate, and *premeditated* killing is murder in the first degree. "*Deliberate*, to balance in the mind, to weigh, to consider. *Premeditate*, to think on and resolve in the mind beforehand, to contrive and design previously."—Webster's Dictionary. Intention comprehends willful, but ignores "deliberation and pre-

meditation," each of which are necessary elements to murder in the first degree. One can deliberate without premeditating, but cannot premeditate without deliberating. The latter goes beyond and includes the former.

C. J. Dilworth, Attorney General, for the State.

LAKE, J.

On the re-hearing of this case, our attention was specially directed to certain of the instructions not before particularly complained of, and to which no exception was taken in the court below. This being a capital case, however, the want of an exception does not necessarily deprive the prisoner of his right to a new trial for errors of the court prejudicial to him. *Thompson v. The People*, 4 Neb., 524.

Under the evidence before the jury the only really difficult question for them to settle was that of the degree of the prisoner's guilt, whether it was murder in the *first* or *second* degree, or manslaughter. In respect to this, however, it was of vital importance not to lose sight of this statutory distinction, in giving them the law by which they were to be guided in making up their verdict.

By the 5th instruction the jury were informed that: "It is not necessary in law that the deliberate and premeditated malice should have existed a long time before the killing." So far this was right. But it was immediately followed by this statement of what would answer the requirement of the law in these particulars, viz.: "But it is sufficient in law that the deliberate intention, unlawfully to kill, is shown to exist at the instant of firing the fatal shot."

This last clause is open to the objection that it com-

pletely ignores "premeditation" as an independent element in murder in the first degree; and left the jury to understand that proof of "deliberate intention unlawfully to kill," and this alone, was sufficient evidence of "premeditated malice," and would warrant a conviction for the highest degree of homicide. And this view of the law is re-enforced by the next two instructions, in one of which the jury is told that: "The law presumes deliberate and premeditated malice from the deliberate, unlawful, and unnecessary use of a deadly weapon in such a manner as naturally tends to destroy human life." And in the other that in case the jury should "find beyond a reasonable doubt the defendant shot and killed Florence Booth, as charged in the indictment, the presumption of law is that he was actuated by deliberate and premeditated malice, and it devolves upon the defendant to remove that presumption."

This latter charge, indeed, dispenses with all affirmative evidence both of deliberation and premeditation, and makes the mere fact of killing by means of shooting all that is requisite to establish murder in the first degree. But such is not the law. The rule established by this court in the case of *Preuit v. The People*, 5 Neb. 377, is, that where the fact of killing is established, without any explanatory circumstances, malice is presumed, and the crime is murder in the *second* degree. *Milton v. The State*, 6 Neb., 136. In the case last cited, in which the act of killing by means of a club was undisputed, the judgment was reversed and a new trial ordered on the sole ground of a want of evidence showing a previously formed design on the part of the prisoner to kill the deceased, or, in the language of the statute, "premeditation."

In failing to recognize in these instructions the distinction made by our statute between the two degrees

of murder, we are of opinion error was committed prejudicial to the prisoner, for which he should have a new trial. And it is so ordered.

REVERSED AND REMANDED.

FRED ROOSE AND OTHERS, PLAINTIFFS IN ERROR, V. ELIZA PERKINS AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** JOINDER OF PARTIES. In case of misjoinder of parties defendant, only those improperly joined can raise the objection. But where it appears on the face of a petition that there is a non-joinder of defendants a demurrer will lie on that ground.

2. ———: OVERRULING DEMURRER. Upon overruling a demurrer to a petition, it is not error for the court to require the defendant to answer *instanter*. Particularly so where it does not appear that there is any defense to the action.

3. **Action by Married Woman and Children against Liquor Seller.** A married woman and her minor children, constituting one family, may join in an action for loss of the means of support against those who have furnished intoxicating liquor to the husband and father.

4. **Selling Liquor:** WHO LIABLE FOR DAMAGES. Where a number of persons furnished intoxicating drink to one P., the drunkenness continuing until his death, *Held*, if P. died from the effects of the drunkenness, all those furnishing liquor to produce it were liable.

5. ———: DAMAGES. In estimating damages, the jury may consider the situation of the deceased, his annual earnings, his estate, if any, his habits, health, and reasonable expectation of life. And where he is shown to be a strong, robust man, the Carlisle tables of expectancy may be introduced.

6. ———: ———. The right of support is not limited to the bare necessaries of life. But in no case can the judgment be for a greater sum than the value of the means of support of which the plaintiff has been deprived.

7. ———: ABATEMENT OF ACTION. The death of a husband and father does not cause an action for loss of the means of support to abate, the death being a mere incident, not the principal cause of action.

8. ———: LICENSE NO PROTECTION. A license is no protection to a vendor of intoxicating drinks in an action for loss of the means of support. The statute, in effect, says to every one engaged in the traffic, beware to whom you sell or furnish intoxicating liquor.

9. ———: DAMAGES. Damages are only recoverable for the actual injury sustained. Exemplary damages cannot be recovered.

10. Practice: ARGUMENT OF ATTORNEYS. An attorney should confine his argument before a jury to a legitimate discussion of the issues presented by the case. Statements of fact outside of the evidence, if properly excepted to, may require a reversal of the case.

11. ———: ———. Where the attorneys for the defendants withdrew from the case, *Held*, not error to permit two attorneys to address the jury on behalf of the plaintiff.

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

Lowley & Leese and *Norval Brothers*, for plaintiffs in error.

1. There is a defect of parties plaintiff. The action should have been brought by the legal representatives of the deceased. The *widow* cannot maintain the action. Statutes, 272, secs. 1, 2; p. 853, sec. 577. *Davis v. Justice*, 31 Ohio State, 364. *Weidner v. Rankin*, 26 Ohio State, 522. If it be claimed that the *widow* and *children* can maintain an action, yet they cannot maintain a joint action, for it is a well settled rule of law that a joint action cannot be maintained against a common defendant by two parties, having distinct and separate causes of action, while neither has any interest in the causes of action of the other. *Bort v. Yaw*, 46 Iowa, 323.

2. Instructions numbered one, two, and three were erroneous for the following reasons:

First. The jury were told that plaintiffs could recover for injuries accruing to each individual, and for which each should maintain a separate action, if one is maintainable.

Second. In enunciating as a principle of law that each defendant is liable for the acts of all, without showing a conspiracy.

Third. In directing the jury that all the defendants who sold the liquors were liable, not only for their own acts, but the acts of others who were not parties to the suit.

Fourth. The question of joint liability is one of fact for the jury and not the *court* to determine. 2 Hilliard on Torts, chap. 33, sec. 9, *c.*

The fourth instruction is clearly erroneous for these reasons·

First. In directing the jury that in determining the amount of damages they could take into consideration the *estate* of the deceased. Could the fact, that the deceased was as rich as a Jew or as poor as a church mouse, cut any figure in the case?

Second. In directing the jury to consider the amount of the deceased's earnings. It should have been, the amount he would have *earned* and *applied* to the support of plaintiff.

Third. In telling the jury that the "Tables of Ex pectancy" should be considered by the jury. Damages can not be allowed for injury to means of support in consequence of the intoxication which caused the death of the intoxicated person. The statute does not give such an action, nor could one have been maintained at common law. *Davis v. Justice*, 31 Ohio State, 359. *Mobile Life Ins. Co. v. Brame*, 95 U. S. Rep., 754.

Hart & Edwards, and *McKillip & Page*, for defendants in error.

1. There was no improper joinder of defendants; the motion to strike was therefore properly overruled by the court, and for the further reason that if there was a defect, the remedy was demurrer. *Woolheather v. Risley*, 38 Iowa, 486. *Hackett v. Smelsey*, 77 Ill., 107, 121. *Jewett v. Warshura*, 43 Iowa, 574. Pomeroy on Remedies, 391, 307. *Fountain v. Draper*, 49 Ind., 441. *Stone v. Dickenson*, 5 Allen, 29. *La France v. Krayer*, 42 Ia., 143. *Kearney v. Fitzgerald*, 43 Ia., 580.

2. There is no defect of parties plaintiff. The action is properly brought in the name of the wife or widow for herself and her minor children, and not as personal representative. Demurrer was properly overruled. Gen. Stats. Neb., 853 sec. 576–7 and 581. Gen. Stat. Neb., 272, Secs. 1, 2. *Emory v. Addis*, 71 Ill., 273. *Hackett v. Smelsey*, 77 Ill., 109. *Davis v. Justice*, 31 Ohio, 364. The dissenting opinion and authorities there cited. *Raferty v. Buckman*, 46 Iowa, 195. *Jackson v. Brooking*, 5 Hun., N. Y., 533.

3. The fourth instruction is correct. Where, as in this case, the action is for damages for means of support, the estate may be considered. Suppose the deceased was rich, and in his lifetime drew his means of support for his wife and family from the profits or proceeds of his estate, and he dies possessed of said rich estate, and the profits or proceeds continue to flow in for the support of his family; and suppose again the deceased was poor and the entire means of support were the proceeds of his manual labor, when he dies their entire means of support is gone, and gone forever—is there no difference in the damage to the means of support left to the families of the rich and the poor? What figure does

the Jew and church mouse argument cut here? *Wight v. Devere*, 33 Wis., 570. *Schneider v. Hosier*, 21 Ohio St., 90. *Mulford v. Clewell*, 21 Ohio St., 191. *Woolheather v. Risley*, 38 Ia., 486. *Hackett v. Smelsey*, 77 Ill., 109. *Raferty v. Buckman*, 46 Ia., 200. Field on Damages, 503, Sec. 632.

MAXWELL, CH. J.

Eliza Perkins, one of the defendants herein, brought an action in the district court of Seward county, in her own behalf, and as next friend for her eight minor children, against Charles Hackworth, and the firms of Rummel & Goodbred, Kuhlenkamp & Weber, and Roose Bros. & Wolf, keepers of the various saloons in the town of Seward, to recover the sum of $10,000 for injuries sustained by herself and children by the death of her husband, caused by liquors sold and furnished to him by the saloon keepers above named, whereby the means of support of herself and children were cut off and destroyed. On the trial of the cause a verdict was returned in favor of the plaintiffs for the sum of $3000, upon which judgment was rendered. Roose Bros. & Wolf and Charles Hackworth bring the case into this court by petition in error. The errors assigned will be considered in their order:

First. It is claimed that the motion of the defendants below should have been sustained, requiring the plaintiffs to state in their petition whether defendants were selling under license or not. The motion was properly overruled. This is not an action on the bond, and the statute expressly provides that the person licensed shall pay all damages, etc. The license is no protection from liability. Gen. Stat., 853.

Second. It is urged that there was an improper joinder of defendants and that the motion to strike out should have been sustained.

Section 576 of the criminal code, Gen. Stat., 853, provides that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic," etc. Section 578 provides that "when any person shall become a county or city charge by reason of intemperance, a suit may be instituted by the proper authorities on the bond of any person licensed under this chapter, who may have been in the habit of selling or giving intoxicating liquors to the person so becoming a public charge; *provided*, that the person against whom a judgment may be rendered under the provisions hereof may recover by a similar action a proportionate part of said judgment from any or all persons engaged in said traffic, who have sold or given liquor to such person becoming a public charge, or to any person committing an offense."

Section 579 provides that: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxicated or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed, or said injuries received; and in an action for damages brought by a married woman, or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such persons in quantities sufficient to produce intoxication, or when under the influence of liquor."

It will be perceived that *every person* who has given or sold intoxicating drinks to another in quantities sufficient to produce intoxication, or when under the

influence of liquor, is liable. The motion was therefore properly overruled. But suppose parties defendant are improperly joined, who can take advantage of the misjoinder? The defendant, Hackworth, moves to strike out of the petition the names of all the other defendants because they are improperly joined with *him* in the action. An objection of this kind can be made only by those defendants who are wrongly sued, by separate demurrers to the petition, not on the ground of "defect of parties"—that is available when it appears on the face of the petition (that there is a nonjoinder of parties plaintiff or defendant)—but upon the ground that the facts stated in the petition do not constitute a cause of action against the party demurring. This is not a case where there is a misjoinder of causes of action. It is difficult to perceive how a party properly sued can be injured by the joinder of other parties. When on the trial of a case it appears that parties not liable have been improperly joined, the cause will be dismissed as to them at the plaintiff's costs.

Third. Objection is made that time was not given Kahlenkamp, Hackworth, and Rummell to answer. It appears from the bill of exceptions that the court, upon overruling the demurrer of the defendants to the petition, required the defendants to answer instanter, whereupon the attorneys for the defendants refused to plead further, and announced their intention to appear no further in the case. Such being the case the court did not err in permitting the cause to proceed to trial. Where it is apparent that a defendant has a defense to an action, the court, upon overruling a demurrer, must allow a reasonable time in which to prepare an answer, unless it appears that the demurrer was filed merely for delay, and not with any expectation that it would be sustained. But it nowhere appears that the defendants had any defense to the action, and therefore they

could not be prejudiced by the order of the court. *Mills v. Miller*, 3 Neb., 95.

The *fourth* objection is that the action should have been brought in the name of the legal representative of the deceased, and that the widow and children cannot maintain a joint action. The statute expressly provides that a married woman or other person, whose support legally devolves upon the person disqualified by intemperance from earning the same, may bring an action. Can there be any objection therefore to all those legally entitled to a support joining in an action? The action is for loss of support, and so long as those entitled to support constitute *one* family, they may unite in bringing an action.

The *fifth* objection is that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs. Without recapitulating the facts stated therein, it is sufficient to say that no serious defect in the petition has been pointed out, and in our opinion it states sufficient facts to sustain a judgment.

Objections are made to the first, second, and third instructions, which are as follows:

1. "This is a civil action of the plaintiff against the defendants jointly, for damages which plaintiffs claim to have sustained as the result of drinking intoxicating liquors, which plaintiffs claim to have been sold to and drank by James B. Perkins, the husband of Eliza, and the father of Lewis Perkins *et al.*, which liquors plaintiffs claim were sold by said defendants."

"2. If from the evidence you find that plaintiff's husband bought and drank intoxicating liquors at various places and from various persons, including all the defendants, on the 29th and 30th day of January, 1877, and that he on the 29th day of January became drunken, and that such drunkenness continued until his death on the 30th day of January, and that on

said 30th day of January he died, as the effect of such drunkenness, then all of these defendants are jointly liable."

"3. But if you find from the evidence that the liquors which deceased drank on the 29th did not contribute to produce his death, but that it was produced wholly from the effect of liquors which he drank on the 30th day of January, 1877, then you can give your verdict only against those defendants who, under the evidence, have been shown to have sold such liquors to him that did so contribute to his death."

The question presented by the first instruction has already been decided. This being an action for loss of support, all those legally entitled to such support may unite in the action.

As to the second instruction, it appears from the testimony of a number of witnesses that the deceased, on the 29th of January, 1877, drank at, at least, three of the saloons named, and that he was taken home at night so much intoxicated as to be helpless. It also appears that he returned to Seward the next morning, and drank several times during that day; the question, therefore, whether the drunkenness continued from the 29th to the 30th was properly submitted to the jury.

As to the third instruction, the court did not assume to take the question of joint liability away from the jury, as contended for by the plaintiffs in error, but simply directed their attention to what facts would constitute joint liability. The liability of persons selling intoxicating drinks does not arise, as in cases of conspiracy, from an agreement to enter into an unlawful enterprise, but from the nature of the business. No other business produces such want and destitution. The statute, therefore, makes all who contribute by furnishing liquor to produce intoxication, liable. There is no error, therefore, in the third instruction.

The fourth instruction is as follows: "In determining the amount which plaintiff should recover in this action, if any, you should consider the situation of the deceased—his annual earnings, his habits, his health, and his estate, if any, the profits of his labor, what he would have earned had he lived for the support of those entitled to recover, and the probability or the reasonable expectation of the life of the deceased at the time of the injury, and in determining this you may take into consideration the tables of expectancy which have been introduced in evidence."

It is the duty of a husband to support his wife, and there is a legal obligation on his part to do so, and the same is true as to a father supporting his minor children. This right of support is not necessarily limited to the bare necessaries of life. The condition of the family and also that of the estate are proper to be considered by the jury, not for the purpose of determining how much may be required for the support of the family, but as an element in determining what the amount of injury may be from the loss of support, as in no case in this kind of action can the judgment exceed the value of such support, whatever may be the necessities of the family.

It is claimed that damages cannot be allowed for loss of support when death has been caused by intoxication. In *Davis v. Justice*, 31 Ohio State, 359, it was held that there could be no recovery in such case. Section 7 of the statute of Ohio is as follows: "That every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer, or other person, shall have a right of action in his or her own name,

severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons," etc. The court held that, as at common law, actions for personal injuries abate by death, and cannot be revived or maintained by the executor or by the heir; therefore, as the legislature had not said in terms that an action for loss of the "means of support" should survive, no action could be maintained. The decision is placed on the ground that the action was brought to recover damages for the *death* of the husband, whereas the action was brought for the loss of the means of support, and the death of the husband was a mere incident, which affected the measure of damages. We cannot give our assent to the doctrine laid down in the opinion of the majority of the court in that case. The action being for loss of the means of support, it will lie in any case where the loss is merely temporary, as by disability, or permanent as by death. *Rafferty v. Buckman*, 46 Iowa, 195. *Hackett v. Smelsley*, 77 Ill., 109.

The Carlisle tables of expectancy were properly admitted. The deceased is shown to have been a robust, healthy man, who, but for the use of intoxicating liquor, appears to have had the ordinary prospects of life. The case differs in that regard from that of *Rafferty v. Buckman*, 46 Iowa, 200. But as the plaintiffs in error made no objection in the court below to them, the objection is unavailing in this court.

The defendants in the court below requested the following instruction:

"1. The plaintiffs cannot recover in this action unless the liquors were sold, furnished, or given in violation of the license laws of the state of Nebraska. And it is incumbent upon the plaintiffs to prove that fact."

This instruction was properly refused. A license is

no protection whatever in an action of this kind. The statute in effect says to every one engaged in the traffic: "Beware to whom you sell or furnish intoxicating liquor."

The defendants also asked the following instruction: "2. The plaintiffs are not entitled to exemplary damages," which the court refused to give, to which the defendants excepted.

This instruction should have been given. Damages are given as a compensation, recompense, or satisfaction to a plaintiff for an injury actually received by him from the defendant. They should be equal in amount to the injury sustained; but upon what principle can they be given in excess of that amount? Where damages are awarded for an injury, they are compensation therefor, so far as money can compensate for the injury. In law the party injured, upon being allowed this compensation, has no further claim upon the defendant for that injury; therefore he is not entitled to recover more. If it be said that such damages are given as a punishment, it may be answered that the state inflicts punishment, not individuals; as between individuals, courts enforce rights. The law protects every one in the enjoyment of his property, and it cannot be taken from him under the pretext of punishment, and given to another. The effect ordinarily of instructing a jury that they may find exemplary damages is to say to them that, in estimating damages they need be governed by no rules, be bound by no oath, and that they may return a verdict for such sum, not exceeding the amount claimed, as, according to their whim or caprice, they may deem expedient, without regard to the amount of the injury. The rule adopted by this court in *Boyer v. Barr*, 8 Neb., 68, is just and equitable and more satisfactory, and to that we adhere.

It is claimed that the attorneys for the plaintiffs were permitted to go outside of the evidence to make certain statements of fact to the jury during their argument. As was said in *Cropsey v. Averill*, 8 Neb., 160, this statement, if true, cannot be too severely censured, and, if properly presented, would be good ground for the reversal of the judgment. It is the duty of the court to confine counsel within the bounds of legitimate discussion, if its attention is called to the matter. But so far as appears no objection was made in the court below to the statements of counsel, and the objection cannot be made here for the first time.

The last objection of the plaintiffs in error is that attorneys for the plaintiff in the court below were permitted to re-argue the case to the jury. It appears that both attorneys for the plaintiffs were permitted to address the jury, the defendants' attorneys having withdrawn from the case. This was a matter resting in the discretion of the court, and was not, so far as appears, prejudicial to the defendants. The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

GILBERT B. SCOFIELD AND MARY SCOFIELD, PLAINTIFFS IN ERROR, V. THE STATE NATIONAL BANK OF LINCOLN, AND OTHERS, DEFENDANTS IN ERROR.

1. **Practice:** STRIKING OUT DEFENSES. Matter constituting a defense to an action will not be stricken out of an answer, on motion, as "irrelevant."

2. ———: ———. Allegations in an answer which raise an issue of fact cannot be stricken out upon the ground that they are untrue as shown by the records of the court.

3. **Pleading:** NEW MATTER IN ANSWER. Every allegation of new matter in an answer not denied by the reply, for the purposes of the action, must be taken as true.

4. **Assignment of Note by State Bank to National Bank.** Where a note secured by mortgage on real estate was assigned by a state bank to a national bank, organized as a successor of the state bank, *Held*, that the national bank could maintain an action to foreclose the same.

5. **Injunction:** PETITION TO ENJOIN JUDGMENT. A petition to enjoin a judgment must set forth facts from which it is made to appear that it is against conscience to permit it to be enforced; and also that the plaintiffs were prevented from making their defense by accident, surprise, mistake, or by fraud of the adverse party, and that the plaintiffs were not guilty of neglect in not making their defense.

ERROR to the district court for Otoe county. Tried below before GASLIN, J., sitting in that county. The case is fully stated in the opinion.

G. B. Scofield, for plaintiffs in error.

1. Corporations have only such powers as are specially given by their charters, and national banks have no power to take deeds of trust or mortgages on real estate as security, and have no power not conferred by Congress. An injunction will be granted to prevent a sale by the bank of such mortgaged property. *Matthews v. Skinker*, 62 Mo., 329. *Beaty v. Knowles*, 4 Pet., 152. *Wiley v. First Nat'l Bank Brattleboro*, 47 Vt., 552. *Fowler v. Scully*, 72 Penn. State, 468. *McMaster v. Reid*, 1 Grant cases, Penn., 36. It will be seen from these authorities, from both the state and federal courts, that the "State National Bank of Lincoln" had no right to purchase the note and mortgage described in the record, and that any pretended purchase would be a nullity; hence, having acquired no title to either, a decree of foreclosure would be void, there being no foundation on which an action could be based, and this court

will prohibit by injunction any attempt to enforce such a decree. The defendant admits by its motion the allegations in the petition to be true. If the act of Congress, under which the defendants were organized, is the law governing the powers and duties of national banks, and as expounded by the courts, then the decree of foreclosure was *fraudulent*, illegal, and void, and a court of equity has power to grant relief against such a judgment or decree. *Dobson v. Pearce*, 12 N. Y., 156. *Scott v. Shreave*, 12 Wheat., 605.

2. A court of equity has always, in the exercise of its admitted powers of jurisdiction, had power to grant relief against judgments and decrees obtained by fraud or misrepresentation. *M'Donald v. Neilson*, 2 Cow., 139, 193. *Reigal v. Wood*, 1 Johns. Ch., 402. *Dilly v. Barnard*, 8 Gill & Johns., 170. *Carrington v. Holabaird*, 17 Conn., 530. *Duncan v. Lyon*, 3 John., 352.

E. F. Warren, for defendants in error.

1. *The petition* shows that a decree had been rendered between the parties in a former suit, and it is alleged, in effect, that the court committed errors of law upon the hearing, and in entering judgment. If so, it should have been reversed in an appropriate proceeding. This is not such a proceeding but an independent action. A final decree in chancery is as conclusive as a judgment at law. Sibbault's Case, 12 Pet., 492. *Kelsey v. Murphy*, 26 Penn. State, 78. *Bank of U. S. v. Beverly*, 1 How., 148. *Low v. Mussey*, 41 Vt., 393. *Rector v. Rotton*, 3 Neb., 171. The questions of the validity of the mortgage, the right of the bank to foreclose the same, the amount due thereon, were directly before the trial court, and decided on the trial. The plaintiffs are estopped by that decree, and cannot be heard *de novo*. *Jackson v. Wood*, 8 Wend., 9. *Au-*

rora City v. West, 7 Wall., 82. *Loring v. Mansfield*, 17 Mass., 394. *Carey v. Gale*, 13 Vt., 639. *Davis v. Talcott*, 12 N. Y., 184. *Woodgate v. Fleet*, 44 N. Y., 1.

2. There are some cases that hold that a national bank can not take a mortgage to secure a present loan; that it is *ultra vires*, and renders the mortgage void. *Union National Bank v. Mathews*, 62 Mo., 329. *Fridley v. Bowen*, 87 Ill., 151, and others. But the doctrine in these cases has been reversed in *National Bank v. Mathews*, 8 Otto, 621. The supreme court of the United States have reversed the judgment of the supreme court of Missouri in the case of *Bank v. Mathews*, and declared the law to be otherwise; so the question is settled. The court say that even if it were *ultra vires* that defense could not be taken advantage of by private parties, a judgment of ouster and dissolution being the proper punishment for such a violation by the bank of its charter.

MAXWELL, CH. J.

In the year 1878, the plaintiffs filed their petition in the district court of Otoe county, setting forth in substance, that on or about the 5th day of August, 1871, Gilbert B. Scofield executed to the State Bank of Nebraska a promissory note for the sum of $600, due January 1, 1872, and to secure the payment of the same himself and wife executed a mortgage upon certain real estate in Nebraska City. That on the 16th day of November, 1871, said state bank was organized as a national bank, under the provisions of the act of Congress, approved June 3, 1864, and the amendments thereto. And that under and by virtue of said act of Congress, the State National Bank was prohibited from purchasing, dealing, or speculating in mortgage securities of any character, or promissory notes, unless

taken to secure a debt contracted by the bank, or to prevent a loss upon a loan made by it after its organization. That about the first day of January, 1873, the State National Bank, through its officers, had assigned to it the note and mortgage hereinbefore mentioned. That said purchase and assignment were illegal and void, so far as these plaintiffs are concerned, and that the plaintiffs are not now and never have been indebted to the State National Bank of Lincoln. That about the 3d day of April, 1875, the State National Bank of Lincoln commenced proceedings in the district court of Otoe county to foreclose said mortgage, and that on or about the eighth day of December, 1876, a decree of foreclosure was rendered by the court in said cause, and the plaintiffs allege that the proceedings of foreclosure and the decree are null and void. That the State National Bank was not the owner of said note and mortgage and had no lawful right to bring suit thereon. That the State Bank of Nebraska, before the pretended assignment of the note and mortgage, was indebted to the plaintiff, Gilbert B. Scofield, in the sum of $833, which should have been applied as payment upon said note and mortgage. That upon said illegal and void foreclosure the State National Bank has obtained an order of sale, and is about to sell said mortgaged premises, etc. The plaintiffs pray for an order restraining the defendants from proceeding under said order of sale, and that said decree of foreclosure may be set aside and held for naught, etc.

The defendants in their answer set up the decree of foreclosure, and allege that the plaintiffs appeared in that action, and plead as a defense to the same the matters set up in the petition in this case, together with the set-off of $833, and that said matters have been fully adjudicated and determined. The plaintiffs filed no reply to the answer, but filed a motion for

judgment on the pleadings, "and to strike out of the answer of the defendants all that portion after the word 'mentioned,' in the 15th line of the answer, because the statements are irrelevant, false, and untrue as appears from the records of this court." The motion was overruled and the case dismissed.

Did the court err in overruling the motion and dismissing the case? We will first consider the motion to strike out.

The first ground assigned is because the statements are irrelevant. The word "irrelevant" signifies "is not pertinent," or applicable. Matter is said to be irrelevant in a pleading which has no bearing upon the subject matter of the controversy, and cannot affect the decision of the court. But matter which constitutes a defense to an action is not irrelevant and should not be stricken out. The motion in this case includes matter which, if true, constitutes a defense to the action, and was properly overruled.

The second ground is that the statements are untrue. Can this question be determined on a mere motion? We think not. Where an answer raises an issue of fact, the question of its truth or falsity must be determined in some other manner than by a motion to strike out portions of it upon the ground that its statements are untrue. The motion to strike out upon this ground was therefore properly overruled.

Were the plaintiffs entitled to judgment on the pleadings? Section 134 of the code of civil procedure provides that "every material allegation of the petition not controverted by the answer, and every material allegation of new matter in the answer not controverted by the reply, shall, for the purposes of the action, be taken as true." Gen. Stat., 545. No reply being filed, the allegations of the answer, that a decree of foreclosure was rendered in a former action between the said

parties, in which the plaintiffs appeared and contested the very matters now set up in their petition, and that upon the trial of that case the court found the issues in favor of the plaintiffs in that case, and against the plaintiff in this, are admitted to be true. That judgment may have been erroneous, but it was not void; and it was valid and binding until modified or reversed.

The plaintiffs lay much stress upon the act of Congress approved June 3, 1864, contending that a national bank is absolutely prohibited from purchasing notes secured by mortgage.

Section 28 of that act provides that: "It shall be lawful for any such association to purchase, hold, and convey real estate as follows:

"*First.* Such as shall be necessary for its immediate accommodation in the transaction of its business.

"*Second.* Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"*Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"*Fourth.* Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or it shall purchase to secure debts due to said association.

"Such associations shall not purchase or hold real estate in any other case, or for any other purpose than as specified in this section; nor shall it hold the possession of any real estate under mortgage, or hold the possession of any real estate, purchased to secure debts due to it, for a longer period than five years."

Section 46 provides "that any bank incorporated by special law, or any banking institution organized under a general law of any state, may, by authority of this act, become a national association under its provisions by the name prescribed in its organization certificate; and

in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act. * * Provided however, that no such association shall have a less capital than the amount prescribed for banking associations under this act."

It will be seen that the statute expressly provides that a state bank may organize as a national bank. That is, the national bank may become the successor of the state bank. In such case what would become of the assets of the state bank? The statute evidently intends that they shall be turned over to the new organization. If it were not so, no advantage would be gained by permitting a state bank to organize as a national bank. If the state bank was required to close up its own affairs, and collect its own notes, before the new organization could be perfected, the provisions of section 46 would be meaningless. In no case, however, can the amount of paid up capital be less than is required by the statute. But suppose there was no authority under the statute to transfer the assets of the state bank to the state national bank, how will it avail the plaintiffs in this action? That the State National Bank was the owner of the note and mortgage in question at the time the decree of foreclosure was rendered, there is no doubt. The mortgage was the valid contract of the plaintiffs, made as security for the payment of money received by them. Did this contract become void by being transferred to the bank? If so, upon what principle? The statute does not declare such transfers void, and in our opinion the bank

may maintain an action to foreclosure such mortgage. *National Bank v. Matthews*, 8 Otto, 621. The motion for judgment on the pleadings was therefore properly overruled.

Does the petition state a cause of action? To authorize the interference of a court of equity to enjoin a judgment it must appear that it is against conscience to permit it to be enforced, and also that the plaintiffs were prevented from making their defense by accident, mistake, surprise, or by fraud of the adverse party, and that they were not guilty of neglect in not making their defense. *Young v. Morgan*, *ante* p. 169. The petition entirely fails to state any facts of this character, and we cannot retry the foreclosure case in this proceeding. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

DWIGHT J. MCCANN, PLAINTIFF IN ERROR, V. THE BOARD OF COUNTY COMMISSIONERS OF OTOE COUNTY, DEFENDANT IN ERROR.

1. **Taxes:** ACTION AGAINST COUNTY. Where certain certificates of illegal tax sales were surrendered to the county commissioners, the illegality of the sales being admitted, but the particular causes not being shown, *held* that the purchaser could recover from the county the amount actually paid by him upon said certificates, with 12 per cent interest.

2. **Public Roads:** POWER OF COUNTY COMMISSIONERS. County commissioners can only locate public roads and erect bridges thereon in the manner provided by law. The county commissioners of Otoe county made a contract with McCann to purchase a private bridge over the Nemaha river, and arbitrators were selected by the parties to appraise the same, and damages for right of way across McCann's land. *Held*, that the award was a nullity.

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

E. F. Warren, for plaintiff in error.

1. Plaintiff in error had, in 1868, in order to help the county authorities and raise money for the treasury, purchased at tax sale a large number of tracts of land, paid the amount of tax therefor into the treasury, and taken certificates of sale thereon. Many of these sales were void by reason of the fact that the taxes alleged to be delinquent had been paid by the owners of the lands, who produced receipts, and for other fatal defects. By Sec. 71, Chap. 66, p. 924, Gen. Stat., the county is required "to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been righfully sold." This is but declaratory of the common law liability to refund in all such cases, because an action for money received to plaintiff's use would lie. *Norten v. Supervisors*, 13 Wis., 612. *Cobb v. Supervisors*, 18 Wis., 247. *Hutchinson v. Supervisors*, 26 Wis., 402. *Warner v. Board*, 19 Wis., 611. *Kellogg v. Board*, 42 Wis., 97. *Barden v. Columbia Co.*, 33 Wis., 445. *Wolf v. Sheyboygan*, 29 Wis., 82. *Nicodemus v. Saginaw*, 25 Mich., 456. *Board v. Manney*, 56 Ill., 160. *Hill v. Board*, 12 N. Y., 52. *Chapman v. Brooklyn*, 40 N. Y., 372. *Gillette v. Hartford*, 31 Conn., 356. *Slack v. Norwich*, 33 Vt., 818–23. *Preston v. Boston*, 12 Pick., 7. *Torrey v. Millsbury*, 21 Pick., 64. *Thayer v. Boston*, 19 Pick., 511. *Wright v. Boston*, 9 Cush., 233–241. *Glass Co. v. Boston*, 4 Met., 181. *Dow v. Sudbury*, 5 Met., 73. *Jayner v. School Dist.*, 3 Cush., 567. *Howe v. Boston*, 7 Cush., 273. *Rogers v. Greenbush*, 58 Me., 390. *Erskin v. Van Arsdale*, 15 Wall., 75. *Bank v. New York*, 43 N. Y., 184.

2. No demand is necessary before suit, nor need the claim be presented for allowance and audit to the board. *Newman v. Board*, 45 N. Y., 676. *People v. Supervisors*, 11 N. Y., 574. *Howell v. Buffalo*, 15 N. Y., 512. *Look v. Industry*, 51 Me., 375. *Pierce v. Benjamin*, 14 Pick., 356.

3. A claim for moneys paid into the county treasury for said tax sales is not within the jurisdiction of the board of commissioners—*Stringham v. Board*, 24 Wis., 512—and therefore this action does not come within the principle of the case of *Brown v. Otoe Co.*, 6 Neb., 112. See Dillon Mun. Corp., § 951.

4. The payment by the county for repairs upon McCann's bridge was clearly within their jurisdiction, and the contract to purchase the same was equally so, if in their discretion it was wiser and better so to do, than to build others. There is nothing in the transaction, as alleged in the answer, contrary to public policy. To deny to McCann payment, therefore, is to use, by the public, private property until it is destroyed, and then refuse compensation for the same. It is a species of confiscation.

Covell & Ransom for defendants in error.

1. The county commissioners could not audit or allow any claim in favor of McCann for invalid tax certificates, so as to bind the county, as is set up in the second count of his answer, because it was not within their jurisdiction. It was a claim for money paid for tax certificates alleged to have been invalid, and for county warrants paid for the same by McCann. Being such, it was no part of the legitimate expenditures of the county, and was not such an account as was "chargeable against the county," and only such were they authorized to examine, audit, and allow. *String-*

ham v. Board, 24 Wis., 594. *Marsh v. Board*, 42 Wis., 355. *Newman v. Supervisors*, 45 N. Y., 689. *People v. Supervisors*, 11 N. Y., 574. There would not have been any possible ground for a recovery by McCann against the county on his claim presented to the county board, concerning which their illegal order was made, in a suit therefor, unless it be given by sec. 71 Gen. Stat., 924.

We contend that not even under this statute has a tax purchaser any right of recovery against the county. A tax purchaser is one who voluntarily pays the taxes on another's land by purchasing same at tax sale, and not by compulsion, and therefore he cannot recover the amount so paid from the municipality receiving it. *Smith v. Redfield*, 27 Me., 145. *N. Y. R. R. Co. v. Marsh*, 12 N. Y., 308. *Walker v. St. Louis*, 15 Mo., 563. *Hospital v. Philadelphia Co.*, 24 Penn. St., 229. *Taylor v. Board of Health*, 31 Penn. St., 73. *Barrett v. Cambridge*, 10 Allen, 48. *Corkel v. Maxwell*, 3 Blatch., 413. *Phillips v. Jefferson Co.*, 5 Kan., 412. *Waubunsee Co. v. Walker*, 8 Kan., 431. *Christy's Administrator v. St. Louis*, 20 Mo., 143. *State of Wisconsin v. Hartman*, C. L. Jour., March 21, 1879, p. 236.

2. The board of county commissioners had no power under the statutes to make any such contract with D. J. McCann with respect to the purchase of a bridge of him, as is sought to be pleaded in said third count of his answer. No power is given them by chap. 9 of the revised statutes, 1866, entitled "County Commissioners and County Clerks," nor by chap. 47 of same statutes, entitled "Roads"—which were the statutes in force at the time of the alleged purchase—to make any such purchase, or attempt to make any such contract as is alleged; even if they had power to make the purchase of said bridge, they could not delegate their powers to third persons as arbitrators to fix

a price for the bridge, so as to bind the county by the award that might be made by them. The board of county commissioners can exercise no powers except such as are especially granted; and the grant must be strictly construed. There is no authority of law for the county commissioners to bind the county in the manner contemplated. *Stewart v. Otoe County*, 2 Neb., 177. *County of St. Louis v. Cleland*, 4 Mo., 84. *Hoover v. Hoover*, 5 Blackf., 182. *White v. Conover*, 5 Blackf., 462. *Murphy v. Napa Co.*, 20 Cal., 497. *Rhode v. Davis*, 2 Cart. (Ind.), 53. *Frees v. Ford*, 2 Seld. (N. Y.), 176.

MAXWELL, CH. J.

In April, 1876, the defendants in error brought an action against the plaintiff in error in the district court of Otoe county upon the following instrument:

"NEBRASKA CITY, Neb., Nov. 22, 1871.

"On demand we promise to pay the treasurer of Otoe county four hundred and sixty-three dollars and twenty-nine cents, in county general fund warrants.

"$463.29.

"D. J. MCCANN & Co."

The petition alleges that, although the instrument is signed in the partnership name, yet it is the individual obligation of D. J. McCann, and this is not denied.

To this petition the plaintiff in error filed an answer, admitting the execution of the allegation above set forth, but denying that Otoe county was the owner of the same.

As a second defense he alleges that on or about the 8th day of September, 1868, he purchased from the treasurer of Otoe county a large amount of lands in said county for delinquent taxes, and paid the treasu-

rer in full therefor in cash and warrants, and received certificates of sale of the lands so purchased; that among said certificates were a large number that were illegal, and not collectible for various reasons; and on or about the 11th of September, 1873, he compromised with the board of county commissioners of said county, by which it was agreed that the commissioners should pay him for such worthless certificates the amount paid by him into the treasury of the county therefor, with interest at 12 per cent thereon upon the surrender of such certificates; that thereupon he surrendered certificates to the amount of $429.60, and received payment therefor; and in November following he surrendered other certificates, amounting with interest to the sum of $1627.20, upon which he was paid the sum of $598.03; that he was to have credit on the books of the treasurer for the amount remaining unpaid, amounting to the sum $1039.34.

As a third defense, he alleges that in the year 1872 he owned the land upon both banks of the Nemaha river at a certain point, and had erected at that place a bridge across said river for his own use; that during that year several freshets carried out the bridges across said river on the county roads, but that his was left undisturbed; that to preserve communication across the river the county commissioners entered into a contract with him for the use of said bridge by the public, and paid him therefor in one season the sum of $700; that afterwards certain arbitrators were chosen by the parties, and the value of said bridge and the right of way were appraised at the sum of $1300, no part of which has been paid.

To this count of the answer the defendants in error demurred upon the ground that the facts stated therein were not sufficient to constitute a defense. The demurrer was sustained, to which the plaintiff in error

excepted. On the trial of the cause the court found the issues in favor of the plaintiff in error and dismissed the case, but denied the plaintiff in error any affirmative relief. He brings the cause into this court by petition in error.

Section 70 of the revenue law (Gen Stat., 924) provides that: "When, by mistake or wrongful act of the treasurer or other officer, land has been sold contrary to the provisions of this act, the county is to save the purchaser harmless by paying him the amount of principal and interest to which he would have been entitled had the land been rightfully sold, and the treasurer or other officer, and their sureties, shall be liable for the amount on their bonds to the county, or the purchasers may recover the amount directly from the treasurer or other officer making the mistake or error."

No question is raised as to the illegality of the sales, nor as to the propriety of surrendering the certificates. Of the cause of the illegality we are not informed, except by general statements. But as no question is raised upon that point, it appears to be sufficient to hold the county liable to the purchaser. The plaintiff in error has evidently brought himself within the provisions of section 70 of the revenue law, and is entitled to recover the amount actually paid by him for the purchase of the lands described in the certificates so surrendered, less the amount already paid, together with twelve per cent interest on the amount of principal remaining unpaid. And as the evidence is before the court, and there being no dispute as to the material facts, the clerk is directed to ascertain the amount due the plaintiff in error upon said certificates, and judgment will be rendered in this court for that amount. The question of the liability of the treasurer or other officer making the mistake or error is not, under the issue, involved in the case.

The demurrer to the third count of the answer was properly sustained. Whatever powers county commissioners may have to open temporary lines of communication in case of the sudden destruction of public bridges and culverts they cannot establish public roads in this manner. Public roads must be located and bridges erected thereon in the manner prescribed in the statute. *Robinson v. Mathwick*, 5 Neb., 252. *State, ex rel. Sims, v. Otoe Co.*, 6 Id., 129.

County commissioners can only exercise such powers as are expressly granted, or are incidentally necessary for the purpose of carrying the same into effect. *Stewart v. Otoe Co.*, 2 Neb., 177. *The S. C. & P. R. R. v. Washington Co.*, 3 Id., 42. If a private bridge is desired for the use of the public, the statute points out the mode of procedure by the location of a public road. And it also provides the mode of assessing damages, and this provision is exclusive. The award of the arbitrators is therefore a nullity. The judgment of the district court is reversed, and judgment will be entered in this court in conformity with this opinion.

JUDGMENT ACCORDINGLY.

SCHOOL DISTRICT NUMBER 9 OF HAMILTON COUNTY, PLAINTIFF IN ERROR, V. SCHOOL DISTRICT NUMBER 6 OF HAMILTON COUNTY, DEFENDANT IN ERROR.

1. **School Taxes.** Certain school taxes were voted by school district No. 6 of Hamilton county, while comprising three townships of land. Soon after said taxes were voted, and before the levy of the same, two and one-half townships of land were detached from said district, and formed into school district No. 9. *Held*, That the taxes thus voted should be levied upon district No. 6 as it existed at the time of the levy, and not as it existed at the time they were voted.

2. ———: ACTION. Where the taxes thus voted were collected from all the territory comprising district No. 6 at the time the vote was taken, the money being paid to No. 6, *held*, that district No. 9 could maintain an action for the amount collected in its territory. And for the purpose of doing complete justice and ending the litigation, all the districts since formed in the original territory of 9 will be permitted to join as plaintiffs and share in the proceeds.

ERROR to the district court of Hamilton county. Tried below before POST, J. The facts appear in the opinion.

A. W. Agee and *M. H. Sessions*, for plaintiff in error.

1. The voting of a tax by school district No. 6, on the first day of April, 1872, created no lien or debt upon the district; that could only be done by virtue of the assessment and levy which were to follow in July, and no levy and assessment could then be made for district No. 6, except upon the territory of which it was composed at the time the same was made, the debt

NOTE.—*Semble*, that if the records of a school district fail to show that a tax voted is one which they are authorized by law to levy, its collection cannot be enforced. But a failure to specify on the tax duplicate all the uses to which the taxes are to be applied will not invalidate the levy. The several items may properly be included under the head of "school district tax." *B. & M. R. R. v. Lancaster County*, 4 Neb., 294. Where, upon a division of a school district, it appeared that there was no finding or determination whatever by the county superintendent as to the property retained by the old district out of which the new one was formed, *held*, that his certificate to the county clerk, stating the amount of tax to be levied on the old district to be paid to the new, when collected, was a nullity. *Ratcliff v. Faris*, 6 Neb., 539. 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 district comprising four sections was primarily liable for the payment of the bonds, and that the new districts formed out of the territory of the old were not required to report to the county clerk the amount due on such bonds. *State v. School District*, 8 Neb., 92.—REP.

being fixed by the assessment and not the vote. *Waldron v. Lee*, 5 Pick., 323. *Inglee v. Bosworth*, 5 Pick., 498. *Wells v. Smythe*, 55 Penn. St., 159. *Whittemore v. Smith*, 17 Mass., 347.

2. The voting of a tax is not a grant of money; it is simply a resolve to raise money, and may be rescinded by a vote at any time before the assessment. *Pond v. Negus*, 3 Mass., 230.

3. The result is, that a district voting to raise a tax should be composed of the same limits or territory when the tax is assessed that it was when it was voted —if it is not, it is a new or different district, and the making of it a new or different district, by the changing of its boundaries, annuls the vote to raise the tax. *Richards v. Dagget*, 4 Mass., 534.

4. There were, on and after April 9th, two separate and independent districts, and if the tax payers of either one or both of said districts saw fit to impose upon themselves the burden of paying the taxes upon the same basis that they were voted, to-wit: 15 mills, they have the right to do so, and the money when so paid in would belong to each district respectively. When the money was paid into the county treasury as taxes upon the territory in district No. 9, school district No. 6 had no more right to an interest in that money than district No. 9 had to the money paid in as taxes upon territory in district No. 6.

E. J. Hainer and *George B. France*, for defendant in error.

1. Where a corporation is divided and a part thereof is set off and formed into a new corporation, the remaining part of the original corporation, in the absence of statute or agreement to the contrary, retains all the property, powers, rights, and privileges, and remains

subject to all its obligations and duties. We submit that this unquestioned rule of law comprehends in its terms a tax which has been duly apportioned, and the amount of which has become fixed, and this although it remains for certain ministerial officers to perform duties imposed by statute, in relation to properly placing this tax on record. *Town of Depere v. Town of Bellvue*, 11 American Reports, 602, and cases cited.

2. Where, by a change of boundary or by a division, made after the assessors of the territory set off have made their returns and the time for making assessment has passed, the county or subdivision from which such territory is detached, and not that to which it is transferred, is entitled to collect and retain the taxes for that year raised from such transferred territory. *Board of Com'rs Morgan Co. v. Board of Com'rs Hendricks Co.*, 32 Ind., 234. *Moss v. Shear*, 25 Cal., 38. *Harman v. Inhabitants of New Marlborough*, 9 Cush., 525. If the court should, however, hold that the division of the district annulled the vote, and that the tax was illegally collected, we contend that the plaintiff cannot recover, for it has been decided in analogous cases that a county which has illegally collected taxes in another is liable for the money to the individuals from whom it was collected, and not to the latter county itself. *Grant Co. v. Delaware Co.*, 4 Blackf., 256. *Gailor v. Herrick*, 42 Barb., 84. *Town of Gallatin v. Locks*, 21 Barb., 579.

MAXWELL, CH. J.

On the fourteenth day of February, 1872, school district No. 6, of Hamilton county, was organized and included the east half of township ten north, range six west of 6th P.M., and on the twenty-seventh day of March of that year its boundaries were enlarged so

as to include all of townships ten in ranges six, seven, and eight west of the 6th P.M.

On the first Monday of April of that year an election for officers of said district was held, and a tax of ten mills on the dollar of taxable property in the district was voted for the purpose of building a schoolhouse in said district, and also a tax of five mills on the dollar for incidental expenses and the payment of teachers' wages.

On the ninth day of April of that year school district No. 9 was formed, comprising the following territory, viz.: The west half of township ten, range six, and all of townships ten, ranges seven and eight west of 6th P.M. The taxes voted by No. 6 on the first Monday of April, 1872, were levied upon all the territory comprising said district at the time of said election.

In 1875 the Union Pacific Railroad Company, which owned a large quantity of land in district No. 9, paid into the treasury of Hamilton county more than $1,000 of the school tax thus voted by district No. 6 and levied upon its lands in district No. 9. This money was afterwards paid to district No. 6. The plaintiff brings this action to recover the money. On the trial of the cause the court found in favor of the defendant and dismissed the cause. The plaintiff brings the case into this court by petition in error.

Here was a school district, at the time of this election, eighteen miles in length and six miles in width, formed apparently for the purpose of raising a large amount of taxes from the owners of real estate therein, as two and one-half townships of land were added to the district but a few days before the election referred to, and detached therefrom a few days afterwards and formed into district No. 9.

The statute provides that each organized county

shall be divided by the county superintendent into as many school districts as may from time to time be found necessary. Gen. Stat., 961. A school district, being formed for the purpose of affording an education to all the children of school age within its boundaries, is, or should be, limited in extent by the distances that scholars are able to attend school. No satisfactory reason can be given for including lands in a school district so remote from the school that it is impossible for those residing on such lands to attend. It is imposing a burden upon the owners of such property from which they derive no benefit whatever.

The question of the formation of new districts is necessarily left to some extent to the discretion of the county superintendent; yet, if possible, districts should be so formed as not to impose the burden of taxation for school purposes upon lands that in no event can derive a benefit from the erection of a school-house, and maintenance of a school therein.

Section 55 of the school law, provides that, "said school board shall, between the first Monday in June and the third Monday in June in each year, make out and deliver to the county clerk of each county, in which any part of the district is situated, a report in writing under their hands of all taxes voted by the district during the preceding year, and of all taxes which said board is authorized to impose, to be levied on the taxable property of the district, and to be collected by the county treasurer at the same time and in the same manner as state and county taxes are collected, to be paid over to the treasurer of the proper district, on the order of the director, countersigned by the moderator of said district." Gen. Stat., 970.

The report is to be delivered between the first and third Mondays in June in each year, and the taxes voted are to be levied upon the taxable property of

the district. On the first Monday in July in each year the county commissioners are required to meet at the county seat and levy taxes for the current year, and school taxes are levied at this time. Gen. Stat., 909. Now upon what property shall these school taxes be levied? Most certainly upon the property of the district as it exists at the time the levy is made. The levy has no extra territorial effect. It is confined to the particular school district voting the taxes. It is intended that, with the aid derived from the state, each school district shall be self supporting; but if the levy of taxes can be extended over the territory detached after the taxes are voted, the territory thus detached, having been formed into a new district, is compelled not only to support its own school, but to aid in supporting the school of another district. Each district being thus required to raise its own taxes, school district No. 6 has no interest whatever in the money in question. This money was raised upon the taxable property of district No. 9, for school purposes, and it should be applied in the district to the purposes for which it was raised. District No. 9 has therefore an equitable right to the money in question.

Our attention is called to the case of *Morgan Co. v. Hendricks Co.*, 32 Ind., 235. In that case a portion of Morgan county was attached to Hendricks county after the assessments were made. The court held in substance that under the statute the lien for taxes had attached at the time of the division, and that Morgan county was entitled to the taxes. The decision appears to rest entirely upon the construction given to the statute. And the same may be said of the case of *Harmon v. The Inhabitants of New Marlborough*, 9 Cush., 525.

In *Moss v. Shear*, 25 Cal., 38, certain lands were assessed in San Mateo county, and were sold by the tax

collector of that county, and a deed made by him. Before the *sale* the boundaries of the county were changed and the lands in question added to the county of San Francisco. It was held that the change in the boundaries did not divest the court of the power to sell the land and make the deed.

Whether the case cited from Indiana is applicable to counties in this state or not, it is unnecessary to determine, but it cannot apply to school districts without palpable injustice. While as between vendor and vendee, and perhaps for some other purposes, taxes attach as a lien upon real estate on the first day of March of each year, and all taxes in this state, when levied, relate back to that period, yet as between school districts, school taxes are to be levied on the territory of each district as it exists at the time the levy is made.

Section 7 of the school law provides that when a new district is formed in whole or in part from one possessed of a school-house or other property, the county superintendent shall ascertain and determine the amount due such new district from the district or districts out of which it may have been in whole or in part formed, etc.

Section 8 provides for imposing a tax for the payment of the amount thus found due. Gen. Stat., 962.

As district No. 6 possessed no property at the time district 9 was formed, there was no finding or determination necessary. But it shows that the statute requires a district retaining the property of another to make compensation therefor. The judgment of the district court is reversed; and for the purpose of doing complete justice between the parties and ending the litigation, it appearing probable that other districts have been formed in the large extent of territory originally comprising district 9, the case is remanded to the district court with instructions to permit all the school

districts now formed in the original territory of district 9 to join as plaintiffs, and to divide the money in question among said districts upon the basis of the assessment of 1872.

JUDGMENT ACCORDINGLY.

NEBRASKA CITY, PLAINTIFF IN ERROR, v. THE NEBRASKA CITY HYDRAULIC GAS LIGHT AND COKE CO., DEFENDANT IN ERROR.

1. **Rescission of Contract.** Generally a contract cannot be rescinded unless by consent of all the parties to it, except in cases of fraud. And a declaration by one party that he rescinds the contract, followed by a refusal on his part further to perform it, not acquiesced in by the other party, does not amount to a rescission, but only a breach.

2. **Practice:** ERROR. Evidence offered in support of an alleged defense, which had been erroneously held bad on demurrer to the answer, was properly rejected on the ground of irrelevancy. The error in such case lies not in the rejection of such evidence, but back of this, and in the ruling on the demurrer.

3. **Taxation.** Without an assessment of his property, the public has no valid claim upon an individual for taxes.

4. **Taxes:** SET-OFF. In an action against a city to recover for gaslight furnished it under a special contract, delinquent taxes due to the city from the plaintiff are not a proper subject of set-off under the law respecting the collection of taxes, as it stood prior to the act of March 1st, 1879, providing a system of revenue.

5. **Quære.** Whether, as a part of the consideration for supplying gaslight to a city, an agreement to exempt from taxes, property of the gas company employed in the manufacture of gas, is valid.

6. **Contract:** CONSIDERATION: ILLEGAL PROMISES. Where a city has authority to contract therefor, it cannot resist payment for gaslight furnished, because of illegal promises as to the particular fund from which payment would be made. The consideration of such promises being legal, the price would be paya-

ble, if not otherwise, out of the general fund, and the objectionable provisions may be rejected, and the rest of the contract be permitted to stand.

7. **Contract for Gaslight with City:** ESTIMATE. The estimate by the city engineer provided for in section 32 of the act relating to the incorporation of cities of the second class is not required in case of a contract with a gas company to light the city with gas.

ERROR to the Otoe county district court.

The action was brought by the gas company against Nebraska City to recover $291.66 for gas furnished under contract to the city during the month of June, 1877. To the *fourth*, *fifth*, and *seventh* paragraphs of the answer (the substance of which is set forth in the opinion) a demurrer was filed, which was sustained and exceptions taken. Upon trial before POUND, J., judgment was rendered in favor of the gas company for the amount claimed, and the city brought the cause here for review upon a petition in error.

J. C. Watson, for plaintiff in error, contended *inter alia:*

1. That the contract, exempting as it does the property of the gas company from taxation, providing for a miscellaneous appropriation of the sinking fund, and in exempting the company from payment of cash into the sinking fund, was in violation of law; violates also the city charter by increasing the general expenses of the city government to such an extent as to necessitate the levying of a tax for general purposes of more than five mills on the dollar, and that in making such contract the officers of the city exceeded their authority. *Weeks v. City of Milwaukee*, 10 Wis., 186. Gen. Stat., Chap. 66, Sec. 2. *Id.*, Chap. 9, Sec. 31, subd. XLV. *Halstead v. Mayor*, 3 N. Y., 430. *Brady v. The*

Mayor, 20 *Id.*, 312. *Thomas v. City of Richmond*, 12 Wall., 356. Dillon Mun. Corp., secs. 372, 381.

2. That the court erred in not allowing the city to show that no estimate was made in regard to the contract, as required by Gen. Stat., p. 151, sec. 32, as the furnishing and erecting of lamps and lamp-posts are certainly improvements within the meaning of the statute.

3. That the contract being void in part, on account of being in violation of the statute, is void *in toto*. *Austin v. Bell*, 20 Johns., 442. *Van Alstyn v. Wimple*, 4 Cow., 547. *Burt v. Place*, 6 Cow., 431. *Loomis v. Newhall*, 15 Pick., 159. *Baldwin v. Palmer*, 10 N. Y., 232.

M. L. Hayward, for defendant in error.

1. No principle of law is better settled than that a party who would rescind a contract must place his adversary "*in statu quo*." *Taft v. Wildman*, 15 Ohio, 128. *Casswell v. Manufacturing Co.*, 14 Johns., 453. *Wilt & Green v. Ogden*, 13 Johns., 56. *Ellis v. Hoskins*, 14 Johns., 363.

2. Where one party breaks a contract, the amount which would have been received if the contract had been kept is the measure of damages. *Doolittle v. McCullough*, 12 Ohio State, 364. *Marsh v. Blackman*, 50 Barb., 329.

3. In no event should the Gas Company recover less than the full contract price for June, because the price is one entire sum for the month, and if the notice could have any effect at any time it could not for that month. Where contract is for time certain, if party is without cause discharged before the time, he is entitled to receive for full time. Parsons on Contracts, 4th ed., 518–528. *Davis v. Maxwell*, 12 Met.,

286. *Read v. Moor*, 19 Johns., 337, and cases there cited.

4. The city, by accepting the gas, has ratified the contract, and can not deny its legality. 15 Cal., 591. 31 Cal., 26. 7 Cal., 463. 1 Dillon, 478. 9 Cal., 453. 20 N. Y., 319. It must pay the contract price. 9 Cal., 453. 18 B. Mon., 41. 7 Ohio State, 327. 12 Ohio State, 624.

5. If any tax was due the city from the Gas Company it could only be collected in the manner pointed out by statute. (Gen Stat., sec. 54, p. 917.) In no event could such tax be pleaded as a counter claim or set-off in this action. Statutes, 540, §§ 101 and 104. Cooley on Taxation, pp. 298 and 300.

LAKE, J.

We shall confine our examination to such of the alleged errors as were relied on by counsel for the plaintiff in error in argument as ground for a reversal of the judgment. And, *first*, did the court below err in sustaining the demurrer "to the fourth, fifth, and seventh defenses" of the answer?

It seems that at the time in question there existed a contract between the plaintiff in error and the defendant company, whereby the latter was to furnish to the city, at a stated price per month, gaslight for its streets, etc. That, while the company was engaged in the due performance of this contract on its part, the city authorities undertook to rescind it, and to that end passed the resolution, and gave the notice to the company, which form the basis of this fourth defense or answer, and which was in these words, viz.: "For a *fourth*, further, and separate defense to said alleged cause of action defendant alleges that, on or about the 11th day of June, 1877, defendant, by a resolution of

its common council, approved by the mayor, declared said alleged contract at an end, and wholly rescinded; and on that day duly notified the plaintiff of such action; and that, from that time on, said contract was wholly rescinded; and directed plaintiff to furnish no more gas or light, and to light no more lamps, and to do nothing more whatever under said contract or modifications."

We do not think that what is thus set forth shows a rescission of the contract. It is only a declaration on behalf of the city to that effect, but to which it is not shown that the company had in any way assented. Generally a contract cannot be rescinded, unless by consent of all the parties to it, except in cases of fraud. Chitty on Contracts, 640. Therefore, there being neither assent nor fraud on the part of the gas company shown, it is clear that the contract remained in full force, notwithstanding this declaration of the city authorities to the contrary. But, although no rescission is shown, there is one material allegation which, admitted to be true, as by the demurrer it is, has an important bearing on the rights of the parties in this action. That allegation is, that on the 11th of June the gas company was duly notified and requested "to furnish no more gas or light, and to light no more lamps, and to do nothing more whatever under said contract."

As we understand the law applicable in such cases, it gave to the city, notwithstanding the contract, the absolute right at its own election to decline to receive any more gas under it, thereby refusing performance on its part. *Clark v. Marsiglia*, 1 Denio, 317. The taking of this step, however, did not amount to a rescission of the contract, but simply a breach of it, for which the company, in a proper action, would be entitled to recover adequate damages. But in such ac-

tion the contract price of the gas furnished, after the refusal to receive it, would not necessarily be the measure of damages recoverable.

And in this connection it is proper to refer to an item of evidence, the rejection of which is alleged for error. We allude to the notice given to the company, in pursuance of a resolution of the city council, to desist from further supplying gaslight to the city under said contract. As the pleadings stood at the time of the trial, by reason of the sustaining of the demurrer, to this fourth count of the answer, the rejection of this evidence on the ground of immateriality or incompetency was not error. *The error lay back of this*, and in holding, on the demurrer, that such notice was of no consequence.

By the fifth defense in the answer it was alleged in effect that, by the terms of the contract in question, the franchise and property of the company, employed in the manufacture of gas, were exempted from taxation for several years for municipal purposes, by reason of which there was lost to the city the sum of $4,200, which it should have received from said company as its proportionate contribution to the municipal revenues during that time.

As to the validity of this exemption, and whether it was a binding agreement, it is not necessary here to decide; but if it were, very respectable authority is cited by counsel for the defendant in error to sustain him in his claim that it was enforceable against the city on the theory that it was an indirect mode of making payment in part for gas supplied. *Grant v. City of Davenport*, 26 Iowa, 396. Howsoever this may be, there is another very conclusive answer to this pretended set-off, which is, that for those years there was neither an assessment of said property, nor the levy of a tax upon it for city purposes, without which there

could be no valid claim against the company for contribution to the public revenue. Mr. Cooley in his treatise on taxation says: "Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individuals subject to taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities." *Thurston v. Little*, 3 Mass., 429. *People v. Hastings*, 29 Cal., 449. No tax is due unless it is assessed. *Miller v. Hale*, 26 Penn. St., 432.

The seventh defense of the answer alleges in substance that taxes for the year 1876 to the amount of $106.54 were levied and assessed on the capital stock of the gas company, which are delinquent and have never been paid, and that the same should be set off against claim of the plaintiff below.

By the demurrer to this defense of the answer, the question is raised whether, prior to the act of March 1st, 1879, providing "a system of revenue," and taking effect September 1st, 1879, delinquent taxes due from the plaintiff below to the city are a proper subject of set-off? Whether they would be under that act is a question that is not now presented, and which we do not decide.

Section 104 of the code of civil procedure (Gen. Stat., 541) provides as to set-off, that it "can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Now taxes neither arise upon contract either express or implied, nor is the amount thereof determinable by the judgment of a court. They are the forcible, and, within constitutional limits, the arbitrary exactions of the government for its support and use, taken from the substance of the people, "and to the making or enforcing of which their assent indi-

vidually is not required." *Pierce v. City of Boston*, 3 Met., 520. *Carondelet v. Picot*, 38 Mo., 125. And of the enforcement of payment, Mr. Cooley says: "Taxes are not debts in the ordinary sense of that term, and their collection will, in general, depend on the remedies given by statute for their enforcement. When no remedy is specially provided, a remedy by suit may fairly be implied, but when one is given which does not embrace an action at law, a tax cannot in general be recovered in a common law action as a debt." Cooley on Taxation, 13. And in *Carondelet v. Picot*, 38 Mo., 125, the court say: "Unless the power is specifically delegated or expressed, no right of action exists for taxes, and they cannot be turned into judgments. Both the state and municipal corporations have a much better and more expeditious remedy. They have the right of summary process to enforce collection by levy and sale; and when this power exists, complete and ample as it most assuredly is, it would be monstrous, without plain and express authority to that effect, to say that they could abandon at pleasure the usual and simple manner of making collections, and subject the delinquent taxpayer to all the embarrassments, vexations, and costs of a legal proceeding." See also on this point, *Turnpike Co. v. Gould*, 6 Mass., 40. *Packard v. Tisdale*, 50 Me., 376. *Perry v. Washburn*, 20 Cal., 318. *Richards v. Stogsdell*, 21 Ind., 74. *Lane Co. v. Oregon*, 7 Wall., 71. *Shaw v. Pickett*, 26 Vt., 486.

In *Turnpike Co. v. Gould*, this language is used: "When we find a power in the plaintiff to make the assessments, they can enforce the payment in the method directed by the statute, and not otherwise; and that method is by the sale of the delinquent shares. This rule applies to all taxes, public and private. No action can be maintained to compel the payment of

state, county, or town taxes, except in the particular cases in which an action is given by statute." Such being the general rule when there is an efficient and summary mode specially provided for their collection, as has heretofore been the case respecting all taxes imposed in this state, under the authority thereof, whether general or special, it follows that the demurrer to this branch of the answer was properly sustained.

It is further contended that the court erred in admitting in evidence the written contract as shown on page thirty-six of the record. This instrument bears date of February 1st, 1877, and is but a slight modification of the then subsisting contract of September 4th, 1873, under which the city was then being supplied with gaslight. By this modification it appears that the amount of each monthly installment payable to the company, thenceforward to August 1st of that year, was reduced from the sum of $500.00 to $291.66. The object in giving this bit of evidence probably was to show the price for the month of June, 1877, for which the action was brought, as this month was within the above modification. And for this purpose it was clearly admissible, although under the admissions of the answer it was not really necessary to introduce any testimony on this point. The answer, after setting out pretty fully the contract of September 4th, 1873, and the modification thereto of February 1st, 1877, concludes in these words: "That the said instrument of September 4th, 1873, and the modifications aforesaid, are the same contracts mentioned in plaintiff's petition as the basis of its alleged cause of action herein." In this particular there was no error committed.

It is urged, however, as against *any* recovery by the company under these contracts, that they contain certain illegal provisions respecting the exemption of property from taxation, and the payment of money

out of the sinking fund of the city, devoted by law to another purpose. But even admitting that in these two particulars the city authorities exceeded their powers (which, however, we do not decide), that would be no defense to this action. Under the charter they were authorized to contract for lighting the streets with gas, and to bind the city for the payment of the price agreed upon. In this respect, therefore, the contract was not *ultra vires*, and so long as the city voluntarily received gaslight under its provisions, it cannot resist payment of the agreed price, simply because of these alleged illegal promises as to the particular fund from which the money should be drawn. The consideration for which these promises were made being entirely legal, and the price agreed upon being payable, if not otherwise, from its general fund, these objectionable provisions may, if necessary, be rejected, and the rest of the contract permitted to stand; especially where, as here, the city has received the consideration for which the promises were made. Chitty on Contracts, 574. If the company were resisting a tax levied in violation of this agreement, or if they were endeavoring to compel payment of a gas bill out of the sinking fund, the argument of counsel for the city in this behalf would be entitled to great weight, but under the issues of this case we deem it altogether inapplicable.

Only one point more is it necessary to notice. It is contended that before the city could lawfully have entered into this contract an estimate of the probable expense must have been made, as provided in section *thirty-two* of the act relating to the incorporation of cities of the second class. (Gen. Stat., 151.) But we think otherwise. This section has no application to contracts of this description, but to those respecting streets, bridges, or other work or improvement to be

made for and owned by the city. Its language on this subject is: "Before the city council shall make any contract for building bridges or side-walks, or for any work on streets, or for any other work or improvements, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate," etc. Now, all that was contracted for here was the supplying the city with light, not for the erection of gas works, to be owned and operated by the city. And the contract was made with the company, which had the exclusive right to that business within the city, the only source from which such light could have been obtained. Clearly this section of the statute has no application here, and the argument based upon it falls to the ground.

The sole material error found in this record lies in the exclusion of the partial defense set out in the *fourth* paragraph of the answer, and based upon the notice of the 11th of June to the company to furnish no more gaslight to the city under said contract. For that error, however, the judgment must be reversed, and the cause remanded to the court below, to be proceeded with according to the views expressed in this opinion.

REVERSED AND REMANDED.

ANTON V. HERMAN, TREASURER OF SALINE COUNTY, PLAINTIFF IN ERROR, V. THE CITY OF CRETE, DEFENDANT IN ERROR.

1. **License Moneys.** All moneys arising from licensing the sale of malt, spirituous, and vinous liquors before November 1, 1875, when our present constitution took effect, belong to the common school fund of the county in which they were paid. And when the corporate authorities of a city or town have diverted such funds and applied them to the use of the city, the county treasurer may maintain an action to recover them from the city, for the purpose of distribution among the several school districts of the county.

2. ———. The fact that such license moneys were illegally exacted by the city, or that the individuals paying them might have resisted successfully the enforcement of the ordinance under which the collection was made, is no defense to an action against the city for their recovery by the county treasurer.

ERROR to the district court for Saline county. The action there was brought to recover of the city of Crete certain moneys alleged to have been collected from saloon keepers as a license tax prior to the taking effect of the present constitution, November 1, 1875. It appears from the answer of the defendant that the city of Crete passed an ordinance in April, 1875, No. 40, in accordance, as alleged, with the provisions of subdivision 4, section 31, Gen. Stat., 144, requiring each saloon keeper to pay a tax of $275 per year, as license tax, before he could engage in that business in said city of Crete, and that about the same time the city of Crete passed another ordinance, No. 41, in accordance as alleged with the provision of sec. 586, Gen. Stat., 855, fixing the liquor license in said city at $25 per year. It appears that under Ordinance 41 $150 was collected, which was on demand paid over to the county treasurer for the use of the county school

fund. It also appears that under Ordinance No. 40 there was collected during the month of May, A.D. 1875, the sum of $900, and that this money was also demanded by the county treasurer as belonging to the county school fund, but was refused, and the same was wholly applied to the use of the city of Crete and to works of internal improvement in the said city. Upon the pleadings in said action and a stipulation to the effect that the sum of $900 was duly demanded, judgment was, at the April term, A.D. 1879, of the district court, WEAVER, J., presiding, rendered for the defendants, to which judgment the plaintiff excepted.

Hastings & McGintie, for plaintiff in error.

M. B. C. True, for defendant in error.

LAKE, J.

According to the course of decisions in this court, it is unquestionable that the moneys in controversy, when collected by the city treasurer, belonged to the common school fund of Saline county, and that the county treasurer was entitled to receive them for distribution among the several school districts of the county. *City of Hastings v. Thorne*, 8 Neb., 160, and cases cited.

But it seems that before the action was brought, and presumably before the constitution of 1875 took effect, the municipal authorities of Crete had, by a misappropriation, applied them to the support of its local government and to certain works of internal improvement, but in what proportion to each of these objects does not appear, nor is it at all material. Under this state of facts is the city liable to make good to the said school fund the money thus diverted from its legitimate use?

If these moneys had been collected, or their misappropriation made under our present constitution, no one could for a moment doubt the liability of the city to refund the amount, with interest, to the proper school fund. And it is clear to our minds that sec. 5, art. VIII of the constitution, was not intended to divert such funds, already collected at the time it took effect, from the use to which the legislature directed them to be applied. This section evidently refers to moneys thereafter to be raised from the sources mentioned, and to these alone. And this in effect was our holding in the case of *City of Hastings v. Thorne*, 8 Neb., 160.

The fact suggested with seeming confidence by counsel for the defendant that these license moneys were illegally exacted by the city, even if it were true, could have no bearing on the case. It is enough that they accrued from licenses issued by the corporate authorities of the city, at least under the forms of law, for the sale of malt, spirituous, and vinous liquors at retail. It matters not that the individuals paying the money might have successfully resisted the enforcement of the ordinance under which the imposition was made; it seems they did not see fit to do so, but paid the amount demanded, and there was but a single use to which the fund could be legally applied, viz.: the support of the common schools of the county. *Bullwinkle et. al. v. Guttenberg*, 17 Wis., 583. *White v. City of Lincoln*, 5 Neb., 505.

No support to this use of these funds by the city is claimed by counsel from the act of the legislature of February 19, 1877, whereby it was sought to release cities and towns from liability in such cases. Indeed, no support could come from this source, for we have already held the act to be unconstitutional and void. *City of Hastings v. Thorne*, 8 Neb., 160. As to the

authority of the county treasurer to maintain the action, that is clear, for the law specially enjoins upon that officer the duty of taking "all proper measures to secure to each district its full amount of school funds" from whatsoever source they may arise. Sec. 72, p. 974, Gen. Stat. *City of Tecumseh v. Phillips*, 5 Neb., 305.

The judgment of the court below, being in conflict with these views, must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

HEATH NUCKOLLS, PLAINTIFF IN ERROR, V. JOHN H. TOMLIN AND R. F. MCCOMAS, DEFENDANTS IN ERROR.

Assignment for the Benefit of Creditors. Before the acts of February 15, 1877, Laws 1877, p. 24, the only remedy against an assignee for the benefit of creditors, where he neglected to collect the assets and render them available, or to settle the conflicting claims of creditors and adjust the respective amounts to be paid to each, was by suit in the nature of a bill in equity to enforce a settlement of the accounts of the assignee and a distribution of the assets among the creditors. No suit on the original cause of action against the assignor could be maintained against the assignee until his accounts had been settled and a decree made for distribution.

ERROR to the district court for Otoe county.

The action there was brought by Nuckolls against J. A. Ware, John H. Tomlin, and R. F. McComas. The petition alleged that on the 6th day of December, 1871, Ware was indebted to plaintiff in the sum of $1234,36; that Ware made an assignment of what he said in the deed of conveyance was all his property, goods, and chattels of every description to John H.

Tomlin, his assignee, to be sold by him, and the proceeds arising therefrom applied in the payment of debts due from Ware, *pro rata*, if sufficient was not realized to pay all in full; that R. F. McComas was subsequently joined with Tomlin as assignee; that they took possession of the property; that they have since had control over the same; that they have from time to time sold and conveyed a large portion of the property and have paid some portion of the debts of Ware out of the proceeds of the property so assigned to them; that no part of plaintiff's demand has been paid, although the said assignees have paid on a large number of debts and demands against said Ware thirty-seven per cent thereof, or about that amount, but neglect and refuse to pay said plaintiff any part of the debt due him. Wherefore he prays judgment, etc.

The defendants filed separate demurrers to the petition. That of Ware was sustained. That of Tomlin and McComas was overruled, and they answered alleging that the realty assigned to them was in the year 1872 duly advertised to be sold for cash to the highest bidder, at which sale creditors were allowed to set-off thirty-seven per cent of whatever demands they held against Ware, upon the purchase of any realty bid in by them, deny that they have paid any claim in full or in part except in the conveyance of property so bid in by creditors, etc.

Upon the issues thus joined, trial was had before POUND, J., who found in favor of the defendants, and entered judgment dismissing the case, to all of which plaintiff excepted.

G. B. Scofield, for plaintiff in error.

1. The assignees were bound to account to the plaintiff for his proportionate share unless prevented by some legal proceeding. *Mills v. Argall*, 6 Paige,

577. *Russell v. Leshler*, 4 Barb., 232. *Bell v. Holfard*, 1 Duer, 58.

2. There is no pretense that the plaintiff's debt against Ware was not a just one or that he should not be treated with like fairness in receiving his part of the proceeds of the estate as other creditors. The plaintiff and the defendant Tomlin both testify to this.

Tomlin says that he and some of the creditors made an arrangement that the property should be sold at auction, and that persons holding claims "had the privilege of taking property" and applying the amount on their debts. The plaintiff was never a party to any agreement whatever in regard to the disposition of the property, and no one will contend that he can be bound by what others may have unlawfully attempted to do. Must the plaintiff take property or nothing because some of the creditors desire to, and the assignees are willing to let them? We think not.

3. The assignees did not perform their duties according to law and the directions in the deed of assignment, and did not appropriate the property so received by them to the use and benefit of all the creditors of Ware, and thereby became personally liable to the plaintiff.

Six long years have passed and this plaintiff seeks to enforce his rights in a court of justice, and these defendants, with insolence and independence unknown to jurisprudence, with gross negligence staring us in the face, say, "Depart from us, we know you not," and the court, from its judicial eminence, has also pronounced the fiat "Go." This is an error and should be corrected. *Adlum v. Yard*, 1 Rawle, 163. *Mitchell v. Beal*, 8 Yerg, 134. *Dana v. Bank of U. S.*, 5 Watts & S., 224. *Christopher v. Covington*, 4 B Monroe, 357. Perry on Trusts, Sec. 590. *Kellog v. Slauson*, 1 N. Y., 302. *Conklin v. Carson*, 11 Ill., 503.

E. F. Warren, for defendant in error.

1. Plaintiff's position is this: Ware owed plaintiff, and made an assignment of his property to Tomlin and McComas in trust for his creditors. Some portion of some of the debts has been paid to certain individual creditors, therefore the assignees are personally liable to plaintiff for the whole of his debt.

2. There is no allegation that the estate would pay the whole of the debts or a given percentage; no allegation of fraud; no allegation that plaintiff's claim was a preferred one, or that the assignees ever promised to pay the same or any part of it; no allegation of a misapplication of the trust estate. Hence there is no cause of action stated. *Davenport v. McCole*, 28 Ind., 495.

3. No case can be found when an action at law has been sustained against a trustee for the benefit of creditors upon an implied promise arising merely out of the acceptance of the trust to pay the demands of particular creditors. Their interests are equitable and belong to another forum. Nor is there any privity of contract between plaintiff and the assignees. *Dias v. Brunell's Exr.* 24 Wend., 9. *Beaches v. Darwin*, 12 Vt., 139. Perry on Trusts, Sec. 843.

COBB, J.

Upon examination of the record in this case, I am satisfied that the petition fails to state facts sufficient to constitute a cause of action. It nowhere states the value of the property which came into the hands of Tomlin and McComas as the assignees of Ware, nor that the same was sufficient to pay the judgment which he prays against them; nor does it set out the deed of assignment or state its terms as to the manner of the

execution of the trust thereby created. It would seem that the plaintiff was aware of the defects in his petition before the trial, as he obtained leave to amend his petition, but filed no amended one. It is equally obvious that had the petition contained and set forth the cause of action which the pleader contends that it does, the answer sets out no defense to it. Before the adoption of the code, where an assignee was remiss in executing the trust, as when he neglected to collect the assets and render them available, or to settle the conflicting claims of creditors and adjust the respective amounts to be paid to each, the appropriate proceeding was by bill in equity to enforce a settlement of the accounts of the assignee, and a distribution of the assets among the creditors. No action at law could be maintained by a creditor against the assignee until his accounts had been settled and a decree made for a distribution. See Burrill on Assignments, pp. 664, 665, and authorities cited in notes. Now, although the names of the actions and the difference in the forms between actions at law and suits in equity have been abolished, yet the difference in the kinds of relief to which parties are entitled upon different states of facts remain the same in the very nature of things. And it is quite clear that neither the facts stated in plaintiff's petition or proved at the trial show him to be entitled to the judgment which he prays, nor yet to that relief which his counsel claims for him in his brief and at the bar of this court.

The judgment of the district court is therefore

AFFIRMED.

WILLIAM FULTON, PLAINTIFF IN ERROR, V. THE CITY OF LINCOLN, DEFENDANT IN ERROR.

Cities of the Second Class: CONTRACT FOR GRADING STREET. The council of a city of the second class has no power to contract for the grading of a street until they first shall have enacted an ordinance for the said improvement, nor except such contract be let to the lowest bidder, after publication of notice and fair competition.

ERROR to Lancaster county district court. The action there was brought by Fulton to recover the sum of $495.05 for work and labor performed by him in the grading of M street, in the city of Lincoln, between 16th and 18th. Upon the trial below defendant moved for a non-suit, which was sustained by the court, POUND, J., presiding, to which plaintiff took exceptions. Plaintiff alleges here that the court erred in sustaining defendant's motion for a non-suit; that the court erred in refusing to allow the plaintiff to prove by his own testimony who directed him to perform the work on M street, in said city; that the court erred in refusing to allow the plaintiff to prove whether or not an estimate of the work was made by the city engineer and submitted to the council; and that the court erred in refusing to allow plaintiff to prove that

NOTE.—When the statute prescribes a particular mode in which the corporation is to act that mode is exclusive. *Hurford v. Omaha*, 4 Neb., 350. The fact that certain provisions of an ordinance are void does not authorize the court to declare void those provisions which relate to the subject matter of the ordinance when they are distinct and separate from those which are void and useless. *State, ex rel. Hahn, v. Hardy*, 7 Neb., 377. See generally as to powers, duties, and liabilities of cities, *Nebraska City v. Lampkin*, 6 Neb., 27. *City of Omaha v. Olmstead*, 5 Neb., 446. *City of Brownville v. Cook*, 4 Neb., 103. *Turner v. Althaus*, 6 Neb., 54. *Wheeler v. City of Plattsmouth*, 7 Neb., 270. *State, ex. rel. School District, v. Omaha*, 7 Neb., 267.—REP.

he presented his account to the city council of said city before the commencement of this action.

N. S. Scott, for plaintiff in error.

A resolution has ordinarily the same effect as an ordinance. Both are legislative acts. *Sower v. City of Philadelphia*, 35 Penn. State, 231. *Gas Company v. San Francisco*, 9 Cal., 453. *Municipality v. Cutting*, 4 La. Ann., 335. A creditor of a city is not bound to look into the regularity of the proceedings of the council when dealing with the city. Dillon Mun. Corp., § 397. *Bigelow v. City of Perth Amboy*, 25 New Jersey Law., 297.

Harwood & Ames, for defendant in error.

1. All regulations of law must be strictly observed, or the city will not be bound, and it follows that the first error assigned in the plaintiff's motion for a new trial is groundless, it being immaterial who directed plaintiff to do the work, or whether he did it without direction. *Zottman v. San Francisco*, 20 Cal., 96. *Loker v. City of Brookline*, 13 Pick., 343. *Jones v. Lancaster*, 4 Pick., 149. *Woods v. Waterville*, 5 Mass., 294. Dillon Mun. Corp., § 373, *note*. Such being the case, it is unimportant whether there was an estimate by the city engineer, and whether the plaintiff's claim was ever presented for allowance to the city council, and the court committed no error in excluding evidence of either fact.

2. Acceptance and user do not obligate the city. Dillon Mun. Corp., § 386. *Wilson v. School District*, 32 N. H., 118, 125. *State v. Hancock*, 45. N. H., 528. *Loker v. Brookline*, 13 Pick., 343. *Reilly v. City of Philadelphia*, 60 Pa. St., 467.

COBB, J.

The city of Lincoln is a city of the second class under the general laws of this state. At the date of the transactions upon which this suit is founded, the law granting and defining the powers and prescribing the liabilities and duties of all corporations of that character and grade was contained in chapter 9 of the General Statutes. Under the provisions of said chapter the mayor and council of such city were authorized and empowered "to enact ordinances" for certain purposes, among others, "to open and improve streets," etc. § 31, p. 142, Gen. Stat.

Section 32 of said chapter is in the following words: "Before the city council shall make any contract for building bridges or side-walks, or for any work on streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate; and in advertising for bids for any such work the council shall cause the amount of such estimate to be published therewith."

The mayor and council derive all their power to bind the city from this statute, which is usually and not inappropriately called their charter. This charter is a public law, of the provisions of which all persons must take notice. The powers of the mayor and council derived from this statute are limited and the manner of their exercise qualified by the several provisions of the same, all of which must be taken notice of by all persons contracting or dealing with the city.

Their power to contract for the grading of "M" street would depend upon their having previously

passed an ordinance for such improvement, either specifically or as a part of a general system of improvements adopted by them, and upon an estimate of the cost of such specific improvement or work having been made by the city engineer and submitted to the council. And as to the manner of making such contract, I think it equally clear that the mayor and council can only bind the city by a contract made with the lowest bidder therefor after publication of notice and fair competition.

On the trial the plaintiff introduced in evidence over the objection of defendant an ordinance of the city in the following language:

"Ordinance No. 90.

"An ordinance to provide for the grading of the streets, avenues, and alleys of the city of Lincoln.

"Section 1. Be it ordained by the mayor and councilmen of the city of Lincoln that whenever the majority of the owners of lots on any street, avenue, or alley, or any part thereof, shall petition the city council of said city to cut down, fill up, or grade any street, avenue, or alley, or any part thereof in the said city, the majority, if they think proper, of the city council shall pass an ordinance to that effect, which ordinance shall set forth the particular locality where such cutting down, filling up, or grading is required to be done, and the time that is allowed for completing the same; and the publication of such ordinance in one of the newspapers of the city for one week shall be deemed a sufficient notice to the owners or holders of lots fronting on any such street, avenue, or alley for any such cutting down, filling up, or grading.

"Section 2. All such filling, cutting down, or grading shall be in conformity with the grade of the street, avenue, or alley under the direction of the street com-

missioner, and all expenses of filling up, cutting down, or grading shall be paid by owners or holders of lots fronting where such filling up, cutting down, or grading is to be done.

"Section 3. If the owners or holders of any such lot or part of a lot shall neglect to fill up, cut down, or grade his street, avenue, or alley in conformity with the order of the city council published as aforesaid, the street commissioner shall contract for the same to be done at the expense of the city, and shall make his report of the expense incurred therefor to the city council, and the city council shall levy a special tax on such lot or part of lot in front of which the street commissioner may have contracted for any such filling up, cutting down or grading, which tax shall be of sufficient amount to cover the expenses thereof, together with all costs or expenses, and immediately after such levy, the city treasurer shall advertise and sell the same according to law in such case made and provided.

"Section 4. This ordinance shall take effect and be in force from and after the publication according to law. Approved October 14, 1872."

The plaintiff also introduced, over the objection of the defendant, the records of the city as follows:

"COUNCIL CHAMBER, October 14, 1872.

"Council met at Mr. Sherwood's office at call of the Mayor. Council called to order by the Mayor. Present: Mayor Brown, Messrs. Gosper, Sherwood, McLaughlin, and Owen. Absent: Fairbank and Scoggin. Petition of C. E. Loomis and others for grading M street between 16th and 18th streets. Granted and work ordered done. The following resolution was introduced and passed: Be it resolved by the Mayor and Councilmen of the city of Lincoln, that M street between 16th and 18th streets be ordered to be graded in accordance with Ordinance No. 90, the requisite

petition having been procured and placed on file. Adjourned. Approved Nov. 9, 1872.

"THOMAS J. CANTLON,
"City Clerk."

Without stopping to comment upon the entire absence of proof of the publication of either of the foregoing ordinance or resolution, it is perhaps sufficient to say that their framers evidently labored under a gross mistake as to the law under which they were acting. It is evident that they understood the law to be that all such improvements of streets as that in question were to be paid for by the owners of abutting property, and (they sought by means of ordinance No. 90 to so provide) that all that was necessary was to procure a petition signed by "a majority of the owners of lots on any street, avenue, or alley, or any part thereof," to have all the hills cut down and valleys levelled up without cost to the general taxpayers. True, lest the people should be too unanimous and enthusiastic to have all the rough places made smooth at once, they reserved to themselves, or as they express it, to the majority, to pass an ordinance in each case "to that effect, which ordinance shall set forth the particular locality where," etc.

The plaintiff in error cites *Sower v. The City of Philadelphia*, 35 Penn. St., 231; *Gas Co. v. San Francisco*, 9 Cal., 563; and *Municipality v. Cutting*, 4 La. Ann., 335., in support of the proposition that the resolution of October 14, 1872, is of the same effect as an ordinance.

The Pennsylvania case is somewhat in point. The legislature of that state passed an act for the consolidation of the city of Philadelphia, by the seventh section of which it was provided that "whenever councils shall deem the public exigencies to demand it, they may order by ordinance any street laid upon any of the public plans of the city to be opened," etc. Acting under the author-

ity of this statute, the city councils passed a joint resolution for the opening of Wilson street. Sower, the owner of property through which said street was about to be opened, prayed for an injunction, etc. In the opinion the court say: "The next objection, that the order for opening was by joint resolution and not by ordinance, seems to be disposed of by uniform legislative usage in the city government, and by a fair analogy to the constitutional practice of the state legislature. Both joint resolutions and ordinances are passed by both councils and approved by the Mayor * * By * * the act of eleventh March, 1879, the laws, ordinances, regulations, and constitutions of the city must be published and recorded, and by the 44th section of the consolidation act, the laws and ordinances of the city must be published for the information of the citizens. It is a legislative act, a law, and it matters not whether it be called a joint resolution or an ordinance."

In the *First Municipality v. Cutting*, which was a criminal prosecution against the defendant for selling groceries in the meat and vegetable market of New Orleans contrary to an ordinance or regulation of the city, the court say: "The first and most material objection which has been taken to the validity of this ordinance or by-law is, that it purports by its terms to be a resolution, and as such has not the force and effect of a legal ordinance or by-law. We considered this objection in the case of *The First Municipality v. Devron*, recently decided, and it was not without difficulty that we came to the conclusion in favor of its legality. The conclusion was founded on the indefinite character of the powers given to the mayor and city council of the late city of New Orleans by the several statutes on that subject. No form in which their legislative acts are to be exercised is given in any of the statutes. They

have authority to make and pass by-laws or ordinances; and, in one instance, fines imposed by the *regulations* and by-laws of the corporation are recognized as valid. * * * In another instance provision is made for the recovery of fines incurred for offenses committed against the ordinances and regulations enacted by the city council. Considering, therefore, that the ordinance contained a prohibition with a penalty attached, it was in fact a by-law or *regulation*, and the form made use of in enacting it did not render it void as such. It was signed by the mayor, and no valid objection was made to the power of the council to enact it."

These cases fall far short of sustaining the position taken. The provisions of our statute on this subject are very plain. The council is authorized to act on the subject, and the manner of its acting is clearly prescribed—not by enacting by-laws, making regulations, or passing resolutions, but by enacting ordinances, and nothing is left to be construed by the analogies of state legislation.

The case cited from 9th California was reversed in the same court in *Zottman v. San Francisco*, 20 Cal., 96.

In both the Pennsylvania and Louisiana cases considerable stress is laid upon the fact that the resolution, in each of those cases, was signed or approved by the mayor, and that the modes of passing a resolution and enacting an ordinance were identical, and in the Pennsylvania case that the joint resolutions were required to be published as laws. But in this state there is no provision of law requiring resolutions of the council to be approved by the mayor or published, and in point of fact the resolution which it is sought to have do duty as an ordinance in this case was neither approved by the mayor or published.

We have seen that the city council was limited to the enacting of ordinances as the means of providing

for the improvement of streets, etc., and I do not think it will be seriously urged that an ordinance, providing that all the streets, avenues, and alleys of a city should be cut down, filled up, or graded, upon the contingency of the majority of the lot owners petitioning therefor, comes within that requirement. But even if it does, we are met by the further contingency that "the majority, if they think proper, of the city council shall pass an ordinance to that effect."

The city council, then, never having enacted an ordinance for the purpose of grading M street between Sixteenth and Eighteenth streets, either specifically or as a part of any defined system of improvements, there was no error in the district court making any of the several rulings complained of by the plaintiff in error.

There was no error in the district court refusing to allow the plaintiff to prove by his own testimony who directed him to perform the work on M street, because in the absence of an ordinance providing for the improvement of said street no one could bind the city by giving such direction.

There was no error in the court refusing to allow the plaintiff to prove by his own testimony whether or not an estimate of the work was made by the city engineer and submitted to the council. It is not an estimate of the work, but of *the cost* of the work, that is required to be made by the city engineer, and there having been no ordinance enacted providing for the improvement of the street in question, such testimony was quite immaterial. And so also of the proof, refused by the court, of the presentation of his account for such work by the plaintiff.

There being no error in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

CHRISTOPHER LYNAM, APPELLEE, V. HENRY ANDERSON AND J. T. SMITH, APPELLANTS.

1. **Taxes:** HOW LISTED. Lands and lots are required to be listed for taxation in the name of the owner or person liable to pay the tax; but the tax being a lien upon the land, a failure to do so will not render the tax void.

2. ———: ASSESSMENT: DESCRIPTION. Where a block was numbered "31" in Ashland, and it appeared that a block in an addition to the town was numbered "31," *Held*, no uncertainty of description; the block in the addition being designated by the name of the addition.

3. ———: ———: OATH OF ASSESSOR. A substantial compliance with the law requiring the assessor to take and subscribe an oath, to be attached to the assessment roll, is jurisdictional, and the county commissioners have no authority to levy a tax without such oath having been made and filed. *Morrill v. Taylor*, 6 Neb., 245, adhered to.

4. ———: ———: ———. The object of the oath is: *first*, as a means of identifying the assessment roll: *second*, as evidence that the assessor has faithfully and efficiently performed his duty and to prevent favoritism and partiality. [Per MAXWELL, CH. J.]

5. ———: ———. The failure of the assessor to require those listing property to swear to the lists is a mere irregularity, and does not render the assessment void. It is his duty, however, to require such oath, and it should be administered to every one listing property.

6. ———: ———: LIST OF TAX PAYER. The list of property furnished by a tax-payer is not conclusive upon the assessor. If he has evidence sufficient of the existence of other property he may, upon notice, add it to the list. *Jones v. Commissioners*, 5 Neb., 561, adhered to.

7. ———: COLLECTION OF TAXES. Under sec. 59 of the revenue law, Gen. Stat., 916, it is the duty of the county treasurer to collect the amount due for taxes upon real estate from the person to whom the same was assessed, if sufficient personal property can be found in the county.

8. ———: ASSESSMENT: REDEMPTION. Where an assessor entered certain real estate as "unknown," the same being im-

proved and occupied at the time of the assessment, and no effort having been made apparently to ascertain the name of the owner, he having an abundance of personal property in the county to pay the taxes, *Held*, that the owner was entitled to redeem from a tax sale upon payment of the amount of the taxes and 12 per cent interest.

9. ———: TAX SALE: REDEMPTION. L. filed a petition in the district court to have certain taxes declared null and void, which were held valid. *Held*, that to avoid a multiplicity of suits he would be permitted to redeem upon payment of the taxes with 12 per cent interest and costs, or, in case of his failure to do so for thirty days, that the premises be sold to satisfy the amount due.

APPEAL from Saunders county. Tried there before POST, J., and judgment for plaintiff. The opinion states the case.

E. Wakeley, for defendants—appellants.

1. If the description is such as to apprise the owner and persons proposing to bid of the exact locality intended it is sufficient. Cooley on Taxation, 282, *et seq.*

NOTE.—The fact that the list of taxable property is sworn to by the owner will not justify the assessor in neglecting to assess property which he knows has been omitted. *Roe v. St. John*, 7 Neb., 139. And see *Jones v. Seward County*, 5 Neb., 561. *Morrill v. Taylor*, 6 Id., 236.—By act of 1877, Laws 1877, p. 43, section 50 of the revenue law 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. And same provision re-enacted. Laws, 1879, p. 311.—The county treasurer has no authority to distrain personal property belonging to the estate of a decedent for taxes due from deceased in his lifetime. *Hedman v. Anderson*, 8 Neb., 185.—See as to void tax sale and jurisdiction of the court in forelosing lien of tax purchaser, *Pettit v. Black*, 8 Neb., 52.—A purchaser of real estate at foreclosure sale cannot enjoin the execution of a tax deed about to be made in pursuance of a sale for taxes made prior to plaintiff's purchase on the sole ground that the mortgagors "were possessed of personal property sufficient to pay the taxes due on said land." *Iler v. Colson*, 8 Neb., 331.—REP.

Talman v. White, 2 N. Y., 66. *Lafferty v. Byers*, 5 Ohio, 458. *Blakeley v. Bestor*, 13 Ill., 708. *Dunn v. Ralyea*, 6 Watts & Serg., 475. *Stewart v. Schoenfelt*, 13 Serg. & Rawle, 360. *Williston v. Colket*, 9 Penn. St., 38. *Dunden v. Snodgrass*, 18 Id., 151. *Miller v. Hale*, 26 Id., 432. *Woodside v. Wilson*, 32 Id., 52. *Glass v. Gilbert*, 58 Id., 260. *Mecklem v. Blake*, 19 Wis., 397. *Patten v. Green*, 13 Cal., 325.

2. Was the failure of the assessor to require the oath of person assessed to swear to his list such a violation of duty or departure from the statutory requirement as rendered the assessment null and void? Was it fundamental and jurisdictional? or was it only an irregularity? I submit that clearly it was the latter. If it was it did not invalidate the assessment or sale. Sec. 6, act June 6, 1871, p. 936, Gen. Stat. Clinton School District Appeal, 56 Penn. St., 315. *Jones v. Sumner*, 27 Ind., 510. *R. R. Co. v. Black*, 32 Ind., 468. *Mills v. Gleason*, 11 Wis., 470. *Mills v. Johnson*, 17 Wis., 598. *Warden v. Superintendent*, 14 Wis., 618. *Exc. Bank v. Hines*, 3 Ohio St., 1, 35. *Machlot v. Davenport*, 17 Iowa, 379. *K. P. R. Co. v. Russell*, 8 Kan., 558. *Gulf R. Co. v. Morris*, 7 Kan., 210. *Smith v. Leavenworth Co.*, 9 Id., 296. *City of Lawrence v. Killam*, 11 Kan., 499. *Dunham v. Chicago*, 55 Ill., 357. *State v. Platt*, 4 Zab., 108. *Ins. Co. v. Yard*, 17 Penn. St., 331.

T. B. Wilson and *M. H. Sessions*, for appellee.

1. The plaintiff and his grantor both have a large amount of personal property in Saunders county, open and notorious, from which the taxes could have been made. This of itself is suffieient to avoid the sales. *Johnson v. Hahn*, 4 Neb., 139.

2. The description of the property is not sufficient.

There are two blocks 31 in the town of Ashland, in Ashland precinct. In which of those blocks does the land lie? From the assessment roll you cannot tell. G. S., 898, §§ 6, 24. *Curtis v. Supervisor*, 22 Wis., 167. *Orton v. Noonan*, 23 Wis., 102. *Dike v Lewis*, 4 Denio, 237. *Lessee v. Dibble*, 10 Ohio, 433. *Tallman v. White*, 2 N. Y., 66.

This court has held in the case of *Morrill v. Taylor*, 6 Neb., 236, that the oath of the assessor attached to the assessment roll is an essential pre-requisite to the exercise of any power or proceeding in the taxation of property. If that is absolutely essential to give any validity to the assessment, there can be no reason assigned for the same that does not apply with equal force for the oath of the person giving the list to be attached to the same. The language of the statute is that "the list shall be signed and sworn to by the person making it." Clear in its intent, imperative and mandatory in its terms. The court cannot, upon any fair rule of interpretation, hold that the legislature did not mean and intend just what the language used naturally imports. There is nothing left for judicial construction in the language used, and in our opinion to attempt it is nothing more nor less than judicial legislation. In this case the majority of the lists containing no description of real property, and not even signed, and not one of them sworn to, and the assessor making no minute of the names of persons refusing to swear, or in any manner indicating how he ascertained the amount and value of the property, renders the assessment void. An assessment made as directed by law is an indispensable basis for the support of the tax that may be levied upon it, and unless the assessment is so made both the assessment and taxes levied are nullities. Cooley on Taxation, 258–59–60. *Thurston v. Little*, 3 Mass., 429. *People v. Hastings*, 29 Cal., 452.

Moss v. Shear, 25 Cal., 46. *Marsh v. Supervisors*, 42 Wis., 502. *Matter of Cameron*, 50 N. Y., 502. *Westfall v. Preston*, 49 N. Y., 349.

MAXWELL, CH. J.

On the eighteenth day of April, 1878, the plaintiff commenced an action in the district court of Saunders county, against the defendant, to have certain taxes upon "Twenty feet off the west side of lot 2, in block 31, in that part of Ashland formerly called Flora City," declared null and void, and to have the county treasurer, Anderson, enjoined from executing a tax deed to Smith under a sale of said premises for said taxes. On the trial of the cause the court found "that the assessments and levies of taxes for the years 1875 and 1876 upon the above described lot are illegal and absolutely null and void, and that the county treasurer's certificates of tax sales * * issued to J. Towner Smith * * for the taxes upon the same for the years 1875 and 1876 are a cloud upon plaintiff's title," etc. A perpetual injunction was granted restraining the execution of a deed. The defendants appeal to this court.

The petition attacks the regularity of the proceedings for the years 1873, 1874, 1875, and 1876. But as the premises were sold only for the taxes of 1875 and 1876, no question is raised as to the other years.

The allegations of the petition as to error in the proceedings for the years 1875 and 1876 are substantially alike, and are in substance as follows:

First. That the premises were not assessed as required by law.

Second. That the premises were not placed on the assessment roll, nor assessed by the assessor; but the assessor did pretend to place a description of said real

estate upon a paper, but said paper did not purport to be an assessment roll, nor have attached thereto any oath of the officer or person who purports to have made the assessment, certified by the proper officer, as required by section 12, of chapter 66, of the General Statutes.

Third. The premises were not described as required by the statute.

Fourth. The list was not sworn to as required by section 8, chapter 66, of the General Statutes.

Fifth. That the paper purporting to be an assessment roll was not returned to the office of the county clerk on or before the second Monday of April, as required by law.

Sixth. That the plaintiff had a sufficient amount of personal property in Saunders county out of which said taxes could have been collected.

The assessment of said premises for the year 1875 is as follows:

"Return of lots in the town of Ashland, in Ashland precinct, Saunders county, Nebraska, as assessed for the year 1875:

NAMES OF OWNERS	LOT	BLOCK	VALUE	REMARKS
Unknown 20 ft. W. S.	2	31	500 00	"

For 1876 the assessment is as follows:

"Return of lots in the town of Ashland, in Ashland precinct, Saunders county, Nebraska, as assessed for the year 1876:

"FLORA CITY.

NAMES OF OWNERS	LOT	BLOCK	VALUE	RATE	AM'T OF TAX
				2 m	
Unknown W. 2	2	31	500 00		2.50"

Section 24 of the revenue law (Gen. Stat., 905) provides that on or before the second Monday of 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 the taxable lands in such precinct, etc.

Second. A list of all the town lots in each town or city in each precinct, in like numerical order, with the valuation of each lot or part of lot, and the name of the person listing the same opposite, with the column of values footed up, substantially in the following form:

"Return of lots in the city (or town) of ....., in ..... precinct, ... county, Nebraska, for the year 18...:

BLOCK	LOT	VALUE	OWNER

"

Section 6 provides that "the list of each person shall contain, *First*, His lands by township, range, and sec-

tion, and any subdivision or part of a section lying in the county in which the list is required; and when such parcel of land is not a congressional division or subdivision, it shall be listed in some mode sufficient to identify it. * * Town lots, naming the town in which they are situated, and their proper description by number and block, or otherwise according to the system of numbering in the town," etc.

The particular objection to the description in this case is the uncertainty as to the block, it being claimed that two or more blocks in Ashland are numbered "31." It appears from the bill of exceptions that the towns formerly known as "Flora City" and "Saline Ford," were united prior to the year 1875, and now constitute the town of Ashland. And it also appears that block 31 of Flora City corresponds with block 31 of Ashland. There is therefore no uncertainty as to the number of the block. Block 31 in Miller & Clark's *addition* to the town of Ashland must be so designated, and could not possibly be mistaken for a block in Ashland proper.

It is further objected that there is no dollar mark to the figures showing the valuation, and that therefore the assessment is void. Such has been the holding in California, and perhaps some other states. The "500" in the assessment represents value; there is no issue made in the pleadings as to the exact amount it represents. When an issue of this kind is made it must be determined in the same manner as other questions of fact. In the absence of any issue or determination as to that question, it will be presumed in a case of this kind, where the testimony shows the property to be of considerable value, that the "500" represents dollars instead of fractional parts thereof. Indeed, that may be said to be the presumption in all cases where the *aggregate* value of real estate is given.

The second ground upon which relief is sought is in substance that the oath of the assessor was not attached to the assessment roll. In *Morrill v. Taylor*, 6 Neb., 245, the court say: "A substantial compliance with the requirements of the statute prescribing the oath to be taken and subscribed by the assessor is an essential pre-requisite—a jurisdictional fact that must exist before the board of commissioners can exercise any power in the taxation of property, and that without such oath there is in law no assessment." We adhere to this doctrine. As was said in that case, "the assessment is the official estimate of the value of property subject to taxation, and constitutes the basis of apportionment." The object of requiring the affidavit is: *First.* As a means of identifying the assessment roll as an official act of the assessor executed in conformity to law. *Second.* To prevent favoritism and partiality, by requiring each assessor to swear that he has "diligently endeavored to ascertain the true amount and value of the property of each tax-payer in his precinct; and that he verily believes that the full value thereof is set forth in his returns; and that he has not knowingly omitted to demand of any person of whom he was required to make it, a statement of the amount and value of his property which he was required by law to list; nor had he connived at any violation or evasion of any of the requirements of the law in relation to the assessment of property for taxation." This oath should be attached to the assessment roll, and in this instance appears to have been so attached. But whether actually attached or not, if actually made at the proper time and filed with the assessment roll as a part thereof, the mere fact that it was not attached thereto will not of itself invalidate the assessment.

The third ground of objection—that the premises were not described as required by the statute, is not well

taken. It is clearly shown that there is but one block 31 in Ashland proper. The mode of describing the premises is not so satisfactory, but it does not appear to have misled the plaintiff, who claims that the tax is a cloud on his title to the premises.

The fourth ground of objection is that the lists were not sworn to by the persons listing property as required by section 8, of chap. 66, Gen. Stat., 898. This is conceded. Does this failure invalidate the entire assessment? No case has been cited sustaining this ground, and we think none can be found which does so. The object of the oath is to appeal to the conscience of the person making the list, and thus if possible, prevent him from concealing from the assessor property, credits, or money. It is merely a means to enable the assessor to arrive at the truth of the statements contained in the list. It is not conclusive upon him. If he has evidence sufficient to satisfy him that the person listing has other property, credits, or money justly taxable in that precinct, which he conceals, he may, upon due notice to such person, add the same to the list of property already in his hands. *Jones v. Commissioners*, 5 Neb., 561. And it is his duty to assess all the taxable property in his precinct. And this duty he cannot evade without a deliberate violation of his oath. The law requires all taxable property, personal and real, to be listed and valued each year at its actual value at the place of listing. The list of each person is required to contain, "first, his lands and town lots, if in the county where the party listing resides; second, his personal property," etc. He is then required to swear that he has listed *all the lands, town lots, personal property, money, and credits*, subject by law to taxation and owned by him, or required by law to be listed by him for any other person, or persons, as guardian, husband, parent, trustee, executor, administrator, receiver, ac-

counting officer, partner, agent, or factor, as the case may be, according to the best of his knowledge. This oath should be administered in all cases. Indeed it is difficult to perceive how an assessor can reach all the property in his precinct without the administration of such an oath. Real estate is to be listed, although the statute makes taxes a lien upon it from the first day of March of the current year. The object of this provision doubtless is to enable the county treasurer to collect the taxes due thereon from personal property, as required by section 50 of the revenue law. Gen. Stat., 916. This provision, although intended primarily for the benefit of the land owner, is also intended to furnish a speedy and convenient mode for the collection of the revenue. But where an assessor complies substantially with the statute in the performance of his duties, a mere error of judgment or irregularity in the mode of making the assessment will not render the proceedings void. This being the case, the failure of parties listing to swear to the lists is not jurisdictional, and does not render the assessment void.

The fifth ground of objection is not sustained by the record.

The sixth ground of objection is that the plaintiff had sufficient personal property in the county of Saunders, out of which the taxes in question could have been collected.

In Pennsylvania lands are classified as seated or unseated, the tax on seated lands being a personal charge, while on unseated lands alone, until recently, taxes were declared a lien, to be enforced by a sale of the land. In a number of the states lands are classified as resident or non-resident, according to their condition, and as a means of designating whether they were improved or unimproved. These requirements are said to be imperative, the reason being that in some of the

states at least the tax upon non-resident lands is a tax on the land itself, while in case of improved lands it is simply a charge upon the person and goods of the delinquent. This distinction will perhaps explain a very large number of cases where it has been held that if the property was not listed in the name of the owner or person liable for the tax, the assessment was void. In this state, taxes being a lien upon the land itself, and the land being the ultimate fund out of which they are to be paid, in case they cannot be collected out of the personal property of the owner, these decisions do not apply.

Section 69 of the revenue law (Gen. Stat., 924) provides that "the sale of lands for taxes shall not be deemed invalid on account of such lands having been listed or charged on the duplicate in any other name than that of the rightful owner." In this case the premises in dispute were marked on the assessment roll as "unknown." No attempt appears to have been made by the assessor to ascertain the name of the owner. A store building, occupied by the owner and containing boots and shoes, was situated on the lot in question, at the time of the assessment in 1875. In August 1875, McMillan, the owner, sold one half of the premises to the plaintiff, who afterwards, and before the assessment was made in 1876, purchased the entire interest of McMillan therein. It is also clearly shown that the plaintiff possessed an abundance of personal property out of which to collect the taxes due upon the premises.

Under these circumstances, can the assessor, by failing or refusing to perform his duty in listing real estate in the name of the proper party, defeat the right of such party to pay his taxes upon his real estate out of his personal property? We think not. It is the duty of assessors to list all real estate in the name

of the owner if the name of such owner can be ascertained. This is not a matter of choice, but of duty. Where, under the statute as it existed prior to Sept. 1st, 1879, real property was improved and occupied as in this case, the assessor could not defeat the rights of a tax payer by making an erroneous or false return. If that were so, the home of a party might be sold from under him for taxes, notwithstanding he had an abundance of personal property in the county out of which the taxes could have been collected.

The prayer of the petitioner is to have the taxes in question declared null and void. There is no offer on his part to pay the amount due. It is evident that the taxes are a lien upon the lot in question, and such being the case the rule that "he that seeks equity must do equity" applies with full force. The law does not favor exemptions of property from taxation. All taxable property should bear its fair share of the public burdens, and where it does not, injustice is done to those who are compelled to pay taxes, by having to bear this added burden to their own proportional share of taxation. As was said in *Bellinger v. White*, 5 Neb., 401, he who seeks the interposition of a court of equity to restrain the collection of a tax upon his real estate on account of its alleged illegality, must bring himself clearly within some recognized rule of equity jurisprudence. This the plaintiff has failed to do. But as it is clear from the entire case that the plaintiff is entitled to redeem the premises upon the payment of the amount of taxes paid and interest thereon at 12 per cent, therefore, in order to avoid a multiplicity of suits, the plaintiff has leave to redeem said premises upon paying the amount due and costs to date to the clerk of the court, within thirty days from this time, or in case of his default that said premises be sold by the sheriff of Saunders county to satisfy

the amount so due. The judgment of the district court is reversed and judgment rendered in this court in conformity with this opinion.

JUDGMENT ACCORDINGLY.

JOHN G. JACOBS, APPELLEE, V. JAMES S. GIBSON, APPELLANT.

1. **Foreclosure of Mortgage:** RECEIVER. In the appointment of receivers in foreclosure suits very much is left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely, and to the injury of the party complaining, it will not be interfered with.

2. ———: ———. In the foreclosure of a mortgage the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect rents, when it is made to appear that the mortgaged property is "probably insufficient to discharge the mortgage debt."

3. ———: ———. In such cases no exception is made in favor of the executors or administrators of deceased mortgagors.

APPEAL from Douglas county. It was an action brought to foreclose a mortgage given by Jacob Gish, deceased, to John G. Jacobs, the plaintiff, on the 12th day of March, 1874, to secure the purchase money in part of the lot upon which the mortgage was given. The purchase price for which the lot was sold was $9,000, of which $2,000 was paid in cash at the time of purchase and three notes given for the balance, one for $2,000 payable in one year, one for $3,000 payable in two years, and one for $2,000 payable in three years, and all bearing interest at 12 per cent from date. The first note was paid in full, and the interest on the other two notes was paid to April 1, 1877. On the 21st day of February, 1878, the said Gish died,

leaving a widow and three minor children, and on the 25th day of March, 1878, J. S. Gibson was duly appointed administrator with the will annexed of said Gish. On the 3d day of April, 1878, after the administrator had entered upon the discharge of his duties and had taken possession of the mortgaged premises and leased them to the purchaser of the stock for the term of six months, this action for the foreclosure of the mortgage was commenced, and an application for the appointment of a receiver to take charge of the mortgaged property, and to rent the same and receive and collect the rents, accompanied the commencement of the action. This application came on to be heard on the 22d day of April, 1878, upon affidavits on behalf of both parties, and was denied, "with leave to plaintiff to renew the the same at the rendition of a final decree herein, or at the next (June, A.D. 1878) term of this court." Afterwards, on the 27th day of July, 1878, SAVAGE, J., at chambers, made an order appointing a receiver "to take charge of rent and collect the rents from that portion of said mortgaged premises," etc. From the order appointing the receiver, Gibson, the administrator, appeals.

George W. Doane, for appellant, cited Gen. Stat., 315, sec. 202. Id., 307, sec. 164. High on Receivers, secs. 693, 695, 707. *Barclay v. Lord Reay*, 2 Hare, 306. *Poythress v. Poythress*, 16 Geo., 406. *Orphan Asylum v. McCartie*, Hopkins Ch., 429. *Harrup v. Winslet*, 37 Ga., 655. *Dougherty v. McDougald*, 10 Ga., 121. *Powell v. Quinn*, 49 Ga., 523. *Johns v. Johns*, 23 Ga., 31. *Fairbairn v. Fisher*, 4 Jones Eq., 390. *Du Val v. Marshall*, 30 Ark., 230. *Gray v. Gaither*, 74 N. C., 237. *Powell v. Quinn*, 49 Ga., 523. *Chautauqua Co. Bank v. White*, 3 Selden, 252. 2 Story's Eq. Juris., sec.

836. *Middleton v. Dodwell*, 13 Ves., 266. Edw on Ref., 36, 356. 1 Van Santvoords Eq. Pr., 386, 387, 396. *Jenkins v. Jenkins*, 1 Paige, 243. *Callanan v. Shaw*, 19 Iowa, 183. *Warner v. Gouverneur's Ex's.*, 1 Barb., 36. *Shotwell v. Smith*, 3 Edw., 588.

Redick & Connell, for appellee.

LAKE, J.

In the appointment of a receiver, especially in a foreclosure case, very much must be left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely and to the injury of the party complaining, this court will not interfere.

This is an action for the foreclosure of a mortgage upon real property, and the application for the appointment of the receiver was made under the last clause of the *second* subdivision of sec. 266 of the code of civil procedure, which provides that it may be made "in an action for the foreclosure of a mortgage when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt." [Gen. Stat., 568.]

A careful examination of the evidence upon which the district judge acted in making the appointment satisfies us that the delicate duty, devolved upon him by the application, was discreetly performed. The full value of the property covered by the mortgage at the time the receiver was appointed, as shown by the average of the estimates placed upon it by nineteen persons, whose affidavits were taken, was considerably less than the aggregate of debt, interest, costs, and taxes, to be satisfied from the proceeds of its sale.

In the absence of an agreement to the contrary, we

suppose no one would contend but that a mortgagor is entitled to the rents and profits of mortgaged premises until condition broken, or in other words, until such time as the mortgagee is authorized to proceed by action on the mortgage to subject the property to the payment of his debt. Such doubtless is the law. On the other hand, it is equally clear that on a condition broken, by which the mortgagee is authorized to commence foreclosure proceedings, if the property be inadequate security, he has thenceforward an equitable lien upon the rents and profits, or so much thereof as may be necessary to the security of the mortgage debt, which he may enforce by proper proceedings.

It will be noticed that the statute before referred to makes no exception in its operation in favor of executors and administrators. It is general in its application so far as parties are concerned. No matter who the defendants may be, if the mortgaged property be "probably insufficient to discharge the mortgage debt," the plaintiff is in a situation to demand that his security be augmented by enough of the rents and profits to make it good.

Indeed we see no good reason for making an exception in favor of the representative of a deceased mortgor, nor how the court can do it in justice to the mortgagee, for it is very clear that rents collected by the administrator would not be liable to the lien of the mortgage, but would belong to the general assets of the estate, and be distributed accordingly among all the creditors.

We see no error in the record, and the order appointing the receiver must be affirmed.

ORDER AFFIRMED.

C. H. & L. J. McCORMICK, PLAINTIFFS IN ERROR, v. WILLIAM DRUMMETT AND OTHERS, DEFENDANTS IN ERROR.

1. **Error:** MOTION FOR NEW TRIAL: PETITION IN ERROR. To enable this court to examine and pass upon alleged errors occurring upon a trial to a jury, it is necessary that the attention of the trial court be specifically called to each alleged error in a motion for a new trial, and the same be also specifically pointed out to the supreme court in the petition in error.

2. **Statute of Frauds.** Parol agreements entered into between A. Z., step-father, and W. D., step-son, that said W. D. should have the use of the farming lands of A. Z. during the life of A. Z., in consideration that W. D. would support A. Z. and his wife (mother of W. D.) during their lives. Under which agreement W. D. cultivated the land and raised a crop of grain. The grain was seized in execution upon a judgment against A. Z. W. D. brought replevin. *Held*, that as between the parties to such suit the said agreement is not within the statute of frauds.

ERROR to Jefferson county district court.

The action was one of replevin brought by the Drummetts against the McCormicks to recover property bought by the latter at a sheriff's sale under an execution issued in their favor against Adam Ziegler, the step-father of the Drummetts. Upon a trial before WEAVER, J., verdict and judgment were given in their favor, to which McCormicks took exceptions. Further facts appear in the opinion.

Slocumb & Hambel, for plaintiffs in error.

1. The instruction of the court that it was necessary for the defendant in the court below to prove that said execution debtor was the owner of the property in question at the date of the levy and sale, before they

(McCormicks) could derive title to the property, misled the jury, and they undoubtedly understood from said instructions that the burden of proof was on the said C. H. & L. J. McCormick. In an action in replevin the burden of proof is always on the plaintiff in the case, and unless he shows by a preponderance of evidence that *he* was the owner and entitled to the immediate possession of the property in controversy at the time of the commencement of the action, the verdict and judgment must be for the defendant, and this is the rule where defendant alleges ownership of property in himself. *Henderson v. Casteel*, 3 Cr. C. C., 365. *Williamson v. Ringold*, 4 Cr. C. C., 39.

2. The instruction asked for by plaintiffs in error, which was to the effect that the owner of the soil was presumed to be the owner of the crops grown thereon, unless there is evidence of a valid lease of the lands, is, we think, a sound proposition of law; and as the evidence shows that the land on which the grain was raised belonged to Adam Ziegler, it was the right of plaintiffs in error to have the jury informed of the legal effect of that fact, and the court certainly erred in refusing the instruction.

W. H. Snell, for defendants in error.

1. The statute of frauds applies only to executory contracts, and when a contract is once executed neither party can claim any advantage under the statute. If such were the case, it would be a fraudulent statute and not a statute to prevent fraud. Brown on Statute of Frauds, sec. 467. *Hoby v. Roebuck*, 7 Taunt., 157. *Rakes, admr., v. Pope*, 7 Alabama N. S., 161.

2. A lease of lands for the life of the lessor is not a lease "for a longer period than one year," consequently the statute of frauds has no application in this

case. Gen. Statutes, p. 392. *Peter v. Compton*, 1 Smith's Lead. Cases. *Peters v. Westborough*, 19 Pickering, 364. *Howard v. Burgen*, 4 Dana, 137. *Lyon v. King*, 11 Metcalf, 411. *Moore v. Fox*, 10 Johns., 244.

COBB, J.

Upon comparing the petition in error with the motion for a new trial in this case, we find our field of inquiry reduced to narrow compass. In order to enable this court to examine and pass upon alleged errors occurring upon a trial to a jury, it is necessary that the attention of the trial court be specifically called to each alleged error in the motion for a new trial, and the same be also specifically pointed out to this court in the petition in error. I will therefore only notice those points in this case which come within those conditions. Several points made in the motion for a new trial are not contained in the petition in error, and will therefore be considered as abandoned by the plaintiffs in error. There are also some points contained in the petition in error which were not made in the motion for new trial. These cannot be considered by this court, because it would be unjust to the trial court to reverse its judgment upon a point to which its attention had not been called. For if the point is a good one we must presume that, had the attention of the trial court been called to it, the result would have been different.

Accordingly I shall consider only the third, fourth, and sixth errors assigned in the petition in error, which are as follows:

"3d. There was error in admitting parol testimony of defendants in error to prove a lease to them of lands for more than one year."

"4th. There was error on the trial of said cause in

the court stating orally in the hearing of the jury, upon refusing to give the instructions asked for by the plaintiffs in error, numbered second and fourth, that the statute of frauds had no application to this case."

"6th. That the court erred in overruling the motion to set-aside the verdict in said cause for the further reason that said verdict is not supported by the evidence."

The third and fourth points may properly be considered together, because if this case is within the statute of frauds, then it was error to receive parol testimony to prove a lease to defendants of lands for more than one year; and it was also error for the court to state in the hearing of the jury, in a manner calculated to carry the same weight with the jury as a formal instruction, "that the statute of frauds had no application to this case." It may be that in order to have availed themselves of any advantage from the last named error, the plaintiffs in error should have prayed the court to have withdrawn the same from the consideration of the jury by an appropriate instruction.

It appears from the evidence in the case that the grain which was the subject of the action was raised by the defendants in error on land belonging to Adam Ziegler, their step-father, under a verbal agreement, entered into between them previous to the planting of the crop, to the effect that the defendants in error should have the use of the land during the life-time of the said Ziegler and his wife (the mother of the Drummetts) in consideration that the latter named parties would cultivate the said land and support the former (Ziegler and wife) during their lives. This evidence was objected to by the plaintiffs in error on the ground that the same amounted to a lease of the land for a term exceeding one year, and the same not being in writing was void under the third and fifth sections of

chapter 25 of the General Statutes, usually called the statute of frauds.

It is urged on the other hand that even if the said agreement is to be considered a lease of the land, yet that it is not within the statute, for the reason that the term is not necessarily one exceeding one year, being for the lives of Adam Ziegler and his wife. We are cited to no authority directly upon this point, nor have I been able to find any within the brief time which I have been able to devote to the subject. But we are cited to several authorities upon the construction of the first subdivision of section 8 of the statute, which declares void "every agreement that by its terms is not to be performed within one year from the making thereof."

The courts of England, Massachusetts, Kentucky, New York, and other states, in construing similar statutes, have declared in effect that a contract is not void by the statute of frauds, as an agreement not to be performed within a year from the making thereof, if the performance of it depends upon a contingency which *may* happen within the year, although in fact it does not happen until after the expiration of the year.

I think the reasoning of the courts by which they reach the above conclusion is also applicable to the point raised in this case, and that it goes far to support the conclusion that the agreement under which the defendants in error cultivated the land in question cannot be considered a contract for the leasing for a longer period than one year, when the event or events which by its terms is to bring it to an end *may* happen at any time within the year.

But there is another and I think a correct view of this case urged by the defendants in error. This action is not brought upon or to enforce the agreement which is claimed by plaintiffs in error to be void under the

statute. The agreement, whatever it should be considered to be in law, is acquiesced in by all the parties to it. So far as this case is concerned the same has been fully executed. Under its provisions, defendants in error have earned or rather produced the property which is the subject of the replevin in this case. Therefore their ownership of the property is not affected by the legal character of the agreement under which they hold the land, whether the same is within or without the provisions of the statute of frauds.

There was therefore no error in the court admitting parol testimony of the terms upon which defendants in error cultivated the land in question; and as the agreement does not come within the provisions of the statute of frauds, there was no error in the court stating in the hearing of the jury that "the statute of frauds had no application to this case."

As to the sixth point, I think that the verdict is not only sustained by the evidence, but that the great preponderance of evidence sustains the conclusion arrived at by the jury, and that the verdict is in accordance with the law and justice of the case.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

JOSEPH MAPSTRICK AND OTHERS, PLAINTIFFS IN ERROR, V. FRANK RAMGE, DEFENDANT IN ERROR.

1. **Action on the Case for Conspiracy and Damage.** The defendants, to the number of eighteen, were engaged by the plaintiff as journeymen tailors to do tailoring work for plaintiff by the piece. They conspired together to stop work simultaneously, and return all work in an unfinished condition. On the thirty-first of March, 1876, they did stop work, and returned to the plaintiff various and numerous pieces or jobs of work (garments) in an unfinished state, which were entirely worthless in such unfinished condition. Plaintiff could not get any workmen to finish said jobs, to plaintiff's damage, etc. *Held*, that a bill of particulars in the county court, setting up the above facts, contained facts sufficient to constitute a cause of action.

2. **County Court:** POWER TO TRY CAUSE BY CONSENT ON AND AFTER THIRD MONDAY OF TERM. The third Monday of the month was the fifteenth day. On Saturday, the 13th, the parties struck a jury, and by consent the venire was made returnable on the following Monday, on which day the parties met with their witnesses and tried the cause, and again by consent continued the same until the 17th for argument. *Held*, that said county court had jurisdiction to so try said cause by consent of parties, on and after the third Monday of the month.

ERROR to the district court of Douglas county. In the county court, where the action was brought, Ramge, plaintiff there, had verdict and judgment in his favor, which was affirmed on error in the district court. From the judgment of affirmance Mapstrick

NOTE.—When the court has jurisdiction of the subject matter of the suit and the person of the defendant, and the defendant has some privilege which exempts him from jurisdiction, he may waive that privilege. *Johnson v. Jones*, 2 Neb., 135. So in an action against a public officer brought in a different county from that in which he held his office, where he appeared and pleaded of the merits of the case, it was held an absolute waiver of all objections to the jurisdiction of the court. *Kane v. U. P. R. R.*, 5 Neb., 105.—REP

and others, defendants in the county court, brought the case here upon a petition in error.

N. J. Burnham, for plaintiff in error.

There is no conspiracy in this case. Conspiracy in the eye of the law is the corrupt agreeing together of two or more persons to do by concerted action something unlawful as a means or end. Bishop, sec. 149. The act must be unlawful, and it must be injurious to an individual or the public, by reason of the combination. When the injury contemplated by the conspiracy is of the former class, and is meant to fall upon an individual in distinction from the public at large, the combination must be of a nature to place the conspirators on an unfair ground toward him, a ground which alone one with the evil intent would not occupy—and whether an individual or the public is to be wronged, the wrong must be of a sufficient magnitude for the law to notice. Taking this case in the light of the above rule of law, there is certainly no conspiracy. *Commonwealth v. Hunt*, 4 Met., 111. As to the offense of the conspiracy itself, there is no difference whether the unlawful thing is the means or the end. If both means and end are unlawful *a fortiori*, the offense is constituted. If neither is unlawful there is no offense. *State v. Rickey*, 9 N. J. Law, 293. *State v. Norton*, 23 Id., 33.

Plaintiff further claims that, although a waiver as to personal service may be held, they cannot waive that which they have no power to control; that is, they cannot, by appearing on a day after said term has expired, give the court, even by consent, that which the legislature has expressly provided it shall not have. Consent cannot give jurisdiction to the subject matter. *Thompson v. Steamboat J. D. Morton*,

20 Ohio State, 26. *Place v. Welch*, 3 W. L. M., 611. If the court has not the capacity to try a question, except under particular conditions or when *approached* in a particular way, the parties cannot by *consent* waive the conditions or approach the court in any other way. An order made under such circumstances will be absolutely void. *Walker v. Walker*, Ex. 4, W. L. M., 32.

John L. Webster and *Ralph E Gaylord*, for defendant in error, cited *Johnson v. Jones*, 2 Neb., 135. *Kane v. U. P. R. R.*, 5 Neb., 105. *Barnes v. Badger*, 41 Barb., 98. *Fiero v. Reynolds*, 20 Barb., 275. *Jacobs v. Morange*, 1 Daly, 527. *People v. Brennan*, 3 Hun., 671.

COBB, J.

The plaintiff in error makes two points: *First*, that the petition in the court below does not state facts sufficient to constitute a cause of action; and *second*, that said cause, which was originally tried in the county court of Douglas county, was argued and submitted to the jury, verdict rendered, etc., on the seventeenth day of May, 1876, that being after the third Monday of the month, at a time when the court had no authority to act.

The petition is certainly rather scant, and had a motion been made for an order requiring the plaintiff to make it more definite and certain, it would probably have been sustained. But after verdict, I think the allegations of the petition sufficient to sustain the judgment.

The petition alleges that the plaintiff was damaged by reason of the defendants having, pursuant to a conspiracy previously formed between themselves, on the thirty-first day of March, 1876, stopped working for the plaintiff, and returned to him all jobs of work then

in their hands in an unfinished condition, and did return to the plaintiff various and numerous pieces or jobs of work (tailoring) in an unfinished state, which were entirely worthless in said unfinished condition. That said plaintiff could not at said time get any men to finish said work. Whereby said plaintiff had been damaged in the sum of $371.00.

One of the issues made by the answer was that the plaintiff sustained no damage by reason of the return to him by the defendants of the said jobs (garments) in such unfinished condition, and there was testimony before the jury in the county court to that point. I do not think that there is much difficulty in the proposition that, where a merchant tailor has a large number of journeymen working for him by the piece, making up garments for his customers out of material furnished by him for that purpose, and by a preconcerted arrangement among themselves the journeymen, instead of finishing the work and thus enabling him to keep his engagements with his customers, all return the garments in an unfinished state, he would be damaged as well directly, in losing the money which his customers would have paid him if he could have delivered the garments to them in a finished condition, as indirectly, by the loss of customers and the damage to the character of his house for punctuality.

The case of *Jones v. Baker & Westervelt*, 7 Cowen, 445, is in point, and I quote a part of the syllabus:

"In all other cases of conspiracy the remedy is by action on the case, and one may be convicted and the other acquitted. In these actions actual conspiracy need not be proved; it may be inferred from circumstances, among which are the acts of the parties in doing the injury which was the object of the conspiracy.

"J., a merchant tailor, was engaged in carrying on a profitable trade in his line of business from New

York to New Orleans, the successful prosecution of which depended on a knowledge of certain things known to so few that his gains were very large. B. conspired with J.'s foreman, in J.'s absence, to obtain the secrets of the business. Did obtain them; and was in consequence enabled to rival J. in his trade; and J. was otherwise injured. *Held*, That an action on the case lay against B. and the journeyman, at the suit of J., for the conspiracy; and that one of the defendants might be convicted and the other acquitted.

"In such a suit the damage is the gist of the action, not the conspiracy."

In the case at bar, while the allegation of damage is not set out with that method which would entitle it to be regarded as a model of pleading, yet it was sufficient to inform the defendants of the plaintiff's claim and the general nature of the proofs necessary to meet it. Upon the trial there was proof of the plaintiff's damage, and this court cannot say that such proof was insufficient to sustain the verdict.

As to the second point. The General Statutes, page 265, section 7, provide that " * * * such regular terms shall be deemed to be open, without any formal adjournment thereof, until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term." That year, 1876, it appears that the third Monday of May was the fifteenth day of the month. From the record it appears that on the thirteenth (Saturday), by consent of parties, a venire for a jury, which had on that day been struck in the case, was issued, returnable on the fifteenth. That on the fifteenth the parties met with their witnesses and a trial was had; when again, by consent, the cause was continued for argument to the 17th.

The statute above quoted is clearly directory, and

was designed for the convenience of parties to suits and their attorneys, and probably also that of the county judges themselves, many of whom are attorneys practicing in the higher courts. While consent does not give jurisdiction over the subject matter, it does over the person, and it is clearly competent for a party to waive a provision of law designed only for his convenience. But leaving the consent of parties out of view, suppose the venire had been made returnable Saturday and the trial had commenced on that day, but could not be completed until Monday, or not even then, would not the letter of the law have been obliged to yield to the reason of the rule and the very necessities of the case, and would it not have been the duty of the court to have gone on and completed the trial, had it taken the entire week? This proposition is so clear that it need only to be stated.

The judgment of the district court must be affirmed.

JUDGMENT AFFIRMED.

JULIETTE B. GILLETTE, PLAINTIFF IN ERROR, v. F. C. MORRISON, ADMINISTRATOR OF THE ESTATE OF A. HEFFLEY, DECEASED, AND OTHERS, DEFENDANTS IN ERROR.

Courts: DISCRETION OF THE COURT. Upon the plaintiff resting her case, defendants' counsel moved for a non-suit "on the ground that there is no evidence whatever offered by the plaintiff to sustain her cause of action, and on the further ground that, as shown by the evidence offered by the plaintiff, there is already on the records of the court a finding, decree, and judgment against the defendants in this cause." Whereupon counsel for the plaintiff asked leave of the court to withdraw his rest, and for leave to introduce the journal entry showing the

setting aside of the other journal entry constituting a judgment against defendant. The court refused the request and sustained the motion for non-suit. *Held*, That the district court should have granted the request of the counsel for the plaintiff, and that his refusal to do so was an abuse of discretion, for which the judgment must be reversed and a new trial granted.

ERROR to the district court for Otoe county, where the cause was tried before GASLIN, J., of the fifth district, sitting in that county. The facts appear in the opinion.

A. C. Ricketts, for plaintiff in error.

1. It is the duty of the trial court to use all proper means to fully determine the issues involved in an action, and thereby conclude litigation. To this end it is not only proper, but the duty of the court to allow the plaintiff to withdraw a rest and put in further material evidence which may have been overlooked or omitted by mistake; and the fact that defendant has made a motion for non-suit does not affect the plaintiff's right. *Newbraugh v. Curry*, Wright O., 511. *Wadsworth v. Thompson*, 18 Ga., 709. *McColgan v. McKay*, 25 Ga., 631. *Larman v. Huey*, 13 B. Mon., 436. *Smith v. Merrill*, 9 Gray, 144. *Lewis v. Ryder*, 13 Abb., N. Y. Pr., 1. *Allen v. Watson*, 2 Hill, S. C., 319. *Hanson v. Michelson*, 19 Wis., 498.

2. A motion for a non-suit, on the ground that no right to recover has been shown, as in the case at bar, is too general. It should specifically point out the defects in the evidence so as to show the real point which defendant intends to raise. *Trustees v. Cagger*, 6 Barb., 576. *Castle v. Duryea*, 32 Barb., 480. *Kiler v. Kimball*, 10 Cal., 267. *People v. Banvard*, 27 Cal., 470. *Booth v. Bunce*, 31 N. Y., 246. *Binsse v. Wood*, 37 N. Y., 526. *Sands v. Shoemaker*, 4 Abbot New York Appeals Decisions, 119.

T. B. Stevenson and *M. L. Hayward*, for defendant in error.

COBB, J.

This case has been before this court once before, 7 Neb., 263.

From the record it appears that I. P. Mumford, on the twenty-fifth day of January, 1870, made his promissory note, payable ten days after date to A. Heffley or order, for the sum of $844.77, with 12 per cent interest, which note was secured by a mortgage on certain real estate in Otoe county, executed by the said Mumford and wife; that on the twenty-fifth day of October, 1870, the said A. Heffley, for value, endorsed and delivered the said note, and assigned by an instrument in writing the said mortgage to the plaintiff; that an action of foreclosure was afterwards commenced in the district court of Otoe county, by this plaintiff, against John W. Mumford and others, heirs at law of said I. P. Mumford (he having deceased), Elizabeth Mumford, his widow, Logan Enyart, his administrator, A. Heffley, Diantha Latham, and Aultman, Miller & Co., upon the said note and mortgage; that a judgment of foreclosure was rendered in said case on the eighth day of September, 1874; that upon the sale of the mortgaged premises by the sheriff of Otoe county, and the application of all the proceeds thereof, properly so applicable to the payment of the plaintiff's claim, there still remained a deficiency of $947.17; that said sale was confirmed and judgment for deficiency in the above amount rendered against A. Heffley on the twelfth day of March, 1875, and that there was afterwards paid on the said judgment by the Mumford estate the sum of $347.66.

It is assumed that the above stated judgment, so far

as A. Heffley was concerned, was afterwards set aside by the district court on application of the said A. Heffley, for the want of sufficient allegations in the original petition to charge him as endorser upon the said note. The record also shows that on the sixteenth day of June, 1876, the plaintiff made her motion in the said district court to revive the said action against the legal representatives of A. Heffley, he having deceased; that said legal representatives appeared and answered; that the court overruled and denied said motion, which action of the district court was, upon error to this court, reversed, and the cause remanded, the same having been revived in the supreme court against F. C. Morrison, administrator of the estate of A. Heffley, deceased; that on the twenty-sixth of April, 1878, the plaintiff, by leave of the district court, filed her amended petition, and that the defendant made answer, presenting two issues.

1. The defendant denies the presentation and demand of payment upon the maker of the note and due notice to decedent as endorser. 2. He alleges fraud and collusion between the attorney for the plaintiff and the attorney of one Diantha Latham in a previous action, by reason of which other securities were lost, which should have been applied by the plaintiff to keep down the deficiency for which this suit is prosecuted. It should perhaps be stated that the defendant also set up the statute of limitations in his answer, but if ever seriously relied upon as a defense, it seems to have been abandoned on the trial.

Upon the trial the plaintiff, under objection, proved by Lee P. Gillette, her husband, the presentation of the note for payment to Mumford four or five days after the indorsement of the same to her, its non-payment and notice thereof to Heffley on the same day.

She also called G. W. Covell, who had been the at-

torney of Diantha Latham, to disprove the charge of collusion, etc., set up in defendant's answer. After the attorney had got through with the examination in chief of this witness the court directed the witness as follows: "You may now tell all about this matter, so that we shall not have to take any further time about it," whereupon witness stated: "Mr. Heffley stated to me that no demand or notice or protest was made on the note after it became due on him," etc.

For some purpose, not apparent to the writer, the attorney for the plaintiff introduced the record of the judgment for deficiency, rendered March 12, 1875. The attorneys for defendant objected to the admission in evidence of the proffered record on the ground that it was incompetent, irrelevant, and being no decree, and for the further reason that the said entry had been set aside, whereupon counsel for plaintiff said: "We admit that; I only offer it to show what the court did. We admit that it was set aside, as against A. Heffley, by reason of insufficient allegations in the petition." Objection overruled and defendant excepted. Plaintiff's counsel having rested the case on the part of the plaintiff, the following proceedings were had as per bill of exceptions, which I quote literally: "The court called upon defendant's counsel to proceed with his case. Counsel for defendant: 'We move for a nonsuit in this case on the ground that there is no evidence whatever offered by the plaintiff to sustain her cause of action, and on the further ground that, as shown by the evidence offered by the plaintiff, there is already on the records of the court a finding decree and judgment against the defendant in this cause.' The court asked for the record, and defendant passed to his honor Journal J of the records of the court, page 437. Counsel for the plaintiff: 'I ask leave of the court to withdraw my rest, and for leave to intro-

duce the Journal entry, showing the setting aside of the other journal entries constituting a judgment against Heffley.' The court refused the request made, to which ruling of the court the plaintiff excepted. Counsel for plaintiff. 'I demand that they put formally into writing their motion for a non-suit before it is argued.' Counsel for defendant. 'We have a reporter here to record our motions.' The Court. 'The defendant moves for a non-suit. I sustain the motion and direct the jury to find for the defendant.' After signing verdict of jury by the foreman, its return and filing of the same by the clerk, the plaintiff's counsel excepted to a non-suit, also to the verdict of the jury."

The plaintiff's motion for a new trial was overruled and final judgment for defendant, and the case comes here again on petition in error.

It is very clear that upon the pleadings and proof the plaintiff was entitled to a verdict and judgment. The whole case was predicated on the former action of the court setting aside the judgment for deficiency against A. Heffley. Counsel for defendant had asserted in open court, pending the trial, as a reason for excluding the record of the judgment, when offered in evidence by the counsel for plaintiff, that the same had been set aside. That it had been must have been a matter of record in the identical case before the court. But suppose it had not been set aside. A former recovery, in order to defeat a subsequent action, must be pleaded in bar. Therefore, whether we understand the court as granting a peremptory non-suit, or directing the jury to find a verdict for the defendant, or both, it was an error.

But had it been true that, in order to make out the plaintiff's case, it was necessary for her to introduce the journal entry showing the setting aside of the judgment, and her counsel had prematurely rested the case

without introducing it, the court should have allowed him to withdraw his rest for the purpose of introducing it; and a refusal to do so upon the reasonable and timely application of plaintiff's counsel was an abuse of discretion on the part of the district court, which it is the duty of this court to correct.

In *Mercer v. Sayre* (impleaded with Toler), 7 Johns., 307, after the evidence was closed, and after the defendant's counsel had summed up to the jury, and while the plaintiff's counsel was addressing the jury, the counsel for defendant informed the judge that he had just discovered certain evidence favorable to the defendant which he asked permission to give to the jury; but the judge thought he could not admit the evidence unless the plaintiff's counsel would consent, which being refused, the evidence was rejected and verdict and judgment for the plaintiff. The supreme court, presided over by then chief justice, James Kent, in reversing the judgment below, say: "The judge, under the circumstances of the case, had a discretion to admit the evidence; and it ought in sound discretion to have been received. We think, therefore, that the defendants are entitled to a new trial." There is an abundance of authorities to this effect.

Counsel for the defendant make the point that plaintiff offered no testimony as to demand of payment of the note of Mumford and notice on Heffley, except Lee P. Gillette, the husband of plaintiff. That under the laws of 1873, Gen. Stat., 582, section 329, this witness, being the plaintiff's husband, and having a direct legal interest in the result of the suit, was incompetent. That hence the plaintiff offered no testimony on that point. The section referred to reads as follows: * * * "Nor shall any person, having a direct legal interest in the result of any civil cause or proceeding, be a competent witness therein when the adverse party is an

executor, administrator, or legal representative of a deceased person." The note sued on has been treated throughout the controversy as the separate property of the plaintiff. It has not been shown to have been in the possession of Lee P. Gillette, except for the purpose of presentation for payment, which he swears he did by authority of the plaintiff. If it is her separate property, then her husband has no direct legal interest in the result of the suit.

Defendant's counsel also make the point that plaintiff should bring her case within the provisions of section 848, on page 656 of the General Statutes. That section provides that: "After such petition (for foreclosure of mortgage) shall be filed, while the same is pending, and after a decree rendered thereon, no proceedings whatever shall be had at law for the recovery of the debt secured by the mortgage or any part thereof, unless authorized by the court." The object of this section is to prohibit a plaintiff, after having commenced an action to foreclose a mortgage, from bringing a separate and independent suit on the note or bond secured by the mortgage. This is not a separate or independent suit, nor is it a proceeding at law. It is a revivor of the original action in chancery for the foreclosure of a mortgage and judgment for deficiency. At the same time it is incorrect to say that said proceeding was unauthorized by the court, as the suit was revived by order of this court. See 7 Neb. Repts., 263.

Defendant's counsel also make a point upon the testimony of G. W. Covell, wherein, in response to the rather sweeping question of the court, he testifies as to statements made to him by A. Heffley in his life-time to the effect that no notice had been given him of a demand on Mumford and refusal to pay the note. To this it may be answered that said evidence was not called out by the plaintiff's counsel, but was excepted

to by him, and that, as it would not have been responsive to any question which could have properly been put to witness on cross-examination, it should not have been permitted to go to the jury. It need scarcely be added that it would be incompetent for the defendant to prove the declarations of the decedent made in his life-time, unless made in the presence of the plaintiff, as a defense to the action.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

SCHOOL DISTRICT NUMBER TWO OF SALINE COUNTY, PLAINTIFF IN ERROR, v. THE BOARD OF COUNTY COMMISSIONERS OF SALINE COUNTY, DEFENDANT IN ERROR.

School Funds: COUNTY TREASURER: DISTRIBUTION. Under the law, since the constitution of 1875 took effect, license moneys are devoted to the support of common schools; and it is the duty of the treasurer of each county to take all proper measures to secure to each district the amount to which it is entitled. But the county is in no way answerable for the acts of the treasurer in respect of this duty.

ERROR to the Saline county district court.

In the years 1876, 1877, and 1878, the treasurer of the city of Crete collected the sum of $3,700 as license money for the sale of intoxicating liquors, under ordinances of said city passed pursuant to the city's general powers and the authority of chapter 53 of the criminal code. This sum of money, in different sums, at different times, said city treasurer turned over to the county

treasurer, who placed it to the credit of the school fund, and disbursed the same in the manner practiced prior to the adoption of the state constitution of 1875.

The city of Crete is a city of the second class, of less than 2,000 population. The plaintiff is a school district which includes all the area and population of the said city of Crete. The plaintiff demanded the money of the defendants. From the refusal of the board of county commissioners, plaintiff appealed to the district court, which sustained defendant's demurrer to the petition and dismissed the cause.

True & Dougherty, for plaintiff in error.

If plaintiff is entitled to sue for this money, the right to recover is sustained by reason and by the following authorities: *Adm'rs of Dumond v. Carpenter*, 3 Johnson, 183. *Union Bank v. Bank*, 3 Mass., 74. *Fowler v. Shearer*, 7 Mass., 14. *Wiseman v. Lyman*, 7 Mass., 288. *Mowatt v. Wright*, 1 Wendell, 355. *Woodward v. Hill*, 6 Wis., 146. *Town of Ripon v. School District*, 17 Wis., 83.

Hastings & McGintie, for defendant in error.

LAKE, J.

The action below was commenced to recover the amount of certain license moneys which, under section 5, article VIII of the constitution of 1875, belonged to the plaintiff, and should have been applied exclusively to the support of its common schools.

But we think the plaintiff has mistaken its remedy. Although the funds in question have been improperly used by the several school districts of the county, their misapplication was a work in which the board of com-

missioners neither took, nor could take, any part whatever, and for which the county is in no way liable.

By referring to sec. 72, page 974, Gen. Stat., it will be seen that the county treasurer is intrusted with very large powers respecting school moneys, and is made the special protector of funds designed for the support of schools within his county. It is specially enjoined upon him to "take all proper measures to secure to each district its full amount of school funds" from whatever source they may arise. And in this connection it is his duty, when such funds come into his hands, to credit them to the proper district, and on proper application pay them over to the officer of the district entitled to receive them from his hands.

With the management of this business the county commissioners have no voice whatever. They cannot control—nor is the county in anywise answerable for—the acts of the treasurer, either committed or omitted, in respect of these duties. If the county treasurer has misappropriated moneys belonging to the plaintiff, he and his sureties may be liable in a proper action on his bond; but the county very clearly is not liable therefor.

JUDGMENT AFFIRMED.

JAMES L. HILTON, PLAINTIFF IN ERROR, V. JOHN C. ROSS AND OTHERS, DEFENDANTS IN ERROR.

1. **Attachment:** ERROR: UNDERTAKING. The undertaking provided for by "An act to provide for the retention of attached property pending a review on error," etc. [Gen. Stat., 715], passed February 17, 1873, not being necessarily a part of the record of the case, its absence therefrom cannot be taken as proof that it was not in fact given.

2. ———: ———. Error in discharging an attachment on motion of defendant, whereby costs are wrongfully visited upon the plaintiff, is not cured by a subsequent final judgment in the action in favor of the defendant.

3. ———: AFFIDAVIT. An affidavit setting forth the existence of the grounds of attachment in the words of the statute, unaccompanied by any facts showing them to be true, will support the writ. But when such affidavit is met by the positive oath of the defendant in denial, it must be supported by competent evidence, or the attachment will be dissolved.

4. ———: DELIVERY UNDERTAKING. The giving of a delivery undertaking, as provided in sec. 206 of the code of civil procedure, neither has the effect of dissolving the attachment nor of preventing the defendant from afterwards moving its dissolution as to the whole or a part of the property attached, which he may do at any time before final judgment in the action.

NOTE.—In support of the third point of syllabus, see also *Ellison v. Tallon*, 2 Neb., 15. *Tallon v. Ellison*, 3 Neb., 73. But in an application for the allowance of an attachment on a claim not due the language of the code should not only be repeated, but the affidavit should also contain a statement of the facts and circumstances, such as ordinarily disclose the intent, purpose, or effect in the disposition of the property as injurious to the rights of creditors. *Siedentoff v. Annabil*, 6 Neb., 54. The affidavit may be amended, even after a motion to quash the proceedings has been filed, because of that particular defect. *Struthers v. McDowell*, 5 Neb., 491. The want of a venue is fatal unless cured by amendment, but to be made available the motion to dissolve in such case must be made before final judgment in the action. *Rudolf v. McDonald*, 6 Neb., 163.—REP.

ERROR to the district court of Buffalo county. Heard below before GASLIN, J. The opinion states the case.

Hamer & Conner, for plaintiff in error.

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

LAKE, J.

This is a proceeding in error to reverse the order of the district court for Buffalo county discharging an attachment of personal property.

A preliminary motion is interposed by the defendant in error, to dismiss the case upon two grounds:

1st. Because "the plaintiff in error has failed to give the undertaking required by an act entitled, 'An act to provide for the retention of attached property pending a review on error of an order discharging the attachment,'" passed and took effect February 17th, 1873. Gen. Stat., 715.

2d. "That the original action in which the attachment mentioned in this cause was issued has proceeded to final judgment in favor of said defendant."

As to the *first* ground of the motion, it may be answered that we have nothing before us to show that the undertaking required by this very crudely expressed statute was not given. In the first section it is provided that the plaintiff in error "shall give an undertaking to the adverse party, with surety or sureties to be approved by the court in double the amount of the appraised value of the property attached, conditioned to pay said adverse party all damages sustained by such party in consequence of the filing of said petition in error, in the event that such order of attach-

ment shall be discharged by the court in which said petition in error shall be filed, as having been unlawfully obtained."

Although it is by no means so clear as it might have been made, it was, we think, the intention of the legislature to have the undertaking approved by the court whose judgment it is sought to have reversed, and then deposited with the clerk thereof. Be that as it may, however, it is clear that the undertaking, not being necessarily a part of the record of the case, its absence therefrom is of no particular significance, and cannot be taken as proof that it was not in fact given. Of this matter the official certificate of the proper clerk would be the proper evidence. Therefore, as there is no evidence before us that the proper undertaking was not in fact given, it is unnecessary to decide what the result of a failure to give it would be.

As to the second point we answer that, if the order of attachment, having been properly issued, were erroneously discharged on motion of the defendants, whereby costs were wrongfully visited upon the plaintiff, the error is not cured by the fact of a final judgment being since rendered which would have dissolved the attachment, had it been continued to that time. If it were properly issued, it was the plaintiff's right to have the attachment stand until final judgment in the action, unless sooner discharged by giving of the undertaking to "perform the judgment of the court," as provided in section 219 of the code of civil procedure. Gen. Stat., 560. While a final judgment in the action, in favor of the defendants, terminates the proceedings in attachment in their favor, it does not have the effect of curing all previous errors committed by the court or judge, respecting the attached property, prejudicial to the plaintiff. The motion to dismiss the petition in error must therefore be overruled.

But was there error in the ruling of the court on the motion to dissolve the attachment? We think not most clearly. The affidavit on which the attachment issued set forth, substantially in the words of the statute, the fifth, sixth, eighth, and ninth causes mentioned in section 198 of the code of civil procedure (Gen Stat., 556) as grounds for which a plaintiff may "have an attachment against the property of the defendant." But no facts or circumstances were given showing, or even tending to show, the actual existence of any one of these grounds. While an affidavit of this description, acquiesced in, will sustain an attachment, it is not sufficient for this purpose when met by the positive oath of the defendant in denial, but must itself be supported by competent proof, or the attachment will be discharged. *Coston v. Paige*, 9 Ohio State, 397. *Emmit v. Yeigh*, 12 Ohio State, 335. *Ellison v. Tallon*, 2 Neb., 14. *Tallon v. Ellison*, 3 Neb., 73.

Here, however, we have, in addition to a positive denial of the truth of the plaintiff's affidavit, a very conclusive showing of facts and circumstances establishing its falsity as to all of the statutory grounds for the attachment recited therein.

But the hope of a reversal seems to rest, not so much upon the strength of the plaintiff's case, as upon what is supposed by counsel to constitute an estoppel of all inquiry concerning the validity of the attachment proceedings prior to the levy of the order. It is claimed here, and was in the court below, that the sheriff, in executing the order of attachment, took from the defendants what is known as a delivery undertaking according to section 206 of the code, "that the property, or the appraised value thereof in money, should be forthcoming to answer the judgment of the court in the action;" and that thereupon the goods were left in possession of the persons where found. Gen. Stat.,

558. That this claim accords fully with the facts as they actually transpired is established beyond all controversy, if we were permitted to look beyond the sheriff's return to ascertain just what he did under the writ. But, in the consideration of this matter, we must take the return of the officer as conclusive; and in this, not only is no mention made of the said undertaking, but the sheriff expressly says: "I now have the property mentioned in the above inventory and appraisement in my possession." There is no doubt whatever of the falsity of this part of the return, for it is shown by several affidavits, among them that of the sheriff himself, giving a copy thereof, showing that the undertaking was accepted, and the goods left with the defendants, who continued thereafter to dispose of them as they had done before the levy was made.

But even if these facts were embodied in the return, as they clearly should have been under section 211 of the code (Gen. Stat., 559), still they could not have the effect contended for by plaintiff's counsel, for the giving of such an undertaking neither has the effect of dissolving the attachment nor of preventing the defendant from afterwards moving its dissolution, as a moment's attention to the statute will show. Indeed, one of the provisions of the undertaking is, that the property shall be forthcoming, to be disposed of in satisfaction of the claim for which the attachment was made. Again, section 229 of the code declares that "the court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking may have been given, and may proceed summarily, on such undertaking, to enforce the delivery of the property," etc. And section 230 is of similar import. Gen. Stat., 562.

Speaking of a statute very similar to ours on this subject, the supreme court of Missouri say that, "it

was not intended to divest the lien of the creditor, but was intended chiefly to save expense to the parties, and had in view only such property as could be used without impairing its value." *Evans v. King*, 7 Mo., 411. So, too, the supreme court of Ohio, in *Rutledge v. Corbin*, 10 Ohio State, 478, in construing a statute from which ours was copied, say: "The party to whom the sheriff so re-delivers it thereby receives and holds it as the bailee of the sheriff, and the property is still in contemplation of law in the possession of the sheriff, so far as subsequent attaching creditors are concerned."

And we think it equally clear that, by giving the undertaking, notwithstanding which, as we have shown, the attached property is liable at any time to be retaken by the sheriff, by order of the court, the defendant did not estop himself from questioning the validity of the seizure. The time within which a motion to discharge the attachment may be filed seems to co-exist with it, up to the rendition of final judgment in the action. *Rudolf v. McDonald*, 6 Neb., 163. Thus it is provided in section 235 of the code that: "The defendant may, *at any time before judgment*, upon reasonable notice to the plaintiff, move to discharge the attachment as to the whole or a part of the property attached." Gen. Stat., 563. And this right may be exercised, whether the property be in the actual possession of the officer or has been released, and is subject to the order of the court under such undertaking in the hands of the defendant, or in the hands of a third person as garnishee. Seney's Code, 308. Note 1 to sec. 212, Ohio Code.

Such being our views of the questions presented, the order of the district court must be affirmed.

ORDER AFFIRMED.

MARY J. DOLBY, PLAINTIFF IN ERROR, V. REUBEN R. TINGLEY, DEFENDANT IN ERROR.

1. **Practice:** MOTION FOR NON-SUIT. Where there is testimony tending to sustain a cause of action, a motion to non-suit the plaintiff should be overruled.

2. ———: GARNISHMENT. Where an action was commenced in the county court and a garnishee duly summoned, who answered, admitting the possession of assets of the debtor, judgment in the county court in favor of the debtor will not discharge the garnishee where, on appeal to the district court, judgment is rendered in favor of the plaintiff. But otherwise if no appeal is taken or the attachment is discharged.

3. ———: ———. A garnishee answered in the county court that he had under his "control notes, judgments, and other evidences of indebtedness" belonging to the debtor, "in the aggregate about $2,000," and an order was entered for him to retain "the sum of $450 and $25 to cover costs to abide the further event of the suit." On appeal to the district court, *Held*, that the garnishee was not discharged, but that no recovery could be had against him under the order of the court until he had collected some of the assets or converted the same into money.

ERROR to the Lancaster county district court, where the cause was tried before POUND, J.

A. C. Ricketts, for plaintiff in error.

1. By our statutes, when an appeal is taken from the county court to the district court the latter becomes possessed of the entire case with all its incidents, and carries its own judgments into execution without any

NOTE.—Garnishment *after* judgment, under sec. 244 of the civil code, Gen. Stat., 565, is authorized only when an execution has been issued and returned unsatisfied for want of property. If in such case the judgment is *set aside*, the garnishee is discharged. *Clough v. Buck*, 6 Neb., 343.—REP.

intervention of the lower court. The judgment of the county court is expunged and the court itself divested of all control over, or power in, the case. By process of law the action is simply transferred and continued in another jurisdiction, to be passed upon in all respects as though originally brought there. If there is no judgment releasing the defendant in attachment, then there is no judgment releasing his debtor the garnishee, who is much less interested and a mere stakeholder for the parties litigant; like money or property in the hands of the court he must follow the suit to which he belongs, to await the orders of the court. Gen. Stat., 268, sec. 26. Code Civ. Procd., sec. 1008 and 1010. 4 Ia., 230. 23 Pick., 465. 9 Ia., 429. Drake on Attachments, sec. 960 and 658. 3 Ia., 200. 6 Wheat, 194. 3 Blatch. U. S. Cirt., 34. 38 Ga., 602. 8 Ala., 811. 9 Ala., 223. 18 Ala., 80. 5 Ala., 583. 3 Ohio, 274. 27 Ill., 352. 3 Stewart, 90.

2. The evidence shows a final order directing the garnishee, defendant in error, to pay the garnished money into court. From this order no appeal has been taken, neither has it been set aside or modified, but remains in full force and effect (like other judgments it cannot be attacked collaterally), and the defendant in error cannot now be heard to dispute his liability. *Wilson v. Burney*, 8 Neb., 39. 5 O. S., 42. 9 Ohio State, 388.

Brown, Marshall & Caldwell, for defendant in error, contended that garnishment, being a purely statutory proceeding, cannot be pushed in its operation beyond the letter of the statute under which it is resorted to. Drake on Attachments, sec. 451. 65 N. C., 681. That from an examination of sec. 226 and 1006 of the code, Gen. Stat., 526, 686, the word "judgment" must mean the same in one section as in the other, and if so

it must be decisive of this case, for in the former section the judgment for the defendant in attachment discharges the garnishee, and in the latter the judgment may be appealed to the district court after the garnishee is discharged. That no provision can be found anywhere for continuing the garnishment if judgment is rendered in favor of the defendant in the court where the action is commenced, while an express statute is found discharging the garnishee under such circumstances. *Boston v. Wright*, 3 Kan., 227. *Gates v. Saunders*, 13 Kan., 411. *Butcher v. Taylor*, 18 Kan., 588.

MAXWELL, CH. J.

On the sixth day of July, 1875, Thomas J. H. Dolby commenced an action against R. F. Parshall by attachment in the county court of Lancaster county, Tingley being served with process of garnishment. On the second day of August of that year Tingley appeared and answered: "I have under my control notes, judgments, and evidences of indebtedness belonging to Parshall in the aggregate of about $2,000, more or less." The court thereupon made the following order: "It is ordered that R. R. Tingley, the within named garnishee, keep and retain in his hands the sum of $450, and $25 to cover costs, to abide the further event of the suit." Various adjournments of the cause were had until the twentieth day of September of that year, when the case was tried and judgment rendered in favor of the defendant, Parshall. The plaintiff appealed the cause to the district court, where in February, 1878, judgment was rendered in his favor for the sum of $549.20 and costs. On the second day of March thereafter the district court sustained a motion to require "Tingley, the garnishee herein, to pay

money into court as per his answer and order heretofore made." The money not being paid, the plaintiff brought this action against the garnishee. The defendant herein in his answer alleges:

First. That he was discharged by the judgment for the defendant in the county court.

Second. That, in obedience to the order of the district court, he, on the fifteenth day of March, 1878, presented to the clerk of the district court the note of J. H. Dolby to R. F. Parshall for about the sum of $492, and therefore he has complied with the order of said court.

Third. That prior to the notice of garnishment Parshall was indebted to him in the sum of $921 and upwards, and the proceeds of the assets were to be applied in payment of the indebtedness due said defendant, and that Parshall is still indebted on the original indebtedness the sum of $525 and upwards, and considerable sums expended in conducting suits for the collection of said assets. The defendant also alleges that he has not been able to collect enough to satisfy his own claim. He also alleges that some of the notes and assets are of no value.

It is unnecessary to notice the reply. On the trial of the cause the plaintiff introduced the judgment against Parshall, and a transcript of the proceedings of the county court, the answer of the garnishee therein, and the order of the court thereon, and also the order on the garnishee in the district court and the assignment to plaintiff, and rested. The defendant then filed a motion for a non-suit. 1. Because the court had no jurisdiction. 2. Because the appeal to the district court did not affect the garnishee. 3. Because the evidence was not sufficient to sustain a judgment. The motion was sustained and the cause dismissed. The plaintiff brings the cause into this court by petition in error.

As to the first objection, that the garnishee was discharged by reason of the county court rendering judgment for the defendant, it is sufficient to say that, had the defendant in that action, Parshall, filed a motion to discharge the attachment which had been sustained, unless the plaintiff had taken the proper steps to have the case reviewed on error, the garnishee would have been discharged. And this without reference to the final judgment in the case. *The State v. Cunningham*, ante p. 146 But where no steps are taken to dissolve the attachment the garnishee is bound from the time of service until final judgment. *Chase v. Foster*, 9 Iowa, 429. The law will not justify carelessness or neglect in a garnishee any more than any other suitor. *B. & M. R. R. Co. v. Hall*, 37 Id., 620. He is supposed to be a disinterested party, and he is not liable for costs beyond those caused by his resistance of the claim against him.

Section 939 of the code provides that: "If the garnishee appear and answer, and it is discovered on his examination that at or after the service of the order of attachment and notice upon him he was possessed of any property of the defendant, or was indebted to him, the justice may order the delivery of such property, and the payment of the amount owing by the garnishee into court, or may permit the garnishee to retain the property or the amount owing, upon the execution of an undertaking to the plaintiff with one or more sufficient sureties, to the effect that the amount shall be paid, or the property forthcoming, as the court may direct." Gen. Stat., 673.

Section 940 provides that: "If the garnishee fail to appear and answer, or if he appear and answer, and his disclosure is not satisfactory to the plaintiff, or if he fail to comply with the order of the justice to deliver the property and pay the money owing into

court, or give the undertaking required in the preceding section, the plaintiff may proceed against him in an action in his own name, as in other cases," etc. Gen. Stat., 673.

The county judge should have required the garnishee to give the undertaking required by the statute, but his failure to do so did not discharge the garnishee. The reason why the undertaking was not required probably was because the trial of the cause was set for the next day (August 3d). Had the answer of the garnishee been unsatisfactory, or had he denied all indebtedness, the plaintiff would not thereby be precluded from maintaining an action against him. The nature of the "evidence of indebtedness" held by the defendant is not disclosed. So far as appears it may have consisted of the best class of public securities, readily convertible into money. But until the defendant had collected some portion of the assets or converted the same into money he would not be in default, and there could be no recovery against him under the order of the court. Does the record contain testimony tending to show that he had money belonging to the debtor in his hands? The answer of the defendants states in substance that he had collected about $400 of the assets, and applied the same upon a debt which he claims is due from Parshall to himself. The existence of such a debt is denied in the reply. It therefore devolved on the defendant to establish its existence. This issue the court could not ignore.

Where there is testimony tending to sustain an action, a non-suit should not be granted, as the testimony should be submitted to the jury. In proceedings in attachment a garnishee should only be required to deliver property or pay money on the order of the court where there is a clear admission in his answer that he has such money or property in his possession. If

questions of fact are involved as to his liability, the case should not be disposed of in this summary manner.

But the order in this case was to retain a certain amount of money. Section 200 of the Ohio code provides for issuing an execution in all cases where "the garnishee shall admit an indebtedness to the defendant." The remedy provided by the code is by action against the garnishee. And the order, together with the admissions of indebtedness of the garnishee, may be given in evidence upon the trial. But where, as in this case, the garnishee seeks to apply the assets collected by him to his own use, the right to make such application, when denied, is a question of fact which must be submitted to the jury. The court therefore erred in sustaining the motion for a non-suit.

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

REVERSED AND REMANDED.

MILO F. KELLOGG, APPELLANT, V. LUKE LAVENDER AND OTHERS, APPELLEES.

1. **Specific Performance.** A plaintiff need not in all cases necessarily perform or offer to perform all of his part of a contract in order to maintain an action for specific performance. *So held*, Where defendant had entered into an agreement for the sale of certain real property to the plaintiff, who paid part of the consideration, gave notes for the balance, which were sold and endorsed by defendant to a third party, upon payment of which defendant was to give a deed for the property, and before the maturity of the note judgments were recovered against defendant, which were in form a lien upon the property, the contract not having been recorded, and defendant, after maturity of the notes, conveying the property to another.

2. **Notice.** A conveyed land to B, a married woman; C had an equitable interest in the land, of which A had knowledge when he received the title, as well as when he conveyed it. The negotiations on the part of B for the purchase and conveyance of the land were conducted by her husband, as her agent, who was a partner in a firm of general land agents, who, at the time of these transactions and for some time previously, had the said real property on their books for sale as the property of C, he, the husband, having entered the same on said books, and knowing of the interest of C in the property, although the naked legal title was in another. *Held*, That B had notice of the equitable interest of C, and took the title subject thereto.

APPEAL from Lancaster county district court. The action was for the specific performance of a contract which, with the facts prior and subsequent to its execution, are set forth in the opinion sufficient to an understanding of the case. Defendants below had judgment before POUND, J., dismissing the case, and plaintiff appealed.

Lamb, Billingsley & Lambertson and *Brown & Marshall*, for plaintiff in error.

1. Time is not of the essence of this contract. *Dorsey v. Hall*, 7 Neb., 464. *Hoagland v. Latourette*, 2 New Jersey Eq., 254. *Huffman v. Hummer*, 17 Id., 264. *King v. Ruckman*, 21 Id., 599.

2. Where the vendor again sells the estate of which, by reason of the first contract, he is only seized in trust, he will be considered as selling it for the benefit of the person for whom by the first contract he became trustee, and therefore liable to account, or the second purchaser, if he had notice at the time of his purchase of the previous contract, will be compelled to convey the property to the first purchaser. *Hoagland v. Latourette*, 2 New Jersey Eq., 254. *Downing v. Risley*, 14 Id., 94. *Murray v. Ballou*, 1 Johns. Ch., 566.

3. The entry of Kellogg into possession and his

payment of part of the price are of themselves a sufficient ground to entitle him to relief when perhaps relief could not otherwise be granted. *Bellamy v. Ragsdale*, 14 B. Monr., 364. *Edgerton v. Peckham*, 11 Paige, 352. *Hoag v. Owen*, 60 Barb., 34.

4. The plaintiff should not have been turned out of court without any relief, and if the court were of the opinion that there was a rescission at Salem, it should have done equity between the parties, the plaintiff should have had a decree for the re-payment for the advanced purchase money—*Eaton v. Redick*, 1 Neb., 305—and a decree enforcing an equitable lien on the land for the amount he had already paid. *Wickman v. Robinson*, 14 Wis., 493, and cases cited. Story's Eq., sec. 1217. 1 A. K. Marshall, Ky., 495. *Willard v. Taylor*, 8 Wallace, 567. *Quinn v. Roath*, 37 Conn., 16. *Snell v. Mitchell*, 65 Me., 48. *Smoot v. Rea*, 19 Md., 398.

Harwood & Ames and *James E. Philpott*, for appellees.

1. Is not an estoppel against Kellogg proven in favor of Lavender and his grantees? Acting in good faith, upon the refusal of Kellogg to complete the purchase, Lavender conveyed with warranty to Philpott and Cantlon, to whom the refusal was made, and they also, relying upon the refusal and circumstances, purchased for and paid a valuable consideration.

2. The contract between Lavender and Kellogg was never acknowledged or made of record, and there is no testimony that E. Mary Gregory, the present holder, for a valuable consideration, of the title under Lavender's grantees, ever had any notice or knowledge of it until after the commencement of this action.

3. No fault can be imputed to Lavender, and consequently none to his grantees, or those claiming under

them. He only contracted to convey upon payment of both notes. An action is now pending on the last note, against Lavender as endorser, which may be prosecuted to judgment; and Lavender and his grantees have never been apprised of its payment, neither has it been paid, unless the articles of confederation found in the record are regarded as payment, which we apprehend will not be done, especially because of the fact that Parshall, the owner of the note, whose action is now pending upon it, has declined to accept a partnership in the confederacy as payment. That he is wholly ignorant of the final consummation of the scheme is evident both from the record and from the absence of his testimony as a witness. He is one of the enemy upon whom the "confederate brigadiers" of this transaction hope to subsist.

COBB, J.

The plaintiff purchased the real estate in question—two city lots in Lincoln, with a dwelling house thereon, on the 13th day of July, 1872; the said purchase was evidenced by a writing of which the following is a copy:

"Agreement made and entered into the thirtieth day of July, 1872, between Luke Lavender, of Lincoln, county of Lancaster, and state of Nebraska, and M. F. Kellogg, city of Lincoln, county, state aforesaid. Witnesseth that the said Luke Lavender, in consideration of the sum of five hundred dollars now paid, and the sum of one thousand dollars to be paid the first day of May, A.D. 1873, and the further sum of one thousand dollars to be paid on or before the first day May, 1874, when a deed is executed, doth grant, bargain, and sell unto the said M. F. Kellogg, his heirs and assigns, all that piece or parcel of land situate in the county of

Lancaster, city of Lincoln, and known on the recorded plat as lots 11 and 12, in block 10 of Lavender's addition to Lincoln, together with all and singular the appurtenances thereunto belonging or in anywise appertaining; and the parties hereby bind themselves, their heirs, executors, and administrators for the performance of all and every part of the above agreement. As witness our hands and seals, day and year first above written."

"Signed, sealed, and delivered
In the presence of, "LUKE LAVENDER.
"Witness: "M. F. KELLOGG.
"C. O. PARMENTER."

The plaintiff paid the $500 down, and executed and delivered notes for the two deferred payments as set out in the agreement. The agreement was not acknowledged or recorded. Kellogg went into possession of the property, and with his family moved into the house on the premises and continued to reside there for about a year. The first deferred payment was about to become due, and the plaintiff (Kellogg) being unable to raise more than seven hundred of the thousand dollars, applied to J. W. Hartley, a banker, gave him the seven hundred dollars which he had, and obtained from him an agreement to advance the remaining three hundred dollars and take up the said note when it should become due, and to secure him, and finally to repay the three hundred dollars, he placed the said property in the hands of Hartley to be rented and sold; he the said Kellogg removing with his family from said property to Salem, Richardson county. In accordance with said agreement between Kellogg and Hartley, the said first note was paid at or about maturity; and about that time, in the spring or summer of 1873, the said Hartley placed the said property in the hands of McMurtry & Gregory, land agents,

to rent and sell the same on account of Kellogg, the plaintiff. They agreed to act as such agents—the defendant Gregory placing the description of the property on their books. McMurtry & Gregory acting as such agents, received and communicated to Hartley several offers to purchase said property, none of which were accepted.

Upon making the said contract and sale, the defendant, Luke Lavender, took the two notes hereinbefore described to Deacon Tingley, who, as the agent of one Parshall, a non-resident, was engaged in loaning and investing money, collecting the same, etc., and sold them to him, endorsing one of them—the first one to fall due—without recourse, and the other generally. Philpott & Cantlon were Lavender's general attorneys, and one of them drew up the said contract of sale between Lavender and Kellogg. About the time of the last mentioned note becoming due, it was put into the hands of Philpott & Cantlon for collection on account of said Parshall, who owned it through Tingley his agent. They at the same time procured a deed to be executed by Lavender to Kellogg of the said lots, and one of them went to the home of the said Kellogg and tendered him the deed, and demanded payment of the note. The note was not paid, whereupon it was returned to Tingley as uncollectible, and shortly afterwards the property was conveyed by Lavender to Philpott & Cantlon, who shortly afterwards sold and conveyed it to the defendant, E. Mary Gregory, wife of John S. Gregory, the trade being in fact made by the said John S. Gregory.

Thus it is seen that, by reason of the failure of Kellogg to pay the notes, and the action of Lavender in conveying the land upon such failure, unless the plaintiff is entitled to relief in this action he has lost the $1200 which he has paid, and is liable for $1300 more,

but which he is probably unable to pay, and in that case the same will be a total loss to Parshall and Hartley, both of whom have acted in good faith in the premises. Kellogg has not performed his part of the contract entirely. But does that preclude him from all relief in a court of equity? When the last note became due he did not pay it for two reasons: *First*, he was unable to pay it; and *second*, had he been able to pay it, Lavender had suffered the lots to become incumbered by judgments then of record against him, and so Kellogg could not have paid off the said note with safety without having first applied to a court of equity to have the said moneys applied upon said judgments, and the lien thereof taken off from the said property. And this could not have been done because Lavender had sold and endorsed the said note to Parshall, and the money, had Kellogg been able to pay it at maturity, must have gone to him. It will not be deemed necessary to cite authorities to the effect that equity will not require of the plaintiff, as a condition precedent to his bringing suit for a specific performance, that he should have made payments which the principal defendant has placed it out of his power to make, with safety and justice to the rights of others. But, laying aside the consideration of the effect of the judgments rendered against Lavender, and which were consequently incumbrances upon the title of the property in question, it is not always necessary that a plaintiff, in order to maintain an action for specific performance, should first perform, or offer to perform, all of his part of the contract. Says an eminent legal writer: "The law holds parties strictly to the very terms of their engagements, and demands from the plaintiff an exact performance of all the stipulations on his part which are essential to a recovery, or else no legal right of action accrues to him. Equity distinguishes between

those terms and stipulations which are of the essence of the contract and those which are not of the essence, and does not permit the defendant to set up a breach of the latter as a complete bar to all relief, or as a sufficient reason for wholly refusing to execute the agreement. In these cases no action at law can be maintained; but equity, if the contract is otherwise a proper one, will decree a specific performance with such compensations or allowances as may be found just to the parties." Pomeroy on the Specific Performance of Contracts, sec. 29. "Even when the partial failure or inability to perform, and the consequent loss of a legal remedy, result directly from the default of the plaintiff himself, the contract will be specifically enforced if the relief is demanded by equitable principles." Ibid. The same doctrine is stated by Lord Redesdale in the following language: "Courts of equity have therefore enforced contracts specifically where no action for damages could be maintained; for at law the party plaintiff must have strictly performed his part, and the inconvenience of insisting upon that in all cases was sufficient to require the interference of courts of equity. They dispense with that which would make compliance with what the law requires oppressive; and in various cases of such contracts they are in the constant habit of relieving the man who has acted fairly, though negligently." *Lemmon v. Napper*, 2 Sch. & Lef., 682.

In this case time was not an essential nor even a material element in the contract. Lavender, by trading off the notes, had not only made it a matter almost, if not quite, of indifference to himself whether they were ever paid or not, but had placed it out of his power to return the notes to Kellogg for the purpose of rescinding the contract. In order to have made time an essential element in the contract, the

same being worded as it was, it would have been necessary for Lavender to have notified Kellogg to pay the unpaid note within a reasonable time then specified, and upon his failure to pay within such time he must then have placed him in *statu quo*, returned to him the $1500 already paid and the unpaid note.

Such were the conditions of the parties when the demand was made for payment, and deed tendered by Cantlon. This demand was peremptory and no time given for compliance with its terms. The testimony is conflicting as to what response Kellogg made to this demand of payment, and the reasonableness of Kellogg's statement inclines me to take it for true rather than the other, which lacks that element. It is unreasonable that, having paid twelve hundred dollars on this property and having placed it in the hands of a responsible banker to be rented and sold, he would have said less than he claims to have said in response to Cantlon's demand. And the demand was one which Lavender nor his agent was in a condition to make, nor was it reasonable; and even if Kellogg did in his despair of being able to save his property use the language attributed to him by Cantlon, under the circumstances it should not be considered sufficient evidence of his abandonment of his right to the property.

Upon the non-payment of the last note by Kellogg it would have been competent for Lavender, who was legally held upon it as endorser, to have taken it up, and had it not been for the judgments which had been recovered against him, and constituted liens on the property, to have brought a suit for specific performance. In that event he would have been entitled to a judgment for the sale of the property and the application of the proceeds of such sale to the payment of the said note, the residue, if any, to go to Kellogg or such other parties as might seem to be equitably entitled

thereto. Before leaving this branch of the case to pass to the consideration of the question of notice to the present holder of the legal title, I will only add that, as between Lavender and Kellogg, the case stands now precisely as it would have stood in the case above put.

The only remaining question is: Had the defendant, E. Mary Gregory, notice of the equitable title of Kellogg in the premises at the time of her purchase.

It appears from the testimony that Philpott & Cantlon had full notice of all the facts in the case, so that they took the title charged with all the equities. They retained the title for somewhat less than two months, when they conveyed it to the defendant, E. Mary Gregory.

It also appears from the testimony that E. Mary Gregory is the wife of John S. Gregory. That John S. Gregory and J. H. McMurtry were in 1874, and previously, co-partners in the business of real estate agents in the city of Lincoln. That some time in the winter or early spring of 1874, the real estate in question was placed in the hands of said McMurtry & Gregory to sell on account of the plaintiff. They made several attempts to sell the property, but without success. Hartley, Tingley, and Lamb, all of whom were interested in the sale of the property on account of the plaintiff, had repeated interviews with McMurtry & Gregory in regard to the same. So far as the testimony shows, while the property was in the hands of these land agents and the plaintiff, and those interested with him expecting them to sell the property, the conveyances from Lavender to Philpott & Cantlon, and from them to Mrs. Gregory, were made, and it appears from the testimony of John S. Gregory that he "made the trade with Philpott," which is evidenced by the deed from Philpott & Cantlon to E. Mary Gregory. That he went into possession soon afterwards, and now makes his

home on the property. It cannot be doubted that he knew of the equities of the plaintiff. And even if the court shuts its eyes to the evidence, that this is one of those cases becoming too numerous throughout the country, where the name of the wife is used in conveyances without her knowledge or participation in the business at all, yet we are bound to presume that he, assuming to act as her agent, communicated to her all the knowledge which he possessed on the subject. Wade on Notice, p. 312 and 313, and authorities there cited.

I conclude, therefore, that the plaintiff is entitled to a specific performance of the contract, and to have the said property treated as a fund out of which the sums severally due to Hartley and Parshall be paid, and so far as may be he be re-imbursed the $1200, paid by him on the contract.

It appears from the testimony that the possession of the real estate in question, as well as the plaintiff's equitable title thereto, were by the plaintiff placed into the hands of J. W. Hartley as collateral security for $300, advanced by him to assist in taking up the first of the $1,000 notes, and that he received some money as rent for the premises, to be applied thereon. Also that Robert F. Parshall is the owner of the last said $1,000 notes.

It also appears from the record that Palmer Way, John Johnson, Dwight G. Hull, H. Atkins, A. K. White, Mary Lavender, Monell & Lashley, A. S. Godfrey & Co., Samuel Roach, Alfred Parmenter, T. B. Sloss & Smith, H. C. Hastings, The First Baptist Church, Farmer Brothers, and Seth Robinson, each have judgments of record in the said county of Lancaster against the said Luke Lavender, which constitute liens in form against and upon the said real estate.

It is a rule of equity jurisprudence that all persons having a joint and common interest in a bill must be made parties thereto either as plaintiffs or defendants. *Boughton v. Allen*, 11 Paige's Chancery, 321. Hence, before a final decree can be entered in this case, it will be necessary that Parshall and Hartley be brought in as parties, and for the purpose of preventing a multiplicity of suits, and that the property, if it should become necessary that it be sold under the decree of the court, bring the best price, it will also be necessary that the persons named as judgment creditors of the defendant Lavender be also made parties to the bill, that their several claims and liens upon the said real estate may be adjudicated in this action.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings, in accordance with the above views.

REVERSED AND REMANDED.

ISAAC ALBERTSON AND OTHERS, PLAINTIFFS IN ERROR, V. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Action against County Treasurer:** EVIDENCE. In an action against a county treasurer for moneys collected by him for the state, the original receipts received by him from the state treasurer, and used by him in his settlement with the county commissioners, *prima facie* control as to the amount paid by him to the state.

2. **Action on Official Bonds.** Section 32 of the code of civil procedure authorizes an action upon an official bond in favor of the *public*, where there are no special provisions to the contrary, in the name of the obligee of the bond. Section 643 authorizes an action in favor of an *individual* who has sustained injury by a breach of its conditions in his own name.

3. **Action against County Treasurer:** PARTIES. A suit in behalf of the public against a county treasurer for a breach of the conditions of his bond must be instituted by the county clerk at the direction of the state auditor or county commissioners, and the petition should allege that it is so instituted.

4. **Construction of Statutes.** Special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict.

5. ———. Where there is an irreconcilable conflict between different sections or parts of the same statute the last words stand, and those in conflict therewith are repealed.

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

C. J. Phelps and *Marlow & Munger*, for plaintiff in error, cited *Board of Education v. Kersinger*, 2 W. L. M. *Hunter v. Commissioners*, 10 Ohio State, 515. *Commissioners v. Craft*, 6 Kan., 145. Sec. 95 Gen. Stat., 930. *Snyder v. The State*, 21 Ind., 77. *Taggart v. The State*, 49 Ind., 42. *Cabel v. McCafferty*, 53 Ind., 75.

C. J. Dilworth, Attorney General, for the State.

MAXWELL, CH. J.

Isaac Albertson was treasurer of Colfax county from the fourth day of December, 1871, to the fifth day of January, 1874. On the seventeenth day of March, 1876, the state of Nebraska commenced an action against Albertson and his sureties on his official bond, in the district court of Colfax county, to recover the sum of $2,210, claimed to be due the state, the items being as follows: $824.43 state taxes, $60 judiciary fund, $455.09 interest on school land, $870.50 principal of school land.

On the trial of the cause the plaintiff recovered the entire sum claimed. Albertson and his sureties bring the cause into this court by petition in error.

The plaintiffs in error called as a witness one Woods who had been employed as an expert by the county commissioners of Colfax county to examine Albertson's accounts, who testified that from the examination made by him it appeared that Albertson had overpaid the general fund $926.07, state sinking fund $185.45¾, university and state normal school fund $485.47¾. That there was a balance due the state on the state school fund of $231.21¾. The witness testifies that he made his statements from the receipts of the state treasurer to Mr. Albertson; that he, with one Bleker, had been employed by the county commissioners of Colfax county, soon after the expiration of Mr. Albertson's term of office, to examine his accounts, and had spent about four weeks in making the examination. The original receipts could not be found at the time of the trial, but the witness swears that the aggregate amounts were taken from such receipts at the time of the examination three years before. No attempt was made on the part of the state to impeach this testimony by showing from the proper records of the county that it is incorrect. This should have been done.

Section 42, chapter 13, Gen. Statutes, 239, provides that "the county clerk shall keep a distinct account with the treasurer of the county for each several term for which the treasurer may be elected, in a book to be provided for that purpose, commencing from the day on which the treasurer shall assume the duties of his office, and continuing until the same or another person is qualified as treasurer, in which account he shall charge the treasurer with all sums paid him, and for all sums for which the treasurer is accountable to the county, and he shall credit him with all orders re-

turned and cancelled, with all moneys paid, and with all vouchers presented to him, and with all matters with which the treasurer is credited on account.

Section 47, chapter 66, Gen. Stat., 916, provides that "the county clerk is required to keep a duplicate of the treasurer's cash book, and to enter therein all duplicate receipts by him received from the treasurer, in the same manner and form as the treasurer is required to keep the same."

Section 77, page 925, provides that "the county treasurer shall settle with the county commissioners on or before the first Monday of May, and on the first Monday of October; *provided, however*, that the county commissioners may require the county treasurer to settle with them at any time. The treasurer is to be charged with the amount of all tax lists placed in his hands for collection, and credited with the amounts collected thereon, and the delinquent lists; he shall leave his vouchers with the commissioners to be retained by them for evidence of his settlement. If the treasurer's accounts are correct, the commissioners shall certify the same; if not, he shall be liable on his bond."

It will thus be seen that the account with the county treasurer is kept in the county, and the settlement is to be made *with the county commissioners.* The state taxes are to be collected and paid to the state treasurer, and the receipt received therefor is to be used as a voucher in his settlement with the commissioners. This receipt given by the state treasurer is the original; a duplicate thereof, it is shown by the testimony, is filed in the auditor's office and a copy retained in the treasurer's office. While the auditor is the general accountant of the state, and is required [Gen. Stat., 1011] to keep all "public account books, accounts, vouchers, documents, and all papers relating to the accounts and contracts of

the state, and its revenue, debt, and fiscal affairs, not required by law to be placed in some other office, or kept by some other officer or person," yet in a contest as to the amount paid to the state treasurer by a county treasurer, the original receipt of the state treasurer filed with the county commissioners *prima facie* will control.

It appears from the record that one F. E. Frye acted as deputy for Albertson, and had acted as deputy for his predecessor. That Albertson, in fact, had trusted the business to his care. It also appears that on the fourth day of December, 1871, Albertson received from his predecessor the sum of $10,421 belonging to the several funds, but we are not informed whether this included the sum of about $2,000 afterwards paid by Frye to the state treasurer on the account of Carson, the predecessor of Albertson. And the testimony entirely fails to show what sum, if any, Albertson turned over to his successor in office. Under the issue made in the pleadings the burden of proof was on the state, and there not being sufficient proof to sustain the judgment it must be reversed.

The plaintiffs insist that the action cannot be prosecuted in the name of the state. Section 5, chapter 6, Gen. Stat., 99, provides that: "All bonds by county and precinct officers shall be given to the county in which such officers are elected respectively, * * and shall be approved by the county commissioners and filed in the office of the county clerk, unless otherwise provided by law." The bonds in this case are given to the "County of Colfax."

Section 30 of the code, Gen. Stat., 528, provides that: "Every action must be prosecuted in the name of the real party in interest, except as provided in section thirty-two."

Section 32 provides that: "An executor, adminis-

trator, guardian, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, or a person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is to be prosecuted. Officers may sue and be sued in such name as is authorized by law, and *official bonds may be sued upon in the same way.*"

Section 643, page 639, Gen. Stat., provides that: "When an officer, executor, or administrator within this state, by misconduct or neglect of duty, forfeits his bond or renders his securities liable, any *person* injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon in his own name against the officer, executor, or administrator, and his sureties, to recover the amount to which he may be entitled by reason of the delinquency."

Evidently two classes of cases are covered by these provisions, the one where the security is taken to protect the rights of the public, and the other where it is taken to protect the rights of individuals, as in the case of *Stewart v. Carter*, 4 Neb., 564. *Hoffman v. Kopplekom*, 8 Id., 344. In this class of cases the action may be brought in the name of the individual, because the public have no interest in the matter in controversy, and a judgment in favor of one person is no bar to another action thereon by some other person injured by a breach of the conditions of the bond. This section seems to be limited to cases of private injury and to have no application where the injury is to the public. Where the injury is to the public the action must be prosecuted as provided in section thirty-two.

This question was before the supreme court of Ohio in *Hunter v. Commissioners of Mercer County*, 10 Ohio State, 616. In that case the bond was given as required by statute to the state of Ohio, conditioned for

the faithful discharge of the official duties of William Hunter as treasurer of Mercer county, etc. An action was brought on the bond in the name of the county commissioners. It was held that the commissioners derived no authority under section 566 (643 of our code) to maintain an action on the bond, and that the action must be brought in the name of the obligee. And the same ruling was had in the case of *Athens Township v. Kersinger*, 2 W. L. M., 474.

Section 95, chapter 66, General Statutes, 930, provides that "if any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions for that purpose from the state auditor, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county." This section corresponds with section 101 of chapter 46 of the Revised Statutes of 1866, and is a special provision as to the mode of procedure, in case of the delinquency of the treasurer. The object of requiring the county clerk to institute proceedings is not entirely clear, but probably because he is the accountant of the county, and knows, or is presumed to know, the condition of the treasurer's account, and whether in fact he is in default. And such a rule is founded on just and equitable principles. The auditor of state being the general accountant of the state, reports to the clerk of a particular county that he finds from his accounts that the treasurer of that county has failed to pay over certain funds due the state, and directs him to institute a suit against the treasurer. The clerk would then ascertain from his own records whether the treasurer had in fact paid such money over or not, as in the event of a suit he

would be required to verify the petition, and he could not swear that he believed the treasurer to be in default unless his records disclosed that fact. Thus the rights of the public are protected, while the rights of the treasurer are also, as no action can be commenced unless there is probable ground. But whatever the object of the statute, its plain provisions cannot be disregarded, and must be obeyed. In an action against a county treasurer like the one at bar, the petition must allege, and if necessary the plaintiff must prove on the trial that the action was instituted by the county clerk at the direction of the state auditor or the county commissioners.

The plaintiffs in error insist that, the bond being given to the *county*, the action cannot be prosecuted in the name of the *state*. As already shown, section 32 of the code provides that "officers may sue and be sued in such name as is authorized by law, and official bonds may be sued upon in the same way."

At common law an action could only be brought on a bond in the name of the obligee. Has the code changed this rule?

In *Hunter v. Commissioners*, 10 Ohio State, 519, it was held that the code had not changed the common law rule in that regard. The bond is a contract made with the county for the use of whoever is intrusted with the funds in the treasurer's hands. The obligee thus becomes the trustee of an express trust. Suppose a county treasurer has in his hands funds belonging to the state, county, and the several school districts in his county? Must each school district, the county, and the state bring a separate action for their several funds, when one suit in the name of the obligee of the bond will place the money when recovered in the hands of the proper authorities, to be paid to those entitled to the same? We think it is clear that an action against

a county treasurer upon his official bond, for the recovery of *public* moneys, must be prosecuted in the name of the obligee of the bond. The attorney general in his brief admits that section 644–643 of the code does not apply to this class of cases, but contends that it is governed by section 4, article 3, of chapter 73, General Statutes, p. 1013, which provides that "It shall be the duty of the auditor * * to direct prosecutions in the name of the state for all official delinquencies, in relation to the assessment, collection, and payment of the revenue, against all persons who by any means become possessed of public money or property, due or belonging to the state, and fail to pay or deliver the same, and against all debtors of the state." If this provision stood alone, it would probably be sufficient to authorize a suit to be instituted in the name of the state. On page 21 of the Revised Statutes of 1866, we find the above provision, with the additional authority to the auditor to employ an attorney in certain cases. On pages 338 and 339, we find section 101 of the revenue law which reads as follows: "If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instruction for that purpose from the territorial auditor or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county.

It is a well settled rule of construction that special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict. *The People v. Gosper*, 3 Neb., 310. *McCann v. McLennan*, 2 Id., 289. *Pelt v. Pelt*, 19 Wis., 193. *City of Covington v.*

McNickles, 18 B. Monroe, 286. *Peyton v. Mosely*, 3 Mon., 77. Such being the case the special provisions contained in section 95 of the revenue law govern in the case, and the general provisions of section 4, chapter 73, do not apply. Again, the Revised Statutes of 1866 were passed as one act, and in such case the well known rule applies that where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those which are in conflict therewith are, so far as there is a conflict, repealed. The judgment of the district court is reversed, and the cause remanded for further proceedings.

JUDGMENT REVERSED.

LAKE, J.

I concur in so much of the foregoing opinion as holds that the action in the name of the state cannot be maintained. It should unquestionably have been brought in the name of the county, although instituted by the direction of the state auditor, under the statute.

But as to the residue of the opinion of the majority of the court I must dissent, and, briefly stated, for the following reasons: 1. Under the pleadings, in my opinion, the burden of proof was not on the state, but on the defendants. 2. But whether the burden of proof were put upon the defendants or not there was ample testimony to support the verdict. As to the burden of proof, an examination of the pleadings will show this to be their condition, viz.: the petition sets forth in detail an itemized account of all the taxes received by the defendant Albertson, as treasurer, belonging to the various state funds, followed by an explicit statement of the full amount paid over by him to the state treas-

urer, as shown by the several vouchers returned by him to the county clerk, as the statute directs, for record. In this statement of taxes collected, the several dates when, and the names of the various persons from whom, they were received, are particularly given. This statement of the account between Albertson and the state shows the exact balance in his hands for which the action was brought.

In the answer there is no denial of the correctness of any item of this long account, and it must be taken as true—or at least should be, under the rule of the civil code—that material allegations of the petition, not controverted by the answer, "shall, for the purpose of the answer, be taken as true." The defendants contented themselves by alleging in the most general way payment by Albertson to the state treasurer of all funds which he had received belonging to the state. This, in addition to being a mere conclusion of fact, with nothing whatever alleged to support it, was denied by the reply, which, according to my understanding of the rules of pleading, threw the burden of proving such payment upon the defendants, and if they failed to make good the averment the plaintiff must recover.

As to the evidence, all I care to say is, that upon all material matters there was but little real conflict, and in my opinion fully warranted the verdict returned by the jury, independently of the effect which I would give to the averment of the petition. With the petition admitted, there is not the shadow of doubt, in my mind, that the verdict was right, and should be upheld.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1880.

PRESENT:

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

BLUNK BROTHERS, PLAINTIFFS IN ERROR, v. F. B. KELLEY, DEFENDANT IN ERROR.

Construction of Statutes: CONTRACTS. The act to prevent the fraudulent transfer of personal property, approved February 19, 1877, does not apply to contracts entered into before the act took effect.

ERROR to the district court of Lancaster county. Tried before POST, J. The facts appear in the opinion.

N. H. Bell, for plaintiffs in error.

1. A statute which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new

disability in respect to transactions or considerations already past, is deemed to be retrospective or retroactive. Sedgwick on Stat. and Const. Law, 2 Ed., p. 160. *Society for Prop. of Gospel v. Wheeler*, 2 Gallison, 105.

2. To allow the act to affect the rights of plaintiffs in error is to make it retrospective. Courts will not give this effect to an act unless it was clearly the intention of the legislature, as shown by the language of the act itself. Sedgwick Stat. and Const. Law, 160. *Young v. Hughes*, 4 H. & N., 76. *Williams v. Smith*, 4 H. & N., 558. *Martin v. State*, 22 Tex., 214. *Aurora v. Holthouse*, 7 Ind., 59. *Bond v. Munro*, 28 Geo., 597. *Gerry v. Stoneman*, 1 Allen, 319. *Parsons v. Payne*, 26 Ark., 124. *Dash v. Van Kleeck*, 7 John., 477. *Varick v. Briggs*, 6 Paige, 332.

J. R. Gilkerson, for defendant in error, cited Sedg. Stat. and Const. Law, 262. *Jackson v. Lamphire*, 3 Peters, 289. Potter's Dwarris on Statutes, pp. 473, 478, 479. *Stocking v. Hunt*, 3 Denio, 274. *Sullivan v. Brewster*, 1 E. D. Smith, 681. *Miller v. Moore*, 1 E. D. Smith, 639. 1 Kent Com., 455. *Fairchilds v. Gwynn*, 16 Abb., Pr. R., 31. Cooley on Const. Lim., 558. Potter's Dwarris on Statutes, 164.

MAXWELL, CH. J.

This is an action of replevin, commenced before a justice of the peace. On appeal to the district court the case was tried upon the following stipulation:

"The case shall be submitted to the court on one question, viz.: whether plaintiffs, who had sold the property in controversy, taking therefor a note from the purchaser, providing that the title and ownership of the property should remain in Blunk Brothers until the note was fully paid, can take and hold the prop-

erty, who claims under an execution levy, made after the taking effect of the law below referred to, and without notice of plaintiffs' claim. It is conceded that the property had been sold by Blunk Brothers before the law took effect requiring notes of the kind above stated, or copies thereof, to be filed with the county clerk, in order that the owner of the note may hold the property against subsequent purchasers in good faith. Would this act of the legislature have a retrospective operation so as to require Blunk Brothers to file a copy of the note that was executed before the act took effect, in order that they might hold the property against defendant? If the question is resolved in favor of Blunk Brothers, then judgment to be entered for them—as prayed for in the petition—otherwise the finding to be for the defendant."

The court rendered judgment in favor of the defendant. The plaintiffs bring the cause into this court by petition in error.

It appears from the bill of exceptions that the property in dispute consisted of a sixteen-inch riding sulky plow and a cultivator; and the defendant, as a judgment creditor, purchased the property at a sale under an execution against one Williamson.

The act "to prevent the fraudulent transfer of personal property," approved February 19, 1877 [Laws 1877, p. 170], provides: "That no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any purchaser or judgment creditor of the vendee or lessee, in actual possession, obtained in pursuance of such sale, contract, or lease, without notice, unless the same be in writing, signed by the vendee or lessee, and a copy thereof filed in the office of the clerk of the county within which said vendee or lessee resides," etc.

Before the passage of this act it was held that a sale or delivery of goods, upon condition that the property was not to vest until the purchase money was paid or secured, did not pass the title to the vendee until the condition had been performed. *Aultman v. Mallory*, 5 Neb., 178. In that case the plaintiffs had sold to one, Johnson, a mower and reaper, receiving from him two notes, payable to them, containing a condition that the title to the property should not pass until the notes were paid. One, Parker, having recovered a judgment against Johnson, caused an execution to be levied upon the machine in question, the plaintiffs brought an action of replevin, and it was held that they were entitled to the possession of the property. Has the statute changed the law as to contracts existing at the time of its passage? We think not. The contract in question was valid at the time it was entered into, and the title of the property in question did not pass to the vendee until payment of the amount due the plaintiffs. The legislature, in the passage of the act of 1877, did not attempt to apply the same to existing contracts. The statute was designed to affect only such contracts as were entered into after the law took effect. This being the case, the plaintiffs are entitled to judgment. The judgment of the district court is reversed, and judgment is entered in this court in conformity to the stipulation.

JUDGMENT ACCORDINGLY.

GEORGE W. MOWERY, PLAINTIFF IN ERROR, V. P. P. MAST & CO. AND ALFRED CALVERT, DEFENDANTS IN ERROR.

Promissory Note: GUARANTY. One M., an agent, wrote the following guaranty on a note before delivering the same to his principal: "For value received, we hereby guarantee the payment of the within note, and waive protest, demand, and notice of non-payment thereof. G. W. MOWERY." *Held*, that a joint action could not be maintained against him and the maker of the note.

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

Batty & Ragan and *A. H. Bowen*, for plaintiff in error, cited 2 Parsons on N. and B., 117, and Note *a* and 118 and Note *d*. Brandt on Suretyship and Guaranty, 2, sec. 1, and cases there cited. *McMillan v. Bull's Head Bank*, 32 Ind., 11. *Central Savings Bank v. Shine*, 48 Mo., 463. *Allen v. Fosgate*, 11 How. Pr., 218. Swan's Pleadings, 109. *Brewster v. Silence*, 8 N. Y., 215. *Draper v. Snow*, 20 Ib., 337. 7 Kan., 339. 20 Mich., 46. The liability of the guarantor does not arise upon the same obligation or instrument, therefore is not brought within sec. 44, page 529, General Statutes of Nebraska. *Central Savings Bank v. Shine*, 48 Mo., 463. *McMillan v. Bull's Head Bank*, 33 Ind., 11. *Allen v. Fosgate*, 11 How. Pr., 218. 2 Parsons, N. and B., 218.

T. D. Scofield and *A. T. Ash*, for defendants in error, cited Gen. Stat., Neb., 529, sec. 44. Story on Promissory Notes, sec. 468. *White v. Howland*, 9 Mass., 314. *Carver v. Warren*, 5 Mass., 545. *Sumner v. Gray*,

4 Pick., 311. *Guidrey v. Vives*, 3 Martin, N. S., 659. *Nelson v. Dubois*, 13 John., 175. *Luqueer v. Prosser*, 1 Hill, 256. 4 Hill, 420. *Manrow v. Durham*, 3 Hill, 584. *Ketchel v. Burns*, 24 Wend., 456. *Clay v. Edgerton*, 19 Ohio State, 554. *State v. Olds*, 12 Ohio, 168. *Gale v. Van Arman*, 18 Ohio, 336. 16 Ohio, 1. *Neil v. Trustees*, 31 Ohio State, 15. The guarantee alleges on its face that it was made for value received. This is a sufficient averment of a consideration. Story on Promissory Notes, §§ 458, 496.

MAXWELL, CH. J.

On the fifteenth day of April, 1876, Alfred Calvert executed a note for the sum of $35 and interest to P. P. Mast & Co., due and payable at the Adams county bank on the first day of November, 1877. Before the delivery of the note to P. P. Mast & Co. the following guaranty was written on the back of the note by Mowery, their agent:

"For value received we hereby guarantee the payment of the within note, and waive protest, demand, and notice of non-payment thereof.

"G. W. MOWERY."

On the seventh day of January, 1879, an action was commenced against Calvert and Mowery before a justice of the peace upon the note in question, and judgment rendered against them jointly for the sum of $44.62 and costs. Mowery appealed to the district court. A petition being filed in the district court praying for a joint judgment against Calvert and Mowery, a demurrer was interposed by Mowery on the ground of a misjoinder of causes of action. The demurrer was overruled and judgment rendered against him jointly with Calvert. Mowery brings the cause into this court by petition in error.

The only question at issue is the right of the holder of a note to bring a joint action against the maker and a guarantor of the note. Section 44 of the code of civil procedure provides that "persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action at the option of the plaintiff." [Gen. Stat., 529.]

This is a literal copy of sec. 120 of the code of New York as it existed prior to 1876, which has been copied in Ohio, Florida, Minnesota, Oregon, Colorado, North Carolina, South Carolina, and Wisconsin. Bliss on Code Pleading, sec. 94. In Kansas the words "and indorsers and guarantors" follow the words "promissory notes."

Section 2550 of the code of Iowa of 1873 provides that "when two or more persons are bound by contract, or by judgment, decree, or statute, whether jointly only or jointly and severally, or severally only, and including the parties to negotiable paper, common orders and checks, and sureties on the same, and separate instruments, or by *any liability* growing out of the same, the action thereon may, at the plaintiff's option, be brought against any or all of them." Under these provisions it is held that the guarantor, when the guaranty is on the same paper with the original instrument, may be joined as defendant with the maker. *Peddicond v. Whittam*, 9 Iowa, 471. *Marvin v. Adamson*, 11 Id., 371. *Tucker v. Shiner*, 24 Id., 334. *Stout v. Noteman*, 30 Id., 414. *Mix v. Fairchild*, 12 Id., 351.

In *Gale v. Van Arman*, 18 Ohio, 336, before the adoption of the code, the supreme court held that, where a stranger to a note, payable in clocks, at the time of the execution wrote upon the back of the note and signed these words: "I guarantee the fulfillment of the within contract," it was a joint contract, and that

the parties might be sued jointly upon it, citing *Leonard v. Sweetzer*, 16 Ohio, 1. *Stage v. Olds*, 12 Id., 158. *Bright v. Carpenter & Schuer*, 9 Id., 139. The decision is placed upon the ground that the instruments were executed by principal and surety at the same time, upon the same consideration, for the same purpose, and took effect from a single delivery. The dissenting opinion of HITCHCOCK, C. J., seems to draw the proper distinction between a guarantor and surety, which seems to have been overlooked by the majority of the court.

Where the guaranty is made at the same time with the principal contract, and becomes an essential ground of credit, there is no doubt the *consideration* extends to the contract of guaranty. But a contract of guaranty is not a primary obligation to pay, but is an undertaking that the debtor shall pay. The contract of the maker and sureties upon a promissory note is to pay the same. The guarantor is not a promisor with the maker. How, then, can he be sued with the maker of a promissory note upon an obligation to which he is not a party? The contract of guaranty is a separate and independent contract, and the liability of the guarantor is governed by the express terms of his contract. He cannot be joined in an action against the maker of a note, he not being liable as maker. *Phalen v. Dingee*, 4 E. D. Smith, 379. *De Ridder v. Schermerhorn*, 10 Barb., 638. *Tibbits v. Percy*, 24 Id., 39. *Allen v. Fosgate*, 11 How. Pr., 218. *Borden v. Gilbert*, 13 Wis., 670. *Virden v. Ellsworth*, 15 Ind., 144. *Bondurant v. Bladen*, 19 Id., 160. It follows that the judgment of the district court must be reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE UNION PACIFIC RAILROAD COMPANY v. THE BOARD OF COUNTY COMMISSIONERS OF BUFFALO COUNTY, THE COUNTY CLERK AND COUNTY TREASURER OF SAID COUNTY.

1. **Taxes: SINKING FUND: LEVY OF TAXES.** The county commissioners of B. county, after the exhaustion of the levy in the years 1876 and 1877, allowed claims against the county to the amount of $22000.00 and issued certificates of indebtedness therefor, and levied a sinking fund tax of five mills on the dollar valuation for their payment. *Held*, that the tax was illegal and void.

2. ——: ——. A "sinking fund tax" is a tax raised to be applied to the payment of the interest and principal of a *public loan*, and it cannot under the statute be levied for the payment of floating indebtedness.

ORIGINAL application for an injunction.

A. J. Poppleton, for plaintiff.

Hamer & Conner, for defendant.

MAXWELL, CH. J.

This is an action to restrain the collection of a sinking fund tax of five mills on the dollar valuation in Buffalo county.

The petition alleges that during the years 1876 and 1877 the county commissioners of said county, after the entire levy for each respective year had been exhausted, audited and allowed a large number of accounts or claims against the county, chargeable against the various funds, amounting in the aggregate to the sum of $22000.00, and the county clerk of said county issued his certificate of such auditing and allowance. A copy of one of the certificates is attached to the petition, and is as follows:

"$160.64. KEARNEY, NEB., January 20, 1877.

"*This is to certify* that the claim of V. B. Clark

against Buffalo county, Nebraska, for 160^{64}_{100} dollars, dated December 2, 1876, and filed in this office December 4th, 1876, has been endorsed by the county commissioners for 160^{64}_{100} dollars to be paid in a warrant drawn on its proper fund as soon as the next levy therefor is made. "SIMON C. AYER,

"No. 500. "*County Clerk.*

"Allowed Dec. 4th, 1876. [SEAL]."

The petition also alleges that among the taxes levied July 7th, 1878, by said commissioners is a tax designated as "county sinking fund" tax of five mills on the dollar valuation of the property of said county, and that said tax was levied to pay the certificates of indebtedness above described; that on the second day of July, 1878, the board of county commissioners ordered twenty-five per cent of said certificates to be paid by warrants drawn on the county sinking fund of said county, and that the same be paid equally to the holders of said certificates; that warrants for a large amount were drawn upon said sinking fund, and there now remains in the treasury of said county the sum of $3849.47; that on the fifth day of May, 1879, said board of county commissioners ordered the county clerk of said county to draw warrants upon the county treasurer of said county for all moneys in the county sinking fund of said county *pro rata* on all outstanding certificates or audited accounts against Buffalo county, except those for rebate of taxes; that said clerk has not drawn said warrants, but said order still remains in full force and effect; that there now stands wrongfully charged on the tax rolls of said county against the property of the plaintiff, for the county sinking fund of 1878, the sum of $2572.69, which tax is now due and payable; that plaintiff has paid all legal taxes levied and charged against the property of the plaintiff, etc.

The defendants in their answer allege that said sink-

ing fund tax was levied as provided in section 2, page 45, laws of 1877, and for the purpose of paying one year's interest on all the outstanding warrants of Buffalo county, and five per cent of the principal thereof; they deny that said tax was levied to pay audited accounts or certificates of indebtedness, but that after it was levied it was determined by said board to pay *pro rata* said audited accounts or certificates of indebtedness; that warrants to the amount of $24,222.15, with interest thereon from the first day of November, 1875, were outstanding and unpaid at the time of the levy of said sinking fund tax; they deny that said commissioners ordered the payment of twenty-five per cent of said certificates or audited accounts, etc.

The testimony consists of copies of the orders of the commissioners for the payment of twenty-five per cent of said certificates out of said sinking fund.

There is but one question presented by the record, viz.: the authority of the county commissioners to levy a sinking fund tax for the payment of audited accounts.

Section 24, chap. 13, General Statutes, 236, provides that "it shall not be lawful for any warrants to be issued for any amount exceeding in the aggregate the amount levied by tax for the current year."*

Section 25 provides that "in order to guard against any such overdraft, each warrant shall express plainly on its face the amount levied for the current year and the amount already expended."

Section 26 provides that "Any warrant drawn after the amount levied for the year is exhausted, shall not be chargeable as against the county, but may be collected by civil action from the county commissioners making the same, or either of them."

Section 27 requires the board to make out and pub-

*NOTE.—See this section now amended, Laws 1879, p. 365.

lish yearly, in at least one newspaper in the county, if such there be, a report of the receipts and expenditures of the year next preceding, and the amounts allowed on each separate fund, and a detailed statement showing the resources and liabilities of the county at the end of each year. If there is no paper published in the county, then such statement is to be posted up in five public places in the county.

These provisions prohibit absolutely the commissioners from drawing warrants in excess of the aggregate amount levied by tax for the current year. The manifest object of the statute is to compel county commissioners to administer county affairs with economy. They have no authority to issue certificates of indebtedness after the exhaustion of the levy. A warrant in fact is a mere certificate of indebtedness although negotiable in form, as it does not partake of the character of negotiable paper so far as to estop the county from availing itself of any defense it may have against it, even in the hands of a *bona fide* purchaser for value without notice. *School District v. Stough*, 4 Neb., 359. In case of a deficit in the county revenue to meet the current expenses of the county, the statute authorizes the commissioners to submit to the people of the county, at any regular or special election, the question of borrowing a sufficient sum of money for that purpose upon the credit of the county. (Gen. Stat., 235.)* They have no authority to levy taxes for any purpose unless authorized by statute. The whole course of the legislation of this state has been to restrict and limit within proper bounds the power to contract municipal indebtedness, and as far as possible protect tax payers and *bona fide* creditors of the county from the evils on one hand of reckless expenditure, and on the other of de-

*NOTE.—See Laws 1879, pp. 361, 363.

preciated credit; but if, when the levy is exhausted, the commissioners can continue to issue certificates of indebtedness, and then levy a sinking fund tax for the payment of the same, there would practically be no limitation upon their power to contract debts; but such is not the law.

A sinking fund is defined to be a fund arising from particular taxes, imposts, or duties, which is appropriated toward the payment of the interest due on a *public loan* and for the payment of the principal. 2 Bouvier's Law Dict., 524. No one will contend that indebtedness against the county in the form of accounts audited and allowed can be designated a public loan. Ordinarily such accounts can be paid out of the ordinary levy, but when this cannot be done, the only remedy is that provided in the statute, by submitting a proposition to the people of the county for authority to borrow the necessary funds.

Section 2 of the act to amend the revenue law, approved February 19, 1877 (Laws 1877, p. 45), which provides for a sinking fund to pay all the outstanding debts of a county, does not apply to merely audited claims, but is restricted to the funded debt, nor does the act, approved February 17, 1877 (Laws 1877, p. 219), "to provide for the funding of the warrants and outstanding indebtedness of counties," authorize the levy of a sinking fund tax to pay the floating indebtedness of a county. The plaintiff having paid all taxes legally assessed against its property in Buffalo county, and the sinking fund tax being levied without authority of law, the injunction heretofore granted is made perpetual.

JUDGMENT ACCORDINGLY.

SAMUEL W. DELL, APPELLEE, V. ISAAC OPPENHEIMER AND ROSA OPPENHEIMER, APPELLANTS.

1. **Usury.** Where the original contract of loan is *bona fide*, and wholly free from the taint of usury, it will not be invalidated by a subsequent agreement to pay interest at an usurious rate after the debt has matured.

2. **Evidence:** WITNESS IMPEACHED. Where a party swears falsely to a fact in respect of which he cannot be presumed liable to mistake, courts are bound to apply the maxim *falsus in uno, falsus in omnibus*, and to give no credit to any alleged fact depending upon his statement alone. This rule applied.

APPEAL by defendants from a decree of foreclosure rendered against them in Lancaster county district court, POUND, J., presiding.

Mason & Whedon, for appellants, cited *Montany v. Rock*, 10 Mo., 506. *Wilcy v. Hight*, 39 Mo., 130. *Willie v. Green*, 2 N. H., 333. *Shireley v. Wilty*, 19 Ill., 623. *Mitchell v. Doggett*, 1 Fla., 365. *Mallock v. Mallory*, 19 Ala., 694. *Richards v. Kountze*, 4 Neb., 200, and authorities there cited.

Burr & Stein, for appellee, cited *Richards v. Kountze*, 4 Neb., 200. *Rosa v. Doggett*, 8 Neb., 48. *Bell v. Coleman*, 2 C. B., 284. *Busby v. Finn*, 1 Ohio State, 409. *Carson v. Ingals*, 33 Barb., 657.

LAKE, J.

This is an action to foreclose a mortgage, and the only defense interposed is that of usury. The court below found from the evidence that the original contract of loan was not usurious, "but that after the maturity of said note and mortgage, the plaintiff agreed to take and receive, and the defendants agreed to give

and pay, interest at the rate of fifteen per cent per annum on said note and mortgage; and that in pursuance of said last named agreement the defendant did pay, and the plaintiff received, interest on said note and mortgage at the rate of fifteen per cent per annum, and that the illegal interest so paid and received amounts to the sum of $52.50." Upon these facts the court, following the decision in the case of *Richards v. Kountze*, 4 Neb., 200, found, as matter of law, "that the plaintiff is entitled to interest on said note and mortgage at the rate of twelve per cent per annum, and that the defendants are entitled to be credited on said note and mortgage, as payments, the amount of said illegal interest," and rendered judgment accordingly. In this application of the law to the facts as found the court was clearly right, for the original contract, if *bona fide*, and wholly free from the taint of usury, would not be invalidated by a subsequent agreement to pay interest at an usurious rate after the note had matured. *Richards v. Kountze*, supra. It only remains, therefore, to ascertain whether the finding of facts, in view of the evidence, can be upheld.

By the terms of the note and mortgage the interest to be paid was fixed at twelve per cent per annum, payable semi-annually. The defendants, however, in their answer allege that the rate actually agreed upon, and which they paid until the note matured, was twelve and a half per cent; and that after its maturity a new arrangement was made whereby, in consideration of a further indefinite extension of the time of payment the interest should be increased to fifteen per cent, and that several semi-annual payments were made at that rate. These allegations of the answer are fully sustained by the testimony of the defendant Isaac Oppenheimer, with whom the contract,

whatever it may have been, was made, and that of Moses Oppenheimer, through whom the defendants paid their last installment of interest, endorsed on the note, the amount of which, although not disclosed by the endorsement, it is clearly shown was fifty-two dollars and fifty cents. This endorsement, like each of the other eight, appearing on the note, being simply an acknowledgement of the payment of "six months' interest," without mentioning the amount.

Opposed to these two witnesses, who testify positively and with great particularity—the first one as to the terms of the original loan and the subsequent extension, and both of them as to payments of interest, showing it to have been exacted at usurious rates, both before and after maturity—we have only the denial of the plaintiff in a general way that he either contracted for or was paid more than twelve per cent, the rate called for by the note. It will be seen, therefore, that there is an irreconcilable conflict of testimony upon the only question in the case. Nor is it possible that this conflict resulted from innocent mistake or want of recollection, and it is certain that either the plaintiff, or the defendant and his witness, Moses Oppenheimer, wilfully testified falsely.

The court below seems to have surmounted this difficulty by a sort of compromise—by entirely discrediting the plaintiff's denial of having taken fifteen per cent after the note matured, but giving full credit to his testimony as to the terms of the original contract and the payment of interest under it. In holding the defense established as to the payment of the fifteen per cent, that court was clearly right; for, all other circumstances being equal, it is less likely that two witnesses, one of whom had no pecuniary interest in the result of the controversy, knowingly swore to that which was false, than that one, and he the intre-

ested plaintiff, did so. But, having thus rightly determined that the plaintiff had sworn falsely of a fact within his knowledge, and concerning which he could not have been innocently mistaken, there was certainly no propriety in giving credit to his statements concerning the original transaction, wherein he is charged with having contracted for and received interest at the rate of twelve and a half per cent. Where a party speaks to a fact in respect to which he cannot be presumed liable to mistake, courts are bound, upon principles of law, morality, and justice, to apply the maxim, *falsus in uno, falsus in omnibus. The Santissima Trinidad*, 7 Wheaton, 283. And in *Knowles v. The People*, 15 Mich., 408, it was held that, where a witness, in a material matter, swears, willfully and knowingly, to that which is false, no credit should be given to any alleged fact depending upon his statements alone.

Such being our view of the evidence, we must hold that the original contract of loan, as well as the subsequent arrangement, was usurious, as alleged in the answer, and render judgment as required by the statute in such cases, viz.: "for the principal, deducting interest paid," and the defendants to recover their costs. There appears to have been paid, as interest, during the first two years under the agreement for twelve and a half per cent, $175.00; and during the next two years and six months, under the agreement for fifteen per cent, $262.50, making an aggregate of $437.50. This amount, deducted from the $700.00 principal, leaves a balance of $262.50, for which the proper judgment will be entered in this court.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, EX. REL. SAMUEL OSBORNE, JR., v. WILLIAM B. THORNE, TREASURER OF ADAMS COUNTY.

1. **Mandamus to compel payment of bonds to aid works of internal improvement.** In the application for a mandamus to compel the payment of bonds issued to aid in the construction of works of internal improvement, it is not sufficient to show merely that they were issued "for works of internal improvement;" but there should be such particular description of the works as to enable the court to see, by an inspection of the petition alone, that they were really of that character.

2. **Precinct bonds:** PAYMENT. The money with which to pay precinct bonds is raised and disbursed with the same formality, and through precisely the same agencies, as are ordinary county funds; and the county treasurer is authorized to make payment of such bonds only on warrants issued by the county commissioners.

ORIGINAL application for mandamus.

Bowen & Tanner, for relator, contended that the respondent, having money in his possession, derived from a special levy, for the specific purpose of paying the interest on the bonds in question, that the act of payment is a naked ministerial duty, clearly incumbent upon respondent, the performance of which will be compelled by mandamus. High on Ex. Remedies, secs. 80, 81, 86, 87, 88, 89, 90, 104, 106, 112, and cases cited. Ib., 324 and 326, and cases cited, and 333, 357, 365, and 367. Moses on Mandamus, 140, 141, 142. *People v. Solomon*, Am. Law Reg., 237. *Savage v. Holmes*, 15 La. An., 334. *State v. Mount*, 21 La. An., 352. 12 Peters, 524. 34 Pa. State, 293. 26 Ga., 665. 7 Ia., 186, 390. *Brown v. Crayo*, 32 Ia., 498. 13 Wis., 257.

J. M. Ragan, for respondent.

1. It must appear that the law affords no other remedy. High Ex. Lex. Rem., 13. 12 Barb., 27. 2 Binn., 360. 25 Barb., 73. 17 Ala., 527. Mandamus is the *dernier ressort.* 25 Ill., 335.

2. The relator's remedy is by suit upon the bond of respondent, as treasurer. Laws 1879, p. 343, secs. 169 to 175 inclusive. Gen. Stat., 640. 22 Ohio Stat., 534. 4 Kan., 252. 8 Kan., 458. Kan. Stat., Ann't'd Ed., 233-238.

3. The relator's petition is insufficient. It states conclusions, and should state facts. Code, sec. 92. It does not allege facts which show that the law was complied with in issuing the bonds. Gen. Stat., 448. *Kemerer v. The State,* 7 Neb., 130.

LAKE, J.

This is an original application to this court for a peremptory writ of mandamus to compel the defendant, as treasurer of Adams county, to pay from the funds in his hands, collected for that purpose, the interest alleged to be due on certain precinct bonds, issued by the commissioners of said county, and now held by the relator.

There is a technical defect in the petition which of itself might be fatal to this application. It is not alleged in terms, nor is it a necessary inference from other facts stated, that the bonds in question were intended "to aid" a work or "works of internal improvement," the only object for which such bonds could have been legally voted and issued. The allegation of the petition is merely that they were issued "for works of internal improvement in said precinct;" but whether to be devoted to the purchase on behalf of the precinct of works of this character already built, for which there was no authority, or to aid in

the construction of those undertaken and prosecuted by others, for which there was authority, the petition fails entirely to inform us. And in this connection it might well be asked, of what did those things consist which the relator has seen fit to style "works of internal improvement?" Were they railroads, turnpikes, canals, or some other of the numerous enterprises to which this term would apply? or might they not have been objects of private concern purely, and which the court would be bound to declare entirely foreign to it, and to aid which no valid precinct indebtedness could have been voted? This is an important inquiry, and one that vitally concerns the relator in making out a case for the desired relief, but to which the petition furnishes no sort of answer.

It is not sufficient, in a petition for the kind of judgment here sought, and which can be given, if at all, only by the plaintiff showing himself very clearly entitled to it, to allege in this general way that the works were "of internal improvement," but there should be such particular description of the works as to enable the court to see by an inspection of the petition alone that they were really of that character.

But, in addition to this, which may be regarded as a defect merely in the statement of existing facts and curable by amendment, there is another objection which seems to go to the very foundation of the relator's right for any relief whatever as against this defendant.

Admitting to the fullest extent the justness of the relator's claim to the money in question, and his right to have it applied in satisfaction of his demand, still there was an important step to be taken, and which he failed to take, before he could legally call upon the treasurer for payment.

When these bonds were issued there was no special provision of statute governing alone the creation and

payment of this sort of indebtedness, but the whole business was assimilated to that respecting county indebtedness for a similar purpose, and, like it, was put in charge of the county commissioners of the proper county, who were not only required to issue the bonds when voted, but also to cause to be annually levied, collected, and paid to the holders of such bonds, a special tax on all the taxable property within the precinct, sufficient to pay the annual interest as it falls due, and finally the bonds themselves at their maturity. Secs. 5, 7, chap. 35, Gen. Statutes, 448.

As to the several duties of the county commissioners respecting them, the law makes no distinction whatever between precinct and county bonds. They must issue both, and when issued it is their duty to keep a record of the kinds and amounts, as well as the times and places of payment, and make provisions therefor, as the statute directs. In the case of precinct bonds the means of payment must be raised by a tax levied by the commissioners "upon the property within the bounds of such precinct," which must be collected in the same manner as is the ordinary county revenue, and through the agency of the county treasurer, whose only duty in connection with the fund arising therefrom, when collected, is to hold it subject to the order of the county commissioners directing its application to the object for which it was intended.

As before stated, the management of this sort of precinct indebtedness is made to conform to that of counties of like character. The sole distinction is that it concerns a distinct portion only instead of the whole body of the county. The money with which to meet the obligations of a precinct is raised and paid out with the same formality, and through precisely the same agencies, as are the ordinary county funds, and, except where there is some special provision of statute

authorizing it, payment therefrom can be legally made only on "warrants issued by the county commissioners according to law." Sec. 53, chap. 13, Gen. Stat. 241.* Therefore, to have justified the defendant in making the payment demanded, the relator should first have obtained from the county commissioners the proper order for him to do so. But having neglected this step, the relator was not in a situation to make a legal demand for the money, and the defendant was right in withholding it.

WRIT DENIED.

THE STATE of NEBRASKA, EX. REL. JOSEPH K. MARLAY, v. F. W. LIEDTKE, AUDITOR OF PUBLIC ACCOUNTS.

Act of the Legislature: ALLEGED OMISSIONS. In the case made, *held* that this court cannot supply a positive provision of law wanting in an enrolled act, approved by the executive, and deposited in the office of the secretary of state, even if it appear by the journals that the bill containing such provision passed both houses of the legislature, and that such provision was left out of the enrolled bill either by accident or design.

ORIGINAL application for mandamus to compel the respondent to draw his warrant on the state treasurer for the sum of $75, balance of salary alleged to be due the relator as deputy commissioner of public lands and buildings for the fiscal quarter ending June 30, 1879.

John D. Hayes, for the relator.

The *Attorney General*, for the respondent.

NOTE.—See Laws 1879, p. 379.

COBB, J.

The act of the legislature, entitled "An act to provide for the payment of the salaries of the officers of the state government, penitentiary, hospital for insane, institutes for the blind and deaf and dumb, for the years 1879 and 1880," approved Feb. 27, 1879 [Laws, 1879, p. 427], fixes the salary of the relator at $1200 per annum, and appropriates $2400 for the purpose of paying the same for the years 1879 and 1880. Such are the provisions of the law as published, and as it appears in the enrolled act on file in the office of the secretary of state.

It would not avail the relator in this action if it were true, as suggested, that a senate amendment to House Roll 52 (being the bill for the above act), raising his salary to $1,500 per year, and appropriating $3,000 to pay the same for the said two years, was agreed to in committee of conference and reported to and adopted in each house respectively. For even then the law in that shape would lack one essential of legislation, viz.: approval by the executive. I will therefore decline to look into the journals to ascertain whether the relator's history of the bill in question be correct or not. Because, if correct in every particular, it could not avail him here.

The writ must therefore be denied.

WRIT DENIED.

THE STATE OF NEBRASKA, EX. REL. JEFFERSON B. WESTON, v. F. W. LIEDTKE, AUDITOR of PUBLIC ACCOUNTS.

Land Commissioner under Statute of June 24, 1867. The relator was state auditor during the years 1875 and 1876, and under the provisions of the act of June 24, 1867, he was *ex officio* state land commissioner at a salary of $1,000 per year. The constitution of 1875, which came into force November 1, 1875, provided for the election of a commissioner of public lands and buildings at the annual election to be held in November, 1876, and that his term of office should begin on the first Thursday after the first Tuesday in January, 1877. The said constitution also contains the following provisions:

"Section 2, art. V. * * * None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected."

"Sec. 23, art. XVI. The present executive state officers shall continue in office until the executive state officers provided for in this constitution shall be elected and qualified."

Held that the relator was entitled to the salary of land commissioner at the rate of $1,000 per annum for the months of November and December, 1875, and for the entire year 1876.

ORIGINAL application for Mandamus.

J. B. Weston, pro se.

F. W. Liedtke, in personam.

COBB, J.

The office of state land commissioner was created, the duties of such office devolved upon the state auditor, and the salary for the services thereof fixed at $1,000 per annum, to be paid quarterly, by an act approved June 24, 1867. Gen. Stat., 990. The relator, who was the state auditor, discharged the duties of state land commissioner during the years 1875 and 1876.

He drew his salary for ten months of the year 1875, leaving the same for two months of that year, and for the whole of 1876, undrawn. The sum of $2,000 being appropriated by the act of February 23, 1875, for salary of land commissioner, there remains of such appropriation $1,166.67, which the relator, having discharged the duties of the office for the whole of said time, is entitled to, unless the provisions of the constitution of 1875 have intervened to cut off his right thereto.

The respondent makes the point that the office of land commissioner, as created by the act of June 26, 1867, was abolished by section 26 of Article V. of the constitution of 1875. This position does not seem to be tenable, except in the sense that all of the offices, as created by the former constitution, were abolished. True, the office of land commissioner, previously a statutory office, was, by the force of the new constitution, lifted to the dignity of a constitutional office, and made an elective one; otherwise there is nothing to distinguish this from any other of the executive state offices, so far as the effect of the new constitution upon it is concerned. I do not think that any such meaning as that contended for can be placed upon section 26, Article V.; but, on the contrary, that by the necessary implication of the language of said section, the office of land commissioner is continued. Section 24 fixes the salaries of the governor, auditor, treasurer, secretary of state, attorney general, superintendent of public instruction, and commissioner of public lands and buildings; fixes the pay of the lieutenant governor, etc. Section 25 provides that the officers mentioned in said article shall give bonds, etc.; then follows the 26th section, which provides that "no other executive state officer shall be continued or created, and the duties now devolving upon officers not

provided for by this constitution shall be performed by the officers herein created." The language of this section clearly shows that it was intended as a limitation of legislative power, and not to apply in any manner to any of the officers named in the 24th section. The land commissioner, or commissioner of public lands and buildings, is not an *other* executive state officer, nor is he an officer "not provided for by this constitution."

The respondent also makes the point: "That by reason of section 24, Article V. of the constitution of 1875, the salary of the auditor of public accounts was established at twenty-five hundred dollars per annum, in lieu of all fees, perquisites of office, or other compensation." Upon this point it may be said the offices of auditor and land commissioner were never united, although, by the act of 1867, it was the duty of one person to discharge the duties of the two offices; yet such duties were inherently and necessarily separate and different; and for this reason, no doubt, the constitution provided that after the 1st of January, 1877, the said two offices should be held by as many different persons. It is scarcely possible, then, that the framers of that instrument should have intended that, for the fourteen months intervening between the taking effect of the new constitution and the going into office of the first executive state officers under it, the two offices should be consolidated, and the compensation for services of one paid for as perquisites of the other. Certainly, had the framers of the constitution intended any such unusual thing, they would have used clear and unmistakable language to that effect, which quality cannot be claimed for the section quoted.

The third and last point made by respondent is: "That by reason of section 2 of Article V. of the con-

stitution of 1875, the relator, while filling the office of auditor of public accounts, could not also hold the office of state land commissioner." The section referred to reads as follows: "SEC. 2. No person shall be eligible to the office of governor or lieutenant governor who shall not have attained to the age of thirty years, and been for two years next preceding his election a citizen of the United States and of this state. None of the officers of the executive department shall be eligible to any other state office during the period for which he shall have been elected."

It will be sufficient answer to the last proposition to say that in and by section 23 of article XVI, the constitution passed upon the eligibility of the relator to hold said office for the term for which he claims the salary in this case. The said section reads as follows: "Sec. 23. The present executive state officers shall continue in office until the executive state officers provided for in this constitution shall be elected and qualified." The relator was one of the "present executive state officers" as well in his official capacity of land commissioner as that of auditor, and the above section continues him in office, indeed in both of said offices, until the election and qualification of his successor, which events were not provided to be consummated until the beginning of 1877.

I therefore reach the conclusion that the relator is not precluded from his right to his said salary by reason of any provision of the constitution of 1875, and that consequently he is entitled to the writ as prayed for. But as the relator could, as the several quarters of salary become due, have issued his warrant therefor and received the several amounts from the state treasury, while, as there was some difference of opinion as to his right, he is to be commended for refraining from doing so until the matter could be decided by the

proper authority, yet by so doing he set a precedent to his successor which this court cannot punish him for following by the interposition of costs.

WRIT ALLOWED.

THE STATE OF NEBRASKA, EX REL. GEORGE MCLEAN, JR., v. F. W. LIEDTKE, AUDITOR OF PUBLIC ACCOUNTS.

1. **University:** STATE TREASURER. In the case made, *held*, that in the execution of his duties, under the provisions of the act of June 23d, 1875, the state treasurer acts as state treasurer, and not as treasurer of the board of regents of the state university.
2. **Salaries of the Officers and Professors of the State University.** Under the appropriation bill of 1879, *held*, that the salaries of the officers and professors of the state university for the years 1879 and 1880 are payable out of the general fund.
3. **Construction of Statutes.** When there is no ambiguity in the language of an act of the legislature, nor conflict between different acts on the same subjects, or between different provisions or sections of the same act, this court will not look into the wisdom or policy of such legislation for the purpose of giving it some other meaning than that apparent on its face.

ORIGINAL application for mandamus.

J. Stuart Dales, for relator.

The Attorney General, for the respondent.

COBB, J.

The relator, who is janitor of the university building, acting under appointment of the board of regents of the university at a stated salary payable monthly, makes

and files his relation against the respondent, who is auditor of public accounts of the state of Nebraska, and prays the judgment of this court that the said respondent be required without delay to draw his warrant in favor of the relator upon the state treasury for the sum of one hundred dollars, the amount of his salary for the months of April and May, 1879; the said relator having on the ninth day of June, 1879, presented to the said respondent the certificate of said board of regentss, howing him, the said relator, to be entitled to the said warrant for salary, and which was by the said respondent refused.

The respondent appears and makes answer to the said relation and states as reasons why a peremptory writ of mandamus should not issue against him, that no specific appropriation has been made by the legislature to pay the said claim out of the regents' general fund for the months of April and May, 1879, upon which fund the board of regents of the university issued their certificate for his said salary. Respondent cites section 22 of article III of the constitution of the state: "that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." Also that the legislature at its last session failed to appropriate any of the funds which constitute the regents' general fund, and for that reason respondent refused to draw any warrant on that fund.

The respondent further states in his said answer that at the last session of the legislature an act was passed making appropriations for the current expenses of the state government, etc., approved February 27, 1879, including the expenses of the university. (Laws 1879, p. 434.) And in said act the sum of $25,000 per annum for two years was appropriated out of the general fund for the support of the university, and which said sum is unexpended. Wherefore and for the reasons

above stated the respondent refused to draw his warrant on the regents' general fund in favor of the relator, etc.

In any event a peremptory writ will have to issue, and the only question of any difficulty presented for the consideration of the court is—out of what fund shall the auditor be directed to draw such amount? And before a proper answer to this question is reached we must consider whether, in the matter of receiving and paying out the revenues of the university, the state treasurer acts in his official capacity as state treasurer or in the capacity of treasurer to the board of regents of the university. Upon careful examination of the several acts of the legislature and constitutional provisions applicable to this question we are forced to the conclusion that it was the intention of the legislature, which passed the act of February 23, 1875 [Laws, 1875, p. 154], that all moneys belonging to the university fund then in the hands of the treasurer of the board of regents should not only be paid over to the state treasurer, but should thereupon be covered into the state treasury, and that thereafter all like funds, upon reaching the hands of the state treasurer, would by force of law be covered into the state treasury. It necessarily follows that no such funds or any other funds once in the state treasury can be drawn out except in pursuance of a specific appropriation.

And as an appropriation was made by the last legislature of funds to meet the expenses of the state university for the years 1879 and 1880 out of the general fund, the auditor is restricted to that fund, and can draw upon none other for said years.

When there is no ambiguity in the language of an act of the legislature, nor conflict between different acts on the same subject, or between different provi-

sions or sections of the same act, this court will not look into the wisdom or policy of such legislation for the purpose of giving it some other meaning than that apparent on its face.

A peremptory mandamus will issue to the respondent requiring him to issue his warrant to the relator for the amount claimed on the general fund. The costs of this proceeding to be paid by the relator.

WRIT ALLOWED.

JAMES P. MILLER, PLAINTIFF IN ERROR, v. MARY E. ROBY, DEFENDANT IN ERROR.

1. **Action against Sheriff:** JURISDICTION OF JUSTICE. R. brought an action against a sheriff and an attachment creditor in the district court to recover the sum of $300, the *value* of certain property levied upon by the sheriff under an order of attachment against S. R., and recovered judgment for the sum of $52.58. *Held*, not an action against an officer for misconduct in office, and that a justice of the peace had jurisdiction, the amount recovered being less that $100.
2. ——: COSTS. In such case, where the district court rendered judgment in favor of the plaintiff for costs, the judgment was reversed, and each party required to pay his own costs.

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

France & Sedgwick, for plaintiff in error.

Edward Bates, for defendant in error.

MAXWELL, CH. J.

The defendant in error brought an action against the plaintiff in error, in the district court of York county, to recover the sum of $300 for the conversion

of certain property owned by her. The case was submitted to the court without the intervention of a jury, and judgment was rendered against the plaintiffs in error for the sum of $52.58, and costs taxed at the sum of $111.93; costs of a former term, amounting to $42.66, being taxed to the defendant in error. A motion to re-tax costs having been overruled, the plaintiffs bring the cause into this court by petition in error.

It appears from the record that Miller was sheriff of York county, and took the goods in question under an order of attachment, in an action wherein J. E. Porter and Son were plaintiffs and Samuel Roby defendant, and that judgment was rendered therein against Roby for the sum of $138.60, and that the property so levied upon was applied in payment of said judgment. There is no allegation in the petition that the officer acted in bad faith in making the levy, or that he had reason to believe that the goods belonged to Mary E. Roby, the allegation of the petition being: "And said plaintiff avers, that then and there the said property being found and converted and disposed of the same to their—the defendant's—own use and benefit, to the damage of said plaintiff in the sum of $300." The action, therefore, is not for misconduct in office, but for the value of the property taken.

"Misconduct in office" may be defined as unlawful behavior or neglect by a public officer, by which the rights of the parties have been affected. Thus, a sheriff or constable is liable to a plaintiff for refusal or neglect to serve process, or want of diligence in service; for the escape of a defendant who was lawfully arrested on civil process, either mesne or final; for neglect or refusal to return process; for making a false return; for negligently caring for goods whereby some of them are lost; for neglect to pay over moneys collected, and the like. Cooley on Torts, 393.

A justice of the peace has jurisdiction in cases where the officer has failed to make return, made a false return, or has failed to pay over money collected on execution issued by a justice of the peace. Gen. Stat., 665. In other cases the action must be brought in the district court. But this action, not being for misconduct in office, should have been commenced before a justice of the peace.

As was said in *Beach v. Cramer*, 5 Neb. 98, the design of the law is to abolish not only fictitious issues but fictitious claims. The amount *claimed* in the petition or bill of particulars determines the right of the district or county court, under the increased jurisdiction, to retain a cause for trial. If the verdict is for less than one hundred dollars, the plaintiff is entitled to judgment thereon, but each party must pay his own costs. *Geere v. Sweet*, 2 Neb., 77. *Beach v. Cramer*, 5 Id., 98. *Ray v. Mason*, 6 Id., 101.

It appears from the record that seven witnesses were allowed $86.60 as fees, and the entire amount of costs in the court below exceeds $154.00. Such costs are a burden upon litigants. The trial does not appear to have been a protracted one, and probably occupied less than a day. The principal portion of the costs probably were incurred by witnesses attending court waiting for the trial. To obviate this difficulty, cases should be set for particular days of the term, and if possible tried at the time designated. If costs are needlessly incurred, they should be taxed to the party at fault. So far as it is consistent with its duty in enforcing and protecting the rights of the parties, the court should discourage the accumulation of costs. The judgment of the district court as to costs is reversed, and each party must pay his own costs.

JUDGMENT ACCORDINGLY.

WILLIAM A. JOHNSON, PLAINTIFF IN ERROR, V. EDGAR D. PRESTON, DEFENDANT IN ERROR.

1. **Boundaries.** J. brought an action against P. to recover possession of a parcel of land, and sought to re-establish the quarter section corner on the south side of a section by course and distance. *Held*, that where the jury find that such corner was established by the government surveyors, its location cannot be changed by testimony showing that it is not equi-distant between the south-west and south-east corners of the section.

2. ———: GOVERNMENT SURVEY. Mounds thrown up by the government surveyors as corners, and quarter section corners, of sections, control course and distance.

ERROR to Hamilton county district court. Tried below before POST, J. The opinion states the case.

Miller & Smith and *A. J. Rittenhouse* for plaintiff in error.

A. W. Agee and *M. H. Sessions*, for defendant in error.

MAXWELL, CH. J.

The plaintiff brought an action against the defendant, in the district court of Hamilton county, to recover possession of a parcel of land described as follows: Commencing at a point forty rods north from the quarter section line corner between sections four and nine, in township ten north, of range six west, thence north forty rods, thence west twenty-one rods, thence south forty rods, thence east twenty-one rods to the place of beginning, the plaintiff claiming that said land is a portion of the south-west quarter of section four, in said township and range. The defendant, in his answer, admits that the plaintiff is the owner of the south-west quarter of section four in the above described

township and range, but denies that said land in dispute, or any portion of it, is in the south-west quarter of said section. Upon the trial of the cause the jury found in favor of the defendant. Judgment having been rendered on the verdict, dismissing the action, the plaintiff brings the case into this court by petition in error.

The errors assigned are that the verdict is not supported by the evidence, and is against the weight thereof, and that the court erred in overruling the motion for a new trial.

The only question to be determined is, does the testimony sustain the finding of the jury as to the proper location of the quarter section corner on the south line of section four in said township?

This is not a case where the government mounds have been obliterated and their location is to be determined by secondary evidence. All the testimony tends to show that the corner in dispute, as now designated, was established by the government surveyors when the original survey was made. The plaintiff himself, soon after settling on the land in question, measured from the south-west corner of said section four, one hundred and sixty rods east on the south line of said section, and drove a stake in what he seems at the time to have regarded as the quarter section corner; and it is proved by other testimony that this corner has been regarded as the quarter section corner from the time of the first settlement of that portion of the county, and it is clearly proved that the distance between the south-west corner of said section and the corner in dispute is one hundred and sixty rods and two links. The plaintiff therefore has a full quarter section of land, and has no cause of complaint, although the south-east quarter of the section may contain an amount in excess of one hundred and sixty acres. The mounds es-

tablished by the government surveyors will control course and distance whenever they can be identified. If they have been destroyed, or their existence is in dispute, their location may be determined by secondary evidence, and course and distance may be considered for the purpose of re-establishing them. No unvarying rule can be laid down, as each case must be determined according to the circumstances surrounding it. It is clear that justice has been done in the case at bar, and that, under the testimony, no other judgment could be sustained. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

WILLIAM E. CLARKE, APPELLANT, v. GEORGE W. FORBES AND OTHERS, APPELLEES.

Mortgages: PRIORITY OF LIEN: FRAUD. In 1870 F. executed a mortgage on certain real estate to the Omaha National Bank, which was recorded in January, 1874. In January, 1873, F. executed another mortgage upon the same property to C., his brother-in-law, as trustee for N., the father-in-law of C. and F., which was duly recorded. This mortgage was fraudulent as to creditors of F. In October, 1873, proceedings in bankruptcy were instituted against F. In April, 1874, while these proceedings were pending, F. obtained a letter from the president of the bank, addressed "to whom it may concern," stating that if F. could borrow $10,000 to $12,000 he could adjust his unsecured debts. This letter was presented to C., who loaned F. $5,000, N. surrendering to him the mortgage above described. A portion of this money was paid directly to the bank upon an unsecured debt against F. *Held*, that there being no testimony showing C. to have had knowledge of any fraud between F. and N., he took the mortgage free from that defense, and that the lien of the bank mortgage was subject to his.

THIS was an appeal by plaintiff from a decree rendered by SAVAGE, J., in the district court of Douglas county. The opinion contains a statement of facts sufficient to an understanding of the case.

George W. Doane, for appellant.

George W. Ambrose and *E. Wakeley*, for Omaha National Bank, appellee.

MAXWELL, CH. J.

On the 7th day of December, 1870, George W. Forbes executed and delivered to the Omaha National Bank a note for the sum of $19,399.08, secured by mortgage on real estate, the agreement between the parties being that the mortgage was not to be recorded for some time, to enable Forbes to make a further loan upon a portion of the real estate described in the mortgage. The mortgage in question was recorded on the 22d day of January, 1874.

In January, 1873, Forbes applied to the plaintiff, who is his brother-in-law, and a resident of Cleveland, Ohio, to negotiate a loan for him of the sum of $10,000, and, to secure the payment of the same, executed a mortgage to the plaintiff upon certain real estate in the city of Omaha. This mortgage was recorded in February, 1873. During the summer of 1873 Forbes drew upon Clarke at various times to the amount of $10,000, all the money but $500 paid thereon being paid with money transmitted to Clarke by one Newton, the father-in-law of Forbes and Clarke. Newton at the time was in the employ of Forbes, and a considerable portion of the money transmitted by him appears to have belonged to Forbes.

On the 10th day of October, 1873, proceedings in bankruptcy were instituted against the firm of Forbes

& Hawzer, of which George W. Forbes was a member, and soon thereafter said firm were adjudged bankrupts.

In April, 1874, Forbes being anxious to relieve himself from these proceedings, undertook to raise a sufficient sum of money to effect a composition with his creditors, of which the Omaha National Bank was one for a considerable amount in excess of the amount due on the note and mortgage; and to aid him in doing so he obtained a letter from the president of the bank, addressed "to whom it may concern," stating that "Mr. George W. Forbes, the bearer hereof, one of the old settlers of Omaha, visits the east with the view of raising some means with which to free him from his difficulties. And, from the showing he has made me of his affairs, I am freely of the opinion that if he can raise ten to twelve thousand dollars he can at once settle all his unsecured debts. I shall aid Mr. F. all in my power to this end. Respectfully, Ezra Millard, president."

This letter is dated April 23, 1874, and was delivered to Forbes, who at once applied to Clarke to negotiate a loan for him. Clarke being unable to borrow money upon the securities offered, it was arranged between Forbes, Newton, and himself that he should loan Forbes $5,000—about $3,000 of his own money, and about $2,000 belonging to one Gardiner, Newton to surrender to Clarke the mortgage heretofore described, and that Forbes should furnish to Clark an additional $5,000, who should thereupon authorize the bank to draw upon him for the sum of $10,000. This arrangement was carried out, two drafts being drawn by the bank upon Clarke for $5,000 each, which were duly paid, the money being applied to the payment of the unsecured debts of Forbes, a portion of which was held by the bank.

In 1877 Clarke instituted proceedings in the district court of Douglas county to foreclose the mortgage in question. The bank answered the petition of plaintiff, setting up various defenses, which it is unnecessary to notice in detail, and claimed that the lien of the mortgage to the bank was prior to that of the plaintiff, and on the trial of the cause the court so found. The plaintiff appeals to this court.

Whatever the rights of the bank may be as against Forbes and Newton, there is an entire failure of testimony to show that the plaintiff had notice of any fraudulent collusion between them. This notice was necessary to make the defense of fraud available. So far as appears, the plaintiff is a *bona fide* purchaser, and in good faith paid his money for the mortgage in question, a considerable portion of the avails of which were paid to the bank upon Forbes' insecured debt. There is nothing in the objection that the mortgage to the plaintiff had fulfilled its purposes when assigned to Clarke for the money loaned. This is not a case where the mortgage had been satisfied and kept on foot as security for a new loan. If such was the case the defendant's position would be correct, and the lien have ceased absolutely. But in the case at bar, while the words "sale" or "sold" are not used, it is clear that the transfer from Newton to Clarke was in fact a sale, and that he is now the owner of the mortgage. The equities of the case are clearly with the plaintiff. The judgment of the district court in regard to the priority of liens is therefore reversed, and the lien of the bank made subject to that of the plaintiff.

JUDGMENT ACCORDINGLY.

CHARLES WEINLAND, APPELLANT, V. ANDREW COCHRAN, THOMAS L. WISWALL, RUE P. HUTCHINS, JOHN W. FORD, AND JENNIE L. FORD, APPELLEES.

1. **Causes of Action:** JOINDER. Under certain statutory restrictions legal and equitable causes of action may be joined in the same suit, but they must be *existing*, not merely prospective, causes of action.

2. **Attaching Creditor:** CREDITOR'S BILL. Before obtaining judgment on his demand, an attaching creditor cannot maintain an action to have an alleged fraudulent conveyance of real estate set aside.

3. **Fraud:** REVIEW OF QUESTION OF. Where a question of fraud in fact is brought up for review, the supreme court is decidedly averse to interfering with the decision below, whether made by the court or by a jury; nor will it do so unless clearly satisfied that injustice has been done.

APPEAL from Nemaha county.

Plaintiff's action was in the nature of a creditor's bill to set aside conveyances by defendant Wiswall to defendant Ford of 850 acres of land in Nemaha county. The petition alleges in substance that Weinland had obtained judgment against defendants, Cochran, Wiswall, and Hutchins in the superior court of Chicago, Cook county, Illinois, March 7, 1876, for the sum of $4756.26 damages and $10 costs, upon which $97.42 only had been made by execution, etc.; that at the time said action was commenced, to-wit: September 21, 1875, Wiswall owned the lands described in the petition, but before judgment was rendered, and on the twenty-second day of November, 1875, Wiswall conveyed the said lands to the defendants, John W. Ford and Jennie L. Ford; that said conveyances were voluntary without consideration, and made to defraud creditors, etc.; and plaintiff prayed judgment and a decree to sell said land to pay said judgment.

Summons issued and served on defendants, Ford and wife, and returned not served as to the other defendants. Plaintiff sued out an attachment against the property of Cochran, Wiswall, and Hutchins, and attached the land in controversy as the property of Wiswall.

Ford and wife answered, denied the allegations of the petition except the conveyances of the land to them.

The district court, POUND, J., presiding, decided in favor of the defendants, and dismissed the cause.

In this court a motion was made to quash the bill of exceptions, and overruled. 8 Neb., 528.

Schoenheit & Thomas, *J. S. Stull*, and *T. L. Schick*, for appellant.

It seems clear from the authorities that the plaintiff has the right to ask, in the same action, for a judgment and also that the fraudulent conveyance be set aside. *The Marion Deposit Bank v. Mc Williams*, 1 West, L. Mo., 571. *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y., 360. It is not sufficient that a conveyance be made upon good consideration or *bona fide*. It must be both. Kerr on Frauds, pp. 199 and 200. *Clements v. Moore*, 6 Wallace, 312. *Tootle & Maule v. Dunn*, 6 Neb., 99. *Chapel v. Clap*, 29 Iowa, 194. There can be no doubt from the evidence that Wiswall made the conveyance in question with intent to defraud his creditors, and the only doubt which can be suggested is whether Ford knew of that intent. If this is to be considered a *voluntary* conveyance, then the indebtedness raises a presumption of fraud, which becomes conclusive by insolvency. 1 Am. Lead. Cases, 41.

J. H. Broady and *W. T. Rogers*, for appellees, Ford and wife.

An attaching creditor cannot maintain an action in the nature of a creditor's bill to have an alleged fraudulent conveyance set aside. Such action can only be maintained by a judgment creditor. Weinland has not obtained a judgment against any of the defendants in this state, and bases his claim to equitable relief upon a foreign judgment, and upon which he had sued out an attachment, and claims a lien on the land in controversy by virtue of said attachment. We contend that the plaintiff has not exhausted his remedy at law, which is absolutely necessary before he can maintain this proceeding. *Weil & Cahn v. Lankin*, 3 Neb., 384. *Smith v. Thompson*, Walk. Ch., Mich., 1. *Newman v. Willett*, 52 Ill., 98. *Thayer v. Swift*, Har. Ch., Mich., 430. *Steward v. Stevens*, Ibd., 169. *Jones v. Green*, 1 Wall., 331. *McElwain v. Willis*, 9 Wend., 564. *Wiggins v. Armstrong*, 2 John. Ch., 144.

LAKE, J.

It was held by this court in the case of *Wiel & Cahn v. Lankins*, 3 Neb., 384, that before obtaining judgment on his demand, an attachment creditor cannot maintain an action in the nature of a creditor's bill to have an alleged fraudulent conveyance of real estate set aside. And it was there said that such a proceeding "can only be maintained by a *judgment creditor*."

The rule there laid down is applicable to this case, and decisive of it, for if an independent suit in equity could not be maintained for that purpose, it cannot in reason be claimed that the court can take cognizance of the same matter by uniting it with the original cause of action, as is done here.

Under our practice, subject to certain statutory restrictions, legal and equitable causes of action may be included in the same suit; but they must be *exist-*

ing, and not merely *prospective* causes of action. And, furthermore, we see no propriety in a practice which would put a grantee to the trouble and expense of a protracted litigation in defense of his title until after the indebtedness of his grantor has been judicially established.

While these considerations alone call for an affirmance of the judgment, it may not be amiss to remark that, were we to go further, and, looking to the evidence, base our decision upon that, the result would be the same. There were some facts disclosed on the trial from which the court might possibly have inferred that the defendant, Ford, was a fraudulent purchaser of the land in question, but the decided preponderance of the evidence is the other way. Besides, where a question of fraud in fact is brought before us for review, and there is, as here, a real conflict of evidence, we are decidedly averse to interfering with the decision, whether made by court or jury. Indeed, we will not do so unless clearly satisfied that injustice has been done.

JUDGMENT AFFIRMED.

E. A. RICHARDSON, PLAINTIFF IN ERROR, v. R. T. STEELE, DEFENDANT IN ERROR.

Replevin: PLEADING: EVIDENCE. In an action of replevin a general denial puts in issue every material allegation of the petition. And under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action.

ERROR from district court of Merrick county. Tried before POST, J.

The defendant in error brought his action in the county court of Merrick county to recover possession of a certain gun of the value of $75, where judgment was rendered in his favor, and plaintiff in error appealed to the district court. The petition charges that defendant in error is the owner of the gun and entitled to the possession thereof, and that plaintiff in error wrongfully detains the same, etc. The answer was a general denial. On trial the plaintiff in error offered to prove that he held the gun at the commencement of the action as *bailee* of one Dimick, and that said Dimick was the owner, which, on objection, the court refused. Plaintiff in error also requested the court to give the jury three instructions, to the effect that, if it appeared that at the commencement of the suit one C. S. Dimick was the owner and entitled to the possession of the gun, that such facts constituted a defense to the suit, which the court refused to give, and on his own motion directed a verdict for defendant in error, on which judgment was rendered, and to reverse which plaintiff in error instituted this proceeding.

John Patterson and *Whitmoyer, Gerrard & Post*, for plaintiff in error.

A general denial in replevin puts in issue every material fact which is necessary to entitle the plaintiff to recover. *Oakes v. Wyatt*, 10 Ohio, 344. *Ferrell v. Humphrey*, 12 Id., 112. *Coverlee v. Warner*, 19 Id., 29. *Heron v. Beckwith*, 1 Wis., 17. *Child v. Child*, 13 Id., 17. *Hunt v. Burnett*, 4 Green (Iowa), 512. "In replevin, under a general denial the defendant may show property in a third party," and a paragraph alleging such facts will be stricken out as an argumentative denial. *Davis v. Warfield*, 38 Ind., 461. *Kennedy v.*

Show, Id., 474. *Thompson v. Sweetzer*, 53 Id., 312. *Moore v. Kepner*, 7 Neb., 291.

J. W. Sparks and *W. H. Webster*, for defendant in error.

If the plaintiff in error, Richardson, claimed and desired to prove that Dimick was the rightful owner of the gun, and that he was innocently in possession as bailee, he should have availed himself of the provisions made by the code, sec. 48, p. 530.

But if the court should decide that these provisions of the code are not to be used in practice, though they seem to have been framed expressly for cases of this kind, still we contend that by our code and practice they should have pleaded specially that which they desired to prove. For a statement of any new matter must be specially pleaded. [Code, sec. 99, p. 540.] If plaintiff in error held the property innocently he should have so pleaded. *Homan v. Laboo*, 1 Neb., 204. And by the New York decisions, in an action for conversion, even "a sheriff cannot prove that he levied on goods before plaintiff set up any title under a general denial. *Graham v. Harrower*, 28 N. Y., 165. Nor on general denial in an action for conversion can a defendant show a special property in himself to the goods. Ib. Nor under a general denial an affirmative defense cannot be given. *Beaty v. Swarthout*, 32 Barb., 293. The effect of a general denial is to cast the burden of pooof upon the plaintiff, and if the necessary evidence is given, and the answer contains only a general denial, the plaintiff is entitled to a verdict and judgment. *Texier v. Gouin*, 5 Duer, 389.

Nor do the authorities cited in plaintiff's brief, as we understand them, go to the extent claimed, but only so far as to prove property in himself or in justification of an officer making a levy.

COBB J.

Whatever may have been the law formerly, or may be now, in those states which have not materially departed from the common law system of pleading, it must be considered as settled both in this state and in Ohio, whose code and practice we have in great measure followed, that in replevin a general denial puts in issue every material allegation of the petition, and under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action. *School District No. 2 of Merrick Co. v. Shoemaker*, 5 Neb., 36. *Creighton, Adm'r, etc., v. Newton*, Id., 100. *Hedman v. Anderson*, 8 Id., 180. *Ferrell v. Humphrey*, 12 Ohio Rpts., 113. *Oaks v. Wyatt*, 10 Id., 344.

It follows, therefore, that the district court erred in ruling out the testimony offered by plaintiff in error to show by the witness, Dimick, and his own testimony, that said Dimick was the owner of the gun in controversy at the time of the commencement of said suit. As the other errors complained of depended in great part upon this one, it is not deemed necessary to pass upon them.

The judgment of the district court is reversed and a new trial granted.

REVERSED AND REMANDED.

C. AULTMAN & CO., PLAINTIFF IN ERROR, V. ANDREW J. REAMS, DEFENDANT IN ERROR.

1. **Replevin:** RIGHT OF PLAINTIFF TO DISMISS WITHOUT PREJUDICE. In an action of replevin, where the property has been replevied and delivered to the plaintiff, it is not error for the court to refuse to allow the plaintiff, after the trial has commenced, to dismiss the case without prejudice to a future action.
2. **Instructions to Jury.** It is the duty of the jury to find a verdict according to the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so, upon proper application of the aggrieved party, is error.

ERROR to Franklin county district court.

This is an action brought on a promissory note by the plaintiff in error in the district court of Franklin county. The note was for $500, and given for a threshing machine. On the trial plaintiff called defendant as a witness to prove his signature to the note, and defendant denied that the signature was his. Plaintiff having no other sufficient evidence to prove the signature, and being taken by surprise at the evidence of defendant, thereupon, and before the case was submitted to the jury, asked and moved the court to dismiss the action without prejudice, which the court, GASLIN, J., presiding, refused to do, and the plaintiff was defeated in the action.

Lamb, Billingsley & Lambertson, for plaintiff in error.

C. J. Dilworth, for defendant in error.

COBB, J.

There can be no doubt of the correctness of the law laid down by the counsel for the plaintiff in error, to-

wit: That the plaintiff has the right to dismiss his case without prejudice to a future action at any time before the final submission of the case to the jury, as a general proposition of law. But is this rule universal? Does it apply to actions of replevin? In this action, after the property has been delivered to plaintiff, the positions of parties become to all practical intents and purposes reversed. The proceeding has already served the primary purpose desired by the plaintiff. He has reduced the property to possession, and should no further step ever be taken in the case he would be content. But the defendant, who also claims the possession of the property, has an interest in a speedy trial as the only means of restoring the property to his possession.

It seems to me that it could not have been the intention of the framers of the statute, giving the plaintiff the right to dismiss his case without prejudice at any time before the same is given to the jury, that the same should apply to actions of replevin. What good would it have done the plaintiff to have dismissed his case? Section 190 of chap. 57, Gen. Stat., page 554, provides that: "If the property has been delivered to the plaintiff and judgment be rendered against him on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of the defendant or his attorney, empanel a jury to enquire into the right of property and right of possession of the defendant to the property taken. If the jury shall be satisfied that said property was the property of the defendant at the commencement of the action, or if they shall find that the defendant was entitled to the possession only of the same at such time, then and in either case they shall assess such damages for the defendant as are right and proper; for which, with costs of suit, the court shall render judgment for the defend-

ant." And section 7 of an act passed February 26, 1873, found on page 713 of the General Statutes, provides that "The judgment in the cases mentioned in sections one hundred and ninety and one hundred and ninety-one, and in section one thousand and forty-one of said code, shall be a return of the property or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit."

Now, if the court had permitted the plaintiff to dismiss his suit as he desired, it would clearly have been the duty of the court to allow the defendant to introduce testimony either before the jury already empaneled in the case, or to empanel another "jury to inquire into the right of property," etc., and the judgment of the court rendered on the finding of such jury, under the provisions of the section last above quoted, would have been as conclusive as is the judgment in the case at bar. Thus it would have been an idle ceremony for the court to have permitted plaintiff to dismiss his suit under the circumstances. Indeed all that plaintiff could have done with the consent of the court he could have done without such consent. But in any event the result must have been the same, so that I see no error in the ruling of the court on that point.

The other point made by plaintiff in error is, "that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law and in disregard of the instructions of the court."

The court charged the jury "that upon the evidence in this case, in any event, you can only find nominal damages, as no actual damages are proved." In the face of this instruction the jury found thirty-five dollars damages. The only testimony in the case was that of the defendant. In his testimony he stated: "I

have been damaged, by reason of the taking and detention of the machine in this case by plaintiff, $350. I estimate my damage at the loss of the use of it during the last threshing season." Again, on cross-examination: "I have lost the use of the machine ninety days since the threshing season commenced; suffered from the loss of it since the last of July, 1878. The use of the machine was worth five dollars per day." I think that the charge of the court was correct that no actual damage was proved in such a way that the jury could consider it. But whether right or wrong, it was the duty of the jury to respect and obey the instructions of the court, and for their failure to do so the verdict should have been set aside; and it was error in the district court to refuse to do so. *Jewett & Root v. Smart & Gillette*, 11 Iowa, 505.

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

REVERSED AND REMANDED.

STATE OF NEBRASKA, EX. REL. J. W. PEARMAN, v. F. W. LIEDTKE, AUDITOR OF PUBLIC ACCOUNTS.

1. **Constitutional law:** PRINTING OF AMENDMENTS TO BILLS. *Held*, That the language of section 11 of Article 3 of the constitution: "Every bill and concurrent resolution shall be read at large on three different days in each house, and the bills and all amendments thereto shall be printed before the vote is taken upon its final passage," does not apply to amendments attached to a bill upon the report of a committee of conference after a disagreeing vote of the two houses.

2. **Act to take effect upon the happening of a future and uncertain event.** "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expedi-

ency of the law; an event on which the expediency of the law, in the opinion of the law-makers, depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event the legislature in effect declares the law inexpedient if the event should not happen, but expedient if it should happen." Ruggles, C. J., in *Barto v. Himrod*, 8 N. Y., 489.

ORIGINAL application for mandamus.

Covell & Ransom and *J. C. Watson*, for relator.

The Attorney General, for the respondent.

COBB, J.

The act under which the relator claims is entitled "An act making appropriations for the payment of miscellaneous items of indebtedness owing by the state of Nebraska," and was approved February 27, 1879. (Laws 1879, p. 429.) It contains ninety-two distinct appropriations, to as many separate persons and firms, for as many different causes of indebtedness on the part of the state, divided under seven heads—penitentiary, capitol building, blind asylum, insane asylum, stationery, sheriffs' fees, and miscellaneous. The relator's claim is the eighty-seventh item, and is in the following words:

"16. J. W. Pearman, for military services, $3,000. [That said $3,000 remain in the treasury of the state, and not to be paid or drawn out until the general government shall re-imburse the said amount to this state.]"

The constitution of the state contains the following provision: "SEC. 11. Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken on the final

passage." * * * * * * * * *
Sec. 11, Art. III., Const.

The relator states in his affidavit accompanying his motion for a writ of mandamus that the "said clause [the clause in brackets above] is unconstitutional and void because it is and was an amendment to the original bill proposed on the last night of the session of the said legislature of the state of Nebraska, at which said act was passed, which said amendment was not printed before the vote was taken on the final passage of the bill," etc. This allegation is not denied by the respondent, and for that reason the relator claims judgment upon the pleadings.

Ordinarily, where a material fact is alleged in a petition, or paper which stands in the place of a petition, and is not denied by the defendant in his answer, such fact will be taken and considered as true, the same as though proved by the amplest evidence. But this question is not within the ordinary rule. This is not an allegation of fact involving the merits of the plaintiff's claim to be paid $3,000 by the state. It is an allegation that a certain clause of the statute, approved by the executive and published by the state for the guidance and government of the courts as well as of all the people of the state, is or is not the law of the land. It therefore becomes the duty of the court to avail itself of all the means within its reach to ascertain the truth or falsity of such allegation—a duty which it cannot shirk because of the failure of the respondent to deny the truth of such allegation.

Upon a thorough examination of the journals of the two houses for the last session, I find that it is probably true that the clause in question was not printed. But I also come to the conclusion that the letter of the constitution did not require that it should be printed. And while such requirement is probably

within the spirit of the constitutional provision referred to, I have met with no authority which has gone so far as to reject a provision of a statute because of its conflict with the spirit only of a constitutional provision.

The act in question originated in the house, and constituted house roll 190, said bill having been reported to the house from the committee of claims on the 15th day of February, 1879, was read on two different days, considered in committee of the whole, amended, engrossed for a third reading, read a third time (on a day different from that of its first or second reading), and on the 20th of February the said bill was declared by the speaker to have been read at large on three different days, and the same, with all its amendments, having been printed, whereupon it was put upon its passage by yeas and nays, and having received a constitutional majority was declared passed. This bill, as it passed the house, contained no appropriation to the relator. It went to the senate on the same day of its passage by the house, and on the following day received its first reading in that body; its second reading on the 22d of February. On the 24th the bill was amended in the senate and referred to the committee of claims, with instructions. On the same day it was reported to the senate from the said committee, with sundry amendments, among which is the item of $3,000 to the relator for military services, but without the other words constituting the said clause as it now stands. On the same day the bill, with the amendments reported from the committee of claims, was considered in committee of the whole, and upon the report of the committee of the whole was adopted by the senate. On the 25th the bill was read the third time, whereupon the president of the senate declared that the said bill had been read at large on three dif-

ferent days, and the same, with all its amendments, having been printed, he put the same upon its passage, and the bill passed the senate by a constitutional majority.

It will thus be seen that the constitutional provision requiring the bill and all amendments thereto to be "printed before the vote is taken upon its final passage," had spent its entire force upon the bill in question before the clause limiting or qualifying the appropriation to the relator had been proposed. The words "final passage" as applied to matters of legislation were well known to the framers of the constitution, and presumably so to the people who adopted it. And it is a part of the legislative and political history of the country that a large per cent of the most important legislation of the states, as well as of the national government, consists of measures proposed as amendments to bills by committees of conference after such bills have gone through all the stages of legislation in the two houses, and only lack concurrence, often on trivial and unimportant points. The object of the constitutional provision is to ensure more deliberate action and prevent haste in the maturing and passage of bills. This is a commendable object and one which should be upheld so far as possible by a sound construction of the constitution. Yet there is a time within the existence of all legislative bodies when haste is absolutely necessary, and when much deliberation is quite out of the question. All of this was well known to the framers of the constitution, and hence the section under consideration does not require the printing of amendments after the bill has been put upon its final passage. Any other line of construction, if followed in its necessary sequence, would lead to a condition of repeated printings and readings on different days, which would tend to becloud rather than to enlighten the legislator,

and would render it impossible to perform the necessary legislation within the forty days to which another section of the constitution limits each session of the legislature.

But to continue the history of this bill. It was on the 25th returned to the house with sundry amendments, among others the appropriation to the relator. On the same day it was taken up and some of the amendments concurred in and some non concurred in. Among the latter we find the appropriation now under consideration. So the bill went back to the senate, which body refused to recede from their amendments and asked a committee of conference. On the same day a like committee was appointed on the part of the house, and the committee of conference made its report to the two houses respectively with sundry recommendations, among the rest "add to line 9" (that being the line containing the appropriation to the relator now under consideration) that the said "$3000 remain in the treasury of the state and not be paid nor drawn out until the general government shall re-imburse the said amount to this state." The report was adopted by each house respectively. The adoption of this report was the final legislative act upon this bill so far as either house was concerned. There are other steps pointed out to be pursued upon the contingency of the bill being returned by the governor to the house in which it originated, with his objections thereto. As we have already seen, there being no constitutional provision requiring the printing of an amendment to a bill made in the manner above detailed, we must regard all parts of this bill, so far as the appropriation to the relator is concerned, as of equal authority, and we must therefore examine the language of the clause and see if we can ascertain the intention of the legislature therein sought to be expressed.

In this examination we shall derive but little aid from the authorities. It is seldom that we meet with language of this character in an act without something to indicate whether the framers desired it to be understood as a saving clause or as a proviso, while it must have been intended for one or the other. If such were not the case, and the court were disposed to consider this case upon purely technical grounds, we would probably be spared considerable labor, for it is laid down in some of the earliest reported cases that a saving clause which is totally repugnant and subversive of the purview of a statute will be rejected, yet that a proviso equally repugnant and subversive will be allowed to stand, and the purview must give way. While I confess that I fail to see the reason for this distinction, it is backed by most respectable authority. But we cannot follow it because of the failure of the legislature to label this clause either as a saving clause or a proviso, and in substance it is as much the one as the other.

The reason given in the case of the *Attorney General v. The Governor and Company of the Chelsea Water-Works*, Fitzgibbon, 195, why, where in an act of parliament the proviso was directly repugnant to the purview, the proviso should stand and the purview give way, is because the proviso speaks the last intention of the law-giver. It was compared to a will—says the report—in which the latter part, if inconsistent with the former, supersedes and revokes it. Were we at liberty, while discussing this branch of the question to consider the history of this measure in its passage through the several stages of legislation, we would see that the above reason applies to it with considerable force. One branch of the legislature expressly refused its assent to the appropriation without the restricting and qualifying clause, which was after-

wards attached, for the purpose of securing for it a consideration which otherwise was denied it.

But the proviso or saving clause—whichever it may be called—now under consideration, may not be entirely subversive of the purview of the act. Possibly some effect may be given the section with that clause attached. If so, then, upon the true principles of construction, which require that, when possible, some effect shall be given to each word and sentence of a statute, it should be given such construction as upon a fair consideration of all its parts seems to express the intention of the legislature in adopting it. It was evidently the intention of the legislature to pass affirmatively upon the justice of the relator's claim against the state to the amount of $3,000, and to provide that, upon the happening of a certain future event, the relator should be paid that amount out of the state treasury without being put to the trouble, delay, or expense of another application to the legislature. That event is the allowance by the general government of the United States, and the appropriation by congress of money to pay for the services of the relator, either specifically or generally, as one of a class of claims growing out of the Indian service, long pending before congress. It was competent for the legislature to pass an act depending for its execution, either in whole or in part, upon the happening of such a contingency, and such an act is not to be confounded with those acts of legislation which have generally been held void by reason of their being made to depend for their vitality upon their ratification by the voters at a popular election.

In the opinion of the court in *Barto v. Himrod*, 8 N. Y., 490, Chief Justice Ruggles says: "The event or change of circumstances on which a law may be made to take effect must be such as, in the

judgment of the legislature, affects the question of the expediency of the law, an event on which the expediency of the law, in the opinion of the law-makers, depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. Where a law is made to take effect upon the happening of such an event the legislature in effect declares the law inexpedient if the event should not happen, but expedient if it should happen," etc. This case is followed in *Ex parte Wall*, 48 Cal., 279–313, and is quoted with approval by Cooley. Cooley's Constitutional Limitations, 146. See also *The Cargo of the Brig Aurora v. United States*, 7 Cranch., 382, which treats of one of a numerous class of cases where the legislation of congress is made to depend for the occasion of its execution upon the happening of future and uncertain events affecting the expediency of such measures.

The relator, in his brief, also makes the point that "said clause is void and unconstitutional for the following reasons: (1.) Said bill contains more than one subject, and does not clearly express the same in the title." While the writer might be inclined to agree with him in that conclusion, yet I do not see how that can help the relator. If the act is unconstitutional and void, certainly this court cannot be required to enforce any of its provisions by mandamus. But without passing upon this point we have already seen that the rights of the relator under the said act are properly made contingent upon an event which is not claimed to have happened. The writ is therefore denied.

WRIT DENIED.

STATE NATIONAL BANK OF LINCOLN, APPELLEE, V. G. B. SCOFIELD AND WIFE, APPELLANTS.

Order confirming sale on foreclosure of mortgage. On appeal from an order of the district court confirming a sale of mortgaged premises, *held*, That this court would not consider a question involving the merits of the original case.

APPEAL from an order confirming a sale of real estate in Otoe county. Tried below before POUND, J.

G. B. Scofield, pro. se.

E. F. Warren, for appellee.

COBB, J.

As the appeal in this case is only from the order of the district court confirming the sale of the mortgaged premises, I do not think that the court can consider any questions as to the legality of the mortgage —questions which were necessarily decided in and by the decree upon which the property was sold. And it not being made to appear but that the said sale was in all respects made in conformity to the provisions of the statute in such cases made and provided, I see no error in the order confirming said sale, and the same must be affirmed.

ORDER AFFIRMED.

WILLIAM EDGERTON, PLAINTIFF IN ERROR, v. A. H. WACHTER, DEFENDANT IN ERROR.

Statute of Limitations. Cause of action arose in the state of Iowa, where defendant then resided with his family. But he carried on a business at the city of Plattsmouth, in this state, and was personally present at Plattsmouth nearly every day for about three years, when he moved with his family to Plattsmouth, and continued to reside there. Suit commenced after the expiration of four years—in contract, not in writing. Plea of the statute of limitations. *Held*, that the statute commenced to run at the time of the defendant's removal with his family into this state.

ERROR from Cass county district court.

T. M. Marquett, for plaintiff in error.

Sam. M. Chapman, for defendant in error, cited *Carpenter v. Wells*, 21 Barb., 594. *Gans v. Frank*, 36 Barb., 320. Voorhies' Code, sec. 100, note "d." *Basset v. Basset*, 55 Barb., 505. *Cole v. Jessup*, 10 N. Y., 96 and 107. *Burroughs v. Bloomer*, 5 Denio, 534. *Cole v. Jessup*, 10 How. Pr., 527. *Cook v. Holmes*, 29 Mo., 61. *Johnson v. Smith*, 43 Mo., 499.

COBB, J.

This case turns upon the construction of the provisions of the statute commonly called the Statute of Limitations. Section 11, of title II., chap. 57, General Statutes, provides that an action upon a contract not in writing, express or implied, shall be brought within four years. Section 20 is in the following language: "If when a cause of action accrues against a person, he be out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to

run until he come into the state. * * *" I understand the above language to mean the same as though it read: "If when a cause of action accrue against a person, he *reside* out of the state," etc., and "the period limited for the commencement of the action shall not begin to run until he come to *reside* in the state," etc.

As I understand the bill of exceptions, the cause of action accrued in the state of Iowa. The plaintiff in error at that time resided in Iowa, and continued to reside in Iowa until about one year before the commencement of the suit, when he moved with his family into the city of Plattsmouth, Nebraska; but that during all of said time plaintiff in error had carried on business at Plattsmouth, and was almost daily in attendance at his lumber-yard there; all of which was well known to the defendant in error, who resided at Plattsmouth, and saw and conversed with plaintiff in error almost daily, etc.

The cause of action arose in the state of Iowa; the statute of limitations commenced to run on it there, and, notwithstanding the daily trips of the plaintiff in error across the Missouri river, and out of the state of Iowa, it continued to run until he moved with his family out of the state. During all of said time, notwithstanding his repeated personal absences from the state of Iowa, he had a last and usual place of abode there, where process could have been served on him, although he was personally absent. But during none of this time had he a last and usual place of abode or residence in Nebraska, although he was generally there during business hours. I do not think that the statute of limitations could be running on the same cause of action in two different states at the same time; and if I am not mistaken in this view, then it necessarily follows that it did not commence to run upon the

cause of action in this case until the removal of the plaintiff in error with his family to the city of Plattsmouth about a year before the commencement of the action.

For aught that appears in the record the order of the district court denying a new trial was correct, and the judgment must be affirmed.

JUDGMENT AFFIRMED.

MAXWELL, CH. J., having been of counsel, and LAKE, J., having sat in the court below at the trial of this cause, the cause was by consent of parties submitted to COBB, J.

MATTHEW NEWLOVE, PLAINTIFF IN ERROR, V. F. D. WOODWARD, ADMINISTRATOR OF THE ESTATE OF G. A. WOODWARD, DECEASED, DEFENDANT IN ERROR.

1. **Summons:** SERVICE: RETURN. When the return to a summons stated that it was served upon the defendant "by *reading* to him a true and certified copy of the same, with all the indorsements thereon," *held*, insufficient to give the court jurisdiction, as the statute requires the service to be made by delivering a copy of the summons with the indorsement thereon to the defendant, or leaving the same at his usual place of residence.

2. **Practice:** APPEARANCE. A party may appear specially to object to the jurisdiction of the court for want of proper service of summons.

3. **Motion for New Trial.** Where the judgment of a justice of the peace is taken on *error* to the district court and affirmed, no motion for a new trial is necessary in that court in order to have the judgment reviewed in the supreme court, as the matters involved are purely questions of law.

4. **Petition in Error:** VERIFICATION. It is unnecessary to add a verification to a petition in error, it not being a pleading of fact within the meaning of the code.

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

H. W. Short, for plaintiff in error, cited 8 Neb., 109. 3 Neb., 108. Id., 215. Code, sec. 911. 1 Nash Pl., 70.

D. W. Barker, for defendant in error.

MAXWELL, CH. J.

In the year 1878 George N. Woodward commenced an action against the plaintiff in error before a justice of the peace to recover the sum of $9.12. The officer's return to the summons in that case is as follows:

"STATE OF NEBRASKA, }
Nuckolls County. }

"Received this summons this 2d day of December, 1878. I hereby certify that on the 2d day of December, 1878, I served the within writ of summons on the within named Matthew Newlove, by reading to him a true and certified copy of the same with all the indorsements thereon. L. H. PRICE."

On the return day the plaintiff in error appeared specially and objected to the jurisdiction of the court, because there had been no service of a summons upon him by a copy served upon or left at his residence. The motion was overruled for the reason as stated in the transcript, that the plaintiff in error and his attorney were present in court. Judgment was thereupon rendered against the plaintiff in error for the sum of $9.50, and costs of suit amounting to the sum of $5.40.

The plaintiff herein took the case on error to the district court, where the judgment was affirmed. He now brings the cause into this court by petition in error.

Section 911 of the code provides that "the sum-

mons must be returnable not more than twelve days from its date, and must, unless accompanied with an order of arrest, be served at least three days before the time of appearance, by delivering a copy of the summons, with the indorsement thereon (certified by the constable or person serving the same to be a true copy), to the defendant, or leaving the same at his usual place of residence." Gen. Stat., 667. A summons must be served upon a defendant in the mode provided by the statute, in order to give the court jurisdiction, unless the defendant by an appearance waive the defect. A party may appear specially to object to the jurisdiction of the court, but if by motion or otherwise he seeks to bring into action the powers of the court, except on the question of jurisdiction, he will be deemed to have appeared generally. *Porter v. The C. & N. W. R. R. Co.*, 1 Neb., 15. *Cropsey v. Wiggenhorn*, 3 Id., 116. *Crowell v. Galloway*, Id. 220.

In the case at bar the plaintiff in error restricted his objections to the failure to serve the summons as waived by the statute, and therefore did not make a general appearance in the action. The mere presence of a party and his attorney in the court room during a trial will not of itself constitute an appearance in the action. There being no lawful service of the summons, his motion to quash should have been sustained.

Upon the affirmance of the judgment in the district court the plaintiff in error filed a motion for a new trial, which was overruled. No motion for a new trial was necessary or proper in such case; the matters presented to the district court by the petition in error were purely questions of law, viz.: Did the justice err in holding the service of summons sufficient, and that the plaintiff in error had entered a general appearance in the action? But the motion being only a mode of

bringing before the court the alleged error in affirming the judgment of the justice, and being entirely unauthorized by statute, was not a general appearance in the action.

The petition in error in the district court was verified. This was unnecessary. Section 113 of the code provides that "every pleading of *fact* must be verified by the affidavit of the party, his agent, or attorney." A petition in error is not a pleading of fact in the sense in which the term is used in the code, and need not be verified.

The action is defended in this court by F. D. Woodward, administrator of the estate of G. A. Woodward, deceased, although there is nothing in the record showing a revivor in his name, but no objection is made on that ground. As there was no legal service of summons, and there has been no general appearance of the defendant in the court below in the action, the judgment of the district court is reversed, and also the judgment of the justice of the peace, and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE STATE OF NEBRASKA, EX. REL. W. H. SNELLING, V. WILLIAM GILLESPIE.

Attachment: TRIAL OF RIGHT OF PROPERTY. Certain property in the possession of and claimed by S. was levied upon under an order of attachment against E. Proceedings were thereupon instituted by S. for a trial of the right of property under the provisions of sections 996, 997, and 998 of the code, and on the trial he was adjudged to be the owner of the property in dispute, and an order was thereupon issued by the justice to require the officer to return the property to the claimant. *Held*, That a judgment in such proceedings in favor of the claimant

is not conclusive as to the ownership of the property, and that the creditor, notwithstanding such judgment, may still contest his right to such property, and that a mandamus will not be granted to compel the officer to comply with the order of the justice.

ORIGINAL application for mandamus.

J. P. Vanatta, for relator.

MAXWELL, CH. J.

In December, 1879, A. W. Clapp & Co. commenced an action by attachment in the county court of Lancaster county against Paren England, and caused a quantity of property in the possession of and claimed by the relator to be attached in the suit as the property of England. The relator thereupon instituted proceedings for a trial of the right of property under the provisions of sections 996, 997, and 998 of the code, and on the trial was adjudged to be the owner of the property in dispute, and an order was thereupon made by the justice directing the defendant to return said property to the relator, which he refused to do. The relator now applies for a peremptory writ of mandamus to compel the defendant to deliver the property in question. Will a writ of mandamus be granted in such case?

Section 646 of the code provides that "the writ shall not be issued in any case where there is a plain and adequate remedy at law." Gen. Stat., 640.

In this case the plaintiff has a plain and adequate remedy at law by an action of replevin for the recovery of the property. The proceedings under the code for a trial of the right of property are designed principally as a protection to the officer who may have made a mistake in the discharge of his duty. *B'Hymer v. Sargent*, 11 Ohio State, 685. *Storms v. Eaton*, 5 Neb., 458.

And in such proceedings a judgment in favor of plaintiff is not conclusive as to the ownership of the property in dispute, as the judgment creditor may still contest his right to the same. It cannot be said, therefore, that the refusal of the officer to return the property to the person adjudged to be the owner of the same is such a failure to discharge an official duty as will authorize the court to compel him by mandamus to do so. The case differs materially from that wherein an officer has levied upon property exempt from execution, and upon an inventory being filed by the debtor refuses to call appraisers. In such case the officer disregards a plain provision of the code, and willfully refuses to perform his duty. And, the debtor having no other adequate remedy, the court will compel the officer by mandamus to perform his duty.* But there is no analogy between such a case and the one at bar. The plaintiff having a plain adequate remedy at law, the writ must be denied.

WRIT DENIED.

THE B. & M. R. R. CO. IN NEB., APPELLEE, V. THE BOARD OF COUNTY COMMISSIONERS OF SAUNDERS CO., APPELLANT.

1. **Constitutional Law:** ROAD TAXES. Land road taxes, legally levied but not collected before the constitution of 1875 took effect, although not imposed upon the basis directed by that instrument are not invalidated by it.

2. ———: DISTRICT SCHOOL BOND TAX. That provision of the act of the legislature, approved February 25th, 1875, entitled "An

* NOTE.—See *People v. McClay*, 2 Neb., 7. *The State v. Cunningham*, 6 Neb., 90.

act to amend 'An act to provide for the registration of precinct or township and school district bonds,'" making it the duty of the county commissioners to levy the necessary taxes to meet the liability incurred by such bonds, is in conflict with Sec. 19, Art. 2, of the constitution of 1867, which declares that "No bill shall contain more than one subject, which shall be clearly expressed in its title," and therefore void.

8. ———: ———. In the year 1875, the county commissioners of Saunders county, of their own motion, and under the supposed authority conferred by said amendatory act, levied the district school bond tax complained of. *Held*, that under the law as it then stood, such taxes could be legally levied only in pursuance of direction from the district as to the amount required.

APPEAL from a decree of the district court of Saunders county, POST, J., presiding, enjoining the collection of taxes levied in the year 1875, to pay school district bonds issued by several districts of that county, and dismissing the petition as to land road taxes levied for the same year.

T. M. Marquett, for plaintiff, appellee.

Clinton Briggs, for defendant, appellant.

LAKE, J.

In this case two questions are presented for our decision. The *first* concerns the land road tax of one dollar upon each forty-acre tract, without regard to value, levied by the county commissioners for the year 1875, pursuant to the requirements of the statutes then in force; and the *second*, certain taxes levied by them upon their own motion to discharge the bonded indebtedness of school districts within the county as it should fall due.

As to the road tax, the plaintiff contends that, although legally imposed, it was rendered invalid and uncollectible by force alone of our present constitution,

which requires all taxes upon property to be levied according to its valuation. The constitution went into operation on the first day of November, 1875, after said taxes were levied, and before they became delinquent. The precise question raised upon this road tax was decided in the case of *B. & M. R. R. Co. v. York County*, 7 Neb., 487, where it is held that the tax having been levied before the constitution took effect, its provisions as to the mode or basis of levy did not apply. The decision in that case furnishes a guide for us in this, and we must hold that the collection of said road tax cannot be enjoined.

As to the levy for district school bond purposes, it appears, as before stated, that the commissioners made it on their own motion, and without its having been voted or "reported by said school district boards or either of them." It is contended on the part of the plaintiff that, without the affirmative action of the proper district in ordering a levy to meet its bonded indebtedness, the county commissioners were powerless to make one. On the other hand this independent action of the commissioners is sought to be upheld by the act of February 25th, 1875, entitled: "An act to amend 'An act to provide for the registration of precinct or township and school district bonds.'" Laws 1875, p. 185. The only change of the former statute sought by this amendment is embodied in these words: "It shall be the duty of the board of county commissioners in each county to levy annually upon all the taxable property in each precinct or township and school district in such county a tax sufficient to pay the interest accruing upon any bonds issued by such precinct, township, or school district, and to provide a sinking fund for the final redemption of the same; such levy to be made with the annual levy of the county, and the taxes collected with other taxes,

and when collected shall be and remain in the hands of the county treasurer a specific fund for the payment of the interest upon such bonds, and for the final payment of the same at maturity."

Now the original act, conforming strictly to its title, provides merely what steps shall be taken for the registration of these bonds by the county clerk, upon facts to be reported to him by the proper precinct or school district officers. (Gen. Stat., 883.) The *first* section makes it the duty of these local officers, "after first having filed for record with the county clerk the question of submission, return of votes for and against, notice and proof of publication," under which the particular bonds were issued, to report them for registry to that officer. Section *two* requires the county clerk to "record in a book prepared for that purpose the question of submission, notice, and proof of publication, return of votes for and against," as reported to him by the local officers. Section *three* directs the clerk as to the particular entries to be made in his registry of the bonds. The only other provision of this act, except as to its taking effect, is the *fourth* section, which requires the local officers of precincts and school districts to report to the county clerk, for registry, bonds issued before its passage, but not already paid.

From this brief statement of its substance it will be seen that the original act, in all of its provisions, is confined strictly to the one object indicated by its title, viz.: "the registration of precinct or township and school district bonds." Not a word is found, either in the title or the body of the act, concerning their payments, for which, indeed, there was already ample provision in other acts of the legislature. Not only was no attempt made in the original act to go beyond the limits set in its title, but the legislature could not rightfully have done so, in view of the constitutional

inhibition that "No bill shall contain more than one subject, which shall be clearly expressed in its title." Constitution of 1867, Art. II., Sec. 19.

The title to the act in question is very restrictive, much more so than was necessary; but the legislature, having thus set bounds for themselves, they could not lawfully overstep them. No one will for a moment contend that the raising of money by taxation to meet a bonded indebtedness has the least necessary connection with the subject of bond registration. Doubtless a title might have been framed of so broad a scope as to have included both of these matters as means for securing a desired result. Here, however, we have registration of certain bonds as the ulterior—in fact the only expressed—object to be accomplished. Now while registration might very properly be made a step in providing for the payment of bonds, it is very clear that taxation cannot possibly be a step toward, nor incident to, their registration. And we may add further, that the title of this amendatory act is no broader, nor could it properly be, than that of the original. Ostensibly they cover precisely the same ground. Therefore, whatever might have been enacted under the title of the former statute, and nothing beyond it, could rightly be included in the amendatory act. And this being so, it follows that the clause above quoted of February 25, 1875, having no relation to the matter of registration, cannot be regarded as an amendment of the act of 1873, but rather as an ingraftment upon it, under the guise of an amendment, of a new and entirely foreign subject, which the constitution did not permit. In deciding upon the validity of the school-bond tax this amendatory act therefore must be laid aside, and the authority of the county commissioners to levy such a tax sought for elsewhere.

By sec. 32 of the general school law it is provided that the qualified voters of a school district, "when assembled at any annual or special meeting, may from time to time impose such tax as may be necessary, * * * to pay and discharge any debts or liabilities of the district lawfully incurred." (Gen. Stat., 966.) And in case of a failure of the district thus to determine the amount of the tax to be levied, sec. 34 imposes that duty upon the district school board, who are also required, by section 55 of the same act, to report the tax so determined upon to the county clerk, "to be levied on the taxable property of the district." (Gen. Stat., 970.) At the time of making the levy in question these several provisions governed, and they provided the only basis on which it could have been legally made. It was for the district itself, either by a vote of its electors when lawfully assembled, or, in default of this, by a resolution of its school board, to ascertain and fix the amount required; and unless such action were first taken and made known to the county commissioners they were entirely without authority to act in the matter.

The judgment of the district court, having been in conformity with these views, is affirmed.

JUDGMENT AFFIRMED.

JOSEPH DUNN, PLAINTIFF IN ERROR, v. JAMES S. GIBSON, CHARLES J. KARBACH, EDWIN LOVELAND, WM. M. DWYER, ALEXANDER MCGAVOCK, CHAMPION S. CHASE, AND EDWARD DAUGHTON, DEFENDANTS IN ERROR.

Practice: JOINDER IN DEMURRER. On error brought to reverse the judgment of the district court sustaining a joint demurrer by several defendants to a petition, charging a joint trespass or wrong to the property of the plaintiff, the court, being of opinion that the petition states a cause of action as against one of the defendants, the demurrer should be overruled as to all of them. The rule of practice in such cases is that a joint demurrer to a complaint by several defendants will be overruled if it state a cause of action against any of those joining in the demurrer.

ERROR to the district court of Douglas county, where the cause was heard before SAVAGE, J., upon demurrer to the petition.

Geo. M. O'Brien and *E. M. Bartlett*, for plaintiff in error, upon the point decided here, cited *Woodbury v. Jackson*, 2 Abb. Pr., 402. *Peabody v. Washington County Mutual Insurance Company*, 20 Barb., 339. *Phelps v. Hagadan*, 12 How. Pr. Rep., 17. *People v. Mayor of New York*, 28 Barb., 240.

George W. Ambrose, for defendant in error.

LAKE, J.

The first inquiry in order is whether the petition states a cause of action against any of the defendants. If it shall be held that it does as to one or more, but not all of them, there being a joint general demurrer to the petition by several of the defendants, it will be necessary to determine further the effect of such joinder upon the ruling thereon.

The petition, after showing with great prolixity that, on the 25th of July, 1877, the plaintiff was in the peaceable occupancy of lot three, block 335, in the city of Omaha, under a lease from said city for the term of five years, from the first day of April, 1873, on which lot he had a dwelling house and other improvements of the value of over six hundred dollars, states: "That on the said 25th day of July aforesaid the said defendant, Edward Daughton, aided and assisted by the said Gibson, Karbach, Loveland, Dwyer, McGavock, and Chase, said defendants as aforesaid colluding and conspiring together as aforesaid, did enter into and upon the premises aforesaid, and into the dwelling house aforesaid, and upon the possession of the said plaintiff, and him, the said plaintiff, and his family, expelled and ejected therefrom, and him, the said plaintiff, hath always from said day of July hitherto kept out of the possession of the same, and now forcibly and wrongfully withholds the possession of the said premises from this plaintiff, and converted the said dwelling house and other improvements hereinbefore described to his, the said Daughton's, own use, to the plaintiff's damage," etc.

If all this be true—and in deciding upon the demurrer it must be presumed that it is—the petition certainly states a cause of action against the defendant Daughton, who is thus shown to have forcibly and wrongfully taken possession of the plaintiff's house and appropriated it to his own use. And the allegation would be sufficient to charge the other defendants also were it not that, by the use of the words, "as aforesaid," the aid and assistance which they gave to Daughton are limited to certain official acts previously stated in the petition, and which are wholly inadequate to render them liable. To be more specific, the aid and assistance, "*as aforesaid*," consisted simply of a secret agree-

ment entered into between Daughton and his co-defendants in February, 1877, that he "should purchase of the said city of Omaha the aforesaid premises without the knowledge of this plaintiff, and at a valuation much below the real value thereof, for the purpose of defrauding the plaintiff out of his improvements thereon." And also that, in pursuance of said agreement, Daughton did purchase said lot and procured from said city a quit-claim deed therefor; that ever since said purchase "the said defendants, colluding with one another as aforesaid, have harassed and annoyed the plaintiff and put him to great trouble and expense by vexatious litigation for the possession of said described premises."

But of all this it may be briefly answered that it is entirely immaterial. The city, like an individual, could sell and convey its interest in the lot to whomsoever and for whatever price its authorities saw fit, and Daughton certainly was at liberty to become the purchaser. This would be no interference with any right of the plaintiff under his lease from the city. As to the result of the litigation for the possession of the lot, however, the petition is silent, nor does the record elsewhere inform us; but if the plaintiff were in possession of the lot under a valid lease from the city, and, as he alleges, in no default, we do not see how it could have been otherwise than favorable. But this is not the place to settle the merits of that controversy; the judgment, whatever it was, cannot be called in question here, nor can it in anywise affect our judgment upon this demurrer. But several of the defendants having joined in their demurrer to the petition, which we find states a cause of action against one of them only, they cannot be severed in the judgment thereon, which must be sustained or fail to the whole extent to which it is applied. The rule of practice in

such cases seems to be that a joint demurrer to a complaint by several defendants will be overruled if it state a cause of action against any one of those so joining in the demurrer. *People v. Mayor of New York*, 28 Barb., 240. *Woodbury v. Suckrider*, 2 Abb. Pr. Repts., 402. *Phillips & Northrup v. Hagadon and wife*, 12 How. Pr. Repts., 17. The judgment of the court below on the joint demurrer therefore must be reversed, the demurrer overruled as to all the defendants uniting therein, and the cause remanded to the court below for further proceedings.

REVERSED AND REMANDED.

HENRY T. CLARK, PLAINTIFF IN ERROR, V. BOARD OF COUNTY COMMISSIONERS OF SALINE COUNTY, DEFENDANT IN ERROR.

1. **Selection of Jurors.** County commissioners must select jurors from the several precincts in the county in proportion to the number of persons therein competent to serve on grand and petit juries, and if they fail to do so it is good cause for challenge to the array.

2. ———. The commissioners should not select the same persons for successive terms of court, the intention of the law being that no person shall be required to serve as a juror a second time until all qualified persons shall have served respectively in rotation.

3. **Bridge:** ACTION AGAINST COUNTY: GRANT BY STATE. In 1869 the legislature passed an act donating to Saline county 5,000 acres of land to aid in erecting a bridge across the Blue river. The county received a conveyance of the land, and let the contract for the erection of the bridge to one H., conveying to him the land in question, and paying $500 in money in payment of the same. Before any part of the contract was performed H. assigned it to C., and conveyed the land to him.

The commissioners then changed the plans of the bridge, paying C. $1000 additional, and changed the location, to which C. consented. C. erected the bridge, which was accepted. The title to the lands having failed in consequence of the state having no title to the same, *held*, that C. was entitled to recover the actual value of the bridge.

ERROR to the district court of Saline county. Tried there before POUND, J., sitting in the absence of WEAVER, J.

O. P. Mason and *J. R. Webster*, for plaintiff in error.

1. For the selection of a jury there can be no proper mode but that fixed in the statute, and that should be pursued, and upon this the following and many others are instructive cases showing the jealousy with which this subject is viewed. *State v. De Rocha*, 20 La Ann., 356. *McDonald v. Shaw*, Coxe, N. J., 6. *People v. Coyodo*, 40 Cal., 586. *Wright v. Stewart*, 5 Blackf., 120. *State v. McQuaige*, 5 Rich., S. C., 449. *Gardner v. Turner*, 9 Johns., 261. *Gladden v. State*, 13 Fla., 623. *Quinnebaug Bank v. Tarbox*, 20 Conn., 510. *Hugg v. Kille*, 2 Halstd., N. J., 435. *Straughan v. State*, 16 Ark., 37. *Woods v. Rowan*, 5 Johns., 133. *Vanauken v. Bremer*, 1 South., N. J., 364. *Morgan v. State*, 20 La Ann., 442. *State v. Pratt*, 15 Rich., 47.

2. The contract after novation was the contract between the defendant and Clark. The consideration moving to the county moves from Clark. The claim upon a *quantum meruit*, after failure of the consideration for his work and material, accrues to him and not to Hunt; for there is no contract longer after novation between the original parties, whatever may be the relations between Hunt and Clark; even though Clark should be a trustee to Hunt, it is not Hunt who could claim from the county. Even had the deed of the county contained in form a full warranty of title, this would

still be the case, for the covenant would be *ultra vires*. *Low v. Townsend*, 11 Gill and J., 407. *Lawrence v. Dall.*, 3 John. Ch., 23. S. C., 17 Johns., 37. And the county is bound to pay upon a *quantum meruit* where it has obtained money, service, or material without payment. *Pimental v. San Francisco*, 21 Cal., 361, 362. *Argenti v. San Francisco*, 16 Cal., 282; and City Slip cases, 26 Cal., 591. *Paul v. Kenosha*, 22 Wis., 266. *Armstrong v. Clarion*, 66 Penn. St., 218. *Wait v. Ormsby Co.*, 1 Nev., 370. *Dill v. Wareham*, 7 Met., 438. *Haydon v. Madison*, 7 Greenlf., 118. *Atkins v. Barnstable*, 97 Mass., 428, 429. *Wheeler v. City*, 24 Ill., 105, 107. *Seagraves v. City*, 13 Ill., 366, 371. *Norway v. Clearlake*, 11 Iowa, 506, 508. *Knowlton v. Plantation*, 14 Me., 20.

Hastings & McGintie, for defendant in error.

1. The provisions of the statute in regard to drawing juries are directory merely, and a substantial compliance with its requirements is sufficient. *State v. Carney*, 20 Ia., 82. *Haight v. Holly*, 3 Wend., 258. *State v. Howard*, 73 N. C., 437. And in the absence of any wrong motive in the selection of a jury an informality therein is no ground for reversal. *State v. Breen*, 59 Mo., 413.

2. To create a novation the new contractor must bind himself in place of the old one, and the latter must be expressly discharged. *Scott v. Atchison*, 36 Tex., 76. *Jacobs v. Calderwood*, 4 La., 509.

3. There could not have been a novation of contract, nor was there any failure of consideration whatever as between plaintiff and defendant, consequently, in any view of the case, the question of compensation upon *quantum meruit* falls to the ground; besides, where there is an express contract for a stipulated amount and mode of compensation for services, the

plaintiff cannot abandon the contract and resort to an action for a *quantum meruit* on an implied assumpsit. 14 Johns., N. Y., 326. 18 Johns., N. Y., 169. 10 Serg. and R., 236.

MAXWELL, CH. J.

The petition states in substance that the state of Nebraska, by an act of the legislature, approved February 15, 1869, donated to the county of Saline 1,000 acres of internal improvement land to aid the county in the erection of a bridge across the Blue river, said lands being conveyed to the county in March, 1869; that said lands were valued at the sum of $5000, and were conveyed to one Hunt, who had contracted to build said bridge, and had given bond for the completion of the same, he being paid the further sum of $500; that on or about the fourth day of October, 1870, and before the construction of any portion of said bridge, the plaintiff took an assignment of said contract from Hunt, and received a conveyance of said land from him, and that the commissioners made a novation of said contract, whereby the plaintiff was to erect the bridge, and the commissioners then desiring to change the plan of the bridge from a Killian to a Howe truss, made said contract with the plaintiff, and paid him therefor the sum of $1000 additional; that the commissioners thereafter changed the location of said bridge to the section line between sections 28 and 29, in township 8 north, in said county, at which point the plaintiff erected said bridge, and the same was duly accepted; that said bridge was 100 feet in length, and the approaches to the same 108 feet in length; that said bridge was of the value of $6160, and that the support to the bridge was worth the sum of $500; that the title to said lands wholly failed, neither the

state of Nebraska nor Saline county having title to the same; wherefore the plaintiff prays judgment for the value of the bridge less the amount already paid. The defendants demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was submitted to the court at the May term, 1875, and taken under advisement, but no decision appears to have been had thereon. In June, 1878, the defendants filed an answer, wherein they allege in substance that they entered into a contract with Hunt for the erection of said bridge, and conveyed to him by quit claim deed the interest of the county in said lands, and that the only contract entered into with the plaintiff was that in relation to the Howe truss, and that said bridge was built of poor material, and not properly constructed, and had to be replaced in November, 1877, and was not worth to exceed $1000, and deny all the other allegations of the petition. The reply consists of a denial of the new matter set up in the answer. On the trial of the cause the jury returned a verdict in favor of the defendant, upon which judgment was rendered. The plaintiff brings the cause into this court by petition in error.

It appears from the bill of exceptions that the plaintiff challenged the "panel and array of the petit jury impaneled and summoned to try the issues joined between the plaintiff and defendant," because the county commissioners did not "select sixty persons having the qualifications of jurors in a number as near as may be proportionate from each precinct in the county," etc. And also that one, Hall, had been drawn and acted as juror at the last term of the court. The motion was supported by an affidavit, which is not denied, and also by a copy of the original canvass of the votes at the last general election in Saline county, from

which it appears that the whole number of votes polled in said county at said election was 2345. The motion to quash was overruled, to which the plaintiff excepted, and now assigns the same for error.

Section 658 of the code of civil procedure provides that "in each of the counties of this state, where a district court is appointed or directed to be holden, the county commissioners of the county shall, at least fifteen days before the first day of the session of the court, meet together, or any two of them may meet, and select sixty persons possessing the qualifications prescribed in section 657, and, as nearly as may be, a proportionate number from each precinct in the county, and shall, within five days thereafter, furnish to the clerk of the district court of the county, or his deputy, a list of the names of the persons selected." Gen. Stat., 642.

Section 659 provides that "the clerk or deputy clerk receiving the names shall write the name of each person selected on a separate ticket and place the whole number of tickets into a box or other suitable and safe receptacle, and shall preserve the names furnished by the commissioners in the files of his office." Gen. Stat., 642.

Section 660 provides that "the clerk of the district court or his deputy, and the sheriff, or if there is no sheriff the deputy sheriff, or if there is no deputy sheriff the coroner of the county, shall, at least ten days before the first day of the session of the district court, meet together and draw by lot out of the box or receptacle wherein shall be kept the tickets aforesaid, sixteen names, and the persons whose names shall be drawn shall be grand jurors; and the clerk and sheriff shall then draw twenty-four additional names, and the persons whose names are drawn shall be petit jurors." Gen. Stat., 643.

These provisions are mandatory, and are designed to secure as far as possible fair, unbiased juries. As was said in *Burly v. The State*, 1 Neb., 396, the grand jury must be selected in the manner prescribed by law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statute. See also *Preuit v. The State*, 5 Id., 377. *McElvoy v. The State*, ante p. 157. As the petit jury is drawn from the same list as the grand jury, the importance of making the selection in the manner provided by law will at once be seen. The commissioners have no discretion in the matter. Jurors are to be selected from the several precincts of the county in proportion to the number of persons therein competent to serve on grand and petit juries. Any other construction would permit the commissioners to select the jury from any particular portion of the county they saw fit, which in times of excitement, or when the interests of that locality or the county were involved, might become the means whereby the process of the court would be used for the perpetration of wrong and injustice. The affidavit filed in this case, however, fails to state the whole number of persons competent to serve on grand and petit juries in the several precincts of the county, and is therefore insufficient. The list of votes cast in the several precincts, without an allegation that those voting were all the persons therein competent to serve as jurors, is not sufficient to justify the court in setting aside the panel. It must affirmatively appear that the apportionment was not properly made. The motion was therefore properly overruled.

There is no direct allegation that the M. W. Hall summoned as a juror at the October term is the same person summoned as a juror at the April term. Whether he is the same person or not is susceptible of

positive proof, and it is not sufficient to state that the affiant has made inquiry and is informed that such is the fact. The commissioners, however, should not select the same persons for successive terms of court. The design of the statute is that no one person shall be required to serve on a jury a second time until all qualified persons shall have served respectively in rotation.

The remaining objections may be considered together. The plaintiff took an assignment of the contract for the erection of the bridge in question with at least the tacit consent of the commissioners. He constructed the bridge in accordance with the change in plans and location made by them; that the bridge was properly accepted there is not a shadow of a doubt from the testimony. No objection is made to the contract, and it is admitted that the title to the lands conveyed to the plaintiff has entirely failed. Is the plaintiff therefore entitled to be paid the fair value of the bridge at the time of its completion?

In the case of *Pimental v. City of San Francisco*, 21 Cal., 362, where certain real estate belonging to the city had been sold under a void ordinance, and the proceeds paid into the city treasury, the title having failed, and action brought against the city for the recovery of the money paid, the court say: "The liability of the city arises from the use of the moneys or her refusal to refund them after their receipt. The city is not exempted from the common obligation to do justice which binds individuals. Such obligations rest upon all persons, whether natural or artificial. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, from this general obligation. If she obtain other property which does not belong to her it is her duty to restore it, or if used, to render an equivalent therefor, from

the like obligation. *Argenti v. San Francisco*, 16 Cal., 282. The legal liability springs from the moral duty to make restitution. And we do not appreciate the morality which denies in such cases any rights to the individual whose money or other property has been thus appropriated. The law countenances no such wretched ethics; its command always is to do justice."

In the case of *Paul v. The City of Kenosha*, 22 Wis., 266, the plaintiff had purchased certain bonds of the city, which were void for want of power to issue them. It was held that he was entitled to recover the amount paid. The court say: "The city has had that amount of money and legal scrip for its city bonds, which turn out to be of no value whatever. It seems to fall under the general rule of law that when a party sells an article which turns out to be valueless and not of such a character as he represented it to be, he is liable to his vendee as upon a failure of consideration. The city bonds, it appears, were void when the agent of the city sold them to the plaintiff. Is it just and equitable for the city to retain the money which it has received for its own worthless bonds?"

In the case of the *Bridge Company v. Frankfort*, 18 B. Monroe, 41, the bridge company was requested by the city authorities to state the terms upon which the city might attach its water pipes to the bridge to carry the water from one side of the river to the other. The company answered, stating its terms, upon which the city council took no action, but proceeded to extend the water works and used the bridge. It was held that the city was liable. Judge Dillon thus states the rule: "If the officers or agents of a municipal corporation, acting under ordinances which are void, make sales and deeds of corporate property which pass *no* right to the purchaser, and can never ripen into a title, and receive the purchase money and place the same in the

treasury of the corporation, which *appropriates* the money to its own use by virtue of ordinance or resolutions legally adopted, the purchaser may recover back the purchase money." Dillon on Mun. Cor., section 750. Is there any difference in this regard between a void ordinance and a void statute? The result is the same in each case—no right or title passes by the conveyance. The purchaser is therefore entitled to recover the purchase money. Can it make any difference that the purchase price was the erection of a public bridge for the county instead of money? We think not. We place no stress upon the form of the deed, as the county commissioners had no authority to bind the county by a warranty. But both the county and the purchaser supposed at the time of the conveyance that the county had title. The failure of the title, therefore, rests upon the same foundation as though the county had sold any other property to which it had no title. The plaintiff expended his time and money in the performance of a valid contract, entered into with the proper officers of the county; the county has received the benefit of such money and labor, and justice requires that he should be paid the fair value of the same. It follows that the judgment of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

JULIUS KRUGER, PLAINTIFF IN ERROR, V. THE ADAMS AND FRENCH HARVESTER COMPANY AND BENJAMIN SPIELMAN, DEFENDANTS IN ERROR.

1. **Error:** NEW TRIAL. On error to the district court for granting a new trial on a petition filed after the adjournment of the term on the ground of newly discovered evidence, *held*, that error would lie in such case for alleged errors of the district court in the matter of granting such new trial.

2. **New Trial:** NEWLY DISCOVERED EVIDENCE. In the case made, *held*, that competent evidence of an agreement on the part of plaintiff in error, made with one W. on sufficient consideration, to pay off a certain judgment held by the A. & F. Co. against said W., and which evidence was discovered after the adjournment of the term, was a good ground for granting a new trial in a case brought by K. (plaintiff in error), to enjoin said A. F. H. Co. from collecting said judgment by execution and sale of said land.

ERROR to the district court of Platte county. Tried below before POST, J. The opinion states the case.

Millet & Son, for plaintiff in error.

This petition for a new trial is defective because the alleged newly discovered evidence, according to the *admission* of the defendants in error in their said petition, does *not bear* upon *any* of the issues in the original suit (*Kruger v. Adams & French Harvester Co. et al.*), thus conceding that the same is *not* material. Code, sec. 314, subdivision 7. 24 Ohio State, 133 and 134. Hilliard on New Tr., chap. XV., page 375, section 2. *Arnold v. Skaggs*, 35 Cal., 684. 3 Estee's Plead. and Forms, 599, sec. 67. *Dierloff v. Winterfield*, 26 Wis., 175. *Alger v. Merritt*, 16 Iowa, 121. The petition is also defective because it fails to state that the defendants in error did not know of the alleged new evidence at the time of the trial. *Jackson v. Malin*, 15 Johnson,

293. *Lisher v. Pratt*, 9 Iowa, 59. *Richards v. Nuckolls*, 19 Iowa, 555. No facts are stated to show the exercise of proper diligence. *Axtel v. Warden*, 7 Neb., 187. *Heady v. Fishburn*, 3 Neb., 263. *Gardner v. Gardner*, 2 Gray, 434. 3 Graham and Waterman on New Trials, 1026. There are no facts stated to show that said new evidence is *not* cumulative. *Scofield v. Brown*, 7 Neb. 221. The petition should contain the evidence given on the trial so that the court may see that the new evidence is not cumulative. 7 Central Law Journal, 279. The petition does not state sufficiently the new evidence. *Moss v. Vroman*, 5 Wis., 147.

Whitmoyer, Gerrard & Post, for defendant in error, cited Freeman on Judgments, 507. *Alger v. Merritt*, 16 Iowa, 121. *Stowell v. Eldered*, 26 Wis., 50. *Hambel v. Williams*, 37 Iowa, 224. Bigelow on Estoppel, 503, 512. *Burlington v. Gilbert*, 31 Iowa, 356. *Sloan v. Holcomb*, 29 Mich., 153.

COBB, J.

The plaintiff in error brought suit against the defendant in error, the Adams & French Harvester Company (and Benjamin Spielman), and obtained a temporary injunction against them, and finally at the trial obtained a judgment making such injunction perpetual. The petition set forth the following facts: That on the eighth day of November, 1872, certain lands, to-wit: The south-west quarter of section 20 in township 20 north, of range one west, in Platte county, Nebraska, were a part of the public domain of the United States and subject to entry as a homestead under the act of congress, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers in the public domain;" that one Henry Wells, on or about said date,

entered said lands as a government homestead under said act of congress: that said Henry Wells, from the date of said entry, resided and continued to reside upon, improve, and cultivate said lands as such homestead until on or about the eighth day of February, 1877, when he duly proved up thereon and duly consummated his title thereto under and pursuant to said homestead law, and his entry thereof made as aforesaid, after making his proofs of settlement, cultivation, etc., of said tract of land, so as to entitle the said Henry Wells to the final receiver's receipt for said lands under said entry; that thereupon the usual duplicate final receipt for said lands under such entry, bearing date on or about said eighth day of February, 1877, was duly issued to said Wells by the receiver of the U. S. land office; that the United States, on or about the first day of May, 1877, duly conveyed by its letters patent, bearing date on that day, all the aforesaid lands in fee simple to said Henry Wells upon his said homestead entry; that the said Henry Wells continued to be the owner in fee simple of said lands from the date of said patent until on or about the twenty-third day of August, 1877, when the said Henry Wells and his wife, Esther L. Wells, duly conveyed the said lands in fee simple, by warranty deed of that date, to the plaintiff, and that the said plaintiff hath ever since been and now is the owner of said lands; that said Henry Wells, on the twentieth day of July, 1875, at Columbus, Neb., duly made his two promissory notes of that date to the Adams & French Harvester Company, and thereby in and by each of said notes, for value received, promised to pay them the sum of one hundred dollars with interest at twelve per cent per annum; that all and each of said notes were then and there given for a debt contracted at that date for an Adams & French harvester machine, which was the sole and only con-

sideration given by said Adams & French Harvester company to said Henry Wells for said notes or either of them; that said Adams & French Harvester Company thereby became and continued from said time to be the owners and holders thereof, until on or about the twentieth day of May, 1877, when said Adams & French Harvester Company commenced an action on said notes against the said Henry Wells in the county court for Platte county, Nebraska; that such proceedings were thereupon had in said county court in said action; that said Adams & French Harvester Company recovered a judgment on said notes against said Henry Wells, in said court, at the June term thereof for the year 1877, on the eleventh day of June, 1877, for the sum of $266.20; that the sole and only consideration of said judgment was and is the face of said notes and interest then due; that the said Adams & French Harvester Company, on the sixth day of July, 1877, procured from said county court a duly certified transcript of the said judgment, and caused the same to be duly filed in the office of the clerk of the district court for said Platte county, and docketed the same in the execution docket therein; that the said Adams & French Harvester Company, on or about the thirty-first day of August, 1877, caused execution to issue on the said judgment and transcript in their favor against the said Henry Wells, out of the district court for said county, under the seal thereof, directed to the defendant, Benjaman Spielman, as sheriff of said county; that said Spielman was then and now is such sheriff of said county, duly elected and qualified and acting as such sheriff; that said Spielman, as such sheriff, with the other defendant, the Adams & French Harvester Company, thereupon proceeded to levy said execution to satisfy the aforesaid judgment upon the aforesaid lands of the plaintiff under the direction and authority of the said Adams &

French Harvester Company, caused the same to be valued and appraised under said levy, and such appraisement or a copy thereof filed in the county clerk's office of said county; that said sheriff, under the directions of said Adams & French Harvester Company, threatens to and will sell said lands so levied upon by him under said execution unless restrained and enjoined by the order of this court; that said sheriff has advertised said lands for sale, etc.; that such sale would cast and constitute a cloud upon the plaintiff's title thereto, cause and produce the plaintiff great and irreparable injury, etc.

The defendant, the Adams & French Harvester Company, appeared by attorney and filed its answer in said cause, in and by which it admitted that it had recovered a judgment against W. H. Wells (with others) at the time stated in the petition; that said judgment was duly entered on the execution docket of said court; that said judgment was wholly unsatisfied; that an execution was issued on said judgment and levied on the said lands, and that the same would have been sold in satisfaction thereof but for the injunction restraining said sale. They also admit that W. H. Wells conveyed said land to plaintiff on the twenty-third day of August, 1877, and that said Wells acquired title thereto as stated in said petition. But defendant says that plaintiff is not entitled to any relief against it in this (said) action, for the reason that at the time said plaintiff purchased said land from the said W. H. Wells, he, the said plaintiff, had full knowledge of the existence of said judgment, and that it remained in full force and unsatisfied; and at said time said plaintiff deducted the full amount of the principal, interest, and costs of the said judgment from the consideration price of said land; and at said time, for a consideration equal to the full amount of said judgment, paid

at the same time by W. H. Wells, the plaintiff, assumed the liability of the said judgment, and that the plaintiff is not the real party in interest in this (said) suit, but W. H. Wells is the said plaintiff.

After the judgment in said cause, making the said injunction perpetual, and declaring the said judgment of the Adams & French Harvester Company against W. H. Wells to be no lien on the said real estate, and after final adjournment of said court for said term, the said Adams & French Harvester Company filed its petition for a new trial in the said court on the ground of newly-discovered evidence, etc.

In and by such petition the said Adams & French Harvester Company, after setting out the filing of said original petition by the said Julius Kruger, with a summary of the contents thereof, the filing of an answer thereto by the said Adams & French Harvester Company, the trial of said cause and the rendition of judgment therein in favor of the said Julius Kruger, and that such judgment is inequitable and wrong, declare that, since the date of the aforesaid decree, and since the adjournment of the term of this court at which the same was rendered, they (the said company) had discovered new and material evidence, which would be decisive of said case in its favor as to the matter involved in the said action; that the only issue in the said cause was the right of defendant to have this plaintiff (said company) restrained from selling said land to satisfy the aforesaid judgment; and the W. H. Wells hereinbefore mentioned, and who now resides in the county of Montgomery, and state of Iowa, will testify that the defendant, Kruger, recognized said judgment as a lien on said land by deducting the whole amount thereof from the consideration price of said land; and for said consideration undertook to satisfy and cancel the said judgment for the benefit of

said Wells; and that said Wells has or makes no claim on said defendant for said money whatever; and that he (said Wells) supposed the defendant had paid the same in satisfaction of said judgment against him, as he had undertaken to do until after said trial and judgment; that plaintiff was not able to produce the said W. H. Wells on the trial of said cause for the reason that, prior to the time said action was commenced, the said Wells had removed from the state of Nebraska to the state of Iowa, and his exact whereabouts was unknown to the plaintiff or his attorneys until after the trial of said cause, and until after the adjournment of the said term of court; and that the residence of said witness could not have been discovered by plaintiff, even by the most diligent search and inquiry.

The said petition contains the further allegation that, prior to the trial of said cause the defendant, Kruger, falsely represented to the plaintiff that said Wells claimed the sum so deducted from the consideration of said land on account of said judgment and costs, and that he was bound to pay the same to said Wells in case decree was rendered in his favor in said action; that plaintiff fully relied upon said false statement, and did not nor could not know that said Wells had paid the amount of said judgment to defendant, and that said defendant had undertaken to discharge the same, and, relying upon said false statement, and fully believing that the said Wells was the party interested in said suit, plaintiff alleged in its answer that said suit was not prosecuted in the name of the party in interest, but was prosecuted for the benefit of said W. H. Wells, and on said trial plaintiff relied solely upon said defense, to-wit: that the said action was not brought in the name of the real party in interest; that plaintiff can now procure the said witness, who will testify as before fully stated; wherefore plaintiff prays

that said judgment may be set aside, and the cause tried *de novo*, etc.

To this petition the defendant therein (the said Julius Kruger) filed a general demurrer, which was overruled, and he standing by the same and declining further to plead to said petition, the court rendered judgment thereon, setting aside the said judgment first hereinbefore stated, and granting a new trial in said cause, to reverse which judgment the defendant therein (Julius Kruger) brings the cause to this court on petition in error.

This court has repeatedly held that error would lie to this court from the judgment of the district court granting a new trial on proceedings commenced after the adjournment of the term on the ground of newly discovered evidence. *Iler v. Darnall*, 5 Neb., 192. *Axtell v. Warden*, 7 Id., 186.

The petition demurred to substantially avers that Kruger, in consideration of the sale of the land by Wells to him at a certain price agreed upon, agreed to pay off the judgment of the harvester company against Wells. This allegation must, for the purposes of this case in the present state of the pleadings, be taken as admitted.

Upon this promise the Harvester Company could have maintained an action against Kruger. And it may be said that wherever the law creates a legal liability it also carries with it an equity against the party charged with such liability. And while I do not think it necessary to pass upon the point as to whether, by reason of such promise, the plaintiff in error is estopped to deny the right of defendants in error to sell the premises on an execution issued upon the said judgment, yet it must be borne in mind that this is an action in equity. It was instituted by the plaintiff, and it has ever been a fundamental principle of equity jurispru-

dence that a party seeking affirmative relief in a court of equity must at least submit to all which equity demands of him in the premises. Indeed, it is an old saying "that he who comes into a court of equity must come with clean hands." If it is true that Kruger agreed with Wells, in consideration of the said conveyance, to pay off the said judgment—which for the purposes of this case is admitted by the demurrer—then he cannot be said to have done equity in the premises, either in respect to the rights of Wells or to those of the defendant in error when he comes into court to enjoin the collection of the judgment out of said lands, without first paying off the judgment according to his agreement.

Plaintiff in error makes the point that "the alleged newly discovered evidence * * * does not bear upon any of the issues in the original suit," etc. I think that the alleged newly discovered evidence, if the same had been known and produced on the trial, would have constituted a defense to the original suit, although it is probable that the defendants in error would have had to amend their answer in order to have got it in.

As to the third point made by plaintiff in error, while the petition is not in all respects as full as it might have been made, yet I think that, as to the objections to it under this head—that "it does not state that defendants in error did not know of the alleged new evidence at the time of the trial," that "no facts are stated to show the exercise of proper diligence," that "the petition should contain the evidence on the trial, so that the court may see that the new evidence is not cumulative, and the petition does not state sufficiently the new evidence"—it is sufficient.

As to the fourth point, that "the alleged new evidence would be incompetent under any issue that can

be made by the pleadings," etc., as we have seen above, the new evidence would not only be competent but, so far as I can see, would constitute a defense to the action.

As to the fifth, sixth, and seventh points, I agree that applications for a new trial on the ground of newly discovered evidence should be received with great caution, yet I do not think that injustice is likely to be done in this case for want of sufficient caution.

As to the complaint that "the district court did not tax the costs to the defendant in error as a condition precedent to granting a new trial," and that the "application was not summarily disposed of at the ensuing term of the court," etc., I regard the former as largely within the discretion of the court, and not a ground of error; and as to the latter, it is a matter which could not have prejudiced the plaintiff in error.

I therefore come to the conclusion that the judgment of the district court, granting a new trial, must be affirmed.

JUDGMENT AFFIRMED.

JOHN A. MEYERS, PLAINTIFF IN ERROR, v. LEPOIDEVIN & COMPANY, DEFENDANTS IN ERROR.

Jurisdiction: SUMMONS. Action against M. and L. to foreclose mechanic's lien. Prayer for judgment against M. for $116.16 and interest, and that "this mechanic's lien be established and enforced against the building and leasehold aforesaid." Allegation that M., out of materials furnished by plaintiff, had erected the building on a lot belonging to L., which M. held by lease. No prayer for judgment against L. No service of summons was had on M., either actual or constructive. L., who was served, appeared and demurred to the petition, which demurrer was overruled. M. was defaulted (though never served)

and judgment rendered against him for $116.16; that the premises be sold to pay the same, and *defendants* foreclosed of all equity of redemption. *Held*, on error brought by M., that the district court had not jurisdiction to render such judgment.

This was an action brought in the district court of Gage county by LePoidevin & Co. against Meyers and La Selle to recover $116.16, and foreclose a mechanic's lien on a lot belonging to La Selle, which Meyers held by lease. Meyers was not served with summons. La Selle was; appeared in the action, and filed a demurrer, which was overruled. Thereupon the court, presided over by GASLIN, J., in the absence of WEAVER, J., rendered judgment against Meyers for $116.16 and costs, and foreclosing the lien upon the premises described in the petition, and barring both Meyers and La Selle from all equity of redemption therein.

W. H. Ashby and *L. W. Colby*, for plaintiff in error.

No appearance for defendant in error.

COBB, J.

There seems to have been no service of summons, nor indeed any summons issued against Meyers, the principal defendant in the court below. The plaintiff below filed an affidavit of the non-residence of Meyers as a foundation for substituted or constructive service, but failed to follow it up by either a notice published in a newspaper or service of a summons out of the state. It is accordingly very clear that the district court had no jurisdiction of the person of defendant Myers, and although an action to enforce a lien of this kind is in the nature of a proceeding *in rem*, yet the judgment is partly *in personam;* and even were it not in order to give the court jurisdiction to hear and determine the matter at all, it was necessary that either

actual or constructive service of a summons in the case be first made on the principal defendant.

Plaintiff in error in his brief claims that the affidavit is not sufficient. I do not deem it necessary to examine that question, because, however liberally this court might be disposed to construe the law as to forms, the service of summons is the foundation of jurisdiction, and where that is entirely wanting, as in this case, all subsequent proceedings must fail.

The judgment of the district court must be reversed.

REVERSED AND REMANDED.

HIRAM FINDLEY, PLAINTIFF IN ERROR, V. JOHN J. HORNER, DEFENDANT IN ERROR.

Warranty Deed: WAIVER. In the case made, *held*, that while the vendee had the right to refuse to accept a deed of general warranty of the land until the incumbrances (which were known to him) were first paid off, yet that, by accepting such deed without the incumbrances being paid, he waived that right, and could not, in an action brought by the vendor for the balance of the purchase money, set-off the amount of such incumbrances without first paying them off.

ERROR to the district court for Richardson county. Upon trial there before WEAVER, J., and a jury, verdict was returned in favor of Horner for $411.70. Judgment on verdict and exceptions by Findley.

Isham Reavis and E. W. Thomas, for plaintiff in error, cited *Grant v. Johnson*, 5 N. Y., 247. 4 N. Y., 396. 9 Id., 535. 1 Spencer, 214. 15 Wis., 341. 7 Neb., 73.

George P. Uhl, for defendant in error, cited 2 Story Con., 946. 2 Wash. on Real Prop., 470. 1 Story Rep., 499. 7 Cranch, 299. 4 Neb., 190.

COBB, J.

The points made by the plaintiff in error consist in great part of objections to testimony admitted by the court over the objections of the plaintiff in error, and to instructions to the jury given and refused by the court over the objections of plaintiff in error. I do not examine these points in detail, because it is quite apparent that if the court erred in any of them it was error without prejudice to the plaintiff in error.

The parties entered into a contract in writing for the sale by the defendant in error to the plaintiff in error of 160 acres of land, therein described, for the sum of $3200, the defendant in error agreeing to make, execute, and deliver to said Findley a good and sufficient deed of general warranty for said premises upon the first day of April, 1875, the plaintiff in error agreeing "to pay to the said John J. Horner the said sum of $3200, as follows: $100 in cash at the time of executing this agreement, $600 on the first day of April, 1875, $600 at the time of the execution and delivery of the deed aforesaid, and $2500 one year thereafter on the first day of April, 1876, with interest after October 1, 1875, at twelve per cent. There were other conditions set out in the said agreement to meet the contingency of the said Horner, being unable to make title to one 40 of the said land, but as such contingency did not happen, no attention need be paid to said conditions. It is admitted that the said payment of $600 was made at or about the time stated in the said agreement, and that the deed was executed and delivered by Horner, and accepted by the agent of Findley on or about the first day of April, 1875, and that Findley went into possession of the property on or about October 1, 1875. At the time of the making of said contract there were

incumbrances on the said land, which were estimated by the parties at about the sum of $2500, the amount of the last payment provided for in the said contract. These incumbrances, or the greater part thereof, remained unpaid at the time of the delivery of the deed. As the deed contained a covenant of warranty against all lawful incumbrances it would have been competent for Findley to have refused to receive said deed until all incumbrances were paid off, but this right he waived by the acceptance of the deed. Having accepted the deed, it was competent for him to have paid off the said incumbrances, and set-off the amount so paid against the last payment still remaining unpaid. But it was not competent for him to retain the title and possession of the land, and, without paying off the incumbrances, set up and urge the same as a defense to the suit of Horner for the unpaid purchase money.

The only instruction given by the court to the jury on the trial of the cause was in the following words: "If you find from the evidence that after the contract, made between the parties to this suit, was entered into, Horner, the plaintiff in this cause, made a deed of general warranty containing covenants against incumbrances, and delivered the same to the defendant, and the plaintiff accepted the same and took possession of the farm under said deed; and if you further find from the evidence that at the time the defendant accepted the said deed and took possession of the said land under the said deed, he (the defendant) knew of all the incumbrances existing against the said land—I say if you find all of the above facts to exist—then you will do this, to-wit: compute the interest on $2500 for one year at twelve per cent per annum, and add the two together, and then find what all the incumbrances existing against the farm on the first day of April, 1876, amounted to; subtract the last amount from the for-

mer, and the balance, if any, will be your verdict for the plaintiff, and if no balance, then your verdict will be for the defendant."

While, as we have seen, I cannot approve of the said instruction, yet as it is altogether too favorable to the plaintiff in error, he cannot be heard to object to it or to the verdict of the jury, which is strictly in accordance therewith.

From the allegations of the petition, which are not denied by the answer, it appears that the said Findley had paid on the said incumbrances the sum of $1,388.35, and no more. It appears therefore that there remained due to the defendant in error the sum of $1,111.65 besides interest, and for which sum I think the defendant in error would have been entitled to judgment on the pleadings had a proper application been made therefor.

Finding no error in the record other than those which were favorable to plaintiff in error, the judgment of the district court should be affirmed.

JUDGMENT AFFIRMED.

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See EVIDENCE, 2. STATUTES, 5.

CITIES OF THE SECOND CLASS.

1. **Taxes:** SET-OFF. In an action against a city to recover for gaslight furnished it under a special contract, delinquent taxes due to the city from the plaintiff are not a proper subject of set-off under the law respecting the collection of taxes as it stood prior to the act of March, 1, 1879, providing a system of revenue. *Nebraska City v. Gas Company*... 339

2. **Quære.** Whether, as a part of the consideration for supplying gaslight to a city, an agreement to exempt from taxes property of the gas company employed in the manufacture of gas is valid. *Id.* 339

3. **Contract:** CONSIDERATION: ILLEGAL PROMISES. Where a city has authority to contract therefor it cannot resist payment for gaslight furnished, because of illegal promises as to the particular fund from which payment would be made. The consideration of such promises being legal, the price would be payable, if not otherwise, out of the general fund, and the objectionable provisions may be rejected, and the rest of the contract be permitted to stand. *Id.* 339

4. **Contract for Gaslight with City:** ESTIMATE. The estimate by the city engineer, provided for in section 32 of the act relating to the incorporation of cities of the second class, is not required in case of a contract with a gas company to light the city with gas. *Id.* 340

5. **Grading Streets.** The council of a city of the second class, has no power to contract for the grading of a street until they first shall have enacted an ordinance for the said improvement, nor except such contract be let to the lowest bidder, after publication of notice and fair competition. *Fulton v. City of Lincoln* 358

See LICENSE MONEYS.

CLERK DISTRICT COURT.

See ASSIGNMENT, 4.

COMMERCIAL LAW.

See NEGOTIABLE INSTRUMENTS.

COMPLAINT.

See FORCIBLE ENTRY AND DETAINER, 2. PLEADING.

CONDITIONS.

See CONTRACTS. LANDLORD AND TENANT. SPECIFIC PERFORMANCE. WARRANTY.

CONFIRMATION OF SALE.

See JUDICIAL SALE, 1, 2, 3. MORTGAGES, 11. PRACTICE, 11, 12.

CONSIDERATION.

See FRAUD, 4, 6. NEGOTIABLE INSTRUMENTS, 2, 5, 6, 8.

CONSPIRACY.

See PLEADING, 11.

CONSTABLE.

See PRACTICE, 13.

CONSTITUTIONAL LAW.

1. **Attachment of Property of Non-Residents.** Section 200 of the code of civil procedure, which authorizes an attachment against the property of a non-resident without an undertaking, is not in conflict with any provision of the constitution of the state or of the United States. *Marsh v. Steele*..... 96
Olmstead v. Rivers..... 234

2. **Signing Bills.** The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act. *Cottrell v. The State*..... 125

3. **District Courts:** TERMS. Section 26, Art. XVI. of the constitution, authorizes the judges of the district court to fix the time of holding courts in their respective districts. This refers to regular terms. There is no authority under this provision to call special terms of court *McElvoy v. The State*..... 157

4. **Illegal Fees.** Section 37, chap. 22, Gen. Statutes, which gives to the party injured a right of action for the recovery of *fifty dollars* damages against an officer taking illegal fees, is not unconstitutional. *Graham v. Kibble*..... 182

5. **Land Commissioner under Statute of June 24, 1867.** The relator was state auditor during the years 1875

and 1876, and under the provisions of the act of June 24, 1867, he was *ex officio* state land commissioner at a salary of $1,000 per year. The constitution of 1875, which came into force November 1, 1875, provided for the election of a commissioner of public lands and buildings at the annual election to be held in November, 1876, and that his term of office should begin on the first Thursday after the first Tuesday in January, 1877. The said constitution also contains the following provisions:

"Section 2. Art. V. * * * None of the officers of the executive department shall be eligible to any other state office during the period for which they shall have been elected."

"Sec. 23, Art. XVI. The present executive state officers shall continue in office until the executive state officers provided for in this constitution shall be elected and qualified."

Held that the relator was entitled to the salary of land commissioner at the rate of $1,000 per annum for the months of November and December, 1875, and for the entire year 1876. *The State, ex rel. Weston, v. Liedtke*..... 464

6. **Printing of Amendments to Bills.** The language of section 11 of Art. III. of the constitution—"Every bill and concurrent resolution shall be read at large on three different days in each house, and the bill and all amendments thereto shall be printed before the vote is taken upon its final passage"—does not apply to amendments attached to a bill upon the report of a committee of conference, after a disagreeing vote of the two houses. *The State, ex. rel. Pearman, v. Liedtke*..... 490

7. **Road Taxes.** Land road taxes, legally levied but not collected before the constitution of 1875 took effect, although not imposed upon the basis directed by that instrument are not invalidated by it. *B. & M. R. R. Co. v. Saunders County*..... 507

8. **District School Bond Tax.** That provision of the act of the legislature approved February 25, 1875, entitled "An act to amend 'An act to provide for the registration of precinct or township and school district bonds,'" making it the duty of the county commissioners to levy the necessary taxes to meet the liability incurred by such bonds, is in conflict with Sec. 19, Art. 2 of the constitution of 1867, which declares that "No bill shall contain more than one subject, which shall be clearly expressed in its title," and therefore void. *Id*..... 507

9. ———. In the year 1875, the county commissioners of Saunders county, of their own motion, and under the supposed authority conferred by said amendatory act, levied the district school bond tax complained of. *Held*, that under the law as it then stood, such taxes could be legally levied only in pursuance of direction from the district as to the amount required. *Id.* 508

CONSTRUCTION OF STATUTE.

See STATUTES.

CONTRACTS.

1. **Contract with City:** CONSIDERATION: ILLEGAL PROMISES. Where a city has authority to contract therefor, it cannot resist payment for gas-light furnished, because of illegal promises as to the particular fund from which payment would be made. The consideration of such promises being legal, the price would be payable, if not otherwise, out of the general fund, and the objectionable provisions may be rejected, and the rest of the contract be permitted to stand. *Nebraska City v. Gas Company* 339

2. ———: ESTIMATE. The estimate by the city engineer provided for in section 32 of the act relating to the incorporation of cities of the second class is not required in case of a contract with a gas company to light the city with gas. *Id.* 340

See CITIES OF THE SECOND CLASS. COUNTIES. FRAUD, 6. MORTGAGES. NEGOTIABLE INSTRUMENTS. NOTICE. PERFORMANCE. RESCISSION. SCHOOLS, 2. SPECIFIC PERFORMANCE. STATUTES, 5.

CONVEYANCE.

See MORTGAGES. VENDOR AND VENDEE.

CORPORATION.

See CITIES OF THE SECOND CLASS. COUNTIES. LICENSE MONEYS. PARTNERSHIP.

COSTS.

See ATTACHMENT, 6. NEGOTIABLE INSTRUMENTS, 2. PRACTICE, 54. PRACTICE IN COUNTY COURTS, 6.

COUNTIES.

1. **Action Against County:** GRANT BY STATE. In 1869 the legislature passed an act donating to Saline county 5,000 acres of land to aid in erecting a bridge across the Blue river. The county received a conveyance of the land, and let the contract for the erection of the bridge to one, H., conveying to him the land in question, and paying $500 in money in payment of the same. Before any part of the contract was performed H. assigned it to C., and conveyed the land to him. The commissioners then changed the plans of the bridge, paying C. $1,000 additional, and changed the location, to which C. consented. C. erected the bridge, which was accepted. The title to the lands having failed in consequence of the state having no title to the same, *held*, that C. was entitled to recover the actual value of the bridge. *Clark v. Saline County*..... 516

See BONDS. JURORS. NEGOTIABLE INSTRUMENTS, 8. SCHOOLS, 5. TAXES.

COUNTY CLERK.

1. **Fees for Making Tax List.** The compensation allowed county clerks by the act to amend the revenue law, approved February 18, 1877, of four cents for each description of lots and lands upon the tax list and duplicate, is in excess of the limitation of $1,500 allowed by Laws 1877, p. 215, and is for extra services. *The State, ex. rel. Lancaster County, v. Silver*..... 86

2. ———. *Semble*, that the item of $400 allowed the county clerk as salary by section 14, Gen. Stat., 380, should be included in his report, of fees received, to the county commissioners as required by section 2, Laws 1877, p. 215. *Id.*....85, 90

See PRINCIPAL AND SURETY, 2.

COUNTY COMMISSIONERS.

See COUNTIES. JURORS. NEGOTIABLE INSTRUMENTS, 8, 14. STATUTES, 1, 2. TAXES.

COUNTY COURTS.

See FORCIBLE ENTRY AND DETAINER. JUDICIAL SALE, 2. PRACTICE, 13, 16, 18. PRACTICE IN COUNTY COURTS.

COUNTY JUDGE.

See FORCIBLE ENTRY AND DETAINER. PRACTICE, 13, 16, 18. PRACTICE IN COUNTY COURTS.

COUNTY SEAT.

See NEGOTIABLE INSTRUMENTS, 8.

COUNTY TREASURER.

1. Action Against County Treasurer: EVIDENCE. In an action against a county treasurer for moneys collected by him for the state, the original receipts received by him from the state treasurer, and used by him in his settlement with the county commissioners, *prima facie* control as to the amount paid by him to the state. *Albertson v. The State*... 429

2. Parties. A suit in behalf of the public against a county treasurer for a breach of the conditions of his bond must be instituted by the county clerk at the direction of the state auditor or county commissioners, and the petition should allege that it is so instituted.. *Id*..... 430

See BONDS. LICENSE MONEYS. SCHOOLS, 5. TAXES, 1, 11, 17.

COUNTY WARRANTS.

See NEGOTIABLE INSTRUMENTS, 14.

COURTS.

1. Constitutional Law: DISTRICT COURTS: TERMS. Section 26, Art. XVI. of the constitution, authorizes the judges of the district court to fix the time of holding courts in their respective districts. This refers to regular terms. There is no authority under this provision to call special terms of court. *McElvoy v. The State*..... 157

2. District Courts: CALLED TERMS. The statute authorizes a judge of a district court, upon request of the county commissioners of a county, to call a special term of court for that county for the transaction of general business, at least twenty days notice thereof to be given. But a judge may, on his own motion, call a special term of court for any county of his district for the trial of criminal offenses

therein. And having authority to make the order, the fact that he recites therein the authority as derived from the constitution will not invalidate it. *Id.* 157

8. ———: ———: SUMMONING JURIES. A judge in calling a term of court has no authority to order the sheriff to summon a grand and petit jury. He must direct whether a grand or petit jury shall be summoned. If required, juries must be drawn as for regular terms of court. *Id.* 157

See PRACTICE, 34, 45.

COVENANTS.

See MORTGAGES, 5. VENDOR AND VENDEE. WARRANTY.

CREDITOR'S BILL.

See PLEADING, 14.

CRIMINAL LAW.

1. **Homicide:** MALICE. It being shown that the prisoner voluntarily, and without cause or provocation, shot and killed the deceased, the act being unlawful, malice will be presumed. *Schlencker v. The State* 241

2. ———: MURDER IN THE FIRST DEGREE. And in addition to being unlawful and malicious, to make the act of killing murder in the first degree, it is only necessary to establish that it was done with deliberation and premeditation, of which there being some evidence before the jury, their verdict fixing that as the degree of criminality is conclusive on that point. *Id.* 241

3. **Intoxication no Excuse for Crime.** Voluntary intoxication is no excuse for crime; but on the trial of one charged with murder in the *first* degree, his intoxication may be taken by the jury as a circumstance to show that the act of killing was not deliberate and premeditated. *Id.* 242

4. **Insanity:** WHEN IT DOES NOT EXCUSE CRIME. Temporary insanity produced immediately by intoxication does not destroy responsibility where the accused, when sane and responsible, made himself voluntarily drunk. *Id.* 242

5. **Murder in Second Degree.** Where the fact of the killing by means of a deadly weapon is established, without any explanatory circumstances, malice is presumed, and the crime is murder in the second degree. *Id* 300

See PRACTICE IN CRIMINAL CASES.

DAMAGES.

1. **Rule of** damages in action against liquor seller. *Roose v. Perkins* 304, 305

See PLEADING, 11. PRACTICE, 2, 5.

DAYS OF GRACE.

See NEGOTIABLE INSTRUMENTS, 11.

DEBTOR AND CREDITOR.

See ASSIGNMENT, 2, 3, 4. FRAUD. VENDOR AND VENDEE.

DECEDENTS.

1. **Mortgage Foreclosure:** ESTATES OF DECEDENTS. A mortgagee, after the death of the mortgagor, may institute and maintain an action to foreclose the mortgage, and cannot be compelled to relinquish his lien, and share in the general assets of the estate. *Jones v. Null*. 57

See EXECUTORS AND ADMINISTRATORS.

DECREE.

See PRACTICE, 12. PRACTICE IN SUPREME COURT, 8.

DEED.

See VENDOR AND VENDEE.

DEFAULT.

See PRACTICE, 8, 62.

DEMURRER.

See PLEADING, 1, 8, 9, 10, 11. PRACTICE, 1, 34, 44, 59.

DISCRETION OF COURT.

See EVIDENCE, 5. PRACTICE, 34, 45.

DISMISSAL OF ACTION.

See PRACTICE IN COUNTY COURTS, 7. REPLEVIN, 6.

DISTRICT COURTS.

See COURTS.

DISTRICT SCHOOLS.

See SCHOOLS.

DIVORCE.

1. **Practice.** The affidavit for service by publication in a divorce case is jurisdictional, and unless it conform substantially to the statutory requirements the court will not acquire jurisdiction. *Atkins v. Atkins*..... 191

2. **Jurisdiction.** When it appears that the defendant cannot be served with process in this state, the records in the absence of an appearance must show how jurisdiction was acquired. *Id*..... 191

DRUGGIST.

See LIQUOR SELLING, 1.

EVIDENCE.

1. **Preponderance.** In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action. *Search v. Miller*..... 27

2. **Understanding of Witness.** In proving a sale of chattels, the understanding of one of the parties as to whether

the title passed to the purchaser is not competent evidence, especially as against a stranger to the alleged contract. As against the party himself, however, it might be competent. *Eiseley v. Malchow* 174

8. **Immaterial Evidence.** The admission of immaterial evidence against objection, where the court can clearly see that it could not have prejudiced the party, is not a ground for granting a new trial. *Id.* 174

4. **Usury:** EVIDENCE. Where usury in the original transaction is proved, the burden of proof is on the plaintiff to show that he is a *bona fide* purchaser for value, and without notice. *Wortendyke v. Meehan* 221

5. **Re-examination of Witnesses.** As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination. But whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge. *Schlencker v The State*... 241

6. **Witness:** EXPERT: SUPPOSED CASE. In the examination of an expert witness as to the appearance of the bullet wound of which the deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been. *Id.* 241

7. **Non-expert Witness:** OPINION OF. The opinion of a witness, not an expert, is competent evidence upon the question of the prisoner's sanity, where such opinion is formed upon facts within the personal knowledge of the witness, and sworn to by him before the jury. *Id.* 242

8. **Action Against Executor:** PROOF OF ASSETS NOT REQUIRED. Where the bond given by the executor, who is also a residuary legatee, is the one provided for by section 165 of the Revised Statutes, conditioned "*to pay all the debts and legacies of the testator*," and no fraud or mistake is alleged to vitiate it, the fact of sufficient assets in the hands of the executor will be conclusively presumed, and the want of them cannot be urged to defeat a recovery on such bond. *Buel v. Dickey* 286

9. **Witness Impeached.** Where a party swears falsely to a fact in respect of which he cannot be presumed liable to mistake, courts are bound to apply the maxim *falsus in uno, falsus in omnibus*, and to give no credit to any alleged fact

depending upon his statement alone. This rule applied. *Dell v. Oppenheimer* 454

10. **Replevin.** Under a general denial in replevin, the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action. *Richardson v. Steele* 483

See BOUNDARIES. FRAUD, 3. PRACTICE IN CRIMINAL CASES, 4

EQUITY.

1. **Fraud without Injury.** A court of equity will not entertain a petition for relief on the ground of a *fraud*, from which no damage, either present or prospective, can result. *Dunn v. Remington* 82

2. **Promissory Notes:** ACTION ON FORGED NOTE: DEFENSE. Y., in 1876, signed a note with C. as surety in favor of M. and G., and was notified in March, 1878, of its non-payment. In June of that year an action was instituted by M. and G. on certain notes claimed to have been forged by C., and judgment recovered against Y. for $360 and costs. Y., supposing the action to be on the genuine note, made no defense. *Held*, on demurrer to the petition for an injunction, it being alleged that M. and G. had knowledge of the forgery, that Y. was entitled to relief. *Young v. Morgan* 169

3. **Jurisdiction:** PARTNERSHIP. Where an action is brought for the dissolution of a partnership and for an accounting, a court of equity, having obtained jurisdiction of the cause, may retain it for the purpose of doing complete justice between the partners, and to avoid a multiplicity of suits. *Sheppard v Boggs* 257

See DIVORCE.

ERROR.

See PRACTICE, 17, 24, 28, 39, 44, 46, 47, 54, 55, 58, 60, 62. PRACTICE IN SUPREME COURT.

ESTATES OF DECEDENTS.

See DECEDENTS. EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

See BASTARDY. LANDLORD AND TENANT, 2, VENDOR AND VENDEE.

EXCEPTIONS.

See PRACTICE, 7, 36. PRACTICE IN CRIMINAL CASES, 8, 10.

EXECUTIONS.

See JUDICIAL SALE.

EXECUTORS AND ADMINISTRATORS.

1. **Executor's Bond:** SUIT ON. An action on the bond of an executor under the Revised Statutes, commenced prior to September 1, 1873, to recover money claimed to be due on a legacy, was properly brought in the name of the probate judge of the proper county. In such action the consent of the probate judge was necessary. *Buel v. Dickey*..... 285

2. ———. It is not a valid objection to such bond that it runs to "the judge of probate" of the proper county, without personally naming him. *Id*..... 286

3. ———: PROOF OF ASSETS NOT REQUIRED. Where the bond given by the executor, who is also a residuary legatee, is the one provided for by section 165 of the Revised Statutes, conditioned "*to pay all the debts and legacies of the testator*," and no fraud or mistake is alleged to vitiate it, the fact of sufficient assets in the hands of the executor will be conclusively presumed, and the want of them cannot be urged to defeat a recovery on such bond. *Id*..... 286

See RECEIVERS.

FEES.

Constitutional Law: TAKING ILLEGAL FEES. Section 37, chapter 22, Gen. Stat., which gives to the party injured a right of action for the recovery of *fifty dollars* damages against an officer taking illegal fees, is not unconstitutional. *Graham v. Kibble*..... 182

FINAL ORDER.

See PRACTICE IN SUPREME COURT, 6.

FORCIBLE ENTRY AND DETAINER.

1. **Forcible Entry and Detainer.** The judgment of a justice of the peace, or of the district court, in proceedings in forcible entry and detainer, is conclusive in that proceeding on the matters in issue at the time of its rendition, unless such judgment is reversed or modified by proceedings in error. But the judgment is no bar to another action in relation to the title of the premises. *Dale v. Doddridge*..... 138

2. **Complaint:** JURISDICTION. The complaint under the statute for the forcible entry and detention of property merely charged that the defendant entered upon the premises in controversy "with force and violence," and that he had "with force detained the same." *Held*, that it was fatally defective in omitting to charge that such entry and detention were *unlawful*, and conferred no jurisdiction upon the court to issue the summons. *Blaco v. Haller*..... 149

3. **Jurisdiction of County Court.** County courts have jurisdiction of actions for the forcible entry and detention of real property. *Id*..... 149

FRAUD.

1. **Fraudulent Sale of Goods:** POSSESSION RETAINED BY SELLER. A sale of goods is void as to a creditor of the seller if there be no change of possession of the things sold until his execution is levied upon them, without proof that it was made in good faith, and without any intent to defraud creditors. *Wake v. Griffin*..... 47

2. ——: ——. The law will not protect a purchaser, even if he pay a valuable consideration, in a sale of goods made for the purpose of putting them beyond the reach of creditors. *Id*..... 47

3. ——: ——: EVIDENCE. Evidence of the seller being largely indebted at the time of making a sale of goods is material to prove such sale to have been fraudulent as to creditors. *Id*..... 47

4. ——: ——: SALE BY HUSBAND TO WIFE: CONSIDERATION. In an alleged sale of goods by the husband to his wife, the only consideration was a pretended loan of money by the wife to him, some five or six years before, which he had ever since used in his business and treated as his own. There was no evidence of any agreement or understanding at the time he took the money, nor any recognition by him at any time that he was to repay it. *Held*, that the wife had no legal claim against her husband for the money, nor would she be permitted, through a voluntary sale, nominally in repayment of that money, to appropriate his property to the exclusion of the claims of *bona fide* creditors. *Id*..... 47

5. **Statute of Frauds.** The object of the ninth section of our statute of frauds, which is substantially the same as section 17 of the English statute, is not to avoid sales of property, satisfactory to the parties to them, but is merely to enable parties to such contracts, in case of dispute and litigation, to properly protect themselves by insisting upon certain specified modes of proof in order to enforce them. *Eiseley v. Malchow*..... 174

6. **Parol Agreement** entered into between A. Z., stepfather, and W. D., step-son, that said W. D. should have the use of the farming lands of A. Z. during the life of A. Z., in consideration that W. D. would support A. Z. and his wife (mother of W. D.) during their lives, under which agreement W. D. cultivated the land and raised a crop of grain. The grain was seized in execution upon a judgment against A. Z. W. D. brought replevin. *Held*, that as between the parties to such suit the said agreement is not within the statute of frauds. *McCormick v. Drummett*..... 384

7. **Review** of question of fraud in supreme court. *Weinland v. Cochran*..... 480

See EQUITY. MORTGAGES.

GARNISHMENT.

See ATTACHMENT, 9.

GENERAL DENIAL.

See PLEADING, 15.

GRANGERS.

See PARTNERSHIP, 1.

GUARANTY.

See NEGOTIABLE INSTRUMENTS, 18.

HOMICIDE.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. **Sale by Husband to Wife:** CONSIDERATION. In an alleged sale of goods by the husband to his wife, the only consideration was a pretended loan of money by the wife to him, some five or six years before, which he had ever since used in his business and treated as his own. There was no evidence of any agreement or understanding at the time he took the money, nor any recognition by him at any time that he was to repay it. *Held*, that the wife had no legal claim against her husband for the money, nor would she be permitted, through a voluntary sale, nominally in repayment of that money, to appropriate his property to the exclusion of the claims of *bona fide* creditors. *Wake v. Griffin* 47

2. **Notice.** A conveyed land to B, a married woman; C had an equitable interest in the land, of which A had knowledge when he received the title, as well as when he conveyed it. The negotiations on the part of B for the purchase and conveyance of the land were conducted by her husband, as her agent, who was a partner in a firm of general land agents, who, at the time of these transactions and for some time previously, had the said real property on their books for sale as the property of C, he, the husband, having entered the same on said books, and knowing of the interest of C in the property, although the naked legal title was in another. *Held*, that B had notice of the equitable interest of C, and took the title subject thereto. *Kellogg v. Lavender* 419

See MARRIED WOMEN.

INCUMBRANCES.

See MORTGAGES, 5. VENDOR AND VENDEE.

INDICTMENT.

See PRACTICE IN CRIMINAL CASES, 1.

INJUNCTION.

See PLEADING, 8, 13.

INSANITY.

See CRIMINAL LAW, 4.

INSTRUCTIONS.

See PRACTICE, 5, 6, 10, 55. PRACTICE IN CRIMINAL CASES, 11, 12

INTEREST.

See USURY.

INTERNAL IMPROVEMENTS.

See BONDS.

INTOXICATION.

See CRIMINAL LAW, 3.

INTOXICATING LIQUORS.

See LIQUOR SELLING.

JOINDER.

See PLEADING, 6, 13. PRACTICE, 38, 59.

JUDICIAL SALE.

1. **Confirmation.** On a motion to confirm a sale of mortgaged premises under a decree formally journalized, it was objected, in substance, that such entry differed materially from the judgment actually pronounced, but the sale was confirmed, notwithstanding the objection. *Held*, that by

the confirmation the court in effect decided that the journal was correct, and that such decision was not subject to review by the supreme court, although the decree itself would be. *Findley v. Bowers*..... 72

2. **Judgment:** RES ADJUDICATA. Judgment was rendered against G. and A. in the county court in 1874, and stay of execution taken. A transcript was afterwards filed in the district court, and an execution issued and sale of real estate had. On a motion to confirm the sale, objection was made that service of summons in the original case was not made by a party authorized to serve process. *Held*, that it will be presumed after judgment that the party serving process had authority to do so. *Gilbert v. Brown*..... 90

3. **Confirmation:** CONDITIONS. An order confirming a sale contained this condition: "That said sale be in all things confirmed upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant upon receipt of $2,000, within sixty days from this date." *Held*, that the court had no authority to impose such conditions against the defendant's objection. *Green v. State Bank*..... 165

4. ——: ——. The court may confirm or set aside a sale, but has no authority to change or modify its terms. *Id*..... 165

5. **Appraisement:** PRACTICE. Where the sheriff causes real estate to be appraised under an order of sale he should forthwith deposit a copy of the appraisement with the clerk of the district court. He must do so before the sale. *Jones v. Null*..... 254

6. **Re-sale of Property.** Where a purchaser at a judicial sale refuses to comply with his bid, the officer may bring an action for the purchase money, or he may at once re-sell the property, but he cannot wait until the sale is closed, and the bidders have departed, before again offering the property for sale. *Id*..... 254

JUDGMENT.

See ACTION, 3, 5. JUDICIAL SALE, 2. MORTGAGES, 5. PRACTICE, 2, 8, 15, 17, 23, 34, 35, 62. PRACTICE IN COUNTY COURTS, 7, 8. PRACTICE IN SUPREME COURT, 6.

JURISDICTION.

See EQUITY. JUDICIAL SALE. PRACTICE, 31, 35, 53, 62. PRACTICE IN COUNTY COURTS, 4, 6.

JURORS AND JURY.

1. **Selection of Jurors.** County commissioners must select jurors from the several precincts in the county in proportion to the number of persons therein competent to serve on grand and petit juries, and if they fail to do so it is good cause for challenge to the array. *Clark v. Saline County*.... 516

2. ———. The commissioners should not select the same persons for successive terms of court, the intention of the law being that no person shall be required to serve as a juror a second time until all qualified persons shall have served respectively in rotation. *Id*..... 516

See COURTS, 3. PRACTICE, 5, 6, 10, 55. PRACTICE IN CRIMINAL CASES, 3, 11, 12.

JUSTICE OF THE PEACE.

See PRACTICE, 13, 16, 17, 23, 50, 53, 54.

LAND COMMISSIONER.

See CONSTITUTIONAL LAW, 5.

LANDLORD AND TENANT.

1. **Notice** to remove from the premises "within three days after service" was served on the tenant September 4th. *Held*, that the tenant was entitled to the fifth, sixth, and seventh days in which to remove from the premises. *Dale v. Doddridge*..... 138

2. ———: WAIVER. The notice may be waived by the tenant, and will be waived if he proceed to trial without objection on that ground, more particularly so where he claims title in himself to the premises. *Id*..... 138

LICENSE MONEYS.

1. **School Fund:** ACTION BY COUNTY TREASURER. All moneys arising from licensing the sale of malt, spirituous, and vinous liquors before November 1, 1875, when our present constitution took effect, belong to the common school fund of the county in which they were paid. And when the corporate authorities of a city or town have diverted

such funds and applied them to the use of the city, the county treasurer may maintain an action to recover them from the city, for the purpose of distribution among the several school districts of the county. *Herman v. City of Crete*..... 350

2. ———. The fact that such license moneys were illegally exacted by the city, or that the individuals paying them might have resisted successfully the enforcement of the ordinance under which the collection was made, is no defense to an action against the city for their recovery by the county treasurer. *Id*..... 350

See LIQUOR SELLING.

LIEN.

Mortgage: NOT RECORDED. An unrecorded mortgage takes precedence of a subsequent conveyance by the mortgagor without consideration. *Merriman v. Hyde*..... 113

See MORTGAGES, 10. PRACTICE, 62.

LIQUOR SELLING.

1. **Druggist Must Obtain License.** The general law relating to the licensing the sale of intoxicating liquors at retail is general and applies to all persons. No exception is made in favor of those engaged in the sale of drugs and medicines, they being within its operation. *Brown v. The State*..... 189

2. **Action by Married Woman and Children against Liquor Seller.** A married woman and her minor children, constituting one family, may join in an action for loss of the means of support against those who have furnished intoxicating liquor to the husband and father. *Roose v. Perkins*..... 304

3. **Selling Liquor:** WHO LIABLE FOR DAMAGES. Where a number of persons furnished intoxicating drink to one P., the drunkenness continuing until his death, *held*, if P. died from the effects of the drunkenness, all those furnishing liquor to produce it were liable. *Id*..... 304

4. ———: DAMAGES. In estimating damages the jury may consider the situation of the deceased, his annual earnings,

his estate, if any, his habits, health, and reasonable expectation of life. And where he is shown to be a strong, robust man, the Carlisle tables of expectancy may be introduced in evidence. *Id.* 304

5. ——: ——. The right of support is not limited to the bare necessaries of life. But in no case can the judgment be for a greater sum than the value of the means of support of which the plaintiff has been deprived. *Id.* 304

6. **Abatement of Action.** The death of a husband and father does not cause an action for loss of the means of support to abate, the death being a mere incident, not the principal cause of action. *Id.* 305

7. **License no Protection.** A license is no protection to a vendor of intoxicating drinks in an action for the loss of the means of support. The statute, in effect, says to every one engaged in the traffic, beware to whom you sell or furnish intoxicating liquor. *Id.* 305

8. **Damages.** Damages are only recoverable for the actual injury sustained. Exemplary damages cannot be recovered. *Id.* 305

See LICENSE MONEYS.

LIMITATION OF ACTIONS.

Cause of Action arose in the state of Iowa, where defendant then resided with his family. But he carried on a business at the city of Plattsmouth, in this state, and was personally present at Plattsmouth nearly every day for about three years, when he moved with his family to Plattsmouth, and continued to reside there. Suit commenced after the expiration of four years—on contract, not in writing. Plea of the statute of limitations. *Held*, that the statute commenced to run at the time of the defendant's removal with his family into this state. *Edgerton v. Wachter.* 500

See PLEADING, 10.

MANDAMUS.

See ATTACHMENT, 2, 11. BONDS. PLEADING, 12.

MARRIED WOMEN.

Action against Husband. A married woman may maintain an action in her own name against her husband, while living with him, on a promissory note made and delivered by him to her since the marriage. *May v. May*..... 16

See HUSBAND AND WIFE.

MECHANIC'S LIEN.

See PRACTICE, 62.

MORTGAGES.

1. **Usury.** A. being the owner of an undivided half of certain premises, conveyed his interest to F. for the agreed price of $350, for which F. gave his note secured by mortgage on the land. In anticipation of this trade A. arranged with the plaintiff to sell him the note and security for $275 cash in hand. To save the trouble of transferring the note and security, A. requested F. to make them directly to the plaintiff, which was done. In an action against F. to foreclose the mortgage, *held* that the transaction was not usurious, the evidence showing it to have been a *bona fide* purchase of security, and not a contrivance by the plaintiff to evade the usury laws. *Armstrong v. Freeman*.. 11

2. **Mortgage Foreclosure:** ESTATES OF DECEDENTS. A mortgagee, after the death of the mortgagor, may institute and maintain an action to foreclose the mortgage, and cannot be compelled to relinquish his lien, and share in the general assets of the estate. *Jones v. Null*..... 57

3. ———: PARTIES. The nominal holder of the equity of redemption ought to be made a party defendant in an action to foreclose a mortgage. But if for any reason he is not, his interest may be ascertained and foreclosed in a subsequent action. *Merriman v. Hyde*..... 118

4. **Priority of Liens.** An unrecorded mortgage takes precedence of a subsequent conveyance by the mortgagor without consideration. *Id*..... 118

5. **Covenant against Incumbrances:** PERSONAL JUDGMENT. In a mortgage of real estate to secure the purchase money there was, among others, a personal covenant to

save the mortgagee harmless from a prior mortgage then resting on the premises. The mortgagors further covenanted and agreed that, "If all of said conditions, agreements, and covenants" were left unperformed "for thirty days, then, at the option of the party of the second part, this mortgage may be declared due for the sum of $1100, with ten per cent interest from date." This security having been completely exhausted by a foreclosure of the prior mortgage, and the purchase money still being unpaid, *held*, that the mortgagors, for this breach of their covenant, were liable to a personal judgment for the $1100, and interest as aforesaid. *Hartley v. Gregory* 279

6. **Foreclosure:** NATIONAL BANK. Where a note secured by mortgage on real estate was assigned by a state bank to a national bank, organized as a successor of the state bank, the national bank can maintain an action to foreclose the same. *Id.* 317

7. **Receiver.** In the appointment of receivers in foreclosure suits very much is left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely, and to the injury of the party complaining, it will not be interfered with. *Jacobs v. Gibson* 380

8. ———. In the forelosure of a mortgage the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect rents, when it is made to appear that the mortgaged property is "probably insufficient to discharge the mortgage debt." *Id.* 380

9. ———. In such cases no exception is made in favor of the executors or administrators of deceased mortgagors. *Id.* 380

10. **Priority of Lien:** FRAUD. In 1870 F. executed a mortgage on certain real estate to the Omaha National Bank, which was recorded in January, 1874. In January, 1873, F. executed another mortgage upon the same property to C., his brother-in-law, as trustee for N., the father-in-law of C. and F., which was duly recorded. This mortgage was fraudulent as to creditors of F. In October, 1873, proceedings in bankruptcy were instituted against F. In April, 1874, while these proceedings were pending, F. obtained a letter from the president of the bank, addressed "to whom it may concern," stating that if F. could borrow $10,000 to $12,000 he could adjust his unsecured debts.

This letter was presented to C., who loaned F. $5,000, N. surrendering to him the mortgage above described. A portion of this money was paid directly to the bank upon an unsecured debt against F. *Held*, that there being no testimony showing C. to have had knowledge of any fraud between F. and N., he took the mortgage free from that defense, and that the lien of the bank mortgage was subject to his. *Clarke v. Forbes* 476

11. **Order confirming Sale on Foreclosure of Mortgage.** On appeal from an order of the district court confirming a sale of mortgaged premises, the supreme court will not consider a question involving the merits of the original case. *State National Bank v. Scofield*..... 499

See PLEADING, 10.

MOTION FOR NEW TRIAL.

See PRACTICE, 57.

MUNICIPAL CORPORATIONS.

See CITIES OF SECOND CLASS. COUNTIES. SCHOOLS.

MURDER.

See CRIMINAL LAW, 1, 2, 8. PRACTICE IN CRIMINAL CASES, 4.

NATIONAL BANKS.

See MORTGAGES, 6.

NEGOTIABLE INSTRUMENTS.

1. **Promissory Notes:** ALTERATION. Where the payee in a note changed it from $217.36 to $208.12, and transferred it before maturity to an innocent purchaser, such alteration vitiates the note and there can be no recovery thereon. *Savings Bank v. Shaffer*..... 1

2. ——: ——: RECOVERY OF ORIGINAL CONSIDERATION. Where an alteration is made under an honest mistake of right, and not fraudulently, and with a view to obtain an improper advantage, a recovery may be had upon the original consideration of the note. And it is the duty of the

court, upon payment of costs, to permit the plaintiff to amend his petition setting up the original consideration. *Id.* 2

8. ———: ———: ASSIGNMENT. The assignment by the payee of an altered note transfers to the assignee all the rights of the assignor to the original consideration. *Id.* 2

4. ———: HUSBAND AND WIFE. A married woman may maintain an action against her husband on a promissory note made and delivered by him to her since the marriage. *May v. May* 16

5. ———: CONSIDERATION. A negotiable promissory note is *prima facie* evidence of a sufficient consideration, but when between the parties to the instrument evidence is introduced to rebut this presumption, the plaintiff must satisfy the jury by a preponderance of evidence that there was a consideration. *Search v. Miller* 26

6. ———: ILLEGAL CONSIDERATION. Suit on note "indorsed and delivered by E. J., payee, to the plaintiff before maturity for value, in due course of trade." Defense that said note was given by defendant to the said E. J. for no other consideration than that the said E. J. would, and his promise that he would, wholly desist from instituting any criminal prosecution against him, the said defendant, for certain felonies which the said E. J. then accused the said defendant with having committed, and for which he threatened to have the said defendant indicted, etc., unless he would give him a note for $1000. *Held*, on demurrer, that the answer constituted no defense. *Smith v. Columbus State Bank* 31

7. **Kittle v. De Lamater, 3 Neb., 225.** So much of the opinion as is expressed in the syllabus of *Kittle v. De Lamater*, 3 Neb., 325, in the following words: "or if the note be founded upon an illegal consideration prohibited by some positive statute, no recovery can be had, though the indorsee may not be privy to the original transaction"—disapproved. *Id.* 31

8. **Promissory Note:** CONSIDERATION. An action was brought by the payee on the following note:
"$250. Four months after date for value received I promise to pay S. J. Herman the sum of two hundred and fifty dollars without interest. "J. B. EDSON.
"WILBER, NEB., Sept. 8, 1877."
The note was given pending a county seat election, and as

an inducement for the location of the county seat at Wilber, under an agreement that it was not to be collected. The payee, without the privity or request of the maker, paid the amount of the note to the county. *Held*, there was no consideration, and as the payment was voluntary there could be no recovery thereon. *Herman v. Edson*..... 152

9. **Action on Forged Note:** DEFENSE. Y., in 1876, signed a note with C. as surety in favor of M. and G., and was notified in March, 1878, of its non-payment. In June of that year an action was instituted by M. and G. on certain notes claimed to have been forged by C., and judgment recovered against Y. for $360 and costs. Y., supposing the action to be on the genuine note, made no defense. *Held*, on demurrer to the petition for an injunction, it being alleged that M and G. had knowledge of the forgery, that Y. was entitled to relief. *Young v. Morgan*..... 169

10. **Banks:** BANK CHECK: NOTICE. Action on bank check against the drawee. The jury by special verdict found that the drawers had no funds in the bank at the time of the presentation of the check. *Held*, that the drawers were not released from liability on the check by reason of the failure of the holder to notify them of the non-payment of the check by the bank. *Shaffer v. Maddox*..... 205

11. **Days of Grace.** In this state, by statute, all negotiable drafts, whether sight or time, are entitled to three days' grace in the time of payment. *Green v. Raymond*..... 295

12. ———: ACCEPTOR: HIS LIABILITY. The measure of an acceptor's liability is the acceptance itself, construed with reference to the law under which it was given. And where the holder of a draft, payable "ten days after date," took a qualified acceptance extending still further the day of payment, *held*, that the holder of the draft was bound by the terms of such acceptance, and that as between these parties the draft must be regarded the same as if it had been drawn payable at the time fixed by the acceptance; that such acceptance is entitled to the usual days of grace in the time of payment. *Id*..... 295

13. **Promissory Note:** GUARANTY. One M., an agent, wrote the following guaranty on a note before delivering the same to his principal: "For value received we hereby guarantee the payment of the within note, and waive protest, demand, and notice of non-payment thereof. G. W.

MOWERY." *Held*, that a joint action could not be maintained against him and the maker of the note. *Mowery v. Mast*..... 445

14. **County Warrants.** A county warrant is a mere certificate of indebtedness, although negotiable in form, and does not partake of the character of negotiable paper so far as to estop the county from availing itself of any defense it may have against it, even in the hands of a *bona fide* purchaser for value, without notice. *U. P. R. R. R. v. Buffalo County*, 449, 452

See MORTGAGES, 6. USURY.

NEW TRIAL.

See PRACTICE, 45, 57, 60, 61.

NON-RESIDENTS.

See ATTACHMENT, 1.

NON-SUIT.

See PRACTICE, 45, 50.

NOTES AND BILLS.

See NEGOTIABLE INSTRUMENTS. USURY.

NOTICE.

Husband and Wife. A conveyed land to B, a married woman; C had an equitable interest in the land, of which A had knowledge when he received the title, as well as when he conveyed it. The negotiations on the part of B for the purchase and conveyance of the land were conducted by her husband, as her agent, who was a partner in a firm of general land agents, who, at the time of these transactions and for some time previously, had the said real property on their books for sale as the property of C, he, the husband, having entered the same on said books, and knowing of the interest of C in the property, although the naked legal title was in another. *Held*, that B had notice of the equitable interest of C, and took the title subject thereto. *Kellogg v. Lavender*..... 419

See LANDLORD AND TENANT. NEGOTIABLE INSTRUMENTS, 10. PERFORMANCE. PRACTICE IN COUNTY COURTS, 7. USURY. VENDOR AND VENDEE.

OFFICERS.

1. **Compensation of Public Officers.** A public officer must discharge all the duties pertaining to his office for the compensation allowed by law, and will not be allowed compensation for extra work unless it is authorized by statute. *The State v. Silver* 85

2. **Misconduct of Officers:** DEFINED. *Miller v. Roby*, 471, 472

See CONSTITUTIONAL LAW. PRACTICE, 53. SCHOOLS, 1, 2. STATUTES.

OFFICIAL BONDS.

Action on Official Bonds. Section 32 of the code of civil procedure authorizes an action upon an official bond in favor of the *public*, where there are no special provisions to the contrary, in the name of the obligee of the bond. Section 643 authorizes an action in favor of an *individual*, who has sustained injury by a breach of its conditions, in his own name. *Albertson v. The State* 429

See PRINCIPAL AND SURETY.

PARTIES.

See LIQUOR SELLING. PLEADING, 10. PRACTICE, 38, 59, 62.

PARTNERSHIP.

1. **Partnership:** PATRONS OF HUSBANDRY: STATE AGENT OF STATE GRANGE: MEMBERS OF STATE GRANGE NOT PARTNERS. The plaintiff was a member of the society known as "The Patrons of Husbandry," and the defendants members of the "State Grange" of the same organization. The action was upon an alleged breach of warranty in the sale of a Werner harvester by one McCaig, the state agent of "The Patrons of Husbandry," appointed by the "State Grange." *Held*, that as to members of subordinate "Granges," whose representatives they were, the defendants were not partners, nor liable for the acts of said agent. *Edgerly v. Gardner* 130

2. **Equity:** JURISDICTION: PARTNERSHIP. Where an action is brought for the dissolution of a partnership and for an accounting, a court of equity, having obtained jurisdiction

of the cause, may retain it for the purpose of doing complete justice between the partners, and to avoid a multiplicity of suits. *Sheppard v. Boggs*..... 257

3. **Sale by one Partner to Another.** When a partnership is dissolved the good-will is a part of the assets of the firm, and the court may order it sold or disposed of in such manner as may be deemed most advantageous to the partners. And the court may permit a partner to retain it upon payment of the full value thereof to his co-partner. *Id*.... 258

See PLEADING, 9.

PATRONS OF HUSBANDRY.

See PARTNERSHIP.

PAYMENT.

See COUNTIES. NEGOTIABLE INSTRUMENTS, 8. USURY

PERFORMANCE.

Performance. Where an act is to be performed within a certain time, as within three days *after* the service of a notice, the party notified has the whole three days in which to perform the act, and an action instituted on the third day is premature. *Dale v. Doddridge*..... 138

See SPECIFIC PERFORMANCE. VENDOR AND VENDEE.

PERSONAL PROPERTY.

See ASSIGNMENTS. STATUTES, 5. WARRANTY.

PETITION.

See PLEADING, 1, 2, 3.

PLEA IN ABATEMENT.

See PRACTICE IN CRIMINAL CASES, 8.

PLEADING.

1. **Petition.** The petition stated in substance that the defendant contracted with the plaintiff to cut his wheat, when

ready to be harvested, for $1.25 per acre; that when the wheat was ripe, the plaintiff notified the defendant of that fact, but the "defendant refused, and neglected to cut plaintiff's wheat, as defendant had agreed and contracted, whereby said wheat was damaged and wasted," to plaintiff's damage $171.30, for which sum judgment was prayed. *Held*, that this petition stated a good cause of action, and a general demurrer to it was properly overruled. *Kelley v Peterson*..... 76

2. ———. Use of the word "as" in the clause—"that said defendant refused and neglected to cut plaintiff's wheat *as* defendant had agreed and contracted,"—commented upon and proper signification given. *Id*..... 77

3. **Petition in Actions to Recover Real Property.** In a petition to recover real property it is not necessary to use the very expressions declared by section 626 of the code of civil procedure to be sufficient in stating the cause of action, but any other language of equivalent import may be employed. *Dunn v. Remington*..... 82

4. **Actions:** INDIVISIBLE DEMAND: PLEA IN BAR. The rule is well settled that an indivisible demand cannot, at the will of the plaintiff, be separated, and collected by several actions. *Beck v. Devereaux*..... 109

5. ———: ———: ———. If a plaintiff bring an action for a part only of an entire and indivisible demand, the judgment in that suit may be pleaded as a complete bar to another action for the residue. *Id*..... 109

6. ———: DISTINCT CAUSES OF ACTION. There is no rule that requires a party to join in one suit several and distinct causes of action, although he may, under certain circumstances, be required to consolidate them. *Id*..... 109

7. ———: ACCOUNTS PAYABLE MONTHLY. A manufacturer of cigars furnished them to a dealer under an agreement that the amount of the account for each month was, at the end thereof, to be "*due and payable*," and bills were made out accordingly. *Held*, that the account for each month constituted a separate demand, and that a recovery of judgment upon one was no bar to an action for another. *Id*.... 109

8. **Undertaking in Injunction.** Action on injunction undertaking. Petition states the cause of action as follows, after setting out the bringing of the injunction suit and giv-

ing of the undertaking, which contained the following conditions: * * * "That the said Joseph H. Smith should pay to plaintiffs the damages plaintiffs should sustain by reason of the injunction in said action if it should be finally decided that said injunction ought not to have been granted." * * * "That afterwards, to-wit: * * * it was found by the judge of the district court of Jefferson county, Nebraska, at chambers, that the petition of said Joseph H. Smith in said injunction action did not contain a statement of facts sufficient to justify the issuance of said injunction, and said injunction was then and there dissolved, and said action of injunction was afterwards dismissed at the costs of said Joseph H. Smith by the district court of said Jefferson county. That by reason of said injunction in said action plaintiffs were damaged in the sum of seventy-five dollars in this, to-wit, for the time and trouble spent by plaintiffs in looking after and in procuring the dissolution of the said injunction, and for money laid out and expended for counsel and attorney's fees, and their expenses in and about the procuring of the dissolution of said injunction. That the same is due and unpaid," etc. *Held*, on demurrer, that the facts stated constituted a cause of action. *Smith v. Gregg*..... 212

9. **Partnership;** SUIT BROUGHT IN THE NAME OF A FIRM. Suit in the name of "Hanson Gregg, Albert Torian, and Mason Gregg, late co-partners under the firm name and style of Gregg, Torian & Co., plaintiffs." *Held*, on demurrer, not brought under the provisions of section 24 of the civil code, and that it was not necessary that plaintiffs should state that such partnership "was formed for the purpose of carrying on trade or business, or for the purpose of holding any species of property in this state." *Id.* 213

10. **Statute of Limitations.** In 1858 C. executed a mortgage, due in one year, upon certain lands in this state. In 1872 an action was instituted to foreclose the same, no payments having been made thereon, and certain parties holding tax deeds on the lands were made defendants, who demurred to the petition. *Held*, 1. That it being apparent from the face of the petition that the debt was barred, the demurrer was properly sustained. 2. That parties holding tax deeds were not proper parties to the proceeding to foreclose; but that, having been made parties, the plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness of the defendant's title. 3. That the statute of limitations is one of repose, and an action to

foreclose a mortgage is barred when the statute has run against the note or debt, under the law as it stood before the amendment to the act of limitations, approved February 12, 1869. *Hurley v. Cox* 230

11. **Executor's Bond:** SUIT ON. An action on the bond of an executor under the Revised Statutes, commenced prior to September 1, 1873, to recover money claimed to be due on a legacy, was properly brought in the name of the probate judge of the proper county. In such action the consent of the probate judge was necessary. *Buel v. Dickey* 285

12. **New Matter in Answer.** Every allegation of new matter in an answer not denied by the reply, for the purposes of the action, must be taken as true. *Scofield v. State National Bank* 317

13. **Injunction:** PETITION TO ENJOIN JUDGMENT. A petition to enjoin a judgment must set forth facts from which it is made to appear that it is against conscience to permit it to be enforced; and also that the plaintiffs were prevented from making their defense by accident, surprise, mistake, or by fraud of the adverse party, and that the plaintiffs were not guilty of neglect in not making their defense. *Id* 317

14. **Conspiracy and Damage.** The defendants, to the number of eighteen, were engaged by the plaintiff as journeymen tailors to do tailoring work for plaintiff by the piece. They conspired together to stop work simultaneously, and return all work in an unfinished condition. On the thirty-first of March, 1876, they did stop work, and returned to the plaintiff various and numerous pieces or jobs of work (garments) in an unfinished state, which were entirely worthless in such unfinished condition. Plaintiff could not get any workmen to finish said jobs, to plaintiff's damage, etc. *Held*, that a bill of particulars in the county court, setting up the above facts, contained facts sufficient to constitute a cause of action. *Mapstrick v. Ramge* 390

15. **Mandamus.** In the application for a mandamus to compel the payment of bonds issued to aid in the construction of works of internal improvement, it is not sufficient to show merely that they were issued "for works of internal improvement;" but there should be such particular descriptions of the works as to enable the court to see, by an inspection of the petition alone, that they were really of that character. *The State v. Thorne* 458

16. **Causes of Action;** JOINDER. Under certain statutory restrictions legal and equitable causes of action may be joined in the same suit, but they must be *existing*, not merely prospective causes of action. *Weinland v. Cochran*..... 480

17. **Attaching Creditor:** CREDITOR'S BILL. Before obtaining judgment on his demand an attaching creditor cannot maintain an action to have an alleged fraudulent conveyance of real estate set aside. *Id*..... 480

18. **Replevin.** A general denial in replevin puts in issue every material allegation of the petition. *Richardson v. Steele*..... 483

See ATTACHMENT. PRACTICE.

PRACTICE.

1. **Action by Wife against Husband.** In an action by a wife against her husband on a promissory note made and delivered by him to her since the marriage, *held*, that a demurrer of the wife to the answer of the husband, setting up the marriage of the parties in the nature of a plea in abatement, should be sustained. *May v. May*..... 16

2. **Replevin:** VERDICT OF JURY. In replevin, when the property has been delivered to the plaintiff, if the jury find for the defendant, they must also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; if they find either in his favor, they must also find the value of the property, or the value of the possession of the same, and damages for withholding the property. If the verdict is silent upon these points, no judgment can be rendered for any amount whatever. *Search v. Miller*..... 26

3. **Negotiable Instruments.** A negotiable promissory note is *prima facie* evidence of a sufficient consideration, but when between the parties to the instrument evidence is introduced by the defendant to rebut this presumption, the plaintiff must satisfy the jury by a preponderance of evidence that there was a consideration. *Id*..... 26

4. **Evidence:** PREPONDERANCE. In a civil action a preponderance of evidence is all that is required to sustain the claim of a party to the action. *Id*..... 27

5. **Replevin:** INSTRUCTIONS TO JURY. The jury should be

informed as to which party is in possession of the property at the time of the trial; and they should be instructed by the court as to the proper mode of estimating damages in each particular case. *Id.* 27

6. ——: ——. Instructions should be directed to the particular questions at issue, and be confined to those questions. *Id.* 27

7. **Bill of Exceptions.** Under the provisions of the act to amend secs. 308 and 311 of the code [Laws, 1877, p. 12] the clerk of the court can settle and sign a bill of exceptions only in case of the death of the judge, and not in case of his resignation. *Schaffroneck v. Martin* 38

8. **Judgment on Default.** It is error to take judgment against a party failing to answer or demur to the petition without first entering a default; but, if the decree show that such party consented to the sum found due by the court, it will be error without prejudice. *Jones v. Null* 57

9. **Verdict.** Where there is a substantial support to the verdict by the evidence the finding of the jury will not be disturbed. *A. & N. R. R. v. Jones* 67

10. **Instructions to Jury.** It is not error to refuse an instruction, although containing a correct proposition of law applicable to the case, which has the effect to withdraw material testimony from the consideration of the jury. *Id.*... 67

11. **Judgment:** JOURNAL ENTRY. It is within the province of the district court to pronounce such judgment in an action before it as it sees fit, and the approved journal entry thereof is indisputable evidence of what that judgment was. *Findley v. Bowers* 72

12. ——: ——. On a motion to confirm a sale of mortgaged premises under a decree formally journalized, it was objected in substance that such entry differed materially from the judgment actually pronounced, but the sale was confirmed notwithstanding the objection. *Held*, that by the confirmation the court in effect decided that the journal was correct, and that such decision was not subject to review by the supreme court, although the decree itself would be. *Id.* 72

13. **Serving Process:** CONSTABLE. A constable has no authority to appoint a deputy. But a county judge or justice of the peace may appoint any person specially to serve process issued by him. *Gilbert v. Brown* 90

14. ———: OFFICER'S RETURN. Where the return of service of summons of an officer fails to show in what county it was served it will be presumed that the officer summoned the party in the county for which he was elected. *Id*..... 90

15. **Summons:** INDORSEMENT OF THE AMOUNT CLAIMED. It is only in actions for the recovery of money only that the amount for which judgment will be taken, if the defendant fail to appear, need be indorsed on the summons. *Roggencamp v. Moore*..... 105

16. ———: ———. In all civil actions for the recovery of money only, whether commenced in the district, county, or justice courts, the amount for which judgment will be taken, if the defendant fail to appear, is required to be indorsed on the summons. *Co-operative Stove Co. v. Grimes*..... 123

17. ———: ———: ———. Where such indorsement is made a defendant has the right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he choose to make no appearance in the action, and it is error to exceed it. *Id*..... 123

18. **Replevin in County Court:** RETURN OF SUMMONS. In all cases of replevin in county courts, whether the value of the property or the damages claimed be within or beyond the jurisdiction of a justice of the peace, the summons should be made returnable, as in justice courts, not more than twelve days from its date. *Roggencamp v. Moore*..... 105

19. ———: MERE IRREGULARITIES, WITHOUT PREJUDICE, NOT GROUNDS FOR REVERSING A JUDGMENT. Mere irregularities in a summons, not at all prejudicial to the party, and of which no advantage was sought to be taken in the court issuing it, furnish no sufficient grounds for reversing a judgment. *Id*..... 105

20. **Foreclosure of Mortgage:** PARTIES. The nominal holder of the equity of redemption ought to be made a party defendant in an action to foreclose a mortgage. But if for any reason he is not, his interest may be ascertained and foreclosed in a subsequent action. *Merriman v. Hyde*..... 113

21. **Bastardy:** PRACTICE AND PROCEEDINGS. Proceedings under the bastardy act of 1875 should be conducted in the name of the prosecuting witness, or, if she refuse to prosecute, in the name of the county; but where proceedings are instituted in the name of the state, without objection on

that ground until after judgment, this will be a waiver of the objections, the state being a mere trustee for the real party in interest. *Cottrell v. The State*..... 125

22. ———: ———. The proceeding is in the nature of a civil action to enforce the performance of a civil and moral obligation—the support by a father of his child. *Id*..... 125

23. **Forcible Entry and Detainer.** The judgment of a justice of the peace, or of the district court, in proceedings in forcible entry and detainer, is conclusive in that proceeding on the matters in issue at the time of its rendition, unless such judgment is reversed or modified by proceedings in error. But the judgment is no bar to another action in relation to the title of the premises. *Dale v. Doddridge*..... 138

24. **Attachment:** PROCEEDINGS IN ERROR: MANDAMUS. Where an attachment is dissolved the court may fix a time, not exceeding twenty days, in which to file a petition in error in the reviewing court and to give the undertaking required by the statute, during which time the attached property shall be held by the officer having possession of the same. If no undertaking is given within the required period, the officer must deliver the property to the party entitled to the same, and if he refuses to do so he may be compelled by mandamus. *State, ex. rel. Rieschick, v. Cunningham*..... 146

25. **Judicial Sale:** CONFIRMATION. An order confirming a sale contained this condition: "That said sale be in all things confirmed upon the plaintiff stipulating to convey the property purchased by it at said sale to the defendant upon receipt of $2000, within sixty days from this date." *Held*, that the court had no authority to impose such conditions against the defendant's objection. *Green v. State Bank*..... 165

26 ———: ———. The court may confirm or set aside a sale; but has no authority to change or modify its terms. *Id*..... 165

27. **Evidence:** UNDERSTANDING OF WITNESS. In proving a sale of chattels, the understanding of one of the parties as to whether the title passed to the purchaser is not competent evidence, especially as against a stranger to the alleged contract. As against the party himself, however, it might be competent. *Eiseley v. Malchow*..... 174

28. **Immaterial Evidence.** The admission of immaterial evidence against objection, where the court can clearly see

that it could not have prejudiced the party, is not a ground for granting a new trial. *Id* 174

29. **Replevin:** INFORMAL VERDICT. A verdict in an action of replevin ought, either in general or in specific terms, to pass upon the question of unlawful detention. But even if it do not, in a case where this question is controlled entirely by that of ownership, which is expressly covered by the findings, the judgment will not be reversed on that ground. *Id*..... 174

30. **Divorce:** PRACTICE. The affidavit for service by publication in a divorce case is jurisdictional, and unless it conform substantially to the statutory requirements the court will not acquire jurisdiction. *Atkins v. Atkins*..... 191

31. ——: ——: JURISDICTION. When it appears that the defendant cannot be served with process in the state, the records, in the absence of an appearance, must show how jurisdiction was acquired *Id*..... 191

32. **Motion to Strike out Counts in Petition.** The petition stated but one cause of action, but was divided into paragraphs and numbered from one to four inclusive. *Held*, that a motion "to strike out the first, third, and fourth *counts*, for the reason that neither of them contains a cause of action," etc., was properly denied. *Shaffer v. Maddox*... 205

33. **Evidence:** MOTION FOR NEW TRIAL. To entitle a party to a review of the rulings of the court below on the admission or rejection of testimony, it is necessary that the alleged errors should be specifically pointed out, not only in the petition in error, but also in a motion for a new trial in the court below. *Id*..... 205

34. **Correcting Judgment.** In an action of replevin the defendant filed a general demurrer to the plaintiff's petition. Demurrer sustained by the court. Plaintiff standing on his petition, on December 18, 1877, judgment was rendered in the following words: "It is therefore ordered and adjudged by the court that the plaintiff's said action be and the same is hereby dismissed, and that the defendant have and recover judgment for his costs herein," etc. Afterwards, on the eighth day of February, 1878, the district court having adjourned from the eighteenth day of December, 1877, to the fourth day of January, 1878, and from the last named day to the said eighth day of February, 1878, and being then in session as of the November term, 1877, the said judg-

ment was by the court modified to read as follows: "It is therefore hereby adjudged and determined by said court that the defendant do have a return of said property, or the value thereof, as found by said court, in case a return cannot be had, and that the plaintiff's cause of action against the defendant is hereby dismissed, and that the defendant go hence without delay and that he have and recover his costs," etc. *Held*, that the district court had the right in its discretion to make such modification, and that the same, being a matter of discretion on the part of the district court, is not for that reason subject to review in the supreme court. *Wise v. Frey* 217

35 ——: ——. At the time of the modification of the judgment, February 8, 1878, there was pending in the supreme court a case on error brought by the plaintiff against the defendant for alleged errors in the said judgment as first rendered. *Held*, that the bringing of such action in error did not oust the district court of jurisdiction to make the said modification of such judgment, pending said action in error in the supreme court. *Id*..... 218

36. **No exception** is necessary to a final order or judgment. *Jones v. Null*..... 254

37. **Res Adjudicata.** If a defendant rely upon the rules of *res adjudicata* as a defense, he should bring such facts into the record as will show affirmatively that the plaintiffs' relation to the former action was such as to make the judgment therein conclusive of the matter in controversy. *Hartley v Gregory* 279

38. **Joinder of Parties.** In case of misjoinder of parties defendant, only those improperly joined can raise the objection. But where it appears on the face of a petition that there is a non-joinder of defendants a demurrer will lie on that ground. *Roose v. Perkins*..... 304

39. ——: OVERRULING DEMURRER. Upon overruling a demurrer to a petition it is not error for the court to require the defendant to answer *instanter*. Particularly so where it does not appear that there is any defense to the action. *Id*..... 304

40. **Argument of Attorneys.** An attorney should confine his argument before a jury to a legitimate discussion of the issues presented by the case. Statements of fact outside of

the evidence, if properly excepted to, may require a reversal of the case. *Id*..... 305

41. ———. Where the attorneys for the defendants withdrew from the case, *held*, not error to permit two attorneys to address the jury on behalf of the plaintiff. *Id*..... 305

42. **Striking out Defenses.** Matter constituting a defense to an action will not be stricken out of an answer, on motion, as "irrelevant." *Scofield v. State National Bank*..... 316

43. ———. Allegations in an answer which raise an issue of fact cannot be stricken out upon the ground that they are untrue, as shown by the records of the court. *Id*..... 316

44. **Evidence:** ERROR. Evidence offered in support of an alleged defense, which had erroneously been held bad on demurrer to the answer, was properly rejected on the ground of irrelevancy. The error in such case lies not in the rejection of such evidence, but back of this, and in the ruling on the demurrer. *Nebraska City v. Gas Company*..... 339

45. **Discretion of the Court.** Upon the plaintiff resting her case, defendants' counsel moved for a non-suit "on the ground that there is no evidence whatever offered by the plaintiff to sustain her cause of action, and on the further ground that, as shown by the evidence offered by the plaintiff, there is already on the records of the court a finding, decree, and judgment against the defendants in this cause." Whereupon counsel for the plaintiff asked leave of the court to withdraw his rest, and for leave to introduce the journal entry showing the setting aside of the other journal entry constituting a judgment against defendant. The court refused the request and sustained the motion for non-suit. *Held*, that the district court should have granted the request of the counsel for the plaintiff, and that his refusal to do so was an abuse of discretion, for which the judgment must be reversed and a new trial granted. *Gillette v. Morrison*..... 395

46. **Attachment:** ERROR: UNDERTAKING. The undertaking provided for by "An act to provide for the retention of attached property pending a review on error," etc. [Gen. Stat., 715], passed February 17, 1873, not being necessarily a part of the record of the case, its absence therefrom cannot be taken as proof that it was not in fact given. *Hilton v. Ross*..... 406

47. ——: ——. Error in discharging an attachment on motion of defendant, whereby costs are wrongfully visited upon the plaintiff, is not cured by a subsequent final judgment in the action in favor of the defendant. *Id.*..... 406

48. ——: AFFIDAVIT. An affidavit setting forth the existence of the grounds of attachment in the words of the statute, unaccompanied by any facts showing them to be true, will support the writ. But when such affidavit is met by the positive oath of the defendant in denial, it must be supported by competent evidence, or the attachment will be dissolved. *Id.*..... 406

49. ——: DELIVERY UNDERTAKING. The giving of a delivery undertaking, as provided in section 206 of the code of civil procedure, neither has the effect of dissolving the attachment nor of preventing the defendant from afterwards moving its dissolution as to the whole or a part of the property attached, which he may do at any time before final judgment in the action. *Id.*..... 406

50. **Motion for Non-suit.** Where there is testimony tending to sustain a cause of action, a motion to non-suit the plaintiff should be overruled. *Dolby v. Tingley*..... 412

51. **Garnishment.** Where an action was commenced in the county court and a garnishee duly summoned, who answered, admitting the possession of assets of the debtor, judgment in the county court in favor of the debtor will not discharge the garnishee where, on appeal to the district court, judgment is rendered in favor of the plaintiff. But otherwise if no appeal is taken or the attachment is discharged. *Id.*..... 412

52. ——. A garnishee answered in the county court that he had under his "control notes, judgments, and other evidences of indebtedness" belonging to the debtor, "in the aggregate about $2,000," and an order was entered for him to retain "the sum of $450 and $25 to cover costs to abide the further event of the suit." On appeal to the district court, *held*, that the garnishee was not discharged, but that no recovery could be had against him under the order of the court until he had collected some of the assets or converted the same into money. *Id.*..... 412

53. **Action against Sheriff:** JURISDICTION OF JUSTICE. R. brought an action against a sheriff and an attachment creditor in the district court to recover the sum of $300, the

value of certain property levied upon by the sheriff under an order of attachment against S. R., and recovered judgment for the sum of $52.58. *Held*, not an action against an officer for misconduct in office, and that a justice of the peace had jurisdiction, the amount recovered being less than $100. *Miller v. Roby* 471

54. ——: COSTS. In such case, where the district court rendered judgment in favor of the plaintiff for costs, the judgment was reversed, and each party required to pay his own costs. *Id.* 471

55. **Instructions to Jury.** It is the duty of the jury to find a verdict according to the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so, upon proper application of the aggrieved party, is error. *Aultman v. Reams* 487

56. **Appearance.** A party may appear specially to object to the jurisdiction of the court for want of proper service of summons. *Newlove v. Woodward* 502

57. **Motion for New Trial.** Where the judgment of a justice of the peace is taken on *error* to the district court and affirmed, no motion for a new trial is necessary in that court in order to have the judgment reviewed in the supreme court. *Id.* 502

58. **Petition in Error:** VERIFICATION. It is unnecessary to add a verification to a petition in error, it not being a pleading of fact within the meaning of the code. *Id.* 502

59. **Joinder in Demurrer.** On error brought to reverse the judgment of the district court sustaining a joint demurrer by several defendants to a petition, charging a joint trespass or wrong to the property of the plaintiff, the court, being of the opinion that the petition states a cause of action as against one of the defendants, the demurrer should be overruled as to all of them. The rule of practice in such cases is that a joint demurrer to a complaint by several defendants will be overruled if it state a cause of action against any of those joining in the demurrer. *Dunn v. Gibson* 513

60. **Error:** NEW TRIAL. On error to the district court for granting a new trial on a petition filed after the adjournment of the term on the ground of newly discovered evi-

dence, *held*, that error would lie in such case for alleged errors of the district court in the matter of granting such new trial. *Kruger v. Harvester Co*..... 526

61. **New Trial:** NEWLY DISCOVERED EVIDENCE. In the case made, *held*, that competent evidence of an agreement on the part of plaintiff in error, made with one W. on sufficient consideration, to pay off a certain judgment held by the A. F. H. Company against said W., and which evidence was discovered after the adjournment of the term, was a good ground for granting a new trial in a case brought by K. (plaintiff in error) to enjoin said A. F. H. Co. from collecting said judgment by execution and sale of said land. *Id*..... 526

62. **Mechanic's Lien.** Action against M. and L. to foreclose mechanic's lien. Prayer for judgment against M. for $116.16 and interest, and that "this mechanic's lien be established and enforced against the building and leasehold aforesaid." Allegation that M., out of materials furnished by plaintiff, had erected the building on a lot belonging to L., which M. held by lease. No prayer for judgment against L. No service of summons was had on M., either actual or constructive. L., who was served, appeared and demurred to the petition, which demurrer was overruled. M. was defaulted (though never served) and judgment rendered against him for $116.16; that the premises be sold to pay the same, and *defendants* foreclosed of all equity of redemption. *Held*, on error brought by M., that the district court had no jurisdiction to render such judgment. *Meyers v. Le Poidevin*..... 535

See ASSIGNMENT, 4, 8. NEGOTIABLE INSTRUMENTS, 2. PLEADING.

PRACTICE IN CRIMINAL CASES.

1. **Allegations of Indictment.** Where there are several counts in an indictment, in the first of which the *time* and *place* are specifically stated, it is sufficient to allege in the subsequent counts that the offense therein described was *then* and *there* committed. *Fisk v. The State*..... 62

2. **Setting Aside Verdict.** Where there is not sufficient testimony to sustain a verdict it will be set aside. *Id*..... 62

3. **Objections to Grand Jury.** Objections to the mode of selecting grand jurors must be made by challenge, or by

plea in abatement, before the accused pleads to the indictment, or they will be waived. *McElvoy v. The State*..... 157

4. **Murder:** EVIDENCE. Where, on a trial for murder, there is testimony tending to show that the accused acted in self-defense, it must be submitted to the jury, to be given such credit as they may think it entitled to. An instruction, therefore, which virtually took that question from them, *held*, erroneous. *Id*..... 157

5. **Questions of Fact to be Settled by the Jury.** In criminal cases all questions of fact are to be settled by the jury, and unless the want of sufficient evidence to support their finding be very clear it will not be disturbed. *Schlencker v. The State*..... 241

6 **Re-examination of Witnesses.** As a general rule the re-examination of a witness should be limited to the points arising out of the cross-examination. But whether this rule shall be strictly enforced or not seems to rest entirely in the discretion of the presiding judge. *Id*..... 241

7. **Witness:** EXPERT: SUPPOSED CASE. In the examination of an expert witness as to the appearance of the bullet wound of which the deceased died, it is not improper to state a supposed case as a means of showing what, under different conditions, the appearance of a wound made by the same agency might or would have been. *Id*..... 241

8. **Practice:** QUESTIONS CONSIDERED BY THE SUPREME COURT. In the supreme court the examination of questions relating to the evidence is confined to such as were distinctly raised and passed upon in the court whose record is under review. *Id*..... 242

9. **Non-expert Witness:** OPINION OF. The opinion of a witness, not an expert, is competent evidence upon the question of the prisoner's sanity, where such opinion is formed upon facts within the personal knowledge of the witness, and sworn to by him before the jury. *Id*..... 242

10. **Exception.** In a capital case the want of an exception will not necessarily deprive the prisoner of his right to a new trial for errors of the court prejudicial to him. *Id*..... 300

11. **Instructions.** In the trial of an indictment charging murder in the *first* degree, the statutory distinction in the degrees of criminal homicide must not be lost sight of. *Id.* 300

12. ———: PREMEDITATED MALICE. An instruction that leaves the jury at liberty to presume "premeditated malice," from the fact of "a deliberate intention unlawfully to kill" alone, is erroneous. *Id.* 300

See COURTS.

PRACTICE IN COUNTY COURT.

1. **Summons:** INDORSEMENT OF THE AMOUNT CLAIMED. It is only in actions for the recovery of money only that the amount for which judgment will be taken, if the defendant fail to appear, need be indorsed on the summons. *Roggencamp v. Moore* 105

2. **Replevin:** RETURN OF SUMMONS. In all cases of replevin in county courts, whether the value of the property or the damages claimed be within or beyond the jurisdiction of a justice of the peace, the summons should be made returnable, as in justice courts, not more than twelve days from its date. *Id* 105

3. ———: MERE IRREGULARITIES, WITHOUT PREJUDICE, NOT GROUNDS FOR REVERSING A JUDGMENT. Mere irregularities in a summons, not at all prejudicial to the party, and of which no advantage was sought to be taken in the court issuing it, furnish no sufficient grounds for reversing a judgment. *Id.* 105

4. **County Courts** have jurisdiction of actions for the forcible entry and detention of real property. *Blaco v. Haller.* 149

5. **Forcible Entry and Detainer:** COMPLAINT: JURISDICTION. The complaint under the statute for the forcible entry and detention of property merely charged that the defendant entered upon the premises in controversy "with force and violence," and that he had "with force detained the same." *Held*, that it was fatally defective in omitting to charge that such entry and detention were *unlawful*, and conferred no jurisdiction upon the court to issue the summons. *Blaco v. Haller.* 149

6. **Powers of County Judge:** PRACTICE: COSTS. A county judge has the ordinary powers and jurisdiction of a justice of the peace; and in an action before him, under such jurisdiction, where the plaintiff in his bill of particulars claims the sum of $50, but recovers only $15, he is entitled to costs. *Geere v. Sweet*, 2 Neb., 67. *Beach v. Cra-*

mer, 5 Id., 98. *Ray v. Mason*, 6 Id., 101, approved. [LAKE, J., dissenting.] *Martin v. Grover*..... 263

7. **Setting Aside Judgment.** Where summons was duly issued and served upon a defendant, who appeared and filed a motion to dismiss the action because the petition was not properly verified, which motion, on the third Monday of the month, was sustained; but on the twenty-seventh day of the same month the judgment of dismissal was set aside. *Held*, in the absence of a showing to the contrary, it will be presumed the defendant had notice of the order setting aside the judgment. Such order is voidable, not void. *Hansen v. Bergquist*..... 269

8. **Judgment by Confession.** The provisions of the statute requiring the judge to continue all cases undisposed of on the third Monday of each month, do not prevent the court from rendering judgment by confession or hearing and deciding cases by agreement at any time during the month. *Id*..... 269

9. **County Court:** POWER TO TRY CAUSE BY CONSENT ON AND AFTER THIRD MONDAY OF TERM. The third Monday of the month was the fifteenth day. On Saturday, the 13th, the parties struck a jury, and by consent the venire was made returnable on the following Monday, on which day the parties met with their witnesses and tried the cause, and again by consent continued the same until the seventeenth for argument. *Held*, that said county court had jurisdiction to so try said cause, by consent of parties, on and after the third Monday of the month. *Mapstrick v. Ramge*..... 390

See ATTACHMENT. FORCIBLE ENTRY AND DETAINER.

PRACTICE IN SUPREME COURT.

1. **Review of Questions of Fact.** It is a rule of this court that the findings of inferior tribunals upon questions of fact will not be interfered with unless found to be clearly against the weight of evidence. And this rule applies to all cases, whether they come here by petition in error or on appeal. *Armstrong v Freeman*..... 11
See also, *Graham v. Kibble*..... 182

2. **Proceedings in Error.** The supreme court can review an action at law only by proceedings in error. And where it appears from the record that no exceptions were taken to

the ruling of the court below, and no steps taken to call the attention of the court to the alleged errors, they will not be reviewed by this court. *Roode v. Dunbar* 95

3. **Appeal not Allowed after Stay Taken.** If a stay of the order of sale under a decree of foreclosure be taken, no proceedings on appeal from such decree can afterwards be had. [Laws 1875, p. 50.] *McCreary v. Pratt* 122

4. **Special Finding.** It was alleged as error that the court refused "to find whether the facts stated in the second count of the answer were true." *Held*, that inasmuch as the special finding, in its necessary effect, completely negatived the facts alleged in the answer, it was equivalent to an affirmative finding that they were untrue and that there was no error. *Graham v. Kibble* 182

5. **Criminal Cases:** EVIDENCE. In the supreme court the examination of questions relating to the evidence is confined to such as were distinctly raised and passed upon in the court whose record is under review. *Schlencker v. The State* 242

6. **Final Order.** An order setting aside a judgment dismissing a cause may be reviewed on error. *Hansen v. Bergquist* 269

7. **Motion for New Trial:** PETITION IN ERROR. To enable this court to examine and pass upon alleged errors occurring upon a trial to a jury, it is necessary that the attention of the trial court be specifically called to each alleged error in a motion for a new trial, and the same be also specifically pointed out to the supreme court in the petition in error. *McCormick v. Drummett* 384

8. **Fraud:** REVIEW OF QUESTION OF. Where a question of fraud in fact is brought up for review, the supreme court is decidedly averse to interfering with the decision below, whether made by the court or by a jury; nor will it do so unless clearly satisfied that injustice has been done. *Weinland v. Cochran* 480

9. **Verification** to a petition in error not necessary. *Newlove v. Woodward* 502

See MORTGAGES, 11.

PRECINCT BONDS.

See BONDS, 2.

PREMEDITATION.

See PRACTICE IN CRIMINAL CASES, 12.

PRESUMPTIONS.

See PRACTICE, 14. PRACTICE IN COUNTY COURTS, 7.

PRINCIPAL AND SURETY.

1. **Sureties on Appeal Bond:** JUDGMENT. When, on appeal from a justice of the peace or a county judge to the district court, judgment is rendered against the appellant, it may also be rendered against the surety on the *appeal* bond. But this rule does not apply to an ordinary undertaking in replevin. The third head note of *Moore v. Kepner*, 7 Neb., 291, corrected. *Lininger v. Raymond*..... 40

2. **County Clerk:** FOR WHAT ACTS ALONE SURETIES ON HIS OFFICIAL BOND ARE LIABLE. Action against sureties on the official bond of county clerk. The petition alleged that one Alpaugh, who was county clerk, had falsely certified, under the county seal, that a bill in his own favor for five hundred and sixty-four dollars against the county of Lincoln had "*been allowed by the county commissioners*," by which means he was enabled afterwards to sell his pretended claim to the plaintiff, to his injury. *Held*, that inasmuch as there was no law requiring, or even authorizing, such certificate in any case, the making it could in no sense be regarded as relating to official duty, and that the sureties were not liable. *Ottenstein v. Alpaugh*..... 237

3. **Sureties on Official Bonds** are answerable only for such acts of their principals as are done *virtute officii*. *Id*..... 237

See NEGOTIABLE INSTRUMENTS, 9.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS. USURY.

PUBLIC LANDS.

See BOUNDARIES.

PURCHASER.

See FRAUD. VENDOR AND VENDEE.

REAL PROPERTY.

See PLEADING, 3. VENDOR AND VENDEE.

RECEIVERS.

1. **Foreclosure of Mortgage.** In the appointment of receivers in foreclosure suits very much is left to the discretion of the district judge, and unless it is made to appear that this discretion has been exercised unwisely, and to the injury of the party complaining, it will not be interfered with. *Jacobs v. Gibson*..... 380

2. ———: ———. In the foreclosure of a mortgage the plaintiff is entitled to the appointment of a receiver to take charge of the property and collect rents, when it is made to appear that the mortgaged property is "probably insufficient to discharge the mortgage debt." *Id*..... 380

3. ———: ———. In such cases no exception is made in favor of the executors or administrators of deceased mortgagors. *Id*..... 380

REDEMPTION.

See TAXES, 13.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

1. **Verdict of Jury.** In replevin, when the property has been delivered to the plaintiff, if the jury find for the defendant, they must also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; if they find either in his favor, they must also find the value of the property, or the value of the possession of the same, and damages for withholding the property. If the verdict is silent upon these points, no judgment can be rendered for any amount whatever. *Search v. Miller*..... 26

2. **Instructions to Jury.** The jury should be informed as to which party is in possession of the property at the time of the trial; and they should be instructed by the court as to the proper mode of estimating damages in each particular case. *Id*..... 27

3. **Principal and Surety.** JUDGMENT. When, on appeal from a justice of the peace or a county judge to the district court, judgment is rendered against the appellant, it may also be rendered against the surety on the *appeal* bond. But this rule does not apply to an ordinary undertaking in replevin. The third head note of *Moore v. Kepner*, 7 Neb., 291 corrected. *Lininger v. Raymond*..... 40

4. **Informal Verdict.** A verdict in an action of replevin ought, either in general or specific terms, to pass upon the question of unlawful detention. But even if it do not, in a case where this question is controlled entirely by that of ownership, which is expressly covered by the findings, the judgment will not be reversed on that ground. *Eiseley v. Malchow*..... 174

5. **Pleading:** EVIDENCE. In an action of replevin a general denial puts in issue every material allegation of the petition. And under it the defendant may give evidence of any special matter which amounts to a defense to the plaintiff's cause of action. *Richardson v. Steele*..... 483

6. **Dismissal.** In an action of replevin, where the property has been replevied and delivered to the plaintiff, it is not error for the court to refuse to allow the plaintiff, after the trial has commenced, to dismiss the case without prejudice to a future action. *Aultman v. Reams*..... 487

See PRACTICE, 18.

RES ADJUDICATA.

Practice. If a defendant rely upon the rule of *res adjudicata* as a defense, he should bring such facts into the record as will show affirmatively that the plaintiffs' relation to the former action was such as to make the judgment therein conclusive of the matter in controversy. *Hartley v. Gregory* 279

See JUDICIAL SALE, 2.

RESCISSION.

1. **Warranty.** In the sale of a "Werner harvester" the warranty was in substance that it was "equally as good" as the "Marsh harvester," and if it were not, the purchaser "could bring it back, and get his money back." *Held*, That in order to rescind the sale, it was not sufficient for the purchaser to show merely that he "wrote" to the seller "that it had proved worthless," and that he "tendered the machine subject to his order," but that in order to do so it was necessary for him to establish that the machine was not equal in its execution to the "Marsh harvester," and that he had returned it to the seller. *Edgerly v. Gardner*... 130

2. **Rescission of Contract.** Generally a contract cannot be rescinded unless by consent of all the parties to it, except in cases of fraud. And a declaration by one party that he rescinds the contract, followed by a refusal on his part further to perform it, not acquiesced in by the other party, does not amount to a rescission, but only a breach. *Nebraska City v. Gas Company*..... 339

REVENUE.

See TAXES.

ROADS AND BRIDGES.

Power of County Commissioners. County commissioners can only locate public roads and erect bridges thereon in the manner prescribed by law. The county commissioners of Otoe county made a contract with McCann to purchase a private bridge over the Nemaha river, and arbitrators were selected by the parties to appraise the same, and damages for right of way across McCann's land. *Held*, that the award was a nullity. *McCann v. Otoe County*..... 324

SALARY.

See FEES. CONSTITUTIONAL LAW, 5. STATE UNIVERSITY.

SALE.

See EVIDENCE, 2. FRAUD. JUDICIAL SALE. RESCISSION. TAXES. VENDOR AND VENDEE. WARRANTY.

SCHOOL FUND.

See LICENSE MONEYS.

SCHOOLS.

1. **School District:** APPOINTMENT OF TEACHER: UNEXPIRED TERM. L. was appointed director of a school district, to hold during the unexpired term of S. *Held,* that the appointment, if legally made, entitled him to hold the office during the whole of the unexpired term. *School District v. Cowee*..... 53

2. ——: ——. Where the director of a school district was appointed to fill a vacancy in November, 1875, and accepted the office, and thereafter performed all the duties pertaining to the same until April, 1877, *held,* in an action on a contract with a qualified teacher, signed by him as director in October, 1876, that the court will not enquire into the strict legality of his appointment. He being a *de facto* officer, the district is bound by his acts. *Id*..... 53

8. **School Taxes.** Certain school taxes were voted by school district No. 6 of Hamilton county, while comprising three townships of land. Soon after said taxes were voted, and before the levy of the same, two and one-half townships of land were detached from said district, and formed into school district No. 9. *Held,* That the taxes thus voted should be levied upon district No. 6 as it existed at the time of the levy, and not as it existed at the time they were voted. *School District No. 9 v. School District No. 6*..... 331

4. ——: ACTION. Where the taxes thus voted were collected from all the territory comprising district No. 6 at the time the vote was taken, the money being paid to No. 6, *held,* that district No. 9 could maintain an action for the amount collected in its territory. And for the purpose of doing complete justice and ending the litigation, all the districts since formed in the original territory of 9 will be permitted to join as plaintiffs and share in the proceeds. *Id*..... 332

5. **School Funds:** COUNTY TREASURER: DISTRIBUTION. Under the law, since the constitution of 1875 took effect, license moneys are devoted to the support of common schools; and it is the duty of the treasurer of each county to take all proper measurers to secure to each district the amount to which it is entitled. But the county is in no way answer-

able for the acts of the treasurer in respect of this duty. *School District No. 2 v. Saline County*..... 403

SERVICE.

See PRACTICE, 18. SUMMONS, 6.

SERVICE BY PUBLICATION.

See DIVORCE.

SET-OFF.

See TAXES.

SHERIFF.

See COUNTY, 3. JUDICIAL SALE, 5. PRACTICE. 53.

SINKING FUND.

See TAXES, 14, 15.

SPECIFIC PERFORMANCE.

Specific Performance. A plaintiff need not in all cases necessarily perform or offer to perform all of his part of a contract in order to maintain an action for specific performance. *So held*, Where defendant had entered into an agreement for the sale of certain real property to the plaintiff, who paid part of the consideration, gave notes for the balance, which were sold and endorsed by defendant to a third party, upon payment of which defendant was to give a deed for the property, and before maturity of the note judgments were recovered against defendant, which were in form a lien upon the property, the contract not having been recorded, and defendant, after maturity of notes, conveying the property to another. *Kellogg v. Lavender*..... 418

See NOTICE. PERFORMANCE.

STATE UNIVERSITY.

1. **State Treasurer.** In the case made, *held*, that in the execution of his duties under the provisions of the act of June

23d, 1875, the state treasurer acts as state treasurer, and not as treasurer of the board of regents of the state university. *State, ex rel. McLean, v. Liedtke*..... 468

2. **Salaries of Officers and Professors.** Under the appropriation bill of 1879, *held*, that the salaries of the officers and professors of the state university for the years 1879 and 1880 are payable out of the general fund. *Id*..... 468

STATUTE OF FRAUDS.

See FRAUDS.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS. PLEADING, 6.

STATUTES.

1. **Construction.** Section 55 of the act concerning counties, approved March 1, 1879, is a re-enactment of section 9 of the act concerning counties and county officers, approved February 27, 1873, Gen. Stat., 233, and is a continuation of that act. *The State v. McColl*..... 203

2. **Effect of Re-enactment.** In such case, the effect of the repeal and re-enactment is to continue the uninterrupted operation of the statute. The act approved March 1, 1879, did not therefore vacate the office of county commissioner. *Id*..... 203

3. **Special Provisions** of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes, so far as there is a conflict. *Albertson v. The State* 430

4. ———. Where there is an irreconcilable conflict between different sections or parts of the same statute, the last words stand, and those in conflict therewith are repealed. *Id*.... 430

5. **Contracts.** The act to prevent the fraudulent transfer of personal property, approved February 19, 1877, does not apply to contracts entered into before the act took effect. *Blunk Brothers v. Kelley*..... 441

6. **Omissions.** In the case made, *held*, that this court cannot supply a positive provision of law wanting in an enrolled act approved by the executive, and deposited in the office of

the secretary of state, even if it appear by the journals that the bill containing such provision passed both houses of the legislature, and that such provision was left out of the enrolled bill either by accident or design. *The State, ex. rel. Marlay, v. Liedtke*..... 462

7. **Construction of Statutes.** When there is no ambiguity in the language of an act of the legislature, nor conflict between different acts on the same subjects, or between different provisions or sections of the same act, this court will not look into the wisdom or policy of such legislation for the purpose of giving it some other meaning than that apparent on its face. *The State, ex. rel. McLean, v. Liedtke* 468

8. **Act to take effect upon the happening of a future and uncertain event.** "The event or change of circumstances on which a law may be made to take effect must be such as, in the judgment of the legislature, affects the question of the expediency of the law; an event on which the expediency of the law, in the opinion of the law-makers, depends. On this question of expediency the legislature must exercise its own judgment definitely and finally. When a law is made to take effect upon the happening of such an event the legislature in effect declares the law inexpedient if the event should not happen, but expedient if it should happen." Ruggles, C. J., in *Barto v Himrod*, 8 N. Y., 489. *The State, ex. rel. Pearman, v. Liedtke*..... 490

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STAY OF EXECUTION.

See APPEAL, 1.

SUMMONS.

1. **Officer's Return.** Where the return of service of summons of an officer fails to show in what county it was served, it will be presumed that the officer summoned the

party in the county for which he was elected. *Gilbert v. Brown* 90

2 **Indorsement of Amount Claimed.** In all civil actions for the recovery of money only, whether commenced in the district, county, or justice courts, the amount for which judgment will be taken, if the defendant fail to appear, is required to be endorsed on the summons. *Co-operative Stove Company v. Grimes*..... 123

——: ——————. Where such indorsement is made a defendant has the right to rely upon it as fixing a limit beyond which the court cannot go in rendering judgment, in case he chose to make no appearance in the action; and it is error to exceed it. *Id*..... 123

4. ——: ——————. When the action is not for recovery of money only, no indorsement is required. *Roggencamp v. Moore*..... 105

5. **Mere Irregularities** in summons, without prejudice, are not grounds for reversing a judgment. *Id*..... 105

6. **Service:** RETURN. When the return to a summons stated that it was served upon the defendant "by *reading* to him a true and certified copy of the same, with all the indorsements thereon," *held*, insufficient to give the court jurisdiction, as the statute requires the service to be made by delivering a copy of the summons with the indorsement thereon to the defendant, or leaving the same at his usual place of residence. *Newlove v. Woodward*..... 502

See DIVORCE. PRACTICE, 15. PRACTICE IN COUNTY COURT, 1, 2, 7.

SURETY.

See PRINCIPAL AND SURETY.

TAXES.

1. **Action Against County.** Where certain certificates of illegal tax sales were surrendered to the county commissioners, the illegality of the sales being admitted, but the particular causes not being shown, *held*, that the purchaser could recover from the county the amount actually paid by him upon said certificates, with 12 per cent interest. *McCann v. Otoe County*..... 324

2. **Assessment.** Without an assessment of his property the public have no valid claim upon an individual for taxes. *Nebraska City v. Gas Company*..... 339

3. **Taxes:** SET-OFF. In an action against a city to recover for gaslight furnished it under a special contract, delinquent taxes due to the city from the plaintiff are not a proper subject of set-off under the law respecting the collection of taxes, as it stood prior to the act of March 1st, 1879, providing a system of revenue. *Id*..... 339

4. ———. Whether, as part of the consideration for supplying gaslight to a city, an agreement to exempt from taxes property of the gas company employed in the manufacture of gas is valid.—*Quære. Id*..... 339

5. **Listing Property.** Lands and lots are required to be listed for taxation in the name of the owner or person liable to pay the tax; but the tax being a lien upon the land, a failure to do so will not render the tax void. *Lynam v. Anderson*..... 367

6. **Assessment:** DESCRIPTION. Where a block was numbered "31" in Ashland, and it appeared that a block in an addition to the town was numbered "31," *Held*, no uncertainty of description; the block in the addition being designated by the name of the addition. *Id*..... 367

7. **Oath of Assessor.** A substantial compliance with the law requiring the assessor to take and subscribe an oath, to be attached to the assessment roll, is jurisdictional, and the county commissioners have no authority to levy a tax without such oath having been made and filed. *Morrill v. Taylor*, 6 Neb., 245, adhered to. *Id*..... 367

8. ———. The object of the oath is: *first*, a means of identifying the assessment roll; *second*, as evidence that the assessor has faithfully and efficiently performed his duty and to prevent favoritism and partiality. [Per MAXWELL, CH. J.] *Id*..... 367

9. ———. The failure of the assessor to require those listing property to swear to the lists is a mere irregularity, and does not render the assessment void. It is his duty, however, to require such oath, and it should be administered to every one listing property. *Id*..... 367

10. **List of Tax-payer.** The list of property furnished by a tax-payer is not conclusive upon the assessor. If he has

evidence sufficient of the existence of other property he may, upon notice, add it to the list. *Jones v. Commissioners*, 5 Neb., 561, adhered to. *Id.* 367

11. **Collection.** Under Sec. 50 of the Revenue law, Gen. Stat., 916, it is the duty of the county treasurer to collect the amount due for taxes upon real estate from the person to whom the same was assessed, if sufficient personal property can be found in the county. *Id.* 367

12. **Assessment:** REDEMPTION. Where an assessor entered certain real estate as "unknown," the same being improved and occupied at the time of the assessment, and no effort having been made apparently to ascertain the name of the owner, he having an abundance of personal property in the county to pay the taxes, *Held*, that the owner was entitled to redeem from a tax sale upon payment of the amount of the taxes and 12 per cent interest. *Id.* 367

13. **Tax Sale:** REDEMPTION. B. filed a petition in the district court to have certain taxes declared null and void, which were held valid. *Held*, that to avoid a multiplicity of suits he would be permitted to redeem upon payment of the taxes with 12 per cent interest and costs; or, in case of his failure to do so for thirty days, that the premises be sold to satisfy the amount. *Id.* 368

14. **Sinking Fund:** LEVY OF TAXES. The county commissioners of B. county, after the exhaustion of the levy in the years 1876 and 1877, allowed claims against the county to the amount of $22,000 and issued certificates of indebtedness therefor, and levied a sinking fund tax of five mills on the dollar valuation for their payment. *Held*, that the tax was illegal and void. *U. P. R. R. v. Buffalo County* 449

15. ———: ———. A "sinking fund tax" is a tax raised to be applied to the payment of the interest and principal of a *public loan*, and it cannot under the statute be levied for the payment of floating indebtedness. *Id.* 449

16. **Land Road Taxes** legally levied but not collected before the constitution of 1875 took effect, are valid. *B. & M. R. R. v. Saunders County* 507

17. **School District Bond Tax.** In 1875 the county commissioners of S. county levied taxes, of their own motion, under authority conferred by act of 1875 [Laws 1875, p. 185]. *Held*, that said taxes were illegal and void. *Id.* 507

See PLEADING, 10. SCHOOLS, 3.

TAX DEEDS.

See PLEADING, 10.

TENANT.

See LANDLORD AND TENANT.

TERMS OF COURT.

See COURTS.

TITLE.

See FORCIBLE ENTRY AND DETAINER. LANDLORD AND TENANT.

TRIAL OF THE RIGHT OF PROPERTY.

See ATTACHMENT, 11.

UNDERTAKING.

See ATTACHMENT.

UNITED STATES.

See BOUNDARIES.

UNIVERSITY.

See STATE UNIVERSITY.

USURY.

1. **Usury.** A. being the owner of an undivided half of certain premises, conveyed his interest to F. for the agreed price of $359, for which F. gave his note secured by mortgage on the land. In anticipation of this trade A. arranged with the plaintiff to sell him the note and security for $275 cash in hand. To save the trouble of transferring the note and security, A. requested F. to make them directly to the plaintiff, which was done. In an action against F. to foreclose the mortgage, *held*, that the transaction was not usurious, the evidence showing it to have been a *bona fide* purchase of security, and not a contrivance by the plaintiff to evade the usury laws. *Armstrong v. Freeman*..... 11

2. **Transfer to Bona Fide Purchaser.** Where a promissory note secured by mortgage based in part on a usurious consideration is transferred before maturity to a *bona fide* purchaser for value, without notice, he takes it free from the defense of usury. *Wortendyke v. Meehan* 221

3. ———: EVIDENCE. Where usury in the original transaction is proved, the burden of proof is on the plaintiff to show that he is a *bona fide* purchaser for value, and without notice. *Id.* 221

4. ———: ———. In such case it is not sufficient for the plaintiff to show the payment of value, he must also show that he purchased in good faith. A statement by him that he did not know or have reason to believe that there would be a contest over it, is not sufficient to show good faith. *Id.* 221

5. **Usury.** Where the original contract of loan is *bona fide*, and wholly free from the taint of usury, it will not be invalidated by a subsequent agreement to pay interest at an usurious rate after the debt has matured. *Dell v. Oppenheimer* 454

VENDOR AND VENDEE.

Warranty Deed: WAIVER. In the case made, *held*, that while the vendee had the right to refuse to accept a deed of general warranty of the land until the incumbrances (which were known to him) were first paid off, yet that, by accepting such deed without the incumbrances being paid, he waived that right, and could not, in an action brought by the vendor for the balance of the purchase money, set-off the amount of such incumbrances without first paying them off. *Findley v. Horner* 537

VERDICT.

See PRACTICE, 9, 55. REPLEVIN, 1, 4. PRACTICE IN CRIMINAL CASES, 2.

VERIFICATION.

See PRACTICE, 58.

WAIVER.

See BASTARDY, 1. LANDLORD AND TENANT. PRACTICE IN CRIMINAL CASES, 3. VENDOR AND VENDEE.

WARRANTY.

Warranty: RESCISSION OF SALE. In the sale of a "Werner harvester" the warranty was in substance that it was "equally as good" as the "Marsh harvester," and if it were not, the purchaser "could bring it back, and get his money back." *Held*, that in order to rescind the sale it was not sufficient for the purchaser to show merely that he "wrote" to the seller "that it had proved worthless," and that he "tendered the machine subject to his order," but that in order to do so it was necessary for him to establish that the machine was not equal in its execution to the "Marsh harvester," and that he had returned it to the seller. *Edgerly v. Gardner*..... 130

See VENDOR AND VENDEE.

WARRANTS.

See NEGOTIABLE INSTRUMENTS, 14.

WITNESSES.

Evidence: WITNESS IMPEACHED. Where a party swears falsely to a fact in respect of which he cannot be presumed liable to mistake, courts are bound to apply the maxim *falsus in uno, falsus in omnibus*, and to give no credit to any alleged fact depending upon his statement alone. This rule applied. *Dell v. Oppenheimer*..... 454

See EVIDENCE.